

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

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Date of decision: 19th November, 2013

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RFA No.755/2010

BSES YAMUNA POWER LTD.

..... Appellant

Through: Mr. Manish Srivastava & Mr. K.
Datta, Advs.

Versus

ROSHAN MASOOD

..... Respondent

Through: Mr. S.A. Quadri, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree dated 25.05.2010 of the Court of Additional District Judge (ADJ)-03 (North-East), Karkardooma Courts, Delhi decreeing on admissions the civil suit No.203/2009 filed by the respondent / plaintiff and declaring the bill No. YMENF 180420090022 (based on inspection dated 02.01.2009) due date 23.04.2009 of Rs.13,38,551/- (incorrectly recorded in the judgment as Rs.33,38,551/-) raised by the appellant / defendant on the respondent / plaintiff as null and void and directing the appellant / defendant to restore electricity supply to the property of the respondent / plaintiff.
2. Notice of the appeal was issued. The respondent / plaintiff could not be served by ordinary process and was ultimately ordered to be served by publication whereafter the counsel for the respondent / plaintiff appeared.

The appeal was on 05.07.2013 admitted for hearing. It was the contention of the counsel for the appellant / defendant on 05.07.2013 that the matter was fully covered by the judgment of the Supreme Court in *The Executive Engineer Vs. Sri Seetaram Rice Mill* (2012) 2 SCC 108. In view of the said statement, the hearing was expedited and the Trial Court record requisitioned. The counsel for the respondent / plaintiff on 11.09.2013 stated that he was not ready with the arguments; accordingly the appeal was adjourned to today subject to payment of costs of Rs.3,000/-. Though costs have been paid today but again request for adjournment has been made on behalf of the respondent / plaintiff. However, upon it being told that adjournment would be granted subject to payment of further costs, the counsel for the respondent / plaintiff agreed to address arguments. The counsels for the parties have been heard.

3. The respondent / plaintiff instituted the suit from which this appeal arises, pleading a) that he was a registered consumer with the appellant / defendant; b) that on 25.06.2009 the officials of the appellant / defendant came to his premises and removed the electricity meter; c) that the respondent / plaintiff on making enquiries learnt that the officials of the appellant / defendant, on the basis of inspection carried out on 02.01.2009,

had concluded that the respondent / plaintiff was extracting electricity by tampering the meter; however the respondent / plaintiff had paid the bills even after 02.01.2009 and till the date of removal of the meter; and, d) that the appellant / defendant could not have, without raising the demand on the respondent / plaintiff, disconnected the electricity supply; accordingly, the relief of declaration that the said bill was null and void and a decree for mandatory injunction for restoration of electricity supply was claimed.

4. The appellant / defendant contested the suit by filing a written statement. No replication is found to have been filed by the respondent / plaintiff.

5. The learned ADJ, vide order dated 25.07.2009 expressed a *prima facie* opinion that the civil court has no jurisdiction to entertain and try the suit and framed the following preliminary issue:

Whether this court has the jurisdiction to entertain and try the present suit?(OPP) ”

6. Thereafter the suit was dismissed in default of appearance of the respondent / plaintiff but was restored on application being made by the respondent / plaintiff.

7. A perusal of the order sheet of the suit file shows the counsel for the appellant / defendant to have, on 22.10.2009, placed reliance on ***B.L. Kantroo Vs. BSES Rajdhani Power Ltd.*** 154 (2008) DLT 56 (DB) to contend that the civil court had no jurisdiction.

8. The learned ADJ vide order dated 18.12.2009 decided the preliminary issue in favour of the respondent / plaintiff and against the appellant / defendant *inter alia* observing that the Division Bench of this Court in ***B.L. Kantroo*** supra had held that Civil Courts would have jurisdiction where the prescribed procedure had not been followed and since the appellant / defendant had not followed the procedure prescribed in Section 126 of the Electricity Act, 2003, the Court of the learned ADJ had jurisdiction to decide the said limited issue.

