DAKSHIN HARYANA BIJLI VITRAN NIGAM LTD

v.

M/S PARAMOUNT POLYMERS PVT. LTD.

OCTOBER 19, 2006

[H.K. SEMA AND P.K. BALASUBRAMANYAN, JJ.]

Electricity (Supply) Act, 1948—Sections 49 and 79(j)—Disconnection of power supply for arrears towards consumption charges of electrical energy—Sale of undertaking of consumer on 'as is where is basis'—Thereafter electricity distribution company amending its terms for supply of electrical energy whereby no fresh connection in respect of premises could be given to a purchaser unless they cleared arrears of consumer whose undertaking had been purchased—Subsequent to this, purchaser of undertaking applying for connection, but it was rejected—High Court holding that as there was no charge on premises for electricity charges and purchase thereof was prior to amendment of terms of supply, electricity distribution company was bound to provide electric connection to purchaser—Correctness of—Held—In view of Sections 49 and 79(j) of Act of 1948, whereby licensee or Electricity Board was empowered to set terms and conditions for supply of electrical energy, the amended terms were not beyond power of distribution company—It was more so as Haryana Government Electrical Undertakings (Dues Recovery) Act, 1970 read with Punjab Land Revenue Act, 1887 enabled predecessor of electricity distribution company to recover dues on account of consumption of electrical energy as an arrear of land revenue and they could be recovered by proceeding against undertaking even in hands of transferee—The amended terms statutory in nature and not merely contractual; they were reasonable provisions to safeguard rights and interest of power distribution company—Purchaser was governed by them especially as application for fresh connection was made after circulation of communication about them—It was more so as sale was on 'as is where is' basis and as a prudent buyer, a reasonable enquiry would have put the purchaser on notice about arrears.

Appeal to Supreme Court—Contentions based on statutes—Put forward before Court at time of arguments and not raised either in High Court or in petition for special leave to appeal—Consideration of—Held that such contentions cannot be ignored—At best, the opposite party could plead that

it did not get a proper opportunity to meet them—Matter remitted for fresh decision to High Court with liberty for amendment of pleadings.

L.L.C. was a consumer of electricity from the appellant, an electricity distributing company. It fell into arrears towards consumption charges of electrical energy, and because of its failure to pay them, its power supply was disconnected by appellant For its inability to repay the borrowed amounts from the State Financial Corporation, L.L.C. was taken over by the Corporation and advertised and offered for sale on 'as is where is basis'. The bid of respondent was accepted and possession was given to them. Thereafter, on 27.11.2001 the appellant incorporated a term in the Terms and Conditions of Supply of electrical energy whereby in cases where a consumer had defaulted in paying electrical charges and there had been a consequent disconnection of supply, no fresh connection in respect of the premises could be given to a purchaser unless the purchaser cleared the amount that was left in arrears by the consumer whose undertaking had been purchased. Respondent applied for a connection on 1.1..2002.The appellant took the stand that unless the respondent paid the amount outstanding against L.L.C., no fresh connection could be given to them. As respondent was not willing to comply, their application for connection was rejected. The respondent filed a Writ Petition in the High Court for quashing the circular dated 27.11.2001 introducing the aforesaid condition for fresh connection. Appellant contended that (i) the Circular dated 27.11.2001 was issued in exercise of power under Section 49 of the Electricity (Supply) Act, 1948 by the competent authority thereunder and the incorporation of such a condition in the Terms and Conditions of Supply was statutory in nature and was perfectly valid (ii) a substantial amount was due to the appellant from L.L.C. was brought to the notice of the Financial Corporation (iii) the sale by the Financial Corporation was on 'as is where is basis' and hence the respondent was liable for the dues run up in respect of the premises by the prior consumer. The High Court did not go into the question of the validity or otherwise of the Circular and held that since there was no charge on the premises for the electricity charges run up by L.L.C and the purchase by respondent was prior to the date of the Circular, it could not be applied in the case of the respondent and that the appellant was bound to provide the electric connection to the respondent without insisting on the Terms and Conditions introduced in that Circular. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. Under section 49 of Electricity (Supply) Act, 1948, the licensee or rather, the Electricity Board, is entitled to set down terms and conditions for supply of electrical energy. In the light of the power available to it, also in the context of Section 79(j) of the Supply Act, it could not be said that the insertion of clause 21A into the Terms and Conditions for supply of electrical energy is beyond the power of the appellant It is also not merely contractual. [647-E, F] A B

