IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.181 OF 2014

NRC Ltd. .. Petitioner.
Vs.
State of Maharashtra & Ors. .. Respondents.

Mr. A.V. Anturkar with Mr. Tahya Ghoghari with Mr. Levi Rubens i/b Vigil Juris for the Petitioner.

Mr. S.D. Rayrikar AGP for Respondent No.1.

Mrs. Deepa Chavan with Ms. Reshma Nathani with Mr.Nirav Shah i/b Little & Co. for Respondent No.2.

CORAM : A.K. MENON, J.

DATED : 21ST SEPTEMBER 2015

P.C. :

1. Heard learned counsel for the parties.

2. This writ petition is filed by the National Rayon Corporation Limited which was later known as NRC Ltd. challenging a final assessment order under section 126 of the Electricity Act, 2006. The facts reveal that the petitioner has been consumer of the electricity since about 1953, initially from Tata Power Company Ltd. Thereafter the distribution was taken over by the Maharashtra State Electricity Board (MSEB) since 1980. After the enactment of Electricity Act, 2003 the use of electric supply was governed by the said Act and subject to supervision of the Electricity Regulatory

Commission. It is the petitioner's case that the petitioner's industrial activity came to an end sometime in the year 2011 and the petitioner submitted an application to respondent no.2 on 9th June, 2011 intimating them that the factory is under lock out. There was no production activity and their demand being very low the maximum demand should be reduced from 10,000 KVA To 1600 KVA having connected load of 52892 KW. Necessary documents were enclosed. In response, vide a letter dated 16th June, 2011 respondent no.2 directed the Executive Engineer to take necessary steps for processing the application for reduction of maximum demand.

3. On 13th January, 2012, the office of Superintending Engineer informed the petitioner that reduction of demand would be effective from the billing for January 2012 subject to the conditions set out in the said communication. Thereafter a provisional assessment came to be made on 7th October, 2013. Pursuant to a spot inspection report dated 5th October, 2013, respondent no.2 noticed that there has been unauthorised use of the connection and although the industrial activity had ceased, the factory being under lock out since December 2008, the electricity supply to the premises was being unauthorisedly used for residential colonies and other commercial purposes including resale of electricity. Thus, it was found that the petitioner was in breach of the provisions of the Act. It assessed the liability of the petitioner provisionally at Rs.7,57,39,310/-.

4. Respondent no.2 then offered a personal hearing to the petitioner which opportunity was availed of. After the hearing a reduction was allowed. In the meantime, vide letter dated 18.3.2013 the petitioner sought to rely upon MERC Tariff order for the year 2012-13 and contended that the bill for its residential and commercial complex should be raised as per the HT-VI category instead of HT-I. Vide letter dated 31st August, 2013, Respondent no.2 confirmed that the request for change of tariff from HT-I to HT-VI has been considered and permitted subject to conditions set out in the letter. It is not in dispute that these conditions which comply with.

5. Mr. Anturkar, learned senior counsel for the petitioner submitted that although section 127 of the Act provides for alternate remedy in the instant case, the facts would justify inference by this Court. He submitted that under section 126 the assessment could be made only if on inspection the consumer concerned is found to be indulging of unauthorised use of electricity, such consumer can be provisionally assessed on the basis of best judgment. According to Mr.Anturkar the occasion to make provisional assessment under section 126 is restricted to cases where inspection is carried out of premises and equipment of registered user. In the case at hand the consumer having itself sought variation of the terms of supply, section 126 of the Act would have no application. He submitted that in such cases the

charges will be determined only on the basis of section 45 of the Act which in express terms provides for charges to be levied for electricity supply by respondent no.2 as the distribution licensee and empowers the distribution licensee to charge for electricity is supplied to the consumers.

6. He then submitted that the issue of adopting the alternative remedy under section 127 would not arise in the present case since the provisional assessment having been made on 7th October, 2013, the final assessment ought to have been made within a period of 30 days from the provisional assessment. He submitted that after service of the order of provisional assessment, objections have been filed by the petitioners and the objections were heard but the final order is passed well beyond period of 30 days i.e. 7th December, 2013 whereas a period of 30 days had expired on 4th December, 2013. Mr. Anturkar pointed out that issue is one that of jurisdiction to pass the final assessment order or rather the lack of it. According to the learned senior counsel by virtue of express provision of section 126 (3) the final order of assessment which is impugned in the present petition could not have been passed after lapse of 30 days. He, therefore, submitted that the facts clearly warranted interference by this Court and the order of final assessment is accordingly liable to be set aside.

7. Mr. Anturkar then submitted that the issue was one of complete

lack of jurisdiction. In view of the provisions of section 126(3) and in the instant case, the Superintending Engineer and Assessing Officer did not have jurisdiction to pass an order of final assessment. Apart from the fact that section 126 would apply only under the conditions and a post inspection scenario, as far as the present case is concerned, the authority also could not have continued with the assessment by virtue of fact that there was a voluntary disclosure and request to reduce maximum demand. He, therefore, submitted that section that could be applied is section 45. Mr. Anturkar referred to the fact that at the time of provisional assessment, the petitioners had filed a writ petition in this Court being Writ Petition No.3065 of 2013 wherein the Vacation Court granted limited protection till respondent nos.2 and 3 filed the affidavit in reply. Thereafter, it transpires that the said petition came to be disposed of vide order dated 24th December, 2013 after which the final assessment had been passed. The present writ petition is, therefore, filed pursuant to liberty granted to file a fresh petition pursuant to the final assessment order.

