

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

RSA No.807 of 2016

Date of Decision: 25.10.2017

Dr.Vivek Gupta

... Appellant

Vs.

Uttar Haryana Bijli Vitran Nigam Limited

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Sunil Chadha, Senior Advocate with
Mr. Chetan Bansal, Advocate,
for the appellants.

Mr. R.D. Bawa, Advocate,
for the respondent.

Amol Rattan Singh, J.

This 2nd appeal has been filed by the plaintiff.

His suit seeking a declaration to the effect that the bills of electricity consumption raised since 21.05.2013 by the respondent herein (defendant no.1 in the suit, hereinafter to be referred to as the Nigam), were “illegal and arbitrary”, though was decreed in his favour by the learned Civil Judge (Junior Division), Panchkula, but the first appeal filed by the respondent Nigam was allowed by the learned Additional District Judge, thereby dismissing the suit filed by him.

The plaintiff had also sought a consequential relief of mandatory injunction directing the said defendant to refund the amount of the bills charged in excess by them and yet further, a decree of permanent injunction, restraining the Nigam from charging electricity consumption under the

“Industrial Category”. Further, he had also sought a direction that the order dated 20.11.2013 passed by the Consumer Grievances Redressal Forum, Uttar Haryana Bijli Vitran Nigam, Panchkula (hereinafter to be referred to as the Forum), i.e. the 2nd defendant in the suit, was also illegal, null and void, being against the sale circulars issued by the Nigam.

2. As per the case set up by the plaintiff, he is the proprietor of M/s G & G Agro Foods, located at village Bhulla Kheri, P O Kandaiwala, Tehsil and District Panchkula. The firm was stated to be dedicated to the “horticulture activity” of mushroom farming, on agricultural land bearing Khasra No.53, Hadbast No.313, Bhoj Rajpura, Morni Hills, Panchkula. It was further stated in the plaint that on 14.08.2012 the plaintiff had applied for an electricity connection under the “horticulture category”, after which the officials of the Nigam inspected the site, and the plaintiffs' application was allowed and an electricity connection under that category was provided to him (as contended).

However, in June 2013 when he received his first electricity bill, it was seen that the tariff charged was the one applicable to connections falling under the “Industrial Category”. The plaintiff having visited the office of the Nigam requesting them to charge tariff for a 'horticulture connection', his pleas were stated to have been ignored, with a direction issued to him to immediately deposit the amount charged, failing which his connection would be disconnected.

3. The plaintiff therefore filed a complaint with defendant no.2, i.e. the consumer forum of the Nigam itself, on 05.09.2013, which was admitted on 12.09.2013.

It was further contended that in order to avoid a huge loss, the

plaintiff deposited the amount of the bill in question, but thereafter he was again charged at the same rates. Thus, by October 2013 the amount claimed by the Nigam was Rs.2,19,733/-.

The plaintiffs' contention was that agricultural tariff was to be charged @ 20 paise per unit, whereas industrial tariff was being charged at Rs.7 per unit.

Thereafter, on 22.10.2013 he received a notice with regard to the hearing of his complaint, with the electricity connection having been disconnected on 21.10.2013.

3-A. It was contended that during the hearing before the Forum, he had shown documents, including a memo bearing the heading "Sanction of the loan of Horticulture connection of Dr. Vivek Gupta". The Forum however asked the Nigam to produce instructions on the basis of which the plaintiff was being charged under the "Industrial Category", which they could not do.

The Forum is also stated to have told the plaintiff that it did not have any authority to pass any kind of orders for restoration of the connection and for the said purpose he would be required to file a civil suit, leading to filing of a suit.

4. In the meanwhile, the plaintiff had also paid 50% of the amount due, upon which his electricity connection was restored. Thereafter, however, the Forum dismissed the application of the plaintiff, with the order allegedly not supplied to him.

On 28.11.2013 he had also received a memo, dated 18.11.2013, asking him to deposit the remaining amount due within 15 days, by which date he had already filed the suit.

5. Upon notice being issued, the Nigam appeared and filed a written statement, taking preliminary objections with regard to maintainability, locus standi, concealment of facts etc., and on merits pleading that the Sale Circular No.2/2010, relied upon by the plaintiff, was only applicable to small scale mushroom farming, whereas the plaintiff was engaged in such farming on agricultural land. It was also stated that the plaintiff was fully aware of the tariff applicable to him and that he had filed the suit only to avoid payment of the bills.

It was also stated by the defendant that the test report of the load to the “office” of the plaintiff was wholly in the nature of commercial activity, including a temperature controller of 50 KW and 6 air conditioners.

