

* **HIGH COURT OF DELHI AT NEW DELHI**

+ LPA No.2725/2005

% Date of decision : 2nd July, 2009

BSES RAJDHANI POWER LTD Appellant
Through: Mr.A.S.Chandhiok, Senior Advocate with
Mr.Amar Gupta, Mr.Amit Kapur,
Mr.Anupam Varma, Mr.Mayank Mishra,
Mr.Ritesh Kumar, Mr.Divyam Agarwal,
Mr.Arjun Mahajan and Mr.Sandeep Bajaj,
Advocates

versus

SAURASHTRA COLOR TONES PVT.LTD
& ANR. ... Respondents
Through: Mr.S.C. Nigam with Mr.A.Nayak,
Advocates
Mr.M.S.Gupta, Dy. Director(Law) DERC
in person

CORAM:

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE S.N.AGGARWAL
HON'BLE DR. JUSTICE S.MURALIDHAR

1. Whether reporters of the local news papers be allowed to see the judgment? Y
2. To be referred to the Reporter or not ? Y
3. Whether the judgment should be reported in the Digest? Y

AJIT PRAKASH SHAH, CHIEF JUSTICE:

RELEVANT FACTS

1. The appellant is a distribution company engaged in distribution of electricity in its area of supply under a

statutory licence issued by the respondent No.2, Delhi Electricity Regulatory Commission (DERC for short). The respondent No.2 is constituted and established under Section 17 of the Electricity Regulatory Commissions Act, 1988 (for short the "ERC Act"). The respondent No.1, a company who is the original writ petitioner, purchased an industrial shed being Shed No.1 Category-1, DSIDC Complex, Nangloi, Delhi. Initially connection No.002-156-022/IP was sanctioned for a load of 89.52 KW in the name of the original allottee, Dev Arora. Inspection on April 22, 1997 allegedly revealed a connected load of 169.11 KW and, therefore, certain demands were raised. Dev Arora filed a suit in the civil court, that was eventually dismissed. In this connection a writ petition being CWP 715 of 2003 was also filed by Dev Arora which is pending in this Court. On transfer of the premises in its name, the first respondent applied for resumption of supply of electricity vide applications dated November 30, 2002 and December 30, 2002. The appellant, as required by Clause 2.1(iv) of 'General Conditions of Supply' contained in the Tariff Order issued by the DERC in exercise of its powers under Section 49 of the Electricity Supply Act, 1948 (for short the "Supply Act") asked the first respondent to deposit development charges, advance

consumption deposit and “all such charges as may be applicable including the outstanding dues against the premises and/or disconnected connections as a condition precedent for resumption of electricity supply. The first respondent therefore approached this Court by filing Writ Petition No.2479 of 2003 contending *inter alia* that a purchaser of the property cannot be asked or coerced to pay the amount which the appellant as the licensee may be claiming from the former consumer.

2. The writ petition was heard and disposed of by the learned single Judge along with five connected matters by a common judgment dated November 9, 2005. The learned single Judge, following the decisions of the Supreme Court in ***Isha Marbles v. BSEB***, (1995) 2 SCC 648, ***Ahmedabad Electricity Company Ltd v. Gujarat Inn Pvt. Ltd***, (2004) 3 SCC 587, ***Union of India v. Raman Iron Foundry***, (1974) 2 SCC 231 and a judgment of the Gujarat High Court in ***Sona Cooperative Housing Society v. Gujarat Electricity Board***, AIR 2004 Guj 26 and also judgments of Delhi High Court in ***Inndev Engineers (India) P. Ltd v. Delhi Vidyut Board***, AIR 2002 Delhi 478, ***Shikha Properties Private Ltd v. NDMC***, (90) 2001 DLT 18, held, *inter alia*, that a distribution company is not entitled to recover arrears of

electricity charges pertaining to the electricity connection to the premises from its new owner/occupier who seeks resumption of supply of electricity unless it establishes mala fides of the old and new consumer or the new consumer was in fact a heir or successor of the defaulting party or had actual notice of the existence of arrears. In any event, according to the learned single Judge, disconnection as a stand-alone action without initiation of recovery proceedings against the actual consumer (not the subsequent purchaser) by way of civil suit for recovery of arrears will be illegal. The learned single Judge further held that "General Conditions of Supply", as contained in the Tariff Order for the years 1997-98 and 2001-02 cannot form part of "Tariff" as contemplated under Section 49 of the Supply Act but are essentially regulations under Section 79(j) of the Supply Act which must be approved by the State Legislature under Section 79A of the said Act. The learned single Judge, therefore, quashed and set aside the General Conditions of Supply contained in the Tariff Orders of 1997-98 and 2001-02. Consequently, the writ petition was allowed and the appellant was directed to restore the electricity supply to the first respondent without insisting on clearance of the arrears of electricity charges.

3. At this stage it may be noted that by the common judgment dated 9th November 2005 the learned Single Judge allowed Writ Petition (C) No. 2479/2003 filed by the Respondent herein (Saurashtra Color Tones Pvt. Limited), the Writ Petition (C) No. 1105/2002 filed by Anil Kumar Singh and Writ Petition (C) No. 3996/2003 by Munni Devi (deceased) through her legal heirs. However, Writ Petition (C) No. 3533/2003 filed by Madhu Garg and J.B. Garg, Writ Petition (C) No. 10586/2004 by Charan Jeet and Writ Petition (C) No. 7638/2003 filed by Meera Devi Jain were dismissed. Writ Petition (Civil) No. 3532 of 2002 by Madhu Garg and J.B. Garg was dismissed by the learned Single Judge on the ground that clause 6 of the sale deed by which she purchased the premises in question from the previous owner clearly stipulated that she would have to bear the liability of clearing the arrears of electricity dues attaching to the premises.
4. Consequently, against the common judgment dated 9th November 2005 of the learned Single Judge, BSES Rajdhani Power Limited (which was aggrieved by the writ petition of the Respondent herein being allowed) filed the present appeal LPA No. 2725 of 2005, and Madhu Garg and JB Garg filed LPA No. 223-24 of 2006. The appeals by Madhu Garg and J.B. Garg were finally heard on the first hearing i.e 1st

February 2006 and judgment reserved. Thereafter the Division Bench heard some of the other appeals, involving a similar question. The present appeal was heard finally on 8th March 2006 and judgment reserved.

