

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

CWP-12022-2020 (O&M)
Date of decision : 19.02.2021

M/s Venus Real Con. LLP (Limited Liability)

..... Petitioner

VERSUS

Dakshin Haryana Bijli Vitran Nigam Limited and others

.... Respondents

CORAM: HON'BLE MR. JUSTICE SUDHIR MITTAL

Present: Mr. Anand Chhibbar, Senior Advocate with
Mr. Lalit Thakur, Advocate and
Mr. Shikhar Sarin, Advocate, for the petitioner.

Mr. Samil Malik, Advocate and
Mr. Aman Malik, Advocate, for respondents No.1 to 3.

Ms. Aakansha Sawhney, Advocate, for respondent No.4.

SUDHIR MITTAL, J.

The petitioner submitted an application dated 9.6.2019 for release of electricity connection (non-domestic). A copy of the same is on record as Annexure P-5. The same has been rejected vide communication dated 27.7.2019 on the ground that the land for which electricity connection was sought was earlier owned by respondent No.4-M/s Haryana Concast Limited (hereinafter referred to as 'Concast') and the said entity was in arrears of a sum of Rs.1,67,51,154/-. According to the instructions of Dakshin Haryana Bijli Vitran Nigam limited (hereinafter referred to as the 'Nigam'), an electricity connection cannot be released till the previous dues are cleared. A copy of this

communication is on record as Annexure P-6. Aggrieved by this communication, the present writ petition has been filed.

The un-disputed facts are that Concast went into liquidation and was ordered to be wound up by the High Court vide order dated 28.10.1999. Its assets were taken over by the official liquidator and claims were received from its creditors. The Nigam also submitted its claim for outstanding electricity dues which was accepted. The only secured creditor of Concast was Bank of India. It transferred its security interest in favour of an entity known as Pegasus Assets Re-construction Private Limited (hereinafter referred to as 'Pegasus'), under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act'). Pegasus approached the Company Court for permission to remain outside winding up proceedings. Permission was granted vide order dated 20.3.2009 subject to certain limitations. Appeals were filed against this order, but both of them were dismissed vide judgment dated 15.12.2009. Pegasus approached the Supreme Court through a special leave petition. Leave was granted and the petition was converted into a civil appeal, which was finally decided vide judgment dated 29.12.2015 titled as Pegasus Assets Reconstruction Private Limited Vs. Haryana Concast Limited and others, AIR 2016 SC 494. After examining the provisions of various statutes, as well as the case law on the subject, it was held that Company Court had no power to regulate or interfere with the proceedings under the SARFAESI Act taken by a secured creditor standing outside winding up. Before the said judgment

was delivered, Pegasus had already put the land and buildings of Concast to auction sale under the SARFAESI Act after its appeal was dismissed on 15.12.2009. The petitioner was the highest bidder having made a bid of Rs.26.50 crores. The auction was challenged by an entity known as S.R. Build Con. Pvt. Ltd. before the Company Court, which conducted an inter se bidding. The petitioner gave a revised bid of Rs.32 crores and the Company Court felt that since, a higher bid had been received, the property was quite valuable and may receive even higher bids, in case a fresh advertisement for auction sale was issued. A fresh advertisement was issued, but no other entity came forward and thus, the Company Court accepted the bid of the petitioner vide order dated 9.7.2010. Sale certificate dated 31.7.2010 was also issued in favour of the petitioner and a copy thereof is on record as Annexure P-3. Appeal against order dated 9.7.2010 filed by one Vinod Rajaliwala was dismissed by a Division Bench of this Court vide judgment dated 23.9.2010 as was SLP which was decided alongwith the case of Pegasus (supra).

From the aforementioned sequence of events, it emerges that the petitioner is the auction-purchaser of the assets (land and building) of Concast in an auction sale conducted by Pegasus under the provisions of SARFAESI Act, after taking permission from the Company Court. It filed its application dated 9.6.2019 for release of electricity connection and the same has been rejected by the impugned order dated 27.7.2019.

