

(1970) 03 KL CK 0014
In the High Court Of Kerala
Case No : SA 457 of 1964

Narayanan Sankaran Mooss

APPELLANT

Vs

National Tyre and Rubber Co. of India Limited

RESPONDENT

Date of Decision : 16-03-1970

Acts Referred:

Constitution of India, 1950 — Article 226
Electricity Act, 1910 — Section 24, 24(1), 24(2), 24(I), 36

Citation : (1970) KLJ 419

Hon'ble Judges : Madhavan Nair, J; Krishnamoorthy Iyer, J

Bench : Division Bench

Advocate : P.K. Subramonia Iyer, V.V. Ananthapadmanabha Iyer and C.S. Ananthakrishna Iyer, for the Appellant; C.M. Kuruvilla, C. George and A. Jacob Oomman, for the Respondent

Final Decision : Allowed

Judgement

Krishnamoorthy Iyer, J.—The defendant in O.S.3 of 1962 on the file of the Subordinate Judge's Court, Kottayam is the appellant. The plaintiff filed the suit for recovery of Rs. 1,92,925/- being the damages alleged to have been caused to them on account of cutting of supply of electrical energy by the defendant in exercise of the right u/s 24(1) of the Indian Electricity Act, 1910. The court below granted a decree to the plaintiff for the recovery of Rs. 1,32,696.67 with interest at 6% per annum from the date of suit. The appeal is filed against the decree and judgment of the court below. The plaintiff who is the National Tyre & Rubber Company of India Ltd., is a company registered under the Companies Act having its head office at Kottayam. The defendant is the proprietor of the Kottayam Electric Supply Agency and is a licensee within the meaning of the Indian Electricity Act and the Electricity (Supply) Act, 1948 for the distribution of electrical energy within the municipal limits of Kottayam. The plaintiff is running a rubber factory within the municipal limits of Kottayam carrying on the manufacture of several varieties of rubber goods. The defendant issued the original of Ex. D 7 notice dated 21st of December, 1961 demanding from the

plaintiff Rs. 12,960.48 being the arrears due towards the charges of electricity due from May 1961 to November 1961 (both inclusive) under consumer Nos. 171 and 4476 payable within three days after seven clear days of the receipt of the notice by the plaintiff and also informing the plaintiff that in default of payment supply of electric energy would be out off u/s 24(1) of the Indian Electricity Act, 1910. Ex. D6 is the acknowledgment receipt evidencing that the original of Ex. D7 was received by the plaintiff on 22-12-1961. Ex. D8 dated 22nd December, 1961 is the reply sent by the plaintiff. In substance Ex. D8 has stated that since there is a bona fide dispute regarding the amount claimed by the defendant there are no arrears of charges due justifying a notice u/s 24(1). In reply to this the defendant sent the original of Ex. D4 dated 27-12-1961 denying the plea of the plaintiff that there is in existence any bona fide dispute regarding the claim of the defendant and pointed out that the disconnection as per Ex. D7 would be carried out in case of default. Ex. D3 is the acknowledgment receipt showing that the original of Ex. D4 was received by the defendant on 28-12-1961. In view of the plaintiff's default to comply with the demand the current was off on 2-1-1961. The suit giving rise to the appeal was filed on 9-1-1962. It is seen that on 22-1-1962 the plaintiff produced Ex. P 16 fixed deposit receipt for Rs. 12,960.58 drawn on the State Bank of Travancore, Kottayam in court towards security for the amount claimed by the defendant who on the same day resumed the supply of energy to the plaintiff.

2. There was non-supply of electric energy to the plaintiff from 2-1-1962 to 22-1-1962. The claim of the plaintiff for damages is for the reason that the notice issued u/s 24(1) and the disconnection are illegal.

3. We may here refer to the course of dealings between the parties in relation to the supply of electric energy by the defendant to the plaintiff disclosed by the evidence on record.

