

AMALGAMATED ELECTRICITY CO.

v.

MUNICIPAL COMMITTEE, AJMER

July 25, 1968

[R. S. BACHAWAT AND K. S. HEGDE, JJ.]

Ajmer Merwara Municipalities Regulation, 1925, s. 223—Municipality fails to pay surcharge levied regarding supply of electricity—Suit to recover—Notice under section, if necessary.

Bombay Electricity Surcharge Act (Bom. Act 19 of 1946) ss. 3, 4 and 6—Power of Commissioner to issue notifications levying surcharge.

Indian Electricity Act (9 of 1910) Schedule, cl. 12—Sections 3 and 4 of Bombay Act if ultra vires, cl. 12 of Schedule.

The Ajmer Electric Supply Co. Ltd, a licensee under the Indian Electricity Act, 1910, entered into two contracts with the respondent-Municipal Committee, (i) for supplying electricity for street lighting, and (ii) for pumping water from the wells belonging to the respondent at a particular place. The Bombay Electricity Surcharge Act, 1946, was extended to the province of Ajmer Merwar subject to certain modifications. Thereafter, the Ajmer Electric Supply Co. applied under s. 3 of the Bombay Act, to the Chief Commissioner, for imposing the surcharge provided in that section, to meet its increased cost. The Chief Commissioner issued a notification and on the basis of that notification the Ajmer Electric Supply Co. called upon the respondent by a notice, to pay the surcharge detailed therein with respect to the two contracts. As the respondent did not comply with the demand, the appellant, with which the Ajmer Electric Supply Company was amalgamated, filed a suit for the recovery of the surcharge.

The trial Court decreed the suit but the High Court set aside the decree on the grounds : (1) Before filing the suit a notice as required by s. 233 of the Ajmer Merwar Municipalities Regulation, 1925, was not given; (2) The Commissioner's notification imposing the impugned surcharge was beyond the provisions of the Bombay Act, because of the omission of certain words from s. 6 of that Act as extended to Ajmer Merwara; and (3) The relevant provisions of the Bombay Act, namely, ss. 3 and 4 were *ultra vires* cl. 12 of the Schedule to the Indian Electricity Act.

In appeal to this Court,

HELD : (1) No notice under s. 233 of the Ajmer Merwar Municipalities Regulation was necessary before instituting the suit. [438 E]

Under the section a notice is necessary when the suit is filed against the Committee only *in respect of any act* done in its official capacity. The expression 'act' includes an illegal omission; but, before an omission can be considered as an *illegal omission*, it must be shown that there was an omission to discharge some official duty imposed in public interest. That is the non-discharge of the duty must amount to an illegality entailing penal consequences. [436 B, G]

In the present case, the appellant's contention was that it was entitled to recover from the respondent the amount of surcharge claimed, while the respondent's case was a *bonafide* contention, namely, that the levy of

A surcharge was invalid. Under the Regulation it was the duty of the respondent to discharge all its liabilities, but failure to do so would not ordinarily make it an illegal omission, because, the respondent or its members or office bearers could not be punished for their failure to pay the amount due to the appellant. [436 D-G]

Revati Mohan Das v. Jitendra Mohan Ghosh, 61 I.A. 171, applied.

B *Debendra Nath Roy v. Official Receiver*, A.I.R. 1938 Cal. 191 approved.

Bhogchand Dagdusa Gujrathi v. Secretary of State for India, 54 I.A. 338, distinguished.

C (2) The provisions of s. 3 of the Bombay Act empower the Chief Commissioner to levy surcharge on the bills for the supply of electricity for street lighting. Section 4 empowers the licensee to collect from the consumer the surcharge levied. Municipal councils are not excluded from the operation of ss. 3 and 4 of the Act as extended to Ajmer Merwar. Similarly, electrical energy supplied on the basis of a contract is not excluded from the operation of s. 3. For taking action on the basis of those sections no assistance is needed from s. 6, and so, s. 6 as it stood originally or as modified does not in any manner cut down the operation of ss. 3 and 4. Therefore, the High Court was wrong in its decision that the notification issued by the Chief Commissioner levying surcharge on the price of electrical energy supplied for street lighting was without the authority of law. [440 C-E, H; 441 A]

