C.E.S.C. Limited Vs. Abdos Trading Co. Pvt. Limited

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Court : Kolkata

Decided On : Oct-19-2012

Judge : Girish Chandra Gupta &Amp; Mrinal Kanti Sinha

Appeal No. : F.M.A. No. 1199 of 2008

Appellant : C.E.S.C. Limited

Respondent : Abdos Trading Co. Pvt. Limited

Advocate for Pet/Ap. : Mr. Dutta, Mr. Datta

Judgement :

Girish Chandra Gupta, J.

This appeal is directed against a judgment and order dated 19th June, 2008 passed by brother Dipankar Dutta J holding that the assessment under Section 126 of the Indian Electricity Act, 2003 suffered from procedural ultra vires and was accordingly quashed. The C. E. S. C. Ltd., was directed to restore supply of electricity within 48 hours without demanding any charges.

Mr. Mitra, Learned Advocate General appearing on behalf of the appellant submitted that the only issue which he is likely to press is a question of law as to “whether presence of the Assessing Officer at the time of inspection under Section 126 of the Indian Electricity Act, 2003 is mandatory?” In the case of Hasi Mazumdar and Anr. -vs.- The West Bengal State Electricity Board and Ors., reported in AIR 2006 Calcutta - 59, he submitted, that one of us held that the presence of the Assessing Officer at the time of inspection was mandatory without disclosing any reasons. He also submitted that a Division Bench of this Court also took the same view in the case of Narayan Chandra Kundu -vs.- State of West Bengal and Ors., reported in AIR 2007 Calcutta 298. According to him, the Division Bench also did not assign any reasons for the aforesaid view expressed therein. He contended that in the case of Reliance Energy Ltd., and Ors. -vs.- Chief Engineer (Electrical) P.W.D. Dept. and Anr., reported in 2006 (6) Maharashtra Law Journal 479 a Division Bench of the Bombay High Court took the view that the Assessing Officer need not be personally present at the time of inspection and that he can rely on the record of the inspection carried out by an officer authorized under Section 135 (2) of the Indian Electricity Act for the purpose of making an assessment. Mr. Mitra contended that the view expressed by the Bombay High Court is based on reason and should, therefore, be accepted. He also drew our attention to a judgment by a learned Single Judge of this Court in the case of CESC Ltd. -vs.- Deputy Chief Engineer, Customer Relation Management Cell and Appellate Authority reported in 2011 (1) CLJ 622, wherein the learned Single Judge has discussed the reasons why presence of the Assessing Officer at the time of inspection is not necessary. Mr. Mitra therefore, contended that the views expressed by the Bombay High Court and the learned Single Judge in the aforesaid judgments should be upheld by this Court. Mr. Mitra submitted a written notes of argument and wanted us to incorporate the same in our judgment so that the submissions made by him continue to remain on the record. We find no reason why we should hesitate in reproducing the written notes submitted by him both in the form of a C.D. and in a hardcopy. The contents of his written notes appearing from the C.D. are as follows:

“Q. Whether the assessing officer u/s 126 of Electricity Act, 2003 must personally inspect the premises, equipments/ devices and records of the consumer for making provisional assessment u/s126?

SUBMISSION:-

The answer should be in the negative as held by the High Court at Bombay and the Hon’ble Justice Jyotirmoy Bhattacharyya.

REASONS:-

1. 3 alternative courses are laid down u/s 126 of the Electricity Act, 2003 to be followed for provisional Assessment. Any one of them may be adopted by the Assessing Officer for making provisional best judgement amassment.

2. “Or” in section 126(1) is disjunctive. This has not been considered by our High Court in two earlier judgments, but has been duly considered by Hon’ble Justice Jyotirmoy Bhattacharya.

3. Section 126 should be interpreted having in mind the possibility of the Assessing Officer being different from the officer designated u/s135. This aspect was not required to be borne in mind by Division Bench as the Assessing Officer and the Officer under section 135 was the same judgement of the Division Bench is not apposite in this case where those two Officers were different persons. Officer u/s126 did not have powers u/s 135.

