

*** HIGH COURT OF DELHI : NEW DELHI**

+ RFA (OS) No.12/2008

Judgment reserved on: 31st July, 2008

Judgment pronounced on: 25th September, 2008

Sh. B.L. Kantroo

....Appellant

Through : Mr. A.S. Chandhiok, Sr.
Adv. with Ms. Maldeep
Sidhu and Ms. Shikha
Bhardwaj, Adv.

Versus

BSES Rajdhani Power Ltd.

....Defendant

Through : Ms. Anjali Sharma, Adv.

Coram:

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may
be allowed to see the judgment?

2. To be referred to Reporter or not?

3. Whether the judgment should be reported
in the Digest?

Yes

MANMOHAN SINGH, J.

1. This appeal has been filed by the appellant (herein after referred to as 'plaintiff') against the order dated 12.2.2008 passed by the learned Single Judge of this Court whereby the suit of the plaintiff seeking a declaration that the bill for Rs.34,23,386/- issued by the defendants is false and illegal and also seeking consequential relief of permanent injunction against the defendant from disconnecting electricity supply to the plaintiff's premises i.e. Charitable Hospital

“Arandhati Hospital” was dismissed.

2. The plaintiff filed the suit CS (OS) No.278/2008 for declaration and permanent injunction before this Hon’ble Court with the following prayer :

- “a) pass a decree of declaration that the bill of Rs.34,23,386/- raised by the defendant against the plaintiff, is false and malafide, has been deliberately made highly exorbitant, is unjust and not recoverable or due to be paid by the plaintiff and further declaration declaring that the plaintiff is not guilty of theft of electricity and inspection report dated 16.06.2007 prepared by the inspection team of the defendant and the electricity bill above described and subsequent reports/speaking orders of defendant are illegal and void.
- b) pass a decree of permanent injunction in favour of the plaintiff and against the defendant from disconnecting the electricity of the plaintiff at the plaintiff’s charitable institution ‘Arandhati Hospital’, situated at RZ F-15, Satsang Road, Nihal Vihar, Nangloi-110041.
- c) ad interim temporary relief with immediate effect, restraining the defendant from disconnecting the supply of energy to the premises ‘Arandhati Hospital’, situated at RZ F-15, Satsang Road, Nihal Vihar, Nangloi, Delhi-110041, without prior leave of this Hon’ble Court, on the exorbitant, erroneous bill raised by Defendant.
- d) the plaintiff is also liable to be paid an appropriate amount towards the costs of this litigation.”

3. The said suit alongwith the injunction application under Order XXXIX Rule 1 and 2 CPC was listed on 12th February, 2008 and after hearing the learned counsel for the parties, the learned Single Judge rejected the plaint on the ground that the suit is not maintainable under Order VII Rule 10 and 11 of CPC mainly on the reason that the

concerned matter falls within the jurisdiction of assessing officer under Section 126 or and adjudicated officer appointed under the Act and on the ground that the subject matter of the present suit cannot be decided in view of Section 145 of the Electricity Act.

4. Brief factual matrix for deciding this appeal is that the plaintiff is the association of National Brotherhood for Social Welfare, a charitable organization being run under the presidentship of Dr. B.L. Kantroo. The association is running a charitable medical facility under the name and style of 'Arandhati Hospital' at RZ F-15 Satsang Road, Nihal Vihar, Delhi-41

5. The plaintiff, inter alia, submits that it is a voluntary organization and is a consumer of the defendant having installed a 7 KW NX (Commercial) meter. It was alleged that the defendant illegally sought to implicate it for alleged unauthorized use/theft of electricity and sought to fasten huge liabilities.

6. It was alleged by the plaintiff that on 16th June, 2007 in the absence of the plaintiff or any of his authorized representatives, the defendant carried out an inspection of the hospital and alleged that electric appliances of load of 51.546 KW were physically connected with BSES supply system. This conclusion was arrived at by taking into consideration each and every electric appliance found available at the hospital premises and some more electrical items exaggerated by the defendant in their list. The defendant further made out a case of direct theft against the plaintiff by alleging that two number of black colour wires were in use for tapping electricity from the BSES mains.

