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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/5635/2017

JABUL AHMED
PROPRIETOR, BATARASHI POWER AGENCY P.O. TILLABAZAR DIST.
KARIMGANJ, ASSAM

VERSUS

ASSAM POWER DISTRIBUTION CO. LTDAPDCL and 6 ORS.
APDCL, CAR, REP. BY ITS CHAIRMAN, BIJULI BHAWAN, PALTAN BAZAR,
4TH FLOOR, GUWAHATI -01, ASSAM

2:THE GENERAL MANAGER

APDCL
CAR
BARAK VALLEY ZONE
MEHERPUR
SILCHAR
P.O. and P.S. SILCHAR
DIST. CACHAR
ASSAM

3:THE GENERAL MANAGER

COMMERCIAL R APDCL
BIJULI BHAWAN
PALTAN BAZAR
GUWAHATI-01
ASSAM

4:THE DEPUTY GENERAL MANAGER

APDCL



CAR BADARPURGHAT
BADARPUR
P.S. BADARPUR
DIST. KARIMGANJ
ASSAM

5:THE ASSTT. GENERAL MANAGER

APDCL CAR
KARIMGANJ ELECTRIC DIVISION
KARIMGANJ
P.O. and P.S. KARIMGANJ
ASSAM

6:THE CHIEF EXECUTIVE OFFICER

BADARPUR ELECTRICAL CIRCLE
APDCL
CAR
BADARPURGHAT.

7:SRI SANKAR DEB

AGM
TMC BADARPUR ELECTRICAL CIRCLE
APDCL
BADARPURGHAT

Advocate for the Petitioner : MR.P HAZARIKA

Advocate for the Respondent :

B E F O R E

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocates for the applicants : Shri M. Dutta, Ld. Counsel
Advocates for the respondents : Shri KP Pathak, SC, APDCL

Date of hearing : **24.11.2022 & 05.12.2022**
Date of Judgment : **20.12.2022**

JUDGMENT & ORDER

The challenge in this writ petition pertains to an order dated 08.04.2017 by which the prayer of the petitioner to shift the franchise of the petitioner from IBDF to CBDF Scheme has been rejected. The petitioner is also aggrieved by the imposition of a demand of Rs.16,11,674/- as dues to be paid to the ADPCL.

2. Before going to the issue which has arisen for determination in this Case, it would be convenient to state the facts of the case in brief. In fact, there is a chequered history including earlier rounds of litigation connected to the present dispute.

3. The projected case of the petitioner, as would appear from the pleadings in the writ petition is that he is an Input Based Distribution Franchise (IBDF) of the APDCL in terms of an agreement which empowers him to draw bills on the consumers and also to collect the dues. The petitioner alleges that some false allegations were made against him in respect of his functioning as a franchise by one Samiti based upon which, on 05.05.2015, the petitioner was restrained from making disconnection of the lines of the defaulting consumers. It may be mentioned that as per the petitioner there were default in payment of bills for which the lines were to be disconnected. The petitioner further alleges that taking advantage of the order dated 05.05.2015, the consumers even stopped payment of electricity bill. At the same time, the Samiti along with 19 others had filed a Civil Suit being TS No. 176/2015 in the Court of the Munsiff No. 2, Karimganj in which an *ad interim* order of temporary injunction was passed by which both the petitioner as well as the APDCL were restrained from resorting to any coercive measures. This led to a situation where there could not be any revenue collection.

4. In the meantime, the APDCL had taken a conscious decision to shift the franchise system from IBDF to CBDF Scheme for which, the existing agreements had to be terminated vide an order dated 02.01.2016. This compelled the petitioner to

approach this Court by filing two numbers of writ petitions as he was covering 12 numbers of DTRs in two groups, which were registered as WP(C)/838/2016 (concerning 2 DTRs) and WP(C)/5875/2016 (concerning 10 DTRs). However, the second writ petition came to be disposed of earlier vide an order dated 05.10.2016 whereby the petitioner was provided an opportunity to raise the dispute before the DGM who would pass appropriate orders within a specified period and till such disposal, the petitioner shall be allowed to continue in his business and further that no recovery be effected in the said period.

