



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP No.2585 of 2024

Date of Decision: 04.04.2024

M/s Pure & Cure Healthcare Pvt. Ltd.Petitioner
HPSEBLRespondent

Coram

Hon'ble Mr. Justice Sandeep Sharma, Judge.
Whether approved for reporting? Yes.

For the Petitioner: Mr. Shrawan Dogra, Senior Advocate, with
Mr. Manik Sethi, Advocate.

For the respondents: Mr. Sunita Sharma, Senior Advocate, with Mr.
Dhananjay Sharma, Advocate.

Sandeep Sharma, J. (Oral)

Being aggrieved and dissatisfied with the issuance of communication dated 02.03.2024 (Annexure P-2), whereby prayer made by the petitioner herein for installation of new electricity connection, came to be rejected with the observation that firstly petitioner shall have to clear outstanding dues to the tune of Rs. 20,43,837/- payable by the previous owner i.e. M/s Ankur Drug Private Ltd., petitioner has approached this Court in the instant proceedings filed under Article 226 of the Constitution of India, praying therein for the following main reliefs:

“(i) Issue a writ of mandamus or any other appropriate writ quashing the communication dated 02.03.2024 (Annexure P-2) as being illegal and without jurisdiction.

(ii) Issue a writ of mandamus or any other appropriate writ directing the respondent to compensation the petitioner in terms of the Himachal Pradesh Electricity Regulatory Commission (Distribution Performance Standards) Regulations, 2010, for the delay in attributable to the respondent for the grant of the electricity connection.”

2. Though, vide orders dated 27.03.2024, 02.04.2024 and 03.04.2024 sufficient time was granted to respondents to file reply/ instructions, but fact remains that till date neither instructions nor reply has been filed. Learned Senior counsel arguing on behalf of the respondents fairly stated during proceedings of the case that controversy can be decided on the basis of material already available on record.

3. For having bird's eye view, the facts relevant for adjudication of the case at hand are that petitioner herein participated in auction proceedings held pursuant to order of auction passed in proceedings initiated against previous owner i.e. M/s Ankur Drug Private Ltd. under Section 13 of the Secularization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (hereinafter to be referred to as “**SARFAESI**”) on account of non-

payment of loan amount and being successful bidder was given Sale Certificate dated 23.11.2023 (Annexure P-1), perusal whereof clearly reveals that after receipt of total sale consideration of Rs. 30,69,85,140/-, the premises of aforesaid company were handed over to the petitioner. Sale Certificate further reveals that pursuant to sale in favour of the petitioner secured asset was made to the petitioner "free from all encumbrances" of the secured creditor. After becoming owner of the property in question, petitioner herein applied for fresh electricity connection, but such prayer of him was not considered, rather it was asked firstly to clear the outstanding dues of the previous owner i.e. M/s Ankur Drug Private Ltd. Though, petitioner herein submitted before the authorities that property in question has been purchased under SARFAESI proceedings and as per Sale Certificate issued in its favour, it has no liability to pay outstanding dues, if any, of the previous owner, but yet vide communication dated 02.03.2024, Assistant Engineer, Electrical Sub Division, HPSEBL, Baddi, disposed of the application filed by the petitioner by making following observations:

Your referral to application has been examined and it has come to notice that you had applied electricity connection in the premises of M/s Ankur Drug Pvt. Ltd. which is permanently disconnected due to non-payment of outstanding dues amounting to Rs. 2047337/-.

As such, you have two options:-

(a) In view the Regulation 10 of the HPERC (Recovery of expenditure for the supply of Electricity) regulation 2012, been amended dated 05.09.2018 by the Hon'ble HPERC, vide HPERC (Recovery of expenditure for the supply of Electricity) (fifth amendment) Regularization 2018, in which the new applicant has the option either to avoid payment of IDC by clearing the dues in respect of old connections on that premises. As such you have option to avoid payment of IDC by clearing the dues in respect of old connections amounting to Rs. 20,47,837/- alongwith interest 12% per annum till the finalization of matter.

Or

(b) And in accordance with the clause 5.213(A) of HP Electricity Supply code 2009, fourth amendment 2020, you have to deposit (Advance cost share toward IDC @ Rs. 200/- per KVA) + (Average bill of last two-month bill of old consumer, i.e. Rs. 16,61,837.00)

As such you are requested to give Self undertaking on Company letter pad for availing option as listed above so that further process for release PAC/electricity connection may be initiated.

4. As per aforesaid observations made by the respondent-board, new electricity connection, if any, could have been given to the petitioner subject to its paying sum of Rs. 20,47,837/- alongwith interest @12% per annum **or** depositing (Advance cost share toward IDC @ Rs.200/- per KVA + (Average bill of last two-month bill of old

consumer, i.e. Rs. 16,61,837.00, meaning thereby, in both the eventualities noticed herein above, petitioner was actually asked to make payment, which was due from the previous owner. In view of aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein to set aside aforesaid order and issue direction to respondent to provide new electricity connection on the payment of usual charges.