7. In the seizure memo prepared by the defendant, inspectors showed the following material seized from the site:

e) Single core black colour aluminium wire mm =

24 meters X 2 Nos. = 48

f) Single core black colour aluminium wire 10 mm =

3 X 2 Nos. = 6

8. The plaintiff submitted that the single core black wires were in fact wires connected to the generators and had been wrongly mentioned as cables being used for tapping illegal electricity. The nearest BSES electricity supply pole is almost 100 meters away from the site of the generators and the meter placed at the hospital premises are another 100 meter away from the generators. As such there could be no possibility of theft of electricity with the cables found at the site that were not more than 24 X 2 meters in length. The bill raised by the defendant dated 5th July, 2007 amounting to Rs.34,23,386/- is highly malicious and mischievous as the inspecting team of the defendant falsely implicated the plaintiff in a case of theft of electricity. The inspecting team did not even enter the OT as may be verified from the videography and photography. It was reported on 16th June, 2007 that plaintiff is using an excessive load of 51.546 KW. The inspecting team carried out inspection of the premises which is not even a part of the hospital premises. The defendant inspected different premises i.e. RZ F-5 where two generators are placed for the use of the medical centre.

9. Prior to the filing of the suit, the plaintiff filed writ petition being W.P. (C) No. 5124/2007 to give an opportunity of hearing to the

plaintiff which was disposed of with the directions not to disconnect the electricity supply to the plaintiff and direction was issued to pass speaking order. Similarly, another writ petition being W.P. (C) No. 731/2008 filed against the defendant for raising a highly exaggerated and exorbitant bill was disposed of by order dated 29th January, 2008 giving directions to the petitioner to approach civil court or any other forum in accordance with law. The defendants were directed not to disconnect electricity for a period of 15 days in view of the impugned speaking order passed on 15th January, 2008.

10. Counsel for the defendant has made her submissions mainly on the following points :-

- “a) The jurisdiction of the civil court is barred under Section 145 of the Electricity Act, 2003 (for short the ‘Act’) as this case is covered under Section 126.
- b) A joint and duly authorized inspection team of the defendant had inspected the plaintiff’s premises on 16th June, 2007. During the inspection it was found that the entire supply was running through two wires which were directly connected to the nearby BSES LV mains.
- c) The Head of Department – Enforcement of the defendant granted a hearing to the appellant on 20th July, 2007. A detailed speaking order was then passed by him on 30th July, 2007.
- d) A complaint for theft of electricity was also pending against the appellant before the Special Court set up under the Act.
- e) While disposing off the CCP No.638 of 2007 vide order dated 11th December, 2007, this Hon’ble Court was pleased to direct the defendant to show the sealed material to the appellant, afford a fresh hearing to him, and then pass a detailed speaking order.
- f) In terms of order dated 11th December, 2007, a fresh hearing was granted to the appellant on 9th January, 2007. The sealed material was opened in front of the appellant and was shown to him. At

the time of resealing however, the appellant refused to sign on the seal. A fresh hearing, as directed by the Hon'ble Court, was then afforded to the appellant, and his submissions were duly heard and appellant during the course of personal hearing, the HOD- Enforcement passed a detailed speaking order dated 15th January, 2008.

- g) The appellant then filed the suit for injunction, out of which the present appeal arises.”

11. We have heard the submissions made by the learned counsel for the parties. We shall first deal with the issue as to whether the concerned matter falls within the jurisdiction of the assessing officer under Section 126 of the Act or not.

12. Section 145 of the Electricity Act, 2003 reads as under:-

“145. Civil Court not to have jurisdiction – No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an assessing officer referred to in section 126 or an appellate authority referred to in section 127 or the adjudicating officer appointed under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.”

13. On plain reading of the aforesaid section, the jurisdiction of the civil court is excluded for entertaining any suit or proceeding in respect of any matter which the assessing officer referred to in section 126 or the appellate authority referred to under section 127 or adjudicating officer appointed under this act has to determine. It is further expressly provided that no injunction shall be granted by any court or any authority in respect of any action taken or to be taken in pursuance of powers conferred or under this Act. Therefore, there is

express provision for excluding the jurisdiction of the civil court in respect of the matters, which the assessing officer has to decide under section 127 of the Act. Therefore, pending the procedure of assessment under Section 126 and pending the decision by the appellate authority or the adjudicating officer, as the case may be, no injunction can be granted by the civil court.

14. Let us now examine the scope and ambit of the assessment under Sections 126 and 127, the aforesaid provisions reads us under:

“126. Assessment –

(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 judgement the electricity charges payable by such person or by any other person benefited by such use.