5. In terms of the aforesaid order dated 05.10.2016, the petitioner had submitted a detail representation. However, the same was rejected vide an order dated 15.11.2016 passed by the Chief Executive Officer, Badarpur Electrical Circle. It was held that the shifting / switch over to the credit system was valid and within seven days, the arrears should be paid. However, the authorities vide a subsequent communication dated 04.02.2017 while reiterating the demand for the outstanding had observed that for six months the switching over may be deferred.

6. So far as the first writ petition was concerned, namely, WP(C)/838/2016 wherein the termination order dated 02.01.2016 was challenged in respect of the remaining DTRs, this Court vide order dated 15.05.2017 had passed a similar direction giving liberty to the petitioner to submit a representation seeking appropriate order regarding switch over which would be disposed of by the appropriate authority. The consideration would also include the issue of arrear dues.

7. In compliance with the aforesaid direction of the High Court, the petitioner had submitted a representation which was disposed of vide an order dated 04.08.2017 issued by the General Manager, APDCL. By the said order, it has been held that the prayer for exempting from switching over would not be favourably considered as the petitioner had totally failed to fulfil the basic concept of IBDF Scheme. It has further been held that the petitioner through his proprietorship firm had a liability of



Rs.16,11,674/- the details of which was annexed in the form of a chart and it is this order which is the subject matter of challenge.

8. I have heard Shri M. Dutta, learned counsel for the petitioner and Shri KP Pathak, learned Standing Counsel for the APDCL. The materials placed before this Court have been duly examined.

9. Shri Dutta, learned counsel for the petitioner has submitted that it is not in dispute that it was the authorities who had passed an order dated 05.05.2015 directing the petitioner not to disconnect the electricity line. He further submits that in TS No. 176/2015, the learned Munsiff No. 2 had passed an order of injunction on 15.06.2015. He submits that a common written statement was filed by the APDCL and the petitioner contesting the Suit by the Samiti and 19 others. In the said written statement, the APDCL did not put any blame on the petitioner and rather had categorically stated that there was no fault on his part.

10. The learned counsel for the petitioner accordingly submits that under the aforesaid background, the factors considered in the impugned order dated 04.08.2017 are absolutely untenable in law and accordingly the order needs intervention. The learned counsel has however submitted that the present challenge can be limited only to the demand.

11. In support of his submissions, Shri Dutta, learned counsel for the petitioner has relied upon the following case laws:

- i. AIR 1983 SC 848 [Gujarat State Financial Corporation Vs. M/s. Lotus Hotels Pvt. Ltd.]**
- ii. AIR ONLINE 2003 SC 700 [ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd.]**
- iii. 2022 Live Law (SC) 966 [MP Power Management Company Ltd. Jabalpur Vs. M/S Sky Power Southeast Solar India Private**

Limited & Ors.]

iv. 2022 Live Law (SC) 180 [T. Takano Vs. Securities and Exchange Board of India & Anr.]

12. The case of ***Gujarat State Financial Corporation (supra)*** has been cited in support of the contention on the maintainability of a writ petition against instrumentalities of the State. The Hon'ble Supreme Court has gone to extent that the relief prayed need not be limited to the claim for the damages only but can also go to the extent of specific performance of the contract. The relevant part which is in paragraph 8 of the judgment is extracted hereinbelow:

8....It is too late in the day to contend that the instrumentality of the State which would be 'other authority' under Article 12 of the Constitution can commit breach of a solemn undertaking on which other side has acted and then contend that the party suffering by the breach of contract may sue for damages but cannot compel specific performance of the contract...

13. The case of ***ABL International (supra)*** has been cited to support the view on the availability of writ remedy under Article 226 of the Constitution of India even in matters where there are disputed questions.

