

(1997) 04 CAL CK 0028
In the Calcutta High Court
Case No : C.O. No. 18364 (W) of 1996 etc.

Brojendra Nath Samanta and others

APPELLANT

Vs

CESC Limited and CMC

RESPONDENT

Date of Decision : 03-04-1997

Acts Referred:

Contract Act, 1872 — Section 23

Electricity Act, 1910 — Section 10, 2, 21(2), 22, 22(A)

Citation : AIR 1997 Cal 352

Hon'ble Judges : Satyabrata Sinha, J

Bench : Single Bench

Advocate : L.C. Behani and Ms. Suchandra Mukherjee, M.K. Basu, Anil Kr. Jana and Bhakti Prasad Das, R. Deb, for the Appellant; Saktinath Mukherjee, Ashok Banerjee, Nadira Patheria and B.K. Jain, for the Respondent

Judgement

1. Both the writ applications involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgment.

2. C.O.No. 18364(W) of 1996 has been filed by 16 persons praying inter alia for following reliefs:-

"(a) to issue a writ in the nature of mandamus commanding the respondents and/or their agents to forbear giving any effect and/or further effect to the impugned notice dated 16-9-96, Annexure `F" issued by the Commercial Executive C.E.S.S. and the notice dated 11.10.96 issued by the respondent No.5, Annexure `H" and rescind, revoke and cancel them all.

(b) to issue a writ in the nature of mandamus commanding the respondents to forbear from giving any effect to the appointment of Respondent No. 5 as incharge of the C.M.C. Market, New Alipore by an impugned agreement and rescind, revoke and cancel them all.

(c) to issue a writ in the nature of prohibition prohibiting the respondents from

taking any steps to disconnect the electricity to the respective stalls/shops from L.T.service as before.

(d) to issue a writ in the nature certiorari directing the respondent to transmit and to certify the records of the case including Annexure `F" and `H" within such time as may be prescribed by this Hon"ble Court and quash them all.

(e) to issue an interim order of injunction restraining the respondents and/or their agents or subordinates from taking any steps to disconnect L.T.Service to stalls/shop of the petitioners and restraining them further from giving any effect and/or further effect to the notice dated 11-10-96 issue by the Respondent No. 5 Annexure `H" and restraining them also from interfering with the L.T. Service to the stalls/shops of the petitioners by an order of injunction till the disposal of the Rule."

3. The petitioner No.1 of the aforementioned writ applications has filed the other writ application being C.O. No. 18909(W) of 1996 praying inter alia for the following relief:-

(a)to issue a writ in the nature of mandamus commanding the respondents and/or their agents to forbear from giving any effect and/or further effect to the impugned order passed by the CESC authority to disconnect the electric supply to the wheat grinding machine at Stall No. B-1 and 2 of the petitioner through the meter Nos. 461129K,663094K and 44047K as mentioned in paragraph 2 to this petition and rescind, revoke and cancel them all.

(b) to issue a writ in the nature of mandamus commanding the respondents and/or her agent to reinstall the said three Industrial meters to the said Meter Room of the CMC Market, New Alipore, Phase-II Building and to reconnect the electric supply to said wheat grinding machine at stall No.B-1 and 2 of the petitioners and to record meter reading of the said meters of the petitioner month by month along with the CMC meter in the same meter room of CMC.

(c) to issue a writ in the nature of certiorari directing the respondents to transmit and to certify the record of the case including the order of disconnection of electric supply to the said Stall No.B-1 and 2 of the petitioner through the said three meters, within such time as may be prescribed by this Hon"ble Court, and quash them all.

(d) to issue a writ in the nature of prohibition prohibiting the respondents from making any obstruction and/or hindrance to the SESC personal to the access to the meter board position of the petitioner in the said Meter Room of the C.M.C. for taking meter reading month by month.

(e) to issue an interim order of injunction restraining the respondents and their agents to forbear from giving any further effect to the impugned order of disconnection of electric supply to the wheat grinding machine of the petitioner at Stall No. 1 and 2 of the said New Alipore Market till the disposal of the Rule.

