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(1995) 01 KAR CK 0036

In the Karnataka High Court

Case No : Writ Petition No. 8722 of 1986

M/s. K.V. Shetty and Company — APPELLANT

Vs

Karnataka Power Corporation Limited, ìbangalore and Others — RESPONDENT

Date of Decision : 03-01-1995

Acts Referred:
Karnataka Electricity Board Electricity Supply Regulations, 1988 — Regulation 33

Citation : (1995) 2 KarLJ 502

Hon'ble Judges : Tirath S. Thakur, J

Judgement

1. The petitioner is a civil contractor who had obtained a contract for the construction of the 1st Stage of Mani Dam for Varahi Hydro-Electric Project, somewhere in the year 1978. In connection with the execution of the contracted works, the petitioner appears to have entered into an Agreement for supply of power with Respondent No. 2 Board, copy whereof has been placed on record by Respondents Nos. 2 to 4, as Annexure R1, to their statement of objections. In terms of clause (2) of the said Agreement, the petitioner had undertaken and covenanted to pay to the supplier Respondent No. 2 Board, monthly minimum charges in accordance with the standard tariff stipulated in the Tariff Schedule applicable to this clause of service in force from time to time irrespective of whether the consumer avails of the power supply as per this agreement or not. Clause (16) of the Agreement provided that the agreed supply under the Agreement executed between the parties shall be for a period of 5 years from the date of commencement of the supply or three months after the date of intimation from the supplier that the supply of electrical energy was available and from year to year thereafter determinable by six calendar months'' notice on either side.

2. It appears that the petitioner completed the contracted work within a period of 17 months from the date the same was started. With the conclusion of the works in question the utilisation of the power supply by the petitioner from the second respondent also stopped. Consequently, the power supply was disconnected but only on 28th of February, 1984. Then followed the Demands raised by the

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second-respondent Board against the petitioner for the payment of arrears of dues on account of the electricity consumed and also minimum charges, interest and tax etc. The petitioner has placed on record demand Notices dated: 4th August, 1984 (Annexure A); and 16th December, 1984 (Annexure B). It has also placed on record a communication sent by the Assistant Executive Engineer (Ele.), Tirathahalli, dated 17th October, 1984 issued against the petitioner from in Form ''B'' for a sum of Rs. 83,136-72 calling upon the petitioner to arrange the payment of the said amount at an early date. Aggrieved by all these demand Notices, the petitioner has filed the present writ petition inter alia for the issue of a writ of certiorari quashing the said Notices as also the Notice of attachment dated 29th October, 1985 issued by respondent No. 5 - the Tahsildar and a writ of mandamus directing respondents Nos. 2 to 4 to refund the security deposit of Rs. 14,700/- to the petitioner.

3. Respondent Nos. 2 to 4 have opposed the petition and have filed their statement of objections in which they point-out that the petitioner having executed an Agreement for a period of 5 years and having undertaken to pay the minimum charges as stipulated under clause (2) of the said agreement is under an obligation to make the payment demanded from it. It has been further asserted that the Agreement in question has not been terminated nor could the same be terminated before the expiry of a period of 5 years from the date of its execution and therefore the liability to pay the minimum charges and other dues was undeniable.

4. I have heard learned counsel for parties at length.

5. Mr. M.P. Eswarappa, learned counsel appearing for the petitioner submitted that the Agreement in question relied upon by the contesting respondents had been executed improperly inasmuch as the petitioner had required only a temporary power connection whereas the Board and its Officers had forced the petitioner to execute an Agreement for a permanent power connection for a period of five years even though the petitioner''s work under the contract allotted in his favour by the Power Corporation was not supposed to last for more than two years. He relied upon a Judgment of the Apex Court in Central Inland Water Transport Corporation Ltd. and Another v Brojo Nath Ganguly and Another, AIR 1986 SC 1571, in support of his submission that any unilateral and one sided stipulations contained in an Agreement executed between the parties which are found to be unfair, on the face of it, were liable to be struck-down.

6. Mr. Gupta, learned counsel appearing for the respondents, on the other hand urged that the Agreement had been properly executed and that there was no question of exercising coercion or undue influence upon the petitioner by the Board or its Officers in that regard. He submitted that the petitioner having induced the Board to make arrangements for supplying power to it, on the representation that the same shall be consumed for a period of five years, cannot now turn-round and dispute its liability to pay the minimum charges on the ground that the agreement was either contrary to the provisions of the

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Regulations or was otherwise improperly executed.

7. The execution of the Agreement between the parties is not in dispute. What is stated is that the same had been executed under coercion by the petitioner. It has in this connection made only a cryptic statement in paragraph-1 of the writ petition in which it has asserted that in spite of the petitioner''s insistence that the petition should be in the forms prescribed for temporary H.T. Power supply in accordance with the separate forms prescribed it was asked to execute and sign an agreement for a permanent connection. This plea has been repeated by the petitioner in paragraph 5 of its petition where it has said that the execution of the Agreement in the prescribed form was under coercion.

