

(1985) 10 AP CK 0005

In the Andhra Pradesh High Court

Case No : Writ Petition Miscellaneous Petition No. 15236 of 1985

Andhra Pradesh Carbides Ltd. and Another

APPELLANT

Vs

Andhra Pradesh State Electricity board, Hyderabad and
Others

RESPONDENT

Date of Decision : 07-10-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, 141
Constitution of India, 1950 — Article 226
Electricity (Supply) Act, 1948 — Section 26, 49, 70
Electricity Act, 1910 — Section 24

Citation : AIR 1986 AP 37

Hon'ble Judges : Jagannadha Rao, J

Bench : Single Bench

Advocate : K. Srinivasa Murthy, for the Appellant; M. Chandrasekara Rao, for the Respondent

Judgement

1. This is a miscellaneous application filed by the petitioner-Company for directing the respondent not to recover the minimum charges for the petitioner's land at Dinne Devarapadu, Kurnool District, for the period subsequent to 16-7-1985 on which date the respondent Electricity Board disconnected the supply of electricity. The Minimum charges levied for the month of July, 1985 is Rs. 42,04, 209.40 and again for the month of August , 1985 is a like sum of Rs. 42,04,209.40, and are to be levied thereafter.

2. There has been considerable litigation between the petitioner and the A.P. Electricity Board earlier but it is not necessary for the purpose of this miscellaneous petition to narrate the earlier litigation. A bill for the month of June, 1985 was served on the petitioner on 2-7-1985. According to the petitioner, the time for payment of the bill is 15 days from the date of service of the bill and that therefore, the petitioner had time till 17-7-1985. The petitioner gave cheques for payment of the amount and presented the same to the Senior Accounts Officer, Operations, Anantapur on the morning of 16-7-1985 which,

according to the petitioner, is one days anterior to the due date. But admittedly the power was disconnected at 1.15 p.m. on 16-7-1985 even though it appears that the petitioner brought to the notice of the Divisional Engineer, Kernel that the amount is paid at the Anantapur office on the morning of the same day viz., 16-7-1985. The petitioner subsequently came to know that the cheques presented at Anantapur were refused to be accepted by the Senior Account Officer, Operations.

3. Subsequent to the disconnections of the power supply on 16-7-1985 , the petitioner Filed WP No. 7514/85 questioning the disconnection and this Court by an order dated 17-7-1985 directed that connection should be given on the condition that the petitioner paid Rs. 28 lakhs within three days of that date. The petitioner could not comply with that order and so the factory continued to be without power supply.

4. Having disconnected the supply of electricity on 16-7-1985 the Board started levying minimum charges, every month.

5. In the present writ petition, the petitioner prayed for the issue of a writ of mandamus restraining the respondents from collecting the minimum charges subsequent to 16-7-1985 and in the miscellaneous petition WPMP No. 1536/85 the petitioner prayed for a similar direction not to recover the minimum charges for the period subsequent to 16-7-1985 pending disposal of the writ petition.

6. I have heard the learned counsel for the petitioners, Sri K. Srinivasa Murthy and the learned counsel for the Board, Sri M. Chandrasekhararao.

7. The only question that arises for consideration in this miscellaneous petition is: whether the respondent Board is prima facie entitled to recover the minimum charges which are in a sum of Rs. 42 lakhs and odd permonth even subsequent to the date of disconnection of the power supply on 16-7-1985.

8. It is true that this question has to be gone into in greater detail in the main writ petition. But having regard to the fact that the petitioner has filed this miscellaneous petition claiming a relief in the nature of a temporary injunction, it is but necessary for this Court to deal with the points raised by the petitioner in the light of the reply of the respondent, for the purpose of this WIMP.

9. At the outset, it was argued by the learned counsel for the respondent that inasmuch as the relief in the miscellaneous petition is similar to the relief prayed for in the main writ petition, this Court Cannot, even for the purpose of deciding the prima facie case, go into the questions raised by the petitioner in the writ petition.

