

(2019) 08 CAL CK 0035

In the Calcutta High Court

Case No : Civil Order/Misc.Cas (CO) No. 522 Of 2019

Sudera Realty Private Limited

APPELLANT

Vs

Om Prakash Chachan (Agarwal) And Others

RESPONDENT

Date of Decision : 14-08-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 11

Citation : (2019) 08 CAL CK 0035

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Jishnu Saha, U.S. Menon, Ishan Saha, Abhirup Chakraborty, Jaydip Kar, Sourav Sengupta, Siddhartha Ghosh, Shashwat Nayak, Aman Baid, Dibesh Dhruvedi

Final Decision : Dismissed

Judgement

Sabyasachi Bhattacharyya, J

1. The defendant in a suit, inter alia, for a declaration that the defendant? landlord cannot claim electricity charges consumed at the plaintiffs' respective tenancies at a higher slab than that fixed by CESC Limited, has filed the present revisional application. The defendant was initially called 'Sudera Enterprises Pvt. Ltd.', but was subsequently re?named 'ABL International Limited' and thereafter again changed to its present name, that is, 'Sudera Realty Private Limited'.

2. By the impugned order, two applications filed by the defendant/petitioner were rejected. The applications were respectively for a direction on the plaintiffs/ opposite parties to pay the defendant at the rate of ten percent of the effective rate as paid by the petitioner to the CESC with retrospective effect from September 7, 2004, on account of electricity service charges towards transformation, conversion and distribution losses and to deposit in court the balance five percent of the said amount as per demand and for a direction to pay the defendant forthwith at least a sum equivalent to seventy five percent of the

amount due to the defendant on account of electricity service charges towards amortization/proportionate distribution cost and to deposit in the suit an amount equivalent to fifty percent of the delayed payment surcharge, both as mentioned in annexure?D thereto to secure the defendant in view of surrender of tenancy by some of the plaintiffs.

3. Upon filing the said suit, the opposite parties had obtained an order of injunction on October 5, 1991, restraining the defendant/petitioner from disconnecting electric supply to their respective tenancies. The matter went up to the Supreme Court, where the opposite parties gave an undertaking that they would continue to pay electric charges, both arrears and current, and the petitioner gave an undertaking that it would not disconnect electric supply to the tenancies.

4. Subsequently, however, electricity was disconnected by the petitioner.

5. On September 4, 2004, the trial court directed the Deputy Commissioner of Police to render assistance for restoration of electric supply to the 68 shop rooms of the tenants at the suit premises, which is commonly known as the "AC Market".

6. The restoration order was challenged in this court in revision, giving rise to C.O. No. 3049 of 2004, and a co-ordinate bench of this court, vide order dated September 7, 2004, granted an ad interim order of restoration subject to the opposite parties continuing to pay at the rate at which the CESC was charging the petitioner. The learned Single Judge also directed, 'for the time being', the opposite parties to pay an amount of Rs.25 lakh on an ad hoc basis, to cover the arrears of electricity charges.

7. On August 21, 2012, an application for modification (C.A.N. No. 850 of 2009) was moved in connection with the said revisional application (C.O. No. 3049 of 2004) by the petitioner, which was treated as a review application and dismissed as time-barred, since a delay of about four-and-half years was occasioned in filing the same. The learned Single Judge, while dismissing such application, also observed that the relief prayed therein would amount to grant of the relief prayed in the suit.

8. In the said application, the petitioner had claimed twenty percent extra per unit for transmission loss in distribution to individual tenants.

9. Learned senior counsel for the petitioner argues that the CESC, which provides electricity to the suit premises, entered into an agreement on September 25, 2004 with its licensee, being the landlord/petitioner. Clause 14 of the said agreement permitted the landlord/petitioner to raise bills on the occupiers of the premises in question. It was also provided in the agreement that the landlord was entitled to the unit charges and government duty, as per the bill preferred by the licensee according to its consumption. .

10. The agreement further provided that all other charges indicated in the bills

preferred by the licensee (including transformation/conversion and distribution loss proportionate to the respective tenants' consumption), along with proportionate cost towards operation and maintenance of the landlord's plant and equipment and other reasonable expenses for transformation/conversion and distribution of energy as and by way of electric charge, could also be recovered by the landlord from the tenants. However, it was provided that the rate of electrical energy chargeable to the occupier by the consumer (landlord) shall not exceed the rate payable by the consumer to the licensee (CESC) under the said agreement.

11. Placing reliance on such agreement, learned senior counsel submits that the landlord/petitioner is entitled to raise the additional charges incurred by the landlord for stepping down electric charges, transformation and distribution loss as well as other incidental expenses in providing electricity to the tenants individually.

