

(2011) 01 CAL CK 0015

Calcutta High Court

Case No: G.A. No. 1602 of 2010; A.P.O. No. 80 of 2010; W.P. No. 237 of 2009

West Bengal State Electricity
Distribution Company Ltd.

APPELLANT

Vs

Jadavpur Tea Company Ltd.

RESPONDENT

Date of Decision: Jan. 21, 2011

Acts Referred:

- Electricity Act, 2003 - Section 126, 126(1), 126(6), 127, 135

Citation: (2012) 1 CHN 1

Hon'ble Judges: Pinaki Chandra Ghose, J; Ashim Kumar Roy, J

Bench: Division Bench

Advocate: Subir Sanyal, Sampa Sarkar, for the Appellant; Kumar Gupta, for the Respondent

Final Decision: Dismissed

Judgement

Pinaki Chandra Ghose, J.

This appeal is directed against an order passed by the Hon'ble Single Judge dated 8th February, 2010 on a writ application filed by the Jadavpur Tea Company Limited & Ors. challenging the order of the appellate authority dated 13th January 2009. By the said order dated 13th January, 2009, final order of assessment dated 10th November, 2008 was affirmed. By the said final order of assessment the respondent/writ petitioner was required to pay Rs. 9,38,045/-.

2. The writ petitioner in the writ petition challenged the entire proceedings from the stage of provisional assessment including the appellate authority's order.

3. The Hon'ble Single Judge held that the purported order of the appellate authority suffers from errors on the face of it. The Hon'ble Single Judge allowed the writ petition in favour of the writ petitioner. His Lordship further directed to reconsider the assessment made by the Assessing Officer in accordance with law within a period of 12 weeks from the date of communication of said order.

4. His Lordship came to such conclusion and held as follows:-

For the reason that the Assessing Officer was not part of the inspection team I hold that he had no jurisdiction to make the assessment order and as such the assessment order is a nullity. The assessment has to be made afresh. If none of the members of the inspection team is a designated Assessing Officer the respondent licensee will forthwith take steps with the State Government to designate an Assessing Officer from the Inspection Team at least for this case.

Therefore, for the reasons given above, I hold that the purported order of the appellate authority is bad for palpable errors on it and also for the reason that the assessment officers had no jurisdiction. So there could be no confirmation by the appellate authority of that assessment order which I have held as earlier a nullity.

Before parting with this matter I do observe that I have not dealt with the point that the assessment order was passed beyond the time stipulated because as I have held that the assessment order is a nullity there is no need to go into the said question.

I have held earlier that the assessment is a nullity. So there is no question of setting aside a null assessment order. But assessment has to be made afresh by a properly constituted Assessing Officer as I have indicated above. I allow the writ partly be directing reconsideration of assessment by the Assessing Officer in accordance with law within a period of 12 weeks from the date of communication of this order. The deposited sum of Rs 9,38,045/- will abide by the results of the assessment.

5. Being aggrieved, this appeal has been preferred by the appellant.

6. The facts of the case briefly are as follows: -

The writ petitioner is a limited public company and owner of a tea estate called "Jadavpur Tea Garden, Ramshai Estate" within the district of Jalpaiguri. The facts pleaded by the writ petitioner is that on 19th September, 2008 at about 4 O'clock, some officials of the appellant herein visited the tea garden for inspection of the meter and the transformer. The said officials at that point of time disconnected electricity supply at the said tea garden and seized the meter at a ground that the original service transformer was damaged and they also found that another transformer was installed and the electricity was taken from the said transformer. The meter was both burnt and damaged.

7. The appellant herein on the ground of unauthorized use of electricity and on the ground of theft of electricity lodged a First Information Report within the Maynaguri Police Station.

8. On the very next day i.e. 20th September 2008, the licensee, the present appellant made a provisional assessment and demanded a sum of Rs 9,38,045/-which was duly paid by the respondent/writ petitioner.

9. The respondent/writ petitioner filed their objection in respect of the said provisional assessment. According to the writ petitioner the said meter was broken in a "natural calamity" and the existing transformer "went out of order" from 4th September, 2008. A new transformer was installed by them without "having any bad intention" and "for smooth running" of the tea estate.

10. Mr. Subir Sanyal, Advocate, appearing on behalf of the appellant contended that during such thorough inspection, it was found that the original 150 KVA service transformer not in its position and then the manager disclosed that the said original transformer was also got burnt and damaged. It is a fact that one transformer having without any name plate was installed in place of its original transformer and line was charged in connivance with Mr. Anath Chandra Das unauthorisedly. Such fact would show that the writ petitioner acted illegally and tapping the WBSEDCL supply line for unauthorized use of electricity.

