

(1992) 01 RAJ CK 0053

In the Rajasthan High Court

Case No : Civil Writ Petition No. 3148 of 1991

Mewar Marble Industries Pvt. Ltd.

APPELLANT

Vs

Rajasthan State Electricity Board and Others

RESPONDENT

Date of Decision : 06-01-1992

Acts Referred:

Cattle Trespass Act, 1871 — Section 20
Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 23
Criminal Procedure Code, 1973 (CrPC) — Section 2, 320
Electricity Act, 1910 — Section 29, 39, 40, 41, 42
Penal Code, 1860 (IPC) — Section 379

Citation : (1992) WLN 309

Hon'ble Judges : Navin Chandra Sharma, J

Bench : Single Bench

Judgement

Navin Chandra Sharma, J.—Mewar Marble Industries Pvt. Ltd., a private limited Company, incorporated under the provisions of the Companies Act, 1956 and having its registered office at E-27, Ambaji Industrial Area, Post Office Abu Road (District Sirohi), is carrying on business of manufacturing mirror-polished marble tiles since the year 1988. It is a Consumer of HT electricity supply from the supplier Rajasthan State Electricity Board (for short, "the Board") since 14th April, 1989 under a sanctioned contract demand of 300 KVA with a sanctioned connected load of 537.5 BHP. The petitioner company provided "Consumer's substation or an enclosed Switch Station" for HT Consumers for the purpose of housing the Board's Terminal High tension Switch gear and equipment which included the metering facilities, apparatus and measuring devices as required by the Board.

2. In this lengthy writ petition running in 51 pages, the petitioner prays, that:

(a) Report dated 15.2.91 (Ann. I), Order of the Chairman of the Board dated 21.2.91 (Ann.4), meter test record dated 23.2.91 (Ann. 12) and an unaverred and unproduced Annexure-13 be declared void and unenforceable against the

petitioner-Company and the demand of Rs. 4,50,000/- under order dated 15.2.91 be quashed;

(b) The Board may be restrained from disconnecting any power supply to the petitioner-Company on account of non-payment of the instalments in pursuance of the order of the Chairman of the Board dated 21.2.91 (Ann. 4); and

(c) The Board be directed to refund a sum of Rs. 1.60 lacs to the petitioner-Company with interest of 18% per annum from the date of payment till realization.

3. What after all these three documents Annexures-1, and 12 are? The Executive Engineer (MT), RSEB, Jodhpur, the Executive Engineer (O & M) RSEB, Sirohi, the Asstt. Engineer (ST), Sirohi and the Asstt. Engineer (O & M), Abu Road made a joint routine checking of JDC HT 115 at the industry precincts of the petitioner-Company on 15th February, 1991 and made a report Ann. I. It was inter-alia reported in the joint inspection report that:

During inspection following act of theft was noticed : "the sealing wire of meter panel is found rejoined i.e. tampering of sealing system where Trivector meter No. 8850/8/80 IMP Make meter sealing wire having sealed by lead seal No. P. 4683.

The above facts indicate that you are guilty of theft. The amount of compensation payable by Consumer to the Board under the relevant provisions of General Conditions of Supply has been provisionally assessed at Rs. 8,93,520/-.

.....

Consumer has agreed for compounding his theft case. Compounding amount Rs. 300 ? 1500 = Rs. 4,50,000/- (four lakhs fifty thousands only). Meter room is sealed by seal No. C 11489 punched by plies No. 308 of X En (MT), Jodhpur.

4. Annexure-4 is an application made by the Director of the petitioner-Company to the Chairman of the Board stating that "during the checking of meter by RSEB officers on dated 15.2.91, we have been agreed for compounding as per their report (copy enclosed) amounting to Rs. 4.50 lacs. Presently we are unable to deposit the full amount. Therefore we request your good self to grant us twenty instalments for depositing the above amount. Moreover we may please be allowed for re-connection of power after depositing the first instalment. We shall also be paying the monthly energy charges along with the instalment." Upon this application is the order dated 21.2.91 passed by the Chairman of the Board addressed to the AEN to the effect that "The party has been allowed to deposit Rs. 1 lakh (one lakh) in five days. Remaining amount may be recovered in monthly instalment of Rs. 30,000/- (Thirty thousands)."

