

Ajay Kumar Agrawal Vs. O.S.F.C. and ors.

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Court : Orissa

Decided On : Nov-23-2006

Reported in : AIR2007Ori37

Judge : A.K. Ganguly and; I. Mahanty, JJ.

Appellant : Ajay Kumar Agrawal

Respondent : O.S.F.C. and ors.

Disposition : Petition allowed

Judgement :

A.K. Ganguly, J.

1. This writ petition has been filed with a prayer for quashing Annexure-3 which is a communication dated 16-11-2001 issued by the Executive Engineer, Electrical, Western Electricity Supply Company of Orissa Limited (WESCO), opposite party No. 2. By the said communication, the petitioner was informed that as it had taken over the assets of M/s. Maa Bhawani Rice Industries from Orissa State Financial Corporation (O. S. F. C.) by auction sale, the petitioner must clear the arrears of Rs. 1,56,798.10 ps. outstanding against M/s. Maa Bhawani Rice Industries before petitioner's application for availing power supply of 95 KW load will be considered. It was made clear that unless the above dues are paid, no power supply will be given from WESCO. The petitioner also made a prayer for a direction upon the opposite parties to refund the instalment money, which was deposited by the petitioner towards arrear dues of the previous consumer M/s. Maa Bhawani Rice Industries.

2. The material facts of the case are that the OSFC conducted an auction sale under Section 29 of the State Financial Corporations Act, 1951 and in such auction sale the petitioner purchased the said industrial unit on the basis of an agreement of sale which was executed between the petitioner and the OSFC. A copy of the said agreement of sale has been enclosed in the writ petition. From Clause 7 of the said agreement, it appears that from the date of delivery of possession, the vendee (the petitioner) shall pay the statutory dues and shall keep the assets insured. Apart from that, the petitioner has also enclosed in the writ petition a letter issued by the Branch Manager of OSFC dated 3-10-2001 to the effect that as per IPR-96 Clause 13(2), the transferred unit under Section 29 shall not be liable for arrears of sales tax and electricity dues of the previous owner. It was also stated that after sale of the unit under Section 29 of the Act, the transferred unit shall be treated as a new unit for the purpose of sales tax and octroi concession.

3. The petitioner's case is that after purchasing the said unit as the petitioner wanted electricity from WESCO, a demand notice was issued asking the petitioner to clear Rs. 1,56,798.10 ps. which represent the outstanding pending dues against the previous owner and the petitioner was informed that without clearance of the same, no power connection will be given. This is Annexure-3 which has been challenged in the writ petition.

Challenging the said communication, the petitioner has filed the present writ petition before this Court on 21-

11-2001 and thereafter this Court issued notice to the opposite parties by special messenger and again on 28-11-2001 the opposite parties gave its letter asking the petitioner to execute an agreement with the opposite parties after making security deposit of Rs. 92,004/- and clearing all outstanding dues pending against the previous consumer, namely, M/s. Maa Bhawani Rice Industries.

4. The further case of the petitioner is that since the opposite parties enjoyed a monopoly status and the petitioner was in dire need of electricity, as without which it cannot carry on its business, the petitioner deposited an amount of Rs, 52,799/- towards arrear dues of the previous owner M/s. Maa Bhawani Rice Industries by way of first instalment. Thereafter an agreement was executed between WESCO and the petitioner on 28-11-2001. On the very same day the petitioner sent the cheque as aforesaid. Thereafter on 29-11-2001 the Executive Engineer, WESCO directed the petitioner to clear the arrear dues of the previous consumer amounting to Rs. 1,56,798.51 in three equal monthly instalments. Out of the aforesaid amount, the petitioner deposited Rs. 52,799/- by cheque, as mentioned above, and thereafter the petitioner deposited Rs. 26,000/- on 28-2-2002 and again Rs. 26,500/- on 30-5-2002. In the meantime, the present writ petition was taken up by the Court and from time to time several orders were passed and counter-affidavit was filed pursuant to the direction of the Court. Ultimately a Misc. Case was filed by the petitioner being Misc. Case No. 2611 of 2002. A Division Bench of this Court by order dated 20-2-2003 directed that the payment made by the petitioner will be without prejudice to its rights and contentions in the writ petition.