4. The defendant filed O.S. 86 of 1956 on the file of the Kottayam Sub Court against the plaintiff for recovery of Rs. 56,797-13-6 being the arrears of current charges from January 1950 to April 1956. The plaintiff challenged the quantity of the current claimed to have been supplied by the defendant and also the rate charged by the defendant and counter claimed Rs. 15,000/- as excess payment. The plaintiff filed O.S. 13 of the 1957 on the file of the same court against the defendant for a declaration that the energy supplied was high tension energy and for restraining the defendant from disconnecting the supply in exercise of the right u/s 24(1) of the Indian Electricity Act, 1910 for nonpayment of the dues claimed in O.S.86 of 1956 Both the suits were jointly tried and disposed of by the trial court by Ex. D1 judgment dated 25-11-1960. O.S. 86 of 1956 was decreed and O.S. 13 of 1957 was dismissed. A.S. Nos. 139 and 140 of 1961 were filed by the plaintiff in this Court against the decisions in O.S. 86 of 1956 and O.S. 13 of 1957. The appeals were dismissed by this Court on 8-1-1965.

5. The defendant also filed O.S. 36 of 1961 in the Subordinate Judge's Court, Kottayam against the plaintiff for recovery of Rs.87,631.36 due towards current

charges for the period from May 1956 to April 1961. Ex. P 10 is the copy of the plaint. The plaintiff apart from raising contentions similar to those he raised in O.S. 86 of 1956, also pleaded that he had filed a petition on 7-1-1961 before the Electrical Inspector u/s 24(2) of the Indian Electricity Act, 1910 for a decision regarding the rate and the quantum of current charges due and prayed for stay of the trial of O.S. 36 of 1961 till the disposal of the said petition. O.S. 36 of 1961 was decreed by the trial court on 28-1-1963. Ex. D2 is the judgment of the trial court. A. S. No. 422 of 1963 filed against the decision by the plaintiff was dismissed by this Court on 8-1-1965.

6. The plaintiff had by his letter dated 7-1-1961 referred two disputes namely the quantity of energy supplied and the rate per unit to the Electrical Inspector appointed u/s 36 of the Indian Electricity Act, 1910 who by his letter dated 12-1-1961 directed the defendant not to take any action against the defendant u/s 24(1) of the Indian Electricity Act, 1910 till his decision on those points. The defendant thereupon filed O.P. 475 of 1961 under Article 226 of the Constitution in this Court to quash the direction issued by the Electrical Inspector and to prevent him from investigating or enquiring into the two matters. The original petition was allowed by Raman Nayar, J., by Ex.D14 judgment dated 19-12-1961.

7. During the months of May 1961 to December 1961 the plaintiff was paying only at the rate of Rs.3500/- every month towards current charges. According to the defendant the balance due towards the supply during these months was Rs. 12,960.48. He therefore issued the original of Ex. D7 demanding this amount and the disconnection of the current on 2-1-1962 was due to the default in paying the same.

8. The learned counsel for the defendant raised the following contentions. (1) The discontinuance of supply effected u/s 24(1) of the Indian Electricity Act, 1910 was because of the plaintiff's neglect to pay the charges and is legal and valid and the plaintiff is therefore not entitled to damages. (2) The plaintiff has not in truth and fact sustained any damages. (3) The plaintiff should have taken steps to mitigate the damages by paying the money and avoiding the discontinuance of supply or by working the oil engine which he was having as a stand-by for use in case of failure of electricity.

9. We shall now take up the first contention. The plaintiff has not given in the plaint any specific reason to prove that the action of the defendant u/s 24 (1) of the Indian Electricity Act, 1910 deemed illegal and invalid. But two reasons are gatherable from paragraphs 10 and 11 of the plaint for the attack against the defendant. The first is that the plaintiff paid Rs.28,000/- during the months of May to November 1961, but the defendant has given credit to only Rs.24,500/-. The second reason is that there was in existence a valid and bona fide dispute regarding the amount claimed by the defendant. Though the reasons are not alleged in the plaint for the existence of a bona fide dispute in Ex. D8, the plaintiff alleged the reason thus:

Whereas you have filed a suit No. 86/56 in the Kottayam Sub-Court basing on untenable illegal claims, and whereas we had filed a suit O.S. 13/57 against you, and appeals have been filed by us in the High Court of Kerala against the judgment of the above Sub-Court, which appeals are now pending, and whereas another suit No. O.S. 36/61 has been filed by you and is pending in the Sub-Court, Kottayam we submit that there is a valid and bona fide dispute regarding the amount due from you to us or from us to you.

