The Sihor Electricity Works Ltd

Vs

The Gujarat Electricity Board and Another

Civil Appeal Nos. 452-453 of 1966

(V. Ramaswami - I JJ)

29.01.1969

JUDGMENT

RAMASWAMI, J. -

1. The appellant, the Sihor Electricity Works Ltd., is a public limited company carrying on the business of generating and distributing electrical energy under the licence granted to it under the Indian Electricity Act, 1910, having its supply area within the limits of Sihor Town situated in the district of Bhavnagar in Saurashtra. The first respondent is the Gujarat Electricity Board which is a Corporation constituted under the Electricity (Supply) Act, 1948, for the purposes of generation, supply and distribution of electricity in the State of Gujarat. The second respondent is the Saurashtra Electrical and Metal Industries (Private) Ltd., a private limited company carrying on business of manufacturing electrical accessories, etc., and having its factory at Sihor within the area of supply of the appellant company. The appellant company was originally generating and distributing electricity but at the relevant time, it was a distributing licensee distributing the energy purchased in bulk from the first respondent within its area of supply.

2. The appellant brought a suit against the respondents in the Court of Civil Judge (Junior Division) of Sihor being Civil Suit No. 45 of 1960 to obtain a declaration that the decision of the first respondent as contained in its letters, dated 3rd June, 1960 and 24th October, 1960, to give direct supply to the factory of the second respondent within the area of supply of the appellant and without its consent was illegal and ultra vires its powers under the Electricity (Supply) Act, 1948 (Act No. 54 of 1948 (hereinafter called the Act), and for a permanent injunction restraining the first respondent from implementing the said decision. The case of the appellant was that the first respondent was not entitled to give direct supply to the second respondent as the 'maximum demand' of the appellant at the time of the request of the second respondent was more than twice the 'maximum demand' asked for by the second respondent. The appellant company alleged that the maximum demand of the appellant company in the relevant period, namely, September 1959 to December 1959 was between 262 to 349 KVA., while the maximum demand of the second respondent had never exceeded 40 to 45 KVA. The first respondent contended the suit on the ground that the decision was legal and proper because the maximum demand of the appellant company at the time of request was less than twice the maximum demand 'asked for' by the second respondent from the first respondent. It was contended that the demand 'asked for' by the second respondent was 388 KVA, and therefore, the first respondent was entitled in law to give direct supply to the second respondent. The trial Judge held that the decision of the first respondent to give direct supply of electricity to the second respondent was ultra vires the power of the first respondent under Section 19(1)(b) (ii) of the Act and was, therefore, null and void and gave a declaration to that effect in favour of the appellant. The trial Judge, however, refused to grant the consequential relief

of injunction on the ground that the Board being a public authority could be excepted to respect the law laid down by the Court and it was, therefore, not necessary to issue any injunction against the respondents. Aggrieved by the decree passed by the trial Judge the two respondents, filed separate appeals in the District Court. The appellant preferred a cross-objection contending that the trial Judge was in error in refusing to grant injunction. The appeals and the cross-objection were heard by the District Judge of Bhavnagar and by a common judgment delivered on 12th October, 1963, the District Judge accepted the contentions urged on behalf of the respondents and allowed the appeals. The District Judge held that the jurisdiction of the Civil Court to entertain the suit was excluded by reason of Section 76(1) of the Act and the dispute between the parties being a dispute covered by that section could be determined only in the manner provided by that section viz., by arbitration. The District Judge also decided that the maximum demand asked for by the second respondent was in excess of 50 per cent. of the maximum demand of the appellant at the time of request for direct supply and the respondent was entitled to give direct supply of electrical energy to the second respondent under Section 19(1)(b)(ii) of the Act. The District Judge accordingly found that the suit was liable to fail not only for want of jurisdiction but also on merits and accordingly allowed the appeals and dismissed the suit. Thereafter, the appellant preferred appeals to the High Court of Gujarat being Civil Section Appeals Nos. 33 and 34 of 1964. The said appeals came for hearing before Mr. Justice P. N. Bhagwati, who dismissed the same by a common judgment, dated 4th July, 1964. The learned Judge took the view that the Court had jurisdiction to hear the suit as the provision for arbitration under Section 76 of the Act was inserted in the statute not in the interest of public good but for the benefit of individuals and therefore either party can waive the right to insist on arbitration. The learned Judge, however, held that the true effect of Section 19(1)(b)(ii) was that "the comparison required to be made was between the maximum demand of the licensee on the Board at the time of request for direct supply which would of course be maximum demand based on electricity actually supplied and taken during some reasonable period immediately preceding the time of request for direct supply and the maximum demand which the applicant wants to keep the Board ready on tap when supplying electricity to the applicant". These appeals are brought by special leave from the judgment of the Gujarat High Court, dated 4th July, 1964, in Second Appeals Nos. 33 and 34 of 1964.