It is also relevant to note that meanwhile, the Nigam issued a sale circular dated 16.1.2013, a copy of which is on record as Annexure P-7. Clause 21-A was included in the terms and conditions of sale of

electric energy, according to which, whenever, there is a transfer of ownership of a premises, the registered owner is bound to communicate such transfer within 15 days. On receipt of intimation, the electricity supply would be dis-connected and in case, the transferee wants the supply to be continued, it should pay the outstanding dues and apply for transfer of the connection within 30 days. No re-connection or new-connection shall be released in favour of a premises unless the arrears existing against it are cleared in advance. It has further been clarified that the provisions would apply to existing consumers also, where, the default exists against the premises. Clause 21-A is reproduced below:-

“21-A (a):- When there is transfer of ownership or right of occupancy of premises, the registered consumer shall intimate the transfer of right of occupancy of the premises within 15 days to the Assistant Engineer/Assistant Executive Engineer concerned. Intimation having been received. The service shall be dis-connected unless application for transfer is allowed. If the transferee desired to enjoy the service connection, he shall pay the outstanding dues, if any, to the Nigam and apply for transfer of the service connection within 30 days and execute fresh agreement and furnish fresh security. New Consumer number shall be allotted in such cases cancelling the previous number.

(b) Re-connection or new connection shall not be given to any premises where there are arrears on any account due to the Nigam unless these are cleared in advance. If the new owner/occupier/allottee remits the amount due from the previous consumer, the Nigam shall provides re-connection or new connection depending upon whether the service

remains dis-connected/dismantled as the case may be. The amount so remitted will be adjusted against the dues from the previous consumer through legal proceedings or otherwise, the amount remitted by the new owner/occupier to whom it connection has been effected shall be refunded to that extent. But the amount already remitted by him/her shall not bear any interest.

The above proposed provisions of Clause 21-A (a) & (b) shall be applicable to existing consumers also where defaulting amount exists against premises occupied by such consumer.”

As mentioned earlier, the Nigam had also submitted its claim as an un-secured creditor before the official liquidator, but the same was rejected vide communication dated 30.1.2019 issued by the official liquidator, a copy of which is on record as Annexure P-8. It was stated that dues of a company in liquidation have to be settled in accordance with provisions of Sections 529-A and 530 of the Companies Act, 1956, which lay down priority of various categories of creditors. The claim of the Nigam would be paid only, if, there are sufficient funds remaining after the claims of preferential creditors are settled and as on the date of issuance of the communication, sufficient funds were not available, for settlement of claims of un-secured creditors one of which was the Nigam.

In the aforementioned factual backdrop, learned senior counsel for the petitioner has argued that from the sale certificate dated 31.7.2010, it is evident that the auction sale in favour of the petitioner was on “as is where is basis”. This implies that the sale was only of the land

and building existing on the spot. In fact, there was no building and the sale certificate was issued only in respect of 287 kanals and 05 marlas of land. There being no other condition attached with the sale, the petitioner could not be made liable for the arrears of Concast. Moreover, the auction sale was conducted pursuant to permission granted by the Company Court. It was a sale of assets of a company in liquidation and creditors of such a company can only be paid in accordance with priority laid down by Sections 529-A and 530 of the Companies Act, 1956. Un-secured creditors can be paid only, if, sufficient funds are available with the official liquidator after paying all the preferential creditors. The Nigam is one such un-secured creditor and it has to claim its dues from the official liquidator only. It cannot impose the dues of Concast on to the petitioner. Still further, there is no privity of contract between the petitioner and the Nigam and the payment of dues for consumption of electric energy is governed by the contract entered into between the Nigam and Concast. For this reason also, the dues of Concast cannot be imposed on to the petitioner. He places strong reliance upon a judgment of the Supreme Court in M/s Isha Marbles Vs. Bihar State Electricity Board and another, 1995 (2) SCC 648. It is also argued that communication dated 30.1.2019 sent by the official liquidator has not been challenged by the Nigam which would imply deemed acceptance thereof. The principle of acquiescence and waiver would consequently be attracted and for this reason also, rejection of the application of the petitioner is illegal.

