

DELHI ELECTRICITY REGULATORY COMMISSION

Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi- 110017.

F.11(547)/DERC/2009-10/

Petition No. 04/2010

In the matter of :

Ashish Gulabani
J-9, Lajpat Nagar -III,
New Delhi-110024.

.....**Complainant**

VERSUS

BSES Rajdhani Power Limited
Through its : **CEO**
BSES Bhawan,
Nehru Place,
Delhi-110019.

.....**Respondent**

Coram:

Sh. P.D. Sudhakar, Chairperson, Sh. Shyam Wadhera, Member & Sh. J.P. Singh, Member.

Appearance:

1. Sh. A.K. Datta, Counsel for Complainant.
2. Sh. A.K. Gulabani, Complainant
3. Sh. H.M. Sharma, Representative of Complainant
4. Sh. K. Datta, Advocate for Respondent, BYPL
5. Sh. Raj Arora, Head, Legal – BRPL
6. Sh. T.R. Bhatia, AVP, BRPL
7. Sh. Sita Ram, DGM for BRPL
8. Sh. Anuj Aggarwal, Head of Customer Care, BRPL
9. Sh. Manish Srivastava, Advocate for Respondent, BYPL

ORDER

(Date of Hearing: 02.08.2011)

(Date of Order: 01.09.2011)

1. The instant complaint has been filed by Sh. Ashish Gulbani resident of J-9, Lajpat Nagar, New Delhi claiming compensation from the distribution licensee i.e, BSES BRPL for damages caused to the him due to harassment and other related issues arising out of raid in his house during his absence and framing of false case without following the norms

stipulated in DERC Supply Code and Performance Standards Regulations, 2007 framed under the provisions of section 57 read with section 24 of EA, 2003. In his prayer he has claimed compensation from the respondent for failure to meet the standards of performance as per section 57(2) of EA, 2003 and section 24 of EA, 2003 and has sought the following damages:-

- a) Humiliation and ignominy due to false raid when no such cause of action arose for which the applicant claims Rs. 5,00,000/- (Rupees Five lakhs) only as compensation.
- b) Anxiety and mental agony following the raid which was allegedly made on false cause resulting in deterioration of health of both the petitioner and her mother for which the applicant claim for Rs.50,000/- (Fifty thousand) only as compensation.
- c) Loss of face in the neighbourhood as an electricity thief resulting in humiliation and loss of esteem of the family for which applicant claims Rs. 5,00,000/- (Rs. Five lakh) only as compensation.
- d) Valuable professional time lost and expenses due to repeated appearance in the corporate legal cell by his representative due to vague time limit of reply and appearance, when a mere reply would have been sufficient for which the applicant claims Rs. 50,000/- (Fifty thousand) only as compensation.
- e) Cost of legal opinion sought on the matter of the show-cause notice is Rs. 50,000/- (Fifty thousand) only.
- f) Cost of retainer /consultant engaged for providing technical input for guiding the petitioner is Rs. 50,000/- (Fifty Thousand) only.
- g) Cost of filing this petition before the Commission for compensation is Rs. 20,000/- (Twenty Thousand) only.

The facts of the case:-

2. The power connection of the above Complainant stands in the name of his late grandmother Smt. Dayali having K.No. 2540C2150227 and Complainant is the user. The Complainant has stated that on 22.10.2009, when he was out of his residence for physiotherapy, there was a raid on his residence, which was made by the Enforcement team of BRPL. This team was led by Er. Ashok Kumar, Sr. Manager (Enforcement) who, as per the Complainant made forced entry into his house and while taking video-graph of the entire house also confiscated electronic energy meter and replaced the same by a new

untested energy meter. The Complainant further submitted that the moment he reached his house, the raiding party was about to leave after completing the operation. It is submitted that on his inquiry Sh. Ashok Kumar informed that as the software of the electronic meter seems to be out of order, he was sending the meter to the lab for testing.

