

2023 STPL(Web) 182 Gauhati
[2024 STPL 1650 Gauhati]

GAUHATI HIGH COURT
(HON'BLE MR. JUSTICE MANISH CHOUDHURY J.)

M/S BORAH AND COMPANY JIBAN PHUKAN NAGAR

Petitioner

VERSUS

ASSAM POWER DISTRIBUTION COMPANY LTD. AND 3 ORS.

Respondents

WP(C) 989 of 2014-Decided on 7-11-2023

Electricity: Outstanding arrears from previous owner

Civil, Electricity

Constitution of India, Article 226 - Assam Electricity Regulatory Commission [Electricity Supply Code and Related Matters] Regulations, 2004 - Electricity Act, 2003 - Section 43, 49, 50, 56 – Electricity - Outstanding arrears from previous owner - The petitioner, a partnership firm, sought a writ petition under Article 226 challenging a decision by the Assam Power Distribution Company Limited (APDCL) to deny a new electricity connection to their premises due to outstanding arrears from previous electricity bills.

The court directed interim relief for immediate electricity connection, subject to 50% payment of outstanding dues, with the remaining 50% to be paid upon dismissal of the writ petition.

The petitioner participated in an auction sale of a property and purchased a portion of land with a Business Centre cum Market Complex. They subsequently applied for a new electricity connection, which was denied by APDCL citing outstanding dues.

The court referred to the Assam Electricity Regulatory Commission [Electricity Supply Code and Related Matters] Regulations, 2004 and the Electricity Act, 2003. It cited a Supreme Court decision (K.C. Ninan vs. Kerala State Electricity Board) regarding the liability of auction purchasers for previous dues in properties sold on 'as is where is' basis.

The court dismissed the writ petition, holding the petitioner liable for outstanding electricity dues as per the auction sale agreement. It directed the petitioner to pay the outstanding dues as per the interim order, with APDCL waiving the accrued interest on the principal dues.

(Para 15, 16)

Advocates : Petitioner : Mr. R.S. Mishra, Advocate
Respondent nos. 1 & 2 : Mr. B. Choudhury, SC, APDCL

JUDGMENT

1. The present writ petition under Article 226 of the Constitution of India is preferred against a decision conveyed by the respondent Assam Power Distribution Company Limited [APDCL], Dibrugarh vide its Letter bearing no. APDCL/SDE/DESD-III/2011-12/2012/981 dated 03.09.2012, whereby, it has been conveyed to the petitioner that new electricity service connection to the premises of the Dibrugarh

Development Authority [DDA] Market, Chowkidinghee cannot be provided due to arrear outstanding amounts, remained to be paid in connection with previous electricity bills.

2. The writ petition has been preferred for setting aside and quashing of the said decision conveyed by the Letter dated 03.09.2012 and the petitioner has sought for a direction to the respondent APDCL authorities to release new service connection to its premises. When the writ petition was moved on 24.02.2014, it was observed, in the interim, that the APDCL authorities shall provide electricity connection to the premises of the petitioner in question immediately, subject to payment of 50% of the outstanding dues, as indicated in the Letter dated 03.09.2012. It was further provided that the amount shall be adjustable, if the writ petition succeeds. As regards the balance 50% of the outstanding dues, the petitioner was directed to furnish an undertaking for payment of the same in case of dismissal of the writ petition.

3. The petitioner is a partnership firm, registered under the Partnership Act, 1932, with its principal place of business at Dibrugarh, Assam.

4. It appears necessary, at this stage, to narrate, in brief, the sequence of events leading to the issuance of the Letter dated 03.09.2012.

4.1. An Auction Sale Notice was published in the English daily newspaper, 'The Assam Tribune', in its issue dated 04.07.2011. The said Auction Sale Notice was published by the Recovery Officer of the Debts Recovery Tribunal, Guwahati in connection with O.A. Case no. 06/2005 [Housing & Urban Development Corporation Limited ...Certificate Holder vs. Dibrugarh Development Authority & othersCertificate Debtors].

4.2. The contents of the said Auction Sale Notice dated 04.07.2011 are extracted hereinbelow, for ready reference.

AUCTION SALE NOTICE DEBTS RECOVERY TRIBUNAL, ASSAM, MEGHALAYA, NAGALAND, ARUNACHAL PRADESH, MANIPUR, MIZORAM, TRIPURA & SIKKIM APSARA BUILDING : DR. B. Baruah Road, Ulubari, Guwahati-781 007. O.A. CASE NO. 06/05

Housing & Urban Development Corporation Ltd.Certificate holder –Verses – Dibrugarh Development Authority & Others Certificate Debtors

It is for general information that the under mentioned properties belonging to the certificate — debtors Dibrugarh Development Authority [defaulters/certificate — debtors] above named will be sold in public auction on the date time and place stated herein below on the following terms and conditions :

[a] The property will not be sold below the reserved price.

