

(1966) 10 MAD CK 0018
In the Madras High Court

M.G. Natesa Chettiar

APPELLANT

Vs

The Madras State Electricity Board

RESPONDENT

Date of Decision : 14-10-1966

Acts Referred:

Citation : (1968) ILR (Mad) 553 : (1969) 1 MLJ 69

Hon'ble Judges : M. Natesan, J

Bench : Division Bench

Judgement

M. Natesan, J.—The defendant, a consumer of electricity under the Madras State Electricity Board, has filed this second appeal, challenging, inter alia, the claim for the recovery of the annual minimum amount guaranteed under an agreement for supply of electricity. The agreement was entered into on 2nd February, 1954, by the electricity department of the State of Madras and by and under the agreement the defendants had agreed to take supply of electric energy for a ten horse-power motor in his field bearing S. No. 726 in Naduhalli village, Salem District. The agreement provided that the defendant was liable to pay to the Government a minimum charge of rupees three hundred and fifty per annum for a period often years from 18th July, 1954, that is from the date on which the supply was available to the defendant at his end, whether electric energy was consumed or not. There was provision in the agreement for disconnecting supply after seven days notice for non-payment of bills within thirty days. The defendant failed to pay the current consumption charges for the month of June, 1957, and after due notice to the defendant, the supply was disconnected on 31st August, 1957. The suit has been filed for recovery of arrears to the tune of Rs. 1,150-53 for the period 31st August, 1957, to 17th July, 1959. It may be stated that on 1st July, 1957, the rights of the State Electricity Department vested in the Madras State Electricity Board, the plaintiff in the suit, and the suit has been instituted by the Board for the recovery of the arrears.

2. Various defences were raised, but only two of them have been persisted in :
(i) whether the plaint has been properly signed and verified on behalf of the

plaintiff Board, and (ii) whether the provision for the payment of the sum of rupees three hundred and fifty, the minimum payable under the agreement by the defendant, whether he consumed electricity or not, was not a penalty clause and so unenforceable.

3. A further point was raised that whereas the agreement was for the supply for a ten horse-power motor, actually the supply was only for a five horse-power motor. Therefore, it was argued that the plaintiff had failed to act in terms of the agreement. This last plea is wholly devoid of substance. P.W. 2, the supervisor, has deposed that while the department was in a position to give supply for ten horse-power motor, the defendant himself represented that he had installed only a five horse-power motor and wanted electricity to be supplied accordingly, though the sanctioned capacity was ten horse-power.

4. To take-up the first point; the plaint has been signed and verified by the Superintending Engineer, Mettur Electricity System. The plaintiff Board came into existence on the 1st of July, 1957, under the Electricity (Supply) Act LIV of 1948. u/s 12 of the Act the Board is a body corporate by name having perpetual succession and a common seal. The relevant provision applicable in the matter of signing and verifying pleadings is Order 29, Rule 1 of the Code of Civil Procedure, which provides that any pleading in suits by or against a Corporation may be signed and verified on behalf of the Corporation by the secretary or by any director or other principal officer of the Corporation, who is able to depose to the facts of the case. The Courts below have elaborately examined the position and pointed out that the Superintending Engineer is a principal officer of the Corporation who could depose to the facts of the case. Under the administrative rules governing the Corporation the administration of an electricity system is in charge of the Superintending Engineer and Rule 122 states that the Superintending Engineers of the power systems are empowered to accept an agreement for low-tension supply of power. In the instant case the Superintending Engineer alone has signed that suit agreement on behalf of the plaintiff Board. He is certainly a principal officer of the Corporation, and Order 29, Rule 1, Civil Procedure Code, does speak of the principal officer of the Corporation.

5. The Board further relied on its proceeding, dated 6th July, 1957, which runs thus:

The Madras State Electricity Board hereby directs that the powers delegated by the Government of Madras to the Chief Engineer (Electricity) and his subordinates prior to 1st July, 1957 be continued to be vested in them till the necessary regulations in this regard are framed by the Board u/s 79 of the Electricity (Supply) Act, 1948.

