IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 6725 OF 2020

The Maharashtra State Electricity
Distribution Company Ltd.,
Through its Additional Executive Engineer,
Kranti Chowk Sub Division, Aurangabad .. Petitioner

Versus

1. Ramchandra s/o. Madhavrao Naik,
Age 80 years, Occu. Retired,
R/o. Flat No. A-1, Chetna Nagar,
Aurangabad
Presently residing at Flat No.301,
Building F, Tejovalay Society,
Near CIPLA Foundation, Warje,
Pune-411 058 .. (Original Appellant)

2. I-Learn Center for Competitive Exams
Through its Proprietor
Abhishek Gaike,
Age Major, Occu. Business,
R/o. Plot No.1132, Sai Nagar, N-6,
CIDCO, Aurangabad

3. Superintending Engineer,
Aurangabad Region Electrical Inspector
Circle, Industries, Energy and Labour
Department, Plot No.11, Shivdas Tarde
Center, First Floor, Trimurti Chowk,
Hedgewar Hospital Road,
Aurangabad 431 005 .. Respondents

Mr. Avishkar S. Shelke, Advocate for the Petitioner;
Mr. Amit A. Yadkikar, Advocate for Respondent No.1;
Mr. C. V. Dharurkar, Advocate for Respondent No.2;
Mrs. R. R. Tandale (Choure), A.G.P. for Respondent No.3

CORAM : S. G. MEHARE, J.

DATE : 06-02-2024

ORAL JUDGMENT :-

1. Rule. Rule made returnable forthwith. Heard finally with consent of the learned counsel for the parties.

2. The brief facts of the case are that the respondent No.1 was a consumer of the petitioner. He took an electricity supply to run his printing press. For his printing press, an Industrial tariff was applied. He closed down the printing press. He gave his premises to respondent No.2 on leave and licence. He opened the coaching classes on that premises in 2010. On his application, the load was enhanced. The petitioner's personnel visited the premises on 27.12.2017 and found that respondent No. 2 was using the electric supply for commercial purposes without changing the tariff. Therefore, it was unauthorized use of electricity as provided under Explanation (b)(iv) to Section 126 of the Electricity Act, 2003 (“the Act”, for short). The officers drew the spot panchnama. There was no dispute that on the day of the inspection, respondent No.2 was running a coaching class on the premises with the old electric supply under the leave and licence agreement. The petitioner assessed the provisional bill for the changed user, and notice was served upon the person from respondent No.2, who had sought time to make the submissions on 28.02.2018. After receipt of the notice, he filed a detailed reply. He contended that he possessed premises under leave and licence agreement with respondent No.1

(original appellant). He submitted that respondent No.1 authorized him to use the premises for commercial activities. He has also submitted that he had a registered leave and licence agreement with respondent No.1. He allowed him to use the electricity supply. Hence, it was not an unauthorized use. He was not privity to the contract between the petitioner and respondent No.1. The purpose for which electricity was supplied to respondent No.1 was not disclosed to him by respondent No.1. Thus, no liability could be fastened upon him. He mentioned that the application was submitted to the office of the petitioner in 2012 for supplying 3-phase electricity with a high load. In the said application, he has fairly mentioned the nature of the use of electricity supply. In pursuance of the application, 3 phase and higher load was granted to him. He prayed to exonerate him from the prosecution.

3. After hearing the person in occupation, the order of final assessment under Section 126 of the Act was passed and addressed to Shri. R. M. Naik, respondent No.1 and respondent No.2, calling upon them to deposit Rs.23,35,321/- within fifteen days, i.e., on or before 28.03.2018. Respondent No.1 has impugned the order of provisional assessment by Writ Petition No.2994 of 2018. This Court, on 13.08.2019, has held that as per Section 126(2) of the Act, the order of provisional assessment shall be served upon the person in occupation, possession, or in charge of the place or premises. Respondent No.2, being in occupation or

in charge of the premises, was served with the provisional assessment. Objections were invited. The objections were considered. Finally, the Court observed that the statutory remedy of appeal is available. Hence, it was not inclined to entertain the writ petition. Accordingly, the writ petition was disposed of with a liberty to avail the alternate remedy. However, the amount of Rs.1,00,000/- which respondent No.1 had deposited was directed to be adjusted in the amount of the assessment. Then, respondent No.1 preferred an appeal before respondent No.3/ appellate authority cum Superintending Engineer, Aurangabad Region Electrical Inspection Circle, Aurangabad. Respondent No.1 was heard, and the appellate authority calculated unauthorized use from January 2010. However, the petitioner can, at the most, recover the money from respondents No.1 and 2 as per Section 56 of the Act for a period of not more than two years. Accordingly, he held that respondent Nos.1 and 2 are liable to pay Rs.10,67,670/-. Against the said order, the petitioner is before this Court.