5. Annexure-12 is the meter test record card issued on 23.2.91 showing percentage of true revolutions errors in KWH revolution, KV Arh revolution and KVAh revolution and percentage of error of demand with KVAh.

6. According to the petitioner-Company, authorised officers of the Board have been frequently and at their convenience had been regularly visiting the premises. Last visit before 13th, 14th and 15th Feb., 1991 to the petitioner-Company's premises was made on 30th Jan., '91 and nothing wrong/defects/seal breaking etc., was pointed out to the petitioner-Company. The Assistant Engineer, came to the factory of the petitioner on 13th Feb., 1991 for checking of the meters and on his request the petitioner-Company handed over the key of the room to him who kept it and he inspected the room on 13th and 14th Feb., 1991. He did not point out any irregularity in any manner on these dates. On 15th Feb., 1991, joint inspection was made and report Ann. I was prepared.

7. The petitioner-Company proceeds on to allege that:

After making the aforesaid report, the Director of the petitioner-Company Shri S.B. Mewar was called to sign the joint inspection report for checking. But he refused to sign it. Thereupon the officers of the Board threatened S.B. Mewar to admit the theft otherwise they would get him arrested. They also asked the petitioner in the circumstances could not understand as to what was happening, though he pointed out to the officers of the RSEB that the petitioner-Company had committed no theft, there was nothing wrong in the metering equipment, he also pointed out that for the last two days, the key of the meter room was with the Asstt. Engineer, but no body paid any attention and they all threatened him of dire consequences. They pointed out that on the refusal to compound a case of theft they had already lodged a case against a party and the consumer had been arrested by the Police. Finding in such situation and concerned by the officers of the Board, the Director of the Company gave a letter in writing to the Assistant Engineer as dictated by him to compound the case for a sum of Rs. 4,50,000/-. A true and correct copy of the letter handed over to the Assistant Engineer dated 15.2.91 is enclosed herewith and marked as Ann. 2. The Assistant Engineer also gave a letter addressed to the Chief Engineer, RSEB, Jaipur for compounding the case

...The Chairman asked him to give a letter in writing so that appropriate order for compounding of the case may be passed. The Director of the petitioner-Company, therefore, on 21.2.91 addressed a letter to the Chairman, RSEB for making suitable instalment for the payment of compounding amount of Rs. 5,50,000/- He had to submit this letter as the Chairman did not hear any complaint against his officers. However, the Chairman was pleased to pass the following order:

...The Chairman also assured that on payment of Rs. 1 lac, re-connection of electricity to the petitioner-Company will be done. The petitioner-Company has deposited a sum of Rs. 1 lac vide receipt No. 70 dated 22.2.91 and reconnection has been done.

8. The petitioner-Company in its writ petition and its-learned Counsel, during the course of his submissions, have taken me through the definition of "meter" and

has explained the meaning of "R.S.E.B."s enclosed Switch Station." He has also explained the idea behind sealing of meters and cut outs, inspection of meter and the provisions relating to the penalty against breaking of any seal in contravention of the relevant rule and on the basis of as many as thirty-nine grounds specified in para 29(i) to (XXXIX) has claimed the reliefs mentioned above.

9. In their counter the respondents have pleaded that the petitioner-Company constructed a structure for housing the switch-gear and the metering equipment in the premises of the factory itself and the room. Inside the room an iron panel is installed in which all the metering equipments, are fitted. This panel has two doors having a slit in the upper portion thereof. The trivector meter is so fitted in the panel that all the readings can be taken through the slit without opening the doors of the panel. The doors of the panel are provided with two seals after being closed-one at the upper end of the door and the other at the lower end and a wire is passed through the two seals and the whole equipment inside the panel is thus sealed. The opening of the door panel or breaking of the seal is not necessary for taking the monthly reading of the meters and the MDI. The seals are broken only for the purpose of testing the meters and other equipment which takes place once in six months and the doors of the panel are again sealed after such testing.