Yet further, it was stated that as per circular no.U29/2012 (Ex.D2), the energy charges for 'A.P. Category' were applicable only to single pump sets used for agriculture, horticulture and fisheries, whereas the plaintiff had applied for “H.T. Industrial Category” and had also submitted a test report which was wholly in the nature of commercial activity, which could be seen even as per the memo dated 12.09.2012, issued by the National Horticulture Board.

6. The second defendant, i.e. the consumer forum of the Nigam, did not appear and was proceeded against *ex parte*.

7. No replication having been filed, the following issues were framed by the learned Civil Judge:-

- “1. Whether the bills of Electricity Consumption raised since 21.05.2013 under the tariff of “Industrial Category” by the defendant no.1 for the electricity connection of the plaintiff's (sic) bearing account No.A25LS0123064F as well as order dated 28.11.2013 passed by Consumer

Grievances Redressal Forum, UHBVN, Panchkula on the complaint of the plaintiff are liable to be set aside being null and void, if so to what effect? OPP

2. If issue no.1 is proved then whether the plaintiff is entitled to the relief of permanent injunction restraining the defendant no.1 from charging the bills of electricity consumption under the Industrial Category and from disconnecting the electricity supply of the connection of the plaintiff? OPP
3. Whether the suit is not maintainable in the present form? OPD
4. Whether the plaintiff has got no locus standi to file and maintain the present suit? OPD
5. Whether the plaintiff has not come to the Court with clean hands and suppressed the true and material facts from the court? OPD
6. Relief.”

8. In support of his claim, the plaintiff examined himself as PW1 and Som Kumar, Junior Engineer, as PW2, and also tendered the following documents in evidence (as taken from the judgments of the learned Civil Judge):-

“Ex.P1	Receipt no.072603 dated 07.11.2013
Ex.P2	Notice from SDO UHBVN dated 18.11.2013
Ex.P3	Copy of Sale Circular
Ex.P4	Copy of sales circular No. U-46/2009
Exs.P5 to P8	Electricity Bills
Exs.P9 & P10	Receipts
Exs.P11 to P14	Electricity bills
Ex.PW2/A & Mark B	Copy of application
Ex.PW2/B & Mark C	Copy of affidavit of plaintiff
Ex.PW2/C & Mark A	Copy of letter.
Mark-D	Copy of application

Mark-E

Copy of reply to RTI application.”

The defendants examined Ravinder Dhakla, SDO, as DW1 and submitted the following documents:-

“Ex.D1 Copy of letter of sales circular No.2/2001

Ex.D2 Copy of letter dated 16.08.2012”

9. Upon appraising the aforesaid evidence, the Civil Court first held that as regards the jurisdiction of that Court, it was not barred even if a consumer had earlier approached the Consumer Forum, as was held in *Dakshin Haryana Bijli Vitran Nigam Ltd. v. Sulekha 2014 (1) CC 549 (P&H)*.

10. Coming to the main issue of whether tariff was to be charged as per industrial rates or agricultural rates, the learned Civil Judge found that the sole defence witness had admitted in cross-examination that the plaintiff was operating his mushroom farm in a village and that mushroom farming activities are taking place on agricultural land. In the light of that testimony, the sale circulars, Exs.P3 and P4, were read by that Court, in which, as per the learned Civil Judge, it was stated that when mushroom cultivation is undertaken on agricultural land, specifically in rural areas, it would be charged at agricultural metered connection rates, also holding that Ex.D4 further revealed that horticulture and fisheries were to be charged @ 25 paise per unit. (The exhibit has been obviously erroneously referred to as 'D4', because there is no Ex.D4 even referred to in the list of documents exhibited by the defendants, and therefore, even the learned lower appellate Court has referred to the said document as Ex.D2, which is a circular issued by the respondents, bearing no.U-29/2012, dated 16.08.2012, giving therein the

schedule of tariff for supply of electricity by the Nigam, in the financial year 2012-13.)

The contention of the Nigam to the effect that Sales Circular no.2/2010 was only applicable to small scale mushroom farming, was rejected by that Court, on the ground that no distinction was actually ever made in any sale circular, to the effect that large scale mushroom farming would be charged as per tariff applicable to the “Industrial Category”.

11. Consequently, holding that the tariff charged under the “Industrial Category” was illegal, the bills raised accordingly and the order of the Consumer Forum of the Nigam were set aside, thereby decreeing the suit of the plaintiff.

