

GAHC010180452022



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

Case No. : WP(C)/5928/2022

TAPASH KUMAR DEV SARMAH AND 5 ORS
S/O- JAGABANDHU DEV SARMAH, R/O- HOWLY TOWN, WARD NO.3, P.O.
AND P.S. HOWLY, DIST.- BARPETA, ASSAM, PIN- 781316

2: PRASENJIT SAHA
S/O- BASUDEV SAHA
R/O- PATILADHAHA
P.O. PATILADHAHA
P.S. MANIKPUR
DIST.- BONGAIGAON
ASSAM
PIN- 783391

3: RAHENA BEGUM
W/O- MR. ABDUL KARIM BANIYA
R/O- GORAMARI
P.O. GORAMARI
P.S. BONGAIGAON
ASSAM
PIN- 783390

4: MALLIKA ROY
W/O- MR. PRADIP KR. ROY
R/O- UTTAR ABHAYAPURI
P.O. AND P.S. AND DIST.- BARPETA
ASSAM
PIN- 781315

5: SANJIB SARKAR
S/O- MR. SUDHANGSHU SARKAR
R/O- BARPETA ROAD
W/NO. 3
P.O. AND P.S. BARPETA ROAD
BONGAIGAON

DIST.- BONGAIGAON
ASSAM
PIN- 781315

6: MALAY MANDAL
S/O- MR. MANTU MANDAL
R/O- BARPETA ROAD
P.O. AND P.S. BARPETA ROAD
BONGAIGAON
DIST.- BONGAIGAON
ASSAM
PIN- 78131

VERSUS

THE APPELLATE AUTHORITY AND 5 ORS
APPOINTED U/S 127 OF THE ELECTRICITY ACT, 2003, BILUJI BHAWAN,
GHY-01

2:THE ASSAM POWER DISTRIBUTION CO. LTD.
REP. BY THE MANAGING DIRECTOR
HAVING ITS HEAD OFFICE AT BIJULI BHAWAN
PANBAZAR
GHY-01

3:THE MANAGING DIRECTOR
APDCL
BIJULI BHAWAN
GHY-01

4:THE CHIEF EXECUTIVE OFFICER
BEC
APDCL
BONGAIGAON
ASSAM

5:ASSTT. GENERAL MANAGER
ICRA
DIV-BONGAIGAON
APDCL
BONGAIGAON
ASSAM

6:THE AREA MANAGER
APDCL
IRCA
LAR
BONGAIGAON

ASSA

Advocate for the Petitioner : MR. M U MAHMUD

Advocate for the Respondent : SC, APDCL

BEFORE

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocate for the petitioners : Shri MU Mahmud

Advocates for the respondents : Shri B. Choudhury, SC, APDCL
Shri R. Talukdar, GA, Assam

Dates of hearing : **20.12.2022 & 21.12.2022**
Date of Judgment : **10.02.2023**

JUDGMENT & ORDER

6 (six) petitioners have joined together in filing the present writ petition. Their principal grievance, as projected, is that though they have preferred an appeal before the Appellate Authority under Section 127 of the ***Electricity Act, 2003***, the appeal has not been heard. The petitioners also claimed to have deposited an amount of Rs.10,86,490/- (Rupees Ten Lakh Eighty Six Thousand Four Hundred Ninety) along with the appeal. Hence, this writ petition.

2. Before going to the dispute which has arisen for adjudication, the background facts of the case may be noted down in the following manner.

3. The petitioners have formed a partnership firm in the name and style of M/s Star Enterprise and had started a business. In course of their business, they had taken an electricity connection from the APDCL authorities. It is the case of the petitioner

that on 22.12.2021, some officials of the APDCL had visited the premises of the petitioners and found some anomalies and also some tempering in the electricity connection. It was detected that the petitioners were consuming around 150 KWs of electricity whereas the local villagers consumed 100 KWs of electricity from the same transformer. Accordingly the APDCL authorities came to a finding of malpractice involving test of electricity for which Rs.84,49,581/- (Rupees Eighty Four Lakh Forty Nine Thousand Five Hundred and Eighty One) was imposed.

4. The petitioners claimed that it was wholly impossible for them to consume that much of electricity and therefore they had filed a petition before the Empowered Committee for reassessment. In the said re-assessment, the amount was re-assessed to Rs. 21,70,980/- (Rupees Twenty One Lakh Seventy Thousand Nine Hundred and Eighty). The petitioners claimed that even those amounts are on the higher side. Accordingly, they had preferred an appeal and also deposited an amount of Rs.10,86,490/- (Rupees Ten Lakh Eighty Six Thousand Four Hundred and Ninety). However, it is the grievance of the petitioner that the appellate authority is not looking into the matter for which grave prejudice have been caused to the petitioners. Hence this writ petition.

