

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 28 .01.2015

CORAM

THE HON'BLE MR.JUSTICE R.MAHADEVAN

S.A.No.1013 of 2007

1. Tamil Nadu Electricity Board
represented by
Assistant Executive Engineer / O & M
Kaveripakkam
Vellore District.
 2. Kaveripakkam Tamil Nadu Electricity Board
represented by
Executive Engineer / O & M
Sholinghur
Vellore District.
- ...Appellants/Defendants

vs.

The Executive Officer
Kaveripakkam Town Panchayat
Kaveripakkam
Vellore District.

...Respondent/Plaintiff

Second Appeal against the judgment and decree dated 08.06.2007 made in A.S.No.70 of 2006 on the file of the Subordinate Judge, Ranipet, reversing the judgment and decree dated 30.11.2005 in O.S.No.146 of 2004 on the file of the District Munsif, Sholinghur.

For appellants : MrV.Viswanathan

For respondent : Mr.Mukund

for

M/s.Sarvabhauman Associates

JUDGMENT RESERVED ON : 11.12.2014

JUDGMENT

This second appeal has been filed by the defendants against the judgment and decree of the Sub-Ordinate Judge, Ranipet reversing the dismissal of the suit by the District Munisf, Sholinghur.

2. The Brief facts of the case are as follows;

The plaintiff had installed motor in the water pumping station for disbursement of water to the public. The permitted load was 25 H.P and the plaintiff had installed two motors of with 12.5 H.P each under service connection No.118. Since enough water could not be pumped with 12.5 H.P motor, the plaintiff had replaced one 12.5 H.P motor with 21 HP motor. After inspection, the 1st defendant issued a notice proposing to levy damages and asked the plaintiff to remove the motor. The plaintiff's reply was rejected and by an order dated 18.07.95, damages to the tune of Rs.91,913/- was levied by the 1st defendant. Aggrieved, the plaintiff filed an appeal, which also turned out to be a futile exercise. Aggrieved the plaintiff had filed the suit for a declaration to declare the order levying damages as null and void and for consequential injunction to refrain the board officials from interfering with the electricity supply to the service connection No.118. The main contention of the plaintiff was that the motor with additional H.P was only a standby motor and the two motors were never used at a time. The plaintiff also relied upon the circular of the Board in No.SE/IEMC/EE3/AEE2/D.705/93(Technical Branch) dated 21.09.1993 recognising and stating that the local bodies were entitled to hold standby motor with interlocking arrangement and the same need not be treated as violation of rules. The suit was resisted by the defendants contending that both the motors with 33.5 H.P were being used in violation of the rules and terms of supply. The defendants further contended that both the motors were connected and in running condition. The defendants also stated that they had no intention to disconnect the service line and sought the dismissal of the suit.

3. After appreciating the oral as well as documentary evidences, the Trial Court dismissed the suit. Aggrieved the plaintiff filed the appeal which was allowed. Aggrieved the defendants have preferred this second appeal inter alia contending that the 21 H.P motor was connected to the electricity board main service without permission, that the first appellate court failed to appreciate that the plaintiff had violated clause 22.05 of the terms and conditions of supply and the circular of the board cannot override the terms and conditions of the supply.

4. At the time of admitting the second appeal, the following substantial questions of law were framed:

1. Whether the lower appellate court is right in reversing the judgment and decree of the trial Court in the light of Clause 22.05 of the terms and conditions of supply of Electricity ?

2. Whether lower appellate court is right in coming to the conclusion that the respondent has not committed the offence of unauthorised Additional Load when the respondents have admitted the erection of two motors to the capacity of 21 H.P. And 12.5 H.P.?
3. Whether circular marked along with Ex.P6 will prevail over the clause 22.05 of the terms and conditions of supply of electricity?

5. The learned counsel for the appellants/defendants relying upon the terms and conditions of supply contended that installation of the motor with 21.5 HP without permission is an offence and hence the defendants are entitled to levy penalty. The counsel further contended that the circular of the board does not have statutory force and cannot override the terms of supply. The fact that no loss has occurred to the board cannot be the reason to discard the violation. The counsel further contended that at the time of inspection, both the motors were running and that the suit itself was not maintainable at the first instance and hence sought the leave of the court to frame additional substantial question of law regarding the maintainability of the suit. The counsel also relied upon the judgments reported in 2005 (4) CTC 573 (Phool Pata & Another Versus Vishwanath Singh & Others) ,2009 (1) CTC 376 (U.R. Virupakshaiah Versus Sarvamma & Another) and 1997 (5) SCC 120 (Punjab State Electricity Board Versus Ashwani Kumar) in support of his contention.

