(2006) 02 GUJ CK 0091

In the Gujarat High Court

Case No : Special Civil Application No. 12624 of 2005

Jay Mahakali Infrasturcture Pvt. Ltd. and Another — APPELLANT

Vs

Paschim Gujarat Vij Company Ltd. — RESPONDENT

Date of Decision : 07-02-2006

Acts Referred:
Companies Act, 1956 — Section 2J, 529
Constitution of India, 1950 — Article 226

Citation : (2006) 02 GUJ CK 0091

Hon'ble Judges : M.R. Shah, J

Bench : Single Bench

Advocate : Amar N. Bhatt, for Petitioners 1 - 2, for the Appellant; Lilu K. Bhaya, for Respondent 1, for the Respondent

Final Decision : Allowed

Judgement

M.R. Shah, J.—Rule. The petitioners have preferred the present Special Civil Application under Article 226 of the Constitution of India directing the respondents to supply electricity/power to petitioner No. 1 at their assets situated at Kanti Cotton Mills, Mills Road, Near Bhogavo River, Surendranagar without insisting for any payment which is alleged to be due towards electricity and other charges of the erstwhile owner of the said assets, namely Kanti Cotton Mills/GSTC.

2. It is the contention on behalf of the petitioners that Gujarat State Textile Corporation Ltd [hereinafter referred to as ''GSTC''] (In liqn.) was a company registered under the Companies Act, 1956 and was ordered to be wound up by the order of this Court vide order dated 6.2.1997 in Company Petition No. 205 of 1996. That the said GSTC had several units including a unit by name Kanti Cotton Mills situate at Mills Road, Near Bhogavo River, Surendranagar. For the sale of assets of the said unit of GSTC, i.e., Kanti Cotton mills, an order dated 22.7.1998 was passed by this Court directing constitution of Sale Committee and thereafter an order dated 11.5.1999 was passed by this Court in Company

Application No. 170/1999 in Company Petition No. 205/1996 with respect to the sale of said unit of said GSTC. That the Official Liquidator thereafter took assets of the said unit of GSTC for sale. According to the petitioner, offers were invited for Lot No. I which were for land only, Lot No. II for all assets other than compound wall, T.K. Office and Accounts Office, and Lot No. III for composite offer for Lot No. I and Lot No. II. According to the petitioners there was no condition to the effect that the buyer would be liable to pay the electricity charges, if any, of the erstwhile owner of the assets, i.e., GSTC or Kanti Cotton Mills. It is also submitted by the petitioners that petitioner No. 1 has submitted offer for Lot No. III which was found to be the highest offer and the petitioner No. 1 offered to purchase the assets of Lot No. III for Rs. 5.50 Crores. That thereafter the offer of the petitioner No. 1 was accepted and the directions for further payments were given Vide order dated 6.8.2003 in Company Application No. 416/2003 in OLR No. 31/2003 further orders were passed permitting the petitioner No.1 to carry out certain activities like cleaning and maintenance of the property. Thereafter the sale deed with respect to the land of the said unit of GSTC was executed by the Official Liquidator on 28.6.2004. It was further submitted ha the said land had been mutated in the name of petitioner No.1 also. According to the petitioners, petitioner No.1 purchased the property of the said unit of GSTC for a total consideration of Rs. 5.50 Crores which amount has already been made to the Official Liquidator. It is submitted that thereafter the petitioner No.1 removed the existing structure and on 29.4.2005 got the lay out of the said property for its development approved from Surendranagar Dhoraji Nagarpalika. As per the petitioners by May 2005 the petitioner No.1 was about to start the development of the assets purchased by it, however the petitioner No.1 received a letter dated 23.5.2005 from the respondent to the effect that there are dues of GEB to the tune of Rs. 5,19,533/- plus HT bill of Rs. 2,32,70,127/- plus DPC amount to be recovered from GSTC/Kanti Cotton Mills and the petitioner No.1 is liable to pay the said amount within 10 days from the date of the said letter. It is submitted by the petitioners that thereafter vide another letter dated 8.6.2005 the petitioner No.1 was informed by the respondent that electric connection No. 17432 of Kanti Cotton Mills had been permanently disconnected with effect from 1.6.1977 and that further dues in respect of which the claim of the respondent pending with the Official Liquidator is Rs. 2035000/- plus DPC and that unless the said amount was paid the petitioner No.1 would not be granted any electric connection. Being aggrieved and dissatisfied with the same, the petitioners have preferred the present Special Civil Application for the aforesaid relief.

