

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1938 OF 2010

IN

SUIT NO.1909 OF 2010

Indo Rama Synthetics (I.) Ltd.	...	Plaintiffs
Vs.		
Reliance Infrastructure Ltd.	...	Defendants

Mr. Mustafa Doctor, Sr. Counsel, a/w. Sairam Subramanian, Adv. i/b. Khaitan & Co. for plaintiff/applicant.

Ms. Anjali Chandurkar, Adv. a/w. Mr. Paresh Patkar, Adv. a/w. Mr. Vaibhav Sharma, Adv. i/b. Mulla & Mulla CB & C for defendant.

CORAM : MRS. ROSHAN DALVI, J.

DATE OF RESERVING THE ORDER : 18th March, 2015

DATE OF PRONOUNCING THE ORDER : 25th March, 2015

O R D E R

1. The suit is filed by an electricity generating company for recovery of amounts upon supply of electricity to a distribution licensee. The suit is a money claim. The fact of supply of electricity and the amounts payable thereupon are admitted. However, the defendant claims compensation from the plaintiff for breach of the agreement to supply electricity and has counterclaimed for the compensation. The counter claim is also a money claim.

2. The pleadings are complete. Upon the defendants admission of the supply of electricity and the payment to be made thereunder, the plaintiff has taken out the above Notice of Motion for directing the defendant to deposit the amounts so admitted for the supply of electricity effected. The plaintiff has also applied for injunction against sale, disposal and alienation of the property of the defendant.

3. The defendants contends that the inherent jurisdiction of the civil court is barred under Section 86 (1) (f) of the Electricity Act, 2003. The claim of lack of inherent jurisdiction of this Court is made orally. There is no separate application. However, upon such claim being made, issue in that behalf has to be and is framed under Section 9A of the CPC. The Court's inherent jurisdiction would have to be seen even if the parties do not take up the contention of the lack of such jurisdiction. In view of the pendency of the interim application this issue would require to be framed and decided as preliminary issue under Section 9A of the CPC.

4. Hence a issue with regard to this Court's inherent jurisdiction is framed as follows :

1. Whether this Court's inherent jurisdiction is barred by section 86(1) (f) of the Electricity Act, 2003.

5. The bar of the jurisdiction would have to be seen from the aforesaid Act itself. Section 86 lays down the functions of state commission (the state electricity commission). Under section 86 it is to discharge various functions being for the determination the tariff, regulation of electricity purchase, intra-State transmission and wheeling of electricity, issue of licenses, promotion, generation and cogeneration of electricity, levy of fee, specification of the State Grid Code, enforcement of standards, fixing of trading margin as also adjudication of disputes between licensees and generating companies and reference of such dispute to arbitration.

6. Consequently it is seen that the state commission is a regulatory as also adjudicatory authority. The suit dispute is between

generating company and a licensee. The dispute is to the extent of the money claimed by both the parties.

7. Counsel on behalf of the plaintiff concedes that the dispute could have been filed before state commission and could have been adjudicated by it. Had it been so filed, the state commission could have adjudicated it or could have referred it for arbitration under Section 86(1) (f). Counsel on behalf of the plaintiff states that though the plaintiff could have availed that statutory remedy, the plaintiff's right to sue for recovery of amounts for the sale and supply of electricity in the civil court cannot be taken away. This would indeed be a suit for supply of goods sold and delivered, the goods in this case is being electricity. The case would otherwise be under the Sale of Goods Act, 1932 being the sale of movable property and recovery of the amount upon such sale and supply. Under the general law the Civil Court would adjudicate the dispute. In view of the fact that the goods sold and supply is electricity, the commodity in question falls under the Electricity Act. The adjudication of the dispute between specified parties being a licensee and a generating company is specifically under Section 86(1) (f) of State Commission as the relevant authority.

8. Under Section 111 (1) of the Electricity Act any person aggrieved by an order of the commission is entitled to prefer an appeal to the appellate tribunal for electricity.

9. Consequently not only the initial adjudication but also the remedy in case of appeal is provided under the Act.

10. Under Section 174 of the Act, the Electricity Act is to have overriding effect. Hence it would have effect notwithstanding anything inconsistent in any other law for the time being enforced. The other law would be the sale of Goods Act. Under Section 175 of the Act the provisions of the electricity Act would be in addition to and not in derogation of other laws. The conferment jurisdiction upon the state commission for adjudication of disputes between licensee and generating companies is, therefore, in addition to the sale of goods Act. These provisions are required to be read harmoniously. (See *Gujarat Urja Vikas Nigam Ltd., Vs. Essar Power Ltd., (2008) 4 Supreme Court Cases 755.*)

11. The case of *Gujarat Urja (Supra)*, the Supreme Court considered the dispute between a generating company and a licensee. The parties tried to settle the dispute and when they could not, one of them sought to appoint an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996. The Supreme Court considered that Section 11 has no application to a dispute under the electricity Act and that only State Commission or its nominate can adjudicate upon such disputes. (Paragraph 16 and 17).