[b] Intending bidders are required to make earnest deposit as shown below by way of pay order/demand draft payable at Guwahati favouring the Recovery Officer, DRT, Apsara Building, Dr.

B. Baruah Road, Ulubari, Guwahati-781007.

[c] The said deposit will be adjusted in case of successful bidders otherwise refunded on the date of sale itself.

[d] Successful bidder shall deposit 25 % of the sale proceeds by way of pay order/demand draft payable at Guwahati favouring the Recovery Officer, DRT, Guwahati-781007 to be received by him immediately after fall of hammer, failing which the earnest money deposited shall be forfeited.

[e] The purchaser shall deposit the balance 75% of the sale proceeds within 15 days from the date of auction sale.

[f] In any case cheques will not be accepted.

[g] Properties will be sold in "AS IS WHERE IS" basis and subject to other terms and conditions of Income Tax Act. 1961 and Rules there under.

[h] Acceptance of the highest bid will be subject to approval of the undersigned.

[i] Auction may be postponed at any time, without prior notice as per discretion of the undersigned.

[j] Interested bidders are required to submit their earnest money deposit before 12 Noon on the date of auction, failing which they will not be allowed to participate in auction.

[k] Interested bidders may inspect the property to be sold in auction at the site after obtaining written consent from the certificate -holder Corporation during office hours.

PARTICULARS OF PROPPERTY TO BE SOLD IN PUBLIC AUCTION

Business Centre cum Market Complex standing on a land measuring more or less 3 Bighas under part of Dag no. 295, first class Basti Land covered by Tea Periodic Patta no. 1 situated at Jalan Nagar South of Extended Khalihamari Gaon Ward, Mouza Dibrugarh Town, P/S Sub-Registry Office and Dist-Dibrugarh in the name of Dibrugarh Development Authority. Dag wise details of the aforesaid plot of land :

Periodic Khiraj Patta no.

Dag no.

Area in Spmt.

Tea Periodic Patta no. 1
295

4014.86

The land is bounded as under :

North — Narsingdass Surajmall Properties [P] Ltd's land [Part of Dag no. 295] South — Narsingdass Surajmall Properties [P] Ltd's land [Part of Dag nos. 297 & 298] East — Narsingdass Surajmali Properties [P] Ltd's land [Part of Dag no. 295] West — Mancotta Road.

Reserved price : Rs. 2,57,12,230/-[Rupees two crore fifty seven lacs twelve thousand two hundred thirty) only.Earnest deposit : Rs. 12,85,811.50 (Rupees twelve lacs eighty five thousand six hundred eleven and paise fifty) only.

Date of auction : 04.08.2011 Time of auction : 1.00 p.m.Place of auction : Office of the Debts Recovery Tribunal, Apsara Buliding, Dr. B. Baruah Road, Ulubari -781007.For further details, contact the undersigned or Housing & Urban Development Corporation Ltd.[HUDCO], Ganeshguri, Guwahatl-5.Given under my hand and seal at Guwahati on this 1st day of July, 2011.

Sd/-

Recovery Officer i/c Debts Recovery Tribunal CD/AN/1382/1
Guwahati -781007

4.3. The petitioner firm participated in the Auction Sale Process of the property, held in the office of the respondent no. 4, on 04.08.2011 and purchased 2/3rd part of the total land measuring 3 Bighas, that is, 2 Bighas i.e. 28,800 square feet of the property comprised of 3 Bighas of land with a Business Centre cum Market Complex standing on that land [‘the subject-property’, for short] at a consideration of Rs. 1,71,46,686/-. One Mr. Ratul Talukdar purchased the remaining part of the auctioned property in the same auction sale proceedings held on 04.08.2011. The entire property was auctioned at an amount of Rs. 2,57,20,029/-.

4.4. On deposit of the amount of Rs. 1,71,46,686/-towards full and final payment for the 2/3rd portion of the auctioned subject-property by the petitioner firm on 18.08.2011, the Recovery Officer, Debt Recovery Tribunal, Guwahati passed an order of confirmation of sale of immovable property on 02.09.2011 confirming the sale of the property with the following specifications :

SPECIFICATION OF PROPERTY

All that piece and parcel of land measuring 2 Bigha, 0 Katha, 0 Lecha, i.e. 28,800 Sq. ft. more or less [out of total auctioned land measuring 3 Bighas, 0 Katha, 0 Lecha] covered by T P Patta No. 1. Dag no. 295 of Dibrugarh Town Mouza, District Dibrugarh, Assam and bounden by :

North : Sri Paban Changmai South : Land fallen in the share of Sri Ratul Talukdar East : Land of Jalan Nagar Tea Co. West : Mancotta Road.

