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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision- 24.07.2019

+ RFA 1/2011

BSES YAMUNA POWER LTD. Appellant
Through: Mr.Manish Srivastav, Adv.

versus

ASHOK KUMAR Respondent
Through: Mr.Ujjwal Kr. Jha & Mr.B.P. Agarwal, Adv.

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

1. The present Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 assails the judgment and order dated 26.08.2010 passed by the learned Additional District Judge, Central, Delhi in Suit No.74/06 whereunder the suit filed by the respondent/plaintiff was decreed. The suit assailed the inspection report dated 26.05.2006 as also the speaking order dated 22.06.2006 passed by the appellant, holding the respondent guilty of dishonest abstraction of energy (DAE), and the consequential bill of Rs.8,32,422/- and sought that the same be declared as inoperative. The respondent further sought that the appellant be restrained from disconnecting the electricity supply to his premises on the ground of non-payment of the impugned bill.

2. The brief facts as emerged from the record may be noted at the outset. The respondent, who is the proprietor of M/s. Apollo Rolling Shutter Engg. Works, has been carrying out business at B-17D, Gali No.9, New Rohtak Road, Anand Parbat, Delhi and obtained an electricity connection, being K.No 11410B120014, from the appellant for the said premises.

3. On 18.05.2006, due to a short circuit, the electricity meter installed at the respondent's premises got burnt and on a written complaint made by him, the appellant replaced the said meter. Subsequently, the appellant raised demand note of Rs.4,650/- towards the said replacement which amount was duly paid by the respondent. On 22.05.2006, some officials of the appellant/BSES conducted an inspection at the premises of the respondent which was followed by another inspection on 26.05.2006, during which, as per the respondent, nothing amiss was found. Consequently, a new meter was installed at the respondent's premises on 26.05.2006. After the said replacement, the appellant conducted an inspection of the removed meter to detect any anomalies therein and an on-site inspection report thereto, along with the accompanying observations, was prepared which the respondent refused to sign. The observations in the on-site inspection report dated 26.05.2006 read as under:

"As per reference from MLCC report out joint inspection team has visited the site. At the site meter was found burnt. After saggnigating the meter resistor found in all the three incoming and outgoing phases. The ultrasonic winding also found tampered and refined. Hence it is a case of DAE. Necessary photographs have been taken at site."

4. Based on the said inspection report, the appellant issued a show cause notice dated 26.05.2006, which was followed by another show cause notice dated 01.06.2006 to the respondent. In response thereto, the respondent submitted a detailed reply on 06.06.2006 and also attended a personal hearing held in the office of the appellant on 08.06.2006. Consequent to this hearing, the appellant passed a speaking order dated 22.06.2006 wherein, after observing that the contention raised by the respondent was lacking in merits and was liable to be rejected, it was held that the on-site inspection had disclosed conclusive evidence of the respondent having tampered with his electricity meter and being liable for DAE. It was, therefore, held that DAE on the part of the respondent was established. Thus, as per the conclusions of the speaking order, the appellant raised a bill for Rs.8,32,422/- against the respondent.

5. In these circumstances, the respondent instituted the subject suit before the learned Additional District Judge pleading therein that no case of DAE had been made out against him and that the defendant/appellant had, before coming to the conclusion that the respondent was guilty of DAE, not even examined his electricity consumption pattern by downloading his CMRI data which would have clearly established that no case of theft was made out against him. It was also pleaded that the appellant had issued the impugned speaking order and bill without even dealing with the pleas taken by him in his detailed reply to the show cause notice.

6. Before, the trial court, the appellant/defendant contested the suit

by reiterating that a case of DAE was clearly made out against the respondent on the basis of the inspection report itself. It was further urged that the speaking order had been passed after considering all the submissions of the respondent and, it was, therefore, prayed that the suit be dismissed.

7. On 15.12.2006, based on the pleadings of the parties, the trial court framed the following issues:-

- “1. Whether the plaintiff has not come to the court with clean hands? OPD.*
- 2. Whether the plaintiff is entitled to the relief of declaration, as prayed for? OPP*
- 3. Whether the plaintiff is entitled to the relief of permanent injunction, as prayed for ? OPP.”*

8. After considering the evidence led on record and the submissions of the parties, the trial court held that the appellant had arrived at a conclusion that the respondent was guilty of DAE even without discussing whether the alleged tampering of the meter was corroborated by the electricity consumption pattern of the respondent. The trial court further observed that the speaking order had been passed by summarily stating that the contentions raised by the respondent/plaintiff lacked merit. The trial court, therefore, decreed the suit by observing as under:-