Explanation.- For the purposes of this section :-

.....

b. “unauthorised use of electricity” means the usage of electricity –

- i. by any artificial means; or
- ii. by a means not authorised 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 authorised.
- v. for the premises or areas other than those for which the supply of electricity was authorized.

127. Appeal to appellate authority –

(1) Any person aggrieved by the final order made under section 126 may, within thirty days of the said order, prefer an appeal in such form, verified in such manner and be accompanied by such fee as may be specified by the State Commission, to an appellate authority as maybe prescribed.

(2) No appeal against an order of assessment under sub-section (1) shall be entertained unless an amount equal to [half of the assessed amount] is deposited in cash or by way of bank draft with the licensee and documentary evidence of such deposit has been enclosed along with the appeal.

(3) The appellate authority referred to in sub-section (1) shall dispose of the appeal after hearing the parties and pass appropriate order and send copy of the order to the assessing officer and the appellant.

(4) The order of the appellate authority referred to in sub-section (1) passed under sub-section (3) shall be final.

(5) No appeal shall lie to the appellate authority referred to in sub-section (1) against the final order made with the consent of the parties.....

15. From the bare reading of section 126, it can be seen that it applies when there is unauthorised use of electricity on inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used. Section 126 excludes mens rea and is provided for the purpose of fastening civil liability. Unauthorized use of electricity is different from theft cases of electricity. The cases of theft of electricity are envisaged under section 135 of the Act by making it a criminal offence and the legislature consciously treated it separately and provided for harsh criminal punishments and heavy fines.

16. A perusal of Section 145 would show that this Section operates only in respect of Section 126 and 127 of the Electricity Act. Section 126 is contained in Part XII of the Electricity Act and deals with investigation and enforcement. Section 126 provides that if on an inspection of the premises and after inspection of equipments, gadgets, etc. found connected or used in the premises, the Assessing Officer

comes to conclusion that the person was indulging in unauthorized use of electricity, the Assessing Officer shall provisionally assess, to his judgment, the electricity charges payable by such person or by any other person benefited by such use. It is also provided that if Assessing Officer reaches to conclusion that unauthorized use of electricity has taken place, it shall be presumed that such unauthorized use was continuing for a period of 3 months. Section 127 provides that a person aggrieved by the final order made by Assessing Officer under Section 126 may prefer an appeal within 30 days of the order to the Appellate Authority as may be prescribed. In view of the above, a careful reading of Section 145 would show that the ouster of jurisdiction is in respect of detection of unauthorized use. However, at the same time, it is also directed by the legislature in the same very Section 145 independently that no injunction shall be granted by the court or authority in respect of any action under the Act

17. The assessment of theft of energy has been given as per provisions of Section 135 of the Electricity Act, 2003. For the sake of convenience, Section 135 reads as under:-

“135. Theft of Electricity.

1. Whoever, dishonestly, --
 - a. taps, makes or causes to be made any connection with overhead, underground or under water lines or cables, or service wires, or service facilities of a licensee or supplier, as the case may be; or
 - b. tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration, calibration or metering

of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or

c. damages or destroys an electric meter, apparatus, equipment, or wire or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity, or

d. uses electricity through a tampered meter; or

e. uses electricity for the purpose other than for which the usage of electricity was authorized.

.....

.....

18. From the abovesaid provisions, it is crystal clear that the assessment under Sections 126 and 135 of the Electricity Act, 2003 are absolutely different from each other. Both sections 126 and 135 operate in different fields. This distinction has been made out in a case decided by the High Court of Delhi in *Sohan Lal vs. North Delhi Power Ltd. and other* (per Sanjay Kishan Kaul, J.) in the decision reported at **113 (2004) DLT 547 in Para 37, 38 and 40** of the said judgment reads as under:-

“37. The Explanation to Section 126 of the said Act defines the expression ‘unauthorised use of electricity’ and the definition includes four categories as specified in the Sub-para (b) to the Explanation. It has been defined to mean the usage of electricity (i) by any artificial means. (ii) by means not authorized by the concerned person or authority of licensee. (iii) through a tampered meter, and (iv) for the purpose other than for which the usage of electricity was authorized. Thus, Section 126 can apply only in these cases since the same is confined to ‘unauthorized use of electricity’. The expression ‘theft’ has not been used under Section 126 of the said Act of 2003,

38. The expression ‘theft’ has been used in Section 135 of the said Act. Thus, in the same enactment, these two expressions – ‘unauthorized use of electricity’ and ‘theft’ – have been used

separately and, thus, must have their own connotations. They cannot be said to be substitute for one or the other.