4.5. A Certificate of Sale of immovable property came to be issued in prescribed Form no. I.T.C.C.20 as per Rule 65 of the 2nd Schedule to the Income Tax Act, 1961 by the Recovery Officer, Debt Recovery Tribunal, Guwahati in connection with O.A. no. 06/2005 certifying that the petitioner firm has been declared to be the purchaser jointly with Mr. Ratul Talukdar at a sale by Public Auction on 04.08.2011 of the subject-property which was included in the property of the Dibrugarh Development Authority [Certificate Debtor] in execution of Certificate no. 677 dated 06.05.2008 issued by the Debt Recovery Tribunal, Guwahati for recovery of debts under the Income Tax Act, 1961 from the Dibrugarh Development Authority, Dibrugarh [O.A. Case no. 06/2005 : Housing & Urban Development Corporation Limited ...Certificate Holder vs. Dibrugarh Development Authority & others ...Certificate Debtors]. With the issuance of the said Sale Certificate from the Recovery Officer, Debt Recovery Tribunal, Guwahati, the sale has been confirmed and became absolute with effect from 05.09.2008. After issuance of the Sale Certificate, the possession of the auctioned subject-property, purchased by the petitioner firm, was handed over to the partners of the petitioner firm by the Recovery Inspector, Debt Recovery Tribunal in presence of the officials of the Certificate Holder, Land Revenue personnel and the Circle Officer, Dibrugarh on 07.12.2011.

5. It was after taking possession of the auctioned subject-property, the petitioner firm applied for registration before the respondent APDCL authorities with a view to obtaining a fresh electricity service connection on 20.06.2012. The application was registered by the respondent APDCL authorities vide Registration no. 149732. When the petitioner firm was expecting to obtain fresh electricity service connection to the subject-property it had purchased in the auction, the Letter dated 03.09.2012 came to be served on the petitioner firm conveying the fact about arrear outstanding dues against previous electricity bills and about the inability on the part of the respondent APDCL authorities to provide any fresh electricity service connection pursuant to the application submitted by the petitioner vide Registration no. 149732.

6. I have heard Mr. R.S. Mishra, learned counsel for the petitioner and Mr. B. Choudhury, learned Standing Counsel, APDCL for the respondent nos. 1 & 2.

7. As per Order dated 21.05.2014 of the Lawazima Court, the notices were duly served upon the respondent no. 3 and the respondent no. 4 respectively. Despite service of notices neither the respondent no. 3 nor the respondent no. 4 have chosen not to enter appearance in the present writ petition.

8. The only issue that has arisen for consideration is whether the petitioner firm which has purchased the subject-property with a building i.e. Business Centre cum Market Complex standing thereon, pursuant to the Auction Sale Notice, is liable for any outstanding arrear amounts pending against previous electricity bills, which were not paid by the consumers occupying stalls in the Business Centre cum Market Complex i.e. DDA Market, who did not pay their respective dues in time.

9. It is apt to refer to the three-Judges Bench decision of the Hon'ble Supreme Court of India rendered in a batch of civil appeals including Civil Appeal no. 2109-2110 of 2004 [K.C. Ninan vs. Kerala State Electricity Board and others], decided on 19.05.2023. One of the civil appeals, decided by the said judgment, had originated from the State of Assam. In so far as the State of Assam is concerned, the Hon'ble Supreme Court of India considered the provisions of the Assam Electricity Regulatory Commission [Electricity Supply Code and Related Matters] Regulations, 2004 framed by the Assam Electricity Regulatory Commission. Clause 3.6 of the Assam Electricity Regulatory Commission [Electricity Supply Code and Related Matters] Regulations, 2004 deals with the regulation of electricity supply requiring a person occupying a new premises to ensure that all the outstanding electricity dues are duly paid up and discharged.

The following issues arose for determination before the three-Judges Bench in K.C. Ninan [supra].

