

(2001) 09 CAL CK 0046

Calcutta High Court

Case No: G.A. No. 2558 of 2001 and C.S. No. 341 of 2001

Bhartia Steel and Forging
Industries and Others

APPELLANT

Vs

Calcutta Electric Supply
Corporation and Others

RESPONDENT

Date of Decision: Sept. 4, 2001

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 8, 80(2)
- Electricity Act, 1910 - Section 21(2), 21(2), 26(6), 26(6)

Citation: 107 CWN 682

Hon'ble Judges: Bhaskar Bhattacharya, J

Bench: Single Bench

Advocate: A.K. Panja, P. Chatterjee, P. Dutta and S.K. Biswas, for the Appellant; A.K. Mitra and Joy Saha, for the Respondent

Judgement

Bhaskar Bhattacharya, J.

The plaintiffs, consumers of electricity, have filed the instant suit thereby praying for the following reliefs :

"a. Leave u/s 80 (2) of CPC to institute the suit.

b. Leave under Order 1 Rule 8 of the Code of Civil Procedure.

c. Declaration that conditions of supply dated 15th May. 2000 published by defendant No. 1 allegedly under, Section 21 (2) of the Indian Electricity Act, 1910 are illegal, bad. ultra vires the Indian Electricity Act, 1910, unconstitutional and thereby not enforceable against the petitioner.

d Declaration that the impugned order dated 18.11.2000 purportedly passed by the defendant No. 1 as mentioned in paragraph 13 above is wrongful, illegal, bad and not enforceable against the petitioners.

- e. Declaration that the purported bills dated 18.11.2000 raised by the respondent No. 1 in terms of the purported order as mentioned in prayer (d) above, are also not enforceable against the petitioners and the same are also bad and illegal.
- f. Declaration that purported bills being bill Nos. 2 and 3 as forwarded under letter dated 23rd June, 2001 by the respondent No. 1 as mentioned in para 34 above are not enforceable against the petitioners and the same are also bad and illegal.
- g. Permanent injunction restraining the respondent No. 1 and/ or its men and agents from taking steps or further steps or to act in terms of the impugned order dated 18.11.2000 and the bills as mentioned in prayers (d). (e) and (f) above in any manner whatsoever.
- h. Permanent injunction restraining the defendants and/or their men and agents from giving any effect or further effect and/ or to act in terms of new conditions of supply dated 15th May. 2000 allegedly framed u/s 21(2) of the Indian Electricity Act, 1910 in any manner whatsoever.
- i. Injunction;
- j. Receiver;
- k. Cost;
- l. Further and other reliefs".

In connection with the aforesaid suit, the plaintiffs have come up with an interlocutory application of injunction restraining defendants, their agents and men from taking any further steps or to act in terms of the order dated November 18. 2000 passed by the Deputy Manager. Commercial of the defendant No. 1 and also from demanding any sum in terms of the purported bill dated November 18. 2000 and also June 23. 2001 as mentioned in paragraphs 35A and 37A of the said application. The plaintiffs have also prayed for injunction restraining the CESC authority, its men or agents from giving any effect or further effect to the new conditions of supply dated May 15, 2000 allegedly framed u/s 21 (2) of the Indian Electricity Act 1910.

2. At the time of entertaining this application, this Court did not grant any ad interim order of injunction but directed the CESC authority to file affidavit Pursuant to the said order the CESC authority has filed affidavit.

3. During the pendency of this application, the plaintiffs complained that the CESC authority has disconnected the supply of electricity. The aforesaid allegation has been disputed by the CESC authority by filing supplementary affidavit thereby asserting that on August 1, 2000 on an inspection it was found that a direct connection had been established from the feeder pillar box by using separate cable which led to the factory premises of the petitioner No. 1 without passing through the metering arrangement. The CESC authority alleged that the cut out box fuses

has been removed together with the cable cores from the cut out of the meter for the purpose of making a direct connection from the main switch of the meter which would have the effect of bypassing the said meter. It further stated that the cable from the pillar box to the meter had been removed and the same had been connected directly to the feeder box by a tee Joint. According to the CESC authority, it was found that those meters have been disconnected for the purpose of reconnection with the main switch directly with the intention to bypass the said meters and as such the CESC authority had no occasion to disconnect electricity supply to the said meter through metering arrangement Accordingly, a complaint dated August 1. 2001 was lodged by CESC authority with the Maloipanchghora Police Station in respect of the said meters..

