

(2011) 08 BOM CK 0154

In the Bombay High Court

Case No : First Appeal No. 232 of 2005 and Cross Objection No. 20 of 2005

Government of Goa

APPELLANT

Vs

Sunrise Electromelt Ltd.

RESPONDENT

Date of Decision : 23-08-2011

Acts Referred:

Citation : (2011) 08 BOM CK 0154

Hon'ble Judges : F.M. Reis, J;D.G. Karnik, J

Bench : Division Bench

Advocate : S.S. Kantak, General and A. Kamat, Additional Government Advocate, for the Appellant; V. B. Nadkarni and N. Noronha, for the Respondent

Final Decision : Allowed

Judgement

F.M. Reis, J.—The above appeal challenges the judgment and Decree dated 29-4-2005 passed by the learned Additional District Judge at Panaji in Civil Suit No. 127 of 2004.

2. The suit came to be filed by the Respondent on the ground that the Plaintiff has set up a factory for manufacturing of Steel Ingots at Cuncolim Industrial Estate, Cuncolim, and that as required under the provisions of the Indian Electricity Act, 1910, an agreement was entered into on 8-2-1995 between the State Government of Goa/Appellant and the Respondent-Company for the supply of 1950 KVA. It is further their case that though the Appellant had agreed to supply 1950 KVA to the Respondent due to the non availability of the power at the Cuncolim Industrial Estate, for reasons beyond their control and for No. fault on the part of the Respondent, they were prevented from consuming electricity as per the Contract demand. It is further their case that the Respondent was not able to avail of the power for all 24 hours of a day in every month and in fact, a Certificate was issued dated 4-8-1997 by the Executive Engineer certifying that the Company is not provided with the power supply from 6.00 p.m. to 11.00 p.m. every day and also that the power supply is not made available to them from 6.00 a.m. on alternate days due to the power system constraints. It is

further their case that they had agreed to pay to the Government, as supplier of power for the power energy at the rates specified in the Supplier's Standard Rate Schedule applicable to the class of service and in force from time to time. It is further their case that there are two well known systems of tariff, one is that of a flat rate system and the other is known as the two part tariff system. The flat rate system is charged on units of energy consumed whereas the two part tariff system contemplates that the amounts are paid by calculating the demand charges to cover investment, installation and the standing charges to some extent and the energy charges for the actual amount of energy consumed. It is further their case that the agreement contemplates that it is in conformity with the provisions of the Indian Electricity Act, 1910. It is further their case that irrespective of the terms of the said agreement, on a true construction of the Indian Electricity Act and the Schedule, the minimum demand charges as per the said Schedule cannot be levied in cases where on account of power cut imposed by the licensee, the customer is unable to take the full contracted quantity and should be reduced prorata to the extent in which the supplies are made. It is further their case that the minimum demand charges could be levied only in cases where the Appellants were in possession to supply the electrical energy as per the Contract demand. It is further their case that without giving any prorata reduction on failure on the part of the Appellants in supplying the electrical energy the demand charges were levied on the Respondent. It is further their case that there were directions from the Chief Engineer of the Electricity Department vide Circular dated 26-10-1998 to bill the industries of Ferro Alloy Steel and Steel Rolling Mills on prorata basis. It is further their case that the Electricity Department has illegally disconnected the power supply to the Respondent on 15-7-1999 for not effecting the payments of the said charges though the Appellants were not entitled to claim such amounts. The Respondent further contends that the Appellants have collected excess amounts from them and accordingly filed the suit for recovery of the excess amounts collected from the Respondent by the Appellants as demand charges in respect of the monthly bills as stated at Annexure "A". Accordingly, the suit came to be filed claiming a sum of Rs. 37,57,951/-being the amount towards the excess amount collected as well as interest at 2% per month compounded monthly and for further interest as mentioned in the plaint.

3. The Appellants filed their written statement raising different contentions. The Appellants, inter alia, stated that in the agreement executed between the parties one of the condition was that the consumer could not draw any power during the period from 18 hours to 22 hours on all the days as and when the situation warrants and on account of the load restrictions there were some constraints in the supply of power. It is further their case that during the month of August, 1997, the Respondent had consumed 3,15,735 units and the constraint in the power supply was of a temporary nature. The Appellants deny that they were not entitled from claiming the minimum demand charges as per the Schedule on account of the power cut imposed by the licensee. It is further their case that as

