

R

IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 6TH DAY OF JULY 2021

PRESENT

THE HON'BLE MR. JUSTICE KRISHNA S.DIXIT

AND

THE HON'BLE MR.JUSTICE PRADEEP SINGH
YERUR

Writ appeal No.100052/2021 (GM-KEB)

BETWEEN:

OPG Power Generation Pvt. Ltd.,
NOP.6, Sardar Patel Road,
Gundy, Chennai600 032,
Rep. by its Authorized Signatory,
DGM (Legal) Mr. Venugopal.

... Appellant

(By Shri G.S. Khannur, Sr. Advocate
for Shri Shivaraj C. Bellakki, Adv.)

AND:

1. Gulbarga Electricity Supply Co. Ltd.,
Station Road, Gulbarga-585 102,
District Gulbarga,
Rep. by its Managing Director,
2. The Executive Engineer (EL),
O & M Division, Station Road,
District Gulbarga.

... Respondents

(By Shri B.S. Kamate, Adv.)

This Writ Appeal is filed under Section 4 of the Karnataka High Court Act, 1961 praying this Hon'ble Court to set aside the order dated 24.02.2021, passed by the Hon'ble learned Single Judge in W.P.No.109192/2017 and allow the writ appeal by granting the reliefs as sought by the petitioner in the writ petition, in the interest of justice and equity.

This Writ Appeal coming on for Preliminary hearing, having been heard and reserved for Judgment on 28.06.2021, this day, the Court pronounced the following:-

J U D G M E N T

This Intra-Court Appeal seeks to lay a challenge to the Judgment & Order dated 24.02.2021 rendered by a learned Single Judge whereby appellant's W.P.No.109192/2017 having been dismissed the stand of the respondent-Electricity Supply Company that the payment of arrears of electricity charges in respect of subject property is a precondition for the sanctioning of power connection is upheld.

2. Some reprieve is granted by the learned Judge to the appellant, as can be construed from the following text of operative portion of the impugned order:

"i) *The writ petition is disposed of.*

- ii) *In the event, the petitioner paying entire arrears as demanded by the respondents, the petitioner would be entitled for fresh connection of electricity.*
- iii) *If after payment of money by the petitioner, the respondents recover the money from the previous consumer, the same shall be paid to the petitioner."*

3. The respondents having entered appearance through their Panel Counsel vehemently resist the appeal making submission in justification of the impugned order and the reasons on which it has been constructed; the panel counsel for the Supply Company contends that this being an Intra-Court Appeal, the examination of the appellant's grievance has to be undertaken in a restrictive way, more particularly when the learned Single Judge has considered all aspects of the matter.

4. A BRIEF FACT MATRIX OF THE CASE:

(a) The subject land in all admeasured about 800 acres of which the writ petitioner bought in a public auction held on 08.12.2010, only a small extent of 119 acres & 62 cents; in this land existed an industry and all its apparatus, is not in dispute, in which the industry was

established; the auction price is Rs.64.90 crore; Sale Certificate was issued followed by delivery of possession; the remainder of the land, it is stated at the Bar, has been bought by another Company namely M/s. Sessagoa Company, which is not a party to these proceedings.

(b) Petitioner's application dated 11.05.2011 for sanctioning of power supply was replied to, on 19.05.2011 by the second respondent herein that the erstwhile owner of the property had the power supply of 400 KVA, in 110 KV class vide RR No.EHT2 and the supply was disconnected on 06.05.2010 for non-payment of arrears then quantified at Rs.17.36 crore (now almost doubled) and therefore, unless the same is cleared, power supply cannot be sanctioned; petitioner's challenge to the aforesaid reply in the subject writ petition, having been negated by the learned Single Judge, this appeal is presented.

