

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL NO.1212 OF 2008**

|                                                         |                |
|---------------------------------------------------------|----------------|
| Maharashtra State Electricity Board                     | ... Appellant  |
| <b>vs.</b>                                              |                |
| M/s. Arkay Industries @<br>Shree Mahaganesh Texpro Ltd. | ... Respondent |

Mrs. A.R.S. Baxi for the Appellant.  
None for the Respondent.

Coram : **A.A. Sayed &  
Manish Pitale, JJ.**  
Reserved on : 13 October 2017  
Pronounced on: 22 December 2017

**ORDER: (per A.A. Sayed, J.)**

1 This First Appeal impugns the judgment and order dated 10 January 2007 in Special Civil Suit No.64 of 2002 passed by the Civil Judge, Senior Division, Panvel. By the impugned judgment and order the suit filed by the Appellant/original Plaintiff - Maharashtra State Electricity Board (MSEB) seeking to recover a sum of Rs.4,32,21,301/- together with interest at the rate of 24% per annum on Rs.2,89,86,795.95 ps. towards consumption of electricity charges against the Respondent/original Defendant (who is arrayed as 'M/s. Arkay Industries alias Shree Mahaganesh Texpro Ltd.' in the Plaint) came to be dismissed. For convenience of reference, the Appellant is hereinafter referred to as the Plaintiff MSEB or Appellant MSEB and the Respondent as the Defendant M/s. Arkay Industries or Respondent M/s. Arkay Industries.

2 The case of the Plaintiff MSEB in the plaint was as follows:

i) The Defendant M/s. Arkay Industries was a partnership firm of which Shri Vishwanathan Khanna and Shri Harikishan Metwani are the partners and Shri Prakash Ratanchand Baler is the Chief Managing Director. The Defendant M/s. Arkay Industries is carrying on business of Printing and Dyeing. The Defendant M/s. Arkay Industries is a High Tension (HT) consumer of the Plaintiff MSEB. Shree Mahaganesh Texpro Ltd. (newly changed name of M/s. Arkay Industries) is not the consumer in the Plaintiff MSEB's record. The consumer number is allotted by the Plaintiff MSEB to the Defendant M/s. Arkay Industries. The Defendant M/s. Arkay Industries did not inform the Plaintiff MSEB, regarding the purchase nor the Agreement executed by the Defendant M/s. Arkay Industries. An Agreement was executed between the Plaintiff MSEB and Defendant M/s. Arkay Industries on 21 October 1980. As per the said Agreement the period of supply of electrical energy was seven years i.e. ending 31 March 1987 and after seven years and thereafter, on year to year basis. The Defendant M/s. Arkay Industries agreed to abide by all the terms and conditions as mentioned in the Agreement in relation to the supply of power continuously for 24 hours as well as the rules and regulations in respect of supply of energy and payment of charges thereof. The Defendant M/s. Arkay Industries also agreed to pay minimum rate

assessed by the Plaintiff MSEB for a period of seven years from 21.10.1980 irrespective of actual consumption of power. Accordingly, the Defendant M/s. Arkay Industries was given power connection on 21.10.1980 bearing High Tension Consumer No.02861-90009110, Tariff HTP I Code-21 at MIDC, Taloja, Taluka Panvel.

ii) On 27 August 1999 a surprise visit was conducted at the premises of Defendant M/s. Arkay Industries by the Flying Squad of the Plaintiff MSEB who detected pilferage committed by the Defendant M/s. Arkay Industries in respect of the electrical energy and consequently an FIR was lodged with Taloja Police Station on 28 September 1999 against the Defendant M/s. Arkay Industries. An amount of Rs.2,89,86,797.95 assessed due to the said pilferage was demanded from the Defendant M/s. Arkay Industries and the Defendant M/s. Arkay Industries was also informed that the final assessment will be communicated later on. Against the action of the Plaintiff MSEB of disconnection of power supply and demand of Rs.2,89,86,797.95, the Defendant M/s. Arkay Industries approached the Civil Court, Junior Division, Panvel and filed Regular Civil Suit No.83 of 1999 seeking (i) restoration of power supply and (ii) permission to use generator in lieu of power supply in the event restoration is not permitted. By an interim order, the Court rejected the Plaintiff MSEB's request but allowed the latter's request. Against the interim order both the Plaintiff MSEB as well as the Defendant