5. The Division Bench delivered a judgment in ***Madhu Garg v. North Delhi Power Limited*** on 22nd March 2006 [**129 (2006) DLT 213 (DB)**]. It is plain from para 22 of the judgment that the Division Bench concurred with the judgment of the learned Single Judge as regards dismissal of ***Madhu Garg's*** writ petition. However in the remaining portion of its judgment, the Division Bench disagreed with the learned Single Judge on the interpretation of the relevant statutory provision. The Division Bench categorically held that the new owner can be compelled to pay electricity dues of previous owner on transfer of premises. It was held that there is no distinction between the occupier of the premises who was aware of the outstanding electricity dues against the previous owner/tenant and one who was not aware of it. In either case dues have to be paid by the new owner/occupier before supply can be continued/restored in view of Clause 2.1(iv) of the General Conditions of Supply which are statutory in nature (being a delegated legislation) and question of bona fides or mala fides do not arise. Also,

there is no requirement for a licensee to first initiate recovery proceedings by filing a civil suit against that consumer before disconnecting the supply. The Division Bench further held that there is no illegality in Clause 2.1 of General Conditions of Supply as it comes within the purview of Tariff Order framed by the DERC as well as provisions of Section 21(2) of Indian Electricity Act, 1910 (for short the "1910 Act") and Section 49 of the Supply Act. General Conditions of Supply do not require approval of State Legislature under Section 79A of the Supply Act as they are not regulations made under Section 79 of the said Act. The Division Bench also held that the electricity dues in respect of the electricity supply to premises, if permitted to be equated with contractual claims of damages, it would encourage dishonest consumers to raise some dispute or other in respect of such arrears and evade consequences of non-payment of electricity charges namely, disconnection/non-resumption of supply.

6. It appears that although orders were reserved in the present appeal on 8th March 2006 and therefore in view of the opinion already expressed by the Division Bench in its judgment dated 22nd March 2006 in **Madhu Garg** the present appeal ought to have been allowed, for some reason

the Division Bench did not pass that order. Instead on 23rd March 2006 the Division Bench passed an order directing the present appeal to be listed for further hearing on 26th April 2006.

7. Meanwhile Writ Petition (Civil) No. 2310/2007 was filed by Suresh Rekhi and Mahesh Kumar, who were subsequent purchasers of a shed in Okhla Industrial Area, Phase-I, New Delhi, challenging the demand raised by the distribution company (BSES Rajdhani Power Limited) that the arrears of electricity dues concerning the said premises should be first paid before a fresh electricity connection could be granted. By an order dated 25th April 2006 the learned Single Judge of this Court, following the judgment of the Division Bench in ***Madhu Garg v. NDPL*** dismissed the writ petition. Aggrieved by the dismissal of the writ petition Suresh Rekhi and Mahesh Kumar filed LPA Nos. 1051-52 of 2006. The said LPA was listed before the Division Bench of this Court presided over by Hon'ble the Acting Chief Justice. On 26th May 2006 the following order was passed in the said LPA:

"LPA 1051-52/2006

In view of the judgment rendered by the Division Bench in Madhu Garg Vs. North Delhi Power Limited (LPA 223-24/2006), whether

under general condition of supply would also include a previous tenant in the premises or previous owner, notice thereof which has not been received by the present incumbent who seeks to get the electricity supply from the respondent, shall also be covered under the said definition, creates some doubt in our mind. Therefore, in view of the said judgment, we would like this question to be answered by a larger Bench of three Judges.

Notice be issued to the respondent to show cause as to why this appeal be not admitted, by ordinary process as well as by registered A.D. cover on filing of process fee returnable on 19.10.2006.

In the meanwhile, the impugned order is stayed.”

8. When the present LPA No. 2725 of 2005 was placed for hearing on 19th September 2006 before the Division Bench headed by the Acting Chief Justice, it was also directed to be heard along with LPA Nos. 1051-52 of 2006. The Bench was informed that an SLP had been filed in the Supreme Court against the judgment of the Division Bench in **Madhu Garg.**

The Bench then directed: “To await the decision of the Supreme Court or the decision of the larger Bench of three judges.” It may be mentioned here that as far as the LPA No. 1051-52 is concerned, learned counsel stated that he did not wish to press the appeal and by an order dated 16th January 2009 the said appeal was dismissed as such.

9. Thereafter the present appeal was kept adjourned awaiting the decision of the Supreme Court in the SLP filed against the judgment of the Division Bench of this Court in ***Madhu Garg v. NDPL*** (supra). However, this Court decided to hear the case finally since it appeared that the recent decision of the Supreme Court in ***Paschimanchal Vidyut Vitaran Nigam Limited v. M/s. DVS Steels & Alloys Pvt. Limited JT (2008) (12) SC 672*** covers the issue squarely.
10. For greater clarity the question referred by the order dated 26th May 2006 passed in LPA No. 1051-52 of 2006 may be reframed as under:

Whether in terms of clause 2.1 of the General Conditions of Supply contained in the Tariff Order dated 23rd May 2001 issued by Delhi Electricity Regulation Commission (DERC), in terms of powers vested in it under Section 28 (2) of the Delhi Electricity Reforms Act

2000 (Reforms Act), can the distribution company insist that an applicant for a fresh electricity connection should first clear the arrears of the electricity dues attaching to the premises in question notwithstanding the fact that the said arrears accrued on account of the non-payment of the demand by the previous occupant/owner of the premises.

