
(1997) 12 BOM CK 0023

In the Bombay High Court

Case No : Notice of Motion No. 2467 of 1995 in Suit No. 2923 of 1995

M/s. Jerry Varghese Construction (P) Ltd. and another

APPELLANT

Vs

B.S.E.S. Ltd.

RESPONDENT

Date of Decision : 08-12-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Constitution of India, 1950 — Article 300
Contract Act, 1872 — Section 10
Electricity Act, 1910 — Section 20

Citation : (1998) 2 ALLMR 239 : (1998) 1 BomCR 171

Hon'ble Judges : S.S. Nijjar, J

Bench : Single Bench

Advocate : M.M Vashi, instructed by M/s M.P. Vashi and Associates, for the Appellant; D.H. Mehta and A.B. Ketkar, for the Respondent

Judgement

S.S. Nijjar, J.—This matter came up for hearing on 4th November, 1997. Arguments were heard in detail. When the order was going to be pronounced an adjournment was sought by the Counsel for the defendant to seek instructions as to whether or not the Bombay Suburban Electric Supply Ltd. are prepared to shift the sub-station. Thereafter the matter has been adjourned on a number of occasions on the request of the Counsel for the defendant that they are in the process of shifting the sub-station. Today the matter was kept for orders. At this stage Mr. Mehta seeks to put in an appearance on behalf of the defendant. He also wishes to place on record an affidavit taking a completely new defence which was never taken at any prior stage. The said affidavit is sought to be placed on the record on the ground that the information which is available to the defendants was not available at any earlier stage. I do not find any justification in permitting Mr. Mehta to re-argue the whole matter nor do I find any justification for permitting him to place on record the affidavit.

2. This suit has been filed by the plaintiffs who are Private Limited Companies incorporated under the Companies Act. The registered offices of both the

Companies are at 63, Reservoir Road (now known as General Arunkumar Vaidya Marg), off. Film City Marg, between Goregaon (East) and Malad (East). Both the plaintiffs are doing business as road builders and contractors. The Directors of both the Companies are common. The plaintiffs had purchased a plot of land from F.E. Dinshaw Trust, a registered Public Charitable Trust, having its registered Office at 412, Churchgate Chambers, 5 Sir Vithaladas Thackersey Marg, Bombay-20. The said plot comprises of S. No. 253 (pt.)= CTS No. 692(Pt.) and S. No. 256(Pt.)= CTS No. 653 (Pt.) admeasuring about 6105 sq.mts. or thereabout. The said property was purchased for Rs. 14 lakhs in the name of the first plaintiff Company, hereinafter referred to as " the suit property". Before the plaintiffs purchased the aforesaid property, they were already in possession of the same as tenants and were paying rent to the aforesaid trust. The plaintiffs nature of business requires electric power as they require mixing of asphalt in road construction material. On the suit property they had an asphalt plant. This has now been shifted to Turbhe-Vashi, New Bombay. Since the plaintiffs were taking contracts from Municipal Corporation and other public bodies for construction of roads the mixing up of asphalt material was required to be done on a very large scale. For this purpose the plaintiffs requirement of power was about 250 KWs. in the year 1986-87. If the power load is over and above 250 KWs. then the relevant rules require for the provision of an independent Power Station. The defendants insisted that plaintiffs should make provision for such a power sub-station. The land was to be made available by the plaintiffs but on a temporary basis for the installation of a temporary sub-station where a transformer can be installed. There were some negotiations between the parties. After negotiations it was decided as follows.

"(i) That the electric supply to the first plaintiffs" factory will be delivered at 11,000/ - volts subject to the permissible statutory variations.

(ii) It was agreed that the proposed power station will be installed in a room of 5.5 M. x 4.0 M. where the switch gear and metering equipment can be installed.

(iii) That the staff of the defendants will be given access at all times.

(iv) It was further agreed that the maximum consumption of energy will be at 11 KV. switchgear installed in the sub-station room."

