

*Privy Council Appeal No. 30 of 1946*

*Allahabad Appeal No. 30 of 1941*

United Provinces - - - - - *Appellant*

v.

The Lower Ganges-Jumna Electricity Distributing  
Company Ltd. and another - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 15TH MARCH, 1948

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*Present at the Hearing :*

LORD SIMONDS  
LORD MORTON OF HENRYTON  
SIR MADHAVAN NAIR

[*Delivered by* LORD MORTON OF HENRYTON]

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This is an appeal from a decree of a Divisional Bench of the High Court of Judicature at Allahabad dated the 22nd August, 1941 dismissing a petition presented by the appellant, in the course of the winding-up of the respondent company, that the official liquidator might be ordered to pay certain bills delivered to him by the appellant and might be further directed to entertain and pay all future bills which might fall due under the provisions of clause 9 of an agreement for the supply of electricity in bulk. The agreement in question was dated the 24th July, 1929 and was made between the Secretary of State for India in Council of the one part and Messrs. P. L. Jaitly and Company, therein called the "distributor," of the other part. It recited the grant of a distributing licence to the distributor, and provided for the bulk supply of electricity to the distributor in two districts in the United Provinces. Clause 9 of the said agreement provided as follows:

"During the first and second years of supply the distributor shall pay for the number of Board of Trade units actually consumed for domestic purposes as shown by the meter readings taken as provided in Clauses (11), (14) and (16). If and whenever after the expiry of the second year of supply the aggregate of the meter readings taken as provided in Clauses (11), (14) and (16) show an annual domestic consumption of less than four units per head of the population as shown in the Schedule hereto annexed of the towns in which energy is supplied, the distributor shall pay for not less than the number of units calculated at four units per head of the population of the towns in which energy is supplied, irrespective of the number of units actually consumed."

The second sentence of Clause 9 was referred to in the proceedings in India, and will be referred to hereafter, as "the four units guarantee clause."

Messrs. P. L. Jaitly and Company floated the respondent company, and with the permission of the Government assigned their licence to the company while remaining its managing agents. The respondent company did not pay in full the bills presented by the Government for electricity and on the 12th April, 1934 the Secretary of State for India in Council filed a petition for the winding-up of the respondent company. On the 10th May, 1934, Mr. Justice Iqbal Ahmad, afterwards Chief Justice, appointed as provisional liquidator Mr. S. P. Das, an electrical and mechanical engineer in the irrigation branch of the Public Works Department. Mr. Das was suggested by the Government Advocate as a suitable man for the post. The judge, however, directed that Mr. Das should not enter upon his duties until the respondent company had had a chance of paying certain sums to the credit of the Government. These sums were not paid, and on the 21st September, 1934 the same learned judge directed Mr. Das to take possession of all the assets of the company. The judge stated:

“ The provisional liquidator will exercise all the rights and discharge all the duties that can be and are exercised or discharged by the company. In short, he will have the right to take the necessary steps to keep the company as a going concern . . . and generally to do all acts that are necessary for carrying into effect the purposes for which the company was incorporated.”

The appellant and the respondent company are agreed that when this Order was made the Government Advocate gave an undertaking in regard to the enforcement of the Government's rights under the four units guarantee clause. Unfortunately this undertaking was not reduced into writing at the time, nor was it incorporated in the Order. The appellant contends first, that the undertaking was given only in respect of the period during which Mr. Das continued to be provisional liquidator, and would cease to have any effect if and when a winding-up order was made and he or another became official liquidator: secondly, that the Government merely undertook to suspend temporarily its rights to claim any sum beyond the price of electricity actually consumed and did not waive its rights. Thus, according to the appellant, the Government was entitled to claim its full rights under the clause, in respect of the period aforesaid, at any time after Mr. Das ceased to be provisional liquidator. The respondent company contends that the undertaking was given at least in respect of the period during which Mr. Das should continue to be in charge of the company's affairs, whether as provisional liquidator or as official liquidator, and that it was an undertaking to waive all payments, other than payments for electricity actually consumed, in respect of the period during which the undertaking continued in force. It will be necessary to return to these contentions hereafter, but in the meantime it is convenient to continue the history of the case.