4. Absurd consequences would follow if the word “Or” is read as conjunctive:

(a) All these courses will no longer be alternative and each of them have to be followed by the Assessing Officer.

(b) The assessing officer, not having been conferred power u/s 135, would become unable to make provisional assessment u/s 126.

(c) The Assessing Officer passing provisional assessment order on the basis of inspection personally carried out by him of the premise the devices would become liable for examination by the consumer. He will be Judge as also the witness - an absurd situation.

(d) The Assessing Officer has quasi-judicial functions to be discharged upon hearing the consumer. If he is made busy with travelling from place to place for making inspection, it will not be possible for him to give hearing to consumers and hear their objections. 1997(1) SCC 146 absurdity to be avoided.

5. Court would not supply word in a statute. Court would not add the words “by the Assessing Officer” at the end of the three alternative courses mentioned in section 126. Had the legislative intent been that the Assessing Officer must him self inspect the premises, equipments and records, the Legislature would have said so in section 126 of the Act. Similarly, if the Legislature intended that records of any person would mean records of consumer only, section 126 would have said so expressly.

In this connection, reference is made to the judgements of the Hon’ble Supreme Court reported in A.I.R. 2005, S.C. page 294 paras 8 to 23 and A.I.R. 1969 Supreme Court page 493 at page 495.

6. Reasonings of Bombay High Court:-

(I) Persons who carried out inspection and submitted report, on the basis whereof the provisional assessment order is made, should be made available to the consumer for testing genuineness of evidence and/or report

(II) It is open to the state Government to authorize any persons other than the assessing officer to carry out inspection in terms of Section 135(2) This has so happened in the instant case.

(III) Evidentiary value of report by an officer authorized Under Section 135(2) will have to be proved by the generating company by allowing such authorized officer to be examined by the assessee.

(IV) It is possible to read in to Section 126 that inspection carried out by an officer authorized officer by the state Government under section 135(2) can be the basis of provisional assessment under section 126(1) of this Act.

7. Reasonings of Hon’ble Justice Jyotirmoy Bhattacharya- 2011 (1) C.L.J. page 622.

(a) records maintained by any person used in Section 126(1) means/includes officer Under Section 135(2).

(b) “Or” is disjunctive.

(c) 3 alternative modes of provisional assessment.

(d) There should be conjoint reading of section 126 and 135.

We humbly adopt the reasonings of the Hon'ble Justice Jyotirmoy Bhattacharya as part of our argument.

8. Judgement of Division Bench reported in A.I.R. 2007 Cal-298:-

The question raised was whether it should be presumed that proceedings for assessment have been vitiated for the reason that prosecutor under section 135 was the assessing officer under section 126- (para 10).

This question does not arise in the instant case.

Para13- "............ we find that the Legislature intended that the assessing officer must be a person who was a member of inspection team at the time of detection of pilferage or unauthorized use of Electricity so that he can pass the order of assessment not on the basis of papers placed before him but after actually visiting the site at the time of detection of illegality".

The above conclusion is not supported by any reason.

Division Bench was dealing with the question of violation of natural justice- no body will be the judge of his own cause. Division Bench answered the question by giving to reasons-(I) objections of the consumer will be considered and dealt with in the order of final assessment and (II) appeal will lie against the order of assessment made by the Assessing Officer.

9. A.I.R. 2006 Cal-59- Single Bench.

It was not contended by the consumer that assessing officer must be present at the time of inspection and if not so present, the order or assessment would be bad. (see para-8 recording arguments of consumer's counsel). Accordingly the counsel for WBSEB did not make any submission on this aspect (see para-8 to 17 recording submission of the counsel of WBSEB).

The Hon’ble Judge, however, recorded a conclusion that “the assessment can be made only by the person who has seen the extent of unauthorized use. Based on his personal observation he has been authorized to assess the quantity of unauthorized consumption and to assess the amount payable..................” (para 18).

