1961 *Present :* **H. N. G. Fernando, J., and L. B. de Silva, J.**

THE NEGOMBO MUNICIPAL COUNCIL, Appellant, *and*
K. M. J. FERNANDO, Respondent

S. C. 48—D. C. Negombo, 18709

Electricity—Contract between a local authority and a consumer, for supply of electric energy—Scope of right of licensee to discontinue supply—Incapacity of licensee to impose conditions not authorised by statute—Electricity Act, No. 19 of 1950, ss. 30, 32, 33, 36, 45, 46, 47, 49, 60, 64 (1)—Municipal Councils Ordinance, No. 23 of 1947.

A local authority, when it enters into a contract for the supply of electric energy, is precluded from imposing on the consumer conditions or terms which are not authorised expressly by the provisions of the Electricity Act, No. 19 of 1950, or by regulations framed in accordance with the provisions of section 46 of that Act. The local authority is not entitled to rely upon such unauthorised conditions in order to justify any discontinuance of supply of electric energy in contravention of section 33, even though the consumer has agreed to be bound by them.

Conditions providing (1) for discontinuance of supply of energy if the consumer obstructs the licensee from connecting other consumers to the service main, and (2) for the licensee's exemption from liability in case of discontinuance of supply, are unauthorised conditions unless they are provided for in regulations made under section 46 of the Electricity Act.

A regulation made under section 60 of the Electricity Act cannot validly authorise any action inconsistent with the express provisions in the Act itself. But even conceding that such inconsistency can be authorised by a regulation made under section 60, Regulation 7 under head (vi) of the set of regulations framed under section 60 and published in the *Gazette* of the 10th April, 1953, does not contain any indication of an intention to alter or evade section 46.

A consumer is entitled to claim from a licensee damages resulting from an unauthorised discontinuance of supply of electric energy.

APPEAL from a judgment of the District Court, Negombo.

H. W. Jayewardene, Q.C., with *A. K. Premadasa*, *N. R. M. Daluwatte* and *D. S. Wijewardene*, for defendant-appellant.

W. T. P. Goonetilleke, for plaintiff-respondent.

Cur. adv. vult.

September 8, 1961. H. N. G. FERNANDO, J.—

The plaintiff in this case applied in October 1953 for a supply of electricity to his premises and undertook in his application to abide by the conditions relating to the supply which were set out in the application form provided for the purpose by the Negombo Municipal Council. The form included *inter alia* the following conditions :

" 7 (*a*) The department reserves the right to connect more than one consumer to a service main wherever the supply to the original applicant is not affected thereby. Where it becomes necessary to make a connection to an existing service cable in a private compound the

Council undertakes to reinstate the ground in a proper and satisfactory manner. If a consumer objects to, prevents or obstructs in any way the department from connecting other consumers to the service main, such consumer shall render himself liable to discontinuance of supply without notice ".

" 7 (*d*) Every endeavour will be made to ensure an efficient and continuous supply of energy to consumers but the council will not be responsible for any interruption of supply. The council shall not be held liable to any person for any loss or damage occasioned, directly or indirectly, by the total or partial interruption of supply, or by the council's failure to supply or discontinuance of supply ".

A supply of electricity was accordingly provided to the house occupied by the plaintiff.

In his plaint filed in July 1956 the plaintiff alleged that on 9th June 1956 the defendant council had unlawfully discontinued the supply of electricity to the plaintiff's premises. On this ground the plaintiff asked in his prayer for damages in Rs. 5,000 alleged to have been suffered by way of inconvenience, humiliation and loss of reputation and also for damages for Rs. 50 per day for the deprivation of the use of electric lights and electric appliances. The damages actually claimed under the second head were alleged to have been incurred in the purchase of private electrical plant but the learned Judge held that this purchase had not been proved. However after inspection of the premises the learned Judge determined that the provision of alternative lighting for the plaintiff's house must reasonably have cost about Rs. 10 per day and damages of Rs. 510 were decreed against the defendant council on this basis.

It is common ground that the supply of electricity to the plaintiff's premises was discontinued on 9th June 1956 but the circumstances in which the disconnection was made were hotly disputed at the trial. According to the plaintiff, the council's electrical foreman came to the house at about 1.30 p.m. with some workmen and informed the plaintiff that it was proposed to take a connection from the plaintiff's premises by means of a wire along the rafters of his house to the adjoining premises the occupant of which had applied for a supply of energy. This the plaintiff refused to permit, according to him for the reason that it would be dangerous to effect such a connection particularly because of the risk to his young children. Later, he alleged, the electrical superintendent also came and asked the workmen to keep a ladder by the wall of his house and this also the plaintiff refused to permit.

