

(2012) 09 OHC CK 0025
In the Orissa High Court
Case No : WP. (C) No. 16411 of 2011

M/s. Shree Shyam Roller and Flour Mill (P) Ltd.	APPELLANT
Vs	
Ombudsman-I and Others	RESPONDENT

Date of Decision : 07-09-2012

Acts Referred:

Electricity Act, 2003 — Section 56, 56(1), 56(2)
State Financial Corporations Act, 1951 — Section 29

Citation : (2013) 116 CLT 233

Hon'ble Judges : S.K. Mishra, J

Bench : Single Bench

Advocate : Ruchi Rajgarhia, R. Agarwal and M. Agarwal, for the Appellant; B.K. Nayak and D.K. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

S.K. Mishra, J.—The Petitioner, in this Writ Petition, assails the Order Dated 15.12.2010 passed by the Learned Grievances Redressal Forum, CESU, Dhenkanal, in Consumer Complain Case No. 116/2010, which has been confirmed by the Learned OMBUDSMAN-I in Consumer Representation Case No. OM(I)-04 of 2011 on 21.4.2011 upholding the demand of the electricity company of Rs. 15,07,307 from the Petitioner towards arrear electricity dues. The Petitioner set up a Flour Mill & for the purpose of running the same entered into an agreement with the Opp. Parties on 20.9.2001 for a contract demand of 250 KVA. For supply of such demand, the Executive Engineer (Electrical), Angul Electrical Division, CESU, Angul, Opp. Party No. 3, prepared an estimate for 1.2 km 11 KV line with 250 KVA 11/0.4 KV transformer. The cost estimate of Rs. 5,26,435 was intimated to the Petitioner, which was duly paid by the Petitioner.

The Petitioner also deposited a sum of Rs. 1,05,268 towards supervision charges & an amount of Rs. 3,90,034/- towards security deposit. Due to labours capital problem, the Petitioner's unit became sick & on 1.11.2003, it put forth its grievance requesting Opp. Party No. 3 to consider its case u/s 109 of the Orissa

Electricity Regulatory Commissioner Distribution (Conditions of Supply) Code, 1998 (for short "the Code, 1998") & allow its unit for 5 KW light load only.

2. In pursuance of the agreement executed on 20.9.2001, the Opp. Parties served a disconnection notice on 18.11.2003 & subsequently power supply was disconnected on 29.11.2003 for nonpayment of dues. Opp. Party No. 3 vide letter No. 610 dated 6.2.2004, intimated the above facts to the Petitioner & further noticed to pay Rs. 2,30,476 up to the month of January, 2004, failing which, the Petitioner was intimated that the agreement will be terminated on 28.2.2004 without further notice. In the meantime, the Petitioner's unit became a sick one & was seized by the Orissa State Financial Corporation u/s 29 of the State Financial Corporation Act, 1951. Thereafter, on 20.8.2008 the Petitioner's unit wrote a letter to Opp. Party No. 3 for refund of the security deposit after adjusting the demanded amount of Rs. 2,30,470/- upto January, 2004. In response to the Petitioner's letter dated 20.8.2008, Opp. Party No. 3 vide letter No. 7640 dated 31.12.2008, sought for necessary instructions from the Sr. General Manager (Com.), CESU Headquarters, to refund the security deposit after adjustment of the arrear dues of Rs. 2,30,476 i.e. upto January, 2004. However, instead of refunding the aforesaid to the Petitioner, Opp. Party No. 3 on 11.2.2009 intimated to the Petitioner to clear up the arrear dues of Rs. 15,07,307 in order to release the refund of security deposit.

3. The Petitioner thereafter aggrieved by such a letter approached the Grievances Redressal Forum (GRF), CESU, Dhenkanal. But as per Judgment dated 15.12.2010 the Petitioner's complain was dismissed & it was directed to pay the amount immediately to the Opp. Parties.

Being aggrieved by such an order the Petitioner filed an appeal before the OMBUDSMAN-I, Orissa Electricity Regulatory Commission (OERC), Bhubaneswar, & the same was also dismissed on 21.4.2011. Being aggrieved by both the orders of the OMBUDSMAN-I as well as the GRF & the action of Opp. Party No. 3 in demanding Rs. 15,07,307 the Petitioner has filed this Writ Petition, inter alia, praying that the orders passed by the GRF & OMBUDSMAN-I be set aside, the letter demanding Rs. 15,07,307 be quashed & the Opp. Parties be directed to deposit the security amount deposited by it after adjusting the arrear dues as claimed by it along with interest.

