
(1989) 07 GUJ CK 0008
In the Gujarat High Court

Patel Dadubhai Narsibhai (Decd.) through his heirs and LRs. APPELLANT
Jayaben D. Patel and Others

Vs

Gujarat Electricity Board RESPONDENT

Date of Decision : 28-07-1989

Acts Referred:

Contract Act, 1872 — Section 73, 73
Electricity Act, 1910 — Section 24

Citation : (1990) 1 GLR 673

Hon'ble Judges : M.B. Shah, J;A.P. Ravani, J

Bench : Division Bench

Judgement

A.P. Ravani, J.—Both these appeals arise out of the same judgment and decree passed by the learned Civil Judge (S.D.), Nadiad in Special Civil Suit No. 80 of 1973. The plaintiff filed suit for recovery of Rs. 53,000/- on the allegation that the defendant-Gujarat Electricity Board had committed breach of the contract inasmuch as "the Board" disconnected the supply of electricity wrongfully and consequently the plaintiff suffered loss to the extent of Rs. 53,000/-. The defendant-Board resisted the suit on facts as well as on law points and also filed counter claim of Rs. 6,363.38 ps. After recording the evidence and after hearing the parties, the trial Court ordered to dismiss the counter claim filed by the defendant-Board. But it partially decreed the suit filed by the plaintiff and ordered the defendant-Board to pay Rs. 6,625/- as damages to plaintiff No. 1 with cost of the suit and interest at the rate of 6 per cent per annum till realisation.

2. Feeling aggrieved by and dissatisfied with the aforesaid judgment and decree passed by the trial Court, both the parties, plaintiff as well as the defendant have filed appeals. First Appeal No. 960 of 1977 is filed by the original plaintiff claiming a further amount of Rs. 46,375/-while the defendant-Board First Appeal No. 1069 of 1977 against the judgment and decree passed by the trial Court directing it to pay an amount of Rs. 6,625/- to plaintiff No. 1, and also against the dismissal of its counter claim of Rs. 6,363.38 ps. Since both these appeals

arise out of the common judgment and decree passed by the trial Court, both the appeals are ordered to be heard together and are being disposed of by this common judgment.

3. It may be noted that the plaintiffs had also filed another suit being Regular Civil Suit No. 349 of 1973 and had claimed an amount of Rs. 766.86 ps. However, as far as the present two appeals are concerned, as it is not necessary for deciding these two appeals, we are not making any reference to Regular Civil Suit No. 349 of 1973.

4. Plaintiff No. 1, Patel Dadubhai Narsibhai applied for electric connection some time in the year 1966. The connection was granted to him being AG 1 and AG 2. Necessary connection for supply of power was given on September 21, 1967. Since that was a period of monsoon, actual use of electricity was started from November 3, 1967. Everything went on smoothly, except some minor disputes between the parties upto July 1970. Initially there were some disputes between the parties as regards the payment of certain amount of electric charges relating to minimum charges commencing from September 21, 1967 and November 2, 1967. The disputes appeared to have been resolved at the local level. However, in the month of April, 1968, bill for the month of March was sent by the Board. Therein an amount of Rs. 388.58 ps. was shown as due and payable by the plaintiff in respect of connection AG 1. In another electric connection AG 2, an amount of Rs. 58.98 ps. was shown on due and payable by the plaintiff. According to the defendant-Board as amount of Rs. 447.56 ps. was required to be paid by the plaintiff due to audit objection. The plaintiff objected to the payment of this amount.

5. Ultimately the defendant-Board served notice dated July 9, 1970 upon the plaintiff. The plaintiff did not comply with the demand. Hence the defendant-Board disconnected the electric supply. Thereupon, in the month of October 1971, the plaintiff filed Regular Civil Suit No. 102 of 1971 for declaration and mandatory injunction to the effect that the electric connection was wrongfully disconnected and the defendant-Board be directed to restore the same. The suit was decreed on January 2, 1973. Immediately thereafter, that is on January 4, 1973, the electric connection was restored by the Board.

