IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.870 of 2008
IN
Civil Writ Jurisdiction Case No. 10139 of 2008

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1. The Bihar State Electricity Board a body constituted under the Indian Electricity Act, 1910 having its office at Bailey Road, Patna, P.S.- Kotwali in Town & District- Patna through its Chairman.
2. The Chairman, the Bihar State Electricity Board, Vidyut Bhawan, Bailey Road, Patna.
3. The Electrical Executive Engineer, Commercial and Revenue, Patna Electrical Circle, Patna.
4. Asstt. Electrical Engineer, Bihta Supply Sub-Division, Bihta, Patna.

.... Appellant/s

Versus

M/S J. M. D. Alloys Ltd., A company incorporated under the Indian Companies Act, 1956 having its registered office at Usha Complex, Kankarbagh Road, Patna and its factory at Deokuli Bihta through its Director and authorized signatory Sri Sanjay Gupta.

.... Respondent/s

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Appearance :
For the Appellant/s : Mr. Chitranjan Sinha, Sr. Advocate
Mr. Vinay Kirti Singh, Sr. Advocate
For the Respondent/s : Mr. Y.V. Giri, Sr. Advocate
Mr. Raju Giri, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY)
Date: 04-01-2018

The appellant Bihar State Electricity Board has preferred this letters patent appeal under Clause 10 of the Letters Patent against the judgment and order passed by the Writ Court in C.W.J.C. No. 10139 of 2008 dated 04.09.2008.

2. The brief facts for the purpose of deciding the present letters patent appeal lies in a narrow campus. The respondent M/s J. M. D. Alloys Limited has filed C.W.J.C. No. 10139 of 2008

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against the revised punitive bill dated 16.06.2008 raised by the appellant Bihar State Electricity Board, whereby the writ petitioner was directed to make payment of Rs.1,74,79,090/- and further directed to raise a fresh energy bill from 03.04.2008 to 24.04.2008 in terms of Clause 9.16 of the Bihar Electricity Supply Code, 2007 and in the alternative for a direction to correct the punitive bill for 32 days instead of 100 days and to declare the agreement dated 14.05.2008 as void under Section 23 of the Contract Act.

3. The Writ Court noted the foundational fact that on 16.1.2008 a new H.T.T.V meter was installed and commissioned by the Bihar State Electricity Board in the petitioner's factory, which was supplied and installed by M/s. Secure Meters Ltd. It is stated that on 1.2.2008 and 1.3.2008 the reading were made and the bills for the month of January and February, 2008 were raised, which were duly paid by the petitioner. On 2.4.2008, the officials of the Board visited the factory premises of the petitioner where it was detected that the matter was not functioning and the same was removed and sealed. A fresh meter was, thereafter, installed on 23.4.2008. The case of the petitioner is that without any approval from him merely a letter was written subsequently to the petitioner that the meter was being sent to the Laboratory of M/s. Secure Meters Ltd. situated at Udaipur for testing but the petitioner, not intending to be a party to the testing by

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the manufacturer itself did not present himself at the time of test. Subsequently, in the test report, it was alleged by M/s. Secure Meters Ltd. that the meter was tampered. Pursuant to the said report, an F.I.R. being Bihta P.S. Case No. 127/2008 was instituted on 13.5.2008 against the Director of the petitioner company and a punitive bill of Rs. 1,72,10,639/- dated 13.5.2008 was raised. Apprehending threat of disconnection, the petitioner filed a representation on 14.5.2008 for making payment of the amount under punitive bill in 24 equal monthly installment, but the respondents agreed to accept 25% of the bill at the first installment and the balance amounts to be paid in four equal monthly instalments, for which an agreement dated 14.5.2008 was entered into between the petitioner and the Electricity Board. The petitioner claims to have deposited Rs. 43,02,660/- on 5.2.2008 itself and thereafter three instalement out of four instalments till 14.8.2008.

4. Before the Writ Court, the writ petitioner has raised the plea that the Board has acted contrary to the provisions of Clause 8.14(c) (iii) of the Bihar Electricity Supply Code, 2007 by sending the meter for testing at the laboratory of M/s Secure Meters Ltd. As under the Supply Code, the requirement was, the licensee Laboratory or independent Laboratory or Electrical Inspector as agreed by the consumer should test the meter.

5. On behalf of the writ petitioner, argument was

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advanced with reference to the judgment of **M/s Shakti Cold Storage & Another Vs. The Bihar State Electricity Board and Others**, reported in **2008 (4) BBCJ 260** that the issue involved in the writ application stands covered by the judgment passed in **M/s Shakti Cold Storage & Another** (supra) where the similar order was interfered by the Writ Court.