4. Opp. Party No. 3 has filed counter affidavit, inter alia, pleading that the agreement, which was entered into between the parties, provides that it shall commence from the date of execution & shall continue in force until expiry of the five years "from the date of supply & thereafter shall so continue until the same is-determined by either party giving to the other two calendar months notice in writing indicating the intention to terminate the agreement.

5 In course of hearing, Learned Counsel for the Petitioner raised two essential points.

The first point raised by Learned Counsel for the Petitioner is that the agreement

having been terminated by Opp. Party No. 3 on dated 6.2.2004 (Annexure-1) it cannot latter on claim that it is contrary to law & claim arrear dues for electricity not supplied to the Petitioner. Interpreting Regulation 17 of the 1998 Code, Learned Counsel for the Petitioner argued that a proper interpretation of the clause only leads to the conclusion that within the agreement period, the contract can be terminated with a notice whereas after the initial period of contract, the same can be terminated without notice after the disconnection of electricity power. Therefore, it was contended that the orders passed by Learned GRF & OMBUDSMAN-I are contrary to the basic tenet of law, & hence, requires interference.

The second point raised by Learned Counsel for the Petitioner that in Section 56(2) of the Electricity Act, 2003 (for short "the Act") a limitation of two years have been prescribed & if Electricity Company is not showing any due/arrears as recoverable dues from the consumer continuously, then the same cannot be recovered. In other words, Learned Counsel for the Petitioner submits that the limitation for recovery of money from the Petitioner is prescribed u/s 56(2) of the Act & the same is two years. On the basis of such submission, Learned Counsel for the Petitioner prayed that the Writ Petition be allowed & prayer of the Petitioner be granted by the Court.

6. Learned Counsel for the Opp. Parties, on the other hand, submits that the agreement is guided by Regulation 17 of the Code, 1998 & it provides that the agreement cannot be terminated by either party within the initial period. It is further contended that Section 56(2) of the Act does not provide for any limitation &, therefore, the Writ Petition is without merit & the same be dismissed.

7. On the basis of such argument advanced at the bar, the following two questions arise for determination in this case:-

(i) Whether Section 56(2) of the Act creates a bar by prescribing the limitation for recovery of money after two years from the date it became due?

(ii) Whether the termination of the agreement, which was effected by Opp. Party No. 3 is legally tenable & can form the basis of claim as made by the Petitioner?

8. Section 56 of the Act provides for disconnection of electricity supply in default for payment. For better appreciation, it is appropriate to take note of the exact words Parliament has enacted. Section 56 of the Act reads as follows:-

56. disconnection of electricity supply in default for payment.-(1) Where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a licensee or the generating company in respect of supply, transmission or distribution or wheeling of electricity to him, the licensee or the generating company may, after giving not less than fifteen clear days" notice in writing, to such person & without prejudice to his rights to recover such charge or other sum by suit, cut off the supply of electricity & for that purpose cut or disconnect any electric supply line or other works being the property of

such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled & may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off & reconnecting the supply, are paid, but no loner;

Provided that the supply of electricity shall not be cut off if such person deposits, under protest,-

(a) an amount equal to the sum claimed from him, or

(b) the electricity charges due from him for each month calculated on the basis of average charge for electricity paid by him during the preceding six months, whichever is less, pending disposal of any dispute between him & the licensee.

(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this Section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied & the licensee shall not cut off the supply of the electricity.

9. In interpreting this provision, a Division Bench of Bombay High Court in *Awadesh S. Pandey Vs. Tata Power Co. Ltd. and Others*, has held that the power to recover u/s 56 of the Act has been conferred. Section 56(1) is held to be a special provision, enabling the generating company or the licensee to cut off supply of electricity until such charges or sum as demanded u/s 56(1) is paid. The Division Bench, further, opined that Sub-Section (2) only provides for a limitation, that the recourse to recovery by cutting of electricity supply is limited for a period of two years from the date when such sum became due. As long as a sum is due, which is within two years of the demand & can be recovered, the licensee or the generating company can exercise its power of coercive process of recovery by cutting off electricity supply. This is a special mechanism provided to enable the licensee or the generating company to recover its dues expeditiously. The Bombay High Court, further, held that the Electricity Act has provided for mechanism for improvement of supply of electricity & to enable the licensee or the generating company to recover its dues. Apart from the above mechanism, independently it can make recovery by way of a suit.

