

Constitutional Writ

Present:

The Hon'ble Mr. Justice Syamal Kanti Chakrabarti

Judgment on 06.09.2010

W. P. No. 9389(W) of 2009

M/s. M. K. & Sons

Vs

CESC Limited & Ors.

Points:

**Outstanding due-** When nexus is proved between the defaulting consumer and the petitioner whether the petitioner is bound to pay the defaulting amount of the earlier consumer of the premises to obtain new connection.- West Bengal Electricity Regulatory Commission (Standards of Performance of Distribution Licensee Relating to Consumers Service) Regulations, 2005 Regulation 3.4.2

Facts:

The petitioner took tenancy in respect of a portion of premises no. 9X, Abinash Chowdhury Lane, Kolkata – 700 046 and applied for a new electric connection at the said premises. The respondent no. 2 informed that they are unable to take any action on his prayer unless the arrears of the previous consumer on account of consumption of electricity is paid by him. Respondents contended that one of the partners, namely, Md. Hussain Shah purchased the premises in question. Thereafter the petitioner was purportedly inducted as a tenant under the said partner of the petitioner Md. Hussain Shah. There is nexus between the defaulting consumer and the petitioner. Therefore, the petitioner is liable to pay the outstanding dues

which is consistent with the Regulation 5 of the West Bengal Electricity Regulatory Commission (Standards of Performance of Distribution Licensee Relating to Consumers Services) Regulation, 2005 and in terms of regulation 3.4.2 of the West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulation, 2007.

Held:

Four brothers forming a registered partnership firm are running a business in a premises where theft of electricity has taken place they are jointly and severally liable to pay the outstanding dues claimed by the CESC Ltd. even after shifting of venue and change of status of the occupier firm because of their clean knowledge of such fact and nexus amongst themselves to assume new identity to evade such liability. Where such nexus is proved from instrument of partnership and rectification deed amongst four brothers, they are bound to clear the dues of the CESC Ltd. in respect of the place of business of their firm in terms of Regulation 3.4.2 of the West Bengal Electricity Regulatory Commission (Standards of Performance of Distribution Licensee Relating to Consumers Service) Regulations, 2005 and that they shall be entitled to get commercial connection for supply of electricity for the firm only after discharging such liabilities and after due performance of all other statutory formalities irrespective of the fact whether such prayer is made either by a partner or on behalf of the partnership firm.

Para 11 and 12

Cases cited

(2009) 1 SCC 210

(Paschimanchal Vidyut Vitran Nigam Ltd. & Ors. –Vs.- DVS Steels and Alloys Pvt. Ltd. & Ors.); (2007) CHN 210; AIR 2007 Orissa 37(1) (Ajay

Kumar Agarwal -Vs.-O. S. F. C. & Ors.), AIR 2008 Guahati 1 (Tripura State Electricity Corporation Ltd. & Ors. -Vs.- Shyamal Chandra Debnath) and AIR 2006 Gujrat 190 (Torrent Power AEC Ltd. -Vs.- Shreeji (Rakhial) Commercial Co-operative Housing Socy. Ltd.)

For the Petitioner : Mr. Abhrajit Mitra,

Mr. Ehtesham Islam,

Mr. Wasim Akram,

Mr. Bakhtiar Shah.

For the Respondents : Mr. Anindya Mitra,

Mr. Subir Sanyal,

Mr. Srijan Nayak.

Syamal Kanti Chakrabarti, J.:

In the instant writ petition the petitioner claims that in September, 2007 he took tenancy in respect of a portion of premises no. 9X, Abinash Chowdhury Lane, Kolkata – 700 046 for the purpose of using it as office/ godown. In June, 2008 he applied before the respondent no. 3 for a new electric connection at the said premises. In response the respondent no. 3 in their letter dated 8th July, 2008 intimated that some outstanding dues in respect of consumption of electricity of previous consumers of the said premises is to be settled and as such asked him to attend their Commercial Department to resolve it. On 18.11.2008 he was officially asked to meet the Deputy Manager, Loss Control Cell of the CESC Limited to resolve the dues. Accordingly he contacted several officials, but to no effect. On 02.03.2009 he again requested the respondent no. 3 to give him an opportunity of being heard which was denied. Then he requested the respondent nos. 2 and 3 by

letter dated 26.03.2009 to take immediate steps for supply of electricity to his tenanted premises as he is not liable to pay third party's liability for consumption of electricity. On the same date he received another letter dated 20.03.2009 from the respondent no. 2 to meet him again. But that too yielded no fruitful result and the respondent authorities adhered to their decision to pay the outstanding dues of the previous consumer first and thereafter his prayer will be considered. He again issued a reminder on 03.04.2009 and ultimately through lawyer demanded justice on 20.04.2009 by issuing a notice to the respondent nos. 2 and 3. In response the respondent no. 2 informed in their letter dated 30.04.2009 that they are unable to take any action on his prayer unless the arrears of the previous consumer on account of consumption of electricity is paid by him. Having no other alternative he has filed the present writ petition praying for a direction upon the respondents, their men and agents to give new electric connection at his tenanted premises and to set aside the order dated 23.04.2009 passed by the respondent no. 3 in the matter demanding outstanding dues of previous consumer.

