(2010) 06 GAU CK 0038

In the Gauhati High Court

Case No : Writ Petition (C) No. 1183 of 2010

Carbon Resources (P.) Ltd. APPELLANT

Vs

Assam Electricity Regulatory Commission and Others RESPONDENT

Date of Decision : 02-06-2010

Acts Referred:

Electricity Act, 2003 — Section 43, 50, 56(2)
Transfer of Property Act, 1882 — Section 55

Citation : (2010) 5 GLR 29 : (2010) 3 GLT 425

Hon'ble Judges : R.S. Garg, C.J;Hrishikesh Roy, J

Bench : Division Bench

Advocate : A.K. Sinha, G.N. Sahewalla, Md. Aslam, D. Senapati and J. Bora, for the Appellant; A.K. Thakur and B.D. Das, for the Respondent

Final Decision : Dismissed

Judgement

Hrishikesh Roy, J.—Heard Mr. Ajit K. Sinha, the learned senior counsel appearing for the petitioner. Mr. B.D. Das, learned senior standing counsel of the Assam State Electricity Board represents the respondents 2 to 5 - who are referred to hereinafter as "the Distributor". Mr. A.K. Thukur represents the Regulatory Commission (respondent No. 1).

2. The issue that needs to be answered in the instant case is whether the petitioner as an auction purchaser is obliged to clear the electricity dues of the previous consumer, before he can be supplied electricity in the premises, where connection was disconnected for non-payment of power dues.

Relevant facts

3. On 29.12.2007, an Auction Sale Notice was published by the Recovery Officer of the Debts Recovery Tribunal (DRT), Guwahati in respect of M/s. Eastern Steel & Alloys Company Ltd. hypothecated premises and land measuring 16 Bighas, 1 Katha, 12 Lachas with AT (Assam Type) & RCC Building/Sheds, etc., besides scraps of plant and machinery and boundary wall on "As is where is basis".

3.1 The petitioner was the only one who responded to the sale notice and the DRT by order dated 24.3.2008 ordered confirmation of sale at the petitioner''s offer of Rs. 1,08,50,000.00 and Certificate of Sale in respect of the auctioned property was granted in favour of the petitioner.

3.2 As a portion of the auctioned property was under occupation of the CRPF personnel, the petitioner wrote to the UCO Bank Authorities to remove the CRPF personnel camping in the property and by the reply dated 27.3.2008 given by the Chief Manager of the UCO Bank, the auction purchaser were informed that the Bank will take responsibility for decamping the CRPF personnel in occupation of the auctioned property.

3.3 On 21.1.2009 (Annexure VIII) the petitioner wrote to the Manager, Bongaigaon Sub-Division, Lower Assam Electricity Distribution Company Ltd. (respondent No. 4) about the purchase of the hypothecated property and requested the Distributor for sanctioning of 50 to 150 KVA Electricity Connection, to set up a Calcined Petroleum Coke Industry, in the purchased premises.

3.4 In the mean time, the petitioner learnt that fresh connection cannot be given in the purchased property as some old power dues are pending in respect of the said premises and accordingly the petitioner requested for intervention of the Chairman of the Distributor for early release of the electricity connection.

3.5 By the impugned communication dated 27.6.2009, the senior Manager of the Bongaigaon Electrical Sub-Division (respondent No. 5) informed that the total outstanding dues of the old consumer with principal and additional surcharge, was Rs. 4,57,23,633.81 for power supplied in the hypothecated property.

3.6 As the Distributor was not prepared to give a fresh connection without clearance of the outstanding dues of the old consumer, the present petition came to be filed.

Petitioner''s contentions

4. Mr. A.K. Sinha, learned senior counsel submits that the prepayment of the power dues of a previous consumer cannot be insisted upon by the Distributor as a pre-condition for providing power in his purchased premises by contending that the petitioner is not in default of such dues. He contends that u/s 43 of the Electricity Act, 2003 ("the 2003 Act''), the Distributor is obliged to provide supply of electricity within 1 month from the date of application of an intending consumer and outstanding dues of a previous consumer should have no bearing in the matter.

