

(2004) 09 DEL CK 0020

In the Delhi High Court

Case No : WP (C) No's. 10383 and 11700 of 2004

Sai Electrical Power Supply Pvt. Ltd.

APPELLANT

Vs

Delhi Electricity Regulatory Commission and Others

Shree Ganesh Power Distributors Vs BSES Rajdhani Power
Ltd. and Others

RESPONDENT

Date of Decision : 03-09-2004

Acts Referred:

Contract Act, 1872 — Section 40
Electricity Act, 2003 — Section 12, 14

Citation : (2004) 114 DLT 78 : (2004) 77 DRJ 30

Hon'ble Judges : T.S. Thakur, J

Bench : Single Bench

Advocate : Lalit Kumar and Jayant Bhushan, for the Appellant; Suresh Tripathy, for Respondent No. 1; Hekami Jakhalu, for Respondent No. 2, Manish C. Pathak, for MCD (Slum and JJ) and Jai Nath, for the Respondent

Final Decision : Dismissed

Judgement

T.S. Thakur, J.—Common questions of law arise for consideration in these two writ petitions which shall stand disposed of by this common order.

2.In W.P.(C) No. 11700/2004, the petitioner company calls in question a communication issued by the Government of NCT of Delhi informing the Government of India that the former has decided not to notify any area in Delhi as a rural area for purposes of Section 14 of the Electricity Act, 2003. A mandamus directing respondent Delhi Electricity Regulatory Commission to issue a license for retail distribution of electricity and to allow the petitioner to distribute electricity in Madanpur Khadar Extn. of adarpur constituency, New Delhi has also been prayed for.

3. W.P.(C) No. 10383/2004 has, on the other hand, been filed by a partnership concern for a somewhat similar relief. The petitioner in that petition has prayed for a direction against the Delhi Electricity Regulatory Commission to issue a

license in its favor for retail distribution of electricity in Mohan Baba Nagar, Bud Vihar and Tajpur Extn., New Delhi. It has also prayed for a mandamus directing respondent No. 1, BSES Rajdhani Power Ltd. to remove the electric poles erected by it in different part of the said areas.

4. Broadly stated, the case of the petitioners is that more than a thousand unauthorised colonies besides Jhuggi-Jhopdi/resettlement clusters having come up in Delhi, the Delhi Vidyut Board had decided not to electrify the said unauthorised colonies and resettlement clusters. Since however the Ministry of Urban Development had proposed to regularise such unauthorised colonies and resettlement clusters, the DVB had issued guidelines for the electrification works to be carried out in the same. These work, according to the petitioner, did not make much headway on account of the failure of the residents to deposit the development cost towards the proposed electrification. The DVB had, Therefore, proposed to distribute electricity within these unauthorised colonies and resettlement clusters through single point delivery connections and had, in that direction, formulated a scheme according to which the residents / welfare association or the electrical contractors could take a single point connection and distribute electricity within its area of operation after completing the necessary formalities. The writ petitions go on to state that since the petitioners had experience in distribution of electricity, they approached the erstwhile DVB to authorise them to distribute electricity as single point contractors for the resettlement colonies of Madanpur Khadar Extn. in the case of WPC No. 11700/04 and for Mohan Baba Nagar, Bud Vihar, Tajpur Extn. in the case of petitioner in WPC No. 10383/2004 After completion of the initial formalities including deposit of the amount towards security, the erstwhile DVB had entered into an agreement with the petitioners copies whereof have been enclosed by the petitioners with their respective writ petitions.

5. The petitioners understanding of the said agreements is that the same authorised them to function as sole distributors of electricity within their respective areas of operation. The agreements were valid for a initial period of 7 years and could be renewed for further periods with the consent of the parties. The agreements also, according to the petitioners, envisaged the appointment of the petitioners as licensees under the provisions of the Electricity Act, 1910 and Electricity Supply Act, 1948 for carrying out their distribution work.

