2024:PHHC:006820

IN THE PUNJAB AND HARYANA HIGH COURT AT CHANDIGARH

211 **CWP-8765-2017 (O&M)**
Date of Decision: 16.01.2024

INDUS TOWERS LTD.

... Petitioner

VERSUS

DAKSHIN HARYANA BIJLI VITRAN NIGAM AND ORS

... Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

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Present: Mr. Vishal Gupta, Advocate
for the petitioner.

None for the respondents.

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VINOD S. BHARDWAJ, J. (ORAL)

Challenge in the present petition is to the assessment order bearing No.P-41/2017/707 and notice memo No.P-41/2017/708 both dated 16.03.2017 issued by the respondent-Distribution Licensee whereby a sum of Rs.10,59,637/- has been demanded from the petitioner on account of theft of energy as per Section 135(1A) and an amount of Rs.1,05,000/- has been demanded as compounding charges under Section 152 of Electricity Act, 2003.

Learned counsel for the petitioner contends that the petitioner-Company is a joint venture company of Bharti Group, Vodafone Group and Idea Group and is engaged *inter alia* in the business of leasing out of antenna sites or multi-tenant towers for a range of wire and wireless communications industries including cellular, mobile services and fixed microwaves as well as the radio and television broadcast. It is contended that the petitioner is carrying on business in the State of Haryana after its due registration with the Ministry of Communication and Information Technology on 10.01.2008 to establish the abovesaid infrastructure. An electricity connection bearing Account No.RT-21/0190 was issued to the petitioner in the name of Idea Mobile Communication at village Durgapur under City Operation Sub Division, Dakshin Haryana Bijli Vitran Nigam, Palwal. The petitioner-Company has been duly making the payment of the bills that have been raised w.r.t. the energy consumed by the petitioner-Company from time to time. It is contended that the meter reading was even though being done regularly by the employees of the respondent-Corporation, however, the billing was made on the "D" (Defective) code. The meter of the petitioner-Company was checked in the month of December 2016 for provisional 3150 units against the actual recorded consumption of 11060 units. Similarly, even in the past, the bill of the petitioner-Company in respect to the site in question was issued for August and October 2016 for 3150 provisional units against the actual recorded consumption of 10210 units and 9840 units. Thus the consumption recorded by the meter in respect to the site in question was proper and there was no dishonest extraction of electricity by the petitioner-Company, however, the bills were nonetheless being raised wrongly by the respondents. He further submits that a fault appeared in the CT chamber of the meter of the connection of the petitioner-Company and there was no output of electricity from the chamber because of burning of the current transformers inside the CT chamber. A representation was accordingly submitted by the petitioner to the respondents on 10.03.2017 for removing the fault and for restoration of the electricity supply. The abovesaid request submitted by the petitioner was marked by the office to the concerned J.E. on the same day. As per the directions of respondent No.4 i.e. the J.E., the supply was restored by breaking open the seal of the CT Chamber and by-passing the current transformer, on their own and without the consent and knowledge of the petitioner-Company. It is further contended that the abovesaid action of the concerned J.E. was in consonance with the Regulation 5.8 of HERC Regulations 29 of 2014 for restoration of supply in case of burnt meter for LT supply. Relevant extract thereof reads thus:-

"5.8 Restoration of Supply in case of Burnt Meters.

(a) For LT supply consumers.

In case a meter is found burnt either on consumer's complaint or upon inspection by the licensee, the licensee shall restore the supply within 24 hours by providing a tested meter. If it is not possible to provide a tested meter immediately, then direct supply shall be given within 24 hours and the consumer shall be charged for the period of direct supply on average basis. The licensee shall ensure that the direct supply shall not continue for more than 72 hours and within this period a tested meter shall be installed."

