

(1994) 04 PAT CK 0036

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 2689 of 1993 (R)

Ivo Pharmaceuticals (P) Ltd. and Others

APPELLANT

Vs

Bihar State Electricity Board and Others

RESPONDENT

Date of Decision : 26-04-1994

Acts Referred:

Citation : (1995) 1 CivCC 243

Final Decision : Allowed

Judgement

R.N. Sahay, J.—The first petitioner is a Company registered under the Companies Act and the second petitioner is the Managing Director of the said Company. The Company is engaged in manufacture of life saving drugs and other drugs since 1983. The Company entered into an agreement with Bihar State Electricity Board for supply of electricity for industrial purpose at the load of 15 Horse powers. The first petitioner was also provided commercial connection for the purpose of lighting in the officer and factory.

2. The first petitioner was served with electric bill for February, 1993 in March, 1993 for a sum of Rs. 72,631.66 (Annexure-3). The petitioner assert that the bill was incorrect and accordingly applied for its rectification. Respondents, however, continued to raise the bills on the basis of wrong calculation. The petitioners were utilizing both the electrical connection, one for the Industrial load and the other for commercial load since 1983. Respondents disconnected the electric lines of the petitioners on 22-3-1993 and 25-8-1993 respectively. The petitioners allege that respondents raised the bill for the Industrial connection on the higher side on the basis of incorrect calculations and as such the petitioners disputed the bill and applied for its rectification. According to the petitioners the bill was raised on minimum guarantee basis in respect of Industrial connection. The factory of the petitioner remained without supply for more than 16 hours a day and hence the demand on the basis of the annual minimum guarantee was illegal.

3. The action of the respondents in disconnecting the two connections of the petitioners has been impugned mainly on the ground of breach of Section 24(1)

of the Indian Electricity Act, 1910 which reads as follows:

Where any person neglects to pay charge for energy or any sum other than a charge for energy, due from him to a licensee in respect of the supply of energy to him, the licensee may, after giving not less than seven clear days," notice in writing to such person and Without prejudice to his right to recover such charge or the sum by suit, cut off the supply and for that purpose cut or disconnect any electric supply line or other works, being the property of the licensee, through which energy may be supplied, and may discontinue the supply untill such charge or other sum together with any expenses incurred by him in cutting off and re-connecting the supply, are paid but no longer.

4. Counter-affidavit has been filed on behalf of the respondents refuting the allegations in the writ petition. In paragraph 4 of the counter-affidavit it is stated that the L. T. I. S. connection of the petitioners was disconnected in March, 1993 on account of the default in payment of the electricity bill. According to the respondents, the bill (Annexure-3) was itself notice u/s 24(1) of the Indian Electricity Act.

5. Mr. P. K. Bhowmik learned Counsel for the petitioners has submitted that only when the bill is not paid, the Board can say that the consumer has no intention to pay and then a separate notice of disconnection as contemplated by Section 24(1) of the Electricity Act has to be issued. He also submitted that the supply of the bill to a consumer cannot be treated as a notice of disconnection. The bill is sent by ordinary post and the Board accepts no responsibility for the loss of the bill in transit. Such a notice is not envisaged by Section 24(1) of the Act. The intention of the Legislature is to use the provisions of Section 24(1) of the Act of 1910 as a last resort.

6. In Rajasthan State Electricity Board, Jaipur Vs. Dr. Madan P. Joshi, , the bill was given to the servant of the consumer. It was not delivered to the consumer personally nor it was pasted on his residential building at the address given in his application nor it was sent by registered post. It was held by a learned Single Judge of the Rajasthan High Court that when these three things are not complied and the time for payment given in the notice was only two days and not 7 days, then it should be presumed that the disconnection was made without due notice and therefore the disconnection was illegal.

