

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 20th October, 2010.

+ **W.P.(C) No.6058/2002 & CM No.11771/2004 (u/O 1 R-10 CPC)**
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M/S KUNDAN INFRASTRUCTURES PETITIONER

Through: Mr. Siddharth Khattar & Mr. Faisal
Zafar, Advocates.

Versus

NDMC & ANR RESPONDENTS

Through: Mr. H.L. Tiku, Sr. Adv. with Mr.
Arjun Pant, Adv. for NDMC.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may
be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported
in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. The petitioner filed this writ petition impugning the condition imposed by respondent NDMC on the petitioner of the dues of the electricity connection earlier provided in Flat No.4 (Second Floor), Building No.3, Scindia House, Connaught Place, New Delhi purchased by the petitioner for granting electricity connection in the name of the petitioner in the said flat.

2. This Court vide interim order dated 23rd September, 2002, while issuing notice of the writ petition and relying upon the judgment of the Supreme Court in *Isha Marbles Vs. Bihar State Electricity Board* (1995) 2

SCC 648, directed the respondent NDMC to grant electricity connection in the name of the petitioner in the said flat subject to the petitioner depositing ₹8,00,000/- only with the NDMC instead of sums of ₹8,26,493/- and ₹3,55,935/- demanded by the respondent NDMC as dues towards the earlier electricity connections provided in the flat. The petitioner is informed to have deposited the said sum of ₹8,00,000/- and electricity connection granted to the petitioner. Rule was issued in the writ petition on 8th April, 2003. On 7th September, 2010 attention of the counsel for the petitioner was invited to the subsequent judgment of the Supreme Court in ***Paschimanchal Vidyut Vitran Nigam Ltd. Vs. DVS Steels & Alloys Private Ltd.*** (2009) 1 SCC 210 and the Full Bench judgment of this Court in ***BSES Rajdhani Power Ltd. Vs. Saurashtra Color Tones Pvt. Ltd.*** AIR 2010 Delhi 14 which have taken a different view from that taken in earlier judgment in ***Isha Marbles***.

3. The senior counsel for the respondent NDMC has today at the outset argued that before taking up the writ petition for consideration, the application of the petitioner under Order I Rule 10, CPC being CM No.11771/2004 has to be taken up for consideration. The petitioner by the said application seeks striking off of the name of M/s Kundan Infrastructures and the substitution of M/s Vanshika Buildtech Ltd. as the petitioner in the present writ petition. It is stated in the application that the writ petition was mistakenly filed in the name of M/s Kundan Infrastructures

and in the body of the writ petition, the said M/s Kundan Infrastructures was mistakenly described as a Company incorporated under the Indian Companies Act, 1956; it is stated that M/s Kundan Infrastructures was a Partnership Firm instituted by Partnership Deed dated 3rd May, 2002; that the name of the partnership was changed to M/s Vanshika Buildtech and a fresh Partnership Deed dated 17th March, 2004 was executed; that thereafter M/s Vanshika Buildtech Ltd. was got incorporated on 31st March, 2004 and all the business and assets of the partnership of M/s Vanshika Buildtech was taken over by the said Company. The respondent NDMC has not filed any reply to the said application. However the senior counsel for the respondent NDMC with reference to the copies of the Partnership Deeds annexed to the application argued that the said Partnerships Deeds have been fabricated and the petitioner is none else but the previous owner of the flat and for this reason only is liable for the electricity dues of the previous owner of the flat. The senior counsel for the respondent NDMC has also argued that if the petitioner is not able to make out a title to the flat, it would in any case be not entitled to maintain the present writ petition and the writ petition would be liable to be dismissed.

4. In the absence of any reply of the respondent NDMC to the application, it is not open to the NDMC to take up such factual pleas orally and without any basis therefor. I have enquired from the senior counsel for the respondent NDMC whether NDMC in its counter affidavit or in any

other pleading has even taken the plea of the identity of the present owner of the flat and of the earlier owner of the flat being the same. The answer is in the negative. In the absence of any pleading, such pleas cannot be permitted to be urged orally.

