

* **HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision: April 24, 2009**
+ **LPA No. 356/2007**

NORTH DELHI POWER LTD. Appellant
Through: Mr. Sudhir Nandrajog, Senior
Advocate with Mr. Diwakar
Sinha and Mr. Achin Garg,
Advocates.

versus

DELHI BOTTLING CO. LTD. Respondent
Through: Mr. Arvind K. Nigam, Senior
Advocate with Mr. Raghav
Tandon and Mr. Rohit Singh,
Advocates.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE NEERAJ KISHAN KAUL

1. Whether Reporters of local papers may be allowed to see the judgment?y
2. To be referred to the Reporter or not? y
3. Whether the judgment should be reported in Digest?y

AJIT PRAKASH SHAH, CJ (ORAL) :-

1. This Letters Patent Appeal is directed against the judgment and order of the learned single Judge dated 30th March, 2007 in W.P.(C) No. 6705 of 1998, whereby the impugned communications dated 2nd December, 1998 and 22nd December, 1998 and the enclosed supplementary bills are quashed.

2. The facts leading to the present appeal are that the respondent, *inter alia*, carries on the activities of soft drinks bottling and mineral water. The respondent was sanctioned an industrial load of 530 HP on 28th September, 1989 and an additional load of 250 HP on 28th September, 1989. An inspection of the premises was carried out on

9th October, 1991 by the officials of the Delhi Vidyut Board (now North Delhi Power Limited, in short 'NDPL') and the following irregularities were noticed viz. (i) connected load found more than committed load, (ii) misuse of supply due to sub-letting, (iii) running industry without Municipal Licence and (iv) low power factor due to non-installation of shunt capacitor. A show-cause notice dated 20th/27th January, 1992 for levy of surcharge on account of the load violation/misuse of supply/non-installation of shunt capacitor was issued referring to the inspection carried on 9th October, 1991 and the irregularities found in the said inspection. It was stated that it was proposed to levy certain penalties as per the provisions of tariff schedule for the relevant year. It was further stated that necessary action to revise the bills as per applicable tariff was contemplated in respondent's case w.e.f. 9th October, 1988 i.e. last three years from the date of the inspection or from the date of the installation of the connection, whichever is longer.

3. The respondent replied to the said notice on 7th February, 1992 denying the allegations and requesting for withdrawal of the notice. By a communication dated 17th February, 1992 the appellant informed the respondent that the reply was not satisfactory. The respondent was asked "to take up the matter with XEN (Enf) 1SRD for further clarification". In the meantime, on the basis of the inspection report dated 9th October, 1991, the appellant started billing as per relevant tariff entry w.e.f. January, 1992 and this was challenged by the respondent by a substantive suit filed in civil court. The subsequent bills were also challenged by separate suits. In all

36 suits had been filed by the respondent in the civil court. All 36 suits filed by the respondent were dismissed by the trial court on 1st July, 1995. The respondent filed thirty-six regular first appeals, which were dismissed by the Appellate Court on 11th March, 1996. In April, 1996, the respondent filed Regular Second Appeals, RSA Nos. 37 to 72 of 1996, in this Court. These appeals were finally disposed of vide order dated 2nd December, 2003.

4. Meanwhile, on 12th August, 1996 pursuant to the request made by the respondent on 20th February, 1992, the appellant re-inspected the premises. The Inspection report dated 12th August, 1996 indicated that there were no irregularities and that the equipments connected were in order. The appellant again raised bills indicating the same levies. The respondent then instituted a fresh civil suit being Suit No.697/1997 in the court of Civil Judge. In this suit a compromise was arrived at between the parties, which has been recorded by the learned Civil Judge in his order dated 23rd November, 1997. As per the said compromise, it was agreed that the penalties on account of sub-letting shall be withdrawn from the date of submission of test notice, i.e. 24th February, 1992. The low power factor penalty was withdrawn with effect from August, 1996. It appears that since the respondent had applied for re-inspection of the premises by submitting a test inspection notice on 24th February, 1992, the sub-letting charges were agreed to be withdrawn from the said date.

