The Gujarat Electricity Board

Vs

The Ahmedabad Electricity Co. Ltd. and Others

Civil Appeal No. 1797 of 1967

(D. G. Palekar, V. R. Krishna Iyer, R. S. Sarkaria JJ)

28.11.1973

JUDGMENT

PALEKAR, J. -

1. This appeal by certificate from the judgment and order of the High Court of Gujarat in Special Civil Application No. 388 of 1964 raises the question whether a reference by the respondent electricity Co. of an alleged dispute between itself and the Appellant Board to the arbitration of the Central Electricity Authority (hereinafter called the Authority) operates as a bar to the constitution of a Rating Committee by the Board under Section 57A of the Electricity (Supply) Act, 1948 (hereinafter called the Act).

2. A few facts may be necessary to be stated. The appellant Board is constituted under Section 5 of the Act and has several functions to perform under the Act. Respondent No. 1 the Electricity Company, holds a licence to generate, transmit and distribute electrical energy within the licenced area of Ahmedabad.

3. On September 11, 1963 the Electricity Company intimated to the Board and the State Government of its intention to revise the rates of electricity with effect from November 16, 1963 on the ground that the cost of operation had increased and it anticipated that the clear profit for the year 1963-64 ending on March 31, 1964 would clearly fall short fall short of the reasonable return. Along with this notice the Electricity Company sent some financial data also. The State Government informed the Electricity Company that the financial data was not correct and there was no justification for the proposed increase of the rates. The Board also by its letter dated November 14, 1963 informed the Electricity Company that they were not satisfied with the data given and considered that there was no justification for revising the rates. The Electricity Company informed the Government and the Board that it did not agree with the view taken by them and, in the meantime, brought the new rates into effect from November 16, 1963.

4. After applying its mind in greater detail the Board proposed to appoint a Rating committee under Section 57A of the Act, being of the view that the Electricity Company was over-charging the consumers which it was not entitled to do. But before constituting the Rating Committee it gave a notice to the Electricity Company, as required by the first proviso of Section 57A, to show cause why the Committee should not be constituted. The notice was issued on March 7, 1964. The notice, in short, informed the Electricity Company that by bringing into effect the enhanced rates of supply from September 16, 1963 the Electricity Company was over-charging the consumers and had thus failed to comply with the provisions of the Sixth Schedule to the Act. Therefore, the Board proposed to appoint a Rating committee to make recommendations to the Government regarding

charges for electricity which the Company could make to its consumers. However, before proceeding to constitute the Committee the show-cause notice was being given. This brought a reply from the Electricity Company dated March 26, 1964, in which some attempt was made to justify the increase and it was alleged that the Company cannot be regarded as having breached the provisions of the Sixth Schedule. The letter was closed on this note :

> We have endeavoured to answer all the points raised by the Board to the hope that the issues raised will be appreciated in the proper context and the Board would not pursue the matter further. If, therefore, the Company fails to hear from the Board say by 6th April, 1964, that the explanations offered are accepted, the issues involved will be referred to the arbitration of the Central Electricity Authority in terms of paragraph XVI of the Sixth Schedule read with Section 76 of the Electricity (Supply) Act, 1948.

5. The threat held out in the above letter was carried out on April 6, 1968 (See : Ext. D) by which the reference was made to the Authority in the following words :

> ..... As the Company has no information a in whether the Board have accepted the explanations preferred by the Company, we hereby refer the "disputes" raised by the Gujarat Electricity Board to the arbitration of the Central Electricity Authority in terms of paragraph XVI of the Sixth Schedule read with Section 574(a)(i) and 76 of the Electricity (Supply) Act, 1948.

The disputes were not formulated but it appears that the copies of correspondence between the Board and the Electricity Company were enclosed with the letter.

6. The Board not being satisfied with the explanation given to the show-cause notice appointed a Rating Committee in April 20, 1964 as per Ext. H. Since the Rating Committee was likely to proceed with the enquiry, the Electricity Company filed the Special Civil Application No. 388 of 1964 to quash its appointment and to restrain it from functioning.

7. The High Court held that a dispute or difference between the Board and the Electricity Company was referable to the arbitration of the Authority under paragraph XVI of the Sixth Schedule, and since pending such arbitration no Rating Committee could be constituted under the second proviso to Section 57A, the constitution of the Rating Committee by the Board was illegal and the Committee had no power to function. These findings are challenged in this Court.

