

GAHC010018802017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/2057/2017

SRI RAJDHANI INDUSTRIES
PROP. SRI MANISH AGARWAL, A PROPRIETORIAL CONCERN HAVING ITS
PLACE OF BUSINESS AND OFFICE AT JYOTINAGAR, DIBRUGARH TOWN,
DISTRICT- DIBRUGARH, ASSAM DULY REPRESENTED BY ITS
PROPRIETOR NAMELY SRI MANISH AGARWAL, SON OF SRI ATMA RAM
AGARWAL, A RESIDENT OF JYOTINAGAR, DIBRUGARH TOWN, DIST.
DIBRUGARH, ASSAM.

VERSUS

ASSAM POWER DISTRIBUTION CO. LTD. and 2 ORS.
A GOVERNMENT OF ASSAM UNDERTAKING DULY INCORPORATED
UNDER THE COMPANIES ACT, 1965 HAVING ITS OFFICE AT BIJULEE
BHAWAN, PALTAN BAZAR, GUWAHATI-781001, DULY REPRESENTED BY
CHAIRMAN-CUM-MANAGING DIRECTOR

2:THE AREA MANAGER/ASSESSING OFFICER
INDUSTRIAL REVENUE COLLECTION AREA
APDCL
DIBRUGARH

3:THE APPELLATE AUTHORITY
APDCL
BIJULEE BHAWAN
PALTAN BAZAR
GUWAHATI-78100

Advocate for the Petitioner : MR.S K KEJRIWAL

Advocate for the Respondent : MR. P N GOSWAMI

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

JUDGMENT AND ORDER

(Oral)

19.01.2023

Heard Mr. S.K. Kejriwal, learned counsel for the petitioner as well as Mr. K.P. Pathak, learned standing counsel for the APDCL, representing respondent nos.1 and 2. None appears on call for the respondent no.3.

2. The appellate order dated 15.02.2017, passed by the prescribed Appellate Authority constituted under Section 127 of the Electricity Act, 2003 as well as the revised assessment bill dated 18.03.2017, issued by the Assam Power Distribution Co. Ltd. (APDCL for short) have been assailed in this writ petition filed under Article 226 of the Constitution of India.

3. The background facts leading to this case is that on 11.04.2016, an inspection team of 8 (eight) APDCL personnel had inspected the electricity metering installation in the premises of the petitioner firm. During such inspection, the APDCL inspection team found that the left side seal of the cabinet box which housed both the LT and CT meter was broken. Accordingly, the said inspection team decided that it was a case of meter tampering. Resultantly, while the electricity power connection of the petitioner was disconnected and a provisional bill for a sum of Rs.5,02,925/- was served on the petitioner. On payment of Rs.2,51,463/- made to the APDCL, the electricity power to the establishment of the petitioner was restored. On assessment bill having been served on the petitioner, the assessment proceeding was taken up

and the Area Manger, IRCA, APDCL. The said authority had heard the representative of the petitioner and by an order dated 19.04.2016, the said authority had held that it was a case of interference with the metering installation and accordingly, it was held that the petitioner was not entitled to any relief in respect of the provisional bill and the said provisional bill served on the petitioner was held to be treated as the final assessment bill.

4. Aggrieved by the said assessment order dated 19.04.2016, the petitioner had preferred an appeal under Section 127 of the Electricity Act, 2003. The Appellate authority i.e. the respondent no.3 heard the matter on 13.02.2017 and by the impugned order dated 15.02.2017, accepted the contention of the respondent no.2 that it was a case of malpractice by interfering with the metering system. However, after taking note of the petitioner's electricity consumption pattern produced by the respondent no.2 at the time of hearing for the period prior to the date of inspection and after replacement of the new meter on 16.04.2016, had arrived at a conclusion that there was a huge loss on account of consumption till the date of inspection due to negligence of the petitioner within its premises. Accordingly, it was ordered that the final assessment bill for Rs.5,02,925/- confirmed by the Area Manager, IRCA on 19.04.2016 was to be withdrawn and a direction was issued for preparing a fresh assessment bill for a period of 12 months as per clause 4.2.2.4 [Electricity Supply Code and Related Matters Regulation, 2004 (1st Amendment) 2007] (hereinafter referred to as 2004 Regulation), with further direction to serve the same to the petitioner for payment after adjustment of payment already made.