Mr. Das remained in charge of the assets as provisional liquidator till a winding-up Order was made on the 19th March, 1937, when he was appointed official liquidator. The Order contained the words:

“ The official liquidator must promptly pay the dues of the Government as they accrue from time to time. The learned counsel appearing on behalf of the petitioner has given an undertaking on behalf of the Government that the Government will treat the official liquidator as licensee.”

Mr. Das remained official liquidator until his death in July, 1939, Mr. Banerji being joint official liquidator with him from March till July, 1939. Some time after the death of Mr. Das Mr. Gupta was appointed to act jointly with Mr. Banerji but Mr. Gupta retired in May, 1940 and thereafter Mr. Banerji was sole official liquidator. Throughout, the official liquidators, on behalf of the company, paid for the electricity actually consumed.

From the time when the provisional liquidator was appointed in 1934 until April, 1939 no bill was ever presented by the Government other than bills for the electricity actually consumed. On the 17th April, 1939 four bills dated that day were sent to Mr. Das as official liquidator claiming amounts

alleged to be due under clause 9 for the years ending August, 1935, August, 1936, August, 1937 and August, 1938, the sums claimed being respectively Rs.71,204, Rs.66,189, Rs.63,913 and Rs.59,559. According to the terms of the agreement of 1929, the appropriate date for the ending of each year was 31st October, since the supply of electricity began on the 1st November, 1930, but it would seem likely that the Government ended each year of claim as at 31st August because Mr. Das had begun his duties as provisional liquidator in September. It will be observed that this claim draws no distinction between the period during which Mr. Das was provisional liquidator and the period during which he was official liquidator. On receipt of these bills Mr. Das wrote a letter, dated the 26th April, 1939 to the Hydro-Electric Engineer, Roorkee the material part whereof is in the following terms:

" With reference to your 4 bills for deficiency in domestic guarantee, I have the honour to say that I am advised to inform you that the Government Advocate on behalf of the Government had given an undertaking to Hon'ble High Court to the effect that minimum guarantee under clause 9 of the Bulk Supply Agreement had been waived as communicated per my letter No. 1496/I.B. of 16th April, 1935 addressed to you.

An early reply is requested."

The letter of the 16th April, 1935 referred to therein was, so far as material, as follows:

" I have to bring to your notice that since the month of September, 1934 of assumption of my charge of the office of the provisional official liquidator of the Lower Ganges-Jumna Electricity Distributing Co., Ltd., the question of the claim of domestic consumption on 4 units per head of population basis, is to be waived as per order (paper torn) Hon'ble High Court and undertaking of the Government Advocate (paper torn) of the Secretary of State of India in Council. I mention this (paper torn) there might not be any written communication to this effect in your office."

It does not appear that any answer was sent to this letter of 1935. Apparently the Hydro-Electric Engineer sent no answer to Mr. Das's letter of the 26th April, 1939, possibly because he passed it on to the Chief Engineer. On the 4th July, 1939 Mr. Banerji wrote a letter to the Chief Engineer in the following terms:

" I have the honour to say that the Hydro-Electric Engineer, Roorkee, has submitted four bills for the deficiency in the domestic guarantee, copies of which are enclosed for ready reference. In this connection I am advised to inform you that the Government Advocate on behalf of the government had given an undertaking to Hon'ble High Court to the effect that minimum guarantee under clause 9 of the Bulk Supply Agreement had been waived as communicated per my letter No. 1496/IB of 16th April, 1935 addressed to the Hydro-Electric Engineer, Roorkee copy enclosed for ready reference.

I am also enclosing the correspondence exchanged between this office and the Hydro-Electric Engineer in this connection who advised to approach you direct for the settlement of the above."

