

(2010) 11 OHC CK 0010
In the Orissa High Court
Case No : W.A. No. 237 of 2010

Special Officer (Commerce) NESCO and Another	APPELLANT
Vs	
Raghunath Paper Mills Pvt. Ltd. and Another	RESPONDENT

Date of Decision : 04-11-2010

Acts Referred:

Companies Act, 1956 — Section 529, 529A, 530
Electricity Act, 2003 — Section 43
Transfer of Property Act, 1882 — Section 55, 55(1)

Citation : AIR 2011 Ori 52 : (2011) 1 OLR 943 Supp : (2011) 1 RCR(Rent) 905

Hon'ble Judges : V. Gopala Gowda, C.J.; B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.N. Mahapatra, J.—This appeal has been filed against the judgment dated 05-08-2010 (Annexure-2) passed by a learned Single Judge of this Court in W.P. (C) No. 9807 of 2010 by which the learned Single Judge quashed the letter dated 21-05-2010 issued by Appellant No. 1-Special Officer, Commerce, NESCO and directed the Appellants to provide electricity to Respondent No. 1-M/s. Raghunath Paper Mills Pvt. Ltd. within a period of seven days from the date of the judgment.

2. Shorn of unnecessary details, the facts and circumstances giving rise to the present appeal are that the Appellants are working in North Eastern Electricity Company of Orissa (for short, "NESCO"), a Company incorporated under the Companies Act, 1956 and engaged, inter alia, in the business of distribution and retail supply of electricity in the Northern Zone of Orissa. Respondent No. 1 in pursuance of an advertisement made by the Respondent No. 2-Official Liquidator inviting sealed tenders from intending purchasers for outright sale of movable and immovable assets/properties of M/s. Konark Papers and Industries Limited under liquidation "as is where is" basis participated in the tender process. Respondent No. 1 on being found to be the highest bidder, the Unit was sold to it

for a consideration of Rs. 3,43,00,000/- and the possession of the unit was handed over to it by Respondent No. 2-Official Liquidator. There being no power supply to the Unit, Respondent No. 1 made an application for availing power supply of 100 KW at 33 KV to which permission was granted vide letter dated 10-12-2008 by the General Manager (Commerce) and RRA. Since the line was required to be drawn from Basta Feeder to the Unit of Respondent No. 1, as directed by the Superintending Engineer, Electrical Circle, Balasore vide his letter dated 23-12-2008, Respondent No. 1 deposited 6% supervision charges amounting to Rs. 86,928/- with the permission of the authority and constructed the line. On completion of the work, a completion certificate was also submitted in the prescribed form by the Electrical Contractor. Thereafter, Respondent No. 1 executed an agreement on 27-03-2009 with the Management of NESCO and deposited the security amount of Rs. 1,65,156/-. When the Appellants did not provide power supply to the Unit, Respondent No. 1 again vide letter dated 26-08-2009 applied for availing permanent power supply for a contract demand of 750 KVA. On 21-05-2010, the Appellants asked Respondent No. 1 to pay the arrears of electricity dues amounting to Rs. 79,02,262/- outstanding against the premises to which it intends to avail power supply.

Being aggrieved by the demand made in the letter dated 21-05-2010, Respondent No. 1 approached this Court in W.P.(C) No. 9807 of 2010 seeking a prayer to quash the said letter and for a direction to the Appellants to provide permanent power supply. The learned Single Judge of this Court after hearing the counsel for the respective parties on various provisions of law governing the issue in question as enumerated in the Electricity Act, 2003 (for short, "Act, 2003"), the Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004 (for short "Code, 2004") and the judicial pronouncements relied upon by the parties, passed the impugned judgment quashing letter dated 21-05-2010 and directed the Appellants to provide electricity to the Unit of Respondent No. 1 within a period of seven days from the date of the judgment.

3. Mr. Roy, learned Counsel appearing for the Appellants submits that the impugned judgment is patently wrong as the same has been passed on complete erroneous interpretation of laws governing the field of supply of electricity as provided under the Act, 2003 and the Code, 2004. The principle decided by the Apex Court in *Dakshin Haryana Bijli Vitran Nigam Ltd. v. Paramount Polymers Pvt. Ltd.* AIR 2007 SC 2, relied upon by the Appellants has not been properly appreciated by the learned Single Judge. As per Sub-clause (10)(b) of Clause 13 of the Code, 2004, Respondent No. 1 is liable to pay arrear dues of the previous owner of the unit. The learned Single Judge has wrongly relied upon Clause 10 of the Code 2004. The case laws relied upon by Respondent No. 1 are not applicable to the facts and circumstances of the present case. The terms and conditions of sale are no way sought to put a fetter on the Appellants in realizing its legitimate arrear dues. The terms and conditions of sale are not binding on the Appellants as they were not parties to the same. The learned Single Judge committed an error in holding that Clause 13 of the Code, 2004 related to

transfer of connection. The condition providing for realization of the previous arrears cannot be said to be in conflict with Section 43 of the Act, 2003.