12. In the appeal filed by the Nigam against the aforesaid judgment and decree, the Additional District Judge, on the issue of jurisdiction of the civil Court, also cited certain judgments of this Court, to hold that the civil Court had jurisdiction to entertain the suit, as the issue pertaining to any theft of electricity would be covered under “Sections 126 and 127” of the Electricity Act 2003 and only such matters (theft of electricity) would be amenable to the jurisdiction of a Special Judge in terms of Sections 135 and 153 of the said Act.

13. However, on the merits of the issue, it was found, in terms of the application filed by the plaintiff seeking sanction of an electricity connection (Ex.PW2/A), that he himself wrote “H.T.” meaning high transmission, and not low transmission. Further, relying upon the affidavit of the plaintiff, Ex.PW2/B, read with Ex.D2, i.e. the circular dated 16.08.2012, it was found by that court that industrial power supply upto 50 KWs was dealt with in 'column no.4' of the circular, whereas load exceeding 50KW was dealt with

in 'column no.5', and agricultural tubewell supply was treated wholly separately.

Thus, finding that the plaintiff himself, as per his aforesaid affidavit, had applied for an 80KW load with CO 65 KVA, it was held that he had not applied for an agricultural tubewell connection. It was further held that he had also not applied for a tubewell connection for water supply, which would then be an agricultural connection, but he was, in fact, running six air conditioners to maintain the temperature in his mushroom cultivating unit.

It was further held that the application seeking conversion from commercial to agricultural tariff, also proved that he actually had applied for an 'industrial connection', as such a connection was issued without delay, whereas 'agricultural connections' took 'some time for sanction'.

14. Thereafter, the contents of the sale circular dated 11.01.2001, Ex.P3, were noticed by the first appellate Court and the relevant part thereof has been reproduced as follows, in its judgment:-

“When mushroom cultivation is undertaken land is (sic) rural areas then it would be charged at agricultural metered connection rate for which that farmer would seek a separate metered connection. In case this activity is carried in rural domestic and urban domestic houses/areas then the farmer would require a separate connection and would be charged at domestic supply tariff. However, if the mushroom cultivation is done in a Non-domestic/commercial areas then the Non-domestic tariff would be applicable and a separate connection under Non-domestic supply category would be sought by the farmer.”

Interpreting the above, it was held that though the plaintiff was only undertaking mushroom cultivation, but with a high transmission load, commercial tariff was required to be levied.

As regards the sale circular dated 21.12.2009 (Ex.P4), it was

held by that Court that this circular was only prospective in nature and did not apply retrospectively and since the plaintiff himself had applied for a high transmission connection, even if he wanted to take benefit of the said circular, he was required to file an application making a prayer to convert his connection to the agricultural category, and if that prayer was allowed by the Nigam, then he would be charged as per the rates specified in that circular. However, for the period in question, the tariff could not have been levied at agricultural rates.

Thus, on the aforesaid reasoning, the findings of the learned Civil Judge were held to be erroneous by the lower appellate Court.

15. Lastly, it was found that earlier also a suit had been filed on the same cause of action and that the plaintiff had appeared before the court in that case on 26.11.2013, and had stated that since his electricity connection had been restored, the suit had become infructuous . However, the Court had still adjourned that suit “to 23.01.2013” (obviously meaning 23.01.2014) and nothing had been stated by the plaintiff in the current *lis* as to the fate of that suit.

Consequently, it was held that the suit in this *lis* was barred both under Order 2 Rule 2 CPC, if the other suit was pending, and if it stood decided, then a second suit would be barred on the principle of 'constructive res judicata', under Section 11 CPC.

16. On the aforesaid reasoning, the appeal of the Nigam was allowed and the judgment and the decree of the Civil Judge was set aside, with the suit of the plaintiff dismissed with costs.

17. Before this Court, in this 2nd appeal, the following questions of law have been framed by learned Senior Counsel for the appellant as require

adjudication, in his opinion:-

“i. Whether the learned lower appellate court fell in error of law while not appreciating the concession given to mushroom farming vide circular, i.e. Ex. P-3 and misreading, misconstruing and misinterpreting the said document?

ii. Whether the learned lower appellate court has acted illegally is not taking into consideration the affidavit Ex. PW2/B which otherwise very much forms part of the application (Ex. PW2/A)?

iii Whether the learned lower appellate court is justified in rendering findings even on such issues which are neither pressed nor framed?

iv Whether the learned lower appellate court has seriously erred in misreading, misconstruing and misinterpreting the oral as well documentary evidence available on record?”

Essentially of course, the basic question of law that arises is as to whether, the appellant to be imposed tariff at rates applicable to agricultural activities or to industry.