(f) to issue a mandatory interim order directing the respondents to restore electric supply to the Stall No. B-182 of the petitioner for running his wheat grinding machine, by reinstalling said three Industries meters of the petitioner as mentioned in paragraph to this petitioner till the disposal of the rule."

4. The basic facts of the matter is not in dispute.

5.The petitioners were occupying shop rooms belonging to Calcutta Municipal Corporation in New Alipore market complex in the town of Calcutta.Calcutta Municipal Corporation entered into a development agreement with Cityscape Developers Private Limited(hereinafter referred to as `Cityscape")for redevelopment of the market complex by demolishing the existing buildings and structures.

6. During course of such demolition the petitioners vacated the showroom in their respective possession but upon construction of the new market complex, they had been rehabilitated in the ground floor thereof. All the petitioner except the petitioner No. 1 Brojendra Nath Samanta have been taking supply of electrical energy from Calcutta Municipal Corporation.Brojendra Nath Samanta,however, had been taking supply of electrical energy separately from CESC Ltd.also, where fore three meters had been installed.It is not the case of the parties that the petitioners have defaulted in making payment of any electrical dues. `Cityscape" in terms of the maintenance agreements entered into with Calcutta Municipal Corporation obtained supply of High Tension Electrical Energy from CESC Ltd.The only question which arises for consideration in these applications is as to whether in view of the provisions of the Indian Electricity Act and the rules framed thereunder, the petitioners can be forced to take supply of electrical energy from `Cityscape" by reason of the purported agreement entered into by it with CESC Ltd.

7. There cannot be any doubt whatsoever that the matter relating to supply of electrical energy is governed by the provisions of Indian Electricity Act and the rules framed thereunder.The CESC Ltd. is admittedly a licensee within the meaning of Section 3 of the said Act.

8. Mr. Bihani, learned counsel appearing on behalf of the Calcutta Municipal Corporation categorically admitted that they had no jurisdiction to issue any direction to the tenants to enter into any arrangement with the `Cityscape" as regard taking supply of electrical energy.The said agreement had been entered into only for the purpose of maintenance of the market complex on the terms and conditions laid down therefore in terms of an agreement dated 1-4-96 upon obtaining a no objection certificate granted by the Corporation in favour of `Cityscape" to supply for additional power.The respondents have relied upon clause 10 of the letter of sanction dated 2-5-96 in terms whereof all H.T. services being switched on, all other supplies at the market complex would be entirely removed.

9.It is absolutely clear that a contract entered into by and between CESC Ltd.and

`Cityscape" is not binding on the petitioners. They are not even the tenants of `Cityscape". Only by reason of a supplementary agreement they were granted the maintenance job of the petitioner's premises comprising of 1170 sq.ft. of the total space of the said market complex. The petitioners are still tenants of Calcutta Municipal Corporation. Thus, there is no relationship of Landlord and Tenant between the petitioner and `Cityscape".

10. Mr. Saktinath Mukherjee, learned senior counsel appearing on behalf of the `Cityscape" has also accepted the position in law that the respondent No. 7 cannot force anybody to take supply from it. The only question which arises for consideration in this application is as to whether CESC Ltd. can direct the petitioners to take supply of High Court Tension electrical energy from `Cityscape".

11. The SESC Ltd. is a licensee in terms of the Section 3 of the Indian Electricity Act. In terms of the provision of the said Act, the provisions contained in the schedule appended thereto shall be deemed to be condition of license unless varied or altered. Paragraph VI of the said schedule reads thus:-

"Where, (after distributing mains have been laid down under the provisions of Clause IV or Clause V and the supply of energy through those mains or any of them has commenced.) a requisition is made by the owner or occupier of any premises situate within (the area of supply requiring the licensee to supply energy from such premises, the licensee shall, within one month from the making of the requisition, (or with such longer period as the (Electrical Inspector) may allow) supply, and, save in so far as he is prevented from doing so by cyclone, floods, storms or other occurrences beyond his control, continue to supply, energy in accordance with the requisition."

Section 3(2)(d) of the said Act reads thus:-

"a license under this part-

(i) may prescribe such terms as to the limits within which, and the conditions under which the supply of energy is to be compulsory or permissive and generally as to such matters as the State Government may think fit, and

(ii) Save in cases in which u/s 10, Clause (b) the provisions of Sections 5 and 6 or either of them, have been declared not to apply, every such license shall declare whether any generating station to be used in connection with the undertaking for the purpose of purchase u/s 5 and 6."