ARGUMENTS

11. Mr.A.S.Chandhiok, learned senior counsel representing the appellant strenuously contended that conditions of supply are statutory in character and have statutory force and they are not “regulations” as contemplated by Section 79(j) of the Supply Act. In this connection he relied upon the decision of a three Judge Bench of the Supreme Court in **Hyderabad Vanaspati v. APSEB (1998) 4 SCC 470** wherein it was held that even in absence of an individual contract, the terms and conditions of supply notified by the Board will be applicable to the consumer and he would be bound by them. Mr.Chandhiok, relying upon a Division Bench judgment of the Bombay High Court in **MSEB v. MERC AIR 2003 Bombay 398** stressed that the General Conditions of Supply are part of a Tariff Order issued by the DERC. He submitted that the General Conditions of Supply

do not require to be placed before the State Legislature under Section 79A of the Supply Act as they are not regulations made under Section 79. Mr.Chandhiok also sought to distinguish the decisions of the Supreme Court in ***Isha Marbles*** and ***Ahmedabad Electricity Company Limited*** on the ground that in those cases there was no statutory provision which empowered the authorities to refuse electricity supply for outstanding dues of the previous owner. However, he pointed out that, in the present case there is a clear statutory provision embodied in the General Conditions of Supply to that effect. According to Mr.Chandhiok DERC being a statutory commission is empowered under Section 28(2) of the Delhi Electricity Reforms Act, 2000 (for short the “Reforms Act”) read with Section 49 of the Supply Act to prescribe the terms and conditions for the determination of supply of electricity. He submitted that the Tariff Order issued by the DERC is statutory in character and as such is binding on the first respondent. He further submitted that the decision in ***Union of India v. Raman Iron Foundry*** (supra) stands overruled by subsequent judgment of the Supreme Court in ***H.M.Kamaluddin Ansari v. Union of India***, (1983) 4 SCC 417 and accepted as overruled in ***Sant Ram & Co v. State***

of Rajasthan, (1997) 1 SCC 147 and **ONGC v. Saw Pipes**, (2003) 5 SCC 705, In any event, according to him, the arrears on account of charges for electricity supply can never be equated and treated at par with contractual claims of damages, which was the subject matter of the decision in Raman Iron Foundry case. This is for the reason that electricity is public property and any arrangement for supply thereof, though in form of a contract, partakes the character of a statutory contract since the terms and conditions thereof are statutory in nature. Finally, he submitted that the issue now stands concluded by a recent decision of the Supreme Court in **Paschimanchal Vidyut Vitaran Nigam Ltd v. M/s. DVS Steels & Alloys Pvt. Ltd**, JT 2008 (12) SC 672 wherein a two Judge Bench has held that where the purchaser of a premises approaches the distributor seeking a fresh electricity connection to its premises for supply of electricity, the distributor can stipulate as one of the conditions of supply that the arrears due in relation to supply of electricity made to the premises when it was in 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.

12. In reply, Mr.S.C.Nigam, learned counsel appearing for the respondent No.1 submitted that law stands settled by the Supreme Court in ***Isha Marbles*** case wherein the Court while expounding Sections 2(c), 24 and Clause 6 of Schedule-I of the 1910 Act have categorically ruled that the subsequent purchaser cannot be subject to the condition of discharging the liability of the former owner in respect of supply in the premises before grant of an electricity connection to the subsequent purchaser. According to him ***Isha Marbles***, which was followed in ***Ahmedabad Electricity Company Limited***, is applicable not only to auction purchasers but also to subsequent transferees. Further, according to him the only remedy of the appellant is to enforce its claim by a civil suit against the former owner/consumer and forfeiting the security amount deposited by him. Mr.Nigam contended that the condition contained in Clause 2.1(iv) of the Conditions of Supply is ultra vires the Supply Act and the Reforms Act. He pointed out that the Supply Act in Section 79 gives power to the Electricity Board to make regulations not inconsistent with the Act. While enumerating the matters on which the regulations are to be made, the regulations made in order to be valid are required to be laid before the State Legislature

as per Section 79A of the Act. According to him DERC under the ERC Act is empowered to fix the tariff order which will not include terms and conditions of supply for which the DERC is required to frame regulations under Section 79 of the Supply Act read with Section 28 of the Reform Act. Learned counsel referred to the celebrated judgment in **Taylor v. Taylor**, (1879) 1 Chancery Division 426 where Justice Jessel M.R. adopted the rule that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. He submitted that the rule laid down in **Taylor v. Taylor** has been followed by the Supreme Court in **Ram Chander v. Govind**, AIR 1975 SC 915 and several other cases.

LEGISLATIVE FRAMEWORK

13. Before adverting to the rival contentions it is necessary to refer to the relevant provisions in various enactments governing the legal regime of the distribution of electricity. The Electricity Act was passed originally in 1903 but it was repealed by the 1910 Act which amended the law relating to supply and use of electrical energy. The said Act was not a complete code on the subject. It was apparently found to be inadequate for coordinating development of

electricity on the regional basis. Hence the Supply Act was enacted in 1948 to provide for rationalisation of production and supply of electricity and generally for taking measures conducive to electricity development. As part of power sector reforms undertaken since mid 1990s legislative initiatives undertaken which included enactment of the ERC Act, the Reforms Act and the Electricity Act, 2003. We are not concerned in the present case with the Electricity Act of 2003 as the matter pertains to the period prior to the enactment of the said Act. We shall briefly refer to the relevant provisions of the other enactments. Section 21(2) of the 1910 Act empowers the licensee “to regulate” his relations with persons “who are or intend to become consumers”. Section 21(2) is extracted and reproduced hereinbelow:

“21(2). A licensee may, with previous sanction of the State Government, given after consulting the State Electricity Board and also the local authority, where the licensee is not the local authority, make conditions not inconsistent with this Act or with his licence or with any rules made under this Act, to regulate his relations with persons who are or intend to become consumers, and, may, with the like sanction given after the like consultation, add to or alter or amend any such conditions; and any conditions made by a licensee without such sanction shall be null and void.”