M/s Hyderabad Vanaspati Ltd. v. *Andhra Pradesh State Electricity Board and Ors.*, [1998] 2 SCR 62, relied on

Isha Marbles v. *Bihar State Electricity Board,* [1995] 1 SCR 847, held inapplicable C

2.1. The High Court has not referred to the Haryana Government Electrical Undertakings (Dues Recovery) Act, 1970 which came into effect on 27.10.1970. The said Act enabled the Electricity Board, of which the appellant is the successor, to recover the dues to the Board on account of consumption of electrical energy and other charges as defined in that Act to be recovered as an arrear of land revenue notwithstanding anything contained in any other law or instrument or agreement to the contrary. The recovery of arrears of land revenue is provided for in the Punjab Land Revenue Act, 1887. Thus, the amount due from the prior owner of the undertaking or consumer could be recovered by proceeding against the undertaking even in the hands of the transferee if one is to go by the relevant provisions of the above two enactments applicable to recovery of dues by the appellant or its predecessor, the Electricity Board. If in the context of such provisions, the appellant introduced a term in the Terms and Conditions of Supply in the case of a transfer that the transferee has to discharge the prior amounts due in respect of that undertaking by the prior consumer, it cannot be said that it had no authority to do so or that the provision is not a reasonable one in the interests of safeguarding the rights of the appellant. [645-H; 646-A-E-H; 647-A, B] D E F

2.2. The High Court did not consider the effect of the above enactments relating to recovery of dues. Even though no such contention was raised in the High Court and even in the petition for special leave to appeal such a contention is not raised, but considering that the contention is based on statutes enacted by the State Legislature and are in force; the arguments cannot be ignored by merely stating that they were not put forward before the High Court, since they have been put forward before this Court at the time of arguments. G H

A At best, the respondent could plead that it did not get a proper opportunity to meet this contention in the circumstances of this case. [647-B, C, D]

3.1. The High Court was also wrong in holding that the relevant date is the date of sale of the undertaking by the Financial Corporation to the first respondent. The insertion of clause 21A was circulated by the communication B dated 27.11.2001 and it was subsequently followed by the formal notification in terms of Section 49 of the Electricity (Supply) Act, 1948 read with Section 79(j) of that Act. The respondent having applied for a fresh connection only on 1.1.2002, the application would be governed by the terms and conditions including the terms inserted on 27.11.2001, as subsequently formally notified. C In the writ petition filed on 27.2.2002 in that behalf, the court could not have come to the conclusion that the application made by the first respondent was not governed by the amended terms and conditions including clause 21A thereof. [644-H; 645-A, B, C, D]

3.2. It is not as if the respondent was an ignorant party. Before submitting D its bid to the Financial Corporation the respondent would certainly have inspected the premises and could have come to know that power connection to the premises had been snapped and this information should have put it on reasonable enquiry about the reasons for the power disconnection leading to the information that the previous owner of the undertaking or consumer was in default. Moreover, the appellant had clearly written to the Financial E Corporation even before the sale was advertised by it, informing it that a sum of Rs. 64,23,695/- was due towards electricity charges to the appellant and when selling the undertaking, that amount had to be provided for or kept in mind. Therefore, any reasonable enquiry by the respondent as a prudent buyer would have put it on notice of the subsistence of such a liability. The sale was F also on 'as is where is basis. Clause 21A of the Terms and Conditions of Supply as inserted with particular reference to clauses (b) and (c) thereof, clearly applied to the respondent when it made an application on 1.1.2002 seeking a fresh connection for the premises. [645-D, E, F, G, H]

4. The writ petition filed by the respondent is remitted to the High Court G for a fresh decision in accordance with law. The respondent would be free to amend its writ petition including the prayers therein and in the case of such an amendment the appellant would be entitled to file an additional statement in opposition. The writ petition will be considered afresh by the High Court in the light of what is stated above. [648-F, G, H]

H CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4574 of 2006.