E (3) Since 'Electricity' is a concurrent subject, the Bombay Legislature was competent to provide for the levy of surcharge so long as the relevant provision did not conflict with any provision in any Central Act. Clause 12 of the Schedule to the Indian Electricity Act, which is deemed to form part of the licence under s. 3(f) of the Electricity Act, does not conflict with ss. 3 and 4 of the Bombay Act. The clause merely prescribes a procedure for settling the price of electricity supplied by the licensee for street lighting and lays down the machinery for settling the price if there is a dispute between the contracting parties. It only means that the licensee cannot dictate its terms to the authority responsible for street lighting, but does not fix the price to be paid or even the maximum price payable. It imposes no fetters on the powers of the Provincial Legislature in the matter of enhancing the price of electricity supplied by the licensee for street lighting. The High Court was, therefore, wrong in holding that by incorporating cl. 12 into the licence the Central Legislature intended that under no circumstances the liability of the consumer can be increased beyond what was agreed during the continuance of the contract. [441 H; 442 A-D]

G (4) Under the notification imposing surcharge, the appellant, however, was not entitled to get any additional sum as regards the pumping of water. Under the notification surcharge is levied on the price of electrical energy supplied under a contract. In construing a contract it must be read as a whole. So read, under the second contract, the appellant only undertook to pump water from the wells and not to supply any electrical energy. [442 E-F, H]

H CIVIL APPELLATE JURISDICTION : Civil Appeal No. 706 of 1965.

Appeal from the judgment and decree dated September 22, 1964 of the Rajasthan High Court in D. B. First Appeal No. 67 of 1956. A

Purshottam Trikamdas and I. N. Shroff, for the appellant.

B. D. Sharma, for the respondent.

The Judgment of the Court was delivered by

Hegde, J. This is plaintiff's appeal. The Amalgamated Electricity Co. Ltd. is the plaintiff in the suit from which this appeal arises. It sued the Municipal Committee, Ajmer through its Chairman in suit No. 21 of 1951 in the court of Sub Judge, first class, Ajmer. In that suit it claimed a sum of Rs. 93,520/2/1 as Surcharge due under certain notifications issued by the Chief Commissioner of Ajmer. Out of the said sum, a sum of Rs. 28,837/12/5 was claimed as being due as Surcharge on the bills issued by it in respect of the electricity supplied by it to the defendant for street lighting. A sum of Rs. 58,143/12/2 was claimed as Surcharge on its bills in respect of the electricity utilised for pumping water in pursuance of one of its contracts with the defendant. The balance amount was claimed as interest on the amount claimed. That suit was resisted by the defendant on various grounds. The trial court substantially allowed the plaintiff's claim and decreed the suit in a sum of Rs. 44,461/11/9 with interest and proportionate costs. The High Court of Rajasthan accepting the appeal (No. 67 of 1956) of the defendant dismissed the plaintiff's suit. After obtaining a certificate under Art. 133(1)(a) of the Constitution, the plaintiff has filed this appeal. B C D E

The High Court of Rajasthan dismissed the plaintiff's suit on two grounds namely (1) that before filing the suit, no notice as required by s. 233 of the Ajmer Merwara Municipalities Regulation, 1925 has been given and (2) the notification of the Commissioner imposing the impugned Surcharge is either beyond the scope of the provisions of Bombay Electricity Surcharge Act, 1946 (Bombay Act 19 of 1946) (to be hereinafter referred to as the Bombay Act) as extended to Ajmer by the Central Government in pursuance of the powers conferred on it under the Ajmer Merwar (Extension of Laws) Act, 1947 or in the alternative the provisions of the Bombay Act are *ultra vires* cl. 12 of the schedule to the Indian Electricity Act, 1910 (to be hereinafter referred to as the Electricity Act). F G

In view of the above findings the other pleas taken by the defendant were not examined. We have to see whether the decision of the High Court is in accordance with law.

The material facts of the case are as follows : H

A company known as Trustees Corporation (I) Ltd. took out a license from the Chief Commissioner of Ajmer on 19-1-1928

- A under the provisions of the Electricity Act authorising it to generate and supply electrical energy within the municipal limits of Ajmer and such extensions beyond those limits as may be permitted by the Chief Commissioner from time to time in accordance with the conditions mentioned in the licence (Exh. 1). Some-time later the said company transferred all its rights and liabilities
- B to Ajmer Electric Supply Co., Ltd. The Ajmer Electric Supply Co. Ltd. was later amalgamated with the plaintiff's company as per the scheme of transfer approved by the Bombay High Court. The Ajmer Electric Supply Co. Ltd. had entered into an agreement (Exh. 20) on 31-3-1932 with the Municipal Committee, Ajmer for supplying electricity for street lighting and maintaining the street lighting equipments. By another agreement (Exh. 21)
- C dated 15-3-1939, it undertook to pump water from the wells belonging to Municipal Committee at Bhaonta.