The position taken up for the council was that it had been decided to give a connection to the neighbouring house from the plaintiff's premises by taking a line over the roof of the plaintiff's house. The council's officers testified that the plaintiff refused to permit this to be done when the workmen wished to effect the connection on the morning of the 9th of June. The electrical foreman came later but was asked not to step into

the plaintiff's premises. Thereafter the superintendent and the engineer also came and at that stage found about five or six persons on the premises armed with clubs. They explained to the plaintiff that what they proposed was only to take a wire over the plaintiff's roof but the plaintiff refused to permit any connection to be taken over his roof.

After exhaustive consideration of the relevant evidence the learned District Judge had found that what the defendant's officers intended to do was to run a wire along the beam of the plaintiff's house in order to give the connection to the neighbouring premises. I can see no reason for doubting the correctness of the finding actually reached that this was indeed the course which the defendant's officers proposed in the first instance at any rate. Counsel for the defendant has argued for the purposes of the appeal that the evidence established that on the last visit made by the council's officers they did inform the plaintiff that they proposed only to take a line over the roof. Although there is no precise finding as to whether or not this proposal was conveyed to the plaintiff on the occasion of the last visit, I feel sure, having regard to the reasons which moved the learned trial Judge to disbelieve the foreman as to the purpose he had in mind originally, that the Judge would not have found that on the occasion of the last visit of the defendant's officers they did in fact intend only to take a line over the plaintiff's roof. The defendant while admitting that an estimate had been prepared for the work involved, did not produce the estimate and did not call the officer who had prepared it. Furthermore the learned Judge went so far, and for reasons which appear quite justifiable, as to decide that some officer of the council had made an alteration upon a minute from the Commissioner of Local Government with the object of supporting the defendant's position that the intention had been only to take a line over the plaintiff's roof. Having regard to the very strong findings of fact which were actually reached by the Judge, it is unreasonable to suppose that he could have held that on the occasion of the last visit of the council's officers they changed their mind and had decided to give in to the plaintiff's objection to a line being taken along the beams of his house.

For present purposes therefore I must assume that the action which the plaintiff prevented the council's officers from taking was only the action of taking a line along the beam of his house. Having regard then to the provisions of paragraph 7 (*a*) of the agreement the simple question which arises is whether that paragraph does in fact confer power not merely to connect a new consumer to the service main provided for the plaintiff's supply but confers further power to effect the connection by affixing wires and other necessary equipment upon the physical premises occupied by the plaintiff. To my mind the paragraph falls short of including such a power to interfere with or damage in any way the property occupied by the plaintiff. But for reasons which will presently appear, the question whether such powers of incidental interference are contained in paragraph 7 does not in fact arise for our decision.

On the assumption however that such incidental interference is not justified by paragraph 7 (*a*), counsel for the defendant has argued that paragraph 7 (*d*) confers an immunity from liability from any loss or damage occasioned by a discontinuance of supply, whether or not the discontinuance be lawful and authorised by the contract. Considering that any discontinuance authorised by the contract would not render the council liable in damages, it is difficult to resist the argument that the intention of paragraph 7 (*d*) was to exclude liability even for unauthorised discontinuance of supply. But again that view does not determine the matter in favour of the defendant council.

The Municipal Council of Negombo is the successor in office of the former Urban Council and by virtue of relevant provision in the Municipal Councils Ordinance, No. 23 of 1947, all by-laws previously made by the Negombo Urban Council and not inconsistent with the Ordinance itself continue in force as by-laws made by the new Municipal Council. The Urban Council had made the by-laws P (3), by-law (2) of which provides that a person desirous of obtaining energy from the council should make an application in such form as may be provided for the purpose by the council and it is not disputed that the form of the application signed by the plaintiff which incorporated the conditions which I have mentioned above was the same form as was previously utilised by the Negombo Urban Council under these by-laws. Having regard therefore to the relevant provisions of the Municipal Councils Ordinance concerning the supply of electricity by the Negombo Municipal Council it can be assumed for present purposes that so far as that Ordinance is relevant, the by-laws and the form utilised by the defendant council and the conditions it contains are all within the powers of the council and that accordingly the plaintiff, when he signed the form of application, bound himself *inter alia* by condition 7 (*d*) and is therefore disentitled to sue for damages.