39. XXX

40. There is no doubt that some of the expressions used in Section 126 of the said Act also appear in Section 135 thereof. An illustration of this was given in respect of tampering of a meter. However, Section 126 uses the expression to include the usage of electricity through a tampered meter, while the expression under Section 135 is 'tampers a meter'. If the definitions given of theft of electricity under Section 135 are considered, they are specific in nature. There is dual requirement. Firstly, the act should be done dishonestly. Secondly, it should form part of one of the acts specified in Sub-paragraphs (a) to (c) of Sub-section (1) of Section 135 of the said Act. Thus, specific acts have been given like tapping through overhead, underground or under water lines or cables, tampering of meter, damage or destruction of electric meters and apparatus, to interfere with the proper or accurate metering of electricity. An act to constitute theft of electricity must, thus, satisfy the aforesaid requirements."

19. In view of the settled law as mentioned above do not find ourselves in agreement with the view of the learned Single Judge that the concerned matter falls within the jurisdiction of the assessing officer under Sections 126 and 127. Therefore the reasons given by the learned Single Judge for dismissing the suit as not maintainable is not correct.

20. In the second part of the Section 145 it is also directed by the Legislature that no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act, Therefore the aforesaid section is to be read with section 153 of the Electricity Act, 2003. Section 153 of Electricity Act, 2003 reads as under:

“153. Constitution of Special Courts – (1) The State Government may, for the purposes of providing speedy trial of offences referred to in (sections 135 to 140 and section 150) by notification in the Official Gazette, constitute as many Special Courts as may be necessary for such area or areas, as may be specified in the notification.
.....”

21. As per the procedure and the power of the Special Court, referred to in section 154, it is categorically mentioned in sub-paragraph (5) of section 154 that the Special Court may also determine civil liability against the consumer or a person in terms of money, for theft of energy which shall not be less than an amount equivalent to 2 times of tariff rate applicable for a period of 12 months, preceding the date of detection of theft of energy. The civil liability so determined shall be recoverable as if it were a decree of Civil Court. Section 154 (5) of the Electricity Act, 2003 reads as under:

“154. Procedure and power of Special Court –
.....

5. The Special Court may determine the civil liability against a consumer or a person in terms of money for theft of energy which shall not be less than an amount equivalent to two times of the tariff rate applicable for a period of twelve months preceding the date of detection of theft of energy or the exact period of theft if determined whichever is less and the amount of civil liability so determined shall be recovered as if it were a decree of civil court.”

22. It is apparent that the cases of theft under section 135(1) involve mens rea. The jurisdiction of civil court is not barred but the power to try offences punishable under section 135 to 139 is conferred exclusively on the Special Court constituted under section 153 of the

Act and the provisions of sub-section (5) of section 154 specifically invest Special Court with the jurisdiction to determine any dispute regarding the quantum of civil liability in theft cases whether or not the allegation of theft is disputed, is still entitled to make such a challenge to the disputed bill before the Special Court, even in cases where no criminal complaint is filed against the consumer and the amount of civil liability so determined shall be recovered as if it were a decree of a civil court and it can act as civil court as well as criminal court while conducting the cases before it.

23. In the present case by speaking order dated 15th January, 2008 passed by the HOD-Enforcement, a case of theft has been registered against the appellant on the basis of the checking report given by the officers of the defendant. Therefore, it has to be decided as to whether a civil suit is maintainable to challenge such a bill given on the basis of purported theft. In other words, the question is whether maintainability of such proceeding at the instance of the consumer as discussed above necessarily excludes the jurisdiction of Civil Court.

24. The relevant principles regarding ouster of jurisdiction of Civil Court were laid down by the Apex Court in **Dhulabhai v. State of MP; AIR 1969 Supreme Court 78 at page 89 (para 32)** reads as under :-

“(1) Where the statute gives a finality to the orders of the special tribunals the civil courts jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied

with or the statutory tribunal has not acted in conformity with the fundamental principles of juridical procedure.