10. It is emphatically denied that the Assistant Engineer or any other officer of the Board went to the factory premises on 13th or 14th February, 1991 and kept any key. It was on 15th Feb., 1991 that the Assistant Engineer along with the Executive Engineer and other officers of the Board went to the factory premises for the routine six-monthly inspection and checking of the metering equipment etc. On that date, the officers of the Board detected the ingenuous method of the petitioner-Company of cutting the wire passage through the seals and re-joining them in a fine manner. When the officers found that the sealing system had been interfered with, they did not break open the seals of the panel containing metering equipment for the obvious reasons that in their opinion a case of theft was detected and they had to report the matter to the police. For that purpose, it was necessary to keep the things as they were. When the theft was detected by the officers of the Board, they made a remark as contained in items Nos. 3 and 4 of Entry 15 of Annexure/I. The representatives of the Board called the Director of the Company. After looking into the remarks made by the officer at items Nos. 3 and 4 of Entry 15 of Ann. I and on seeing the wire cut and rejoined, his conscious pricked and he thought it better and so voluntarily offered to compound the matter. No threat was administered to the Director, nor it was suggested to him that if he did not compound the matter, he may be arrested by the police. The Director of the petitioner-Company, after applying his mind coolly, patiently and thinking over the matter for quite sometime himself offered to compound the matter, and he, therefore, put his signatures on the agreement to compound the matter at the bottom of Annexure-R/I. It is denied that any threat was given or undue influence exerted on the Director to compound the matter.

On the Director's willingness to voluntarily compound the matter, the Assistant Engineer gave a letter addressed to the Chief Engineer for compounding the case to the Director himself. The Director took the letter Ann. R/4 and gave it to the Chief Engineer. It is pleaded that the petitioner-Company has compounded the matter with open eyes voluntarily and reaped the benefit of such compounding by getting instalments; by getting supply reconnected; by escaping the consequences of police investigation and prosecution.

11. In para 24(19) of their reply, the respondents state:

It may be submitted here that all these things lose charm and effect in cases of theft specially when the petitioner admits the guilt and compounds the offence and performs a part of his agreement while the respondents performed their whole part of the agreement.

12. Case of the petitioner-Company set forth in the writ petition and that of the respondents as pleaded in their counter will need determination of following facts:-

(1) Whether the key of the room containing the metering equipment had been given by the petitioner to the Assistant Engineer of the Board and the key remained with the latter on 13th and 14th Feb., 1991.

(2) Whether the officials of the RSEB inadvertently omitted to score out items 1 and 2 under item No. 15 of the joint inspection report Annexure-I.

(3) Whether the Director of the petitioner-Company agreed to pay or agreed to compound the case for a sum of Rs. 4,50,000/- under coercion and under undue influence as pleaded in para 6 of the writ petition?

13. It was not disputed by the learned Counsel for the petitioner-Company and conceded by him during the course of arguments that the above three issues will need determination at the hands of this Court while deciding this writ petition and all of them involve disputed questions of fact. It is obvious, therefore, that these disputed questions of fact materially in issue in this writ petition cannot be decided by this Court in exercise of its jurisdiction under Article 226 of the Constitution. The determination of these questions necessitates recording of evidence and this Court, in exercise of its extraordinary writ jurisdiction, is hardly a forum for this purpose.

14. Theft of energy" is defined in Section 39 of Indian Electricity Act, 1910 as follows:

Theft of energy" - Whoever dishonestly abstracts, consumes or uses any energy shall be deemed to have committed theft within the meaning of the Indian Penal Code; and the existence of artificial means for such abstraction shall be prima facie evidence of such dishonest abstraction.

15. Avtar Singh Vs. State of Punjab, may be extracted. Sarkar, J., speaking for the Court, observed:

It seems to us beyond question that Section 39 did not extend Section 378 in the sense of amending it or in any way altering the language used in it. Section 378, read by itself even after the enactment of Section 39, would not include a theft of electricity for electricity is not considered to be movable property. The only way in which it can be said that Section 39 extended Section 378 is by stating that it made something which was not a theft u/s 378, a theft within the meaning of that section. It follows that if Section 39 did so, it created the offence itself and se. 378 did not do so. In this view of the matter we do not think it possible to say that the thing so made a theft and an offence, became one by virtue of Section 378.