8. Though we are chiefly concerned with the Electricity (Supply) Act, 1948 a reference is also necessary to the Indian Electricity Act, 1910 because it was under the latter Act that the licence was issued by the State Government to the Electricity Company - the licensee. Section 3 of that Act empowers the State Government to grant the licence. It may impose several obligations on the licensee. Sub-section (2) sub-clause (f) sows that apart from other terms imposed, the provisions contained in the Schedule to the Act shall be deemed to be incorporated with and to form part of every licence granted, save to so far as they are expressly added to, varied or excepted. Sections 4 and 4A give the State Government alone the power to revoke or amend the licence. Certain consequences follows where the licence is revoked as shown in Section 5, and Section 6 permits the purchase of the Undertaking by the State Electricity Board. Under Section 7 the Undertaking vests in the purchaser like the State Electricity Board who from then on is deemed to be a licensee. Only one more proviso need be noted in this Act and that is Section 52. It provides that where any matter

is by or under the Act directed to be determined by arbitration the matter shall unless it is otherwise provided in the licence of a licensee, be determined by such person or persons as the State Government may nominate in that behalf on the application of either party. But in all other respects the arbitration shall be subject to the provisions of the Arbitration Act, 1940. Hence if a dispute under the licence arises between the State Government and the licensee and if such dispute is referable to arbitration under Section 52, it shall be so referred either at the instance of the State Government - the licensor or the Electricity Company - the licensee.

9. The Electricity (Supply) Act, 1948 was passed as complementary to the Indian Electricity Act, 1910 and made some special provision with a view to meet the needs of increased electricity consumption. The Preamble to the Act states that the Act was passed to provide for the rationalization of the production and supplying of electricity and generally for taking measures conducive to electrical development. By sub-section (3) the Central Government was empowered to constitute a body called the Central Electricity Authority and two of its functions were (1) to develop a sound, adequate and uniform national power policy and particularly to guarantee the activities of the planning agencies in relation to the control and utilisation of national power resources : (2) to act as arbitrators in matters arising between the State Government or the Board and a licensee or other person as provided in the Act. The Central Electricity Authority is called the Authority in the rest of the Act. Under Section 5 power is given to the State government to constitute by notification in the Official Gazette a State Electricity Board. Its constitution and jurisdiction are given in Chapter III of the Act, Section 12 of which says that the Board shall be a body corporate having perpetual succession and common seal with power to acquire and hold property and to sue and be sued. Chapter IV provides for the powers and duties of the State Electricity Board and we may only refer to Section 26 therein which says that subject to the provisions of the Act the Board shall in respect of the whole State have all powers and obligations of a licensee under the Indian Electricity Act, 1910 and the Supply Act of 1948 is deemed to be the licence of the Board for the purposes of the Indian Electricity Act, 1910.

10. The principal question before us is whether the claim made by the Electricity Company that its dispute with the Board was legally referable to the Authority is sustainable in law. For such a claim, there must be either as agreement between the parties to refer any particular dispute to its arbitration or there must be a statutory provision. It is not the case that there is any agreement between the Board and the Electricity Company to refer any dispute to the arbitration of the Authority. But it is contended that there are statutory provisions making such a reference competent and, therefore, we shall have to deal with some other provisions of the Act. To begin with, we shall refer to the two Schedule of the Act which are known as the Sixth Schedule and the Seventh Schedule. The Seventh Schedule is incorporated by reference in the Sixth Schedule with which we are principally concerned. The Sixth Schedule consists of XVIIparas - the last one dealing with definitions of words used in the Schedule. The whole Schedule deals with financial principles in accordance with which the business of the licenses is to be carried on. The principle is accepted that a licensee is entitled to 'clear profit' but it is also provided that this clear profit shall not exceed the amount of 'reasonable return'. In other words, these financial provisions are laid down with view to ensure that the consumer of electricity is not exploited by the licensee. Therefore, the State government and the Board have been required by the Act to be vigilant and if they find that by any illegal manipulation in the financial structure the licensee is over-charging the consumer, they have to step in on the ground that the provisions of the Sixth Schedule are not complied with. To that end these two Schedules are made by the Act part of the licence issued by the State Government to the licensee under the Indian Electricity Act, 1910. Section 57 provides, so far as we are concerned, that the provision of the Sixth Schedule and the Seventh Schedule shall be deemed to be incorporated in the

