(2017) 11 DEL CK 0371

In the Delhi High Court

Case No : Execution Petition no. 47 Of 2004, Execution Application (OS) No. 377 Of 2014

Ece Industries APPELLANT

Vs

Delhi Power Supply Co. & Ors RESPONDENT

Date of Decision : 17-11-2017

Acts Referred:

Code Of Civil Procedure, 1908 — Section 151, Order 1 Rule 10

Delhi Electricity Reform (Transfer Scheme) Rules, 2001 — Rule 4, 6, 8(3)

Citation : (2017) 11 DEL CK 0371

Hon'ble Judges : Yogesh Khanna, J

Bench : Single Bench

Advocate : Amandeep Bawa, S.K.Dubey, Gaurav Gupta, Ravi Gupta, Sunil Fernandes, Anju Thomas, Nupur Kumar, Parnay Deep Shah, Saurabh Shaw

Judgement

Yogesh Khanna, J

EA (OS) No.417/2012

1. This order shall decide an application moved by the judgment debtors No.3 & 4 under Order 1 Rule 10 read with Section 151 of the CPC for

impleading of non-applicant/Tata Power Delhi Distribution Limited (TPDDL) in the present execution proceedings as judgment debtor No.5.

2. The decree holder has sought execution of an arbitral award dated 09.04.2002 for recovery of Rs. 1,40,18,612.84/- along with interest @ 18% pa

against the judgment debtor Nos.1 & 2. Vide an order dated 02.04.2007 the applicants viz judgment debtor Nos.3 & 4 were impleaded and they filed

their respective affidavits.

3. The case of the decree holder, initially, was three purchase orders were placed by the Delhi Vidyut Board (DVB) for supply of 50, 110 and 135

KV Distribution Transformers. The same were duly supplied to the DVB and since they did not pay in terms of the purchase orders, the arbitration

was invoked and subsequently award dated 09.04.2002 was passed against judgment debtors No.1 & 2.

4. In the year 1998 the Government of NCT of Delhi has started the process of bundling and privatization of the DVB and pursuant to such exercise,

it was unbundled into six company i.e., a holding company; a generating company; a transmission company; and three distribution companies

(DISCOMS). The provisions of the Delhi Electricity Reform (Transfer Scheme) Rules, 2001 came into force with effect from 01.07.2002 as notified

by the notification dated 26.06.2002 and thus such rules are statutorily binding in nature. After the privatization, in place of the erstwhile DVB, six

companies came into existence viz. holding company namely Delhi Power Company Limited; generating company namely GenCo; a transmission

company namely Delhi Transco Limited; and three distributions companies / DISCOMS viz BSES Rajdhani Power Limited; BSES Yamuna Power

Limited; and Tata Power Delhi Distribution Limited (North Delhi Power Limited). The work related to the decree holder claimant, as contained in the

statement of claim was undertaken and executed till 2002, but prior to the date of privatization. Despite there being no privity of contract between the

judgment debtors Nos.3 & 4 and the decree holder, this Court vide an order dated 02.04.2007 had impleaded them being DISCOMS as subsequent to

the Transfer Scheme came into existence with effect from 01.07.2002 three DISCOMS shared the responsibility for supply of electricity through

transformers.

5. Hence, it is prayed that TPDDL formerly known as North Delhi Power Limited, a DISCOM, be also made a party to the present proceedings as

under the transfer scheme it was entitle to equal assets and liabilities along with two other DISCOMS viz. judgment debtors No.3& 4. It is alleged

there is nothing on record to suggest as to what happened to the transformers that were received by the judgment debtor Nos.3 & 4 and by the

TPDDL. It is also alleged that TPDDL, if impleaded, would reveal as to how many transformers were supplied to them by erstwhile DVB which are

lying in its possession or is using it for supply of electricity within the vicinity of Delhi. Hence TPDDL is necessary and proper party.

6. In reply TPDDL/DISCOM in para No.9 has alleged that all records relating to the transformer were within the sole custody of the Transco and

therefore, it is the liability of the Transco to provide the details as to whether any of the transformers relating to the present execution petition were

ever delivered /transferred or is possessed by the non-applicant. Admittedly the dispute amongst the DISCOMS pertain only to 64 transformers.

7. Now Rule 8 (3) of the Delhi Electricity Reform (Transfer Scheme) Rules, 2001 notes as under:-

â??8. Pending suits, Proceedings â?

(1) xxx

(2) xxx

(3) Notwithstanding anything contained in these rules including the Schedules, the liabilities arising out of litigation, suits, claims, etc

pending on the date of the transfer and / or arising due to events prior to the date of the transfer shall be borne by the relevant distribution

company viz.DISCOM 1, DISCOM 2, and DISCOM 3 respectively, subject to a maximum of Rs.1 Crore per annum. Any amount above this

shall be to the account of the holding company in the event for any reason the Commission does not allow the amount to be included in the

revenue requirement of the DISCOM.â??

