

A.F.R.

HIGH COURT OF ORISSA: CUTTACK

W.P.(C) Nos.6338 and 6386 of 2012

In the matter of applications under Articles 226 and 227 of the Constitution of India.

In W.P.(C) No.6338 of 2012

Assessing Officer-cum-Executive Engineer (Elect.),
NESCO, Baripada Electrical Division,
At/P.O. Baripada,
Dist: Mayurbhanj ... Petitioner

-Versus-

Appellate Authority-cum-Dy. Electrical Inspector,
(T & D) Balasore and another ... Opp. Parties

For Petitioner : Mr. S.C. Dash

For Opp. Parties : M/s. F.R. Mohapatra,
M.K. Panda, R.K. Nayak &
A.K. Moharana
(For O.P.No.2)

In W.P.(C) No.6386 of 2012

Samiran Singha, aged about 50 years,
S/o. Late Dayanidhi Singha,
At/P.O. Kosta, Dist: Mayurbhanj ... Petitioner

-Versus-

Executive Officer (Electrical),
NESCO, Baripada Electrical Division,
At/P.O. Baripada,
Dist: Mayurbhanj and another ... Opp. Parties

For Petitioner : M/s. F.R. Mohapatra,
M.K. Panda, R.K. Nayak &
A.K. Moharana

For Opp. Parties : Mr. S.C. Dash
[For O.P. No.1]

P R E S E N T:

THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA

Date of Judgement: 23.11.2012

B.N. Mahapatra, J. Writ petition bearing W.P.(C) No.6338 of 2012 has been filed by the licensee-Assessing Officer-cum-Executive Engineer (Elect.) with a prayer to quash the order dated 23.03.2012 passed by the Appellate Authority-cum-D.E.I. (T&D), Balasore in Case No.AAC 01/2012 (Annexure-9) directing for reconnection of power supply to the premises of the consumer-petitioner within 48 hours without any cost. Further prayer is for a clarification that 50% statutory deposit as required under Section 127 (2) of the Electricity Act, 2003 for the purpose of maintaining the appeal neither confers any right on the consumer to demand for restoration of power supply nor does it empower the Appellate Authority to direct the licensee by an interim order for reconnection of power supply to the consumer's premises. In the writ petition, though prayer has been made to quash order dated 23.03.2012 passed in Case No.AAC 01 of 2012 under Annexure-9, no such order has been attached to the writ petition as Annexure-9. Annexure-8 is the last Annexure attached to the writ petition, which is a petition dated 26.03.2012. However, it is found that the order dated 23.03.2012 has been annexed to the writ petition as Annexure-7. From the various arguments advanced by Mr. Das, learned counsel for the petitioner, it appears that the petitioner licensee has filed this writ

petition to quash the order dated 23.03.2012 passed in Case No.AAC 01 of 2012 under Annexure-7 and not Annexure-9.

2. Writ petition bearing W.P.(C) No.6386 of 2012 has been filed by the consumer with a prayer to direct opposite party No.1-Executive Engineer (Electrical), NESCO to restore power supply to the premises of the petitioner and to dispose of the appeal within a stipulated period.

3. Since both the writ petitions are interconnected, they are disposed of by this common judgment.

4. Petitioner's case in W.P.(C) No.6338 of 2012 in a nut-shell is that the petitioner is one of the electrical supply Engineers of the Distribution-Licensee i.e. NESCO engaged in the business of retail supply of electricity to various categories of consumers within the area of supply. Opposite party No.2 Samiran Singha @ Singha, son of late Dayanidhi Singha is a consumer of electricity under the petitioner-company for a contract demand of 5KW under general purpose commercial tariff to run lethe work/fabricating unit for installation of welding machine upon execution of the agreement to that effect on 15.11.2010. Under the said agreement, the petitioner has undertaken to abide rules and regulations as contemplated under OERC Distribution (Condition of Supply) Code, 2004. During spot verification conducted by the squad of NESCO on 04.02.2012, it was found that the said consumer has committed theft of power supply unauthorizedly by way of direct 3 phase hooking from the nearby L.T. Line through 2.5 mm sqr. Current wires of red, blue and yellow colours for the purpose of running