He contends that since in a case where a meter is found burnt either on consumer's complaint or upon inspection by the respondent-Distribution Licensee, the supply has to be restored within a period 24 hours by providing a tested meter and where the same is not possible, then supply has to be given within 24 hours by direct supply and the consumer is to be charged on average basis for the period for which the direct supply has been provided, hence, action of J.E. in giving a direct supply was thus in conformity with the above said Regulations. It is further added that instead of providing a tested meter as per requirement in the Regulations i.e. 24 hours and not later than 72 hours, the J.E. marked the application to the Foreman on 16.03.2017. The connection at site was checked again by the officials on 16.03.2017, who, however, reported that the CT Chambers were broken and two CTs were by-passed. The vigilance officials of the respondent-Distribution Licensee including the SDO (Operation) and the J.E. visited the site on the same day and found it as a case of theft of electricity. It is contended that supply having been restored at the site by the officials of respondents itself, as per the provisions of Regulation of 5.8 of HERC Regulations 29 of 2014, the same could not be portrayed as a case of theft of energy. The consequential demands on the basis of assessment under Section 135 (1A) of Electricity Act, 2003 as well as for seeking compounding of the offence are not sustainable. It is further contended that notwithstanding the petitioner having not deposited the amount for compounding as demanded by the respondent-Distribution Licensee, no FIR in the case has been registered, which further lends credence to his case. It is further argued that even though a specific assertion had been made by the petitioner about the supply having been restored by the concerned J.E. in terms of Regulation of 5.8 of HERC Regulations 29 of 2014, however, in the written statement filed by the respondents, there is no denial; rather vague and general allegations have been levelled against the petitioner and its employees. The relevant part of the written statement is extracted as under:

> *"6. That the contents of para No. 6 are wrong and denied. It is submitted that bills issued on dated 23.12.2016, 21.10.2016 & were on average basis as the meter status code was shown 'D' i.e. defective. However no representation regarding defective meter/ average billing was submitted by the consumer for the last said period so that same can be verified and corrected at that time. However defective meter can be replaced on request of consumer*

and also it can be replaced departmentally on report of area Incharge / Reading Agency.

7. That the contents of para No. 7 are wrong and denied. It is submitted that a complaint regarding supply of M / s Indus Tower having A/c No. RT21-0190 submitted by representative of M / s Indus Tower Ltd on dated 10.03.2017 in the office of respondent and get the application marked by consumer clerk to Sh. Ved Parkash JE for checking the complaint. However consumer/ representative took away the application along with him without submitting the same to the office of respondent It is also added that consumer/ representative approached to Sh. Ved Parakash JE on dated 16.03.2017, reasons best know to them (consumer/ representative) instead of 10.03.2017. Then Sh. Ved Parkash JE, Area Incharge forwarded to application to Sh Rattan Chand AFM on the same day for further site verification. Sh. Rattan Chand AFM along with Sh. Naresh LM visited the M/s Indus Tower site & found that meter box seals were broken & supply found already direct by consumer by bypassing the 2 No CT's (clearly mentioned on the site verification report by Sh. Rattan Chand AFM) The same was intimated to Sh. Ved Parkash JE. The application was also snatched by consumer from the line staff. So Sh. Ved Parkash JE, after getting the information of direct supply, visited the site immediately & found that vigilance team was already present at site and checked the premises and found all the four No. seals bearing Sr. No. M4827258, M4827260, M4827257 & M4827259 put on cubical box of LT CT meter and two No. CT's bypassed red & blue phase, hence consumer committed offence of theft of energy. So power supply got disconnected by line staff and Videography/ photography was done at site by the vigilance team

8. That the contents of para No. 8 are admitted to the extent of the regulations annexed by the petitioner The content of rest of the para are wrong and denied. Detailed reply with regard to the *incident are already given in the preceding paras and the same is not being reiterated for the sake of brevity. It has been submitted that the petitioner has committed offence of theft of energy, so he is liable to pay the penalty charge as well as compounding charge to the answering defendant.*

9. XXX XXX XXX

10. That the contents of para No.10 are correct to the extent that the defendant department visited to the premises of the petitioner and checked his premises, but it is wrong to allege that supply of the energy was running as per provision of Regulation 5.8. of HERC regulation No. 29/2014. On the contrary it is submitted that the petitioner was found to commit offence of theft by using the energy illegally by way of theft, as such on the basis of the said checking repot the notice was issued to the petitioner, which clearly shows that a case of theft of energy made out against the petitioner.

11. That the contents of para No. 11 are correct and admitted to the extent that the defendants department issued/ Memo No. F41/2017/707 dated 16.03.2017 by imposing penalty charge of Rs. 1059637/- upon the petitioner, but the rest contents of this para are strictly denied being wrong. It has been submitted that the petitioner has committed of theft of energy U/s 135 of E C. Act and is liable to pay the penalty on account of theft of energy."