5. We have heard the learned counsel for the parties and perused the appeal papers; we have also adverted to the relevant rulings cited at the Bar; having

done this, we grant a limited indulgence in the matter as under and for the following reasons,

(i) Learned Sr. Advocate Mr. Guru Khannur appearing for the writ petitioner firstly argues that the arrears of power supply charges not being an encumbrance do not run with the land and therefore, the buyer more particularly a buyer in public auction cannot be saddled with the said liability; learned Sr. Panel Counsel for the Electricity Supply Company replies that it is not a case of coercive recovery, but only a precondition for availing the power supply to the premises in question; it is a matter of a bit statutory policy vide "Conditions of Supply of Electricity of the Distribution Licensees in the State of Karnataka" (hereafter 'Policy Conditions'); he justifiably draws our attention to clause 4.09(iv) of the Policy Conditions which has the following text:

"iv) If any person desires to have electricity for a premises for which the power supply Agreement has been terminated (whether the service line is dismantled or not) he shall be treated as a fresh Applicant and the licensee shall collect the outstanding arrears in respect of the said premises from such persons before connection is given."

(ii) The question raised by Mr. Khannur as above is no longer *res integra*: in almost an identical fact matrix the Apex Court in Paschimanchal Vidyut Vitran Nigam V. DVS Steels and Alloys Private Limited, **(2009)1 SCC 210**, has observed that a transferee of a premises although does not suffer the arrears of power supply charges as an encumbrance because of absence of brevity of contract, still the Supply Company can stipulate that the clearance of arrears that rested on the predecessor-in-title or in possession of the subject property is a *sine qua non* for seeking a fresh connection; it also said that such conditions are not unreasonable, lest an unscrupulous consumer should commit default with impunity and make the recovery of arrears impossible by selling away the property; learned Panel Counsel is right in contending that the Supply Conditions have a statutory flavour and that they are not *ex contractu* pure & simple vide Telangana State Southern Power Distribution Company Limited V. Srigdhaa Beverages, **(2020)6 SCC 404** and therefore, the arrears are 'statutory dues'; the power supply is regulated by the contract, does not make them

any the less statutory and therefore, the absence of *privity of contract* does not come to the protection of the buyers of the property concerned, which suffered disconnection of power supply on account of non-payment of power charges.

(iii) Mr. Khannur secondly argues that as on the date of public auction the petitioner company had no means of knowing the arrears in question and of the court cases launched by the erstwhile owner; therefore, his client cannot be made liable vicariously; the learned Panel Counsel for the Electricity Supply Company vehemently points out Condition 2.8 of the Tender Document under which the public auction of the property in question was effected; it reads:

"2.8 The unit may have certain outstanding liabilities having priority over secured creditors' dues which are to be met by the purchaser and which will be over and above the purchase consideration. The prospective purchaser may carry out due-diligence in respect of likely liabilities pertaining to the unit before submitting the tender. It may be noted that the purchaser will be responsible for meeting these liabilities, if arise, and secured creditors will not be liable to meet any such liabilities whatsoever."

(iv) The text of the above condition of Tender not only reinforces the concept of *caveat emptor* but it goes far ahead in entailing the auction buyer even with the 'contemplated liabilities' as well; so broadly is coined the said condition transcending the contours of conventional *caveat emptor*, as rightly submitted by Sr. Panel Counsel; therefore, the argument that as on the date of auction, the question of liability of the erstwhile owner was being litigated upon in the Courts, does not come to the rescue of the petitioner which is admittedly an incorporated Company that has bought the property in question at a price running in crores of rupees; presumably it has all men & matter who with due diligence could have known of the arrears of power supply charges and such other levies, that were in crores of rupees; therefore, the petitioner company cannot feign ignorance of the 'likely liabilities' of the kind; had it been the case of a poor peasant, perhaps the considerations would have been much different, is beside the point; even the similar aspect of the matter having been discussed by the Apex Court in **Paschimanchal** *supra*,

argument of the kind, as advanced by the petitioner, is held unsustainable.