5. I have heard Shri M. U. Mahmud, learned counsel for the petitioners whereas the respondents-APDCL are represented by Shri B. Choudhury, learned Standing Counsel and Shri R. Talukdar, learned Government Advocate, Assam. The materials placed before this Court have also been carefully examined.

6. Shri Mahmud, learned counsel for the petitioner has submitted that the action of the APDCL is unreasonable and they have acted on presumption that the petitioners are indulging in malpractice. He submits that in absence of any credible materials to come to a conclusion of malpractice, the penalty could not have been imposed.

7. The learned counsel for the petitioner further submits that though the penalty is of Rs.84,49,581/-, in the one time settlement, the same was revised to

Rs.21,70,980/-. He submits that if the discrepancy can be of such magnitude, there is absolutely no basis to sustain the impugned demand.

8. Shri Mahmud, learned counsel for the petitioner further submits that the requirement of pre-deposit can be altered by this Court as the powers under Article 226 of the Constitution of India are wide enough. The said submission has been made as with regard to the specific query of this Court, a certain deposit was consented to be made.

9. The petitioners claimed that their industry is closed since 22.12.2021. In this regard, the petitioners further claimed to have submitted a number of representations.

10. In support of his submission, Shri Mahmud, learned counsel for the petitioners relies upon the following case laws-

i. (2004) 5 SCC 568 [State of Orissa Vs. Dhaniram Luhar]

ii. (2006) 1 SCC 479 [U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey]

iii. (2006) 1 SCC 314 [S.K. Shukla v. State of U.P.]

iv. AIR 2008 SC 1943 [Himanshu Singh Sabharwal Vs. State of M.P.]

v. (2010) 12 SCC 414 [Dynamic Orthopaedics (P) Ltd. v. CIT]

11. The case of ***Dhaniram Luhar (supra)*** has been cited on the aspect of judicial discipline to be maintained by the High Court *qua* the pronouncement by the Hon'ble Supreme Court. The said decision however does not seem to have any application in the present case.

12. In the case of ***U.P. State Brassware Corpn. (supra)***, the Hon'ble Supreme Court has reiterated the powers to mould the relief under Article 142 of the Constitution of India. Apparently, the said case will not have any application in the facts of the present case. This Court is however of the view that though the powers

under Article 266 of the Constitution of India is plenary in nature wherein the relief prayed for can be moulded, such powers can only be exercised so far as the relief is concerned and not for a requirement of a statute.

13. The case of **S.K. Shukla (supra)** is related to the POTA Act, 2002 and has no application in this case.

14. The case of **Himanshu Singh Sabharwal (supra)** pertains to appointment and has no application in this case.

15. The case of **Dynamic Orthopaedics (supra)**, the requirement of referring matters of larger Bench in case of disagreement between Coordinate Bench has been laid down. The said case hardly has any applicability in the instant facts.

16. *Per contra*, Shri B. Choudhury, learned Standing Counsel, APDCL has submitted that no case for interference has been able to be made out by the petitioners. He denies that the penalty has been imposed without any basis to substantiate and the same stands belied by the averments made in paragraph 5 of the writ petition itself, which reads as follows:

“5. That the petitioners beg to state that on 22/12/2021, the several superior officers of the APDCL Authority inspected the office and premises of the Star Enterprise and found certain defects in connection of electricity like 100 KVA/DTR HOWCHER i.e. in putting hook in the 100 meter and taking electricity energies from public and the public portions is taken from the transformer, which has caused losses to the APDCL Authority. After that they disconnected the electric connection of Star Enterprise without issuing any notice. In this regard, it is worthy to mention that in the general remarks on observation of Testing / Inspection, the said authority found nothing wrong with the consumption of electricity by the Star Enterprise. Even, then the authority also lodged a criminal case against the Managing Partner of the Firm namely, Abdul Karim Bania for coming theft of electric duties before the O.C., Bongaigaon

Police Station alleging the theft of electric tariffs. The case was registered as Bongaigaon PS Case No. 1037/2021, u/s 135 of the Electricity Act, 2003. In addition to this, the APDCL Authority also prepared a heavy penalty assessment of Rs.84,49,581/- on the basis of provisional assessment bill with a statement showing the reasons of that assessment bill with a statement showing the reasons of that assessment on 24/12/2021. Thereafter, the petitioners through their partner submitted an appeal before the APDCL Authority to deduct the amount as the same, was extremely excessive and without any logic.”

