BOMBAY HIGH COURT

Bharat B

Vs.

Bombay Municipality

Appeal No. 25 of 1973 (Misc. Petn. No. 765 of 1972)

(Kantawala, C.J. and Desai, J.)

13.02.1978

JUDGEMENT

Desai J.

1. The appellants before us are the original petitioners in Misc. Petition No. 765 of 1972. They have preferred this appeal from the decision of Nain J. in the said petition dismissing the same with costs.

2. The appellants are manufacturer of barrels and drums and for the purpose of their manufacturing activity consume electricity which is supplied by the B.E.S.T. Undertaking owned by the 1st respondent Corporation. The 2nd respondent to this appeal, who was also the 2nd respondent to the original petition, was at the relevant time an Officer of the B.E.S.T. Undertaking. The appellants filed their petition for an appropriate writ, order or direction requiring the respondents to withdraw or cancel the notice dated 31st Oct. 1972, by which it was threatened that the electric supply of the petitioners would be disconnected on account of non-payment of the sum of Rs. 3,30,853.68 mentioned is the said notice. In order to understand the rival contentions, it will be necessary to mention the following facts. 2A. Prior to 1st April 1960 the appellants had been provided with metering equipment consisting of current transformers of the ratio of 40 : 5 on the basis of the appellants' then connected load which was 485 KW with an authorized maximum demand of 210 KW. The said metering equipment recorded direct reading of the energy consumed on the dial provided for that purpose. At or about that time the appellants had placed an order with the Government Electric Factory, Bangalore, for the supply of 1000 KVA transformer to feed the appellants' new automatic plant imported by them which had been erected for the appell-ants by the General Electric Company, Bombay. On 8th April, 1961 the appellants by a letter to the B.E.S.T. Undertaking informed them that the appellants desired a shut-down of the power supply to their factory with a view to enable the appellants to connect their new (1000) KVA transformer. On 13-4-1961 one H. B. Shivdasani, a representative of the

appellants, called on the Superintendent of the B.E.S.T. Undertaking with a view to finalize the arrangement to meet the additional load that would be required by the appellants through the new transformer. By reason of the new plant and the new requirement the authorized maximum demand at the appellants' factory was revised upward from 210 KW to 500 KW. The existing metering equipment viz. the current transformers having the ratio of 40 : 5 became inadequate to meet this revised maximum demand and it became necessary, therefore, to provide metering equipment with a higher ratio. Accordingly on 17th April 1961 the old current transformers with the ratio of 40 : 5 were replaced by those having a ratio of 80 : 5. It is the case of the respondents that as a result of the said replacement, it became necessary to multiply the reading recorded on the dial of the existing meter by 2 (two) with a view to arrive at the correct number of units of energy consumed by the appellants. According to the respondents, further, it was about that time that the reading activities of the B.E.S.T. Undertaking were transferred to their northern zonal office and due to some mistake the concerned officer of the northern zonal office was not informed of the changes effected. It is the case of the respondent that because of this mistake the electric energy consumed at the appellants' factory continued to be charged on the basis of the actual reading recorded on the dial of the existing meter without the reading being multiplied by 2 (two) as had become necessary. According to the respondents, the said mistake was detected by the staff of the B.E.S.T. Undertaking only in Jan. 1972 and after checking the records it was found that the appellants had been undercharged from 17th April 1961. As the multiplier that was required to be applied, according to the respondents, was 2, it would follow that that the undercharging was to the extent of one-half. By a letter dated 4th May 1972 the Superintendent, Consumers (North) of the B.E.S.T. Undertaking apprised the appellants of this position and requested them to make payment of the amount mentioned in the letter. A statement of amounts claimed by the B.E.S.T. Undertaking was annexed to the said letter and the statement indicated that the amount claimed represented charges for electric supply made and not billed for as also the electricity duty payable thereon. This was followed by a subsequent letter dated 24th May 1972 sent by the Undertaking by way of a reminder, in which for the first time disconnection of supply for non-payment was hinted at. On 31st May 1972 the appellants recorded their surprise at the claim made in the Undertaking' s letters dated 4th and 24th May 1972. It was claimed in this letter that the appellants were not aware of the replacement of the meter. The appellants further contended that the threat to discontinue supply was uncalled for. The appellants sought time and facility to check the calculations made by the B.E.S.T. Undertaking and to confirm the amounts claimed. It was also pointed out that the appellants had based their costing on the electricity bills sent by the B.E.S.T. Undertaking which had been duly paid and they would not be entitled to recover the supplementary fabrication charges from their customers, which would entail great loss. The B.E.S.T. Undertaking sent a detailed reply by their letter dated 13th July 1972 in which the facts set out earlier in this judgment were briefly and chronologically indicated. This was followed by a reminder dated 25th Aug. 1972. By their letter dated 4th Sept. 1972 the appellants mentioned that they were unable to check up their earlier records in view of the unsettled labor conditions at their factory and promised to check up the past records as soon as possible and write to the Undertaking further thereafter. Ultimately on 31st Oct. 1972 the