5. By the first impugned communication dated 2nd December, 1998, the appellant raised a supplementary bill amounting to Rs.

20,33,662.86 for the period from 9th October, 1988 that is last three years from the date of the inspection i.e. 9th October, 1991. The respondent protested against this demand by letter dated 7th December, 1998 issued by its counsel, wherein it was contended that the demand was barred by limitation and that the regular second appeals between the parties were still pending adjudication before this Court. It was further contended that the appellant itself by its communication dated 20th March, 1998 decided to withdraw the misuse charges with effect from 24th February, 1992 and therefore, there was no basis to raise the bills against the respondent for the period prior to the said date. However, by the second impugned communication dated 22nd December, 1998, the appellant overruled the objections and reiterated the demand as raised earlier.

6. Being aggrieved, the respondent has filed the writ petition being WP(C) No.6705 of 1998 seeking a direction to quash the impugned communications dated 2nd December, 1998 and 22nd December, 1998 and the enclosed bills towards the misuse charges for the period between 9th October, 1988 and October, 1991. The principal challenge in the petition is that the demand raised is barred by limitation. Secondly, it is contended that the demand is barred by constructive *res judicata* and reference is also made to the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'). It is further contended that the impugned judgment is based on the inspection report dated 9th October, 1991 which also stood repudiated in the light of the said subsequent development. Lastly, it is contended that the supplementary demand

violates the principles of natural justice since the decision contained in the communication dated 22nd December, 1998 was without affording the respondent an opportunity of being heard.

7. By order under appeal the learned single Judge has held that the impugned demand is barred by limitation, that the principles of constructive *res judicata* would apply and that the compromise recorded on 23rd November, 1997 should be read as governing all liabilities of the respondent upto that date.

8. Mr. Sudhir Nandrajog, learned senior counsel appearing for the appellant NDPL submitted that under Section 22 of the Indian Electricity Act, 1910 there is an obligation on the licensee to supply electricity and on the consumer to receive on the same terms and conditions as contained in the tariff. There is also an obligation on the consumer to make payment and therefore, enforcement of this obligation of the consumer by raising a bill was the right of the electricity company. According to him, limitation would not begin to run till such time a bill was not raised. He submitted that there is no provision in the Act that stipulated the period within which an electricity bill was to be raised. He placed reliance on the decision of this Court in ***H.D. Shourie v. Municipal Corporation of Delhi, AIR 1987 Delhi 219*** which was affirmed by the Division Bench in ***Municipal Corporation of Delhi v. H.D. Shourie, 53 (1993) DLT 1***. It was further contended by the learned senior counsel for the appellant that the impugned demand is justified on the principle of "escaped billing" which has been approved by the Supreme Court in ***Swastic Industries v. Maharashtra State Electricity Board, AIR***

1997 SC 1101. It was also contended that there is no question of constructive *res judicata* particularly since the compromise dated 23rd November, 1997 did not cover the period from 9th October, 1988 to 9th October, 1991. Learned senior counsel submitted that even in the order dated 2nd December, 2003 disposing of the Regular Second Appeals, this Court held that “the charges levied or imposed by the respondent prior to 9.10.1991 are legitimate and payable, however, charges on the basis of load violation subsequent to 9.10.1991 are quashed”. Therefore, he contended that this Court had upheld the right of the appellant to recover charges prior to 9th October, 1991.

9. In reply Mr. Arvind Kumar Nigam, learned senior counsel appearing for the respondent contended that under Section 24 of the Indian Electricity Act, 1910, the undertaking was not entitled to disconnect the respondent’s supply for non-payment of the claim which was barred by the law of limitation. It was urged by the counsel that Section 24 of the Indian Electricity Act, 1910, provided an alternative drastic and penal remedy or method which may be followed by a licensee in preference to or by way of an alternative to filing a suit. It was submitted that such a provision should be strictly constructed and by any such coercive method or power of withholding electric supply, the licensee ought not to be allowed to recover old or stale claims going back over a period of ten years. He referred to the phrases “neglects to pay” and “charge or sum due from him”, and submitted that an amount, the recovery of which was barred by the law of limitation, could not be properly regarded as ‘due’ by the consumer i.e. the respondent to the appellant

undertaking. The counsel also referred to the principal governing Order II Rule 2 CPC and the observations of the Supreme Court in the case of ***Forward Construction Company v. Municipal Corporation of Greater Bombay AIR, 1986 SC 391***. According to him the appellant board having failed to raise the issue about the additional claim in the civil suit would be barred by the principles of constructive *res judicata* from making such claim. Mr. Nigam finally contended that the supplementary demand violates the principles of natural justice since the decision contained in the communication dated 22nd December, 1998 was taken without affording an opportunity of hearing to the respondent.