5. Learned Counsel for the petitioner submits that the WESCO has no right to insist on the payment, but the petitioner had to make those payments under compelling circumstances and the petitioner is entitled to a refund of the entire amount paid by it towards the dues of the previous consumer.

6. In this matter, the counsel for the opposite parties has appeared and urged that the writ petition is not maintainable inasmuch as the petitioner has accepted the demand of WESCO for payment of arrear dues for consumption of electricity by the previous consumer. It was also submitted that after accepting the said demand and thereafter while making payments the petitioner has signed a contract which contains the clause for payment of arrears of the previous consumer. As such, the petitioner is estopped from contending to the contrary. It was also stated that in the writ petition there is no prayer for setting aside the contract between the parties and the petitioner is also guilty of suppression of fact as the said contract had not been disclosed by the petitioner or referred to in the writ petition presented on 21-11-2001. It was also stated that once the contract, which is commercial in nature is signed, there is no question of fairness or reasonableness in such a contract. The petitioner having signed the contract cannot wriggle out of the same.

7. Learned Counsel for the parties have referred to various judgments in support of their contentions.

8. Learned Counsel for the petitioner relied on the decision in the case of M/s. Isha Marbles v. Bihar State Electricity Board and Anr. reported in : [1995]1SCR847 . In that case, the appellant-Isha Marbles like the petitioner, was also an auction-purchaser of the mortgaged assets in an open auction held by the Corporation. The question in Isha Marbles was whether the electricity dues of the previous owner which is a contractual liability between the previous owner and the Electricity Board can be fastened on to the subsequent purchaser? The learned Judges of the Supreme Court in Isha Marbles held that the relationship between the Board and the Consumer is purely contractual and the subsequent purchaser had not consumed electricity for which dues cannot accrue against the subsequent purchaser. As such, the Board cannot insist on the subsequent purchaser to pay arrears of the erstwhile consumer. The Court noted that the auction notice issued by the Corporation or even the subsequent transfer by it, did not mention anything about the electricity dues of the previous consumer. The same facts are also present in the instant case. The learned Judges in Isha Marbles referred to the various provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 and by referring to all the provisions, the Court held that the auction-purchasers came to purchase the property after disconnection so they cannot consume electricity in the same premises till a new contract is entered into. The learned Judges came to a clear finding that electricity being public property must be protected. But the law, as it stands, is inadequate to enforce the liability of the previous contracting party

against the auction-purchaser who is a third party and is in no way connected with the previous owner/occupier. The Court has of course cautioned by holding that a dishonest consumer cannot be allowed to play truant with public properties. In other words, the Court wanted to make it clear that if there is some nexus or connection between the erstwhile owner and the subsequent purchaser, the subsequently purchaser is bound to clear the arrears of the erstwhile owner. The said view of the Apex Court in *Isha Marbles* was subsequently reiterated in the case of *Ahmedabad Electricity Co. Ltd. v. Gujarat Inns Pvt. Ltd. and Ors.* reported in : AIR2004SC217 .

9. The present case is for fresh connection. The Supreme Court in *Ahmedabad Electricity Co. Ltd.* makes it clear that 'in case of a fresh connection though the premises are the same, the auction-purchasers cannot be held liable to clear the arrears incurred by the previous owners in respect of power supply to the premises in the absence of there being a specific statutory provisions in that regard'. From the facts as recited in the case of *Ahmedabad Electricity Co. Ltd.*, it appears that the subsequent purchasers paid some of the arrears of the erstwhile owner, but even that has not altered the legal position as stated in *Isha Marbles*.

10. It is clear that WESCO as a distribution-licencee is in the position of a 'State' under Article 12 of the Constitution of India. It deals in electricity which is public property and its function are statutorily controlled by the Electricity Act and the Rules' and Regulations framed thereunder. The power and obligations of WESCO are also controlled by the statute or statutory instruments. Being controlled by such statutory provisions, WESCO virtually discharges Governmental functions and its actions are amenable to judicial scrutiny by a writ Court. Even though the provisions of the Electricity Act and the Regulations cover a very wide area but they are silent insofar as the right of a distribution-licencee to demand from a new consumer arrears of payment for consumption by an erstwhile consumer is concerned.