10. A plain reading of the Section 56 of the Act as well as the aforesaid case of the Bombay High Court, it is clear that Sub-Section (1) of Section 56 of the Act provides that whenever there is a default in payment of electricity charges, the licensee or the generating company has the right to disrupt electricity supply to the consumer, as a method of recovering the money due from the consumer. Sub-Section (2) of Section 56 of the Act is a limitation to Sub-Section (1). In other words, Sub-Section (2) is rider to Sub-Section (1). Notwithstanding the provision of Sub-Section (1) any sum due from any consumer shall not be recoverable after a period of two years from the date when such sum became due unless such sum being shown continuously as recoverable, as arrear of charges for

electricity supply & the licensee shall not cut off the supply of electricity. In other words, if any amount is due & the same is due within a period of two years, licensee or the generating company can resort to Sub-Section (1). If it is beyond two years from the due date & only in case the sum has been shown continuously as recoverable amount from the consumer, the licensee can resort to Sub-Section (1) otherwise not. Thus, in that view of the matter, the argument advanced by the Learned Counsel for the Petitioner that the amount claimed by the licensee is barred by limitation under Sub-Section (2) of Section 56 is clearly erroneous & hence is not accepted. Accordingly, the first question-formulated is answered against the Petitioner.

11. As far as the termination of agreement is concerned, the Learned Counsel for the Petitioner drew attention of the Court to Annexure-1, wherein the Manager, Angul Electrical Division of the Opp. Party-Company has intimated the Petitioner that disconnection has been effected to his premises on 29.11.2003 in pursuance of the disconnection notice No. 6117 issued on 18.11.2003. The consumer was, therefore, asked to take notice to immediately comply with the arrear outstanding against him up to 1st January, 2004 amounting to Rs. 2,30,476 only, failing which the agreement for power supply against the consumer shall be terminated w.e.f. 28.02.2004 without further notice as per clause-17 of the OERC, Distribution (Conditions of Supply) Code, 1998. This letter has been issued on 06.02.2004. It is hotly contested at the Bar that in view of such termination of contract/agreement the Petitioner is not liable to pay any further energy dues to the licensee after January, 2004. However, it is contended by the Learned Counsel for the Opp. Parties that such a notice has been issued due to a bonafide mistake on the part of the officer of the company & by virtue of clause-17 of the OERC Distribution (Conditions of Supply) Code, 1998, the agreement cannot be terminated by the licensee, & therefore, it has to be held that the agreement remained in force for a period of five years.

Clause-17 of the OERC Distribution (Conditions of Supply) Code, 1998 reads as follows:-

17. Deemed Termination of Agreement- (1) If power supply to any consumer remains disconnected for a period of two months for nonpayment of charges or dues or non-compliance of any direction issued under this Code, & no effective steps are taken by the consumer for removing the cause of disconnection & for restoration of power supply, the agreement of the licensee with the consumer for power supply shall be deemed to have been terminated on expiry of the said period of two months, without notice, provided the initial period of agreement is over.

(emphasis supplied)

The Learned Counsel for the Petitioner argues that a plain reading of the clause provides that whenever the initial period of agreement is over & there is a disconnection of electricity for nonpayment or non-compliance of any direction,

without notice, the licensee has the right to terminate the agreement. It is, therefore, contended by Learned Counsel for the Petitioner that in case the initial period of agreement is not over, as is the situation of the present one, the termination can be effected only after a notice. The Learned Counsel for the Opp. Parties, on the other hand, submits that the termination can be effected only in case the initial period of agreement is over & no other situation the agreement can be terminated. Such rival contention required our attention & adjudication.