- On September 3, 1948, the Government of India in exercise of the powers conferred on it by s. 2 of Ajmer Merwar (Extension of Laws) Act, 1947, extended the Bombay Act to the province of Ajmer Merwar subject to certain modifications. That
- D notification among other modifications omitted the words "or in any contract for energy or for maintenance of street lighting equipment" found in s. 6 of the Bombay Act. The other modifications made are not relevant for our present purpose. After the extension of the Bombay Act to Ajmer Merwar the Ajmer Electric Supply Co., Ltd., applied under s. 3 of the Bombay Act to the
- E Chief Commissioner for imposing Surcharge as provided in that section to meet its increased cost. On September 19, 1948, the Chief Commissioner directed that the Bombay Act as modified shall apply to two undertakings including Ajmer Electric Supply Co. Ltd., Ajmer. There was another notification on September 19, 1948 but that is not relevant for our present purpose. On
- F March 29, 1949, the Chief Commissioner issued the notification herein set out below in substitution of the notification issued by him on September 19, 1948.

"CHIEF COMMISSIONER'S OFFICE, AJMER.

- G No. 6/5/48-LSG. Dated Ajmer, the 29th
March, 1949.

To be substituted for the notification bearing the same number and date.

Orders by the Chief Commissioner, Ajmer Merwara.

H NOTIFICATION

No. F/8-4-II(CC)-II. Dated Ajmer, the 19th
September 1948.

In exercise of the powers conferred by sub-sec. (2) of sec. 3 of the Bombay Electricity (Surcharge) Act 1946 (XIX of 1946) as extended to the Ajmer Merwara by the Government of India, Ministry of Home Affairs Notification No. 8/9/48-Judicial dated the 3rd September 1948, and in accordance with the recommendations made by the Electricity Advisory Board constituted by him under sec. 35 of the Indian Electricity Act, 1910, the Chief Commissioner, is pleased to fix for a period of two years from the date of this Notification, the following rates of surcharge on the charges for energy leviable by the Ajmer and Beawar Electric Supply Companies :—

(1) For supplies made under standard tariffs :

- (i) Ajmer Electric Supply Co. Ltd., Ajmer 20%
- (ii) Beawar Electric Supply Co., Ltd., Beawar 15%

(2) For supplies made under special contracts, other than those made with Municipal Committee for street lighting.

Ajmer Electric Supply Co., Ltd. Ajmer and Beawar Electric Supply Co., Ltd., Beawar.—0.007 of an anna per unit (Kw. hour) per rupee increase in the price of oil beyond the basic price of Rs. 90/- per ton.

(3) For supplies for Municipal Street Lighting made under special contracts

Ajmer Electricity Co., Ltd., Ajmer, Beawar Electric Supply Co., Ltd., Beawar.—0.128 of an anna per month per each rupee advance in price of fuel oil beyond the basic price of Rs. 90/- per ton for each 60 wattage lamp and prorata for lower and higher wattage lamps.

The surcharge is leviable on the actual energy consumed and not on the standing charges of motors and meters.

By order

Sd/- A. N. Lal

Secretary to the Chief Commissioner,
Ajmer Merwara."

On the basis of that notification the Ajmer Electric Supply Co., Ltd. called upon the defendant by means of a lawyers' notice dated 16-8-1951 to pay the surcharge detailed therein. As the defendant did not comply with the demand made, the plaintiff after the amalgamation mentioned earlier instituted the present suit.

- A It is not necessary to deal with the various pleas taken by the defendant in resisting the plaintiff's suit. Some of those pleas have been given up; some have not been considered by the High Court. The plaintiff's suit has been dismissed by the High Court solely on the grounds mentioned above. If the plaintiff succeeds in satisfying this Court that the view taken by the High Court is
- B wrong then the matter will have to go back to the High Court for decision on questions left undecided.

We shall first take up the question of notice under s. 233 of Ajmer Merwar Municipalities Regulation. The contention of the defendant is that the notice issued is invalid inasmuch as the same was issued on behalf of the Ajmer Electric Supply Co. Ltd.

