

(2005) 07 BOM CK 0109

In the Bombay High Court

Case No : Writ Petition No. 2362 of 2005

ETCO Spinners Private Limited and Another

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 20-07-2005

Acts Referred:

Electricity (Supply) Act, 1948 — Section 49, 79
Electricity Act, 1910 — Section 24

Citation : (2005) 6 BomCR 351 : (2006) 1 CivCC 676 : (2006) 1 MhLj 457

Hon'ble Judges : Kukday S.P., J;Khandeparkar R.M.S., J

Bench : Division Bench

Advocate : R.N. Dhorde and R.A. Tambe, for the Appellant; Umakant Patil, A.G.P. for respondent No. 1, V.H. Dighe, for respondent No. 2, H.T. Joshi and P.M. Shah, Sr.C., P.V. Baide, Pushkar Shendurlkar, for the Respondent

Final Decision : Allowed

Judgement

Khandeparkar R.M.S., J.—Heard. Rule. By consent, the rule is made returnable forthwith.

2. The petitioners seek mandamus directing the respondent Nos. 3 and 4 to grant forthwith the electricity connection (high tension consumer) to the petitioner No. 1 company at its premises, namely plots B-2 & B-3, MIDC, Parabhani.

3. Undisputed facts in the matter are, that a co-operative spinning mill known as "Prabhavati Co-operative Spinning Mill Ltd.", which existed on the said plots, was ordered to be liquidated by the authorities under the Maharashtra Co-operative Societies Act, 1960, hereinafter called as the "Cooperative Act" and as a result of the liquidation proceedings the assets of the said society were put to public sale by inviting tenders. The petitioner No. 1 submitted its tender along with some other parties and those tenders were opened on 25-3-2004 and the petitioner No. 1's tender having been found to be the highest, same was accepted by the respondent No. 2, the Liquidator and the petitioner No. 1 was informed to

deposit a total amount of Rs. 4.30 crores within 30 days by demand draft to get possession of the property. The petitioner-company accordingly deposited the entire amount of Rs. 4.30 crores on 29-4-2004. The respondent No. 2 thereupon executed an agreement dated 8-7-2004 with the petitioner No. 1 confirming the petitioner No. 1 was the highest bidder and its bid having been accepted and handed over the possession of the assets along with the said plots to the petitioners. Thereafter an agreement of sale was also executed by the respondent No. 2 in favour of the petitioner No. 1 on 26-7-2004 and since then the possession of the said plots is with the petitioners. The final deed of assignment, however, is yet to be executed by the respondent No. 2.

4. It is the case of the petitioners that the above referred Prabhavati Spinning Mill was closed down more than five years back and the entire plant and machineries were not in use since then, as a result the major portion thereof had been rusted and rendered non-usable. Consequently, there was overhauling of the plant and machineries, including replacement of certain parts which resulted in further expenditure of Rs. 4 crores to the petitioners. It is further case of the petitioners that the Prabhavati Spinning Mill was supplied with the electricity by the respondent Nos. 3 and 4 but on account of the said company having gone into liquidation and thus there was default in payment of the consumption charges by the said Mill, the electricity supply to the premises was disconnected. Upon overhauling of the plant and machineries by the petitioners, the respondent No. 4 was requested by the petitioners to supply the electricity. In spite of repeated letters, however, there was no response from the respondents nor release of the electricity supply. Meanwhile, the said plots were transferred to the petitioner-company by the MIDC on 4-2-2005. The respondents, however, refused to grant connection on the ground that no such connection would be granted unless the arrears of the Prabhavati Spinning Mill are cleared.