Section 9(2)(3) of the said Act reads thus:-

"The licensee shall not at any time assign his license or transfer his undertaking, or any part thereof, by sale, mortgage, lease, exchange or otherwise without the previous consent in writing of the State Government.

Any agreement relating to any transaction of the nature described in sub-section (1) or sub-section (2), unless made with, or subject to such consent as

afrosaid,shall be void."

Section 22 of the said Act reads thus:-

"Where energy is supplied by a license, every person within the areas of supply , shall, except in so far as is otherwise provided by the terms and conditions of the license, be entitled, on application to a supply on the same times as those on which any other person in the same area is entitled in similar circumstances to a corresponding supply.

Provided that no person shall be entitled to demand,or to continue to receive, from a licensee a supply of energy for any premises having a separate supply unless he has agreed with the licensee to pay to him such minimum annual sum as well give him a reasonable return on the capital expenditure, and will cover other standing charges incurred by him in order to meet the possible maximum demand for those premises, the sum payable to be determined in case of difference or dispute by arbitration."

12. Section 22 of the Indian Electricity Act and with the condition of license, thus, clearly casts a statutory duty upon the licensee to supply electrical energy to an owner or occupier of premises. The spirit of the aforementioned provisions is that any occupier or owner of a premises is entitled to receive electrical energy within one month from the date of filing an application therefor. It is not in dispute that prior to grant of high-tension electrical connection in favour of the 'Cityscape' CESC Ltd.used to supply low-tension electrical energy both to the petitioner in C.O.No.18909(W) of 1996 as well as to the Calcutta Municipal Corporation.

13.It is also not in dispute that the terms and conditions for supply of high-tension electrical energy are more stringent than the terms and conditions applicable for supply of low-tension electrical energy.

14. The licensee having a monopoly as record supply of electrical energy in the area of supply must act reasonably and fairly in the matter of distribution of electrical energy to the consumers within the particular area of supply.The CESC Ltd. is also not authorised to delegate its own power to the third party which would amount to transfer of its license.This licensee has not power to direct the consumer to take high-tension supply of Electrical Energy.A restricted power to the effect that licensee shall supply energy to a particular class of consumer is vested in the State Government in terms of Section 22A of the Act. Furthermore, the tariff for supply of electrical energy is governed by Section 33 of the Act.Thus, a consumer cannot be subject to pay a higher charge than the charges which he is liable to pay in terms of nature of supply of energy needed by him.

15. In D.C.M. Ltd. and Another Vs. Assistant Engineer (HMT Sub-Division), Rajasthan State Electricity Board, Kota and Another, J.S.Verma, C.J. (advising his Lordship thereby) and I.S. Irani,J. While considering the clause in the agreement

is regard payment os minimum charges held that Section 22 obliges the Board to supply to every person within the area of supply energy on the same terms. A contract of supply of electrical energy is statutory in nature.

16 It is not dispute that as regard 89 per cent of the said market complex, the Calcutta Muncipal Corporation only handed over the question of maintenance to 'Cityscape'. In terms of the agreement , they have not become owners of the said buildings and the petitioners who were tenants under the Calcutta Municipal Corporation continued to remain its tenants.The maintenance of the market complex only even according to the 'Cityscape' consists of rent collection etc.Supply of electrical energy is not and cannot be a matter of maintenance within the preview of maintenance of market complex. If there exist any such agreement as has been asserted by the 'Cityscape' the same would be contrary to public policy and thus void u/s 23 of the Indian Contract Act.As indicated hereinbefore, Mr.Mukherjee has also conceded that 'Cityscape' cannot thrust itself upon the petitioners to take supply of electrical energy from it.

17. Electricity is a basic amenity.It is not disputed that for effective running of business, it is necessary for the petitioners to obtain supply of electical energy. The obligation on the part of the licensee to supply electical energy to a consumer is not only to be viewed in the context of the provisions of the Indian Electivity Act but also in the context of the fundamental rights of the petitioner.Requisition to obtain electivity is no more a luxury.It is a basic necessity for human existence.