3. The applicant then received a show -cause notice on 28.10.2009, asking why action be not taken for suspected theft (meter tampering) of electricity, which was signed by Sh. Ashok Kumar on 22.10.2009. The Complainant was also directed to be present at MMG laboratory at 10.30 to 2.00PM on 30.10.2009 for de-sealing the defective meter and witnessing the testing process.
4. On this, the Complainant informed the respondent that he is bed ridden with a critical illness for over 6 months and still undergoing treatment. During the hearing the Complainant further made submissions to the Assessing Officer vide his letter dated 16.11.2009 that Regulation 52 of the Supply Code has not been adhered to while issuing show-cause notice and hence it was defective and has been issued with the sole purpose of harassing the applicant. The show cause notice was defective because **both the old meter and the new meter now installed were untested and were defective meters**, which is a violation of Regulation 52(viii)(ix)(x)(xi) & (xii) of Supply Code. He further submitted that the Electronic Energy meter was obviously malfunctioning and not only showing wrong date and time but had also recorded negative reading. The Enforcement officer could not explain how the case of tampering arose, when seal & hologram of the meter were intact and both the meters were not tested.
5. The Respondent BRPL submitted that meter bearing No. 13487916 was checked on 22.10.2009 by the authorised officer of the company. The RTC of the meter was found failed i.e. the current date & time was shown by the meter as 4.10.2000 & 19:27:07 hours respectively against actual 20.10.2009 and 12:31:00 hrs. A total connected load of 23.186 kW was found being used for domestic purpose against sanctioned load of 2 kW. Meter details report, load report and inspection report were prepared at site and was also signed by the Authorised Officer as well as the members of the inspection team. As the Complainant refused to accept the same at site and did not allow to paste, the

inspection report was dispatched to the consumer under registered post on 22.10.2009. The inspecting team prima-facie came to the conclusion that it is a case of interference with the metering equipment by external disturbance into the meter. The team also analysed the consumption pattern and found that the recorded consumption was 9% of the assessed consumption. Therefore, the old meter was seized at site in the presence of representative of the Complainant vide seizer memo dated 22.10.2009 and sent to NABL accredited Energy Meter Testing Lab in sealed condition for further testing/analysis under intimation to the consumer. Supply was restored through a new electronic meter.

The consumer was served show-cause notice for suspected theft of Electricity (meter tampering) in accordance with Regulation 52(X) along with all relevant documents of inspection dated 22.10.2009, including intimation for lab testing on 30.10.2009 and requesting to file reply by 9.11.2009 as well as to attend the personal hearing on 16.11.2009 before the Assessing Officer. This was sent to the Complainant by post. The consumer expressed his inability to attend the lab testing on account of paucity of time and requested to get the meter tested from a third party.

6. The Respondent held a personal hearing on 16.11.2009, which was attended by the Complainant, wherein both parties agreed that the next date of hearing should be fixed after receiving the lab report of NABL testing laboratory following which fresh show-cause notice shall be issued. This request of the consumer was acceded to and the meter was handed over to ERDA (Electrical Research & Development Authority) who in its report dated 15.3.2010 recorded that extreme high voltage / ESD has been applied on the meter externally to disturb the meter reading. Pursuant to this, a fresh show-cause notice dated 16.3.2010 was issued, wherein the consumer was asked to file reply by 25.3.2010 and to attend the personal hearing on 1.4.2010. The case is under process.
7. The Complainant filed a rejoinder on 18-05-2010, wherein, he refuted all the charges made in the reply filed by the Respondent, He denied the charge that he or his representative refused to receive the said report. He submitted that the signature of his mother on the inspection/meter

report and allowing the inspection team to take video-grapey of the house clearly establish that the member of his family cooperated with the inspection team.

Complainant while refuting charges of the Respondent submitted that

- i) The Detailed examination of evidence and study of consumption patterns is not supporting the framing of above case of theft.
- ii) Period of 7 days to be taken for examination not availed.
- iii) Notice was issued instantly on 22nd Oct'2009 while sitting in the office on the same day of inspection without examination of consumption pattern.
- iv) Testing of meter was not made on the date of raid.
- v) Prior information relating to the sending of the meter to the NABL Testing Lab was not even given to the applicant.