- (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunal so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

- (3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constitutes under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.
- (4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.
- (5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, suit lies.
- (6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.
- (7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.”

25. Let us now examine the relevant facts of the present case. It is not in dispute that a joint and duly authorized inspection team had inspected the plaintiff's premises on 16th June, 2007 and as per the case of the defendant during the inspection it was found that the entire supply was running through two wires which were directly connected to the nearby BSES LV mains. It is a matter of fact that a detailed speaking order was passed by the defendant on 30th July, 2007 after granting an opportunity of hearing to the appellant on 20th July, 2007. Not only that the appellant prior to the filing of the suit filed a writ petition being WP (C) No.5124/2007 to give an opportunity of hearing to him as well as filed another writ petition being WP (C) No.731/2008 for passing fresh speaking order which was passed on 15th January, 2008. The complaint of theft of electricity is also pending against the appellant before the special court set up under the Act as per the submission of the defendant.

26. It is also necessary to appreciate Section 9 of the CPC which provides when the jurisdiction of the civil court is either expressly or impliedly barred, it reads as under :

“9. Courts to try all civil suits unless barred – The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

[Explanation I] – A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

[Explanation II]- For the purposes of this section, it is immaterial whether or not any fees are attached

to the office referred to in Explanation I or whether or not such office is attached to a particular place.]”

27. No doubt Electricity Act is a complete code in itself, but in the following cases, civil suit can be entertained even though the jurisdiction of the civil court may have been specifically ousted. Where provisions of law are not complied with or the forum or tribunal does not act according to the fundamental principles of judicial procedure, the jurisdiction of civil court is clearly implied. This was laid down under the following cases:

a) “if the court is of prima facie opinion that the order is nullity in the eye of law because of any ‘jurisdictional error’ in exercise of the power by the commissioner or that the order is outside the Act” ***Shiv Kumar Chadha vs. MCD [JT 1993 (3) SC 238]***

b) “even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principle of judicial procedure” ***Secretary of State vs. Mask and Co. [AIR 1940 Privy Council 105].***

28. It is well-settled that the exclusion of jurisdiction of civil court cannot be readily inferred and the normal rule is that civil courts have jurisdiction to try all suits of a civil nature except those of which cognizance by them is either expressly or impliedly excluded. The scheme of the Electricity Act is complete in itself and thereby the jurisdiction of the civil court to take cognizance of the cases under the Act, by necessary implication, stood barred. The Act provides for the

jurisdiction of the Tribunals and/or appropriate forum and also hierarchy of appeals or revisions and gives finality to the orders passed thereunder. This also necessarily implies that the jurisdiction of the civil court to take cognizance of the suit of civil nature covered under Electricity Act stands excluded. Consumer cannot approach civil court without exhausting alternative remedies provided under Electricity Act.

29. It is true that ordinarily, the Civil Court has jurisdiction to go into and try the disputed questions of civil nature, where the fundamental fairness of procedure has been violated. By necessary implications, the cognizance of the civil court has been excluded. As a consequence, in the present case, the Civil Court shall not be justified in entertaining this suit and giving the declaration without directing the party to avail of the remedy provided under the Act. Therefore, by necessary implications, the appropriate competent authority should hear the parties, consider their objections and pass the reasoned order, either accepting or negating the claim. Of course, it is not like a judgment of a civil court. Civil court has no jurisdiction by necessary implication to entertain suit for declaration and injunction against specially constituted forum in view of the specific provisions found in the Electricity Act. [(1997) 5 SCC 120].

30. Although there is no specific provision in Section 145 of the Act for exclusion of jurisdiction of Civil Court to entertain any proceeding in respect of any matter which the Special Court is empowered by or under the Act to determine, we are of the view that

any dispute about civil liability in theft cases is impliedly excluded from the jurisdiction of civil court in view of the provisions of Section 153 and 154 of the Act wherein special court has got the jurisdiction to determine any dispute regarding the quantum of civil liability specifically in theft cases and the said court can act as civil court as well as criminal court while conducting the cases before it.

31. In view of the facts and circumstances of the present case, we are in agreement with the conclusion in the impugned order dismissing the plaint though for different reasons as stated above.

32. In view of the above facts and circumstances, the appeal has no merit and the same is dismissed. No order as to costs.

MANMOHAN SINGH, J.

SEPTEMBER 25, 2008
sd/ns

A.K. SIKRI, J.