(Even though the reliance of the petitioner was only on the paragraphs No.6 to 8 of the written statement, however, the other paragraphs No.10 and 11 are also found to be relevant for the purpose of adjudicating the present case. Hence, the same have been extracted above.)

Counsel further contends that the instructions issued by the respondent-Distribution Licensee in matters relating to theft of electricity mandate that before making/reporting a suspected case of theft of energy, there must be some corroborative evidence, by reflecting upon the consuming pattern of a consumer, valid temper information and such other evidence which substantiates a case of theft of energy being actually committed and not merely on account of the seals on the meter/meter cubicle missing, tampered with or being fake. It is contended that in the absence of any supportive and corroborative evidence, the case of the petitioner could not have been projected as a case of theft of energy. It has been vehemently argued that the mandatory provision and procedure required to be followed in case of theft of energy has not been followed. The assessing officer, in a case of theft of energy, could not have been an officer below the rank of Executive Engineer (Operations) and that the assessment impugned in the present case has been done by the SDO, who is not competent under the Regulation to pass the said assessment order.

It is seen from a perusal of the orders passed by this Court that there had been no representation on behalf of the respondent-Distribution Licensee compelling this Court to order to proceed *ex parte* against the said respondent vide order dated 05.07.2017. However, an advocate entered appearance on behalf of the respondent-Distribution Licensee on 30.11.2017 and last opportunity was granted to the respondents. The case has been adjourned on various dates and has remained pending since then. Even thereafter, there has been no representation on behalf of the respondents on last three dates. The position remains the same today as well. The matter relates to the year 2017, there seems to be no justification for adjourning the case to await appearance on behalf of the respondents. The matter is accordingly heard and decided in absence of the respondents.

Written statement filed by the respondent-Distribution Licensee has also been perused, wherein it has been specifically averred that the bills of August, October and December, 2016 had been issued on average basis, as the meter status report was shown as "D" (defective). No representation regarding defective meter or billing on average basis was, however, submitted by the consumer or received by the Distribution Licensee during the said period. It is contended that the complaint dated 10.03.2017 was handed over in the office of the respondent-Distribution Licensee and the same was marked by Consumer Clerk to J.E. for checking the premises. The said complaint was taken back by the representatives of the petitioner-Company for submitting the same to the office of the said respondent. It is further averred in the reply extracted earlier that the representative of the petitioner approached the J.E. on 16.03.2017 only instead of 10.03.2017. The said application was thereafter, forwarded by the J.E. to the Asstt. Foreman for verification. The site was visited by the concerned officials as well as the Lineman and the meter box seals were found to be broken and supply found to have been already made direct by the consumer by by-passing two CTs. The same was intimated by the abovesaid officials to the J.E. The application was, however, snatched by the employees of the petitioner from the staff of the respondent-Distribution Licensee. On receipt of the information as regards the direct supply, the J.E. immediately visited the site and found that the vigilance team was already present at the site and had already checked the premises and had reported that all the four number seals bearing Sr.No.M4827258, M4827260, M4827257 and M4827259 put on the cubicle box of LTCT meter and two number CTs by-passed red and blue phase. It was thus a case of theft of energy. The electricity supply was hence disconnected by the line staff after getting videography of the entire incident and the same was signed by the vigilance team itself. The assertions of the petitioner as regards the J.E. having himself restored the supply on 10.03.2017 is thus specifically denied and the specific stand of the respondent-Distribution Licensee is that the information was received by them only on 16.03.2017, when the abovesaid incident was brought to the notice of the Authority and appropriate steps against commission of theft of energy were initiated. It is further averred that being a case of theft of energy, the assessment has been rightly done; and so far as the averment of the petitioner that the electricity supply had been restored by the employees of the respondent-Distribution Licensee in terms of the Regulation of 5.8 of HERC Regulations 29 of 2014 is concerned, the same was stated to have never been undertaken by the respondent-Authorities and that the steps for seeking a direct supply by by-passing the same through the meter were initiated by the petitioner-Company at its own level.

Counsel for the petitioner contends that the abovesaid facts, agitated by the respondent-Distribution Licensee in its written statement, had been denied by the petitioner in its replication accompanying with CM-6806-CWP-2019 dated 15.10.2019.

