

Supreme Court of India

Western Elect.Sup.Co.Of Orissa ... vs M/S Baba Baijanath Roller & Flour ... on 26 March, 1947

Author: P C Ghose

Bench: Gyan Sudha Misra, Pinaki Chandra Ghose

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO . 4023 of 2014

(Arising out of Special Leave Petition (Civil) No. 3396 of 2011)

Western Electricity Supply Co. of Orissa Ltd & Ors. ...Appellants

VS

M/s Baba Baijanath Roller and Flour Mill P. Ltd. ...Respondent

With

CA No.4024 of 2014

(arising out of SLP (Civil) No.3397 of 2011)

## J U D G M E N T

Pinaki Chandra Ghose, J.

1. Leave granted.

2. This appeal is directed against an order dated August 3, 2010 passed by the High Court of Orissa allowing the writ petition filed by the respondent, quashing the bill issued by the appellant for a sum of [pic]5,10,930/- as well the notice of disconnection dated October 5, 2010.

3. The respondent-writ petitioner is a registered company, inter alia, carrying on its business under the name and style of M/s. Baba Baijnath Roller and Flour Mill Pvt. Ltd., having installed a Mill in the district of Jharsuguda and is the consumer of the appellant herein.

4. The facts of the case, briefly, are as follows :

4.1 The respondent alleged in the writ petition that on an inspection conducted by the appellant on September 9, 2002 at the premises of the respondent, the appellant intimated that at the time of inspection it was found that H.T. Meter, T.P Box's inner door and meter terminal cover quick seals, plastic seals and paper seals were tampered. In addition, L.T.T.P Box inner door quick seals, plastic seals and paper seals were found tampered. The B-Phase P.T wire was found cut as such the meter

was not getting B-Phase potential.

2. It was further brought to the notice of the respondent by the appellant that the interference with the metering arrangement was made by the respondent in order to prevent the meter from recording actual consumption which attracts Regulation 64 of the Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 1998 (hereinafter referred to as “the Code”). Accordingly, the penal charges as per rules were intimated and raised on the respondent on September 30, 2002. The appellant further called upon the respondent to submit its representation, if any, within seven days. It was intimated that in default of payment of such charges within seven days from the date of receipt of the penal bill, the power supply to the premises will be disconnected without any further notice. The penal bill was raised on the respondent/writ petitioner for a sum of [pic] 5,10,930/-. On October 5, 2002 the electricity supply was disconnected since the respondent failed to make the payment.

4.3 In these circumstances, a writ petition was filed by the respondent challenging the action on the part of the appellant before the High Court. The respondent-writ petitioner made out a case that the bill used to be received by the writ petitioner was around [pic]80,000/- per month and according to the writ petitioner/respondent, the meter was defective and recording excessive consumption.

4.4 The writ petitioner/respondent challenged the action on the part of the appellant that when the inspection was made, at that point of time the officers of the appellant made a demand for illegal gratification since refused by the Manager of the respondent-company, the officers of the appellant raised such allegations and further the Manager was forced to sign several papers under duress and coercion.

4.5 It was urged before the High Court on behalf of the respondent-company on the ground (i) that the penal bill had been issued in violation of the principles of natural justice; (ii) that the inspection was made without giving a notice and in the absence of the representative of the firm; (iii) that the allegation of tampering with seals cannot be sustained as there was no allegation that the outer seal of T.P. box was broken or tampered with; and (iv) that the penal bill could not have been raised since the meter was defective and was not recording proper consumption. By filing a counter affidavit, the appellant herein duly contested the writ petition and stated that an alternative remedy was available to the respondent under the Code. It was further submitted that in the instant case, there is no question of alleging that the meter is defective. It is a clear case of theft of electricity by the consumer and Section 26 of the Indian Electricity Act, 1910 (hereinafter referred to as “the Act of 1910”) has no application. It is submitted that Section 26(6) of the Act of 1910 is attracted only when a meter is defective and is incapable of recording the correct consumption of electricity. It was further contended on behalf of the appellant before the High Court that inspection of the meter was done in the presence of the representative of the writ- petitioner/respondent.

6. The High Court after hearing the parties held that in case of violation of principles of natural justice even if alternative remedy is available, a writ court can interfere for redressal of grievance of the petitioner. The High Court further held that the representation filed by the writ petitioner was never considered before the imposition of penalty, far less giving an opportunity of hearing to the

writ petitioner. Accordingly, the High Court held that this action of the appellant is in clear violation of the principles of natural justice. In these circumstances, the High Court set aside the penalty charges imposed by the appellant on the writ petitioner/respondent. The inspection report was also quashed on the ground that such inspection was never done in the presence of the authorised persons of the writ petitioner. The High Court further held that since the penalty is untenable, the appellant was not entitled to levy delayed payment surcharge on the penal charges treating it as old arrears or current arrears. In these circumstances, the High Court further directed to refund the amount so paid within three months. 4.7 Being aggrieved, this appeal has been filed by the appellant.