8. In the counter affidavit filed on behalf of respondent Nos. 2 to 4, these allegations of coercion and the request for the grant of temporary connection have been stoutly denied. In that view of the matter, therefore, it is difficult for this Court in the present proceedings to return a definite finding as to whether the Agreement was actually vitiated on account of coercion, fraud or mistake on the part of the parties or any one of them. Any serious exercise to go into the merit of this allegation would require production of evidence and a comprehensive trial which would be possible only in a competent Civil Court and not in the extraordinary writ jurisdiction of this Court. There is therefore no escape from the conclusion that the Agreement in question cannot be held as at present to have been executed either improperly or under coercion as alleged by the petitioner. The first-ground of attack raised by Mr. Eswarappa, must therefore fail.

9. Mr. Eswarappa, then submitted that there was no justification legal or moral on the part of the Board to demand payment of any amount on account of electricity not actually consumed by the petitioner. He submitted that clause (2) of the Agreement executed between the parties, providing for payment of minimum charges, was wholly unfair and improper and that the same should be declared to be unenforceable. I find no substance even in this submission of Mr. Eswarappa. The question as to whether the stipulation contained in the agreement for supply of electricity requiring payment of minimum charges is legally valid and enforceable, fell for consideration of their Lordships of the Supreme Court in Bihar State Electricity Board, Patna and Others v M/s. Green Rubber Industries and Others, AIR 1990 SC 699. After a review of the case law on the subject, their Lordships held thus:-

"It is true that the Agreement is in a standard form of contract. The standard clauses of this contract have been settled over the years and have been widely adopted because experience shows that they facilitate the supply of electric energy. Lord of Diplock has observed: "If fairness or reasonableness were relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable. "A Schuoeder Music Publishing Co. Ltd. v Macaulay, (1974)3 All ER 616 (624). In such contracts a standard form enables

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the supplier to say; "If you want these goods or services at all, these are the only terms on which they are available. Take it or leave it". It is a type of contract on which the conditions are fixed by one of the parties in advance and are open to acceptance by anyone. The contract, which frequently contains many conditions is presented for acceptance and is not open to discussion. It is settled law that a person who signs a document which contains contractual terms is normally bound by them even though he has not read them, even though he is ignorant of the precise legal effect. In view of clause (4) having formed one of the stipulations in the contract along with others it cannot be said to be nudum pactum and the maxim nudum pactum ex quo non oritur actio does not apply. Considered by the test of reasonableness it cannot be said to be unreasonable inasmuch as the supply of electricity to a consumer involves incurring of overhead installation expenses by the Board which do not vary with the quantity of electricity consumed and the installation has to be continued irrespective of whether the energy is consumed or not until the Agreement comes to an end. Every contract is to be considered with reference to its object and the whole of its terms and accordingly the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of enquiry is the meaning of an isolated clause. This Agreement with the stipulation of minimum guaranteed charges cannot be held to be ultra vires on the ground that it is incompatible with the statutory duty. Difference between this contractual element and the statutory duty have to be observed. A supply agreement to a consumer makes his relation with the Board mainly contractual, where the basis of supply is held to be statutory rather than contractual. In cases where such agreements are made the terms are supposed to have been negotiated between the consumer and the Board, and unless specifically assigned, the agreement normally would have affected the consumer with whom it is made, as was held in Northern Ontario Power Co. Limited v La Roche Mines Ltd, (1938)3 All ER 755."

To the same effect is another judgment of their Lordships of the Supreme Court in General Manager-cum-Chief Engineer, Bihar State Electricity Board and Others v Rajeshwar Singh and Others, AIR 1990 SC 706.

10. Respectfully following the view taken by their Lordships, I have no hesitation in holding that a stipulation regarding the payment of minimum charges by a consumer is valid and enforceable. This is so because the payment of minimum charges is more in the nature of compensation to the supplier for the capital expenditure in the plants that it has made for purposes of making the supply available to the consumer. These charges are made recoverable on the basis that if no electricity is consumed or a very small amount thereof is consumed, for a very short period then the supplier must be entitled to charge minimum charges by way of compensation or interest on the capital out-lay incurred for providing the facility to the consumer. There is therefore no infirmity in the demand raised against the petitioner on account of the minimum charges.

