(1991) 05 CAL CK 0011

Calcutta High Court

Case No: Appeal from Original Decree No. 122 of 1988

Prasad Choudhuri		APPELLANT
	Vs	
Oriental Gas Company Undertaking		RESPONDENT

Date of Decision: May 16, 1991

Acts Referred:

- Evidence Act, 1872 - Section 106, 114

Citation: (1991) 2 CALLT 227

Hon'ble Judges: Bhagabati Prosad Banerjee, J; Altamas Kabir, J

Bench: Division Bench

Advocate: R.P. Bagchi and S.S. Ray, for the Appellant; None, for the Respondent

Final Decision: Allowed

Judgement

Altamas Kabir, J.

This appeal, at the instance of the plaintiff, is against the judgment and decree dated 11th February, 1985, passed by the learned Judge, 4th Court, City Civil Court at Calcutta, in Title Suit No. 2398, dismissing the suit on contest, but without cost.

2. The plaint case is that the appellant is the owner of premises No. 27A, Kalidas Patitundi Lane, Calcutta-26, situated under Bhowanipur Police Station. On the appellant''s application to the respondent company, a State Government Undertaking, for supply of gas to his aforesaid premises for domestic consumption, the respondent company installed two gas meters Nos. 60606 and 60772 in the said premises. The numbers of the two meters were subsequently changed to 60975 and 11341 respectively, under Consumer Nos. A/c. No. 16F/610/10 and A/c. No. 16F/, 610/11. The further case of the appellant is that gas was being supplied to his premises from the road pipe by means of one pipe. The said pipe was bifurcated to supply gas simultaneously to the two meters installed in the appellant''s premises. The appellant received monthly bills in respect of his two meters and the same were

duly paid against proper receipts, upto and for the month of December, 1975. Since 21st December 1977, however, the meter reading of Meter No. 60975 (A/c. No. 16F/610/11) remained constant at 7246 units, as there was no supply of gas. As far as the appellant''s other meter is concerned, it was admitted by the respondent company that there was no supply of gas at the relevant time and hence less charges were levied in respect thereof in the bills dated 24th July 1978 and 11th November, 1978. According to the appellant, the bills for Meter No. 60975 were raised on the basis of minimum charge of Rs. 5/- together with meter rent. But, in terms of the agreement executed between the appellant and the respondent company, the respondent company was not entitled to levy minimum charges when there was no supply of gas. In terms of the agreement, the respondent company was entitled only to the meter rent during the period then there was no supply of gas. The bills raised by the Respondent Company in respect of the appellants two meters are discriminatory and repugnant to the terms of the agreement and principles of equity. On 31st March, 1978, the appellant received a final registered notice, together with a bill dated 16th March, 1978, for a sum of Rs. 153.89 paise in respect of Meter No. 11341 (A/c. No. 16F/610/10), as alleged accumulation for a period of nine months. The bill was prepared on an average basis and the same was arbitrary, unwarranted and illegal, since, accordingly to the appellant, there had been stoppage of supply of gas for over seven months through the consumer pipe line supplying gas to the appellants two meters. Subsequently, the appellant received three other bills dated 12th June, 1978, 27th July, 1978 and 11th November, 1978, in respect of Meter No. 11341 (A/c. No. 16F/610/10, which were not based on meter reading and were, therefore, illegal, untenable and unwarranted. According to the appellant, he also received six bills in respect of his other meter No. 60975 on the basis of meter reading. It is the appellant''s case that the rules relating to raising of bills being the same in respect of both the meters, and there being no supply of gas to both the meters, the raising of the bills in respect of the two meters on a different basis is unwarranted and unsupportable and repugnant to the terms of the agreement between the appellant and the respondent company. The appellant sent his representative to the respondent company to draw the attention of the respondent company to the illegality of the bill dated 16th March 1978, in respect of Meter No. 11341, but as the respondent company did not review the bill, the same was paid by the appellant under protest. Since the respondent company failed to explain the discrepancy in the bills in respect of the two meters of the appellant, the appellant was compelled to file the aforesaid suit for a declaration that the bill dated 16th March 1978 in connection with Meter No. 11341 (A/c. No. 16F7610/10) and the notice dated 30th March 1978 are illegal, inoperative, void and irrecoverable. The appellant also prayed for a declaration that the respondent company could not discriminate in raising bills on- the appellant''s two meters and the amount of the impugned bill was refundable to the appellant and/or was liable to be adjusted against future bills. The appellant prayed for an order of permanent injunction to restrain the respondent company from raising bills in respect of A/c. No. 16F/610/10

