HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

C.C.C.A.No.87 of 1994

JUDGMENT:

This appeal is filed aggrieved by the judgment and decree dated 15.06.1994 in O.S.No.14 of 1986 on the file of IV Additional Judge, City Civil Court, Hyderabad.

2. The plaintiff is the appellant and defendants 1 to 5 are respondents 1 to 5 herein. Amendment already permitted to change the name of the State Electricity Board as Central Power Distribution Company Limited, so far as array of the 1st respondent concerned. Since name changed as Telangana, the same is recorded.

3. Heard the learned counsel for the appellant/plaintiff and also the learned Standing Counsel for the 1st respondent. Perused the material on record.

4. The present suit is an off-shoot of the earlier suit covered by O.S.No.215 of 1973 filed by the plaintiff against two defendants i.e., Andhra Pradesh State Electricity Board, represented by the Superintending Engineer, Hyderabad and the Assistant Engineer, Distribution V, Hyderabad, to declare that the defendants are not entitled to estimate any loss of energy to claim any amount as compensation or otherwise till the statutory offence of theft of energy is proved beyond reasonable doubt in pilferage criminal

case if any and for mandatory injunction to resume the supply that was disconnected and prohibitory injunction restraining them from sending any bill or claim.

5. The suit after contest while answering as many as nine issues framed, mainly after discussing the factual matrix with reference to the rival contentions and the evidence more particularly at judgment pages 9 to 11 that in the cross examination of PW.1, Ex.B1-H.T.Test report dated 25.02.1972 marked, which bears signature of the Managing Partner of plaintiff by name, Kartar Singh (PW.2) and Ex.B2-letter dated 02.07.1973 addressed to A.E.Operations, stating that the meter was showing low consumption and it is not working. This fact substantiated further from Ex.A23-meter card produced by the plaintiff wherein there was endorsement of meter was not working and however as can be seen from its reverse side, there were subsequent readings noted in the months from May to November, 1972, February and April, 1973 and again on 30.05.1973 i.e., for May, shows the meter was recording slow to say meter is not functioning properly. While referring to PW.2's evidence, it was observed that he admits in the cross examination that he maintains accounts and he is a sales tax assessee and did not file objections before the S.E. or did not file before S.E.Operations any account books about consumption record and the new meter was

installed in June, 1973 and Ex.B5-consumption record from January, 1973 to February, 1974 shows that during January, 1973 to May, 1973, the units recorded varied between 754 to 2488 whereas after installation of new meter in June, 1973, the consumption recorded for June, July and August were 57,786, 67,134 and 77,825 units, respectively. PW.2 admits that on 30.05.1973 when A.E. and D.P.E. inspected, he was also present and the removed seals were kept in sealed cover which is Ex.B6, which bears signature of PW.2. It is there from having discussed something before answering the issues immediately taken up issue No.4 regarding the contest of the suit maintainability as premature and the same was answered. No doubt, while answering, in page No.13 it is observed in the evidence of DW.2-Kondaiah Sastry that in 1973 in the middle of April he took charge as A.E Distribution-V City Circle, Hyderabad and on 30.05.1973 he accompanied A.E., D.P.E. and DW.1 and Ex.B10-original statement of Kartar Singh also signed by him and he brought the seals to the Court which were in vogue in March, 1972 and demonstrated before the Court as regards the MRT 5 seals on 2 lead-bits and MRT-6 seals on 2 lead-bits which are marked as Exs.B11 to B14 and deposed that in Ex.B11 the letter ‘t’ is smaller size than the letters ‘MR’ and it is aligned a little higher than the letters ‘MR’ whereas in ‘Hyd’ the letter 'd' is smaller than 'Hy' whereas even the position of the letters will be of specific alignment to detect the real and counterfeit seals. In the cross examination DW2 stated that on 20.04.1973 he took the reading and came out and he did not minutely examine to find out any incriminating things. EX.A5-notice dated 01.05.1973 issued in his signature. He did not verify the test report. It is on the basis of A.E. & D.PE.'s report he issued Ex.A5. On 30.05.1973, A.E. & D.P.E. came to his office and took him with them. The allegations made in Ex.A5 are only on the basis of A.E. & D.P.E's letter and denied that he is not in a position to give the veracity of the seals produced into Court. Ultimately, the Court below held that the suit is premature by following the earlier expression of this Court in **A.P.S.E.B.Board v. M/s.G.A.Naidu and Brothers (1979(2) APLJ 336**) that followed the Apex Court's expression made earlier in this regard and another Division Bench expression in **A.S.No.577 of 1972**. The sum and substance there from, including from the expression of **J.Singh v. K.Murali (AIR 1967 SC 947)** followed, the suit is premature without exhausting departmental remedies. It was thereby driven to approach

3rd defendant of the present impugned suit claim. In fact, the plaintiff approached the 3rd defendant and 3rd defendant issued Ex.A4-report and impugning the correctness, the plaintiff approached by appeal 2nd defendant and 2nd defendant has issued Ex.A5-letter dated 16.12.1985. The proceedings were issued imposing penalty with three times to the estimated consumption of Rs.4,63,749/- by 3rd defendant and the same was modified and reduced to Rs.4,02,513/- by 2nd defendant. However, having been aggrieved by saying there is no pilferage, the question of imposing three times penalty on the original amount does not arise and even out of the original estimated amount is the actual amount without pilferage, that could be levied if at all the meter is slow for nothing proved by pilferage, and once the same is objected what the plaintiff has to pay actually for the alleged error in reading of 21.3% calculated comes to Rs.73,000/- and there from while seeking for declaration of the proceedings issued by 3rd defendant consequently modified by 2nd defendant as illegal, unsustainable and from what is paid of Rs.1,12,527.65ps., what is rightly payable is Rs.73,000/- in seeking to refund of Rs.39,527.65 ps.