5. It is the contention of the petitioners that the petitioner No. 1 is an independent company and has acquired the property of the Prabhavati Spinning Mill in public auction and it cannot be saddled with the responsibility or liability of the Prabhavati Spinning Mill to pay the arrears of consumption charges relating to the period prior to the date of auction on which the property of the said mill was purchased by the petitioners. Besides, the electricity supply which is asked for by the petitioners is by way of a new connection and it has nothing to do with the connection which was granted to the Prabhavati Spinning Mill. It is their further contention that it is the statutory duty of the respondent Nos. 3 and 4 to supply the electricity to the petitioner-company and in the absence of such supply of electricity, the petitioners are not able to start the manufacturing process. The respondent Nos. 3 and 4 have exclusive monopoly in supplying the electricity. However, they are deliberately not releasing the electricity supply to the petitioner-company which is resulting in irreparable loss to the petitioners.

6. It is the case of the respondents, on the other hand, that the petitioner-company steps in the shoes of the erstwhile Prabhavati Spinning Mill and,

therefore, the petitioners are liable to clear the arrears in relation to the electricity consumption charges by the Prabhavati Spinning Mill. They are, in fact, the successors of the erstwhile consumer and hence cannot avoid the liability of the erstwhile consumer. It is further case of the respondents that there is no existing legal right in favour of the petitioners to seek electricity supply to the said premises as the title of the plots has not been conveyed in favour of the petitioner-company and the right or interest, if any, of the petitioners in the said plots is only by virtue of an agreement which is not even registered, as is otherwise required to be registered under the Indian Registration Act.

7. The learned Advocate appearing for the petitioners, placing reliance in the decision of the Apex Court in the matter of Isha Marbles Vs. Bihar State Electricity Board and Another, and the decision in (Ahmedabad Electricity Co. Ltd. v. Gujarat Inns Put. Ltd. and Ors.), reported in 2004 (4) Bom.C.R. 880 : AIR 2004 S.C. 2171 as also an unreported judgement of the Division Bench of this Court in (Sicom Ltd. and Anr. v. Maharashtra State Electricity Board and Ors.), Writ Petition No. 295 of 2001 a/w Writ Petition No. 5196 of 2001, delivered on 13-12-2002 as well as in the matter Aurangabad Industrial Associates Vs. State of Maharashtra and Others, submitted that the respondents cannot refuse to release a fresh connection to the premises at the instance of the petitioners as the liability to pay the arrears in relation to the erstwhile consumer in the said premises cannot be fastened to the petitioners and the same cannot recovered from the petitioners since the petitioners have purchased the premises in public auction, free from encumbrances. On the other hand, learned Senior Counsel appearing for the respondent Nos. 3 and 4, drawing attention to the decision of the Apex Court in the matter of M/s. Hyderabad Vanaspathi Limited Vs. Andhra Pradesh State Electricity Board and Others, , of the Division Bench of the Kerala High Court in A. Ramachandran Vs. Kerala State Electricity Board and Others, , as also of the Division Bench of the Andhra Pradesh High Court in Nava Bharat Ferro Alloys Limited and Raasi Cement Limited Vs. A.P. State Electricity Board and Others, and further referring to Clause 23 of the Conditions and Miscellaneous charges for supply of the Electricity Energy formulated in exercise of powers u/s 79 r/w Section 49 of the Electricity (Supply) Act, 1948, hereinafter referred to as "the Supply Act", submitted that the statutory provisions in the absence of contract to the contrary clearly requires that the successor of the defaulting consumer would be liable to pay the arrears of the defaulting consumer. He has also submitted that the decisions of the Apex Court in the cases of Isha Marbles (supra) as well as in Gujarat Inns (supra) have no application to the facts of the case in hand as the contract with the concerned parties in those cases did not permit the recovery of the arrears of the defaulting consumer from its successor. He has also submitted that the claim of the petitioners that the property was purchased in public auction free from encumbrances is not substantiated by any material on record.

8. As regards the point as to whether the auction purchaser is liable to meet the liability of the old consumer of electricity of the premises which is purchased by

the auction purchaser in an auction sale, the Apex Court in *Isha Marbles*" case, after taking into consideration the various provisions of the Supply Act, held as under :

"... Where that premises comes to be owned or occupied by the auction-purchasers, 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 the third party. Of course, the bona fides of the sale may not be relevant.

