

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 03.10.2019	Delivered on: 08.11.2019
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CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM
S.A.No.1157 of 2005

- 1.Tamil Nadu Electricity Board
Rep.by Assistant Engineer / O & M
Mylam.
 - 2.Tamil Nadu Electricity Board
Rep.by Executive Engineer / O & M
Tindivanam.
 - 3.Tamil Nadu Electricity Board
Rep.by Assistant Account Office
Tindivanam. Appellants/Defendants
- Vs.
- Kalivaradha Gounder Respondent/Plaintiff

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the decree and judgment dated 19.10.2004 made in A.S.No.87 of 2002 by the Principal Sub-Court, Tindivanam, reversing the judgment and decree dated 31.10.2002 made in O.S.No.83 of 1996 by the District Munsif-Cum-Judicial Magistrate, Vanur.

For Appellants : Mr.V.Viswanathan
Standing Counsel

For Respondent : Mr.P.B. Balaji

JUDGMENT

This Second Appeal has been filed by the defendants against the judgment and decree passed by the Principal Sub-Judge, Tindivanam in A.S.No.87 of 2002 dated 19.10.2004, reversing the judgment and decree passed by the District Munsif-Cum-Judicial Magistrate, Vanur in O.S.No.83 of 1996 dated 31.10.2002.

2. The respondent herein had filed a suit in O.S.No.2 of 1995 on the file of the District Munsif Court, Tindivanam, to declare the assessment in communication No.AB.No.73/94 dated 04.08.1994 for a sum of Rs.3,61,350/- as illegal, arbitrary and void and for consequential relief of permanent injunction to restrain the defendants from recovering the said amount from him and also for permanent injunction to restrain the defendants from disconnecting the service S.C.No.59 at Semangalam Village, Vanur Taluk. The said suit was subsequently transferred to the District Munsif-Cum-Judicial Magistrate, Vanur and renumbered as O.S.No.83 of 1996. The learned District Munsif-Cum-Judicial Magistrate, Vanur, by the judgment dated 31.10.2002 had dismissed the said suit with costs.

3. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.87 of 2002 on the file of the Principal Sub-Judge, Tindivanam. The learned Sub-Judge, by the judgment dated 19.10.2004 had allowed the said appeal and set aside the judgment and decree passed by the trial Court and decreed the suit as prayed for without costs. Feeling aggrieved, the defendants have filed the present Second Appeal.

4. For the sake of convenience, the parties are referred to as described before the trial Court.

5. The averments made in the plaint are, in brief, as follows:-

(a) The plaintiff is having a service connection in S.C.No.59 with a connected load of 10 H.P. for agricultural purpose. He also applied for service of a new connection to have a connected load for 20 H.P. for which, a sum of Rs.500/- was remitted on 20.04.1994. The plaintiff had received a communication on 25.04.1994 from the Executive Engineer, Tamil Nadu Electricity Board (Operation and Maintenance) Cuddalore, stating that the plaintiff has to pay a sum of Rs.25,000/- for getting electricity connection. Further, an Engineer from Vilianur, who came to inspect the Transformer, intimated to the plaintiff that a new transformer is to be erected which may require Rs.2,00,000/- to be remitted and for that the plaintiff expressed the inability to pay huge amount. After discussion, the concerned authority demanded extra amount of Rs.5000/- for himself and promised to give service without any payment by the plaintiff. This led for a heated discussion between the plaintiff and the official person in May, 1994. Due to the said

discussion, misunderstanding arose between the plaintiff and the authority concerned. On the alleged date of inspection i.e., on 30.09.1994, the plaintiff was at Pondicherry. While plaintiff got down from Bus on returning from Pondicherry, after treatment for his ill health, he was called by the Sub Inspector of Police, Vanur. When he was about to cross the police station, he was informed by the Sub- Inspector that a First Information Report has been registered based on the complaint given by the Electricity Board and thereafter, he was arrested and subsequently, he was released on bail.

(b) After a lapse of more than three weeks, the plaintiff was surprised to receive a communication in No.200/1994 dated 30.05.1994 from the Assistant Executive Engineer, Tindivanam calling upon the plaintiff to show cause as to why penal assessment should not be made for theft of energy found on inspection on 13.05.1994. The theft of energy is said to be for the motor erected in borewell where new service was sought for a 20 H.P. Electric motor. Actually there was no theft of energy. The plaintiff never took any energy directly from the pole or from overhead lines by using hook. The communication also stated that Black and Red cables were used to a distance of 100 feet. If really the plaintiff had committed theft of energy, he would have taken it only from the nearest poll. The pole that is nearest is No.17. In order to victimise the plaintiff, the Tamil Nadu Electricity Board issued such kind of communication and none of the wire or other materials were seized. On receipt of the said communication, the plaintiff approached the local officer and he said that there is no problem and the matter can be settled.