and A/c No. 16F/610/11 on any basis other than meter reading.

3. The suit was contested by the respondent company by filing a written statement denying the. averments in the plaint and contending that in case the meters did not correctly register the full quantity of gas supplied, the bills in respect of the meters would be raised in accordance with the average monthly consumption over the previous twelve months.

4. On the pleadings of the parties, four issues were framed, of which issue No. 2, which is the most important, reads as follows :-

"2. Is the plaintiff entitled to a decree declaring that the bill dated 16.3.1978 and the notice dated 30.3.1978 in connection with Meter No. 11341 relating to consumer A/c. No. 16F/610/10, is illegal, void and inoperative ?

5. When the suit was taken up for trial, the appellant examined only himself and no other witness and adduced documentary evidence in support of the plaint case. No evidence was adduced on behalf of the respondent company. On the evidence on record, the learned trial court dismissed the suit on contest on the finding that the appellant had failed to prove that during the period in question there had been no supply of gas to his premises. This appeal has been preferred against the dismissal of the appellant''s suit.

6. No one appeared on behalf of the respondent company when the appeal was taken up for hearing.

7. On behalf of the appellant it has been urged that the learned trial Judge erred both in law and in fact in dismissing the suit. It was submitted that the learned trial Judge erroneously shifted the onus of proof on the appellant to prove that there had been no supply of gas to the appellant premises during the period in question, despite the fact that it had been asserted on behalf of the appellant that during the said period there had been no supply of gas to his premises and it was within the special knowledge of the respondent company whether such assertion was correct or not. It was further submitted that the Log Book maintained by the respondent company recording the supply of gas to consumers, would have indicated whether during the relevant period, gas had actually been supplied to the appellant''s premises or not. Despite notice to produce the said Log Book, the respondent company had failed to produce the same at the time of hearing of the suit. The said notice was made Exhibit 3 in the suit. It was submitted on the appellant''s behalf that in view of the failure of the respondent company to produce the said Log Book, an adverse presumption should have been drawn by the trial court infavour'' of the appellant, u/s 114 of the Evidence Act. It was submitted that, although the appellant had duly discharged his onus in proving his case, and the Respondent Company had chosen not to adduce any evidence in the suit, and had also failed to produce the Log Book, the learned trial Judge had arrived at the perverse finding that the fact that the appellant''s Meter No. 60975 had remained constant at 7246 during the

entire period in question, did not by itself prove that there was no supply of gas during the said period. It was submitted that the learned trial Judge wrongly dismissed the suit on the basis of such erroneous and perverse finding.

8. Having considered the facts of the case and the evidence on record, we are of the view that the learned trial court was wrong in dismissing the appellant''s suit. We cannot reconcile ourselves to the view taken by the learned trial court that the appellant had failed to prove that during the relevant period there was no supply of gas to his premises.