5. Moreover, the Sale Certificate with respect to the flat issued by the Debt Recovery Tribunal (DRT) pursuant to the auction of the said flat is in the name of M/s Kundan Infrastructures; it was the said M/s Kundan Infrastructures who had applied to the NDMC for electricity connection in the said flat and the petitioner in the writ petition has paid the sum of ₹8,00,000/- as aforesaid to the respondent NDMC and the respondent NDMC cannot convert this writ petition into a proceeding for the petitioner to establish its title to the flat.

6. The application being CM No.11771/2004 (u/O 1 R-10) is thus allowed and the name of the petitioner is permitted to be changed from M/s Kundan Infrastructures to M/s Vanshika Buildtech Ltd.

7. Coming to the merits of the matter, the case of the petitioner is that the aforesaid flat was earlier owned by M/s Surya Agro Oils Ltd.; that in a recovery proceeding filed by State Bank of Travancore against the said M/s Surya Agro Oils Ltd. before the Debt Recovery Tribunal, Delhi, a Recovery Certificate was issued against the said M/s Surya Agro Oils Ltd.; that in pursuance to the said Recovery Certificate, the said flat was auctioned and

bid therefor made by the petitioner was accepted and Certificate of Sale dated 12th August, 2002 issued in favour of the petitioner and possession of the flat delivered to the petitioner; a Conveyance Deed is also stated to have been executed in favour of the petitioner. It is the case of the petitioner that after taking possession of the flat it found that there was no electricity connection existing therein and the electricity meter had also been detached; that upon approaching the respondent NDMC it was required to submit an application for electricity connection along with documents including an affidavit in the prescribed form; that the proforma of the affidavit required to be submitted by the petitioner *inter alia* provided:-

“The said premises is installed with electricity connection against K.No. _____ NA _____. We undertake to pay the dues of electricity against the said existing electricity connection if found subsequently after the sanction of New / Additional load in this premises.”

That the petitioner accordingly submitted the affidavit in the prescribed proforma; that after the petitioner had submitted the aforesaid affidavit, the respondent NDMC demanded the sums of ₹8,26,493/- and ₹3,55,935/- from the petitioner claiming the same to be due towards electricity connection in the name of M/s Cooke and Kelvey and M/s Aditya Cables Ltd. respectively earlier provided in the said flat. The petitioner contending that in terms of judgment in *Isha Marbles* it was not liable to pay the electricity arrears of the earlier owner/occupant of the flat, filed the present writ petition as aforesaid. The petitioner also claimed the relief of

declaration that the clause aforesaid in the affidavit obtained by the respondent NDMC from the petitioner is *ultra vires* the provisions of the Indian Electricity Act, 1910, Electricity (Supply) Act, 1948 and the New Delhi Municipal Council (NDMC) Act, 1994.

8. The respondent NDMC in its counter affidavit has *inter alia* stated that it was the duty of the petitioner to before acquiring the property ascertain the electricity dues, if any therein; that the petitioner had by submitting the affidavit aforesaid expressly agreed to pay the arrears and cannot wriggle out of the said commitment; that its demand of electricity arrears from the petitioner is reasonable and in public interest and is necessary to prevent dishonest consumers transferring the properties without clearing the dues.

9. The counsel for the petitioner has today argued:

- i) that the judgments in ***Paschimanchal Vidyut*** (supra) and in ***Saurashtra Color Tones*** (supra) are in the context of the Delhi Electricity Reforms Act, 2000; however, the said Act is not applicable to the area of the New Delhi Municipal Committee. Attention in this regard is invited to Section 1(2) of the Delhi Electricity Reforms Act, 2000;
- (ii) that there is no provision in the NDMC Act, 1994 or in the

Indian Electricity Act, 1910 or in the Electricity (Supply) Act, 1948 in force at the relevant time, entitling the respondent NDMC to recover the electricity dues owed by the earlier owner/occupant of the property from the new owner thereof;