B.E.S.T. Undertaking sent to the appellants the notice which had been impugned in the petition pointing out that the amount claimed viz. Rs. 3,30,853-68 had not been received and calling upon the appellants to pay the same within seven days, failing which it was stated that the Undertaking would be constrained to disconnect the appellants' electricity supply for non-payment of the dues. By the said letter it was further mentioned that in case the appellants raised any dispute, the amount could be deposited either with the B.E.S.T. Undertaking or with the Electrical Inspector to the Government of Maharashtra. By their letter dated 3rd Nov. 1972 the appellants characterized the claim of the B.E.S.T. Undertaking as false. They repeated the earlier contentions raised by them in their letter of 31st May 1972 and described the Undertaking' s letter dated 13th July 1972 as alleging various irrelevant facts. As regards the amount claimed for the period 1961 to 1972 it was contended that the claim would be barred by the law of limitation. It was further mentioned that the appellants were disputing the claim of the Undertaking *bona fide* and therefore the electricity supply of the appellants could not be disconnected under the provisions of Section 24 of the Indian Electricity Act, 1910 (hereinafter referred to as " the Electricity Act" for the sake of brevity). As regards the demand for making a deposit in case there was a dispute, the appellants contended that they had no objection to refer the dispute to the Electrical Inspector under Section 26 of the Electricity Act, but urged further that the Undertaking had no power to call upon the appellants to deposit the sum claimed either with the Undertaking or with the Electrical Inspector. By another letter of the said date addressed by the appellants to the Electrical Inspector, Government of Maharashtra, enclosing a copy of their letter to the B.E.S.T. Undertaking, the appellants demanded that the dispute and the contentions raised by the appellants should be adjudicated by him. In the said letter the dispute referred to was one in respect of the meter reading for the said period viz. 17th April 1961 to 31st Dec. 1971. The contention of the appellants that the whole of the claim was barred by the law of limitation was also brought to the attention of the Electrical Inspector. This correspondence was followed by the petition filed on 13th Nov. 1972, in which it was inter alia, repeated (para 11 (d)) that the whole claim of the Undertaking was barred by the law of limitation.

3. Before the learned trial Judge at the time of hearing of the application for interim relief, a consent order was made on 19th Feb. 1973 by which the Electrical Inspector to the Government of Maharashtra was appointed as a Referee to inspect the electric meter installed by the B.E.S.T. Undertaking bearing No. 546017 and the C.T. and the P.T. connected thereto in the premises of the appellants, and he was required to report whether the type of the equipment was such that the units recorded by the meter had to be multiplied by 2 (two) in order to arrive at the actual consumption of electrical energy. On 28th Feb. 1973 the report of the said Inspector was received and in the report it was, *inter alia* reported that it had been established that the meter under (sic) was geared for half the ratio for direct reading and that the metering equipment with Meter No. 546017 with C. T. ratio 80 : 5 and the existing power transformer ratio of 6600 : 110 - connected therewith was such that the units recorded by the meter had to be multiplied by 2 (two) in order to arrive at actual consumption of the electrical energy. In other words, to paraphrase the substance of the report, the claim of the Undertaking that the actual meter reading had to be

multiplied by 2 (two) in order to arrive at the actual consumption of electric energy by the consumer was upheld in to.

4. Two principal contentions were taken before the learned trial Judge. The first of them was that a large portion of the claim of the Undertaking was time-barred except that for the period of three years immediately preceding the demand. In fact the appellants offered to pay whatever amount would fall within this period of three years and therefore not time-barred. It was contended that under Section 24 of the Electricity Act the Undertaking was not entitled to disconnect the appellants' supply for non-payment of that part of the claim which was barred by the law of limitation. The further contention of the appellants was that as there was a *bona fide* dispute with regard to the date from which the new metering equipment was installed the B.E.S.T. Undertaking could not disconnect the supply under the provisions contained in Section 24 (1) of the Electricity Act.
5. The learned trial Judge dealt with the latter contention first and observed that on reading the correspondence and the affidavits he was completely satisfied that there was no *bona fide* dispute existing between the parties as regards the date from which the new metering equipment was installed. We are in total agreement with this view and it may be fairly stated that counsel for the appellants did not press any such contention before us.

6. What was strenuously pressed was the first contention earlier mentioned, viz. that action under Section 24 of the Electricity Act was not warranted and detailed arguments were advanced on various aspects and facets of this submission.

7. In order to appreciate these several submissions reference may be made to some of the provisions of the Electricity Act which are relevant for our purposes. Section 22 refers to the obligation on a licensee to supply energy to every person within the area of supply who makes an application for such supply. Sections 22A and 22B confer power on the State Government to give directions to a licensee in regard to supply of energy to certain class of consumers, and the latter section confers power to control the distribution and consumption of energy. Section 23 prohibits the licensee from showing undue preference to any person in making any agreement for the supply of energy. We then come to Section 24 which is extremely material for our purposes and may therefore be fully set out; it reads as follows:-

> " 24. Discontinuance of supply to consumer neglecting to pay charge-
> (1) Where any person neglects to pay any charge for energy or any sum, other than a charge for energy, due from him to a licensee in respect of the supply of energy to him, the licensee may, after giving not less than seven clear days' notice in writing to such person and without prejudice to his right to recover such charge or other sum by suit, cut off the supply and for that purpose cut or disconnect any electric supply-line or other works, being the property of the licensee, through which energy may be supplied, and may discontinue the supply, until such charge or other sum, together with any expenses

incurred by him in cutting off and re-connecting the supply, are paid, but no longer.