From the final Judgement and Order dated 12.12.2005 of the High Court of Punjab and Haryana at Chandigarh in L.P.A. No. 186/2005. A

Neeraj Kumar Jain, Bharat Singh, Sanjay Singh Vikrant Hooda and Ugra Shankar Prasad for the Appellant.

Vijay Hansaria, Sanjay Sarin, Tarun Rana, Ashok Mathur and Sneha Kalita for the Respondents. B

Amit Dayal for Haryana Financial Corporation.

The Judgment of the Court was delivered by

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P.K. BALASUBRAMANYAN, J. 1. Leave granted.

2. M/s L.L.C. Steels Pvt. Ltd. was a consumer of electricity from the appellant, a distributing company established in the place of the State Electricity Board. It allegedly fell into arrears to the tune of Rs. 64,23,695/- towards consumption charges of electrical energy including interest and other incidental D charges. Because of the failure to pay the consumption charges, the power to the undertaking was disconnected on 6.4.1998. M/s L.L.C. Steels Pvt. Ltd. had also borrowed amounts from the Haryana Financial Corporation and had mortgaged the undertaking to the Financial Corporation. In exercise of power under Section 29 of the State Financial Corporations Act, 1951, the undertaking was taken over by the Financial Corporation and advertised for sale. In the E advertisement, the undertaking was offered for sale on "as is where is basis". The first respondent herein bid the undertaking and its bid was accepted. Possession was given by the Financial Corporation to the first respondent on 22.4.1999.

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3. On 27.11.2001, the appellant-Company decided to incorporate a term in the Terms and Conditions of Supply of electrical energy by providing that in cases where a consumer had defaulted in paying electrical charges and there had been a consequent disconnection of supply, no fresh connection in respect of the premises would be given to a purchaser unless the purchaser cleared the amount that was left in arrears by the consumer whose undertaking G had been purchased. It is seen that the first respondent applied for a connection on 1.1.2002. The appellant-Company took the stand that unless the first respondent paid the amount outstanding against M/s L.L.C. Steels Pvt. Ltd., the prior consumer, no fresh connection could be given to the first respondent. Since the first respondent was not willing to comply, the application of the H

A first respondent was rejected. The first respondent thereupon filed a suit, Civil Suit No. 23 of 2002 in the Court of Civil Judge (Senior Division), Faridabad, seeking to restrain the appellant-Company from interfering with the use of generators by the first respondent for generating electricity for its use and for a mandatory injunction directing the appellant-Company to give a fresh electric connection to the first respondent without insisting on the B clearing of the dues of the prior owner of the premises. Even while the suit was pending, the first respondent filed a Writ Petition, Civil Writ Petition No. 5350 of 2002 in the High Court of Punjab and Haryana praying for the issue of a writ of certiorari to quash the circular dated 27.11.2001 introducing a condition for fresh connection only on payment of the dues of the previous C consumer of electricity in the premises concerned, for a writ of prohibition restraining the appellant from removing the generators installed by the first respondent in the premises, for a writ of mandamus directing the appellant to provide electric connection temporarily to enable the first respondent to run its factory during the pendency of the Writ Petition and for other incidental reliefs. The scrutiny of the prayers made in the Writ Petition shows that there D was no prayer for a writ of mandamus directing the appellant-Company to provide a permanent electric connection to the first respondent. The appellant resisted the Writ Petition submitting that the first respondent having already approached the Civil Court for relief, the Writ Petition was not maintainable. It was further contended that the Circular dated 27.11.2001 sought to be E challenged in the Writ Petition was issued in exercise of power under Section 49 of the Electricity (Supply) Act, 1948 by the competent authority thereunder and that incorporation of such a condition in the Terms and Conditions of Supply was statutory in nature and was perfectly valid. It was also pleaded that the fact that a substantial amount was due to the appellant from M/s L.L.C. Steels Pvt. Ltd. was brought to the notice of the Financial Corporation F and a request was made that the amount of Rs. 60,48,504/- should also be recovered when the sale was effected by it. The sale by the Financial Corporation was on "as is where is basis" and hence the first respondent was liable for the dues run up in respect of the premises by the prior consumer. It was submitted that there was no merit in the Writ Petition and it was liable G to be dismissed.