C after that company was amalgamated with the plaintiff. The next ground of attack is that the said notice is invalid because it does not set out the name and the place of abode of the intending plaintiff. These contentions have commended themselves to the learned Judges of the High Court. Section 233 of the Ajmer Merwar Municipality Regulation prescribes :

- D "Section 233 : Suits against Committee or its officers.—No suit shall be instituted against a Committee, or against any member, officer or servant of a Committee, in respect of any act purporting to be done in its or his official capacity, until the expiration of one month next after notice in writing has been, in the case of a
- E Committee, delivered or left at its office, and in the case of an officer or servant, delivered to him or left at his office or place of abode, stating the cause of action and the name and place of abode of the intending plaintiff; and unless the plaint contains a statement that such notice has been so delivered or left :

- F Provided that nothing in this section shall apply to any suit instituted under section 54 of the Specific Relief Act, 1877. (I of 1877)."

So far as suits against public officials are concerned this section is an exact reproduction of s. 80, Civil Procedure Code. But s. 80, Civil Procedure Code has two parts namely :

- G
- (1) Suits against Governments and
 - (2) Suits against public officers in respect of acts purporting to be done by those public officers in their official capacity.

- H So far as suits against Governments are concerned, they cannot be validly instituted without giving a notice as required by s. 80, Civil Procedure Code. But when we come to suits against public officers, s. 80, Civil Procedure Code applies only to suits in respect of any 'act' purporting to be done by a public officer and

that in his official capacity. Hence before s. 80 can be relied on in any suit against a public officer, it must be shown that it is a suit in respect of an 'act' purporting to be done by him in his official capacity. In view of the provisions of the General Clauses Act, the expression 'act' also includes illegal omissions. Therefore if the suit does not relate to any 'act' or 'illegal omission' purporting to be done by a public officer in his official capacity, s. 80 will not have any application. Similar is the position under s. 233 of the Ajmer Merwar Municipalities Regulation.

The stand taken by the plaintiff is that in the instant case no notice under s. 233 of Ajmer Merwar Municipalities Regulation was necessary; alternatively it was urged that if such a notice is necessary, the notice issued complies with the requirements of law. If the first alternative is accepted there is no need to go into the question as to the validity of the notice issued.

In the suit, the plaintiff does not complain of any act done by the defendant nor does it say that the defendant was guilty of any illegal omission. The plaintiff's case is as mentioned earlier that in view of the notification issued by the Chief Commissioner on March 29, 1949 [Exh. 13(B)], it was entitled to recover from the defendant the amount claimed. The stand taken by the defendant is that the levy of surcharge is invalid. Whether the contention is sustainable or not there is no doubt that it is *bona fide* contention. That contention had commended itself to the High Court. Every omission is not an illegal omission. Before an omission can be considered as an illegal omission it must be shown that the official concerned had omitted to discharge some official duty imposed on him in public interest. The omission in question must have a positive content in it. In other words the non-discharge of that duty must amount to an illegality. We are told that under the provisions of the Ajmer Merwar Municipalities Regulation, it is the duty of the Municipal Council to discharge all its liabilities. In that connection reference was made to certain provisions of the said Regulation. But the failure on the part of the Municipality to discharge its liabilities will not ordinarily become illegal omissions. The municipality or its members or office bearer cannot be punished for their failure to pay the amount due to the plaintiff. To put it differently the omission complained does not entail any penal consequence for the public official responsible for it. If every omission is considered as an illegal omission and therefore an 'act' either within the meaning of s. 80, Civil Procedure Code or s. 233 of the Ajmer Merwar Municipalities Regulation then the distinction between the first part of s. 80, Civil Procedure Code and its second part disappears. If that is so, it follows that in every suit against a public officer relating to his public duty, the issuance of a notice is a condition precedent. That in our opinion would be re-writing the section.