Reference has now to be made to a special statute, The Electricity Act, No. 19 of 1950, enacted to " regulate the generation, transmission, transformation, distribution, supply and use of electric energy ". Under this Act a local authority is prohibited from supplying electric energy unless authorised in that behalf by a licence granted by a Minister. The earlier part of the Act provided for the conditions and circumstances in which licences to supply electricity may be granted and confers on a licensee powers necessary to enable electricity installations and supply equipment to be established and maintained. Then follow certain sections which are in my opinion of the utmost importance in considering the rights, duties and privileges *inter se* of a local authority which is a licensee and of consumers or of prospective consumers within its administrative area. It is necessary therefore to reproduce these provisions *in extenso :*

" 30. The supply of electrical energy by the holder of a licence shall, in every case, be in accordance with—

(*a*) the provisions of this Act and of the regulations made thereunder,

(*b*) such general conditions as may be prescribed under the Act and declared to be applicable to all licences of the class or description to which that licence belongs ; and

(*c*) such special conditions as may be set out in that licence and declared to be applicable to that licence.

" 32. A licensee shall not be compelled to give a supply of energy to any premises unless he is reasonably satisfied that the consumer's lines, fittings and apparatus therein are in good order and condition, and are not likely to affect injuriously the use of energy by other persons or the supply thereof by the licensee.

" 33. (1) A licensee shall, upon being required to do so by the owner or occupier of any premises situated within one hundred and fifty feet from any distributing main of the licensee in which he is for the time being required to maintain or is maintaining a supply of energy for the purposes of general supply to private consumers, give and continue to give a supply of energy for those premises in accordance with the provisions of the licence and of the regulations, and he shall furnish and lay any service lines that may be necessary for the purpose of supplying the maximum power which may be required by such owner or occupier and may be supplied under the licence.

" 36. The prices to be charged by a licensee for energy supplied by him shall not exceed those specified in his licence as appropriate to the several methods of charging provided therein :

" 46. (1) A licensee may make regulations to be observed by the consumers as to—

(*a*) the conditions of supply ;

(*b*) the terms and length of contracts required to be entered into ; and

(*c*) any other matters relating to the supply to consumers.

(2) No regulation made by a licensee under sub-section (1) shall have effect until it has received the approval of the Minister or, where the licensee is a local authority, the approval of the Minister of Local Government given after consultation with the Minister.

" 64. (1) A licensee who makes default in supplying energy to any owner or occupier or premises to whom he is required to supply energy by or under the provisions of this Act or of his licence, shall be guilty of an offence punishable save as provided in section 73 with a fine not exceeding twenty-five rupees in respect of each day on which or on any part of which any such default occurs ".

In addition, section 60 also generally empowers the Minister to make regulations.

We were not referred during the course of the argument to any provisions of the earlier law (whether relating to Municipal Councils or Urban Councils or otherwise) bearing any resemblance to that which is now contained in section 33 of the Electricity Act. Without reproducing again the language of that section which is framed in the form of the imposition of an obligation on the licensee, that section in my opinion amounts to nothing less than provision which confers upon the occupier of premises in proximity to a distributing main a right to be given a supply of energy *in accordance with the provisions of the licence (granted by the Minister to the local authority) and of the regulations made under the Act.* In other words an occupier has a right to point to the provisions of the licence and to regulations made under the Act and to insist that if his case falls within the scope of those provisions the local authority must give and continue to give a supply of energy for his premises; and if the authority makes default in doing so the authority is liable to be prosecuted and punished under section 64.

It is important I think to appreciate the far-reaching change which section 33 effected in the relationship between the licensee and occupiers of qualified premises within its area. Having conferred the right to a supply by section 33 and having imposed a sanction found in section 64, the Legislature further assumed control of the matter of charges in section 36 for the benefit presumbly of consumers. Thereafter in order to protect the rights of a licensee and the public interest the Legislature in section 45 provided for discontinuance where a consumer improperly interferes with the supply of energy or fails to comply with any regulations relating to the conditions of supply. Again in section 47 the Legislature provided necessary powers of inspection with the sanction of discontinuance where inspection was not permitted and in section 49 for discontinuance in the event of the non-payment of charges for a supply. I pass now to consider section 46 which empowers the licensee to make regulations to be observed by consumers as to (*a*) conditions of supply, and (*b*) terms and length of contracts required to be entered into by consumers. Such regulations do not have effect unless approved both by the Minister in charge of the subject of Electrical Undertakings and the Minister of Local Government.

