(2014) 07 AP CK 0055

In the Andhra Pradesh High Court

Case No : Writ Petition No. 28271 of 2008

Dhanalakshmi Iron Industries Ltd.	APPELLANT
Vs	
The Central Power Distribution Company of A.P. Limited	RESPONDENT

Date of Decision : 25-07-2014

Acts Referred:

Constitution of India, 1950 — Article 14
Electricity Act, 1910 — Section 2(c)
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 29

Citation : (2014) 6 ALD 129 : (2015) 1 ALT 404

Hon'ble Judges : A. Ramalingeswara Rao, J

Bench : Single Bench

Advocate : D.V. Nagarjuna Babu, Advocate for the Appellant; O. Manoher Reddy, S.C, Advocate for the Respondent

Judgement

A. Ramalingeswara Rao, J.—Heard the learned counsel for petitioner and the learned Standing Counsel for respondents.

2. In this case, a short but interesting question with regard to the right of respondents to recover arrears of electricity charges from the petitioner who is a subsequent purchaser from the auction purchaser of the defaulting sick company arises for consideration.

3. The petitioner is a limited company which purchased the land admeasuring Acs. 1-97 cents in survey No. 172/C in Bollaram Village, Zinnaram Mandal, Medak District from one G.Prabhu for a consideration of Rs. 21,50,000/- under a registered sale deed dated 26.03.2007. The said G.Prabhu, in turn, purchased the said property in a public auction held by the Recovery Officer pursuant to a certificate issued by the Presiding Officer, Debt Recovery Tribunal, Hyderabad for recovery of arrears from M/s.Mittal Ferro Rerolling Limited, which has become sick in R.P. No. 337 of 2003 in O.A. No. 490 of 2000 dated 07.07.2003.

4. The petitioner applied for release of H.T. power supply with a contracted maximum demand of 600 KVA. The third respondent vide his letter No.DEE/OP/

SNG/F-T/Bollaram/D. No. 386/2007 dated 03.05.2007 informed the petitioner that in the land purchased by the petitioner, there was a service connection bearing No.MDK-648 standing in the name of M/s.Mittal Ferro Rerolling Limited (sick unit) which fell in arrears to the tune of Rs. 1,78,51,195/- and as per Condition No. 8.4 of the General Terms and Conditions of Supply, new connection cannot be provided for the said land unless the arrears are paid. Challenging the same, the present Writ Petition was filed.

5. The learned counsel for the petitioner submitted that the property was purchased by the vendor of the petitioner free from all encumbrances in a public auction on 13.07.2005 and the General Terms and Conditions of Supply containing Condition No. 8.4 came into force with effect from 06.01.2006 and it cannot have retrospective application. Even assuming that Condition No. 8.4 is applicable, the same is liable to be struck down as arbitrary, irrational and violative of Article 14 of the Constitution of India.

6. The learned Standing Counsel for the respondent placed reliance on Condition No. 8.4 and submitted that the letter dated 03.05.2007 of the third respondent is valid. With regard to the retrospective application, the learned Standing Counsel submitted that the date of application for release of power supply is the criteria and since the application was made on 27.04.2007, Condition No. 8.4 of Terms and Conditions of Supply was in force on that date and will be made applicable to the case.

7. Now the point for consideration is whether the petitioner, who purchased the property for an amount of Rs. 21,50,000/- under a registered sale deed dated 26.03.2007 from the auction purchaser can be directed to pay an amount of Rs. 1,78,51,195/- towards the electricity dues of the sick company.

8. Condition No. 8.4 of the General Terms and Conditions of Supply reads as follows.

"8.4. Transfer of Service Connection:

The seller of the property should clear all the dues to the company before selling such property. If the seller did not clear the dues as mentioned above, the company may refuse to supply electricity to the premises through the already existing connection or refuse to give a new connection to the premises till all dues to the company are cleared."

9. The said Condition starts with an obligation of the seller of the property to clear all the dues to the Electricity Company before selling such property. If the seller fails to clear the dues, the company may refuse to supply the electricity till all the dues are cleared. Admittedly, the company which was in arrears of the electricity dues became sick. Thus it was not in a position to clear the dues. The sale was undertaken by the Tribunal at the instance of the creditor and it was purchased by the vendor of the petitioner. Hence, the obligation imposed in Condition No. 8.4 is incapable of being performed. If at all the respondent

wanted to recover the amount of dues, it should have taken legal steps before the Debt Recovery Tribunal claiming the amount or should have gone to the Civil Court and admittedly no such steps were taken by the respondent.