10. I am unable to agree with the objection which has been raised, more or less, as a preliminary objection. In cases where the main relief is in itself in the nature of an injunction, the interim relief sought for would also be in the nature of a preventive relief. In such cases, it is, in my opinion, open to the Court to go into the contentions of the parties for the limited purpose of the miscellaneous

application while at the same time making it clear that any conclusions arrived at in the miscellaneous application will not certainly weigh with the Court at the time of final disposal of the case. If the broad contention urged by the learned counsel for the respondent is to be accepted, in every suit for permanent injunction, no application for a temporary injunction would lie nor can the Court consider such petitions. The very fact that the CPC makes provision in O. 39 for grant of interim preventive relief pending suit would make it clear that the Legislature itself considers it justifiable for a Court to grant preventive relief as an interlocutory measure in a case where the main relief is also of a preventive nature. Though the provisions of O. 39, C.P.C. are not directly applicable to cases arising under Article 226 of the Constitution of India. In view of the amendment of Sect. 141, C.P.C. there is a clear provision in the writ rules that the procedure followed by the Civil Court, so far as may be, is attracted to petitions under Art. 226 of the Constitution. Even otherwise the analogy of O. 39, CPC. Would certainly apply for considering application for preventive relief though the relief in the main writ petition is of a like nature. I, therefore, overrule the preliminary objection.

11. For the limited purpose of the miscellaneous application, I have to consider whether, prima facie, the levy of minimum charges is valid or not, and the balance of convenience.

12. Under S. 24 of the Electricity Act, 1910 where any person neglects to pay any charge for energy or any sum, other than a charge for energy, due from him to a licensee in respect of the supply of energy to him, the licensee may, after giving not less than 7 clear days" notice in writing to such person and without prejudice to his right to recover such charge or other sum by suit, cut off the supply.

13. From the aforesaid provision, it is prima facie clear that after a person neglects to pay any charge for energy due from him to a licensee, the licensee will have to give a further notice of not less than 7 clear days before disconnection of power supply.

14. It is, however, contended by the learned counsel for the respondents, firstly that the notice of demand for the month of June, 1985 is dated 28-6-1985 and that the said demand itself specified that the amount was payable on or before 13-7-1985 and that any offer to pay the bill amount on 16-7-1985 cannot be treated as a valid tender inasmuch as the same is beyond the time. The second contention for the respondents is that even though S. 24 of the Electricity Act, 1910 prescribes that a further notice of not less than 7 clear days is to be given after the consumer's neglect to pay the charges, the said provision is not applicable inasmuch as the Regulation 32.3 made by the Board in exercise of powers conferred on it by S. 49 of the Electricity (Supply) Act., 1948 in B.P.M.S. No. 690 dated 17-9-1975, permits disconnection:-

"without further notice under S. 24 of the Electricity Act. 1910."

It is contended that on account of S. 70 of the Electricity (Supply) Act, 1948 the provisions of the latter Act of 1948 override the provisions of the Electricity Act, 1910 including S. 24 of the earlier Act and that any regulation made under Sec. 49 of the latter Act of 1948 will also have an overriding effect upon the provisions of S. 24 of the 1910 Act. For this reason it is argued, that the contract entered between the parties incorporates the provisions of Regulation 32.3 in the contract itself and enables disconnection without the 7 day's clear notice contemplated by S. 24 of the Electricity Act, 1910.

15. In my view, prima facie, the 15 days notice for payment of the electricity charges is to be counted not from the "date" mentioned in the demand notice but from the "date of service" of the said demand notice on the consumer. The Supreme Court in *Raja Harish Chandra Raj Singh Vs. The Deputy Land Acquisition Officer and Another*, has held that the period of limitation prescribed from the date of the award in S. 18(2)(B) of the Land Acquisition Act has to be computed by construing the words "date of the award" as meaning the date of receipt of the award. Prima facie, I am satisfied that the 15 days time for payment has to be computed not from 28-6-85 on which date the demand notice was prepared but from 2-7-1985 on which date it was served and communicated to the petitioner. The demand notice is therefore erroneous in granting time only till 13-7-1985. In my opinion, prima facie, the petitioner had time till 17-7-85 and therefore the tender of the money on 16-7-1985 at Anantapur would be within time and it cannot be said that there was "neglect" to pay the amount by 16-7-1985 inasmuch as the petitioner had time till 17-7-1985. Thus, the first condition of neglect to pay as envisaged by S. 24 of the 1910 Act is not prima facie satisfied.