12. It is further submitted on behalf of the petitioner that the order dated September 7, 2004 passed in C.O. No. 3049 of 2004 specifically mentioned that the amount of Rs. 25 lakh, payable by the opposite parties, was 'for the time being'. Moreover, it is submitted that the subsequent order dated August 21, 2012 could not operate as *res judicata*, even as far as the finding, that the relief of the suit would be granted if the prayer in the application was allowed, was concerned. The cause of action for the present applications, which were rejected by the impugned order, were subsequent and continuing and as such, could not be prohibited by the principle of *res judicata*.

13. Learned senior counsel for the petitioner cites a judgment reported at AIR 1964 SC 993 [Arjun Singh vs. Mohindra Kumar and others], for the proposition that interlocutory orders designed to preserve the status quo pending the litigation do not decide the merits of the controversy in issue in the suit and do not put an end to it even in part. It was held by the Supreme Court that such orders were certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situation which subsequently emerged.

14. In the present case, it is submitted, there were several changed circumstances to attract the said proposition laid down by the Supreme Court in Arjun Singh (*supra*). First, the electric charges have been enhanced from time to time by the CESC subsequent to the previous orders passed in C.O. No. 3049 of 2004. Secondly, several tenants have been leaving the suit premises by vacating their tenancies, which would make it all the more difficult for the petitioner to recover their dues as regards electric charges. Thirdly, it is argued, the petitioner has been suffering transmission loss and stepping down charges on a regular basis, which would make it impossible for the petitioner to continue electric supply to the tenants due to huge loss incurred on a day-to-day basis.

15. It is further argued by the petitioner that the order dated August 21, 2012

passed in C.O. No. 3049 of 2004 was passed in respect of a prayer to enhance the payments as conditions for restoration of electricity supply. However, the current applications, which were rejected by the impugned order, were independent applications, filed on subsequent causes of action, to meet the huge losses suffered by the petitioner which, unless mitigated, would render it impossible for the petitioner to continue with the supply of electricity to the opposite parties.

16. Learned senior counsel for the opposite parties, on the other hand, argues that the tenancy agreements between the opposite parties and the petitioner/landlord were the only agreements binding on the opposite parties, and not the agreement entered into between the CESC and the petitioner, since the opposite parties were not parties to the latter agreement.

17. A sample of one of such tenancy agreements (the others submitted to be similar in content), dated October 22, 1982, is annexed to the present revisional application. It is evident from Clause 3 thereof that the tenants were to pay electric charges at the rate 'M' as levied by the CESC, at which the landlord/petitioner was to pay to the CESC, subject to increase or decrease in rates.

18. Rate 'M' has been specified in a chart annexed at page 160 of the instant revisional application, based on the types of consumers, as enumerated in serial number 3 of such rate chart. It is alleged by the opposite parties that the petitioner has been charging all along at the maximum rate available under rate 'M', irrespective of consumption by the individual tenants, although such maximum rate was applicable only to consumptions above 300 KWH. It is pointed out from paragraph 14, sub-paragraphs (b), (c) and (e) of the written statement that the payments by the opposite parties at the rate indicated in the maximum slab for rate 'M' was admitted by the petitioner therein. Such charges were *de hors law* and equity.

19. Placing reliance on paragraph nos. 5 and 6 of the plaint, it is argued by learned senior counsel for the opposite parties that the dispute in the suit is, whether the maximum slab of rate 'M' can be charged universally at all, irrespective of individual consumption of the tenants. As such, it is submitted that the prayer for enhanced payments at this premature juncture would amount to a decision on the relief prayed in the suit itself and would be contrary to the finding in the order dated August 21, 2012 passed in C.O. No. 3049 of 2004.

20. The issue in the suit revolves, as evident in particular from paragraph nos. 14 and 15 of the written statement as well, not around whether the petitioner is entitled to a ten percent or fifteen percent increase in electric charges but as to whether the opposite parties are liable to pay the distribution charges and other extra charges levied by the petitioner.

21. As stipulated in the order dated September 7, 2004 passed in C.O. No. 3049 of 2004, the opposite parties have all along been paying electric charges at the rate changed circumstance to justify an enhancement of such rate. The present

stand by the landlord was available to the landlord/petitioner even at the juncture when such order was passed. Moreover, the transmission loss charges, claimed by the petitioner in C.A.N. No. 850 of 2009 in connection with C.O. No. 3049 of 2004, was specifically refused by the order dated August 21, 2012 and the same prayer cannot be renewed now in the garb of present applications.