per Clause 12 of the said agreement, the consumer has agreed to restrict stagger and cut off in the consumption of electrical energy under the said agreement during peak hours. It is further their case that they are entitled to recover the annual minimum guarantee recoverable for seven years from the Respondent. It is further their case that the decision of the Appellants in instructing the Superintending Engineers and Executive Engineers to bill the industries on prorata basis was taken only because the said industries were melting industries and there were restrictions to draw power only for 10 days, 15 days or 20 days in a month and as such, the Department in consultation with the Government of Goa decided to bill the said industries as far as the demand charges are concerned only on prorata basis whereas the energy charges were levied and billed as per the actual energy consumed by the said industries. It is further their case that the power supply was available to the Respondent throughout during the month barring the peak hour load restrictions on the day which was as per the agreement executed between the parties. Denying the contentions raised by the Respondent by filing the said written statement and stating that there was No. default committed by the Appellants in the supply of electrical energy, the Appellants contended that the Respondent is not entitled for any reliefs in the suit and prayed for dismissal of the suit. After framing the issues and recording of the evidence, the learned Additional District Judge by judgment and Decree dated 29-4-2005 partly decreed the said suit and directed the Appellants to refund an amount of Rs. 22,05, 839/- to the Respondent.

4. Being aggrieved by the said Judgment, the Appellants have preferred the present appeal. After being duly served, the Respondent filed the cross objections and, inter alia, claimed that the Respondent be granted interest at the rate of 2% per month compounded monthly from the date of the respective excess payment until actual payment.

5. Shri S.S. Kantak, learned Advocate General appearing for the Appellants has assailed the impugned judgment and submitted that on the basis of the evidence on record, the Respondent has failed to establish that it was entitled for any reliefs claimed in the suit much less the amount directed to be refunded in favour of the Respondent. It is further their case that the learned Judge has not at all considered the terms of the agreement to ascertain as to whether there was any default committed by the Appellants in the supply of the electrical energy or that there were any restrictions in the supply of such electricity at specific hours which resulted in any damages in favour of the Respondent. Learned Advocate General further pointed out that the amounts which have been claimed by the Appellants are in accordance with the terms of the agreement read with the Indian Electricity Act and there is No. case made out by the Respondent to establish that any excess payment has been effected to the Appellants. Learned Advocate General has taken us through the letter of the Engineer which does not at all suggest that there was any non supply of electrical energy throughout the said period as claimed by the Respondent. Learned Advocate General further submitted that the reason for not utilizing the demanded contractual energy is on

account of the inability by the Respondent to run the industry for a continuous period of time though the energy was available to the Respondent and for reasons best known to them failed to consume the demanded contractual energy from the Appellants. Learned Advocate General further submitted that the Respondent failed to adduce evidence to substantiate their contentions that on account of restrictions in supply of electrical energy any loss had occasioned to the Respondent which prevented them from continuing the activities in the said industry. Learned Advocate General further submitted that the evidence on record suggests that the Appellants were always in a position to supply electrical energy but it was the Respondent who was unable to avail of such electrical energy on account of his inability to run the industry for a maximum period. Learned Advocate General took us through the statement of accounts and pointed out that the amounts claimed by the Appellants are as per terms of the agreement and on the basis of the actual consumption and in the manner contemplated in the agreement executed between the parties. Learned Advocate General further submitted that there was No. admissible evidence on record to substantiate the claim of the Respondent for any amounts and it is further submitted that Annexure "A" to the plaint has not been duly proved and cannot be read in evidence and as such the impugned judgment deserves to be set aside.

6. Shri v. B. Nadkarni, learned Senior Counsel appearing for the Respondent has supported the impugned Judgment. Learned Senior Counsel has pointed out that there was sufficient evidence on record to establish the default committed by the Appellants in not supplying the electrical energy as stipulated in the said agreement. Learned Senior Counsel further submitted that because No. electrical energy was supplied for the entire period of 24 hours the Respondent was unable to run the industry and has not met the demands of the production which resulted in substantial damages to the Respondent which the Appellants bound to account for. Learned Senior Counsel has taken us through the evidence on record and pointed out that there was sufficient material to establish that the Appellants are liable to pay the amounts as claimed by the Respondent in the said suit. Learned Senior Counsel further submitted that the documents which have been submitted have to be read in evidence as the mode of proof was not challenged at the time when the documents were brought on record. Learned Senior Counsel submitted that the documents have been duly proved as the Appellants never challenged the admissibility of the evidence before the learned trial Judge. Learned Senior Counsel took us through the evidence on record and submitted that there is sufficient material produced by the Respondent which conclusively establishes that the Respondent is entitled for the excess amounts paid to the Appellants. Learned Senior Counsel took us through the evidence on record and pointed out that considering the cross-examination of the Respondent by the Appellants, it substantially establishes that the averments made on the plaint has been duly proved by the Respondent. The learned Counsel further pointed out that the Respondents are also entitled for interest on the decretal amount as

prayed for.