6. Thereafter in the month of June 1973, the plaintiff filed the present suit claiming damages to the tune of Rs. 53,000/- on the allegation that during the period commencing from July 22, 1970 to January 3, 1973, the plaintiffs could not carry on its business of selling water to different agriculturists as there was no electric supply and hence they could not lift the water from their well. Therefore they had suffered loss in their business of sale of water. The plaintiffs alleged that plaintiff No. 2 firm was carrying on the business of selling water to different agriculturists. It had earned profit of Rs. 53,000/- by selling water to different people during years 1967-68 and 1969. Plaintiffs produced relevant extracts from the books of accounts (Ex. 95 to Ex. 106) to show that plaintiff No. 2 firm had earned profit of about Rs. 53,000/- during the aforesaid period prior

to the disconnection of electric supply. The books of accounts produced related to Samvat Year 2024, 2025 and 2026.

7. On the basis of the income earned from the business of selling water during the previous years, the plaintiffs claimed damages for the period in question i.e. from July 1970 to January 3, 1973. The plaintiffs examined one Shri Vaghjibhai Jivabhai (Ex. 75), an employee of plaintiff No. 2 firm. The plaintiff relied upon the books of accounts (Ex. 95 to Ex. 106) and the income tax assessment orders (Ex. 90 and Ex. 91) passed by the appropriate Income Tax authorities in respect of the income of plaintiff No. 2 firm for the years 1969-70 and 1970-71. The plaintiffs also produced Income Tax assessment order (Ex. 92) in respect of the income of Prahaladbhai Patel (partner of the firm) for the year 1969-70. The oral evidence led on behalf of the plaintiffs is that of Shri Vaghjibhai Jivabhai (Ex. 75). The oral evidence led by the defendant-Board consists of one Pinakinprasad Jivatram, Deputy Engineer of the Board (Ex. 191).

8. The evidence led by the parties disclose the following facts:

Plaintiff No. 2 is a partnership firm registered under the provisions of Indian Partnership Act, 1932. It commenced its business since February 9, 1954 (Ex. 76). Plaintiff No. 1, Dadubhai Patel is a partner of the firm right from the beginning of the firm. There was change in the constitution of the firm, but the firm has continued. The business of the firm was that of selling water to different agriculturists. Plaintiffs lifted water from two wells one well called "Aidio kuva" and another called "Ambaivalo kuva" and sold water to surrounding agriculturists till the year 1966, the firm was using oil engine for lifting water. But from the year 1967, electric motors of 17.5 H.P. were installed on both the wells and thereby the firm continued its business. Ex. 115 is the application dated February 2, 1966 submitted to defendant-Board by plaintiff No. 1, Shri Dadubhai Narsibhai Patel for obtaining electric connection. Plaintiff No. 1 executed bond on a stamp of Rs. 3/- in favour of the Board on November 15, 1966. Two different bonds have been executed by plaintiff No. 1, Shri Dadubhai Narsibhai Patel. Both the bond papers are in Gujarati language. Plaintiff No. 1 had entered into correspondence with the Board. Similarly the Board has also entered into correspondence with plaintiff No. 1 only. This is clear from Ex. 118 to Ex. 122. The defendant-Board issued electric consumption bills in the name of plaintiff No. 1 Dadubhai Patel. These bills are also on record at Exs. 123, 124, 126, 127 and 129. Ex. 131 is the certificate issued by the village Sarpanch to the effect that in Survey No. 505, there were two electric motor pumps of 17.5 H. P. capacity and there was adequate water in both the wells. The certificate is issued in favour of plaintiff No. 1 only and not in favour of plaintiff No. 2 firm. The true copy of the certificate bears date of September 10, 1968.

9. The oral evidence of Vaghjibhai (Ex. 75) is to the effect that he was serving with plaintiff No. 2 firm for last many years. That formerly, the firm was lifting water from wells by means of oil engines, but from the year 1967, electric connection was obtained and two electric motors of 17.5 H.P. were installed.