2. The respondent nos. 1, 2 and 3 in their affidavit-in-opposition on the contrary have claimed that in the disputed premises at 9X, Abinash Chowdhury Lane, Kolkata – 700 046 there are two disconnected supplies for theft or unauthorised use of electricity and a sum of Rs. 12,27,140/- and Rs. 22,90,547/- respectively is due and payable against such disconnected supplies. It is further contended that Md. Nadim, son of Ezaz Ahmed Vohra was the previous consumer and vendor of the premises in question and they were running their business in the same in the name and style of M/s. Plasto Wing and now the same place are being used by the writ petitioner seeking supply of new connection. The disconnected service installations are still

existing in the premises and the writ petitioner sought to install the meters in the same service position. The final assessment order was issued in the name of Md. Nadim and against M/s. Plasto Wing (Annexure R-1) in respect of the Consumer No. 29188048000 and Meter No. 2141671. They have further contended that one of the partners, namely, Md. Hussain Shah purchased the premises in question in September, 2007 in his personal name from the said Ezaz Ahmed Vohra. Thereafter the petitioner was purportedly inducted as a tenant under the said partner of the petitioner Md. Hussain Shah. The petitioner made his application in June, 2007 for commercial use but did not submit complete partnership agreement for the partnership firm and also the Deed of Conveyance in the name of Md. Hussain Shah (Purchaser) and Janab Ejaz Ahmed Bhora (Vendor) till 20th August, 2009. It is further contended that Md. Hussain Shah, a partner of the petitioner firm, was fully aware of the disconnected supplies and the huge amount of outstanding dues against such supplies. Subsequently the documents called for were supplied by the writ petitioner in his letter dated 20.08.2009. It transpires from the said Deed of Conveyance that he shall hereafter keep the purchaser, his heirs, executors, administrators, legal representatives and assign, saved, harmless and indemnified against all estates, charges, encumbrances, litigations, mortgages, heirs, attachments, lispendences, trusts, claims and demand whatsoever created, occasioned or made by the vendor or any person or persons lawfully or equitably or rightfully claiming as aforesaid and any loss, damage, expense, claim, demand action and proceeding arising in respect of the said property and/or any part thereof. The aforesaid clause of indemnification keeps the petitioner indemnified against any demand or claim of CESC for consumption of electricity at and in respect of the said property. In view of the aforesaid clause the petitioner is now liable to pay

the aforesaid dues of the vendor prior to obtaining supply of electricity at the same premises as the same has been purchased by one of the partners of the petitioner firm from the defaulting consumer/ vendor Ejaz Ahmed Vhora at a total undervalued price of Rs. 15,00,000/- for more than six cottahs of land with standign structure whereas the present market price of land in the locality per cottah will be more than Rs. 6,00,000/-, i.e., the total value would have been more than Rs. 36,00,000/-. It is further contended that purchase of the property at such an undervalued rate is on account of full knowledge of the vendor that huge outstanding dues are lying in respect of the same premise and this clearly establishes the nexus between the defaulting consumer/ vendor and the petitioner purchaser. Therefore, the petitioner is liable to pay the outstanding dues which is consistent with the Regulation 5 of the West Bengal Electricity Regulatory Commission (Standards of Performance of Distribution Licensee Relating to Consumers Services) Regulation, 2005 and in terms of regulation 3.4.2 of the West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulation, 2007. Moreover, only the manager of the writ petitioner has affirmed the petition instead of its partner. In absence of any affidavit of competency on behalf of the writ petitioner such writ petition is not maintainable in its present form.

3. In their affidavit-in-reply the writ petitioner has claimed that the said Nesar Ahmed has authority to affirm in this case as by virtue of his appointment as Manager of the partnership firm he has been authorised by the partners to deal with all matters concerning and relating to the said firm. They have, however, denied all the allegations made against them by the respondents in their affidavit-in-opposition. In paragraph 19 of such reply it is categorically claimed that neither the writ petitioner nor any other partner

of the said firm has any right, title and interest as owner of the said premises. It is specific case of the writ petitioner that it is a tenant in respect of one portion of the said premises and as such not liable to pay any outstanding dues of the previous tenants/ occupiers of the said premises.

