(2010) 09 GUJ CK 0028

In the Gujarat High Court

Case No : Special Civil Application No. 4669 with 2160 and 17053 of 2007

Abhisar Developers APPELLANT

Vs

Torrent Power Ltd. RESPONDENT

Date of Decision : 14-09-2010

Acts Referred:

Electricity Act, 1910 — Section 24
Electricity Act, 2003 — Section 14, 15, 19, 2(17), 43

Citation : AIR 2011 Guj 1 : (2011) 2 CivCC 556 : (2010) 3 GLH 356 : (2011) 2 RCR(Civil) 55 : (2011) 2 RCR(Civil) 55

Hon'ble Judges : K.S. Jhaveri, J

Bench : Single Bench

Advocate : Mayur Rajguru, B.T. Rao and H.A. Dave, for the Appellant; K.B. Pujara, for the Respondent

Final Decision : Allowed

Judgement

K.S. Jhaveri, J.—In all these petitions common questions of law is raised and, therefore, all these petitions were heard together and are being decided by this common judgment.

2. In all these petitions the Respondent licensee Electricity Company had granted electric connections to the respective premises long back. The said electric connections were disconnected by the Respondent-Company in exercise of its powers u/s 24 of the Indian Electricity Act, 1910, due to nonpayment of electrical energy charges as well as the corresponding Government Electricity Duty and Tax and Tax on sale of electricity.

2.1 The Petitioners herein have purchased the concerned premises (wherein the electricity supply was discontinued due to nonpayment of charges) in auction held in winding up proceedings under the Companies Act, 1956 or under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

2.2 When the Petitioners approached the Respondent electricity company for electric supply at the said premises the Respondent insisted that unless and until the outstanding dues of the electric connections at the said premises are paid the Respondent-company would not be in a position to give electric supply to the Petitioners. It is under these circumstances that the present petitions have been preferred.

3. Learned Advocate for the Petitioners raised the following contentions:

3.1 The application of the Petitioners for grant of fresh power connection is after enactment of the Electricity Act, 2003 (Act of 2003). Accordingly the provisions of Electricity Act, 2003 would apply in relation to such application.

3.2 As per Section 43 of the Act, 2003, the Respondent, which is a distribution licensee within the meaning of Section 2(17) of the Act, is obliged to give supply of electricity within one month.

3.3 The GERC has framed Electricity Supply Code u/s 50 of the Act, 2003. This Code provides for regulations based on which the power is required to be supplied by the Distribution Licensees. These regulations are to be applied uniformly by all the Distribution Licensees in the State of Gujarat.

3.4 There is no provision in the Act or the Regulations permitting the Respondent-company to recover the dues of the predecessor. On the contrary, the Division Bench of this Court has held that the Supply Code does not permit the Respondent-company to demand dues of the earlier consumer from the new applicant.

3.5 In the case of Raipur (Rakhial) Commercial Co-op Housing Society Ltd. and Another Vs. Ahmedabad Electricity Co. Ltd. and Another, this Court has held that the Respondent-company cannot insist upon the payment of arrears of electricity dues for grant of power supply to the concerned Petitioner. This judgment has been upheld by the Division Bench in the case reported in Torrent Power AEC Ltd. Vs. Shreeji (Rakhial) Commercial Co-Oprative Housing Soc. Ltd.,

3.6 The Petitioners have also relied upon the following decisions:

(1) Isha Marbles Vs. Bihar State Electricity Board and Another,

(2) Ahmedabad Electricity Co. Ltd. Vs. Gujarat Inns. Pvt. Ltd. and Others,

3.7 Thus, the learned Advocates for the Petitioners submitted that the Respondent Electricity Company cannot insist that unless and until the outstanding dues of the electric connections at the concerned premises prior to the auction purchase are paid, the Respondent-company would not grant electric supply to the Petitioners.

4. Mr. K.B. Pujara, learned Advocate for the Respondent-Electricity Company has raised the following contentions:

4.1 The Petitioners have purchased the concerned premises wherein the electricity supply was discontinued due to non-payment of charges, in auction held in winding up proceedings and the auction was held "As is where is and whatever there is" basis and purchasers were given the opportunity to inspect the premises before the auction. Therefore, as held by the Apex Court in Dakshin Haryana Bijli Vitran Nigam Ltd. Vs. Paramount Polymers Pvt. Ltd., it is not as if the Petitioner was an ignorant party, and before submitting the bid the purchaser would certainly have inspected the premises and could have come to know that the power connection to the premises had been snapped and this information should have put him on reasonable inquiry about the reasons for power disconnection leading to information that the previous owner of the undertaking or the consumer was in default and any reasonable inquiry by the prudent person would have put him on notice of subsistence of such liability.