11. In several taxing statutes like Bihar and Orissa Motor Vehicles Taxation Act or Income-tax Act or Central Excise Act, arrears of tax liability is a charge on either the vehicle or the property in respect of which tax burden has not been discharged by the previous owner. If such a property is transferred by the owner or any agency to another person by sale or contract, the subsequent purchaser's title is burdened with the charge of unpaid taxes. But bills for consumption of electricity by an erstwhile consumer is not a charge on the premises which is purchased by a bona fide purchaser. Charge on a property can only create by words of statute.

12. Therefore, unless WESCO is empowered by law, which it is not, it cannot treat the arrears of consumption charges by the previous owner as a charge on the immovable property and consequently it cannot recover the same from a subsequent purchaser as a condition precedent to supply electricity. In this case, it has not been alleged by WESCO that the petitioner is not a bona fide purchaser. The learned Counsel for WESCO has not even fairly urged that there is any nexus of connection between the previous consumer and the petitioner. In fact the petitioner being an auction-purchaser from OSFC, such an allegation normally cannot be made.

13. The obligation of WESCO to supply electricity is controlled by the provisions of the Electricity Act, 2003 (hereinafter called as 'the said Act'). Section 43 of the said Act imposes a statutory obligation on a distribution licence. Section 43 of the said Act is set out below.

43. Duty to supply on request.- (1) 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:

Provided that where such supply requires extension of distribution mains, or commissioning of new sub-sections, the distribution licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as may be specified by the Appropriate Commission:

Provided further that in case of a village or hamlet or area wherein no provision for supply of electricity exists,

the Appropriate Commission may extend the said period as it may consider necessary for electrification of such village or hamlet or area.

(2) It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in Sub-section (1):

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price as determined by the Appropriate Commission.(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.

14. It is clear from the aforesaid provision that such obligation of WESCO, a distribution-licensee, to supply electricity is a mandatory obligation under the statute. Any failure on the part of a distribution licensee to supply electricity within the time fixed in the statute will expose the licensee to penal consequences. This is very clear from subsection (3) of Section 43. The Court has repeatedly asked the learned Counsel for the WESCO whether under the said Act, WESCO has any statutory right to recover the arrears of charges of consumption by the erstwhile consumer from the subsequent purchaser? Learned Counsel has fairly stated that there is no such statutory provision empowering the WESCO to do so.

15. In exercise of power under Section 181(2)(t)(v) (w) and (x) read with Part IV of the said Act, the Orissa Electricity Regulatory Commission framed the Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004. Under Clause 96 of the said Code it is provided that the distribution company is entitled to take recourse to proceedings under the Orissa Public Demand Recovery Act, 1962 for realization of the licensee's dues. Therefore, under Clause 96 the licensee i.e. the distribution company has a remedy by way of initiating an OPDR proceeding against the defaulting party.

16. Therefore, it is clear that the outstanding dues of the previous consumer-M/s. Maa Bhawani Rice Industries can be enforced against it, in terms of Clause 96 of O. E. R. C. (Conditions of Supply) Code, 2004 by initiating OPDR proceeding. In the present case, the petitioner-Ajay Kumar Agrawal has not claimed electricity on the basis of an assignment of any pre-existing agreement with the erstwhile consumer for supply of electricity but has made an application for a new connection. In terms of such application, a new contract for supply of power has been entered into between the petitioner and WESCO.

17. Taking into account the aforesaid provisions contained in the (Conditions of Supply) Code, 2004, the raising of the demand by WESCO, vide Annexure-3 on the petitioner-company appears to be in contravention of the provisions of the Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004.

18. It is, therefore, clear that the demand of WESCO from the petitioner to clear the arrears of consumption charges by the erstwhile consumer is a demand which is de-hors the said Act. Therefore, the impugned demand by WESCO is not recognized under law. But since such demand was made by the WESCO which is enjoying a monopoly status, and the petitioner had no other means of obtaining electricity, the petitioner was compelled to accept those conditions under duress. The duress on the petitioner is writ large in this case.

19. That is why petitioner immediately came before this Court and filed a writ petition on 21-11-2001 which was immediately after the demand of WESCO on 16-11-2001. On such writ petition being filed by the petitioner, this Court issued notice on 26-11-2001 to WESCO by special messenger. But since no interim order was granted to the petitioner, it had to enter into an agreement with WESCO on 28-11-2001 and Clause 9 of the said agreement provided as follows:

9. This Agreement on and from date of operation supersedes the earlier agreement between the supplier and the consumer dated 24-12-92 for the purpose of power supply to the same premises and for the same

purposes. Provided that all arrears and liabilities under the old and/or superseded agreement above shall be treated as arrears and liabilities under the present agreement.