18. Furthermore, the CESC Ltd. could not have unilaterally disconnected the electical energy of the petitioner in respect of three industrial meters only because it had entered into an agreement with 'Cityscape'. The CESC Ltd.must act within its statutory powers and conditions of license.It is evident that in disconnecting the supply of electical energy of the petitioner Brojendranath Samanta, it has acted arbitrarily. The said action was ultra vires Indian Electricity Act and the conditions of license.

19.If the petitioner Brojendra Nath Samanta had been taking electrical energy both from Calcutta Muncipal Corporation and the SESC Ltd. it was for the concerned authorities to see whether he is entitled thereto but his electrical connection certainly could not have been unilaterally disconnected and that too during the pendency of this writ application. CESC Ltd., thus, had tried to over reach this Court.

20.It is an admitted fact that even CESC's metes have not been removed till December, 1996.

21. The 'Cityscape' admittedly is entitled only to sale 89 per cent of the market complex.

22. The CESC Ltd. has no jurisdiction to delegate its power authorising sale of electical energy to a third party.Is this connection reference may be made to a

decision of this Court rendered on 18 the December, 1996 in C.O. No. 14297 of 1996 in the matter of Smt.Monju Singhal v. CESC Ltd.In the aforementioned case, the only argument which was advanced by Mr.Deb, learned counsel appearing on behalf of CESC Ltd. was with the provision of Section 22 of the Act can be taken recourse to only in respect of area of supply and, thus,the petitioner thereto could be directed to taken electrical energy from a third party to whom the respondent company have been supplying electrical energy to a bulk. The Court held:-

"The word "Area" of supply has been defined in Section 2(b) of the Indian Electivity Act to mean the area within which alone a licensee is for the time being authorised by his license to supply energy.This very definition goes against the contention of Mr.Deb.

In that view of the matter there cannot be any doubt that any arrangement made by the petitioner and the aforementioned M/s. Hanuman Industries is illegal, being in contravention of the provisions of the Indian Electricity Act, 1910. The State Government if it is so chooses may enquire into the matter and taken action against the licensee in accordance with law.

In view of the fact that in terms of Section 22 of the Indian Electricity Act the respondent company as a statute obligation to supply the electical energy to the petitioner, they are directed to do so a within four weeks from the date of compliance o the statutory and other formalities."

23. Although no other arguments had been advanced in this case, on 14th March, 1997 a written submission has been placed or records (although the arguments were heard on 7th March, 1997), wherein, inter alia, it is stated thatCESC Ltd., in usual courses of business may not install any other services of electical energy where HT services was supplies for safety and other technical difficulties.The plead taken by CESC Ltd.are by way of an after thought.It has been the consistent stand of CESC Ltd.that the petitioners are not entitled to such supply because of the agreement entered into by and between if and `Cityscase".

24.It is difficult to comprehend that when advent of science has taken a quantum leap, both LT and HT supplies cannot be made to the same premises. Even in a case of necessity, a separate underground supply lien may be laid down and, the safety aspect of the matter can also be taken care of.

25. It is also difficult to accept the said contention as no provision of law was pointed out in support of the aforementioned argument. The licensee is required to take adequate safety measures within the frame work of the law but it cannot act contrary thereto.The reasons stated in the written argument do not find place in the affidavit-in-opposition nor any provision of law or authority had been cited for raising a contention that a basic amenity like supply of electivity can be denied only on the basis of hypothesis or surmise and conjectures of the part of CESC Ltd. The said purported reasons had been set up only to cover up its illegal

actions.

26. It has further been submitted that in terms of 25(a) of the condition of supply framed by the CESC Ltd. in terms of Section 21(2), it is permitted to re-sal energy under certain circumstances which are as follows:-

"Electrical Energy purchased from the Licensee by the consumer may not be supplied or re-sold by the consumer to any third party except as follows:

(i) Energy purchased at Rate `G" for lights and fans may be supplied or re-sold by the consumer to his bona fide tenants for use on the premises for which the supply is granted by the Licensee.

