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Court : Gujarat

Decided On : Jan-31-2013

Judge : Jayant Patel

Appeal No. : Special Civil Application No. 6164 of 2004

Appellant : Gujarat Microwax Ltd

Respondent : Chief Engineer Uttar Gujarat Vij Co. Ltd. and Others

Judgement :

Oral Judgment:

The petitioner by this petition has prayed for appropriate writ to quash and set aside the order dated 5.4.2004 passed by the Appellate Committee and copy whereof is produced at Annexure-O; whereby, the appeal of the petitioner has been dismissed and the supplementary bill is confirmed of Rs.17,42,344/-.

Short facts of the case appears to be that the petitioner is private limited company having its factory situated at Survey No.291/2 and 2, Village: Nandasan, Taluka: Kadi, District: Mehsana and the petitioner is having contracted load of H.T. connection of 325 KVA. As per the petitioner, in the very compound of the petitioner, a portion of it, for the purpose of factory, has been given on lease basis which is an another shed to M/s.Shaili Polymers Pvt. Ltd. (herein after referred to

as the Tenant Company) and the area leased out to said company is ad-measuring 6076.75 Sq.Mtrs. with an annual rent of Rs.5,000/-. The Tenant Company has taken its separate connection of 125 HP.

On 14.8.98, the unit of the petitioner was checked by the officers of the respondent the then Board now the Electricity Company and as per the checking sheet, dated 14.8.1998, copy whereof is produced at Annexure-C, nothing was found objectionable and as per column No.7 of the checking sheet, the total energy consumed with the connected load was also examined.

Similarly, on 12th August, 1998, the inspection had also taken place and the officers of the respondent- Electricity Company has examined the connection of the premises of Tenant Company and everything was found in okay (OK) condition. Copy of inspection report is produced at Annexure-D and as per column No.7 of the said report, electric installation are also examined and thereafter, the report was submitted.

It appears that thereafter, on 17th August, 1998, as there was fire in the cable of the Tenant Company, they had requested officers of the respondent-Electricity Company to immediately supply the power since the production of the Tenant Company was continuous in nature. Copy of the said communication is at Annexure-E. On the same day, since there was disruption of power supply and existing plants were to be adversely affected, in order to see that those plant may not die and may not be spoiled, a temporary connection was provided by the petitioner to Tenant Company of 20 KW by connecting the wire and the Tenant Company was permitted to consume the load of 20 KW i.e. to the extent which was required for saving the life of the plants of the Tenant Company. As per the petitioner, the aforesaid arrangement was only by way of temporary and stopgap arrangement in order to see that plants of the Tenant Company may survive until the supply was reconnected.

Thereafter, on 21.8.1998, the officers of the respondent, the then Board, now Electricity Company visited the premises of the petitioner and it was found that there was connected load even to Tenant Company and therefore, inspection report was prepared. Based on the same, initially, the supplementary bill was

issued for Rs.4,17,262.24 dated 27th August, 1998 and it appears that thereafter, the petitioner had challenged the said bill by preferring Special Civil Application No.6951 of 1998 and initially, it was ordered to the petitioner to deposit Rs.50,000/-. It appears that thereafter, on 17th June, 2000 on account of the audit query, the additional supplementary bill was issued for a sum of Rs.12,68,082/-. It is the case of the petitioner that thereafter, they wanted to enhance the connection and therefore, Special Civil Application No.6951 of 1998 was withdrawn with a view to prefer appeal before the Appellate Committee. In this manner, for the supplementary bill amounting to Rs.17,42,344/- i.e. Rs.4,74,262 + Rs.12,68,082, the petitioner preferred appeal before the Appellate Committee and the Appellate Committee thereafter, passed the order on 5.4.2004; whereby, the appeal of the petitioner has been dismissed. Under the circumstances, the present petition before this Court.

I have heard Mr.B.T.Rao, learned counsel for the petitioner and Ms.Bhaya, learned counsel appearing for the respondent-Electricity Company and its officers.