6. Per contra, the learned counsel for the respondent/plaintiff would contend that the first appellate court was perfect in reversing the judgment and decree of the Trial Court. The plaintiff being a panchayat , a statutory organ of the state would not resort to any illegal activity. The penalty by way of damages has been levied on presumption and in any case as per the circular of the board, the plaintiff is entitled to have a spare motor. The counsel also contented that at no point of time, were the two motors used at a time. The counsel also relied upon the judgments reported in 1937 (46) LW 929 (Adiraju Mallikarjana Rao Versus Somavaram Co-Operative Represented By Prisident Somavarapu Chandramouleswara Rao & Another) and 2000 (4) SCC 108 (Municipal Commissioner, Calcutta & Others Versus Salil Kumar Banerjee & Others) to contend that once having submitted to the jurisdiction, the same cannot be raised at a later stage.

7. Before going into the substantial questions of law already framed, it is necessary to decide as to whether there is a necessity to frame additional substantial question of law regarding the jurisdiction of a civil court to entertain the suit ?

8. The counsel for the appellants/defendants has contended that the suit itself is not maintainable in view of the specific bar under section 145 of the Electricity Act and has raised the issue of maintainability of the suit for the first time before this court. The counsel has also relied upon the judgments reported in 2005 (4) CTC 573 (Phool Pata & Another Versus Vishwanath Singh & Others), 2009 (1) CTC 376 (U.R. Virupakshaiah Versus Sarvamma & Another) and 1997 (5) SCC 120 (Punjab State Electricity Board Versus Ashwani Kumar) and insisted this court to frame additional substantial question of law.

9. In the judgment reported in 2005 (4) CTC 573 (Phool Pata & Another Versus Vishwanath Singh & Others), the Hon'ble Apex Court has held that the High Court can frame substantial question of law and answer the same even if such question had not been formulated earlier if High Court satisfied that the case involves such question and it should record the reason for the same. The relevant portions are as follows:

"7. After the amendment of CPC, Section 11 (5) reads as follows:

"The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

8. As a bare perusal of the provision shows, nothing in sub-section (5) takes away or abridges power of the High Court to hear for reasons to be recorded, the appeal on any other substantial question, not formulated earlier, if it is satisfied that the case involves such question.

9. In the instant case, the only question that was formulated has been quoted above. Undisputedly, there was no other question formulated regarding the findings of the Appellate Court on the readiness and willingness aspect. In terms of sub-section (5), the High Court could have heard the appeal on a question not formulated if for reasons to be recorded (emphasis supplied) if it was of the view that the case involves such question. In the instant

case no such reason has been recorded. The memorandum of appeal filed before the High Court also does not indicate that any specific question was formulated in that regard."

10. In the judgment reported in 2009 (1) CTC 376 (U.R. Virupakshaiah Versus Sarvamma & Another), the Hon'ble Apex Court has held that High Court should not ordinarily frame substantial question of law at subsequent stage except at time of admission of appeal and the High Court should assign reason and afford opportunity of hearing to parties, while framing substantial question of law at subsequent stage. The finding of the Hon'ble Apex Court in this regard is as follows:

"12. The Code of Civil Procedure was amended in the year 1976 by reason of Code of Civil Procedure (Amendment) Act, 1976. In terms of the said amendment, it is now essential for the High Court to formulate a substantial question of law. The judgments of the Trial Court and the First Appellate Court can be interfered with only upon formulation of a substantial question of law, if any, which has arisen for its consideration by the High Court. It, furthermore, should not ordinarily frame a substantial question of law at a subsequent stage without assigning any reason therefor and without giving a reasonable opportunity of hearing to the respondents. {See Nune Prasad & Ors. v. Nune Ramakrishna [2008 (10) SCALE 523]; Panchugopal Barua & Ors. v. Umesh Chandra Goswami & Ors. [(1997) 4 SCC 713 paras 8 and 9]; and Kshitish Chandra Purkait v. Santosh Kumar Purkait & Ors. [(1997) 5 SCC 438 paras 10 and 12]}.

13. The High Court, in this case, however, formulated a substantial question of law while dictating the judgment in open court. Before such a substantial question of law could be formulated, the parties should have been put to notice. They should have been given an opportunity to meet the same. Although the court has the requisite jurisdiction to formulate a substantial question of law at a subsequent stage which was not formulated at the time of admission of the second appeal but the requirements laid down in the proviso appended to Section 100 of the Code of Civil Procedures were required to be met. The High Court did not record any reason for formulating the additional question. The prayer

of the appellant to grant some time to deal with the said question was declined. The High Court failed to take into consideration the fact that by framing the additional substantial question of law, a new case is sought to be made out."