5. Learned counsel appearing on behalf of the appellant contended before us that the High Court has erred in holding that the matter should come within the purview of Section 26(6) of the Act of 1910. He submitted that the High Court ignoring the judicial pronouncements on this question undermined the authority of the licensee (appellant) to impose penalty as a consequence on a consumer even if the consumer has committed theft of electricity. By this process, the provisions of the statutory Code have been made nugatory. The meter could be subjected to tampering in various ways. The methods as detected on inspection by the officers of the appellant are more than sufficient to conclude that the meter was tampered with and did not record the actual consumption of energy consumed by the writ petitioner/respondent. He further contended that the theft of electricity is governed by the Code and not under the provisions of the Act of 1910.

6. The relevant provisions of the Act of 1910 as well as the Code, in particular Clauses 54, 56, 64, 105, 110 and 115, were duly placed before us. It will be proper for us to reproduce those hereunder:

“Section 26 - Meters. – (1) In the absence of an agreement to the contrary, the amount of energy supplied to a consumer or the electrical quantity contained in the supply shall be ascertained by means of a correct meter, and the licensee shall, if required by the consumer, cause the consumer to be supplied with such a meter:

Provided that the licensee may require the consumer to give him security for the price of a meter and enter into an agreement for the hire thereof, unless the consumer elects to purchase a meter.

(2) Where the consumer so enters into an agreement for the hire of a meter, the licensee shall keep the meter correct, and, in default of his doing so, the consumer shall, for so long as the default continues, cease to be liable to pay for the hire of the meter.

(3) Where the meter is the property of the consumer, he shall keep the meter correct and, in default of his doing so, the licensee may, after giving him seven days' notice, for so long as the default continues, cease to supply energy through the meter.

(4) The licensee or any person duly authorised by the licensee shall, at any reasonable time and on informing the consumer of his intention, have access to and be at liberty

to inspect and test, and for that purpose, if he thinks fit, take off and remove, any meter referred to in sub-section (1); and, except where the meter is so hired as aforesaid, all reasonable expenses of, and incidental to, such inspecting, testing, taking off and removing shall, if the meter is found to be otherwise than correct, be recovered from the consumer, and, where any difference or dispute arises as to the amount of such reasonable expenses, the matter shall be referred to an Electrical Inspector, and the decision of such Inspector shall be final:

Provided that the licensee shall not be at liberty to take off or remove any such meter if any difference or dispute of the nature described in sub-section (6) has arisen until the matter has been determined as therein provided.

(5) A consumer shall not connect any meter referred to in sub-section (1) with any electric supply-line through which energy is supplied by a licensee, or disconnect the same from any such electric supply-line, but he may by giving not less than forty-eight hours' notice in writing to the licensee require the licensee to connect or disconnect such meter and on receipt of any such requisition the licensee shall comply with it within the period of the notice.

(6) Where any difference or dispute arises as to whether any meter referred to in sub-section (1) is or is not correct, the matter shall be decided, upon the application of either party, by an Electrical Inspector; and where the meter has, in the opinion of such Inspector ceased to be correct, such Inspector shall estimate the amount of the energy supplied to the consumer or the electrical quantity contained in the supply, during such time, not exceeding six months, as the meter shall not, in the opinion of such Inspector, have been correct; but save as aforesaid, the register of the meter shall, in the absence of fraud, be conclusive proof of such amount or quantity:

Provided that before either a licensee or a consumer applies to the Electrical Inspector under this sub-section, he shall give to the other party not less than seven days' notice of his intention so to do.

(7) In addition to any meter which may be placed upon the premises of a consumer in pursuance of the provisions of sub-section (1), the licensee may place upon such premises such meter, maximum demand indicator or other apparatus as he may think fit for the purpose of ascertaining or regulating either the amount of energy supplied to the consumer, or the number of hours during which the supply is given, or the rate per unit of time at which energy is supplied to the consumer, or any other quantity or time connected with the supply:

Provided that the meter, indicator or apparatus shall not, in the absence of an agreement to the contrary be placed otherwise than between the distributing mains of the licensee and any meter referred to in sub-section (1):

Provided also that, where the charges for the supply of energy depend wholly or partly upon the reading or indication of any such meter, indicator or apparatus as aforesaid, the licensee shall, in the absence of an agreement to the contrary, keep the meter, indicator or apparatus correct; and the provisions of sub-sections (4), (5) and (6) shall in that case apply as though the meter, indicator or apparatus were a meter referred to in sub-section (1).