4. Learned counsel for respondent No.1/appellant submits that the appellate authority has not granted a fair hearing before passing the impugned order. The appellant had filed a reply. Thereafter, there is no hearing; therefore, on this count itself, the impugned order is liable to be cancelled. He submits that it was not disputed that, initially, the supply was only to run the printing

press. He submitted that an industrial tariff was applied for electric consumption, considering the nature of business. However, the petitioner and respondent No.2 never intimated to the petitioner that he changed the use of the supply from the LT-V-industrial tariff to the commercial tariff. On the inspection day, the Officers found that the electricity supply was used for commercial purposes. Though the application for enhancement for the higher load was applied, it was never informed that it was used for commercial purposes. He submitted that provisional notice had been correctly served upon the person in occupation of the premises. The spot panchnama was drawn in the presence of the person in occupation. He submits that the term ' unauthorized use' has been explained in Explanation B(iv) of Section 126 of Act. The person who has raised an objection to the provisional assessment i.e. respondent No.2, admitted that it was used for commercial purposes. The leave and licence indicate that he occupied the premises since 2010. Therefore, the authorities exercising the power under Section 126(5) of the Act correctly assessed the bill for unauthorized use of electricity from the date of its use. The plea of 'no privity of contract' would not absolve the person concerned from the liability to pay for the unauthorized use. This Court, in writ petition preferred by present respondent No.1, has recorded the findings that, under Section 126(2) of the Electricity Act, such notice/order of provisional assessment shall be served

upon the person in occupation or possession or in charge of the place or premises, in the manner as may be prescribed. So, the provisional notice was correctly served upon the person who was in occupation and possession. The landlord cannot be run away from the liability. In the case at hand, the documentary evidence shows that respondent No.2 was using the premises under leave and licence. Referring to the impugned order, he would submit that the appellate authority did not *set aside* the final assessment order in its entirety. However, the Appellate Authority misread Section 56 of the Act and incorrectly held that Section 126 would not apply. Enhancing the load and changing the class of the consumer are different issues. Sections 126 and 56 of the Act are distinct.

5. Relying on the case of ***Executive Engineer and Another vs. Sri Seetaram Rice Mill, 2012 (3) Mh.L.J. 536***, he vehemently argued that Section 56 of the Act does not apply at all to the facts of the case. He relied on the case of ***Prem Cottex vs. Uttar Haryana Bijli Vitran Nigam Limited and Others, 2021 S.C.C. Online (SC) 870***, and argued that the Honourable Supreme Court interpreted Section 56(2) of the Act and held the person may take recourse to any remedy available in law for recovery of additional demand, but barred from taking recourse to disconnection of supply under sub-section (2) of Section 56 of the Act.

6. He has also vehemently argued that Section 126(5) has been correctly applied. The papers of assessment were placed before the appellate authority. The appellate authority has exceeded its jurisdiction in applying Section 56 of the Act. The opportunity for a hearing was not given to the petitioners. Therefore, the order of the appellate authority is liable to be quashed and set aside.

7. Per contra, learned counsel for respondent No.1/landlord has vehemently argued that the findings of the Appellate Authority clearly reflect that the petitioner was heard. Therefore, it could not be said that the opportunity of hearing was not granted to the petitioner. The Load from 5 H.P. to 14 K.W. was enhanced by application of the year 2012. At that time, G.T.L. Company was outsourced for distribution. Before enhancing the load, the Officer of the petitioner inspected the spot and then enhanced the load. Since then, the petitioner has had knowledge of the change in the use of the electricity supply. However, they deliberately did not care to change the tariff and went on to issue bills. So, in the circumstances, it is hard to digest that respondents No.1 and 2 are at fault and have used and consumed electricity unauthorizedly. Considering the facts and circumstances of the case, explanation b(iv) of Section 126 of the Act would not apply. He also vehemently argued that there was no concrete evidence that the use of electricity for commercial purposes was started in 2010. Therefore, there was no material before the assessing authority from when