(ii) Energy purchased at Rate `A" for industrial purpose may be supplied or re-sold by the consumer to his bona fide employees subject to the conditions in para 23(b).

(iii) Energy purchased at Rate `B" may be supplied or re-sold by the consumer for consumption within the area of the premises specified in the agreement.

(iv) Energy purchased under a special contract may be supplied or re-sold in accordance with the terms and provisions of such contract.

In no case may the consumer charge more for energy re-sold under (i), (ii), (iii) or (iv) above than he is called upon to pay for like quantities of energy purchased by him from, the Licensee, due consideration being given to the cost of conversion and distribution.

Note: If any profit from the sale of energy is made by the consumer he consumer he may be liable to prosecution u/s 41 of the Indian Electricity Act, 1910 and punishable with a fine not exceeding Rs.3,000/-"

27. Even in support of the said contention no fact has been placed. It is not known whether the charges sought to be levied by `Cityscape" upon the petitioner and other satisfy the aforementioned contention of note.

28. Furthermore, the petitioners are not concerned as to what sort of agreement was entered into between `Cityscape" and `SESC Ltd." The petitioners are not tenants of the `Cityscape" Developers Pvt. Ltd. but still then, admittedly for the purpose of granting high-tension electrical connection to them, they had been asked to deposit a huge amount by way of security and it has also been asked to enter into an agreement. Thus, for all intent and purport `Cityscape" has assumed the role of a licensee or a permit holder.

29. Clauses 1, 2, and 3 of the said condition of supply have no application in this instant case. In these cases, the consumers remain solely liable to the licensee. The `Cityscape" cannot obtain security deposit from the petitioner or impose any other conditions which are beyond the purview of the provision of the Indian Electricity Act and rules framed thereunder; particularly in view of the interim order passed by this Court. So far as Clause 4 of conditions No. 25(a) is

concerned, such a contract, even assuming for the sake of argument could be entered into, the same must be subject to the provisions of Section 9(2) of the Act. By framing a condition of supply in terms of Section 21(2) of the Act, it cannot by-pass the mandatory provision of sub-section (2) of Section 9 as for such purpose consent in writing of the State Government in each case are required and there cannot be a general authorisation in that behalf; inasmuch as, evidently the State Government must know as to whether the purported contract of supply of energy authorising the consumers of the CESC Ltd., to re-sale the same in terms of provisions of the contract would be violative sub-section (2) 9 or the conditions of supply or not. A license, inter alia, is granted for generation and sale of electrical energy. Nobody is entitled to sale electrical energy unless he is a licensee or permit holder in terms of Sections 3 and 28 of the Indian Electricity Act. Thus, if a licensee authorises some other persons to sale electrical energy, he for all intent and purport assigns his license which cannot be done by sale, mortgage, lease, exchange or otherwise. The Word "otherwise" plays a very vital role in this construction of the said provisions. If a licensee is to grant such permissions, it would be entitled to do indirectly which it would not do directly in view of the provisions of the Indian Electricity Act as the same would frustrate the object of the Act.

30. "Business" for supplying energy to the public need not necessarily be a profit making one. The respondent No.7 had admittedly entered into a commercial venture by entering into an agreement with Calcutta Municipal Corporation for carrying out the job of maintenance of the said business complex. Business convenience of the parties is not and cannot be a substitute of law. The Calcutta Municipal Corporation also could not have permitted "Cityscape" to enter into such an agreement with the CESC Ltd.

31. The matter may be different when sale of electrical energy takes place by mutual consent of the concerned persons. In any event, a person can supply electrical energy to another not as a business venture but in a limited manner provided the consumers agrees thereto but nobody can be forced to take supply of electrical energy from a person with whom CESC Ltd. has entered into an agreement.

32. Each of the petitioners in terms of Section 22 of the Indian Electricity Act has an independent right to get supply of electrical energy from CESC Ltd. The provisions of Section 22 confers a right upon an owner or occupier to get supply of electrical energy. The licensee is also under a statutory obligation to supply such energy, once the condition laid down therefore are fulfilled. In the fact of this case, it is admitted that CESC Ltd. had been supplying electrical energy both to Calcutta Municipal Corporation and Brojendra Nath Samanta, although Brojendra Nath Samanta was a tenant of Calcutta Municipal Corporation.