10. Having considered the submissions made in this appeal, the first question which calls for our consideration is whether the impugned demand is barred by limitation. In order to appreciate the issue of limitation, it is necessary to refer to some of the provisions of the Indian Electricity Act, 1910 which are relevant for our purpose. Section 22 refers to the obligation on a licensee to supply energy to every person within the area of supply who makes an application for such supply. Sections 22A and 22B confer power on the State Government to give directions to a licensee in regard to supply of energy to certain class of consumers, and the latter Section confers power to control the distribution and consumption of energy. Section 23 prohibits the licensee from showing undue preference to any person in making any agreement for the supply of energy. We then come to Section 24 of the Indian Electricity Act, 1910, which is material for the purpose of this appeal, is fully set out and it reads as

follows:-

“24. Discontinuance of supply to consumer neglecting to pay charge.- (1) *Where any person neglects to pay any charge for energy or any sum, other than a charge for energy due from him to a licensee in respect of the supply of energy to him, the licensee may, after giving not less than seven clear days' notice in writing to such person and without prejudice to his right to recover such charge or other sum by suit, cut off the supply and for that purpose cut or disconnect any electric supply-line or other works, being the property of the licensee, through which energy may be supplied, and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no longer.*

(2) Where any difference or dispute 5[which by or under this Act is required to be determined by an Electrical Inspector, has been referred to the Inspector before notice as aforesaid has been given by the licensee, the licensee shall not exercise the powers conferred by this section until the Inspector has given his decision: Provided that the prohibition contained in this sub-section shall not apply in any case in which the licensee has made a request in writing to the consumer for a deposit with the 7[Electrical Inspector] of the amount of the licensee's charges or other sums in dispute or for the deposit of the licensee's further charge for energy as they accrue, and the consumer has failed to comply with such request.”

11. The provisions of Section 24 of the Indian Electricity Act, 1910 have to be properly appreciated in the context of the obligations cast and the restrictions placed on the licensee under the provisions of the Indian Electricity Act, 1910, which we have earlier referred to. Within the supply area the licensee is obliged to supply electricity on an application to any consumer and cannot discriminate between one consumer and another. The licensee is also obliged to follow certain

directions given by the State Government as also made subject to the power of the State Government to control the distribution and consumption of energy within the area of the license. Section 24, regulates the licensee's power to disconnect the supply to a consumer within this area of supply who has defaulted in respect of payment of amounts owing to the license and a further restriction is imposed on the license, which is that he can discontinue the supply only until such time as the charges or the sums due are not paid by the consumer together with reimbursement of the additional expenses incurred by the licensee for cutting off and reconnecting the supply. Therefore, immediately upon the charges or the sums due and these additional expenses are paid, the supply has to be restored to the consumer whatever be the nature of the default, the number of defaults or the period and extent of the default. In the light of these strict provisions, it is not possible to read the word "due" in the narrower sense viz. as only restricted to amounts within the period of limitation or which could be successfully claimed by a suit. Moreover, this issue is of no longer *res integra* in view of the authoritative pronouncement of the law by the Supreme Court in **Swastic Industries Vs. Maharashtra State Electricity Board** (*supra*) and the judgment of the Division Bench of this Court in **H. D. Shourie Vs. Municipal Corporation of Delhi & Anr.** (*supra*)

12. Before we refer to the decision of the Supreme Court in **Swastic Industries Vs. Maharashtra State Electricity Board** (*supra*), we may make a reference to the decision of the Division Bench of the Bombay High Court in **Bharat Barrel and Drum**

Manufacturing Co. Pvt. Ltd. Vs. The Municipal Corporation of Greater Bombay and Anr., AIR 1978 Bombay 369.