However, upon the appeal having been reserved for judgment at an earlier date, it was noticed by this Court that no arguments had been addressed by either side on the question of maintainability of the suit itself, the first appellate Court having held that the suit was also barred under Order 2 Rule 2 CPC.

Consequently, a second question of law was found by this Court to be needing adjudication, viz. the maintainability of the suit under the aforesaid provision; and on that ground the appeal was put up for re-hearing.

18. It also needs to be noticed here that no issue has been brought to the notice of this Court, ever raised at any stage, that the appellant filed the

suit in his capacity as an individual, and not on behalf of his firm, for the reason that the bills raised by the respondents were in the name of the appellant only. Hence, the firm not being a plaintiff is not an issue that is required to be looked at, it never having been raised by the respondent Nigam at any stage.

19. Coming back to the primary question of law, upon a direction given, the circulars dated 11.01.2001 and 21.12.2009, i.e. Exs. P3 and P4 before the learned Civil Judge, were produced, to determine by a first hand reading thereof, as to their contents, wholly contradictory interpretations having been given by the learned Courts below, as to the tariff applicable to the appellant-plaintiff.

20. Mr. Chadha, learned senior counsel appearing for the appellant, argued in terms of the stand of the appellant, drawing specific attention to the finding of the learned Civil Judge on sale circular no. 2/2001 (Ex.D1) relied upon by the respondents-defendants (though no exhibit number has been referred to in the said judgment, pertaining to the document). He submitted that the circular nowhere specifies that agricultural tariff is applicable only to small scale mushroom farming. (The circular has erroneously been referred to as sale circular no. 2/2010 in that judgment as per learned counsel).

He further drew attention to the fact that the said Court, upon a perusal of Exs. P-3 and P-4, i.e. the other sale circulars relied upon by the plaintiff, as also upon a perusal of Ex. D-2 relied upon by the defendants, found as a matter of fact that horticulture and fisheries were to be charged at 25 paise per unit.

Learned senior counsel drew specific attention to Ex. P-4, by which a decision was taken in the year 2009 itself, that horticulture and

fisheries would be treated in the agricultural category and hence, he argued that the findings of the learned first appellate court, to the contrary, are wholly based on perverse reasoning.

21. On the other hand, Mr. Bawa, learned counsel appearing for the respondent-defendant (Nigam) relied upon the reasoning adopted by the first appellate court, to submit that as per the circular dated 16.08.2012 (Ex. D-2), power supply up-to 50 KW came within the purview of 'industrial and finance supply', whereas load exceeding 50 KW related to agricultural tubewell supply.

Thus, the appellant-plaintiff not using the electricity connection for any tubewell but for air conditioners to keep the temperature within control in his large scale mushroom farming unit, the circular of 2001, applying to small scale mushroom farming, was not applicable to him.

22. On the question of maintainability of the suit on grounds of *res judicata*/constructive *res judicata*, Mr. Bawa referred to the finding on that aspect by the lower appellate court, as contained in paragraph 17 of its judgment, to submit that paragraph 9 of the plaint admitted the filing of a previous suit, in which the same substantial questions of law and fact were found to be involved, by that Court.

The learned Additional District Judge also came to the conclusion that as stated in the last part of paragraph 9 of the plaint in the present *lis*, the plaintiff had stated that he had appeared in that suit on 26.11.2013, informing the Court seized of that *lis*, that the present suit had been restored and therefore, the previous one had been rendered infructuous. However, the Court seized of that (other) suit had adjourned the matter to 23.01.2014, with the fate of what happened in that suit never brought on

record in the present *lis*.

Thus, on those findings, the suit filed in the present *lis* was held to be barred either under Order 2 Rule 2 CPC, with the Court further holding that if the other suit had been already decided, then the present *lis* was barred under Section 11 of the Code.

Learned counsel for the respondents further submitted that the previous suit was actually withdrawn on 23.01.2014 but with the present suit having been instituted on 04.12.2013, it was barred by the principle of *res judicata*.

23. Mr. Bawa thereafter drew attention to Order 23 Rule 1, (specifically referring to sub-rules (3) and (4) thereof), which reads as follows:-

“1. Withdrawal of suit or abandonment of part of claim.- (1) *At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim.*

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the court.

(2) *An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.*

(3) *Where the court is satisfied,—*

a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.

(4) Where the plaintiff,—

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs”

24. He submitted that the previous suit being one seeking mandatory injunction that agricultural tariff be charged and not industrial tariff, the cause of action was identical to the one in the present suit, even though the present one also sought permanent and mandatory injunction along with a declaration to the same effect.