7. In Maharashtra State Electricity Board Vs. Madhusudandass and Brothers, , a Division Bench of the Bombay High Court considered the question whether Section 24(1) of the Indian Electricity Act was applicable to electricity board constituted u/s 5 of the Indian Electricity Supply Act, 1948, having regard to the provision in Section 26 of the Electricity Supply Act, 1948. Section 26 of the Electricity Supply Act, 1948 reads as follows:

26. Board to have powers and obligations of licence under Act 9 of 1910,-Subject to the provisions of this Act, the Board shall, in respect of the whole State have all the powers and obligations of a licensee under the Indian Electricity Act, 1910

and this Act shall be deemed to be the licence of the Board for the purposes of that Act:

Provided that nothing in Sections 3 to 11, Sub-sections (2) and (3) of Section 21 and (Section 22, Sub-section (2) of Section 22A and Sections 23 and 27) of that Act or in (clauses 1 to V, Clause VII and Clauses IX to XII) of the Schedule to that Act relating to the duties and obligations of a licensee shall apply to the Board:

Provided further that the provisions of Clause VI of the Schedule to that Act shall apply to the Board in respect of that area only where distribution mains have been laid by the Board and the supply of energy through any of them has commenced.

7. The Bombay High Court held that the effect of Section 26 is that if the Board has laid supply mains and has commence to supply the energy then it becomes a licensee to that extent acquires all the powers and obligations under that Act (Electricity Act of 1910) and all the provisions of the Act must apply except such as are excluded and as Section 24 of the Act is not excluded by the said provisions it must apply to the Board and it has to act strictly in accordance with the same. Their Lordships further rejected the stand of the Board that it cannot be-ried down to limited power of cutting down of supply contained in Section 24 because it is not obligatory to supply electrical energy. This plea was based on Section 70 of the Electricity Supply Act which exempts the application of Electricity Act, 1910.

8. Section 70 of the Electricity Act, 1948 provides as follows:

70. Effect of other laws,-(1) No provision of the Indian Electricity Act, 1910 (9 of 1910), or of any rules made thereunder or of any instrument having effect by virtue of such law or rule shall, so far as it is inconsistent with any of the provisions of this Act, have any effect:

Provided that nothing in this Act shall be deemed to prevent the State Government from granting, after consultation with the Board, a licence not to any person in respect of such area and on such terms and conditions as the State Government may think fit.

(2) Save as otherwise provided in this Act, the provisions of this Act shall be in addition to and no in derogation of the Indian Electricity Act, 1910 (9 of 1910).

9. Learned Judge of the Bombay High Court negatived the contention for the reasons stated in paragraphs 19 and 21 of the report as follows:

19. The first proviso excludes the application of certain sections and some clauses in the Schedule to the Electricity Act, 1910, the sections being 3 to 11, Sub-sections (2) and (3) of Section 21 and Sections 22, 23 and 27 of that Act and Clauses 1 to V, VII and IX to XII of the Schedule to that Act. The second proviso applies Clause VI of the Schedule in the Electricity Act to the Board in

respect of an area where distribution mains have been laid by the Board and the supply of energy through any of them has commenced. The effect of Section 26 is that if the Board has laid supply mains and has commenced to supply the energy then it becomes a licensee to that extent and acquires all the powers and obligations under that Act (Electricity Act of 1910) and all the provisions of that Act must apply except such as are excluded. As Section 24 is not excluded by the provisions it must apply to the Board and it has to act strictly in accordance with the same.

21. In order that the sections which are expressly applied by Section 26 should be excluded by Section 70 of this Act, the provisions thereof must be shown to be inconsistent with the provisions of the Electricity (Supply) Act. It is said that Section 49 of the Electricity (Supply) Act, 1948 vests a discretion in the Board to supply electrical energy to a consumer and is therefore in conflict with Section 24 of the Electricity Act and therefore Section 24 ought not to be applied. It is not possible to accept this contention. Section 49 itself provides that the Board may supply electricity to any person subject to the provisions of the Act and of the regulations made in this behalf and one of the provisions of the Act is Section 26 under which it has got the same powers and the obligations as a licensee. We cannot disregard the word "obligation" in Section 26. Once it has laid the mains and started the supply it is obliged to continue to do so as a licensee. Section 24(1) therefore applies to the case of a supply of electrical energy by the Board to a consumer and, if that is so it can discontinue the supply only if the conditions of Section 24(1) are satisfied i.e. there must be neglect on the part of the consumer to pay the electrical charges. If Clause 34 gave wider power to the Board, to that extent, what power would be ineffective.