Explanation.—A meter shall be deemed to be “correct” if it registers the amount of energy supplied, or the electrical quantity contained in the supply, within the prescribed limits of error, and a maximum demand indicator or other apparatus referred to in sub-section (7) shall be deemed to be “correct” if it complies with such conditions as may be prescribed in the case of any such indicator or other apparatus.”

#### “CHAPTER - IV METERS

54. Initial power supply shall not be given without a correct meter. Meters will be installed at the point of supply or at a suitable place as the engineer may decide. The same shall be fixed preferably in the basement or ground floor in multi-storied buildings where it will be easily accessible for reading and inspection at any time. The consumer shall run his wiring from such point of supply and shall be responsible for the safety of the meter or metering equipment on his premises from theft, damage or interference.

x x x

56. The meters and associated equipment shall be properly sealed by the engineer and consumer’s acknowledgement obtained. The seals, nameplates, distinguishing numbers or marks affixed on the said equipment or apparatus shall not be interfered with, broken, removed or erased by the consumer. The meter, metering equipment, etc. shall on no account be handled or removed by any one except under the authority of the engineer. The engineer can do so in the presence of the consumer or his representative. An acknowledgement shall be taken from the consumer or his representative when seal is broken.

x x x

64. If a meter or metering equipment has been found to have been tampered or there is resistance by the consumer to the replacement of obsolete or defective meters by the engineer, the engineer may disconnect the supply after giving seven clear days show cause notice and opportunity to the consumer to submit his representation.

#### x x x Penal Charges --

105. (1) On detection of unauthorised use in any manner by a consumer, the load connected in excess of the authorised load shall be treated as unauthorised load. The

quantum of unauthorised consumption shall be determined in the same ratio as the unauthorised load stands to the authorised load.

(2) The period of unauthorised use shall be determined by the engineer as one year prior to the date of detection or from the date of initial supply if the initial date of supply is less than one year from the date of detection. If the consumer provides evidence to the contrary, the period may be varied according to such evidence. The engineer may levy penal charges in addition to the normal charges for aforesaid period of unauthorised use. Where addition of the unauthorised installation or sale or diversion would result in a reclassification according to this Code, the whole of the power drawn shall be deemed to have been drawn in the reclassified category. The consumer shall also be required to execute a fresh agreement under the reclassified category.

(3) The penal energy charges for unauthorised use of power shall be two times the charges applicable to the particular category of consumer.

(4) The penal demand charges for unauthorised use of power in cases covered under two part tariff shall be calculated on un-authorised connected load expressed in KVA multiplied by two times the rate of demand charges applicable.

#### x x x CHAPTER - XII CONSUMER PROTECTION

110. (1) A consumer aggrieved by any action or lack of action by the engineer under this Code may file a representation within one year of such action or lack of action to the designated authority of the licensee, above the rank of engineer who shall pass final orders on such a representation within thirty days of receipt of the representation.

(2) A consumer aggrieved by the decision or lack of decision of the designated authority of the licensee may file a representation within forty five days to the chief executive officer of the licensee who shall pass final orders on such a representation within forty five days of receipt of the representation.

(3) In respect of orders or lack of orders of the chief executive officer of the licensee on matters provided under Section 33 of the Act, the consumer may make a reference to the Commission under Section 37(1) of the Act.

#### x x x Overriding effect --

115. (1) The provisions of this Code shall override the provisions of OSEB (General Condition of Supply) Regulation, 1995.

(2) Nothing contained in this Code shall have effect, in so far as it is inconsistent with the provisions of Indian Electricity Act, 1910, Electricity (Supply) Act, 1948 and Rules framed thereunder as amended by the Act.”

7. Therefore, it would be evident from Section 26(6) which carves out an exception, that where there is an allegation of “fraud”, the same provision is not attracted. He further contended that invariably a plea is being taken by the consumer found to have committed theft of electricity that his meter was defective. In the instant case, in accordance with Section 26(4), an inspection was conducted in the presence of the representative of the respondent. If the meter is found to be defective on such inspection and if the respondent was desirous of availing the benefit of Section 26(6), it is the duty of the consumer under the said Section to move an application before the Electrical Inspector for getting the meter tested.

