

(1992) 09 BOM CK 0029

In the Bombay High Court

Case No : First Appeal No. 1079 of 1984

M/s. Mahavir KHandsari Sugar Mill and Others

APPELLANT

Vs

Maharashtra State Electricity Board and Others

RESPONDENT

Date of Decision : 23-09-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5
Contract Act, 1872 — Section 74
Electricity Act, 1910 — Section 24
Sales of Goods Act, 1930 — Section 2(7), 61(2)

Citation : AIR 1993 Bom 279 : (1993) 1 BomCR 331 : (1993) 1 MhLj 544

Hon'ble Judges : S.M. Daud, J;M.G. Chaudhari, J

Bench : Division Bench

Advocate : K.J. Abhyankar, for the Appellant; Miss. A.R.S. Baxi and S.G. Surana, for the Respondent

Judgement

Daud, J.—Defendants Nos. 1 to 3 and 5 to 7 take exception to a money decree passed against them on the basis of certain clauses incorporated in Exh. 96 being an agreement dated 14-12-1973.

2. Defendants Nos. 2, 3 and 5 to 7 along with two others, who are respondents Nos. 2 and 3 to this appeal, were doing business in the name and style of defendant No. 1. Defendant No. 1 was a partnership firm and had set up a unit at Aklad, Taluka and District Dhule, for the manufacture of Khandsari. To work the machinery installed in the factory, defendant No. 1 required the supply of electrical energy. To enable the supply being made, the plaintiff Maharashtra State Electricity Board (MSEB), which is a licensee within the meaning of the Indian Electricity Act, 1910, also described as a supplier, agreed to provide the energy required subject to the terms and conditions set out in Exh. 96. The agreement at Exh. 96 was passed in favour of the supplier for and on behalf of defendant No. 1 by its partners. Certain terms of the agreement have a bearing on the issue that arises for determination. Clause 9(a) stipulated that the consumer, i.e. defendant No. 1, guarantee the consumption of a certain number

of units of electricity, the value whereof was not less than Rs. 2130/- or the monthly minimum charges payable under clause 8, whichever was more. Clause 10(a) stipulated that the duration of supply under the agreement would be a minimum of 7 years commencing from 1-2-1974 and ending with 31-3-1981. Clause 11 spoke of the consequences in the supply of energy being discontinued by the supplier because of "any breach of default on the part of the consumer entitling the supplier so to do to recover the amount or charges for the electrical energy already supplied and all other monies then payable under the agreement to become due and recoverable forthwith, the consumer being additionally liable to continue to pay the minimum charges and the minimum guarantee payable thereunder". Clause 12 imposes upon the consumer where he had committed a breach during the continuance of the agreement of pay monies due up to the receipt of the notice of termination as also a sum equal to the amount of the minimum guarantee for the unexpired minimum period of supply as and by way of liquidated damages. Right from the inception, the 1st defendant experienced some difficulty in consuming the stipulated minimum quantity of electricity or paying the billed sums. Sometime at the end of 1976, electric supply to defendant No. 1's factory was disconnected. Thereupon defendant No. 1 addressed Exh. 69 to the plaintiffs Superintending Engineer. This letter prayed for the facility of being allowed to pay the arrears in instalments and also that the supply be resumed. Plaintiff replied to the said letter of defendant No. 1 by referring to the letter at Exh. 69 and also a personal discussion. The sum due was to be paid by defendant No. 1 in four monthly instalments and there would be a re-connection upon the first instalment being paid. Defendant No. 1 was informed that it would be under an obligation to pay the interest as also the regular bills along with the amount of instalment. Though reminded to clear the arrears by letters dated 19-1-1976 and 28-3-1976, defendant No. 1 could not pay even the first instalment. On 21-5-1977, an Advocate acting at the instance of the plaintiff sent a notice to defendant No. 1 calling upon it to pay the unpaid arrears plus minimum charges for the period 1976-77 to 1980-81, the total sum payable was placed at Rs. 1,35,210.71 ps. together with interest at rate 15% per annum and the notice costs. Defendant No. 1 gave a reply to the notice disputing its liability to make the payments claimed under the notice.

3. On 4-4-1978, the plaintiff instituted the suit, the decree wherefrom has given rise to this appeal. The case of the Plaintiff was that pursuant to the agreement at Exh. 96, it's transformer was required to be installed within the premises of defendant No. 1. The 1st defendant had made a security deposit of Rs.4500/-. Defendant No. 1 had manufactured and sold khandsari in the market. Bills for the energy supplied or otherwise claimable had been served upon defendant No. 1 from time to time. Despite notices, defendant No. 1 had not cared to collect the arrears. This had constrained the plaintiff to disconnect the supply as on 4-11-1976. Adjusting the security deposit lying with the plaintiff, a sum of Rs. 1,35,210.71 ps. was outstanding from defendant No. 1 and its partners. Thus defendants were liable to pay interest which comes to Rs. 6686.15 ps. and notice

charges of Rs. 75/ -. The total plus costs was payable by defendants along with interest at rate 15% per annum from the date of suit till realisation.