11. In support of his contention to raise an additional substantial question of law regarding the maintainability of the suit, the counsel for the appellants/defendants has relied upon the ratio in the judgment reported in 1997 (5) SCC 120 (Punjab State Electricity Board Versus Ashwani Kumar), which is evident from the paragraphs 8, 9, and 10 which read as follows:

" 8. The question then arises : whether the Civil Court would be justified in entertaining the suit and issue injunction as prayed for ? It is true, as contended by Shri Goyal, learned Senior counsel, that the objections were raised in the written statement as to the maintainability of the suit but the same given up. Section 9 of CPC provides that Civil Court shall try all suits of civil nature, subject to pecuniary jurisdiction, unless their cognizance is expressly or by necessary implication barred. Such suit would not be maintainable. It is true that ordinarily, the Civil Court has jurisdiction to go into and try the disputed questions of civil nature, where the fundamental fairness of procedure has been violated. The statutory circulars adumbrated above do indicate that a fundamental fairness the procedure has been prescribed in the rules and is being followed. By necessary implication, the cognizance of the civil cause has been excluded. As a consequence, the Civil Court shall not be justified in entertaining this suit and giving the declaration without directing the party to avail of the remedy provided under the Indian Electricity Act and the Indian Electricity (Supply) and the Instructions issued by the Board in that behalf from time to time as stated above.

9. Shri Goyal has contended that the authorities do not hear the parties, nor give reasoned order. Therefore, the parties cannot be precluded to avail of the remedy of a suit. We cannot accept such a broad and generalized proposition. When the provision for appeal by way of review has been provided by the statutory instructions, and the parties are directed to avail of the remedy, the authorities are enjoined to consider all the

objections raised by the consumer and to pass, after consideration, the reasoned order in that behalf, so that the aggrieved consumer, if not satisfied with the order passed by the Board/appellate authority, can avail of the remedy available under Article 226 of the Constitution. Therefore, by necessary implication, the appropriate competent authority should hear the parties, consider their objections and pass the reasoned order, either accepting or negating the claim. Of course it is not like a judgment of a civil court. It is then contended that the respondent has been subjected to pay huge amount of bill in a short period; hence, it is a case for interference. We find no force in the contention. May be that due to the advice given by the counsel, the respondent obviously has availed of the remedy of the suit, instead of departmental appeal. In our view, by necessary implication the suit is not maintainable. Therefore, the respondent is at liberty to avail the remedy of appeal within six weeks from today and raise the factual objections before the Board and the Board/appellate authority would consider and dispose of them, as indicated earlier, on merits.

10. It is next contended that the respondent has been charged huge amount. It would be difficult for him to pay the amount in lump sum. Therefore, he may be given permission to pay the amount in instalments. We find that the request is genuine and in view of long lapse of time, we direct that the respondent would pay the amount in demand in six monthly instalments. First instalment shall be paid on or before April 5, 1997. In case he succeeds in appeal or in the proceedings, the Board shall refund the amount with interest at the rate of 12 per cent per annum from the date of deposit."

12. The above judgment have been relied upon to contend that in view of the availability of remedy by way of departmental appeal, the suit is barred by limitation and by invoking the other judgments referred above, the counsel for the defendant insisted this court to frame additional substantial question of law regarding the maintainability of the suit. The counsel also contended, the question of jurisdiction being a legal point can be raised at any time.

13. Rebutting the contentions of the counsel for the defendants, the learned counsel for the appellant has contended that the defendants having submitted to the jurisdiction of the courts below and all along participated in the suit and first appeal, cannot now raise the question of jurisdiction as they are deemed to have waived the right. The counsel further contended that maintainability of the suit was never raised by the defendants before the trial or first appellate court.