Ex. D8 proceeded to state thus:

We have pointed out to you on previous occasion that there is an agreement between us that an amount adequately higher than the charges for electric energy supplied to us, calculated at the rate, we claim, you are lawfully entitled to charge us, will be paid regularly every month. Such amount has been increased from time to time according to the increase of the consumption of electric energy by us. At present, we are paying you at the rate of Rs. 3500/- every month, as per the above agreement, and it has to be deemed that this agreement is in full satisfaction of your claim, until the disputes between us are finally settled in the proper Court and hence, we emphatically bring to your notice that it has to be deemed that there are no arrears of charges for electric energy supplied to us.

10. The learned Judge has found that there was a bona fide dispute between the parties for the following reasons. (1) The plaintiff has paid during the months of May to November 1961 Rs. 28,000/- and the defendant has credited only Rs. 24,500/- for the period. (2) for the months of May to November 1961, the plaintiff was liable only for Rs.23,123.61. (3) The plaintiff was claiming that during the period in question he was supplied only with high tension current and he was charged with the rate for low tension current.

11. Ex. D8 did not mention any payment in excess of Rs. 24,500/- towards the current charges during the months of May to November 1961. According to the defendant, Rs.3,500/- paid in the beginning of May 1961 were towards the current charges due for April 1961 and the claim in O.S. 36 of 1961 is only after deducting the said amount. The learned Judge has not found to the contrary. There is unimpeachable evidence furnished by the defendant that the sum of Rs.3,500/- was adjusted for amounts due for April 1961. We therefore hold that the plaintiff paid on Rs.24,500/- towards part payment of charges due for May to November 1961.

12. The learned Judge is wrong in his conclusion that only Rs. 23,123.61 were due towards current charges for the months of May to November 1961. The conclusion of the learned Judge is drawn from Ex. P 38. It is admitted that there were two consumer numbers for the plaintiff and they are 171 and 4476. The demand under Bx. D 7 is for supply to both the numbers. There is no plea by the plaintiff that he is not liable for the energy supplied to consumer No.4476. Ex. P 38 is the statement relating to the supply to consumer No. 171. The learned

judge misunderstood Ex. P 38 as a claim made in respect of both the consumer numbers. Exs. D 10 (a) and Oil (a) are the consumer ledgers for consumer No.171 from 10-8-1960 to 10-12-1961. Exs D 12 (a) and D 11 (b) are the consumer ledgers for consumer No.4476 from 16-8-1960 to 10-8-1963. The correctness of these entries was not disputed either in the lower court or before us. The plaintiff did not file in court the statement of accounts for consumption of energy by consumer No. 4476 during the relevant period. The conclusion drawn by the learned Judge on this aspect cannot therefore be accepted.

13. The plea of the plaintiff that he was being supplied only with high tension current and was not therefore liable at the rate charged was overruled by Ex. D 1 judgment dated 25-11-1960 is O.S. 86 of 1956. It was found in Ex. D 1 thus

The energy supplied to the defendant is low tension energy.....The defendant is not entitled to impeach the rates levied for low tension energy.

14. Ex. D 1 was long before the issue of Ex. D 7 even though the appeal against the decision was pending. The three reasons given by the learned Judge are therefore not sufficient to prove that there was in fact a bona fide dispute existed between the parties on the date of Ex. D 7.

15. The learned Judge has overruled the plea of the plaintiff that the payment at the rate of Rs.3,500/- a month during the months of May to November 1961 was in pursuance of an oral agreement between the parties. It is necessary to remember that the oral agreement was put forward in Ex. D8. The learned Judge has observed thus:

Plaintiff has alleged an oral agreement entitling him to pay at the rate of Rs. 3,500/- per month in the running account between the parties. But that has not been substantiated by independent evidence.