The next argument is that if, the demand of the Nigam was to be accepted, it would amount to duplication of the demand for arrears of dues of Concast and the same is not permissible in law. Claim for these arrears has already been accepted by the official liquidator, though, not paid till date and therefore, the Nigam cannot be permitted to raise the same claim against the petitioner also. Learned senior counsel has also placed reliance upon Section 43 of the Electricity Act, 2003 (hereinafter referred to as the 'Electricity Act') to argue that on an application by the owner or occupier of a premises, the distribution licensee is bound to release the electricity connection within one month of the receipt of the application. Thus, there is a statutory duty placed upon the Nigam to release the electricity connection.

Learned counsel for the Nigam submits that an electricity supply code has been framed by the Haryana State Electricity Regulatory Commission in obedience to the statutory command contained in Section 50 of the Electricity Act. This is contained in the Haryana Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2014 (hereinafter referred to as the 'Regulations'). The said Regulations inter alia provide for restoration of supply of electricity and dis-connection of supply of electricity for non-payment. Duties of transferees are also laid down in the said regulations and specific reference has been made to Regulation 4.3.1, Regulation 4.4.1 (5) as well as Regulation 4.5.11. On the basis thereof, it has been submitted that a transferee of a premises has to clear the arrears existing against the premises and unless and until the same is done, an electricity connection cannot be released. The

Regulations were in force on the date the application for electricity connection was made and they would govern the release of the same. Reliance has been placed upon judgments of the Supreme Court in DHBVN Limited Vs. M/s Paramount Polymers Private Limited, 2006 (13) SCC 101 as well as Paschimanchal Vidyut Vitran Nigam Limited and others Vs. DVS Steels and Alloys Private Limited and others, 2009 (1) SCC 210. Condition No.21-A inserted in the terms and conditions of supply of electric energy vide sale circular dated 16.1.2013 (Annexure P-7) is still in force and this also bars the release of any electricity connection till the arrears are cleared. The judgment in Isha Marble (supra) is not applicable to this case. The auction sale has been conducted under the provisions of SARFAESI Act and the law laid down by the Supreme Court in Telangana State Southern Power Distribution Company Limited Vs. Srighdaa Beverages, 2020, SCC online SC 478, would apply. By placing reliance upon Section 174 of the Electricity Act, it has been argued that the provisions of the said Act have an over-riding effect and the same would prevail over any other statute.

To counter the argument of learned counsel for the Nigam that the judgment in Telangana (supra) is applicable in this case, learned senior counsel for the petitioner submits that the case of M/s Isha Marbles (supra) has been decided by a three Judge Bench, whereas that of Telangana (supra) was decided by two Judge Bench. The judgment of the larger Bench would prevail. This is in accordance with the settled principle of *Stare Decisis*. Regarding Regulation 21-A, it has been stated that the said regulation cannot be applied in the case of the petitioner as it

was inserted after the sale. The rules and regulation in force on the date of sale would be applicable to the case of the petitioner as has been held by a Division Bench of this Court in M/s Paramount Private Limited Vs. DHBVN, 2005 SCC online P&H, 816.

Learned senior counsel for the petitioner has laid great stress on the provisions of the Companies Act, 1956, to argue that the Nigam could claim its dues only in accordance with the priority set by the said Act. The argument in sum and substance is that Sections 529-A and 530 of the said Act govern the priority inter se the creditors. Workmen dues have the highest priority followed by the dues of secured creditors. Un-secured creditors will be paid only if funds remain after satisfying the claims of the workmen and the secured creditors. Thus, the attempt of the Nigam to link the release of electricity connection with dues of Concast is illegal and unjustified. Moreover, the claim having been rejected vide communication dated 30.1.2019 and the same having been accepted, it does not lie in the mouth of the Nigam to seek to realize the dues of Concast from the petitioner. The doctrine of acquiescence and waiver as well as non-entitlement of a party to duplicate its claim have been woven into the argument.