Thereafter water was being sold by lifting the same with the means of electric motors. In his deposition, he has given the history of previous disputes and the consequent filing of suit and restoration of electric connection. Thereafter he has given details with regard to the income earned by plaintiff No. 2 firm during Samvat years 2024, 2025 and 2026. He has also referred to the books of accounts maintained by the firm and has produced the extracts from the books of accounts. On the basis of the income earned by plaintiff No. 2 firm during the years 1968-69, 1969-70 and 1970-71, it is claimed that had there been continuous electric supply during the period commencing from July 1970 to January 2, 1973, plaintiff No. 2 firm would have earned profit of Rs. 53,000/-. According to his say, this profit could not be earned by plaintiff No. 2, firm as the defendant-Board had committed breach of contract and had wrongfully disconnected electric supply.

10. It is an admitted position that plaintiff No. 1 has not been examined as witness in the case. Another person Prahaladbhai, who is also a partner of plaintiff No. 2 firm and whose Income Tax Assessment order for year 1969-70 has been produced on record (Ex. 92) was on certain occasions present in Court, but he was also not been examined. The sole witness examined on behalf of the plaintiffs is Vaghjibhai Jivabhai (Ex. 75). He has admitted that Ex. 115, the application for electric connection was submitted by plaintiff No. 1, Dadubhai Patel in his individual capacity. A suggestion was put to the witness in his examination that in case of dispute regarding the amount of bill issued by the defendant-Board, the subscriber was required to tender the amount of the bill under protest and the Board was required to treat the same as advance. With regard to this suggestion, the witness stated that he had no such knowledge.

11. In this connection it may be noted that a specific case has been put by the defendant-Board in written statement to the effect that as per the agreement entered into between plaintiff No. 1 and the defendant-Board the relationship between plaintiff No. 1 and the defendant-Board will be governed by the conditions of supply of energy. Bonds Exs. 16 and 117 executed by plaintiff No. 1 also inter alia provided that the consumer had read the conditions and the tariff and he would abide by the same. Condition No. 27 of conditions of supply, as disclosed in the written statement and in the evidence inter alia provided that the bills should be paid by the consumer at the Board's office within 20 days of the date of billing. In case there is any dispute the amount of the bill should be paid within 20 days of the billing under protest. The same will be regarded as advance to the credit of the consumer's account until such time the bills in dispute have been finally settled. Thus it is clear that though the witness denied the suggestion made in the cross-examination as regards the condition regarding the payment of bill under protest, the fact remains that as per the documents executed by plaintiff No. 1 (Exs. 116 and 117), the relationship between the parties were governed by the conditions of supply of energy. One of the these conditions (i.e. Condition No. 27(b)) is with regard to the payment under protest in case of dispute.

12. The witness admitted that the entire correspondence between the plaintiffs and the Board was with plaintiff No. 1 and not with plaintiff No. 2. The witness expressed his ignorance as regards the fact that about six firms had started selling water within one year after 1967. However, he admitted that "Mahi" canal ("Mahi" is name of river) was passing through the nearby area, but he did not know since when the Mahi canal water supply started. He admitted that from Mahi canal for last five years, the water was being supplied to agriculturists. This would mean that since the year 1971 Mahi canal water was available in this area. The witness admitted that the plaintiffs had no evidence to show that the contract was for and on behalf of plaintiff No. 2 firm and not on behalf of plaintiff No. 1 alone. It is also an admitted position that plaintiff No. 1 never informed the defendant-Board that the electric connection was being used for the business of plaintiff No. 2 firm and that a separate and distinct interest of plaintiff No. 2 was also created in the electric connection obtained by plaintiff No. 1.