25. In relation to the applicability of subsidized tariff for mushroom farming, Mr. Bawa also submitted that Section 65 of the Electricity Act would prevail over any circular issued by the Corporation and as such, since the Government of Haryana has not made good the subsidy that it wished to extend to the consumer, by way of actual payment of the difference between

the actual tariff and the subsidized tariff, to the Nigam, the consumers would eventually be liable to pay the actual tariff payable.

However, on a specific query, he admitted that no such stand was taken by the Nigam in its written statement filed before the learned Civil Judge.

26. He next submitted that it had been exhibited before the Courts below by way of Ex. D-2, which is the circular dated 16.08.2012, that clause 6 thereof provides for agricultural tariff only for tubewell supply, and not for consumers utilizing the electricity connection for any other purpose (other than pumping up water through tubewells).

The appellant, it is contended and admitted, is not using the connection for pumping water but is using it for cooling purposes for his mushroom farming, by installing 6 air conditioners and for ancillary purposes, drawing a load of 80 KV.

Mr.Bawa therefore prayed for dismissal of the appeal.

27. In rebuttal, Mr. Chadha, learned senior counsel appearing for the appellant, submitted that even though the ground now raised under Section 65 of the Electricity Act was not taken before the Courts below, however, it being a statutory provision, even such statutory provision does not debar the respondent-Corporation from claiming any amount which has been granted by way of subsidy to the consumer, on the basis of any policy of the State Government, as reflected by the circular issued by the respondent-Corporation itself, dated 11.01.2001.

He submitted that, however, no evidence was led by the respondents to show that they had even attempted to obtain the difference of subsidy, as was payable by the State Government to the corporation. Hence,

the argument by learned counsel for the respondents, as per learned senior counsel for the appellant, is wholly misplaced.

28. On the contention of Mr. Bawa with regard to the suit in the present *lis* being barred on the principle of *res judicata*, Mr. Chadha submitted that the 'present suit' had been filed because after the filing of the first suit, the Consumer Forum of the respondent-Corporation had dismissed the petition of the plaintiff on 28.11.2013, which was therefore also made subject matter of challenge in the present *lis*. Hence, the cause of action was not entirely the same and moreover, the factum of the earlier suit having been filed was never concealed in the second suit, with that suit having been actually withdrawn on 23.01.2014.

Hence, he submitted that for all of these three reasons, firstly, that the suit in the present *lis* also challenged the order of the Consumer Forum dated 28.11.2013, second, the fact that filing of the first suit was never concealed, and last, that it was in fact withdrawn soon after the filing of the present one, the finding of the learned first appellate Court on that question is also wholly unsustainable.

29. Learned Senior Counsel further submitted that the provisions of Order 23 Rule 1 would also not apply to the present case, in view of the fact that at the time of filing of the second suit, the first one had neither been withdrawn nor abandoned, but only subsequently, after disclosing in the second suit that the first one had been filed, was that one withdrawn about a month and half later.

On that aspect, Mr. Chadha further submitted that the reply of the defendants, to paragraph 9 of the plaint, does not even refer to the earlier suit being barred under Order 2 Rule 2 and as such, that plea at a subsequent

stage was not available to the respondents-defendants and in fact, the lower appellate Court had taken up that issue on its own.

Yet further, on the same aspect, Mr. Chadha submitted that not even an application was filed by the respondents herein before the lower appellate Court, to bring on record either the pleadings or the orders passed in the previous suit; hence, the conclusion drawn by that Court on the suit being barred under Order 2 Rule 2 CPC, is wholly erroneous, as per learned senior counsel.

30. Having considered the aforesaid arguments, as regards the primary issue of whether agricultural or industrial tariff was to be charged from the appellant, I am in agreement with the judgment of the learned Civil Judge, as also with the contentions raised by learned Senior Counsel for the appellant, that the lower appellate Court misappreciated the evidence while reversing the judgment of the lower court.

Firstly, as has been actually pointed out from the circular Ex. P-4, dated 21.12.2009, it is very categorically stated therein as follows:-

“The matter has now been reviewed by the State Government and it has been decided that the Horticulture and Fisheries connections are included in the Agricultural metered category. As such billing of the Horticulture and Fisheries consumers be made at the rate of 25 paise per unit under the same terms and conditions as applicable to the Agricultural consumers w.e.f. 01.12.2009.

All the connections (existing) be got shifted to the Agriculture feeders at consumer cost.

The above instructions should be brought to the notice of all concerned for strict and careful compliance.

The Sales Circular No. U-72/2006 stands amended to the above extent.”