8. The matter was listed for hearing before the commission on 26.05.2010 and 29.06.2010, where both the parties were present. In its interim order dated 18.07.2010 the Commission directed the Respondent to file its submissions on the following issues and directed the petitioner to file a counter reply.

- a) Violation of procedure for booking a case for Theft of Electricity, under Regulation 52 of the Delhi Electricity Supply Code and Performance Standard Regulations 2007.
- b) Violation of Section 135(4) of the Electricity Act, 2003 while booking the theft case against the Complainant and applicability of Section 142 of the Electricity Act, 2003 in respect thereof.
- c) Jurisdiction of Commission in case of matters pending before a Special Court.

9. The Respondent submitted its response on 21st July 2010 and Petitioner submitted his reply on 16th July and 2nd August 2010. The Respondent in his response stated that on 27.2.2009, electronic Meter of the Complainant was stuck on reading 11163, but was going forward & backward and displaying same reading on 22.10.2009. The RTC failed with displayed date of year 2000. Hence the raid was conducted. This satisfy the main pre-condition for conducting raid u/s 135 of EA, 2003 i.e. 'reason to believe'. The Petitioner having refused to accept Show cause notice and other papers in person, then these were sent to him

by post. The Respondent could not arrange independent witness during raid. In its reply the licensee has further reiterated that the present complaint has been filed against the violation of provisions of Section 57 of EA 2003 which provides guaranteed standards of performance in the Supply Code and Regulation 65 which further provides that respondent is liable to pay the affected consumer compensations specified in Schedule III for its failure to meet above standards specified in schedule for which under Regulation 66 the consumer is required to lodge a claim for compensation.

However, the Respondent stated that in the instant case, as the consumer has failed to specify as to which guaranteed standard of performance mentioned in Schedule-I has not been met by the respondent. Therefore it is not a case falling u/s 142 of EA for violation of Regulations. The respondent has further submitted that the Complainant without resorting to the remedy as provided in the Statute has by-passed the procedure mentioned in the Regulations by approaching the Commission directly whereas the remedies in the above case lie with the CGRF. According to the respondent the instant case is outside the purview of the Hon'ble Commission. To substantiate its stand the respondent has enumerated many citations viz.:

- I Maharashtra Electricity Regulatory Commission Vs. Reliance Energy Ltd. (2007 (8) SCC 381)
- II MSERC vs Lloyd Steel Industries Limited (AIR 2008 SC 1042)
- III Vikas Road Line vs. NDPL (DERC)
- IV Jain Ata Chakki vs. NDPL(DERC)
- V B.L. Kantroo Vs. BRPL (154(2008)DLT 56 (DB)

Pending adjudication of the above complaint in the Hon'ble Commission and specifically in view of the fact that no restraint order was ever passed by the Commission, the Assessing Officer passed a speaking order on 23.02.2011, pursuant to which a theft assessment bill of Rs.97,551/- was raised upon the consumer.

It was further submitted by the Respondent that it has also filed a criminal complaint against the above Complainant u/s 154 read with Section 135

of the Electricity Act – 2003 bearing criminal complaint No.148 of 2011, before Ld. Special Court, Saket, New Delhi constituted under the Electricity Act-2003, which is pending for adjudication.

10. The Petitioner pointed out the following irregularities and complained of fraudulent and mischievous action of the Respondent as given below:-

(a) On the issue of violation of Regulations while booking a case of theft:

