
(2024) 02 BOM CK 0066

Bombay High Court

Case No: Writ Petition No. 11888 Of 2023

City Center Mall Private
Limited And Others

APPELLANT

Vs

State Of Maharashtra
And Others

RESPONDENT

Date of Decision: Feb. 22, 2024

Acts Referred:

- Constitution Of India, 1950 - Article 14, 226
- Indian Electricity Act, 2003 - Section 126, 126(2), 126(3), 127, 127(2)
- Indian Stamp Act, 1899 - Section 47A

Hon'ble Judges: A. S. Chandurkar, J; Jitendra Jain, J

Bench: Division Bench

Advocate: Sharan Jagtiani, Sumeet Nankani, Vishal Kanade, Ishwar Nankani, Huzefa Khokhawala, Kunal Naik, Nankani, Kiran Gandhi, Aakash Kothari, N.C. Walimbe, A.R. Metkari

Final Decision: Disposed Of

Judgement

A. S. Chandurkar, J

1] Rule. Rule made returnable forthwith and heard the learned Counsel for the parties.

2] The Petitioner No.1 is a Company incorporated under the Companies Act, 1956 and is operating a Shopping Complex and Mall known as "City

Centre Mall". It is the case of the Company that the Maharashtra State Electricity Distribution Company Limited ("MSEDCL") supplies

electricity to the Mall through single point at the meter that stands in the name of the Company. The Company provides electricity to various licensees

of the said Mall and the said licensees pay electricity charges as per their usage. No extra charge or premium is claimed by the Company. By an

order dated 24/05/2010 passed by the Maharashtra Electricity Regulatory Commission, the requirements and guidelines as regards the manner in

which a Distribution Franchisee can be obtained had been laid down. Pursuant thereto, the Company made an application for Distribution Franchisee

through the MOU route. On various documents being sought by MSEDCL, the Company claims to have supplied the same after which its application

has been pending. On 20/07/2023, spot inspection of the Mall was undertaken by the officers of MSEDCL. It was noted that the Company had

installed 1115 KW Solar Unit and 218 submeters at various individual shops. Based on the aforesaid, the Additional Executive Engineer made a query

with the Company seeking further documents. The Company submitted its reply on 27/07/2023. Further documents were sought by the Superintending

Engineer after which on 07/08/2023, an order of provisional assessment under Section 126(2) of the Indian Electricity Act, 2003 (for short "the Act

of 2003") came to be passed by the Assessing Officer. By applying HT-II tariff in commercial category for the period from 16/10/2020, provisional

assessment to the tune of Rs 22,91,08,410/- came to be served on the Company. On 17/08/2023, the Company raised an objection to the same and

sought time of fifteen days to submit its objection.

3] The Assessing Officer informed the Company through its concerned representative to remain present for personal hearing on 29/08/2023 at 11.30

hours. On the said date, a detailed objection was raised by the Company. Pursuant thereto, on 06/09/2023, an order of final assessment under Section

126(3) of the Act of 2003 came to be served on the Company. It was stated that since no valid document to indicate grant of any permission as

distribution franchisee was submitted there was unauthorized use of electricity within the meaning of Section 126 of the Act of 2003. The provisional

demand as made was upheld and the final bill for the same amount came to be issued. Being aggrieved by the order of final assessment, the Company

has challenged the same in the present Writ Petition.

4] Shri Sharan Jagtiani, the learned Senior Advocate for the Company submitted that MSEDCL was not justified in making provisional assessment

under Section 126(2) of the Act of 2003 followed by a final assessment under Section 126(3) of the Act of 2003. Since the Company's application

for grant of Distribution Franchisee made on 20/02/2013 was pending consideration by MSEDCL, there was no basis whatsoever for seeking to pass

an order of assessment. Referring to Commercial Circular No.219 dated 28/02/2014 under which guidelines for converting single point supply

consumers to Distribution Franchisee through MOU Route had been issued, it was submitted that it was only in case of those consumers who had not

applied for Distribution Franchisee who were liable for action under Section 126 of the Act of 2003. Since the Company's application in that

regard was pending, there was no occasion to invoke the Circular dated 28/02/2014 and undertake such assessment. Reference was made to the

communications dated 26/09/2017 and 29/12/2017 addressed by the Company through its authorized signatory to the MSEDCL. Having failed to

consider the Company's request, it was not permissible for MSEDCL to proceed in the matter and hold the Company liable for unauthorised use.

For this reason, it was submitted that the assessment undertaken was without jurisdiction. Notwithstanding the fact that remedy under Section 127 of

the Act of 2003 was available, a strong case having been made out by the Company, the Writ Petition ought to be entertained on merits. It was further

submitted that the objection raised by the Company to the provisional assessment had not at all been considered and final assessment had been

undertaken in an arbitrary manner. About 40% to 50% consumption of electricity supplied to the Company was utilized for common areas and other

facilities. The assessment undertaken was grossly excessive and exorbitant. This was another reason for the Company to invoke the jurisdiction of this

Court.