licence of every licensee .... and .... the license shall comply with the provision of the said Schedules accordingly. The provisions of these Schedule after incorporation in the licence, are to prevail over any provisions of the Indian Electricity Act 1910, the licence granted to the licensee therein and of any other law, agreement or instrument applicable to the licensee in so far as they are inconsistent with the provisions of section 57A and the said Schedule. In other words, the provisions of the Schedule must prevail wherever they are inconsistent with the other terms of the licence granted by the State Government to the licensee to the extent of the inconsistency.

11. Section 57A gives a direct hand to the Board to interfere by the appointment of a Rating Committee if it is satisfied that the licensee has failed to comply with any of the provision of the Sixth Schedule i.e. in other words, over-charged the consumer by committing a breach of any of the financial principles mentioned in the Schedule. It with he the function of the Rating Committee under Section 57A to examine the licensee's charges for the supply of electricity and to make recommendations. In that behalf to the State Government. The Section has three provisos. The first proviso requires that when it is proposed to constitute a Rating Committee on the ground that the licensee had failed to comply with any provisions of the Sixth Schedule the Committee shall not be constituted unless the licensee had been given a notice in writing of 30 clear days, to show cause against the action proposed. In the present case the show-cause notice was given and nothing turns on it. The third proviso also is not applicable. It is the second proviso which is important and the Electricity Company's case is mainly based on this proviso. The proviso reads as follows :

> Provided further that no such Rating Committee shall by constituted if the alleged failure of the licensee to comply with any provision of the Sixth Schedule raises any dispute or difference as to the interpretation of the said provisions or any matter arising therefrom an such difference or dispute has been referred to the licensee to the arbitration of the Authority under paragraph XVI of that Schedule before the notice referred to in the proceeding proviso was given or is so referred within the period of the said notice.

It was and is the contention of the Electricity Company that there was a dispute between the Board and itself under paragraph XVI referable to the Authority, and since the same was referred within time provided in the proviso the Board had no power to constitute the Rating Committee and if any such Rating Committee was constituted it had no jurisdiction to function.

12. Section 57, as we have already seen, incorporates the Sixth Schedule in the licence issued by the State Government to the licensee as far back as 1944. The grantor was the State Government and the grantee viz. The licensee was the Electricity Company. The provisions of the Sixth Schedule became part of this licence and had effect notwithstanding any other inconsistent provision or terms of that licence. Nevertheless, the engagement between the State Government and the licensee continued to bind them to each other. There is no specific provision in the whole Act to the effect that the Board shall be substituted in the place of the State Government as the granter of the licensee. The functions of the State Government and the Board are well-defined under both the Acts and the Board, as such is not substituted in the place of the State Government. The parties to the licence, therefore, in spite of the incorporation of the provisions of the Sixth Schedule continue to be the State Government and the Electricity Company. Therefore, if any of the provisions of that licence including an incorporated provision of the Sixth Schedule provides for arbitration, the dispute, unless otherwise expressly indicated must be between the parties to the licence namely the State Government, on the one hand and the Electricity Company, on the other. Paragraph XVI of the Sixth Schedule provides for the arbitration clause. It is as follows :

> Any disputes or difference as to the interpretation of any matter arising out of the provisions of the Schedule shall be referred to the arbitration of the Authority :
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> Provided that where a Rating Committee has been constituted under Section 57A no such dispute or difference shall be referred to the arbitration of the Authority during the period between the date of the constitution of such committee and the date of Order of the State Government made on the recommendations of the Committee.