(iii) that the respondent NDMC in its counter affidavit is seeking to justify the recovery only on the basis of the clause aforesaid in the affidavit obtained from the petitioner but protest in which regard was lodged immediately upon the respondent NDMC informing the petitioner of the arrears and the petitioner can thus not be held bound by the said affidavit;

(iv) that the respondent NDMC being the sole supplier of electricity in the area, enjoys a position of monopoly and in exercise of such monopolistic practice had obtained the affidavit in the prescribed format from the petitioner and which the petitioner was bound to give and the said affidavit cannot now be used against the petitioner;

(v) Without prejudice to the aforesaid and in the alternative, it is argued that the aforesaid arrears are claimed to be for the period of 1996 to 2001; that the respondent NDMC in any case is not entitled to recover arrears beyond three years and could at best have recovered arrears for three years prior to 2002 from the petitioner and which as per the computations delivered by the respondent NDMC to the

petitioner are of not more than ₹50,000/-. It is contended that the respondent NDMC cannot recover time barred arrears from a subsequent purchaser of the property.

10. The senior counsel for the respondent NDMC has sought to justify the power of NDMC to recover such electricity arrears from the subsequent purchaser of immovable property by referring to Sections 200, 363 & 102 of the NDMC Act, 1994 which are as under:-

“Section 200-Charges for supply of electricity—Subject to the provisions of any law for the time being in force, charges shall be leviable for the supply of electricity by the Council at such rates as may, from time to time, be fixed by the Council.

Section 363-Mode of recovery of certain dues—In any case not expressly provided for in this Act or any bye-law made thereunder any sum due to the Council on account of any charge, costs, expenses, fees, rates or rent or on any other account under this Act or any such bye-law may be recoverable from any person from whom such sum is due as an arrear of tax under this Act.

Provided that no proceedings for the recovery of any sum under this section shall be commenced after the expiry of three years from the date on which such sum becomes due.

Section 102—Recovery of Tax—(1) If the person liable for the payment of the tax does not, within thirty days from the service of the notice of demand, pay the amount due, such sum together with all costs and the penalty provided for in Section 101 may be recovered under a warrant, issued in the form set forth in the Seventh Schedule, by distress and sale of the movable property or the attachment and sale of the immovable property of the defaulter:

Provided that the Chairperson shall not recover any sum the liability for which has been remitted on appeal under the provisions of this Act.

(2) Every warrant issued under this section shall be

signed by the Chairperson.”

11. It is argued that dues of electricity are a charge under Section 200; under Section 363 any sum due to the NDMC on account of charge, is recoverable “from any person” and which would include a subsequent purchaser; that under Section 102 the said charge being in the nature of a tax is recoverable as arrears of land revenue by attachment and sale of immovable property.

12. Attention is also invited to Section 2(15) of the Electricity Act, 2003 containing the definition of a “consumer” and which on enquiry is informed to be the same as definition of a consumer under the Indian Electricity Act, 1910. It is argued that under the said definition, the subsequent owner/occupant of the premises where the electricity connection is provided is also covered.

13. It is next contended by the senior counsel for the respondent NDMC that the petitioner had bound itself in the affidavit aforesaid, as a condition of supply of electricity to pay the arrears of the earlier owner/occupant and cannot now be permitted to be wriggle out.

14. The counsel for the petitioner in rejoinder has controverted that electricity charges are a tax. Attention is invited to the proviso to Section 363 laying down a limit of three years from the date when the “sums become due”, for instituting proceedings for recovery thereof to buttress the argument that dues beyond three years cannot be recovered. The counsel for the petitioner has also invited attention to the recent dicta dated 20th August,

2010 of the Supreme Court in CA No.6817/2010 titled ***Haryana State Electricity Board Vs. Hanuman Rice Mills*** laying down that electricity arrears do not constitute a charge over the property and therefore in general law, a transferee of a premises cannot be made liable for the dues of the previous owner/occupier and further holding that only where the statutory rules or terms and conditions of supply which are statutory in character, authorize the supplier of electricity, to demand from the purchaser of a property claiming re-connection or fresh connection of electricity, the arrears due by the previous owner/occupier in regard to supply of electricity to such premises, can the supplier recover the arrears from the purchaser.