14. While the 1910 Act deals with supply and use of energy and the rights and obligations of the licensee, the Supply Act deals with statutory powers and functions of the Central Electricity Authority, the State Electricity Boards and generating companies. By virtue of Section 26 of the Supply Act the "State Electricity Board" (Delhi Vidyut Board) was vested with the powers and obligations of licensee under the 1910 Act. Section 49(1) and (4) of the Supply Act empowered the Board to supply electricity to any person other than a licensee – i.e. the real consumer – upon such terms and conditions as the Board thought fit and to frame uniform tariffs for the purposes of such supply. Section 49(1), which is material for our purpose, is extracted and reproduced hereinbelow:

"49. Provision for the sale of electricity by the Board to persons other than licensees:- (i) subject to the provisions of this Act and of regulations, if any, made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs."

15. Under Section 79 of the Supply Act, the Board was empowered to make regulations to provide for various matters set out therein and Clause (j) relates to principles

governing the supply of electricity by the Board to persons other than licencees under Section 49. Regulations framed under Section 79 are required to be placed before the State Legislature by virtue of Section 79A.

16. The ERC Act was enacted pursuant to the Minimum National Action Plan for Power adopted in the Conference of Chief Ministers and Section 22(1)(a) and (b) thereof deals with the Commission's power to fix the tariff and 22(2)(d) deals with licencing. DERC was constituted under the ERC Act in December, 1999.

17. The Reforms Act was also enacted as part of the implementation of reforms in the power sector and was enforced after receiving the assent of the President of India under Article 364 of the Constitution of India. Section 11 of the Reforms Act lays down the functions of the Commission including, *inter alia*, the determination of the tariff for electricity, wholesale, bulk, grid, or retail, as the case may be. Section 15 of the Reforms Act empowered the Delhi Government and provided for the reorganisation of Delhi Vidyut Board through a Statutory Transfer Scheme. Under sub-section (3) it was stipulated that "such of the rights and powers to be exercised by the Board under the Electricity (supply) Act, 1948 (54 of 1948) as the case may be by

notification in the official gazette, specified, shall be exercisable by a company or companies established as the case may be, under Section 14 for the purposes to discharge all the functions and duties with which it is entrusted.” Section 20 of the Reforms Act relates to grant of licence and the procedure therefor. Section 22 of the Reforms Act lays down the general conditions and powers of the licensee. Section 22 reads as follows:

“22. General duties and powers of the licensees.-(1) It shall be the duty of the holder of a supply licence or a transmission licence in respect of a particular area to develop and maintain an efficient, coordinated and economical system of electricity supply or transmission in the area of transmission or area of supply as the case may be.

(2) Each licensee and generating company in discharge of its duties shall comply with the provisions of the regulations framed from time to time governing the terms and conditions for the operation and maintenance of power system and electric supply lines.”

18. Section 28 of the Reforms Act deals with tariffs and sub-section (2) thereof, which is material for our purpose reads as follows:

“The Commission shall, subject to the provisions of sub-section(3), be entitled to prescribe the terms and conditions for the determination of the licensee's revenues and tariffs by regulations duly published in the official Gazette and in such other

manner as the Commission considers appropriate.”

Section 61 of the Reforms Act empowers the DERC to frame regulations to carry out the purposes of the Act including the matters enumerated therein.

19. Under Section 63(2) of the Reforms Act all matters with which the Delhi Vidyut Board was concerned with or dealing with all its functions were inherited by DERC and the companies established under Section 14. Legislative intent to save the powers of the Board under the 1910 Act as well as the Supply Act (except those expressly excluded) and vest the same in the successor entities including Commission as a regulator is apparent on a bare reading of Section 63. Section 63 is extracted and reproduced as below:

"63. Effect of the Act on the Indian Electricity, 1910 and the Electricity(Supply) Act,1948.-

(1) Except as provided in section 63 of this Act, the provisions of this Act, notwithstanding that the same are inconsistent with or contrary to the provisions of the Indian Electricity Act, 1910 or the Electricity (Supply) Act, 1948 shall prevail in the manner and to the extent provided in sub-section (3).

(2) Subject to sub-section (1) in respect of all matters in the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948, with which the Delhi Vidyut Board has been concerned or dealing with, upon the constitution of the Commission the functions of the Board shall be discharged by the Commission and the companies established under section 14.

.....

(3) Subject to sub-section (1) and sub-section (2) of this section, upon the establishment of the Commission the provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 shall, in so far as the National Capital Territory of Delhi is concerned, shall be read subject to the following modifications and reservations, namely:-

THE INDIAN ELECTRICITY ACT,1910

(i) All references to State Electricity Board in the Indian Electricity Act, 1910 in so far as the National Capital Territory of Delhi is concerned shall be read as references to the Delhi Electricity Regulatory Commission or the companies established under section 14 or other licensees or wherever it relates to general policy matters, to the Government.

(ii) In respect of matters provided in sections 3 to 11, 28, 36(2), 49-A, and 50 and 51 of the Indian Electricity Act, 1910, to the extent this Act has made specific provisions, the provisions of the Indian Electricity Act 1910 shall not apply in the National Capital Territory of Delhi.