9. The plaintiff/appellant examined himself as witness to prove his case. In his deposition he has categorically stated that there was no supply of gas to him from 1977 and that he paid the bills which were raised in anticipation of such supply. He also expressed his willingness to pay for meter charges, but expressed his unwillingness to pay any money to the defendant/respondent on account of gas when there was no supply. Even in cross-examination, the appellant''s testimony relating to non-supply of gas remained unshaken although, he admitted that he did not intimate to the respondent that his meters were defective or that there was no supply of gas. In order to prove his case further, the appellant caused notice to be served on the respondent company for production of the Log Book maintained by it in respect of supply of gas to customers. Inspite of such notice (Exhibit 3), the respondent company did not produce the Log Book, which would possibly have made it clear as to whether there had been supply of gas to the appellant''s premises during the relevant period. Whether gas had been supplied to the appellant''s premises, being within the special knowledge of the respondent company, within the meaning of Section 106 of the Evidence Act, withholding of such information by non-production of the Log Book, should have led the learned trial court to draw an adverse presumption u/s 114 of the said Act, illustration (g). The provisions of Section 106 of the Evidence Act are designed to meet certain exceptional cases in which it would,, be impossible for the plaintiff to prove certain facts which are in the special knowledge of the defendant.

10. In the present case, since the meter of the plaintiff remained constant, it would prima facie go to establish the claim of the appellant that during the relevant period there was no supply of gas to his premises. It was upto the respondent company to disprove the appellants claim by production of relevant records to show that during the said period gas had been supplied to the appellant''s premises but that the meters had failed to register the same. By asserting that there had been no supply of gas to his premises during the relevant period and by showing that his meter reading had remained constant during the said period, the appellant discharged the initial, onus of proving, his claim. In our view, in the absence of any evidence to the contrary forthcoming from the respondent company, the learned trial court was wrong in holding that the fact that the meter remained constant at 7246 for the period in question did not by itself, prove that there was no supply of gas to the

appellants premises during such period. In this case, the plaintiff asserted and deposed that at the relevant period there was no supply of gas at all and consequently, raising of the bill for payment for supply of gas was without any basis at all. There was no evidence to the contrary. The defendant company by production of the Log Book could have thrown light on the issue, but it chose to withhold the same. It is a case of withholding of a valid piece of evidence, which, if produced, could have proved or disproved the case of the plaintiff. The case of production and supply of gas, electricity, etc. which are supplies essential to the community, there are records showing production and supply of such commodities. Non-production of the said records at the trial is very fatal for the defendant against whom it was alleged -that there was no supply of gas at the relevant time. These authorities are discharging not merely contractual duties, but duties of a public nature also. It is their duty to produce the records which are the only proof of production and supply of gas. Things negative in nature are sometime difficult to establish. When positive evidence is available for establishing a fact and the same is in the custody and control of the defendant and the defendant does not willfully produce the same before the court, an adverse presumption must be drawn to the effect that had the same been produced, it would have gone against the defendant. When authorities are dealing with the public in the discharge of their public duties, they have no right to withhold any information concerning the discharge of such public duties from the courts. In our view, the learned trial court was wrong in holding that the non-production of the Log Book, did not lead to any adverse inference against the respondent company. This is one of those rare cases where by asserting that there has been no supply of gas to his premises during the period in question, and by asking for production of the Log Book, the plaintiff/appellant had thrown the burden of disproving his claim on the defendant/respondent, since in the absence of any meter reading it was within the special knowledge of the defendant/respondent from its records whether such supply had actually been effected or not and it was not possible for the plaintiff to prove that there had been no supply. There is also no material before us to show that even if there is no supply of gas to a consumer''s premises, the respondent company was entitled to raise bills for minimum charge apart from the meter rent.

11. In the light of our above discussions, we are of the view that the appellant was entitled to a declaration as well as an order of permanent injunction, as prayed for by him. We then, therefore, allow the appeal with cuts and decree the suit with costs also. It is declared that the impugned bill dated 16th March 1978 and the notice dated 30th August, 1978, in connection with Meter No. 11341 A/c. No. 16F/610/10 are illegal, inoperative and void. The respondent is directed to refund to the appellant the amount of the said bill or to adjust the same against future bills. The respondents are also permanently restrained from raising bills in respect of A/c. No. 16F/610/10 and 16F/610/11 relating to the appellants Meter Nos. 11341 and 60979, respectively, on any other basis other than in terms of the agreement between the

parties.

Bhagabati Prosad Banerjee, J.

12. I agree.