(v) The vehement submission of Mr. Khannur that predecessor-in-title had got the installation vide RR No.EHT2 to the premises which in all admeasured about 800 acres and the petitioner having bought only about 15% of this i.e., 119 acres & 62 cents, cannot be asked to pay the entire arrears quantified at Rs.21.63 crore, merits consideration; there is a *Dictionary Clause* i.e., Condition No.2 in the Supply Conditions, which have a statutory character vide **Srigdhaa Beverages**, *supra*; clause 2.18 defines 'Consumer' by including 'any person whose premises are for the time being connected for the purpose of receiving electricity with the works of licensee...'; clause 2.31 defines 'Factory' to mean 'any premises including the precincts thereof...'; clause 2.32 defines 'Factory Premises' to mean 'the premises in which laboratories, shop, store, offices, reading rooms, libraries, yards, watch & ward, canteen, first aid centres belonging to the factory are housed'; clause 2.53 defines 'Premises' to include 'any land, building or structure'.

(vi) The Power Supply Company heavily relies upon Condition 4.09(iv) *supra* to enforce recovery of arrears against the petitioner; we need to construe this condition keeping in mind the Definition Clause; this condition employs the word 'premises' twice, as an expectant mother carrying twins in her womb; it is a settled principle of interpretation of statutory instruments that ordinarily the words used in its provisions carry the meanings assigned to them in the Definition Clause, subject to just all exceptions, into which argued case of the Supply Company does not fit; the definition of 'premises' given in Clause 2.53 is much wider than the definition of 'Factory Premises' given in Clause 2.32; that gives an indication that the installation was in respect of entire extent of 800 acres, the contra material to assume otherwise, not being available on record; the language of Clause 4.09(v) which reads as under, lends support to our view:

'v) Arrears in any particular installation, which is under disconnection for non-payment, shall be collected as arrears of any other installation except residential installation standing in the name of the same consumer. However arrears of any other

installation shall not be included to a residential installation.”

It is only in the case of domestic supply of power, an exception is made so far as the recovery of arrears of any other installation, the registered consumer being the same;

(vii) After all the apportionment of liability has a kinship with the doctrine of proportionality since the non-apportionment in a given circumstance may be true to be unjust & unfair to a perspective consumer who is made to shoulder the entire liability for arrears; no contra-indicative provision in the Supply Conditions is brought to our notice; the decision of the Apex Court in **Pashimanchal** *supra* too supports this view, as rightly submitted by Mr. Khannur; should that be so, petitioner is more than justified in seeking apportionment of liability for arrears; however, this entire aspect needs to be examined by the respondents themselves afresh, since the foundational facts have to be ascertained from the files in their custody and the same not readily available on record loaded to the Board here.

(viii) The next argument of Mr. Khannur that the petitioner has bought the subject property in the liquidation of M/s. Bellary Steels and Alloys Limited i.e., predecessor-in-title and that the Electricity Supply Company having raised the claim already before the Official Liquidator in respect of the very same arrears, cannot press for the recovery qua his client does not much impress us; as already mentioned above the Supply Conditions in the light of the Apex Court observation do not make an exception, in such a situation; the Company Liquidation Proceedings being what they are, will take their own time to attain finality; that apart the contentions such as 'priority of claims', 'rateable distribution' & the like may also arise before the Official Liquidator and the Company Law Tribunal, it cannot be readily assumed that, the claim of the Supply Company would be favoured in full, if at all it is going to be; learned Single Judge has safeguarded the interest of the petitioner by directing '*If after payment of money by the petitioner, the respondents recover the money from the previous consumer, the same shall be paid to the*

petitioner; this very protective clause made by the learned Judge arguably grants locus to the petitioner to participate in the proceedings before the Official Liquidator, may be, after securing the leave and that the Supply Company may not oppose such participation.

(ix) Mr. Khannur's next contention that the Writ Petition filed by the predecessor-in-title in the Kalaburagi Bench challenging the levy of electricity supply arrears has been dismissed for non-prosecution and that having lost the property in public auction it has lost interest too in getting the same restored, does not come to his assistance much; it hardly needs to be stated that the petitioner being the successor-in-title itself can seek restoration of the said Writ Petition and prosecute the challenge; this, the petitioner can do of course, after clearing the arrears; after all the Writ Courts are Courts of Equity too, and they are not known to deny relief to the aggrieved on technical grounds, *per se*; if the said Writ Petition is allowed by voiding the demand for arrears, that would enure to the benefit of the petitioner

herein in seeking reimbursement of the amount *pro tanto*.