(2) Where any difference or dispute which by or under this Act is required to be determined by an Electrical Inspector, has been referred to the Inspector before notice as aforesaid has been given by the licensee, the licensee shall not exercise the powers conferred by this section until the Inspector has given his decision :

Provided that the prohibition contained in this sub-section shall not apply in any case in which the licensee has made a request in writing to the consumer for a deposit with the Electrical Inspector of the amount of the licensee' s charges or other sums in dispute or for the deposit of the licensee' s further charges for energy as they accrue, and the consumer has failed to comply with such request."

Section 26 provides for meters. Some reliance was placed by counsel for the appellants on the provisions contained in sub section (6) of Section 26 and, therefore, sub-sections (1) and (6) of the said section (which alone were referred to) may be fully set out:

" 26- Meters- (1) In the absence of an agreement to the contrary, the amount of energy supplied to a consumer or the electrical quantity contained in the supply, shall be ascertained by means of a correct meter, and the licensee shall, if required by the consumer, cause the consumer to be supplied with such a meter:

Provided that the licensee may require the consumer to give him security for the price of a meter and enter into an agreement for the hire thereof, unless the consumer elects to purchase a meter.

... .

... .

(6) Where any difference or dispute arises as to whether any meter referred to in sub section (1) is or is not correct, the matter shall be decided, upon the application of either party, by an Electrical Inspector; and where the meter has, in the opinion of such Inspector ceased to be correct, such Inspector shall estimate the amount of the energy supplied to the consumer or the electrical quantity contained in the supply, during such time, not exceeding six months, as the meter shall not, in the opinion of such Inspector, have been correct, but save as aforesaid, the register of the meter shall, in the absence of fraud, be conclusive proof of such amount or quantity:

Provided that before either a licensee or a consumer applies to the Electrical Inspector under this sub-section, he shall give to the other party not less than seven days' notice of his intention so to do.

....

8. It was urged on behalf of the appellants that Section 24 of the Electricity Act provided an alternative drastic and penal remedy or method which may be followed by a licensee in preference to or by way of an alternative to filing a suit. It was submitted that such a provision

should be strictly construed and the construction which was submitted for our acceptance was that by such coercive method or power of withholding electric supply, the licensee ought not to be allowed to recover old or stale claims going back over a period of ten years when it was obvious that such claims could not have been recovered by the licensee fully by means of an ordinary civil suit. For the purposes of this argument concentration was lavished on the phrases " neglects to pay" and " charge or sum due from him" , and it was submitted that an amount, the recovery of which was barred by the law of limitation, could not be properly regarded as ' due' by the consumer i.e. the appellants to the licensee i.e. the B.E.S.T. Undertaking. It was further submitted that if the appellants *bona fide* disputed their liability, then there was no neglect on their part to pay the amount even if ultimately in the view of the Court the ground or the basis of that refusal to pay was found or held to be erroneous or incorrect.

9. In connection with the first head of this argument our attention was drawn to several decisions given by Courts applying Sections 433 and 434 of the Companies Act where the word ' due' was required to be considered in connection with a claim between the creditor of a company and the company. It was submitted that it was well-settled that a company could not be regarded as unable to pay its debts and therefore required to be wound up when the amount claimed by the creditor was in respect of or pertained to a time-barred claim. A number of authorities were cited in connection with this branch of the argument resting with *M/s. Madhusudan Gordhandas and Co. v. Madhu Woolllen Industries Pvt. Ltd*[1]*.,* in which there is reference to an earlier Supreme Court decision in *Amalgamated*

[1] AIR 1971 SC 2600

Commercial Traders (P) Ltd. v. A. C. K. Krishnaswami[2]*,*

9A. It was contended on behalf of the respondents that the discussion in these authorities, which was on the question of winding up of a company on the ground of non-payment of the debt due, which restricted the debts due to those which would fall within the period of limitation only, was entirely inappropriate to the statutory provisions under consideration, and we find considerable substance in this approach. For consideration of the financial solvency of an individual as also of a company, attention must be concentrated only on such claims of the creditors as would fall within the period of limitation, and other claims falling outside such period must be excluded from consideration for obvious reasons. Similar consideration would not necessarily apply to the statutory provisions with which we are concerned viz. sub section (1) of Section 24 of the Electricity Act. It appears to us that what is provided is not a method of recovery of any amount by the licensee but a provision whereby the licensee would be relieved of his obligation under Section 22 to supply electricity to a consumer who has not paid to the licensee the amount owed by that consumer to the licensee.