15. The senior counsel for the respondent NDMC has also drawn attention to the terms and conditions of the auction held by the DRT to show that the flat aforesaid was put to auction together with all liabilities and claims attaching to the said flat. It is contended that the electricity charges are a liability attaching to the flat.

16. I am unable to accept any of the contentions of the senior counsel for the respondent NDMC. The contention that electricity dues are a charge on the immovable property to which they pertain has been expressly negated even in ***Paschimanchal Vidyut***; the Supreme Court therein held that a transferee of the premises or a subsequent occupant of the premises with whom the electricity supplier has no privity of contract cannot be asked to pay the dues of his predecessor in title or possession as the amount payable towards supply of electricity does not constitute a “charge” on the premises.

For the same reason the attempt of the senior counsel for the respondent NDMC to, by referring to the provisions aforesaid of the NDMC Act contend that the electricity charges are a charge on the property cannot be accepted. The provisions of the NDMC Act relied upon by the senior counsel for the respondent NDMC also do not create a charge with respect to the electricity dues on the property to which the dues pertain. Section 363 makes the electricity dues recoverable only from the person from whom the same are due and not from the property with respect to which the same are due. Section 102 deals with the recovery of tax and not of electricity charges. The senior counsel for the respondent NDMC himself did not even attempt to justify that electricity charges are a tax except for making a bare submission. In any case even if Section 102 of the NDMC Act were to be applicable, the same makes the taxes recoverable from attachment and sale of immovable property of the defaulter and not from the immovable property to which the taxes pertain. The defaulter in the present case would be the person in whose name the connection with respect to which the dues pertain was and cannot mean the subsequent purchaser of the property.

17. Insofar as the reference to the definition of “consumer” in the Indian Electricity Act, 1910 is concerned, the said definition was noticed in para 35 of the judgment in *Isha Marbles* and the said definition was not held to include the subsequent purchaser of the property.

18. The argument of the senior counsel for the respondent NDMC of the right of the NDMC on the basis of the clause reproduced above in the

affidavit obtained by the NDMC from the petitioner also has no force. The said affidavit was obtained admittedly in consideration of grant of electricity connection. However the electricity connection did not come to be granted by the respondent NDMC to the petitioner and the petitioner immediately on the earlier dues being intimated to it preferred this writ petition. Thus the question of the petitioner being bound by the said affidavit, does not arise. Moreover, it is quite clear that the affidavit was in the format prescribed by the respondent NDMC itself and thus the contention of the petitioner that the affidavit was not given voluntarily has merit and the petitioner having immediately protested thereagainst cannot be held to be bound by it. Reference in this regard can be made to the judgment of the Supreme Court in *National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd.* MANU/SC/4056/2008 holding that when such standard terms and conditions are immediately protested against, no reliance can be placed thereon.

19. Notwithstanding having disagreed with all the contentions of the respondent NDMC, I am still unable to grant relief to the petitioner. I do not agree with the contention of the counsel for the petitioner that the judgment of the Full Bench of this Court in *Saurashtra Color Tones* is not applicable, being in relation to the Delhi Electricity Reforms Act, 2000, not applicable in the present case.

20. A close perusal of each of the judgment mentioned above shows:-

(a) Though the Supreme Court in *Isha Marbles* also held that

electricity is public property and law requires such public property to be protected but held the law, in that case relating to Bihar, to be inadequate to enforce the liability of the previous owner of the property on the subsequent owner of the property.