4.Almost the whole case of the first respondent in the Writ Petition was based on the decision of this Court in *M/s Isha Marbles* v. *Bihar State Electricity Board,* [1995] 1 S.C.R. 847. In that decision, this Court held that in the absence of there being a charge over the property and the premises H comes to be owned or occupied by the auction purchaser and that auction

purchaser seeks supply of electrical energy by way of a fresh connection, he cannot be called upon to clear the past arrears as a condition precedent for the fresh connection or supply. What mattered was the contract entered into by the erstwhile consumer with the Electricity Board. The Electricity Board could not seek the enforcement of the contractual liability of the prior consumer against the third party, the purchaser. Even the bona fides of the sale may not be relevant. It was impossible to impose on the purchaser a liability which was not incurred by him. The auction purchaser came to purchase the property after disconnection but it could not be understood as a consumer or occupier within the meaning of the Electricity Act until a contract was entered into. Though, it was stated that electricity is public property and law, in its majesty, benignly protects public property and it behoves everyone to respect public property, since the law, as it stood, was inadequate to enforce the liability of the previous contracting party against the auction purchaser who was a third party and was in no way connected with the previous owner/occupier, the liability could not be enforced against the purchaser or the clearing off of the earlier dues made a condition precedent for grant of a fresh connection. The answer of the appellant- Company to the argument based on this ratio of *Isha Marbles* (supra) was that on 27.11.2001, the appellant-Company had incorporated a specific term in that regard in the Terms and Conditions of Supply and since there was no infirmity or invalidity attached to such a condition, the ratio of the decision in *Isha Marbles* (supra) would not enable the first respondent to ignore the condition specifically inserted in exercise of statutory power and consequently, no relief could be granted to the first respondent unless that condition was also fulfilled by the first respondent.

5. The High Court did not go into the question of the validity or otherwise of the amendment to the Terms and Conditions incorporated as clause 21A on 27.11.2001. The learned single judge accepted the argument on behalf of the first respondent that since there was no charge on the premises for the electricity charges run up by M/s L.L.C. Steels Pvt. Ltd. and the purchase by the first respondent was on 22.4.1999, the amendment promulgated on 27.11.2001 could not be applied in the case of the first respondent and that the appellant-Company was bound to provide the electric connection to the first respondent without insisting on the Terms and Conditions introduced with effect from 27.11.2001. The argument that what was relevant was the date of the application for connection made by the first respondent herein and the application was made after the amended term was incorporated, was brushed aside stating that in the absence of any charge or of contractual liability created against the auction purchaser, the liability

A could not be fastened unless it is shown that on the date of transfer, the auction purchaser was either bound by a statute or by a contract. The judge also noticed that in another case where a transfer was effected in the year 2003, the appellant had conceded that the decision of the Supreme Court in *Isha Marbles* (supra) applied and a different stand could not be taken in the present case by the appellant. Thus, it was directed that the appellant release B the power connection to the first respondent expeditiously and not later than 30 days from the date of the judgment. The appellant filed an appeal. The Division Bench of the High Court even without admitting the appeal and without appreciating that some questions of importance do arise for decision in the appeal dismissed the same by referring to the decision in *Isha Marbles* C (supra) and stating that the amendment of the Terms and Conditions of Supply could not be made applicable since the purchase by the first respondent was prior to the introduction of condition 21A and as legislation which affected substantive rights are presumed prospective. The High Court also relied heavily on the fact that in another case of disconnection and transfer in the year 2003, the appellant had not taken up the stance it had taken up D in the present case and had conceded that the decision in *Isha Marbles* (supra) applied to that case. It is this dismissal that is challenged in this appeal.