5. Ms. Sunita Sharma, learned Senior Counsel representing respondent/ board vehemently submitted that since at the time of auction some amount was payable by the previous owner, the respondent/ Electricity Board, is within its right to claim such amount from the auction purchaser. However, such plea of her deserves outright rejection for the reason that claim qua the outstanding amount, if any, could have been raised by Electricity Department under SARFAESI proceedings, wherein property in question was being put to auction on account of non-clearance of loan amount by the previous owner. Since petitioner herein being successful bidder has already been granted Sale Certificate dated 23.11.2023 (Anneuxre P-1), wherein it has been declared that the secured asset is free from all encumbrances, it cannot be compelled to pay outstanding amount, if any, on account of electricity charges payable by the previous owner. Though, at this stage, Mr. Sunita Sharma, learned Senior Counsel

representing respondent attempted to argue that at the time of auction, there was a charge already created on the property on account of non-payment of Electricity bill and as such, amount could only have been realized from the sale proceeds or from the auction purchaser, however, such plea of her is not tenable in the eye of law for the reasons that Himachal Pradesh State Electricity Board Ltd. is a company governed under Companies Act, 2013 and Chapter VI of aforesaid Act specifically deals with the creation of charge in terms of Section 77 & 78 of Act readwith enabling provisions of the Company (Registration of Charges) Rules 2014, it is mandatory on the company to register such charge with Registrar of Company within 30 days of creation of such charge. Since in the case at hand, no charge in terms of aforesaid provision of law has ever come to be created at the behest of respondent, now, it cannot establish at this stage, any right to recover such amount from the auction purchaser.

6. Further, perusal of document dated 15.03.2024 downloaded from the site of Ministry of Corporate Affairs clearly reveals that secured creditors had registered their charge qua the property in question and as such, their interest was duly taken care by the authority concerned after sale of the property in question, whereas aforesaid document nowhere reveals that respondent-

Electricity Board had ever registered its charge on account of non-payment of electricity dues from the previous owner.

7. Aforesaid aspect of the matter has been elaborately dealt with by the Hon'ble Apex Court in its judgment titled as K.C.Ninan Vs. Kerala State Electricity Board & Ors., 2023 SCC OnLine SC 663, wherein it has been held as under:-

“62. In Isha Marbles (supra), a three-judge Bench of this Court held that an application for supply of electricity to the same premises is to be regarded as a reconnection. This Court, while interpreting the provisions of the 1910 Act, gave its reasoning on the assumption that the supply of electricity is with respect to premises and not the consumer. **However, the 2003 Act has statutorily clarified the position that supply of electricity is with respect to the consumer. It necessarily follows that when a new owner or occupier of the premises applies for supply of electricity in terms of Section 43 of the 2003 Act, it will constitute a fresh connection, regardless of the fact that the premises for which the electricity is sought was being supplied with electricity previously.** An application for supply of electricity can be categorised as reconnection only when the same owner or occupier of the premises, who was already a consumer, applies for supply of electricity with respect to the same premises in case the electricity supply is disconnected.

64. In Gujarat Inns. (supra), this Court held that an application for electricity by an auction-purchaser will constitute fresh connection even though the premises are the same. **The reasoning is based on the correct assumption that supply of electricity is with respect to the consumer, and not the premises.** Therefore, even if the premises may be the same to which electricity had already been supplied, it will be considered as a fresh connection in the situation where a different applicant, in that case an auction-purchaser, applies for supply of electricity.

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V. Whether arrears of electricity can become a charge or encumbrance over the premises

96. The next issue that arises for our consideration is whether arrears of electricity can become a charge or encumbrance over the premises. An ancillary issue is whether such arrears can become a charge on the property only through an express provision of law. Before we embark upon our analysis, we clarify that it is unnecessary to deal with the submission of the auction purchasers regarding registration under Section 17 of the Indian Registration Act 1908 for the conditions of supply contained in a contract to constitute a charge. The decision of this court in M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons, was limited to the extent that it holds that a charge created by an act of parties under Section 100 of the Transfer of Property Act 1882 does not

attract the provisions of Section 59 of the Indian Registration Act 1908.

97. The contention of the auction purchasers is that arrears of electricity are not a charge on property as they do not run with the land. They have relied on the decision in Ahmedabad Municipal Corporation v. Haji Abdulgafur Haji Hussenhba to submit that enforcement of a charge against the property in the hands of a transferee for value without notice of the charge does not arise, and electricity dues are simply an unsecured debt. On the other hand, the Electric Utilities submit that it is not even their case — in the absence of an express provision of law — that there is any mortgage or charge over the property in the form that the licensee would be a secured creditor.

98. Section 100 of the Transfer of Property Act 1882 contemplates two types of charges: charges created by act of parties and charges arising by operation of law.

It inter alia provides as follows:

“100. Charges: Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions

hereinbefore contained 1[which apply to a simple mortgage shall, so far as may be, apply to such charge].

Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, [and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.”