11. Hence, he submitted that the manager has committed an offence u/s 135 of the Electricity Act, 2003. Such finding was duly recorded in the inspection report (appearing at page 80 of the paper book) as well as First Information Report dated 19th September, 2008 (appearing at page 77 of the paper book) lodged with the local police station, then provisional assessment was made and the respondent filed a writ objection to the Provisional Order of Assessment and in the said written objection, the respondent did not deny the fact that the meter was not displaying and the glass of the meter was found broken. The existence of new meter installed by the respondent was also admitted and that has been done without any clearance or approval from the authorities. The said fact was also not denied by the writ petitioner. Therefore, after accepting the said position the writ petitioner only prayed for reconsideration of the provisional bill raised on them. The respondent, writ petitioner, filed an appeal before the appellate authority u/s 127 of the said Electricity Act, 2003, questioning the Final Order of Assessment dated 10th November, 2008 passed by the Assessing Officer. The appellate authority upheld the Final Order of Assessment by an order dated January 13, 2009 after considering the facts and the materials placed before him.

12. Mr. Sanyal submitted that the writ petitioner first took the point before the learned Trial Court that in terms of the provisions of Regulation 4.9 of the regulations framed by the West Bengal Electricity Regulatory Commission under Notification No 36/WBERC dated 20th September, 2007, the licensee is to serve the reasons to the assessee within 48 hours from disconnection of supply on account of theft. Therefore, there is an obligation on the part of the authority to give reasons in the provisional order of assessment. The other point which was canvassed before the Trial Court that the assessment order was passed by the authority, by non-application of mind and no reasons were assigned by the said Assessing Officer. His Lordship while deciding the writ petition held that the appellate authority did not consider any evidence apart from taking the records of the

inspection team as correct and did not consider other materials. Therefore, the appellate authority decided the question with a closed mind.

13. Mr. Sanyal submitted that the said findings of the learned Trial Court are contrary to the records. According to him, steps were taken, inspection was made, written objections were filed on October 17, 2008 admitting the said illegalities and irregularities found in the metering and electrical installations installed by the appellant company at the said factory and no other evidence or material were produced before the appellate authority against the charges leveled by the appellant company.

14. Mr. Sanyal also draw our attention to Explanation in Para (b) (ii) of section 126 of the Act of 2003 and submitted that "unauthorized use of electricity", means the usage of electricity by a means not authorized by the concerned person or authority or licensee. The company shows that admittedly the distribution transformer itself installed at the factory premises of the respondent was replaced by the writ petitioners/respondent by another transformer. Moreover, display of the meter was not found, and front glass of the meter was found broken. From the said act admittedly the conclusion would be that the meter installed was tampered by the respondent. Therefore, it is submitted that the order passed by the appellate authority dated 13th January, 2009 duly assigned the reasons.

15. To substantiate his contention he relied upon the following decisions:-

1. [Deokinandan Sharma Vs. Union of India and Others,](#)
2. [Canara Bank Vs. V.K. Awasthy,](#)
3. [Ashok Kumar Sonkar Vs. Union of India \(UOI\) and Others,](#)
4. [Vasant Ganesh Damle Vs. Shrikant Trimbak Datar and Another,](#)

5. Narayan Chandra Kundu vs. State of West Bengal & Ors., reported in 2008 (1) CHN 459;

6. [Tej Kaur and Others, etc. Vs. State of Punjab and Others,](#)
7. [State of Haryana and Others Vs. M.P. Mohla,](#)

16. Mr. Sanyal also contended that the point of non-application of mind or closed mind was never urged before the authority and therefore it cannot be taken before the Writ Court. He further submitted that when no prejudice is shown, the application of principle of natural justice would be a useless formality. According to him, in view of the admission on the part of the respondent/writ petitioners, they cannot show any reason how prejudice has been caused to the writ petitioner. Therefore, principle of natural justice cannot be invoked in the matter.

17. Therefore, his contention in view of the clear admission on the part of the writ petitioners, it is not necessary even to assign any reason to uphold the Final Order

of Assessment. He further contended that the appellate authority while exercising jurisdiction u/s 127 of the Act, he has a right to show the reasons for upholding not only the Provisional Order of Assessment but also the Final Order of Assessment under the said section and he relied upon a decision in the case of Vasant Ganesh Damle (Supra).

18. According to Mr. Sanyal the Assessing Officer if not present at the time of inspection he has no jurisdiction to assess and pass Final Order of Assessment in terms of section 126 of the Act cannot be accepted in terms of the judgment of Narayan Chandra Kundu (Supra).

19. On the contrary, he relied upon a judgment of the Hon"ble Division Bench of Bombay High Court in the case of Reliance Energy Ltd. vs. Chief Engineer (Electrical) P.W.D. Department, Government of Maharashtra and contended that no such issue was framed or discussed in the said judgment. None of the parties were invited to advance their arguments on the said question. Therefore, he submitted that the said judgment is not an authority on the point directly raised in this appeal and the said judgment has no manner of application in this case.