6. We may observe even at this stage that though the main contention E raised on behalf of the first respondent was that the condition incorporated on 27.11.2001 was not valid in the light of the ratio of the decision in *Isha Marbles* (supra), that question has not been decided by the High Court. The High Court has proceeded on the basis that there is no charge created on the undertaking for the consumer's dues and consequently, the incorporation of a condition on 27.11.2001 could not have operation in a case where the sale F of the undertaking and purchase by the first respondent, were prior to the date of the amendment. What is the effect of the first respondent applying for a fresh connection only on 1.1.2002 after the amendment was incorporated was not considered properly. The terms incorporated were also not scrutinized. The court proceeded on the basis that the relevant date was the date of G purchase of the undertaking by the first respondent.

7. Even at the outset, learned counsel for the first respondent submitted that the correctness of the decision in *Isha Marbles* (supra), which is a three judge Bench decision, has been doubted by a Bench of two judges in Civil Appeal Nos. 5312 and 5313 of 2005 and the appeals have been referred to a H Bench of three judges and these appeals can also be so referred. But on

scrutinizing the order of reference, this is what we find recorded: A

> " Heard.
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> The basic question is whether electricity dues constitute a charge on the property so far as the transferor or the transferee of the unit are concerned. B
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> Considering the importance of the issues involved, it would be appropriate if the matters are heard by a three judge Bench. The matters may be placed before Hon'ble The Chief Justice of India for necessary directions."

C

On a scrutiny of the decisions of the High Court of Bombay giving rise to those appeals, we find that the primary question in those appeals would be the correctness of the view of the High Court that the Electricity Board had no power to impose a condition that the purchaser of an undertaking will have the obligation to clear the arrears of charges of the prior consumer. Of course, incidentally the correctness of some of the observations in *Isha Marbles* D (supra) may also be involved. Anyway, that aspect will also have to be borne in mind while we consider the elaborate submissions made before us in this appeal.

8. It appears to be appropriate to set down Clause 21A inserted in the Terms and Conditions of Supply of electrical energy by the appellant with E effect from 27.11.2001, which reads as under:

> "21-A (a) When there is transfer of ownership or right of occupancy of a premises, the registered consumer shall intimate the transfer of right of occupancy of the premises F within 15 days to the Assistant Engineer/Assistant Executive Engineer concerned. Intimation having been received, the service shall be disconnected unless application for transfer is allowed. If the transferee desires to enjoy the service connection, he shall pay the outstanding dues, if any, to the Nigam and apply for transfer of the service connection within G 30 days and execute fresh agreement and furnish fresh security. New Consumer number shall be allotted in such cases canceling the previous number.
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> (b) Reconnection or new connection shall not be given to

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A any premises where there are arrears on any account due to the Nigam unless these are cleared in advance. If the new owner/occupier/allottee remits the amount due from the previous consumer, the Nigam shall provide reconnection or new connection depending upon whether the service remains disconnected/dismantled as the case may be. The amount B so remitted will be adjusted against the dues from the previous consumer. If the Nigam get the full or partial dues from the previous consumer through legal proceedings or otherwise, the amount remitted by the new owner/occupier to whom the connection has been effected shall be refunded C to that extent. But the amount already remitted by him/her shall not bear any interest.

(c) The above proposed provisions of clause 21-A(a) and (b) shall be applicable to existing consumers also where defaulting amount exists against premises occupied by such D consumer."