22. In this regard, learned senior counsel for the opposite parties cites a judgment reported at (1999) 5 SCC 590 [Hope Plantations Ltd. Vs. Taluk Land Board, Peermade and another], for the proposition that the principles of estoppel and res judicata are based on public policy and justice and the rule of res judicata prevents the parties to a judicial determination from litigating the same question over again, even though the determination may even be demonstrably wrong. The parties cannot litigate again on the same cause of action or on any issue which was necessary for decision in the earlier litigation. The principles of cause of action estoppel and issue estoppel were also discussed in the said judgment. It was held that Section 11 of the Code of Civil Procedure contains provisions of res judicata but these are not exhaustive of the general doctrine of res judicata.

23. It is next contended on behalf of the opposite parties that the plaintiffs are still prosecuting the suit. As such, the apprehension that the tenants would vacate the suit premises, defeating ultimate recovery of dues from them, is an irrelevant yardstick for establishing changed circumstances. The alleged vacating of the suit premises by the tenants is not material for deciding the prayer for enhancement of electric charges.

24. It is further submitted on behalf of the opposite parties that no counter claim has been filed by the defendant/petitioner for the alleged loss suffered by the petitioner and as such, the said relief cannot be obtained in the garb of an interlocutory order beyond the scope of the suit. Moreover, the claim of such alleged loss is required to be proved by cogent evidence and cannot be decided on an application of an interlocutory nature like the current applications of the petitioner.

25. It is further argued that the percentage of enhancement cannot be a valid yardstick and the only test for the rate of electric charges payable by the opposite parties would be the current rate 'M' as charged by the CESC to the petitioner.

26. It is submitted by the opposite parties that the bills raised by the CESC on the petitioner for the bulk supply of electricity, at rate 'M', could very well be divided by the total number of units being consumed by the tenants to get the rate payable by each tenant for each unit of electricity. The individual tenants' liability to pay would simply depend on multiplying such rate per unit with the number of units consumed by each of the tenants. In fact, the opposite parties submit that the aforesaid procedure is being followed at present and is the best method to assess the liabilities of the opposite parties regarding electric charges,

at least on an ad hoc basis.

27. It is thus argued that the revisional application should be dismissed and the order passed by the trial court, rejecting the applications of the petitioner, upheld.

28. Two agreements have been relied on by the petitioner in forwarding their arguments. The first agreement, dated September 25, 2004, was entered into between the CESC and the petitioner and pertained to the supply of electricity to the occupants/tenants. The next agreement dated October 22, 1982 was a representative sample of the agreements entered into between the petitioner? landlord and its tenants, including the opposite parties.

29. What is evident in the context is that the agreement between the CESC and its licensee, that is the present petitioner, cannot in any manner bind the opposite parties, since the opposite parties were not parties to it. As such, the arguments advanced by the petitioner, that its agreement with the CESC permitted it to charge more than the bills raised towards operation and maintenance of its plant and equipment and other 'reasonable' expenses for transformation/conversion and distribution of energy to the occupier, cannot be enforced on the tenants without their specific consent.

30. Hence, the basis of the claim of the petitioner for such additional charges loses ground.

31. If we look into the sample agreement between the tenants and the petitioner, Clause 3 of the same, within Head II, provides for payment of electricity charges in respect of the electricity to be consumed by the tenant in the demised premises, which were to be calculated on the basis of rate 'M' of the Schedule of Rates of The Calcutta Electric Supply Corporation (India) Ltd. The current charges were also indicated therein, inclusive of government duty and coal surcharge. It was also contemplated in the same clause that, in the event of any increase or decrease in the rate 'M' of the CESC, the tenant shall bear and pay electricity charges at such increased rate or rates from the respective date or dates of increase or increases.

32. As such, the tenancy agreements between the petitioner and the opposite parties, relied on by the petitioner itself, makes it amply clear that the opposite parties could not be over?charged above the amount stipulated in Clause 3 of their agreement, for the purpose of unjust enrichment of the petitioner.

33. While stipulating the rate at which the opposite parties were to pay the petitioner in respect of electricity supplied to their premises, the order dated September 7, 2004 passed in AST No. 1683 of 2004 (subsequently renumbered as C.O. No. 3049 of 2004), was not merely restricted to a condition for the restoration of electric supply. The co?ordinate bench, while passing the order dated September 7, 2004, made an ad hoc arrangement of payment at the rate at which the CESC was charging the petitioner, which was rate 'M' and in consonance with Clause 3 of the tenancy agreement, as discussed above. The

said rate was perpetuated and affirmed by the refusal of the petition for review of such order (C.A.N. No. 850 of 2009) by the order of the other learned Single Judge dated August 21, 2012. It was further held in the latter order that if the application of the petitioner for enhancement was allowed, at that belated stage, it would amount to grant of relief as sought for in the suit itself. It is relevant to mention here that the premise of such review application was that the petitioner was incurring heavy loss to compensate the loss of energy for transmission and distribution.

