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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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W.P.(C) No. 13974 of 2009

BSES RPL AND ANOTHER Petitioners
Through: Mr.Sunil Fernandes, Advocate.

versus

NATIONAL HIGHWAYS AUTHORITY OF
INDIA Respondent
Through: Mr. Sunil Gahlawat, Advocate for NHAI
with Mr. Arun Jagga, Officer NHAI.

AND

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W.P.(C) No. 13975 of 2009

BSES RPL AND ANOTHER Petitioners
Through: Mr.Sunil Fernandes, Advocate.

versus

NATIONAL HIGHWAYS AUTHORITY OF
INDIA Respondent
Through: Mr. Sunil Gahlawat, Advocate for NHAI
with Mr. Arun Jagga, Officer NHAI.

CORAM:
HON'BLE DR. JUSTICE S.MURALIDHAR

% **ORDER**
09.02.2010

W.P.(C) Nos. 13974 & 13975 of 2009

1. An avoidable controversy between the BSES Rajdhani Power Ltd. ('BRPL') and the National Highways Authority of India ('NHAI') forms the subject matter of these two petitions. Writ Petition (C) No. 13974 of 2009

concerns the refusal by the NHAI to grant permission to the BRPL to dig/excavate a pit on National Highway No. 2 ('NH2') at Okhla Mod, New Delhi to carry out urgent repairs of the damaged/faulty 11 KV underground electricity cables of the Petitioner No.1. It is stated that these cables provide electricity to thousands of consumers in the Zakir Bagh area.

2. Writ Petition (C) No. 13975 of 2009 concerns the refusal by the NHAI to permit the BRPL to excavate a pit on NH2 at Sarita Vihar again to carry out urgent repairs of the damaged/faulty 11 KV underground electricity cables of the Petitioner No.1 which is stated to be providing electricity to thousands of consumers at Sarita Vihar and Madan Pur Khadar areas. It is stated that similar permission for carrying out the repair work in Badar Pur area was granted and in fact the NHAI had undertaken to pay the costs of such repairs.

3. Mr. Sunil Fernandes, learned counsel appearing for the BRPL refers to Rule 82 of the Indian Electricity Rules, 2005 which reads as under:

“Erection of or alternation to buildings, structures, flood banks and elevation of roads.-(1) If at any time subsequent to the erection of an overhead line (whether covered with insulating material or bare), any person proposes to erect a new building or structure or flood bank or to raise any road level or to carry out any other type of work whether permanent or temporary or to make in or upon any building or structure of flood bank or road, any permanent or temporary addition or alternation, he and the contractor whom he employs to carry out the erection, addition or alteration, shall if such work, building, structure, flood bank, road or additions and alterations, thereto, would during or after the construction result in contravention of any of the provisions of rule 77,

79 or 80, give notice in writing of his intention to the supplier and to the Inspector and shall furnish therewith a scale drawing showing the proposed building, structure, flood bank road, any addition or alteration and scaffolding required during the construction.

(2)(a) On receipt of the notice referred to in sub-rule (1) or otherwise, the supplier shall examine whether the line under reference was lawfully laid and whether the person was liable to pay the cost of alternation and if so, send a notice without undue delay, to such person together with an estimate of the cost of the expenditure likely to be incurred to so alter the overhead line and require him to deposit, within 30 days of the receipt of the notice with the supplier, the amount of the estimated cost.

(b) If the person referred to in sub-rule (1) disputes the suppliers estimated cost of alteration of the overhead line or even the responsibility to pay such cost the dispute may be referred to the Inspector by either of the parties whereupon the same shall be decided by the Inspector.

(3) No work upon such building, structure, flood bank, road and addition or alteration thereto shall be commenced or continued until the Inspector has certified that the provisions of rule 77, 79 or 80 are not likely to be contravened either during or after the aforesaid construction:

Provided that the Inspector may, if he is satisfied that the overhead line has been so guarded as to secure the protection of persons or property from injury, or risk of injury, permit the work to be executed prior to the alteration of the overhead line or in the case of temporary addition or alteration, without alteration of the overhead line.

(4) On receipt of the deposit, the supplier shall alter the overhead line within one month of the date of deposit or within such longer period as the Inspector may allow and ensure that it shall not contravene the provisions of rule 77, 79 or 80 either during or after such construction.

(5) In the absence of an agreement to the contrary between the parties concerned, the cost of such alternation of the overhead line laid down shall be estimated on the following basis, namely:-

(a) the cost of additional material used on the alteration giving due credit for the depreciated cost of the material which would be available from the existing line;

(b) the wages of Labour employed in affecting the alteration;

(c) supervision charges to the extent of 15 per cent of the wages mentioned in clause (b); and

(d) any charges incurred by the supplier in complying with the provisions of section 16 of the Act in respect of such alterations.