4. The stand taken by respondents Nos. 2 and 3 need not detain us in this appeal for they have been exonerated of the liability by the trial court and the 1st respondent, who was the plaintiff before the trial court, appears to be content with that decision. The 1st defendant along with the remaining partners took up various objections, one of them being that the clauses in Exh. 96 entailing upon defendant No. 1 the liability to pay minimum charges was opposed to public policy and not enforceable against them in law. Plaintiff examined some 4 or 5 witnesses while defendants examined none. P. W. 4 S.K. Mahajan who was a Joint Chief Accounts Officer in the plaintiff's Board came out with some information regarding the expenditure incurred for taking of the power line right upto the factory of defendant No. 1. According to him, the expenditure incurred on this count came to about Rs. 15,000/-. The learned Civil Judge passed a decree in favour of the plaintiff rendering the appellants liable to pay a sum of Rs. 1,41,471.86 ps. and costs together with-interest at rate 15% per annum from the date of suit till 27-2-1974 and from that date onwards till payment at rate 6% per annum. The decretal amount was made a charge upon the property of defendant No. 1 which had been attached under Order XXXVIII, Rule_5 of the Civil Procedure Code, 1908, (CPC).

5. Appellants take exception to the decree, their principal defence being that the liability to pay minimum charges fixed under Exh. 96 was in the nature of a penalty and that this entitled them to relief at the hands of the Court. It is admitted that this defence which falls u/s 74 of the Indian Contract Act was not set out in the trial Court. We have however allowed Mr. Abhyankar representing the appellants to raise it before us, as the same amounts to raising of a question of law. Section 74 10 the extent relevant reads as follows:--

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

The illustrations appended to the section furnish some indication as to its meaning. Illustration (e) is thus worded:--

"A, who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach."

Illustration (f) shows the other side, when it says:--

"A undertakes to repay B a loan of Rs. 1000/- by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms".

The short question therefore is whether the clauses on the basis of which minimum charges for the unexpired portion of the agreement were sought to be recovered are penal in nature entitling the appellants to relief at the hands of the Court? Mr. Abhyankar for the appellants first contends that the plaintiff was not entitled to proceed under clause 11 and that they had not so proceeded, having regard to the admitted position that recourse had been had by the plaintiff to S. 24 of the Indian Electricity Act, 1910. To our mind there is not much of a difference so far as the appellants are concerned whether the action taken by the plaintiff be construed as that falling under clause 11 or clause 12 of Exh. 96. Under both the clauses, the consumer has to pay not only the sums due and payable, at the date the action is taken but also the minimum charges and minimum guarantee payable thereunder. Of course clause 12(c) is more specific when it speaks of the minimum guarantee being for the unexpired minimum period of supply as and by way of liquidated damages. But a different construction cannot be placed upon the terms appearing in clause 11 which words are thus spelt out :--

"..... the minimum charges and minimum guarantee payable hereunder."

Therefore, whether the action of the plaintiff be under clause 11 or Clause 12(c), both entitle the supplier to claim recovery of the entire minimum guarantee or minimum charges, and this, for the unexpired minimum period of supply. Learned Counsel relies upon *The Gujarat Electricity Board v. Shri Rajratna Naranbhai Mills Co. Ltd.* (1975) 16 Guj LR 90. The Gujarat Electricity Board's agreements appear to be on the same lines as Exh. 96 figuring in this case. What the Court was considering in that case was the validity or otherwise of the minimum charges payable to the Board vis-a-vis Section 74 of the Contract Act. The concept of minimum charges was explained thus:--

"With respect, we agree with these four decisions which we have referred to above because they set out the effect of the legal provisions which we have set out hereinabove and they correctly point out that provision of minimum charge in the agreement between a consumer and a licensee is but one of the modes of providing for reasonable return to the licensee for the investment that it has made and on the capital outlay that it has made and merely because the agreement provides for a minimum charge, it cannot be said that the terms are unreasonable or that a monopoly concern has taken undue advantage over the consumer in the area of supply The entire operation and levying of charges is strictly controlled by the rules and provisions of statutes and one of the provisions is that in the case of bulk supply, a minimum charge can be provided for in the agreement between the parties. With respect of our learned brother D. A. Desai, J., we are unable to, agree with him that too much sanctity should not

be attached to such an agreement between unequally placed parties or that once electric supply was disconnected or supply of power was discontinued, the agreement came to an end. As we have pointed out, the agreement did not come to an end nor was the Board disentitled to levy minimum charges during the period of discontinuance of supply."