20. Judgment should be read in its entirety in the light of pleadings of parties and reliefs prayed for and he relied upon the decisions of the Division Bench in the cases of Tej Kaur (Supra) and State of Haryana (Supra) it would show from the facts that the Assessing Officer was present in the inspection concern and the point raised that the Assessing Officer being the Judge of the proceedings and having presented himself in the inspection could not make the assessment. Therefore, he submitted that it was not in issue before this said Division Bench.

21. He also submitted that in any event a personal inspection of the premises or of the equipments and gadgets used for unauthorized use of electricity by the Assessing Officer is not mandatory which would be evident from the section 135(2) of the said Act. According to him the Assessing Officer may express its opinion on the basis of the facts and materials placed before him and can come to the conclusion that there has been unauthorized use of electricity. He further submitted that the judgment of the Division Bench of the Hon"ble Bombay High Court is directly an authority on the issue and should have been accepted by the Hon"ble Trial Court. Hence, he submitted that the appeal should be allowed and the judgment of the learned Single Judge should be set aside.

22. On the contrary, Mr. Kumar Gupta, the learned Advocate appearing on behalf of the respondent relied upon the decision of Narayan Chandra Kundu (Supra) where the Hon"ble Division Bench opined that the legislature has intended that the Assessing Officer must be a person who was actually a member of the inspection team at the time of detecting the pilferage or unauthorized use of electricity so that he can pass the order of assessment. The appellants seeking to distinguish the said judgment on the basis of the judgment of the Hon"ble Bombay High Court delivered

on 27th July 2006 in W.P. No 1902 of 2005 (Reliance Energy Ltd. vs. Chief Engineer (Electrical) P.W.D. Department). According to learned Advocate, in view of the law laid down by the Hon'ble Division Bench of this Hon'ble High Court, the judgment of the Hon'ble High Court of Bombay cannot be applied in the present case. He has also drawn our attention to section 126(1) of the Electricity Act, 2003 which is set out hereunder:-

Section 126(1). If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorized use of electricity, he shall provisionally assess to the best of his judgment the electricity charges payable by such person or by any other person benefited by such use.

(Emphasis supplied)

23. He further contended that section 126(1) of the Electricity Act, 2003, is penal in nature as it seeks to impose a penalty for unauthorized use of electricity. Therefore, it should be construed strictly.

24. He further submitted that cross-objection has been filed by the respondents and having held that the assessment order was without jurisdiction and nullity. The Hon'ble Court should have directed the refund of the monies paid by them. It is further submitted that the Hon'ble Single Judge erred in directing remand of the matter. It is further submitted in the present case, no assessment order was served within the period under Regulatory 52 of the Electricity Code as well as he submitted that the appeal is liable to be dismissed and the cross objection should be allowed.

25. He further relied upon the decision of Deokinandan Sharma (Supra) and submitted that the appellant, at the relevant time, was posted in State Bank of India as officer-in-charge of the Extension Counter, Sewa Samiti. He was suspended and charge-sheeted. After a departmental enquiry, he was removed from service. After unsuccessfully approaching the appellate authority, reviewing authority and the High Court, he contended before the Supreme Court that the Enquiry Officer had not afforded reasonable opportunity of hearing to the appellant to adduce defence evidence and that the appellate authority had committed error in disposing of the appeal without recording reasons and considering the submissions of the appellant. The Supreme Court held that reasonable opportunity was afforded to the appellant to adduce evidence during the course of enquiry.

26. In the decision of Canara Bank (Supra) the Hon'ble Supreme Court held that principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

27. In the said decision the Hon"ble Supreme Court also held as follows:-

Para 16. How then have the principles of natural justice been interpreted in the Courts and within what limits are they to be confined? Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is "nemo judex in causa sua" or "nemo debet esse judex in propria causa sua" as stated in 1605(12) Co, Rep. 114\$ that is, "no man shall be a Judge in his own cause". Coke used the form "cc non debet esse judex in propria cause, quia non potest esse judex et pars" (Co. Litt. 1418), that is, "no man ought to be a Judge in his own case, because he cannot act as Judge and at the same time be a party". The form "nemo potest esse simul actor et judge, that is, "no one can be at once suitor and Judge" is also at times used. The second rule is "audi alteram partum, that is, "hear the other side". At times and particularly in continental countries, the form "audietur at altera pars" is used, meaning very much the same thing. A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, namely "qui aliquid statue it parte inaudita altera, acetum licet dixerit, haud acetum fecerit" that is, "he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right" (see Bosewell case 16) or in other words, as it is now expressed, "justice should not only be done but should manifestly be seen to be done". Whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left open. All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated.