13. On behalf of the defendant-Board one Pinakinprasad Jivatram Dave (Ex. 191) has been examined. He has stated in his deposition that the contract of supply of electricity was with plaintiff No. 1 and not with plaintiff No. 2. It is also borne out from Exs. 115, 116 and 117 and the deposition of Pinakinprasad J. Dave (Ex. 191) that the contract of supply of electricity was for agriculture purpose and not for commercial purpose. The witness has given details with regard to the application submitted by plaintiff No. 1 for electric connection and correspondence pertaining to disputes between the parties. The sum and substance of the evidence of witness Pinakinprasad is that there was dispute with regard to the supplementary bill issued by the Board and the plaintiffs were asked to pay the amount even under protests. But the plaintiffs failed to pay the amount and hence the electric supply was disconnected, the details with regard to the counter claim made by the defendant-Board for Rs. 6,363.38 ps. have also been given by the witness. The witness has categorically stated that the privity of contract was between the Board and plaintiff No. 1 as individual. There was no privity of contract with plaintiff No. 2 firm.

14. The trial Court believed that the defendant-Board had committed breach of contract inasmuch as electric connection was wrongfully disconnected and the damages suffered by plaintiff No. 2 firm was to the extent of Rs. 26,500/-. In the opinion of the trial Court since the profit of plaintiff No. 1 would be to the extent of Rs. 6,625/- the trial Court determined the amount of damages at Rs. 6,625/- and directed the defendant-Board to pay the same to the plaintiff. The trial Court dismissed the counter claim of the defendant-Board. Against the aforesaid judgment and decree passed by the trial Court, as stated hereinabove, both the plaintiffs as well as the defendant-Board have preferred two separate appeals.

15. In case of breach of contract and resultant damages, if any, the damages are to be claimed as per the provisions of Section 73 of the Central Act, 1872. The liability to pay damages would arise if a breach has been committed by a party to the contract. Thus precondition for applicability of Section 73 is that there should

be a contract between the parties. The existence of contract is the basis for fastening the liability of a party committing the breach. Therefore first thing to be determined is who are parties to the contract and what was the contract?

16. Application for grant of electric connection (Ex. 115) dated February 2, 1966 was submitted by plaintiff No. 1, Dadubhai Narsibhai Patel in his individual capacity. Be it noted that plaintiff No. 2 firm is in existence since the year 1954 (Ex. 76). It is also in evidence that the firm is carrying on its business of selling water for last many years, even before the rate of electric pump. Prior to the year 1967 the firm was using oil engines for lifting water and thereby it was carrying on its business activities. Despite this fact, plaintiff No. 1 applied for electric connection in his individual capacity. He /". e. plaintiff No. 1, executed bonds (Exs. 116 and 117) in his individual capacity. The entire correspondence (Exs. 118 to 122) was carried on between the defendant-Board and plaintiff No. 1 only. The bills produced on record are at Exs. 123, 124, 126, 127 and 129. They are in the name of plaintiff No. 1.

17. The witness examined by the plaintiffs admitted that plaintiff No. 1 did not ask the permission of the Board to change the user of electric connection and permit him to use the electric supply for the purpose of commerce i.e. for selling water. The evidence of Pinakinprasad J. Dave (Ex. 191) examined on behalf of the defendant-Board clearly disclose that the contract was between defendant-Board and plaintiff No. 1. Thus as far as the pre-condition of applicability of Section 73 of Contract Act, 1872 is concerned, it is clear that the contract was between the defendant-Board and plaintiff No. 1-Dadubhai Narsibhai Patel. Thus there was no privity of contract between the defendant-Board and plaintiff No. 2. In this view of the matter, Section 73 of the Contract Act will not be applicable as far as the loss suffered by plaintiff No. 2 is concerned.