4. In course of hearing the maintainability point has not been pressed and I also do not find any contrary material on record to disbelieve the contention made in the affidavit-in-reply filed on behalf of the present petitioner. Moreover there is no denial that the person affirming affidavit for the petitioner firm is not its Manager. Therefore, I hold that the petition affirmed by its Manager is maintainable in law.

5. So points for considerations in this case are:

- a) Whether there is any nexus between the writ petitioner and previous consumer of electricity of the same premises;
- b) Whether the writ petitioner is liable to pay the outstanding dues as claimed by the respondents AND
- c) Whether the writ petitioner is entitled to get new electricity connection in the premises as prayed for.

6. So far as the first point is concerned it appears from paragraph 4(a) of the affidavit-in-opposition that the petitioner, M/s. M. K. & Sons is a registered partnership firm consisting of four partners. All the four partners are the sons of Late Md. Kamgar Shah. The names of the partners are Janab Md. Hossain Shah, Janab Fateh Ali Shah, Janab Ahmed Shah and Janab Munawar Ali Shah. None of them have filed the present writ petition which is filed in firm name to conceal their identity. It will appear from the Rectification Deed Of Partnership dated 22.05.2009 that the same was executed between Md. Husain Shah, son of Late Md. Kamgar Shah (First Part) and Fateh Ali Shah, son of Late Md. Kamgar Shah (Second Part), Ahmed Shah, son of Late

Kamgar Shah (Third Part) and Nunawar Ali Shah, son of Late Kamgar Shah (Fourth Part). It also appears from such instrument that by virtue of an indenture dated 04.01.1980 all the aforesaid four parties entered into a partnership firm for carrying on business of Kerosene Oil dealership in co-ownership under the firm name and style of M/s. M. K. & Sons with effect from and on the terms and conditions as mentioned therein and whereas there has been a change in the residential address of the partners as also in the sale office and godown address of the firm, they have taken steps for necessary correction in the earlier deed to avoid any dispute or difference and agreed that the newly constituted partnership business shall be deemed to have commenced from April, 2009 and all the assets, liabilities, benefits and privileges belonging to the old firm styled as M/s. M. K. & Sons have vested in the new firm constituted under the aforesaid indenture and the parties thereof shall be and become partners in the aforesaid business of Kerosene Oil and other petroleum products under the name and style of M/s. M. K. & Sons and that the administrative office/ godown of such firm will be at 9X, Abinash Chowdhury Lane, Kolkata – 700 046.

7. From the relevant Sale Deed dated 10th September, 2007 it will appear that Ejaz Vohra, son of Late Mia Nazir Hossain Vohra is the vendor and Md. Husain Shah is the purchaser of about 6 cottahs and 20 square feet of land together with standing structures at premises no. 9X, Abinash Chowdhury Lane, Kolkata – 700 046 (formerly premises no. 9/11/14, 9X, Abinash Chowdhury Lane). Clause 'e' of the said registered document reads as follows:

“AND THAT the Vendor abovenamed shall hereafter keep the Purchaser, his heirs, executors, administrators, legal representatives and assigns saved harmless and indemnified against all estates, charges, encumbrances,

litigations, mortgages, liens, attachments, lispendens, trusts, claims and demands whatsoever created, occasioned, or made by the Vendor or any person or persons lawfully or equitably or rightfully claiming as aforesaid and any losses, damages, expenses, claims, demands, actions and proceedings, arising in respect of the said property and/or any part thereof". Therefore, learned lawyer for the respondent has rightly pointed out that by such instrument the purchaser has taken up the liability of paying all outstanding dues of the vendor in respect of the said premises which cannot be denied at present. Moreover, from the recital of the aforesaid documents it also appears that the present writ petitioners, M/s. M. K. & Sons is a partnership firm and amongst four partners who obviously had full knowledge of the assets and liabilities of the firm and by Rectification Deed of Partnership they have in fact continued the old partnership business at new premises. Therefore, all the assets and liabilities of the said firm has been devolved upon the partners by virtue of such rectification deed. By filing certain rent receipts the petitioner has tried to prove that M/s. M. K. & Sons is a tenant in respect of the aforesaid premises but Md. Husain Shah seems to be the real owner of the said premises as well as partner of the petitioner firm in disguise. Therefore, by necessary implication it is apparent on the face of record that the ownership has been retained by Md. Husain Shah but the premises has been occupied in the name of a partnership firm as tenant to which the writ petitioner had interest. This is a clear proof of nexus by and between the parties to evade the outstanding liabilities of the consumption of electricity by theft or pilferage as alleged by the respondents. Each partner is, therefore, jointly and severally liable to shoulder the liability of their registered firm under Section 25 of the Indian Partnership Act.