3. The question of law presented for determination in this case is whether the High Court was right in holding that Section 19(1)(b)(ii) of the Act prescribed that a comparison must be made between the actual maximum demand of the licensee company and the anticipated maximum demand of the consumer before the Electricity Board can decide to give direct supply to the consumer within the area of supply of the licensee company.

4. Section 19(1) of the Act states :

> "The Board may, subject to the provisions of this Act, supply electricity to any licensee or person requiring such supply in any area in which a scheme sanctioned under Chapter V is in force :
>
> Provided that the Board shall not -
>
> (a) supply electricity for any purpose directly to any licensee for use in any part of the area of supply of a bulk-licensee without the consent of the bulk-licensee, unless the licensee to be supplied has an absolute right to veto on any right of the bulk-licensee to supply electricity for such purpose in the said part of such area, or unless the bulk-licensee is unable or unwilling to supply electricity for such purpose in the said part of such area on reasonable

terms and conditions and within a reasonable time, or

(b) supply electricity for any purpose to any person, not being a licensee for use in any part of the area of supply of a licensee without the consent of the licensee, unless -

(i) the actual effective capacity of the licensee's generating station computed in accordance with Paragraph IX of the First Schedule at the time when such supply was required was less than twice the maximum demand asked for by any such person; or

(ii) the maximum demand of the licensee, being a distributing licensee and taking a supply of energy in bulk is, at the time of the request, less than twice the maximum demand asked for by any such person; or

(iii) the licensee is unable or unwilling to supply electricity for such purpose in the said part of such area on reasonable terms and conditions and within a reasonable time."

Section 2(8) of the Act defines 'maximum demand' as follows :

"'Maximum demand' in relation to any period shall, unless otherwise provided in any general or special order of the State Government, mean twice the largest number of kilowatt-hours or kilo-volt ampere-hours supplied and taken during any consecutive thirty minutes in that period."

Section 18 deals with general duties of the Board and reads :

"Subject to the provisions of this Act, the Board shall be charged with the general duty of promoting the co-ordinated development of the generation, supply and distribution of electricity within the State in the most efficient and economical manner, with particular reference to such development in areas not for the time being served or adequately served by any licensee, and without prejudice to the generality of the foregoing provisions it shall be the duty of the Board -

(a) to prepare and carry out schemes sanctioned under Chapter V;

(b) to supply electricity to owners of controlled stations and to licensees whose stations are closed down under this Act;

(c) to supply electricity as soon as practicable to any other licensees or persons requiring such supply and whom the Board may be competent under this Act so to supply."

Section 26 of the Act clothes the Board with all powers and obligations of a licensee under the Electricity Act, 1910, with this exception that certain sections, including Section 22 relating to the duties and obligations of a licensee, are declared not to apply to the Board. Since Section 22 is excepted from its application to the Board, it is evident that unlike a licensee under the Electricity Act, 1910, the Board is under no obligation to supply electricity to any person applying to it for supply. Section 49 of the Act empowers the Board to fix the terms and conditions on which it will supply electricity to a person other than a licensee and that power is conferred in wide terms subject only to the provisions of the Act and any regulations which may be made by the Board in that behalf.

5. The legal position therefore is that the Board cannot supply electricity to any licensee or a person other than a licensee unless the Board is competent to do so under the Act. Under Section 19(1) the Board would ordinarily be competent to supply electricity to a licensee or to a person requiring such supply in any area in which a scheme sanctioned under Chapter V is in force. But there are two provisos which limit the general power of the Board to supply electricity. Proviso (a) relates to a case of a licensee requiring supply of electricity in any part of the areas of supply of a bulk licensee. Proviso (b) is material to the present case. This proviso enjoins the Board not to supply electricity for any purpose to any person other than a licensee for use in any part of the area of the licensee unless the case falls within any of the three clauses, namely, clauses (i), (ii) and (iii). The intention of the Legislature seems to be that if any person requires supply of electricity for any purpose for sue in any part of the area of supply of a licensee, he must approach the licensee in the first instance and the licensee alone must have the right to supply electricity to him unless of course the licensee consents to his taking of supply of electricity from the Board in which event the Board would be free to supply electricity to him. This provision was apparently enacted with a view to protect the interest of the licensee who has incurred capital expenditure in putting up generating plants, transformers, mains and transmission lines and who should be therefore entitled to secure a reasonable return by having a sufficient number of consumers to take the electricity which may be generated by the licensee or which may be taken in bulk by the licensee from the Board. But the Legislature engrafted certain exceptions to this rule by enacting clauses (i), (ii) and (iii) and by providing that in cases covered by any of these clauses, the Board shall be at liberty to supply electricity to any person applying to it for supply despite the want of consent of the licensee. It is common ground that the exceptions set out in clauses (i) and (iii) do not apply to the present case and the only exception relied on by the respondents is that set out in clause (ii). On behalf of the respondents it was contended that the High Court had taken a correct view with regard to the interpretation of Section 19(1)(b)(ii) of the Act and the first respondent was entitled to supply electricity to the second respondent without the consent of the appellant as the conditions of clause (ii) of the sub-section have been satisfied. We are unable to accept this argument as correct. In our opinion, the 'maximum demand' as defined in Section 2(8) of the Act has relation only to an existing state of facts and there can be no maximum demand in relation to a future period, and, therefore, on a true construction of Section 19(1)(b)(ii) of the Act what is required to be compared for determining the applicability of the clause with the maximum demand of the licensee on the Board at the time of request for direct supply, was the 'maximum demand' by the applicant on the licensee at that time and not any hypothetical or anticipated demand which the applicant may call upon the Board to be read to supply. It is manifest that Section 2(8) of the Act gives a technical meaning to the expression 'maximum demand' by defining it as twice the largest number of kilowatt hours or kilo-volt ampere-hours supplied and taken during any consecutive thirty minutes in any particular period. It follows from the language of the definition that the concept of maximum demand is a concept based on existing facts and it is not possible to think of a maximum demand in relation to a future point of time. Reference should be made in this connection to the phrase "supplied and taken" in Section 2(8) of the Act. This phrase also shows that the ascertainment of maximum demand is dependent upon the electricity actually supplied and taken in any particular period in the past and not electricity which may be supplied and taken in a future period. In other words, the 'maximum demand' as defined in Section 2(8) of the Act has always a reference to a past period and there can be no maximum demand in relation to a future period. On behalf of the respondents, attention was invited to the words "asked for by any such person" in Section 19(1)(b)(ii) of the Act. But these words are inserted in the section merely by way of description and they must be construed to mean that the Board will make direct supply only when the applicant makes a request for such direct supply from the Board and not otherwise. It is not possible to accept the argument of the

