

Punjab-Haryana High Court

Dakshin Haryana Bijli Vitran ... vs M/S Sirohi Medical Center on 12 October, 2015

RSA No.4054 of 2013 (O&M)

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IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH

RSA No.4054 of 2013 (O&M)

Date of Decision: 12.10.2015

Dakshin Haryana Bijli Vitran Nigam Ltd., and others  
....Appellants

Vs

M/s Sirohi Medical Centre  
....Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Pardeep Singh Poonia, Advocate  
for the appellants.

Mr. Akshay Bhan, Senior Advocate with  
Mr. Amandeep Singh Talwar, Advocate  
for the respondent.

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1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

RAJ MOHAN SINGH, J.

[1]. Defendants are in second appeal against the judgment and decree dated 09.04.2013 passed by District Judge, Faridabad vide which judgment and decree dated 18.04.2012 passed by Civil Judge (Sr. Divn.) Faridabad was upheld and cross-objection filed by the plaintiff against part decretal of the suit was also dismissed. [2]. Plaintiffs filed suit for declaration to the effect that demand notice by the defendants is illegal and consequently defendants are liable to restore the electricity supply to the premises of the plaintiff and are also liable to pay damages @ Rs.1,000/- per day from the date of its disconnection till final realisation of the amount. MOHMED ATIK 2015.10.17 10:26 I attest to the accuracy and authenticity of this document [3]. Plead case of the plaintiff is that the plaintiff is running a medical centre at 5/3, Section 3, Ballabgarh in the name and style of "Sirohi Medical Centre". Electricity connection bearing account No.HU-21/0050 was installed in the premises in the year 2002. Plaintiff has been making payment of electricity charges regularly. However on 21.05.2009, defendant No.3 along with its other officials visited the premises of the plaintiff and reported that the seals of the meter seemed to be tampered with. The electricity meter was removed and a new meter was installed in place. It was alleged that consumer was running excess load of 26.99 KW instead of sanctioned load of 10 KW. Old meter was sent to laboratory for checking.

However, no defect was found in accuracy of meter within permissible limits. Therefore, checking report issued by the defendants was claimed to be illegal, arbitrary and consequently demand notice, calling upon the plaintiff to pay fine of Rs.13,43,179/- was claimed to be set aside.

[4]. Defendants contested the suit by taking preliminary objections regarding maintainability, jurisdiction, estoppel, concealment of facts. On merits it was alleged that Vigilance Team found running of excess load by the consumer on 21.05.2009 as the connected load was found to be 26.99 KW against sanctioned load of 10 KW. The M&T Lab report dated 22.05.2009 found that both the firm seals were tampered and meter body was also found to be tampered. A case of theft of energy by tampering meter seals was found. Plaintiff was given memo for depositing compounding fee of MOHMED ATIK 2015.10.17 10:26 I attest to the accuracy and authenticity of this document Rs.2,70,000/- i.e. Rs.10,000/- per KW of connected load i.e. 27 KW and penalty of Rs.13,43,179/- was imposed under Section 135 of the Electricity Act, 2003 (hereinafter referred to as 'the 2003 Act'). Thus, demand raised by the defendants was claimed to be valid. [5]. Trial Court framed the following issues:-

- "1. Whether the demand notice issued to defendants is illegal, null and void and not binding on the plaintiff? OPP
2. Whether suit is not maintainable in the present form? OPD
3. Whether civil court has got no jurisdiction to try the present suit?OPD
4. Whether plaintiff is estopped from filing the present suit by his own act and conduct? OPD
5. Whether plaintiff has concealed the material facts from the court? OPD
6. Relief."

[6]. Both the parties led evidence before the trial Court. The trial Court vide judgment and decree dated 18.04.2012 partly decreed the suit on the ground that report of M&T Lab Ex.P-12 showed accuracy of meter within limits and, therefore, penalty for commission of alleged theft of energy could not have been imposed upon the plaintiff. The defendants could have asked for compounding fee of Rs.10,000/- per KW on the excess load connected to the meter. Evidently the sanctioned load of the premises of the plaintiff was 10 KW.