his fabricating industry. The said hooking wires were seized on the spot after taking photographs and power supply was disconnected as per Clauses-34 and 46 of OERC Supply Code, 2004 read with Section 135 of the Electricity Act, 2003 and subsequently, on 07.02.2012, FIR was lodged against the consumer for his availing power supply in such an authorized manner. On the basis of spot verification report dated 04.02.2012, the present petitioner as Assessing Officer proceeded under Section 126 of the Electricity Act, 2003 and assessed an amount of Rs.1,69,928/- towards the provisional assessment vide his office letter No.348 dated 08.02.2012 and served on the consumer inviting objection fixing 16.02.2012 as the date for personal hearing in the matter. In response to the said letter of provisional assessment the consumer filed objection on 14.02.2012 admitting the actual fact of availing power supply unauthorizedly in the manner as detected by the squad of the licensee (NESCO). The Assessing Officer upon consideration of the reply of the consumer-opposite party no.2 has passed the final assessment order No.869 dated 06.03.2012 for an amount of Rs.1,56,474/-. Against the said final assessment order dated 06.03.2012, the consumer approached the present petitioner to allow him to deposit 50% of the finally assessed amount towards the statutory deposit to prefer appeal under Section 127 of the Electricity Act, 2003 to the Appellate Authority and accordingly, he was allowed to deposit 50% of the finally assessed amount for the purpose of preferring Appeal as provided under the Statute. On 24.03.2012, the petitioner received interim order dated

23.03.2012 passed by the appellate authority in Case No.AAC 01 of 2012, wherein the petitioner has been directed to revive power supply to the premises of the consumer without any cost. On receipt of the said interim order, the petitioner filed a petition on 26.03.2012 for vacation of the said interim order as the same being without authority. The appellate authority rejected the said petition of the petitioner vide order dated 28.03.2012. Hence, the present writ petition.

5. Mr. S.C. Dash, learned counsel for the petitioner submitted that the interim order was passed by the appellate authority without serving any notice of the appeal petition on the petitioner. Deposit of 50% of the finally assessed amount is only made for the purpose of preferring and maintaining the appeal and in absence of any provision for restoration of power supply by the appellate authority, it cannot direct for restoration of power supply. Only remedy available for restoration of power supply is to deposit the entire assessed amount as required under 3rd proviso to Section 135(1A) of the Electricity Act, 2003. The appellate authority has exceeded its jurisdiction by passing an ex parte order for reconnection of power supply to the premises of the consumer while exercising power under Section 127 of the Electricity Act, 2003 without appreciating the meaning of Section 127(2) of the Act, 2003, which provides that 50% deposit out of the finally assessed amount is required for the purpose of maintaining the appeal but it does not confer any right on the consumer to get restoration of power supply. The appellate authority is not authorised under any law to pass any

interim order directing restoration of power supply. Therefore, the interim order dated 23.03.2012 passed by the appellate authority is liable to be set aside. The appellate authority has passed the impugned order without hearing the petitioner which is violative of the principles of natural justice. The appellate authority on 28.3.2012 in utter disregard to the citations filed by the petitioner rejected the petition dated 26.03.2012 filed by the petitioner for vacation of interim order dated 23.03.2012. In support of his contention that the appellate authority has no power to pass interim order, Mr.Dash, relied upon the decisions of the Calcutta High Court in the cases of *Kuban Sk. vs. State of West Bengal and others*, AIR 2011 (NOC) 124 (CAL) and *Amit Sasmal vs. West Bengal State Electricity Distribution Co. Ltd. & Anr.*, AIR 2011 (NOC) 126 (CAL). Concluding his argument, Mr. Dash prays to allow the writ petition.

6. On the contrary, Mr. F.R. Mohapatra, learned counsel appearing for opposite party No.2-Samiran Singha in W.P.(C) No.6338 of 2012 and the petitioner in W.P.(C) No.6386 of 2012 submitted that the authority has power to grant interim order as incidentally or ancillary to its appellate jurisdiction. In support of his contention, relying upon the judgment of the Hon'ble Supreme Court in the case of *Income Tax Officer, Cannanore vs. M.K. Mohammed Kunhi*, AIR 1969 SC 430, Mr. Mohapatra submitted that there is no infirmity or illegality in the order passed by the appellate authority.

7. The only question that falls for consideration by this Court is as to whether the appellate authority has incidental and ancillary powers which it can exercise to make fully effective the express power granted under Section 127 of the Act, 2003 and therefore the impugned order dated 23.3.2012 passed by the appellate authority in Case No.AAC 01/2012 directing the licensee-petitioner to reconnect power supply to the consumer's premises is justified.

8. Undisputed facts are that opposite party No.2 has been finally assessed under Section 126 of the Electricity Act, 2003. Section 127 of the Act, 2003 provides that any person aggrieved by a final order made under Section 126 may, within thirty days of the said order, prefer an appeal. Section 127(2) of the Act, 2003 provides that no appeal against an order of assessment under sub-section (1) shall be entertained unless an amount equal to [half of the assessed amount] is deposited in cash or by way of bank draft with the licensee and documentary evidence of such deposit has been enclosed along with the appeal.

