

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 12th January, 2011.

+ W.P.(C) 8547/2004

% KIRAN MEHTA Petitioner
Through: Mr. Inderpreet Singh Josh & Mr. S.K. Pandey, Advocates.

Versus

B.S.E.S. RAJDHANI POWER LTD. Respondent
Through: Mr. Sunil Fernandes & Mr. Deepak Pathak, Advocates.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1. The respondent on inspection of the property of the petitioner on 2nd April, 2004 and as per the Joint Inspection Report of that date, found the petitioner to be indulging in direct theft of electricity from LV mains bus bar through different cables. The respondent claims to have raised a direct theft bill of ₹3,51,396/- dated 12th April, 2004 on the petitioner and on non-payment thereof, disconnected the electricity to the petitioner through the electricity connection in the name of the petitioner with 1 KW load.

2. Aggrieved therefrom the present writ petition was filed for re-

connection of the electricity connection and for quashing of the inspection report dated 2nd April, 2004.

3. This Court on 31st May, 2004 while issuing notice of the writ petition, directed restoration of electric supply to the petitioner upon the petitioner depositing ₹1,10,000/- with the respondent, subject to further orders in the writ petition. The said amount is stated to have been deposited and the electric supply restored. Pleadings have been completed and counsels heard.

4. The counsel for the petitioner has today firstly argued that no notice for hearing whatsoever was given to the petitioner before making the bill dated 12th April, 2004 for ₹3,51,396/-. The counsel for the respondent contends that the bill being for direct theft, no notice or hearing was required to be given. Attention in this regard is invited to Regulation 25(v) of the DERC (Performance Standards Metering and Billing) Regulations, 2002 then in force. The counsel for the petitioner rejoins by inviting attention to Section 126 of the Electricity Act, 2003. However the said provision deals with the unauthorized use of electricity and not with a case of direct theft. Faced with the same, the counsel for the petitioner invites attention to the “Explanation” to Section 126 which includes use of electricity through a tampered meter within the meaning of unauthorized use of electricity. However the case of the respondent against the petitioner is not of use of electricity through a tampered meter but of the petitioner having been found to be indulging in direct theft of electricity from LV mains bus bar by means

of a blue colour 7/22 aluminum cable found to be going to the shop of the petitioner. Thus the provision of Section 126 would not be applicable. The counsel for the petitioner has not been able to show any other provision requiring notice/hearing to be given before making the bill for direct theft.

5. The counsel for the petitioner has next contended that since the bill raises a civil liability on the petitioner, the principles of natural justice demand that notice/hearing be given. The Legislature however having provided for an elaborate procedure for different kind of cases and having not made a provision for notice/hearing in direct theft cases while making provision for notice/hearing in other kind of cases, the said argument cannot be accepted. Moreover, in a case of direct theft, a Distribution Licensee is required to lodge a complaint with the Special Court and the consumer if aggrieved from the demand is always entitled to challenge the same before the Special Court. The Division Bench of this Court in ***Sh. B.L. Kantroo Vs. BSES Rajdhani Power Ltd.*** 154 (2008) DLT 56 has also clarified that even without the Distribution Licensee filing a complaint, the consumer also is entitled to approach the Special Court. It is thus not as if the consumer accused of direct theft is without any remedy. The remedy is before the Special Court constituted for the other purposes or even by way of the writ petition as done by the petitioner in the present case. The bill therefore cannot be quashed for the said reason.

6. The counsel for the petitioner has however contended that this Court

by orders dated 21st April, 2005 and 4th November, 2008 in this proceeding has already reached a conclusion that a notice is required to be given and had directed the respondent to produce the records to show whether any notice had been issued to the petitioner or not. It is contended that the said view having been taken in the earlier orders, now it cannot be held that no notice is required to be given.

7. The matter was not concluded in the order dated 21st April, 2005 and 4th November, 2008. Often it happens that on contentions made, directions are issued. However the same are always subject to the final adjudication and the Court at the time of final adjudication cannot be bound by stray observations passed during the pendency of the proceedings before the Court. The counsel for the petitioner having been unable to establish in law the requirement of a notice/hearing, cannot peg his case on the basis of the observations in the orders made from time to time and which observations are clearly not conclusive.

8. The counsel for the petitioner has next contended that the respondent has not been able to establish any case of direct theft. It is argued that though in the inspection report, it is noted that photographs have been taken but the said photographs have not been produced inspite of directions from time to time of the Court in these proceedings and imposition of costs on the respondent for not production of the records. The counsel has argued that unless the respondent *prima facie* satisfies this Court of the basis of a case of

direct theft, the petitioner cannot be permitted to face the prosecution or to pay the bill for direct theft. It is also contended that if the writ petition is dismissed, the interim order made in this writ petition and pursuant whereunto electricity supply was restored to the petitioner would also disappear and the petitioner would again be left without electricity, even though the respondent in spite of directions has not been able to place any material before this Court of any merit in its case of direct theft against the petitioner.

9. The question whether the inspection report of the respondent is correct or not, is a question of fact. If this Court was to in this writ petition hold that no case for direct theft is made out and the bill for direct theft was to be quashed for the said reason, the same would foreclose the right of the respondent of proving before the Special Court by cogent evidence the case if any of direct theft against the petitioner or of genuineness of the inspection report. This Court in writ jurisdiction cannot allow any such finality when disputed questions of fact requiring adjudication by examination and cross-examination of witnesses arises.

10. Insofar as the apprehension of the petitioner, of the petitioner being again left without electricity in the event of the writ petition being dismissed, the same can be allayed by making an appropriate provision therefor.

11. The counsel for the respondent states that a complaint has already been lodged against the petitioner with respect to the aforesaid inspection

and the same is pending consideration before the Special Court. It is stated that the said complaint is at the stage of pre-summoning evidence.

12. The counsel for the respondent also states that the respondent has already placed before this Court documents to establish a case of direct theft.

13. In the circumstances, the writ petition is disposed of with the directions:-

(i) that as against the demand of the respondent against the petitioner of ₹3,51,396/- for direct theft charges, the petitioner till the disposal of the complaint case, shall be liable to pay only the sum of ₹1,10,000/- already deposited with the respondent. If the petitioner is ultimately held liable for any further amount, the petitioner shall remain liable to pay the same together with the applicable interest.

(ii) conversely, if the complaint of the respondent is dismissed, consequently the direct theft bill shall also fail and the petitioner shall then be entitled to refund/adjustment of ₹1,10,000/- paid by her against the said bill together with interest at rate of interest in terms of Section 154(6) of the Act from the date when the said amount was deposited by the petitioner with the respondent under orders of this Court and till the date of refund/adjustment.

(iii) it shall be open to the petitioner, if summoned in the direct theft

complaint to oppose the said claim on all grounds available under the law.

(iv) the petitioner if so desirous, shall also have liberty to approach the Special Court impugning the action of the respondent.

No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

12th January, 2011
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