(iii) The provisions of all other sections of the Indian Electricity Act, 1910(9 of 1910) shall apply except that:-

(a) the term “licence”, “licensee”, “licence holder” shall have the meanings as defined under this Act and the licences shall be construed as having been issued under this Act;

(b) the reference to the sections of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 in the provisions of the Indian Electricity Act, 1910 shall be taken as reference to the corresponding provisions of this Act to the extent modified by this Act;

(c) the reference to arbitration in these

provisions except where it is by the Central Electricity Authority or the Central Electricity Regulatory Commission shall be taken as reference to the proceedings under section 40 of this Act and the arbitration procedure prescribed under the Indian Electricity Act, 1910 shall not apply.

.....

THE ELECTRICITY (SUPPLY) ACT, 1948

(v) All references to State Electricity Board in the Electricity (Supply) Act, 1948 in so far as the National Capital Territory of Delhi is concerned shall be read as references to the Delhi Electricity Regulatory Commission or the companies established under section 14 or other licensees or where it relates to general policy matters, to the Government.

(vi) In respect of matters provided in sections 5 to 18, 19, 20, 23 to 27, 37, 40 to 45, 46 to 54, 56 to 69, 72 and 75 to 83 of the Electricity (Supply) Act, 1948, to the extent this Act has made specific provisions, the provisions of the Electricity (Supply) Act, 1948 shall not apply in the National Capital Territory of Delhi.

(vii) The provisions of all other sections of the Electricity (Supply) Act, 1948 shall apply except that –

(a) the term “licence” , “licensee” , “licence holder” shall have the meanings as defined under this Act and the licences shall be construed as having been issued under this Act;

(b) the references to the sections of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 in the provisions of the Electricity (Supply) Act, 1948 shall be taken as reference to the corresponding provisions of the Act to the extent modified by this Act;

(c) the reference to arbitration in these provisions except where it is by the Central Electricity Authority shall be taken as reference to

the proceedings under section 40 of this Act and the arbitration procedure prescribed under the Electricity (Supply) Act, 1948 (54 of 1948) shall not apply.

20. The DERC issued its first Tariff Order in May 23, 2001 which was effective from June 1, 2001. The said Tariff Order contained General Conditions of Supply wherein the condition akin to the one contained in the earlier Tariff Order issued by the DVB namely, condition 1(iv) of the General Conditions of Supply. The said condition is extracted and reproduced below:

“General Conditions of Supply

2.1 Supply of electricity in all cases is subject to conditions that :

(iv) The application deposits development charges, advance consumption deposit and all such charges as may be applicable including outstanding dues against the premises and/or disconnected connection(s). *(emphasis supplied)*

DERC thereafter issued a Tariff Order for the year 2003 and 2003-2004 on June 26, 2004. It also contained provision similar to the condition in Clause 2.1(iv) of the Conditions of Supply.

WHETHER CONDITIONS OF SUPPLY ARE REQUIRED TO BE PLACED BEFORE THE STATE LEGISLATURE

21. As has been seen, Section 49 of the Supply Act stipulates that the Board may formulate conditions of supply after due consideration of the provisions of the Act and any regulations made in this behalf whereas the power to make regulations is embodied in Section 79 of the said Act. The power conferred upon the Board under Section 49(1) is now assumed by the DERC by virtue of Sections 19 and 20 read with 63(2) of the Reforms Act. DERC is vested with the power to frame tariff and as a part of the licencing and regulations making process to stipulate conditions governing terms of supply in terms of Sections 11, 19, 20 and 63(2) of the Reforms Act. In **Hyderabad Vanaspati v. APSEB** (supra) the Supreme Court made it clear that the power of the Board to frame terms and conditions of supply is distinct from its power to make regulations. Even in the absence of a individual contract, the terms and conditions of supply notified by the Board will be applicable to the consumer and he will be bound by them. The relevant observations of the Court are extracted below:

“20. We have already seen that Section 49 of the Supply Act empowers the Board to prescribe such terms and conditions as it thinks fit for supplying electricity to any person other than a licensee. The section empowers the Board also to frame uniform tariffs for such supply. Under Section 79(j) the Board could have made regulation

therefor but admittedly no regulation has so far been made by the Board. The Terms and Conditions of Supply were notified in BPMs No. 690 dated 17-9-1975 in exercise of the powers conferred by Section 49 of the Supply Act. They came into effect from 20-10-1975. They were made applicable to all consumers availing supply of electricity from the Board. The section in the Act does not require the Board to enter into a contract with individual consumer. Even in the absence of an individual contract, the Terms and Conditions of Supply notified by the Board will be applicable to the consumer and he will be bound by them. Probably in order to avoid any possible plea by the consumer that he had no knowledge of the Terms and Conditions of Supply, agreements in writing are entered into with each consumer. That will not make the terms purely contractual. The Board in performance of a statutory duty supplied energy on certain specific terms and conditions framed in exercise of a statutory power. Undoubtedly the terms and conditions are statutory in character and they cannot be said to be purely contractual.

22. In **Punjab SEB v. Bassi Cold Storage**, 1994 supp(2) SCC 124 the Supreme Court held that the conditions of supply are akin to subordinate legislation.
23. In **Bihar SEB v. Parmeshwar Kumar Agarwala**, (1996) 4 SCC 686 the Supreme Court held that conditions of supply are part of statutory terms and conditions. In paragraph 16 of the judgment, the Court said: (SCC p. 691)

“16. Before we advert to the effect produced by a combined reading of the four clauses, it deserves to be pointed out that the terms and conditions have sacrosanctity, in that Rule 27 of the Indian Electricity Rules, 1956, framed by the Central Electricity Board in exercise of power under Section 37 of the 1910 Act has, read with Annexure VI thereof, provided the model conditions of supply which are required to be adopted by the State Boards. It is on the basis of this statutorily prescribed model, with suitable variations, that energy had been supplied by the Board to the consumers. The model conditions can be said to be akin to the model Standing Orders prescribed by the Industrial Employment (Standing Orders) Act, 1947, which, when certified, become part of the statutory terms and conditions of service between the employer and employees and they govern the relationship between the parties, as held in **Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd.**—**SCC at p.832**. We are inclined to think that similar is the effect of terms and conditions, on which a State Board supplies energy to the consumers.”