(c) Thereupon the plaintiff did not send any reply. Subsequently, the Electricity Board had sent an assessment order directing the plaintiff to pay a sum of Rs.3,61,350/-. The calculation arrived at by the Electricity Board is not correct. The motor 20 H.P. was purchased only on 10.01.1994 and that being so, it would not be proper to calculate for one year. Further, the defendants threatened that if the plaintiff failed to pay the electricity amount, they would disconnect the service connection S.C.No.59 which is already given to the plaintiff. Hence, the plaintiff was constrained to file a suit for the aforesaid reliefs.

6. The averments made in the written statement filed by the second defendant and adopted by the first and third defendants

are, in brief, as follows:-

(a) The allegation that the plaintiff is having S.C.No.59 with a connected load of 10 H.P. is true and correct. But it is incorrect to say that the said service connection is in operation. It is also true that the plaintiff applied for service connection under the new scheme as alleged in the plaint. But, it is false to say that the visiting engineer from Viliyanur demanded Rs.25,000/- from the plaintiff and it is also false to say that a new transformer has to be erected for a cost of Rs.2,00,000/- and the said amount to be paid by the plaintiff. It is also false to allege that the visiting Engineer demanded extra amount of Rs.5000/- for himself and promised to give service connection without any payment by the plaintiff. The aforesaid allegations have been made with a view to escape from the payment of the electricity charges.

(b) On 13.05.1994 the Anti Power Theft Squad of Villupuram inspected the field of the plaintiff. The said field was not connected with any authorised service connection by the Electricity Board officials. Inspection was made by the APTS at about 10.20 A.M., on 13.05.1994. At that time, the plaintiff was operating his submersible 20 H.P. motor by tapping energy illegally from the overhead line from pole No. 17 of Vinayagapuram SS by using two black and one red cable of 7/20 gauge Aluminium wire and that would amount to theft of energy by the plaintiff. Since the motor was a submersible motor, it cannot be taken out without proper machinery and hence, the APTS did not seize the motor. The APTS through proper officials lodged a complaint on 13.05.1994 before the Vanur Police Station and a case has been registered against the plaintiff in Cr.No.211/1994. Since there was a prima facie evidence of theft of energy, the defendants as per the Board proceedings BPMS No.61 issued a show cause notice to the plaintiff on 30.05.1994. The plaintiff neither replied nor complied with the show cause notice and hence, a final assessment order was passed on 04.08.1994 and served on the plaintiff. But the plaintiff has not complied with the said final order and also filed the aforesaid suit. The allegation that the plaintiff has not committed theft of energy and hence he is not liable to pay the amount of Rs.3,61,350/- is false. Since the plaintiff has committed theft of energy, he is liable to pay the said amount and therefore the defendants prayed to dismiss the above suit.

7. Based on the aforesaid pleadings, the learned District Munsif-Cum-Judicial Magistrate, Vanur, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and also examined one more witness as PW2 and marked Exs.A1 to Ex.A7 as exhibits. On the side of the defendants, two witnesses were examined as DW1 and DW2 and six documents were marked as Exs.B1 to B6.

8. The learned District Munsif-Cum-Judicial Magistrate, Vanur, after considering the materials placed before her found that the allegation of the plaintiff that the visiting Engineer of Electricity Board demanded extra amount of Rs.5000/- is false. She further found that the plaintiff without exhausting the remedies available under the Electricity Act, directly approached the Civil Court and hence, the suit is not maintainable. Accordingly, she dismissed the suit.

9. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.87 of 2002 on the file of the Principal Sub-Judge, Tindivanam. The learned Principal Sub-Judge, Tindivanam, had allowed the said appeal and set aside the judgment and decree passed by the trial Court and decreed the suit as prayed for. Feeling aggrieved, the defendants have filed the present Second Appeal.

10. This Court, at the time of admitting the second appeal, has formulated the following substantial questions of law:-

"1. Whether in the weight of evidence on record theft of energy was not established if so, whether the appellant board is not entitled to compensation as provided in the terms & conditions of supply?

2. Whether the first Appellate Court was justified in sitting in judgment over the inspection and subsequent assessment made by the appellant board Engineer in exercise of their powers?

3. Whether not the finding of the criminal Court which is different in content and consequence is binding on the Civil Court?"

11. Heard, Mr. V.Viswanathan, learned Standing Counsel for the appellants and Mr.P.B.Balaji, learned counsel for the respondent.

12. Substantial Questions of law 1 to 3:

The learned counsel for the appellants has submitted that the first Appellate Court erred in reversing the well considered judgment and decree of the trial Court. He further submitted that the first Appellate Court failed to consider that the plaintiff failed to prove that the visiting Engineer demanded extra amount of Rs.5000/-. He further submitted that the first Appellate Court failed to see that only in case of committing theft by a Consumer, the notice will be given before inspection, but, in this case, the plaintiff tapped the energy by putting hook in the overhead lines and hence, there is no necessity to give prior notice.