Further, even as reproduced by the lower appellate Court, in paragraph no. 15 of its judgment, the circular dated 11.01.2001 (Ex. P-3) stipulates that “when mushroom cultivation is undertaken in agricultural land in rural areas then it would be charged at agricultural metered connection bate (sic) for which that farmer would seek a separate metered connection” (The complete reproduction by that Court has been reproduced hereinabove in paragraph 14).

It is also admitted by the respondents that the appellant is undertaking mushroom cultivation on land located in a rural area.

31. In paragraph 16 of its judgment, the lower appellate Court has stated that the circular dated 21.12.2009, Ex. P-4, was prospective in nature and could not be made to apply retrospectively. That Court wholly also lost sight of the fact that the sale circular dated 21.12.2009 was a circular issued about two and half years before the application made by the appellant, for an electricity connection, in the month of May-June 2012. Thus, as to how it was to apply retrospectively to the case of the appellant, is obviously something which that Court did not see at all.

32. The reliance of Mr. Bawa, learned counsel for the respondents, on the circular dated 16.08.2012 (Ex. D-2), also does not come to his rescue in my opinion, because though as per Clause 4 thereof, low transmission (LT) industrial supply, up-to 50 KWs, was available to industrial loads and agricultural loads (other than agricultural tubewell pump sets), at various rates staring from 535 paise per kWh going down to 498 paise kVAh, however, Clause 6 of the said circular reads as follows:-

“6. AGRICULTURAL TUBEWELL SUPPLY

(i) *Availability*

Available for Irrigation pumping
sets/Horticultural /Fisheries /Lift irrigation/MITC.

(ii) Character of service

A.C. 50 cycles, single phase, 230 volts

A.C. 50 cycles, three phase, 400 volts

(iii) Tariff

(a) Metered supply (Agricultural tube well pump sets and
Horticulture & Fisheries)

Energy Charges

(i) With motor upto 15 BHP 25 paise per unit

(ii) With motor above 15 BHP 20 paise per unit

(b) Unmetered Supply (Agricultural tube well pump sets)

Energy charges of Flat Rate:

(i) With motor upto 15 BHP Rs. 35 BHP per month

(ii) With motor above 15 BHP Rs. 30 BHP per month

(d) Lift Irrigation and MITC:

510 Paise per kWh plus fixed charges @ Rs. 150 per BHP
per month”

Thus, though Mr. Bawa tried to submit that the said agricultural tubewell supply is specific only to tubewells, which would also seem to be the case from the nomenclature of the clause itself, however, clause (i) states that the said supply is available for “Irrigation pumping sets/Horticulture/ Fisheries/Lift Irrigation/MITC”. Thus, the phrase Irrigation pumping sets is wholly separate from the words “Horticulture/Fisheries/Lift Irrigation/MITC.”

Similarly, in the tariff given at clause (iii) it was specified that it would be for metered supply for agricultural tubewell pump sets and Horticulture & Fisheries. In other words it does not say that it is for “agricultural tubewell pump sets and pump sets for horticulture and

fisheries”. If that were the case, the phrase used in clause (iii) would have been “tube well pump sets for agriculture, horticulture and fisheries” and in clause (i), as regards availability of such a connection for agricultural tubewell supply, the phrase would have read “available for tubewell pumping sets for agriculture/ horticulture/fisheries/lift irrigation/MITC”.

Very obviously the Government took a conscious decision to give impetus to horticulture and fisheries, and therefore provided for lower tariffs on par along with the agricultural activity of tubewell pumping, and hence included the said activities for a discounted rate of tariff, as is available for agricultural tubewell electricity supply.

33. It is also to be noticed that it is not denied by the respondents that mushroom farming is included within the term horticulture.

It is further to be noticed that no circular exhibited before the courts below has been brought to the notice of this Court, whereby the special concession given to mushroom farming on agricultural land, vide the sale circulars dated 11.01.2001 and 21.12.2009 (Exs. P-3 and P-4 respectively) was withdrawn at any time.

34. Further, as regards clause 4 of the circular, Ex. D-2, which provides for low transmission industrial supply up-to 50 KW, it reads as follows:-

“L.T. INDUSTRIAL POWER SUPPLY (Upto 50 kW)

(i) Availability

Available to all industrial loads, agricultural loads (other than agricultural tube well pump sets), e.g. Threshers, 'Toka' connections, pumps (other than irrigation) and flood dewatering pumps installed by the Government up to a connected load of 50 KW and existing industrial consumers as to 30th September 2010 with load above 50 KW and upto 70 KW who are on LT supply.