3. Shri S.N. Soparkar, learned Senior Advocate appearing with Shri Amar N. Bhatt, learned advocate appearing on behalf of the petitioners has vehemently submitted that no such condition was mentioned in the terms and conditions for sale of the unit as advertised by the Official Liquidator and that the petitioner No.1 had purchased the assets from auction held pursuant to the orders of this Court. It is further submitted that even otherwise the petitioner No.1 cannot be

made liable for dues of the erstwhile owner of the said assets, namely Kanti Cotton Mills/GSTC. It is submitted that in view of the decision of the Hon''ble Supreme Court in the case of Isha Marbles Vs. Bihar State Electricity Board and Another, the respondent cannot refuse electric connection to the petitioner No.1 on the ground that it has to discharge electric dues of erstwhile owner, namely Kanti Cotton Mills. He has further submitted that even the dues of Kanti Cotton Mills/GSTC which are sought to be recovered by the respondent from the petitioner was of 1997 and the same is time barred and therefore the same cannot be recovered from the petitioners. It is further submitted by him that Section 529 of the Companies Act provides for priority and by such type of recovery the respondent wants to get the money dehors the priority as provided in the Companies Act which is not permissible. It is further submitted by him that when the petitioners purchased the property in question in a public auction pursuant to the order passed by this Court in company proceedings the new Electricity Act of 2003 has come into force and there is a new Electricity Supply Code and neither in the Electricity Act 2003 nor in the Electricity Supply Code there is any provision by which purchaser of the property is called upon to pay the dues of erstwhile owner. It is further submitted that on the contrary under the new Act and the Electricity Supply Code the electricity companies have to give new connection and failure to give electricity connection is an offence. It is further submitted that when the petitioners purchased the property in question, Section 2-J was not in existence and therefore the petitioners are entitled to the electricity connection. By relying upon the Judgment of the learned Single Judge of this Court, in the case of Raipur (Rakhial) Commercial Co-op Housing Society Ltd. and Another Vs. Ahmedabad Electricity Co. Ltd. and Another, , more particularly Paragraph 11, Shri Soparkar has submitted that as recovery of the dues of Kanti Cotton Mills which are sought to be recovered from the petitioners has become time barred the respondents cannot recover the same from the petitioners and insist for payment of such dues which have become time barred, and therefore it is requested to allow the present Special Civil Application.

4. It is to be observed that number of submissions have been made with regard to applicability of new Electricity Act of 2003 and new Electricity Supply Code. Other submissions have also been made on the basis of the judgment of the Division Bench of this Court in Letters Patent Appeal No. 691 of 2003 and others, and also on the basis of the decision of the Hon''ble Supreme Court in the case of Ahmedabad Electricity Co. Ltd. Vs. Gujarat Inns. Pvt. Ltd. and Others, However, for the reasons stated hereafter as the present Special Civil Application is to succeed on one ground that as per the decision of this Court in judgment of the learned Single Judge in Raipur (Rakhial) Commercial Co-Op. Housing Society Ltd. and Anr. v. Ahmedabad Electricity Co. Ltd. [supra] holding that if the dues which are sought to be recovered from the petitioners are time barred, the same cannot be recovered and the petitioners cannot be denied the electricity Connection, and it cannot be insisted upon by the respondents that as a precondition the petitioners must deposit/pay the outstanding dues of the

erstwhile owner, i.e., Kanti Cotton Mills which have become time barred, this Court is not dealing with other submissions on merits. Shri Soparkar, learned Senior Advocate has also relied upon the resolution of the State Government issued by the Commerce and Mines Department dated 7th February 2004 [Page 47].

5. On the other hand, number of submissions have been made on behalf of the respondents meeting with the submissions on behalf of the petitioners with regard to applicability of new Electricity Act of 2003 and new Electricity Supply Code. It is further submitted by Ms. Lilu Bhaya, learned advocate appearing on behalf of the respondent that the particulars and details regarding dues of the earlier consumer, i.e., 31st December 2003 were communicated vide letter dated 24.11.2003 and therefore on 24.11.2003 it was within the knowledge of the petitioner that they were the dues of electricity consumption charges of the erstwhile consumer in the said premises. It is further submitted by her that the petitioner has alleged that the petitioner has applied in May 2005, however the same is factually incorrect. It is submitted that looking to the correspondence dated 24.11.2003, 2.12.2003 and May 2005, it is clear that the petitioner had knowledge about dues since 2003 and as per the procedure of GEB as and when any consumer who is interested in getting electric connection has to make an application in the prescribed form and get it registered by payment of requisite fees. It is therefore submitted that the case of the petitioner is governed under the old Acts and the conditions and miscellaneous charges for supply of electrical energy, and not under the Electricity Act of 2003. It is submitted that it is the dues towards the electricity consumption which was actually required to be paid by the consumer and which has not been paid and therefore the dues will also include time barred dues and the Board is entitled to recover the total amount of dues. It is submitted by her that limitation will not come in the way of collecting time barred rent as in the Rent Act there is no provision that it also includes time barred rent. It is submitted that likewise in the case of electric supply, consumption charges can be recovered by the Board from the date it was due failing which the Board has powers to discontinue the power supply. It is also required to be noted that number of submissions have been made on behalf of the respondent with regard to applicability of new Electricity Act of 2003 relying upon the judgment of the learned Single Judge of this Court, reported in [2005] 2 GLR 933. However, as stated above, this Court does not propose to go into all these questions as the petitioners are to succeed on the other ground.