Counsel for the petitioner has further place reliance upon the judgment of this Court in the matter ***"Narender Kumar Versus Dakshin Haryana Bijli Vitran Nigam"*** reported as ***(2015) 5 Law Herald, 3947***, wherein this Court has held in a case where employees of the respondents had visited the Filling Station and restored the electricity supply by directly connecting the third phase avoiding the meter, that the consumer cannot be held liable for committing theft of energy.

Reference was also placed on another judgment passed in the matter of ***"PSPCL Versus Kulwinder Singh"*** reported as ***(2022) 2 RCR (Criminal) 540*** in ***Regular First Appeal No.445 of 2021***, wherein it was held that Special Courts constituted under Section 153 of Electricity Act, 2003, do not have any jurisdiction to entertain, try and decide the civil liability, in the absence of pendency of trial of offences. He contends that since no FIR has been registered against the petitioner, hence, the determination of civil liability can neither be undertaken nor can it be challenged by the respondents at this stage.

I have heard the learned counsel for the petitioner and have gone through the documents and record available on case file with his able assistance.

The judgment in the matter of ***Narender Kumar (Supra)*** was in relation to the factual aspect as regards the employees of the respondent-Distribution Licensee having carried out a direct connection which fact was not disputed. However, the above issue is at a dispute in the present case. As per the facts of the present case, as referred to in the written statement filed by the respondent-Distribution Licensee demonstrate, a specific denial was made by the respondents qua having carried out a direct supply/restoration in terms of Regulation of 5.8 of HERC Regulations 29 of 2014 on any purported receipt of the application dated 10.03.2017. As a matter of fact, the respondents have denied the receipt of the application dated 10.03.2017 on that day, even though it has been heavily relied upon by the petitioner and to contend it has itself submitted the application on account of the meter being burnt. It is the specific case of the respondents that the application was presented to the J.E. for the first time only on 16.03.2017 when the abovesaid anomaly and tampering with the seals were noticed and reported. When the J.E. visited the site to verify the information so submitted, the vigilance team was already there. They had also conducted a videography of the entire incident. Hence, there is denial of the manner in which the supply has been restored to the petitioner vis-a-vis the claim made by the petitioner giving rise to the disputed questions of fact, which cannot be gone into by this Court at this juncture.

However, at the same time, it cannot be disputed that no FIR has been registered against the petitioner till date and the officials/ advocate on behalf of the respondent-Distribution Licensee has also chosen not to appear before this Court. There is thus no information as regards the status of any FIR and/or any deposit having been made by the petitioner for seeking compounding of the offence. Even though the specific claim of the petitioner is that no compounding charges have been deposited by him and notwithstanding that there was no stay granted against the respondent-Distribution Licensee for initiating action as per law and the interim order granted was only to the effect that the electricity supply was to be restored on deposit of the actual consumption charges without calling upon the petitioner for payment of alleged demand. The contention of the petitioner that the assessment has been conveyed to him by an officer who is not competent in law to carry out the assessment and that only an Executive Engineer (Operation) is competent to determine the assessment has also remained uncontroverted.

In the absence of response to the arguments of the petitioner and any reference to a document to controvert the same, the submissions deserve to the accepted. Assessment by a person not competent in law cannot be accepted to be a valid assessment. Besides, the arguments on factual aspects also remain undisputed, leaving little room for Court.

The impugned order of assessment is accordingly held to be bad at this juncture and is thus set aside. The petitioner is directed to appear before the Competent Authority of the respondent-Distribution Licensee i.e. Executive Engineer (operations), Dakshin Haryana Bijli Vitran Nigam, Palwal on 31.01.2024, whereupon the respondent-Distribution Licensee-Competent Authority shall proceed further in the matter and carry out proceedings w.r.t. the incident in accordance with law and after granting an opportunity of hearing to the petitioner.

The interim protection granted by this Court vide order dated 27.04.2017 shall operate in favour of the petitioner till adjudication of the issue by the Competent Authority.

Petition stands disposed of accordingly.

All other misc. application(s), if any, also stand(s) disposed of accordingly.

(VINOD S. BHARDWAJ)
JUDGE

JANUARY 16, 2024
rajender

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No