Since paragraph XVI i.e. the arbitration clause is incorporated in the licence to which the State Government, on the one hand, and the Electricity Company, on the other are parties the plain construction of the arbitration clause would be that the alleged dispute or difference should be between the two and that dispute or difference alone is referable to the Authority. That view was taken by this Court in The Amalgamated Electricity Co. Ltd. v. N. S. Bathena ((1959) Supp 2 SCR 213 : AIR 1959 SC 711 : 1959 SCJ 641). In that case this particular clause was sought to be pressed into service by the Electricity Company in a regular suit filed by a consumer against the Electricity Company for over-charging. The Electricity Company prayed for the stay of the suit on the ground that the consumer's remedy was only to go to the arbitration of the Authority under paragraph XVI. This Court rejected the contention in the following words at page 216:

> Therefore all that we get is that the licence which is granted by Government to a supplier of electricity, like the appellant, is to contain a clause that certain disputes would be referred to arbitration. The licence is an engagement between the Government and the licensee, binding the parties to it to its provision. It is necessary to decide whether this engagement is contractual or statutory for, in either case, it is between the two of them only. An arbitration clause in an instrument like this can only be in respect of disputes between the parties to it. Such an arbitration clause does not contemplate a dispute between a party to the instrument and one who is not such a party.

13. It is, therefore, obvious that since the Board is not a party to the licence, unless there are other provisions in that respect, the arbitration clause in the licence cannot be exploited by the Electricity Company for referring its disputes with the Board to the arbitration of the Authority.

14. We have then to see if there are any statutory provisions which make disputes between them referable to the arbitration of the Authority. Section 76 of the Act read as follows in 1964 when the present dispute arose :

> 76. (1) All questions arising between the State Government or the Board and a licensee or other person shall be determined by arbitration;
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> (2) Where any question or matter is, by this Act, required to be referred to arbitration, it shall be referred :
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> (a) in cases where the Act so provides, to the Authority, and on such reference the Authority shall be deemed to have been duly appointed as Arbitrators, and the award of the Authority shall be final and conclusive; or
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> (b) in other cases, to two arbitrators, one to be appointed by each party to the dispute.
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> (3) Subject to the provisions of this Section, the provisions of the Arbitration Act,

1940 shall apply to arbitrations under this Act.

15. Sub-section (1) was deleted by Act 30 of 19666. When the dispute arose a dispute between the Board and the licensee was undoubtedly referable to arbitration. But all disputes were not referable to the Authority only those referred to in sub-clause (a) of sub-section (2) i.e. to say only those case for which the Act provides. There are some cases where the Act provides for the arbitration by the Authority between the Board and the licenses. See : for example Section 44(3), 45(5) and 55(2). No similar provision has been brought to our notice which makes a reference to the Authority compulsory in a dispute between them relating to the non-compliance of the provisions of the Sixth Schedule.

16. It was however, contended for the Electricity Company - a contention which found favour with the High court - that by virtue of section 60(1) of the Act the Board stepped into the shoes of the State Government. That sub-section reads :

> 60. (1) All debts and obligations incurred, all contracts entered into and all matters and things engaged to be done by, with or for the State Government for any of the purposes of this Act before the first constitution of the Board shall be deemed to have been incurred, entered into or engaged to be done by, with or for the Board; and all suits or other legal proceedings instituted or which might but for the issue of the notification under sub-section (4) of Section 1 have been instituted by or against the State Government may be continued or instituted by or against the Board.
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> A mere reading of the Section would show that the provision is made in respect of the engagements of the State Government prior to the constitution of the Board. It will be seen from Section 1(3) that Section 1 and some other Sections including Sections 57 and 57A and the provision of the Sixth and the Seventh Schedule came into force at once i.e. in 1948 only. By Section 5 the State Government were given power to constitute the Boards. Some States exercised that power early, some others did not. Where the Boards were not constituted the State Government had to departmentally implement the relevant provisions of the Act and in their implementation the State Government had to incur debts and obligations, enter into contracts, and other engagements for the purpose of the Act. But as soon as the Board was constituted all these liabilities were statutorily transferred to the Board, and in cases where suits were filed or legal proceedings taken by or against the State Government they had to be continued or defended by the Board. To say that paragraph XVI i.e., the arbitration agreement between State Government and the licensee was an obligation incurred by the State Government within the meaning of Section 60 (1) would be to unnecessarily strain the language. Under the arbitration clause both the State Government and the licensee were equally entitled to refer their dispute or difference to the arbitration of the Authority and, similarly, equally obliged thereunder to submit to its arbitration such a clause cannot be described as an obligation incurred by the State Government in favour of the licensee for any of the purposes of the Act. In our opinion, Section 60 cannot be invoked with a view to substitute the Board in the place of the State Government for the purposes of arbitration under paragraph XVI.