5. Having extensively heard the learned counsel for both sides, the

basic point of determination which has arisen for adjudication in this case is whether the appellate order directing (i) the APDCL to withdraw the final assessment bill, and (ii) for preparation of a fresh assessment bill as per clause 4.2.2.4 of the 2004 Regulation is liable to be interfered with.

6. It has been forcefully contended by the learned standing counsel for the respondent nos.1 and 2 to the effect that disputed questions of facts has been raised in this writ petition and moreover, it was submitted that under the provision of Sub-section (3) of Section 127 of the Electricity Act, 2003, the appellate authority is vested with the power to pass an "appropriate order". Therefore, it was submitted that as because under Clause no.4 (xiii) of the "Statement of Objects and Reason" of the Electricity Act, 2003 it is provided that the "provisions relating to theft of electricity have a revenue focus", the Appellate Authority had the power to order enhancement of the assessment bill amount. For the meaning of the word "*appropriate*", the learned standing counsel for the respondent nos. 1 and 2 has placed reliance on the 7th Edition of Oxford Advanced Learner's Dictionary of Current English published by Oxford University Press by submitting that the said word has not been described in Black's Law Dictionary. To support his submissions, reference was made to the principles of (i) golden rules of interpretation, as well as (ii) purposive rule of interpretation. The following cases were cited in support of the said submission, viz., (i) *Nathi Devi v. Radha Devi Gupta*, (2005) 2 SCC 271, (ii) *Grid Corporation of Orissa Ltd. & Ors. v. Eastern Metals & Ferro Alloys & Ors.*, (2011) 11 SCC 334, and (iii) *Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) & Ors., v. M/s. Sri Seetaram Rice Mill*, (2012) 2 SCC 108.

7. It was submitted that the respondent no. 3, being the appellate

authority, has the inherent power under Section 107 of the CPC to pass any order, keeping in mind the revenue loss that the APDCL had suffered by malpractice committed by the petitioner by tampering the security seal of the left side of the electricity meter, which could be found from the change in electricity energy consumption pattern after new electricity meter was installed on 14.06.2016.

8. It was also submitted that the appellate order passed by the Appellate Authority is under challenge in this writ petition filed under Article 226 of the Constitution of India the present writ proceeding cannot be construed to be an extension of either the (i) assessment, or (ii) the appellate proceeding. In the said context, it was submitted that by applying the doctrine of merger, the assessment order had merged with the order passed by the Appellate Authority, as such this Court was not required to adjudicate upon the legality or otherwise of the assessment order. In support of his submissions on doctrine of merger, the learned counsel for the respondent nos.1 and 2 has relied on the case of (i) *Kunhayammed & Ors. v. (2000) 6 SCC 359*, and (ii) *Amba Bai & Ors. v. Gopal & Ors., (2001) 5 SCC 570*.

9. With regard to the limitations on the power of the High Court under Article 226 of the Constitution of India, the learned counsel for the respondent nos. 1 and 2 has referred to the case of (i) *Sawarn Singh & Anr. v. State of Punjab & Ors., (1976) 2 SCC 868*, and (ii) *Surya Dev Rai v. Ram Chander & Ors., (2003) 6 SCC 675*.

10. The principles of doctrine of merger need not be gone into at this stage because the petitioner has not assailed the order passed by the assessing authority. As per the learned counsel for the petitioner, the appellate

authority was not in accordance in law and it was also submitted that incorrect principles were applied while passing order for preparing fresh assessment bill. It was submitted that it was not the case of the respondent nos. 1 and 2 that the petitioner was found involved in theft of electricity and therefore, the recourse to the provision of Clause 4.2.2.4 of the 2004 Regulation was *ex facie* illegal. It was submitted that the appellate authority had decided the appeal by relying on extraneous document without putting the petitioner to notice and without hearing the petitioner on the said document.

11. The petitioner has not assailed the assessment order in this writ petition and therefore, the Court is not required to examine the legality of the assessment order dated 19.04.2016. Thus, the cases cited by the learned counsel for the respondent nos. 1 and 2 on doctrine of merger need not be examined.

12. For ready reference, it would be relevant to quote herein below the appellate order dated 15.02.2017, which reads as follows:-

“The appeal petition submitted by M/S Rajdhani Industries, Jyoti Nagar, Dibrugarh came up for hearing on 13.02.2017. The appellant and the respondents were present during the hearing.