9. In the instant case, opposite party no.2 has filed an appeal under Section 127 of the Act, 2003 and to maintain his appeal he has deposited 50% of the assessed amount. The appellate authority has passed the impugned order dated 23.03.2012 directing the licensee-petitioner to reconnect power supply to the premises of the consumer-opposite party No.2 within 48 hours without cost with a further direction not to initiate any action against the consumer-opposite party no.2 for

non-payment of balance 50% of the assessed amount till disposal of the appeal by the appellate forum. Licensee-petitioner's case is that under Section 127 of the Act, 2003 no power is vested with the appellate authority to pass any interim order, but despite the same, the appellate authority has passed the impugned interim order. Therefore, interim order directing restoration of power supply is illegal. The remedy available to the consumer-opposite party No.2 is under 3rd proviso of sub-section (1-A) of Section 135 which provides that on deposit or payment of the assessed amount or electricity charges in accordance with the provisions of this Act, without prejudice to the obligation to lodge the complaint as referred to in the second proviso to that clause, the licensee shall restore the supply line of electricity within forty-eight hours of such deposit or payment. Mr. Dash, learned counsel for the licensee-petitioner submitted that only remedy available to the consumer-opposite party No.2 in case of disconnection of power supply under 3rd proviso to Section 135(1-A) of the Act, 2003 is to deposit the payment of the assessment amount of the electricity charges. Therefore, the interim order passed by the appellate authority is contrary to law.

10. The consumer-petitioner's case in W.P.(C) No.6386 of 2012 is that power supply to the premises of the petitioner has been disconnected by exercising power under Section 135 of the Act, 2003 on the very same day of verification i.e. on 04.02.2012 much prior to passing of the final assessment order. It is further submitted that on the date of disconnection of power supply i.e. the date of verification no

demand has been raised by the petitioner-licensee. In any event, the provision contained in 3rd proviso to sub-section (1-A) of Section 135 is not adequate remedy available to the consumer-petitioner as the said provision provides for payment of entire assessed amount, even if the correctness of such assessment is challenged in the appeal. Therefore, it was submitted that since there is no adequate remedy available under the Act, 2003 for restoration of power, except making payment of the entire assessed amount which was challenged before the appellate authority, the said authority has power to grant the interim order as incidentally or ancillary to its appellate jurisdiction.

11. At this juncture, it is necessary to refer some of the decisions of the Hon'ble Supreme Court which is relevant for our purpose. The Hon'ble Supreme Court in the case of ***Matajog Dobey vs. H.C. Bhari***, AIR 1956 SC 44,

“**23.** Where a power is conferred or a duty imposed by statute or otherwise, and there is nothing said expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably necessary for such execution.....”

12. The Hon'ble Supreme Court in the case of ***Bidi, Bidi Leaves & Tobacco Merchants' Association v. State of Bombay***, AIR 1962 SC 486, held as under:

“**20.** “One of the first principles of law with regard to the effect of an enabling act”, observes Craies, “is that if a Legislature enables something to be done, it gives power at the same time by

necessary implication to do everything which is indispensable for the purpose of carrying out the purposes in view⁵". The principle on which this doctrine is based is contained in the legal maxim "*Quando lex aliquid concedit concedere videtur et illud sine quo res ipsa ease non potest*". This maxim has been thus translated by Broom thus: "whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect". Dealing with this doctrine Pollock, C.B., observed in *Michael Fenton and James Fraser v. John Stephen Hampton*⁶ "it becomes therefore all important to consider the true import of this maxim, and the extent to which it has been applied. After the fullest research which I have been able to bestow, I take the matter to stand thus: Whenever anything is authorised, and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorised in express terms be also done, then that something will be supplied by necessary intendment". This doctrine can be invoked in cases "where an Act confers a jurisdiction it also confers by implication the power of doing all such acts, or employing such means, as are essentially necessary to its execution." In other words, the doctrine of implied powers can be legitimately invoked when it is found that a duty has been imposed or a power conferred on an authority by a statute and it is further found that the duty cannot be discharged or the power cannot be exercised at all unless some auxiliary or incidental power is assumed to exist. In such a case, in the absence of an implied power the statute itself would become impossible of compliance. The impossibility in question must be of a general nature so that the performance of duty or the exercise of power is rendered impossible in all cases. It really means that the statutory provision would become a dead-letter and cannot be enforced unless a subsidiary power is implied. This position in regard to the scope and effect of the doctrine of implied powers is not seriously in dispute before us. The parties are at issue, however, on the question as to whether the doctrine of implied powers can help to validate the impugned clauses in the notification."