4.2 Mr. Pujara has submitted that after the Division Bench judgment of this Court in Torrent Power AEC Limited (supra), the Apex Court has rendered two decisions viz. (i) Dakshin Haryana Bijli Vitran Nigam Ltd. Vs. Paramount Polymers Pvt. Ltd., and (ii) Paschimanchal Vidyut Vitran Nigam Ltd. and Others Vs. DVS Steels and Alloys Pvt. Ltd. and Others,

5. This Court has heard learned advocates for the respective parties at length and perused the papers on record. u/s 24 of the Indian Electricity Act, 1910 the licensee had power to recover the charges by filing Civil Suit and also the right to discontinue the supply of electrical energy to the consumer who neglects to pay the charges and to keep the supply discontinued until the charges are paid. In these cases the Petitioners have purchased properties of another company in public auction. After purchase of the property the Petitioners have applied for electricity connection. However, the Respondent has refused the same on the ground that there are arrears of the previous consumer and the electricity connection cannot be granted.

5.1 On a conjoint reading of Section 2(17)-the definition of Distribution Licensee, Section 14 -- the provision regarding grant of licence to the Distribution Licensee by the State Commission, Section 15 -- the procedure to grant license, Section 19 -- the provision regarding revocation of license by the State Commission in the event the licensee acts contrary to the Act or the Regulations, Section 43 - the duty to supply power on request, etc. would demonstrate that as per the scheme of the Act, 2003 the Electricity Companies are known as the Distribution Licensee and they are obliged to act strictly as per the Act and the Regulations framed by the State Commission i.e. Gujarat Electricity Regulatory Commission (GERC). They have no independent right to prescribe any different terms or conditions than what is stipulated in the Act and/or the Regulations.

6. In view of the Division Bench judgment in the case of Torrent Power AEC Ltd. Vs. Shreeji (Rakhial) Commercial Co-Oprative Housing Soc. Ltd., which is not stayed by the Apex Court in SLP preferred by the Ahmedabad Electricity Company, the law on the subject is very clear. In that view of the matter, as on today it can be said that the Respondent-company has not followed the law.

However, an endeavour is made to take shelter of the observations made by the Apex Court in subsequent judgments which are as under.

...it is not as if the Petitioner was an ignorant party, before submitting the bid the purchaser would certainly have inspected the premises and could have come to know that the power connection to the premises had been snapped and this information should have put him on reasonable inquiry about the reasons for power disconnection leading to information that the previous owner of the undertaking or the consumer was in default and any reasonable inquiry by the prudent person would have put him on notice of subsistence of such liability.

7. After considering the law on the subject it is evident that the officers of the Respondent-company are required to follow the law namely, they ought to have filed civil suit against the defaulter and having failed in doing so, the dues of the earlier owner which are more than three years old are time-barred. The claim of the Respondent-company is, therefore, time-barred today. Even while public notice was given for auction of the property the Respondent-authority has not objected and therefore it would not be appropriate for the Respondent-authority now to deprive the Petitioners of their rights which they have acquired after the purchase of property in public auction either through official liquidator or State Financial Corporation or Bank or public institution for which prima facie assumption is that they have complied with the requirements under the law. It is required to be noted that the dues are against the consumer and not against the land or property. In that view of the matter, the conduct of the Respondent-company is required to be viewed very seriously and for their omission the Petitioners should not be deprived of their huge investment made after due diligence. There is no claim lodged before any of the authorities and therefore the Respondent-company is not covered by lis pendens or any other principle on dues of property.

8. The judgment of the Apex Court in the case of Paschimanchal Vidyut Vitran Nigam Ltd. and Others Vs. DVS Steels and Alloys Pvt. Ltd. and Others, is not applicable to the facts of the present case inasmuch as this judgment arose from the proceedings which started in April 1994 i.e. when the earlier Act viz. Electricity (Supply) Act, 1948 was in operation. The Act of 2003 has different provisions and there is a new Supply Code prepared by GERC u/s 50 of the said Act. Furthermore, the judgment refers to the then applicable Supply Code of State of Uttar Pradesh. The said Supply Code are not applicable to the consumers of the State of Gujarat. The consumers of the State of Gujarat are governed by the Supply Code/Regulations framed by the GERC u/s 50 of the Act.

8.1 It is pertinent to note that the auction either through Official Liquidator or by State Financial Corporation under State Financial Corporations Act or Securitisation Act or by the Bank or public institution are held after giving due public notice. The Respondent-Company should have put forth their claim at that stage or even earlier in the proceedings pursuant to which such auction was held. Respondent-Company ought to have filed its claim as a creditor of the

Company which was being liquidated. After having not participated or sat silent during such proceedings they cannot now claim the alleged previous dues from the auction-purchaser. If the auction-purchaser says that he does not want re-connection, but wants a new connection to the premises purchased by him under the auction, I do not think any law would protect the Respondent-company for its action of refusal to give such connection. Thus, having not participated or made a claim for their dues in the liquidation proceedings, the Respondent-company must be deemed to have given up their dues. In any event, their remedy is against the original owner and/or the sale proceeds of the property in question in the hands of the Official Liquidator or the financial institutions and not against the auction-purchaser. It appears, the refusal of the Company is an effort to overcome the inaction on the part of the concerned officials of the Respondent-Company in not diligently acting in realizing the dues of the Company at the proper stage.