(6) Where the estimated cost of the alteration of the overhead line is not deposited the supplier shall be considered as an aggrieved party for the purpose of this rule.”

4. He submits that in both these instances, the NHAI undertook the expansion of the NH2 under the National Highways Development Project (‘NHDP’) without seeking prior permission of the BRPL, which after the privatisation of the electricity supply in the National Capital Territory of Delhi, is placed in

the same position as the State Electricity Undertaking in terms of the above rules.

5. It is stated that as a result of the expansion of the road at both these places, the underground cables which were on the side of the carriageway are now in the middle of the carriageway and cannot be accessed except by digging a pit.

6. It is submitted that had the NHAI sought prior permission and gave an advance notice to the BRPL, then a plan could have been devised to either deactivate the cables or to shift them out; the cost of such plan could have been worked out and the NHAI asked to reimburse it and if there was any dispute over the cost, the matter could have been referred to the Inspector in the manner indicated in Rule 82. It is stated that such a reference can also be made to the Delhi Electricity Regulatory Commission ('DERC').

7. The NHAI on its part submits that in terms of Section 38 of the Control of National Highways (Land and Traffic) Act, 2002 ('CNHLTA') any person who announces to "construct, install, shift, repair, alter or carry any poles, pillars, advertisement towers, transformers, cable wire etc. on highway land or across, under or over any highway except with the prior permission in writing of the Highway Administration." It is further pointed out that under Section 48 the above Act states that the said Act shall have effect notwithstanding anything inconsistent contained in any other Act. It is submitted that while in terms of the CNHLTA, the BRPL has rightly sought permission of the NHAI, there is no question of the NHAI being asked to pay the cost to be incurred by the BRPL for repairing the 11KV cables.

8. In these cases initially this Court required the two parties to sit together to try and resolve the differences. The minutes of the meeting held on 29th December 2009 showed that there was still an impasse. On 20th January 2010 this Court was informed by Mr. Fernandes, learned counsel for the BRPL, that “the entire work of repairing the fault in the underground 11KV electric cable is not likely to take more than two days and further that the work will commence on the off peak hours with minimum inconvenience to the traffic.” Learned counsel for the NHAI then sought time to seek instructions.

9. The NHAI thereafter offered a solution of deploying a High Density Drilling (‘HDD’) method by which the cables could be repaired. According to the BRPL this option would be far more expensive than the proposal moved by the BRPL which was that either they will dig the pit at their own cost and complete the entire work within a limited time-frame and then restore the highway to the original position or that the NHAI will itself make the necessary excavation to facilitate the repair of the cable.

10. In the further hearing it appeared that the impasse still could not be broken and, therefore, this Court was called upon to decide the issue on merits.

11. Admittedly, the NHAI never sought any permission of the BRPL before it undertook the expansion of the NH2 as a result of which the underground cables that were on the side of the carriageway have now been located in the centre of it. It is not open to the NHAI to contend that Rule 82 of the Indian Electricity Rules did not apply to it. There is no such exemption for the NHAI under the Indian Electricity Act or the Rules thereunder.

12. The solution now offered by the BRPL is that they will deactivate the 11KV cables in both places and lay afresh a new set of cables by using the space in the unpaved area beyond the metalled part of the carriageway, even beyond the pavement. Consequently, the BRPL will not touch the highway at all.

13. In view of the above solution offered by the BRPL, the question of the NHAI having to give permission in terms of Section 38 of the CNHLTA does not arise. If indeed BRPL is able to deactivate the 11KV cable and lay a fresh set of cables by using the space beyond the pavement running alongside the carriageway, there should really not be any difficulty for the NHAI.

14. The question then that arises is that who should pay for the work to be undertaken by the BRPL. Rule 82 itself says that the entire costing for this exercise will be done by the BRPL and if there is any dispute with regard to the same it can always be looked into by the Inspector or the DERC.

15. Consequently, it is directed that the Petitioner BRPL will be permitted to commence within one week from today the work of laying cables afresh in the two areas in question on the NH2 by not, in any manner, digging the main highway NH2 or even the pavement area abutting it. BRPL will use the non-metalled portion beyond the pavement for this purpose. BRPL will take steps to deactivate the existing 11KV lines once the new cables are in place.

16. BRPL has submitted in this Court two sheets of calculation for each of the locations, copies of which have been given already to the learned counsel for

the NHAI. The NHAI will reimburse the costs as indicated to the BRPL within a period of eight weeks after the completion of the work by the BRPL, for which they will furnish to the NHAI a certificate to that effect, if the NHAI raises a dispute as to the costing, and if it fails to resolve the dispute with the BRPL through negotiation, it is open to either party to refer the matter for the decision of the Inspector/DERC in accordance with the Indian Electricity Rules.

17. With the above directions, both writ petitions are disposed of.

S. MURALIDHAR, J

FEBRUARY 09, 2010

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