16. We will now examine the plea of the counsel that the existence of a bona fide dispute between the parties as to the amount payable resulting in nonpayment is a bar to any action u/s 24(1) of the Indian Electricity Act, 1910. A bench of the Bombay High Court in Corporation of the City of Nagpur Vs. The Nagpur Electric Light and Power Company Ltd., on which much emphasis was made by the plaintiff's counsel has in view of the decisions in In re London and Paris Banking Corporation (1875) 19 Eq. 444 and Joseph v. East Ham Corporation (1936) 1 K. B 367 observed:

In these circumstances, we think that there is, in fact, a bona fide dispute between the parties and that the failure of the petitioner to pay the dues does not amount to a neglect to pay within the meaning of the expression occurring in sub-section (1) of S. 24 of the Electricity Act.

17. It was therefore argued by the plaintiff's counsel that a mere failure to pay will not amount to neglect to pay within the meaning of Section 24(1). We shall therefore extract Section 24 of the Indian Electricity Act, 1910. The Section reads:

24(1) Where any person neglects to pay any charge for energy or any sum, other than a charge for energy, due from him to a licensee in respect of the supply of energy to him, the licensee may, after giving not less than seven clear days notice in writing to such person and without prejudice to his right to receive such charge or other sum by suit, cut off the supply and for that purpose cut or disconnect any electric supply-line or other works, being the property of the licensee, through which energy may be supplied, and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and re-connecting the supply, are paid, but no longer.

(2) Where any difference or dispute which by or under this Act is required to be determined by an Electrical Inspector, has been referred to the Inspector before notice as aforesaid has been given by the licensee, the licensee shall not exercise the powers conferred by this section until the Inspector has given his decision:

Provided that the prohibition contained in this sub-section shall not apply in any case in which the licensee has made a request in writing to the consumer for a deposit with the Electrical Inspector of the amount of the licensee's charges or other sums in dispute or for the deposit of the licensee's further charges for energy as they accrue, and the consumer has failed to comply with such request.

18. What do the words "neglects to pay" occurring in sub-section (1) of Section 24 signify? *Joseph v. East Nam Corporation* (1936) 1 K. B 367 was based on Section 18 of the Electric Lighting Act, 1909. That provision reads:

The undertakers may refuse to supply electrical energy to any person whose payments for the supply of electrical energy are for the time being in arrear (not being the subject of a bona fide dispute), whether any such payments be due to the undertakers in respect of a supply to the premises in respect of which such supply is demanded or in respect of other premises.

19. Interpreting the above Section Slessor, L.J. observed:

..... for when we reach s. 18 of the Act of 1909 it is only aright to refuse a supply when the payments for the supply of electrical energy are in arrear, where those payments are not the subject of a bona fide dispute.

20. The decision therefore turned on the words "not being the subject of a bona fide dispute" found in the provision. In our view, the decision cannot help us to interpret the words "neglects to pay" in Section 24 (1) of the Electricity Act.

21. In *In re London and Paris Banking Corporation* (1875) 19 Eq. 444 sub-section (1) of Section 18 of the Companies Act, 1862 was interpreted. The question was whether a creditor who has given the statutory notice u/s 18 is entitled to a statutory right to a winding-up Order on account of nonpayment by the Company for a space of 3 weeks. Sir G. Jessel. M.R., pointed out:

Now, first of all, what does the statute say? It says that whenever a creditor to whom a company is indebted in a sum exceeding ?50 has served on the

company in a certain way a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum or to secure or compound for the same to the reasonable satisfaction of the creditor, then the company shall be deemed to be unable to pay its debts., It is very obvious, on reading that enactment, that the word "neglected" is not necessarily equivalent to the word "omitted". Negligence is a term which is well known to the law. Negligence in paying a debt on demand, as I understand it, is omitting to pay without reasonable excuse. Mere omission by itself does not amount to negligence. Therefore I should hold, upon the words of the statute, that where a debt is bona fide dispute by the debtor, and the debtor alleges, for example, that the demand for the goods sold and delivered is excessive, and says that he, the debtor, is willing to pay such sum as he is either advised by competent values to pay, or as he himself considers a fair sum for the goods, then in that case he has not neglected to pay, and is not within the wording of the statute.