10. The learned trial Judge referred in connection with this branch of the argument to a decision of our High Court in Ramrao Raoji Palkar v Amir Kasam Bhagwan, (1956) 58 Bom LR 284, where a Division Bench of this Court had occasion to consider the provisions contained in

Section 12 (3) (b) of the Bombay Rent Act. The words which were being considered by the Division Bench were ' rent then due' occurring in Section 12 (3) (b) of the Bombay Rents, Hotel and Lodging Bouse Rates Control Act, 1947. In the judgment Chainani J. (as he then was) who spoke for the Division Bench considered several meanings of the word ' due' to be found in Webster' s and Murray' s Dictionary, in Wharton' s Law Lexicon and Stroud' s Judicial Dictionary as also in other decisions and observed as follows :

> " The word ' due' is, therefore, used in two different senses. In some statutes it has been held to mean all moneys owed or payable, even though their recovery may be barred by the law of limitation. In other statutes, a more restricted meaning has been given to this word and that is, moneys legally recoverable or those which can be recovered by action."

The question which was then considered by the Division Bench was : which of these two meanings should be given to the word ' due' in Section 12 (3) (b)? It considered and construed the provision to refer to all rent in arrears or outstanding, including rent which cannot be recovered through the process of the Court owing to the bar imposed by the Limitation Act. Thus, the wider meaning, the dictionary meaning was applied in preference to the narrower meaning which had been found appropriate whilst applying some of the sections of the Companies Act e.g. Section 186 of the Indian Companies Act, 1913 (S. 469 of the Companies Act, 1956).

11. In a very recent decision of the Supreme Court viz. in *Khadi Gram Udyog Trust v. Shri Ram Chandraji Virajman Mandir*[3], the view of the above Division Bench appears to have been approved though the Supreme Court was

[2](1965) 35 Com Cas 456

[3] AIR 1978 SC 287

concerned not with the Bombay Rent Act but with a similar enactment viz. U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972). Relevant observations are to be found in para. 4 of the report.

12. It was submitted by counsel for the appellants that the meaning given to the word ' due' in these provisions under the Rent Act was on account of special considerations which he indicated and it was submitted that there were no such special considerations inherent in the provisions under the Electricity Act which would warrant the wider meaning being adopted in preference to the narrower meaning. His argument was based upon the general provision in the T. P. Act by reason of which a landlord would be permitted to forfeit a lease on the ground of non-payment of rent (and presumably all leases would contain an express condition for this purpose). It was submitted that where a landlord took action by way of forfeiture of the lease on such ground and moved the Court to secure possession of the demised premises, Section 114 of the T.P. Act conferred discretion on the Court to grant relief against forfeiture to the lessee if the lessee paid or tendered to the lessor the rent in arrears together with interest thereon and the full costs of the suit at the time of hearing of the suit. It was submitted that the scheme of these provisions under

the Rent Act should be considered to be similar to this power of granting relief against forfeiture. It was further submitted that where such relief was required to be granted, the provision had to be construed in the manner in which it had been done, giving or adopting the wider meaning for the word ' due' as to be inclusive of all amounts due to the landlord including the amounts which were barred by the law of limitation inasmuch as it was a discretion to be exercised in favor of the tenant. It was submitted that there was no warrant for adopting any such construction for Section 24 of the Electricity Act. It would appear to us that Section 24 has to be properly appreciated in the context of the obligations cast and the restriction placed on the licensee under the provisions of the Electricity Act, which we have earlier referred to. Within the supply area the licensee is obliged to supply electricity on an application to any consumer and cannot discriminate between one consumer and another. The licensee is also obliged to follow certain directions given by the State Government as also made subject to the power of the State Government to control the distribution and consumption of energy within the area of the licence. Section 24 regulates the licensee' s power to disconnect the supply to a consumer within this area of supply who has defaulted in respect of payment of amounts owing to the licensee and a further restriction is imposed on the licensee, which is that he can discontinue the supply only until such time as the charges or the sums due are not paid by the consumer together with reimbursement of the additional expenses incurred by the licensee for cutting off and reconnecting the supply. Immediately the charge or the sums due and these additional expenses are paid, the supply has to be restored to the consumer whatever be the nature of the default, the number of defaults or the period and extent of the default. We see no warrant in the light of these statutory provisions to read the word ' due' in the Electricity Act in the narrower sense viz. as only restricted to amounts within the period of limitation or which could be successfully claimed by a suit. In other words there is no logical basis shown for preferring the narrower construction to the ordinary construction, the wider one which is in accordance with the dictionary meaning as set out in Ramrao Palkar' s case ((1956) 58 Bom LR 284).

13. It was submitted that the interpretation canvassed for by counsel for the appellants was more valid by reference to the language employed in sub section (1) of Section 24, which preserved the licensee' s right to file a suit to recover the charges or sums due. It was argued that if in such suit the licensee can only recover the charges or sums within the period of limitation, these could be the only charges or sums (viz. those within the period of limitation) for the non-payment of which the electric supply could be cut off by the licensee. In our opinion, the argument is not well-founded. It has to be provided that the right to discontinue the supply of electricity is without prejudice to the licensee' s right to file a suit to recover the amounts, since by reason of disconnection of the supply the licensee will not necessarily obtain the amounts due from the consumer. It became necessary therefore to protect the licensee' s right to recover such amounts by ordinary civil action and merely because in such an action the defendant to the suit i.e. the consumer may have the defense of limitation open to any portion of the claim would not warrant such considerations being applied to the licensee' s right of discontinuance of supply for non-payment of the amounts owed to the licensee. The provision contained in Section 24 (1) which

enables the licensee to discontinue electric supply to a particular consumer is mainly by way of relieving of the licensee of the obligation on him to be found contained in Section 22 viz. to make supply of electricity on application to all consumers within the area of supply. Once the proper position is perceived, then there is no warrant for obliging the licensee to go on supplying electricity to a consumer who has not paid the amounts in respect of the supplies made to him in the past on the ground that if the licensee were to file a suit, the claim or part thereof would be barred by the law of limitation. The provision in our opinion, would clearly warrant the wider meaning to be given to the word ' due' rather than the narrower meaning, as the wider meaning would be more in accord with the scheme of the statutory provisions under consideration as also with commercial honesty.