4. The aforesaid allegation however has been disputed by the plaintiff thereby complaining that CESC authority had deliberately made a false case against the petitioners and that it is the CESC authority who has disconnected such supply.

5. Therefore, the undisputed fact is that during the pendency of this application the electricity supply of the plaintiffs has been disrupted. Whether it has been really disconnected by the CESC authority or whether the same has been disconnected by the plaintiffs themselves for the purpose of bypassing the metering system and getting a direct supply, will be adjudicated in the appropriate criminal proceedings and at this stage this Court does not intend to go into the said disputed question.

6. Mr. Mitra, the learned counsel appearing on behalf of the CESC authority however seriously contended that in view of such disruption of supply of electricity during the pendency of the application, the present application has become infructuous and no order should be passed on this application. According to Mr. Mitra, in order to get an order of restoration of supply the petitioner must file a fresh suit based on separate subsequent cause of action.

7. After hearing Mr. Panja appearing on behalf of the petitioner and Mr. Mitra appearing on behalf of the CESC I am however not at all impressed by the aforesaid submissions of Mr. Mitra. If during the pendency of an application, due to subsequent events, the initial prayers made in the application become inappropriate, the court can always mould the relief after taking into consideration the subsequent events which have made the original relief claimed inappropriate.

8. In the instant case, I have already indicated that the CESC authority is to prove the allegations of pilferage in the criminal proceedings but before the plaintiff No. 1 is held to be guilty of pilferage, it cannot be deprived of the right to get electricity and to run business, if it complies with the conditions that may be imposed by Court while passing the order of restoration.

9. In the instant case, in order to succeed in the application, the plaintiffs must prove that there is prima facie case to go for trial, that the balance of convenience and inconvenience in favour of granting injunction and that they will suffer irreparable

loss and injury if the injunction is not granted.

10. I have already indicated that in this suit, the plaintiffs have challenged the vires of the conditions of supply dated May 15, 2000 published by defendant No. 1 u/s 21(2) of the Indian Electricity Act. This court has been given to understand by the learned counsel for the parties that challenging those conditions of supply already several writ applications have been filed and those have been entertained by other Judges of this Court. It is however, true that there is no stay order in those proceedings. I am also of the view that the petitioner has got a strong prima facie case go for trial on the question of vires. I propose to indicate my reasons in the latter part of this order.

11. Next question is whether the bill dated November 18, 2000 raised by the CESC authority on the basis of their calculation is prima facie correct. It appears from the said order dated November, 18, 2000 which is Annexure "A" to the instant; application that for the purpose of assessment, the CESC authority has assumed that the factory ran for 24 hours a day and 295 days a year. It further appears that in the absence of any positive information as to utilisation factor, the same was adjudged to be 0.8 and thus assessed the consumption on the basis of such data. It came to the conclusion that total dues payable by the petitioner was Rs. 62.37.292.75 paise. Accordingly. the CESC authority was directed to raise fresh bill for the excess amount and another bill for additional security.

12. At the time of hearing of the present application. Mr. Mitra, the learned counsel appearing on behalf of the CESC authority submitted that this Court should not interfere with the findings of the authority as the plaintiffs did not avail of the opportunity to contest the claim. Mr. Mitra further submitted that even in this suit the plaintiffs did not place any material by disclosing their documents which are part of the registers maintained under the Factories Act and other relevant statutes. According to Mr. Mitra by producing those documents the plaintiffs could easily show that the assessment of the CESC was incorrect and thus he prayed for drawing adverse inference against the plaintiffs for non-production of those documents.