6. The Writ Court allowed the writ application and quashed the punitive bills and directed the Board to adjust the amounts already deposited against the punitive bills contained in Annexures- 3 and 8 of the writ petition in future bills of the petitioner.

7. The Bihar State Electricity Board aggrieved by the said decision of the Writ Court preferred the present appeal. Mr. Chitranjan Sinha, learned senior counsel appearing on behalf of the appellant Bihar State Electricity Board submitted that the Writ Court has misconstrued the provisions of law and the judgment relied by the Writ Court while allowing the writ application was inapplicable to the facts and circumstances of the case. Mr. Sinha submitted that the decision in **M/s Shakti Cold Storage & Another** case is inapplicable in the peculiar facts and circumstances of the case. Referring to the Bihar Electricity Supply Code, 2007 Mr. Sinha has submitted that the respondent-writ petitioner was not entitled to any relief in equity under Clause 226 of the Constitution of India. Mr. Chitranjan Sinha,

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learned senior counsel submitted that the Writ Court failed to appreciate that the writ petitioner has not approached the Court with clean hand. He submitted that the conduct of the parties are relevant factor while considering the case in exercise of judicial review under Article 226 of the Constitution and one who does not come with clean hand is not entitled to any relief. Mr. Sinha submitted that the writ petitioner has a chequered history and in fact earlier the writ petitioner was found guilty for offence under the Electricity Act, which was approved up to the Hon'ble Apex Court. The person with that credential and backdrop was not entitled to any indulgence made by the Writ Court in a matter where the meter was removed, as being tampered/faulty and the same was sent for examination with the consent of the consumer and as such the writ petitioner was not entitled to any consideration.

8. Mr. Sinha at the very out set submitted that the case of the writ petitioner was distinguishable on the fact with the case of **M/s Shakti Cold Storage & Another** (supra). In the case of **M/s Shakti Cold Storage & Another** (supra), the meter was found non-functional and the meter was removed thereafter, defective meter, without sealing in presence of the consumer was sent for expert opinion after 13 months, such decision was behind the back of the consumer, thus the judgment of **M/s Shakti Cold Storage & Another**

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(supra) is totally inapplicable in the present case, as in the present case, the meter was sealed and sent for examination after sealing the meter in presence of the consumer. Mr. Chitranjan Sinha next submitted that the Writ Court has wrongly relied upon the judgment in the case of **Central Inland Water Transport Corporation Ltd. and another vs. Tarun Kanti Sengupta and another,** reported in **AIR 1986 SC 1571**. Mr. Sinha referred to para 90 of the aforesaid judgment, which reads as follows:

> "90. Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth-century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample under foot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable

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contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge

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each case on its own facts and circumstances."

9. Referring to the aforesaid discussion of the Apex Court in **Central Inland Water Transport Corporation Ltd.** case (supra) Mr. Sinha submitted this decision is not applicable in commercial transaction in view of the discussion made in para 90 of the judgment and thus the Writ Court has committed gross error in relying upon the judgment in the case of **Central Inland Water Transport Corporation Ltd.** (supra).

10. Mr. Sinha thereafter referred to the judgment of the Apex Court in the case of **Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and others,** reported in **AIR 1991 SC 101** and placed reliance on paragraph 251 of the judgment, which reads as follows:

> "251. In Brojonath's case (AIR 1986 SC 1571) (supra) after elaborate consideration of the doctrine of "reasonableness or fairness" of the terms and conditions of the contract vis-a-vis the relative bargaining power of the contracting parties this Court laid down that the principles deductable from the discussion made therein is in consonance with right or reason intended to secure socio-economic justice and con- forms to mandate of the equality clause in Article 14. The principle laid was that courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contact or an unfair and unreasonable clause in a contract, entered into

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> between parties who are not equal in bargaining power ..... It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscienable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal or where both parties are businessmen and the contract is a commercial transaction."