13. He further submitted that the first Appellate Court failed to see that the plaintiff did not send any reply to the show cause notice. He further submitted that the first Appellate Court failed to prove the oral and documentary evidence in a proper perspective. He further submitted that the judgment of the criminal Court will not have any relevancy because the standard of proof in the criminal case and civil case are totally different. In the criminal case, the prosecution has to prove the charge beyond reasonable doubts against the accused, in civil cases, the preponderance of probability has to be taken into consideration. He further submitted that the first Appellate Court failed to consider that there is no necessity to serve copy of the intimation report to the plaintiff. He further submitted that the first appellate court failed to consider that an appeal remedy is provided in the Electricity Act itself and without exhausting the said remedy the plaintiff should not have filed a suit directly before the Civil Court. He further submitted that the trial court, taking into consideration of the aforesaid facts, had rightly dismissed the suit, but the first appellate court without considering the same in a proper perspective, had reversed the findings of the trial court and hence he prayed to allow the second appeal and set aside the judgment and decree passed by the first appellate court and restore the judgment and decree passed by the trial court and dismiss the suit.

14. Per contra, the learned counsel for the respondent/plaintiff has submitted that there is no evidence that any inspection was made on 13.05.1994. He further submitted that eventhough DW1 has deposed in his cross examination that the plaintiff was also present at the time of inspection, he did not obtain any signature from the plaintiff in the inspection report. He further submitted that eventhough it is stated in the inspection report that the defendants made inspection on 13.05.1994 at 10.20 a.m., they did not lodge a complaint immediately before the police and only in the evening they lodged a complaint before the police. He further submitted that the defendants have not seized the wires, switch box and motor to prove that the plaintiff had tapped the energy by putting hook directly in the overhead lines. He further submitted that since the defendants have not followed the principles of natural justice, the assessment order is vitiated.

15. He further submitted that the plaintiff gave an explanation in the plaint that the local officers at Mailam told him that there is no problem and the matter can be settled and hence, he did not send any reply. The said statement has not been denied by the defendants. He further submitted that for the alleged theft of energy, a criminal case was filed against the plaintiff and the same ended in acquittal. He further submitted that the judgment passed by the criminal Court will not be binding on the civil Court but the same can be taken into consideration by the civil Court.

16. He further submitted that since the defendants have not followed the principles of natural justice, the plaintiff is entitled to approach the civil Court. He further submitted that the trial Court without taking into consideration of the aforesaid facts had mechanically dismissed the suit but, the first Appellate Court after taking into consideration of the aforesaid facts in a proper perspective had rightly allowed the appeal and decreed the suit as prayed for and in the said factual findings, this Court cannot interfere and therefore, he prayed to dismiss the Second Appeal. In support of the aforesaid contentions, he relied upon the decision in P.Subramanian Vs. The Assistant Divisional Engineer and 2 Others, 1994 - Writ L.R.197

17. The trial Court after referring to the decision of this Court in the Tamil Nadu Electricity Board by its Chairman represented by its Superintending Engineer, Thanjavur and others Vs. Shanmuga Engineering College and Shanmuga Polytechnic,

Vallam, Thanjavur, (1999) 3 Law Weekly, 784 and also the decision of the Hon'ble Supreme Court in Punjab State Electricity Board and another Vs. Ashwani Kumar (1997) 5 SCC 120 has held that the plaintiff, if aggrieved by the assessment order issued by the second defendant (Ex.A6) he would avail the remedy provided under the Electricity Act, only after exhausting the said remedies, the plaintiff has got a right to file a suit. Accordingly it has dismissed the suit as not maintainable. But the first Appellate Court has held that since the defendants have not followed the procedures properly, the suit is maintainable and accordingly, allowed the appeal and set aside the judgment and decree passed by the trial Court and decreed the suit as prayed for.

18. So, this Court has to see whether the principles laid down in the aforesaid decisions will apply to the facts of this case or not. In Punjab State Electricity Board and another Vs. Ashwani Kumar (cited supra) the Hon'ble Supreme Court in para Nos.8 and 9 has held as follows:-

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

from time to time as stated above.