(ii) Character of Service

A.C. 50 cycles, single-phase, 230 volts.
A.C. 50 cycles, three phase, 400 volts (for load above 5 KW but up-to 50 KW and existing industrial consumers as on 30th September 2010 with load above 50 KW and up-to 70 KW who are on LT supply.

(iii) Tariff

(a) Upto 20 KW	535 paise per kWh
(b) Above 20 KW upto 50 KW	510 paise per kWh plus fixed charges @ Rs. 150 per KW or part thereof of the connected load per month.
(c) Existing consumers with connected load above 50 KW up to 70 KW	498 paise per kvAh plus fixed charges @ Rs. 150 per KW on part thereof of the connected load per month

Note: 80% of the connected load shall be taken into account for levying fixed charges where leviable in case of LT industrial supply.”

Hence agricultural loads other than tubewell pump sets up-to 50 Kws are otherwise to be charged different rates to those applicable to agricultural pumping sets, which are covered by Clause 6 of the said circular.

This is to be read with the fact that load sanctioned under Clause 4 is to be charged between 498 paise per kVah to 535 paise per kWh, as already noticed, whereas for agricultural pumping tubewell pumping sets (under clause 6), the load is to be charged @ 25 paise per unit for motors up-to 15 BHP and for 20 paise per unit for motors above 15 BHP.

Again, as noticed earlier, the circular dated 21.12.2009 (Ex. P-4) specifies that billing of horticulture and fisheries consumers would be made at the rate of 25 paise per unit, as per the agriculture metered category.

Therefore, horticulture and fisheries were, by a conscious decision, brought on par with metered supply as applicable to agricultural

tubewell pump sets, with a different energy charge in respect of un-metered supply to agricultural tubewell pump sets. Such unmetered supply, at a flat rate, is to be charged at the rate of Rs. 35 paise BHP per month for agricultural tubewell pump sets with a motor up-to 15 BHP and thereafter, at a rate of Rs.30 BHP per month in respect of motors with a higher power than 15 BHP.

35. Consequently, in my opinion, the interpretation attempted to be given by Mr. Bawa, learned counsel for the Nigam, to what is applicable to mushroom farming, is wholly without rationale, a very conscious decision having been taken by Government to bring horticulture and fisheries on par with metered connections supplying electricity to agricultural tubewell pump sets.

This would be obvious from a conjoint reading of the circulars Exs. P-3, P-4 and D-2.

In fact, as per the circular Ex. D-2, electricity connections even to other agricultural activities, such as for threshing etc., are to be treated differently to connections for agricultural tubewell pump sets and horticulture and fisheries.

36. Undoubtedly, as noticed by the lower appellate Court, the application made by the plaintiff on 14.08.2012 for an electrical connection for his mushroom farming (Ex. PW2/A, as pointed out), was on an application and agreement form in respect of the 'HT industrial category', but it is also seen to be accompanied by an affidavit (Ex. PW-2/B), specifically stating therein that the applicant had a need for a three phase electricity connection as per agricultural tariff rate.

Hence, the intention of the plaintiff was clear, to avail of the

concession in terms of the existing Government policy for granting lower tariff rates to agricultural activity, and mushroom farming undertaken on agricultural land in a rural area.

Though I have no doubt in my mind that he must have applied on a form meant for a connection under the industrial category, so that it was dealt with at a quicker pace, however, the application not having been rejected and undoubtedly the activity being mushroom cultivation, known to the respondents, in my opinion it would be the policy applicable for mushroom farming that would rule, rather than the kind of application form used by the plaintiff.

The observation of the lower appellate Court, that the plaintiff having consciously applied for a change of tariff to agricultural tariff, it implied that he had applied under the industrial category, is not an observation without basis; but again, in view of the fact that tariff to be actually applied would be in terms of the policy of the Government and not based on the kind of application form filled in, the plaintiff should have been levied agricultural tariff in the opinion of this Court.

37. Though no penalty clause for filling up a wrong form has been pointed out from the evidence produced before the courts below, even by way of any document attempted to be brought on record at the stage of this second appeal, yet, even while upholding the plaintiffs claim to be charged for electricity supply at rates applicable to metered agricultural connections for pumping sets, horticulture and fisheries, if any penalty is leviable upon the plaintiff for having filled in a wrong form, the respondents would be at liberty to impose any such penalty after following due procedure.

38. Consequently, the finding of the learned lower appellate Court

that the tariff applicable would be that applicable to industrial connections and not to agricultural/horticultural connection, is set aside and the finding of the learned Civil Judge is restored.

The first question of law is therefore accordingly answered.