6. Ms. Lilu Bhaya, learned advocate appearing for the respondent Company, has tried to distinguish the decision of this Court [Coram: K.S. Jhaveri, J.] by submitting that the said judgment was delivered in a case where the petition was filed against the then Ahmedabad Electricity Company which was merely a licensee and the GEB and the respondents were the licensors who are empowered to frame the terms and conditions for supply of electric energy, whereas the Ahmedabad Electricity Company had no powers to frame such terms and conditions. She has further submitted that the Division Bench of this Court

[Coram: Mr. G.S. Singhvi and Mr. Anant S. Dave, JJ.] has also declared Condition No. 2-J of the Conditions of Supply to be statutory in nature, and therefore the reliance placed by the petitioners on the judgment delivered by this Court [Coram: Mr. K.S. Jhaveri, J.] in the case of Ahmedabad Electricity Company Ltd will not be applicable to the case of the petitioner.

7. Heard the learned Advocates on behalf of the parties. It is not in dispute that the property in question was purchased by the petitioner pursuant to the winding-up proceedings held before this Court and the property in question came to be purchased by the petitioner in a public auction. It is also not in dispute that the dues of the erstwhile owner, i.e., GSTC/Kanti Cotton Mills which are now sought to be recovered from the petitioners as subsequent purchasers are of prior to 1997. As even the electricity connection and the supply of electricity to the erstwhile owner was permanently disconnected from 1.6.1997 their dues must be at least prior to 1.6.1997. It appears from the communication dated 2.12.2003 [Page 45] an amount of Rs. 97,47,883.37 ps. was due and payable as on 31.5.1997 and as on 2.12.2003 the amount due was Rs. 2,70,127.21 ps. and the balance amount after 31.5.1997 was due towards interest and delayed payment charges. It is also not in dispute that no proceedings have been initiated by the respondent company against the erstwhile owner either by way of filing a suit or any other proceedings before the competent Court to recover the amount due and payable by the erstwhile owner. It is also not in dispute that the property in question came to be sold in favour of the petitioner by registered Sale Deed dated 28th June 2004. Thus, the petitioner became the absolute owner of the property in question only on and after 28th June 2004. Therefore knowledge of liability by the petitioner would arise only after 28th June 2004. The contention, therefore, on behalf of the respondent that they were aware of the dues in the year 2003 and that they will be liable to pay the said amount from 2003 cannot be accepted. Even if the communication at Page 45 is considered which is dated 2nd December 2003, even on that day also the aforesaid dues had become time barred. Assuming that Condition No. 2-J is applicable and the purchaser is required to pay the dues of the erstwhile owner, in that case also the question, which is required to be considered, is whether the subsequent purchaser is liable to pay and/or make good the dues which are legally recoverable and/or the dues which have become time barred.

8. In the case of Raipur (Rakhial) Commercial Co-Op. Housing Society Ltd. and Anr. v. Ahmedabad Electricity Co. Ltd. [supra], the learned Single Judge of this Court in Para No. 11.1 and 12.2 has held that the Electricity Company cannot be permitted to recover the amount of arrears which have become time barred by exercising the powers which were not exercised at the relevant point of time. The relevant paragraphs read as under;

11.1. It is not in dispute that the properties in question were purchased by the petitioners pursuant to the winding=up proceedings held before this Court. Thereafter, as per the orders of this Court, the Official Liquidator had executed the sale-deeds in favour of the petitioners herein, and therefore, the petitioners are the auction-purchasers under the orders of this Court. Being the auction-purchasers, the petitioners cannot be called upon to clear the past arrears of the previous owners as a condition precedent for supplying power to their premises. Apart from the above, no suit/s were filed by the respondent-Company and no objections were raised before this Court when Advertisement was given by the Official Liquidator for public auction of the properties in question.