D. Issues

23. Based on the submissions of the parties, the specific issues which arise for determination are :

- a. Whether the Universal Service Obligation under Section 43 of the 2003 Act is linked to premises to which the connection is sought;
- b. Whether a connection of electricity supply sought by an auction-purchaser comprises a reconnection or a fresh connection;
- c. Whether the power to recover arrears of a previous owner or occupier from an auction-purchaser of the premises falls within the regulatory regime of the 2003 Act;

- d. Whether the power to enable the recovery of arrears of the previous owner or occupier from an auction-purchaser can be provided through subordinate legislation by the State Commissions;
- e. Whether the 1910 Act, 1948 Act, and the 2003 Act have express provisions enabling the creation of a charge or encumbrance over the premises;
- f. Whether the statutory bar on recovery of electricity dues after the limitation of two years provided under Section 56[2] of the 2003 Act, will have an implication on civil remedies of the Electric Utilities to recover such arrears; and
- g. What is the implication of an auction-sale of premises on “as is where is” basis, with or without reference to electricity arrears of the premises?

10. The Hon’ble Supreme Court of India has summed up the conclusions arrived at after determining the issues in paragraphs 327 & 328 of the judgment. For ready reference, the same are extracted hereinbelow:

327. Taking all facts and circumstances into consideration, including the lapse of more than two decades since the appeals were filed before this Court and the equities arising in favour of one party or the other, we direct the Electric Utilities to waive the outstanding interest accrued on the principal dues from the date of application for supply of electricity by the auction purchasers

I. Conclusions 328. The conclusions are summarised below :

- a. The duty to supply electricity under Section 43 of the 2003 Act is not absolute, and is subject to the such charges and compliances stipulated by the Electric Utilities as part of the application for supply of electricity;
- b. The duty to supply electricity under Section 43 is with respect to the owner or occupier of the premises. The 2003 Act contemplates a synergy between the consumer and premises. Under Section 43, when electricity is supplied, the owner or occupier becomes a consumer only with respect to those particular premises for which electricity is sought and provided by the Electric Utilities;
- c. For an application to be considered as a ‘reconnection’, the applicant has to seek supply of electricity with respect to the same premises for which electricity was already provided. Even if the consumer is the same, but the premises are different, it will be considered as a fresh connection and not a reconnection;
- d. A condition of supply enacted under Section 49 of the 1948 Act requiring the new owner of the premises to clear the electricity arrears of the previous owner as a precondition to availing electricity supply will have a statutory character.
- e. The scope of the regulatory powers of the State Commission under Section 50 of the 2003 Act is wide enough to stipulate conditions for recovery of electricity arrears of previous owners from new or subsequent owners;
- f. The Electricity Supply Code providing for recoupment of electricity dues of a previous consumer from a new owner have a reasonable nexus with the objects of the 2003 Act;

g. The rule making power contained under Section 181 read with Section 50 of the 2003 Act is wide enough to enable the regulatory commission to provide for a statutory charge in the absence of a provision in the plenary statute providing for creation of such a charge;

h. The power to initiate recovery proceedings by filing a suit against the defaulting consumer is independent of the power to disconnect electrical supply as a means of recovery under Section 56 of the 2003 Act;

i. The implication of the expression “as is where is” basis is that every intending bidder is put on notice that the seller does not undertake responsibility in respect of the property offered for sale with regard to any liability for the payment of dues, like service charges, electricity dues for power connection, and taxes of the local authorities; and

j. In the exercise of the jurisdiction under Article 142 of the Constitution, the Electric Utilities have been directed in the facts of cases before us to waive the outstanding interest accrued on the principal dues from the date of application for supply of electricity by the auction purchasers.

11. It has been held to be consistent position in law that the condition in supply stipulated by the licensee or Boards, have a statutory character. The implication of the sale premises on ‘as is where is’ basis with or without reference to electricity arrears of the premises has also been considered in view of the fact that in the said batch of civil appeals, the premises were sold in auction sale generally held on an ‘as is where is’ basis. It has been observed that a sale on ‘as is where is’ basis postulates that the purchaser would be the acquiring the asset with all its existing rights, obligations and liabilities. When a property is sold on ‘as is where is’ basis, encumbrances on the property stand transferred to the purchaser upon the sale.

12. After considering a number of precedents, it has been observed as under :

138. Thus, the implication of the expression “as is where is” or “as is what is basis” or “as is where is, whatever there is and without recourse basis” is not limited to the physical condition of the property, but extends to the condition of the title of the property and the extent and state of whatever claims, rights and dues affect the property, unless stated otherwise in the contract. The implication of the expression is that every intending bidder is put on notice that the seller does not undertake any responsibility to procure permission in respect of the property offered for sale or any liability for the payment of dues, like water/service charges, electricity dues for power connection and taxes of the local authorities, among others.