57. The form of requisition relating to the contract is in Annexure VIII prescribed under Clause VI of the Schedule to the Electricity Act. They cannot make the auction-purchaser liable. In the case of *Isha Marbles* we have already extracted the relevant clause wherein the consumer was asked to state his willingness to clear off the arrears to which the answer was in the negative. Therefore, the High Court has rightly held that the auction-purchaser, namely, "the write petitioner before us is ready and willing to enter into a new contract (sic and) that the auction-purchaser does not intend to obtain the continuance of supply of electrical energy on the basis of the old agreement. It is true that it was the same premises to which reconnection is to be given. Otherwise, with the change of every ownership new connections have to be issued does not appear to be the correct line of approach as such a situation is brought about by the inaction of the Electricity Board in not recovering the arrears as and when they fall due or not providing itself by adequate deposits."

9. In the *Gujarat Inns* case, while following the law laid down in *Isha Marbles* case and while dealing with similar issue relating to fresh connection, it was held that :

"We are clearly of the opinion that in case of a 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."

10. Relying upon the decisions in *Isha Marbles*" case, the Division Bench of this Court in *Sicom Ltd.* 's case (supra) had also directed supply of the electricity to the auction purchaser without fastening the liability of the arrears payable by the earlier defaulting consumer upon the auction purchaser.

11. Similar was the decision of the Division Bench of this Court in the case of *M/s Aurangabad Industrial Associates* (supra). In that case, however, the Division Bench had also considered the said Clause 23(a) and it was held that in terms of the said clause the liability to clear the arrears of the erstwhile consumer would arise only when there is voluntary transfer by the consumer to third person of the benefits under the agreement with the Board and, therefore, the said clause has no application to the case where the transfer is by way of a public auction or

involuntary transfer.

12. The Division Bench of the Kerala High Court, however, after taking note of the decisions of the Apex Court in *Isha Marble* as well as *M/s. Hyderabad Vanaspathi* (supra) and taking into consideration the various provisions of the Supply Act and the Regulations framed by the Board and the terms of contract with the consumer, held that if the transferee desired to enjoy the service connection, he shall pay the dues of the Board and apply for transfer of the ownership of the service connection and, therefore, it is evident that in cases where the transferee desires to enjoy the service connection, the amount due to the Board should be paid or else the Board has right to refuse the reconnection or supply of electricity. It was further held that reconnection or new connection shall not be given into any premises where there are arrears on any account due to the Board pending payment, unless the arrears including penalty, if any, are cleared in advance and if the new owner/occupier/allottee remits the amount due from the previous consumer, the Board shall provide reconnection or new connection depending on whether the service remains disconnected/dismantled, as the case may be.

13. The short point which arises for consideration in the matter is whether the owner of a property pursuant to purchase thereof in public auction or pursuant to non-voluntary transfer thereof can be held liable to clear the arrears incurred by the previous owner of the property in respect of power supplied to such property, in the absence of either specific statutory provision in that regard or specific condition in respect thereof being part of the terms and conditions of the auction of the property.

14. As already observed above, there is no dispute that the erstwhile consumer was defaulter. There is also no dispute about the fact that the respondent-Board has formulated regulations in terms of the statutory provisions empowering the Board to frame such Regulations and the Clause 23 is the only clause in the said Regulations which pertains to the liability of the person who acquires the property of the erstwhile consumer in the circumstances specified thereunder. In other words, the controversy between the parties or the dispute merely relates to the scope of the Clause 23 in relation to such liability of the person acquiring the property of the erstwhile consumer. There is also no dispute about the law on the point that in case of fresh connection sought for by the auction purchaser of the property, he cannot be asked to clear the arrears incurred by the erstwhile consumer in respect of the power supplied to the premises purchased by the auction purchaser in the absence of specific statutory provisions in that regard and, therefore, the entire defence in support of the claim for arrears of the erstwhile consumer from the petitioners rest upon the meaning of the Clause 23 of the said Regulations.