The construction of section 46 which the plaintiff contends for is that the intention of the Legislature was to provide that where a licensee desires to impose conditions or terms in contracts which are not authorised by any other section of the Act the licensee must necessarily include such conditions in regulations framed under section 46 and approved by the two appropriate Ministers. *Prima facie,* having regard to the provisions of the Act to which I have already referred disclosing an intention of the Legislature to cover in its enactment as many matters as possible both in the interests of the consumer and the local authorities, there is much to be said in favour of this construction. For instance

while it is obvious that disconnection would be the only proper remedy where a consumer fails to pay the charges due or improperly interferes with the electricity supply or injures the licensee's equipment, this remedy was not left to be imposed even by regulation. The Legislature itself provided the remedy. Section 45 also *expressly refers to a failure on the part of the consumer to comply with the regulations relating to the conditions of supply and expressly provides the remedy of discontinuance of supply in such an event.* Considering the nature of the privilege granted to the consumer by section 33 it would not in my opinion be reasonable to suppose that even in the absence of a section such as section 46, the Legislature would have contemplated that a local authority could impose conditions at its own will and pleasure. But the enactment of section 46 in my opinion places the matter beyond doubt. The Legislature was itself unable to frame before-hand all possible terms and conditions which may be included in a contract and chose instead the alternative of permitting the local authority (with the approval of the two Ministers) to frame regulations for that purpose.

If this be the proper construction of the Act, then the conditions 7 (*a*) and 7(*d*) of the agreement are unauthorised conditions, since they are not terms or conditions provided for in regulations made under section 46 ; in fact no regulations whatever have been made by the council under that section. Whether such unauthorised conditions can be relied upon by the council is a question with which I shall have to deal later in this judgment.

The construction which Mr. Jayewardene for the council seeks to place upon section 46 would give it but little effect. According to his contention the section was designed to serve two purposes which I may briefly summarise as follows :—

(1) because there were contracts between local authorities and consumers entered into prior to the new Act of 1950, section 46, it is contended, would enable a local authority to provide for new conditions binding consumers, in addition to conditions already contained in such contracts ;

(2) even prospectively the section could be utilised to alter by means of statutory regulations provisions in contracts previously entered into. Although, it is argued, there may be a legal necessity to resort to section 46 for the two special purposes mentioned, a local authority may for other purposes impose its own conditions in contracts by virtue of its rights as a Municipal Council to enter into contracts, and the conditions in paragraph 7 of the agreement are therefore valid even though not authorised by section 46.

If such were the only objects which the Legislature had in mind in enacting section 46, it is surprising that no reference is made in the section to any intention that regulations could be made in order to add

or subtract from pre-existing contracts. Indeed I myself much doubt whether, once there has been a contract which is otherwise valid, section 46 confers any power to make any regulation detracting from contractual rights already enjoyed by the consumer. There is not in this section, *as there is in section 45*, any expression of intention to override prior contracts. If this doubt be a proper one, then the argument for the council would render section 46 devoid of any meaning.

Even in the agreement in question in the present case there are many conditions the validity of which is clearly referable to the express provisions of the Act, and the authorisation of regulations made under section 46 is not in law necessary in order to enable conditions of that kind to be included in a contract. Indeed, having regard to the matters dealt with in sections 45, 47, 49 and 50, the Act itself contains more or less adequate provision for the discontinuance of supply in appropriate cases. Even if condition 7 (*a*) be a valid condition imposed under section 46, the power of discontinuance conferred by section 45 would automatically operate. By providing in section 45 a sanction for a failure to comply with regulations relating to the conditions of supply and in section 46 for regulations as to such conditions and to the terms of contract, the Legislature has expressly laid down a means by which any gaps left in its express enactments may be duly filled.

Section 46 contains express provision for a case where a licensee desires to impose conditions or terms not already authorised by the Act itself but with the safeguard that such regulations require the sanction of the two Ministers. It is in my opinion quite unreasonable to hold that nevertheless the Legislature had an intention that if a licensee wishes to impose conditions or terms it can do so without resort to the legal means provided in that behalf by section 46.

The plain meaning of section 46 is that if a local authority desires to impose conditions and terms not contemplated in the Act, it may frame regulations incorporating such terms and conditions, but only if the two Ministers approve. The question is whether a local authority has any additional or residuary power to impose conditions. To hold that it has would lead to absurdity ; for if so, it would either be able to ignore the two Ministers completely, or else even if the Ministers decline to approve any proposed conditions, it could nevertheless flout the views of the Ministers and proceed to impose its own conditions. Would not such a course be obviously in conflict with section 33 ? When that section declares that a supply must be given and continued to be given *in accordance with the provisions of the regulations*, it is surely unlawful for the authority to say that it will give a supply *only in accordance with conditions it chooses to impose.*

It has been argued that, even though section 33 may have contemplated that a supply must be given in accordance with regulations, and not in accordance with conditions determined by a local authority of its own

motion, the legal position has been altered subsequently. This argument is based on the regulations framed under section 60 of the Act and published in the *Gazette* of April 10th 1953. Regulation 7 under head (vi) of this set of regulations provides *inter alia* that every consumer "*shall comply with all the conditions under which electric energy is supplied by a licensee*".