13. At this stage. Mr. Panja appearing on behalf of the plaintiffs submitted that before drawing adverse presumption against a party for Don production of any material document, that part;- should be given opportunity to produce those documents. According to Mr. Panja, if inspite of giving, opportunity, no such document is produced, the court can" legitimately draw adverse inference.

14. This Court was convinced by the aforesaid submission of Mr. Panja and thus permitted the plaintiffs to produce the materials demanded by Mr. Mitra on behalf of the CESC authority.

15. Pursuant to the said order passed by this Court, the plaintiffs have produced xerox copies of all those materials and also gave inspection of the originals to the learned advocate-on-record of the CESC authority. By those documents, the

plaintiffs have produced the entire records showing their total amount of product, the number of workers employed, the working days as well as hours of production which are required to be maintained under Factories Act.

16. It appears that the factory ran for 235 days in last one year. The hours of production were eight hours a day. However, Mr. Panja indicated that there are losses of working hours due to mechanical fault, load shedding etc.

17. Mr. Chatterjee, the learned counsel appearing on behalf of the plaintiffs supplementing Mr. Panja, drew attention to the provision of Rule 29 of the New Conditions of Supply which has been challenged in these proceedings. According to Rule 29(e), if in the course of assessment of the energy pilfered and the quantity of electricity consumed thereby, the consumer is unable to satisfy the officer authorized by the licensee as to load, hours of daily use, diversity factor, load factor, as applicable, and if there be no other reasonable means to affix them, the load factor in the absence of any material should be 0.5 but not 0.8 assessed by the authority. Mr. Chatterjee similarly points out that in the absence of any information, 12 hours per day should be the hour of daily use but the authority maliciously treated such hours to be 24 hours per day. Mr. Chatterjee in this connection submits that his clients have already produced materials showing that hours of operation every day were 8 hours. He however submits that it should come down to 7 hours after taking into account loss of hours due to various reasons.

18. After taking into consideration the documents produced by the plaintiffs it is apparent that the mode of calculation indicated in Annexure "A" was absolutely baseless, even, according to the conditions of supply formulated by the CESC authority. In the said order dated November 18, 2000, no reasons has been assigned why load factor was treated to be 0.8 nor was any other reasonable means for affixing such rate given. I have already indicated that hours of operation were treated to be 24 hours a day. Under the aforesaid circumstances, in my view, the calculation given in the order dated November 18, 2000 was improper even on the basis of conditions of supply framed by CESC. Thus, the plaintiffs have proved a strong prima facie case as regards incorrectness of assessment shown in Annexure "A".

19. The CESC authority by an affidavit however has relied upon a report given by Chief Electrical Inspector in a different matter for the purpose of showing that utilization factor in a rolling mill should be taken as 0.8. After going through the said report I find that in that case, the Chief Electrical Inspector has assigned no reason why the utilization factor was taken to be 0.8. Moreover, it does not appear from the impugned order dated November 18, 2000 that the assessing authority relied upon the said report while passing the order impugned. The CESC authority, as it appears from the supplementary affidavit, sought to rely upon only that part of the report where utilization factor was held to be 0.8. but curiously enough, it was conspicuously silent about the other part of the report where it has been held that

in this type of factory out of 8 working hours, 1 hour is generally lost for the various reasons mentioned therein. The CESC authority has conveniently decided not to rely upon that part of the report, but on the other hand has taken the working hours to be 12 hours a day. In my view, the CESC authority cannot rely upon the finding of the Chief Electrical Inspector in different proceedings for the purpose of fixing utilization factor in a given case. At this stage, it will not be out of place to mention here that in a pending suit between the parties, the Chief Electrical Inspector was appointed as Special Officer for the purpose of giving report whether the allegation of CESC as regards pilferage by the plaintiffs pursuant to which the disputed bill was issued was correct or not and the Chief Electrical Inspector after inspection has prima, fade opined that there was no apparent sign of tampering the seal of the meter. Thus, the plaintiffs have proved prima facie that the basis of issue of the disputed bill on the allegation of pilferage by way of tampering with the meter is without any foundation.