8.2 It is also required to be noted that these are the resumption charges and not taxes and therefore this will be covered by purely the terms of contract. If the contention of the Respondent is allowed to be accepted then a tenant or lessee using property of landlord is not paying dues of the Electricity Company the property of landlord cannot be auctioned or cannot be withheld at the instance of the default of the consumer. Further it is also required to be noted that if the subsequent purchaser or tenant is asked to pay the charges of the previous owner, no prudent person would be willing to invest in a re-sale property or in auction proceedings. At the end of the day the Government shall also be at a loss. Merely because the authority failed to recover the amount from the initial owner, they cannot deny the right of the subsequent purchasers purchasing the said property. In that view of the matter, the observation made by the Apex Court is required to be suitably interpreted. The observations of the Apex Court shall apply only in case when public auction is collusive and only with a view to avoid dues of the electricity company. No such allegation is made in any of these matters.

9. At this stage it would be advantageous to refer to a decision of the Apex Court in the case of Haryana State Electricity Board Vs. Hanuman Rice Mills and Others, In the said decision the Apex Court considered the case of Isha Marbles Vs. Bihar State Electricity Board and Another, Dakshin Haryana Bijli Vitran Nigam Ltd. v. Paramount Polymers (P) Ltd. (2006) 13 SCC 1011, and Paschimanchal Vidyut Vitran Nigam Ltd. v. Excell Buildcon Pvt. Ltd. 2008 (10) SCC 7201. The Apex Court observed therein as under:

9. The position therefore can may be summarized thus:

(i) Electricity arrears do not constitute a charge over the property. Therefore in general law, a transferee of a premises cannot be made liable for the dues of the previous owner/occupier.

(ii) Where the statutory rules or terms and conditions of supply which are statutory in character, authorize the supplier of electricity, to demand from the purchaser of a property claiming re-connection or fresh connection of electricity, the arrears due by the previous owner/occupier in regard to supply of electricity to such premises, the supplier can recover the arrears from a purchaser.

Position in this case:

10. The Appellant did not plead in its defence that any statutory rule or terms and conditions of supply, authorized it to demand the dues of previous owner, from the first Respondent. Though the Appellant contended in the written statement that the dues of Durga Rice Mills were transferred to the account of the first Respondent, the Appellant did not specify the statutory provision which enabled it to take such a claim. The decision in Paramount Polymers shows that such an enabling term was introduced in the terms and conditions of electricity supply in Haryana, only in the year 2001. The Appellant did not demand the alleged arrears, when first Respondent approached the Appellant for electricity connection in its own name for the same premises and obtained it in the year 1991. More than three years thereafter, a demand was made by the Appellant for the first time on 16.1.1995 alleging that there were electricity dues by the previous owner. In these circumstances the claim relating to the previous owner could not be enforced against the first Respondent.

9.1 Thus, the electricity arrears do not constitute a charge over the property and therefore in general law, a transferee of a premises cannot be made liable for the dues of the previous owner/occupier. A transferee of the premises or a subsequent occupant of a premises with whom the supplier has no privity of contract cannot obviously be asked to pay the dues of his predecessor-in-title or possession, as the amount payable towards supply of electricity does not constitute a charge on the premises. A purchaser of a premises, cannot be foisted with the electricity dues of any previous occupant, merely because he happens to be the current owner of the premises. In the present case the learned Advocate for the Respondent is not in a position to show any statutory rules or terms that the arrears due in regard to the supply of electricity made to the premises when it was in the occupation of the previous owner/occupant, should be cleared before the electricity supply is restored to the premises or a fresh connection is provided to the premises. In absence of any such term or rule, the claim relating to the previous owner cannot be enforced against the Petitioners.

10. At this stage, learned Advocate for the Respondent-Electricity Company stated that the very same issue is pending before the Apex Court in Special Leave Petitions preferred by the Respondent in other matters.

11. For the foregoing reasons, the petitions are allowed, subject to the Petitioners giving an undertaking that they shall abide by the decision of the Apex Court which has been pending in the SLP preferred by the Ahmedabad Electricity Company. The Respondent-Electricity Company shall provide electric

connection to the Petitioners on their making necessary payment of connection charges, if not already made. Rule is made absolute in each petition accordingly with no order as to costs.

12. At this stage, Mr. Pujara, learned Advocate, requests to stay the present order for a period of two weeks. The request is granted. This order is stayed for a period of two weeks from today.