7. Having heard the learned Advocate General as well as the learned Senior Counsel and on perusal of the records, the following points for determination arise.

1. Whether the learned Additional District Judge was justified to direct the payment of a sum of Rs. 22,05,839/- to the Appellants herein?

2. Whether the learned Judge was justified to refuse the grant of interest as claimed by the Respondent?

8. On going through the evidence on record and the findings in the impugned Judgment, we find that the learned Judge has relied upon a letter dated 26-10-1998 written by the Chief Engineer to the Superintending Engineer to the effect that Ferro Alloy Steel and Steel Rolling Mills at Kundaim and Madkaim Industrial Estates are not being supplied with adequate power due to the power system constraints to accept the contention of the Respondents that there was short supply of electrical energy. It is material to note that the said letter refers to the Industrial Estates at Kundaim and Madkaim and has No. reference to the Cuncolim Industrial Estate where the industries belonging to the Respondent are located. Merely because some power constraints are imposed at the said two Industrial Estates by itself would not justify the Court to come to the conclusion that similar restrictions were imposed at the Cuncolim Industrial Estate. Besides that, the agreements executed between the parties have not been properly appreciated by the learned Judge whilst deciding the said dispute between the parties. Another document which has been relied upon is a certificate which stipulates that the power supply was not provided from 6.00 p.m. to 11.00 p.m. everyday and from 6.00 a.m. to 6.00 p.m. on alternate days due to power system constraints. There is No. material on record to show that the supply of electricity on alternate days from 6.00 a.m. to 6.00 p.m. was for the entire period as claimed by the Respondent. The Respondent has also not adduced any evidence to substantiate that it was in a position to avail of the entire electrical energy contracted during the said period and that the same resulted in a loss to the Respondent. Merely producing a statement of account without any proof as to the actual capacity of the Respondent to utilize the electricity cannot saddle the Appellants with any liability for payment of the amounts on account of non supply of electrical energy. Merely because some decision has been taken to give some concession on prorata basis to the industries at Kundaim and Madkaim could not necessarily apply to the industry at Cuncolim Industrial Estate unless it is established by cogent evidence that the power supply position was the same at the said Industrial Estate. No. such material has been produced by the Respondents on record.

9. When it was brought to the notice of the learned Counsel that the evidence on record was not sufficient to decide the case advanced by the parties, the learned Senior Counsel appearing for the Respondent pointed out that the learned Judge

has not appreciated the entire evidence on record in proper perspective by applying the well settled principles of law of appreciating such evidence. Both the learned Counsel pointed out that in case the matter is remanded for deciding afresh, the parties should be given liberty to adduce further evidence in support of their respective contentions.

10. On going through the impugned judgment and on perusal of the evidence on record, we find that the learned Judge has misconstrued the evidence on record and has not applied the well settled principles of law in appreciating the evidence. It was incumbent on the learned Judge to scrutinize every piece of admissible evidence and decide on the contentions raised by the parties. The contention of the learned Advocate General that the disputed bills are in accordance with the provisions of the Electricity Act has also not been considered by the learned Judge. We also find from the evidence on record that the material was not sufficient to decree the suit of the Respondent. We find it appropriate in the interest of justice that the impugned judgment passed by the learned Judge be quashed and set aside and the matter be remanded to the learned Judge to decide the suit afresh after giving an opportunity to both the parties to lead further evidence if they so desire. The learned Judge will not be influenced with any of the findings given hereinabove. The questions of interest would also be considered by the learned Judge whilst disposing the suit. The points for determination are answered accordingly.

11. In view of the above, we pass the following Order:

ORDER

1. The appeal and cross objections are partly allowed.
2. The impugned Judgment and Decree dated 29-4-2005 is quashed and set aside.
3. Civil Suit No. 127/2004 is restored to the file of the Additional District Judge.
4. The learned Judges directed to decide the suit afresh after giving both the parties an opportunity to be heard and lead further evidence in support of their respective claim and pass afresh judgment on the basis of the evidence on record and the evidence which shall be adduced hereinafter in accordance with law. All the contentions of both the parties are left open.
5. The appeal and cross objection are disposed of accordingly with No. order as to costs.
6. Parties are directed to appear before the learned Judge on 03.10.2011 at 10.00 a.m.