11. Referring to the aforesaid discussion of the Apex Court in **Delhi Transport Corporation** (supra) he submitted that the Commercial transaction are excluded from the applicability of unconscionable agreement concept, which was considered as opposed to public policy in the case of **Central Inland Water Transport Corporation Ltd.** (supra) and **Delhi Transport Corporation** (supra). Mr. Sinha next submitted that in the present case, the Writ Court has committed error in holding that the meter could not have been sent for examination by the Laboratory of M/s Secure Meters Ltd. This finding of the Writ Court is contrary to the settled principle of law. He submitted that the principle of estoppel by conduct is attracted in the instant case against the writ petitioner. Mr. Sinha

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submitted that the writ petitioner **cannot blow hot and cold** together. The conduct of the appellant of approbate and reprobate disentitle the writ petitioner from any relief under Article 226 of the Constitution. He submitted that the writ petitioner in the present case in order to take advantage entered into agreement and prayed for installment and after taking advantage of the installment under the agreement is stopped from altering his position. Mr. Sinha referred to the provisions of Bihar Electricity Supply Code, 2007 and in para 8.12 and 8.14 thereof and submitted that the writ petitioner is a consenting party is not allowed to question after availing the benefit of installment under the agreement. The relevant provisions of the aforesaid Bihar Electricity Supply Code, 2007 reads as follows:

> "8.12 The Licensee shall ensure tested meters are installed at the consumer premises. Meters purchased by the consumer shall be tested, installed and sealed by the licensee.
>
> The licensee shall also conduct periodical inspection/testing of the meters as per the following schedule:
>
> (a) LT Single phase meters: –at least once every five years
> (b) LT 3 phase meters (above 50 KVA): –at least once every 3 years
> (c) Other LT metering systems –at least once every 2 years
> (d) HT meters including MDI:
> – For EHT consumers (above 10MVA) – once in three months
> – For loads between 5-10MVA – Once in six months
> – Other HT consumer – at least once a year.
>
> CT and PT shall also be tested along with meters.
>
> Records of these test results shall be maintained in accordance with Rule 57 of Indian Electricity Rules, 1956.
>
> If required, the licensee may remove the existing meter for the

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purpose of testing. The representatives of the licensee must, however, produce an authenticated notice to this effect and sign the document, mentioning his full name and designation, as a receipt, before removing the meter. The consumer shall not object to such removal.

(c) The licensee may arrange for third party testing at NABL accredited test labs specified in clause 8.8 and recalibrated if required at manufacturer's work, if the testing facility is not available with them for periodical testing, or in case of consumer's request when meter is defective.

8.14 A consumer may request the licensee to test the meter, if he doubts its accuracy, or meter reading not commensurate with his consumption, stoppage of meter, damage of seal by applying to the licensee along with the requisite testing fee. The licensee shall test the meter within 7 days in urban area and 15 days in rural areas, or as otherwise provided in Standards of Performance of Distribution Licensee Regulations of the receipt of the application. Preliminary testing of meters can be carried out at the premises of the consumers through electronic testing equipment.

(c) In case of testing of meter at consumer's premises, the testing of meter shall be done for a minimum consumption of 1 kWh. The meter testing team of the licensee shall carry heating load of sufficient capacity to carry out the testing. Optical Scanner may be used for counting the pulses / revolutions or meter shall be tested as per the procedure described in IS / IER 1956.

(i) In case the meter is found O.K., no further action shall be taken.

(ii) In case the meter is found fast / slow by the licensee, and the consumer agrees to the report, the meter shall be replaced by a new meter within 15 days, and bills of previous three months prior to the month in which the dispute has arisen shall be revised in the subsequent bill as per the test results. In case meter is found to be slow, the additional charges may be recovered in installments not exceeding three, if the consumer shows his inability to pay at a time.

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(iii) If the consumer disputes the results of testing, or testing at consumer's premises is difficult, the defective meter shall be replaced by a new tested meter by the Licensee, and, the defective meter after sealing in presence of consumer, shall be tested at licensee's lab / Independent lab / Electrical Inspector, as agreed by consumer in presence of the representative of both Licensee and the consumer. The option once exercised by consumer shall not be changed. The decision on the basis of reports of the test lab shall be final on the Licensee as well as the consumer.

(d) In cases of testing of a meter in the licensee's / Independent test laboratory,

i. Consumer shall be informed of the proposed date of testing at least 7 days in advance so that he may be present at the time of testing, personally or through an authorized representative.

ii. The signature of the consumer or his authorized representative, shall be obtained on the Test Result Sheet."

12. Mr. Sinha, thus, submitted that in the present case, since the writ petitioner was a consenting party, he also entered into an agreement and also agreed for payment of punitive bill and availed the benefit of installment, is estopped from changing the position and questioning the testing of the meter and raising of punitive bill and the Writ Court has committed grave error in allowing the writ application.