On the strength of this proceeding, the Board rested upon G.O.Ms. No. 336, Law, dated 10th August, 1956, whereby the Superintending Engineers to Government are authorised to sign and verify plaints and written statements on behalf of the

Government. Section 79 of the Electricity (Supply) Act, provides for the Board making regulations not inconsistent with the Act, and the Rules, made thereunder, to provide inter alia in regard to the duties of officers and servants of the Board and their salaries, allowances and other conditions of service, and in regard to matters arising out of the Board's functions under the Act for which it is necessary or expedient to make regulations. Learned Counsel for the Board contends that the proceeding, dated 6th July, 1957, should be considered to be regulation, and when so considered, the Superintending Engineer by the earlier Government Order gets authority to sign and verify complaints on behalf of the Board. Learned Counsel for the appellant submits that the proceeding could not be deemed to be a regulation as it contemplates the framing of regulations in future. Now no procedure is prescribed under the Act and no formality provided as to how a regulation is to be framed. The only proviso u/s 79 requires that certain regulation could be made only with the previous approval of the State Government and certain other regulations shall be made with the concurrence of the Central Electricity Authority constituted under the Act. It is not contended that the proceeding, in question, comes under any of the regulations contemplated in the proviso. Section 13 of the Act may be referred to, in this connection. It provides that all orders and decision of the Board shall be authenticated by the signature of the Chairman or any other member authorised by the Board in this behalf, and all other instruments issued by the Board shall be authenticated by the signature of such member or officer of the Board as may in like manner be authorised in this behalf. If the Board could frame a regulation, I do not see why, in the circumstances, the proceeding of the Board, dated 6th July, 1957, cannot be considered a regulation as contemplated u/s 79. May be the regulation is transitory in character, and contemplates detailed regulations in future. But there is nothing wrong in having a regulation for the time being tentatively adopting pre-existing rules to avoid any hiatus. It is not shown to be ultra vires of the Board. The point that the Superintending Engineer was not competent to sign and verify the complaint, therefore, fails.

6. Another point was raised before me, and this for the first time in second appeal. The objection is to the frame of the cause-title, which runs, The Madras State Electricity Board by the Superintending Engineer, Mettur Electricity System. Learned Counsel for the appellant submitted that the plaintiff on the aforesaid description is the Superintending Engineer of the System, and not the Board. The argument runs : admittedly the Superintending Engineer has not been authorised to institute suits in his own name : at the most, he can claim authority to sign and verify pleadings on behalf of the Corporation : but the suit has been instituted by the Superintending Engineer no doubt on behalf of the Corporation. It has, therefore, to fail because he has no authority to institute the suit by himself. No ground in this form has been taken even in the memorandum of grounds of appeal to this Court. Advantage is obviously sought to be taken of what may be considered to be misdescription. It has never been contended that the plaintiff was not the Board. Proceedings have gone on title now on the basis

that the Electricity Board is the plaintiff not only in substance, but also de facto. If the point had been taken at the earliest opportunity all that might have been necessary would be to delete part of the description in the cause-title. Obviously as the Superintending Engineer was signing and verifying the plaint, this was brought to the forefront by the description in the cause-title. Very likely the effect of using the preposition by which in the context means through the instrumentality o/was not considered. It makes the cause-title read as if the plaintiff is the Superintending Engineer, suing no doubt on behalf of the Board, while, in fact, what is meant is that the Board is suing, the Superintending Engineer signing and verifying the plaint on behalf of the Board. The intention being clear that it was the Board that has been suing, the defect is purely one of form and it cannot be made a ground for setting aside the decree and that in second appeal.

7. To come to the substantial point the agreement provides that the consumer shall pay to the Government for electric energy supplied at the rates given in the schedule in accordance with the terms of the agreement and that the minimum rates specified should be paid irrespective of whether energy to that extent has been consumed or not. The monthly minimum whether electricity is consumed or not, is fixed at Rs. 29-2-8. The argument of learned Counsel is that the agreement must be read as a contract for supply of electric energy at specified rates and that the minimum charge is a penalty for breach of the agreement to consume energy. It is, therefore, argued that the plaintiff can claim only compensation for breach u/s 73 of the Indian Contract Act, that Section 74 of the Contract Act would apply and that the minimum charge fixed is only the maximum compensation that the plaintiff would be entitled to : in law the plaintiff cannot claim anything more than reasonable compensation for the breach : and he must establish the loss or damage consequential on the non-consumption of electricity by the defendant and claim only that amount.

