
(2013) 02 PAT CK 0078

In the Patna High Court

Case No : Letters Patent Appeal No. 521 of 2011 in Civil Writ Jurisdiction Case No. 9742 of 2009

Bihar State Electricity Board

APPELLANT

Vs

M/s. Ice Berg Industries Ltd. and Others

RESPONDENT

Date of Decision : 07-02-2013

Acts Referred:

Constitution of India, 1950 — Article 12, 14

Electricity Act, 2003 — Section 56

State Financial Corporations Act, 1951 — Section 29

Citation : AIR 2013 Patna 78

Hon'ble Judges : Shivaji Pandey, J; Navin Sinha, J

Bench : Division Bench

Advocate : Anand Kumar Ojha and Mr. Ashok Kumar Karn in LPA Nos. 521 of 2011 and 1490 and 1491 of 2010, for the Appellant; Jitendra Singh and Mr. Satyabir Bharti in LPA Nos. 521 of 2011 and 1490 and 1491 of 2010, for the Respondent

Final Decision : Dismissed

Judgement

Navin Sinha, J.—The three appeals arise out of a common order dated 29.4.2010 disposing three writ applications. CWJC 4637 of 2008 and CWJC 9742 of 2009 preferred by respondent no. 1, M/S. Iceberg Industries Ltd. (hereinafter referred to as the "Industry") challenging the Annual Minimum Guarantee bills with DPS (hereinafter referred to as "AMG" and "DPS") raised by the Appellant Board have been allowed with directions to compute the bills afresh excluding periods of illegal disconnection. CWJC 7314 of 2008 preferred by the Appellant Board against the order of the Consumer Redressal Forum (hereinafter referred to as the "Forum") constituted under the Electricity Act 2003 (hereinafter referred to as "the Act"), on an application by the Industry denying the Board to charge AMG and DPS for the period of illegal disconnection has been dismissed. The Industry was provided a High Tension electric connection (hereinafter referred to as "H.T.") for setting up a Brewery. An agreement was entered between the

parties in 2005, as an H.T. Consumer with a contract demand of 1000 KVA in HTS-II category. Electric supply was energized on 6.5.2005. Charges for current consumption were raised and paid.

2. On 17.4.2006 a bill was raised for Rs. 27,11,812/- towards AMG for the period 2005-06 payable by 6.5.2006. The Industry represented on 29.7.2006 for grant of instalments citing difficulties. The representation evoked no response. On 23.8.2006, a disconnection notice was served u/s 56 of the Act for non-payment of AMG bill with DPS for Rs. 33,38,572/-. The Industry on 26.8.2006 again requested for grant of 10 instalments offering DPS also, citing difficulties occasioned by closure of the Unit ordered by the Excise department. The representation again remained unanswered.

3. Subsequently a fresh bill was raised on 1.9.2006 which included arrears of AMG and DPS under the bill dated 17.4.2006 also, for a total of Rs. 37,00,923/- along with current charges. The due date for payment was 20.9.2006. The Board disconnected supply on 6.9.2006 pursuant to the notice for disconnection dated 23.8.2006. The Board thereafter acted on the representation dated 26.8.2006 and granted facility of instalments. An agreement was signed between the parties on 11.4.2007 for payment of AMG and DPS in instalments. The connection was restored 7 months later on 16.4.2007. It is not in dispute that payments under the bill dated 17.4.2006 has then been made as agreed.

4. A fresh bill was thereafter raised by the Board on 4.5.2007 for Rs. 70,23,149/- as the minimum guarantee charge/base charge for the disconnected period of 1.11.2006 to 30.4.2007, along with AMG charge for the financial year 2006-07 (which also included charges for the disconnected periods of August, September, October 2006) of Rs. 18,02,582/-. The total bill thus raised was for Rs. 88,389,528/-. A fresh disconnection notice for non-payment of the same was issued on 22.5.2007. The Industry moved the Forum under the Act. By order dated 12.2.2008 the Forum held the Industry liable to pay minimum charges up to November 2006. The minimum charges from December 2006 to April 2007 were held to be bad. The Industry, to the extent it was aggrieved by the order, questioned it in CWJC 4637 of 2008. The latter part of the order was not challenged by the Board.

5. On 19.3.2008, a fresh disconnection notice was served for non-payment of Rs. 1.33 Crores inclusive of AMG and DPS for the period December 2006 to April 2007 disallowed by the Forum. The Board also refused to accept current consumption charges. Based on a demand contrary to the order of the Forum, the Board disconnected electric supply for the second time on 2.4.2008.