18. It may also be examined, what was the purpose of the contract for which the parties entered into contract. In this connection documents Exs. 115, 116 and 117 and bills Exs. 123, 126, 127 and 129 may be examined. In column 5 of Ex. 115, the purpose for which the electric energy is required is to be mentioned. It is clearly mentioned that the application was for obtaining electric supply for the purpose of agriculture. The bills issued by the defendant-Board for consumption electric energy also show that the tariff rate applicable to the electric consumption for agriculture purpose has been applied to the present case. Even the connection numbers (i.e. AG 1 and AG 2) given to different connections show that the electric supply was for agricultural purpose. In the bond executed by plaintiff No. 1, Clause 4 read with remarks made at the footing by putting an asterisk mark shows that the electric connection was for a period of seven years and that it was for the purpose of agriculture and not for commerce.

19. Once factually this position is made clear, it is required to be examined as to whether any loss or damage has been caused to plaintiff No. 1? If yes, whether such loss or damage could be said to have naturally arisen in the usual course of things? The contract is with plaintiff No. 1 for supply of electricity for agricultural

purpose and not for commercial purpose. As per the contract, the electric energy was to be used by plaintiff No. 1 and not by plaintiff No. 2 firm. Clause 2 of the application clearly provide that the applicant (plaintiff No. 1) applied for supply of electricity for the following genuine purpose i.e. for agricultural purpose. The bonds (Exs. 116 & 117) executed by plaintiff No. 1 have been executed in his individual capacity and not as partner of the firm or on behalf of the firm. Clause 2 of the bond provides that the terms and conditions and the tariff for supply of electric energy in force from time to time were read by the applicant and were binding upon him. The conditions and miscellaneous charges for supply of electrical energy (clause 23) inter alia provides that the consumer could not without the previous consent in writing of the Board assign transfer or part with the benefit of the agreement with the Board. It also provided that nor could he in any manner part with or create any partial or separate interest thereunder. Even the witness of the plaintiffs Vaghjibhai (Ex. 75) admitted that no such consent has ever been obtained before using the electric supply for the purpose of business of plaintiff No. 2 firm.

20. In above view of the matter, even if it is assumed for a moment that plaintiff No. 2 firm has incurred business loss of about Rs. 53,000/- as claimed by it, then also plaintiff No. 2 firm will not be entitled to recover the same from the Board. This is so because there is no contract with plaintiff No. 2 and the defendant-Board. Moreover the plaintiffs have not used the electric energy for the purpose for which the contract has been entered into between the parties. Hence whatever loss suffered by plaintiff No. 2 firm cannot be said to be naturally arising out of the usual course of things. Therefore the defendant-Board cannot be saddled with the liability of paying the damages even if it is assumed that plaintiff No. 2 firm has suffered the damages as claimed.

21. The defendant-Board never knew that the electric energy supplied to plaintiff No. 1 was being used for commercial purposes and was being used by plaintiff No. 2 firm for its business of selling water. The learned Counsel for the plaintiffs has argued that Ex. 115 only says that the application for electric connection was for agricultural purpose and it does not say that it was for the agricultural purpose of plaintiff No. 1. In his submission from the volume of electric energy consumed and the amount of electric charges mentioned in the bills issued, it should be inferred that it was within the knowledge of the Board that the electric energy was being used by plaintiff No. 2 firm and the connection was given for the purpose of business of plaintiff No. 2 firm.

22. We are afraid, such argument cannot be accepted. The liability of damages, if any, arises out of contract between the parties and the consequent breach thereof. A contract with a statutory Board has to be entered into in the manner prescribed under the relevant provisions of the statute and the rules and regulations framed in that connection. Simply because an officer of defendant-Board is alleged to have known (for which also there is no cogent evidence) different user of the electric energy by different parties, it cannot be said that the

defendant-Board knew and that the defendant-Board had contracted to supply electric energy for commercial purpose by some one else. As far as the evidence is concerned, it is even admitted by the witness of the plaintiffs that at no time the plaintiff informed the Board that plaintiff No. 1 had taken consent of the Board for supply of electric energy to plaintiff No. 2 firm. The entire correspondence is between the defendant-Board and plaintiff No. 1.