In that case, the contention was that a large portion of the claim of the Undertaking was time barred except that for the period of three years immediately preceding the demand. It was contended that under Section 24 of the Electricity Act the Undertaking was not entitled to disconnect the appellant's supply for non-payment of that part of the claim which was barred by the law of limitation. Rejecting the argument, the Division Bench in paragraph 13 has held as under:

“13. It was submitted that the interpretation canvassed for by counsel for the appellants was more valid by reference to the language employed in sub-sec.(1) of S. 24, which preserved the licensee's right to file a suit to recover the charges or sums due. It was argued that if in such suit the licensee can only recover the charges or sums within the period of limitation, these could be the only charges or sums (viz. those within the period of limitation) for the non-payment of which the electric supply could be cut off by the licensee. In our opinion, the argument is not well-founded. It has to be provided that the right to discontinue the supply of electricity is without prejudice to the licensee's right to file a suit to recover the amounts, since by reason of disconnection of the supply the licensee will not necessarily obtain the amounts due from the consumer. It became necessary therefore to protect the licensee's right to recover such amounts by ordinary civil action and merely because in such an action the defendant to the suit i.e. the consumer may have the defence of limitation open to any portion of the claim would not warrant such considerations being applied to the licensee's right of discontinuance of supply for non-payment of the amounts owed to the licensee. The provision contained in S.24(1) which enabled the licensee to discontinue electric supply to a particular consumer is mainly by way of relieving of the licensee of the obligation on him to be found contained in S. 22 viz. to make supply of electricity on application to all consumers within the area of supply. Once the proper position is perceived, then there is no warrant for obliging the licensee to go on supplying electricity to a

consumer who has not paid the amounts in respect of the supplied made to him in the past on the ground tht if the license were to file a suit, the claim or part thereof would be barred by the law of limitation. The provision in our opinion, would clearly warrant the wider meaning to be given to the word 'due' rather than the narrower meaning, as the wider meaning would be more in accord with the scheme of the statutory provisions under consideration as also with commercial honesty."

13. Coming back to the Supreme Court's decision in the case of **Swastic Industries Vs. Maharashtra State Electricity Board** (*supra*), the admitted position in that case was that the respondent Electricity Board had issued a supplementary bill which was paid by the consumer under protest and a complaint was filed before the State Consumers' Disputes Redressal Commission. The State Commission allowed the complaint and held that the claim was barred by limitation of three years. Feeling aggrieved, the Electricity Board filed an appeal. The National Commission relying upon the decision of the Division Bench of the Bombay High Court in **Bharat Barrel and Drum Manufacturing Co. Pvt. Ltd. Vs. The Municipal Corporation of Greater Bombay and Anr.** (*supra*) held that there is no limitation for making the demand by way of supplementary bill and that Section 24 of the Electricity Act, 1910 gives power to the Board to issue such demand and to discontinue the supply to a consumer who neglects to pay the charges. It was contended before the Supreme Court that Section 60-A of the Electricity (Supply) Act, 1948 prescribes a limitation of 3 years for the Board to institute any suit, after its constitution, for recovery of the arrears. Thereby the limitation of 3 years is required to be observed. The Board in negation of Section 60-A of the Electricity (Supply) Act cannot be

permitted to exercise the power under Section 24 of the Indian Electricity Act, 1910. Rejecting the argument, the Supreme Court has observed in paragraph-5 as under:-

