

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

Date of decision: 4th March, 2011

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W.P.(C) 1814/2008

N.M.SOFT DRINKS P.LTD.

..... Petitioner

Through: Mr. Mukul Dhawan, Advocate.

versus

NORTH DELHI POWER LTD.

..... Respondent

Through: Mr. Vikram Nandrajog & Mr. Sushil
Jaswal, 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 petition impugns the speaking order dated 13th February, 2008 of the respondent holding the petitioner guilty of Dishonest Abstraction of Energy (DAE) and consequent bill/demand for ₹10,73,165/-. Notice of the petition was issued and vide interim order the respondent restrained from taking action in pursuance to the impugned demand. The said interim order was confirmed on 1st May, 2009.

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2. The counsel for the petitioner has at the outset argued that the petition is entitled to be allowed only for the reason that while the personal hearing was granted/conducted by one officer, the speaking order was passed by another. In this regard, it may also be noticed that on the said submission of the counsel for the petitioner on 11th January, 2010, the respondent was directed to file an affidavit in this regard. The respondent in the affidavit so filed has confirmed that the officer who has passed the order dated 13th February, 2008 is different from the officer, who had held the hearing on 22nd July, 2005.

3. I am however of the opinion that the said argument is not relevant and does not arise in the facts of the present case.

4. The electricity meter in the property of the petitioner was inspected on 18th July, 2005 and a show cause notice issued on the same day calling the petitioner for hearing on 22nd July, 2005. The counsel for the respondent has today handed over in the Court the original file of the respondent and which contains the proceedings. From the same, it transpires that the petitioner appeared on 22nd July, 2005 and merely sought time to file a detailed reply and the proceedings were adjourned to 27th July, 2005. It further transpires that on 27th July, 2005 none appeared for the petitioner before the officer of the respondent, though a reply through post was received. From the file, it is not very clear whether the reply was received on 27th July, 2005 or thereafter. Be that as it may, no further steps were taken by the respondent till 23rd/24th April, 2007 when another show cause notice relating to the same

inspection was issued and the petitioner called for hearing on 10th May, 2007. None appeared for the petitioner on 10th May, 2007 also and thereafter the speaking order dated 13th February, 2008 (supra) passed.

5. It would therefore be evident from the aforesaid that there was no hearing, for the argument to be raised that the officer other than the one who had heard the petitioner passed the order. The hearing of 22nd July, 2005 in which merely time was given to the petitioner to file reply is of no consequence.

6. Regulation 25 (viii) of the DERC (Performance Standards - Metering & Billing Regulations), 2002 then in vogue provided for a 3 days notice to be served on the consumer at site to show cause as to why case for DAE should not be booked against him. Regulation 26 (i) required the respondent to arrange a personal hearing with the consumer within 4 working days from the date of submission of the reply if any. Regulation 26 (iii) required the officer of the respondent who gives a personal hearing to the consumer, to within 15 days pass a speaking order as to whether the case of suspected theft/DAE is established or not. It further provided that in case of the decision that the case of suspected theft/DAE was not established, no further proceedings were to be taken.

7. The counsel for the petitioner has argued that the proceedings in the present case are contrary to the aforesaid Regulations also. Though a show cause notice was given as prescribed, but no personal hearing was arranged

within 4 days of receipt of the reply. Not only so, no decision on the notice to show cause was also taken for a period of more than one year after the issuance of show cause notice and receipt of reply thereto. Though a second show cause notice was given but the respondent did not show any haste thereafter also and passed the speaking order after nearly 10 months of the second show cause notice also. He thus contends that the speaking order is liable to be set aside on this ground alone, though it is contended that the same is bad for other reasons also.

8. Per contra, the counsel for the respondent has contended that the time provided in Regulation 26 is not mandatory and is only directory. Attention is invited to ***Dalchand v. Municipal Corporation, Bhopal*** (1984) 2 SCC 486 where the time of 10 days provided under the then Rule 9 (j) of the Prevention of Food Adulteration Act prescribing a time of 10 days for supply of Report of the Public Analyst was held to be directory and not mandatory and non-compliance whereof was held to be not fatal to the prosecution. The counsel has contended that the payment of electricity dues is in public interest and thus in the present case also it should be held that the time prescribed in Regulation 26 is directory and not mandatory.

9. I have enquired from the counsel for the respondent, that the Regulations having prescribed a time even if the same were to be construed as directory, what is the explanation if any of the respondent for not abiding by the said time. I am of the opinion that even if the contention of the respondent of the time prescribed being directory and not mandatory were to

be accepted, it cannot be given a complete go-by and the only effect of it being directory would be to if the facts of the case so permitted, extend the said time. The counsel for the respondent has fairly stated that neither in the counter affidavit any reason for the said unusual delay has been stated nor is the same borne out from the file produced before this Court. He urges that it appears that since the petitioner did not appear for the hearing on 27th July, 2005 and sent the reply by post, the concerned officials lost track of the matter.

10. The reasons which prevailed with the Supreme Court in ***Dalchand*** (supra) to hold the time prescribed in that case to be directory were, that the design of the statute under consideration in that case was avoidance or prevention of public mischief and the enforcement of the particular provision prescribing time literally was found to be defeating that design. It was further held that negligence of those to whom public duties are entrusted cannot by statutory interpretation be allowed to promote public mischief and cause public inconvenience and defeat the main object of the statute. It was further held that the time prescribed in that case was not the limitation within which an action was to be initiated and on the expiry of which a vested right accrued.

11. The position in the present case is to the contrary. The Delhi Electricity Supply Code & Performance Standards Regulations, 2007 which have replaced the 2002 Regulations then in force have in Regulation 52 (xi) expressly provided that if the show cause notice is not served even

after 30 days from the date of inspection, the case of suspected theft shall be considered as dropped and no further action can be initiated against the consumer. From the said provision it is apparent that the time provided in the Regulations for determining the suspected theft/DAE was meant to be adhered to and cannot be disregarded.

12. Though in the 2002 Regulations it was not so expressly provided but the statute having remained the same, it has to be held that the intent under the 2002 Regulations was also the same and as clarified/expressed in the 2007 Regulations. Rather from Regulation 26 (iii) of the 2002 Regulations providing that in case the decision of suspected theft/DAE is not taken within 15 days no further proceedings shall be taken, also suggests so.

13. The objective of the said Regulations is also different from that of the Prevention of Food Adulteration Act. The Regulations tread against the grain of natural justice by making the distribution licensee a Judge in its own cause by enabling/empowering its officers to not only issue notice to show cause but also to adjudicate upon the reply thereto and if deciding against the consumer, to disconnect the electricity supply for the reason of non-payment of the assessment made for theft/DAE. The Regulations while vesting such power in the distribution licensee has required the distribution licensees to follow a procedure and a time schedule. The employees of the distribution licensees while doing so are not discharging public functions. Thus no parity whatsoever can be drawn with the case in *Dalchand*.

14. In the absence of any reason/explanation for the prescribed time schedule having not been followed, the speaking order and the demand impugned in this petition cannot be sustained and are set aside leaving the question as to whether the time prescribed is directory or mandatory for adjudication in an appropriate case.

15. The writ petition is accordingly allowed. The speaking order and the demand impugned are quashed/set aside. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

MARCH 4th, 2011
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