23. Even assuming for a moment that the subsequent user of electric energy by a different party has come to the knowledge of the Board, then also it would not be of any help to the plaintiffs. Provisions of Section 73 of the Contract Act, 1872 provides that it should be to the knowledge of the contracting parties at the time when they entered into contract that breach of contract was likely to result into damages. There is absolutely no evidence whatsoever to show that at the time when Ex. 115 dated February 1966 and Exs. 116 and 117 dated November 15, 1966 were executed by plaintiff No. 1, it was brought to the knowledge of the defendant-Board that electric energy to be supplied was for the purpose of business and that it was to be used for the business of plaintiff No. 2 firm. As the contract stands, the parties would never know, in fact never knew, that breach of the contract was likely to result in business loss either that of plaintiff No. 1 or that of plaintiff No. 2 firm. Thus from this point of view also for the loss suffered, if any, by plaintiff No. 2 firm, the defendant-Board cannot be made liable.

24. Section 73 also provides that compensation is not to be given for any remote and indirect loss or damage sustained by the party to the contract by reason of the breach. In the instant case it is argued on behalf of the plaintiff that plaintiff No. 1 had entered into contract with defendant-Board. The plaintiff was carrying on the business of selling water. Whether the plaintiff No. 1 was carrying on business in his individual capacity or in partnership with others pales into insignificance because plaintiff No. 1 was a partner of the firm. The firm was carrying on the business of selling water. This firm has suffered loss. Therefore it is submitted that he should be reimbursed by making payment of compensation. This argument cannot be accepted for the simple reason that the contract was for the supply of electric energy for agricultural purpose. The contract was with plaintiff No. 1 in his individual capacity. The firm was in existence since the year 1954. But plaintiff No. 1 did not choose to enter into contract with the defendant-Board in his capacity as partner of the firm or for and on behalf of the firm. Hence the business loss suffered by the firm would be too remote and indirect for which the defendant-Board cannot be made liable. At no time the defendant-Board had been made aware that the electric connection was taken for the purpose of business of plaintiff No. 2 firm of which plaintiff No. 1 was a partner and that the contract was entered into an behalf of plaintiff No. 2 firm. Unless this knowledge is imparted to the defendant-Board at the time of execution of the contract, the defendant-Board cannot be held liable for such remote and indirect loss.

25. In the instant case, there is no evidence whatsoever to show that what loss

has been sustained by the party to the contract i.e. plaintiff No. 1. In fact plaintiff No. 1 has not entered into the witness box. When there is no evidence with regard to the damages which naturally arise in usual course of things and which the parties knew, when the contract was made, to be likely to result from the breach of the contract, then the question of consideration of damages which are too remote and indirect does not arise at all. But even if it arises, for the aforesaid reasons, the defendant-Board cannot be made liable for the same.

26. Now one important aspect may also be examined which is contained in explanation to Section 73 of the Contract Act, 1872. The explanation reads as follows:

In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the nonperformance of the contract must be taken into account.

It is the duty of the Court while estimating the damages arising out of breach of contract to examine conduct of the parties. The party claiming the damages should act reasonably. A party claiming the damages is duty bound to remedy inconvenience caused on account of non-performance of the contract. To put in other words, the party claiming the damages is bound to show that it has acted in reasonable manner so as to mitigate the damages. In the connection reference may be made to a decision of the Supreme Court in the case of Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Another, In para 9 of the judgment, the Supreme Court has enunciated the principles on which the damages in such type of cases are to be determined. The relevant portion reads as follows:

The two principles on which damages in such cases are calculated are well settled. The first is that as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in a good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps: "British Westing House Electric and Manufacturing Co. Ltd. v. Underground Electric Rly. Co. of London (1912) AC 673 . These two principles also follow from the law as laid down in Section 73 read with the Explanation thereof.