14. In this connection our attention was drawn repeatedly by counsel for the appellants to the policy underlying the Limitation Acts and it was submitted that it could not be regarded that such contentions or defenses were merely technical or could be regarded as dishonest or improper. The policy of the Limitation Acts has been indicated in para. 330 of Halsbury' s Laws of England, Third Edition, Vol. 24. It is unnecessary to lavish any time on this contention inasmuch as we have not adopted the wider meaning or rejected the narrower meaning of the word ' due' on the basis of any consideration that the defense by way of the bar of limitation ought to be regarded as dishonest or improper. Reading the statutory provisions together and in their correct perspective there is no warrant for considering the charge due as restricted to charge falling within the period of limitation and excluding the charge owing for any earlier period.

15. Before dealing with the second submission we may dispose of the argument based on the provisions contained in Section 26 which might seem to have a bearing both on the words ' due' and ' neglects to pay' . It was submitted that the provisions contained in Section 26 make it abundantly clear that a claim can be made by the licensee or by the consumer only in respect of the dues for the six months prior to the date of the claim and not for any period prior thereto. This appears to us to be based on a misreading of the provisions contained in Section 26. If either the licensee or the consumer disputes the correctness of the meter, then it is true that Section 26 enables the dispute to be resolved by the Electrical Inspector but such right of correction is rectricted to a period of six months. But that can have no bearing on the claim made by the licensee in the matter before us. Very briefly stated, the learned trial Judge rejected the argument on the simple basis that additional amounts for the eleven-year period were claimed not on the basis of a faulty meter but on the basis of failure to multiply the reading by 2 (two), which was an entirely different thing. That there was such a mistake was contended by the licensee and the Electrical Inspector (on a reference by the Court) held that the reading of the meter was required to be doubled in order to show the real consumption. Under Section 26 of the Electricity Act the restriction as to six months period does not seem to apply to such a claim made by the licensee.

16. This brings as to a consideration of the other branch of the argument, which was that there was no neglect on the part of the consumer i. e. the appellants to pay the charge claimed by the

licensee i.e., the Undertaking and, therefore, action under Section 24 of the Electricity Act was not warranted. In connection with this branch of the argument our attention was drawn to several authorities, to which reference may now be made.

17. Counsel for the appellants drew our attention to several authorities both of the other High Courts and of the Bombay High Court and we shall first discuss three decisions of the Bombay High Court, one of which is unreported. The first of these decisions is Corporation of the *City of Nagpur v. Nagpur Electric Light and Power Co. Ltd*[4]*.,* In the said decision a dispute had arisen between the licensee company and the Nagpur Corporation concerning the supply of electricity by the company to the Municipality, which was, according to the municipality by reason of the large difference between the consumption set out in the bills for public lighting submitted by the company and the consumption which was actually recorded in the meters. Mudholkar J. speaking for the Division Bench considered the provisions of Section 24 (1) of the Electricity Act along with Clause XII of the Schedule and observed that where, as in the case before the Bench, charges are claimed from a local authority and there was a dispute between the local authority and the electrical undertaking as to such amounts or charges, the matter was first required to be determined by an arbitrator under Clause XII. It was further observed that it is only after the arbitrator gave his award and determined what the charges due were that it would be open to the electrical undertaking to avail itself of the provisions of Section 24 of the Electricity Act. It is in this connection that the Court had occasion to consider the words ' neglects to pay' . It was contended by the advocate for the Municipality relying upon the observations of Jessel M. R. in Re London and Paris Banking Corporation, (1875) 19 Eq 444, that negligence in law means " omitting to pay without reasonable excuse, Mere omission by itself does not amount to negligence" . This appears to have been approved. It was held further by the Division Bench that if there is a *bona fide* dispute between the licensee and the consumer as to what was payable, action under Section 24 (1) could not be taken or threatened by the licensee. Our attention was drawn to observations to be found in para. 34 of the report, where it is indicated that the powers under Section 24 (1) must be regarded as very drastic and, therefore, strict compliance with the provisions of the sub-section was required.