9. Shri Goyal has contended that the authorities do not hear the parties, nor give reasoned order. Therefore, the parties cannot, nor given reasoned order. Therefore, the parties cannot be precluded to avail of the remedy of suit. we cannot accept such a broad and generalised proposition. When the provisions for appeal by way of review has been provided by the statutory instructions, and the parties are directed to avail of the remedy, the authorities are enjoined to consider all the objections raised by the consumer and to pass, after consideration, the reasoned order in that behalf, so that the aggrieved consumer, if not satisfied with the order passed by the Board/appellate authority, can avail of the remedy available under Article 226 of the Constitution. Therefore, by necessary implication, the appropriate competent authority should here the parties, considers their objections and pass the reasoned order, either accepting or negating the claim. Of course it is not like a judgment or a civil court. It is then contended that the respondent has been subjected to pay hug amount of bill in a short period; hence, it is a case for interference. We find no force in the contention. May be that due to the advice given by the counsel, the respondent obviously has availed of the remedy of the suit, instead of departmental appeal. In out view, by necessary implication the suit is not maintainable. Therefore, the respondent is at liberty to avail the remedy of appeal within six weeks from today and raise the factual objection before consider and dispose of them as indicated earlier, on merits."

19. Following the aforesaid decision of the Hon'ble Supreme Court, this Court in the Tamil Nadu Electricity Board by its Chairman represented by its Superintending Engineer, Thanjavur and others Vs. Shanmuga Engineering College and Shanmuga Polytechnic, Vallam, Thanjavur (cited supra), has held in para No.11 as follows:-

"11....In the above circumstances, it cannot be contended that the appellants have not right to advance arguments on the question of jurisdiction of the Court. In view of the latest judgment of the Apex Court referred to above, the Civil Court has no jurisdiction to entertain the suit for declaration that the order of assessment made by the Electricity Board is not valid in law. The question whether the plaintiff is entitled to insist the defendants to fix the demand of supply meter to service 102 will not arise at this stage with exhausting the remedy before the Appellate Authority. Therefore, the plaintiff is not entitled to the relief in respect of prayer (b), (c) and (e). The plaintiff is at liberty to avail the remedy of appeal and after exhausting the said remedy, he is entitled to file the suit, if necessary..."

20. From the aforesaid decisions, it is clear that when the provision for appeal by way of review has been provided by the statutory instructions, and the parties are directed to avail of the remedy, the authorities are enjoined to consider all the objections raised by the consumer and to pass, after consideration, a reasoned order in that behalf, so that the aggrieved consumer, if not satisfied with the order passed by the Board/Appellate Authority, can avail of the remedy available under Article 226 of the Constitution.

21. In this case, in Ex.A6, itself, it is clearly stated that the plaintiff, if aggrieved by the said assessment order, can file an appeal before the Superintending Engineer, Villupuram Tamil Nadu Electricity Board, but without exhausting the said remedy he has approached the civil Court. In view of the aforesaid decisions, the plaintiff has to exhaust the said remedy and thereafter, he can file a suit.

22. In Tamil Nadu Electricity Board Vs. Chakkaravarthy Madras High Court in S.A.No.609 of 1994, it was contended that the show cause notice and letter issued by the Electricity Board are against the principles of natural justice and therefore, the plaintiff has approached the civil Court to declare the said notice and the letter as null and void. But, this Court by referring to the decision of the Hon'ble Supreme Court in Punjab State Electricity Board and another Vs. Ashwani Kumar (cited

supra) has held that without exhausting the remedy available under the Electricity Act, the plaintiff cannot maintain a suit before the civil Court. Further, it has granted one month time to file the appeal before the statutory Authority.

23. In P.P.Subramaniam Vs. The Assistant Divisional Engineer and 2 Others, (cited supra), there was no issue as to whether, the civil Court will have jurisdiction or not. In that case the petitioner had filed a Writ Petition whereas, in the present case, the plaintiff had filed a suit before the civil Court. Therefore, the aforesaid decision will not help the plaintiff.

24. The trial Court taking into consideration of all the aforesaid facts and applying the principles of law laid down by the Hon'ble Supreme Court had rightly held that the suit is not maintainable before the civil Court. But the first Appellate Court had mechanically reversed the said judgment and decree. Hence, this Court is of the view that the judgment and decree passed by the first Appellate Court are liable to be set aside. Accordingly, the substantial questions of law are answered in favour of the appellants/defendants.

25. In the result, the Second Appeal is allowed. The judgment and decree passed by the first Appellate Court are set aside. However, it is open to the respondent/plaintiff, if he is so advised to avail the remedy of appeal before the Appellate Authority, within a period of one month from the date of receipt of a copy of this judgment. If the appeal filed within the time granted, the Appellate Authority is directed to dispose of the appeal within a month thereafter. With this observation, the Second Appeal is allowed. No costs.

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Sd/-

Assistant Registrar

/true copy/

Sub Asst. Registrar

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To

1.The Principal Subordinate Judge Tindivanam.

2.The District Munsif-Cum-Judicial Magistrate,
Vanur.

3. The Section Officer,
High Court, Madras.

+1 cc to Mr.P.B.Ramanujam Advocate sr92954

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