- (i) The raid was conducted with half a dozen men when his old heart patient mother was only present in the house and they made a manipulative Inspection Report.
- (ii) No independent witness was present which is violative of Section 135 (4) of the EA 2003.
- (iii) The Respondent left immediately after removing the Electronic Meter.
- (iv) Admittedly the Respondents were carrying the Show cause notice during raid on 22.10.2009 which is violative of Section 52 (x) of the DERC code of Performance Regulation 2007.
- (v) Respondent did not examine the consumption pattern of the Petitioner for last 12 months which the Petitioner claimed to be uniform for last 24 months. The case should have been dropped at that stage. Show cause notice was issued before even making the inspection and this was again violative of Section 52 (ix) of DERC Code of Performance Regulation 2007. Further all the members of the raiding party did not sign the Inspection Report as per Section 52 (ix) of the Regulation Code which was thus defective.
- (vi) Respondents submission stating that the Meter got stuck up on 27.2.2009, and then going forward & backward is a matter of blatant lie. As per DERC Regulation 39(b) the Respondent should have changed the Meter on 4.5.2009 but failed to do so thus violating the DERC Code of Performance Regulation. Besides, stating lies on oath makes them guilty of perjury. Respondent has failed to comply with the provision of 39(b) of

Delhi Electricity Supply Code & Performance Standard) which states “where the licensee observes that meter is not recording any consumption for last two billing cycles, he shall notify the consumer. Thereafter, the licensee shall check the meter and if the meter is found stuck/ stopped, the meter shall be replaced within seven days”. As the sequence of event now unfold, the meter reading given in electricity bill is given below: -

Dated	Reading unit
27.02.2009	11163
04.05.2009	11163
27.07.2009	11795
08.09.2009	No reading shown in bill
22.10.2009	11163 (as per inspection report)

It is clear from the above table that the meter got stuck at 11163 on 27.02.009 and had the same reading of 11163 on 04.05.2009. The respondent should have notified the applicant and changed the meter. Either by design or by sheer negligence they did not notify the applicant and had given manipulated reading of 11795 for 27.07.09, gave no reading of 08.09.09 and finally specified 11163 on the date of raid on 22.10.2009, in order to avoid payment of compensation as per Schedule III for not changing the meter. Thereby the respondent adopted diversionary tactics and arranged a raid for booking a case under theft.

- (vii) Petitioner pointed out that the Show cause notice was defective because there was no result of meter test and it had vague, non applicable, irrelevant statements and no specific charge. The Petitioner, therefore, demanded dropping the show cause notice during hearing. Fresh Show cause notice after proper NABL Lab Test could not be issued by the Respondent even after 30 days of inspection i.e. 21.11.2011 and hence the case of suspected theft was deemed to have been dropped.

(viii) Speaking order on the outcome of personal hearing held by the Respondent on 16.11.2009 was not issued at all which is violative of Section 52(ix) of Code of Performance of Regulation 2007. Therefore the Complainant made allegation against the Respondent that it is guilty of violation of 52 (IX) (X) (XI) and 39 (b) of DERC Code of Performance Regulation 2007 as well as Section 135 (4) of the EA 2003, because no independent witness was taken while conducting raid.

(b) On the issue of violation of Section 135(4) of Electricity Act, 2003, while booking the theft case:

The Complainant further stated that there is no case pending before the Special court because the Respondents could not establish suspected case of theft and repeatedly violated the Code of Performance Regulation 2007 & EA 2003.

(c) On the issue of jurisdiction:

The Commission has full jurisdiction to deal with cases due to failure in performance of the Code Regulation 2007 & EA 2003 by the Respondent and can take suitable action as per Section 142 of the EA 2003.

11. It was further submitted by the Complainant that since the Petitioner filed an application under 57(2) of EA 2003 on 19.1.2010 and subsequent to two notices issued by the Hon'ble Commission, the response filed by the Respondent is an afterthought and a cover up of his mischievous actions. This act of the licensee can be seen from the fresh Show cause notice issued on 16.03.2010 to the consumer i.e. after 89 days based on a fake meter test of an already defective meter. As per Complainant all actions of the Respondent post 19.01.2010 and after notice issued by the Hon'ble DERC in this case have allegedly been done with mischievous intention, fraudulently in contravention of DERC Regulations and are outside the preview of this case.

Hearing in the commission and its findings:-

12. Finally the Commission heard the matter on 02.08.2011 at length where the counsels of both parties were present and placed their views. After hearing both as well as taking into account the entire record, facts and

figures available with the Commission, the Commission comes to the following conclusions:-

Payment of damages caused due to harassment

The issue raised and prayer made in the instant complaint, which petitioner has filed against the licensee relates to seeking of compensation under section 57(2) read with 24 of the EA, 2003 for certain damages, caused due to certain actions of the licensee, the details of which have been given in para – 1 of this order.