the so-called unauthorized use of electricity was started for the first time. Under such circumstances, at the most, the authority could assess the bill for unauthorized use, without admitting, for a period not more than twelve months preceding the date of inspection. He also vehemently argued that the materials on the basis of which the provisional assessment of the bill was done were not served upon the respondents. Therefore, the respondents had no material to explain the assessment. He has placed on record a compilation and referred to the copy of the final assessment order. He also referred to the provisional assessment bill and pointed out that the said bill was dated 28.02.2018, so how could there be an assessment before that date? The rules and procedures of panchnama have not been complied with. The petitioner company never issued the monthly bills. The bills for two months were charged. That indicates that the electric meter was not in order. Therefore, the so-called assessment is incorrect and without base. The procedure laid down in Section 126(1) of the Act was not duly followed. The final assessment order is without reasons. The impugned order is not passed only on the yardstick of Section 56 of the Act; other relevant factors have also been considered. The case laws relied upon by the petitioner are not applicable. Respondent No.1 is in growing age. There was no deliberate act on his part. He was fair and regular in paying the petitioner's electricity bills as charged. He submits that the

interpretation of Section 56 of the Act, as referred by the petitioner in the case of *M/s. Prem Cottex (supra)* is in another context. It has been vehemently argued that assessment had been shown in the case of theft, and the person Mr. Abhishek Gaike, who submitted the representation, was not a licencee. He prayed to dismiss the petition.

8. Learned counsel for respondent No.2 adopts the arguments of learned counsel for respondent No.1.

9. The learned A.G.P. filed an affidavit-in-reply and contended that the government is a formal party.

10. Considering the arguments advanced by the learned counsel for the parties, the following points arise for consideration;

i) Was a change of load a change of the class of the user?

ii) Could the assessment have been done for a limited period of twelve months immediately preceding the inspection date?

iii) Was the assessment for unauthorized use done correctly?

iv) Does Section 56 of the Act was correctly applied?

Point No.1 :

11. It is admitted that the electricity supply was initially for running the printing press, and its tariff was an industrial class. It is also not in dispute that the suit premises was given on leave and licence to respondent No.2 by registered document. It is admitted

that in 2012 an application was moved to the petitioner for enhancing the load and supply for 3-phase electricity. The inspection was accordingly done, and the load was enhanced. The arguments of the learned counsel for respondent No.1 is that since the day of moving an application for enhancing the load and inspection, the petitioner knew that the nature of the electricity supply had been changed. Respondent No.1 or 2 never suppressed its user. The Officers of the petitioner were satisfied, and they had enhanced the load. His arguments reveal that the petitioner knew the change of user, but it did not apply the new tariff. Hence, the respondents No.1 and 2 could not be penalized. The authority deliberately did not produce a copy of the application to hide its fault. For want of any such material before the Court, it is difficult to arrive at the conclusion that no prayer for change of the use of electricity supply was made. He supported the impugned order and prayed to dismiss the petition.

12. Learned counsel for respondent No.1 fairly conceded that after receiving the notice of the provisional assessment, respondent No.2 had telephonically informed him. However, he did not prefer to appear before the authority. Till the final assessment of the bill for the unauthorized use was done, he never appeared. However, for the first time, he impugned the said order by way of appeal.

13. Enhancing the load and changing the user of the electricity supply from one class to another class are apparently distinct. The load may be enhanced for any class of user of electricity for the purpose for which it was supplied. The consumer is bound to inform the supplier about any change in the class/tariff. The respondent never had a case that they intimated to the petitioner about the change of the class of electricity users. So, respondent No.1 cannot say that since 2012, when the application was moved to enhance the load, the petitioner had knowledge about the change of the user's class, and they failed to charge for the commercial tariff. Hence, he cannot be blamed.

Points No.2 to 4 :-

14. It has been argued that the person who has signed submissions before the authority is not his licencee. It has also been argued that it was not an unauthorized use of electricity. It is indirectly argued that the right person did not submit the representation. Hence, his representation does not bind respondent No.1. The petitioner erred in not applying the correct tariff. The copy of the licence was not before the authority. Without concrete evidence, the petitioner incorrectly assessed the bill from 2010. There may be agreement, but it could not be said that commercial use was started from its date of execution. Therefore, the second part of Section 126(5) of the Act would apply. The assessment was done on the surmises of the petitioner's officers.