18. The second Bombay decision, also reported, was *Maharashtra State Electricity Board v. Madhusudandas and Brothers*[5]*,* The consumer in that case had entered into an agreement for supply and the licensee had agreed to supply electrical energy for a period

[4] AIR 1958 Bom 498

[5] AIR 1966 Bom 160

of five years. Clause 20 of the agreement, however, provided that the rates were flexible in the sense that they were payable according to the tariffs fixed by the Board from time to time. The licensee purported to revise the charges and claimed higher amounts from the consumer. According to the consumer, refixing at a higher rate than the one indicated in the agreement between the parties was *ultra vires* and the claim for higher amounts was therefore resisted. On behalf of the consumer reliance was placed on Clause 30 of the agreement between the parties. According to the Division Bench, Clause 30 was nothing but a corollary to the liability created

between the parties under Clause 20. It was contended on behalf of the consumer that even if the consumer' s interpretation of the agreement was incorrect and his contention as to the invalidity of the claim made by the licensee appeared to the Court as unsound, there was in fact a *bona fide* dispute between the parties when the consumer failed to pay for the supply of energy and if there was such *bona fide* dispute, the cutting off of the supply was unjustified. The Nagpur Corporation' s case was considered and the view, that action under Section 24 would not be justified when there is a *bona fide* dispute between the parties i.e. the consumer and the licensee, appears to have found favor with the latter Division Bench also.

19. Our attention was also drawn by counsel for the appellants to an unreported decision of a single Judge of this Court (K. K. Desai J.) given in Misc. Petn. No. 167 of 1967 (decided on 21-6-1972) (Bom), where the licensee had called upon the consumer to pay the amount of Rs. 17,552.17 after a lapse of more than five years, and it was held by the learned single Judge that it was difficult to accept the licensee' s submission that the consumer had neglected to make payment of the amount claimed or that the dispute raised in regard to the balance of the amount claimed by the impugned notice was not bona fide. In the opinion of the Court, there was a genuine dispute raised on behalf of the consumer and, therefore, the consumer could not be regarded as guilty of negligence under Section 24 (1) of the Electricity Act. In the view of the Court, therefore, the licensee i.e. the B.E.S.T. Undertaking was not entitled to discontinue the supply of electricity to the consumer as threatended in the notice impugned in the said Petition. In all these authorities ' negligence' has been regarded as something more than a mere failure or omission to pay; and relief has been granted to the consumer where, in the opinion of the Court, the omission to pay was a result of the consumer raising a *bona fide* dispute with the licensee as to his liability to pay the amount demanded from him.

20. It was submitted by counsel for the appellants before us that the appellants had disputed their liability to pay and even if, in the opinion of the Court, the basis of the dispute may be regarded as erroneous, it could not be said that there was no *bona fide* dispute; and if that was so, the appellants could not be said to have neglected to pay the amount claimed. Before considering the correctness or the ramifications of such contentions further, brief reference may be made to decisions of other High Courts in India to which our attention was drawn at the Bar. These were principally cited to show that if the 1st respondents had attempted to recover the amount in a regular suit, a large portion of the claim i.e. the claim for the period excluding the three years period prior to the filing of such suit would have been time barred. It was urged that the mere mistake of the licensee' s employee could not extend the period of limitation in any way and the starting point of limitation for the purposes of the suit would run from date of the supply and not from the date when the licensee became aware of the mistake. In connection with this aspect our attention was drawn to *Nainital Hotel Co. Ltd. v. Municipal Board, Nainital*[6], and to *Firm Attar Singh Sant Singh v. Municipal Committee, Amritsar*[7], It was submitted that what could not be recovered by a suit was being sought to be recovered from the consumer by the threat of disconnection. It was urged that if the consumer resisted the demand on the footing that the claim

or a large part thereof was barred by the law of limitation (apart from raising other disputes), the consumer must be regarded as disputing the claim *bona fide* and therefore cannot be held to have neglected to pay the charges demanded. It was submitted that in these circumstances the licensee was not entitled to threaten to discontinue the electric supply.

21. It is true that in the two reported Bombay judgments the power of the licensee under Section 24 has been referred to or described as a drastic power and the Court has required strict compliance with the provisions of sub section (1) in order to uphold the threat given by the licensee. Although the consequence of non-supply of electricity to the consumer may be serious, particularly for a consumer such as the appellants it must be borne in mind that this cannot be regarded in the same manner as or equated with penal or taxing provisions of a statute which, it is well-settled, are required to be strictly construed. As already indicated, in a way the provision relieves the licensee from its obligation imposed by Section 22 of the Electricity Act which compete and obliges it to supply all consumers within the area of supply on necessary application being made. It is relieved of this obligation if the consumer has not paid to it the charges for the electricity supplied. If a claim is made for such charges and if it is found that the reasons offered by the consumer are not genuine but may be regarded as indicative of a mere desire not to pay, the dispute raised by the consumer ought not to be regarded as *bona fide* and the failure to pay in that particular case must be held as equivalent to ' neglect to pay' . Mr. Singhvi rightly contended that the Court in each case will have to scrutinise the attitude of the consumer and consider the reasons given by him to the licensee for not meeting with the demand made by the licensee. As indicated in the earlier part of this judgment, the Undertaking by their letters dated 4th May 1972 and 13th July 1972 gave full explanation in respect of the amounts claimed from the appellants for the period 17th April 1961 to 31st Jan., 1972. By their letter dated 31st May 1972 the appellants characterized the demand as illegal and unjustified and sought time to check up and verify the claim. After receipt of the letter dated 13th July 1972, which gave all the necessary details, the appellants did not seek any explanation or clarification but only sought time on account of lab our trouble at their factory, and even after the impugned notice was given, the appellants by their letter of 3rd Nov., 1972 characterized the Undertaking' s letter of 13th July 1972 as containing various irrelevant facts. In their letters the appellants have gone on denying that any meter was changed on 17th April 1961, a fact which was not alleged in these terms by the Undertaking. The reason for the denial is obvious and that was to bring the dispute within the four corners of Section 26 of the Electricity Act. Again, in their letters as well as in the petition the appellants contended that the whole of the claim was barred by the law of limitation. In our opinion, the bar of limitation pleaded had no real relevance but the point is being emphasized to indicate the attitude of the consumer when the consumer ought to have been aware that a part of the claim of which a full statement was explained was patently and obviously within time. What then must be the reason why the entire claim was characterized as barred by the law of limitation? The reason must be to allege sub-