17. Now to turn to the second proviso of Section 37A which we have already quoted. According to that proviso, the bar against the constitution of the Rating Committee operates under 3 conditions

(1) There should be an alleged failure of the licensee to comply with any provisions of the Sixth Schedule; (2) This alleged failure raises a dispute or difference as to the interpretation of the said provisions or any matter arising therefrom; (3) and such difference or dispute has been referred by the licensee to the arbitration of the Authority under paragraph XVI of that Schedule before a certain date.

18. In the present case there is no doubt that there is an allegation by the Board that the licensee had failed to comply with the provisions of the Sixth Schedule. As regards the second condition there is considerable dispute as to what exactly it means. It is contended by the learned Additional Solicitor-General on behalf of the Board that the dispute or difference should be one as to the interpretation of the provisions or any matter arising therefrom i.e. the interpretation. On the other hand it is contended by Mr. Chagla on behalf of the Electricity Company that the expression "any matter arising therefrom" is not limited to interpretation only, and in this connection he has referred to paragraph XVI itself. The wording of paragraph XVI is rather complicated. But it seems it may be possible to re-write it in this form "any disputes or difference as to the interpretation of the provisions of this Schedule or any matter arising out of the provisions of this Schedule." Mr. Chagla contends that paragraph XVI contains cognate words throwing light on the words in the second proviso and since paragraph XVI clearly shows that the dispute or difference is not merely confined to the interpretation of the provisions but also extends to any factual mater arising out of the provision a similar construction should be placed on the second condition in the second proviso. The learned Additional Solicitor-General has pointed out that an all India body like the Authority, whose task it is to develop a sound, adequate and national power policy, may be only properly invested with the power of interpreting the provision of the Sixth Schedule because uniformity of interpretation throughout India would be very necessary. On the other hand, disputes with regard to facts as to how much amount is to be included under this provision or how much amount is to be excluded under some other provision or how much amount is to be excluded under some other provision of the Sixth Schedule are matters of detail which could not have been intended to be referred to the Authority. According to him the almost similar expressions used in the second proviso and paragraph XVI must be so interpreted that the Authority's jurisdiction as arbitrator was confined to the interpretation of the provision and matters subsidiary thereto. Undoubtedly we see force in this submission but we do not find it necessary to express any final opinion on the point. We shall only say this that there is ground for argument as to whether the one thing or the other was intended. It is for the Parliament to clear the doubt and uncertainty. For our present purpose we shall proceed on the assumption that in the present case the alleged failure raises a dispute or difference as to the interpretation of the said provisions or any matter arising therefrom. Coming to the third condition we find that the reference must be by the licensee to the arbitration of the Authority under paragraph XVI of the Sixth Schedule. No doubt the dispute had been referred by the licensee to the arbitration of the Authority within the time allowed by the Statute. But was it a reference under paragraph XVI of the Schedule ? The answer must be in the negative. The reference to arbitration to the Authority under paragraph XVI of the Schedule could be made by the licensee only against the grantor of the license namely the State Government and not the Board. If the licensee could make such reference under any other provisions of the Act, it is another matter. The present reference, to the Authority against the Board however could not be described as a reference under paragraph XVI of the Schedule. That proviso puts an embargo on the constitution of the Rating Committee if at that time there is already a reference to the Authority of a dispute between the State Government and the licensee for the interpretation of any of the provision of the Sixth Schedule. The object is clear. There would be no point in constituting a Rating Committee if the interpretation of the provisions is referred to the Authority in a reference competently made as between the State Government and the

licensee. All the three condition of the second proviso were necessary to co-exist if the Rating Committee was not to be constituted by the Board. But since the third condition is absent it must be concluded that there could be no bar to the appointment of the Rating Committee by the Board.