4.1 Referring to Clause 3.6.4 of the Assam Electricity Regulatory Commission (Electricity, Supply Code and Related Matters) Regulations, 2004 (''the Regulations, 2004'') on the basis of which the Distributor is seeking to recover the outstanding electricity dues, Mr. Sinha contends that the said clauses are inconsistent with the provisions of the parent Act as according to him, the 2003 Act does not provide for clearance of outstanding electricity dues when a new consumer applies for fresh electricity connection in respect of the same premises. It is also submitted that Clause 3.6.4 of the Regulations, 2004 cannot be resorted to for such pre-deposit as the State Regulatory Commission as the delegatee has exceeded their jurisdiction in incorporating the said clause in the Regulation.

4.2 The petitioner contends that u/s 56(2) of the 2003 Act, a distributor is not entitled to recover dues of a consumer 2 years after such dues become payable and since the dues in the present case are beyond the said period, there can be no demand for payment of such dues by the Distributor.

4.3 Referring to the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (''the Recovery Act''), the learned Counsel contends that the hypothecated premises having been sold by the bank without encumbrance recovery of outstanding electricity dues. if it is to be made, can be realized only from the seller and not from a bona fide purchaser. Reference to the provisions of Section 55(g) of the Transfer of Property Act, 1882 (''the T.P. Act'') is also made to advance the submission that it is the responsibility of the seller and not of the purchaser, to pay all public charges in respect of the property.

4.3 In support of his contentions, Mr. Sinha relies upon the following decisions of the Apex Court: -

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

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

(iii) Dakshin Haryana Bijli Vitran Nigam Ltd. v. Paramount Polymers Ltd. (2006)13 SCC 101.

(iv) Dakshin Haryana Bijli Vitran Nigam Ltd. v. Excel Buildcon (P.) Ltd. (2008) 10 SCC 720.

(v) Union of India (UOI) and Others Vs. SICOM Ltd. and Another,

(vi) AI Champdany Industries Limited Vs. The Official Liquidator and Another,

(vii) Global Energy Ltd. and Another Vs. Central Electricity Regulatory Commission,

Respondents contention

5. Arguing for the Distributor/respondents, Mr. B.D. Das, learned Standing Counsel of the Assam State Electricity Board (ASEB) refers to Section 50 of the 2003 Act to submit that an Electricity Supply Code is required to be framed by the Regulatory Commission to provide for recovery of electricity charges. According to him, the Regulations, 2004 containing Clause 3.6.4 have been framed under the authority of Section 50 and, therefore, there is no basis to contend that Clause 3.6.4 is either ultra vires the Electricity Act, 2003 or that the said clauses have been enacted by the State Regulatory Commission, in excess of the power delegated by the Act.

5.1 Mr. Das also submits that demand for clearance of outstanding dues is justified because fresh electricity connection is sought in the same premises where electricity was disconnected for non-payment of dues and such recovery having been provided for through appropriate Regulation, the time limitation prescribed for recovery of electricity dues from the earlier consumer u/s 56(2) of the 2003 Act, would not apply in the instant case.

5.2 The learned Counsel for the Distributor further submits that neither the provisions of the Recovery Act nor the T.P. Act would apply as the impugned action is not against the previous consumer or the seller (Bank) and the demand for payment of outstanding dues is made only because the petitioner seeks power to a premises where supply was disconnected for non-payment of power dues.

5.3 In support of his contentions, the respondents relies upon the following decisions:

(i) Suraj Vs. K.S.E.B.,

(ii) K.G. Purushothaman Vs. Kerala State Electricity Board and Another,

(iii) Mahila Kamla Dubey Vs. Madhya Pradesh Vidyut Mandal and Others,

(iv) Paschimanchal Bidyut Vitran Nigam Ltd. v. DVS Steels and Alloys (P.)Ltd. (2010)1 SCC 210....

Legality of the supply conditions

6. In the present case, we find that conditions have been incorporated through Clause 3.6.4 under the Regulations, 2004 providing, inter alia, the terms under which electricity supply is to be made by the Distributor.

As this clause has a material bearing on the issue, the same is extracted hereinbelow for ready reference -

3.6.4. In case of a person occupying a new property, it will be the obligation of that person to check the bills for the previous months or in case of disconnected supply, the amount due as per the licensee''s records immediately before his occupation and ensure that all outstanding electricity dues as specified in the bills subject to limitation as per Sub-section (2) of Section 56 of the Act are duly paid up and discharge. The licensee shall be obliged to issue a certificate of the amount outstanding from the connection in such premises on request made by such person.