15. The Clause 23 of the said Regulations reads thus :

"23. Assignment or Transfer of Agreement :

(a) The consumer shall not without previous consent in writing of the Board, assign, transfer or part with the benefit of his agreement with the Board nor shall the consumer in any manner part with or create any partial or separate interest thereunder.

(b) A consumer who commits breach of condition 23(a) above and neglected to pay to the Board any charges for energy or to deposit with the Board amount of security deposit or compensation and the supply of such consumer is disconnected u/s 24 of the Indian Electricity Act, 1910 or under condition No. 31 (e) of these conditions dies, or transfers, assigns or otherwise dispenses of the undertaking or the premises to which energy was being supplied to the consumer, any person claiming to be heir, legal representative, transferee, assignee or successor of the defaulting consumer with or without consideration in any manner shall be deemed to be liable to pay the arrears of electricity charges, security deposit or compensation due payable by the consumer and it shall be lawful for the Board to refuse to supply or reconnect the supply or to give a new connection to such person claiming to be the heir, legal representative, transferee, assignee or successor of the defaulting consumer of such premises, unless the amount of such charges due and/or the compensation demand from the defaulting consumer, is as the case may be duly paid to or deposited with the Board."

16. As already seen above, the Division Bench of this Court in the unreported decision in the matter of M/s Aurangabad Industrial Associates had occasion to deal with the scope of Sub-clause (a) of Clause 23 and therein it was clearly ruled that the auction purchaser cannot be saddled with the liability to pay arrears of the erstwhile consumer. The contention of the Senior Counsel for the Board, however, is that the Division Bench had arrived at the said finding on construction of the Sub-clause (a) of Clause 23 alone and did not consider the Sub-clause (b) thereof and further that in terms of Sub-clause (b) even every successor of the defaulting consumer is liable to pay the dues of such consumer irrespective of the fact whether the transfer is voluntarily or non-voluntarily.

17. The Division Bench in M/s Aurangabad Industrial Associates case had clearly distinguished between voluntary transfer and involuntary transfer. By no stretch of imagination the transfer of a property purchased in a public auction can be said to be a voluntary transfer. Obviously, it is conducted by the liquidator and the owner of the property is left with no option than to surrender to the end result of such auction held by the Liquidator in that regard. Of course, the liquidator has to act in accordance with the provisions of law but the fact remains that there is no choice left to the owner and his rights to the property stand forfeited and conveyed in favour of the auction purchaser. Being so, it is an involuntary transfer by the owner.

18. The Sub-clause (b) of Clause 23 nowhere refers to involuntary transfer though it does refer to voluntary transfer or transfer on account of death of the owner. However, the expression "any person claiming to be heir, legal