It is humbly submitted that no reason for this conclusion has been given. The assessment has vitiated because it was the judgment of the person who had issued the guideline- para19.

10. To construe the Section 126 otherwise would make section 126 vulnerable to constitutional invalidity. It would mean:-

(I) The assessing officer must make assessment on his personal inspection and knowledge.

(II) By his final order, he will support his personal views.

(III) The consumer would have no opportunity to examine and test the personal knowledge and the view based thereon by the Assessing Officer.

(IV) The Assessing Officer is entitled to act on the basis of personal knowledge without giving reasonable opportunity to challenge the same.

The court would not interpret a statute in such manner as would render the statute vulnerable to challenge of being ultra vires the Constitution.

Mr. Kishore Dutta, learned Advocate appearing for the writ petitioner/consumer submitted that his submissions are the same as made before the Trial Court. From the impugned judgment of the Learned Trial Court, it appears, that Mr. Dutta appearing on behalf of the writ petitioner made the following submissions:

“Mr. Dutta, learned Counsel for the petitioner submits that the allegation in the intimation dated 20-02-08 that “incoming neutral to meter no.3219663 found disconnected” and the observation in the provisional order of assessment dated 20.02.08 to the effect that “Incoming neutral Loop found disconnected” do not amount to unauthorized use of electricity under Clause (b) of Section 126 (6) of the Electricity Act and hence the proceeding is without jurisdiction. He contends that the explanation sought to be given by CESC Limited in paragraph 8 of the affidavit-in-opposition should not to be looked into for it is not entitled to improve its case by filing an affidavit having regard to the law laid down by the Apex Court in its decision reported in AIR 1978 SC 851. He further argues that the proceeding initiated against the petitioner under Section 126 of the Act is absolutely without jurisdiction and in this connection he reiterates the contentions raised by him at the time the interim order dated 22-04-08 was made."

It appears that Mr. Dutta on 22nd April, 2008 when the writ application was taken up for interim orders had advanced the following submissions:

"Mr. Datta, learned Counsel for the petitioner has raised the following two points:

1) The provisional and final orders of assessment are absolutely unauthorized inasmuch as detection of alleged theft of electricity was made by 'X', provisional order has been passed by 'Y' and final order has been passed by 'Z'. These actions, according to him, are in the teeth of the Division Bench decision of this Court reported in 2008(1) CHN 459: Narayan Chandra Kundu vs. State of West Bengal and Ors., and the Single Bench decision of this Court reported in AIR 2006 Cal 59 : Hasi Mazumdar and Anr. Vs. West Bengal State Electricity Board and Ors. These decisions, according to him, lay down the law that an Assessing Officer must be one who has been part of the inspection team which detected theft of electricity by a consumer. Since the person who detected alleged theft of electricity and the persons who assessed the amounts to be paid by the petitioner for such theft are different persons, the impugned assessments suffer from the vice of procedural ultra vires.

2) The provisional order of assessment, at any rate, does not disclose that theft has been committed by the petitioner and, therefore, it is not liable to be proceeded against under Section 126 of the Electricity Act."

The learned Trial Court in its interim order dated 22nd April, 2008 had expressed the following prima facie opinion:

“In terms of Section 126(1) of the Act, an Assessing Officer is under an obligation to provisionally assess, to the best of his judgment, the charges payable by a consumer or any person benefited by unauthorized use of electricity. Such assessment is to be made on the basis of (i) inspection of any place or premises; or (ii) inspection of the equipment, gadgets, etc. used; or (iii) inspection of records maintained by any person.

According to Mr. Mitra, the words “any person” after the fourth “or” in the Sub-Section would include the Assessing Officer.