8. It was submitted that the Orissa Electricity Regulatory Commission (for short “OERC”) by virtue of Section 54 of the Orissa Electricity Reforms Act, 1995 has framed a Code on different issues including the manner in which theft of energy is to be determined. They are statutory in character. Accordingly, he submitted that the High Court has erred in dealing with the matter without taking into account the clauses of the Code which are framed to deal with the theft of electricity. Factually also, the High Court was incorrect in recording that the inspection was conducted in the absence of the consumer. It is further submitted that the decision relied on by the High Court is totally inapplicable in the facts and circumstances of this case since *Belwal Spinning Mills Ltd. v. U.P. State Electricity Board* [1] did not deal with the Code of 1998 framed by the Orissa Electricity Regulatory Commission and the distinguishable feature of the said decision is that the said decision made it clear that when there is an allegation of fraud or tampering of meter, Section 26(6) of the Act of 1910 has no application. Learned counsel further relied upon the decision in *Madhya Pradesh Electricity Board & Ors. v. Smt. Basantibai* [2] and drew our attention to paragraph 9 of the said decision and contended that Section 26(6) of the Act of 1910 has no application where there is a dispute regarding the commission of fraud in tampering with the meter and breaking the body seal is totally outside the ambit of Section 26(6) of the said Act. It is further contended that after the inspection was conducted in the presence of the representative of the consumer, details of the illegalities found on such inspection were shared with the respondent consumer, resulting in receipt of a vague reply from the consumer and was processed to raise a demand by way of a penal bill. Therefore, according to him, the requirement under the law was followed before issuance of the said penal bill. He further pointed out that on being aggrieved by such decision, the writ petitioner/respondent could have followed the statutory remedy as envisaged under Section 110 of the Code. It is further stated that the High Court did not even give any reason for the direction to refund the delayed payment surcharge.

9. In these circumstances, it is submitted that the order of the High Court cannot be sustained under the provisions of law. The penal bill was quashed only on the ground that the unit of the respondent was closed. Such fact is immaterial and irrelevant in respect of demand of a penal bill. The approach of the High Court is patently erroneous.

10. Per contra, it is submitted on behalf of the respondent that the argument of the appellant could have succeeded if the appellant could prove that the respondent had indulged in theft of electricity. It is pointed out that on October 10, 2002, the High Court directed the respondent to deposit [pic]30,000/- without prejudice and for restoration of power supply since the electricity was disconnected on October 5, 2002. The power supply was restored on deposit of [pic]10,000/- and subsequently, the respondent further deposited a sum of [pic]20,000/- in terms of the direction. It is submitted that in spite of the interim order passed by the High Court directing stay of realisation of the penal bill, the appellants went on charging delayed payment surcharge on the penal charges in monthly bills raised subsequently on the respondent. It is submitted that the meter had actually inherent defects as only the inner seal was broken but the outer seal was intact. It is true that the matter was not referred to Electrical Inspector. It is further stated that in case of a dispute between the Central Act and the State Act, Central Act will prevail upon the State Act.

11. We have noticed the facts in this case. We have also considered the Sections of the Act of 1910 and it appears to us that Section 26 is relevant only when there is any difference or a dispute arises in connection with correctness of a meter, in that case the matter shall be decided, upon being applied by either party, by an Electrical Inspector and in the opinion of the Inspector if it is found that the meter is defective, the Inspector shall estimate the amount of energy supplied to the consumer or the electrical quantity contained in the supply during such time not exceeding six months but if there is a question of fraud in tampering with the meter, in that case there is no question of applicability of Section 26 of the said Act in such a matter. In the instance case, we have asked the learned counsel appearing for the respondent whether following Section 26(6), the respondent ever asked or applied for checking of the meter by the Electrical Inspector on the ground of defective meter. The answer was in the negative. Therefore, it shows that the ingredients of Section 26(6) were not followed by the respondent to meet the necessity of checking the meter in question in accordance with the said provision.

12. We have further noticed that the inspection was made in the presence of the representative of the respondent who is a Manager of the said company and in his presence the meter was checked up and was found to be tampered with. We have also noticed that the plea of duress or coercion in signing the inspection report was raised by the respondent but in reality no allegation was made by the respondent before an appropriate authority excepting such bald allegations have been made before the writ court without any basis or evidence. Therefore that fact cannot have any bearings in deciding this matter. We cannot brush aside the said fact from the mind while dealing with the matter concerning tampering of meter. It appears to us that the said aspect has escaped the attention of the High Court and therefore, in our opinion, the High Court failed to appreciate the facts in their proper perspective. Therefore, on this ground, we find that the High Court has misconstrued the facts and the provisions of law in dealing with the matter. The provision of law which deals with tampering of metering equipments, i.e. clauses 56, 64 and 105 of the Code have not been considered by the High Court and in our opinion the High Court has failed to construe such provisions and erred in deciding the matter ignoring the said provisions. The High Court accepted the position submitted on behalf of the respondent/writ-petitioner that it was a case of defective meter and there is no question of any tampering with the meter in question. The High Court has failed to appreciate that the inspection was made and the fact of tampering of meter would appear