“10.2 Speaking order Ex.DW2/2 makes it clear that consumption pattern was neither discussed nor considered. There was no report from any independent laboratory before the Assessing Officer. The contention raised by the plaintiff in reply to show cause notice has not been discussed in speaking order. Assessing Officer Shri H.S.Semwal concluded speaking order by a single stroke by saying that contention of consumer lacks merit and is liable to be rejected. The onus was upon the

defendant to establish that, in fact, the meter was tampered in a way to record lesser consumption than the actual. In speaking order Ex.PW2/2, the Assessing Officer stated that onus was upon the consumer to keep the meter intact and in correct position. As per speaking order Ex.DW2/2, there was no collateral evidence before the Assessing Officer to really reach to the findings that the meter was tampered in the manner that it had recorded lesser consumption of units than the actual consumption. In my opinion, the speaking order Ex.DW2/2 does not fulfill the fundamental principle of law to make out a case of DAE.

10.3 *In view of the above findings, in preponderance of probabilities, plaintiff has established that impugned bill has been raised arbitrarily though there was no material to make out the case of DAE, whereas defendant has failed to establish that, in fact, the case of DAE was made out as there was no collateral evidence showing theft of electricity. In my view, plaintiff has established entitlement for the relief of declaration as well as for permanent injunction. Accordingly, issues are decided in favour of the plaintiff and against the defendant.”*

9. Aggrieved by the aforesaid judgment and decree, the present appeal has been preferred by the appellant/BSES Yamuna Power Ltd.

10. Mr.Manish Srivastav, learned counsel for the appellant submits that the trial court has erred in coming to the conclusion that no case of DAE was made out against the respondent. He submits that the present case is a blatant case of DAE as the inspection report dated 26.05.2006 clearly shows that the resistors were found to have been illegally fixed in each of the three incoming and outgoing phases. He submits that the very factum of the ultrasonic winding being tampered and refined, in itself, also shows that the respondent had tampered

with the meter in a clever manner by preserving its seal. He further submits that the lack of detailed reasons in the appellant's speaking order, for rejecting the respondent's contention, would not be an adequate reason to set aside the same especially once the inspection report has confirmed the tampering of the meter. He, therefore, prays that the impugned judgment be set aside.

11. On the other hand, Mr.Jha, learned counsel for the respondent/plaintiff while supporting the impugned judgment states that the trial court has rightly come to the conclusion that no case of DAE was made out against the respondent. He draws my attention to paragraphs 2(m) and 25(iv) the Delhi Electricity Regulatory Commission (Performance Standard Meter and Billing) Regulations, 2002 ("2002 Regulations" for short) and submits that these regulations mandate that before a consumer is booked for DAE, the factum of his guilt should be corroborated by his consumption pattern. The provisions of the 2002 Regulations deem it essential for the appellant to show that the respondent's electricity consumption pattern substantiates the allegation of meter tampering levelled against him. He further submits that without carrying out the said exercise, the appellant was not justified in issuing any show cause notice to the respondent or raising the bill in question. He contends that even though the respondent had raised various grounds in his detailed reply to the show cause notice, the appellant had conveniently not dealt with any of them at the time of passing the speaking order. He submits that in case the appellant had considered the submissions made by the respondent in his detailed reply, he

would have been absolved from the charges levelled against him by the appellant. This is also evident from the fact that after a full fledged trial, the respondent, as on 28.09.2013, stands acquitted in the criminal case being CC No. 11/07 filed against him by the appellant in the Court of the Additional Sessions Judge, Special Court (Electricity), Tis Hazari Court, Delhi. He places reliance on the decisions of this Court in ***Mukesh Mehra vs. BSES Yamuna Power Ltd.***, [168 (2010) DLT 6] and ***Bansi Lal vs. BSES Rajdhani Power Ltd.***, [169(2010) DLT 678] in support of his contention that when speaking orders do not even deal with the contentions raised by the parties, as in the present case, the same cannot be sustained. He, therefore, contends that the trial court was justified in decreeing the suit.

12. I have considered the submissions of learned counsel for the parties and, with their assistance, perused the record.

13. In order to appreciate the respondent's contention that the action of the appellant was contrary to the 2002 regulations, it would be necessary to refer to Para 2(m) and Para 25(iv) of the same, which read as under:-

*“2. (m) **Dishonest abstraction of energy (DAE)** shall mean abstraction of electrical energy where accessibility to the internal mechanism of the metering equipment and some collateral evidence is found to support the conclusion that the meter has been caused to record less energy than actually passing through it. It shall also include any other means adopted by consumer to cause the meter to stop or run slow (such as reversing the polarity of one phase of poly phase meters, changes in CT or PT etc).*

25. Procedure for booking a case for pilferage of energy

(iv) No case for DAE shall be booked only on account of one seal on the meter missing or tampered or breakage of glass window etc., unless corroborated by consumption pattern of consumer as per Regulation 26(ii) given below and such other evidence as may be available.”

