

Bhusawal Borough Municipality

Vs

Amalgamated Electricity Co. Ltd. & Anr

Civil Appeals Nos. 47 and 48 of 1961

(CJI B.P. Sinha, J. R. Mudholkar, Raghuvar Dayal, N. Rajgopala Ayyangar JJ)

10.12.1963

JUDGMENT

MUDHOLKAR J. –

This judgment will also govern C.A. 48 of 1961. Both the appeals are by special leave from the judgment of the Bombay High Court in second appeal disposing of two appeals which arise out of two separate suits instituted by the appellant, the Borough Municipality of Bhusawal, against the Bhusawal Electricity Co. Ltd., respondent No. 1 before us, to which suits the State of Bombay was later added as a defendant.

In each of the two suits the appellant had claimed refund of two sums of money paid by them to the respondent No. 1 under protest as electricity charges to which the respondent No. 1 claimed to be entitled by virtue of an order made by the Government of Bombay under the Bombay Electricity Supply (Licensed Undertakings War Costs) Order, 1944 (herein referred as Surcharge Order). The appellant succeeded in both the suits in the trial court as well as the District Court. In second appeal, however, the High Court set aside the decrees passed by the trial court and dismissed the two suits. While doing so, the High Court admitted on record certain documents by way of additional evidence and the only contentions raised before us by Mr. G. S. Pathak for the appellant are firstly that the High Court is incompetent in second appeal to admit additional evidence on record inasmuch as O. XLI, r. 27, Code of Civil Procedure is inapplicable to a second appeal. Secondly, the provisions of O. XLI, r. 27 cannot be used to fill up the lacuna in the evidence left by a party. We may incidentally mention that when the High Court, by its order dated April 30, 1958, decided to admit additional evidence on record, no objection was raised on behalf of the appellant before us.

It seems to us to be wholly unnecessary to decide in this case whether the High Court has the power to admit additional evidence in second appeal and also whether even if it has that power it was right in admitting the evidence in the circumstances of this case. Basing itself on a particular interpretation of the agreements regarding payment of electric charges with respondent no. 1, the appellant claimed refund on the ground that it was not liable to pay the surcharge payable under the Surcharge Order, 1944 in respect of electrical energy consumed by it. The substantial defence of the respondent no. 1 was that the dispute between it and the municipality was decided by the Government of Bombay and that under the second proviso to cl. 5 of the Surcharge Order, 1944 the decision of the Government was final and binding both on the appellant and the respondent No. 1. The relevant provisions read thus :

Clause 5 : "Upon the rate of the War Costs Surcharge being fixed by the Provincial Government from time to time in accordance with this order, it shall not be lawful

for the licensee or sanction-holder concerned to supply energy at other than charges surcharged at the rate for the time being so fixed."

Second proviso : "Provided further that no War Costs Surcharge shall be effective upon the charges for the supply of energy under any contract entered into after the 1st May, 1942, unless such contract provides for the same charges for energy as have been contained in similar previous contracts for similar supply by the licensee or sanction holder concerned (as to which in the event of dispute by any party interested, the decision of the Provincial Government shall be final) or unless and to such extent as such application may be expressly ordered by the Provincial Government."

It is not disputed before us by Mr. Pathak that the decision of the Government upon the dispute is final and binding on the parties. But, according to him, it was not established by the evidence led in the trial Court that the dispute between the parties had at all been referred to the Government and that a certain communication sent by the Government to the parties, Ex. 68 dated May 22, 1946 relied upon by the respondent no. 1, contains nothing but the opinion of the Government. Mr. Pathak further urged that the proviso referred to by us purports to constitute the Government into an arbitrator and, therefore, there had to be a reference to the arbitrator by both the parties to the dispute under the provisions of the Arbitration Act, 1940. This latter point, however, had not been taken in the courts below nor is it found in the statement of the case. We have, therefore, not permitted Mr. Pathak to rely upon it before us.

The communication of May 22, 1946 relied upon by the first respondent runs thus :

#"NO. 6404/36-E1(1). Public Works Department, Bombay Castel, 22nd May, 1946.FromThe Secretary to the Government of Bombay PublicWorks Department (Irrigation).ToThe President, the Borough Municipality, Bhusawal.Subject : War Costs Surcharge.Dear Sir,With reference to the correspondence ending with Government letterno. 6404/36, dated the 10th May, 1946 on the subject mentionedabove, I am to inform you that Government has fully consideredyour case under the second proviso to clause 5 of the BombayElectricity Supply (Licensed Undertakings War Costs) Order,1944, and has decided that you should pay the surcharge to theBhusawal Electricity Co. Ltd., at the rate of 15% fixed inGovernment Order No. 6331/36 (IV) dated the 15th August, 1944,unless the Company raised its rate of supply of energy forstreet lighting to more than 4 annas per unit.Yours faithfully,Sd/ D. N. Daruwala.for Secretary to the Govt. of Bombay.##

Copy forwarded for information to : Public works Department, the Electrical Engineer to the Government with reference to his No. LRM. 57/5260, dated the 8th March, 1946. The Accountant General, Bombay with reference to his No. O.A. 2888, dated the 2nd February 1946. Messrs The Bhusawal Electricity Co. Ltd., Bombay with reference to correspondence ending with Government letter No. 6404/36-E1. (i) dated the 17th May 1946. CC to E. E. Bhusawal for information sent on 25th May 1946."

It is obvious from this communication that both the parties, that is, the appellant as well as the respondent no. 1 had stated their respective cases before the Government. There was no occasion for them to do so unless they were both purporting to act under the second proviso to cl. 5 of the Order of 1944. After consideration of the cases of both the parties the Government has stated in the

aforesaid communication that it had decided that the municipality should pay to the Electricity Company surcharge at the rate of 15% fixed in a certain Government Order unless the Company raised its rate for the supply of energy for street lighting to more than four annas per unit. There is no reason to think that what is on the face of it a decision is nothing but an opinion because if there were anything in the correspondence to which a reference is made in that letter as well as in the endorsement at the bottom which went to show that the appellant did not purport to refer any dispute to the Government, it was for the appellant to produce that correspondence. Its omission to do so must be construed against it. Then Mr. Pathak said that under the Surcharge Order itself the dispute had to be referred by both the parties and not by only one of them. This contention is, however, untenable in view of the clear language of the proviso which says : "In the event of dispute by any party interested" the decision of the Provincial Government shall be final. There is, therefore, no substance in the contention. In our opinion the trial court and the District Court had wholly misconstrued this document which is not merely of evidentiary value but is one upon which the claim of the respondent no. 1 for the surcharge is based. Misconstruction of such a document would thus be an error of law and the High Court in second appeal would be entitled to correct it. This is what in fact has been done.

There is no substance in the appeals which are dismissed with costs.

Appeals dismissed.

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