10. In *Andhra Pradesh Carbides Ltd. and Another Vs. Andhra Pradesh State Electricity board, Hyderabad and Others*, a similar question was considered and held by Jaganath Rao, J.:

15. In my view, *prima facie*, the 15 days notice for payment of the electricity charges is to be counted not from the "date" mentioned in the demand notice but from the "date of service" of the said demand notice on the consumer. The Supreme Court in *Raja Harish Chandra Raj Singh Vs. The Deputy Land Acquisition Officer and Another*, has held that the period of limitation prescribed from the date of the award in Section 18(2)(b) of the Land Acquisition Act has to be computed by construing the words "date of the award" as meaning the date of receipt of the award. *Prima facie*, I am satisfied that the 15 days time for payment has to be computed not from 28-6-85 on which date the demand notice was prepared but from 2-7-1985 on which date it was served and communicated to the petitioner. The demand notice is therefore erroneous in granting time only till 13-7-1985. In my opinion, *prima facie*, the petitioner had time till 17-7-1985 and therefore the tender of the money on 16-7-1985 at Anantapur would be within time and it cannot be said that there was "neglect" to pay the amount by 16-7-1985 inasmuch as the petitioner had time till

17-7-1985. Thus, the first condition of neglect to pay as envisaged by Section 24 of the 1910 Act is not prima facie satisfied.

17. It is true that Section 70 of the latter Act viz. the Electricity (Supply) Act, 1948 states that no provision of the Electricity Act, 1910, or of any rules made thereunder or of any instrument having effect by virtue of such law or rule, shall so far as it is inconsistent with any of the provisions of this Act, have any effect. It is also true that u/s 49 of the Electricity (Supply) Act, 1948 the Board may, subject to the provisions of the Act and of regulations, if any, made by it, in this behalf, supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit. It is also true that Regulation 32.3 made by the Board in BP Ms. No. 690 dated 7-9-1975 u/s 49, permits the Board to disconnect the power without following the procedure u/s 24 of the Electricity Act, 1910, i.e. without giving the 7 days' notice contemplated by the earlier Act.

18. In my opinion, prima facie, the overriding effect given by Section 70 of the Electricity (Supply) Act, 1948 is only to such of the provisions of the latter Act of 1948 which are inconsistent with the former Act, viz., the Electricity Act, 1910, and Section 70 cannot be recast by adding words to read as:

Inconsistent with any provisions of this Act and of any regulations made under this Act.

In my view the acceptance of the argument of the respondent would require the addition of the words and of regulations made under this Act "in Section 70 of the Electricity (Supply) Act, 1948, which are not there in Section 70.

11. The Andhra Pradesh High Court followed the decision of Bombay High Court (supra) and held that decision of Bombay High Court (supra) is the direct answer to contention of the respondent, and neglect to pay the bill and further notice of 7 days are statutory obligation of the Board which cannot be dispensed with by the regulation.

12. In Corporation of the City of Nagpur Vs. The Nagpur Electric Light and Power Company Ltd., , it was held that if there was a bona fide dispute between the parties as to what is payable the failure to pay the due does not amount a neglect to pay within the meaning of Section 24(1) and therefore action u/s 24(1) cannot be taken by the electrical undertakings in such a case.

13. In C. Buchaiah Shetty and another Vs. Regional Transport Officer, Mahaboobnagar and another, it was held by Full Bench of the Andhra Pradesh High Court that Composite demand for tax and penalty u/s 3 of the Taxation Act was not warranted and penalty can be imposed when tax is not paid. The Full Bench following earlier decision in Y. Peda Venkaiah Vs. The Regional Transport Officer, Nellore, held ;

29. The impugned demand notice dated 15th October, 1988, in the present case, is a composite demand, i.e. containing demand for tax as also penalty. In view of the Full Bench ruling of this Court in Y. Peda Venkaiah Vs. The Regional Transport

Officer, Nellore, penalty proceedings cannot be instituted unless and until default is committed in payment of the tax "as" demanded. The respondent will, therefore, be at liberty to invoke penalty proceedings only if the tax as demanded by the demand notice dated 15th October, 1988, is not paid. Consequently, the said demand notice, to the extent it demands penalty, is invalid and is liable to be set aside.