[7]. At the time of raid, load of 26.99 KW was found. Plaintiff MOHMED ATIK 2015.10.17 10:26 I attest to the accuracy and authenticity of this document has tried to demonstrate from electricity load calculation Ex.P-28 that load of 16.185 KW was attached to the electricity connections. He alleged that load of 3 KW is against lift which was not being operated and the load of air conditioner was only 6 KW instead of 9.25 KW as shown in checking report Ex.P-1. No evidence was led by the plaintiff in respect of proving that the lift having load of 3.730 KW was not being operated on the electricity connection, rather as per Ex.P-28 itself, plaintiff has admitted that load of the appliances

had exceeded sanctioned load of 10 KW. According to own showing of the plaintiff load of different appliances mentioned in Ex.-28 is 16.185 KW. [8]. On the basis of findings recorded under issue No.1, the suit was held to be maintainable under issue No.2. Defendants contended that under issue No.3 jurisdiction of civil Court is barred under Section 153 of the Electricity Act, 2003 as for the cases involved in theft of electricity, a special Tribunal has been constituted to deal with. Trial Court dealt with this issue and found that it is a case of running of excess load on the connection and not a case of theft of energy and the plaintiff had sought declaration qua the demand notice being illegal and arbitrary and has proved the same to some extent. In view of that, trial Court held that jurisdiction of civil Court is not barred under the Act. Findings under issues No.4 and 5 were also returned on the basis of findings recorded under issue No.1 and both the issues were decided against the defendants. [9]. Demand notice issued by the defendants to the plaintiff was held to be illegal to the extent of seeking penalty from the plaintiff on MOHMED ATIK 2015.10.17 10:26 I attest to the accuracy and authenticity of this document account of alleged theft of electricity. Accordingly defendants were restrained from effecting recovery of penalty of Rs.13,43,179/- from the plaintiff, however demand notice regarding recovery of compounding fee @ 10,000/- per KW in respect of 17 KWs of excess load being run by the plaintiff on electrical installations was held to be valid and, therefore, defendants were held entitled to recover an amount of Rs.1,70,000/- from the plaintiff towards compounding fee. Since the plaintiff had already deposited an amount of Rs.6,72,000/- as per receipt Ex.P-31 in compliance to order dated 29.05.2009 passed by the trial Court, therefore, defendants were directed to refund the excess amount deposited by the plaintiff after adjusting the compounding fee in accordance with law.

[10]. Judgment and decree dated 18.04.2012 passed by Civil Judge (Sr. Divn.) Faridabad was assailed by the defendants in appeal before the lower appellate Court. Cross-objections were filed by the plaintiff against the part dismissal of the suit. Lower appellate Court dismissed the appeal vide judgment and decree dated 09.04.2013.

[11]. I have heard arguments of both the sides and have perused the material on record with assistance of both the learned counsel for the parties.

[12]. Appellants have formulated following substantial questions of law in para No.6 of grounds of appeal:-

"(i) Whether the demand notice of Rs.13,43,179/- on MOHMED ATIK 2015.10.17 10:26 I attest to the accuracy and authenticity of this document account of theft of electricity was valid and justified in view of the tampering of the meter seals and meter body?

(ii) Whether the suit of the respondent was maintainable before the Civil Court in view of the bar operative per Section 126 of the Indian Electricity Act, 2003 in case of theft of energy? [13]. Before embarking upon the issues involved in case it is relevant to consider material on record.