Area Manager, IRCA Division, APDCL, Dibrugarh briefed the case as follows- On 11.04.2016, T&C Division, Dibrugarh inspected the installation of Metering system of M/s Rajdhani Industries, Dibrugarh as per letter dtd. 11.04.2016 of SDE-II, Dibrugarh and found that the cabinet box seal (Left) was in broken condition. This was the only seal of the cabinet where Meter, CTS and LT bus-bars were housed to prevent free access from outside for any type of malpractices and seized the meter in presence of appellant. The metering system was housed inside the premises of the appellant. As such, Area Manager, IRCA served a provisional assessment bill of Rs 5,02,925.00 treating as a case of malpractice (Interference with metering system). The appellant paid 50% of the assessment bill amounting to Rs 2,51,463.00 on 16.04.2016 and subsequently the provisional assessment bill was confirmed on the same amount after conducting a hearing on 19.04.2016 by the

AM IRCA.

Aggrieved consumer with final assessment bill appealed before the appellate authority, APDCL for justice.

During hearing respondent (1) submitted the consumption pattern of the appellant prior to inspection and after replacement of new meter on 16.04.2016. The operation carried out during inspection was also shown in the presence of the appellant from the CD.

However, the appellant denied his involvement in interference of metering system within its secured premises. How the seal of the cabinet box had been broken was beyond his knowledge as claimed by his representative.

Appellate Authority after going through the above facts, photographs and documentary evidences-it is observed that there was huge loss of consumption till the date of inspection due to negligence of the appellant within his premises.

In view of the above, it is hereby ordered to carry out the following:-

(1) Final assessment bill of Rs.5,02,925.00 confirmed by AM, IRCA dtd. 19.04.2016 is to be withdrawn.

(2) Prepare a fresh assessment bill for a period of 12 (Twelve) months as per clause 4.2.2.4 (Electricity supply code & Related matters Regulations, 2004 (First Amendment), 2007 and serve to the appellant for payment after adjusting the payments already made, to compensate the loss of the respondent. (since the malfunction of meter cannot be attributed to the consumer).

The appeal petition is disposed of accordingly.

Let the order be served to all concerned."

13. From the herein before quoted appellate order, it can be seen that the appellate authority has not set aside the finding of the Area Manger, IRCA, yet without assigning any reason and without holding that the assessment bill was wrong, the assessment bill has been set aside and moreover, a direction was issued to prepare the assessment bill as per Clause 4.2.2.4 of the 2004 Regulation. The said clause is quoted below:-

4.2.2.4 Procedure for assessment of consumption in case of incorrect or stopped meter. In the event of any meter being found prima-facie incorrect (which includes a stunned. slow, or fast meter) and where actual errors of reading cannot be ascertained, the assessed quantity of energy consumed shall be determined by taking the average consumption for the previous 3 months, proceeding the date

on which the defect was detected or the next three months after correction whichever is higher and bill be prepared and presented accordingly.

For seasonal consumers, in event of any meter being found incorrect (which includes stopped, slow or fast meter) the quantity of energy consumed shall be determined by taking the average consumption of the immediate identical 3 months period consumption. For consumers whose contract demand/ connected load varies in the concerned period, consumption should be assessed proportionate to the contract demand/ connected load. It is the responsibility of the meter reader to note down the details of every stopped / defective meter and to report promptly to the concerned officer of the licensee, who shall be responsible to take immediate steps to replace or repair the stopped / defective meter. In case where a check meter is in use, the consumption recorded in this may also be used for provisional billing, when the meter is removed for testing or otherwise, subject to adjustments against reading of the tested main meter to be installed subsequently, reconciling the reading of the check meter with the reading of the test meter for an identical period.