Assuming that the remedy under Section 127 of the Act of 2003 was available, it was submitted that under sub-section (2) of Section 127, a licensee

was required to deposit 50% of the final assessment amount. Considering the extent of demand raised by MSEDCL, it could not be said that such

remedy was efficacious which could be availed by the Company. Since the demand as made was itself arbitrary, the Petitioner could not be driven to

avail the statutory remedy that too by requiring compliance of such stringent pre-deposit amount. Complying with the provisions of Section 127(2) of

the Act of 2003 was onerous. The learned Senior Advocate placed reliance on the decisions reported in 1954 SCR 1122 (Himmatlal Harilal Mehta vs.

State of M.P. and two others), (1966) 1 SCR 284 (M.G. Abrol, Additional Collector of Customs, Bombay and Anr vs. Shantilal Chotelal & Co.),

(2008) 4 SCC 720 (Government of Andhra Pradesh and Others vs. P. Laxmi Devi(Smt)) and (2012) 2 SCC 108 (Executive Engineer, Southern

Electricity Supply Company of Orissa Limited (Southco) and Another vs. Sri Seetaram Rice Mill) to buttress his contention. It was thus submitted that

the Writ Petition be entertained on merits and the order of final assessment passed under Section 126(3) of the Act of 2003 be set aside.

5] Shri Kiran Gandhi, the learned Advocate appearing for MSEDCL opposed the aforesaid submissions. According to him, since a statutory remedy

under Section 127 of the Act of 2003 was available to the Company and there being unauthorized use of electricity, this Court may not entertain the

Writ Petition. Referring to the judgment of the Hon'ble Supreme Court in Sri Seetaram Rice Mill (supra), it was submitted that unauthorized use

of electricity in any form resulted in the provisions of Section 126 of 2003 being attracted. After following the prescribed procedure, the Company has

been served with the provisional assessment. Thereafter the Company was heard and the order of final assessment was passed. It was further

submitted that under the Circular dated 28/02/2014, it was not sufficient to merely make an application for Distribution Franchisee but it was also

necessary for a licensee to satisfy various other requirements before benefit thereunder was claimed. He referred to the eligibility criteria prescribed

under the said Circular to submit that the Company did not satisfy the said requisites and therefore it could not take benefit of the said Circular. There

was no exceptional case made out by the Company for not availing the statutory remedy and hence the Writ Petition was not liable to be entertained.

The learned Counsel referred to the judgment of the learned Single Judge reported in (2018) 5 AIR Bom R 744 (Maharashtra State Electricity

Distribution Company Limited vs. Mahindra Life Space Developers) to submit that the provisions of Section 126 of the Act of 2003 had been rightly

invoked. Since the provisional assessment and thereafter the final assessment had been undertaken in accordance with law, there was no case made

out to interfere in writ jurisdiction. It was submitted that the Company ought to be relegated to invoke the statutory remedy.

6] At the outset, it may be stated that there can be no quarrel with the proposition that the availability of an alternative remedy under a statute would

not by itself operate as a bar for this Court to entertain a writ petition under Article 226 of the Constitution of India. The parameters to be examined

while invoking such jurisdiction are well settled. In the matter of requirement of pre-deposit as a condition precedent for invoking a statutory remedy,

reference can be made to the observations in paragraphs 28 and 29 of the decision in P. Laxmi Devi (supra) that has been relied upon by the learned

Senior Advocate for the Company. The said paragraphs read thus:

“28. We may, however, consider a hypothetical case. Supposing the correct value of a property is Rs 10 lakhs and that is the value stated in the

sale deed, but the registering officer erroneously determines it to be, say, Rs 2 crores. In that case while making a reference to the Collector under

Section 47-A, the registering officer will demand duty on 50% of Rs 2 crores i.e. duty on Rs 1 crore instead of demanding duty on Rs 10 lakhs. A

party may not be able to pay this exorbitant duty demanded under the proviso to Section 47-A by the registering officer in such a case. What can be

done in this situation?

29. In our opinion in this situation it is always open to a party to file a writ petition challenging the exorbitant demand made by the registering

officer under the proviso to Section 47-A alleging that the determination made is arbitrary and/or based on extraneous considerations, and in that case

it is always open to the High Court, if it is satisfied that the allegation is correct, to set aside such exorbitant demand under the proviso to Section 47-A

of the Stamp Act by declaring the demand arbitrary. It is well settled that arbitrariness violates Article 14 of the Constitution vide *Maneka Gandhi v.*

Union of India [(1978) 1 SCC 248]. Hence, the party is not remediless in this situation.