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11. Mr. Eswarappa, however tried to draw a distinction between the aforesaid two judgments and the facts of this case. He urged that the judgments in the aforesaid two cases related to permanent electricity connection and not temporary connections as was the case here. I see no substance in this submission also. In the first place, the connection secured by the petitioner could not be said to be a temporary connection for the same was admittedly for an initial period of 5 years extendable by a further period of 2 years in terms of clause (16) of the Agreement. As a matter of fact Mr. Eswarappa''s grievance was that as against a temporary connection, the petitioner had been wrongfully made to sign an agreement for a permanent connection. In other words, what was given to the petitioner was a permanent connection, even according to Mr. Eswarappa. That being so, the distinction sought to be drawn by the learned counsel between his case and the cases decided by the Apex Court appears to me to be without any difference. That apart I see no conceptual difference between minimum charges demanded and recovered from a consumer on the basis of a permanent connection and one who is asked to pay such charges for a temporary connection. If the Board as a supplier is entitled to ensure a reasonable return on the capital out-lay made by it for supplying the power to the consumer by providing for payment of minimum charges then it is immaterial whether the connection was permanent or temporary. The principle underlying the claim for such charges would then apply squarely to both the situations entitling the supplier to claim minimum charges even when the connection may have been temporary in natural.

12. That brings me to the next submission of Mr. Eswarappa. He argued that in terms of the clause (2) of the Agreement, minimum charges were payable only at the rate of 18% on the capital expenditure incurred by the supplier for making available the supply of electrical power. He urged that in the instant case the 11 K.V. Lines were drawn upto the work site by respondent No. 1, Corporation and that all that the Board had done was to install a cubical meter at a cost of Rs. 12,000/- for recording the actual consumption of electricity. He therefore urged that the petitioner could at best be said to be liable to pay minimum charges at 18% of the capital expenditure incurred by the supplier for arranging the supply of power.

13. In the counter-filed on behalf of the Board, it has been emphatically denied that the only expenditure incurred by the Board was on providing a cubical meter for recording the energy consumption. It has also been disputed that the cost of the said Meter was only Rs. 12,000/- and that all that the Board was entitled to recover was 18% of the said amount. Be that as it may, there is no gainsaying that the question as to what was the expenditure actually incurred by the Board for supply of the electrical power to the petitioner, is a disputed question of fact. Whereas the petitioner asserts that the expenditure was only Rs. 12,000/- the respondents have disputed the same. As pointed out earlier, I am in no position in the present writ proceedings to resolve such a disputed question of fact nor can I hold an enquiry into the question as to the extent of expenditure incurred

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by the supplier. That again is a matter which the petitioner would be well advised to agitate in a proper civil suit instead of the present proceedings which suffer from certain inherent disabilities. The submission made by the learned counsel therefore needs to be mentioned only to be rejected.

14. That brings me to the other and the last submission made by Mr. Eswarappa. He contended that the amount being demanded from the petitioner is not a ''Debtor'' within the meaning of Section 2 of the Karnataka Electricity Board Recovery or Debts Act, 1976. He therefore submitted that the recovery proceedings initiated against the petitioner were wholly incompetent and deserved to be quashed.

15. Section 6 of the Act provides that if the aggregate amount of the debts, penalty and costs mentioned in the demands served under Section 4 is not deposited, within three months from the date of service of such notice, the debtor shall be deemed to be in default in respect of such amount and the same shall be recoverable as arrears of land revenue notwithstanding anything to the contrary contained in any law, instrument or agreement. The term ''dues'' is defined by Section 2, sub-section (2) thus:-

2. Definitions.-(2) "dues" means any sum payable to the Board on account of,-

(i) consumption of electrical energy supplied; or (ii) any remuneration, rent or other charges for hire, inspection, test, installation, connection, repairs, maintenance or removal of any electric meter, electric machinery, control gear, fittings, wires, or apparatus for lighting, heating cooling or motive power or for any other purpose for which electricity can or may be used, or any industrial or agricultural machinery operated by electricity;

16. A plain reading of the definition clearly shows that the term "dues" includes not only the sum payable to the Board on account of actual consumption of electricity supply but also any remuneration, rent, or other charges for hire, extension, test, installation, connection, repairs, maintenance etc. It is therefore not possible to limit the term "dues" to only sums payable for electrical energy consumed by the consumer. Sums payable on other accounts such as rents, hire charges, repairs, maintenance etc., are also "dues" within the meaning of Sections 4 and 6 of the Act. This would include the minimum charges in question also. This is so when we see the background in which the recovery of minimum charges has been held to be permissible by their Lordships of the Supreme Court. These charges being meant to compensate the supplier for the investment made by it on providing the infrastructure, installation and maintenance thereof it is difficult to appreciate how any charges payable to the supplier on account of maintenance of the installations which became necessary on account of supply of electricity to the petitioner/consumer can be said to be anything other than a ''due'' within the meaning of the Act. The amounts in question on account of electricity actually consumed and the minimum charges, was therefore clearly a ''due'' within the meaning of Section 2(2) of the Act, and therefore was

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recoverable by the summary procedure provided by the Act.

17. In the result, this writ petition fails and is dismissed but in the peculiar circumstances of the case without any orders as to costs.

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