13. Mr. Sinha referring to the judgment of the Apex Court in the case of writ petitioner (J. M. D. Alloys Ltd. Vs. Bihar State Electricity Board & Ors), reported in 2003 (2) PLJR SC 123 submitted that the writ petitioner was found guilty of tampering with the meter and the decision against the writ petitioner was approved by

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the Apex Court and thus in view of the judgment reported in 2003 (2) PLJR SC 123, the Writ Court was not justified in granting indulgence to the writ petitioner having such reputation and conduct of tampering with the meter, which was approved up to the Apex Court. The judgment in the case of **M/s Shakti Cold Storage** (supra) is distinguishable on the fact, as the Writ Court in that case has noted the breach of the mandatory requirement in sending the meter for scrutiny by the expert without the approval and seal of the consumer, which is not available in the present case, as the meter was sent with the consent of the writ petitioner. The writ petitioner entered into an agreement and availed the benefit of installment under the agreement.

14. Mr. Sinha referring to the judgment of the Apex Court in the case of **S. K. Jain vs. State of Haryana and another**, reported in **(2009) 4 SCC 357** submitted that Sections 23 and 28 of the Contract Act, 1872 is inapplicable in commercial contracts like the instant case and as such submitted that the Writ Court has committed gross error in interfering with the punitive bill.

15. Mr. Y. V. Giri , learned senior counsel appearing on behalf of writ petitioner submitted that in the present case the meter was installed on 16.01.2008. The competent officers of the Board inspected the meter after installation on 16.01.2008 on different dates and after inspection on 01.02.2008 and 01.03.2008 bill was

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raised, which was paid by the writ petitioner. He next submitted that in the present case, the Board has filed F.I.R. against the writ petitioner and after investigation final form was submitted and as such he submitted that the writ petitioner cannot be fastened with any liability of punitive bill in view of the fact that (i) in criminal case final form was submitted, (ii) the meter was not sent for examination by independent agency. Mr. Giri submitted that in view of the judgment of **M/s Shakti Cold Storage** (supra) there is no infirmity in the judgment of the Writ Court. However, Mr. Giri has no answer to the fact that the meter was found defective and non-functional on 02.04.2008 and in fact that the writ petitioner has never raised objection in testing of the meter by M/s Secure Meters Ltd. He has not been able to dispute the factual position that the writ petitioner represented on 14.05.2008 for making payment of the punitive bill and the fact that he has availed the benefit of installment under the agreement dated 14.05.2008.

16. Mr. Giri has not been able to dispute the factual position that the defect in the meter was found on 02.03.2008 and it was sealed with the signature of the consumer on 02.03.2008 and replaced by another meter only on 23.04.2008. Thus, for the period in between 02.04.2008 to 22.04.2008 when admittedly defective meter was removed and sealed and fresh meter was installed on 23.04.2008,

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the writ petitioner was liable to pay the punitive bill for the aforesaid period.

17. Mr. Chitaranjan Sinha, learned senior counsel in the peculiar facts and circumstances of the case has not been able to dispute the fact that prior to 02.04.2008 the authorities of the Board inspected the meter, but they have not raised any doubt about the proper functioning of the meter. There was no whisper that it was tampered or found defective or non-functional during the earlier inspection after installment on 16.01.2008 and as such he was unable to explain the liability of the writ petitioner for payment of punitive bill prior to that day when the defective meter was found during routine check and sealed.

18. We have considered the rival contention of the parties. On scrutiny of the fact we find that the fact of the present case is not similar to the case of **M/s Shakti Cold Storage** (supra). The judgment in **M/s Shakti Cold Storage** (supra) is not attracted in the present case, as in the present case the defective and non-functional meter was sealed ing presence of the consumer and it was sent for examination with the seal and signature of the consumer, which was not the case in **M/s Shakti Cold Storage** (supra). In addition thereto in the present case, the writ petitioner cannot approbate and reprobate as the writ petitioner entered into the agreement and availed the

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benefit under the agreement including the benefit of installment. In addition thereto in the present case considering the totality of the conduct of the writ petitioner including the fact that in the past the writ petitioner was found guilty for tampering of the meter and the same was approved by the Hon'ble Apex Court, we are of the considered view that the Writ Court was not justified in quashing the entire punitive bill relying upon the judgment of **M/s Shakti Cold Storage** (supra). The reliance placed by the Writ Court on the judgment in the case of **Central Inland Water Transport Corporation Ltd.** (supra) is inapplicable in the present case.

19. Considering the totality of the facts situation, we partly allow the appeal, set aside the order and judgment of the Writ Court dated 04.09.2008 and direct the Board to raise fresh punitive bill in accordance with law for the period 02.04.2008 to 22.04.2008.

20. In the result, the appeal is partly allowed to the extent indicated hereinabove.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

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