As per law the Commission can take cognizance on any complaint filed before it if the Commission is satisfied that any person has contravened any of the provisions of the Act or the Rules and Regulations made there under or any directions issued by the Commission. Thereafter, it may, after giving opportunity of being heard in the matter, impose penalty on such erring person under section 142 of the EA, 2003. But the consumer in the aforesaid complaint has failed to specify as to which guaranteed Standard of Performance mentioned in Schedule-I have not been complied with or violated.

The instant complaint is against the violation of provision of Section 57 of EA 2003 (which provides guaranteed Standards of Performance in the Supply Code) and Regulation 65 (which provides that respondent is liable to pay the affected consumer compensations specified in schedule III for its failure to meet above standards specified in schedule). Under Regulation 66 the consumer is required to lodge a claim for compensation and indicate which provisions are alleged to have been violated.

In this regard, the Commission is in full agreement with the argument advanced by the Counsel of the respondent Sh. K. Dutta that since, the Complainant has failed to illustrate any violation of performance standards; therefore, it cannot attract any violation of section 57(2) of the EA, 2003. As far as claim for damages is concerned the same can be raised before the appropriate forum and not before the Commission as the remedy for damages lies under the law of tort and not under the provisions of EA, 2003. Hence, the issue raised in the plaint regarding seeking damages for harassment is beyond the jurisdiction of this Commission and cannot be heard by it.

The Commission in its order of 18.07.2010 has apparently taken suo-moto cognizance of apparent violation of Regulation 52 of Delhi Electricity Supply Code and Performance Standards Regulations 2007 and Section 135(4) of EA, 2003 as well as applicability of Section 142 of EA, 2003 in the theft case and the question of jurisdiction of the consumer in matters pending before the special court. Both the Complainant and respondent have filed submissions in this regard and they were heard on 02.08.2011 on the above issues. The findings of the Commission on these issues are given below:

Issue(a)

Violations of Regulation 52 and 53 read with 39(b) of DERC Supply Code and Performance Standard Regulation, 2007.

Not observing the principle laid down in regulation 52 and 53

The Complainant has raised the issue of violation of above regulations while framing charges of theft under section 135 read with 154 of the Electricity Act stating that the Respondent has failed to follow the said principles laid down in the above regulations. The Respondent has since filed a criminal complaint against the Complainant (bearing complaint No.148 of 2011) which is pending for adjudication before the Ld. Special Court of Saket, New Delhi. The Special Courts have been established under the Electricity Act-2003 to deal with theft matters and any interference in the present matter which is pending before the Special Court may adversely affect the criminal trial and prejudice the final outcome of the criminal complaint. It is true that any adverse observation of this Commission during the pendency of criminal complaint of the respondent and that too without adducing any evidence or cross examination is bound to adversely affect the criminal trial. It is also true that criminal proceedings must be given precedence over civil proceedings and the Commission being a quasi-judicial authority cannot interfere in the matter which is the subject matter of criminal proceedings. Therefore, in the light of pending litigation before the Special court, Commission would not like to pass any judgment on the above issue. The Complainant is free to file fresh complaint, in case the respondent is found guilty of framing of wrong theft case by the competent Special court.

Violation of Regulations 39(b)

The DERC Regulation 39(b) of Delhi electricity Supply Code & Performance Standard) states “where the licensee observes that meter is not recording any consumption for last two billing cycles, he shall notify the consumer. Thereafter, the licensee shall check the meter and if the meter is found stuck/ stopped; the meter shall be replaced within seven days”. Hence, in the instant case, the Respondent should have changed the Meter on 4.5.2009 but failed to do so. We re-capitulate the sequence of events and the meter reading given in electricity bills as below: -

Dated	Reading unit
27.02.2009	11163
04.05.2009	11163
27.07.2009	11795
08.09.2009	No reading shown in bill
22.10.2009	11163 (as per inspection report)