20. I am at a loss to find that CESC authority in this case has taken exception to the report of Chief Electrical Inspector holding prima facie in favour of the plaintiffs and disbelieving the allegation of pilferage but in the same breath is relying upon a part of a report given by a Chief Electrical Inspector in a different case which supports its decision as regards fixation of utilization factor for assessment and at the same time prefers to ignore the observation in other part about loss of 1 hour in working hours of 8 hours in this type of business.

21. I, however, find substance in the contention of the CESC authority that unit actually consumed cannot be measured simply on the basis of amount of production of the materials. It definitely depends upon the size of furnace employed in the production and the process used. At the same time, waste of electricity in the process is also a factor. I thus place no reliance upon the certificate produced by the plaintiffs showing rate of consumption of electricity per ton of product.

22. So far the new conditions of supply framed by CESC as regards the allegation of pilferage, it appears that the licensee has usurped the authority to decide its own allegation finally through its officers notwithstanding the existence of the present remedy under the existing law. Thus, according to the new conditions, even if it is proved either in a Civil or a Criminal Court that a consumer is not guilty of pilferage alleged, the licensee, if finds through its own investigations (of course after giving opportunity to the consumer of being heard) that the consumer is guilty, can assess the amount of electricity found pilfered on such investigation and compel the consumer to pay that amount. Rule 29(f) even authorises the licensee to presume duration of such pilferage to be one year from the date of detection by It

23. In my view, the plaintiffs have made a strong prima facie case of the question vires of such unjust conditions of supply. Prima fade, I am of the opinion that in a case of this nature, so long the consumer is not found guilty by any competent court, he cannot be forced to pay the amount assessed by licensee as provided in

the conditions. The licensee to protect its interest can adopt other measures of detection theft of electricity by either making direct connection or installing a static meter or a duplicate meter and can also impose exemplary costs if the consumer is found guilty of pilferage in the long run by a competent court or even can decide to deprive the guilty consumer of the future supply as a penal measure, but the licence cannot arrogate to itself the authority to take final decision on the basis of its own investigation notwithstanding a contrary decision taken by a competent court in this behalf.

24. Mr. Mitra in this connection placed strong reliance upon the decision of the Apex Court in the case of [M/s. Hyderabad Vanaspathi Limited Vs. Andhra Pradesh State Electricity Board and Others](#), and contended that the similar conditions of supply to those challenged in this suit were approved by the Apex Court.

25. In the, case of M/s. Hyderabad Vanaspathi Ltd. (supra),. Rule 39 of the conditions of supply therein authorised the Superintending Engineer of the Electricity Board to decide the question of final assessment of pilferage and the Chief Engineer of the Board was the appellate authority. Against the order of the appellate authority, the Chairman of the Board or his nominee, a member of the Board was given suo motu power of review. Under such circumstance, the Apex Court held that the Board, as statutory body, was performing a statutory duty, that the conditions were statutory in character and not mere contractual and those were not inconsistent with the provisions of Electricity (Supply) Act, 1948 and the Indian Electricity Act.

26. In the present case, power of assessment has been given to a Manager or a Deputy Manager of CESC while a Deputy Chief Engineer or an Additional Chief Engineer of CESC is the appellate authority whose decision, according to the conditions of supply, is final.

27. We must not lose sight of the fact that a statutory authority function with the sole object of performing the statutory duties; but the object of CESC, a limited company, is on the other hand to run business in order to profit and in the process, having been appointed a licensee by the State Government, is required to merely comply with duties cast upon a licence under the relevant statutes as conditions of such licence.