14. In the judgment relied upon by the learned counsel for the respondent/plaintiff reported in 1937 (46) LW 929 (Adiraju Mallikarjana Rao .V. Somavaram Co-Operative Represented By Prisident Somavarapu Chandramouleswara Rao & Another), this court has held that having submitted to the jurisdiction of the lower court and long acquiescence in its decision, the party cannot raise a ground for interference based on jurisdiction as follows:

"But in the present case the conduct of petitioner is such as to leave no room for any doubt that for over two years after the case had been referred under Section 51 to the Deputy Registrar it never even occurred to him that this officer had no jurisdiction. He took his chance, of success before that tribunal and it was not until he had failed and until the adverse decree had been executed that he elected to move this Court for a writ. My attention has been drawn to the case reported in Latchmanan Chettiar v. Commissioner of Corporation of Madras . It was there pointed out by a Bench of three judges that prima facie the English decisions establish the proposition that in such circumstances the applicant cannot obtain a writ of certiorari ex debito justitiae, but that the Court exercises a purely discretionary power. The test," it was said, is whether the applicant armed with a point either of law or of fact, which would oust the jurisdiction of the lower Court, has elected to argue, the case on its merits before that Court. Judged by that test I have no hesitation in finding that the petitioner has so conducted himself as to preclude this Court from exercising its discretionary power in his favour. The petition is therefore dismissed with costs."

15. In the judgment relied upon by the learned counsel for the respondent/plaintiff reported in 2000 (4) SCC 108 (Municipal Commissioner, Calcutta & Others .V. Salil Kumar Banerjee & Others) , the Hon'ble Apex Court has held that challenge to jurisdiction after having submitted to it and suffering adverse result is not maintainable. The relevant portion is extracted hereunder:

"4. In the first place, by reason of Section 631(3), the Tribunal that heard the first respondent's appeal was properly constituted. That sub-section expressly made provision that the procedure of the 1980 Act would be followed in respect of proceedings that related to contraventions of the 1951 Act. This provision was overlooked by the High Court. The High Court also overlooked the fact that it was the first respondent, the writ petitioner before it, who had filed the appeal under the 1980 Act before the Tribunal and had at no stage before the Tribunal ever contended that it was improperly constituted. Even assuming that it ought to have consisted of three or more Members, had that objection been taken at the initial stage of the hearing of the appeal before the Tribunal, that position could have been rectified. Certainly, in circumstances such as these, the High Court ought not to have exercised its discretion in favour of the first respondent."

16. Upon perusal of the records, it is evident that the defendants have not raised the issue of maintainability of the suit either before the trial court or the first appellate court. Even though the contention of the defendants that the suit is not maintainable is right, having participated in the proceedings for nearly 20 years, this court is of the view that the plea cannot be entertained at this stage and it would not be proper to relegate the parties to alternative remedy at this stage. The judgments relied upon by the counsel for the plaintiff would be squarely applicable to the facts of the case. Having participated in the trial and appellate proceedings without raising any objection as to the maintainability, the defendants are estopped. In view of the above, this court is not inclined to frame additional question of law.

17. Let us now take up the substantial questions of law already framed.

18. In the facts and circumstances, this court is inclined to take up the third substantial question of law for adjudication before deciding the first two questions of law:

"3. Whether circular marked along with Ex.P6 will prevail over the clause 22.05 of the terms and conditions of supply of electricity?"

19. Clause 22.05 of the Terms and conditions of supply of electricity of the Tamil Nadu Electricity Board issued by exercising the powers conferred under section 49 of the Electricity (Supply) Act, 1948 is as follows:

"Tamil Nadu Electricity Board, Terms and Conditions of Supply of Electricity 22.00 CHANGE IN SANCTIONED DEMAND CONERACTED LOAD AND CONNECTED LOAD

22.05 Any consumer, not covered by the low Tension Tariffs I (Domestic) VII (Educational and other special institutions etc.) VIII, VIIIA (Laboratories, Research Institute studied and cineme theaters) and XXX 16 (other categories) to his instalments only as provided hereunder.

Should the consumer, at any time after supply Electricity has connected desire to increase the number of size of lights, fans, motors etc., in his premises or in any way after the position of the wiring therein he shall send notice there of in writing to the Board whose representative will call additions or repairs and if necessary, change lines and the competent authority will accord sanctioned for the change in the connected load by connecting the additional load. A test report signed by him wiring contractor shall be submitted by the consumer and the cost of the alterations additions or repairs to the service line shall also be borne by him. Testing as per clause to shall apply to the alterations additions or repairs made in the installation. Failure to give such notice may derange the supply system and will render the supply to the consumer liable to be summarily discontinued or repairs are executed. The supply to the circuit which is being altered, added to or repaired, must be entirely disconnected and it shall remain disconnected until the alterations, additions or repairs have been tested and passed by the Engineer of the Board."

20. The operative portion of the Board's circular in SE/IEMS/EE/(T)AEE/AE.ICR.01893/94 (Technical Branch) dated 07.04.1994 is as follows:

" It is ordered that penal action taken in cases where the local bodies have stand by motor pumps may not be pursued further if compensation charges have not been collected"

..... "Number of other Government Departments/Undertakings have also represented that the stand by motors/pumps need not be treated as violation, instructions issued in respect of the provisions of standby motors in L.I.Services through T.P.D.T. or interlocking arrangement is applicable to state Government Departments and state Government undertakings."