14. In the case of ***T. Takano (supra)***, the Hon'ble Supreme Court after considering the relevant case laws on the subject had laid down the principles which are extracted hereinbelow:

“39. The following principles emerge from the above discussion:

(i) A quasi-judicial authority has a duty to disclose the material that has been relied upon at the stage of adjudication; and

(ii) An ipse dixit of the authority that it has not relied on certain material would not exempt it of its liability to disclose such material if it is relevant to and has a nexus to the action that is taken by the authority. In all reasonable probability,

such material would have influenced the decision reached by the authority.

Thus, the actual test is whether the material that is required to be disclosed is relevant for purpose of adjudication. If it is, then the principles of natural justice require its due disclosure.”

15. In the case of **MP Power Management Company Ltd. (supra)**, the Hon'ble Supreme Court had explained the meaning of an arbitrary action. The relevant paragraph is extracted hereinbelow:

“48. We would, therefore, sum up as to when an act is to be treated as arbitrary. The court must carefully attend to the facts and the circumstances of the case. It should find out whether the impugned decision is based on any principle. If not, it may unerringly point to arbitrariness. If the act betrays caprice or the mere exhibition of the whim of the authority it would sufficiently bear the insignia of arbitrariness. In this regard supporting an order with a rationale which in the circumstances is found to be reasonable will go a long way to repel a challenge to state action. No doubt the reasons need not in every case be part of the order as such. If there is absence of good faith and the action is actuated with an oblique motive, it could be characterised as being arbitrary. A total nonapplication of mind without due regard to the rights of the parties and public interest may be a clear indicator of arbitrary action. A wholly unreasonable decision which is little different from a perverse decision under the Wednesbury doctrine would qualify as an arbitrary decision under Article 14. Ordinary visiting a party with the consequences of its breach under a contract may not be an arbitrary decision.”

Further, in paragraph 54 of the judgment, the Hon'ble Supreme Court has laid down the principles of judicial review in contractual matters by invoking the public law remedy.

16. *Per contra*, Shri KP Pathak, learned Standing Counsel, APDCL had defended the

impugned action and even raised the issue of maintainability of this writ petition. He submits that the dispute is essentially a private dispute between the petitioner and the APDCL. Further, the said dispute is civil in nature wherein evidence will be required to be adduced by either of the parties. He also submits that the issue arises from a contract which is determinable in nature and under such circumstances, even assuming there is any cause of action, the remedy would only lie in the Civil Court by invoking, amongst others, Section 73 of the Indian Contract Act. That apart, the maintainability of the writ petition itself has been questioned and in this regard Clause 15 of the agreement had been referred to which contains a dispute resolution clause.

17. Shri Pathak, learned Standing Counsel has structured his defence on certain grounds. He submits that there is no specific challenge to the order of termination and in absence of such challenge, the relief prayed is not maintainable. He submits that the dispute is a purely contractual one, which cannot be adjudicated by the Public Law Remedy under Article 226 of the Constitution of India. He also submits that a determinable contract cannot be specifically enforced.

18. In support of his submissions, the following case laws have been relied upon:

- i. (1991) 1 SCC 533 [Indian Oil Corporation Ltd. Vs. Amritsar Gas Service & Ors.]*
- ii. (2000) 6 SCC 293 [Kerala State Electricity Board & Anr. Vs. Kurien E. Kalathil & Ors.]*
- iii. (2003) 1 GLR 619 [Star India Ltd. Vs. Arup Borah & Ors.]*
- iv. (2008) 12 SCC 500 [Kisan Sahkari Chini Mills & Ors. Vs. Vardan Linkers & Ors.]*

19. In the case of ***Indian Oil Corporation Ltd. (supra)***, it was held that Public Law Remedy should not be normally invoked in matters concerning contractual rights.