28. Therefore, CESC cannot be placed in the same position as that of a State Electricity Board.

29. Besides, when even in case of a defective meter, where there is no allegation of fraud or pilferage, Section 26(6) of the Indian Electricity Act does not permit CESC to estimate the amount of energy actually supplied but it vests an Electrical Inspector with the authority to decide such dispute, the new conditions of supply have preposterously conferred the right to adjudicate the allegations of such a serious nature upon the accuser itself notwithstanding the fact that the question of huge financial gain or loss involved in such adjudication.

30. The decision of M/s. Hyderabad Vanaspati Limited (supra) thus cannot have any application to the fact of the present case.

31. I thus propose to dispose of this application in the following manner:

Subject to the final decision that will be passed in this suit, the CESC will calculate the amount of electricity consumed by the plaintiffs from November 3. 2000, the alleged date of disconnection by fixing load factor to be 334 K.W. as found during inspection in the presence of the Special Officer at the time of inspection held on May 17. 2001. The number of working days as reflected from the register produced by the plaintiffs should be taken to be number of days from November 3. 2000 till August 1. 2001. the date from which electricity has been admittedly disrupted.

32. The hours of supply should be fixed at 7 hour 30 minutes. I have in this connection allowed loss of hours everyday to be 30 minutes. The utilization factor should taken to be 0.5 instead of 0.8 suggested by the CESC.

33. The CESC on the basis of the aforesaid data will further find out the number of working days from May 3. 2000 i.e. six months from the alleged date of detection as will appear from the materials placed by the plaintiffs and will calculate the total amount of consumption by applying $L \times II \times D \times F$ formula. As the provisions contained in Section 26 (6) of the Indian Electricity Act do not authorize even the Electrical Inspector to take Into account any period beyond six months for the purpose of assessing the amount of energy supplied, I have decided to turn down the prayer of the CESC for taking into consideration the period of one year prior to November 3. 2000 at this stage. Thus, the CESC after calculating the amount of energy on the basis of the aforesaid data from May 3. 2000 to August 1. 2001 will find out the price of such energy according to the prevailing rate and after deducting the amount already paid by the plaintiffs will raise bill for the balance amount within three days from date.

34. If the entire amount is paid by the plaintiffs within seven days from the service of such bill, the CESC will within forty eight hours of such payment, restore connection by supplying a new meter.

35. While giving reconnection, the CESC will be entitled to place upon the premises of the plaintiffs at any place selected by CESC in addition to the new meter, such number of meter, maximum demand indicator or other apparatus including static meter or provisions for direct supply as it thinks fit.

36. For the purpose of providing the case in the existing criminal cases on the ground of alleged pilferage, the CESC and the police authority will be entitled to take all possible steps in accordance with the provisions of the Code of Criminal Procedure for removal of the existing meter or part of supply lines.

37. For the time being, the CESC will bear all the costs and expenses for giving new meter or other equipment as mentioned above and will not charge any amount as

delayed surcharge on the amount of bill prepared as per this order, but if ultimately the plaintiffs are found guilty in the pending criminal cases. CESC will be entitled to recover not only the cost of all these meters, equipment and usual reconnection charges but also impose interest at the rate of 26% per annum on the billed amount from the date of pilferage and on the costs and expenses of installing meters and equipment from the date of such installation.

38. It is needless to mention that if in the pending criminal proceedings the plaintiffs are not found to be guilty, they will be entitled to sue CESC for damages for causing injury to them by unnecessary disconnection of electricity. They will also be entitled to refund of the excess amount paid by them pursuant to this order with interest at the rate of 26% on such amount which is in excess of the amount shown in the meter.

39. After reconnection. the plaintiffs will go on paying current consumption charges in accordance with the reading of the new meter.

40. The defendants are restrained from taking any further steps or to act in terms of the order dated November 18. 2000 being Annexure-"A" to this application and also from demanding the amount shown in the said order on in any subsequent bills issued pursuant to such order till the disposal of the suit. The defendants are however entitled to realise the amount calculated on the basis of this order if payment is not made by the plaintiffs. The application is thus disposed of. Observations made herein are all tentative for the purpose of disposal of this application.

No costs.