7] It is clear from the aforesaid that the challenge to an exorbitant demand or an arbitrary demand can be entertained under Article 226 of the

Constitution of India in a given case subject to the petitioner making out such case. In *Har Devi Asnani vs. State of Rajasthan and Others* (2011) 14

SCC 160, the Hon'ble Supreme Court has observed that if such challenge is made to an exorbitant demand notwithstanding the availability of a

statutory remedy, it would be necessary to examine whether a case for interference under Article 226 of the Constitution of India has been made out.

In *Technimont Private Limited (Formerly known as Technimont ICB Private Limited) vs State of Punjab and Others* (2021) 12 SCC 477, the

Hon'ble Supreme Court has revisited its earlier decisions on this aspect and has reiterated that in a case of extreme hardship being made out, a

writ petition could be treated as an appropriate remedy for such party. It would therefore be necessary to examine whether the Company has made

out such case warranting interference under Article 226 of the Constitution of India notwithstanding the fact that remedy under Section 127 of the Act

of 2003 is available to the Company.

8] Another reason put forth by the Company for invoking Article 226 of the Constitution of India is the requirement of pre-deposit under Section

127(2) of the Act of 2003. 50% of the amount as assessed under Section 126(3) of the Act of 2003 is required to be deposited as condition precedent

for the appeal to be entertained. Relying upon the decision in Himmatlal Harilal Mehta and M. G. Abrol, Additional Collector of Customs, Bombay

(supra) it is urged that the remedy of appeal would not be effective or efficacious since the Company would have to satisfy the requirement of pre-

deposit of 50% of the amount assessed.

In Himmatlal Harilal Mehta (supra) the requirement prescribed under the Central Provinces and Berar Sales Tax Act, 1947 was the deposit of the

entire amount of tax as a condition for preferring an appeal. Since challenge raised was to the vires of certain provisions of the said Act by alleging

infringement of the Petitioner's fundamental right, it was found that the remedy provided was of an onerous and burdensome character. In M. G.

Abrol Additional Collector of Customs, Bombay (supra) the discretion exercised by the High Court in entertaining the Writ Petition despite remedy

being available under the Sea Customs Act, 1878 was not interfered with in the absence of any exceptional circumstances to interfere with the

discretion as exercised by the High Court.

It may be stated that there cannot be any strait jacket approach in the matter of exercise of discretion by the High Court under Article 226 of the

Constitution of India notwithstanding availability of an alternate remedy. The facts of each case would be material in this regard. That the requirement

of pre-deposit is onerous, cumbersome or results in hardship is a factual aspect to be considered in an individual case while exercising discretion under

Article 226 of the Constitution of India.

9] Perusal of the pleadings in the writ petition indicates that the Company seeks to rely upon the orders dated 24/05/2010 and 01/06/2010 passed by

the MERC as well as the Commercial Circular dated 28/02/2014 issued by MSEDCL. On the premise that the Company's application seeking

Distribution Franchisee through MOU Route was pending it has been pleaded that the provisional assessment under Section 126 of the Act of 2003 is

arbitrary and without support of statutory guidelines. Another ground raised is that in the absence of any revenue loss to MSEDCL or any

corresponding benefit to the Company, the demand as made pursuant to provisional assessment was excessive and thus arbitrary. There are no

pleadings in the Writ Petition to indicate as to how compliance of the requirement of pre-deposit under Section 127(2) of the Act of 2003 is onerous

for the Company. In absence of necessary pleadings, it cannot be said that the Company has made out a case of extreme hardship to enable this

Court to entertain the Writ Petition.

10] It would thereafter be necessary to examine as to whether the final assessment as undertaken is shown to be arbitrary or without any authority of

law. The order of provisional assessment under Section 126(2) of the Act of 2003 indicates that the same has been undertaken by applying HT-II

tariff in the commercial category for the period from 16/10/2020. The amount has been assessed at Rs 22,91,08,410/-.

The Company has placed on record the bill issued to it for the month of September, 2020 by MSEDCL. The billing history of the Company from

November, 2019 to October, 2020 has been indicated therein. The same is as under:-

The aforesaid would indicate the consumption of units for all these months and the bill amount ranging approximately from Rs 90 lakhs to Rs 10 lakhs

per month. The aforesaid figures would thus give a picture of consumption history of the Company. The order of final assessment proceeds on the

basis that there has been unauthorized use of electricity.