6. Before the arrangement envisaged by the agreement could however become functional in the true sense, the DVB was privatized on 30.06.2004 and divided into three distribution companies. The area qua which the petitioners claim to have been appointed as distributors of electricity fell to the lot of respondent BSES RPL. The privatisation notwithstanding the petitioner's case is that the provisions of Delhi Electricity Reforms (Transfers scheme) rules 2001 made all rights and obligations acquired or incurred against DVB enforceable against respondent No. 2, its successor company. The successor company has not however considered the single point delivery contractors for grant of licenses for

distribution and retail supply of electricity nor given them an opportunity to apply for grant of such licenses. The petitioners assert that since they have entered into agreements with the erstwhile DVB and since they have the consent of the user association and residents / welfare association of the areas covered by their respective agreements, they have a preferential right to get licenses for distribution and retail supply of electricity in the said areas. Applications for grant of licenses appear to have been made by the petitioners to the Delhi Electricity Regulatory Commission in response to which the commission has sent its communications dated 09.07.2004 and 17.05.2004. The commission has, by the said communications, informed the petitioners that their request for issue of licenses shall be processed only after the Government of India have issued the necessary policy guidelines regarding the areas that may be covered by multiple distribution licensees other than the original licensees of that area. It is also evident from the communications that the Government of NCT of Delhi have decided to formulate their own views on the subject only after inputs from the Government of India are available to them. In WPC No. 11700/04, the petitioner has also assailed a communication addressed by the Government on NCT of Delhi to Government of India informing the latter that the Government of Delhi have decided not to notify any area in Delhi as a rural area for purposes of 8th proviso to Section 14 of Electricity Act, 2003.

7. I have heard learned counsel for the parties and perused the record.

8. On behalf of the respondents, the maintainability of the present writ petitions was questioned on the ground that the petitioners had no locus standing to maintain these petitions for want of any privity of contract with either DVB or its successor company. The petitioner company in WPC No. 11700/04 was a stranger to the agreement executed between DVB on the one hand and M/s. Sai Enterprisers, a sole proprietor concern of Mr. Vinod Kumar Bangwal on the other. Even in the accompanying WPC No.10383/2004 the agreement being relied upon by the petitioner is executed between DVB on the one hand and M/s. Anil Kumar and Sh. Sanjay Kumar Singal on the other. The petitioner Shree Ganesh Power Distributors which claims to be a registered partnership concern had, according to the respondents, nothing to do with the said agreement or the rights and obligations flowing from the same.

9. The writ petitions do not sufficiently explain the transformation of the original contracting parties into a private limited company in one case and a registered partnership concern in the other. All that is stated in WPC No. 11700/04 is that the petitioner company was, earlier to its incorporation, carrying on business as an electrical contractor in the name and style of M/s. Sai Enterprisers. M/s. Sai Enterprisers was, however, a sole proprietary concern. The factual matrix relevant to the composition of the company and its transformation from a sole proprietary concern to a corporate entity remains obscure from the court. So also is the position in WPC No. 10383/04 in which the agreement relied upon by the petitioner was executed between two individuals on the one hand and the DVB

on the other. The writ petition makes an inaccurate statement in para 4 in as much as it alleges that the petitioner had approached the erstwhile DVB for appointment as a single point contractor and had entered into distribution contract with the Board. Suffice it to say that the objection relating to the locus of the petitioners and the maintainability of the petitions on the averments made therein cannot be lightly brushed aside, especially when the agreements executed with DVB specifically provide that the rights and obligations under the same cannot be assigned to any person without the consent in writing of the other contracting party.

10. It was argued by Mr. Jayant Bhushan, learned Sr. Advocate appearing for the petitioner in WPC 10383/04 that the agreements executed between the petitioners on the one hand and the erstwhile DVB on the other envisaged making of considerable investments by the petitioners which investments the petitioners had already made thereby entitling them to claim distribution rights from the successor company of the DVB. It was submitted that DVB and so also its successor company was discharging a public function and providing an essential service to the consumers with the result that neither DVB nor its successor could act unfairly or arbitrarily and either ignore the consequences flowing from the agreements or otherwise violate the stipulation contained thereon with impunity. The agreements were, according to the learned counsel, enforceable in the writ jurisdiction of this court, as the alternative remedy by way of a suit or arbitration was neither efficacious nor speedy. It was also contended that although the agreements reserved a right to the contracting parties to terminate the arrangement by giving a six months notice to the other party, no such notice had been given to the petitioners which implied that the agreements continued to remain enforceable. Reliance was also placed by him upon Section 40 of the Contract Act to argue that the arbitration clause was not an assignable part of the agreement between DVB on the one hand and the contractors on the other.