34. Such prayer being refused on merits, despite the plea of continuing cause of action having been taken, the same question cannot be reopened indirectly in the suit in the garb of the two applications for enhancement by percentage, as currently made in the court below. What could not be directly obtained by the petitioner from this court, could not also be indirectly obtained from the trial court in the garb of different applications.

35. However, all said and done, a small window remains for the petitioner to have prayed for a modification of the previous directions, being on the ground of change of circumstances, as rightly argued by the petitioner.

36. The change of circumstances pleaded is primarily threefold:

- (i) Enhancement of electricity charges imposed by the CESC;
- (ii) Costs incurred for step down charges and transmission loss etc.; and
- (iii) Several tenants were vacating the suit premises, thereby making it difficult for the petitioner to recover the dues, which ought to be compensated by an enhancement of the rate at which the remaining tenants paid.

37. As regards the first 'change of circumstance', the same could not be a relevant factor, since the previous orders of this court fixed the rate at which electricity was charged by the CESC. Taking in conjunction with Clause 3 of the tenancy agreements, as discussed above, the said charge would obviously incorporate in its fold the enhanced charges at the current rate when the bills were raised on the tenants by the petitioner. Hence, the said change of circumstance is taken care of in the previous order, coupled with Clause 3 itself, entitling the petitioner to incorporate such enhancements in its current bills.

38. As far as the second ground is concerned, the same was specifically turned down by the order dated August 21, 2012 passed in C.A.N. No. 850 of 2009 in connection with C.O. No. 3049 of 2004. Moreover, the tenancy agreements do not contemplate any such additional charge. The only leverage for claiming such charges could have been available for the petitioner from its agreement with the CESC which, as held above, cannot bind the tenants/opposite parties at all. As such, it was an entrepreneurial risk taken by the petitioner as a landlord while inducting and perpetuating the tenancies and such additional charges cannot be shifted now on the tenants beyond the tenancy agreement entered into with them.

39. As regards the third 'change of circumstance', the alleged surrender by tenants would entail zero consumption of electricity by the tenants who left and as such, cannot add to their arrears as alleged. That apart, since the vacating tenants remain as plaintiffs in the suit, there could not be any escape for them for the purpose of recovery of any dues from them, if ultimately it was so held in the suit. Moreover, the moment the tenancy agreements were entered into, the petitioner implicitly took the risk that tenants might be vacating. Such risk was obviously negated by induction of new tenants in their place, which was again an entrepreneurial venture by the petitioner. The evacuation of previous tenants could easily be set off by induction of new tenants on new terms, which is a part of business policy. As such, it would be unfair to shift such burden on the present tenants. Again, vacating by some tenants could not be a relevant factor for enhancement of charges, simply because the rate at which electricity was currently charged from the tenants was based on the total units consumed by the tenants, irrespective of their number. What was being done (and is the most efficient mode of calculation) was that the total bill raised by the CESC on the petitioner was divided by the number of units consumed by the tenants to get the electricity charge per unit. Thereafter, the charge per unit was being multiplied by the number of units consumed by each of the tenants, to arrive at the electricity charges payable by each tenant. This scientific mode of calculation took into account the enhancement of electric charges as well as the total number of units consumed, thereby negating any effect which might be occasioned by some tenants leaving the premises.

40. Hence, it is seen that none of the circumstances projected by the petitioner are changed circumstances to justify the opposite parties being charged by the petitioner over and above the contractual rate and the rate earlier fixed by two orders of this court. Another argument of the opposite parties appeals to judicial conscience, being that the petitioner could not arbitrarily seek an enhancement by percentages in an unilateral manner, be it ten percent or fifteen percent. Such an enhancement was never contemplated in the tenancy agreements.

41. Moreover, since the crux of the dispute involved in the suit pertains to whether the petitioner could charge the opposite parties more than at the rate at which the petitioner was paying to the CESC, it would be pre-judging the issue at an interlocutory stage, without evidence being led by either of the parties at length on the said issue. Such a premature exercise ought not to be permitted at this stage, particularly when the suit is progressing towards culmination.

42. As such, the revisional application does not have any merit and deserves to be turned down. Accordingly, C.O. No. 522 of 2019 is dismissed on contest, thereby affirming the impugned order, without any order as to costs.

43. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.