It is seen that the above amendment was also formally notified on 11.2.2002. As we see it, a transferee of ownership or of right of occupancy of a premises to which electrical connection had been given, is given the option to enjoy the service connection already granted by paying the outstanding dues, if E any, to the appellant and apply for transfer of service connection and obtain the same by executing a fresh agreement and furnishing a fresh security. Sub-clause (b) provides that reconnection or new connection shall not be given to any premises where there are arrears on any account to the appellant unless the arrears are cleared in advance. It has to be noted that reconnection F is related to the premises and arrears again is related to the premises. The amount remitted by the transferee towards arrears are to be adjusted against the dues from the previous consumer. But it is provided that if meanwhile the appellant is enabled to recover the amount from the transferor or consumer, the amount remitted by the transferee-consumer is to be refunded, but without interest. Sub-clause (c) provides that provisions contained in sub-G clauses (a) and (b) of clause 21A shall be applicable to an existing consumer also where defaulting amount exists against the premises occupied by such consumer.

9. According to us, the High Court has gone wrong in holding that this newly inserted clause 21A of the terms and conditions was not applicable H to the first respondent. It is true that the sale of the undertaking at the

instance of the Financial Corporation to the first respondent was prior to 27.11.2001 and possession was also given to the first respondent on 22.4.1999, prior to the insertion of clause 21A. But going by clause 21A(c) it is clear that even if the view taken by the High Court that the relevant date is the date of sale in favour of the first respondent is accepted, even then, the appellant would be entitled to apply sub-clause (b) of clause 21A to the first respondent as an existing consumer, since defaulting amount existed against the premises occupied by the first respondent. We are also not in a position to agree with the High Court that the relevant date is the date of sale of the undertaking by the Financial Corporation to the first respondent. The insertion of clause 21A was circulated by the communication dated 27.11.2001 and it was subsequently followed by the formal notification in terms of Section 49 of the Supply Act read with Section 79(j) of that Act. The first respondent having applied for a fresh connection only on 1.1.2002, the application would be governed by the terms and conditions including the term inserted on 27.11.2001, as subsequently formally notified. In the writ petition filed on 27.2.2002 in that behalf, the court could not have come to the conclusion that the application made by the first respondent was not governed by the amended terms and conditions including clause 21A thereof. It is not as if the first respondent was an ignorant party. Before submitting its bid to the Financial Corporation the first respondent would certainly have inspected the premises and could have come to know that power connection to the premises had been snapped and this information should have put it on reasonable enquiry about the reasons for the power disconnection leading to the information that the previous owner of the undertaking or consumer was in default. Moreover, the appellant had clearly written to the Financial Corporation even before the sale was advertised by it, informing it that a sum of Rs.64,23,695/- was due towards electricity charges to the appellant and when selling the undertaking, that amount had to be provided for or kept in mind. Therefore, any reasonable enquiry by the first respondent as a prudent buyer would have put it on notice of the subsistence of such a liability. The sale was also on 'as is where is' basis. On our interpretation of clause 21A of the Terms and Conditions of Supply as inserted with particular reference to clauses (b) and (c) thereof, we are of the view that the said clauses clearly applied to the first respondent when it made an application on 1.1.2002 seeking a fresh connection for the premises.

10. We find that the High Court has also not referred to the Haryana Government Electrical Undertakings (Dues Recovery) Act, 1970 which came

A into effect on 27.10.1970. The said Act enabled the Electricity Board, of which the appellant is the successor, to recover the dues to the Board on account of consumption of electrical energy and other charges as defined in that Act to be recovered as an arrear of land revenue notwithstanding anything contained in any other law or instrument or agreement to the contrary. We may set down Section 6 of that Act herein:

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> "6. Recovery of dues, etc., if not paid If the aggregate amount of the various dues, penalty and costs mentioned in the notice of demand served under Section 4 is not deposited with the prescribed authority within sixty days of the date of such service or such extended period as the prescribed authority may from time to time allow, the debtor
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> C shall be deemed to be in default in respect of such amount and the same shall be recoverable as an arrear of land revenue, notwithstanding anything contained in any other law or instrument or agreement to the contrary.
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> (2) For the purpose of such recovery, the prescribed authority may
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> D forward to the Collector a certificate under his signature in the prescribed form stating the amount and details of the demand and the name and description of the debtor in default and the Collector shall on receipt of such certificate, proceed to recover from the debtor the amount of the demand as if it were an arrear of land revenue."