6. After it had disobeyed the order dated 12.2.2008 of the Forum, CWJC 7314 of 2008 was filed by the Board on 5.5.2008 questioning the same. The writ petition did not disclose that the Board had already disobeyed the order and disconnected supply without raising fresh revised bills. No prayer for interim stay of the order of the Forum was made in the writ petition.

7. Pursuant to an interim deposit of 35 Lacs directed on 15.5.2008 in CWJC 4637 of 2008, electric supply was restored on 24.5.2008. A fresh bill was again raised on 22.5.2009 for Rs. 1.47 Crores along with notice for disconnection. It included AMG and DPS for the period disallowed by the Forum. It also included AMG and DPS charges for the subsequent disconnection from 2.4.2008 to 23.5.08. The Industry challenged the same again before the Forum. The demand was stayed by the Forum on 12.6.2009. Without challenging the order of the Forum, the Board in complete disregard refused to accept even current payments, showed arrears of Rs. 1.82 crores and disconnected supply of the Industry again on 7.8.2009. CWJC 9742 of 2009 was preferred against the same by the Industry. Rs. 80 Lacs was deposited pursuant to the order of the Court, and electric supply was restored on 1.12.2009. The Industry therefore also questioned AMG and DPS charge for the disconnection period from 7.8.2009 to 30.11.2009. Further payment of Rs. 40 Lacs has been made pursuant to interim directions in the present Appeals.

8. The Writ Court held that disconnection without consideration of the request for instalments was bad and it did not qualify as "neglect" to pay u/s 56 of the Act. Once fresh bill was raised on 1.9.2006 showing the last date for payment as 20.9.2006, disconnection on 6.9.2006 based on the earlier notice dated 23.8.2006 was unjustified. The subsequent grant of instalments on 11.4.2007, after disconnection was evidence of arbitrariness and the disconnection unjustified. The subsequent demands in defiance to the orders of the Forum, without any challenge to the same, and disconnection, was deprecated. It was held on facts that the industry did not neglect to pay. A default in payment simplicitor expecting response to the request for instalments could not be construed as neglect to pay. Directions were issued for revising the bills giving due credit for payments made in the meantime.

9. Learned Counsel for the Board submitted that the Writ Court erred in importing principles of equity while interpreting Section 56 of the Act. The statutory language was unambiguous and did not call for any enlargement of scope. The remedy available to the Consumer u/s 56 has not been considered. Even in case of any dispute, payment had first to be made under protest. The Industry had not disputed the bill dated 17.4.2006. Failure to pay by due date amounted to "neglect" u/s 56 without furthermore. Grant of instalments was not a matter of right with a corresponding obligation or duty to accept by the Board. The making of a representation was therefore inconsequential by itself. Even this request was made two and half months after the due date for payment had expired. The Writ Court erred in holding that it did not constitute neglect to pay. Such interpretation was not in consonance with a fiscal statute.

10. The disconnection notice dated 23.8.2006 amounted to rejection of the request for instalments made on 29.7.2006. The raising of a fresh bill on 1.9.2006 made it evident that the subsequent representation dated 26.8.2006 for instalments was also rejected. The writ application filed by the Board did

state that electricity supply had been disconnected for non-payment of dues.

11. A supply agreement had been executed between the parties. The Industry was bound by the same. Heavy investments are made by the Board for providing services to consumers and AMG charges have their own relevance for the purpose. If the Board is required to consider requests for instalments in the present manner, chaos would ensue putting in peril not only the existence of the Board but also its ability to render services. A request for instalments accompanied with an offer to pay delayed payment surcharge did not over-ride the statutory duties of the Consumer or affect the statutory rights of the Board. With the unbundling of the Board into Generation-Transmission-Distribution by different agencies, chaos would ensue if such liberalism is permitted to consumers. Even if the Board is a "State" under Article 12 of the Constitution, nonetheless if it is discharging commercial functions, the Board has to be permitted to operate in a commercial manner with liberty to protect its commercial interests. Reliance was placed on *The Executive Engineer and Another Vs. Sri Seetaram Rice Mill*, , *The State of West Bengal Vs. Kesoram Industries Ltd. and Others*, , *M/s. Raymond Limited and Another, Vs. Madhya Pradesh Electricity Board and Others, Etc. Etc.*, and *Bihar State Electricity Board, Patna and Others Vs. Green Rubber Industries and Others*, .

