

**IN THE COURT OF THE ADDL. DISTRICT JUDGE –CUM- SPECIAL  
JUDGE, C.B.I. COURT NO.II, BHUBANESWAR.**

**PRESENT:**

**Dr.A.K.Mishra,**

Addl. District Judge –cum-  
Special Judge, C.B.I. Court No.II,  
Bhubaneswar.

**R.F.A. No. 8/25 of 2015/2013.**

(Arising out of Judgment dated 18.1.2013 passed by  
the learned Civil Judge (Junior Division)  
Bhubaneswar in T.S.No. 894 of 2001)

1. Chief Executive Officer,  
Central Electricity Supply Corporation, Bhubaneswar.
  2. Executive Engineer, BED,  
Bhubaneswar Electrical Division,  
Central Electricity Company Ltd. Bhubaneswar-2  
P.S.Lingaraj, Dist. Khurda.
  3. Asst. Engineer (Commerce),  
Manager Temple Electrical Sub-division, Bhubaneswar.
  4. Junior Engineer, Electrical Section No.1,  
At- Old Town, Bhubaneswar.
- ... Appellants.

Versus.

Bijay Kumar Mallik, aged about 45 years,  
Son of Basanta Kumar Mallik,  
At- Plot No.3117 Samantarapur,  
P.O. Samantarapur, Bhubaneswar-2  
P.S. Lingaraj, Dist. Khurda.

... Respondent.

**COUNSELS**

For the Appellant : Sri D.Mohanty & Associates, Advs.

For the Respondent : Sri A.K.Ray & Associates, Advs.

Date of hearing : 07.4.2016.  
Date of Judgment : 21.4.2016.

### **JUDGMENT**

The defendants as appellants have assailed the judgment and decree dated 18.1.2013 in T.S. 894 of 2001 passed by the learned Civil Judge (Jr.Dvn.) Bhubaneswar in decreeing the suit in the following terms:

“The suit be and the same is decreed on contest against the defendants but without cost. The plaintiff unit is hereby declared as SSI unit and the said unit is to be charged accordingly to the SSI tariff category in stead of commercial category. The bill issued by the defendants for the month of September, 2001 is held as wrong and illegal and the same is to be rectified as per SSI tariff category. The defendants are hereby permanently enjoined to forcibly disconnect the power supply to the plaintiff unit on the ground of non-payment of the electricity dues as per commercial tariff. It is made clear that the defendants are to give corrected electricity bills to the plaintiff as per SSI tariff category and the plaintiff is to clear outstanding electricity dues under the said category if any within a period of three months hence in order to get the benefit of this decree”.

2. The plaintiff – respondent was a consumer of electricity under defendants. The plaintiff had a small scale industry unit registered under District Industrial Center (DIC), Bhubaneswar vide registration No.15/15/02271 dated 30.4.1991 for production of general fabrication, ruling shutters, steel windows etc. On 1.1.1991 the plaintiff entered into an agreement vide Ext.2 with Orissa Electricity board and accordingly electric supply to its unit was made vide Ext.4. As per agreement the

purpose of electric supply was for fabrication and consumption was limited up to 8.9 KVA out of the contract demand. The agreement Ext.2 amongst others had one arbitration clause. As per plaintiff the electricity connection was given under category of small scale industry. Thereafter the Orissa Electricity Board was taken over by the Central Electricity Supply Corporation Ltd (CESCO) for management of the electricity division at Bhubaneswar. The plaintiff was issued with a consumer No. 1580-SI. The tariff was continued to be charged and bills were issued. The plaintiff made payment accordingly. The essence of the plaintiff's case is that on 11.7.2001, the defendant no.2, Executive Engineer asked him to execute a fresh agreement on the ground that his industrial unit had been changed from small scale industrial category to commercial category. The plaintiff issued legal notice explaining that his unit was coming under small scale industry (SSI) unit as per Rule-81 (i) of Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 1998. The Executive Engineer Defendant No.2 on 9.10.2001 issued disconnection notice with the bill for the month of September, 2001 charging commercial tariff rate. The plaintiff then filed the suit on 16.10.2001 seeking following reliefs :

- “(i) Let a decree may be passed declaring the industry of the plaintiff as SSI unit.
- (ii) Let it be declared that the tariff of the plaintiff's industry shall be charge according to SSI unit instead of commercial tariff.
- (iii) Let it be declared the bill submitted by the BED for the month of September,2001 is wrong and illegal.
- (iv) Let a decree be passed restraining the defendants permanently from forcible disconnection of the plaintiff's unit.

(v) And other relief/ reliefs deem fit and proper in the interest of justice”.