8. Here I would also like to refer to the decision of the Supreme Court in North Delhi Power Limited vs. Government of NCT of Delhi & Ors (2010)

6 SCC 278, where it notes:-

â??54. The learned counsel next contended that the High Court had erred in interpretation of Rule 8(3) of the transfer scheme. It was

urged that if the Rule is construed widely, it will be arbitrary and affect the foundation of the privatisation which is mutual agreement. We

do not think so. On the other hand, the purpose of sub-Rule (3) is to cap any liability arising out of litigation, suits, claims etc. either

pending on the date of transfer and/ or arising due to events prior to the date of transfer to be borne by the relevant DISCOM 1, DISCOM

2 or DISCOM 3, respectively. However, it will be subject to a maximum of rupees one crore per annum and any amount above this shall be

to the account of the holding company and, even for any reason the Commission does not allow the amount to be included in the revenue requirements of the DISCOMS. The language is extremely clear. All that it obtains is capping of the liability. However, the nature of the

liability and its being imposed on the DISCOMS alone is as clear as sunshine. To that extent, there can be no doubt that it includes all the

liabilities including the liabilities on account of the personnel. Unlike Rule 3, Rule 8 (3) does not make any difference between the liabilities

arising out of the transfer under Rule 4 or the liabilities contemplated in Rule 6. The contention is clearly incorrect.

55. It was suggested that the non obstante clause in Rule 8(3) if widely construed, would render the clause unconstitutional. We do not think

that the clause can be rendered unconstitutional in any manner. The language is clear, unambiguous and must be given its natural meaning.

If such a meaning is given, we do not think that any other interpretation is possible except the one rendered by the High Court. Shri Rao

and Shir Patwalia relied on paragraphs 28 and 29 of the reported judgment in M. Rathinaswami & Ors. v. State of Tamil Nadu & Ors.

[2009 (5) SCC 625]. In the said paragraphs, it is reiterated that in order to save a statutory provision from the vice of unconstitutionality

sometimes a restricted or extended interpretation of the statute has to be given. Since we don't agree that the clause can be rendered

unconstitutional in any manner, in our opinion, the judgment is not apposite.â??

9. Hence, considering the provision of Rule 8(3) of the Electricity Reforms Act and decision in North Delhi Power Limited (supra), the non-applicant

TPDDL cannot say that it would be illegal or unjustified to implead them as party to these proceedings.

10. It is matter of record that in order dated 21.11.2013 this Court notes three transformers have been transferred to BSES Yamuna Power Limited;

seven to BSES Rajdhani Power Limited; but the details of 54 transformers was yet to be provided. In an affidavit dated 19.04.2014 on behalf of

judgment debtor no.2 reference was made to failure of 10 transformers, of which deductions were given by the learned arbitrator. Moreso, the

affidavit of Mr.Prakash Kumar Choudhary, on behalf of the judgment debtor No.1 averred about the Scheme of the Act more specifically under Rule

8(3) (supra) and deposed that on the basis of the discussions the decree holder had with the officials of DPCL a sum of Rs. 1,17,93,716/- was determined. The calculations were upto 31.01.2017. The affidavit further recorded the aforesaid sum is payable by the DISCOMS and not by DPCL,

per Rule 8(3) (supra). He further reiterated that in view of above, the amount so calculated shall be payable by three DISCOMS viz BSES Rajdhani

Power Limited; BSES Yamuna Power Limited; and Tata Power Delhi Distribution Limited in equal proportion of 1/3rd each of such amount in terms

of Shared Facility Agreement dated 27.06.2002 effective from 01.07.2002 which is the part of the statutory Transfer Scheme Rules, 2011 and the

DISCOMS were legally bound by the same. The relevant portion of the schedule annexed to Share Facility Agreement dated 27.06.2002 read as

under:-

â??2. The DISCOMS will make arrangements for the procurement / acquisition of stores required by them. However, only for the existing

stores and for the tenders already floated or orders placed, the following arrangements shall be applicable.

a) All civil works including buildings and facilities relating to stores situated at RPH Store (except Generation Store), Gazipur Store, Narela

EHV Store, Lwarence Road Store, Okhla Store and Sri Niwaspuri Store (hereinafter jointly referred to as â??Centralised Storesâ?) shall

vest in the relevant DISCOM, in whose area of supply the store is situated. The civil works including buildings and facilities of Mehruali

Stroe and New Mehurali Store shall vest in TRANSCO. Each of the time of materials lying in the centralized stores pertaining to distribution

functions shall be divided amongst the three DISCOMS in equal share with a right to the DISCOMS to adjust among themselves and vary

the proportion of the stores based on their mutual agreement. Transco shall bill the DISCOMS for these stores on actual cost. The Transco

will, however continue to provide services for stores at Centralised Stores for the benefit of the DISCOMS, at their option, for a period not

exceeding one year. All the parties to this agreement shall, however, cooperate to ensure that the stores of distribution functions are divided

and distributed within six months of the date of the transfer.â??

11. In view of the Shared Facility Agreement between Holding; Generating and Distribution companies and in view of Rule 8(3) of Delhi Electricity

Reforms (Transfer Scheme) Rules 2001, it shall be necessary to implead all

DISCOMS. Since two of the DISCOMS have already been impleaded as

judgment debtors no. 3 and 4 hence to resolve matter in controversy it is imperative to implead TPDDL, being necessary and proper party in these

execution proceedings, hence is directed to be impleaded as judgment debtor No.5.

12. Amended memo of parties be filed by the decree holder within two weeks from today. The application stands disposed of.

EX.P. 47/2004, EX.AAPL.(OS) 377/2014

13. List for further directions before the learned Joint Registrar on 13.12.2017.