39. As regards the question on whether the suit of the plaintiff was barred on the principle of *res judicata*, either under Section 11 of the CPC or Order 2 Rule 2 thereof, in my opinion, firstly, vide the second suit (i.e. the suit in the present *lis*), he having also challenged the order of the Consumer Forum of the respondent Nigam, (dated 28.11.2013), in the second suit, the cause of action was not entirely the same as the first one. Undoubtedly, the basic cause of action was the same and as such, it could be interpreted that the second suit was barred on the principle of *res judicata*.

Yet, the plaintiff not having concealed the factum of the filing of the first suit, and while instituting the second suit he having disclosed that fact in paragraph 9 thereof and having eventually having withdrawn the first suit on 24.01.2014, as is admitted by both learned counsel, in the opinion of this Court, there would be no bar on proceeding with the second suit.

40. As regards the reliance of Mr. Bawa on Order 23 Rule 1, the second suit not having been filed after either withdrawal or abandonment of the claim raised in the first suit and, to repeat, the factum of the first suit having been duly revealed in the plaint of the second suit, the subsequent withdrawal of the first suit, would not come within the purview of the provision, especially as the withdrawal was made pursuant to a statement made in that suit, that the withdrawal was occasioned by restoration of the suit in the present *lis*.

In this context, an old judgment of the Lahore High Court in

Mangi Lal and another vs. Radha Mohan and another AIR 1930 Lahore

599 can be cited, wherein a Division Bench observed as follows:-

“7. It is obvious that Order 23, Rule 1 refers to permission to withdraw a suit with liberty to institute a fresh suit after the first one has been withdrawn. It appears to me that the section cannot be read so as to bar a suit which has already been instituted before the other suit had been abandoned or dismissed. The learned District Judge has said that no authority has been quoted on this point, but he felt certain that the legislature could not have intended that such an obvious device should be permitted as its effect would be to defeat the provisions of the rule by dispensing with the necessity of obtaining permission of the Court.

*8. I am not concerned with the intention of the legislature as the section itself is clear and can only be applied to suits instituted after withdrawal or abandonment of previous suits. This view was taken by a single Judge of this Court in **Ram Mal v. Upendra Datt AIR 1928 Lahore 710**, a case similar to the present. With this view I am in agreement and I would, therefore, accept the appeal, set aside the judgment of the District Judge and remand the appeal to him to be decided on the other legal points and On the merits. For example, it will still be open to the appellants before the District Judge to urge that the second suit is barred under Section 16, Civil Procedure Code, and any other legal point will be open, apart from the question whether the suit is barred by reason of Order 23, Rule 1, Civil Procedure Code The court-fee on appeal in this Court will be refunded as the remand is under Order 41, Rule 23, Civil Procedure Code Parties will bear their own other costs in this Court. Costs up to the District Court will be in the discretion of the District Judge.”*

[Note: The judgment is seen to be that of a Division Bench, even though the reference to himself is in the singular in paragraph 8, the 2nd hon'ble Judge having thereafter agreed with the judgment].

The ratio of that judgment was also approved by the Supreme Court in Vimlesh Kumari Kulshrestha vs. Sambhajirao and another AIR 2009 SC 806, while also discussing other judgments on the issue.

Though in Kulshresthas' case, the second suit was filed after the first suit had been insufficiently stamped, yet, what was held by the Division Bench of the Lahore High Court has not been set aside by the Supreme Court, even while noticing that a Division Bench of this Court in Girdhari Lal Bansal vs. The Chairman, Bhakra Beas Management Board, Chandigarh and others AIR 1985 (P & H) 219, had followed the earlier judgment of the predecessor Court.

Consequently, that contention of Mr. Bawa is also rejected and the 2nd question of law is answered to the effect that the suit filed by the appellant-plaintiff in the present lis was not barred on the principle of *res judicata*, either under Order 2 Rule 2 CPC, or under Section 11 of the Code, or even under Order 23 Rule 1 thereof. The finding of the learned lower appellate Court on that aspect is therefore, set aside.

41. In view of what has been discussed heretofore, this appeal is therefore allowed and the impugned judgment and decree of the learned first appellate Court is set aside, with the appellant-plaintiff held entitled to be charged only at agricultural metered rates applicable to tubewell pump sets, horticulture and fisheries.

However, if any penalty is leviable on him as per law, for having filled in a wrong application form, the respondent would be at liberty to

initiate proceedings for the same, by due procedure, as observed in paragraph 37 hereinabove.

The appellant plaintiff having filled in a wrong application form, he is left to bear his own costs.

A decree sheet be drawn up accordingly.

October 25, 2017
dinesh

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned	Yes
Whether Reportable	Yes