M/s. Arkay Industries filed Appeals before the District Court, Alibag. The District Court, Alibag passed a common judgment and order dated 19 April 2000 directing the Plaintiff MSEB to restore the electricity supply to the Defendant M/s. Arkay Industries subject to deposit of Rs.40,00,000/- within one month, but the Defendant M/s. Arkay Industries did not abide the said order and did not pay sum of Rs.40,00,000/-. However, the Court allowed the Defendant M/s. Arkay Industries liberty to avail electric energy by operating the generator in case of failure to deposit Rs.40,00,000/- with the Plaintiff MSEB. The proceeding was remanded back to the lower Court. The Plaintiff MSEB in the said suit bearing RCS No.83 of 1999 filed Written Statement and Counter Claim of Rs.2,89,86,797/-. Though the Counter Claim was filed in RCS No.83 of 1999, the Plaintiff MSEB felt it right and proper to file a separate suit for recovery of amount towards theft of energy against the Defendant M/s. Arkay Industries and accordingly the present suit was filed.

iii) The Plaintiff MSEB sent a demand notice dated 1 September 1999 and the final demand notice dated 15.02.2000 to the Defendant M/s. Arkay Industries despite the fact that the said arrears of assessed amount was claimed by the Plaintiff MSEB in the Counter Claim in the RCS No.83 of 1999. (It may be stated here that in the Memo of Appeal it is however it is stated that it is Shree Mahaganesh Texpro Ltd., who had filed the R.C.S. No.83 of 1999).

iv) As the Defendant M/s. Arkay Industries failed to pay the arrears of electricity consumption charges which were due, the electricity was temporarily disconnected on 28 August 1999 and thereafter permanently disconnected on 1 June 2000. The last payment made by the Defendant M/s. Arkay Industries was of Rs.1,56,547/- on 10 September 1999. The billing was done upto May 2000. As the consumer did not pay even the arrears of regular bills and for that purpose a separate Special Civil Suit No.208 of 2000 was filed at Thane for recovery of monthly bills.

3 Written Statement was filed by one Shri Prakash Ratanchand Baler (describing himself as the Defendant No.3, though there was no such Defendant No.3 and the suit was filed against the sole Defendant M/s.Arkay Industries describing it as "M/s. Arkay Industries alias Shree Mahaganesh Texpro Ltd., a partnership firm led by - (1) Mr. Vishwanath Khanna, Age : Adult, Occ. Business (Partner), (2) Mr. Harikishan Metwani, Age : Adult, Occ. Business(Partner), (3) Mr. Prakash Ratanchand Baler, Age : Adult, Occ. Chief Managing Director, All carrying on business at: J-18 M.I.D.C.Taloja, AT : P.O. Narade, Tal: Panvel, Dist : Raigad." The case of Shri Prakash Ratanchand Baler in the Written Statement is as follows:

i) It was falsely and illegally stated in the title of the Defendant as M/s. Arkay Industries alias Shree Mahaganesh Texpro Ltd. Both the

units are different and there is no connection between them and the Plaintiff MSEB has made false contentions and suppressed truth and the suit ought to be dismissed on this count.

ii) It was falsely stated in the title that Defendant No.3 is the Chief Managing Director of Defendant M/s. Arkay Industries and the Defendant No.3 was never and not a Chief Managing Director of the Defendant M/s. Arkay Industries and not liable to be sued in that capacity. It is falsely stated that Shree Mahaganesh Texpro Ltd. is the changed name of Defendant M/s. Arkay Industries. Shree Mahaganesh Texpro Ltd. is not the consumer of the Plaintiff MSEB nor any Agreement was executed by the Plaintiff MSEB with them. There is no Agreement made after 1987 nor renewed or in existence with the Defendant M/s. Arkay Industries and false and incorrect statements are made.

iii) It is falsely stated that there was pilferage of electricity and consumption. The Regular Civil Suit No.83 of 1999 was in respect of the unlawful acts of the Plaintiff MSEB. The Plaintiff MSEB has filed a suit before the Thane Court for arrears and for the same arrears this suit is filed before the Panvel Court and therefore the suit is not maintainable and tenable. The Plaintiff MSEB has to prove which consumer either M/s Arkay Industries or Shree Mahaganesh Texpro Ltd. consumed electricity as they are different units. The Plaintiff MSEB is not entitled to demand any amount beyond six months as per the

provisions of law and the suit was time barred. The plot No.J-18, MIDC, Taloja, cannot be sold or transferred in possession of the Defendant M/s. Arkay Industries but is in possession of the Bank of Oman and has first charge in Suit No.1379 of 2001 and the same is attached by the Debt Recovery Tribunal and Greater Bombay Co-operative Bank has attached the factory on 2 November 2001. The dispute in respect of ownership is filed before the High Court by one Laxman Dattu Surve who is not made a party to the suit and therefore the suit suffers from non-joinder of necessary parties. The suit is filed on imaginary grounds and not based upon metered bills and units consumed and the suit is liable to be dismissed.