21. The terms and conditions of supply have been framed by exercising the powers under section 49 of the Electricity Supply Act, 1948 which reads as follows:

"49. Provision for the sale of electricity by the Board to persons other than licensees.-

(1) Subject to the provisions of this Act and of regulations, if any made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs.

(2) In fixing the uniform tariffs, the Board shall have regard to all or any of the following factors, namely:-

(a) the nature of the supply and the purposes for which it is required;

(b) the co-ordinated development of the supply and distribution of electricity within the State in the most efficient and economical manner, with particular reference to such development in areas not for the time being served or adequately served by the licensee;

(c) the simplification and standardisation of methods and rates of charges for such supplies;

(d) the extension and cheapening of supplies of electricity to sparsely developed areas.

(3) Nothing in the foregoing provisions of this section shall derogate from the power of the Board, if it considers it necessary or expedient to fix different tariffs for the supply of electricity to any person not being a licensee, having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and any other relevant factors.

(4) In fixing the tariff and terms and conditions for the supply of electricity, the Board shall not show undue preference to any person."

22. Under sub-section 4, it has been clearly laid out that in fixing the tariffs and terms and conditions for the supply of electricity, the Board shall not show undue preference to any person. Therefore, the circular is directly in violation of section 49 as it attempts to give an undue advantage to state departments and is hence invalid. A violation is a wrong irrespective of who does it. There cannot be any special treatment just because, the person violating is a wing of the state government. An administrative circular can be issued only with regard to procedural aspects. It cannot contravene the express provisions of a statute. A clarification of a provision can also be issued if the provisions itself permit such clarification. Otherwise, the board cannot amend the terms and conditions/regulations by way of circulars. The terms and conditions of supply will have statutory force and therefore, the circular issued in contravention of express provisions is invalid and cannot override the statutory provisions. Any amendment to the terms and conditions contrary to the mandates stipulated in section 49 would also be invalid. Hence, this court is of the view that the circular cannot override clause 22.05 of the terms and conditions of supply. The substantial question of law is answered accordingly.

23. Since the first and second questions of law are related to each other, the same are taken together.

24. It is clear from the clause 22.05 that any alteration to the existing line in the form of increase in load, can be carried out only with the consent of the board and by the representative of the board. It is also not in dispute that then existing motor of 12.5 HP was changed with 21 HP motor without the consent of the board. The trial court after appreciating the entire evidence has held that even though there is no evidence to show that the plaintiff has used both the motors at the same time, it is an admitted case that the plaintiff has installed motors beyond permissible limits and has violated clause 22.5 of the terms and conditions. In view of the violation, the trial court has dismissed the suit rejecting the contention that since the plaintiff is also a public body, a lenient view may be taken. However, the trial court's order has been rejected by the first appellate court based on the board's circular in SE/IEMS/EE/(T)AEE/AE.ICR.01893/94 (Technical Branch) dated 07.04.1994. Holding that the installation of motor with excess HP ought not to be treated as an offence in view of the above circular, the first appellate court has reversed the judgment and decree of the trial court. The plaintiff themselves have pleaded that they have installed a motor with higher HP beyond permissible limit. The plaintiff has also stated that since the existing motor was insufficient to draw the necessary water to satisfy the public demand, the motor with additional load was installed. It is settled law that an admitted fact need not be proved. Hence, the violation is

clearly and apparently evident. The first appellate court has given undue weightage to the circular. In view of the fact that this court has already held the circular to be invalid, this court holds that the first appellate court erred in reversing the judgment of the trial court and holding that the appellant has not committed the offence of unauthorised additional load. The first and second substantial questions of law are accordingly in favour of the defendants.

25. In view of the above, the second appeal is allowed and the suit is dismissed. The plaintiff is directed to pay the amount demanded within four weeks from the date of receipt of the copy of this order. In the facts and circumstances, there will be no order as to the costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

mra
To

1. The Subordinate Judge, Ranipet.
2. The District Munsif, Sholinghur.
3. The Section Officer, V.R. Section,
High Court, Madras.

+ 1 cc to M/s. Sarvabhauman, Advocate SR.4341
+ 1 cc to Mr.V. Viswanathan, Advocate SR.4375

TEJ(CO)
EU 23.03.2015

S.A.No.1013 of 2007

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