[6] AIR 1946 All 502

[7] AIR 1938 Lah 338

sequently that there is a dispute and to contend that since there was a *bona fide* dispute

the electric supply could not be disconnected. We have a somewhat curious situation here. Detailed explanations are sent by the Undertaking explaining the basis of its claim; in reply the letter containing the explanation is characterized by the consumer as containing irrelevant allegations. It is obvious that the whole claim cannot be time barred and a part of the same at any rate must be within time; the consumer describes the whole claim as time-barred. When to this is added the entirely frivolous discussion regarding the replacement of the meter, which is not what was claimed by the Undertaking but something totally different which was fully explained by the letter of 13th July 1972, we are forced to conclude that the dispute raised on behalf of the consumer was neither proper nor bona fide. It is true that if a change in the rate of tariffs is opposed or if it is claimed that the higher claim on some footing contrary to the meter reading is controverted, the consumer cannot be said to have ' neglected' to pay the amount claimed although in the Â opinion of the Court its contentions could not be upheld or were ultimately found to be untenable. The initial contentions raised by the appellants before us would, in our opinion, not qualify to be considered as raising a *bona fide* dispute. If the consumer raises a *bona fide* dispute, he cannot be said to have ' neglected' to pay the amount claimed by the licensee. If the consumer merely disputes the amount or the claim but the dispute cannot be regarded as *bona fide* then, the omission on the part of the consumer to pay the amount, the failure to pay the amount, must be regarded as ' neglect' to pay the amount, which neglect will entitle the Undertaking to take recourse to disconnection as provided by Section 24 of the Electricity Act. The analogy of the provisions under the Companies Act and the claim of the creditors of the company vis-a-vis the company sought to be wound up or consideration of provisions such as those contained in Section 186 of the Indian Companies Act, 1913, or in Section 469 of the Companies Act, 1956, are totally inappropriate in order to realize the true implication of the provisions contained in Section 24 of the Electricity Act.

22. Bearing in mind all the circumstances earlier indicated, it is not possible to accept the submission that the Undertaking had sought to exercise its powers under Section 24 wrongly, improperly, unreasonably or not bona fide. On other hand, the dispute raised in the correspondence by the appellants cannot be characterized as *bona fide* and can indeed, if properly considered, be regarded as frivolous and vexatious. It is in this sense that we must consider the two authorities of the Bombay High Court on which great reliance was placed by counsel for the appellants. The nature of the dispute raised in those cases was entirely different from the type of dispute raised in the matter before us; we have held that the contention that a part of the claim is time-barred was not open and could not be the subject-matter of a *bona fide* dispute. This is even apart from the fact that it was not the case of the appellants that a portion of the claim was time-barred but rather that the entire claim was time-barred.

23. We are, therefore, of opinion that both the conditions required for the licensee to take action under Section 24 (1) of the Electricity Act are satisfied; these are: that there was a debt due from the appellants to the licensee and that the appellants had neglected to pay the amount which was owing. If that is so, the impugned notice dated 31st Oct., 1972 cannot be characterized as

contrary to law. It would follow that the same is not required to be quashed as alleged or for any other reason.

24. Even as regards the objection to the claim for deposit made by the licensee, it would seem that the attitude of the licensee was in accord substantially with the statutory provision to be found in the Proviso to Section 24 of the Electricity Act. This may be a minor indicator of the attitude of the consumer. However, our opinion of the nature of the dispute raised by the appellants in the correspondence is not based only upon the refusal to make any deposit but on various other factors indicated earlier in this judgment. We have already dealt with the contention raised on behalf of the appellants on the provisions contained in Section 26 (6) of the Electricity Act, which we have held to be totally inapplicable to the claim of the licensee.