11. On behalf of the petitioner in WPC No. 11700/04, it was contended that the decision of the State Government not to notify any area in Delhi as a rural area was unjust, improper and legally unsound. It was submitted that Madanpur Khadar Extn. in respect of which the petitioner in that petition had entered into a distribution agreement, was a rural area which fact the Delhi Government could not refuse to recognise. The requirement of a license for carrying out distribution work was, on that basis, inapplicable in the light of the 8th proviso to Section 14 of the Electricity Act, 2003.

12. Learned counsel for the respondents, on the other hand, argued that the agreements being relied upon by the petitioners did not assign to the contractors any function except revenue realisation from persons using electricity in the designated areas.

The contractors were entitled to payment of commission for the said work subject to their fulfilling other requirements stipulated in the agreements which,

according to the respondents, did not in the true sense assign any distribution work to the contractors. It was also contended that in the very nature of the arrangement, the same was terminable at the instance of either party and any dispute arising between them referable to arbitration under clause 11 of the additional terms and conditions of the contract. The question of exercising the writ jurisdiction of this court in a matter like the present did not, Therefore, arise especially when the provisions of Section 12 of the Electricity Act, 2003 clearly prohibited transmission, distribution or trading of electricity by any person without a license issued in terms of Section 14 of the said Act, which license the petitioners do not possess.

13. The agreements described the nature of the work which DVB was desirous of getting done from the contractors in the following recitals:-

RECITALS

A. DVB is desirous of getting the job of revenue realization from persons using electricity from its source in the designation J.J. Basti or Basties to be defined hereafter, carried out through an Agency.

B. The Agency is prepared to carry out the said job of the monthly revenue realization in the designated J.J. Basti on behalf of DVB.

C. DVB is agreeable to make payment of connection let for the services thus rendered by the Agency.

14. Clause 10 of the agreements prescribed the minimum revenue which the contractor or agency was to ensure to DVB. In lieu of the work assigned to them, the contractors were to be paid commission which, according to Clause 13 of the agreements was to be 25% of the revenue paid to the DVB for the bulk supply. Clause 13 reads as under :-

13. COMMISSION

For the services rendered, the agency shall be paid commission of twenty five percent (25%) of the revenue paid to DVB for the bulk supply.

15. The additional terms and conditions of the contract agreement inter-alia provide that the contractor shall not assign or transfer any of its rights or application under the agreement to any person without the other parties' consent in writing. It also envisaged termination of the agreement by either party by giving six months notice. In the event of disputes, the contracts provide for arbitration under clause 11 which reads as under :-

11. DISPUTES AND ARBITRATION

Disputer under the Agreement shall be settled by mutual discussions. Failing this, the disputes will be sole arbitrator. The agency shall have no objection if the nominee is an employee of DVB.

The arbitration shall be carried out as per Indian Arbitration and Conciliation Act,

1996 and the arbitration award shall be binding on both the parties.

The parties to the agreement shall continue to fulfill their obligations under the Agreement during arbitration proceedings and no payment shall be withheld on this account unless it is a subject matter of the dispute.

16. It is, from the above, evident that the contracts executed between DVB and the contractors were terminable at will subject only to the condition that the party exercising the right of termination had to give a six months notice to the other side. In the event of disputes, the parties had agreed to have the same resolved by way of arbitration. That apart, the entire arrangement was in the realm of commercial contracts where the contractor was to work for gain which had to be proportionate to the results shown by him in terms of the revenue recovered for the DVB. A contract of this kind may not be specifically enforceable in a suit for specific performance, much less can it be so in the writ jurisdiction of this court. It is trite that the violation of a commercial contract may entitle the aggrieved party to compensation by way of damages, but no such violation can be forbidden by a mandamus for any such direction would in essence tantamount to specific performance of the contract.

17. The argument that the arbitration clause contained in the agreements executed between DVB and the contractors could not be assigned to the successor companies of DVB in view of the provisions of Section 40 of the Contract Act, also appears to be an argument in despair. Section 40 of the Contract Act deals with cases where the parties to any contract intended that the promise contained in the contract should be performed by the promisee himself and by no one else. In such cases, it is the promisee alone who has to perform the promise while in other cases, the promisee or his representative can employ a competent person to perform the same. The illustrations given u/s 40 make the difference between the two clauses of cases evident. In the case of a promise to pay money, the promisee can either pay it himself or cause the same to be paid by another person. But in the case of a promise to paint a picture, the promisee must perform that promise personally.