11] One of the facets of arbitrariness could be viewed from the requirement of compliance with principles of natural justice. The record indicates that

on 20/07/2023 a spot inspection of the Mall was undertaken by officials of MSEDCL. The representatives of the Company were also present during

the spot inspection. The report indicates the tariff applicable to be Commercial / HT-II and notes Solar installation of 1115 KW as well as 218 sub-

meters. Based on the spot inspection report, MSEDCL sought various documents from the Company. By communication dated 21/07/2023 the

Company provided the documents sought by MSEDCL. Thereafter on 27/07/2023 MSEDCL issued another communication to the Company and

sought further documentary material from the Company. Reference was also made to use of rooftop solar panels of 1115 KW without intimation to

MSEDCL through on-line mode. Since there was no response from the Company, an order of provisional assessment under Section 126(2) of the Act

of 2003 came to be issued on 07/08/2023. An opportunity of personal hearing as well as submission of documentary material for registering

disagreement was also offered to the Company. On 17/08/2023 the Company disagreed with the order of provisional assessment and sought time of

fifteen days to submit its objection. In view of this response, MSEDCL on 22/08/2023 called upon the representative of the Company to remain

present for personal hearing on 29/08/2023. On that day the Company submitted its objection to the provisional assessment stating that it had applied

for Distribution Franchisee Route and that its application was pending with MSEDCL. It is thereafter that the order of final assessment under Section

126(3) of the Act of 2003 came to be passed.

The aforesaid would thus indicate that sufficient and reasonable opportunity of raising an objection as well as grant of hearing was given to the

Company. The final assessment has thus been shown to have been undertaken prima facie by following the procedure prescribed under the Act of

2003. The same thus does not confer a ground to the Petitioner to contend that there has been a breach of principles of natural justice.

12] At this stage, it would be necessary to refer to the decision in Sri Seetaram Rice Mill (supra) that considers the provisions of Sections 126 and 135

of the Act of 2003 in detail. After analyzing the statutory provisions of the Act of 2003 the Hon'ble Supreme Court has held that the provisions of

Section 126 would be applicable to the cases where there is no theft of electricity but the electricity is being consumed in violation of terms and

conditions of supply, leading to malpractices which may squarely fall within the expression "unauthorized use of electricity". The supply of

electricity to consumers has been held to be subject to the provisions of the Act of 2003, State Acts, Regulations framed thereunder as well as the

terms and conditions of supply in the form of a contract or otherwise. Thus generally when electricity is consumed in violation of any or all of these, it

would be understood as “unauthorized use of electricity” It has been further held that “unauthorized use of electricity” would mean that what

is stated in the explanation to Section 126 of the Act of 2003 as well as such other unauthorized user that is squarely in violation of statutory or

contractual provisions. The said expression has to be given a wider meaning that would take within its scope all the misuse of electricity or even

malpractices adopted while using electricity. On the issue with regard to interference by the High Court in exercise of jurisdiction under Article 226 of

the Constitution of India, where a statutory alternate remedy is available, it was held that such extraordinary jurisdiction could be exercised but with

circumspection in exceptional cases, particularly where cases involve a pure question of law or if the vires of the Act is challenged. It was further

observed in this context that normally cases that involve preliminary question of jurisdiction or matters which go to the very root of the jurisdiction and

where authorities have acted beyond the provisions of the Act are heard. The specialized Tribunal or the Appellate Authority should be left to examine

merits of assessment or even factual matrix of the concerned case.

13] Examining the grounds urged in the present proceedings in the light of aforesaid law, we do not find that there is any question of jurisdiction that

arises for consideration. Undisputedly, the authority under the Act of 2003 has undertaken provisional assessment and after giving due opportunity to

the Company, final assessment has been made. Whether the Company is entitled to rely upon Commercial Circular No.219 dated 28/02/2014 so as to

avoid the proceedings of assessment is a matter to be considered under Section 127 of the Act of 2003. Assuming that the assessing authority failed to

give benefit to the Company under the said Commercial Circular, same would be an error within jurisdiction that can be corrected by invoking the

statutory remedy available. On the ground that there is no jurisdictional error while undertaking assessment, we do not find that any exceptional case

has been made out to exercise writ jurisdiction.

14] In view of these reasons, we are not inclined to interfere in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India. It

would be for the Company to invoke the statutory remedy provided under Section 127(2) of the Act of 2003 if it is advised to challenge the final

assessment. We find that the final assessment is pursuant to the order dated 06/09/2023. Prior to the statutory period under which remedy under

Section 127 of the Act of 2003 could be invoked, this writ petition came to be filed on 21/09/2023. It was directed that no coercive steps nor forcible

recovery be undertaken against the Petitioners. Since the writ petition is not being entertained on merits, time of four weeks from today is granted to

the Petitioners to invoke the statutory remedy provided under Section 127 of the Act of 2003. The interim order dated 21/09/2023 would thus operate

for a period of four weeks from today and would cease to operate automatically on the expiry of period of four weeks. Keeping all points on merit

open for being urged before the appropriate forum the writ petition is disposed of as not entertained. Rule stands discharged with no order as to costs.