9. The learned ADJ thereafter vide order dated 14.05.2010 on the application of the respondent / plaintiff under Order 39 Rule 1&2 of the CPC directed the appellant / defendant to restore the electricity supply to the respondent / plaintiff and to continue supplying electricity to the respondent / plaintiff upon the respondent / plaintiff making payment of future bills.

10. Vide the same order dated 14.05.2010, another preliminary issue as under was framed:

*“Whether the suit is not liable to be allowed U/o 12 rule 6 CPC?
OPD”*

11. The learned ADJ vide the impugned judgment and decree has held that since the appellant / defendant had not followed the procedure prescribed in Section 126 of the Act supra and had before raising the impugned bill admittedly not issued any notice to the respondent / plaintiff as contemplated under Section 126(2), the demand was not in accordance with law. Axiomatically, the suit was decreed as aforesaid with costs.

23. The counsel for the appellant / defendant has contended that the matter is no longer *res integra*. Attention is invited to ***Sri Seetaram Rice Mill*** supra, particularly to paras No.15 and 17 thereof to contend that the Supreme Court has carved out a distinction between Section 126 of the Act which deals with unauthorized use of electricity and Section 135 of the Act dealing with theft of electricity. It is contended that though as per explanation (b)(iii) of Section 126 of the Act, use of electricity through a tampered meter is also unauthorized use of electricity but the Supreme Court had held that a case of theft under Section 135 of the Act is distinct from a case under Section 126 of the Act. It is thus contended that the learned ADJ has erroneously invoked Section 126 of the Act which is not even applicable

in case of theft of electricity, which is dealt with under Section 135 of the Act.

24. Upon enquiry as to how the appellant / defendant contends the bill impugned in the suit to be for theft under Section 135 of the Act and not under Section 126 of the Act, attention is invited to the impugned bill which itself describes the same as “Assessment Bill for Theft (Meter Tempering)”.

25. The counsel for the respondent / plaintiff has invited attention to the inspection report which shows the meter of the respondent / plaintiff to be tampered.

26. It has as such been enquired from the counsel for the appellant / defendant that when the meter is found to be tampered, how does the appellant / defendant decide, whether to proceed under Section 126 of the Act or under Section 135 of the Act.

27. The counsel for the appellant / defendant states that if tempering is found to be without dishonest intention, the case will be treated as under Section 126 of the Act and if with a dishonest intention, as under Section 135 of the Act. Attention is invited to the inspection report of the subject meter where a decision has been taken to book the respondent / plaintiff under Dishonest Abstraction of Energy (DAE) and it is argued that the said

expression is confined to theft of electricity alone and not to a case under Section 126 of the Act.

28. It has next been enquired from the counsel for the appellant / defendant whether the respondent / plaintiff is being prosecuted under Section 135 of the Act.

29. The counsel for the respondent / plaintiff states that no FIR has been lodged and no prosecution is underway.

30. The counsel for the appellant / defendant states that he has no instructions whether any prosecution has been lodged or not and in any case the limitation therefor is three years.

31. The counsel for the respondent / plaintiff points out that the said limitation of three years also has lapsed.

32. The counsel for the appellant / defendant has also relied upon ***Sohan Lal Vs. North Delhi Power Ltd.*** 113 (2004) DLT 547, in paras No.37, 38 and 40 whereof also it has been held that the difference between Sections 126 and 135 of the Act is that, for a case to fall under Section 135 of the Act, there should be dishonesty coupled with one of the acts specified in Sub- paras (a) to (c) of Sub-section (1) of Section 135 of the Act. On enquiry, as to in which category, the action of the respondent / plaintiff falls, the counsel

contends that the action of the respondent / plaintiff would fall under Section 135(1)(b) of the Act i.e. of tempering of meter as described therein.

33. The counsel for the appellant / defendant also contends that it is not essential for the appellant / defendant to lodge an FIR in all cases of theft of electricity.