This Court does not agree. The words “any person” is followed and qualified by the words “such person” whom the Assessing Officer concludes has been indulging in unauthorised use, which can only include the consumer charged with unauthorised use or any other person benefited by such use, and not the Assessing Officer. Therefore, there is no escape from the conclusion that action taken by an Assessing Officer to provisionally assess the charges payable under Section 126(1) of the Act only on the basis of records that might be placed before him by the licensee (which may include report of inspection of F.I.R. or any other relevant document) would not amount to compliance with the statute. Since nothing has been shown to Court that the Assessing Officer in the present case had made the order of provisional assessment either on inspecting the place or premises, or the equipments, gadgets, etc., such action is indefensible.

Repelling a reverse challenge (i.e. the Assessing Officer acting as prosecutor and Judge violates principles of natural justice), the Division bench in Narayan Chandra Kundu (supra) clearly held in paragraph 13 as follows:

“After going through the provisions contained in Sections126 and 135 of the Act we find that the legislature has intended that the Assessing Officer must be a person who was actually a member of the inspection team at the time of detecting the pilferage or unauthorised use of the electricity so that he can pass the order of assessment not on the basis of papers placed before him but after actually visiting the site at the time of detection of the illegality”.

For reasons aforesaid, this Court shares the view expressed by the learned Judges of the Division Bench and feels free not to be persuaded to concur with the views expressed by the Bombay High Court."

Mr. Mitra concluded his submissions on 25th September, 2012. On 28th September, 2012 this Court required, Mr. Mitra to clear a few doubts as regards the submissions already made by him. Mr. Mitra prayed for time and the matter was adjourned. On 5th October, 2012, Mr. Mitra submitted that the points raised by him, though he does not want to give up, appear to have been covered by a judgment of the Apex Court in the case of Executive Engineer, Southern Electricity Supply Company of Orissa Ltd. and Anr., -vs.- Sri Seetaram Rice Mill reported in 2012 (2) SCC 108 wherein their Lordship expressed the following views:

"Having dealt with the principle of interpretation of these provisions and the distinction between Sections 126 and 135 of the 203 Act, we shall now discuss the ambit and scope of Section 126. The provisions of Section 126 contemplate the following steps to be taken:

(i) An assessing officer is to conduct inspection of a place or premises and the equipments, gadgets, machines, devices found connected or used in such place.

(ii) The formation of a conclusion that such person has indulged in unauthorised use of electricity.

(iii) The assessing officer to provisionally assess, to the best of his judgment, the electricity charges payable by such person.

(iv) The order of provisional assessment to be served upon the person concerned in the manner prescribed, giving him an opportunity to file objections, if any, against the provisional assessment.

(v) The assessing officer has to afford a reasonable opportunity of being heard to such person and pass a final order of assessment within 30 days from the date of service of such order of provisional assessment.

(vi) The person, upon whom the provisional order of assessment is served, is at liberty ot pay the said amount within seven days of the receipt of such order and where he files such objections, final order of assessment shall be passed, against which such person has a right of appeal under Section 127 of the 2003 Act within the prescribed period of limitation.”

He submitted that in view of the aforesaid decision of the Apex Court he no longer expects this Court to concur with the views expressed by the Division Bench of the Bombay High Court or by the Learned Single Judge of this Court. He however maintained that the aforesaid views were expressed by the Apex Court while dealing with some other matters and the question as to whether the presence of the Assessing Officer at the time of inspection under Section 126 of the Indian Electricity Act is mandatory was not in issue before Their Lordships. He submitted that his client may like to approach the Supreme Court for a decision on the matter.

Speaking for ourselves we can only say that a plain reading suggests that the presence of the Assessing Officer at the time of inspection under Section 126 of the Indian Electricity Act, 2003 is mandatory. Considering that we are not called upon to decide the issue we prefer not to express any further opinion in the matter.

The appeal fails and is dismissed.

Parties shall bear their own costs.

Urgent xerox certified copy of this judgment, be delivered to learned Advocates for the parties, if applied for, upon compliance of usual formalities.

Girish Chandra Gupta, J.

I agree.