6.1 Clause 3.6.4. requires a new occupier to ensure that all outstanding electricity dues are duly paid up prior to his occupation. Regulations, 2004 have been framed u/s 50 of the Electricity Act, by the Regulatory Commission. As Supply Code is required to provide for Recovery of Electricity Charges we are of the view the said Regulation and the clauses contained therein cannot be said to be ultra vires the provisions of the Electricity Act. For the same reason it cannot also said to be an excessive exercise of power by a delegatee and accordingly we are enable to accept the contrary arguments raised by the petitioner with regard to the legality of the Regulations, 2094 and clauses contained therein.

7. Insofar as the argument advanced that the Distributor is entitled to proceed only against the seller of the hypothecated property, i.e., UCO bank and not against the purchaser, we find that the distributor is demanding prepayment of the outstanding dues before electricity connection is given to the petitioner, in terms of the notified conditions. Therefore, the petitioner''s contention that recovery has to be made from the seller and not the buyer does not appeal to us and the same is accordingly rejected.

8. Since conditions have been prescribed for making supply to a premises where electricity has been disconnected for non-payment of the dues, it would be unjust in our view to compel the Distributor to give electricity connection at the same premises as the Distributor''s rights to recover outstanding dues would then be adversely impacted. This cannot certainly be in public interest and we are unable to accept the argument of the petitioner on this count.

CASE LAW

9. As regards the decisions relied upon by the petitioner in the case of Isha Marbles (supra) and Ahmedabad Electricity Co. Ltd. (supra), we find that the said decisions were rendered at a stage when conditions of supply were yet to be notified unlike in the present case where Regulations, 2004 is available. Therefore, we feel that the said 2 decisions cannot be applied for deciding the issue in the facts of this case.

10. We may also take note of paragraph 63 of the judgment in Isha Marbles (supra) to understand that even in that case, the Supreme Court had expected the courts to be vigilant in respect of electricity which is considered to be a public property and only because inadequacy of law at that point of time, the Supreme Court gave its decision against the Distributor. Paragraph 63 reads as under: -

63 We are clearly of the opinion that there is great reason and justice in holding as above. Electricity is public property. Law, in its majesty, benignly protects public property and behoves everyone to respect public property. Hence, the courts must be zealous in this regard. But, the law, as it stands, is inadequate to enforce the liability of the previous contracting party against the auction-purchaser who is a third party and is in no way connected with the previous owner/occupier. It may not be correct to state, if we hold as we have done above, it would permit dishonest consumers transferring their units from one hand to another, from time to time, infinitum without the payment of the dues to the extent of lakh and lakh of rupees and each one of them can easily say that he is not liable for the liability of the predecessor in interest. No doubt, dishonest consumers cannot be allowed to play truant with the public property but inadequacy of the law can hardly be a substitute for overzealousness....

11. The 3 High Court decisions, i.e., Suraj K.R. (supra), K.G. Purushothaman (supra) and Mahila Kamla Dubey (supra) relied upon by the respondents took note of the change in law after the Apex Court''s decision in Isha Marbles (supra) and on the basis of the subsequently notified supply conditions, the Distributor''s right to demand prepayment of past electricity dues, when fresh connection is applied in the same premises, was upheld by the High Courts in these cases.

12. That apart, the issue raised in the present case in our view is now squarely covered by the Apex Court''s decision in Paschimanchal Vidyut Vitran Nigam Ltd. and Others Vs. DVS Steels and Alloys Pvt. Ltd. and Others, where the Supreme Court while examining similar conditions of supply as laid down in the Regulations, 2004 have held as follows:

....

11. The supply of electricity by a distributor to a consumer is "sale of goods". The distributor as the supplier, and the owner/occupier of a premises with whom it enters into a contract for supply of electricity are the parties to the contract. A transferee of the premises or a subsequent occupant of a premises with whom the supplier has no privet 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. The supplier can, therefore, neither file a suit nor initiate revenue recovery proceedings against a purchaser of a premises for the outstanding electricity dues of the vendor of the premises in the absence of any contract to the contrary.

12. But the above legal position is not of any practical help to a purchaser of a premises. When the purchaser of a premises approaches the distributor seeking a fresh electricity connection to its premises for supply of electricity, the distributor can stipulate the terms subject to which it would supply electricity. It can stipulate as one of the conditions for supply, 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. If any statutory rules govern the conditions relating to sanction of a connection or supply of electricity, the distributor can insist upon fulfillment of the requirements of such rules and regulations. If the rules are silent, it can stipulate such terms and conditions as it deems fit and proper to regulate its transactions and dealings. So long as such rules and regulations or the terms and conditions are not arbitrary and unreasonable, courts will not interfere with them.