The reply of the Chief Engineer on the 20th July, 1939 was in the following terms:

" I have the honour to acknowledge the receipt of your letter No. 2104/1-3, dated the 4th July, 1939, together with its enclosures, and to say that at the time the undertaking was given in the High Court on behalf of the Government to the effect that the Government would not enforce the guarantee for the minimum annual consumption of electrical energy for domestic purposes under Clause (9) of the Bulk Supply Agreement for so long as the affairs of the Lower Ganges Jumna Electricity Distributing Company, Limited were in the hands of the Provisional Official Liquidator, it was not expected that the winding up of the Company would take such a long time as it has

taken, involving the Government in a heavy loss. While the Government agreed not to enforce the guarantee, they did not surrender their right to the guarantee altogether, nor did they bind themselves to suspend the guarantee for an indefinite period. In the circumstances, I trust that you will find the bills for deficiencies in the guarantee issued by the Hydro-Electric Engineer to be in order."

This letter was followed by a refusal of the official liquidator to pay the four bills in question. On the 14th December, 1939 the appellant delivered amended bills but it is unnecessary to refer to the details of the amendments. On the 18th December, 1939 the appellant filed the petition which forms the subject of the present appeal. By the petition the appellant prayed:

" that the official liquidator may be ordered to pay the bills withheld by him and may be further directed to entertain and pay all future bills relating to the deficit in the guaranteed annual minimum consumption in terms of clause 9 of the Bulk Supply Agreement as they fall due."

This petition was dismissed in the High Court of Judicature at Allahabad by a Divisional Court consisting of the Chief Justice, who as Mr. Justice Iqbal Ahmad had appointed the provisional liquidator in 1934 and had made the winding-up Order in 1937, and Mr. Justice Allsop.

Two questions arise on the present appeal. The first relates to the period from the 21st September, 1934 until the making of the winding-up Order on the 19th March, 1937. It is not disputed that the appellant gave an undertaking as to this period, and the question is whether the appellant merely undertook to suspend temporarily its rights to claim any sum beyond the price of electricity actually consumed during that period or whether the appellant waived these rights. Their Lordships feel no doubt that the latter view of the matter is correct. The Government Advocate who gave the undertaking in question afterwards became Mr. Justice Ismail and when that learned judge was asked to state his recollection of the terms of the undertaking, for the assistance of the High Court, he replied that:

" the undertaking was to the effect that the Irrigation Branch would waive its claim under clause 9 of the Bulk Supply Agreement during the period the provisional official liquidator would be in possession and that there was no stipulation as regards time."

This reply is set out in paragraph 10 of the Reply filed by the official liquidators. The Divisional Court naturally accepted this statement and referred, apparently without any objection being taken, to an Office Memorandum signed on the 28th September, 1936 by the Joint Secretary to the Government of the United Provinces, Public Works Department, Irrigation Branch. That Memorandum is in the following terms:

" The Governor in Council is pleased to waive the guarantee of the minimum consumption of electrical energy for domestic purposes fixed under clause 9 of the agreement, dated July 24, 1929, for the bulk supply of electrical energy by the Public Works Department, Irrigation Branch, United Provinces, to Messrs. P. L. Jaitly & Co., for so long as the affairs of the Lower Ganges-Jumna Electricity Distributing Co., Limited, are in the hands of the Provisional Official Liquidator appointed by the Hon'ble High Court of Judicature at Allahabad."

It is further to be noted that waiver and not suspension is referred to in Mr. Das' letter of the 16th April, 1935 already quoted. If the phrase " is to be waived " were incorrect, their Lordships would have expected a reply to be sent pointing out this fact, but apparently, as has already been stated, no reply was sent. In their Lordships' view, the evidence in favour of waiver, as contrasted with suspension, is overwhelming; and the claim now made in respect of the period up to the 19th March, 1937 cannot be sustained.