In paragraph 26 of the judgment the Supreme Court observed that Section 86(1) (f) is special provision of adjudication of the disputes or for reference of those disputes to arbitration (it interpreted the word “and” in Section 86 (1) (f) as “or”).

In paragraph 28 of the judgment the Supreme Court considered that the special law overrides the general law of arbitration.

In paragraph 34 it referred to Section 174 for the legislative mandate of overriding anything inconsistent with the electricity Act and hence held that by implication Section 11 would not apply to disputes

between licensees and generating companies.

Upon the same analogy it may be said that the Sale of Goods Act or general law for recovery of monies would by implication not apply to disputes for the recovery of monies under the Act. Consequently the contention of the plaintiff that it can elect to sue either before the state commission or the civil court does not deserve acceptance.

In paragraph 35 of the judgment the Supreme Court observed that when a thing was to be done in a particular manner it had to be done in that manner and no other (an oft repeated proposition of law). Hence the Supreme Court concluded that by implication other methods (in that case of appointment of arbitrator and in all cases of adjudication of disputes as also appointment of arbitrator) are barred.

The Supreme Court further considered that under Section 158 of the Electricity Act which deals with arbitration if an arbitration is directed, the person nominated by the appropriate state commission would arbitrate and all other aspects of arbitration would be under the provisions of Arbitration Act. Hence the Supreme Court observed that except for Section 11 of the Arbitration Act all other provisions of the Arbitration Act would be applicable and the arbitration would have to be conducted by the person nominated in that behalf.

Further applying Section 174 and 175 the Supreme Court considered in paragraph 58 and 59 of the judgment that upon reading the section harmoniously in case of any conflict between the Electricity Act and any other Act the provisions of Electricity Act is to prevail and when there was no conflict both the acts would be read together. The Supreme Court held that there was an implied conflict Section 86(1) (f) of between the Electricity Act and Section 11 of the Arbitration Act.

12. In fact in paragraph 60 of the judgment the Supreme Court observed that after the enactment of the Electricity Act all adjudication of all disputes between licensees and generating companies can be only done by the state commission or the arbitrator appointed by the state commission and there can be no adjudication of dispute other than by the state commission or the arbitrator nominated by the state commission. The Supreme Court clarified that all disputes and not merely those pertaining to matters under other clauses of Section 86(1) (f) of the Electricity Act between a licensee and a generating company could be resolved by the commission or the arbitrator appointed by the commission and that is because there is no restriction in Section 86(1) (f) about the nature of the dispute.

Consequently even a money dispute is covered under Section 18(1) (f). It is to be adjudicated only by the state commission and not by a civil court.

13. Upon the same analogy this Court would see conflict between Section 86 (1) (f) of the Electricity Act and the general law relating to the suits for recovery of price of goods sold and delivered which would be under Sale of Goods Act. Consequently just as Section 11 of the Arbitration Act is seen to be in conflict with Section 86(1) (f) of the Electricity Act and is held to be impliedly barred, the jurisdiction of the civil court must also, on similar analogy, be held to be impliedly barred.

14. The specified conferment of jurisdiction upon the state commission and an appeal provided therefrom makes the Electricity Act a complete code. (See *PTC India Ltd., Vs. Central Electricity Regulatory Commission*, (2010) 4 Supreme Court Cases 603,

paragraph 17) in which the Supreme Court described the Electricity Act as an exhaustive code on all matters concerning electricity. The Supreme Court has further noted the dual functions of commission in paragraph 25 and the substantial powers of the commission as also the appellate tribunal under Section 66 and 111(1) of the Electricity Act in paragraph 27 of the judgment.

15. Mr. Doctor on behalf of the plaintiff drew the Court's attention to Section 145 of the Electricity Act under which the civil court's jurisdiction is expressly barred with regard to matters to be considered by the assessing officer under Section 126 of the Electricity Act and thereafter by the appellate authority under Section 127 of the Act or the adjudicating officer (which would be under Section 143 of the Act). Mr Doctor would contend that when there is express bar only for matters of assessment, appeal and adjudication for enquiry, the other matters cannot be taken to be barred because the legislature is seen to have applied its mind only for excluding the jurisdiction of the civil court for specified matters and not for all matters under the Act. This argument would imply that when there is a partial express bar there cannot be a partial implied bar. The implied bar under the Electricity Act is for a wholly different function. It is for functions of the state commission under Section 86. This aspect having been considered by the Supreme Court is no longer *res integra*. It would have to be read separately. The Electricity Act would, therefore, be a statute showing an express bar of the civil courts jurisdiction for specified matters and an implied bar for others.