12. In support of that contention, the Opp. Parties have relied upon the case of Bihar State Electricity Board, Patna and Others Vs. Green Rubber Industries and Others, wherein it has been held that considered by the test of reasonableness the agreement to pay minimum guaranteed charges, irrespective of whether energy was consumed or not cannot be said 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 & the installation has to be continued irrespective of whether the energy is consumed or not until the-agreement comes to an end. The ratio decided in that case is not at all applicable to the present case, inasmuch as, the reasonableness of agreement is not under challenge. Rather, the question is whether there has been a determination of agreement or not is to be adjudicated. Secondly, it is undisputed case of the Petitioner that the scheme of providing electricity to the Petitioner was found to be non-remunerative. Hence, the consumer was asked to bear the portion of charges. As per Annexure-6, the consumer paid Rs. 5,26,435/- along with Rs. 1,05,268 towards supervision charges. Therefore, the licensee has not incurred any expenses on overhead & hence, the ratio decided in the aforesaid case is not applicable to the present case.

13. Maxwell on Interpretation of Statutes at page-28 has written that the first & most elementary rule of construction is that it is to be assumed that the words & phrases of technical legislation are used in their technical meaning if they have acquired one, & otherwise in their ordinary meaning, & the second is that the phrases & sentences are to be construed according to the rules of grammar. This is called the literal construction in interpretation of statutes. At page-33, it is further written that it is a corollary to the general rule of literal construction that nothing is to be added or taken from a statute unless there is adequate ground to justify the inference that the legislature intended something which it omitted to express. However, if the literal rule interpretation is applied in this case, then no meaning can be derived in the sense that it neither helps the contention raised by the Petitioner nor the words or expressions supplied by the Opp. Parties. Therefore, it requires a harmonious construction which in otherwise will lead to a just, reasonable & sensible conclusion, rather than something which may be presumed that the legislator would not have intended such a outcome.

If the clause interpreted as providing that total exclusion of termination of a contract by any of the party in whatsoever situation, then it will lead to

absurdity. For example, when the contract becomes impossible to perform, then what should be the course of action available to the parties. For example in a case the property to which electricity is supplied is destroyed by natural calamity & the same is not repairable, then is it to be taken that the law framing authority wanted that in such cases also the agreement cannot be terminated & it shall be incumbent on the consumer to pay electricity charges even when it is impossible for him to consume electricity. So is the situation in this case. The consumer is in a position that it is impossible for him to consume electricity as the mill has been seized by the financier & later on it has been sold in auction. In such a situation, can it be held that law framed was intended the licensee to gain money from the consumer. Having given very anxious thought to the matter at hand, this Court is of the opinion that clause-17 of the OERC Code, 1998 lays down in case of disconnection of electricity for non-payment of charges or noncompliance of direction issued under the Code & when no effective steps has been taken by the consumer to remove the cause of disconnection for restoration of power supply, the licensee can terminate the contract by giving a notice of two months if the same is in the initial period of agreement. In case the initial period of agreement is over, it is not necessary even to issue notice of two months for termination of agreement to the consumer for nonpayment/Non-compliance. In that view of the matter, the contention raised by Learned Counsel for the Opp. Parties that the Petitioner should continue to be saddled with electricity charges even after disconnection & termination of the agreement is not tenable.

14. Judging this problem from another aspect, the same conclusion can be reached. It is well settled that a person should not be allowed to unjustly enrich himself. In this connection, the Supreme Court has laid down the law in the case of Indian Council for Enviro-Legal Action Vs. Union of India (UOI) and Others, .

At paragraphs -151, 152 & 153 of the said case the Supreme Court has laid down as follows:-

151. "Unjust enrichment" has been defined by the Court as the unjust retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice or equity & good conscience. A person is enriched if he has received a benefit, & he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has & retains money or benefits which in justice & equity belong to another.

152. Unjust enrichment is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity & good conscience. A Defendant may be liable even when the Defendant retaining the benefit is not a wrongdoer & even though he may have received (it) honestly in the first instance.

153. Unjust enrichment occurs when the Defendant wrongfully secures a benefit or passively receives as benefit which would be unconscionable to retain.

15. Thus, if we apply this unjust enrichment to the present case, the inevitable conclusion is that the licensee should not be allowed unjustly enriched himself by saddling the consumer with electricity charges, which were not used by the consumer.