12.2. Now, assuming even if the respondent-Company has the power to recover the arrears of electricity charges of the previous owner from the new incumbent, it has to be concluded that by not recovering the amount at the relevant point of item, mistake/omission has occurred on the part of the respondent-Company in not taking necessary steps at the appropriate time. On account of the said act of omission/mistake on the part of the respondent, the petitioners cannot be held to be liable to pay the said amount of arrears. Hence, the power to recover the arrears of electricity charges has to be exercised against the original consumer and not on the new incumbent, i.e., a third party. It may not be out of place to state that when this Court had advertised for the auction of the properties in question prior to the winding-up proceedings, the respondent-Company could have objected to the said auction of the properties in view of the huge revenue dues of the erstwhile owners of the said properties. Having not done so, the respondent-Company, cannot take advantage of their mistake/omission at this stage.

12.3. Further, even if it is presumed that the respondent-Company had not initiated coercive measures for the benefit of the workers of the textile mills, the respondent-Company cannot thrust upon the burden of the arrears of electricity charges on the petitioners. The petitioners cannot be made victims of such huge recovery of arrears, on account of the liberal stand taken by the State Government in that regard. Apart from the above, the arrears in question are very old and by now they have become time-barred, and therefore, the petitioners cannot be permitted to recover the said amount of arrears by exercising powers which were not exercised at the relevant point of time.

9. The learned Advocate appearing on behalf of the respondent has tried to distinguish the aforesaid judgment in the case of Raipur (Rakhial) Commercial Co-Op. Housing Society Ltd. and Anr. v. Ahmedabad Electricity Co. Ltd. [supra] by submitting that in that case the dispute was between the Ahmedabad Electricity Company, a licensee and there was no such condition like Condition No. 2-J with respect to Ahmedabad Electricity Company. The contention on behalf of the respondent cannot be accepted, as the learned Single Judge has clearly observed in the said Judgment that assuming that such a condition to recover the dues of the erstwhile owner from the subsequent purchaser is there, in that case also, the Electricity Company cannot be permitted to recover the amount which has become time-barred.

10. It is the submission on behalf of the respondent that so far as electricity

charges are concerned, even if it has become time-barred the same is recoverable by the Electricity Company at any time and the same can be considered at the time of consideration of the application for reconnection and/or fresh connection with regard to the property in question. It is required to be noted that for the purpose of recovery of any dues and/or charges towards supply of electricity, the Electricity Company is required to file Civil Suit within the time prescribed under the Limitation Act. It is also required to be noted that the subsequent purchaser is called upon to make payment of dues of the erstwhile owner and therefore the subsequent purchaser will step in the shoe of the erstwhile owner. If the Electricity Company cannot recover the dues against the erstwhile owner, how they can be permitted to recover the said dues from the subsequent purchaser. Even if Condition No. 2-J is held to be applicable and the dues of the erstwhile owner can be recovered from the subsequent purchaser, in that case also it cannot be said that any dues can be recovered from the subsequent purchaser. The dues which is recoverable and only the legal dues which is capable of being recovered only can be recovered from the subsequent purchaser. The dues which have become time barred cannot be said to be legally recoverable and therefore the respondent company cannot be permitted to recover the dues which have become time barred from the subsequent purchaser under the guise of Condition No. 2-J. As stated above, the electricity connection was permanently disconnected on 1.6.1977 and therefore the dues must be prior to May 1997 which are sought to be recovered by the respondent Electricity Company in the year 2004/2005. In view of the above, the insistence on the part of the respondent Company to pay the dues of the erstwhile owner by the subsequent purchaser, i.e., the petitioners as a condition precedent either to have reconnection and/or fresh connection cannot be sustained and therefore it is held that the respondent Company cannot take shelter of the provisions of Condition No.2-J of the Conditions of Supply and miscellaneous charges in order to transfer the burden of arrears of the previous owner, i.e., arrears which have become time-barred on the new owners. As the petitioners are to succeed on this ground alone, and considering Condition No.2-J of the Conditions of Supply and miscellaneous charges is applicable, for the reasons stated hereinabove, the respondent cannot be permitted to recover the dues of the erstwhile owner from the subsequent purchaser, i.e. The petitioners herein as the dues have become time-barred, and therefore all the other questions with regard to the consequences of the new Electricity Act of 2003 and new Electricity Supply Code and/or whether in view of the G.E.B., not being in existence and other new companies have come into existence, whether Condition No. 2(J) would be applicable to them or not, and other questions which are argued are kept open and this Court is not dealing with the same on merits.

11. For the reasons stated above, the petition succeeds and the respondent Company is directed to grant power of supply to the premises of the petitioners without insisting upon payment of arrears of electricity dues in respect of the power supply owed by previous owners, i.e., GSTC/Kanti Cotton Mills, subject to

fulfilling all other conditions and requirements. On completion of all other formalities and fulfilling the requirements, the respondent Company is directed to grant electricity connection to the petitioners in their premises in question as early as possible. Rule is made absolute to the aforesaid extent with no order as to costs.