[14]. Checking report dated 21.05.2009 showed that meter body and seals seemed to be tampered. Connected load was found to be 26.99 KW as against sanctioned load of 10 KW. [15]. As per report of M&T Lab both the firm seals were found to be tampered, meter body was also found tampered, in

the column of remarks accuracy of meter was found within limits. In view of accuracy of meter and running of excess load whether case of theft of energy can be made out or not, is a factor to be debated here. [16]. Statement of defendant No.3 Sh. S.P. Singh-DW-1 highlighted that he was heading Vigilance Team at the time of checking of the premises of the plaintiff. Witness admitted in his cross-examination that 3 phase meter was installed in the premises of the plaintiff. There were five seals. Two seals besides that were fixed by Nigam. In total there were seven seals on the meter, only two were found tampered. In the report of M&T Lab meter body was found tampered, but the description of said tampering has not been given. The defect in the body of meter was not pointed out and how it MOHMED ATIK 2015.10.17 10:26 I attest to the accuracy and authenticity of this document was found to be tampered has not been elaborated. Mere mentioning of word 'meter body found tampered' the same cannot be considered on defined parameters whether there was deformity in the body/shop of the meter or it was found tampered on account of other specifications. Tampering of body has not come forth in terms of any particular specification and, therefore, cannot be taken to be qualified word in order to give exact meaning to the alleged tampering.

[17]. The witness admitted that no theft was being committed and it was a case of excess running of load of 26.99 KW in place of sanctioned load of 10 KW. The witness further admitted in his cross-examination that the accuracy of the meter was found to be within permissible limits and the alleged tampering of body has not been elaborated within defined meaning by means of qualified words, tampering of two seals out of total seven seals could not have projected a case of theft of energy particularly when inflow of energy in the premises was being correctly measured by the meter and its accuracy was found to be well within permissible limits. [18]. At the time of inspection no shunt connection was found, rather running of excess load on sanctioned load of 10 KW was only found. Five seals were found intact, therefore, it was not a case of theft of energy. In order to constitute theft of energy and before raising such a presumption under Section 39 of the Act, there must be a dishonest abstraction of energy by an artificial means and consumption thereof has to be established. Merely MOHMED ATIK 2015.10.17 10:26 I attest to the accuracy and authenticity of this document because two seals out of seven seals were found to be tampered, remaining five seals were found to be intact and there was accuracy of meter within permissible limits, case of theft cannot be presumed. Since it is not a case of theft of energy, therefore, question No.(i) as framed by the appellants has to be answered in negative. Demand notice of Rs.13,43,179/- on account of alleged theft of energy is not justified in law.

[19]. As regards maintainability of the suit, Section 126 of the 2003 Act needs to be appreciated, which is reproduced as under:-

"126. Assessment:-

(1) If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorised use of electricity, he shall provisionally assess to the best of his judgment the electricity charges payable by such person or by any other person benefited by such use.

(2) The order of provisional assessment shall be served upon the person in occupation

possession or in charge of the place or premises in such manner as may be prescribed.

(3) The person, on whom an order has been served under sub-section (2) shall be entitled to file objections, if any, against the provisional assessment before the assessing officer, who shall, after affording a reasonable opportunity of MOHMED ATIK 2015.10.17 10:26 I attest to the accuracy and authenticity of this document hearing to such person, pass a final order of assessment within thirty days from the date of service of such order of provisional assessment, of the electricity charges payable by such person. (4) Any person served with the order of provisional assessment may, accept such assessment and deposit the assessed amount with the licensee within seven days of service of such provisional assessment order upon him.

(5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorised use of electricity has taken place and if, however, the period during which such unauthorised use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection.

(6) The assessment under this section shall be made at a rate equal to the tariff applicable for the relevant category of services specified in sub Section (5).

Explanation- For the purposes of this section-

(a) "assessing officer" means an officer of a State Government or Board or licensee, if the case may be, designated as such by the State Government;

(b) "unauthorised use of electricity" means the usage of electricity-

(i) by any artificial means; or

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(ii) by a means not authorised by the concerned person or authority or licensee; or

(iii) through a tampered meter; or

(iv) for the purpose other than for which the

usage of electricity was authorised; or

- (v) for the premises or areas other than those for which the supply of electricity was authorised."