representative, transferee, assignee or successor of the defaulting consumer" is sought to be construed on behalf of the Board to include even a successor by virtue of involuntary transfer. We are afraid no such interpretation can be given to the word "successor". The said word will have to be understood by applying the principle of ejusdem generis. The word preceding the word "successor" clearly discloses reference to the person who acquire right to the property on account of either voluntary transfer or on account of death of the owner. It does not contemplate any other type of transfer. Being so, the word "successor" has to be understood to refer to only to an owner acquiring the right by way of voluntary transfer or on account of right of inheritance and this is clear from the further reproduction of the same words while referring to the defaulting consumer in the same clause wherein it has been stated as "such person claiming to be the heir, legal representative, transferee, assignee or successor of the defaulting consumer". In other words, at both the places same words are reproduced and they cannot have two different meaning. The decision of the Kerala High Court in A. Ramachandra's case (supra) was in a situation where Clause 15(c) of the Regulation framed by the Kerala State Electricity Board clearly provided that "If the transferee desires to enjoy service connection, he shall pay of the dues to the Board and apply for transfer of ownership of service connection within 15 days and executed fresh agreement and furnish additional security. New consumer number shall be allotted in such cases cancelling the previous number." And further Sub-clause (d) of Clause 15 thereof also provided that "all dues to the Board from a consumer shall be first charge on the assets of the consumer. All dues including penalty shall be realised as a public revenue due on land." Considering the said provisions the Division Bench of the Kerala High Court held that the Clause 15(c) of the Regulations says that when there is transfer of ownership or right of occupancy of the premises the registered consumer shall intimate the transfer of right of occupancy of the premises within 7 days to the Assistant Engineer/Assistant Executive Engineer concerned and on such intimation having been received, the service shall be disconnected, Further that if the transferee desires to enjoy service connection, he shall pay of the dues for transfer of ownership of service connection. It is provided under Regulation 15(d) that all the dues to the Board from a consumer shall be the first charge on the assets of the consumer and all the dues including penalty shall be realised as public revenue due on land and that, therefore, it was evident that in cases where the transferee desires to enjoy the service connection, the amount due to the Board should be paid or else the Board has right to disconnect the supply which was being enjoyed by the previous consumer and the Board is not bound to give new connection or reconnection in the premises where there are arrears of any amount due to the Board unless the arrears including the penalty are cleared in advance. Being so, the decision does not help the respondents in the case in hand where there is no provision of law in the nature of Clause 15 as was available in the Kerala case. 19. The decision of the Apex Court in M/s Hyderabad Vanaspati is of the no help to the respondent-Board. In the said case, the Apex Court has held that Section 49 of the said Act empowers the Board to

supply electricity on such terms and conditions as it thinks fit and for that purpose it may also frame uniform tariff. It has further been held that the terms and conditions of supply are statutory in character and they can be invalidated only if they are in conflict with any provisions of the said Act or the Constitution of India and the only limitation in Section 49 is that the terms and conditions of supply should be subject to the provisions of the said Act. It has been further clarified that even in the absence of individual contract, the terms and conditions of supply, notified by the Board, will be applicable to the consumer and he will be bound by that.

20 The decision of the Andhra Pradesh High Court in *M/s. Nava Bharat Ferro Alloys case* (supra) is also on a totally different issue and therein the said company had assailed the validity of the action of the Board in demanding additional charges known as surcharge for late payment and the interest on delayed payment of outstanding dues. The decision therein has absolutely no relevancy to the matter in issue in the case in hand.

21. It is pertinent to note that the agreement which the respondent-Board had with the erstwhile consumer of the premises made specific provisions in relation to discontinuation of supply, termination of the agreement and assignment or transfer of the agreement. As regards the discontinuation of supply, Clause 11 of the agreement provided that in the event of the supply of electricity energy being discontinued by the supplier in consequence of any breach or default on the part of the consumer entitling the supplier so to do under the provisions of the Act and the Rules, the amount of charges for the electricity energy already supplied and all other monies then payable under the agreement shall become due and recoverable forthwith provided always that during the period of such discontinuance the consumer shall continue to pay the minimum charges and minimum guarantee payable thereunder. Obviously, the consequences for breach or default on the part of the consumer are specifically provided for under Clause 11 and which entitles the Board to recover the dues forthwith.

22. The Clause 12 of the agreement relates to summary termination of the agreement and it provides that if at any time during the continuance of the agreement the consumer shall (a) being a limited company pass a resolution for winding up or be ordered to be wound up by a Court of competent jurisdiction and being an individual or individuals commit any act of insolvency or be adjudged insolvent, (b) execute or create any mortgage charge or other encumbrance on any property or asset of the consumer so as to prejudicially affect the supplier's electric meters, plant, apparatus and equipment at the consumer's premises or any part thereof or any right exercisable by the supplier in connection with the said electric meters, plant, apparatus and equipment, or (c) commit any breach of or fail to observe and perform any of the conditions and provisions contained in the agreement and on his part to be observed and performed, the supplier shall be at liberty to terminate the agreement by giving seven days' notice to the consumer and upon such termination, the consumer

shall forthwith pay to the supplier at the office of the Chief Engineer or as may be otherwise required all the monies then due and payable under the agreement together with a further sum equal to the amount of the minimum guarantee for the unexpired minimum period of supply as and by way of liquidated damages. The Clause 13 of the agreement provides that the consumer shall not, without the previous consent in writing of the supplier, assign, transfer or part with the benefit of the agreement nor shall the consumer in any manner part with or create any partial or separate interest in it.