As such, the issue involved in the present petition could be said as covered by the decision of this Court in Special Civil Application No.16975 of 2003 on the aspect of number of days to be considered for the alleged malpractice. It may be recorded that in the said decision at para 6 to 8, the Court observed thus:

The examination of the contention shows that it is an admitted position that on 27.1.2003, when the officers of the then Board, now Electricity Company, had visited the place of electricity installation of the petitioner, no malpractice or theft was found by the officers of the electricity company. The said checking sheet dated 27.1.2003, which has been made available by the learned Counsel during the course of hearing, shows that the seals of the meter were found in ok condition and the other condition of the meter, terminal cover, etc., were also found in ok condition. In the said checking sheet, no remarks whatsoever has been made for any malpractice or theft of the electricity. Therefore, one can safely conclude that on 27.1.2003, nothing objectionable was found when the officers of the electricity company visited the place of the petitioner for installation of the new meter. It is also a fact that on 9.2.2003 when inspection was carried out by the officers of the

Electricity Company the alleged malpractice and alleged theft of electricity was found. The petitioner is not challenging the aspect of the report dated 9.2.2003 and, therefore, the said aspect is not required to be further examined. However, even if it is considered that on 9.2.2003 the alleged theft of electricity was found, then also the relevant period could not be earlier than 27.1.2003, because on 27.1.2003 when checking for the replacement of the meter was made nothing objectionable was found. No material is considered by the appellate committee, nor produced in the present proceedings showing that on 27.1.2003 there was lapse on the part of the officers of the electricity company to record the malpractice in the checking sheet even if they existed.

If the aforesaid factual aspect is considered and thereafter the reasons recorded by the appellate committee are examined, it appears that there is no proper application of mind on the part of the appellate committee and the appellate committee has committed error apparent on the face of record, inasmuch as it is not that in every case of theft electricity energy a period of six months is to be considered for all purposes even if there is a cogent and reliable evidence available for showing the period less than six months. It is true that in absence of any other evidence the period of six months would be chargeable, but thereby it cannot be said that even if there is reliable and cogent evidence available, which may lead to show that the alleged theft of electricity could not be for a period beyond a particular time, the said aspect is to be ignored for all purposes. There was no material before the appellate committee that the officers of electricity company when inspected on 27.1.2003, had committed lapse in not recording the alleged malpractice or theft, which existed. In my view, in absence of such evidence the appellate authority has to proceed on the basis that on 27.1.2003 nothing was found objectionable by the officers of the electricity company. Thereafter, if the alleged theft is found on 9.2.2003, appropriate period would be from 27.1.2003 to 9.2.2003 for the chargeability of the amount on the settled formula, but it would be absurd to conclude that in spite of the checking sheet and report dated 27.1.2003, wherein nothing objectionable was found, the period of six months would apply in the present case. It appears that the conclusion recorded by the appellate committee is clearly by committing error apparent on the face of record, which cannot be sustained in the eye of law for the purpose of applying six

months period. It is hardly required to be stated that if the quasi judicial authority, whose order is under challenge, has committed error apparent on the face of record, the jurisdiction of this Court would be attracted for correcting the mistake. The matter could be considered for remanding the case to the appellate committee for reexamination in light of the observations made herein above, however, it has been stated by Mr.Sinha, learned Counsel for the respondent Electricity Company that after the enactment of New Electricity Act, the appellate committee is no more functioning and, therefore, I find that no useful purpose would be served in remanding the matter to the appellate committee, more particularly when the evidence of the checking sheet dated 27.1.2003 is not in dispute.

In view of the aforesaid the impugned order passed by the appellate committee for chargeability of the amount for a period prior to 27.1.2003 cannot sustain in the eye of law. Hence, the same is quashed and set aside. Consequently, the order of the appellate committee shall remain for chargeability of the amount for the period from 27.1.2003 to 9.2.2003. The respondent Electricity Company shall recalculate the amount and refund the amount to the petitioner, if any, or may give adjustment in the future bill within a period of two months from the date of receipt of the order of this Court.