This passage legitimises the concept of minimum charges. It would not be correct to say that the clauses entitling the supplier to collect minimum charges is unconscionable and having no connection to the investment made or the reasonable profit excepted from the capital outlay. Mr. Abhyankar relies upon an admission given before the Court that the supplier was put to an expenditure of not more than Rs. 15,000/- for taking the power line to the factory of defendant No. 1. But this is an estimate only of the poles and wires put in by the Board for connecting the defendant No. 1's factory with the main on the road in the proximity of the factory. Apart from this, there may be certain other arrangements required to be made all along the line right from the main station of the plaintiff at Dhule. In any case, the plaintiff expected some reasonable profit from the investment it was making and from the facility that it was giving to defendant No. 1. Plaintiff bound itself to supply energy for a period of 7 years and in consideration of its commitment, expected the 1st defendant to consume a certain minimum number of units. In the event of such consumption not being made, defendant No. 1 was required to pay a certain minimum charge. The number of years as also the amount payable by way of minimum charge per month may be taken to represent a reasonable return on the investment made by the plaintiff as also the profit that it expected to derive from the bargain. Where the parties have themselves fixed the liquidated damages payable in the event of a breach of the agreement, Court will be slow to interfere with the terms of the agreement reached between them. Here, Exh. 96 provides the minimum charge per month as also the duration of 7 years as from 1-2-1974. It was argued that the plaintiff had to discharge the burden to show that the sum stipulated as payable by way of minimum charges, and, that too for the unexpired period of the agreement was reasonable, Prima facie it was unconscionable as defendant No. 1 was being required to pay 5 1/2 years minimum charges for a supply of energy made for only about 13 months. This would be to look at the contract only from the consumer's angle. The supplier's angle is different and there is nothing in Exh. 96 to indicate that the appellants were bargaining from an unequal position. The concept of a minimum charge has been explained by a Division Bench of the Punjab High Court in *Watkins Mayor and Co. Vs. Jullundur Electric Supply Co. Ltd.*, thus:--

"A minimum charge is not really a charge which has for its basis the consumption of electrical energy. It is based on the principle that every consumer's installation involves the licensee 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 and when no such energy is consumed, by the consumer, he is allowed to charge by his license, but these minimum charges are

really a return on his capital outlay incurred for the particular consumer."

In the present case there is evidence to show that a transformer was fixed. The laying down of a power line may not have put the plaintiff to much of an expenditure. But the other over-heads, and possibly of a recurring nature, may account for the terms of Exh. 96. As the illustrations show, it is not that every in-default-of-payment clause which can be said to be penal in nature. Here it is true that the plaintiff was not required to supply energy to defendant No. 1 after Nov. 1976. But the expenditure already incurred was there and Section 24 of the Indian Electricity Act seems to stipulate that the consumer could have demanded a reconnection at any time. In fact the appellants had sought a reconnection by their letter dated 5-1-1977. It is a different matter that they could not get reconnection because the very first instalment could not be paid by them. Nonetheless, Section 24 which compels the supplier to give a reconnection once the arrears are satisfied, may seem to indicate the existence of an obligation upon the supplier to keep its equipment intact indefinitely. Even if this extreme view is not taken, Exh. 96 stipulated the supply of energy to defendant No. 1 for a period of 7 years. The agreement took care of the reasonable rights of both the parties. By mutual consent the parties agreed to certain minimum terms and it was one such term that was sought to be enforced by the plaintiff through the suit. Therefore, the contention based on Section 74 of the Contract Act has to be negatived.

6. Mr. Abhyankar next contends that the Civil Judge was in error in granting past interest at rate 15% per annum. According to the learned counsel Exh. 96 did not stipulate interest on delayed payment and therefore, the plaintiff was not entitled to claim any interest; What this argument overlooks is that in the notice dated 21-5-1977, the plaintiff had given a hint to appellants being liable to pay interest unless the principal sum due was cleared by a particular date. The service of the notice is not disputed and that would attract the liability to pay interest under the Interest Act. Learned counsel is right when he contends that the interest should not be as high as 15% per annum. Electric energy is "goods" within the meaning of Section 2(7) of the Sale of Goods Act, 1936, Section 61(2) of the said Act empowers the Court to award interest at a reasonable rate. We would therefore allow interest at rate 6% per annum towards past interest which means a reduction of the interest item to Rs. 2674/- only. The balance of interest which has been allowed by the trial Court will have to be disallowed. This apart, there will have to be a re-phrasing of the operative part of the judgment because of the confusion in the order passed by the trial Court. Hence the order:--

ORDER

Decreed that defendants Nos. 1 to 3 and 5 to 7 do jointly and severally pay upto plaintiff a sum of Rs.1,37,884.00/-. Rs. 1,35,210/-therefrom to carry interest at rate 6% per annum from the date of suit till realisation. Plaintiff shall get costs in proportion to its success in both the Courts from defendants Nos. 1 to 3 and 5 to

7. Defendants Nos. 1 to 3 and 5 to 7 shall bear their own costs in both the Courts. Respondents Nos. 2 and 3 shall bear their own costs, if any, in this Court. Rest of the plaintiffs claim dismissed with the balance of costs. Charge placed on defendant No. 1 's property to continue until the decree is fully satisfied. Appeal allowed in part.

Appeal allowed in part.