8. Reference was made to the decision of the Supreme Court in *Fateh Chand Vs. Balkishan Das*, . for the position that the measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 of the Contract Act, reasonable compensation not exceeding the penalty stipulated for. It was submitted that in assessing the damages the Court can, subject to the limit of the penalty stipulated, award only such compensation as it deems reasonable having regard to all the circumstances of the case. It is contended that the plaintiff has failed to prove specifically the loss suffered by it in consequence of the breach of the contract committed by the defendant. Learned Counsel would contend that the plaintiff has not made out that by the failure of the defendant to consume energy, energy was left in surplus. This argument, in my view, fails to take note of the true character of the relevant terms. The defendant would read the provision for minimum charge as the equivalent of the price paid for the guaranteed consumption. But, as pointed out by P.W. 3, the special guarantee is the minimum return anticipated on the capital invested by the Board irrespective of whether the consumer consumed energy or not. Whether the consumer takes

energy or not, by reason of the covenant, the Board has to keep the supply ready at the defendant's end for being tapped by the defendant whenever he wanted. It is seen from the record that the scheme of supply was extended solely for supplying energy to the defendant at a total cost of Rs. 10,967.07, exclusive of establishment charges. A reference to Mead's Law relating to Electrical Energy in India and Burma, Sixth Edition, page 97, would show that the minimum charge has been customary and has long been in force. It is pointed out that it has a substantial foundation, namely, that every consumer's installation involves the licensee in a certain amount of capital expenditure in plant and mains on which he is entitled to a reasonable return.

9. Elaborate machinery is found in the Act and Rules for fixing the tariff. Section 23 (4) of Act IX of 1910 provides for certain factors to be taken into consideration. It cannot be, and it was not, contended that the term in the agreement itself is ultra vires of the Board. The argument has been that the minimum is the quantum of damages fixed in the agreement for not taking the guaranteed consumption, that it is a penal provision and that it is a case merely of breach of contract entitling the Board to claim only reasonable compensation in accordance with the provisions of Sections 73 and 74 of the Contract Act. The agreement, no doubt, is just a contract and is binding between the parties like any other contract subject to the provisions of the Electricity Act of 1910, and the Electricity (Supply) Act of 1948. True also, if there is breach by either party, there will be liability for damages. But the question is whether the provision for the minimum guarantee is just a stipulation by way of penalty or predetermined damages for breach on the part of the consumer or something else. In my view the minimum fixed is only consideration for keeping the energy available to the consumer at his end; it is not a penalty for not consuming a stated quantity of energy. I would view it as a concession shown up to the amount fixed, energy at the specified rates could be consumed free, consumption beyond only has to be paid for. In *The Land Elec. Supply Corporation v. Priddis* (1901) 18 T.L.R. 64 B, an installation was put in on the terms that the consumer should have the right to purchase the installation after five years, and during that period of five years the consumer should be liable to pay a minimum rent, whether the current was de facto used or not. The consumer had, until purchase, to pay quarterly to the supply company for the use of the installation 3/4 per Board of Trade Unit for every unit for electrical energy supplied to the premises and the minimum payment in any year had to be is. for each eight candle power lamp or its equivalent installed. In giving judgment the learned Chief Justice observed:

The minimum rent had no reference to the amount of current used, and it was therefore clear that the mere fact that the defendant had not taken any current or a small current did not affect the case.

Channell, J., concurring stated:

The meaning of the clause was that the minimum rent did not merely cover the actual but the right to use the current. The customer had to pay for the right to

use the current, although he did not in fact use it.

10. I respectfully adopt the approach of Channell, J., to the matter. Learned Counsel for the appellant contended that the case was one where the consumer had agreed to purchase the installation ultimately. The feature of the agreement in that case does not, in my view, affect the ratio of the decision.

11. In *Saila Bala Roy and on her death Malti Rose Vs. Chairman, Darjeeling Municipality*, Mitter, J., said:

A minimum charge is not really a charge which has for its basis the consumption of electric energy. It is really based on the principle that every consumer's installation involved the licence in a certain amount of capital expenditure in plant and mains on which he is to have a reasonable return. He gets a return when energy is actually consumed, in the shape of payments for the energy consumed. When no energy is consumed by the consumer or a very small amount is consumed in a long period, he is allowed to charge minimum charges by his licence, but these minimum charges are really interest on his capital outlay incurred for the particular consumer.

12. The legality of minimum charge is discussed in extenso in *Watkins Mayor and Co. Vs. Jullundur Electric Supply Co. Ltd.*, . The learned Judges observe:

The whole scheme of the Act seems to show that the provision made in any contract for a minimum charge is really to provide for a fair return on the outlay of the licensee, and it is for this reason that the law allows a contract of this kind to be entered into....

13. Learned Counsel for the appellant contends that the decision in *Watkins Mayor and Co. Vs. Jullundur Electric Supply Co. Ltd.*, , is based upon clause XI-A of the Schedule to the Electricity Act of 1910 and that this clause which was inserted in 1922 has been omitted by Act XXXII of 1959. Therefore, it is argued that the decision cannot be of any help now. In my view the decision does not rest wholly on the now deleted clause XI-A of the Schedule. The provisions in the Schedule to the Act, it is provided in the Act are deemed to be incorporated with and to form part of every licence granted under Part II of the Act (IX of 1910) save in so far as they are added to varied or excepted by the licence. Clause XI-A of the Schedule ran thus:

A licensee may charge a consumer a minimum charge for energy of such amount and determined in such manner as may be specified by his licence, and such minimum charge shall be payable notwithstanding that no energy has been used by the consumer during the period for which such minimum charge is made.