20. A perusal of Clause 9 makes it clear that by not referring the name of its erstwhile consumer, namely, M/s. Maa Bhawani Rice Industries, WESCO in Clause 9 of the agreement has referred to the earlier agreement dated 24-12-92 presumably with M/s. Maa Bhawani Rice Industries and provided that all arrears and liabilities under the old and superseded agreement shall be treated as arrears and liabilities under the present agreement. It has already been noted that WESCO has no such power under the statute to treat arrears under the superseded agreement as arrears under the present agreement. Therefore, the said clause on the face of it is ultra vires the provision of Section 43 of the said Act which fastens an obligation on WESCO to supply electricity to a Consumer.

21. Learned Counsel for WESCO has very much relied on two facts. The first is that the petitioner suppressed the said agreement before this Court and has not come with clean hands and as such, the petitioner is not entitled to any relief. In support of this contention, the learned Counsel for the petitioner relied on several decisions of the Supreme Court in the case of S.P. Changalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and Ors. reported in : AIR1994SC853 , in the case of Mahendra Baburao Mahadik and Ors. v. Subhash Krishan Kanitkar and Ors. reported in : AIR2005SC1794 and in the case of Bank of India and Anr. v. Avinash D. Mandivikar and Ors. reported in : AIR2005SC3395 . The principles elaborated in those decisions cannot be disputed but those principles are not attracted in the facts of the present case inasmuch as the writ petition was filed by the petitioner admittedly on 21-11-2001 which was much before the agreement dated 28-11-2001. In the writ petition the petitioner categorically challenged the demand of WESCO dated 16-11-2001. Therefore, there is no suppression of material facts when the writ petition was moved.

22. Now, the question is whether the WESCO can enforce its agreement dated 28-11-2001 against the petitioner just because the petitioner has signed the same and secondly, because it has not been challenged by the petitioner subsequently in the writ petition. In support of such contention learned Counsel for the WESCO has strongly relied on a decision of the Supreme Court in the case of Assistant Excise Commissioner and Ors. v. Issac Peter and Ors. reported in : [1994]2SCR67 . In that case, the Apex Court was dealing with a contract which was statutory in nature as the matter arose under the Kerala Abkari Act and it was pertaining to the excise year 1981-82. The question which arose in that case was whether as a result of failure on the part of the State in supplying the quantity of arrack undertaken by it, the licencees are entitled to any rebate/remission of the amounts payable by them under the contracts. The Apex Court held that the contract being statutory in nature, there is no right in the licencees to compel the Government to supply the quantity which they demand nor has the State the right to compel the licencees to purchase all that the Government proposes to sell to them. This Court is unable to appreciate the relevance of the aforesaid ratio to the facts of the present case which are totally different. Here the opposite parties, the distributing licencees, are insisting on the petitioner, the payment of an amount which the licencee had no right to demand in law. The distribution-licencees' obligation to supply electricity is governed by statute as noted hereinabove. The said statutory obligation is made subject to certain conditions but the right to recover the arrears of an erstwhile consumer from the subsequent consumer is not one of those conditions. Therefore, the decision in Assistant Excise Commissioner (supra) is not of much relevance to the present case.

23. Learned Counsel for the opposite parties has urged that the petitioner is estopped from challenging the agreement in question. Here the petitioner is challenging the demand of WESCO as wholly unwarranted in law. There is no estoppel against statute. Apart from that, as noted above, the petitioner had signed the agreement because it had no option. The petitioner had to sign the same after it filed the writ petition in which it had challenged the demand made. Apart from that, the writ Court, at an earlier stage of the proceeding, in the presence of the parties, had made it clear by its order dated 20-2-2003 that the payment made by the petitioner will be without prejudice to the rights and contentions in the writ petition and the petitioner had made payment of the dues of the erstwhile consumer under protest and on the condition that the same will be adjusted against the future bills in the event the case pending in the High Court is decided in

its favour. The same will appear from Annexure-6 to the additional affidavit filed by the petitioner. Therefore, the petitioner has never made payment without raising a protest.