14. From the contents of the hereinbefore referred Clause 4.2.2.4 of 2004 Regulation, it is apparent that the procedure prescribed therein is to be adopted for assessment of consumption in case of incorrect or stopped meter. In this case, neither the assessment authority nor the Appellate Authority had given a finding that the electricity energy meter installed in the premises of the petitioner was incorrect or stopped. The case of the respondent nos. 1 and 2 is that during the inspection the left side of the meter was found tampered. It is not in dispute that there is no evidence on record to show that the inspection of the meter was carried out either by the Meter Testing Authority or by the meter manufacturer to the effect that the electricity energy meter installed in the premises of the petitioner was either incorrect or stopped. Hence, in the absence of any reason assigned in the appellate order as to why direction was issued for preparing assessment bill under Clause 4.2.2.4 of the 2004 Regulation, the said part of the appellate order is *ex facie* illegal and also vitiated by error apparent on the face of record because in spite of lack of

evidence that the electricity meter was incorrect or stopped, the recourse to Clause 4.2.2.4 of the 2004 Regulation was ordered by the Appellate Authority.

15. The Area Manager, IRCA i.e. the assessment authority had calculated the assessment amount purportedly under Clause 5.A.4.4 of the 2004 Regulations. While doing so, the said authority had made its assessment by presuming that there was an unauthorised use of electricity meter by tampering the meter, as envisaged under Explanation (iii) of Section 126 of the Electricity Act, 2003. In other words, it can be said that the finding by the IRCA and the inspection team was that the petitioner was unauthorizedly drawing electricity power by bye-passing the electricity meter, which can be presumed from the fact that assessment was made by invoking clause 5.A.4.4. Hence, it is apparent that order passed by the Appellate Authority does not disclose any basis as to why a direction was issued to have the assessment bill prepared by following Clause 4.2.2.4 of the 2004 Regulation.

16. The learned standing counsel for the APDCL has not been able to show that in the guise of passing an "appropriate order", the Appellate Authority constituted under Section 127 of the Electricity Act, 2003 was vested with the power under any statute to pass an order which would have the effect of enhancing the assessment bill issued by the assessing authority. Therefore, in the considered opinion of the Court, the impugned order which has the effect of enhancing the assessment bill could not have been passed by the Appellate Authority without any cross appeal by the APDCL against the quantum of assessment bill which was raised by the Area Manager, IRCA and that too without putting the petitioner to notice. Therefore, the petitioner, who was the appellant before the Appellate Authority, by virtue of the impugned order,

suffered enhancement of the assessment bill amount in the absence of any cross appeal. Thus, by the impugned order, the petitioner was made to suffer an adverse situation which was worse than one which he would have suffered had he not filed an appeal. In the said context, we may refer to the case of *Banarasi & Ors. V. Ram Phal*, AIR 2003 SC 1989, where such a practice was deprecated by the Supreme Court of India.

17. The Court could not be shown any provision contained in the Electricity Act, 2003 or any Rules, Regulation or Code framed under the said Act which empowers the Appellate Authority to set aside the assessment bill and to issue a direction to calculate the use in terms of clause 4.2.2.4. It may be mentioned that pursuant to the appellate order, the assessment bill for a sum of Rs.5,02,925/- got enhanced to Rs.11,51,756/-.

18. Moreover, the learned counsel for the petitioner has referred to Sub-clause (D) of Clause (3) of Annexure-A appended to the 2004 regulation. The said provision relates to manner in which calculation is to be made in case involving meter tampering, wherein it is provided as under:-

D. For tampering:

<i>Assessed consumption for 12 months</i>	<i>= A</i>
<i>Consumption recorded by meter</i>	<i>= B</i>
<i>Loss (A-B)</i>	<i>= C</i>
<i>E.C. (C X 2 X Rate)</i>	<i>= D</i>
<i>E.D. (C X 0.10)</i>	<i>= E</i>
<i>FPPPA (C X 2 X 1.03)</i>	<i>= F</i>
<i>Total (D+E+F)</i>	<i>= T</i>

Example:

Commercial consumer 5 kw meter bypassed consumption for 12 months 2,600 unit.

Assessed compensation (120 X 5 X 2) = 7,200 unit

Consumption recorded by meter: = 2,600 unit

Loss: = 4,600 unit

Assessed amount:

E.C. 4,600 X 2 X 5.00 = Rs.46,000.00

E.D. 4,600 X 0.10 = Rs. 460.00

FPPPA 4,600 X 2 X 1.03 = Rs. 9,476.00

Total: = Rs.55,936.00

19. The learned counsel for the petitioner has fairly submitted that as the petitioner's connected load was 98 KW, the electricity charges would be Rs.150.00 per kilo watt per month and not Rs.100.00 per kilo watt per month, as calculated. Thus, it was projected that the calculation made in the assessment bill was prima facie incorrect. The calculation made by the learned counsel for the petitioner could not be negated at the Bar.