33. The word "same area of supply" has a wider connotation. It cannot be confined only to a building. The area of supply would mean the entire area wherein the mains have been drawn.

34. In any event, any conditions of supply made u/s 21(2) must be in conformity with the provisions of the Act, as such conditions can be made "not inconsistent with this Act or with his license or in any rules made in this Act" No provision of the Act or the condition of license or a rule made under the said act as been pointed out to show that CESC Ltd. can force any consumer to take supply of electrical energy from another consumer.

35. Furthermore, the consumer is entitled to get supply of electrical energy to the extent of his need. It has not been disputed before this Court that the condition four supply of high-tension energy and the condition for supply of low-tension energy for domestic or industrial purposes are different. In that view of the matter also CESC Ltd. cannot force anybody to take supply of a particular type of electrical energy.

36. In this context it may be noticed that science has developed to a great extent and it cannot be said that adequate preventive measures cannot be taken by supplying two different types of energy in the same building; particularly in view of the fact that it has not been disputed by the learned counsel appearing on behalf of the parties, when questioned, that a similar nature of electrical energy is being supplied to the neighbouring buildings. It may be noted that Rule 30 of the Indian Electricity Rules to which reference has been made does not prohibit supplies of different nature of the energy in the same premises. Rule 30 only provides for supply lines and apparatus of consumer premises. It has got nothing to do with the rights and discharge of obligations on the part of the licensee as regard supply of different kind of electrical energy and under different pressures.

37. The licensee has no unfettered right to decide the mode of supply. It is compelled to give a particular type of supply in terms of Section 22 of the Indian Electricity Act subject to the provision of the Act and the condition of license. No provision has been brought to this Court's notice which entitles not to supply the electrical energy to the petitioner.

38. Only in exceptional cases, it can refuse to supply on the ground of safety hazard or on technical ground. Such is not the case here and no such case had been pleaded. The only case of CESC Ltd. as also "Cityscape" is that they would give any supply of electrical energy to the petitioners only because they have entered into an agreement with "Cityscape" is that they would give any supply of electrical energy to the petitioners only because they have entered into an agreement with "Cityscape" is that they would give any supply of electrical energy to the petitioners only because they have entered into an agreement with "Cityscape" and all the petitioners must take supply of high-tension of electrical energy from the said Company.

39. In this view of the matter the action on the part of the CESC Ltd. must be held to be illegal particularly in view of stand taken by the learned counsels appearing on behalf of the Calcutta Municipal Corporation and "Cityscape" as

regard interpretation of the provisions of the Indian Electricity Act and Rules vis-a-vis the right of the writ petitioners to take supply from the CESC Ltd. It has been accepted at the bar that even a tenant residing under the same roof with his landlord is entitled to get supply of electrical energy. There is absolutely no reason as to why the premises in the ground floor of the market complex and that too when they have no relationship of landlord and tenant for 'Cityscape', the petitioner would be deprived of the said right. The CESC Ltd. is, therefore, directed to restore supply of electrical energy to Brojendra Nath Samanta forthwith under the same terms and conditions as was being done independent. It is further directed to grant electrical connection to all other intending consumers who may file their applications or might have filed applications for grant of such electrical energy in terms of Section 22 of the Indian Electricity Act.

40. It will be open to petitioner No.1 Brojendra Nath Samanta to file a suit for damages and/or to initiate a prosecution against the concerned authorities of CESC Ltd. in terms of the provisions of the Indian Electricity Act.

41. It may also be placed on records that in view of Mr. Chatterjee's report is evident that no actual supply of electrical energy has been given to the petitioner No. 1 and in fact he had been asked to deposit a security amount. It is also placed on record that submission of Mr. Deb to the effect that electrical connections have been stated in the application for further order of the petitioner, cannot be appreciated at this stage I refrain from taking any action against it.

42. In view of my findings aforementioned it is not necessary to decide the other questions of fact raised in this case. This application is disposed of accordingly. The CESC Ltd. shall bear the costs of the petitioners. Advocates fees assessed at 200 G.M.s.

43. Order accordingly.