[20]. Apparently Sections 126 and 135 of the 2003 Act if read

together would constitute a complete code in themselves covering all relevant consideration for passing of an order of assessment in cases which do not fall under Section 135 of the 2003 Act. There is mark distinction in the contents of Section 126 and Section 135 of 2003 Act. Both are distinct and different provision, which operate in different field having no common premise in law. Theft has been defined in Section 135 of the 2003 Act which falls under part XIV relating to offences and penalties. Title of Section is 'theft of electricity'. The word 'dishonestly' appearing in the Section denotes abstract or consumption or use of electricity by dishonest means which is punishable under Section 135 of the 2003 Act. The mechanism for dealing under Section 135 of 2003 Act is based on dishonest abstraction and consumption of energy. Besides imposition of punishment as specified under these provisions or the proviso thereto, Section (1A) of Section 135 of the 2003 Act provides that without prejudice to the provisions of the 2003 Act, licensee or MOHMED ATIK 2015.10.17 10:26 I attest to the accuracy and authenticity of this document supplier through officer of rank as authorised may immediately disconnect the supply of electricity and even take other measures enumerated under sub-Sections (2) to (4) of the said Section. The fine which may be imposed under Section 135 of the 2003 Act is directly proportional to the number of convictions and is also dependent on the extent of load abstracted. [21]. Contra to the aforesaid provisions, Section 126 of the 2003 Act would be applicable to the cases where there is no theft of energy but energy is being consumed in violation of terms and conditions of supply leading to authorised used of energy. Such malpractice squarely falls within the expression 'unauthorised use of electricity'. The proceeding would start with the inspection of the premises by an Assessing Officer and he would record the finding that the consumer is indulging in unauthorised use of energy. The Assessing Officer shall provisionally assess to the best of his judgment, the electricity charges payable by such consumer as well as pass a provisional assessment order in terms of Section 126(2) of the 2003 Act. The Officer is also under obligation to serve a notice in terms of Section 126(3) of the 2003 Act on the consumer, requiring him to file his objections, if any against the provisional assessment before passing of final order of assessment within 30 days of from the date of service of such order of provisional assessment. Any person served with order of provisional assessment may accept the same or deposit the amount with the licensee within seven days of service of such provisional assessment order or he may file appeal MOHMED ATIK 2015.10.17 10:26 I attest to the accuracy and authenticity of this document against the final order under Section 127 of the 2003 Act. [22]. The explanation to Section 126 of the 2003 Act is of some significance. Section 126 of the 2003 Act falls under chapter XII and relates to investigation and enforcement and empowers the Assessing Officer to pass order of assessment, whereas Section 135 of 2003 Act deals with an offence of theft of energy and the penalty that can be imposed for such theft. This falls under the domain of criminal jurisprudence where mens rea is one of the relevant factor for finding a case of theft. Section 126 of the 2003 Act does not talk about any criminal intendment and primarily revolves around an action and remedy available under civil law. It does not have any mens rea or the ailments which are traceable to the criminal

concept of mens rea.

[23]. In this way Section 126 of the 2003 Act deals with cases of unauthorised use of energy in the absence of intention/mens rea whereas Section 135 of the 2003 Act deals with an offence of theft of energy where mens rea is the relevant factor. The cases under Section 126 of the 2003 Act would certainly be different from the cases where dishonest abstraction of electricity by means of artificial methods enlisted under Section 135 of the 2003 Act. [24]. Consumption of excessive load as against sanctioned load simpliciter would attract applicability in terms of Section 126 of the 2003 Act. On the other hand where a consumer, by any of the means and methods as specified under Section 135(a) to 135(e) of the 2003 Act, has abstracted energy with dishonest intention and MOHMED ATIK 2015.10.17 10:26 I attest to the accuracy and authenticity of this document without authorisation like providing shunt connection/direct connection bypassing the installed meter, the case would fall under Section 135 of the 2003 Act.