The second question is, on what terms did the appellant continue to supply electricity, and the official liquidator continue to take electricity, after the 19th March, 1937? It is not entirely clear whether the undertaking given in 1934 was in terms limited so as to come to an end when Mr. Das ceased to be provisional liquidator, and their Lordships are content to assume in favour of the appellant, without so deciding, that the undertaking was so limited. On this assumption their Lordships draw the inference from the surrounding circumstances that both parties agreed to the continuance of a supply of electricity by the appellant to the respondent company on the terms which were in force immediately before the Order for winding-up was made. They agree with the comment of the High Court that the business of the company could only be carried on at a considerable loss if the four units guarantee clause were enforced, and that

“ it is incredible that the court would have allowed an official liquidator to continue the business of the company in conditions in which the continuation of the business would cause so serious and progressive a loss to the creditors of the company.”

It is important to observe that the claim put forward by the appellant's petition is not merely a claim to rank as a creditor in the winding-up of the respondent company for the sums in question, averaging about Rs.60,000 per annum. The appellant claims to be paid in priority to other creditors, on the ground that these sums were expenses incurred by the official liquidator in carrying on the business of the company. It can hardly be doubted that if the official liquidator had thought the appellant was insisting on the enforcement of the four units guarantee clause as from the date of the winding-up Order, he would have disclaimed the agreement of 24th July, 1929 under section 230A of the Indian Companies Act. Such a disclaimer would presumably result either in a sale of the company's undertaking or in a reopening of negotiations with the appellant and a continuance of the business, with the leave of the Court, on less onerous terms.

Apart from the matters just mentioned, in their Lordships' view the conduct of the appellant was not consistent with its present contention that on the making of the winding-up Order, the four units guarantee clause became immediately enforceable. No bill, other than bills for electricity actually consumed, was presented till the 17th April, 1939, more than two years after the winding-up Order, and the wording of the Chief Engineer's letter of the 20th July, 1939, already quoted, in particular the observation :

“ it was not expected that the winding-up of the company would take such a long time as it has taken, involving the Government in a heavy loss.”

is inconsistent with the case now put forward on behalf of the appellant. If the Government was entitled to enforce the four units guarantee clause as from the making of the winding-up Order, the continuance of the winding-up for a long time would not involve the Government in a heavy loss, as it would have the benefit of the clause. Finally, their Lordships agree with the comment of the High Court :

“ We may point out that Mr. Das remained in charge of the affairs of the company and that the only change in the position was a formal one, namely that he was formally an official liquidator instead of a provisional liquidator. We do not believe that anybody thought at the time when the winding-up order was passed that this formal change would in any way affect the position of the parties.”

Their Lordships cannot doubt that the responsible officials of the appellant were aware that the official liquidator was carrying on the business of the respondent company, with the sanction of the court, on the footing that the appellant would continue to supply electricity on the same terms as those which were in force immediately before the winding-up Order was made. In these circumstances, it is not to be supposed that those responsible officials were deliberately allowing the court and the official liquidator

to proceed upon a false assumption. Nor can it be supposed that the existence of the four units guarantee clause was entirely overlooked by those officials; it was a clause of importance, which had been the subject of discussions between the parties and the subject of an arbitration, wherein the award was made only a year before the winding-up Order. The only reasonable explanation of the continuation of the company's business is that the appellant gave, and the official liquidator received, a supply of electricity on the terms which were in force immediately before the Order for winding-up was made. It does not appear that any limit of time was set for this arrangement, and it was for the appellant to take the appropriate steps to bring it to an end. Instead, the appellant put forward the claims which have already been stated, and these claims were rightly rejected by the official liquidator and the High Court.

On the view which their Lordships take of the matter, it is unnecessary to discuss the further question whether the conduct of the officials of the appellant was such as to give rise to any estoppel.

For these reasons, which are in substance the same as those which led the High Court to dismiss the petition, their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the respondent company's costs of this appeal. The respondent Lala Man Mohan Das took no part in the proceedings before the Board.



In the Privy Council

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UNITED PROVINCES

2.

THE LOWER GANGES-JUMNA  
ELECTRICITY DISTRIBUTING  
COMPANY LTD. AND ANOTHER

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DELIVERED BY LORD MORTON OF  
HENRYTON

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