**IN THE HIGH COURT OF PUNJAB AND HARYANA,
AT CHANDIGARH**

**RSA No. 5483 of 2016 (O&M)
Date of Decision: 21.10.2016**

Madan

......Appellant

Vs.

SDO, 'OP' Sub Division, Uttar Haryana Bijli Vitran Nigam Limited Murthal District Sonepat.

.........Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Jarnail S. Saneta, Advocate,
for the appellant.

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<u>AMOL RATTAN SINGH, J. (ORAL)</u>

1. This is the second appeal of the plaintiff-appellant (hereinafter referred to as the plaintiff), who filed a suit seeking a declaration to the effect that the notices issued to him on 13.01.2012 by the respondent-defendant (hereinafter referred to as the defendant), seeking to recover Rs. 1,04,155/- + Rs. 40,000/- as compounding fee, be declared to be illegal, null and void, along with checking report no. LL-1, dated 11.01.2012 and the bills issued subsequent thereto.

2. The facts, as taken from the judgments of the Courts below, are that the plaintiff was a consumer of domestic electricity connection no. SP-334, installed by the defendant, for which, it was stated by the plaintiff, he was paying bills regularly. On 13.01.2012, he received a letter bearing no. 123, alleging that his premises had been checked by the inspecting officer on 11.01.2012 and on the basis of the checking report, for theft of energy, penalty was imposed of the aforesaid amount of Rs. 1,04,155/- along with

compounding fee of Rs. 40,000/-, vide memo no. 124, also dated 13.01.2012.

Upon receiving the notices, the plaintiff is stated to have approached the office of the defendant, requesting him to withdraw the notices as he had never committed theft of electricity and that the checking report was wholly 'false and illogical'.

It was further contended that the sanctioned load given to the plaintiff was 1.800 K.W. and when the staff of the defendant had checked the load it was shown to be in excess, i.e. 3.189 K.W, allegedly wrongly and illogically. It was further contended that though the connection was for domestic use, the checking party had wrongly shown it to be for non-domestic use and as such, the notices, the report and the bills were liable to be set aside.

The respondent-defendant not having withdrawn these notices etc., the suit was filed, seeking the aforesaid declaration as also the consequential relief of permanent and mandatory injunction, directing the defendant to restore the electricity supply of the plaintiff.

3. Upon notice issued to the defendant, he appeared and filed his written statement, taking some preliminary objections of maintainability, *locus* etc., as also on jurisdiction of the civil court to entertain the suit.

On merits, it was contended that though electricity connection no. SP-334 had been allotted to the plaintiff, however, the plaintiff had not been paying his bills regularly and that the premises of the plaintiff were checked by the staff on 11.01.2012 and the plaintiff was caught red handed while committing theft of energy. At the time of checking, the plaintiffs' son, Sunder, had been present and had signed the report on behalf of the plaintiff, by which it was found that the plaintiff was using electricity by cutting the incoming red and yellow wires and attaching them to the wires of his house, bypassing the electricity meter. Consequently, the connected load was found to be 3.189 K.W. at the spot and therefore, had been disconnected.

The checking report was signed by the vigilance team along with the son of the plaintiff.

4. No replication having been filed, the following issues were framed by the learned Additional Civil Judge (Senior Division), Sonepat:-

> "1. Whether the plaintiff is entitled to a decree for declaration to the effect that the alleged notices vide memos no. 124 both dated 13.01.2012 amounting to Rs. 1,04,155/- and amount to Rs. 40,000/- as compounding fee and checking report LL-1, vide bills are wrong, illegal, invalid, void, *ab initio* as prayed for? OPP.
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> 2. Whether the plaintiff is entitled to a decree for permanent injunction restraining the defendant from recovering the illegal amount of Rs. 1,04,155/- and amount of Rs. 40,000/- in the colour of illegal memos till the final decision of the case as prayed for? OPP.
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> 3. Whether the plaintiff is entitled to a decree for mandatory injunction, directing the defendant to restore the electricity supply of the plaintiff as early as possible as prayed for? OPP
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> 4. Whether the suit of the plaintiff is not maintainable in the present form? OPD