15. Section 126(2) of the Act provides for service of the notice of the provisional assessment of a bill for unauthorized use. Such provisional assessment bill shall be served on a person in occupation or possession or in charge of the place or premises. The licencee/ respondent no.2 appeared before the petitioner to respond to the notice of provisional bill. He put his defence. Respondent No.2 was informed about the said notice to respondent No. 1. He never objected to the representation made by its signatory that he has no concern with the premises. It is the objection raised for the first time. Hence, his objection seems an afterthought.

16. Respondent No. 2 had placed a copy of the leave and licence agreement on record. It was a document showing that respondent No.1 was using the premises for coaching classes, and the electricity was used for commercial purposes.

17. Learned counsel for the petitioner has correctly pointed out that before the final assessment was done, the notice was served to the right person. The document of the bill revision report is coming from the custody of respondent No. 1. The said document is dated 05.02.2016. It is a detailed report of the assessment. The learned counsel for respondent No.1 has correctly pointed out that the reason code is 7- THEFT 126 in the said document. He is also correct that the assessment of the theft bill is under different

sections. However, reading the said document, it is clear that though the reason code is mentioned as theft, ahead of it, 126 is mentioned. It is a section under which the assessment is done. Reading Section 126, it is an assessment of the bill for an unauthorized use of electricity. Section 135 of the Act provides for the assessment of the bill for theft. Examining the said document carefully, it does not indicate that the rule of Section 135 of the Act is applied to assess the bill. Applying the law to read the document as a whole, to understand the real intention of the parties, the Court, after reading the said document as a whole, is of the opinion that merely writing incorrect reason code, the petitioner's case cannot be doubted.

18. The petitioner had a simple case that the user class of the electricity was changed. It is unauthorized use. Explanation, 2 (b) (iv) of Section 126 of the Act has defined the term 'unauthorized use'. It means the usage of electricity for a purpose other than for which the usage of the electricity was authorized. The Explanation simply says that where the purpose for which the supply is taken is changed is an unauthorized use of electricity. There are various tariffs for different kinds of electricity use. The tariffs are applied as per the demand of the consumer for the purpose for which he wanted to have an electric supply. Initially, respondent No.1 had applied to run the printing press. Hence, an industrial tariff was applied. Thereafter, there was no intimation of the change in the

usage of electricity. The document of leave and licence shows that it was used for the coaching classes, for which the commercial tariff was applied. Therefore, the learned counsel for the petitioner has correctly argued that the usage of electricity for a purpose other than for which it was supplied as per demand, is unauthorized usage. For such unauthorized usage, the petitioner is empowered to take the action. No authority has taken any coercive action against respondents No.1 and 2. They never disconnected the electricity supply.

19. The bill revision report reflects that 52-LT COMM less than 20 K.B. was applied for the assessment of the bill. The bill revision report contains various heads and lock credits were given to respondent No.1. It was a detailed bill making the final assessment for Rs.23,35,320.92. The learned counsel for respondent No. 1, referring to the consumer's personal ledger, correctly pointed out that the bills for two months were provided to him. He argued that it is the best evidence that the electric meter was not in order. However, there is nothing on record to show that he ever made a complaint that the meter was not in order. If the meter was defective, it was the duty of the consumer to inform the Board or authority immediately and get it changed. This also has not been done. Therefore, there appears to be no substance in objection of respondents No.1 and 2 that the electric meter was not in order. Hence, the assessment of the bill is incorrect.

20. The very document of the bill revision report was available, and that was a basis for the final assessment. Respondents No.1 and 2 could not point out any defect in this report. In this report, some deductions have also been given. Therefore, it is difficult to accept that the assessment of the bill was without any basis.

21. The Officers of the petitioner have assessed the bills for unauthorized use since 2010. The basis for such calculations was leave and licence agreement. Respondent No.2 represented before the authority on the receipt of the provisional assessment. He did not state since when he was occupying the premises. However, he had a case that he had a leave and licence agreement with respondent No.1. A copy of said leave and licence was produced. It was the best evidence to ascertain the fact when he changed the usage of electricity. Sub-section (5) of Section 126 is in two parts. The first part provides for the assessment of the bill for the entire period during which the electricity was used. In other words, where the material is sufficient to believe that from a particular date, the unauthorized use of electric supply has been started, then the authorities have no option but to assess the bill for unauthorized use from that date. The second part of the said sections is for the assessment of the bill for the period where no such date is ascertained. In such cases, the bill to be assessed shall be for a limited period of twelve months immediately

preceding the date of inspection. The cogent and reliable material was available before the assessing authority about the date of unauthorized use of electricity. Therefore, arguments of the learned counsel for respondents No.1 and 2 that the assessment could have been done for a period not more than twelve months immediately preceding the date of inspection is unfounded.