22. What was considered ultimately in the above decision was whether the failure to pay was for a reasonable cause and it has to be restricted to its own facts. The meaning of the word "neglect" given in Black's Law Dictionary, 4th edition, is as follows:

Neglect. May mean to omit, fail, or forbear to do a thing that can be done, or that is required to be done, but it may also import an absence of care or attention in the doing or omission of a given act. And it may mean a designed refusal or unwillingness to perform one's duty.

23. A mere nonpayment in certain circumstances may not amount to neglect to pay. At the same time it must be borne in mind that the Section does not contemplate proof of any positive negligence on the part of the consumer for his failure to pay. Section 24 (1) of the Indian Electricity Act provides that where a consumer neglects to pay any charge for energy or any sum, other than a charge for energy, the licensee shall after giving the requisite notice contemplated by the Section be entitled to stop supply of electrical energy. The power u/s 24(1) is controlled by Section 24(2) which provides that if any dispute between the parties which under the Act is required to be determined by an Electrical Inspector has been referred to him for decision before the issue of notice u/s 24(1) it is not open to licensee to exercise the powers u/s 24(1) before the decision rendered by the Electrical Inspector, But the proviso to Section 24 (2) lays down that in some cases Section 24 (2) will not apply to a licensee. The proviso to Section 24 (2) lays down that the licensee shall not be prohibited to proceed u/s 24 (1) in any case in which he has requested the consumer in writing to deposit with the Electrical Inspector the amount of licensee's charges or other sums in dispute or for the deposit of the licensee's further charges for energy as they accrue and the consumer has failed to comply with such request. The words "neglects to pay" in Section 24(1) have to be understood from a reading of the whole of Section 24. The power vested in a licensee u/s 24 (1) has

been limited to some extent by Section 24 (2). But the proviso to the said provision has restricted the embargo created by Section 24(2). If there is a reference to the Electrical Inspector before the issue of notice u/s 24 (1) the licensee shall not be entitled to cut off the supply until a decision is given by the Inspector. At the same time the proviso to sub-section 24 (2) gives an option to the licensee to request the consumer to deposit with the Electrical Inspector the amount of the licensee's charges or other sums in dispute and also the future charges as and when they accrue and in case of default to cut off the supply. The Section itself contemplates that even when there are disputes to be decided by the Electrical Inspector, the consumer should deposit the amounts with the Electrical Inspector and in case of default the licensee can exercise his right to cut off the supply. We are not therefore satisfied that by the mere raising of a dispute by the consumer however bona fide it may be the right of a licensee u/s 24 (1) will be affected. The plaintiff did not in Ex. D 8 dispute the quantum of the energy consumed under the two consumer numbers referred to. His main plea was that he was supplied with high tension energy for which he is liable to pay only at the rate of 75 annas per unit and not at the rate charged in the bills. This contention was overruled by the trial court even in Ext. D 1. The finding is that the energy supplied to the plaintiff was at all material times only low tension current. Because he had chosen to file an appeal against the decree in O.S. 86 of 1956 in the High Court and he succeeded in getting at the Electrical Inspector to take cognizance of certain disputes between the parties without jurisdiction cannot lead to an inference that there was a bona fide dispute on the part of the plaintiff regarding the demand of the defendant. The oral agreement has been even found against by the learned Subordinate Judge. We fail to understand on what basis can the plaintiff contend that he had raised a bona fide dispute regarding the claim of the defendant. We are satisfied not only about the absence of any dispute much less a bona fide dispute between the parties. We are satisfied that from 1951 onwards the plaintiff has been putting forward false contentions and trying to evade payment of current charges for the energy consumed for running his factory. Apart from the ground of bona fide dispute the learned Judge found that the original of Ext. D 7 was defective for two grounds. The first is a sum of Rs. 5933.70 was not actually due on that date. This is because of the following reason, Ex. P 8 is the bill dated 10-12-1961 for the charges due for consumption of energy in the month of November 1961 from consumer No.171. The amount due from consumer No.171 is Rs.3,475.63 and the amount due from consumer No.4476 as is disclosed by Ext. D 11 (b) is Rs.2,458.07. The total amount thus due for the current consumption during November 1961 is Rs. 5933.70. The previous balance of Rs.64,921.40 due from consumer No. 171 has been added and the total amount claimed in Ex. P 8 is Rs.68,397.03. There are certain conditions printed on the back of Ex. PS. Condition No. 1 is to the effect that the current charges have to be paid within one month from the date of the writing of the bill and if there is default service will be disconnected without issuing any separate notice. In view of this condition the learned Subordinate Judge took the view that the plaintiff was granted 30