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11. The recovery of arrears of land revenue is provided for in the Punjab Land Revenue Act, 1887. Chapter 6 thereof deals with recovery. Section 61 provides that the entire estate and the land owner shall be liable for the land revenue for the time being assessed on the estate. Section 62 provides as further security that the land revenue payable in respect of a holding shall
F be the first charge upon rents, profits and produce thereof. Section 67 deals with the modes of recovery of arrears of land revenue. That section contemplates recovery, *inter alia*, by way of arrest and detention of the person who is liable to pay the land revenue; by distress and sale of his movable property and uncut or ungathered crops; by transfer of the holding
G in respect of which the arrears is due; by attachment of the estate or holding in respect of which the arrears is due; by sale of that estate or holding or by proceeding against other immovable property of the defaulter. Under Section 72 of the Act, the Collector can takeover the management of the estate or effect attachment thereof and under Section 75 he can sell the estate itself for recovery with the previous sanction of the Commissioner. Thus, the amount

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due from the prior owner of the undertaking or consumer could be recovered by proceeding against the undertaking even in the hands of the transferee if we go by the relevant provisions of the above two enactments applicable to recovery of dues by the appellant or its predecessor, the Electricity Board. If in the context of such provisions, the appellant introduced a term in the Terms and Conditions of Supply in the case of a transfer that the transferee has to discharge the prior amounts due in respect of that undertaking by the prior consumer, could it be said that it had no authority to do so or that the provision is not a reasonable one in the interests of safeguarding the rights of the appellant?

12. We must notice that the High Court did not consider the effect of the above enactments relating to recovery of dues. Counsel for the first respondent submitted that no such contention was raised in the High Court and even in this petition for special leave to appeal such a contention is not raised. But considering that the contention is based on statutes enacted by the State Legislature and are in force, the arguments cannot be ignored by merely stating that they were not put forward before the High Court, since they have been put forward before us at the time of arguments. At best the first respondent could plead that it did not get a proper opportunity to meet this contention in the circumstances of this case.

13. We must observe that the decision in *Isha Marbles* (supra) is by itself not an answer to the validity of clause 21A of the terms and conditions inserted by notification. Under section 49 of the Supply Act, the licensee or rather, the Electricity Board, is entitled to set down terms and conditions for supply of electrical energy. In the light of the power available to it, also in the context of Section 79(j) of the Supply Act, it could not be said that the insertion of clause 21A into the Terms and Conditions for supply of electrical energy is beyond the power of the appellant. It is also not merely contractual. This Court in *M/s Hyderabad Vanaspati Ltd.* v. *Andhra Pradesh State Electricity Board and Ors.*, [1998] 2 S.C.R. 620 has held that the Terms and Conditions for Supply of Electricity notified by the Electricity Board under Section 49 of the Electricity (Supply) Act are statutory and the fact that an individual agreement is entered into by the Board with each consumer does not make the terms and conditions for supply contractual. This Court has also held that though the Electricity Board is not a commercial entity, it is entitled to regulate its tariff in such a way that a reasonable profit is left with it so as to enable it to undertake the activities necessary. If in that process in respect of recovery of dues in respect of a premises to which supply had

A been made, a condition is inserted for its recovery from a transferee of the undertaking, it cannot ex facie be said to be unauthorized or unreasonable. Of course, still a court may be able to strike it down as being violative of the fundamental rights enshrined in the Constitution of India. But that is a different matter. In this case, the High Court has not undertaken that exercise.