22. The crucial question that has been raised is whether Section 56 of the Act would apply. The Honourable Apex Court, in the case of ***Executive Engineer*** (*supra*) has discussed in detail Sections 126 and 56 as well as Section 127, and candid distinction has been made in these two sections.

23. The appellate authority has observed that respondent No.1 had applied to the petitioner to increase the load, and even thereafter, the bills of industrial use were given to him. When the request to change the load was made, it was necessary to change the class. However, the petitioner did not take any action and continued to issue the electricity bills for industrial use. Then, the Appellate Authority jumped to reproduce Section 56 of the Act. On reproducing Section 56, without assigning reasons, how Section 56 is applied to the case in hand, directly passed the order cancelling the final assessment bill. In fact, there were no reasons at all in the impugned order directing to make the assessment as per Section 56 of the Act and to refund the amount deposited with

the petitioner.

24. The Honourable Supreme Court, in the case of ***Prem Cottex (supra),*** has interpreted Section 56 of the Act and observed in paragraph No.13 that, despite holding that electricity charges would become first due after the bill is issued to the consumer (para 6.9. of the SCC Report),and despite holding that Section 56 (2) does not preclude the licencee from raising an additional or supplementary demand after the expiry of the period of limitation prescribed in the case of a mistake or bonafide error (Para 9.1 of the SCC Report), this Court came to the conclusion that what is barred under Section 52(2) is only the disconnection of supply of electricity. In other words, it was held by this Court in the penultimate paragraph that the licencee may take recourse to any remedy available in law for the recovery of the additional demand but is barred from taking recourse to disconnection of supply under Section 56(2).

In paragraphs 15 and 16, it has been observed that thus;

> "15. Therefore, the bar actually operates on two distinct rights of the licencee, namely, (i) the right to recover; and (ii) the right to disconnect. The bar with reference to the enforcement of the right to disconnect is actually an exception to the law of limitation. Under the law of limitation, what is extinguished is the remedy and not the right. To be precise, what is extinguished by the law of limitation is the remedy through a court of law and not a remedy available, if any, de hors through a court of

> law. However, section 56(2) bars not merely the normal remedy of recovery but also bars the remedy of disconnection. This is why we think that the second part of Section 56(2) is an exception to the law of limitation".
>
> "16. Be that as it may, once it is held that the term "first due" would mean the date on which a bill is issued, (as held in para 6.9 of Rahamatullah Khan) and once it is held that the period of limitation would commence from the date of discovery of the mistake (as held in paragraphs 9.1 to 9.3 of Rahamatullah Khan), then the question of allowing licencee to recover the amount by any other mode but not take recourse to disconnection of supply would not arise. Rahamatullah Khan says in the penultimate paragraph that "the licencee may take recourse to any remedy available in law for recovery of the additional demand, but barred from taking recourse to disconnection of supply under subsection (2) of section 56 of the Act".

25. The Honourable Supreme Court has laid down a clear law that Section 56 gives two distinct rights of the licencee i.e. (i) the right to recover; and (ii) the right to disconnect. On reading the above judgment carefully, the Court is of the view that Section 56 of the Act would not attract in the case at hand. The case against respondents is altogether on a different footing. Therefore, the appellate authority has incorrectly observed that Section 56 of the Act shall be applied and that the respondents are liable to pay the charges only for the period given thereunder. The Officers of the

petitioner have correctly assessed the bill for unauthorized use under Section 126 of the Act.

26. For the above reasons, the writ petition deserves to be allowed. Hence, the order;

ORDER

i) The writ petition is allowed.

ii) The impugned order of respondent No.3 passed in Appeal No.6/2919-20, dated 20.03.2022, is quashed and set aside and the final assessment order, dated 06.03.2018, is restored.

iii) The amount deposited by the petitioner should be adjusted in the final assessment of the bill for an unauthorized usage of electricity.

iv) Rule made absolute in above terms with no order as to costs.

27. Learned counsel for respondent No.1 prays for the stay of this order for four weeks as he wishes to seek legal remedy. Considering the issue involved in this case, his prayer is accepted. This order is stayed for four weeks from today.

(S. G. MEHARE)
JUDGE

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