(b) A Division Bench of this Court in *Mrs. Madhu Garg Vs. North Delhi Power Ltd.* 129 (2006) DLT 213 cited with approval in *Saurashtra Color Tones* had occasion to examine the law as applicable to Delhi. Reference was made to 'General Conditions of Supply (of electricity), as applicable in Delhi, clause 2.1(iv) whereof provides for the applicant for supply of electricity depositing *inter alia* outstanding dues against the premises and/or disconnected connection(s). The judgment refers to the said Clause being contained in General Conditions of Supply contained in the Tariff Orders of 1997-98 and 2001-02 also and which was continued. It was further held that the said General Conditions of Supply had been framed under Section 21(2) of the Indian Electricity Act, 1910 as well as Section 49 of the Electricity (Supply) Act, 1948 and hence is a piece of delegated legislation.

It was further held that in view of the aforesaid conditions of supply, it was irrelevant whether the subsequent purchaser was aware of the electricity dues or not.

The Division Bench further held that the binding and statutory nature of the Conditions of Supply was upheld by the Supreme Court in *Punjab State Electricity Board Vs. Bassi Cold Storage* 1994 Supp(2) SCC 124, *Bihar State Electricity Board Vs. Parmeshwar Kumar Agarwala* (1996) 4 SCC 686 and in *M/s Hyderabad Vanaspati Ltd. Vs. A.P. State Electricity Board* (1998) 2 SCR 620.

The Division Bench further held that an interpretation of law which furthers the preservation and protection of public property ought to be adopted; if arrears of electricity supply to a premises were to be equated with contractual claim of damages, it would encourage dishonest consumers to raise some dispute or other in respect of such arrears and evade the consequences of non-payment of electricity charges.

The Division Bench held the decision in *Isha Marbles* to be distinguishable being in the context of inadequacy of law applicable in the State of Bihar. It was held that law applicable in Delhi being different inasmuch as there is a statutory condition of supply which requires payment of such outstanding dues before resumption/continuation of electricity supply.

It was also held that clause 2.1(iv) of the General Conditions of Supply was formulated by DESU (DVB) as far back as in 1997-98

and thereafter adopted by DERC in 2001-02.

(c) The judgment of the Full Bench in *Saurashtra Color Tones* also though referring to the provisions of the Delhi Electricity Reforms Act, 2000 (not applicable in the present case) also referred to the Clause 2.1 (iv) of the General Conditions of Supply applicable as far back as in 1997-98 and also to the provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948. Reference was also made to Section 21(2) of the Indian Electricity Act, 1910 empowering the licensee to regulate its relations with persons who are intended to become consumers. Reference was also made to Section 49(1) of the Electricity (Supply) Act, 1948 empowering the licensee to supply electricity to the real consumer upon such terms and conditions as it may be deem fit. It was reiterated that the clause 2.1(iv) (supra) in the General Conditions of Supply was the same as in the regime of DVB.

It was noticed that the licensee was not required to enter into a contract with an individual consumer and even in the absence of individual contract, the terms and conditions of supply would be applicable to the consumers and the consumers would be bound by the same.

It was held that the licensee in performance of a statutory duty

supplies energy on certain specific terms and conditions framed in exercise of a statutory power and the terms and conditions are statutory in character and cannot be said to be contractual.

It was further held the Conditions of Supply have sacrosanctity since Rule 27 of the Indian Electricity Rules, 1956 framed by the Central Electricity Board (in exercise of powers under Section 37 of the Indian Electricity Act, 1910) read with Annexure VI thereof provided the model Conditions of Supply required to be adopted by the State Boards and that it was on the basis of the statutorily prescribed model that energy was being supplied by the Board to the consumer.

It was held that there was no illegality or unconstitutionality in Clause 2.1(iv) of the General Conditions of Supply aforesaid and the same was held to have been framed under Section 21 (2) of the Indian Electricity Act, 1910 and Section 49 of the Electricity (Supply) Act, 1948.

The Full Bench held that the statutory void or inadequacy of law found by the Supreme Court in *Isha Marbles* had been corrected insofar as the city of Delhi was concerned inasmuch as there is a statutory Condition of Supply which requires payment of such outstanding dues before resumption/continuation of electricity supply.