24. In the light of the decision in **Hyderabad Vanaspati Ltd v. APSEB**, it is clearly seen that the conditions of supply notified by the Board/DERC are not regulations and are not required to be placed before the State Legislature under Section 79A of the Supply Act. Explaining this position, Katju, CJ observed in **Madhu Garg's** case:

“17. In our opinion, there is no illegality or unconstitutionality in sub-clause (iv) of Clause 2 of the General Condition of Supply.

18. It may be mentioned that in **Hyderabad Vanaspati Ltd. v. A.P. State Electricity Board AIR 1998 SCC 1715**, the Supreme Court took the view that even in the absence of a contract the terms and conditions of supply will be governed by the statutory Regulations and they will be applicable to the consumers who will be bound by them.

.....

20. The above Clause 2.1 (iv) of the General Conditions of Supply has been framed under Section [21\(2\)](#) of the Indian Electricity Act 1910 as well as Section [49](#) of the Electricity Supply Act, 1948, and hence is a piece of delegated legislation.

21. The learned Single Judge in the impugned judgment has struck down Clause 2.1 (iv) of the General Conditions of Supply. With respect to him, we are of the opinion that there is no illegality in the said Clause as it comes within the purview of the Tariff Order framed by the Delhi Electricity Regulation Commission as well as under Section [21\(2\)](#) of the Indian Electricity Act, 1910 and Section [49](#) of the Electricity Supply Act, 1948. We do not agree that the General Conditions of Supply requires approval of the State Legislature under the proviso to Section [79](#) of the Electricity (Supply) Act, as in our opinion they are not Regulations made under Section [79](#).

.....

29. In our opinion, the condition of supply relates to Section [49](#) of the Electricity (Supply) Act, as well as Section [11](#) and [28](#) of the DERA. The Court has consistently held that the condition of supply forms an integral part of the tariff and does not require approval of State Legislature. In fact, Clause 2.1 (iv) of the Condition of Supply was formulated by DESU (DVB) as far back as in 1997-98 and thereafter adopted by DERC in 2001-02.”

25. In **MSEB v. MERC** (supra) the Division Bench of the Bombay High Court has categorically held that the conditions of supply form an integral part of the tariff. The Court observed:

“10.....The terms and conditions for supply of electricity also go with the cost of electricity. Therefore, while fixing the tariff for electricity, the State Commission has to necessarily take into consideration terms and conditions for supply of electricity in so far as they add to the costs of the electricity. In determination of the tariff of electricity, the terms and conditions of supply which form integral part of the electricity tariff cannot be bifurcated in the manner suggested by Mr. Diwan. Fixing of such terms and conditions by MSEB also impinges on payment of charges by the consumers and are, therefore, subject to review by the Commission in view of Section [29\(1\)](#) and (4) of ERC Act. Section [29\(4\)](#) of ERC Act provides that the Board shall observe methodology and procedure specified by the Commission from time to time in calculating the expected revenue from tariff which it is permitted to recover and in determining tariffs to collect those revenue. Therefore, the charges as such service line charges, transmission charges etc. which were charged by MSEB will have to be approved by the Commission.”

26. The effect of the General Conditions of Supply as contained in Tariff Order dated May 23, 2001 has been considered and discussed by a Division Bench of this Court in **Suresh Jindal v. BSES Rajdhani Power Ltd**, LPA

256/2006, decided on February 20, 2006. In paragraph 51 of which it was observed:

“It may be mentioned that the binding and statutory nature of the Conditions of Supply has been upheld by the Supreme Court in Punjab State Electricity v. Bassi Cold Storage, 1994 suppl (2) SCC 125, Bihar State Electricity Board v. Parmeshwar, 1994 (4) SCC 636 (vide para 16) and M/s.Hyderabad Vanaspati Ltd v. A.P.State Electricity Board, AIR 1998 SC 1715 (para 22).”

In the same judgment it was also observed in paragraph 57:

No doubt, the license was granted by the Delhi Electricity Regulatory Commission on 11.3.2004. However, the respondent had applied for the license under Rule 10 (2) of the Delhi Electricity Reforms (Transfer Scheme) rules 2001 within 60 days of 1.7.2002, which was the notified date of transfer. Hence the respondents were duly licensed to supply electronic meters in the area of their distribution and were vested with the powers of the licensee under the Indian Electricity Act, 1910, Electricity (Supply) Act, 1948, and the rules framed there under. The powers under Section [26](#) of the Indian Electricity Act, 1910 and Section under Section [49](#) of the Electricity (Supply) Act, 1948 were available with the respondent No. 1 as also the power under the conditions of supply which were notified when Delhi Vidyut Board was in existence.

27. In our opinion, the learned Single Judge erred in relying upon decision of the Gujarat High Court in **Sona Cooperative Housing Society v. Gujarat Electricity Board** (supra). The General Conditions of Supply framed by

the DERC are not required to be placed before the State Legislature as they are not regulations made under Section 79 of the Supply Act. There is no illegality attached to the conditions of supply framed by the DERC and they are of binding and statutory in nature as held by the Supreme Court in **M/s. Hyderabad Vanaspati v. APSEB** (*supra*).