Let us examine the relevant sequence of events. Concast was ordered to be wound up vide order dated 28.10.1999. Thereafter, the Nigam submitted its claim for electricity dues. The secured creditor i.e. Bank of India, transferred its rights in favour of Pegasus under provisions of SARFAESI Act, whereupon, Pegasus sold the assets of Concast comprising land and building through auction. The petitioner emerged as

the highest bidder and sale certificate dated 31.7.2010 was issued in its favour. The request of the Nigam for payment of its dues was rejected by the official liquidator vide communication dated 30.1.2019 on the ground that sufficient funds were not available to honour the claims of un-secured creditors. The petitioner applied for an electricity connection vide application dated 9.6.2019, which was rejected vide order dated 27.7.2019. In this factual backdrop, it cannot be said that the Nigam is trying to jump the queue or that it is attempting to by-pass the priorities laid down in the Companies Act, 1956. The rights provided under the said Act are distinct and separate from those provided to the Nigam by the Electricity Act. Rejection of its claim by the official liquidator would not bar it from enforcing the rights provided to a distribution entity while accepting or refusing an application for release of electricity connection under the Electricity Act. The act of the Nigam can also not amount to duplication of its claim. The claim has been submitted before the official liquidator and enforcement of rights under the Electricity Act cannot amount to duplication of claim. Learned senior counsel for the petitioner may have been right, if, the Nigam had sought to expedite its claim before the official liquidator by submitting another claim. That not being the case, the argument has to be rejected.

The doctrine of waiver is also not attracted in the instant case. The said doctrine gets attracted when a party makes an express or implied representation that it has given up its rights provided under a statute or otherwise. It would also be attracted where, a party elects to adopt a particular mode for enforcement of its rights. Is, this is the situation in the

present case ? The Nigam filed its claim before the official liquidator as Concast was ordered to be wound up. Its claim as an un-secured creditor was rejected vide communication dated 30.1.2019 and this order has not been challenged further. This fact conveys that the Nigam did not think it prudent to waste public money in challenging the said order as the order was not erroneous or illegal. It cannot be interpreted to mean that the Nigam expressly or impliedly gave up its rights under the Electricity Act. The opportunity for enforcement of these rights was provided by the petitioner's application for release of electricity connection, which is a subsequent event. It is an independent right provided under an independent statute. Remedies or inter-se rights provided by two distinct statutes cannot be inter mingled.

Thus, the arguments of learned senior counsel for the petitioner based upon the Companies Act, 1956, is rejected as are the arguments related therewith.

Learned senior counsel for the petitioner is correct in arguing that the sale in his favour does not contain a condition that the petitioner must clear the pending dues. That is however, not the case of the Nigam. No such stipulation/condition has either been referred to by the learned counsel for the Nigam nor has any argument been raised on this basis. The argument of learned counsel for the Nigam is that on the date, application for electricity connection was made, Electricity Act was in force and conditions for release of connection will be governed thereunder. Specifically, reference has been made to Regulation 4.3.1 and 4.4.1 (5) of the Regulations framed in exercise of powers conferred by

Sections 50 and 177 of the Electricity Act. The said Regulations are reproduced below:-

“4.3.1 Purchase of existing property:- Where the applicant has purchased an existing property, whose supply has been disconnected, it shall be the applicant’s duty to verify that the previous owner has paid all dues to the licensee and obtained a ‘no dues certificate’ from the licensee. In case such ‘no dues certificate’ has not been obtained by the previous owner, the applicant shall request the previous owner to obtain a no dues certificate from the licensee and handover the same to him. On receipt of such request from the previous owner, the licensee shall either intimate in writing the dues outstanding on the premises, if any, or issue a ‘no dues certificate’ within thirty (30) days from date of receipt of request. If the licensee does not issue the no dues certificate or dispatch a letter intimating the dues to the previous owner within thirty (30) days of receipt of his request, the applicant shall be absolved of any liability on account of dues against the previous owner and the licensee shall have to seek legal recourse separately against the previous owner for recovery of such dues.