days" time from the date of Ext. P8 viz., 10-12-1961 to pay the amount and since the original of Ex. D 7 issued on 21-12-1961 before the expiry of one month the sum of Rs.5933.70 were not then payable. The learned Judge therefore found the original of Ex. D 7 to be defective relying on the decision in Corporation of the City of Nagpur Vs. The Nagpur Electric Light and Power Company Ltd., . The learned Judge observed:

There is one mere defect in the notice under S. 24(1) and it is this. The last bill which was sent by the respondent to the petitioner was, as already stated, dated 9-6-1958. That bill was received by the petitioner on 11-6-1958. It is stated on the top of the bill that the petitioner was entitled to time for 30 days to pay the bills, that is to say, the petitioner could pay the bill on or before 10-7-1958. Since the petitioner had time to pay the bill till that date, that time could not be curtailed by the notice dated 26-6-1958. The notice however purports to curtail that time by saying that the bill must be paid within seven days of 26-6-1958. Shri Phadke says that this period of 30 days given is one of grace and it was open to the respondent to curtail that period. Whether it is open to the respondent to do that or not need not be considered here because the respondent has not stated in the notice under S. 24 (1) that the period of grace which was given by the respondent to the petitioner was curtailed by it.

24. The above conclusion was because of the view that the notice u/s 24(1) did not cancel the time for payment already granted. The decision has therefore to be confined to its facts and cannot be taken as enunciating any general rule.

25. The liability to pay current charges arises not on account of the demand made but as a result of the consumption of the current. The moment the current is consumed the consumer is liable to pay the charges. The liability does not depend upon any demand for payment by the licensee. Condition No. 1 in Ex. P 8 does not grant any time to the consumer to pay but it only informs the consumer that if the amount is not paid within 30 days there will be a disconnection without any further notice.

26. Even assuming that Ex. P8 has granted 30 days to the consumer to pay the amount we do not find anything standing in the way of the defendant to call for the amount earlier. The effect of the original of Ext. D 7 is to cancel the period of 30 days mentioned in Ext. P8. Before the issue of Ext. D7 the plaintiff has not accepted the amount and agreed to pay the same within a period of 30 days from the date of Ex. P 8 in which case atleast it will be possible for the plaintiff to contend that there was a completed contract and it was not open to the defendant to revoke the time given unilaterally. If the plaintiff had repudiated the liability before the issue of the original of Ext. D 7 the learned counsel for the plaintiff did not contend for the position that even then the original of Ex. D 7 will be invalid. His submission was that on the date when Ex. D 7 was issued the plaintiff had not denied the liability. By the mere grant of time in Ex. P 8 there is neither any contract between the parties nor any estoppel against the defendant preventing him from claiming the amount earlier. We are therefore of the view

that the effect of the issue of the original of Ex. D 7 is to revoke the period of 30 days and the time granted being concessional the defendant is entitled to revoke the same.

27. There is one other way of looking at the matter. The period of 30 days was for the payment of the entire amount mentioned in Ext. P 8 bill. The defendant was satisfied in view of the pendency of the appeals with the arrears due for the months of May to November 1961. He therefore claimed only Rs. 12,960.48. The defendant did not grant 30 days' time to the plaintiff for paying this amount. We overrule the plea that the original of Ex. D 7 was defective for this reason. We therefore hold that the original of Ex. D 7 is valid and legal and the defendant was within his legal competence when he stopped the supply of energy for consumer Nos. 171 and 4476. The defendant has to succeed on this finding. We think it unnecessary to enter findings on the other points raised by the defendant's counsel. We therefore set aside the decree and judgment of the court below and allow the appeal dismissing the plaintiff's suit with costs both in this Court and in the trial court.