To put it shortly, dishonest abstraction of electricity mentioned in Section 39 cannot be an offence under the Code for under it alone it is not an offence; the dishonest abstraction is by Section 39 made a theft within the meaning of the Code, that is, an offence of the variety described in the Code as theft. As the offence is created by raising a fiction, the section which raises the fiction, namely Section 39 of the Act, must be said to create the offence since the abstraction is by Section 39 to be deemed to be an offence under the Code, the fiction must be followed to the end and the offence so created would entail the punishment mentioned in the Code for that offence. The punishment is not under the Code itself for under it abstraction of energy is not offence at all.

We may now refer to certain general considerations also leading to the view which we have taken. First, we find that the heading which governs Sections 39 to 50 of the Act is "Criminal offence and Procedure". Obviously, therefore, the legislature thought that Section 39 created an offence. We have also said that Sections 48 and 49 indicates that in the legislature's contemplation Section 39 provided for a punishment. That section must, therefore, also have been intended to create an offence to which the punishment was to attach. The word "offence" is not defined in the Act. Since, for the reasons, earlier mentioned, in the legislature's view Section 39 created an offence, it has to be held that was one of the offences to which Section 50 was intended to apply. Lastly, it seems to us that the object of Section 50 is to prevent prosecution for offences against the Act being instituted by anyone who chooses to do so because the offences can be proved by men possessing general qualifications. That is why it is left only to the authorities concerned with the offence and the persons aggrieved by it to initiate the prosecution. There is no dispute that Section 50 would apply to the offences mentioned in Sections 40 to 47. Now it seems to us that if we are right in our view about the object of Section 50, in principle it would be impossible to make any distinction between Section 39 and any of the sections from Section 40 to Section 49.... For all these reasons we think that the present is a case of an offence against the Act and the prosecution in respect of that offence would be incompetent unless it was instituted at the instance of a person named in Section 50.

16. By virtue of Section 379, the offence of theft is punishable with imprisonment

of either description for a term which may extend to three years, or with fine, or with both. That would also be the punishment for the offence of dishonest abstraction, consumption or uses of energy u/s 39 of the Act.

17. The respondents have stated in para 29 of their reply that for the benefit of the consumers the Board has introduced the scheme for settlement of cases of theft of energy in lieu of cash compensation and according to this scheme such cases could be compounded for the amount mentioned for the various categories of consumers. So far as high-tension consumers are concerned, the Board has fixed Rs. 1,500/- per KVA of the contract demand. It is for the consumers to take the benefit of this scheme. Since the petitioner volunteered to take the benefit of the scheme and compounded the matter, the charges are according to the decision of the Board dated 24.7.90.

18. Section 320(9) of the Code of Criminal Procedure provides that "no offence shall be compounded except as provided by this section." The expression "offence" is defined in Section 2(n) of the Code as meaning any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made u/s 20 of the Cattle Trespass Act, 1971. Firstly, the offence u/s 39 of the Indian Electricity Act, 1910 is not made compoundable either by the Act or the Code. Secondly, the offence of theft u/s 379 IPC, where the value of property stolen does not exceed two hundred and fifty rupees may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the owner of the property stolen (see. Section 320(2) Cr.P.C.) Clearly, therefore, the offence u/s 39 of the Indian Electricity Act, 1910 was not a compoundable offence.

19. Let us, therefore, immediately come to the question as to what was compounded between the petitioner-Company and the Board. The Joint Inspection Report Annex. I clearly mentioned:

During inspection following act of theft was noticed. The sealing wire of meter pane is found rejoined i.e. tampering of sealing system wire Trivecto-meter No. 8850/8/88 1 MP Make meter sealing wire having sealed by lead seal No. P 46843. The above facts indicate that consumer are guilty of theft. The amount of compensation payable by consumer to the Board under the relevant provision of General Condition of supply has been provisionally assessed at Rs. 8,93,580/-.