6. The trial Court framed as many as seven issues. It found on issue No.1 that in view of the earlier suit and the findings therein and approaching for availing departmental remedies and having exhausted therein

the subsequent civil suit is not a bar. However, coming to issue Nos. 2 to 4 in crux as to whether entitlement to the declaratory relief of estimation by 3rd defendant modified by 2nd defendant for the alleged pilferage is unsustainable as sought for and permanent injunction not to disconnect and mandatory injunction for refund of the alleged excess payment other than on pilferage estimation from the slow moment of the meter of 21.3% variation, claimed refund of Rs.39,527.65 ps. Concerned, leave about other issues of the bar for injunction under Section 41 of the Specific Relief Act and sufficiency of the court fee and ultimately as to what result, the trial Court held that the findings in the earlier suit that there is a pilferage from issue No.4 operates as resjudicata. Same is now impugned in the present appeal.

7. It is the contention from the grounds of appeal vis-à-vis the oral submissions of the learned Senior Counsel, Sri S.Ravi, representing the learned counsel for the appellant/plaintiff on record that despite notice under Exs.A1 and A2 issued by the plaintiff on 15.02.1994 and subsequently to produce the original alleged seals preserved by DWs. 1 and 2 of the earlier suit and in their alleged inspection, for saying seals noticed in variance to claim as tampered, same was not produced before the Court that also proved from the

evidence of PW.1 and trial Court ignored this vital aspect and arrived a wrong conclusion in seeking to allow the appeal decreeing the suit claim as prayer for by setting aside the portion of the suit claim ended in dismissal.

8. Whereas, it is the contention of the learned Standing Counsel for the respondents-entity that the trial Court rightly came to the conclusion on merits from material available on record and there is nothing for this Court to interfere with the well considered judgment and decree of trial Court and sought for dismissal of the appeal claim with costs.

9. In fact, the three Judge Bench expression of the Apex Court in **Gopal Krishnaji Ketkar v. Mohamed Haji Latif**[1], held that it is not on whom the burden of proof lies to produce the documents to the lis for just decision of the case but for who withheld. It is irrespective of no burden, once the party is in possession of best evidence it is the duty to produce before Court and any non-production of the same leads to adverse inference. Further, in **Karnesh Kumar Singh v. State of U.P.**[2]**,** it was held also on the scope of Section 114(g) of the Evidence Act that the non-examination of a material witness or non-production of a material document leads to adverse inference.

10. Here, it is important to note that though it is the

duty of the Authorities of the defendants concerned to produce the best evidence in their custody to substantiate their contention of alleged pilferage of power by plaintiff, even impugned by the plaintiff, though notice got issued by the plaintiff to produce the seals covered by Exs.A1 and A2, they did not respond and production of the seals before Court are material to show alleged variance to the contention of pilferage and that best evidence to throw light on the core issue in dispute for notice to produce even, not produced, suffice there from to draw adverse inference as the Court has no other go. No doubt, there is a stray observation in dealing with issue No.4 of the earlier judgment exhibited as Ex.B1, which it is not a *resjudicata.* Said Kondaiah Sastry(DW.2), then A.E. examined before the trial Court in the earlier suit as Dw.1., in the present suit said A.E. or D.E.E. were not even examined and there is nothing to show they are out of reach, and their depositions not even submitted if at all they are out of reach by invoking Section 33 of the Evidence Act. The earlier judgment is not within the scope of Sections 40 or 41 or 43 of the Evidence Act even to operate any of its findings as right in *rem* and even there is no finding on an issue with specific answering as judgment inter parties to bind. Further even in the earlier suit PWs.1 and 2 made certain observations. Those depositions not even filed in the present suit much less to contradict the versions of present suit either under Section 145 r/w 155(3) of the Evidence Act. In the absence of which when depositions of living persons are inadmissible, there is nothing to say from earlier judgment in the background of facts made certain discussion regarding a deposition of a living person that cannot be formed basis as part of evidence. Once such is the case, when evidence is not adduced to show that there is pilferage and once the original seals even required to be produced not produced. There is nothing even to say seals were tampered or to say the burden is on the plaintiff as in whose premises the meter and its immediate control lies, though under pervasive control of the Department for the plaintiff has no right to middle with or to operate but for to record the consumption as licensee to say there from the burden is on the plaintiff to explain incriminating material within personal knowledge under Section 106 of the Evidence Act. Here, the best evidence when not produced despite notice there is nothing more to say against the plaintiff further to discharge his burden under Section 106 of the Evidence Act.

11. Having regard to the above, the trial Court went wrong in dismissing the suit claim instead saying that from the evidence placed before the trial Court with reference to the pleadings covered by PW.1 and DW.1

with reference to Exs.A1 to A5 and Exs.B1 and B2, there is no proof of pilferage and malpractice on the part of the plaintiff. Once, such is the case the three times of the estimated amount what is valued from the change of meter cannot be imposed but for to estimate the actual value. In fact what was the alleged actual value claimed of Rs.1,12,527.65 ps. paid by the plaintiff. The payment made no doubt was not even on protest much less by disputing the same. Thus, no refund is entitled out of said amount.

12. Accordingly and in the result, the appeal is partly allowed by setting aside the estimation made by defendants 2 and 3 covered by Exs.A4 and A5. However, dismissed the claim of mandatory injunction for refund of Rs.39,527.65 ps. Whatever from any interim direction to pay and paid if any can be sought for adjustment for future bills. There is no order as to costs.

13. Miscellaneous petitions, if any pending, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:28-01-2016
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[1] AIR 1968 SC 1413
[2] AIR 1968 SC 1402