Following the aforesaid principles laid down in the aforesaid decision of the supreme Court and after discussing the relevant provisions of law and other case law on the point, the learned single Judge of this High Court (Coram : N.G. Shelat, J.) in the case of Vora Sirajudin Kalimuddin and Another Vs. Safkathassein Badruddin and Others, , has observed as follows:

But when the question comes for determination of those damages, it has to be remembered that the burden lies on him to make wise attempt to reduce to the minimum the injury that may be caused to him by such a breach of contract,

and, if the fails to do so, law debars him from claiming any part of damages which is due to neglect to take such steps on his part.

We are in respectful agreement with the aforesaid observations made by the learned single Judge of this High Court. The same principle in different words has been reiterated by the Supreme Court in the case of *M. Lachia Setty and Sons Ltd. Vs. Coffee Board, Bangalore*, of the judgment it is inter alia observed as follows:

...the principles of mitigation of loss does not give any right to the party who is in breach of the contract but it is a concept that has to be borne in mind by the Court while awarding damages.

...the non-defaulting party is not expected to take steps which would injure innocent persons. If so, then steps taken by him in performance or discharge of his statutory duty also cannot be weighed against him. In substance the question in each case would be one of the reasonableness of action taken by the non-defaulting party.

27. In the light of the principles of law mentioned hereinabove, the conduct of the parties may be examined. As far as the action on the part of the defendant-Board is concerned, it has been held by a Court of competent jurisdiction that the disconnection of election supply was wrong and unjustified. (Judgment and decree passed in Regular Civil Suit No. 102 of 1971). It is an admitted position that this judgment and decree has not been challenged by the defendant-Board. In fact, within two days from the date of the judgment and decree, the electric connection has been restored. The conduct of plaintiffs side be examined. The plaintiff entered into an agreement with the Board expressly undertaking that the plaintiff would abide by the conditions of supply of electricity which may be in force from time to time. In fact Condition No. 27(b) of conditions of supply of electrical energy inter alia provides that any complaint with regard to the accuracy of the bills should be made in writing to the local office of the Board, but the amount of such bills should be paid under protest within the period of 20 days of the bills. As per this condition, the amount paid under protest is to be regarded as advance to the credit of the consumer's account until such time as the bills in dispute have been finally settled. Even the bills issued to plaintiff No. 1, which are on record (Exs. 161 to 182) also mention these conditions. On the reverse side of the bill, certain instructions are printed which the consumer is required to take note of. Instrument No. 7 inter alia provides that any complaint with regard to the correctness of the bill may be made to the local office of the Board. However, amount of the bill should be paid within 20 days under protest. Such amount paid under protest will be treated as advance in the credit of the consumer's account and shall be settled finally. Thus the reasonable conduct expected of a consumer who has agreed to abide by the contract, would be to pay under protest the amount of the bill issued to him. He cannot sit tight over his assumed just and legal stand and say that first of all the defendant-Board should remedy the wrong caused and then only he shall pay the amount of the

bill.

28. Section 24 of the Electricity Act, 1910 inter alia provides for resolving such disputes. The scheme of the Electricity Act, 1910 clearly indicates the fact that the consumer can in no case retain the amount of the bill with him unless he obtains appropriate order from the Electric Inspector. No such course is adopted by the plaintiff in the instant case. The plaintiff appeared to have made it a question of prestige. For a paltry sum of Rs. 457/- which was in dispute, the plaintiffs did not budge an inch and did not make the payment even under protest. Had the plaintiff made the payment of this amount under protest, what would have been the damages suffered by him? At the most interest loss for the amount of Rs. 457/- or so. Plaintiff No. 1 did not adopt this course and forced the defendant-Board to disconnect the power supply. Simply because the action of the defendant-Board is held to be wrongful, the plaintiff is not absolved from his obligation to act reasonable. This is a statutory obligation cast upon him under the provisions of Section 73 of the Contract Act, 1872. This principles has been well-settled as per the aforesaid Supreme Court decisions.