14. It no doubt expressly authorised the levy of minimum charge. But to start with, there is no provision in the relevant Acts prohibiting or precluding the insertion of a clause for payment of minimum charge in any contract between a licensee or the Board and the consumer. Only the term has to be in conformity with the provisions of the Act and the Rules made thereunder. If a statutory basis

for the term is required, Section 22 of Act IX of 1910 itself provides it. Section 22 makes it obligatory on the licensee to supply energy to every person in the area applying, subject to the following proviso.

Provided that no person shall be entitled to demand, to continue to receive from a licensee a supply of energy for any premises having a separate supply unless he has agreed with the licensee to pay him such minimum annual sum as will give him a reasonable return on the capital expenditure, and will cover other standing charges incurred by him in order to meet the possible maximum demand for these premises, the sum payable to be determined in case of difference or dispute by arbitration.

15. The provisions contained in the Schedule to Act IX of 1910, are only deemed (to be incorporated with and to form part of every licence granted under that part, save in so far as they are expressly added to, varied or excepted by the licensee. When the section itself enables the licensee to levy a minimum charge, clause XI-A inserted in the Schedule is only a provision *ex abundanti cantela* Watkins Mayor and Co. Vs. Jullundur Electric Supply Co. Ltd., and its deletion cannot take away the right of the licensee to levy a minimum charge granted under the section. For the Board reliance is placed also on Section 23 (3) of Act IX of 1910, which provides that in the absence of an agreement to the contrary, a licensee may charge for energy supplied by him to any consumer:

- (a) by the actual amount of energy so supplied for
- (b) by the electrical quantity contained in the supply, or
- (c) by such other method as may be approved by the State Government.

16. Learned Counsel for the Board relies on Clause (c) above set out and contends that in the present instance the agreement was entered into by the State Government itself originally. It is pointed out that the approval of the State Government to the method of charging found in the agreement, the subject of consideration in this case is manifest. It is stated that the rights of the State Government have since devolved on the Board and that, therefore, there is sufficient authority to levy the minimum charge claimed. This is an additional argument in support of the claim on the particular facts of the case.

17. Learned Counsel for the appellant argues that in view of Section 26 of the Electricity (Supply) Act (LIV of 1948), the Board cannot rely upon Sections 22 and 23 of Act IX of 1910. Section 26 of Act LIV of 1948 runs thus:

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 (IX of 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-section (2) and (3) of Section 21 and Section 22, Sub-section (2) of Section 22-A and Sections 23 and 27 of that

Act or in clauses I to V, clause VII and clauses IX or XII of the Schedule to that Act relating to the duties and obligations of a licensee shall apply to the Board.

18. While learned Counsel for the Board contends that only the provisions of the; aforesaid sections relating to the duties and obligations of a licensee are made not . applicable to the Board by the proviso, the appellant's Counsel would contend that as every right in the case of statutory body may also be looked upon as a duty or obligation such rights also cannot be relied upon. There is a limitation of the right conferred when the right is specified in a statute. In my view, this is not the way of looking at the particular provision of Section 26. At any rate a right conferred on a licensee to levy a minimum annual sum cannot be considered to be a duty or obligation of the licensee. In fact, u/s 22 of the Act, the duty or obligation to pay minimum annual sum is placed in the consumer. Now Section 70 of Act LIV of 1948 also provides by Sub-section (2) that:

Save as otherwise provided in this Act, the provisions of this Act, shall be in addition to, and not in derogation of, the Indian Electricity Act, 1910.

19. Section 49 of Act LIV of 1948, has also bearing on the subject now under consideration. It runs:

Subject to the provisions of this Act and of any regulations made in this behalf the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board may from time to time fix having regard to the nature and geographical position of the supply and the purposes for which it is required:

Provided that in fixing any such terms and conditions the Board shall not show undue preference to any person.

20. Thus it is seen that there is a statutory basis also for the term in the agreement providing for a minimum annual charge. That apart as discussed earlier there is nothing illegal in the insertion of a term for payment of a minimum charge in the agreement for supply of energy, and it has not been made out that it is an unreasonable levy. I have held that it is not a penalty clause.

21. In the circumstances, the second appeal fails and is dismissed with costs.

22. Leave granted.