16. The next question is: Whether a further notice of 7 days should have to be given after the neglect of the consumer informing the consumer that power will be disconnected within 7 days as contemplated by Sec. 24 of the Electricity Act of 1910.

17. It is true that S. 70 of the latter Act viz., the Electricity (Supply) Act, 1948 states that no provision of the electricity Act, 1910, or of any rules made thereunder or of any instrument having effect by virtue of such law or rule, shall so far as it is inconsistent with any of the provisions of this Act, have any effect. It is also true that under Sec. 49 of the Electricity (Supply) Act, 1948 the Board may, subject to the provisions of the Act and of regulations, if any, made by it, in this behalf, supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit. It is also true that Regulation 32.3 made by the Board in BP Ms. No. 690 dated 7-9-1975 under S. 49, permits the Board to disconnect the power without following the procedure under S. 24 of the Electricity Act, 1910 i.e., without giving the 7 days' notice contemplated by the earlier Act.

18. In my opinion, prima facie, the overriding effect given by S. 70 of the Electricity (Supply) Act, 1948 is only to such are inconsistent with the former

Act, viz., the Electricity Act, 1910, and S. 70 cannot be recast by adding words to read as:

"Inconsistent with any provisions of this Act and of any regulations made under this Act."

In my view the acceptance of the argument of the respondent would require the addition of the words and of regulations made under this Act" in S. 70 of the Electricity (Supply) Act, 1948, which are not there in S. 70.

19. Further, S. 26 of the Electricity (Supply) Act, 1948, provides that, subject to the provisions of the latter Act, the Board shall have all the powers and "obligations" of a licensee under the Electricity Act, 1910. The proviso to S. 26 is, in my opinion, important and it states that nothing in several enumerated provisions of the 1910 Act shall apply to the Board. It is significant to note that there is no reference in the proviso to S. 24 of the 1910 Act. In *Maharashtra State Electricity Board Vs. Madhusudandass and Brothers*, a Division Bench of the Bombay High Court had to consider the effect of Ss. 49 and 70 of the 1948 Act upon S. 24 of the 1910 Act. After referring to the proviso to S. 26 of the 1948 Act, the learned Judges observed:

"The effect of S. 26 is that if the Board had laid supply mains and has commenced to supply the energy, then it becomes a licensee to that extent and acquires all the powers and obligations under that Act (Electricity Act of 1910) and all the provision of that Act must apply except such as are excluded. As S. 24 is not excluded by the provisions it must apply to the Board and it has to act strictly in accordance with the same."

In that case the learned counsel for the Board then relied upon S. 70 of the 1948 Act and to the contract entered into between the parties. The Division Bench observed that S. 70 gave overriding effect only to the 1948 Act in so far as there was any specific provision in the 1948 Act inconsistent with the provisions of the 1910 Act and observed.:

"In order that the sections which are expressly applied by S. 26 should be excluded by S. 70 of this Act, the provisions thereof must be shown to be inconsistent with the provisions of the Electricity (Supply) Act. It is said that S. 49 of the Electricity (Supply) Act, 1948 vests a discretion in the Board to supply electrical energy to a consumer and is therefore in conflict with S. 24 of the Electricity Act and therefore S. 24 ought not be applied. It is not possible to accept this contention. S. 49 itself provides that the Board may supply electricity to any person subject to the provisions of the Act and of the regulations made in this behalf and one of the provisions of the Act is S. 26 under which it has got the same powers and the obligations as a licensee. We cannot disregard the word "obligation" in S. 26. Once it has laid the mains and started the supply, it is obliged to continue to do so as a licensee. S. 24(1) therefore applies to a case of a supply of electrical energy by the Board to a consumer and if that is so, it can discontinue the supply only if the conditions of S. 24(1) are

satisfied....."

20. In my view this ruling of the Divisions Bench of the Bombay High Court is prima facie a direct answer to the contention of the respondent, and "neglect" to pay the bill and a further notice of seven days are statutory "obligations" of the Board which cannot be dispensed with by the regulations. As to what is meant by "neglect" to pay, there is a large body of precedent of various High Courts, and it is not necessary to go into that question in this miscellaneous petition.