12. Appearing on behalf of the Industry, Learned Counsel submitted that Section 56 would apply where the consumer "neglects" to pay without justification. It implies complete disregard, failure to give due care and attention or to ignore. The Industry admitted liability and did not deny payment. Only accommodation by instalments was sought for reasons explained. The Board has itself decided to grant instalments upon request by consumers and framed circulars, under which it was subsequently granted to the Industry. If payment was not made by due date and instalments were sought for before issuance of disconnection notice, fairness required the Board to consider it especially when it related to AMG and not current charges. It was the duty of the Board to communicate either acceptance or rejection of the representation and not to sit over it. Reliance was placed on *The Maharashtra State Financial Corporation Vs. M/s. Suvarna Board Mills and another*, and *Zakir Hussain Vs. Bihar State Credit and Investment Corporation Ltd. and Others*, . The Board accepted the earlier request belatedly on 11.4.2007 on the same bill dated 17.4.2006 but after disconnection. There is no explanation for such belated consideration. It amounts to the Board taking advantage of its own lapses and visiting the consumer with consequences. It was impermissible as held in *All India Groundnut Syndicate Ltd. Vs. Commissioner of Income Tax, Bombay City*, .

13. Section 56 of the Act provided for 15 days notice before disconnection. The purpose was to provide an opportunity to pay the dues. In response to the disconnection notice dated 23.8.2006, the Industry within fifteen days made a request for instalments on 26.8.2006. All liabilities under the agreement dated 11.4.2007 have been faithfully discharged. The "neglect to pay" has relation to

the conduct of the Consumer after disconnection notice is issued. The words used are neglects to pay and not neglected to pay. Once a request for instalments was made, within the time period, the issue of neglect to pay does not arise. The electric supply remained disconnected for 7 months only because the Board did not act prudently by considering the request for grant of instalments in time but did so belatedly after disconnection. Even if the Board performs commercial activities, being a "State" under Article 12 of the Constitution it has to act fairly and reasonably. Reliance was placed on ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, and Karnataka State Forest Industries Corporation Vs. Indian Rocks, .

14. The Forum was a statutory body vested with quasi-judicial powers. The Board could not sit in administrative judgment over its orders because it may not have agreed with its findings. Reliance was placed on Amrik Singh Lyallpuri Vs. Union of India (UOI) and Others, . It was bound to comply the order as held in Bikaner Plasto Flex Pvt Ltd. Vs. The State of Bihar and Others, affirmed in LPA 401 of 2009 (Bihar State Electricity Board v. M/s. Bikaner Plasto Flex Pvt. Ltd.). If the disconnection under notice dated 23.8.2006 was unjustified and illegal, no AMG or DPS could be charged for the period of disconnection. The Preamble of the Act provides that it was also meant to protect the interests of the consumer. The Act was not a fiscal statute. We do not consider it necessary to deal with this last aspect as on facts, the appeal can be considered and adjudicated otherwise.

15. We have considered the materials on record and submissions made on behalf of the parties. The controversy emanates from an AMG bill dated 17.4.2006 not discharged by 6.5.2006. There was no statutory much less vested right in the Industry to seek instalments on 29.7.2006. The Board was statutorily empowered to disconnect after expiry of the period u/s 56 of the Act. Being a statutory right, the Board was competent to waive the same by grant of instalments and for which it had framed necessary circulars. But such request to overcome the rigours of Section 56 of the Act had to be made within 15 days of the notice for disconnection. The purpose was salutary. It provided a further opportunity to remedy the "neglect", pay the dues and avoid disconnection. The disconnection notice was issued on 23.8.2006. The request for grant of instalments made on 26.8.2006, was within the period of 15 days. It was an offer to pay contemplated under the circulars of the Board. The Board could have either accepted the request or rejected the same. It could not sit over the same and then disconnect the line taking advantage of its own lapses. If the same request was considered by the Board, but after disconnection, there has to be an explanation by the Board why it did not consider it necessary to do so earlier. Was it creating grounds for disconnection? The counter affidavit or the Memo of Appeal do not disclose any reasons for the same. The conduct of the Board in disconnection on 8.9.2006 has necessarily to be held arbitrary, unreasonable not sanctified by law. We are in agreement with this finding of the Writ Court. The Board cannot be permitted to claim AMG and DPS on the period that the line remained disconnected illegally from 8.9.2006 till 16.4.2007.

16. In *The Maharashtra State Financial Corporation Vs. M/s. Suvarna Board Mills and another*, relied upon by the Industry a notice was given u/s 29 of the State Finance Corporation Act, giving fifteen days to liquidate the dues failing which possession would be resumed. It was done without disposing the representation in time seeking accommodation for reasons explained. The Court observed:

6. The representation it is alleged was not at all attended to, not to speak of the same receiving due consideration. We should have thought that the appellant being a public body should have acted fairly and should have communicated its response to the representation...

17. The contractual relationship between the parties does not detract from the obligation of the Board to comply Article 14 of the Constitution by acting fairly, reasonably and responsibly as rightly urged on behalf of the Industry relying on *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, observing as follows:

23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India...