10. The provisions of Second and Third Schedules to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962 were made applicable in relation to the amount of debt due under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 by virtue of Section 29 of the said Act. If the sale is held under the provisions of Second Schedule to the Income Tax, the sale would be confirmed if no application is made for setting aside the sale and thereafter when the sale becomes absolute, the Tax Recovery Officer shall grant a certificate specifying the property sold and the name of the person, who at the time of the sale is declared to be the purchaser and it indicates the date on which the sale becomes absolute. Thus, it is in absolute sale in favour of the auction purchaser, the vendor of the petitioner.

11. This Writ Petition could be disposed of on the simple interpretation of Condition No. 8.4 extracted above. But, in view of the case law cited by both the counsel, it has become necessary to consider the effect of the earlier decisions.

12. A three Judge Bench of the Hon''ble Supreme Court in Isha Marbles Vs. Bihar State Electricity Board and Another, had an occasion to consider a case arising out of the provisions of the Electricity Act, 1910 and Electricity (Supply) Act, 1948. In the said case, the appellant was a purchaser of the mortgaged assets of M/s.Patel Industries, Daltonganj in an open auction sale held by the Bihar State Financial Corporation. The appellant has paid a substantial sum towards the said transaction and thereafter got possession of the industry on 31.01.1991. The appellant was called upon to discharge all the liabilities of the previous consumer. When it was challenged before the High Court of Patna, Ranchi Bench, Ranchi, it was dismissed by a Division Bench of the High Court holding that the Bihar State Electricity Board would be entitled to take action in accordance with law. Against the said judgment, an appeal was preferred before the Hon''ble Supreme Court. The Hon''ble Supreme Court considered the said appeal along with other connected matters and held that the electricity dues are not a charge over the property. It further held that where that premises comes to be owned or occupied by the auction purchaser, when such purchaser seeks supply of electric energy he cannot be called upon to clear the past arrears as a condition precedent to supply. What matters is the contract entered into by the erstwhile consumer with the Board. The Board cannot seek the enforcement of contractual liability against a third party. The sale by the Bihar State Financial Corporation cannot affect the right of the Board to recover its dues. The failure of the Board to recover the dues as and when such dues arose, is a point to be put against it. It is impossible to impose on the purchasers a liability which was not incurred by them. It also held that though the purchasers asked for electricity connection as a new connection, it cannot be regarded as a new connection. It is only a reconnection since the premises had already been supplied with electrical energy.

Such a supply had been disconnected owing to the default of the consumer. That consumer had bound himself to the Board to pay the dues. When the consumer fails to pay electricity dues, the Board can disconnect the power supply and that is not the only remedy, as it has a remedy to file a suit. The Hon''ble Supreme Court ultimately held as follows, while allowing the appeal.

"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 lakhs and lakhs 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.............."

13. In Ahmedabad Electricity Co. Ltd. Vs. Gujarat Inns. Pvt. Ltd. and Others, , the appellant submitted that the above decision in Isha Marbles''s case (supra) does not lay down correct law and needs reconsideration. The contention was that a distinction should have been drawn between the case of a reconnection and case of a fresh connection. In the case of reconnection, the buyer would not be entitled to a connection unless the arrears are cleared. But, the Hon''ble Supreme Court held that in case of fresh connection though the premises are the same, the auction purchasers cannot be held liable to clear the arrears incurred by the previous owners in respect of power supply to the premises in the absence of there being a specific statutory provision in that regard. The plea of the appellant for reconsideration of the decision in Isha Marbles''s case (supra) was left open for consideration in an appropriate case.

14. In Dakshin Haryana Bijli Vitran Nigam Ltd. Vs. Paramount Polymers Pvt. Ltd., , a two Judge Bench of the Hon''ble Supreme Court considered the case of an auction purchaser who applied for connection after incorporating a term in the Terms and Conditions of Supply of electrical energy by providing that in cases where a consumer had defaulted in paying electrical charges and there had been a consequent disconnection of supply, no fresh connection in respect of the premises would be given to a purchaser unless the purchaser cleared the amount that was left in arrears by the consumer whose undertaking had been purchased. In view of the said term, the application of the purchaser was rejected by the electricity company. The learned Single Judge of the Punjab and Haryana accepting the case of the petitioner that there was no charge on the premises for the electricity charges of the previous owner held that the electricity company

was bound to provide electrical connection to the purchaser without insisting on the terms and conditions introduced with effect from 27.11.2001. The electricity company filed an appeal and it was dismissed at the admission stage by relying on Isha Marbles''s case (supra). The case was taken to the Hon''ble Supreme Court and during the course of hearing it came to light that the issue with regard to the question whether the electricity dues constitute a charge over the property so far as the transferor or the transferee are concerned was referred to a three Judge Bench in Civil Appeal No. 5315 of 2005. The two Judges Bench refused to refer the matter before them to the three Judges Bench and ultimately held that in view of non-consideration of amendment to the Terms and Conditions of Supply by the High Court, the matter was remanded to the High Court for fresh consideration in accordance with law.