13. The Hon'ble Supreme Court in the case of *M.K. Mohammed Kunhi (supra)*, held that the power to stay is a necessary corollary to the power to entertain an appeal or revision. That even without an express conferment, the appellate authority has the power to stay the proceedings and the collection pending appeal, as incidental or ancillary to its appellate jurisdiction.

14. The Hon'ble Supreme Court in the case of ***Sikri Vasu vs. State of U.P. and others, (2008) 2 SCC 409***, held as under:

“18. It is well settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary for its execution.”

“19. The reason for the rule (doctrine of implied power) is quite apparent. Many matters of minor details are omitted from legislation. As Crawford observes in his *Statutory Construction* (3rd Edn., p. 267):

“... If these details could not be inserted by implication, the drafting of legislation would be an interminable process and the legislative intent would likely be defeated by a most insignificant omission.”

15. This Court in the case of ***Harendra Prasad Sahu vs. Orissa Sales Tax Tribunal and others, (1996) 103 STC 333 (Ori)***, held as under:

“4..... Tribunal has all the powers conferred expressly by the statute. Furthermore, being a judicial body, it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. Certain powers are recognized as incidental and ancillary not because they are inherent in the Tribunal, nor because its jurisdiction is plenary, but because it is the legislative intent that the power which is expressly granted in the assigned field of jurisdiction is efficaciously and meaningfully exercised. The implied grant is of course limited by the express grant and therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective. (See Maxwell on Interpretation of Statutes, Eleventh Edition). A Division Bench of this Court in *Smt. Aruna Kar v. Dr. Sarat Dash and Nachhi*, (1973) 75 CLT 24 also dealt with these aspects.”

16. In view of the above settled legal proposition, this Court is of the view that the appellate authority while exercising power under Section 127 of the Act, 2003 carries with it by necessary implication, the authority to use or reasonable means to make such power effective by way of passing any interim order. Such power is incidental and ancillary to make the power granted under Section 127 of the Act, 2003 effective.

17. The issue involved in this case can be looked at from a different angle. In a case, where exorbitant amount is raised by an illegal, arbitrary assessment and pursuant to such assessment, power supply is disconnected for non-payment of the assessed amount but in appeal, the said demand is substantially reduced or annuled, in that case till the appeal is disposed of or entire assessed amount is paid no power supply would be restored to consumer's premises even though the

consumer is not liable to pay such illegal demand. This is certainly not the intention of legislature. Only in cases where the consumer does not want to challenge the demand assessed before any higher forum, in that case only 3rd proviso to Section 135 (1-A) has full application and unless the consumer pays the entire assessed amount with reconnection charges, power supply cannot be restored to his/her premises.

18. For the reasons stated above, the decision of the Calcutta High Court in the case of **Kuban Sk.** (*supra*) and in the case of **Pradip Haldar vs. The CESU Ltd. & Ors.**, AIR 2011 (NOC) 127 (CAL.) are of no help to the petitioner. In the said cases the learned Single Judge of Calcutta High Court has not taken note of the judgment of the Hon'ble Supreme Court hereinbefore referred to. Moreover, there is no detailed discussion of the issue involved in the present case.

19. Therefore, the impugned order dated 23.03.2012 (Annexure-7) passed by the Appellate Authority-cum-D.E.I. (T & D), Balasore in Case No.AAC 01/2012 directing the licensee-petitioner to reconnect power supply to the premises of opposite party No.2-Samiran Singha and not to take any action against the said opposite party No.2 for non-payment of the balance 50% of the assessed amount till disposal of the appeal is legal/valid and warrants no interference of this Court. The interim order dated 09.04.2012 passed by this Court stands vacated. The licensee-petitioner is directed to restore power supply to the premises of opposite party No.2 forthwith without insisting any payment towards the balance 50% of the assessed amount. The appellate

authority is directed to dispose of the appeal pending before it within a period of three months from the date of receipt of a copy of this judgment after affording opportunity of hearing to the parties concerned.

20. In the result, W.P.(C) No.6338 of 2012 filed by the Assessing Officer-cum-Executive Engineer (Elect), NESCO is dismissed with the aforesaid observations and direction. Consequentially, W.P.(C) No.6386 of 2012 is allowed to the extent indicated above.

No order as to costs.

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B.N. Mahapatra,J.

Orissa High Court, Cuttack
The 23rd November, 2012/ss/skj.