19. As a branch of the same argument it was pointed out that if the Board had not been constituted and the powers under Section 57A were left to be exercised by the State Government it would have been possible for the licensee to go to the arbitration of the Authority on the question whether the State Government had good ground to be satisfied that the licensee had not complied with the provisions of the Sixth Schedule and thus held up the constitution of the Rating Committee. It was, therefore, submitted that the mere interposition of the Board which took over the functions of the State Government should not make any difference. It is true that if arbitration for any sort of non-compliance of the provisions of the Sixth Schedule fell within the second condition of the proviso, and otherwise, there was competent arbitration between the licensee and the State Government the licensee could have possibly prevented the constitution of the Rating Committee by the State Government. Unfortunately the interposition of the Board makes all the difference because as already stated paragraph XVI of the Sixth Schedule contemplates a dispute between the State Government and the licensee and a reference to the Authority only of such a dispute. It is not the case that the provisions of the Sixth Schedule would not, in the very nature of things, generate any dispute between the State Government and the licensee with regard to the interpretation of the provisions or other matters. In that event to read the Board in the place of the State Government would be incorrect. It is not as if the Act has made no provision at all for referring disputes between the Board and the licensee to the arbitration of the Authority. We have already referred to them. Then again sub-section (1) of Section 71 of the Act which had not been deleted till 1966 could have also given an opportunity to the present licensee for an arbitration under sub-section (2) of two arbitrators if not the Authority. Indeed such an arbitration would not have helped the licensee to prevent the appointment of the Rating Committee because that arbitration was not by the Authority which is requisite for the second proviso. However that may be the whole point of the matter is whether the Board could be compelled to submit to the arbitration of the Authority. The mere fact that in similar circumstances the State Government could, perhaps, have been compelled to submit to arbitration of the Authority is no adequate answer. If this is a lacuna in the legislation it is for the Parliament to correct it. We may however, point out that in enacting Section 57A parliament seemed to attach some importance to the appointment of the Rating Committee and must have intended that the enquiry by the Committee should be expeditious. The Board takes the decision to appoint the Committee only when it is satisfied that the provision of the Sixth Schedule are not complied with i.e. to say, the licensee was over-charging the consumer. The proviso to paragraph XVI of the Sixth Schedule also emphasizes this. It says that even if there be any dispute or difference between the State Government and the license with regard to the interpretation of any provision or any matter arising out of the provisions, no such dispute or difference would be referred to the arbitration of the Authority when a Rating Committee has been constituted and is making the necessary enquiry. Having regard to the urgency of the matter and the proviso to paragraph XVI just referred to, it seems more likely that Parliament did not want to prevent the constitution of the Rating Committee except when there was an important dispute involving the interpretation of the provisions of the Schedule and such a dispute was already before the Authority. The matter is not free from difficulty. It is perfectly arguable that if the State Government while implementing the Act is liable to submit to the arbitration of the Authority, there was no good reason why the Board taking over the functions of the State Government should not be so liable in similar circumstances. Then again it is not clear on a comparison of the wording of the second proviso of Section 57A and the wording of paragraph XVI of the Sixth Schedule whether Parliament wanted for the purposes of both

provisions that the Authority should be approached not merely for the interpretation of the provisions of the Sixth Schedule but also sundry matters of detail arising out of the provisions. It is for the Legislature to remove doubts and uncertainties. But as things now stand and in the light of the decision of this Court in The Amalgamated Electricity Co. Ltd. v. N. S. Bathena already referred to we must say that in the absence of any express provision substituting the Board in the place of the State Government for the purposes of arbitration in a dispute or difference between the Board and the licensee, we cannot construe the second proviso as contemplating an arbitration before an Authority in a dispute to which only the licensee and the Board are parties.

20. Nor is there any substance in the contention that paragraph XVI of the Sixth Schedule in a statutory provision for arbitration to which Section 46 of the Arbitration Act, 1940 would apply. The point was specifically urged in the above case and has been rejected.

21. In our opinion the second proviso to Section 57a does not contemplate holding up of the constitution of the Rating Committee merely on the ground that there is a dispute or difference between the Board and the licensee as to whether the provisions of the Sixth Schedule had been complied with or not and such a dispute was referred to the Authority. Not are we referred to any provision in the Act which makes such a dispute between the Board and the licensee referable to the Authority.

22. We have, therefore, to conclude that the finding of the High Court on which relief was given to respondent No. 1 cannot be sustained in law. It appears that some other issues had been also raised before the High Court but they were not dealt with in view of the finding recorded. The parties, therefore, are agreed that the case will have to go back to the High Court for disposal in accordance with law after considering the other issues raised in the Special Civil Application. Accordingly the case is remanded to the High court for disposal. The costs shall be costs in the cause.

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