4. Mr. B. K. Nayak, learned Counsel appearing for the Respondents supports the order passed by the learned Single Judge. It is submitted that as per the Act, 2003 on an application made by the owner or occupier of any premises, the electricity authorities have to supply electricity within one month from the date of receipt of application, failing which, the said authority shall be liable to penalty. As per condition of sale, the Appellants are not liable to pay any dues payable by the Company under liquidation on or before handing over of possession. Placing reliance on the decisions of this Court in the cases of Anshuman Behera v. Orissa State Financial Corporation and Ors. AIR 2010 Orissa 10 and Ajay Kumar Agrawal v. O.S.F.C. and Ors. AIR 2007 Orissa 37, he argues that the learned Single Judge has rightly quashed the letter dated 21-05-2010. It is submitted that since the unit is purchased by Respondent No. 1 on "as is where is" basis and as per the terms and conditions of sale, the Respondent-purchaser is not liable to pay any arrear dues of the erstwhile Company, which may be cleared up by the Official Liquidator, who was in charge of the winding up process of the Company and the Appellants may put forth their claim before the Official Liquidator regarding arrear electricity dues of the erstwhile company.

5. The issue involved in the present case is whether Respondent No. 1, who purchased the property of a company under liquidation through Court auction is liable to pay the arrears of electricity dues outstanding against the erstwhile company and the learned Single Judge is justified in quashing letter dated 21-05-2010 and directing the Appellants to provide electricity to the Unit of Respondent No. 1 within a period of seven days from the date of the judgment?

6. The undisputed facts are that Respondent No. 1 in pursuance of an advertisement made by Respondent No. 2-Official Liquidator inviting sealed tenders from intending purchasers for outright sale of movable and immovable assets/properties of M/s. Konark Papers and Industries Limited under liquidation "as is where is" basis participated in the tender process and being found to be the highest bidder the unit was sold to it. The possession of the unit was handed over to it by Respondent No. 2-Official Liquidator. At the time of taking possession of the unit in question, there was no power supply to the Unit. Hence, Respondent No. 1 applied for fresh power supply of 100 KW at 33 KV to its unit. On receiving such application, no objection was raised by the Appellants. On the other hand, the General Manager (Commerce) and RRA vide letter dated 10-12-2008 granted permission to Respondent No. 1 for availing construction of power. As directed by the Superintending Engineer, Electrical Circle, Balasore vide letter dated 23-12-2008, Respondent No. 1 deposited the supervision charges amounting to Rs. 86,928/-. On completion of the work, a completion certificate in the prescribed form was submitted by Electrical Contractor. For the purpose of availing construction load of 100 KW at 33 KV, Respondent No. 1 executed an agreement on 27-03-2009 with the management of NESCO and

deposited security amount of Rs. 1,65,156/-. When the Appellants did not provide power supply to the unit in question, Respondent No. 1 again vide letter dated 26-08-2009 applied for availing permanent power supply for a contract demand of 750 KVA. It was at that stage, the Appellants vide its letter dated 21-05-2010 asked Respondent No. 1 to pay arrear electricity dues amounting to Rs. 79,02,262/- outstanding against the premises to which it intends to avail power supply.

7. At this juncture, it is necessary to refer here the relevant provisions contained in the electricity laws pertaining to supply of electricity on application made by the owner or occupier of the premises. Section 43 of the Act, 2003 reads as follows:

43. Duty to supply on request.- (1) (Save as otherwise provided in this Act, every distribution) licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply;

x x x x

(3) If a distribution licensee fails to supply the electricity within the period specified in Sub-section (1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default.

Clause 13.3 of the Code, 2004 provides that power supply in case of 33 KV shall be given within a period of 90 days after receipt of the application along with fees charges and security amount payable.

In the instant case since all the dues as demanded by the licensee Company have been paid and Respondent No. 1 had already executed agreement with the licensee company, later it is not justified in not giving electricity supply to the unit of Respondent No. 1.