- A It is true that in *Bhagchand Dagdusa Gujrathi and ors. v. Secretary of State for India*⁽¹⁾ the Privy Council laid down that s. 80 should be strictly complied with and is applicable to all forms of action and all kinds of reliefs claimed against the Government. But here in this case we are not concerned with a claim against the Government. Therefore that decision has no application to the facts of the present case. The case which is relevant for our present purpose is *Revati Mohan Das v. Jatindra Mohan Ghosh*⁽²⁾. Therein a manager of an estate appointed under s. 95 of the Bengal Tenancy Act, 1885 executed a mortgage in favour of the predecessor of the plaintiff therein after obtaining the sanction of the local court. The successor of that manager failed to discharge the mortgage debt. Consequently the plaintiff brought a suit against him for obtaining a mortgage decree. That suit was resisted on the ground that the plaintiff had failed to give the notice prescribed by s. 80, Civil Procedure Code before instituting the suit. That plea succeeded in the High Court. The Judicial Committee of the Privy Council reversed the decree of the High Court holding that the failure on the part of the respondent to discharge the mortgage cannot be considered as an 'act' within the meaning of s. 80, Civil Procedure Code. In the course of the Judgment Sir George Lowndes speaking for the Board observed thus :

- E "On the alternative contention their Lordships are unable to hold that non-payment by respondent 1 is an 'act purporting to be done by' the manager 'in his official capacity'. Under the general definitions contained in s. 3, General Clauses Act, 1897 an 'act' might include an illegal omission *but there clearly was no illegal omission in the present case*. It is also difficult to see how mere omission to pay either interest or principal could be an act purporting to be done by the manager in his official capacity."
- F (emphasis supplied).

- G At this stage we would like to emphasise the observations of their Lordships; "but clearly there was no illegal omission in the present case." This observation shows that a mere omission to discharge the debt without any thing more is not an illegal omission. It is true that in that case, the court proceeded further and observed :

- H "The mortgage imposed no personal liability upon the manager, but merely provided that if payment was not made the mortgagee would be entitled to realize his dues by sale through the Court, and this was all that the appellant sought by his suit. The manager for the time being no doubt had an option to pay in order to save the sale, but failure to exercise an option is not in any sense a breach of duty. The appellant made no claim against

(1) 54 I.A. 338.

(2) 61 I.A. 171.

respondent 1 personally. He was there only as representing the estate of which the sale was sought. In their Lordships' opinion, such a suit is not within the ambit of s. 80 and no notice of suit was required." A

It is possible to read this passage as merely setting out the facts of that particular case and the equitable considerations arising therefrom and not as the ratio of the decision. Even if we consider that passage as one of the reasons given in support of the decision, the strength of the earlier ratio is not weakened. The interpretation placed by us on that decision is the same as that placed by the Calcutta High Court in *Debendra Nath Roy v. Official Receiver*⁽¹⁾. Mr. Sharma read to us several decisions of the various High Courts wherein it has been laid down that a suit brought in respect of breach of contract by a public official is an act within the meaning of s. 80 Civil Procedure Code. Similarly, illegal omissions have been held to be 'acts' under that section. In some of the decisions it was held that the second part of s. 80, Civil Procedure Code applies only to actions on torts committed by public officials, in the discharge of their public functions. There is conflict of judicial opinion on that point. For our present purpose it is not necessary to resolve that conflict. Suffice it to say that in the present case, the plaintiff does not complain of any 'act' or even an illegal omission on the part of the defendant. Hence we agree with Mr. Purshottam Tricumdas that no notice under s. 233 of the Ajmer Merwar Municipalities Regulation was necessary before instituting the suit. In that view it is not necessary to consider whether the notice relied on by the plaintiff meets the requirements of the law. B C D E

This takes us to the validity of the notification issued by the Chief Commissioner of Ajmer on March 29, 1949 levying certain surcharges on the consumers of electricity supplied by the plaintiff. Section 6 of the Bombay Act as it originally stood read : F

"The provisions of the Act shall apply notwithstanding anything in any other law or any licence or sanction granted under the Principal Act or in any contract for energy or maintaining street light equipments."

The notification extending this Act to Ajmer Merwar modified that section and the modified section reads : G

"The provisions of the Act shall apply notwithstanding anything in any other law or any licence or sanction granted under the principal Act."

The words 'Principal Act' refer to the Electricity Act. On the basis of this modification it is urged on behalf of the respondent H

(1) A.I.R. 1938 Cal. 191.

- A that the Chief Commissioner was not competent to levy the impugned surcharge. From the fact that certain words were omitted in s. 6, we are asked to assume that the Government of India intended that no surcharge should be levied on the bills issued to the defendant for the supply of electrical energy for street lighting. We do not know why the words in question were omitted from s. 6. But to our mind the omission of those words does not in any manner affect the provisions contained in ss. 3 and 4 of the Bombay Act. Now we shall set out ss. 3 and 4 of the Bombay Act. They read :

C “Section 3.—(1) Any licensee or sanction-holder may apply to the Provincial Government in the prescribed form for fixing a rate of surcharge on the charges for energy or street lighting equipment leviable by him under the terms of his licence, sanction or contract, as the case may be. Such application shall be accompanied by such calculations as may be prescribed.