The pertinent aspect which deserves to be considered is that in the above referred case, this Court considered the issue for days to be charged for alleged theft and malpractice. It may also be recorded that for alleged theft case, chargeability was at 2.5 times, whereas, for malpractice it is 1.5. times the charge of the unit. Similar issue once again came to be considered by this Court in case of Prakashchandra C.AAriwala V/s. Chief Engineer in Special Civil Application No.15804 of 2003 at para Nos. 5 to 13 as under:

5. It may be recorded that in the said decision this Court has observed thus:-

6. The examination of the contention shows that it is an admitted position that on 27.1.2003, when the officers of the then Board, now Electricity Company, had visited the place of electricity installation of the petitioner, no malpractice or theft was found by the officers of the electricity company. The said checking sheet dated 27.1.2003, which has been made available by the learned Counsel during

the course of hearing, shows that the seals of the meter were found in ok condition and the other condition of the meter, terminal cover, etc., were also found in ok condition. In the said checking sheet, no remarks whatsoever has been made for any malpractice or theft of the electricity. Therefore, one can safely concluded that on 27.1.2003, nothing objectionable was found when the officers of the electricity company visited the place of the petitioner for installation of the new meter. It is also a fact that on 9.2.2003 when inspection was carried out by the officers of the Electricity Company the alleged malpractice and alleged theft of electricity was found. The petitioner is not challenging the aspect of the report dated 9.2.2003 and, therefore, the said aspect is not required to be further examined. However, even if it is considered that on 9.2.2003 the alleged theft of electricity was found, then also the relevant period could not be earlier than 27.1.2003, because on 27.1.2003 when checking for the replacement of the meter was made nothing objectionable was found. No material is considered by the appellate committee, nor produced in the present proceedings showing that on 27.1.2003 there was lapse on the part of the officers of the electricity company to record the malpractice in the checking sheet even if they existed.

7. If the aforesaid factual aspect is considered and thereafter the reasons recorded by the appellate committee are examined, it appears that there is no proper application of mind on the part of the appellate committee and the appellate committee has committed error apparent on the face of record, inasmuch as it is not that in every case of theft electricity energy a period of six months is to be considered for all purposes even if there is a cogent and reliable evidence available for showing the period less than six months. It is true that in absence of any other evidence the period of six months would be chargeable, but thereby it cannot be said that even if there is reliable and cogent evidence available, which may lead to show that the alleged theft of electricity could not be for a period beyond a particular time, the said aspect is to be ignored for all purposes. There was no material before the appellate committee that the of electricity company when inspected on 27.1.2003, had committed lapse in not recording the alleged malpractice or theft, which existed. In my view, in absence of such evidence the appellate authority has to proceed on the basis that on 27.1.2003 nothing was found objectionable by the officers of the electricity company. Thereafter, if the

alleged theft is found on 9.2.2003, appropriate period would be from 27.1.2003 to 9.2.2003 for the chargeability of the amount on the settled formula, but it would be absurd to conclude that in spite of the checking sheet and report dated 27.1.2003, wherein nothing objectionable was found, the period of six months would apply in the present case. It appears that the conclusion recorded by the appellate committee is clearly by committing error apparent on the face of record, which cannot be sustained in the eye of law for the purpose of applying six months period. It is hardly required to be stated that if the quasi judicial authority, whose order is under challenge, has committed error apparent on the face of record, the jurisdiction of this Court would be attracted for correcting the mistake. The matter could be considered for remanding the case to the appellate committee for reexamination in light of the observations made herein above, however, it has been stated by Mr.Sinha, learned Counsel for the respondent Electricity Company that after the enactment of New Electricity Act, the appellate committee is no more functioning and, therefore, I find that no useful purpose would be served in remanding the matter to the appellate committee, more particularly when the evidence of the checking sheet dated 27.1.2003 is not in dispute.

8. In view of the aforesaid the impugned order passed by the appellate committee for chargeability of the amount for a period prior to 27.1.2003 cannot sustain in the eye of law. Hence, the same is quashed and set aside. Consequently, the order of the appellate committee shall remain for chargeability of the amount for the period from 27.1.2003 to 9.2.2003. The respondent Electricity Company shall recalculate the amount and refund the amount to the petitioner, if any, or may give adjustment in the future bill within a period of two months from the date of receipt of the order of this Court.