3. The plaintiff was allowed exemption of court fee u/s.35 of the Court Fees Act (Odisha amendment).
4. The defendant no. 1 and 4 were set exparte. Defendant No.2 and 3 together filed written statement challenging the maintainability of the suit on the plea that one complaint handling procedure approved by OERC is available. While admitting that electricity connection was given to the plaintiff unit, it is averred that plaintiff's fabrication unit was coming under the category of commercial unit as per rule-80(b) of the OERC Code,1988 and the unit's registration under DIC Bhubaneswar is not a basis to classify the consumers for the purpose of tariff . It is a specified that plaintiff having not consumed electricity as a motive force, his unit comes under commercial category and the same thing having been detected, defendant no.2 Executive Engineer issued notice on 11.7.2001 for execution of fresh agreement as well as to make good the additional security deposit.
5. Learned lower court framed as many as nine issues. The plaintiff himself was examined as P.W.1 and seventeen documents were exhibited from his side. Asst. Manager (Commerce) Electrical, CESCO is examined as D.W but no document is exhibited from the defendant side.
6. Learned lower court found that electric connection was given to the plaintiff's unit under SSI category and for the first time in the September, 2001 the defendants charged bill treating the plaintiff's unit under commercial category. The OERC (Conditions & Supply) Code 1988 does not prescribe that

the general fabrication unit would come under commercial tariff category. The defendants having made no inquiry or verification to assess that in the plaintiff's unit, power was not being utilized as motive force, the plaintiff unit would be treated under SSI tariff category. It is further held that defendants having failed to show any outstanding amount against plaintiff till July, 2001 under SSI tariff category, the plaintiff is entitled to the relief of injunction as well as declaration. With regard to jurisdiction, the learned lower court found that rule-111 of OERC Code 1988 saves the jurisdiction of Civil Court and for that the suit was found maintainable.

7. Learned counsel for appellants put forth his submissions that the plaintiff's fabricating unit being found to have not used power as motive force should have been treated as a commercial unit u/s.80 (b) of the OERC Distribution (Conditions & Supply) Code 1998 in as much as D.I.C registration certificate could not have formed the basis to accomplish the classification of consumers under such regulation. On his second plank, learned counsel for appellant argued that the provision of section 50 of the Electricity Reforms Act, 1995 ousts the jurisdiction of the Civil Court and for that the suit should have been dismissed.
8. Per-contra, learned counsel for respondent supported the impugned judgment and repelled the above contentions stating that the jurisdiction of the Civil Court cannot be ousted by the subsequent law made in the year 1995 i.e. Electricity Reforms Act, 1995 and defendants had failed to prove that plaintiff-industry was not utilising power as a motive force.
9. On the anvil of rival contentions advanced , the seminal points for determination are :

- (i) Whether the Civil Court's jurisdiction was ousted for the nature of dispute raised in the suit on the date of commencement?
- (ii) Whether the finding of the learned lower court putting the plaintiff's industry under the Small Scale Industry category is correct?
- (iii) Whether the plaintiff is entitled to the relief of permanent injunction as granted?

**10. ANSWER TO POINT NO.I.**

Facts are not required to be reinvented to answer this point. Admitted position would serve the end. The relationship between the parties is based upon a statutory contract. The same was executed on 1.1.1991 vide Ext.2. That agreement has contained duration clause which stipulates that it would continue until expiry of 5 years from the date of supply and thereafter shall so continue unless the same is determined by either party giving to the other six calendar months notice in writing of its intention to terminate the agreement. Under clause-2 it is stipulated that the Orissa State Electricity Board (General Conditions of Supply) Regulation, 1981 as modified from time to time shall be deemed a part of the agreement. Inter alia, clause-9 of that agreement provides an arbitration clause in the following manner:

*" 9.Arbitration- Any dispute or difference arising between the Consumer and the Supplier as to the supply of electrical energy hereunder or as to the interpretation of this Agreement shall only be referred to the sole arbitration of a Superintending Engineer (Electrical), unconnected with the dispute, to be nominated by the 'Chief Engineer, Electricity, Orissa State Electricity Board and if no such Superintending Engineer*

*(Electrical) is available, all such disputes shall be referred to the sole arbitration of the Chief Engineer, Electricity, himself. The arbitration shall be governed by the provisions of the Indian Arbitration Act, 1940 (Act 10 of 1940) as amended from time to time and the decision of the Arbitrator shall be final and binding on the parties. If for any reason, whatsoever, it is not possible to nominate the Arbitrator, or the Superintending Engineer or the Chief Engineer are unable to take up the arbitration, then there shall be no arbitration at all:*

*Provided that any dispute or difference with regard to the rates of tariff, surcharge or any other dues payable under this Agreement or the liability, of the consumer to pay the same shall not be deemed to be a dispute within the meaning of this clause:*