16. In the case of Shyam Telelink Ltd. now Sistema Shyam Teleservices Ltd. Vs. Union of India (UOI), , the Supreme Court has held that it is well accepted principle that a party cannot both approbate & reprobate. He cannot at the same time blow hot & cold. He cannot say at one time that the transaction is valid & thereby obtain some advantage for which he could only be entitled on its footing that it is valid, & at another time say it is void for the purpose of securing further advantage. This view has been reiterated by the Supreme Court in City Montessori School Vs. State of Uttar Pradesh and Others, & New Bihar Biri Leaves Co. and Others Vs. State of Bihar and Others, The Supreme Court has held that it is fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms & works out the contract, he cannot be allowed to adhere to & abide by some of the terms of the contract, which provided advantageous to him & repudiate the other terms of the same contract, which might be disadvantageous to him. The maxim is "qui approbate non reprobate", one who approbates cannot reprobate. In applying this principle to the case at hand, it is seen that a responsible officer of the Opp. Party-company on 06.02.2004 in categorical term demanded a sum of Rs. 2,30,476 be paid towards electricity-charges upto January, 2004, failing which the contract would be terminated w.e.f. 28.02.2004. It is, further, seen that the Manager, Angul Electrical Division, Angul has written to the Senior General Manager (Commercial) on 31.12.2008 that the Petitioner has applied for refund of security deposit of amount of Rs. 3,90,034 outstanding with the CESU. The said consumer has executed five years agreement on 20.09.2001 for power supply to 225 KW contract demand & power was given on 25.09.2001. It is, further, intimated that due to non-payment of arrear dues power supply was disconnected on 29.11.2003 & termination of agreement was w.e.f. 28.02.2004. The amount of Rs. 2,30,470 was lying outstanding upto 1st January, 2004. The Manager, further, wrote that accordingly the EC bill was claimed up to February, 2004, whose arrear amount shown as Rs. 2,75,307 upto 2/2004 & bills stopped from March, 2004. Thereafter, the Manager (Electrical) intimated that the OSFC, Angul has seized the unit & taking over the possession of the assets of the Mill u/s 29 of SFCS Act, 1951. Therefore, he called for necessary instructions for refund of security amount to the consumer after adjusting the arrear dues of Rs. 2,30,476 upto 1/2004. However, on 11.02.2009 the said Manager (Electrical), A.E.D., Angul intimated the consumer, as per Annexure-6, as follows:-

With reference to the cited above letter it is to intimate you that the power supply agreement executed with CESU Angul Elect. Division Angul on dt. 20th Sept, 2001 & power supply given on 25.09.2001. Accordingly, your agreement is valid up to 24.09.2006 as per para-1 of agreement.

Hence, you are requested to clear the arrear out standing dues till end of agreement period up to 24.09.2006 i.e. arrear up to 2/2004 of Rs. 2,75,307 along with demand charges from 3/2004 to 24.09.2006 of Rs. 12,32,000 i.e. (CD. 80% 200 KVA @ 200 per KVA x 30 month 24 days). Total claimed amount of Rs. 15,07,307 (Rupees fifteen lakh seven thousand three hundred seven only) for release refund of S.D. amount out standing with CESU as per clause 85(2) of OERC Code-2004.

It is clear that the company has taken a view that the agreement has been terminated for non-payment of outstanding dues, & therefore, it cannot later on claim that such communication was made under a bonafide erroneous impression & the Petitioner is liable to pay a further sum of Rs. 12, 32,000 for the period he has not consumed electricity. In other words, he cannot approbate & re-approbrate.

In that view of the matter, the writ application needs to be allowed. Hence, the letter dated 11.02.2009 & orders directing Opp. Parties to pay outstanding dues of Rs. 12,32,000 is hereby quashed along with the orders passed by the Grievance Redressal Forum, CESU, Dhenkanal & the order of the Appellate authority i.e. Ombudsman-I, OERC, Bhubaneswar. It is, further, directed that the Petitioner should be refunded with the security deposit of Rs. 3,90,034 within six weeks from the date of communication of this order to the Opp. Parties, failing which it shall carry an interest @ 6% from the date of termination of contract, i.e. 28.02.2004.