16. Mr. Doctor drew the attention of the Court to the express bar under the Land Acquisition Act. (See *Laxmi Chand & Ors., Vs.*

Gram Panchayat, Kararia & Ors, (1996) 7 Supreme Court Cases 218, State of Bihar Vs. Dhirendra Kumar & Ors., (1995) 4 Supreme Court Cases 229, State of A P Vs. Manjeti Laxmi Kantha Rao (dead) by LRs & Ors., (2000) 3 Supreme Court Cases 689 and Dhruv Green Field Ltd., Vs. Hukam Singh & Ors., (2002) 6 Supreme Court Cases 416.) Indeed under that legislation there is an express bar to the civil court's jurisdiction for all matters connected with that statute. That, however, cannot determine that another statute would not bar the civil court's jurisdiction impliedly as also expressly.

17. Mr. Doctor would argue that the civil court's jurisdiction in a suit for injunction relating to various aspects covered by the Companies Act, 1956 under Section 397 and 398 was held not barred. He referred to the case of *CDS Financial Services (Mauritius) Ltd. Vs. BPL Communications Ltd., & Ors., 2004 Vol.123, page 374*, in which the Division Bench of this Court held that there was no express provision excluding the civil court's jurisdiction in case of a dispute which could otherwise be filed under of Section 397 and 398 of the Companies Act relating to acts of oppression and mismanagement in which minority shareholders would be aggrieved.

The suit in that case was for an injunction restraining the defendant from implementing an agreement without obtaining the approval of the shareholders of the company and from giving effect to particular resolution. The suit was filed under the general law of contract or the company law. The civil court's jurisdiction was held not barred for any right relating to the general law of contract or the company law. The suit happened to be between two groups, one of which constituted minority shareholding and other majority shareholding.

The Court held that the civil court's jurisdiction was not impliedly barred referring to the case of *Ammonia Supplies Corporation (P) Ltd. Vs. Modern Plastic Containers Pvt. Ltd., & Ors., 1998 Company Cases, Vol.94 page 310*, which was a dispute between members of a company for alteration of the register of members upon transfer of certain shares for rectification of register of members under Section 155 of the Companies Act, 1956. The Court in that case considered the application of rectification of the register of members by the Company Court or by filing of the suit in a civil court. The Court held that when disputed questions of facts made are required to be adjudicated upon evidence, not strictly under Section 155 of the Companies Act, a suit in a civil court would be the remedy.

It may be stated that Sections 397 and 398 of the Companies Act laid down the substantive law relating to complaints about affairs of the company prejudicial to or oppressive to certain members in minority or for a complaint relating to the affairs of the company being mismanaged. The suit before the Division Bench did not relate to such complaints alone. It required the common law remedy of injunction against the company from acting upon a certain agreement. It was for enforcement of disputes about general working of the company though it may result in a group of minority shareholders being oppressed or company being mismanaged. Consequently the civil law remedy could not be barred. Similarly in the case of a rectification of register of members upon transferring of shares the case may require disputed questions to be settled before the register can be altered and for which also civil adjudication would be imperative. In fact Section 155 is a part of the chapter relating to register of members or debenture holders contained in Section 150 to 156 which does not provide for an adjudicating authority but deals

with only administrative functions of a company.

18. In fact in that judgment the Division Bench held that the exclusion can be implied only in cases where a right is created and the machinery for enforcement of the right is provided by another statute. In this case the right in a generating company or in a licensee is created to have its dispute adjudicated by the state commission. The machinery for its enforcement is specified in Section 86(1) (f) of the Electricity Act.

19. The case of a dispute between a generating company and a licensee for which a specific remedy is provided before a specified authority as also for which the remedy of appeal is provided before a specified authority is quite another matter. In such a case such statute would be a complete code.

20. Consequently issue of lack of inherent jurisdiction of this Court is answered in the affirmative holding that this Court's inherent jurisdiction is impliedly barred.

Thus this court cannot proceed with the suit and the counter-claim. The plaint and the counter-claim as also further proceedings are returned to proper court / commission for filing.

(ROSHAN DALVI, J.)