*Provided further that the pendency of a dispute or a reference before the Arbitrator shall not entitle the consumer to withhold the payment of tariff, surcharge including delayed payment surcharge, duty or any other dues payable under this agreement and in case of default in payment, provisions regarding disconnection of supply as in the Orissa State Electricity Board (General Conditions of Supply) Regulations, 1981 shall operate”.*

11. It appears that defendants did not raise the plea of arbitration in the lower court, for which the present plea that grievance redressal forum is available under OERC, is not acceptable. No provision of law is shown that for the dispute accrued out of agreement executed on 1.1.1991 under the Orissa State Electricity Board (General Conditions of Supply) Regulations, 1981, the jurisdiction of the court was barred on the date of filing of the suit i.e. On 16.10.2001. It may be

mentioned that electricity Act, 2003 came into force on 26.5.2003. The said statute was neither retrospective nor retroactive to oust the jurisdiction of the civil court which was earlier available to the civil court.

Section 50 of the Electricity Reform Act, 1995 states that - *"No order of proposal made under this Act or Rules or Regulations framed under this Act shall be appealable except as provided in this Act and no civil court including the Arbitration Act, 1940 shall have jurisdiction in respect of any matter which the commission or the appellate authority under this Act is empowered by, or under this Act to determine."*

The commission has been defined under section 2 (b) of the Electricity Reform Act, 1995. There is no pleading that the commission as defined had exercised his authority in the matter of agreement with plaintiff dated 1-1-1991. In absence of pleading and evidence, the defendants cannot take advantage of section 50 of The Electricity Reform Act, 1995.

The defendants could have but having not opted to take advantage of arbitration clause u/s. 8 of the Arbitration and Conciliation Act, 1996, cannot now be heard to plead ouster of jurisdiction. On the analysis of above provision of law and agreement Ext.2, I am of the considered view that the Civil Court jurisdiction is not ousted for the dispute raised in this suit.

**12. ANSWER TO POINT NO.II.**

On the date of execution of agreement dated 1.1.1991, the then prevailing law i.e. Orissa State Electricity Board (General Conditions of Supply) Regulations, 1981 had prescribed classification of services to the consumers under regulation-28. Small industry u/r 28(x) is defined as follows-

*"Small Industries- This supply is meant for industrial production purposes with contract demand / connected; load up to but excluding 20 K.W/ 22 K.V.A where power is ordinarily utilised as a motive force. The supply shall be given at one point at 230 Volts, single phase up to and including contract demand/ connected load of 3 K.W/3.5K.V.A and at 400 volts 3 phase for contract demand/ connected load above 3 K.W/ 3.5 K.V.A."*

13. In the subsequent regulation of the year 1998, the small industry vide clause-80 (i) was defined in the following manner-

*"80(i) Small Industries- This category relates to supply of power for industrial production purpose with a contract demand below 22 K.V.A where power is generally utilised as motive force".*

On careful reading of the agreement, I find no mention/ attribution of any specified category to the plaintiff's fabrication unit. In absence of such specific mention in the agreement, the supplier which includes the successors and assigns can be said to be bound by the pith and substance of the agreement till the same is terminated or determined as per law. As the contract Ext.2 dated 1.1.1991 was not terminated as per contractual obligation till the filing of the suit on 16.10.2001, the supplier defendants could not be said to have acquired any authority to act contrary to the said agreement. The sanctity of contractual obligation has to be honoured. If plaintiff's unit was accepted and treated under a particular category, the defendants supplier was estopped to disown the same. Such contractual deviancy being law's bar, the defendants action would be regarded as arbitrary. Because of the fact that the defendants had failed to terminate

agreement as per law and charged tariff as a commercial unit of plaintiff's fabrication industry contrary to the agreement dated 1.1.1991 Ext.2, the same was illegal. The learned lower court's finding in this regard is affirmed.

14. **ANSWER TO POINT NO.III.**

The prayer of permanent injunction in this nature of dispute shall be concomitant and commensurable to the contractual relationship created vide agreement dated 1.1.1991. By using word "not to make forcible disconnection" the learned lower court has kept the permanent injunction opened for lawful disconnection. Save and except this clarification, I do not find any infirmity in granting relief of permanent injunction in the manner stated above. Sequel to analysis made above, no interference is warranted in the impugned judgment. The appeal is liable to be dismissed. Hence, it is ordered.

**ORDER**

The appeal be and the same is dismissed on contest without any cost.

Addl. District Judge-cum-  
Special Judge, C.B.I.- II, Bhubaneswar

Dictated and corrected by me. The judgment is pronounced in the open court today this the 21<sup>st</sup> day of April, 2016.

Addl. District Judge-cum-  
Special Judge, C.B.I.- II, Bhubaneswar