It was also agreed between the parties that the electricity to the plaintiffs plant will be governed by the provisions of the Indian Electricity Act and the Rules. It was also agreed that the equipment which would be installed for giving supply will remain the property of the defendant and they will have a right to utilise it for giving supply to any other applicants. These terms and conditions are recorded in a letter dated 16th May, 1987 written by the defendants to the plaintiffs. A copy of this letter is annexed to the plaint as Annexure-B. The transformer was installed and for this purpose the plaintiffs made a payment by cheque of Rs. 1,12,406/- by way of security deposit and the balance of Rs. 11,800/- towards cost of supplying and laying 20 metres of High Tension Cable.

Rs. 600/- was paid towards the cost of jointing the 11 KW. cable to the defendants switchgear and Rs. 6/- as connection fee. The sub-station was built some time between June 1987 and October, 1987. It was inspected by the defendants on 16th October, 1987 and found to be in order. The suit land is in the non-developed zone while the plots across the road known as Reservoir Road (Tank Road) are in the development zone. As per the policy of the defendants, they are bound to provide power to the Industries and Housing Colonies by providing sub-stations in the development zones. Though the plaintiffs plant was in the non-developed zone they agreed to provide temporary sub-station in their plot since the development zone did not exist in 1987. In the course of time the second plaintiffs shifted one of their plants to Turbhe. Thus they did not require the High Tension power of 250 KWs. Their requirement now is only for low tension power supply. Thus the plaintiffs by their letter dated 12th April, 1995 informed the defendants that their construction activities and asphaltting plant had been shifted to Turbhe. Thus it was stated that they do not require high tension power and a request was made that the high tension power be disconnected immediately and low tension power be supplied like any other normal consumer. Necessary forms were also filled in by the plaintiffs for supply of low tension power. Accordingly low tension power was provided by the defendants with effect from May, 1995. Since then the second plaintiffs are consuming only low tension electric power and the bills are being paid regularly. On 21st June, 1995 at about 12 Noon three persons claimed to be officers of the defendants from Dindoshi Office came on the suit land without informing the plaintiffs and started tapping power connection from the main cable. The security guard of the plaintiffs tried to prevent the officers of the defendants from tapping the power. Because of this objection the power supply to the mixing plant of plaintiff No. 2 was disconnected on 21st June, 1995. This disconnection remained for 24 hours. Thus the mixing plant of the plaintiff No. 2 remained inactive for 24 hours. It is claimed that on account of the said disconnection and the temporary closure of the plant the plaintiffs suffered a loss of Rs. 5 lakhs. Thus the second plaintiffs approached the Chairman and the Managing Director of the defendant by their letter dated 22nd June, 1995. It was stated that because of the disconnection they were unable to do the asphaltting work of Bandra Flyover. By letter dated 30th June, 1995 the defendants wrote to the second plaintiff stating that they have no right to object to the defendants connecting the cables inside the sub-station. It was stated that whilst commissioning the sub-station plaintiffs had signed the way leave form. It was also stated that as per the Indian Electricity Act the defendants have the clear access to the equipment. It was also stated that in case of any mishap the defendants will be forced to take action against the plaintiffs. The defendants also wrote a letter dated 5th July, 1995 in reply to second plaintiff's letter dated 22nd June, 1995. In this letter the defendants stated that the representatives of the plaintiffs are unduly obstructing the normal activities of the defendants in a high-handed manner. Therefore, by way of this letter a notice was served on the second plaintiff for entering into the suit premises. The claim put forward in the sum of Rs. 5 lakhs by way of

damages by the second plaintiff was denied. The claim put forward by the plaintiffs is that the arrangement between the parties to permit the defendants to install and erect the sub-station and transformer was of a temporary nature. A prayer is made for a mandatory injunction directing the defendants to remove the power sub-station from the suit land to the development zone across the road. It is also prayed that the defendant be restrained by an order of injunction from disconnecting the electric power to the second plaintiffs. Sum of Rs. 5 lakhs is claimed by way of damages.