24. The mere fact that there is no prayer in the writ petition for setting aside the agreement dated 28-11-2001 does not debar the petitioner from contending that the said agreement cannot be enforced in law,. The demand of Annexure-3 has been challenged. The same demand is reflected in Clause 9 of the agreement. Just because Clause 9 has not been challenged, the petitioner cannot be denied relief if he is entitled to the same under law. In this case petitioner's right to relief against Clause 9 of the agreement having been clearly established, relief cannot be denied for inartistic or defective prayer clause. The approach of the writ Court in moulding relief, where such a relief is available in law, has been liberal and never been hyper-technical. See the decision of the Supreme Court in the case of Charanjit Lal Chowdhury v. The Union of India and Ors. reported in AIR 1951 SC 41 at page 53, and also in the case of K.S. Rashid and Son v. Income-tax Investigation Commission and Ors. reported in AIR 1954 SC 207.

25. It is obvious that the powers and duties of the distribution licensee is governed under Chapter VI of the said Act and its power to recover charges is provided under Section 45 of the said Act. Section 45 does not contemplate power of the distribution licensee to recover some charges of consumption by an erstwhile consumer from the subsequent consumer. The distribution licensee is at liberty to recover its charges from the previous consumer under Clause 96 of the Code, as noted already, but it has not done so. So, for its failure to recover charges from A, it cannot fasten those charges on B as a condition of supply.

26. The said Act has various new features and Section 43 is one of them. It has, subject to certain conditions, created a mandatory statutory duty on every distribution licensee to supply electricity on an application made by the owner or occupier of any premises. Apart from the right to obtain supply of electricity, the said Act has given the consumer many other rights which were unknown under the previous Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948. This is clear from the preamble to the said Act which states that protecting the interest of consumers in one of its avowed object. That object is clearly discernible in Section 43 of the said Act. Clause 9 of agreement dated 28-1-12001 which is dictated by WESCO is contrary to the interest of any consumer and contradicts Section 43 of the said Act and also its dominant and manifest purpose.

27. Therefore, the submission of the learned Counsel of WESCO that the transaction is absolutely commercial is not entirely correct. It may be noted that the petitioner is asking for supply of electricity for commercial purposes. But electricity, being a public property, its supply is controlled by the statute. Therefore elements of public law govern the situation at the stage of supply. Under such circumstances, WESCO as a distribution licensee is clothed with the status of a State under Act. 12 of the Constitution of India since it is to discharge preeminently governmental function, namely, supply of power to industries. In such a situation, the WESCO cannot act like a 'public giver'. It cannot act at its caprice, whims or fancy nor can it, taking advantage of its monopoly status, exact an amount which it cannot do under the provision of law. If the Court, ignoring the provision of the said Act, permits WESCO to realise the amount which is contemplated under Clause 9 of its purported agreement dated 28-11-2001 then the Court would be permitting WESCO, a State under Article 12, to flout the provisions of the said Act and to enrich itself by virtue of its superior bargaining position through a method, not contemplated under law and therefore prohibited by law. Here, the silence of the statute would amount to a prohibition, otherwise it amounts to an exaction of a sum from a consumer who is under no legal obligation to pay the same. That would amount to deprivation of one's property without authority of law. Thus the Constitution's mandate under Article 300A would be breached. Article 300A runs as follows:

300A. Persons not to be deprived of property save by authority of law.- No person shall be deprived of his property save by authority of law.

28. Therefore, the contention of the learned Counsel for the WESCO cannot be sustained.

The writ petition, is therefore, allowed. The impugned demand made by WESCO vide Annexure-3 is set aside and consequently Clause 9 of the agreement dated 28-11-2001 cannot be given effect to insofar as it relates

to the demand of WESCO on the petitioner to pay arrears of M/s. Maa Bhawani Rice Industries. The amount which has been paid by the petitioner on that account must be adjusted by WESCO against future bills of the petitioner. But the petitioner, in the facts and circumstances of the case, will not be entitled to any interest on the said amount. Such adjustment shall be made by WESCO in the subsequent bills of the petitioner starting from the month of December, 2006.

The Writ Petition is thus allowed to the extent indicated above. No order as to costs.

I. Mahanty, J.

29. I agree.

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