13. A stipulation by the distributor that the dues in regard to the electricity supplied to the premises should be cleared before electricity supply is restored or a new connection is given to a premises, cannot be terms as unreasonable or arbitrary. In the absence of such a stipulation, an unscrupulous consumer may

commit defaults with impunity, and when the electricity supply is disconnected for non-payment, may sell away the property and move on to another property, thereby making it difficult, if not impossible for the distributor to recover the dues. Having regard to the very large number of consumers of electricity and the frequent moving or translocating of industrial, commercial and residential establishments, provisions similar to clauses 4.3(g) and (h) of the Electricity Supply Code are necessary to safeguard the interests of the distributor.

14. We do not find anything unreasonable in a provision enabling the distributor/ supplier to disconnect electricity supply if dues are not paid, or where the electricity supply has already been disconnected for non-payment, insist upon clearance of arrears before a fresh electricity connection is given to the premises. It is obviously the duty of the purchasers/occupants of premises to satisfy themselves that there are no electricity dues before purchasing/occupying a premises. They can also incorporate in the deed of sale or lease, appropriate clauses making the vendor/lessor responsible for clearing the electricity dues up to the date of sale/lease and for indemnity in the event they are made liable. Be that as it may.

13. Having regard to the aforesaid decision of the Supreme Court in DVS Steels (supra), we are unable to hold that the Distributor was without any legal authority in seeking to recover outstanding dues of a previous occupier, from the petitioner, when he applied for fresh electricity connection in the same premises.

14. In Paramount Polymers (supra), the Supreme Court while examining the right of the Electricity Company to demand liquidation of the outstanding dues for a premises where power were disconnected have held that dues of a previous owner can be recovered by proceeding against the Transferee. The court also held that the newly inserted Clause 21A would clearly apply to the Transferee when it made application for fresh power connection in the disconnected premises, when a purchaser acquires such premises on "As is where is basis".

14.1 Insofar as the decision in Sicom Ltd. (supra) where the Supreme Court held that debt owed to the State is an unsecured debt and a secured debt has the first charge over a property and in Al Champdany Industries Ltd. (supra), where the Supreme Court held that Municipality is an Unsecured Creditor and dues to Municipality can only be discharged after the Secured Creditors are paid, we are of the opinion that these decisions, can have no application in the present case. In this case demand of liquidation of the outstanding dues is made on the basis of laid down terms and conditions for giving fresh connection and the applicant as a consumer is entitled according to us, to obtain power supply only on fulfillment of the laid down terms.

14.2. In view of our finding that the Regulatory Commission has acted within the ambit of the powers conferred by Section 50 of the 2003 Act in laying down conditions for recovery of electricity charges, we see no basis for applications of the legal principles enunciated by the Supreme Court in the case of Global

Energy (supra), where the delegated authority acted beyond the power given in the parent Statute.

15. It is also relevant to record that steps have been taken by the Distributor through newspaper to notify all prospective buyers of property that they are liable to clear the earlier dues of old consumer before power supply can be provided to a premises where supply has been disconnected for non-payment of dues. Therefore, the auction purchaser cannot be said to un-informed about his obligation to pay the arrear dues of the old consumer, before he can receive fresh power supply in the same premises.

16. Section 56(2) of the 2003 Act which prohibits recovery of a sum due from any consumer after a period of 2 years from the due date in our view has no application here as the Distributor had already instituted Money Suit 3/95 in the court of District Judge, Bongaigaon for recovery of the dues from the previous consumer. After they obtained a decree, an execution proceeding was also started by the decree holder. So the Distributor proceeded against the old consumer as per law and they were vigilant about the recovery of the dues owed to them. Although in this case, we are not required to pronounce on the legality of the steps taken by the Distributor, considering that steps have also been initiated for execution of the decree, to balance the interest of the parties, it is made clear that if any outstanding amount is received from the old consumer, such amount be adjusted with the power bills of the new consumer.

17. In view of the above discussion, we find no merit in this petition and the same is accordingly dismissed directing the parties to bear their respective costs.