3. In this Notice of Motion prayer is made that the defendants be restrained by an order of injunction from giving any new electricity connections to any outsider from the Power Station situate in the suit land. It is also prayed that during the pendency of the suit, defendants be restrained from disconnecting the electric power supply from the sub-station/transformer to plaintiff No. 2. The plaintiff also prays for the appointment of Commissioner to visit the site and make a report about the transformer, about the compound wall and about the likelihood of breaking the wall for the purpose of giving electric connections to outside parties. The plaintiffs also claimed an order of mandatory injunction directing the defendants to remove the sub-station/power station from the plaintiffs properly and to shift somewhere else at the cost of the defendants and to continue to supply electric power to the plaintiff. An affidavit in support of the Notice of Motion has been filed in which the facts as narrated above have been reiterated and confirmed. The defendants have filed an affidavit in reply. In this affidavit it is denied that the plaintiffs gave the land on temporary basis for constructing a temporary sub-station for installing the defendants transformer. The land for the sub-station, according to the defendants, was given by the plaintiffs on a permanent basis and a sub-station also was constructed on a permanent basis. It was also agreed between the parties that the officers of the defendants will be given access at all times and that electric supply to the plaintiffs land will be governed by the provisions of Indian Electricity Act and the Rules. It is further stated that the equipment which was installed in the sub-station for giving supply to the plaintiffs will remain the property of the defendants and thus the defendants have a right to utilise it for giving supply to any other applicant. It is further stated that admittedly the plaintiffs had permitted the grant of other connections in their letter dated 16th May, 1987. Other averments about the payments and the compensation are stated to be substantially correct. It is, however, reiterated that the sub-station was built and the transformer was installed on a permanent basis and not temporarily as claimed by this plaintiffs. The attempts to terrorise the plaintiffs are denied. It is further stated that the plaintiffs are not entitled to any order of injunction. u/s 20 of the Indian Electricity Act, 1910, if the plaintiffs do not give access to the defendants, electricity supply can be disconnected after giving 24 hours notice in writing . Disconnection of the power supply for a period of 24 hours is denied. It is further stated that the defendants have an obligation to give electric supply to other applicants in the locality. The defendants have a right to take supply from the

sub-station. Thus the defendants should not be restrained from giving any new electric connection to the applicants in the locality. It is stated that this would amount to restraining the defendants from carrying out their obligations and responsibilities under the Indian Electricity Act and the licence granted thereunder.

4. I have heard the Counsel for the parties at length. A perusal of the letter dated 16th May, 1987 shows that the very subject of the letter is "Electricity supply for temporary purpose at Goregaon (East)". The first paragraph of the letter refers to the requisition of the plaintiffs for the electricity supply for temporary asphalt plant at Goregaon. The plaintiffs machinery was to be kept completely segregated from the machinery and switchgear of the defendants. The plaintiffs were to provide their own 11 KW cable, switch gear and transformer etc. at a place suitable to them. The lay out of the electrical installation was to be approved by the Electrical Inspector, Govt. of Maharashtra. Paragraph 4 of the said letter states that the electric supply to the factory shall be governed by the provisions of the Indian Electricity Act and the Rules. Paragraph 5 reiterates that the equipment which will be installed for giving supply will remain the property of the defendants and they will have a right to utilise it for giving supply to any other applicants. These terms and conditions were confirmed by the plaintiffs but a reading of the aforesaid letter shows that it was talking only about a temporary arrangement. The fact that it was only a temporary arrangement is also confirmed from the letter dated 14th October, 1987 which mentions the subject "Temporary supply at Goregaon" therein the plaintiffs were required to make the payment as narrated above. A reading of the aforesaid two letters makes it prima facie clear that the permission granted to the defendants was only temporary.

5. I find substance in the submission made by Mr. Vashi, Counsel for the plaintiffs, that the claim put forward by the defendants to the effect that the plaintiffs had permanently given the suit land to the defendants is only an afterthought. This plea is obviously taken only in order to defeat the claim put forward by the plaintiffs. If there was any truth in the defence put forward, then there was no necessity for asking the plaintiffs to construct the structure in which the transformer is installed. There was also no necessity for seeking permission of the plaintiffs even for the purpose of access on the suit land. There was also no need for any permission from the plaintiffs for sanctioning of any other connections. Apart from this, it is obvious that the defendants have accepted that fact that the plaintiffs are not in requirement of high tension electricity as the asphalt plant has been shifted from the suit land. If the plea put forward by the defendant is accepted it would amount to compulsory acquisition of the property of the plaintiffs. Property of a citizen of India can be acquired by the State by following the due procedure of law under the Land Acquisition Act. Admittedly no such proceedings have been taken out under the Land Acquisition Act. There is also no private contract between the parties wherein the plaintiffs have sold the suit land to the defendants. If the defendants are permitted to