14. The respondent in the case in hand has not framed any regulation u/s 49 of the Electricity (Supply) Act, 1948 providing for Electric bill-cum-notice of disconnection hence the action of the Board in the present case is ultra vires Section 24(1) of the Indian Electricity Act, 1910 which postulates separate notice in the event of neglect on the part of the consumer to deposit the bill by the due date specified in the bill.

15. A subsidiary question arises for consideration as to whether the notice in the instant case can be deemed to be notice of disconnection assuming a bill-cum-notice is permissible. In other words whether notice in small prints on the reverse of the bill can be said to sufficient notice of disconnection. Is the consumer expected to look to the contents on the back of the bill which contains three paragraphs and in para 2 thereof is the notice.

16. The situation is some what a kin to the "exclusion Clauses" in contracts evolved by the Courts in England in the last hundred years. The up-to-date law on the subject has been lucidly dealt in Cheshire and Fifoot's Law of Contract (9th Edn.) at page 144. The learned authors states:

The common law has long been familiar with the attempt of one party to a contract to insert terms excluding or limiting liabilities which would otherwise be his. The situation frequently arises where a document purporting to express the terms of the contract is delivered to one of the parties and is not read by him. A passenger receives a ticket, stating the terms or referring to terms set out elsewhere, on which British Railways are prepared to carry him or take charge of his luggage, A buyer or hirer signs a document, containing clauses designed for the seller's or owner's protection. Are these terms or clauses part of the contract so as to bind the passenger, the buyer or the hirer, despite his ignorance of their character, or even of their existence ?

The problems caused by exclusion clauses overlap with those caused by two other emergent themes of modern contract law, the increased use of standard form contracts and the development of special rules for the protection of consumers. Exclusion clauses are usually though not necessarily, contained in standard form contracts but they are by no means the only problem which such contracts present for the courts. To a large extent whole areas of English commercial practice are governed by the prevalent standard forms, which exist in a symbiotic relationship with the courts, so that an historical analysis of the development of a particular form would show that a clause represented a response to a decision in the past.

The learned authors say at page 148:

If the document is to be regarded as an integral part of the contract, it must next be seen if it has or has not, been signed by the party against whom the excluding or limiting term is pleaded. If it is unsigned, the question will be whether reasonable notice of the term has been given. That this was the crucial test was pronounced by Mellish, L.J. in 1877 in the case of *Parker v. South Eastern Rail Co.* where the defendants claimed that a passenger was bound by terms stated on a cloakroom ticket of which he was ignorant. Had the defendants done what was sufficient to give notice of the term to the person or class of persons to which the plaintiff belonged ? The question is one of the fact, and the court must examine the circumstances of each cause.

17. In *White v. Black More* (1972) 2 QB 851 Lord Denning, M.R. held that the Court must be satisfied that particular document containing notice is an integral part of the contract. "To hold a party bound by the terms of a document which reasonable persons would assume to be no more than a receipt is an affront to common sense."

18. Lord Denning in his book "what next in the law" refers to an interesting case *Thompson v. L.M.S.* (1930) 1 KB 41, Lord Denning in his style describes the case:

Even as late as 1929 there was another case where a train was too long for a platform and a lady was injured in getting out. The case is *Thompson v. LMS* she had taken an excursion ticket which had a condition on the back saying "see time table". If she had bought a time-table and looked at the small print on the back page she would have found a condition exempting the company from any liability. The jury found that the company were negligent and that they had not taken reasonable steps to bring the condition to her notice. Nevertheless the Court of Appeal overruled the jury. They held that the company were exempted from liability by the condition. Another example of the judges interfering too much with the decision of juries.

19. The Courts in England have held that Court may infer notice from previous dealing with the parties (see *Sparling v. Bradshaw* (1956) 2 All ER 121. We have no materials before us to hold that from previous dealings the petitioner was aware of the notice. The question of estoppel does not arise here since there can be no estoppel against statute. Here is a case where doctrine of fundamental breach applies. The doctrine of fundamental term or fundamental breach has been evolved by the courts to defeat the rigours of an exemption clause even the most carefully drafted. If a party fails to perform the fundamental obligation he will be guilty of a breach of contract irrespective of exemption Clause (see *Chitty on contract* 22nd Edn. Para 702.)