In case, the licensee dispatches a letter intimating the dues to the previous owner within thirty (30) days of receipt of his request and in case, these are not deposited by the previous owner, the applicant shall be liable to clear any dues against the previous owner before a new connection is released in his favour.

If, however, subsequently at any stage, the audit points out any additional amount due on account of period of the previous owner, it shall be the liability of the new consumer to pay such amount.”

“4.4.1 Application for new connection: (5) Application form for new connection must be accompanied with a photograph of the applicant, identity proof of the applicant, proof of applicant’s ownership or legal occupancy over the premises for which new connection is being sought, proof of applicant’s current address and the no dues certificate mentioned in Regulation 4.3.1 or in its absence undertaking to pay outstanding dues of the previous owner and in specific cases, certain other documents as detailed in Regulations 4.4.1 (7) to 4.4.1 (11).”

The aforementioned Regulations justify the argument of learned counsel for the Nigam.

Regulation 4.4.1 (5) stipulates submission of an undertaking in case, no dues certificate cannot be produced. Such an undertaking was submitted and the same is borne out from Clause 9 of the affidavit annexed with the application. Having undertaken to clear the electricity dues but, not doing so justified the passing of the impugned order. Further, it is not in dispute that Clause 21-A has been introduced in the terms and conditions of supply of energy vide sale circular dated 16.1.2013. The said clause links the electricity dues to the premises and makes the payment of electricity dues a pre-condition to release of electricity connection.

With regard to the aforementioned sale circular, an argument has been raised by learned senior counsel for the petitioner that the said circular would not apply to the case of the petitioner as its right would be governed under the rules existing as on date of sale, which was 31.7.2010. For this purpose, reliance has been placed upon a Division Bench

judgment of this Court in M/s Paramount Polymers Pvt. Ltd. Vs. DHBVN Ltd. and others, 2005 SCC online P&H, 816. This judgment has been countered by the learned counsel for the Nigam through judgment in Dakshin Haryana Bijli Vitran Vs. Paramount Polymers Pvt. Ltd. 2006 (13) SCC 101. The argument is being noted only to be rejected, because, against the Division Bench judgment of this Court in M/s Paramount Polymers (supra), the Nigam went up to the Supreme Court. The Supreme Court in its judgment relied upon by learned counsel for the Nigam held that statutory provisions in force on the date of application for electricity connection would apply and consequently, reliance upon the judgment of the High Court is misplaced. Similar view has been taken in Paschimanchal Vidyut Vitran Nigam Limited and others Vs. DVS Steel and Alloyes Private Limited and others, 2009 (1) SCC 210. It has been held that demand of clearance of arrears on account of electricity dues can be made and conditions can be imposed based upon statutory rules in force on date of application. Thus, it has to be held that the Nigam was justified in demanding payment of arrears of electricity dues.

One of the main planks of arguments of learned senior counsel for the petitioner was the judgment of the Supreme Court in M/s Isha Marbles (supra). To counter it, learned counsel for the Nigam has placed reliance upon the case of Srigdhaa Beverages (supra).

The fact situation prevailing in the case of M/s Isha Marbles (supra) was that M/s Isha Marbles had purchased the assets of M/s Patel Industries in an auction sale held by the Bihar State Financial Corporation. Possession was taken and at that stage, electricity supply

was dis-connected with a demand to clear the liabilities of the previous consumer. The writ petition filed before the High Court was dismissed, but the Supreme Court held that the concept of liability for dues being imposed upon the premises was not envisaged either under the Electricity Act, 1910 or under the Electricity Supply Act, 1948. Thus, demand from the auction-purchaser was not justified. Further, it was held that the consumer of electricity had bound himself to pay the dues. The liability was contractual in nature and cannot be enforced against the third party in the absence of any statutory provisions.