If the facts of the present case are examined in light of the above referred legal position, in the present case also the earlier inspection had taken place on 29.11.2002 and at that time connected load was found to be more in comparison to the sanctioned load. Therefore, such has resulted into supplementary bill. The pertinent aspect is that when the inspection had taken place new MM Box seal as well as new paper seals were applied. In the Col. No.4 of the Inspection Report, all the four seals at the time of inspection were found to be in existence and no

tampering has been recorded. Therefore, two circumstances arise; one is that at the time when the inspection had taken place on 20.11.2002, nothing objectionable was found save and except the fact that the connected load was more in comparison to the sanctioned load and as recorded earlier such resulted into supplementary bill and the petitioner is not challenging the supplementary bill in the present petition. The second aspect is that on the day when MM Box seal and paper seals were applied everything was ok. Therefore, we can find that on 20.11.2002 at the time of earlier inspection, except the one as referred to herein above, nothing objectionable was found.

Thereafter, on 18.1.2003, the inspection has taken place and it is found that if the glass portion of MM Box is lifted, the meter was not running and, therefore, the tampering was recorded. Additionally, it is also found that the paper seal was in torn condition and based on the same second supplementary bill has been issued. If the checking sheet dated 20.11.2002 is considered with the checking sheet dated 18.1.2003, the period for chargeability would be from 20.11.2002 till 18.1.2003 and it could not be prior to 20.11.2002.

Having taken into consideration the said aspect, if the order of the appellate authority is considered, it has not considered the matter in light of the observations and discussion made herein above, but has proceeded on the premise that since earlier checking was not for malpractice, the chargeability of 180 days minus the staggering days would be proper. If the view taken by this Court in the above referred decision is considered the only conclusion, which may be required to be recorded would be that there is absurdity in the decision of the appellate committee because by normal prudence no person would come to the conclusion that the chargeability would be for 180 days when as per the electricity company itself, when the inspection had taken place on 20.11.2002 nothing was found objectionable, save and except that the connected load was more. Further, the fresh MM Box seals and paper seals were applied and, therefore, tampering, if any, would be for the period later to it and not prior thereto.

However, the learned Counsel appearing for the petitioner made an attempt to contend that at the time when this Court considered the above referred matter, the

conditions of supply appear to have been not brought to the notice of this Court and she mainly relied upon the Condition No.34 and more particularly sub-condition No.4, which read as under:-

4. The actual period from the date of previous installation checking and has resulted into supplementary bill under provisions of this Clause even six months period from the date of detection under consideration and up to the date of detection. By relying upon the said decision, she submitted that the chargeability will be for minimum six months 180 days and not from the last inspection.

In my view even if the contention is considered, it would not make any difference in the present case, inasmuch as the previous installation checking did result into the supplementary bill since the connected load was more in comparison to the sanctioned load. Therefore, it is to be counted from the last inspection till the date of detection, which in the present case would be from 20.11.2002 to 18.1.2003.

The learned Counsel for the respondent did submit that the very condition was read down by the learned Single Judge of this Court in Ambeshwar Paper Mills Ltd. Vs. Gujarat Electricity Board, reported in 2003(2) GLR 1500, she also stated that the said decision is carried before the Division Bench of this Court in LPA and the Division Bench has stayed the operation of the judgement. Under these circumstances, I find that when the Division Bench has stayed the operation of the judgement and order, I cannot read the condition as read down by the learned Single Judge of this Court in case of Ambeshwar Paper Mill Limited (supra). Further, in the said case, the earlier inspection had not resulted into supplementary bill, whereas in the present case the earlier inspection had resulted into supplementary bill. Therefore, it appears to me that taking into consideration matter in either way, the period for chargeability could not be more than the period from 20.11.2002 to 18.1.2003 as per the applied formula.

The learned Counsel appearing for the respondent next relied upon the decision of the Apex Court in the case of JMD Alloys Limited .v Bihar State Electricity Board, reported in (2003) 5 SCC 226 and contended that similar contention was raised before the Apex Court, but the Apex Court has found that the period for chargeability would be 180 days i.e. six months as per the conditions of supply

and, therefore, she submitted that in view of the decision of the Apex Court, this Court may take the same view for chargeability of 180 days instead of for the period from 20.11.2002 to 18.1.2003.