It is clear that the meter apparently got stuck at 11163 on 27.02.009 since it had the same reading of 11163 on 04.05.2009. The respondent should have notified the applicant and changed the meter. However, this was not done by the Respondent. The reading of 11795 on 27.07.09 appears to be manipulated, because the earlier reading of 11163 again appears on the date of raid on 22.10.2009. Hence, prima facie the weight of evidence seems to be in favor of a struck meter where the licensee should have acted as per Regulation 39(b). By not doing so, the licensee is found guilty of not changing the meter within the period prescribed under the Regulation 39(b) and failing to take cognizance in time.

Therefore, a penalty of Rs.10,000/- is imposed on the Respondent under Section 142 of the EA, 2003 for violation of the above Regulation.

Issue (b)

Violation of Section 135(4) of the Electricity Act, 2003 while booking the theft case against the Complainant and applicability of Section 142 of the Electricity Act, 2003 in respect thereof.

The Complainant in the instant complaint has raised the issue of not following the provisions laid down under above section of the Act wherein at the time of raid provisions of Cr.P.C. relating to search and seizure under section – 100, as far as may be, shall apply by not calling two or more independent and respectable inhabitants of locality as witness. In response to the above, the Respondent has submitted that they try to arrange the witness, however, since none agreed to be a witness in the present case an officer of the Respondent witnessed the same. The Respondent further stated that in *Sadhu Singh Vs. State of Punjab* on the issue of procuring of public witness under Section 100 of Cr.P.C., the Court has observed that there can be cases when public witnesses are reluctant to join or are not available. In such a scenario the prosecution is required to show that a genuine attempt been made to join public witnesses. Public witnesses may not be joined, but attempt must be made to join the public witnesses. These issues would be raised during the course of trial before the Special Court. That it has been held in various judgments such as *Kochan Velayudhan Vs. State of Kerala* (AIR 1961 Kerala 8) that once the evidence gathered in a search is reliable, a conviction based on such evidence is not invalid on the ground of irregularity in the search. The evidence gathered in search which is not fully compliant with Section 100 of the Cr.P.C. is not invalid, only irregular. The Delhi High Court has also held in *Mukesh Rohtagi Vs. NDPL* that “Neither the Evidence Act nor the Cr.P.C. exclude relevant evidence on the ground that it was obtained under an illegal search or seizure. Even if the inspection is not valid the Respondent has a right to prove that theft of electricity is done by the Accused.” Hence, prima facie, the fact of absence of independent witnesses alone cannot vitiate theft proceedings. Furthermore, keeping in view the pendency of the above matter in the Criminal Court on the above issue, the Commission does not want to go into the merits of this case due to pending litigation. However, the Complainant is free to file a fresh complaint against the Respondent if the above Criminal case is decided in his favour on the above grounds.

Issue (c)

Jurisdiction of the Commission

Before, going into the merits of the case and deciding whether the Commission has jurisdiction to hear the case under 142 relating of violation of any Regulations, we shall have to know the intent of the legislation while framing the above provisions of the Act on the above issues.

Section 142 of EA, 2003, states that

"In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of the Act or Rules or Regulations made there under and any directions issued by the Commission, the Appropriate Commission may after filing such person an opportunity to being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to sic thousand rupees for every day during which the failure continues after contravention of the first such direction."

So, a bare perusal of the above provisions show that **the Commission, if satisfied can impose penalty on any person who violates any Rules/Regulations/directions of the Commission.** This gives a clear mandate to the Commission to hear and impose penalty on any person who violates any rules, regulations or its directions **if it is fully satisfied** that the above person has violated any of such conditions. So, the Commission has full jurisdiction under Section 142 of the Act.

The Respondent shall comply with the orders and submit compliance report to the Commission within four weeks from the date of this Order.

Ordered accordingly.

Sd/-
(J. P. Singh)
MEMBER

Sd/-
(Shyam Wadhera)
MEMBER

Sd/-
(P. D. Sudhakar)
CHAIRMAN