ENTITLEMENT OF DISTRIBUTION COMPANY TO RECOVER DUES FROM NEW OWNER/CONSUMER

28. The learned single Judge has mainly relied upon the Supreme Court decision in **Isha Marbles** (*supra*). We have carefully perused the said decision. In that decision the facts were that the previous owner of the premises in question had mortgaged/hypothecated the premises to secure a loan from the State Financial Corporation. Since the loan was not repaid, the property was auctioned under Section 29 of the State Financial Corporation Act, 1951. The auction purchaser applied for re-connecting of the electricity supply to the premises which had been disconnected for non-payment of dues by the previous owner. The question arose whether the auction purchaser had to pay the electricity dues of the previous owner to get restoration of the electricity connection. The Supreme Court observed that the Electricity Board had no charge over the property, and it could not seek

enforcement of the contractual liability against a third party (the State Financial Corporation). The Supreme Court further observed that the law, as it stands, is inadequate to enforce the liability of the previous contracting party against the auction purchaser who is a third party. In this regard, the relevant observations in paragraph 63 of the judgment are extracted below:

“Electricity is public property. Law, in its majesty, benignly protects public property and behoves everyone to respect public property. Hence, the courts must be zealous in this regard. But, the law, as it stands, is inadequate to enforce the liability of the previous contracting party against the auction-purchaser who is a third party and is in no way connected with the previous owner/occupier. It may not be correct to state, if we hold as we have done above, it would permit dishonest consumers transferring their units from one hand to another, from time to time, infinitum without the payment of the dues to the extent of lakhs and lakhs of rupees and each one of them can easily say that he is not liable for the liability of the predecessor in interest. No doubt, dishonest consumers cannot be allowed to play truant with the public property but inadequacy of the law can hardly be a substitute for overzealousness.”

29. In our opinion, the statutory void or inadequacy of law found by the Supreme Court in ***Isha Marbles*** has been corrected in the Reforms Act empowering the distribution companies in the NCT of Delhi to recover arrears of

electricity charges from the new owner/occupier. Condition 2.1(iv) of the General Conditions of Supply, as contained in the Tariff Order, issued by the DERC in exercise of its powers under Section 49 of the Supply Act read with Section 63(2) of the Reform Act provides for recovery of arrears of electricity charges from new occupiers/owners of the premises. The said condition has been continued in effect under Section 185(2)(a) of the Electricity Act, 2003 till the same is varied or abrogated. Thus the decision in ***Isha Marbles*** case is clearly distinguishable, as the Supreme Court observed therein that it was due to inadequacy of law, as applicable in the State of Bihar that arrears could not be realised from the subsequent purchaser. However, the law applicable in Delhi is different inasmuch as there is a statutory condition of supply which requires payment of such outstanding dues before resumption/continuation of the electricity supply.

30. We may also mention that the decision in ***Isha Marbles*** case was distinguished by the Kerala High Court in ***A.Ramachandran v. KSEB***, AIR 2001 Kerala 51 and ***Seena B. Kumar v. Assistant Executive Engineer***, AIR 2004 Kerala 68, in which it was held that under Section 79(j) of the Electricity Supply Act, 1948, the Kerala Electricity Board had framed Regulation 15(d) which provided that all the dues to

the Board from a consumer shall be charged on the asset of the consumer and hence can be realised as arrears of land revenue. The Division Bench of the Kerala High Court held that Regulation 15(d) is statutory in nature and it will supersede any contract between the parties. The Division Bench in **Madhu Garg** after noting the decisions in **A.Ramachandran v. Kerala State Electricity Board** and **Seena B. Kumar v. Assistant Executive Engineer** observed:

“13. The learned counsel for respondents has sought to distinguish the decision of the Supreme Court in **Isha Marbles** Case (supra) on the ground that in that case there was no statutory provision which empowered the authorities to refuse supply of electricity for outstanding dues against the previous owner. However, in the present case, there is a clear statutory provision embodied in the General Condition of Supply to that effect. We agree with this submission. In our opinion, the general conditions of supply is a piece of delegated legislation, and hence has statutory force.

14. In our opinion, there is no distinction between the purchaser of a premises who was aware that there were outstanding electricity dues against the previous owner/tenant, and one who was not aware of it. In either case, the dues have to be paid by the new owner/occupant before supply can be continued / restored. This is because of the statutory provision contained in Clause 2 (iv) of the General Conditions of Supply which has been quoted above.

15. In our opinion, whenever a person purchases a property, it is his duty to find out whether there are outstanding electricity dues in relation to the premises or not, and he cannot be allowed to say later that he was unaware of the fact that there were electricity dues of the previous owner / tenant.

16. In view of the General Condition of Supply, it is the duty of the new owner/occupant to himself make enquiries and find out whether there was such dues or not. The General conditions of supply are statutory in nature (being delegated legislation), and hence the question of bona fide or mala fide does not arise, and in either case the new owner/occupant of the premises has to pay the dues against the previous owner / tenant, if he wishes the electric supply to be continued/restored.”

31. The position is now placed beyond any pale of doubt by the recent judgment of the Supreme Court in ***Paschimanchal Vidyut Vitaran Nigam Ltd. v. M/s. DVS Steels & Alloys Pvt. Ltd*** (supra). In this case the appellant distribution company was one of the successors-in-interest of the UP State Electricity Board. The third respondent was a consumer receiving electricity supply from the Board to its industrial unit at Ghaziabad. It appears that the Board had raised certain supplementary bills against the third respondent towards the difference in tariffs, in respect of which the third respondent filed a civil suit disputing the said claim and obtained an order of injunction restraining the Board from recovering the said supplementary bills amount.