25. In the appeal counsel for the appellants had submitted that the learned trial Judge was in error in not permitting two amendments to the petition sought for by draft amendments dated 8th March 1973 and 12th March 1973 respectively. It is found that the petition was ordered to be placed peremptorily on board subject to overnight part-heard on 7th March 1973 and it reached hearing and was argued on 8th March 1973, when after opening and citing authorities counsel for the appellants (petitioners before the trial Court) tendered the draft amendments to the petition. It was observed by the learned trial Judge that the contentions sought to be raised in the said amendments were based upon the alleged violation of constitutional provisions viz. right of citizen under Article 19 (1) (f) and (g). By the said amendment the petitioners also alleged discrimination and violation, therefore, of Article 14 of the Constitution. Under the said amendments the petitioners also sought to raise the contention that the provisions of Section 24 (1) of the Electricity Act constitute an unjustified barrier on the freedom of trade and commerce and were violative of Articles 301 to 305 of the Constitution of India. It was obvious that these were sought for at a belated stage and would require, if granted, the respondents to put in supplemental affidavit, and under the provisions of Order 27A of the Civil P. C. notice would be required to be issued to the Attorney General of India. This would result in further postponement of the hearing. These were the grounds indicated by the learned trial Judge in rejecting the amendments. It would be very clear that amendments were sought for as a device after obtaining stay to prolong the hearing and to continue with the happy position in which the appellants had found themselves by reason of what we have held to be an unjustified dispute of a proper claim made on behalf of the Undertaking. It is true that in an appropriate case amendment can be permitted even at a belated stage; but that would be a discretion to be properly exercised depending upon the nature of the claim for justice before the Court, the conduct of the parties and the substance in the amendment sought for. On all the three grounds the amendments appear to us to be ones which deserved to be rejected as was done by, the learned trial Judge.

26. It may be further mentioned that two amendments were sought to be raised on 8th March 1973 and in the second amendment by the addition of para (e-ii) new allegations pertaining to the purported practice of the 1st respondents were sought to be made. The practice pertained to claim for non-residenttial tariffs, and the letter, Exhibit D-1, which was part of the amendment sought,

would seem to indicate that this was a matter totally extraneous to and different from the type of claim before us. Apart from other considerations, the amendment sought for by adding para (e-ii) and Exhibit D-1, which would also have required an affidavit in reply, would appear to be totally useless and irrelevant, and on this ground also the said amendment could have been disallowed.
27. The second amendment was sought for on 12th March 1973 i.e. after a full day' s hearing of the petition. The further amendment sought also seeks to raise the contention that the provisions of the Electricity Act are violative of Article 14 of the Constitution inasmuch as there are two remedies provided to the licensee, two choices, without any principles for the guidance of the licensee. Apart from the various objections already noted, it would appear that there is a confusion inasmuch as the threat to disconnect supply appears to be totally different from a proceeding to recover the dues. In order to realise or recover the dues a suit would have to be filed, whereas what Section 24 provides, in our opinion, is an occasion for the licensee to be relieved of the obligation cast on them by reason of Section 22 of the Electricity Act occasioned by the default of the consumer. Once the true position is realized, there is no question of any choice or alternative proceeding open to the licensee. If there are arrears the licensee is relieved of the obligation; they may then discontinue the supply of energy and will thereafter have to adopt legal proceedings to recover their amounts or charges. Both the proceedings are complementary and not alternative. Accordingly we are of opinion that the learned trial Judge was right in refusing this amendment also.

28. In the result, we are of opinion that the learned single Judge was entirely right in the view that he took of the provisions of the Electricity Act which arise for consideration before us and in dismissing the petition with costs. Accordingly the appeal also will stand dismissed with costs, which are quantified at Rupees 500/- (Five Hundred).

29. On 26th March 1973 after the appeal was filed stay was granted on the appellants furnishing a bank guarantee in favour of the Prothonotary and Senior Master. This order was modified on 3rd April 1973, by which the bank guarantee was reduced to Rs. 3,05,000/- and the balance amount of Rs. 61,336.18 was directed to be deposited in cash. Finally, by a further order dated 10th May 1973 the appellants were permitted to deposit Rupees 2,86,000/- in cash instead of furnishing a bank guarantee for Rs. 3,05,000/-. We are informed that the amount of Rs. 61,336.18 and the amount of Rupees 2,86,000 have been duly deposited, of which the former amount has been withdrawn. In our opinion, the amount of Rs. 2,86,000 together with the accrued interest should be directed to be paid over to the 1st respondents to meet their claim against the arrears due by the appellants. There will be an order accordingly.

30. The amount of Rs. 500 being the security for costs deposited by the appellants also is ordered to be paid over to the respondents' advocate.

31. The Prothonotary will make this payment on the minutes on the usual undertaking given by the advocate for the respondents.

32. Mr. Parekh applies orally for leave to appeal to the Supreme Court and submits that the following two questions may be regarded as important questions arising from this judgment of public importance which would require settlement by the Supreme Court.
1. Whether on a true construction of Section 24 of the Indian Electricity Act, 1910, the words ' neglects to pay' would include omission to pay or refusal to pay a time-barred claim?

2. Whether on a true and proper construction of Section 24 of the Indian Electricity Act, 1910, the word ' due' includes time-barred debts or excludes time-barred debts?
Mr. Singhvi opposes.

PER COURT:

33. Leave to appeal to the Supreme Court granted as, in our opinion, the two questions submitted by counsel for the appellants would seem to raise substantial questions of law of general importance which in our opinion are required to be decided by the Supreme Court in view of the nature of the statutory provisions under consideration. Accordingly we grant leave to appeal to the Supreme Court as orally applied for.
Order accordingly.