It appears that in the decision of the Apex Court in the case of JMD Alloys Limited (Supra) the contention was raised by the learned Counsel appearing therein at paragraph 7 of the decision. However, while considering the aspect of chargeability of 180 days at paragraph 12, the Apex Court has recorded the conclusion based on the conditions of supply, but the contention raised at paragraph 7 is not specifically dealt with, nor any view has been expressed by negating the said contention. It is hardly required to be stated that any decision of the higher forum is to be considered and understood with the specific observations made in the facts of the said case. Had the contentions been specifically considered and the observations made by the Apex Court on the said aspect, the matter stand on different footing but since there is no ratio laid down, nor even obiter for such purpose, it cannot be said that such contention was expressly negated by the Apex Court in the said decision. Hence, the said decision would be of no help to the respondent.

It may be recorded that the above referred case was also pertaining to theft case and not pertaining to malpractice. In both the above referred decisions, this Court took the view that if on the earlier occasion, the premises of the connection holder was inspected and everything was found OK and thereafter, if theft is detected, the Board or the Electricity Company would be entitled to recover additional charges but such charges shall be from the date of last inspection till the theft had detected and not prior to last inspection during which everything was found in OK conditions. The another distinguishing aspect is that in the later case of Special Civil Application No.15804 of 2003 there was amendment in the conditions; whereby, it was additionally provided that earlier inspection should have resulted in supplementary bill.

After having taken into consideration the above referred legal position, the facts of the present case are now to be examined. It is not the case of the respondent-Board nor it is found by the Appellate Committee that when the premises of the

petitioner-Company was examined on 14th August, 1998, any objectionable thing was found nor it is even the case of the respondent-Electricity Company nor it is found by the Appellate Company that when the premises of the Tenant Company was examined on 12th August, 1998, any objectionable thing was found. This would mean that upto 14th August, 1998, everything was found in OK condition by the officers of the respondent the then Board (now Electricity Company).

It is true that on 21st August, 1998, when the premises of the petitioner was inspected, it was found that cable was connected with Tenant Company but it is not a matter where there is no possible justifiable explanation. As such, it was the petitioner-Company who intimated the officers of the Electricity Company that since the life of the plants of the Tenant Company was to be adversely affected and there was firing of cable and there was disruption of power, by way of temporary basis, the supply of load of 20 KW was given to the Tenant Company. Therefore, the action in normal circumstances could be said as bona-fide.

An attempt was made by learned counsel appearing for the respondent-Board to contend that there is nothing on record of the Electricity Company that the said communication was received, whereas, Mr.Rao, learned counsel appearing for the petitioner during the course of the hearing has shown the xerox copy to the Court; wherein, the receipt is also signed, as per him, by the officers of the respondent-Company. It is true that the Appellate Committee has found that there is nothing on record to show that such correspondence was received but, in my view, whether such was intimated or not, would be inconsequential for the simple reason that even if such, supply was given by way of temporary measure, one cannot get away from the charges to be paid by way of compensation as per condition No.35. Therefore, I find that no much discussion is required on the said aspects.

It was also submitted by the learned counsel appearing for the petitioner that initially, bill of Rs.4,74,262/- was as per the actual load supplied by the petitioner-Company to the Tenant Company and thereafter, additional bill of Rs.12,68,082/- has been issued by the respondent-Company in an arbitrary manner and therefore, the said action is also illegal and the Appellate Committee has not properly considered the said aspects.

Whereas, Ms.Bhaya, learned counsel appearing for the respondent contended that once the load is found to have been unauthorizedly connected with 3rd party, which would include Tenant Company, in the present case, it is re-sale of the electricity power irrespective of fact that petitioner-company has received any consideration or not. It was, therefore, submitted that once unauthorized electric power is supplied for chargeability, connected load is to be taken into consideration and not the actual load supplied even if it is so connected, load is to be taken into consideration.

I find that document vide letter dated 2.6.2000 for the calculation is self explanatory on the said aspects. In the earlier calculation, neither FCI charges or demand charges were considered nor included. Further on the calculation of the unit also, as per applied formula, there is substantial difference. Therefore, there is no reason to hold that the method applied for revised bill was incorrect in any manner. No material is produced to the notice of the Court to show that the charges were not to be calculated on contracted load or that FCI charges or demand charges were not recoverable or that the formula applied was improper. Therefore, the contention of Mr.Rao on that aspects does not deserve to be accepted.