8. Learned lawyer for the respondent has claimed that Section 43 of the Electricity Act provides for supply of electricity to a premises and not to any consumer so any charge payable in respect of any premises is to be cleared in terms of regulation 3.4.2 of the Electricity Code. He has relied upon the principles laid down in (2009) 1 SCC 210 (Paschimanchal Vidyut Vitran Nigam Ltd. & Ors. –Vs.- DVS Steels and Alloys Pvt. Ltd. & Ors.) and (2007) CHN 210 in support of his contention. The Hon'ble Apex Court in the aforesaid case has observed as follows:

“But the above legal position is not of any practical help to a purchaser of a premises. When the purchaser of a premises approaches the distributor seeking a fresh electricity connection to its premises for supply of electricity, the distributor can stipulate the terms subject to which it would supply electricity. It can stipulate as one of the conditions for supply, that the arrears due in regard to the supply of electricity made to the premises when it was in the occupation of the previous owner/occupant, should be cleared before the electricity supply is restored to the premises or a fresh connection is provided to the premises. If any statutory rules govern the conditions relating to sanction of a connection or supply of electricity, the distributor can insist upon fulfilment of the requirements 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.”

In this connection the provisions laid down in Regulation 3.4.2 of the West Bengal Electricity Regulatory Commission (Standards of Performance of Distribution Licensee Relating to Consumers Services) Regulation, 2005 is quoted below:

“3.4.2 The licensee shall be eligible to recover from a new and subsequent consumer(s) the dues for the previous and defaulting consumer(s) in respect of the same premises only if a nexus between the previous and defaulting consumer(s) and the new consume(s) in respect of the same premises is proved. The onus of proving a nexus, if claimed by a licensee, shall lie on the licensee.”

9. Learned lawyer for the petitioner on the contrary has drawn my attention to the principles laid down in AIR 2007 Orissa 37(1) (Ajay Kumar Agarwal -Vs.-O. S. F. C. & Ors.), AIR 2008 Guahati 1 (Tripura State Electricity Corporation Ltd. & Ors. -Vs.- Shyamal Chandra Debnath) and AIR 2006 Gujrat 190 (Torrent Power AEC Ltd. -Vs.- Shreeji (Rakhial) Commercial Co-operative Housing Socy. Ltd.) to prove that real consumer is an individual and the transferee has the liability to clear the dues of the transferor and a defaulting tenant cannot be liable to pay the arrears as pre-condition for granting connection to a subsequent tenant or owner of land.

10. After perusal of the facts and circumstances of the aforesaid cases, I hold that the decision taken by the Hon'ble Apex Court shall prevail over the decisions taken by the Hon'ble High Courts as referred to above. What is apparent on the face of record that four sons of Late Md. Kamgar Shah are running the petitioner firm as partners from 04.01.1980 and theft of electricity occurred within their full knowledge in the premises in respect of which they have executed rectification deed as above. Considering all these facts I hold that there is nexus between the previous owner and the present firm, i.e., amongst all those four brothers seeking supply of electricity for commercial purpose in the same premises without paying any outstanding dues and by indemnifying the previous owner in written instruments amongst the partners of the firm to evade the liability and to deprive the

respondent CESC Limited of its legitimate claim of recovery of arrears by suppressing existing fact in a round about way.

11. So I hold that where four brothers forming a registered partnership firm are running a business in a premises where theft of electricity has taken place they are jointly and severally liable to pay the outstanding dues claimed by the CESC Ltd. even after shifting of venue and change of status of the occupier firm because of their clean knowledge of such fact and nexus amongst themselves to assume new identity to evade such liability.

12. I also hold that where such nexus is proved from instrument of partnership and rectification deed amongst four brothers, they are bound to clear the dues of the CESC Ltd. in respect of the place of business of their firm in terms of Regulation 3.4.2 of the West Bengal Electricity Regulatory Commission (Standards of Performance of Distribution Licensee Relating to Consumers Service) Regulations, 2005 and that they shall be entitled to get commercial connection for supply of electricity for the firm only after discharging such liabilities and after due performance of all other statutory formalities irrespective of the fact whether such prayer is made either by a partner or on behalf of the partnership firm.

13. All the three points are accordingly decided.

14. So I dispose of this writ application with the following directions:

- a) That the present writ petitioner is liable to pay the arrears of Rs. 35,17,687/- as demanded by the respondents either in full or by instalments as may be granted by the CESC Limited within such time as will be fixed by them on prayer of the firm, if made;
- b) Upon payment of such dues in full the CESC Limited shall supply electricity to the writ petitioner as prayed for within one month from the date

of full payment of the outstanding dues and upon compliance of all other formalities as may be required by the supplier.

15. Urgent photostat certified copy of this order, if applied for, be given to all the parties upon compliance of all necessary formalities.

(Syamal Kanti Chakrabarti, J.)