141. To conclude, all prospective auction purchasers are put on notice of the liability to pay the pending dues when an appropriate “as is where is” clause is incorporated in the auction sale agreement. It is for the intending auction purchaser to satisfy themselves in all respects about circumstances such as title, encumbrances and pending statutory dues in respect of the property they propose to purchase. In a public auction sale, auction purchasers have the opportunity to inspect the premises and ascertain the facilities available, including whether electricity is supplied to the premises. Information about the disconnection of power is easily discoverable with due diligence, which puts a prudent auction purchaser on a reasonable enquiry about the reasons for the disconnection. When electricity supply to a premises has been disconnected, it would be implausible for the purchaser to assert that they were oblivious of the existence of outstanding electricity dues.

142. In terms of the legal doctrine of caveat emptor, it becomes the duty of the buyer to exercise due diligence. A seller is not under an obligation to disclose patent defects of which a buyer has actual or constructive notice in terms of Section 3 of the Transfer of Property Act, 1882. However, in terms of Section 55[1][a], in the absence of a contract to the contrary, the seller is under an obligation to disclose material defects in the property or in the seller's title thereto of which he is aware and which a buyer could not with ordinary care discover for himself.

13. The Hon'ble Supreme Court of India had also considered the provisions of the Assam Electricity Regulatory Commission [Electricity Supply Code and Related Matters] Regulations, 2004 in the following manner :

307. The Assam Electricity Regulatory Commission framed the AERC Supply Code on 30 August 2004 in exercise of its power under Section 50 of the 2003 Act to provide for recovery of electricity charges. Clause 3.6 deals with requisition of supply. Clause 3.6.4 is extracted below :

“3.6.4 In case of a person occupying a new property, it will be the obligation of that person to check the bills for the previous months or, in case of disconnected supply, the amount due as per the licensee's records immediately before his occupation and ensure that all outstanding electricity dues as specified in the bills subject to limitation as per sub-section [2] of Section 56 of the Act are duly paid up and discharged. The licensee shall be obliged to issue a certificate of the amount outstanding from the connection in such premises on request made by such person.”

14. In Special Leave Petition [C] no. 24502 of 2010 [Carbon Resources vs. Assam Electricity Regulatory Commission], the facts, in brief, inter alia, were that the Recovery Officer of the Debt Recovery Tribunal issued an Auction Sale Notice for the land in question stipulating in the Auction Sale Notice that the properties would be sold on 'as is where is' basis. The appellant therein was the highest bidder and was declared as an auction-purchaser. Accordingly, a Sale Certificate was issued in favour of the appellant and the possession was handed over to the appellant by the Bank. The Recovery Officer also confirmed the auction sale in favour of the appellant who took over the possession of the property. The appellant thereafter, applied for a high-tension industries electricity connection but the Board denied it due to pending arrears of the previous owner. The Hon'ble Supreme Court of India upheld the validity of Regulation 3.6.4 of the Assam Electricity Regulatory Commission [Electricity Supply Code and Related Matters] Regulations, 2004 observing that the said Regulation is reasonable and within the ambit of the powers conferred by Section 50 of the Electricity Act, 2003. It has been observed that the clause is reasonable and consistent with the provisions of the Electricity Act, 2003 and accordingly, the appellant therein was obligated to check the bills for previous months and ensure that all the outstanding amounts were duly paid up and discharged. Finding no merit to the plea raised, Special Leave Petition [C] no. 24502 of 2010 was negated.

15. Reverting back to the facts of the case, it is an admitted position that the Auction Sale Notice, published on 04.07.2011, clearly stipulated that the subject-property would be sold on 'as is where is' basis, subject to the other terms and conditions of Income Tax Act, 1961 and rules framed thereunder. In view of the authoritative pronouncement of the Hon'ble Supreme Court of India in K.C. Ninan [supra] decided on 19.05.2023, observing that the auction purchaser of a property purchased with the stipulation, 'as is where is' basis, would be liable for the previous dues, this writ petition lacks merit and is liable to be dismissed. It is accordingly dismissed.

16. In view of dismissal of the writ petition, the petitioner shall deposit the outstanding dues in terms of the interim order dated 24.02.2014. For the purpose of facilitating such payment, the respondent APDCL

authorities shall inform the petitioner within a period of 15 [fifteen] days from today as regards outstanding dues to be payable and after the balance amount is paid by the petitioner within a period of 6 [six] weeks from the date of receipt of the information about the outstanding dues, it is observed that the respondent APDCL authorities, in view of the direction given in Paragraph 327 in K.C. Ninan [supra] shall waive the outstanding interest accrued on the principal dues from the date of application for supply of electricity made by the petitioner as the auction purchaser. There shall, however, be no order as to cost.

GAUHATI HIGH COURT

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