17. It is further submitted that the requirement of a pre-deposit for entertaining any appeal is a statutory one and in absence of a specific challenge of such pre-requirement, no relief can be granted to the petitioners. He submits that though on principle, he would not join issues with regard to exercise of extra-ordinary powers under Article 226 of the Constitution of India to mould relief, in the instant case, the prayer is not for moulding the relief but of diluting the requirement of the statute which is not within the domain of this Court.

18. Shri Choudhury, learned Standing Counsel further submits that the amount which was offered in the One Time Settlement (OTS) cannot be regarded as based on some standard yardstick as many other factors are taken into consideration while announcing an OTS.

19. Shri R. Talukdar, learned Government Advocate, Assam endorses the submission of Shri B. Choudhury, learned Standing Counsel, APDCL.

20. While the learned counsel for the petitioners have argued on several aspects, the controversy or issue which needs to be decided can be deciphered from the prayer made in the writ petition. The prayer of the writ petition is extracted hereinbelow-

“It is therefore, most humbly prayed that Your Lordship may be pleased to admit this petition, call for the records, issue Rule calling upon the respondents particularly to respondent nos. 3 and 6 to show cause as to why the respondent

no. 1 shall not be directed to dispose of the Appeal within a very short time and / or also to show cause to why proper equal installments shall not be granted to pay the assessed bill, which may come out after hearing the appeal by the Appellate Authority and causes being, shown, if any, and after hearing the parties and on perusal of the records, be further pleased to make the rule absolute and / or pass any other order / orders as your Lordship may deem fit and proper in the interest of justice.”

21. It appears that the grievance of the petitioners relates to the disposal of the appeal which they have preferred. The specific prayer made in the writ petition is for a direction for consideration and disposal of the appeal pending before the appellate authority. The statute in question namely, the Electricity Act of 2003 lays down the provision for appeal. The relevant provision, namely Section 127 is extracted hereinbelow-

“127. Appeal to appellate authority.—

(1) Any person aggrieved by a final order made under Section 126 may, within thirty days of the said order, prefer an appeal in such form, verified in such manner and be accompanied by such fee as may be specified by the State Commission, to an appellate authority as may be prescribed.

(2) No appeal against an order of assessment under sub-section (1) shall be entertained unless an amount equal to 1[half of the assessed amount] is deposited in cash or by way of bank draft with the licensee and documentary evidence of such deposit has been enclosed along with the appeal.

(3) The appellate authority referred to in sub-section (1) shall dispose of the appeal after hearing the parties and pass appropriate order and send copy of the order to the assessing officer and the appellant.

(4) The order of the appellate authority referred to in sub-section (1) passed

under sub-section (3) shall be final.

(5) No appeal shall lie to the appellate authority referred to in sub-section (1) against the final order made with the consent of the parties.

(6) When a person defaults in making payment of assessed amount, he, in addition to the assessed amount shall be liable to pay, on the expiry of thirty days from the date of order of assessment, an amount of interest at the rate of sixteen per cent, per annum compounded every six months."

22. Section 127(2) lays down a mandatory condition for pre-deposit of a percentage of the demand.

23. In the instant case it appears that the only reason for which the appeal is still pending is non-deposit of the statutory amount. The aforesaid fact is not disputed. A careful examination of the pleadings made in the writ petition would also show that the writ petitioners are not aggrieved by the aforesaid provision requiring a pre-deposit. Further, the vires of the said provision of law has not been put to question. Under the circumstances, whether it will be appropriate on the part of this Court to tinker with such requirement is also an issue.

24. At this stage, Shri Mahmud, the learned counsel for the petitioners has submitted that in exercise of the powers conferred by Article 226 of the Constitution of India, the relief can be moulded. Though the aforesaid propositions of law may be correct, the power is only to mould the relief and not to dilute any requirement of a statute. In instant case, there is a requirement of deposit of a specific amount of pre-deposit to entertain an appeal.

25. A specific query was put to the learned counsel for the petitioners as to how much amount the petitioners are willing to deposit. On instructions, Shri Mahmud, the learned counsel for the petitioners had submitted that the petitioners are willing to deposit an amount of Rs.4 lakhs only. The said amount, as per the learned counsel for

the respondents is wholly inadequate and will not meet the requirement of the statute.

26. This Court is also of the opinion that when the statute prescribes a requirement which is mandatory in nature and such requirement not being the subject matter of challenge, this Court may not embark into such a territory without a specific challenge. Ultimately, it is the wisdom of the legislature to incorporate such a provision so to make the Act effective as the said Act is a self contained one where in various kinds of malpractices are also taken care of.

27. In view of the aforesaid facts and circumstances, this Court is of the opinion that no relief can be granted to the petitioners. The various case laws which have been cited by the petitioners will not have any application in the facts and circumstances of the instant case. The writ petition, accordingly stands dismissed.

28. No order as to cost.

JUDGE

Comparing Assistant