5. Whether the plaintiff has got no *locus standi* or any cause of action to file the present suit? OPD

6. Whether the plaintiff is estopped by his own act and conduct to file the present suit? OPD

7. Whether the plaintiff has not come to the court with clean hands and has suppressed the material facts and has filed the present suit just to harass and humiliate the answering defendant? OPD

8. Relief."

5. The plaintiff examined himself as PW1, tendering his affidavit as Ex. PW1/A, reiterating the contents of the plaint, and by way of documentary evidence, he tendered the two memos dated 13.01.2012 as Exs. P1 and P2.

The defendant examined Davender Singh, Sub-Divisional Officer, Murthal, as DW-1, and also tendered his affidavit, Ex. DW1/A, reiterating the contents of the written statement and testifying in support of compact disc, Ex. D9 and memo no. 124 dated 13.01.2012, Ex. D-10.

The defendant also examined Naresh Kumar, Junior Engineer (Vigilance Wing), Rohtak, as DW2, who tendered the following documents by way of evidence:-

"Ex. D1	:	Checking report
Ex. D2 to Ex. D7	:	Photographs
Ex. D8	:	Memo no. 124 of 13.01.2012"

Another witness, SI Virender Kumar, also from the Vigilance Wing, Rohtak, was examined by the defendant as DW3.

No evidence in rebuttal is stated to have been led by the plaintiff.

6. Upon appraising the evidence and considering the pleadings and arguments, the learned Additional Civil Judge first recorded that though the plaintiff had set up his case in support of which he had tendered his affidavit also, he did not allow himself to be cross-examined, despite several opportunities granted.

Consequently, his evidence was thereafter closed and in the absence of cross-examination of the plaintiff, who was the sole witness appearing in support of his suit, it was held that it could not be said that there had been no checking of the plaintiffs' premises on 11.01.2012.

Further discussing the testimonies of DWs 1, 2 and 3 in support of the defendant in his written statement, the learned Court found no reason to disbelieve the testimonies, supporting the documentary evidence with regard to theft of electricity.

It was also noticed that the checking report, Ex. D1, showed that the plaintiff had bypassed the meter by connecting two cable wires with his own electricity connection, and he was found to be using a load of 3.819 K.W., as against his sanctioned load of 1.800 K.W., and that the defendant had also correctly taken it to be non-domestic supply, though the sanctioned connection was for a domestic purpose.

7. On finding no reason to disbelieve the evidence led on behalf of the defendant, with the plaintiff himself not supporting his case (by not letting himself to be cross-examined), his suit was dismissed.

8. In the first appeal filed by the plaintiff, the learned District Judge, Sonepat, after noticing the facts and the pleadings taken by the

parties before the first court, firstly held that the respondent-defendant had not appeared in the appeal despite service and as such, he was proceeded against *ex parte*.

Even so, it was further held that though the SDO, Uttar Haryana Bijli Vitran Nigam Limited, Murthal, District Sonepat, had been impleaded as a defendant in the suit, the Corporation itself, i.e. the Uttar Haryana Bijli Vitran Nigam Limited, had not been impleaded. Hence, it was held that there was a non-joinder of a necessary party, in terms of Order 1 Rule 3 CPC. It was held that proceedings by officers of the Corporation are always carried out on behalf of the Corporation and as such, the Corporation was a necessary party, which was not impleaded in the suit, even in terms of Order 29 of the Code, because Rule 2 of the said order requires service upon a Corporation through its secretary or any director or other principal officers.