20. In the agreement (Annexure-1) there is a Clause (Clause 5) which reads thus:

5(a) Readings of meter shall be taken by the Board once in each month or on

such other intervals or times as the Board shall deem expedient and the Board's meter reader shall have access to the Consumer's premises at all reasonable times for the purpose of taking such reading. The Board shall within reasonable time deliver to the consumer the bill for energy consumed during the month in accordance with the reading of the meter and subject to the minimum guaranteed charged. The consumer shall pay the amount under the bill so delivered within the due date specified therein as per terms of the tariffs framed by the Board and enforced from time to time.

(b) If the consumer fails to pay the amount of any bill due under this agreement within the due date specified in the bill referred to in Clause 5(a) above, he shall pay a surcharges at the rate given in the tariffs framed by the Board and enforced from time to time, If the amount of such a bill remains unpaid after the due date specified in the bill, the Board may discontinue the supply after giving the Consumer not less than 7 clear days" notice. The service will be reconnected only on receipt of full payment for all obligations outstanding up to the date of reconnection and charges for the work of disconnection and re-connection of service.

21. Thus according to Clause 5(b) the Board is entitled to surcharge and if the amount is not paid within the date specified in the bill the Board may disconnect the supply after giving 7 days" clear notice. This was not done in the present case. The impugned action of the Board is therefore, totally illegal and hence unsustainable.

22. I am accordingly constrained to hold that the impugned action of the Bord was illegal being in contravention of Section 24(1) of the Indian Electricity Act, 1910 as also Clause 5(b) of the L.T. agreement (Annexure-3). I further hold that notice contained in para 2 on the reverse of the electric bill cannot be considered to be sufficient notice in the facts and circumstances of the case.

23. This application is allowed and a writ of mandamus is issued to respondents No. 2 to 5 to restore the electric connection of the petitioners (Consumer No. PL-651-3 and P. L. M. Ku. 25-LT and 5) within four weeks from the date of this order. I have not examined the validity of the claim of the petitioner with regard to incorrect billing. The respondents shall consider and dispose of the objections to the bill within three weeks.

K.S. Paripoornan, C.J.

24. I agree with my learned brother Sahay, J. that the impugned action of the Board was illegal. In view of the importance of the question involved for consideration in this case, I desire to express my opinion independently. It appears to me that it is possible to reach the said conclusion on the ground that there has been no proper or valid notice in writing before the electricity supply of the petitioners was cut-off or disconnected. It is true that Annexure-3 electric bill for February, 1993 was served in March, 1993 for a sum of Rs. 72,631.66. I will proceed on the basis that the petitioners did not pay the bill as per the demand.

There was default. Section 24(1) of the Indian Electricity Act, 1910 permits the Board to cut-off the supply after giving not less than seven days clear notice in writing. According to counsel for the Board, such a notice was served on the petitioners. The plea is that the bill (Annexure-3) itself was notice u/s 24(1) of the Indian Electricity Act, 1910. Counsel for the petitioners contend that the supply of the bill to the consumer in the instant case cannot be treated as a notice of disconnection.

25. For the purpose of this case, I will assume that it is possible to have a composite document reflecting the bill and also a notice of disconnection or cutting-off the supply u/s 24(1) of the Indian Electricity Act. The question is whether Annexure-3 bill which is said to be such a composite document, satisfies the requirements of law. In my opinion, it does not.

26. Before proceeding further, I would quote certain observations of Jasraj Chopra, J. in Rajasthan State Electricity Board, Jaipur Vs. Dr. Madan P. Joshi, , which are relevant the context. In paragraph 7 of the judgment, the learned Judge observed thus:

...supply of the bill to a consumer cannot be treated as a notice for disconnection. It is actually a notice to make payment and when it is found that the amount is not paid within a prescribed time, then only the notice has to be given as required by Section 24(1) of the Act...the express provisions of Section 24(1) of the Act of 1910 which provides that where any person neglects to pay any charge for energy to a licensee his power connection can be cut after serving on him a notice in writing addressed to the consumer, delivered by hand or pasted at his premises or sent by registered post. Such an eventuality can arise only when payment is not made on the due date. At the cost of repetition it may be stated that such a contingency cannot be envisaged as soon as a bill is delivered... Section 24(1) of the Act of 1910 therefore clearly envisages a separate notice in writing after the default.