The aforesaid takes me to examine the last aspect of number of days to be applied for charges to be recovered by way of compensation on the formula as per the conditions of supply. Condition No.34 which is for theft cases and for which view is taken by this Court in the above referred case, reads as under:

34. Payment of energy dishonestly used or abstracted or maliciously wasted or diverted. Where it is established to the satisfaction of Boards officer that a consumer has dishonestly abstracted used, consumed or maliciously caused energy to be wasted, or diverted, the value of the electrical energy thus abstracted, used, consumed, wasted or diverted shall be assessed by such officer for the past six months period or the actual period from the date of commencement of supply, whichever is less, in the manner specified herein below and the value of energy so assessed shall be collected by including the same in the next bill or by a separate bill. Such amount shall always be deemed to be the

arrears of electricity dues for all purposes.

(Emphasis supplied)

18. Condition No.35 also provides in the same manner and for ready reference, the same is reproduced as under:

35. Disconnection for malpractice and compensation therefor Where any consumer is detected in the commission of any malpractice with reference to his use of electrical energy, the Board may, without prejudice to its other rights, cause consumers supply to be disconnected forthwith. The supply may be restored at the discretion of the Board if the consumer, compensates the Board in the manner prescribed here under and takes such other action as may be directed by the Board in this context.

(Note:-This authority of the Board shall be exercised by an officer not below the rank of the Junior Engineer of the Board.)

The consumer shall be required to pay the Board before reconnection of power supply an amount towards compensation as mentioned below which shall be applicable for the past six months period including the month during which malpractice is detected limited to actual period since the commencement of supply if it is less.

(Emphasis supplied)

If the language for chargeability of period of 6 months as per condition No.34 is considered which is applicable to theft case, with condition No.35 which is applicable to the case of malpractice, there is no difference. It is not that the period of 6 months is to operate in absolute but it leaves room for the lesser period. It was submitted by the respondent that since the lesser period can be considered only if there is a new connection and the electricity supply is given during the period of less than 6 months. In her submission, such would not apply if the inspection was carried out earlier and everything was found in OK condition.

It is true that language used since the commencement of the supply if it is less but there is simultaneous use of the word, malpractice is detected to limit to actual period. This shows that the actual period is to be considered from the date of detection and it can not only be relatable to the new connection, for commencement of the electricity supply. No condition can be read resulting to create absurd situation. Therefore, condition is to be reasonably read and the proper meaning is to be extracted. If condition is reasonably read, it is clear that the period of 6 months has been provided but subject to limitation of availability of actual period.

Further, when everything was found in OK condition, the officers of Electricity Company cannot be heard to say that it was their lapse or could not detect the alleged malpractice at the relevant point of time. There is nothing brought on record to show that any action was taken against any of the officers by the Board that at the time of inspection the malpractice was in existence but the same was neither detected nor recorded in the inspection on 14th August, 1998. Hence, it appears that if the condition of supply for chargeability of the period is same as that of theft cases, more particularly because, the word used is compensation for malpractice, the different meaning cannot be taken nor the view than that as was taken in the above referred earlier two matters deserves to be taken.

Under the circumstances, the only conclusion it deserves to be recorded is that period for chargeability would not be earlier than 14th August, 1998.

If the order of the Appellate Committee is considered in light of the aforesaid, the order of the Appellate Committee could be said as with clear non-application of mind and error apparent on the face of the record by the Appellate Committee has been committed which deserves to be corrected accordingly.

In view of the aforesaid observations and discussion, the impugned order of the Appellate Authority for chargeability of the days as per the approved formula for the period prior to 14th August, 1998 cannot be sustained in the eye of law. Hence, the same is quashed and set aside.

Consequently, the days for chargeability as per the approved formula shall be from 14th August, 1998 till 21st August, 1998. The respondent-Electricity Company and its officers will be required to recalculate the amount and shall also be required to refund the amount, if the amount is deposited or recovered, or in alternative, respondent- Electricity Company may give adjustment in the subsequent bill of the petitioner. The aforesaid exercise shall be completed within a period of 2 months from today.

Petition is allowed to the aforesaid extent. Rule made absolute accordingly. Considering the facts and circumstances, no order as to cost.

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