exercise ownership rights on the suit property, it would be in direct contravention of the provisions of Article 300-A of the Constitution of India. Even though the right to property is no longer a fundamental right, it is certainly a constitutional right. Article 300-A provides that no person shall be deprived of his property save by authority of law. Prima facie I am of the view that if the defendants wish to exercise ownership rights over the property where the transformer is installed they would have to comply with the provisions of the Land Acquisition Act or enter into private contract with the plaintiff. No such contract having been entered into and no other proceedings having been taken out for compulsory acquisition of the property of the plaintiffs the defendants have no right whatsoever to remain on the suit property. Counsel for the defendants, however, has placed strong reliance on sub-section (3) of section 20 of the Indian Electricity Act, 1910 to contend that the defendants are licensees and, therefore, the plaintiffs have no right to interfere with their possession. Sub-section (3) of section 20 reads as under :

"(3) Where a consumer refuses to allow a licensee or any person authorised as aforesaid to enter his premises or land in pursuance of the provisions of sub-section (1) or, sub-section (2), when such licensee or person has so entered, refuses to allow him to perform any act which he is authorised by those sub-section to perform, or fails to give reasonable facilities for such entry or performance, the licensee may, after the expiry of twenty four hours from the service of a notice in writing on the consumer, cut off the supply to the consumer for so long as such refusal or failure continues, but for no longer."

A perusal of said sub-section shows that the defendants had to be licensees of the plaintiff. In my view, no such licence was created in favour of the defendants. Counsel for the defendants has further argued that granting of relief in the nature of prayer clause (d) would amount to passing a decree in favour of the defendants. Having considered the arguments anxiously I am of the considered view that in the present case there is no alternative but to grant the relief as prayed for in the Notice of Motion. It must not be forgotten that the rights of the owner of the land are sought to be impinged upon by a public utility authority without taking recourse to the provisions of the Land Acquisition Act or any other law which would enable them to compulsorily acquire the suit property. There is no other viable method by which this Court at this stage can compensate the plaintiffs for the loss and the damage they will continuously suffer if the defendants are permitted to remain on the suit property. In fact, the matter had been adjourned on four occasions on the express request of the Counsel for the defendants that they would voluntarily make alternative arrangements and shift from the suit premises. Today Mr. Mehta has appeared for the defendants and has sought permission to re-argue the whole matter on the basis of an affidavit he wishes to place on record. I am not inclined to accede to the request of Mr. Mehta. In view of the aforesaid, the Notice of Motion is made absolute in terms of prayer clauses (a) and (d) except the bracketed portion. The said prayer clauses (a) and (d) read as under.

"(a) That pending the hearing and final disposal of the suit, the defendants, their officers, servants, agents and contractors be restrained by an order and injunction of this Hon'ble Court from giving any new electric connections to any outsider from the power station situated in the plaintiffs' property being Survey No. 253 (Pt.) (CTS No. 692 (Pt.)) and Survey No. 256 (Pt.) (CTS No. 653 (Pt.)) situated at General A.K. Vaidya Marg, Malad (E)/ Goregaon (East), Bombay.

(d) That pending the hearing and final disposal of the suit, the defendants, their servants, agents and employees be ordered and directed by a mandatory order and injunction to remove the sub-station/power station from the plaintiffs' property and shift somewhere else at the cost of the defendants (and continue to supply the electric power to the plaintiffs)."

The defendants are directed to comply with the direction issued on the basis of prayer clause (d) within a period of eight weeks from today. It is also clarified that it would be incumbent on the defendants to continue to supply to plaintiff No. 2 low tension electricity from wherever other consumers of low tension electricity are being supplied after the shifting of the sub-station. The plaintiff has already been supplied low tension electricity. Plaintiff is hereby directed by was of abundant caution to re-submit the application when the sub-station is shifted which will be decided in accordance with law.

6. Mr. Mehta at this stage has requested that in view of the relief granted to the plaintiff, operation of the order be stayed. The defendants have already been given 8 weeks time to comply with the order. Therefore, I find there is no justification for staying the operation of the order.

Certified copy expedited.

Parties to be given a copy of the order duly authenticated by the Associate of this Court to enable Mr. Mehta to take the matter in appeal.