20. Thus, in light of the discussions above, the Court is inclined to hold that there is nothing contained in the Electricity Act, 2003, or in any Rules, Regulations, or Code framed thereunder which empowers the Appellate Authority to enhance the assessment bill amount without any cross appeal being filed by the APDCL. The Appellate Authority did not hold that it was doing so in guise of passing "appropriate order". Therefore, the Court is unable to accept the contention of the learned standing counsel for the petitioner that in guise of passing an "appropriate order" as envisaged under Sub-Section (3) of Section 127 of the Electricity Act, 2003 was vested with power to enhance the assessment bill amount in the absence of any cross appeal and without putting

the petitioner to notice of the same. Thus, the said Appellate Authority had acted in excess of jurisdiction vested in it by law. The said order is also vitiated by arbitrariness because the Appellate Authority had not assigned any reason why it had issued a direction to prepare assessment bill by applying 4.2.2.4 of the 2004 Regulation.

21. Moreover, the Court is of the considered opinion that the impugned order is also vitiated by non-compliance of the principles of natural justice as the petitioner was not put to notice before the assessment amount was directed to be enhanced by the learned Appellate Authority. Resultantly, the revised assessment bill dated 18.03.2017, impugned in this writ petition is also not sustainable in law and on facts.

22. Furthermore, it is seen that the Appellate Authority had not given any finding to the effect that the assessment bill prepared by the Area Manager, IRCA was wrong, erroneous or incorrect. Thus, in the absence of such finding, the direction contained in the appellate order to the Area Manager, IRCA, APDCL to withdraw the assessment bill for Rs.5,02,925/- is not sustainable on facts and in law.

23. It may be stated that in spite of the fact that the left side seal of the cabinet box which housed both the LT and CT meter was found broken, the APDCL authorities did not send the said meter for inspection/examination by the "meter testing authority" or by the meter manufacturer. Moreover, the Appellate Authority has not even held that merely because the left side seal of the cabinet box which housed both the LT and CT meter was broken, it was legally

permissible to presume that there was unauthorised consumption of electricity energy. Furthermore, the Appellate Authority has also not stated in the impugned order that when any outer cabinet seal is found broken, it was legally permissible to prepare assessment bill on the basis of "consumption pattern". Therefore, some element of arbitrariness appears to be engrained in the decision making process of the Appellate Authority.

24. The learned standing counsel for the respondents had submitted that the petitioner had raised disputed question of facts, which ought not to be adjudicated in this writ petition filed under Article 226 of the Constitution of India. In the aforesaid context, apart from the discussions above, the Court finds that the Appellate Authority had relied on the "pattern of consumption" which was produced by the Area Manager, IRCA, APDCL at the time of hearing. There is nothing on record to show that the Appellate Authority had put the petitioner to notice before relying on a new material, which was not considered by the Area Manager, IRCA, APDCL while deciding the assessment bill. In the considered opinion of the Court, such a procedure amounts to acceptance of evidence that was not available before the primary authority and therefore, this is a case of improper acceptance of evidence without complying with the principles of natural justice by putting the petitioner to the notice of the same. Under such circumstances, as the decision making process was arbitrary and whimsical, and contrary to principles of accepting additional evidence at the appellate stage, it is open for this Court exercising jurisdiction under Article 226 of the Constitution of India to examine the decision making process of the Appellate Authority. Therefore, the said contention of the learned counsel for the respondents is rejected.

25. In this case, we have held that the Appellate Authority had exercised its power arbitrarily and with material irregularity. Therefore, in view of the discussions above the Court has no hesitation to set aside and quash (i) the impugned appellate order dated 15.02.2017 (Annexure-J), and (ii) the assessment bill dated 18.03.2017 (Annexure-L). Resultantly, the appeal filed by the petitioner before the Appellate Authority constituted under Section 127 of the Electricity Act, 2003 stands restored to file. The Appellate Authority is directed to provide an opportunity to the parties of being heard and thereafter, to take a fresh decision in accordance with law.

24. This writ petition stands closed with aforesaid observations.

JUDGE

Comparing Assistant