4 On behalf of the Plaintiff MSEB, three witnesses were examined. No one was examined on behalf of the Defendant M/s. Arkay Industries. The Plaintiff MSEB's witnesses were cross-examined by the Advocate for Prakash Ratanchand Baler who had filed Written Statement claiming to be Defendant No.3. The trial Court framed and answered the issues in the following terms:

| Sr.No. | Issues                                                                                                                                 | Findings                  |
|--------|----------------------------------------------------------------------------------------------------------------------------------------|---------------------------|
| 1      | Does Plaintiff prove that without giving knowledge to the Plaintiff the Defendant Mahaganesh changed its name as M/s.Arkay Industries? | In negative.              |
| 2      | To whom high tension consumer connection bearing No.02861-90009110 is allotted?                                                        | To M/s. Arkay Industries. |

|   |                                                                                                                                                       |                     |
|---|-------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------|
| 3 | Does Plaintiff prove that against consumption of electricity charges, the plaintiff has to recover Rs.2,89,86,795.95 ps. from the Defendant?          | In negative.        |
| 4 | Does Plaintiff prove that the Defendant No.3 is the Managing Director of the Defendant No.1 firm?                                                     | In negative.        |
| 5 | Does Plaintiff prove that it is entitled to attachment before judgment as claimed?                                                                    | In negative.        |
| 6 | Do Defendants prove that since the land and the property of the Defendant is attached by the Debt Recovery Tribunal, it is not liable for attachment? | In negative.        |
| 7 | What order and decree?                                                                                                                                | As per final order. |

5 We have heard the learned Counsel for the Appellant MSEB. None appeared on behalf of the Respondent M/s. Arkay Industries. We have perused the record.

6 On the basis of the same, the following points arise for our determination in this Appeal:

| Sr.No. | Points                                                                                                                                                                                                                                            | Findings           |
|--------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| 1      | Whether the Trial Court was justified in proceeding on the basis that since there was a defect in the electric meter, the matter ought to have been referred to the Electrical Inspector under section 26(6) of the Indian Electricity Act, 1910? | In the negative.   |
| 2      | What order?                                                                                                                                                                                                                                       | Appeal is allowed. |

7 In our view, the Trial Court has wrongly proceeded on the basis that since there was a defect in the electric meter, the matter ought to have been referred to the Electrical Inspector under section 26(6) of the Indian Electricity Act, 1910. The Trial Court, in our opinion, wrongly concluded that it was mandatory that the dispute whether the meter is correct or not, has to be decided upon an Application being made by either party to the Electrical Inspector and since the matter has not been referred to the Electrical Inspector it would be fatal to the Plaintiff MSEB's case. We find that the present case was not in respect of a defect in the electricity meter. The case is one of tampering and theft and therefore the Electrical Inspector has no jurisdiction to decide the dispute under section 26(6) of the Indian Electricity Act. In this regard, learned Counsel for the Appellant MSEB has rightly relied upon the judgment of the 3-Judge Bench of the Supreme Court in **J.M.D. Alloys Ltd. vs. Bihar State Electricity Board and others, (2003) 5 SCC 226**. The Apex Court in paragraph 10 of the said judgment has observed as follows:

“10. The contention that the dispute regarding tampering of the seal of CT/PT terminal unit should have been referred to the Electrical Inspector, has hardly any merit. In M.P. Electricity Board vs. Basantibai, (1988) 1 SCC 23 : 1988 SCC (Cri) 23 it has been held that a dispute regarding the commission of fraud in tampering with the meter and breaking the body seal is one outside the ambit of Section 26(6) of the Indian Electricity Act and the Electrical Inspector has no jurisdiction to decide such cases of fraud. It was further held

that under Section 26(6), the only dispute which can be decided by the Electrical Inspector is as to whether the meter is correct and is accurately recording the reading or there is some fault in the same. Since in the present case it has been found that the seal on the CT/PT terminal box had been tampered with and the natural working of the meter had been affected by taking recourse to external devices, a dispute of this kind cannot be referred to an Electrical Inspector."

8 In the circumstances, the learned Counsel for the Appellant MSEB is right in contending that the finding of the trial Court that the dispute ought to have been referred to the Electrical Inspector and therefore the case of the Plaintiff MSEB was fatal, was incorrect.