34. It has been enquired from the counsel for the appellant / defendant as to on what basis the appellant decides whether to lodge an FIR or not.

35. The counsel now states that there is a 'practice' not to book cases of tampering under Section 126 of the Act.

36. It has however been put to the counsel for the appellant / defendant as to how can the appellant / defendant have a practice contrary to the statute and why the consumers, if entitled to a beneficial / better procedure in cases of tampering, also under Section 126 of the Act, should not be permitted to avail of the same and as to how they can be deprived thereof by a 'practice' adopted by the appellant / defendant for which there appears to be no basis. It has further been enquired from the counsel for the appellant / defendant as to how the appellant / defendant can at its *ipse dixit* take a call, in which case to lodge an FIR and / or file a complaint and in which case not to do so. The appellant / defendant having over 50% shareholding of the State, cannot be

permitted to so discriminate without any guidelines and the counsel for the appellant / defendant is unable to cite any guidelines in this respect.

37. Though the counsel for the respondent / plaintiff has drawn attention to *Kawsar Ali alias Kawsar Sk. Vs. State of West Bengal* AIR 2006 Calcutta 65 laying down that a final assessment order under Section 126 of the Act, without complying with the procedure prescribed therein to be bad. However, here the very applicability of Section 126 is disputed by the appellant/defendant which contends the case to be falling in Section 135 of the Act. The Supreme Court in *Sri Seetaram Rice Mill* supra has carved out a distinction between the two. The Calcutta judgment thus does not help the respondent/plaintiff.

38. However, the fact remains that even if the case was to be under Section 126 of the Act, the Civil Court would have no jurisdiction in view of the bar under Section 145 of the Act as expressly held in para No.30 of *B.L. Kantroo* supra. I may notice that the appellant / defendant in this appeal has not challenged the order dated 18.12.2009 of the learned ADJ holding that Court to have jurisdiction. However, once the said fact has come to the notice of this Court in a challenge to a subsequent order in the said proceedings, this Court cannot shut its eyes to the same and allow an order

of a Court which has no jurisdiction and the judgment whereof would be a nullity for the said reason, to stand. Even if the argument of the respondent / plaintiff of Section 126 of the Act being applicable were to be accepted, the jurisdiction to challenge the bill or demand under Section 126 of the Act would be of the Appellate Authority constituted under Section 127 of the Act.

39. In this light of the matter, the appeal succeeds. The judgment and decree of the learned ADJ which is found to have no jurisdiction, declaring the impugned bill as null and void and directing the appellant / defendant to restore electricity supply is set aside and the suit filed by the respondent/plaintiff is dismissed. In the circumstances, no costs. Decree sheet be prepared.

40. The amount of Rs.20,000/- deposited by the appellant / defendant in this Court towards costs imposed vide the impugned judgment be refunded to the appellant / defendant.

41. On enquiry, it is informed that in compliance with the order in the suit, the electricity was restored.

42. It is felt that the electricity be not immediately disconnected by the appellant/defendant without giving the respondent/plaintiff an opportunity to

either pay/settle the disputed amount or to challenge the same before appropriate fora. It is accordingly directed that the appellant / defendant, as a consequence of this judgment, shall not be entitled to disconnect the electricity supply for a period of 30 days from today, during which time the respondent / plaintiff may avail of the appropriate remedy against the impugned bill or pay/settle the dues of the appellant/defendant. The disconnection of electricity after 30 days shall be subject to the orders if any in the proceedings which may be preferred by the respondent / plaintiff.

43. However, the issues as raised and discussed in paras No.26 to 37 hereinabove are found to be in public interest. It is deemed appropriate to give an opportunity to the appellant / defendant to address further on the said aspect and the appellant / defendant may also file an affidavit on the aforesaid aspects within three weeks.

44. List for the said limited purpose on 16th December, 2013.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 19, 2013

‘gsr’