15. In Paschimanchal Vidyut Vitran Nigam Ltd. and Others Vs. DVS Steels and Alloys Pvt. Ltd. and Others, , the Hon''ble Supreme Court was considering the question whether the supplier can recover the electricity dues from the purchaser of a sub-divided plot. It was held that it is the duty of the purchasers/occupants of the 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-date of sale/lease and for indemnity in the event they are made liable. The electricity company was justified in making a demand for clearance of electricity dues on pro rata basis by the purchaser on a sub-divided plot. But, the facts of the said case are different and it is not strictly applicable to the facts in the present case.

16. However a similar issue came up for consideration before the Hon''ble Supreme Court in Haryana State Electricity Board Vs. Hanuman Rice Mills and Others, . In the said case, the Haryana Financial Corporation auctioned the rice mill premises and the first respondent therein purchased the said premises for a consideration of Rs. 15,25,000/-. At the time of purchase, the electricity supply to the premises was disconnected. After taking possession of the premises, the first respondent applied for and obtained electricity connection in its own name in the year 1991. Four years later, the appellant, Haryana SEB served upon the first respondent, a notice dated 16.01.1995 demanding payment of Rs. 2,39,251/- towards arrears of electricity charges due by the previous owner Durga Rice Mills. After considering the previous case law on the point, the Hon''ble Supreme Court summarised the position as follows.

"12. The position therefore can may be summarized thus:

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

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

Since the demand was made by the appellant after three years, it was held that the claim relating to the previous owner could not be enforced against the first respondent. Thus on facts, it was held that the appellant cannot recover the dues of the previous owner.

17. Though it is not directly relevant to the point in issue, a learned single Judge of this Court in Dr. J. Ramachandra Rao Vs. A.P. Eastern Power Distribution Co. Ltd. and Another, held that the arrears in respect of the company cannot be collected from the Directors of the company or the Managing Director who signed the agreement in the capacity of Managing Director. Of course, the said decision was rendered by interpreting Section 2(c) of Indian Electricity Act, 1910 and Condition No. 2.5 of the Electricity Supply Conditions.

18. In the instant case, Condition No. 8.4 obligates the seller of the property to clear all the dues to the company before selling such property. If the seller fails to clear the dues, the company may refuse electricity supply to the premises through the already existing connection or refuse to give a new connection to the premises till all dues to the company are cleared. It is clear from the wording of the said condition that the responsibility is cast on the seller and in the case of sale of a sick unit, the seller would be in capable of complying with the above term. However the said condition does not disable the Company from recovering the dues when the arrears became due and before the unit was sold. The Company cannot keep quiet and try to recover the dues from the purchaser. The issue of limitation also crops up for consideration.

19. In the circumstances, it is for the respondent to take necessary steps for recovery of the dues, and if it fails to do so, it cannot enforce the same against the purchaser. In the present case, the property was put to sale in a public auction by Tribunal in execution of a sale certificate in R.P. No. 337 of 2003 in O.A. No. 490 of 2000 dated 07.07.2003 issued by the Presiding Officer, Debt Recovery Tribunal, Hyderabad. It was purchased by the vendor of the petitioner and the petitioner purchased the same on 26.03.2007. There was no claim of the respondents till the petitioner applied for service connection. When the petitioner made a request for supply, it was rejected on 03.05.2007 on the ground that the original consumer whose unit was put to sale was in arrears to the tune of Rs. 1,78,51,195/-. It is nearly 9 times of the sale consideration paid by the petitioner. In view of the incapacity of the seller to comply with Condition No. 8.4 coupled with the fact of first respondent not taking steps to recover the arrears and the long silence till an application is made by the petitioner, the order of rejection dated 03.05.2007 passed by the third respondent is liable to be set aside.

20. Accordingly, the Writ Petition is allowed by setting aside the impugned order

dated 03.05.2007 passed by the third respondent and consequently the respondents are directed to continue the electricity supply to the petitioner till it continues to pay the regular electricity charges. No costs. Miscellaneous Petitions pending, if any in this Writ Petition, shall stand closed.