[25]. Section 135 of the 2003 Act uses the word 'whoever, dishonestly' does any act of the listed actions so as to abstract or consume electricity would be punished in accordance with provisions of the 2003 Act. In this way a distinction has been made between Sections 126 and 135 of the 2003 Act which operate in different fields and have no overlapping mechanism. [26]. In the instant case, since no evidence of direct connection/shunt connection or direct connection bypassing the installed meter, has been found, therefore, the case does not fall under any of the listed actions so as to abstract or consume electricity. Finding the meter to be running on genuine parameters is a fact in addition to aforesaid phenomena which makes the present case distinct from the applicability of Section 135 of the 2003 Act. The ambit and scope under Section 126 of the 2003 Act with reference to the construction of the words 'unauthorised use' and 'means' are to be judged differently from the words 'whoever, dishonestly' does any act of listed actions so as to abstract or consume electricity which falls under the ambit of Section 135 of the 2003 Act.

[27]. In view of aforesaid discussion question No.(ii) as formulated has to be answered in negative. Section 126 of the 2003 Act cannot be equated with theft of energy so as to attract any listed MOHMED ATIK 2015.10.17 10:26 I attest to the accuracy and authenticity of this document action of dishonesty or to abstract or consume electricity under Section 135 of the 2003 Act. Therefore, whenever the consumer consumes electricity in excess of the maximum of the contracted load would be governed by Section 126 of the 2003 Act unless and until he is found to have abstracted or using electricity dishonestly in terms of any of the listed actions under Section 135 of the Act, like providing for direct connection bypassing the installed meter that is where the consumer, by any of the means and methods as specified under Section 135(a) to 135 (e) of the 2003 Act as abstracted energy with dishonest intention without authorisation. Highlighted mechanism is based on the interpretation given by the Apex Court in Executive Engineer and another v. M/s Sri Seetaram Rice Mill, 2012(1) Law Herald (SC) 205.

[28]. The remaining question with regard to jurisdiction of the civil Court has to be answered in the light of nature of notice issued to the plaintiff by the defendants. The very nature of the notice shows absurdity thereby mixing both the provision. If the Authority acts illegally and in violation of principles of natural justice, civil Court has got jurisdiction under Section 9 CPC. Section 152 of the

2003 Act provides for compounding of offences and special Courts are to be constituted for speedy disposal under Sections 135 to 142 and 150 of the 2003 Act. Since the compounding fee has already been deposited the case squarely falls under the ambit of Section 126 of the 2003 Act.

[29]. The case does not fall under any of the category of MOHMED ATIK 2015.10.17 10:26 I attest to the accuracy and authenticity of this document Sections i.e 135 (a) to 135 (e) of the 2003 Act, therefore, issuance of notice in utter disregard to provisions of the Act makes the action of the Authority illegal. The defendants have raised illegal demand of huge amount of penalty on account of alleged theft of energy which is against the scheme of the 2003 Act. The bar of civil Court jurisdiction is only applicable where dispute falls within the purview of Section 126 of the 2003 Act. The demand of illegal amount is based on allegation of theft of energy, therefore, the contemplating action does not falls within the purview of Section 126 of the 2003 Act and the civil Court jurisdiction to entertain such a relief is maintainable. Reference can be made to Dakshin Haryana Bijli Vitran Nigam Limited v. Poonam Vashisth, 2009(2) CivCC 131. [30]. Since the impugned action of the defendants is based on wrong categorisation of case in view of inspection and the contemplated action cannot be treated to be a mechanism evolved in terms of Section 126 of the 2003 Act, therefore, in the light of principles as discussed above, the impugned action is not sustainable in law and bar of civil Court jurisdiction is not at all attracted.

[31]. In view of above, this appeal is found to totally bereft of merits and the same is accordingly dismissed.

October 12, 2015  
Atik

(RAJ MOHAN SINGH)  
JUDGE

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