18. The arbitration clause contained in the agreements in the instant case did not contain a promise that could be said to be personal in nature to the promisee. Whether or not the arbitration clause can ensure an independent, fair and impartial forum for adjudication of the disputes is a matter which does not arise for consideration in this case and shall have to be determined in separate proceedings under the provisions of Arbitration and Conciliation Act, 1996. All that need be said is that arbitration does appear to be one of the options which the parties have available to them for adjudication of their rights and obligations. Whatever may be the nature of the claim or the relief which the contractors may seek, a writ court is not the proper forum for adjudication of the rights and obligations arising out of the contract executed between them. This is so especially when the distribution work which the contractors claim the right to carry on cannot be carried on without a license, in the light on section 12 of the

said Act which contains a clear bar to any transmission, distribution or trading in electricity by any person who does not possess a license issued in his favor under Section

19. Learned counsel for the petitioners placed reliance upon the decisions of the Supreme Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, and Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, in support of his submission that the availability of an alternate remedy is no bar to the maintainability of the writ petition if the facts of the case otherwise justify intervention by a writ court.

20. In Harbanslal's case (supra), the petitioner's dealership in oil through Petrol Pumps was cancelled on the ground that the same was vitiated by irregularities and other extraneous considerations. The High Court had dismissed the said petitions in view of the alternate remedy available to the aggrieved dealers by way of arbitration. Their Lordships of the Supreme Court observed that availability of an alternate remedy was no bar to the maintainability of a writ petition at least in three situations which were summarised by the court in the following words :

""In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the virus of an Act is challenged. (See Whirlpool Corpn. V. Registrar of Trade Marks). The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealers, which is their bread and butter, came to be terminated for an irrelevant and non existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.""

21. The present cases do not, in my view, fall in any of the three situations indicated in the above decision. The petitions do not make out the violation of any fundamental or statutory right of the petitioners. There is no failure of the principles of natural justice either, for no decision has been taken by the respondents on any matter which could attract the application of the said principles. The petitions do not involve the virus of any legislation so as to render the alternative remedy inappropriate or ineffective. The argument that the availability of the alternate remedies is not a bar to the maintainability of these petitions must Therefore fail and is accordingly rejected.

22. That brings me to the question whether the Government of Delhi could take a policy decision that it will not notify any area in Delhi as a rural area for purposes of the 8th proviso to Section 14 of the Electricity Act. The said proviso exempts from the requirement of a license, any person who intends to generate and distribute electricity in a rural area to be notified by the State Government.

Whether or not a given area is a rural area and if so whether it should be declared to be so for purposes of the 8th proviso to Section 14 is a matter which rests essentially with the Government concerned. No prospective licensee u/s 14 or distributor can claim that any fundamental, statutory or legal right vested in him is violated if the State Government decides not to declare any area as a rural area for purposes of the 8th proviso to Section 14. Since the issue is entirely one of Government policy, the scope of judicial review of any such decision is also very limited. There is nothing in the present case to even suggest that the decision of Government of Delhi not to declare any part of Delhi as a rural area for purposes of the 8th proviso to Section 14 is vitiated either by any mala fide or other extraneous considerations nor is the decision so palpably irrational or in outrageous defiance of logic that a writ court may feel inclined to judicially review the same.

23. Equally untenable is the submission that the Regulatory Commission ought to have granted a license in favor of the petitioners just for the asking. The Commission has not yet finally taken a decision on the request made by the petitioner. All that the commission has said is that the application will be processed after the Governments have issued the requisite policy decision in regard to the grant of multiple distribution licenses for a given area. The issue whether or not more than one license ought to be given for a specified area is a matter which will effect not only the areas covered by the agreements in the present cases but a large number of other areas also. Various considerations like investments required to be made, economic viability, efficiency of the systems and confusion arising from multiple agencies working in the same area may have to be kept in view by the Government and the Regulatory Commission while taking a final view on the subject. The Commission, Therefore, did not commit any mistake leave alone one that can call for interference from this court when it wrote to the petitioners that their applications will be processed after the requisite policy guidelines are issued by the Government.

24. In the result, there is no merit in these writ petitions which fail and are hereby dismissed but in the circumstances without any orders as to costs.