27. Even assuming that a composite document will serve the plurality of purposes one as a bill and another as a notice u/s 24(1) of the Indian Electricity Act, 1910, I am of the view that Annexure-3 herein is not a proper or valid notice, as contemplated by Section 24(1) of the Indian Electricity Act, 1910. The bill is not one signed by the customer (the petitioners). The plea is that Annexure 3 bill, on the reverse side, contains some instructions and Clause 2 thereof contains the following, will satisfy the requirements of law:

...If the consumer fails to make tie payment before the expiry of seven days after the due date, Electric Supply would be liable for disconnection.

Can it be said that it is reasonable and valid notice of disconnection u/s 24(1) of the Indian Electricity Act? It should be remembered that the clause relied on operates in "terrorem." It visits the consumers with dire or penal consequences. In such cases, where the Board or the public authority claims that the consumers like the petitioners are bound by the said penal clause, the question is whether

the Board or the public authority had done what was sufficient to give notice of the term to the person or class of persons to which the petitioners belong. This depends upon largely on the circumstances of each case. It is settled law that contractual documents must be of a class which the party receiving it would expect to contain contractual conditions. (Pollock and Mulla-Indian Contract and Specific Relief Acts, Tenth Edition, page 70). It is well-known that people hardly ever trouble to read printed conditions on a ticket or delivery note or a bill or similar documents. They do not ordinarily expect such documents to contain contractual conditions. The developments in the modern age have tended and have resulted in parties inserting printed conditions which are more and more one-sided in favour of the party who is imposing them, but the other parties, even if they notice that there are printed conditions, whether printed in big or small letters, generally assume that such matters are only one of form. Generally, they are not considered to be of importance. The courts have always required that reasonable steps should be taken to draw the other parties attention to the printed conditions, if they should form part of the contract. If the condition in a printed form is particularly onerous or visits the other party with dire consequences, the party seeking to enforce it must show that the particular condition was fairly and reasonably brought to the attention of the other party. The court cannot hold any person bound by such a condition unless the attention of the person who is sought to be bound by the condition is drawn in the most explicit and pointed way. The above aspect of law on the point has been succinctly discussed in a recent decision of the Court of Appeal in *Interfoto Ltd. v. Stiletto Ltd.* 1988 (1) All ER 348. The question in all such cases is whether a condition specified in a general document, which is particularly onerous or penal, has been brought to the notice of the other party. It is necessary that something special need to be done, to draw the attention of the other party to that particular condition. Denning L. J. in *Spurting Ltd. v. Bradshaw* 1956 (2) All ER 121 stated the law thus:

This brings me to the question whether this clause was part of the contract. Counsel for the defendant urged us to hold that the plaintiffs did not do what was reasonably sufficient to give notice of the conditions within *Parker v. South Eastern Railway Co.* I agree that the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.

28. Applying the test laid down by Denning L. J. and by the Court of Appeal in *Interfoto Ltd.* case, the question is whether in all the circumstances of the case, it can be said that the penal clause has been given as explicit or pointed or fair notice as required by law. I am of the view that no fair or proper or explicit notice, as required by law, to draw the attention of the consumer is given by the mere mention of instruction No. 3 in the printed bill. In order to draw the pointed attention of the consumer, it would have been appropriate and fair, if the said clause is prominently printed in bold letters on the face of the document itself to

attract the eye of the consumer or printed in red ink on the face of the document itself, with a pointer in red necessarily drawing the attention of the consumer,

29. I cannot consider the instructions appearing on the reverse side of Annexure-3 bill as satisfying the requirements of service of notice of disconnection or cutting off of the supply as contemplated by Section 24(1) of the Indian Electricity Act, 1910. I concur with the conclusion of my learned brother that the instructions contained in Annexure-3 bill does not satisfy the requirements of law as envisaged by Section 24(1) of the Indian Electricity Act, 1910. It is not a valid and fair notice contemplated by the said statutory provision. In this perspective, I hold that the writ petition deserves to be allowed. A direction is issued to respondents No. 2 to 5 to restore the electric connection of the petitioners, as stated by my learned brother.