20. Then there was moved an application dated 15.2.91 by the petitioner-Company addressed to the Assistant Engineer, RSEB, Abu Road (Annex. 2), which when translated in English reads as under:

Subject-Regarding detection of theft of electric energy at our place.

Sir,

It is hereby submitted that on today the 15th February, 1991, the officials of Meter Wing and O & M Wing had detected theft of electric energy at my factory M/s. Mewar Marble Industries (Pvt. Ltd. I do not want lodging of an FIR in that

regard in police and I am ready to deposit in accordance with rules by instalments the amount of Rs. 4,50,000/- pointed out as compensation or damages in lieu of theft of electric energy. The electric connection shall remain disconnected till the amount of first instalment was not deposited as per rules. If I do not deposit the instalment, the FIR can be lodged in the police.

21. Upon this application, the checking officers made the endorsement on Annex. I to the effect:

Consumer has agreed for compounding his theft case-Compounding amount Rs. 300 ? 1500 = Rs. 4,50,000/- (four lakhs fifty thousand only).

22. Information in that regard was sent to the Chief Engineer (Commercial) RSEB, Jaipur by the Assistant Engineer (O & M). The petitioner-Company deposited Rs. One lac on 22.2.91, Rs. 30,000/- on 20.4.91 and Rs. 30,000/- on 14.5.91 under consumer's cash receipts Annexures-8, 9 and 10.

23. Surprisingly, there is one photostat copy of a letter dated 15.2.91 (Annexure-R/2) which is purported to have been sent by Shri Manohar Singh, Assistant Engineer (O & M), RSEB, Abu Road which inter alia recites that:

The amount of compensation payable by you to the Board under the relevant provision of General Conditions of supply has been provisionally assessed at Rs. 8,93,520/- (Rupees Bight lac ninety three thousand five. hundred and twenty only).

Final assessment of the loss so caused by you to the Board shall be made by Chief Engineer, Commercial RSEB, Jaipur on 4.3.91.

You are hereby directed:

(a) to pay the Board at least 50% of the amount so provisionally assessed if you desire the continuity of supply in the office of the Assistant Engineer (O & Hi RSEB, Abu Road.

(b) to submit to the officer indicated in Para 4 above on or before the date so fixed any representation in the matter or against the said provisional assessment.

24. The surprising aspect is that this letter Annexure-R/2 dated 15.2.91 bears the endorsement of its receipt by the petitioner's Company of a date one day prior to the date of the letter itself (i.e. the date of receipt of the letter is given as 14.2.91 at 6.20 PM). As against this, the receipt, of Ann. R-I (corresponding to Annexure I) is 15.2.91 at 7.15 PM. How Annexure-R/2 could be received even before the joint inspection by the officials of RSEB is bit confusing. The Chairman of the Board, upon an application Annexure R-5 made by the petitioner Company to him to the effect that the Company had agreed for compounding as per report of RSEB officers for an amount of Rs. 4.50 lacs, passed the order:

The party may be allowed to deposit Rs. 1 lakh (one lakh) within five days. Remaining amount maybe recovered in monthly instalments of Rs. 30,000/-

(Thirty thousand).

25. The letter dated 15.2.91 (Ann. R-4) sent by Manohar Singh, Asstt. Engineer (O & M) to the Chief Engineer (Commercial) RSEB, Jaipur does not mention anything about provisional assessment of Rs. 8,93,520/-, or of the date being fixed at the level of Chief Engineer for final assessment of the loss as 4.3.91 and the petitioner-Company having been asked to make any representation against provisional assessment before the Chief Engineer on or before the date fixed. On the contrary Annexure R4 mentioned in it the amount of compounding for theft case as $300 \times 1500 = \text{Rs. } 4,50,000/-$ and what were enclosed to the Chief Engineer were (1) site checking report No. 12/174 dated 15.2.91 and (2) undertaking of consumer photostat copy (i.e. Annexure R-I and R-III) and not Annexure R-2. It is thus clear that Annexure R-II has a suspicious origin.

26. Stifling a prosecution is illegal even though there is no injury to the public. As has been said "you shall not make trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself." It is contrary to public policy to compound a non-compoundable criminal case. Abstention from criminal prosecution should not be made a matter of bargain. The consideration or object of such an agreement is opposed to public policy and hence unlawful. Every agreement of which the object or consideration is unlawful is void.