9. We may now refer to condition 31(e) of the Conditions And Miscellaneous Charges For Supply Of Electrical Energy. It reads as follows:

**"31. PREJUDICIAL USE OF SUPPLY:**

a) ... ..

b) ... ..

c) ... ..

d) ... ..

(e) Where any consumer is detected in pilferage or dishonest abstraction of energy with reference to his use of electrical energy he shall be deemed to have committed theft within the meaning of Indian Electricity Act 1910. The existence of artificial means for such abstraction shall be prima facie evidence of such dishonest abstraction. Where any of the above offences is detected, the Board may, without prejudice to its other rights, cause the supply to be discontinued forthwith. The board would charge the consumer for the

electricity so abstracted and the assessment shall be made for the entire period during which pilferage is taking place and can be clearly established, (subject to a maximum of 3 years). If there is any ambiguity, the period shall be limited to a maximum of three years prior to the date of detection. The consumption so assessed shall be charged at the appropriate tariff applicable for such consumption plus surcharge of 25% on the amount so arrived at. The supply will be restored only after the consumer suitably compensates the Board as laid down above and takes such other action as may be directed by the Board to take in this context.

Levy of charges so assessed together with surcharge as above under this condition shall be without prejudice to the Board's right to take any other action provided in Board's terms and conditions of supply or any other law governing the supply of electricity to the consumers.

Further where any consumer is detected in the commission of any other malpractice with reference to his use of electrical energy which includes any violation of law and/or the provision of the Conditions & Miscellaneous Charges for supply of energy framed under the Electricity (Supply) Act, 1948, including unauthorized extensions, unauthorised alterations to his installation or maliciously causes the energy to be wasted or diverted, the Board may, without prejudice to its other rights, cause the consumer's supply to be forthwith disconnected. The supply may be restored at the discretion of the Board subject to the consumer depositing to the Board an amount which may not be less than 20% of the amount billed and taking such other actions as may be directed by the Board to take in this context.

**Pilferage:**

I. **H.T.Consumers:** In case of pilferage or dishonest abstraction of electricity by H.T.consumers, the quantity of electricity consumed shall be assessed as follows:-

a) Demand Charges: For the purpose of assessment of maximum demand for the month, contracted demand of the consumer or 60% of the connected load at the time of inspection whichever is higher shall be taken as maximum demand and billed accordingly.

b) Energy charges:

One shift : Assessed MD in kW x 7 hours x 25 days

Two shift : Assessed MD in kW x 14 hours x 25 days

Three shift : Assessed MD in kW x 21 hours x 25 days

**II. L.T.consumers: ...”**

(emphasis supplied)

From the above provision, it would be clear that once the consumer is detected in pilferage he shall be deemed to have committed theft of electricity. Under the said provision, an assessment is required to be made, the period of which may extend to a maximum period of three years prior to the detection.

10 It is an admitted position that no Written Statement was filed by the Defendant M/s.Arka Industries before the Trial Court. In these circumstances, the averments of the Plaintiff MSEB against Defendant M/s.Arka Industries in the Plaint remained uncontroverted. We have gone through the evidence of three witnesses on behalf of the Plaintiff MSEB viz. 1) Shri Dnyandeo Krishna Mali, Deputy Executive Engineer at the relevant time, 2) Shri Prasad Dattatraya Pathak, Divisional Accountant, and 3) Shri Nilkant Baliram Wadekar, Deputy Executive

Engineer (Testing Department), Vashi. We find that there was sufficient evidence on record in the form of oral evidence and documents which were marked as Exhibits before the trial Court to conclude that the case of the Plaintiff MSEB was proved. The final assessed amount was Rs.2,89,86,797/- and the suit claim is based on this assessed amount alongwith DPC/interest. The following documents were produced before the trial Court in the evidence and which were marked as Exhibits - Exhibit-39 - FIR, Exhibit-40 - Another FIR, Exhibit-41 – Additional Inspection Report, Exhibit-42 Panchanama, Exhibit-43 – Assessment of Theft of Energy, Exhibit-44 - Spot/Inspection Report, Exhibits-45 to 50 - Inspecting Officer's Reports, Exhibit-51 - Statement of Shri Prakash Ratanchand Baler before police, Exhibit-52 - Statement of details of revised bill, Exhibit-53 – Last Bill from September 1999 to May 2000, Exhibit-54 –Conditions and Miscellaneous Charges for Supply of Electrical Energy, Exhibit-55 - Notice, Exhibit-56 - Final Notice, Exhibit-61- Agreement. Even otherwise, in absence of Written Statement having been filed by the Defendant M/s. Arkay Industries and in absence of any cross-examination by the Defendant M/s. Arkay Industries and the case of the Plaintiff MSEB having remained uncontroverted, in the facts and circumstances of the case, in our view, the Trial Court ought to have decreed the suit. We are constrained to observe that the sole Defendant in the suit was M/s. Arkay Industries and the Written Statement filed by Prakash Baler claiming to be the

Defendant No.3 is really speaking non-est (as there was no Defendant No.3 arrayed in the Plaint). That apart, nothing turns on the Written Statement filed by the said Prakash Baler and he has not entered the witness box and/or offered himself for cross-examination and the Plaintiff MSEB has not been able to prove his relationship/connection with the Defendant M/s. Arkay Industries.