8. Mr.Anturkar, learned senior counsel relied upon the judgment of the Supreme Court in the case of Superintendent of Taxes, Dhubri and Others Vs. M/s. Lakshmichand Indra Chand AIR 1975 SC 2065. He relied upon observations of the Supreme Court to the effect that if there has been default on the part of the authority concerned, there is fetter against exercise of the

power of authority and such a fetter would not permit issuance of the final assessment order. He relied upon the observations of the Supreme Court in paragraphs 13, 17 and 18 in support of his contentions. In my view, this is not a case that would be of assistance to the petitioners inasmuch the aforesaid judgment was delivered in the context of Assam Taxation (On goods carried by Road or on Inland Waterways) Act and the failure to issue notices under section 7(2) within the statutory period of two years. A tariff statute had to be interpreted strictly in accordance with the provisions of the statute and the principles that the Hon'ble Supreme Court was dealing with said case cannot be imported in this case.

9. Mr.Anturkar also relied upon the decision of the Supreme Court in Executive Engineer, Southern Electricity Supply Company of Orissa Ltd. and Anr. Vs. Sri Seetaram Rice Mill 2012 (3) Mh.L.J. 536 and relied upon paragraph 52 and 54 of the said judgment wherein the Hon'ble Supreme Court observed that ordinarily the High Court would not interfere in exercising its extra ordinary jurisdiction under Article 226 of the Constitution where a statutory remedy is available. However, this principle is not free from exceptions. He submitted that the present case warranted interference as it constitutes an exceptional case and the petitioner ought not to be relegated to the alternative remedy as provided under section 127. In paragraph 54 Mr. Anturkar pointed out that although it is difficult to state with

absolute certainty principles governing such exercise of jurisdiction it would depend on the facts of each case and the facts of the present case certainly would justify interference.

10. On behalf of respondent no.2, Ms.Chavan pointed out that the petitioner had in fact being found guilty of reselling electricity and misusing the services. This was revealed from the spot inspection carried out on 5th October, 2013. The learned counsel for respondent no.2 relied upon the spot inspection report appearing at Exhibit-J to the petition wherein it was recorded that several connection have been given to third parties by installing sub-meters without permission or knowledge of respondent no.2. The details of the sub-meters were provided in the annexures to the inspection report. The inspection report reveals that the sanctioned load had been reduced to 1600 KV as sought by the letter of 9th June, 2011 and after giving effect to the same the remarks column no.17 disclosed that although industrial activity was discontinued and the factory is under lock out, utilisation of the energy was made by NRC for residential and commercial purposes. The commercial purpose as it transpires included inter alia the connection provided to Canara Bank apparently for installation and use of automated teller machine in the premises.

11. Ms.Chavan also pointed out that while making the spot

inspection report, respondent no.2 had relied upon debit note made out by the petitioner to Canara Bank wherein specific provisions had been made for incorporating the meter readings for electricity consumed for designated period, in addition to license fees charged from Canara Bank. Thus, the electricity charges were billed and recovered from Canara Bank in addition to license fees, thereby inviting action pursuant to section 12 of the Act. This fact according to her is suppressed. Section 12 clearly provides for licensee seeking the consent of respondent no.2 in order to distribute electricity. In the present case while permitting the Canara Bank amongst others to utilise electricity, the petitioner are guilty of violating section 12. Learned counsel further submitted that the provisional bill was initially issued for Rs.7,57,39,310/-. However, after hearing the petitioners' submission during the personal hearing this came to be revised and the order of final assessment is made in the sum of Rs.4,44,62,770/- as detailed in annexure thereto. In the circumstances she submitted that the contentions of the petitioner in the letter dated 9th June, 2011 are not relevant at all to issue at hand inasmuch as the amounts that are outstanding include amounts of bills for 45 months from December 2009 to August 2013. These bills have taken into consideration utilisation of power for the aforesaid period as per reduced load sanctioned at the request of the petitioner. In the circumstances she submitted that the assessment order does not call for any interference.

12. Referring to the judgment relied upon by Mr.Anturkar, Ms. Chavan relied on the observation of the Court in paragraph 52 of the judgment in case of Executive Engineer, (Southco) & Anr. Vs. Sri Seetaram Rice Mill which in her submission dealt specifically with the scope of jurisdiction of Article 226 in the face of provisions of section 127. The observation of the Court she submitted were clearly vesting this Court with discretion in entertaining a petition.

13. Having considered the facts I am not persuaded to exercise the extraordinary jurisdiction vested in this Court under Article 226. The fact that the petitioners have indulged in resale of electricity being the principal contention of respondent no.2 it would only be appropriate that all facts can be conveniently gone into by the appellate authority when the petitioner approaches the authority hence I pass the following order :

(i) The writ petition is dismissed.

(ii) There will be no order as to the costs.

(iii) In the event the petitioners files an appeal under section 127, the same will be decided purely on merits of the case without being influenced by this order.

14. At this stage Mr.Anturkar submits that since 16th January, 2014 the petitioners have been protected by this Court inasmuch as there is

direction in respect of residential quarters. He submits that the respondents may take coercive steps in respect of residential quarters as the same will have serious consequences. Accordingly, he prays that such protection be extended. Accordingly, the respondents shall not take any further coercive steps in respect of residential quarters for a period of six weeks from today.

(A.K.MENON, J.)