In Srigdhaa Beverages (supra), the assets of M/s S.B. Beverages Private Limited had been purchased in auction, one of the terms and conditions of which was that the auction-purchaser would be responsible for payment of electricity dues etc. Apart from this condition, the distribution company also sought to enforce its rights provided under Clauses 5.9.6 and 8.4 of the terms and conditions of supply of distribution and retail supply licensees. In this background, the judgment in M/s Isha Marbles (supra) was distinguished as a different fact situation prevailed therein. It was held that where, there is a specific condition stipulating payment of electricity dues of the previous consumer, the distribution company would be justified in insisting upon payment of such dues. DVS Steel & Alloys Pvt. Ltd. (supra) has also been referred to in the judgment.

Statutory regulations referred to hereinabove, were in force, on the date application for electricity connection was made. As held hereinabove, the Rules & Regulations in force, on the date of application

for electricity connection are applicable and thus, the facts of this case are similar to the facts in the case of Srigdhaa Beverages (supra). Of course there is no condition of sale that electricity dues have to be cleared, but that by itself would not justify taking of a different view. Consequently, it has to be held that the case of M/s Isha Marbles (supra) is not applicable.

Learned senior counsel for the petitioner has then argued that the judgment in M/s Isha Marbles (supra) is of three Judges Bench, whereas, the judgments relied upon by the learned counsel for the Nigam are of two Judges Bench. Therefore, the judgment in M/s Isha Marbles (supra) has to prevail in accordance with the doctrine of precedent. This argument has also to be rejected for the simple reason that a judgment is a precedent for what it decides. A decision is based upon the facts of a particular case and thus, while applying the doctrine of precedent, the fact situation has to be kept in view. Even though, M/s Isha Marbles (supra) is a judgment of Larger Bench, the fact situation prevailing in the said case was different from the fact situation in the later cases decided by the Supreme Court. The fact situation in the instant case is also different from that of M/s Isha Marbles (supra). Although, M/s Isha Marbles (supra), was also a case of auction-purchase of assets of an entity against whom arrears of electricity dues existed, there were no statutory Rules and Regulations or conditions of sale of electric energy in force when the said case was decided. In the present case, statutory regulations are in force and this has made a fundamental difference.

On behalf of the petitioner, great stress has been laid on the expression “as is where is” mentioned in the auction notice. The said term only signifies that the property being put to sale is being sold in the existing situation and condition. It does not convey anything more than that. Solely on the basis of this expression, it is wrong to argue that under the terms and conditions of auction, the petitioner was not bound to pay the electricity dues, because, the same are not being demanded on the basis of any contractual obligation. It has so been held earlier as well and the said finding is reiterated. The demand is independent of any contractual rights or liabilities.

Finally, it has been argued that Section 43 of the Electricity Act confers a right upon an applicant for electricity connection and a corresponding duty upon the Nigam to release a connection within a period of one month of the receipt of the application and thus, the Nigam was bound to release the electricity connection. This argument also deserves to be rejected. Section 43 of the Electricity Act cannot be construed as a stand alone provision. It has to be read in conjunction with other provisions of the said Act and Rules and Regulations framed thereunder. Thus, construed the duty imposed upon the Nigam under the said provision is subject to rights provided under the other provisions. This would also be in accordance with the accepted principles of interpretation of statutes one of which is harmonious construction.

For the aforementioned reasons, the writ petition has no merit and is dismissed.

(SUDHIR MITTAL)
JUDGE

19.02.2021

Ramandeep Singh

Whether speaking / reasoned

Yes

Whether Reportable

Yes