11 Learned Counsel for the Appellant/Plaintiff MSEB has pointed out that after the provisional assessment, the final assessment order was also passed by the Plaintiff MSEB and the Defendant M/s. Arkay Industries has not challenged the final assessment order as provided in condition 31(e) of the Conditions And Miscellaneous Charges for Supply Of Electrical Energy by filing an Appeal before the Appellate Authority. Learned Counsel for the Appellant MSEB has also pointed out that the subsequent Suit No.202 of 2002 filed by the Appellant/Plaintiff MSEB was in respect of the arrears of the monthly bills of a different period which constituted a different cause of action.

12 It is noted that a surprise visit was conducted by the Flying Squad of the Plaintiff MSEB on 27 August 1999 and pilferage was detected which resulted in lodging FIR with the Taloja Police Station on 28 August 1999 and the electrical energy was temporarily disconnected on 28 August 1999 and permanently disconnected on 1 June 2000. Condition 31(e) of the Conditions And Miscellaneous Charges For

Supply Of Electrical Energy, specifically provides that where any consumer is detected in pilferage or dishonest extraction of energy, he shall be deemed to have committed theft within the meaning of Indian Electricity Act, 1910. In the circumstances, the Trial Court was not right in concluding that the Plaintiff MSEB had failed to prove the theft. The Trial Court failed to appreciate that even after the expiry of period of Agreement in 1987, electricity was being consumed by the Defendant M/s.Arkey Industries and as stated in the Plaint, the Defendant M/s. Arkay Industries had thereafter continued to pay the electricity charges and the last payment of Rs.1,56,547/- was made by them on 10 September 1999.

13 For all the aforesaid reasons, the impugned order of the Trial Court cannot be sustained and is required to be set aside and accordingly set aside. The suit of the Appellant/Plaintiff MSEB is decreed in terms of prayer clause (a) with costs.

14 We make it clear that the suit is only decreed against the Defendant M/s. Arkay Industries and not against Shree Mahaganesh Texpro Ltd. It is required to be noted that there is only one Defendant i.e. M/s. Arkay Industries which is arrayed as sole Defendant in the Plaint. The Defendant is described in the Plaint as follows:

"M/s. Arkay Industries Alias )  
Shree Mahaganesh Texpro Ltd. )  
A partnership firm Led by -  
(1) Mr. Vishwanath Khanna )  
Age : Adult )  
Occ. Business (Partner) )  
(2) Mr. Harikishan Metwani )  
Age : Adult )  
Occ. Business(Partner) )  
(3) Mr. Prakash Ratanchand Baler )  
Age : Adult, )  
Occ. Chief Managing Director )  
All carrying on business at: )  
J-18 M.I.D.C.Taloja )  
AT : P.O. Narade )  
Tal : Panvel )  
Dist : Raigad )...Defendant"

M/s. Arkay Industries is thus the sole Defendant in the suit and it is described in singular i.e. Defendant. Though it is sought to be contended by the learned Counsel for the Appellant MSEB that the decree also may be passed against Shree Mahaganesh Texpro Ltd., we decline to do so. Shree Mahaganesh Texpro Ltd. is admittedly not the consumer in the records of the Plaintiff MSEB. Shree Mahaganesh Texpro Ltd. is a separate legal entity and there was nothing brought on record by the Plaintiff MSEB before the Trial Court to show how the Defendant M/s. Arkay Industries is linked/connected with Shree Mahaganesh Texpro Ltd., though it is submitted during the course of

arguments before us that Prakash Baler is the Chief Managing Director of Shree Mahaganesh Texpro Ltd. and the name of M/s. Arkay Industries was changed to Shree Mahaganesh Texpro Ltd. Unfortunately, the parties and even Trial Court proceeded on the basis that there were three Defendants. Even the present Appeal, which takes the title from the Plaint describes M/s.Arkay Industries as “Respondent” in singular. We say no more and leave at that.

**(Manish Pitale, J.)**

**(A.A. Sayed, J.)**

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