respondents that the words "asked for by any such person" must be construed to mean any hypothetical or anticipated demand which the applicant may call upon the Board to be ready to supply. Such an interpretation would be inconsistent with the definition of 'maximum demand' in Section 2(8) of the Act. We also see no reason why the phrase 'maximum demand' in Section 19(1)(b)(ii) of the Act should be given two different meanings, one for the licensee and the other for the consumer asking for the maximum demand. It cannot be supposed that the Legislature contemplated that the phrase 'maximum demand' should be given two different meanings in the same clause.

6. It was pointed out on behalf of the respondents that if the phrase 'maximum demand' in Section 19(1)(b)(ii) of the Act is given the technical meaning as mentioned in Section 2(8) of the Act, hardship may be caused in certain cases. It was said that an applicant may not be taking electricity supplied by the licensee and may still be desirous of taking electricity from the Board for the first time. Such an applicant would have no maximum demand at the time of request for direct supply but when asking for direct supply, he is required to intimate to the Board what is the maximum demand he would require. It was said that the applicant may have a potential peak demand which the licensee may not be able to supply. In such a case it was not reasonable to require the applicant to approach the licensee in the first instance and thereafter make an application to the Board. It was also argued that there was no reason why the applicability of clause (ii) should be restricted only to persons taking electricity supplied by the licensee. In our opinion, there is no warrant for this argument. As we have already indicated the language of Section 19(1)(b)(ii) of the Act must be construed in the light of the definition of 'maximum demand' contained in Section 2(8) of the Act. Upon that construction, it is clear that the applicability of clause (ii) is restricted to persons taking electricity supplied by the licensee. There is also no hardship caused to an applicant who may not take electricity supplied by the licensee and who may be desirous of taking electricity for the first time from the Board in view of his anticipated requirements. It is open to such an applicant to take recourse to the provision of clause (iii) of Section 19(1)(b) of the Act which provides that the Board may supply electricity direct without the consent of the licensee if the later is unable and unwilling to supply electricity for the purpose of the applicant on reasonable terms and conditions and within a reasonable time. In our opinion, no anomaly or inconvenience would result if the construction contended for on behalf of the appellant with regard to Section 19(1)(b)(ii) of the Act is accepted.

7. If our interpretation of Section 19(1)(b)(ii) of the Act is correct, the appellant is entitled to the grant of a decree in terms of the trial court's decree. It is pointed out by Mr. Justice Bhagwati in his judgment that right up to the end of December, 1959, the maximum off-take of electricity by the second respondent from the appellant was not more than 50 K.V.A. The maximum demand of the licensee in that period was 291 K.V.A. and so, the conditions of Section 19(1)(b)(ii) of the Act were not satisfied. It follows that the first respondent was not entitled under that clause to supply electricity direct to the second respondent.

8. For the reasons expressed we hold that the judgment of the Gujarat High Court in Second Appeals Nos. 33 and 34 of 1964, dated 4th July, 1964 and of the District Judge of Bhavnagar, dated 12th October, 1963, should be set aside and the judgment and decree of the Civil Judge (Junior division) at Sihor, dated 31st March, 1960, should be restored. The appeals are accordingly allowed with costs, in this court and the High Court.

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