99. An encumbrance means a burden or charge upon property or a claim or lien upon an estate or on the land. Encumbrance must be a charge on the property, which must run with the property. In terms of the first paragraph of Section 100, when an immovable property of one party is pledged as security for the payment of money to another, and the transaction does not constitute a mortgage, the latter would acquire a charge over the property. All provisions that apply to a simple mortgage are applicable to a charge. A charge is neither a sale nor a mortgage because it creates no interest in or over an immovable property but it is only a security for the payment of money. In other words, a charge only results in the creation of a right of payment out of the property towards the satisfaction of the debt or obligation in question.

100. The second paragraph of Section 100 provides an exception to the general proposition that a charge runs

with the land and can be enforced even if the property has passed into the hands of a third party. It provides that a charge cannot be enforced against a property in the hands of a transferee without notice. The words “save as otherwise expressly provided by any law for the time being in force” indicate that a charge can be enforced against a transferee without notice when an express provision of law exists. **Hence, a charge cannot be enforced against a transferee if they have no notice of the same, unless the requirement of such notice has been dispensed with by law.**

104. **Counsel for the Electric Utilities have not referred to any provision in the plenary legislation of the 2003 Act by which electricity dues would constitute a charge on the premises. The provisions of the 1910 Act, 1948 Act, and the 2003 Act do not provide that the arrears of electricity dues would constitute a charge on the property or that such a charge shall be enforceable against a transferee without notice. It is pertinent to note that this Court has reiterated that arrears of electricity cannot become a charge or encumbrance over the premises, in the absence of an express provision of law in the 1910 Act, 1948 Act or 2003 Act.**

113. **In exercise of such power, Regulation 10.5 of the Maharashtra Electricity Supply Code 2005 provides that any charge for electricity or any other sum**

which remains unpaid by an erstwhile owner constitutes a charge on the property and can be recovered from the transferee subject to the permitted period specified therein. This provision spelt out in the present judgement is a mere illustration of a subordinate rule wherein unpaid electricity dues constitute a charge on property and can be recovered from a subsequent transferee.

116. The provisions of the statute and statutory conditions of supply need to be examined to determine whether the conditions of supply provide for the creation of a charge in terms of Section 100 of the Transfer of Property Act, 1882. Once it is established that a statutory charge is created and required notice was given, the charge attaches to the property and the licensee is entitled to recover the unpaid electricity dues by proceeding against the premises. Consequent to the charge created, Article 62 of the Indian Limitation Act, 1963 would come into play. Article 62 of the Limitation Act relates to enforcing the payment of money procured by mortgaged or otherwise charged upon the immoveable property. The electricity utilities would get a period of twelve years to recover the dues charged on the immoveable property from the date when the money payable became due.

117. In light of the above discussion, we are of the opinion that the electricity utilities can create a

charge by framing subordinate legislation or statutory conditions of supply enabling recovery of electricity arrears from a subsequent transferee. Such a condition is rooted in the importance of protecting electricity which is a public good. Public utilities invest huge amounts of capital and infrastructure in providing electricity supply. The failure or inability to recover outstanding electricity dues of the premises would negatively impact the functioning of such public utilities and licensees. In the larger public interest, conditions are incorporated in subordinate legislation whereby Electric Utilities can recoup electricity arrears. Recoupment of electricity arrears is necessary to provide funding and investment in laying down new infrastructure and maintaining the existing infrastructure. **In the absence of such a provision, Electric Utilities would be left without any recourse and would be compelled to grant a fresh electricity connection, even when huge arrears of electricity are outstanding.** Besides impacting on the financial health of the Utilities, this would impact the wider body of consumers.

8. It is quite apparent from the aforesaid exposition of law laid down by Hon'ble Apex Court that dues, if any, on account of electricity Bill are attributable to the consumer and in case it is to be made attributable to premises, then charge is to be created in conformity with the provision contained in Section 100 of Transfer of

Property Act. Admittedly, petitioner herein was not a consumer qua the electricity connection provided to the previous owner i.e. M/s Ankur Drug Private Ltd. and in case electricity bill was to be made attributable to the premises, respondent-electricity board ought to have created charge. Since in the instant case, charge, if any, never came to be created in terms of aforesaid provision read with and Sections 77 and 78 of Companies Act, 2013. Respondent-board is estopped from claiming that respondent-board is entitled to claim amount as detailed in impugned order on account of creation of charge. Since, at no point of time respondent-board took steps to create charge as has been discussed in detail herein above, it cannot be permitted to recover the dues of previous occupier from the auction purchaser or subsequent occupier.

9. Consequently, in view of detailed discussion made herein above as well as law taken into consideration, this Court finds merit in the present petition and accordingly, the same is allowed. Order dated 02.03.2024 (Annexure P-2) is quashed and set aside to the extent petitioner herein has been asked to clear the outstanding dues of previous owner. It is further ordered that request of the petitioner for installation of fresh electricity connection shall be considered and decided by the board without insisting upon it to deposit outstanding dues, if any, payable by the previous owner, expeditiously, preferably

within a period of two weeks. Pending applications, if any, are also disposed of.

April 4, 2024

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**(Sandeep Sharma),
Judge**

High Court of H.P.