(d) The Supreme Court in *Paschimanchal Vidyut* held that if any statutory rules govern the conditions relating to sanction of a connection or supply of electricity, the distributor can insist upon fulfillment of requirement of such rules and regulations—if the rules are silent, it can stipulate such terms and conditions as it deems fit and proper to regulate its transactions and dealings. So long as such rules and regulations or the terms and conditions are not arbitrary and unreasonable, Courts will not interfere with them. A stipulation by the distributor that the dues in regard to the electricity supplied to the premises should be cleared before electricity supply is restored or a new connection is given to a premises was held to be not unreasonable or arbitrary.

(e) The same Hon'ble Judge who delivered the judgment in *Paschimanchal Vidyut* laying down that even in the absence of the statutory rules, the distributor was entitled to stipulate such terms and conditions as it may deem fit, in *Hanuman Rice Mills* (supra), restricted the right to recover dues of earlier owner/occupant only when statutory rules or terms and conditions of supply existed.

21. Though the judgments in *Madhu Garg* (supra) and *Saurashtra Color Tones* did not relate to the NDMC areas but I find that under Section 197 of the NDMC Act, the NDMC has all the powers and obligations of a licensee under the Indian Electricity Act, 1910. Section 199 empowers the NDMC to

enter into agreements regarding sale and price of electricity. Section 200 also empowers the NDMC to levy charges for electricity at such rates as may be fixed by the NDMC. The Full Bench in *Saurashtra Color Tones* has approved the judgment of the Division Bench of the Bombay High Court in *Maharashtra State Electricity Board Vs. Maharashtra Electricity Regulatory Commission* AIR 2003 Bom 398 laying down that the terms and conditions for supply of electricity go with the costs of electricity and while fixing the tariff for electricity, the terms and conditions of supply insofar as they add to the costs of electricity have to be considered. The recovery of dues of the earlier owner/occupant was thus held to be a part of the tariff.

22. Since the respondent NDMC neither in its counter affidavit nor in its arguments has dealt with the aforesaid aspect of the matter, the occasion did not arise to place before this Court documents to show that the General Conditions of Supply with Clause 2.1 (iv) as aforesaid apply to NDMC area. However, I have no doubt in my mind in this regard. The very fact that the format of the affidavit demanded by the respondent NDMC from the petitioner included a clause for payment of dues of earlier owner/occupant also indicates that the said General Conditions of Supply were applicable to respondent NDMC also.

23. The Division Bench and Full Bench of this Court in *Madhu Garg* and *Saurashtra Color Tones* respectively have held that the Conditions of Supply aforesaid whereunder such arrears are demanded are statutory. The

said judgments are binding on the undersigned.

24. Resultantly, it is held that the petitioner is liable to pay the dues of the earlier owner/occupant and the writ petition fails and is dismissed. The alternative argument of counsel for the petitioner of the said claim or bulk of it being barred by time also cannot be accepted. Such recovery has been held to be in public interest. The limitation would commence only on demand being raised on subsequent purchaser and from which date it is within time. As aforesaid, the petitioner instead of ₹8,26,493/- and ₹3,55,935/- i.e. total ₹11,82,428/- has deposited only ₹8,00,000/- with the respondent NDMC. The petitioner remains liable to pay the balance amount of ₹3,82,428/-. The petitioner is granted four weeks time to pay the balance amount to the respondent NDMC failing which the respondent NDMC shall be entitled to disconnect the electricity connection granted to the petitioner under interim orders in this writ petition. Though the petitioner has availed the benefit of stay but in view of the aforesaid complex legal position and in view of the respondent NDMC having not taken the stand on which the writ petition has failed, I refrain from awarding any interest on the stayed amount or costs of the writ petition to the respondent NDMC.

**RAJIV SAHAI ENDLAW
(JUDGE)**

20th October, 2010
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