8. The Apex Court in the case of Paschimanchal Vidyut Vitran Nigam Ltd. and Others Vs. DVS Steels and Alloys Pvt. Ltd. and Others, , in Paragraph 9, observed as follows:

9. ...A transferee of the premises or a subsequent occupant of a premises with whom the supplier has no privity of contract cannot obviously be asked to pay the dues of his predecessor in title or possession, as the amount payable towards supply of electricity does not constitute a "charge" on the premises. A purchaser of a premises, cannot be foisted with the electricity dues of any previous occupant, merely because he happens to be the current owner of the premises. The supplier can therefore neither file a suit nor initiate revenue recovery proceedings against a purchaser of a premises for the outstanding electricity dues of the vendor of the premises, in the absence of any contract to the contrary.

9. Law is also well settled that purchaser of the properties of a Company under

liquidation is entitled to get a clear title free of charges or encumbrances, even if, there was an attachment by a statutory authority.

The Gujarat High Court in *Keventer Agro Ltd. v. O.L. of Kengold (India) Ltd. and Anr.* (2008) 146 Comp Cas 495 (Guj), held that the statutory authority could not demand payment of arrears of the dues pertaining to the pre-liquidation period from the purchaser, who had purchased the property through Court auction and the dues had to be settled by the liquidator as per the provisions of Sections 529, 529A and 530 of the Companies Act, 1956, with the prior sanction of the Court. The official liquidator was to hand over the possession of the property in question without any charge or encumbrance of sales tax liabilities and execute the sale deed accordingly.

Thus, Respondent No. 1, who purchased the property in question through Court auction, is not liable to discharge any of the liabilities including the arrears electricity charges pertaining to pre-liquidation period of the erstwhile Company. Any attachment made on the assets of the Company under liquidation is required to be removed and the auction purchaser is entitled to get clear and marketable title free from all encumbrances of the pre-liquidation period of the Company under liquidation.

10. In view of the above, the Appellants are not entitled to recover the arrear electricity dues outstanding against the erstwhile Company went into liquidation from Respondent No. 1.

11. The matter can be looked at from another angle. u/s 55(1)(g) of the Transfer of Property Act, 1882, the seller is bound to pay all public charges due in respect of the property up to the date of sale, when a property is sold in auction. Section 55 refers to a contract only. Unless there is a contract to the contrary, the rights and obligations of the parties to a sale would be as indicated in Section 55. Such a contract to the contrary must be express and not implied, as a result whereof the meaning of the term encumbrance would be expanded. See *AI Champdany Industries Ltd. v. Official Liquidator and Anr.* (2009) 148 Comp Cas 641 (SC).

Admittedly in the case on hand, Respondent No. 1 has purchased the unit on "as is where is" basis and as per the terms and conditions of the sale, Respondent No. 1 is not liable to pay any arrears of dues of the erstwhile company.

12. The Appellants relying on Sub-clause (10)(b) of Clause 13 of the Code, 2004, submitted that unless Respondent No. 1 pays the arrear electricity dues against the erstwhile company, electricity supply cannot be given to the unit of Respondent No. 1. Sub-clause (10)(b) of Clause 13 of the Code, 2004 is reproduced below:

13. (10)(b) The service connection from the name of a person to the name of another consumer shall not be transferred unless the arrear charges pending against the previous occupier are cleared.

Provided that this shall not be applicable when the ownership of the premises is

transferred under the provisions of the State Financial Corporation Act.

A plain reading of the above sub-clause makes it amply clear that the said provision is not applicable to Respondent No. 1. In the instant case, Respondent No. 1 has not applied for transfer of service connection from the name of the erstwhile Company to its name. On the other hand, Respondent No. 1 applied for fresh connection to its unit after purchasing the same from the Official Liquidator in Court auction. The arrears of electricity dues were not levied against the premises in question. Rather it was levied against the erstwhile Company. Thus, the Appellants are not justified in demanding Respondent No. 1 to pay the arrears of dues of Rs. 79,02,262/- outstanding against the erstwhile Company which was put under liquidation to give power supply to the unit of Respondent No. 1. Therefore, the notice dated 21-05-2010 issued by the Special Officer (Commerce), NESCO is not sustainable in law.

However, it is open to the Appellants to take such steps as may be just and proper in consonance with law for realization of the arrears of electricity dues payable to it by the erstwhile Company.

13. In view of the above, we don't find any illegality or infirmity in the impugned judgment dated 05-08-2010 passed by the learned Single Judge warranting any interference in this appeal.

14. In the result, the writ appeal is dismissed.

No order as to costs.