18. The Industry in *CWJC 4637 of 2008* questioned the order of the Forum holding that the disconnection was valid. We have already held, for reasons discussed that the disconnection was invalid. The Board did not challenge the order of Forum dated 12.2.2008 that minimum guarantee charge/base charge could not be levied for the disconnected period from 1.11.2006 to 30.4 2007. It was not open for the Board to disobey the order of the Forum and refuse to revise the bill. We affirm the observation of the Writ Court that the conduct of the Board in this regard was to be deprecated. The subsequent institution of *CWJC 7314 of 2008* by the Board more than 2 months later, after having flouted the order of the Forum, did not disclose that it had already acted to the contrary and disconnected supply. No prayer for stay of the order of the Forum was made. A challenge was laid to the jurisdiction of the Forum. Before us, Counsel for the Board fairly acknowledged that the Forum had jurisdiction to adjudicate the dispute. An executive authority does not possess the power or jurisdiction to sit over a quasi-judicial statutory order at its discretion opining that the order was wrong. Such approach is not only arbitrary and illegal but fraught with subversion of the Rule of law itself and cannot be countenanced at all. We shall not be exaggerating in holding that the answerability for the conduct has to be individual of the officers of the Board and not the Board. No decision was taken, if it could have been taken by the Board, to disobey the order.

19. Counsel for the Industry has aptly placed reliance on *Amrik Singh Lyallpuri Vs. Union of India (UOI) and Others*, holding:

16. This Court further explained that: (*P. Sambamurthy case*,)

4. ... Now if the exercise of the power of judicial review can be set at naught by the State Government by overriding the decision given against it, it would sound the death knell of the rule of law. The rule of law would cease to have any meaning, because then it would be open to the State Government to defy the law and yet to get away with it...

20. The bill dated 19.3.2008 which included the AMG and DPS for the period 1.11.2006 to 3.4.2007 contrary to the order of the Forum being illegal, the Industry was under no obligation to pay the same. The subsequent disconnection on 2.4.2008 automatically becomes illegal. Surprisingly, the officials of the Board persisted in defying the order of the Forum in the bill dated 22.5 2009 by again including AMG and DPS for the period of disconnection disallowed by the Forum and reiterating the subsequent illegal bill also for the period of illegal disconnection from 2.4.2008 to 23.5 2008. The petitioner challenged this bill before the Forum again which stayed disconnection on 12.6.2009. The authoritarianism of the Board persisted in flagrant disobedience and supply again disconnected on 7.8.2009 leading to institution of CWJC 9742 of 2009. The supply was restored on 1.12.2009 upon payment of Rs. 80 Lacs under orders of the Court. The disconnection from 7.8.2009 to 30.11.2009, needs no further discussion to be held illegal. We are constrained to observe that this second occasion when the officials of the Board acted in gross defiance of the orders of the statutory authority is indicative of dangerous executive thinking. We expect the officials of the Board to understand their folly and act prudently, take action against the officers concerned so that in future such administrative adventurism is not attempted.

21. In fairness to the Board, we must deal with CWJC 7314 of 2008 filed by it against the order of the Forum. It does not appear from the impugned Judgment that any substantive challenge was laid out to it except that the Board did not agree with the same. Even before us no substantive challenge has been laid out why the order of the Forum was wrong. The only ground urged before us was that the order of the Forum was contrary to the agreement signed between the parties for an H.T. connection. It was the foremost duty of the Board to either comply the order of the Forum and then challenge it or alternately challenge the order immediately and seek stay of the order. Its conduct has been found grossly wanting on both aspects. An evasive and purposefully vague statement was made in paragraph 9 of disconnection. No details of the date was stated or that it had already disobeyed the order before filing the Writ petition. If the Board was seeking the protection of the law against the statutory quasi-judicial order, it had to first respect the law. A person falling foul of the law cannot seek the shelter of the law to perpetuate disobedience. The writ petition filed by the Board was therefore fit to be dismissed on this ground also.

22. The case of (Southco) (supra) relied upon by the Board has no application to the present case. The words "revenue focus" was used in context of unauthorised use of electricity. Similarly Kesoram Industries (supra) related to construction of

a taxing statute. Likewise Raymond (supra) and Green Industries (supra) did not relate to the obligation for payment of Minimum Guarantee Charges for the period of illegal disconnection by the Board.

23. Affirming the reasoning and findings of the Writ Court, we hold that the initial disconnection itself being illegal, the Board does not have the authority to charge any AMG and DPS not only for that period but also for each and every subsequent period of illegal disconnection also, because it failed to revise the bills. The directions given by the Writ Court in the penultimate paragraph of the judgment calls for no interference. The Appeals are dismissed with Costs.