23. Plain reading on the Clauses 11 to 13, therefore, specifically provide for the consequence on breach on the part of the consumer in performing his obligation under the agreement or the Act and Rules made thereunder as well as the action which can be taken by the respondent-Board to recover the dues from such consumer. However, neither the said agreement nor any statutory provision has been brought to our notice which can disclose that such dues would create a charge or encumbrance on the premises which are occupied by the consumer. The charge, if any, is only on the electricity meter, plant or apparatus and equipment supplied by the Board. The charge does not exceed beyond such articles. Being so, the case in hand is clearly distinct from the one which was before the Division Bench of the Kerala High Court where the Sub-clauses (c) to (e) of Clause 15 of the Regulations framed by the Board in exercise of the powers given to it under the said Act, specifically provided for creation of charge over the property of the consumer and liability to clear such dues by every transferee. The provisions comprised in Clause 15 of the said Regulations evidently disclose that the transfer would include even non-voluntary transfer. That is not the case in the matter in hand. In Clause 23, neither Sub-clause (a) or (b) thereof nor any of the clauses of the agreement nor any of the statutory provisions discloses any such liability of the transferee occupying the premises of the erstwhile consumer on account of having acquired right by public auction or any other mode of non-voluntary transfer of the property by the erstwhile consumer.

24. For the reasons stated above, therefore, the petitioners are justified in contending that the respondent Nos. 3 and 4 have statutory duty to supply electricity to the petitioners as those respondents have exclusive monopoly in supplying the electricity in the State and further that the petitioners cannot be saddled with the liability as regards the dues payable to the respondent Nos. 3 and 4 by the erstwhile consumer in the premises occupied by the petitioners.

25. It was sought to be argued that the view that we are taking in the matter may encourage the dishonest consumers to defraud the public undertaking like the respondent Nos. 3 and 4 by committing default and avoiding such liability by adopting the procedure of transfer by public auction. The apprehension is totally misconceived. In fact, there can hardly be any occasion for a consumer to accumulate arrears of lakhs and crores of rupees unless there is failure on the part of the Board authorities to take appropriate and prompt steps to recover the

dues in relation to the supply of electricity to such consumer. Though it may appear to be harsh to say but taking into consideration the overall situation in the State of Maharashtra in relation to lakhs and crores of rupees being due and payable by numerous consumers, can it be said that it would be possible for consumer to accumulate such arrears either in the absence of connivance with the Board officers or its management or without adopting some dubious tactics and dishonest modalities by such consumer with surreptitious arrangement with the Board. In any case, there is no justification to hold the third party liable for such dues when such party acquires the right to the property, either in public auction or in a proceedings where the property is conveyed to him by way of non-voluntary transfer.

26. It is also sought to be argued that the purchased property in public auction was not free from encumbrances and at least nothing is placed on record in that regard. The argument presupposes that the arrears of the erstwhile consumer constituted charge upon the property purchased by the petitioners. However, as already seen above, neither there is any statutory provision nor there is an agreement creating any charge over the property in relation to the arrears from the erstwhile consumer. Unless it is primarily shown by the respondents that such arrears were the charge upon the property, the contention that the purchased property is not free from encumbrances stands devoid of substance. The burden in that regard was primarily upon the respondents to establish that those arrears constituted valid charge over the property purchased by the petitioners and in the absence thereof, the argument sought to be canvassed on behalf of the respondents falls flat to the ground.

27. In the result, therefore, the petition succeeds and the same is allowed and the rule is made absolute in terms of the prayer Clause 18(B) with no order as to costs.