Mr. Jayewardene's contention has been that the expression "conditions under which electric energy is supplied by a licensee" in this regulation includes any condition *de facto* imposed by the licensee, whether or not it is a condition authorised by the Act or by section 46. There might have been some force in this contention if the language of the regulation had been that a consumer must comply with "such conditions as the licensee may impose". But as the regulation stands, the question is whether the regulation confers an implied power on the licensee to impose conditions, or else merely requires a consumer to comply with the conditions contemplated in the Act. I do not agree that a regulation under section 60 can validly authorise any action inconsistent with the express provisions in the Act itself (in this context section 46). But even conceding that such inconsistency can be authorised by a regulation made under section 60, this particular regulation does not contain any indication of an intention to alter or evade section 46. If, as I have already held, section 33 and section 46 have the effect that a supply must be given in accordance with regulations, the "conditions" referred to in the regulation must clearly mean conditions imposed by regulations. A piece of delegated legislation can never be construed in a sense contrary to the express provisions of the statute, unless the language renders such a construction irresistible and unavoidable. In this instance, the language can be construed in a sense which is in perfect conformity with the statute, namely that the "conditions of supply" are the lawful conditions contemplated in the Act.

For the reasons stated, I am satisfied that the defendant council had no authority under the Electricity Act to insert in the agreement the two conditions 7 (*a*) and 7 (*d*) on which the council relies for its action of discontinuing the supply to the plaintiff's premises. It remains to be considered whether, though unauthorised by the Act, those conditions were nevertheless effective to bind the plaintiff who had agreed to be bound by them.

But for the licence granted to the council under the Act, the council would have no right to supply electricity, and would indeed be committing an offence in so doing. The fact that a Municipal Council is empowered by the 1947 Ordinance to supply electricity and to enter into contracts for that purpose is of no avail, since those powers cannot now be exercised save in conformity with the Electricity Act, which is a later special enactment governing the supply of electricity. The "scheme" of the Act, as I have held, is that a licensee is bound to supply electricity in accordance with conditions laid down by the Legislature

itself or else prescribed by regulations made under the Act; and just as the mode and conditions of supply are comprehensively controlled by the Act, so also is the relationship between the licensee and the consumer similarly controlled.

In so far as the council acted in breach of the Act by discontinuing the plaintiff's supply without the necessary authority of a condition lawful under the statute, the council committed an offence under the Act for which it could have been prosecuted and punished. In such a prosecution, conditions 7 (*a*) and 7 (*d*) would have provided no defence, for in imposing them the council contravened the provisions of section 33. That being so, it is in my opinion not open to the council to plead these conditions as a defence in a civil action for damages.

In form, it may appear that the rights of the plaintiff flow from his contract; but the contract in this context should be nothing more than the reduction into the form of a document of the terms of the relationship contemplated by the statute. What the plaintiff complains of is not merely the breach of the agreement, but rather the breach of the obligation imposed by the Act on the licensee and the breach of the right conferred by the Act on himself. Indeed, there is no compelling need for any formal contract between licensee and consumer, however convenient and useful such a document may be. A contract outside the terms contemplated by the statute would not bind the council; equally a condition which is unauthorised by the statute does not bind the consumer.

The correctness of the proposition just stated can I think be made manifest. Suppose that the council had fixed in the agreement, and the plaintiff had agreed to pay, some special charges not prescribed by or under the Electricity Act, and had imposed in the agreement a condition for discontinuance on non-payment of such charges. Undoubtedly, the council could not successfully recover such charges in a civil action. How then could the council successfully plead the discontinuance clause if in the same action the plaintiff had counter-claimed for damages for unlawful discontinuance? The fact that, in the present case, the condition appears to this Court to be perfectly reasonable cannot confer on it legal validity or effect.—the reason being that the Legislature has committed to the two Ministers the function of deciding whether such a condition is or is not reasonable and should or should not be made a term of the contract.

For these reasons I would dismiss the appeal with costs.

L. B. DE SILVA, J.—I agree.

Appeal dismissed.