20. In the case of ***Kerala State Electricity Board (supra)***, the Hon'ble Supreme

Court was dealing of the issue of maintainability of a writ petition on availability of the alternative remedy. It has been held that when an alternative remedy was prescribed in a contract, in case of dispute, the party should be relegated to other remedies.

21. In the case of ***Star India Ltd. (supra)***, this High Court had held that in case of a dispute involving a contract which is determinable in nature, the bar of the Specific Relief Act would come into operation and no injunction can be granted to enforce the same.

22. Shri Dutta, learned counsel for the petitioner however submits that the challenge regarding conversion / switching over may not be seriously pressed as sufficient time has elapsed in the meantime. However, the action of recovery is liable to be interfered with.

23. The rival submissions made by the learned counsel for the parties have been duly considered and the materials placed before this Court have been carefully examined.

24. To appreciate the issue certain factors are required to be considered. Firstly, there is no manner of doubt that there was an order of the authorities dated 05.05.2015 directing the petitioner not to disconnect the electricity connection. Immediately, thereafter on 15.06.2015 an order of injunction was passed by a competent Court to the effect that the electricity connection should not be disconnected.

25. In the backdrop of the aforesaid preceding facts, the legality of the impugned order is required to be examined.

26. The Suit namely TS/176/2015 instituted by the Samiti and 19 Ors., amongst others, had the following prayers:

- (a) *“For a declaration that consumer / members of plaintiff No. 1 Samiti including plaintiff Nos. 2 to 20 are the legitimate consumers of defendant*

No. 1 APDCL, CAR & they are entitled to continue the enjoyment of electric service on payment of actual consumption bills directly to the Office of the defendant No. 5 & 6.

- (b) *For a declaration that the bills issued by the defendant Nos. 8 & 9 in the name of the members of plaintiff No. 1 Samiti including plaintiff Nos. 2 to 20 vide dated 20.04.2015 & 20.05.2015 "Bill cum Disconnection Notice" are illegal, arbitrary & collusive & direct violation of the letter dated 05.05.2015 & 30.05.2015 issued by the defendant No. 6 & also in violation of tariff of defendant No. 1 & as such the same are liable to be declared illegal, collusive, baseless & cancelled & the defendant Nos. 8 & 9 have no authority to implement the said bills.*
- (c) *For a declaration that members of plaintiff No. 1 Samiti including plaintiff Nos. 2 to 20 are not liable to make payment of the alleged amount as shown in the Bill cum disconnection Notice dated 20.04.2015 & 20.05.2015 & on subsequent date(s) issued by the defendant Nos. 8 & 9.*
- (d) *For a declaration that defendant Nos. 1 to 7 are bound by law & equity to terminate franchise of defendant Nos. 8 & 9 for his illegal & arbitrary action & misuse of power (energy) & take up the consumers of plaintiff No. 1 Samiti including the plaintiff Nos. 2 to 20 directly under the control & management of defendant No. 1 to 7 & its officials i.e., under the town feeder meter near forest office, Botorashi & Town Feeder meter near old custom office of Dhit Botorashi.*
- (e) *For a perpetual injunction restraining the defendants from giving effect to the bill cum disconnection notices dated 20.04.2015 & 20.05.2015 & other*

bills on other dates in the name of the members of the plaintiff No. 1 Samiti including the plaintiff No. 2 to 20 or in any way attempt to collect the alleged bill amount of the said bills or in any way cause loss & suffering to the consumers members of plaintiff No.1 Samiti including plaintiff Nos. 2 to 20 or deprive them from their legitimate rights & consumption charges or attempt to disconnect the electric service connection of the members of plaintiff No. 1 Samiti including plaintiff Nos. 2 to 20."

27. As observed above, both the APDCL and the petitioner had filed a common written statement. The petitioner and his firm were arrayed as respondent nos. 8 and 9 in the aforesaid TS/176/2015. In the said written statement, the case of the plaintiffs was specifically opposed and it was contended that the suit be dismissed. The averments made in the following paragraphs of the written statement which are extracted hereinbelow are required to be taken into consideration.