(x) The contention of Mr. Khannur that the Electricity Supply Company could not have fastened the theft charges attributable to erstwhile owner of the property, vicariously on the auction purchaser of the subject property more particularly when the challenge thereto in W.P.No.200858/2016 levied by the erstwhile owner is still pending consideration, is bit difficult to countenance; the arrears necessarily include the charges for the thieved power as well; criminal liability cannot be fastened on a person other than the offender, is ordinarily true; however this statement of law has several reflections; theft of the electricity power can be both a tort and a crime; if an act is a crime, it is not that it can never be a tort; '**Winfield and Jolowicz on Tort**', 20th Edition-2010, Sweet & Maxwell, at page 20, would say:

"H. Tort and Crime Distinguished

1-13 Crime and Tort overlap. Many torts are also crimes, sometimes with the same names and with similar elements and sometimes a civil action in tort is

deduced from the existence of a statute creating a criminal offence... but the scope of tort is wider... there is no real difficulty in distinguishing criminal prosecution from tort claims, if only because they are tried in different courts by different procedures."

When the charges for theft of electricity are levied in accordance with the applicable Rules, the action partakes the character of civil proceedings.

(xi) Explanatory to the above, the language of Condition 42.06(a)(i) & (ii) of Supply Conditions, merits advertence and it runs as under:

"42.06 THEFT OF ELECTRICITY

(a)(i) Where it is prima-facie established to the satisfaction of the officer authorized by the State Government in this behalf under Section 135 of the Electricity Act 2003 that the person / Consumer or his agent, servant etc., has committed / is committing theft of Electricity as indicated in Section 135 of the Electricity Act 2003, Authorized officer shall estimate the value of the electricity thus abstracted, used or wasted or diverted, in accordance with the calculation table: 1 as noted hereunder, for the entire period during which such unauthorized use of electricity has taken place and if, however, the period during which such unauthorized use of electricity has taken place can not be ascertained, such period shall be limited to a period of 12 months immediately preceding the date of inspection at two times the Tariff applicable to such category of installation and demand and collect the same

by including the same in the next bill or in a separate bill pending adjudication by the Special Court. Before including the said amount in the bill, the Authorized officer shall issue a provisional assessment notice indicating the demand to the concerned person within 3 days from the date of inspection informing such person to file his objections, if any, within 7 days and due opportunity shall be given to such person of being heard.

(ii) This is without prejudice to the criminal proceedings that may be instituted under the provisions of the Electricity Act 2003 for theft of energy."

(xii) The text and context of the above provision leave no manner of doubt as to theft of power giving raise to a civil cause of action for recovering the charges of thieved power by the competent authority, sans any criminal proceedings; in fact sub clause (a)(i) & (ii) of the condition of 42.06 itself makes it clear; even in the criminal prosecution of the offender for the theft of power, the criminal court can make an order for recovery of the charges of the thieved power, is true but beside the point; suffice it to say that the conviction by the criminal court for the offence of theft of power is not a condition precedent for recovering the charges in a quasi judicial proceeding in terms of Condition 42.06.

(xiii) The decision dated 28.01.2016 made by the learned Single Judge in **W.P.No.9055/2003** between Nirani Cements Pvt. Ltd., V. HESCOM, does not derogate from the above view; any way a lis in this regard is still pending and if & when the same is decided in favour of the erstwhile owner, petitioner in a sense being his successor in interest may take advantage thereof. The same is the answer to the other contention of the petitioner that certain charges could not have been levied on the predecessor-in-title and therefore, the quantification of arrears cannot include such unsustainable charges and consequently the liability to that extent cannot be made to rest on the petitioner's shoulder.

In the above circumstances, this appeal succeeds in part; subject to what has been observed hereinabove, the respondents shall consider afresh and decide after hearing all the stake holders, as to the apportionment of the liability for arrears in question within an outer limit of four weeks and thereupon consider the application for the power supply within the next four weeks in terms of

: 18 :

the said decision; all contentions in this regard are kept open; in all other aspects, the impugned order of the learned Single Judge is left intact.

Costs made easy.

SD/-
JUDGE

SD/-
JUDGE

Vnp*