9. Rejecting the arguments on behalf of the appellant, based upon a judgment of the Andhra Pradesh High Court in **Addepalli Venkata Laxmi** vs. **Ayinampudi Narasimha Rao and others** AIR 1994 AP 72, to the effect that an objection must be taken at the trial stage itself and not for the first time at appellate stage and consequently, the said objection not having been taken by the defendant before the learned Civil Judge, it could not be taken at the appellate stage, the first appellate court held that the defect in the suit was noticed by the court itself and was not an argument raised on behalf of the respondent-defendant (the respondent in any case having been proceeded against *ex parte*).

10. Further noticing that though by virtue of Order 1 Rule 9 CPC, no suit shall be defeated by reason of non-joinder of parties and the Court

may deal with the matter in controversy even as regards the parties actually appearing before it, however, relying upon the proviso to the said rule, it was held that the stipulation contained in the rule itself would not apply in case of non-joinder of a necessary party.

Further holding that the SDO (OP), UHBVNL, Sub-Division Murthal, could be an additional party but with the principal being the Corporation itself, it not having been impleaded as a defendant in the suit, the suit itself was not maintainable.

11. Consequently, without discussing the merits of the case, the first appeal of the plaintiff was dismissed.

12. Before this Court, learned counsel for the appellant has submitted that the learned first appellate court dismissed the appeal of the appellant-plaintiff only on the ground of non-impleadment of the Uttar Haryana Bijli Vitran Nigam Limited (the Corporation) and as such, the matter needs to be remanded to that Court, allowing the appellant-plaintiff to implead the Corporation, in view of the fact that no such objection had been taken by the respondent-defendant himself, even in his written statement, and the Court having *suo motu* found that the Corporation was a necessary party which had not been impleaded, at least one chance should have been given to the appellant-plaintiff to implead it as a party and thereafter, the first appeal should have been decided on merits.

13. Having heard learned counsel and having considered the judgments of the learned courts below, though I am not in disagreement with the argument raised by learned counsel, to the effect that the first appellate court should have at least granted one opportunity to the appellant-plaintiff to implead a party which that Court found was necessary,

especially when the respondent-defendant had been proceeded against *ex parte*, before it, however, in the opinion of this Court, it would be a pointless exercise to remand the case for impleadment of the Corporation, if at all it was an absolutely necessary party.

Thus, though the first appellate court is the last court to determine findings of fact (unless such findings are found to be wholly perverse or not based on wholly logical reasoning), I find there would be no purpose in such remand, in view of the fact that it is seen that even before the learned Additional Civil Judge (Senior Division), Sonepat, the appellant-plaintiff did not even step into the witness box for cross-examination with regard to the contents of his plaint and the affidavit that he filed by way of his examination-in-chief.

The allegation against the appellant-plaintiff being theft of electricity, and other than his bald denial in his plaint that there was no theft, no other evidence having been led by him to that effect, whereas evidence was led by the respondent-defendant in the form of witnesses, as also a checking report, photographs concerned with the checking report, with the report also having been found to have been signed by the son of the plaintiff, I find no ground to entertain this second appeal simply on a wholly technical ground, with no purpose left in doing so.

To repeat, remanding the case to the first appellate court to determine the correctness of the finding of fact by the lower court, would be wholly purposeless, with factually no evidence led by the plaintiff in support of his stand in the suit. The defendant on the other hand, having proved his case as per his stand in his written statement and the affidavits filed by his witnesses, I find no ground to interfere with the dismissal of the suit by the learned Additional Civil Judge and the dismissal of the appeal, though on a wholly different ground than that taken by the learned first appellate court.

Consequently, finding no merit in the appeal, it is dismissed in limine but with no order as to costs.

<u>CM No. 14321-C-2016 and CM No. 14322-C-2016</u>

In view of the fact that the appeal itself has been dismissed on merits, without notice having being issued, the question of condoning the delay of 03 days in re-filing and 37 days in filing the appeal is rendered academic and is not gone into.

(AMOL RATTAN SINGH)
JUDGE

October 21, 2016
nitin

Whether speaking/reasoned Yes

Whether Reportable Yes.