D (2) On receipt of an application under sub-section (1) the Provincial Government may, if it considers that a surcharge is desirable in the case of such licensee or sanction-holder, by order notified in the Official Gazette, fix the rate of surcharge.

E (3) The rate of surcharge fixed under sub-section (2) shall not exceed :

(a) 33½ per centum in the case of undertakings where diesel oil is used for the generation of energy,

F (b) 20 per centum in the case of undertakings where steam is used for the generation of energy.

(4) In the order fixing the rate of surcharge under sub-section (2), the Provincial Government may specify such conditions as it may think fit to be observed by the licensee or sanction-holder.

G (5) Without prejudice to the generality of the power contained in sub-section (4), the Provincial Government may require the execution of an undertaking in the prescribed form by the licensee or sanction-holder that his profits in excess of the prescribed limits shall be transferred to a Rates Stabilization Reserve for prescribed purposes.

H (6) The Provincial Government may at any time enhance or reduce by a like order the rate fixed under sub-section (2).

Sec. 4 :—Upon the rate of surcharge being fixed by the Provincial Government from time to time in accordance with this Act, it shall not be lawful for the licensee or sanction-holder concerned except with the previous sanction of the Provincial Government to charge at other than charges surcharged at the rate for the time being so fixed;

Provided that no surcharge or any subsequent revision thereof shall affect charges leviable for any period not covered by the relevant order of the Provincial Government."

The provisions contained therein clearly empower the Chief Commissioner to levy surcharge on the bills for the supply of electricity for street lighting. Section 4 empowers the licensee to collect from the consumer the surcharge levied. Municipal Councils are not excluded from the operation of ss. 3 and 4 of the Bombay Act as extended to Ajmer Merwar. Similarly electrical energy supplied on the basis of a contract is not excluded from the operation of s. 3. That much is clear from the language of that section. We see no reason to read into that section an exception in the case of Municipal Councils or electricity supplied for street lighting under a contract. Section 6 does not in any manner cut down the operation of ss. 3 and 4. In our opinion that section as it stood originally or as modified has no impact on ss. 3 and 4. Charges for the supply of energy for street lighting are ordinarily payable by the Municipal Councils. Generally speaking it is the Municipal Councils that provide street lighting. Possibly s. 6 was included in the Bombay Act as a matter of abundant caution. It is not denied that the Bombay legislature had competence to enact that Act. We shall presently examine the contention that that Act is *ultra vires* the provisions of Electricity Act and therefore the provisions of that Act should not be given effect to. But for the present we are assuming that that Act is valid and proceed to examine the impact of s. 6 on ss. 3 and 4. We think that s. 6 does not in any manner control ss. 3 and 4. The intention of a legislature or its delegate has to be gathered from the language of the statutory provisions and not from what it failed to say. If because of modification of s. 6, the provisions contained in ss. 3 & 4 could not be applied in the case of supply of electrical energy for street lighting under a contract then it could have been said that the notification issued by the Chief Commissioner was without the authority of law. But that cannot be said in this case. The provisions in ss. 3 and 4 are self contained provisions. For taking action on the basis of those sections no assistance is needed from s. 6. Therefore we think the High Court was wrong in opining that the notification issued by the Chief

- A Commissioner levying surcharge on the price of the electrical energy supplied for street lighting was without the authority of law.

- B We shall now examine the contention that the notification issued by the Chief Commissioner on March 29, 1949 is *ultra vires* the provisions of the Electricity Act. On this aspect the argument on behalf of the respondent proceeded thus : Section 3(f) of that Act provides that the provisions contained in the Schedule shall be deemed to be incorporated with, and to form part of, every licence granted under this Act save in so far as they are expressly added to, varied or excepted by the licence, and shall, subject to any such additions, variations or exceptions which the State Government is hereby empowered to make, apply to the undertaking
- C authorised by the license :

(Proviso is not relevant for our present purpose)
 Clause 12 of the Schedule as it stood at the relevant time read :

D "XII. CHARGE FOR SUPPLY FOR PUBLIC LAMPS.—

- E The price to be charged by the licensee and to be paid to him for energy supplied for the public lamps, and the mode in which those charges are to be ascertained shall be settled by agreement between the licensee and the (State Government) or the local authority, as the case may be, and, where any difference or dispute arises, the matter shall be determined by arbitration."