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14. The position obtaining in *Isha Marbles* (supra) was akin to the position that was available in the case on hand in view of the Haryana Government Electrical Undertakings (Dues Recovery) Act, 1970. There was no insertion of a clause like clause 21A as in the present case, in the Terms and Conditions of Supply involved in that case. The decision proceeded on C the basis that the contract for supply was only with the previous consumer and the obligation or liability was enforceable only against that consumer and since there was no contractual relationship with the subsequent purchaser and he was not a consumer within the meaning of the Electricity Act, the dues of the previous consumer could not be recovered from the purchaser. This D Court had no occasion to consider the effect of clause like clause 21A in the Terms and Conditions of Supply. We are therefore of the view that the decision in *Isha Marbles* (supra) cannot be applied to strike down the condition imposed and the first respondent has to make out a case independent on the ratio of *Isha Marbles* (supra), though it can rely on its ratio if it is helpful, for attacking the insertion of such a condition for supply of electrical energy. E This Court was essentially dealing with the construction of Section 24 of the Electricity Act in arriving at its conclusion. The question of correctness or otherwise of the decision in *Isha Marbles* (supra) therefore does not arise in this case especially in view of the fact that the High Court has not considered the question whether clause 21A of the terms and conditions incorporated is F invalid for any reason.

15. In the light of what we have stated above we think that the proper course to adopt is to set aside the judgments of the learned Single Judge and that of the Division Bench and remit the writ petition filed by the first respondent to the High Court for a fresh decision in accordance with law. G The first respondent would be free to amend its writ petition including the prayers therein and in the case of such an amendment the appellant would be entitled to file an additional statement in opposition. The writ petition will be considered afresh by the High Court in the light of what we have stated above.

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16. It is seen that after the High Court allowed the writ petition, the connection was restored to the first respondent in obedience to the writ, even though subsequently, this Court stayed the operation of the judgment of the High Court by its order dated 5.7.2006. It is now brought to our notice that a fresh connection has been provided to the first respondent in the light of the direction in the judgment under appeal without collecting the arrears that were due from M/s L.L.C. Steel Pvt. Ltd. Strictly, in view of the fact that we have set aside the judgment of the High Court, the first respondent should lose the benefit of the fresh connection. But considering that the first respondent is an industrial undertaking and taking note of the plea that investments have been made by it to make the unit workable, we think that it will be appropriate to direct the first respondent to deposit a portion of the amount in arrears as a condition for continuance of the supply to it by the appellant on payment of regular monthly bills as per the terms and conditions between the parties. We, therefore, direct that if the first respondent pays to the appellant, without prejudice to its contentions in the writ petition, a sum of Rs. 25 lakhs (rupees twenty five lakhs) within a period of six weeks from today, the fresh connection given to the first respondent will not be disconnected by the appellant, until the writ petition is disposed of afresh by the High Court pursuant to this order of remand. In case the High Court accepts the challenge of the first respondent to clause 21A as inserted in the terms and conditions of supply, the appellant will refund the sum of Rs. 25 lakhs with six per cent interest thereon from the date of payment by the first respondent till the date of its return by the appellant. In case the writ petition is dismissed by the High Court, the appellant would be entitled, at the volition of the first respondent, to adjust the amount of Rs. 25 lakhs towards the dues claimed from the previous consumer, M/s L.L.C. Steel Pvt. Ltd. and maintain the fresh connection given to the first respondent on it fulfilling its obligations in terms of clause 21A and act on that basis. If the first respondent, does not desire to have a power connection based on clause 21A of the Terms and Conditions of Supply, the appellant will refund the sum of Rs. 25 lakhs to the first respondent without interest within two months of the judgment of the High Court and would disconnect the power connection now given. Of course, if the first respondent fails to deposit the sum of Rs.25 lakhs within the time fixed by us, the appellant would be free to disconnect the power supply granted to the first respondent pursuant to the judgment of the High Court which we have set aside herein and take all steps that may be permissible in law for recovery of the amounts due.

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A 17. The appeal is allowed in the above manner. There will be no order as to costs. The High Court is requested to expeditiously dispose of the writ petition afresh according to law and in the light of the observations contained herein.

V.S. Appeal allowed.

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