"14. That the statements made in paragraph 7 of the plaint are not correct and hereby denied by the answering defendants. The answering defendant No. 9 never issued any arbitrary bill without observing the Schedule of the tariff as alleged in paragraph 7 of the plaint. It is not true that the defendant No. 9 through the defendant No. 8 failed to collect accurate / correct reading of the meter of its consumers. It is also a false and baseless statement that the defendant No. 9 through the defendant No. 8 failed to adjust subsidy as per schedule of tariff. The defendant No. 9 never violated the tariff. The F.P.A. charged in the electric energy bill as per tariff and subsequently the F.P.A. amount were adjusted to the consumers after change the tariff.

15. That the statements made in paragraph 8 of the plaint are totally false and baseless. It is not true that the defendant No. 9 through his franchise the

defendant No. 8. Sometime collected money unauthorisely from the consumers for providing new electric service connection under Jivan Jyoti Programme and other project of electricity as provided by the Govt. It is also not true that the defendant No. 9 collected consumption charges of electricity by issuing token / slip as alleged in paragraph 8 of the plaint. The defendant No. 9 never took money from the consumers unauthorisedly. The defendant No. 9 through his franchise the defendant No. 8 never gave connection of electricity in the house of some of the consumers of the plaintiff No. 1 Samity without installing meter in their house as alleged in paragraph 8 of the plaint.

...

17. That the statements made in paragraph 10 of the plaint are totally false and baseless. The defendant No. 9 in the name of his franchise the defendant No. 8 issued electric energy bills to the consumers as per consumptions of electric energy by the consumers. The defendant Nos. 8 and 9 never did any illegal acts and as such there are no reasons for cancellation of franchise of the defendant Nos. 8 & 9. The consumers are not entitled to consume electric energy without payment of electric energy bills. The defaulter consumers have formed an unlawful assembly and filed the instant suit suppressing the facts to avoid payment of electric energy bills against their consumption of electric energy and to cause loss & injury to the defendants.

...

38. That the salient facts of the case are as follows:-

i. ...

ii. That the instant suit is vague, speculative and without any cause of action. Admittedly the plaintiff Nos. 3 to 19 are defaulters in payment of electric energy bills against their consumption of electric energy. The plaintiff Nos. 3 to 19 being the consumers of

the defendant No. 1, they have come before this Hon'ble Court with prayer for declaration that the plaintiffs are not liable to make payment of the amount of bill cum disconnection notice dated 20.04.2015 and 20.05.2015 and on the subsequent bills issued by the defendant Nos. 8 and 9. The plaintiffs stated in paragraph 25 of the plaint that the plaintiffs did not make payment of electric energy bills against their consumption of electric energy with effect from the month of January, 2015 and February, 2015. Accordingly the admitted fact is that the plaintiff Nos. 3 to 19 paid electric energy bill upto December 2014. Thereafter the plaintiff Nos. 3 to 19 continued consumption of electric energy without making payment of electric energy bills against their consumption on electric energy till today.

iii. ...

iv. That the defendant No. 8 under the proprietorship of the defendant No. 9 is the franchise of the defendant No. 1 and as such all functions of the defendant Nos. 8 & 9 remains under the direct supervision of the defendant Nos. 1 to 7. The payment of electric energy bills of the consumers of the franchise, the defendant No. 8 are treated as payment to the defendant No. 1. The plaintiff Nos. 3 to 19 are not entitled to consume electric energy without payment of electric energy bills.

v. The electric energy bills are issued as per consumption of electric energy by the consumers. It is not true that the electric energy bills are issued by the defendant No. 9 through his franchise, defendant No. 8 arbitrarily without observing the schedule of tariff. The consumers are liable to make payment of electric energy bills

against their consumption of electric energy. In the event of detection of any genuine anomalies in the Bill the same may be adjusted as per norms and procedures. The consumers are not entitled to consume electric energy without payment of electric energy bills.

