

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

Date of decision: 18th March, 2011.

+ W.P.(C) 1789/2011 & CM No.3796/2011 (for stay)

% NARINDER AGGARWAL Petitioner
Through: Mr. V.K. Goel, Adv.

Versus

BSES RAJDHANI POWER LTD Respondent
Through: Ms. Anjali Sharma, Adv.

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? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. The writ petition impugns the speaking order dated 24th February, 2011 of the respondent holding the petitioner guilty of Dishonest Abstraction of Energy (DAE) and the consequent demand for approximately ₹87,000/-.

2. The counsel for the petitioner has impugned the order on the ground of having been made in violation of Regulation 58(viii) of the Delhi Electricity Supply Code and Performance Standards Regulations, 2007. It is contended that the speaking order records that the meter was sent to National Accreditation Board for Testing and Calibration Laboratories (NABL) accredited laboratory but the laboratory the report whereof is relied upon is of the respondent itself, not an NABL accredited laboratory.

3. The counsel for the respondent appearing on advance notice has contended that its laboratory has also been accredited by the NABL and documents in which regard have been produced in other matters. He seeks time to produce the same.

4. The counsel for the petitioner has fairly handed over in the Court an accreditation letter qua the laboratory of the respondent but contends that the said accreditation is not for assessment relating to theft.

5. It has been enquired from the counsel for the petitioner as to whether accreditation granted by NABL to Electronic Regional Test

Laboratory (North) and Central Power Research Institute (CPRI) is different from the accreditation granted to the laboratory of the respondent.

6. The counsel states that he will have to obtain accreditation letters of the other laboratories from Delhi Electricity Regulatory Commission (DERC) to verify whether the others have been expressly accredited for assessment relating to theft.

7. It is however not deemed expedient to keep this matter pending on this ground inasmuch as else it is felt that several grounds which are urged, are factual and which can be best adjudicated before the Special Court constituted under Section 153 of the Electricity Act, 2003.

8. The counsel for the petitioner has also raised another legal argument for entertaining the writ petition before this Court only. It is contended that though Regulation 52(viii) talks of the meter being tested in an NABL laboratory, Regulation 52 (xii) provides for the establishment of theft by analysis of metering data “downloaded by a third party authorized laboratory”. He contends that even if the

laboratory of the respondent is NABL accredited, it would still not fit into the definition of “third party”. He thus contends that the finding of DAE on the basis of downloading of data by the respondent’s own laboratory cannot be sustained.

9. In my opinion, the reference in Regulation 52(xii) to a “third party authorized laboratory” has to necessarily mean an NABL accredited laboratory referred to in Regulation 52(viii). I am unable to hold that though the testing in an NABL authorized laboratory can form the basis of theft under Regulation 52(viii), for arriving at a conclusion of theft under Regulation 52(xii), the data has to be sent to a third party laboratory. Thus, in my opinion the reference in Regulation 52(xii) is to an NABL accredited laboratory only.

10. I have in judgment dated 16th March, 2011 in W.P.(C) No.1712/2011 titled *Smt. Kanta Sharma Vs. BSES Rajdhani Power Ltd.* held that when a writ petition is preferred before this Court and the Court is of the opinion that the challenge includes factual controversies best adjudicated by the Special Court only, this Court still

has the power if finding a strong *prima facie* case in favour of the consumer to, direct the respondent to approach the Special Court and to not exercise powers of disconnection without obtaining the sanction therefor from the Special Court.

11. The facts of the present case have been considered in the aforesaid context.

12. The finding of DAE against the petitioner is on two accounts. Firstly, for the reason of Real Time Clock (RTC) being disturbed and secondly for the reason of the analysis of the data downloaded from the meter showing Maximum Demand to have been recorded more than once in a month.

13. As far as the findings with respect to the RTC are concerned, the counsel for the petitioner relies upon *Mukesh Mehra Vs. B.S.E.S. Yamuna Power Ltd.* 168 (2010) DLT 6 where this Court has held that no finding of DAE merely on the basis of defect in RTC can be arrived at. Holding so, the speaking order in that case was set aside.

14. I am however of the opinion that though the order on the basis of defective RTC may be said to be not entitling the respondent to enforce disconnection but the respondent nevertheless has to be given an opportunity to prove its case before the Special Court.

15. The counsel for the respondent has also fairly stated that this aspect may be directed to be considered by the Special Court where the respondent could be entitled to lead evidence to corroborate the defect in the RTC.

16. However, the counsel for the respondent has contended that the finding of the meter having been tampered for the reason of the meter having been found to have recorded Maximum Demand more than once in a month, is based on cogent reasons and which are sufficient for upholding the speaking order.

17. This Court has in:

(a) ***Udham Singh Vs. BSES Rajdhani Power Ltd.*** 136 (2007) DLT 500.

(b) ***Jagdish Narayan Vs. NDPL*** 140 (2007) DLT 307.

(c) ***J.K. Steelomelt (P) Ltd. Vs. BSES Rajdhani Power Ltd.***

140 (2007) DLT 563.

held that before arriving at a finding of DAE, the Assessing Officer is required to observe the consumption pattern of the consumer and in the absence of DAE having been established from the consumption pattern, no case for DAE can be made out. It was further held that when the meter is not checked for accuracy, the finding of the DAE is flawed. The Courts have also held that *mens rea* or intention of the consumer to dishonestly abstract electricity must be proved conclusively to bring home the charge of DAE. It was further held that external manifestation of tampering can only raise a suspicion which cannot take the place of proof. This Court in ***Harvinder Motors Vs. BSES Rajdhani Power Ltd.*** AIR 2007 Delhi 85 further held that the proceedings for DAE have adverse consequences; the consumer is held liable to pay statutorily determined amount—the monetary liabilities are stiff. In the circumstances it was held that without putting the brief description of the consumption pattern to the consumer, there could be

no proper hearing or compliance of principles of natural justice.

18. In the present case also, the finding of DAE is not supported by any consumption pattern. The counsel for the respondent has sought to argue that the very recording of MDI more than once in a month is indicative of the meter having been subjected to external Electrostatic Discharge (ESD).

19. In my view, the same also is required to be corroborated with the consumption pattern subsequent to the change of meter and which has not been done in the present case. Moreover, the speaking order itself states that it is only “ordinarily” that the meter is expected to record MDI once a month. The counsel for the petitioner has also argued that sudden fluctuation and disconnection of electricity supply may also lead to recording of MDI more than once a month.

20. I am therefore of the opinion that the said question also needs to be proved by the respondent before the Special Court.

21. Since the reasons given in the speaking order have been held in the judgments aforesaid to be not sufficient for the finding of DAE, in

the facts of the present case, it is felt that the respondent should be restrained from exercising power of disconnection in pursuance to the speaking order and demand impugned in this writ petition and be given an opportunity to prove its case before the Special Court.

22. The writ petition is therefore allowed to the aforesaid extent. It is directed that the respondent shall not disconnect the electricity supply to the premises of the petitioner for the reason of non-payment of the demand impugned in this writ petition. The respondent shall however be entitled to approach the Special Court and to obtain orders therefrom including for disconnection of electricity supply to the petitioner for non-payment of the said amount.

No order as to costs.

Copy of this order be given *Dasti*.

**RAJIV SAHAI ENDLAW
(JUDGE)**

MARCH 18, 2011/Bs..