14. The aforementioned extracts leave no manner of doubt that under the 2002 Regulations, before a person is held guilty of DAE, there must be some collateral evidence to conclude that the meter has been caused to record less energy than what is actually passing through it and, for this purpose, the alleged tampering must be corroborated by the consumption pattern of the consumer or any other such evidence as may be available.

15. In the present case, despite the appellant being in a position to examine the respondent's consumption pattern did not make any attempt to do so either before passing the speaking order or raising the impugned bill, the appellant has miserably failed to lead any evidence before the trial court to show the respondent's consumption pattern and therefore, the learned trial court was fully justified in holding that no case of DAE against the respondent had been made out.

16. In order to appreciate the findings of the learned trial court that the speaking order stood vitiated, it would be apposite to refer to the respondent's reply to the show cause notice and the speaking order passed by the appellant based on which the liability of Rs.8,32,422/- was sought to be fastened on the respondent. The reply dated 06.06.2006 furnished by the respondent reads as under:-

"I am in receipt of the above said show cause notice which is illegal, arbitrary and unjustified on the Following grounds:-

1. That the meter of the applicant got burnt in the morning of 18/05/2006 due to short circuit and in this regards, a complaint was made on 18.05.2006 vide No. 671685. A written complaint was also made vide no. E114106050501 dated 18/05/2006.

2. That a demand note bearing No. 06050606 dated 18/05/2006 for Rs. 4,650/- was issued and the same was paid on 18/05/2006.

3. That on 22/05/2006 an inspection was conducted by the officer of the company and as per requirement of clause 20(iii) (a) of DERC Regulation the supply was given by passing the meter. Before supply bypassed the meter was the meter was checked and no irregularities were found at site.

4. That on 26/05/2006 an inspection was conducted and at the time of inspection, all the seals of the meter were found intact and O.K. and even no allegations were made regarding tempering of seals of the C. T. Meter or meter box, which shows that there was no DAE.'

5. That since there was no allegations of tempering of any seals and hence the meter was segregated at site and at the time of segregation of the meter nothing adverse was found inside the meter, due to this reason, the meter was removed from the premises by the officers of the company and the same was taken away by the officers while taking the premises.

6. That as per clause 25 (iv) of the regulations in case of suspected DAE, the inspection team shall not remove the tempered meter but shall disconnect it from the supply and shall restore the supply through a new meter of appropriate rating but in this case, since there was no suspected DAE and hence the meter was removed from site by the officer of the company on 26/05/2006.

7. That in the notice it was nowhere alleged that any seal of the meter or meter box were found tampered which shows that there was no - DAE. However, in the notice it was alleged that resistor found in each of the incoming and outgoing which was going to the PCB but in the notice it was not mentioned that what was the effect of these resistor on the meter.

8. That if there is no effect of the resistor on the Meter and there cannot be a case of DAE as there was no loss of energy and if there is effect of these resistor on the meter then in the notice it was nowhere mentioned that the meter was tested and the same was found slow, which shows that the company is making false allegations against the applicant.

9. That once the seals of the meter box and C. T. Meter found intact and O.K. then the consumer is not at all responsible for any resistor in the Meter.

10. That in the notice it was also nowhere mentioned that these resistor are an additional device because in the electronic meter, there is a necessity of the resistor to run the meter.

11. That at the time of inspection, the connected load was found to be 33.528 KW. Against the sanctioned load of 34.32 KW which shows that the applicant never requires additional load and there is no necessity to indulge in DAE.

12. That since the electronic meter was installed in Premises of the applicant, the half hourly data can be downloaded from CMRI and from the data it can be established that what was the exact load running at a particular point of time and what was the consumption recorded by time at that time and if the consumption of the meter is not found in consonance with the load and use coupled with the tampering in the meter then only a case of DAE can be booked otherwise not. The company is required to supply the complete data so that the detailed reply can be given.

It is therefore prayed to your good self that the complete data may kindly be supplied to the applicant and a fresh opportunity of personnel hearing be given to the applicant and this notice be treated as null and void and be quashed.”