29. It is evident from the facts and circumstances of the case that the conduct of the plaintiff was certainly not reasonable. He ought to have been steps to mitigate the damages. The first step which he ought to have taken and which he could have taken was to make the payment of the bill in dispute under protest. This was required to be done even without there being any specific condition in the contract between the parties. In this case, plaintiff No. 1 was under obligation to make payment even as per the contract entered into between the parties. Plaintiff No. 1 agreed to abide by terms and conditions of the supply of electric energy. This is evident from Exs. 115, 116 and 117. Plaintiff did not conduct himself as per the terms of the contract. Thereby the plaintiff forced the defendant-Board to disconnect the electric supply. The duty of the plaintiff was to see that all the reasonable steps which are expected of a reasonable and prudent man be taken by him so that the damages be mitigated. The plaintiffs have failed to perform their duty to act reasonably in this case.

30. The evidence discloses that even in the suit (Regular C.S. No. 102 of 1971) filed by the plaintiffs for declaration that the action of disconnection of electric supply was illegal and for mandatory direction for restoration of electric connection, the plaintiffs did not file an application for restoration of electric connection during the pendency of the suit. In such a situation if the claim of the plaintiffs is allowed, what disastrous consequence may follow, may be visualised. A plaintiff who feels that the defendant had committed breach of contract may first file suit for declaration that the defendant has committed wrong and the defendant be directed to remedy the wrong. The suit proceeds for a period of 5 to 10 years. The matter is carried in appeal before the appellate Court or even in the higher forum available and the litigation subsequently ends after a decade or two. In such cases, how the defendant be made liable for the loss which the plaintiff might have suffered during the period of a decade or two. Confirming of

the decree passed by the trial Court in favour of the plaintiff would lead to such disastrous consequences. We do not think that such can be the provisions of Section 73 of the Contract Act, 1872 or for that matter any other provisions of law.

31. There is no evidence to show that the plaintiff No. 1 or even plaintiff No. 2 firm had entered into a contract for supply of water with other agriculturists who were their customers for a particular period and that it could not perform the contract during the period between July 1970 and January 3, 1973. On the basis of the income earned by plaintiff No. 2 firm during the previous years, no prognosis can be made with regard to the income which might have been earned by plaintiff No. 2 firm. From the deposition of the witness of the plaintiff it is clear that for the last five years, supply of Mahi canal water had started. This would mean that since the year 1971, water from Mahi canal was available in that area. Consequently this would mean that profit in selling of water must have dwindled during these years. It is also admitted by the witness Vaghjibhai examined on behalf of the plaintiffs that one year after 1967, about five to six firms had started business of selling water to different people. It is also admitted by the witness that water in one of the wells was inadequate. The supply of water in one of the wells, that is, water level, had improved from the current year i.e. in the year 1976 only. There is no evidence whatsoever to show that what was the position of water supply in both the wells during the period in question i.e. from July 1970 to January 3, 1973. It is also admitted by the witness of the plaintiffs that plaintiff No. 1 had in fact applied to the Electricity Board for reduction of load. Such application would have been submitted only if the sale of water had dwindled. Thus there is no evidence which can lead to ascertainment of damages with reasonable certainty. From this point of view also, the decree passed by the trial Court cannot be sustained.

32. For the aforesaid reasons, the judgment and decree passed in favour of the plaintiff directing the defendant to pay Rs. 6,625/- as damages is required to be reversed and set aside. As far as the counter claim preferred by the defendant-Board is concerned, no cogent evidence is led by the defendant-Board in support of its counter claim. We are in agreement with the reasons given and conclusion arrived at by the trial Court for dismissal of the counter claim.

33. In above view of the matter, the appeal preferred by the plaintiffs, being Appeal No. 960 of 1977 is dismissed with costs. The appeal preferred by the defendant-Board, being First Appeal No. 1069 of 1977 is partly allowed. The appeal against the counter claim of Rs. 6363.38 ps. is dismissed. While the appeal against the judgment and decree passed against the defendant for Rs. 6,625/- is allowed. The suit of the plaintiff is ordered to be dismissed with costs.