from the inspection report and such inspection report was signed on behalf of the respondent/writ-petitioner. Therefore, the High Court ignoring the said fact, came to the conclusion without giving any reason, that the inspection report is bad and has erred in setting aside such inspection report. Hence, such findings of the High Court cannot be sustained.

13. Therefore, in our opinion, the High Court was also wrong in not considering the rights of the appellant to raise penal charges on the respondent on the ground of unauthorised consumption by way of tampering the meter or metering equipment and has a right to raise penal bill in accordance with the provisions of Code. On this ground the High Court has erred in allowing the writ petition in favour of the respondent, quashing the penal charges and further the direction given to refund the amount. The said order is without any reason and cannot be sustained in the eyes of law. Hence, the same is set aside.

14. We have also noticed in *Madhya Pradesh Electricity Board & Ors. v. Smt. Basantibai* (supra), this Court held:

“9. It is evident from the provisions of this section that a dispute as to whether any meter referred to in sub-section (1) is or is not correct has to be decided by the Electrical Inspector upon application made by either of the parties. It is for the Inspector to determine whether the meter is correct or not and in case the Inspector is of the opinion that the meter is not correct he shall estimate the amount of energy supplied to the consumer or the electrical quantity contained in the supply during a period not exceeding six months and direct the consumer to pay the same. If there is an allegation of fraud committed by the consumer in tampering with the meter or manipulating the supply line or breaking the body seal of the meter resulting in not registering the amount of energy supplied to the consumer or the electrical quantity contained in the supply, such a dispute does not fall within the purview of sub-section (6) of Section

26. Such a dispute regarding the commission of fraud in tampering with the meter and breaking the body seal is outside the ambit of Section 26(6) of the said Act. An Electrical Inspector has, therefore, no jurisdiction to decide such cases of fraud. It is only the dispute as to whether the meter is/is not correct or it is inherently defective or faulty not recording correctly the electricity consumed, that can be decided by the Electrical Inspector under the provisions of the said Act.” In *Sub-Divisional Officer (P), UHBVNL v. Dharam Pal*[3], it appears to us that in case of tampering, there is no scope for reference to Electrical Inspector. It was held :

“9. In *State of W.B. v. Rupa Ice Factory (P) Ltd.* [2004 (10) SCC 635], it was observed as follows: (SCC p. 637, para 5) “5. As regards the second claim, namely, the claim for the period from December 1993 to December 1995, the finding of the High Court is that the Vigilance Squad had found that Respondent 1 had tapped the electric energy directly from the transformer to the LT distribution board bypassing the meter circuit. If that is so, we do not know as to why the High Court would go on to advert

to Section 26 of the Electricity Act and direct reference to the Electrical Inspector for decision under Section 26(6). In two decisions of this Court in *M.P Electricity Board v. Basantibai* [1988 (1) SCC 23] and *J.M.D. Alloys Ltd. v. Bihar SEB* [2003 (5) SCC 226] it has been held that in cases of tampering or theft or pilferage of electricity, the demand raised falls outside the scope of Section 26 of the Electricity Act. If that is so, neither the limitation period mentioned in Section 26 of the Electricity Act nor the procedure for raising demand for electricity consumed would arise at all. In this view of the matter, that part of the order of the Division Bench of the High Court, directing that there should be a reference to the Electrical Inspector, shall stand set aside. In other respects the order of the High Court shall remain undisturbed.

The appeal is allowed accordingly.”

15. In these circumstances, in our opinion, the High Court was wrong in bringing the matter within the scope of the provision of Section 26(6) of the said Act, and further the High Court was totally wrong in appreciation of facts even on the question of inspection and stated that no representative was present at that point of time. On the contrary, admittedly the Manager of the respondent at the time of the inspection was present.

16. In these circumstances, the appeals are allowed, the writ petitions filed by the respondent/writ-petitioner are dismissed and the order passed by the High Court is set aside.

.....J.

(Gyan Sudha Misra)

New

Delhi;

.....J.

March 26, 2014.

(Pinaki Chandra Ghose)

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- [1] 1997 (6) SCC 740
  - [2] 1988 (1) SCC 23
  - [3] 2006 (12) SCC 222
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