The impugned speaking order passed by the appellant on 22.06.2006 reads as under:-

“SPEAKING ORDER

REF CASE ID: YM 29050600044

REF.K.NO: 1141 0B12 0014

METER No. 17034569

USER NAME: Apollo Rolling Shelter Engg. Works

R/C NAME: Apollo Rolling Shelter

ADDRESS: B-17 D Gali No.9, New Rohtak Road, Delhi

This has reference to the inspection of connection number 1141 0B12 0014 carried by the Enforcement Inspecting Team of BYPL on 26/05/2006 when the following salient observations were made on the meter number 17034569.

- *Total Connected Land of the premises found 33.528 KW under IX category use against the sanctioned load of 34.32 KW under NF category.*
- *Three phase whole current electronic meter ultrasonic winding also found tampered and refixed.*
- *Three phase whole current electronic meter found deliberately burnt.*
- *Three phase whole current electronic meter segregated in front of the consumer and found resistors in each of the incoming and outgoing phases which are going to the PCB.*

Photographs were taken meter was seized through seizure memo as material evidence. The prima facie case of Dishonest Abstraction of Energy was initiated against you. Show-cause notice for Dishonest Abstraction of Energy was prepared at site vide letter dated 26/05/2006

requesting consumer also to attend personal hearing on 09/06/2006. Consumer refused to sign and refuse to accept show cause notice. Show cause notice were given again on 01/06/2006 through speed post to appear before Assessing Officer (Enf.) on 08/06/2006. Mr.Ashok Kumar attended the personal hearing on 08/06/06 and submitted that he was not aware of tampering of the meter.

*As per DERC regulations, the responsibility of keeping the meter under safe custody shall lie with the consumer. That the contention raised by consumer has been found to be lacking in merits and substance is liable to be rejected. Else also, the onus to prove the contrary lies on the consumer as per the regulations, which you have failed to do in the present case. **Your case falls well within the ambit of Regulations 25 & 26 of the DERC (Performance Standards Metering and Billing) Regulations as well as Section 135 & 138 of the Electricity Act, 2003,** as you have deliberately damaged/destroyed your electric meter, so as to interfere with the proper or accurate metering of electricity.*

It is observed that meter seals have been found tampering & burnt. On segregation of the meter, internal circuitry of the meter was found highly tampered. Thus, conclusive evidence of Dishonest Abstraction of Energy was detected at the time of inspection.

In view of the aforementioned facts, it is hereby logically concluded that DAE is established.

DAE bill is to be raised as per Tariff Schedule, 2005-06 and Regulation 26 of Metering & Billing Regulations of DERC. In case of default, further necessary action including lodging of complaint FIR u/s 135 & 138 of the Electricity Act, 2003 and disconnection of supply shall be taken as per rules.

Consumer is required to get connected load of 33.528 KW sanctioned.

BM (Div) restored supply through new electronic meter keeping old meter at site as material evidence."

17. Thus what emerges from the record is that the respondent had submitted a detailed reply to the show cause notice, but the appellant,

while issuing the speaking order based on which the bill was raised, has not dealt with any of the grounds raised by him. In my view, once an opportunity to show cause is given, it is expected that the competent authority would at least deal with the grounds raised therein, howsoever briefly, before passing any final order conclusively determining the liability of the consumer. In the present case, as would be evident from a perusal of the respondent's reply and the impugned speaking order, the appellant has not even referred to any of the contentions in the respondent's reply and, therefore, evidently there has been a blatant violation of the principles of natural justice. In my view, on this ground alone, the speaking order and the consequential bill are not sustainable and have been rightly declared to be inoperative by the learned trial court.

18. At this stage, learned counsel for the appellant strenuously urges that the matter be remanded back to the competent authority so as to enable it to pass a fresh speaking order after considering the pleas raised by the respondent in his reply. However, I am of the view that once the appellant has not been able to demonstrate, even before this Court, that any attempt was ever made to compare the consumer pattern or refer to the CMRI records before holding the respondent guilty of DAE, no useful purpose will be served in remanding the matter back to the competent authority. There is yet another reason as to why a remand at this belated stage is not deemed appropriate. Even though I am conscious of the fact that acquittal in a criminal trial may not be a bar to fasten a civil liability; in the facts of the present case, the respondent having been acquitted in the criminal proceedings

initiated at the behest of the appellant, after a full-fledged trial, coupled with the fact that nothing has been placed on record even before this Court to show how the respondent can be held guilty of DAE, no useful purpose would be served by remitting the matter back to the appellant.

19. In view of my aforesaid conclusions, I do not deem it necessary to refer to the decisions relied upon by the learned counsel for the respondent.

20. For the aforesaid reasons, I have no hesitation in holding that the learned trial court was completely justified in decreeing the respondent's suit.

21. The appeal, being meritless, is dismissed without any cost.

REKHA PALLI, J

JULY 24, 2019

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