21. Further, it has to be noted that even where the statute says that the rules or regulations are to be treated "as if enacted in this Act", the Supreme Court has laid down that that does not make the rules or the regulation equivalent to the Act itself, and that nonetheless they remain as subordinate legislation vide *The Chief Inspector of Mines and Another Vs. Lala Karam Chand Thapar etc.*, ; *Kalipada Chowdhury Vs. Union of India (UOI)*, ; *State of Kerala Vs. K.M. Charia Abdullah and Co.*, and *Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others*, .

22. For the aforesaid reasons I am, prima facie, of the view that S. 49 read with S. 70 of the 1948 Act does not empower the Board to make a regulation such as Regulation 32.3 which is inconsistent with the provisions of S. 24 of the 1910 Act.

23. Even assuming that expression of any opinion about prima facie case of the petitioner can be treated as objectionable, I am of the view that there is a "triable issue" arising in the case which requires the grant of an injunction.

24. In Halsbury's Laws of England (Vol. 24, para 955, 4th Edn.) the recent changes in the law relating to proof of prima facie case for purposes of injunction have been mentioned as follows:

"It has been stated in the past that where the plaintiff is asserting a right he should show a strong prima facie case, at least, in support of the right which he asserts. Now, however, the test appears to be whether there is a serious question to be tried. (*American Cyanamid Co. V. Ethicon Ltd.*, 1975 AC 396 at p. 407.)"

25. The Supreme Court has recently adopted this change in the law. In *United Commercial Bank Vs. Bank of India and Others*, , A.P. Sen.J., speaking for the Bench observed (at p. 1440 para 50) as follows:

"No injunction could be granted under O. 39, Rr. 1 and 2 of the Code unless the plaintiffs establish that they had a prima facie case, meaning thereby that there was a bona fide contention between the parties or a serious question to be tried." (Emphasis applied)

26. Even assuming for a moment that my conclusion about the petitioner's prima facie case is not wholly acceptable at this stage still, for the same reasons which I have already given it cannot be argued for the respondents that a bona fide contention or a serious question does not arise to be tried in this case.

27. For the aforesaid reasons I hold that the petitioner has made out a prima facie case or alternatively at least a bona fide dispute and a serious question to be tried in the main writ petition.

28. Reliance is then placed on the recent decision of the Supreme Court in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, which stated that even if there was a prima facie case the High Court would not have granted an interim order permitting the party to furnish bank guarantee instead of payment of the tax in question. In my view the observations of the same Bench in paragraph 5 (at p. 334) are wide enough to permit grant of interim orders and further the case before the Supreme Court was one relating to an exparte interlocutory order, and to payment of tax rather than to a service charge. I am therefore unable to accept that on the basis of that decision no order in the nature of injunction could be granted by the High Court under Art. 226 of the Constitution.

29. In the present case, if the disconnection is prima facie contrary to S. 24 of the Electricity Act, 1910 as pointed out by me, the refusal to grant an injunction against recovering the minimum charges would mean that even though prima facie the Board committed a wrong in disconnecting the supply it could claim every month, subsequent to the disconnection, a sum of Rs. 42 lakhs and odd from the petitioner and even though not one unit of power was supplied by it or consumed by the petitioner.

30. I may also point out that Madhava Rao, J. In W. P. No. 5155/83 observed in the judgment dated 19-11-1984 that the Board has to comply with S. 24 of the 1910 Act. The learned judge observed.

"In this view of the matter we find sufficient substance in the contention of the learned counsel for the petitioner that disconnection of power supply without any advance notice is bad."

The said view was not dissented from by the Division Bench in the appellate judgment in W. A.No. 835 of 1984 and batch dated 5-4-1985.

31. In view of the peculiar facts and circumstances of the case, I am of the view that the balance of convenience is therefore in granting stay of recovery of the minimum charges which have been or may be billed against the petitioner subsequent to 16-7-1985.

32. For all the aforesaid reasons this W.P.M.P. is allowed as prayed for.

33. Petition allowed.