Injunction was stayed in appeal preferred by the Board before the Allahabad High Court. The third respondent closed its unit. It sub-divided its industrial plot into 129 smaller plots of different sizes with the permission of Uttar Pradesh State Industrial Development Corporation. One of those plots was sold by the third respondent to the first respondent. The first respondent applied to the appellant for supply of electricity which came to be sanctioned subject to the condition that it should pay arrears due by the third respondent, in proportion to the area purchased by it, as a condition precedent for supply of electricity. Accordingly, the first respondent deposited a sum of Rs.8,63,451/- being the dues of the third respondent pro rata, subject to the condition that in the event of pending challenge to the demand being decided in favour of third respondent, the appellant shall refund the amount deposited by the first respondent. Later on, on the basis of certain orders passed by the UP State Electricity Regulatory Commission, the first respondent filed a writ petition seeking direction to the appellant to refund the sum of Rs.8,63,451/- with interest @ 12% per annum. The High Court allowed the said writ petition and directed the appellant to refund the said amount with interest @ 6% per annum from the date of payment.

The question before the Supreme Court was whether the supplier can recover the electricity dues from the purchaser of sub-divided plot. Answering this question in the affirmative, the Supreme Court held as follows:

“10. 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.

11. A stipulation by the distributor that the dues in regard to the electricity supplied to the premises should be cleared before electricity supply is restored or a new connection is given to a premises, cannot be termed as unreasonable or arbitrary. In the absence of such a stipulation, an unscrupulous consumer may commit defaults with impunity, and when the

electricity supply is disconnected for non-payment, may sell away the property and move on to another property, thereby making it difficult, if not impossible for the distributor to recover the dues. Having regard to the very large number of consumers of electricity and the frequent moving or translocating of industrial, commercial and residential establishments, provisions similar to Clauses 4.3(g) and (h) of the Electricity Supply Code are necessary to safeguard the interests of the distributor. We do not find anything unreasonable in a provision enabling the distributor/supplier to disconnect electricity supply if dues are not paid, or where the electricity supply has already been disconnected for non-payment, insist upon clearance of arrears before a fresh electricity connection is given to the premises. It is obviously the duty of the purchasers/occupants of premises to satisfy themselves that there are no electricity dues before purchasing/occupying a premises. They can also incorporate in the deed of sale or lease, appropriate clauses making the vendor/lessor responsible for clearing the electricity dues up to the date of sale/lease and for indemnity in the event they are made liable. Be that as it may.

12. In this case, when the first respondent, who was the purchaser of a sub-divided plot, wanted a new electricity connection for its premises, the appellant informed the first respondent that such connection will be provided only if the electricity dues are paid pro rata. They were justified in making the demand. Therefore, it cannot be said that the collection of Rs.8,63,451 from the first respondent was illegal or unauthorised. It is relevant to note that when the said amount was demanded and paid, there was no injunction or stay restraining the appellant from demanding or receiving the due

32. In the light of the above decision in ***Paschimanchal Vidyut Vitaran Nigam Limited*** the legal position that emerges is that where there are statutory rules governing the conditions relating to sanction of a connection for supply of electricity, the distribution company can insist upon prior fulfilment of the requirement of such rules and regulations before granting a fresh connection. Even if the rules are silent, it can stipulate such terms and conditions as it deems fit and proper to regulate its transaction and dealings. So long as such rules and regulations or terms and conditions are not arbitrary and unreasonable, the Courts will not interfere with them.

33. In our view, the learned single Judge committed an error in holding that the outstanding dues of earlier owner/occupier cannot be realised from the new owner/occupier unless there were mala fides of the old consumer. The question of mala fides does not arise when there is a statutory provision. We may add that there is no requirement in law for the distribution company to first initiate recovery proceedings by filing a civil suit against the old consumer before disconnecting the electricity supply. In ***Swastic Industries v. MSEB (1997) 9 SCC 465*** the Supreme Court observed:

“It would, thus, be clear that the right to recover the charges is one part of it and right to discontinue supply of electrical energy to the consumer who neglects to pay charges is another part of it. The right to file a suit is a matter of option given to the licensee, the Electricity Board. Therefore, the mere fact that there is a right given to the Board to file the Suit and the limitation has been prescribed to file the suit, it does not take away the right conferred on the Board under Section 24 to make demand for payment of the charges and on neglecting to pay the same they have the power to discontinue the supply or cut off the supply, as the case may be, when the consumer neglects to pay the charges.”

34. In our opinion, the arrears of electricity charges outstanding in respect of electricity supply to the premises cannot be equated with contractual claim of damages, as held by the learned single Judge relying upon the decision of the Supreme Court in **Raman Iron Foundry** (supra). The said decision is no longer good law in view of the subsequent decision in **H.M.Kamaluddin Ansari v. Union of India** (supra). That apart, as pointed out in **Isha Marbles** case, electricity is a public property and hence the law in its majesty benignly protects public property and behoves everyone to respect public property. Hence, the courts must adopt the interpretation which furthers the preservation and protection of public property.

CONCLUSION

35. For the foregoing reasons, we hold that in terms of clause 2.1(iv) of the General Conditions of Supply forming part of the Tariff Order dated May 23, 2001 if there are electricity dues against the previous owner or occupant of a premises who transfers the premises to a new owner or occupant, the new owner or occupant applying for a fresh electricity connection can be compelled by the Distribution company to pay the arrears of electricity dues of the previous owner or occupant and the distribution company can refuse to supply electricity to the premises on account of such non-payment.

36. In the result, the appeal succeeds. The impugned judgment of the learned single Judge in WP (Civil) No. 2479 of 2003 is set aside. The first respondent shall pay the costs of the appellant, quantified at Rs.25,000/-.

CHIEF JUSTICE

S.N.AGGARWAL, J

JULY 2nd, 2009

S.MURALIDHR, J

“v”