- F The argument proceeded that the Electricity Act which is a central legislation lays down that the price to be charged by the licensee and to be paid to him for the electrical energy supplied for street lighting shall be settled either by agreement between the licensee and the State Government or the local authority as the case may be or, and, where any difference or dispute arises the matter should be determined by arbitration; the price so fixed cannot be altered in any manner; levying surcharge is but one mode of enhancing the price to be paid; such a course is violative of cl. 12
- G of the Schedule in the Electricity Act; hence it must be held that the Chief Commissioner had no power to levy any surcharge which would interfere with the mandate of cl. 12. It was not said before us nor before the High Court that the Bombay legislature had no competence to enact the Act. Electricity is a concurrent subject both under the Constitution as well as under the Government of
- H India Act, 1935. Therefore quite clearly the Bombay legislature had competence to provide for the levy of surcharge so long as the relevant provision did not conflict with any provision in any central Act. Hence the question is whether ss. 3 and 4 are in conflict

with cl. 12 of the Schedule of the Electricity Act? If the two can co-exist then there is no question of conflict between the two.

We see no conflict between cl. 12 of the Schedule in the Electricity Act and ss. 3 and 4 of the Bombay Act. Clause 12 prescribes a procedure for settling the price of electricity supplied by the licensee for street lighting. It merely lays down the machinery for settling the price if there is dispute between the contracting parties. That clause does not fix the price to be paid or even the maximum price payable. We fail to see how that clause takes away the power from the State legislature to impose additional burden on the consumer. All that clause means is that the licensee cannot dictate his terms to the authority responsible for street lighting. We are unable to agree with the learned Judges of the High Court that in incorporating cl. 12 of the Schedule, the central legislature intended that under no circumstance the liability of the consumer can be increased beyond what is asked during the continuance of the contract. In our opinion it imposes no fetters on the powers of the provincial legislatures in the matter of enhancing the price of the electricity supplied by the licensee for street lighting.

For the reasons mentioned above we are unable to agree with the High Court that either the suit is bad because of want of a valid notice under s. 233 of the Ajmer Merwar Municipalities Regulation or that the notification imposing surcharge is invalid for any reason.

Under the notification imposing surcharge the plaintiff is not entitled to get any additional sum as regards the pumping of water. Under that notification to the extent it is applicable to this case surcharge is levied only on the price of electrical energy supplied under a contract for street lighting and not in respect of the price of the electrical energy used for pumping water. Under Exh. 21 the plaintiff entered into an agreement to pump water for a fixed consideration. For so doing it may have to utilise the electricity produced by it but that does not amount to supplying electricity to the Municipal Council much less supplying electricity for street lighting. From cl. 8 of that agreement it is seen that the parties to that agreement contemplated the pumping of water by using Oil Engines though ordinarily it was expected that it will be done by electrical energy. It is true that cl. 20 of the agreement provides that the Municipal Council shall have first claim over other consumers for the supply of energy for pumping such quantity of water as may be required from the wells at Bhaonta. In construing the true nature of the contract entered into between the parties, the contract has to be read as a whole and if so read it is clear that what the plaintiff undertook was to pump water from the wells in question and not to supply any electrical energy.

- A Hence we are in agreement with the learned Judges of the High Court that the plaintiff's case in this regard should fail.

- B Mr. Sharma urged that the High Court had not thought it necessary to decide certain contentions advanced on behalf of the defendant in view of its conclusions set out earlier. He told us that the defendant had pleaded that the plaintiff failed to prove the quantum of surcharge payable by the defendant. It also contended that the notification under which the surcharge is levied cannot have retrospective operation and that no surcharge was leviable under that notification on the charges in respect of maintaining street lighting equipments. According to the learned Counsel for the plaintiff there is no merit in any one of these contentions. As mentioned earlier the High Court has not gone into these contentions. It is for that court to examine those contentions. This court does not ordinarily examine contentions which have not been examined by the appellate court. It is best that these questions should be gone into by the High Court.

- D In the result we allow this appeal, set aside the judgment of the High Court and remand the case back to the High Court for deciding the issues that remain to be decided. The costs of this appeal shall be costs in the cause.

V.P.S.

Appeal allowed..