28. In the decision of Narayan Chandra Kundu (Supra) the High Court find that the provisions contained in sections 126 and 135 of the Act, the intention of the legislature is that the Assessing Officer must be a person who was actually a member of the inspection team at the time of detecting the pilferage or unauthorized use of the electricity so that he can pass the order of assessment not on the basis of papers placed before him but after actually visiting the site at the time of detection of the illegality.

29. Therefore, in our considered opinion, the assessment should be done as per the intention of the legislature expressed in the said provision.

30. After hearing the learned Counsel for the parties and after taking into consideration of the facts and the material placed before us it appears to us that it is necessary for us at this stage that whether there is any reason recorded in the order so passed by the authorities in coming to the said assessment. The assessment order dated 10th November 2008 which reads as follows:-

In connection to the above subject, this is to apprise you that the provisional pilferage bill raised vide this office earlier memo No: S.E. & C.M. (JDC)/Bulk/Prov. Bill/III-5/406/2090 dated 20/09/2008 i.r.o. your aforesaid bulk service connection has been carefully examined on the basis of your written representation produced during the reasoned hearing held on 27/10/2008 in this office over the above-cited matter and after examination, we have come to a decision that the said provisional bill may be treated as final one.

31. Therefore, no reasons in fact given in the said order dated 10th November 2008. It is only confirm the provisional assessment made by the Assessing Officer. The decision of the appellate authority dated 13th January, 2009 would also show that no reasons were given in the said final order of assessment. The authority makes the following observations :-

...It cannot be denied that this Final Order of Assessment is "non-speaking", is not a "reasoned order" and does not mention even any major objection/argument which may have been raised by the appellant and the reasons for rejecting this.

32. The said authority further holds that it had no power to remit the matter to the Assessing Officer and findings are set out hereunder:-

But, the statutory provisions provide for an appeal u/s 127 of the Act and the appellant has filed the instant appeal inter alia challenging the "infirmity" of the aforesaid Final Order of Assessment. This casts a more onerous duty upon the appellate authority to ascertain the truth and ensure that justice is done. If the appellate authority simply sets aside the Final Order of Assessment on the grounds of the aforesaid "infirmity" and if any offence(s) had really been committed by the appellant, then this may result in condonation of offence(s) committed by a consumer to the detriment of the interests of other consumers of the respondent and indirectly encouraging others to commit such offense. On the other hand, the Act and the regulations do not empower an appellate authority u/s 127 of the Act to remit the Final Order of Assessment back to the learned Assessing Officer, with a direction that a reasoned order be passed in the matter.

33. Thereafter, the said authority decided the matter and the material findings recorded by him are reproduced hereunder :-

The appellant, therefore, obtained a 100kV A transformer from Impelco Electric Co.. As stated hereinbefore, the authorized officials of the respondent found that the said transformer obtained from Impelco Electric Co., without any name plate, had been connected illegally and unauthorisedly to the respondent's 11kV distribution system for obtaining electricity. But, it was also found that the said transformer, without any name plate, had been connected to the respondent's 11kV distribution system "in connivance with" Sri Anath Chandra Das, Asst. Engineer (O&M) of the respondent.

34. After going through the said orders and analyzing the same we are unable to find any reasons. It also appears to us that the authority decided the matter with a closed mind. It appears to us that all the authorities thought it fit only to calculate the amounts suffered by them. It did not consider any evidence apart from the facts recorded by the inspecting team and holding the records of the said team as correct. It is a fact that the Assessing Officer was not part of the inspection team. We have also considered the explanation, given under first explanation, to section 126(6) of the Electricity Act, 2003, which is reproduced hereunder:-

6...

Explanation.-- For the purposes of this section, --

- (a) "assessing officer" means an officer of State Government or Board or licensee, as the case may be, designated as such by the Stage Government;
- (b) "Unauthorized use of electricity" means the usage of electricity --
 - (i) by any artificial means, or
 - (ii) By a means not authorized by the concerned person or authority or licensee; or
 - (iii) through a tampered meter, or
 - (iv) for the purpose other than for which the usage of electricity was authorized, or
 - (v) for the premises or areas other than those for which the supply of electricity was authorized.

35. It is further appears that the question which has already been stated by the Division Bench of this High Court that the Assessing Officer must be a member of the inspection team so that he can assess the facts and the situation properly and the Division Bench of this High Court in the case of Narayan Chandra Kundu (supra) and held that it would be the proper way of appointing an Assessing Officer, who was actually a member of the inspection team at the time of detecting the use of electricity unauthorizedly.

36. Hence, in our considered opinion we do not find that the judgment impugned suffers from any illegality or irregularity. We also do not find any merit in the appeal.

37. Hence, the appeal must fail and is hereby dismissed.

38. Xerox certified copy of this order, if applied for, be supplied to the parties on usual undertakings.

Ashim Kumar Roy, J.

39. I agree.