vi. *There was no illegal acts and deeds of the defendant Nos. 8 & 9. The complain of the plaintiff No. 1 Samity was, however, duly entertained by the defendant/OP Nos. 3 and 6 and the defendant Nos. 8 & 9 were requested not to initiate any disconnection of the defaulting consumer until further instruction from GM Silchar Zone APDCL, Silchar. But nowhere it was stated that the plaintiffs are entitled to enjoy electric energy without payment of electric energy bills. The defendant No. 9 being the proprietor of defendant No. 8 Franchise is entitled to maintain the electric service connection within his franchise and issue electric energy bills to the consumers within the supervision of the defendant No. 5 & 6 to protect the interest of the consumers. The defendant Nos. 8 & 9 is under the control and supervision of the defendant Nos. 5 & 6 and as such there are no reasons for any illegality and loss of consumers.*

vii. ...”

Apart from the paragraphs quoted, on a reading of the stand of the APDCL in the said Title Suit, it becomes absolutely clear that no fault was attributed upon the petitioner by the APDCL in the matter.

28. The impugned order dated 04.08.2017 has been passed by taking certain factors into consideration. It has also been stated that the petitioner's firm has been found to be regular defaulter and a police case was also lodged for making unauthorized connection along with extension of LT Line. That apart, complaints were

made by the Samiti regarding erroneous bills.

29. A writ Court exercising jurisdiction under Article 226 of the Constitution of India can examine the decision making process. The examination can go to the extent of reaching a satisfaction as to whether the relevant factors have been taken into consideration and as to whether the conclusion reached is that of a reasonable person. This Court would also explore as to whether extraneous or irrelevant consideration had played any role in the decision making process coupled with the fact of absence of any bias. Finally, adherence to the principles of natural justice which is the hallmark of a reasonable action needs to be examined.

30. In the instant case, certain factors appear to have been taken into consideration in the impugned order dated 04.08.2012 before reaching the conclusion. Those factors, *per se*, do not appear to be extraneous or irrelevant. However, at the same time, one cannot ignore or overlook the stand of the APDCL in the common written statement filed in the Title Suit, the details of which have already been observed above. The APDCL being an instrumentality of the State cannot be allowed to take wavering stand in two proceedings connected to the same dispute.

31. Admittedly, there was an order dated 05.05.2015 passed by the authorities directing the petitioner not to raise any bills in respect of the consumers in question. That was followed by the order of injunction dated 15.06.2015 passed by a competent Civil Court in TS/176/2015 and as per the records, the injunction was vacated only on 21.09.2016 when the Suit was also dismissed. Therefore, the records itself would show that from 05.05.2015 to 21.09.2016, the petitioner could not raise any bills and therefore, it would be wholly unjustified to make any demand for that period.

32. At the same time, as has been laid down by the Hon'ble Supreme Court that disputed questions of facts cannot be adjudicated by a writ Court which would require adducing of evidence, cross examination etc., an attempt by this Court to enter into the merits may not be a correct step. As noted above, the issue of conversion / switch



over has not been pressed by the petitioner.

33. In view of the above, this writ petition is disposed of by holding that so far as the challenge to the impugned demand of Rs.16,11,674/- to APDCL is concerned, the same can be the subject matter of challenge in an appropriate Suit for which liberty is granted to the petitioner. In the event, such Suit is instituted, the learned Civil Court is required to deal with the wavering stand of the APDCL as indicated above and thereafter, take a decisions on merits. Since, the present writ petition is the third round of litigation in this High Court which was continuing till date, in case a Suit is instituted by the petitioner the same be entertained and examined on merits and should not be rejected on the ground of limitation. The parties may also take recourse to Section 14 of the Limitation Act of 1963 as this present petition was being pursued *bona fide*.

34. The writ petition is accordingly disposed of.

35. No order, as to cost.

JUDGE

Comparing Assistant