“5. It would, thus, be clear that the right to recover the charges is one part of it and right to discontinue supply of electrical energy to the consumer who neglects to pay charges is another part of it. The right to file a suit is a matter of option given to the licensee, the Electricity Board. Therefore, the mere fact that there is a right given, to the Board to file the suit and the limitation has been prescribed to file the suit, it does not take away the right conferred on the Board under Section 24 to make demand for payment of the charges and on neglecting to pay the same they have the power to discontinue the supply or cut off the supply, as the case may be, when the consumer neglects to pay the charges. The intendment appears to be that the obligations are mutual. The Board would supply electrical energy and the consumer is under corresponding duty to pay the sum due towards the electricity consumed. Thus the Electricity Board, having exercised that power, since admittedly the petitioner had neglected to pay the bill for additional sum, was right in disconnecting the supply without recourse to filing of the suit to recover the same. The National Commission, therefore, was right in following the judgment of the Bombay High Court and allowing the appeal setting aside the order of the State Commission. Moreover, there is no deficiency of service in making supplementary demand for escaped billing. There may be negligence or collusion by subordinate staff in not properly recording the reading or allowing pilferage to the consumers. That would be deficiency of service under the Consumer Protection Act. We do not find any illegality warranting interference.”

14. In **H. D. Shourie Vs. Municipal Corporation of Delhi** (*supra*), the challenge in the writ petition was to the levy of electricity charges which was raised by a revised bill. The argument of the petitioner was that no demand can be raised for a period which is more than three years after the consumption of the electricity. It was contended

that on a correct interpretation of Section 24 of the Act, the amount becomes due the moment electricity is consumed and under Section 455 of the Delhi Municipal Corporation Act, this amount cannot be recovered more than three years after it has become due. This argument was considered in depth by B. N. Kirpal, J. as he then was and the learned Judge held that the electricity charges become due after the bill are sent and not earlier. This being so, the proviso to Section 455 will apply only when the bill has been sent and the remedy available with the respondents for filing a suit to recover the said amount would come to an end after three years elapse after the electricity charges have become due and payable. In other words, the provisions of Section 455 would come into play after the submission of the bill for electricity charges and not earlier. The learned Judge went on to observe that there is no provision either under the Municipal Corporation Act or under the Electricity Act of 1910 which provides the period within which a bill for electricity charges must be sent. Unless and until a statute clearly limits the right of an authority to assess, compute or to send a bill, it cannot be said that that authority loses its right to recover the money due to it by not sending a bill within 3 years. Where, however, once a bill has been sent then the period of limitation for recovery of the same would commence and if payment is not made within three years, the right of the Undertaking to file a suit would be lost. The decision of the learned Judge was affirmed by the Division Bench in ***Municipal Corporation of Delhi (DESU) Vs. Mr. H. D. Shourie*** (supra). In the light of the law laid down in the aforesaid judgments, it is clear that

the electricity Undertaking is at liberty to issue the bill for consumption of electricity even after three years after the electricity has been consumed.

15. Coming then to the argument of learned counsel Mr. Nigam, that as a result of non-filing of counter-claim, the claim has been barred by principle of 'constructive *res judicata*', it is required to be noted that in view of the compromise, the demand on account of misuse due to sub-letting stand withdrawn w.e.f. the date of submission of test notice i.e. 24th February, 1992. The Low Power Factor charges stand withdrawn w.e.f. 12th August, 1996. The compromise does not cover the period three years prior to the notice in respect of which an additional demand has been raised by the appellant under the impugned communications. The right to raise a demand for the period from 9th October, 1988 to 9th October, 1991 was an independent right and was not a necessary defence to the claim of the respondent in the civil suit. Merely because the licensee did not seek adjudication of the same in the suit filed by the respondent and has chosen to enforce it by exercising power under Section 24 of the Indian Electricity Act, 1910, does not mean that the Undertaking had abandoned its right to recover the said charges and the principles of constructive *res judicata* are clearly inapplicable to the present case.

16. Coming to the last argument of the respondent that there was violation of principle of natural justice, learned senior counsel for the appellant was unable to show that the opportunity of hearing was

given to the respondent prior to the issuance of the supplementary demand for the period from 9th October, 1988 to 9th October, 1991. On this short ground, the impugned judgment is liable to be set aside. The appellant Undertaking is directed to offer/provide an opportunity of hearing to the respondent and decide the matter afresh after considering the objections of the respondent. All contentions on merits are left open to the parties.

17. The present appeal is accordingly disposed of in terms of what is stated hereinabove.

CHIEF JUSTICE

NEERAJ KISHAN KAUL, J

APRIL 24, 2009

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