27. The respondents do not state that they were despite composition contemplating to prosecute the petitioner-Company for offence u/s 39 of the Act. On the other hand, they have said in their reply:

It is submitted that an agreement reached between the parties with open eyes and which has been acted upon cannot be avoided or declare void.... The respondents on their part have fully acted upon the agreement and immediately restored the electric connection to the petitioner factory and did not hand over the matter to the police for investigation and further action.

The petitioner having taken the advantage of the settlement having got the connection restored and having escaped the consequences of police investigation and probably prosecution and suitable sentence, cannot turn round and say that the same was obtained under coercion.

28. What better and what more can be an admission of the fact that the consideration or object of the compounding agreement was abstention by the Board from criminally prosecuting the petitioner-Company from offence u/s 39 of the Act and that the Board has converted the crime into a source of profit and benefit to itself. This consideration or object is clearly opposed to public policy and hence the compounding agreement is unlawful and void u/s 23 of the Contract Act. It is unenforceable as against the petitioner-Company.

29. The remedy provided to the Board under Condition No. 29 of the "General Conditions of Supply & Scale of Miscellaneous charges relating to the Supply of

Electricity (1964) by the RSEB" is different than what has been done by the Board in the instant case. The Board's remedy u/s 29(c) was to disconnect the supply without notice. The Superintending Engineer of the Board had to arrive at a satisfaction that the consumer had dishonestly abstracted, consumer used or wasted electrical energy in any manner. The Superintending Engineer had to obtain details and estimate the value of the electrical energy thus abstracted, consumed, used or wasted for a back period not less than 3 months or the actual period in excess of 3 months, If it could be established. He had then to collect from the consumer that amount by including in the next month's bill or otherwise. An appeal against the order of the Superintending Engineer calling upon the consumer to pay compensation lay to the Chief Engineer of the Board within one month of communication of such order to the consumer or such further time as the Chief Engineer may allow. Nothing of that sort was done in the instant case under Condition 29(c)(ii) of the General Conditions of Supply. Superintending Engineer nowhere came into picture. Everything was done and completed by the two Executive Engineers and two Assistant Engineer and what they did was compounding the theft case. The petitioner-Company vide Annexure-2 applied for was for compounding the offence. The Chairman of the Board put his seal over it by his order dated 21.2.91 on Annexure-4. Fabrication of Annexure R-2 is so crystal clear when we are faced with Annexure R-2 and also the application presented by the counsel for the respondents in this Court on 24.9.91 along with another carbon copy of Manohar Singh AEN's letter dated 15.2.91 bearing the receipt endorsement of the petitioner-Company of that very date as against the receipt endorsement of the petitioner company of a day earlier i.e. 14.2.91 on Ann. R-2. That only shows how for Manohar Singh AEN could go in the Company of the petitioner-Company.

30. The petitioner-Company has also prayed for the refund of the amount of Rs. 1.60 lacs which has been deposited by him along with interest at 18% per annum. When facts which go to make a contract illegal come to the notice of the Court, the doctrine of *pari delicto* will be given effect to and the Court will refuse its aid to the party who has participated in the fraud and asked for relief. Once the Court finds two parties are in *pari delicto* in a civil sense, no effect will be given to the claims of either party because the Court will refuse to recognise the transactions between them in toto. Where a contract, as in the instant case, is opposed to public policy the petitioner-Company is not entitled to claim a refund of the part of consideration money that was paid by him with full knowledge of the illegality of the contract.

31. The result of the above discussion is that the writ petition is partly allowed, the compounding of the offence u/s 39 of the Indian Electricity Act, 1910 made by relevant parts of Annexures-1, 2 and 4 by the parties is declared to be unlawful and void u/s 23 of the Contract Act and the respondents are hereby restrained from realising any further amount from the petitioner-Company on the basis of the compounding agreement arrived at between the parties as per the relevant parts of Annexure-1, 2 and 4. Grant of any other relief to the petitioner-

Company is uncalled for. That ends the dismal tale. Costs would be easy.