

D.C.M. Ltd.

Vs

Municipal Corporation of Delhi

(Sujata V. Manohar, M. Jagannadha Rao JJ)

08.08.1997

JUDGMENT

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MRS. SUJATA V. MANOHAR,J.

1. These appeal arise as a result of certain increases in fuel adjustment charges levied by the second respondent on the appellant and the resultant arbitration. The award of the learned arbitrator was the subject matter of challenge in the High Court. These appeals arise from the judgment and order of the Division Bench of the Delhi High Court.
2. For the sake of convenience we are referring to the fact in Civil Appeal No. 1269 of 1987. The facts in other appeals are similar and the disputes raised are the same.
3. The appellant entered into an agreement dated 26th of September, 1972 with respondent No. 2 Delhi Electricity Supply Undertaking (DESU) for the supply of electrical energy. Clause 15 (a) of the agreement is as follows :

"15(a): The consumer shall pay each month to the undertaking for electrical energy supplied during the a preceding month such amount as shall be calculated and ascertained in accordance with the Rate Schedules LIP attached hereto. The rates containing in the schedule are those in force at the time of executing this agreement. The consumer be eligible for whatever reduction or repeat as may be granted on the rates and shall be liable to pay for whatever surcharge or increase in those rates as may from time to time be levied or made by the Undertaking. Any other method of charging deciding by the Undertaking shall also be applicable." The Rate Schedule of Large Industrial Power (LIP) which was annexed to the said agreement was the same as the prescribed form time to time by the Tariff which was fixed by respondent No. 2 for the relevant year. The Tariff pertaining to Large Industrial Power sets out the availability of such power to large industrial consumers having connected load above 100 K.W. and the character of service-viz. A.C. 50 Cycles, 3 phase, 11 K.V. The Tariff is divided into two parts. The first part deals with demand charges. In addition the consumers are also required to pay energy charges. Under energy charges. Clause 1 provides for fuel adjustment charges as follows:- (For the year 1982-83)

"1. An Adjustment of energy charges as under:-

- (i) The above energy charges are based on the basic average fuel and purchase cost of 15.25 paise per KWH.

- (ii) The actual cost of fuel used during any period shall be the amount in rupees on the cost of all types of fuel burnt in the undertaking's Thermal Generating Plants in that period.
- (iii) The actual cost of energy purchased shall be the amount paid in rupees for Import of energy for that period.
- (iv) The cost of energy per KWH sold shall be the quotient computed on dividing the sum of (ii) and (iii) by the KWH sold during the period.
- (v) The increase or decrease in cost of per KWH sold shall be the difference of (iv) & (i) above and accordingly shall be added or subtracted to the above energy rates. Final adjustment on account of Variation in energy charges will be made as soon as possible after the close of the period of account but adjustment as may be provisionally fixed by the DESU Management from time to time will be incorporated as a part of the monthly bill and shall be payable by the consumer. Such provisional rates as and when finalized shall have retrospective effect from the beginning of that financial year." This was the Tariff for the year 1982-83. The energy charges were prescribed at Rs. 15.25 per KWH. These were subject to adjustment.

4. Respondent No.2 enhanced the energy charges from Rs. 15.25 to Rs.20.44 paise per unit whereupon the appellants disputed the increase and filed suits under Section 20 of the Arbitration Act for referring their dispute relating to the increase in fuel adjustment charges to arbitration. During the pendency of the suit, fuel adjustment charges were further enhanced from 20.44 paise per unit to 27.97 paise per unit on 12th of March 1983, and to 29.47 paise per unit in May, 1983.

5. In the suit of the appellants under Section 20 of the Arbitration Act, learned Single Judge examined the arbitration clause in the contract which was very widely worded. He held that any question or difference arising between the parties as to any matter in any way connected with or arising out of the agreement or with regard to the rights, duties or liabilities of either party in connection with the agreement, was referable to arbitration. He said that the dispute was with regard to the liability of the petitioners to pay the fuel adjustment charges. The quantum of this liability was disputed. Such a dispute was covered by the arbitration clause. He further held, "It will, of course, not be open to the partners to contend before the arbitrator that the rate fixed in the Tariff is high nor will it be open to the petitioners to challenge the formula which has been laid down. It will be outside the scope of the arbitration to ask the arbitrator to enquire into the correctness of the accounts of DESU". In fact in the earlier part of the judgment also learned Single Judge observed that there can be no dispute with the rates so fixed or the method of computation. Which can be referred to arbitration. The dispute in the present cases was really as to whether the Variation of fuel adjustment charges had been done in accordance with the formula or not. The petitioners said that they were willing to pay the energy charges which were fixed in accordance with the said formula. The learned Judge then said, "To my mind, though it is not open to the petitioners to challenge the correctness of the rates fixed or the formula which is laid down for computing the amount of energy charges, but it is open to them to contend that in working out the formula no irrelevant or extraneous considerations have been taken into account or that the formula has not properly followed while computing the fuel adjustment charges which are now being demanded. While considering whether the said charges have been worked out in accordance with the formula or not it is not open to challenge the correctness of the accounts or the figures of respondent No.2. But as already noted it can be contended that some relevant factors have not been taken into consideration

or irrelevant factors have been taken into account." With these direction, namely: (1) that the petitioners before the court were not entitled to contend before the arbitrator that the rate fixed in the Tariff was high; (2) it was not open to the petitioners to challenge the formula laid down; (3) it was not open to the petitioners to ask the arbitrator to enquire into the correctness of the accounts of DESU, learned Judge referred the following question to arbitration:-

"Whether the fuel adjustment charges have been fixed and are being demanded by respondent No.2 from time to time in accordance with the Tariff for the year in question." He said that this reference was comprehensive enough to include all the questions which can be raised before the arbitrator including the question as to whether provisional revision of such charges can be made from time to time with retrospective effect.

6. The learned Judge appointed a retired Chief Justice of the Delhi High Court as sole arbitrator. The arbitrator entered upon the reference and by speaking award dated 24.9.1985 dealt with the various issues which were raised before the arbitrator. The award was filed in court and an application was made by the appellants under the Arbitration Act for the award being made rule of the Court. The second respondent filed its objections to the award before the High Court. A learned Single Judge of the High Court, inter alia, held that there was an error apparent on the face of the award in so far as it dealt with transmission and distribution losses. The award of the arbitrator on the question of transmission and distribution losses was set aside in so far as it said that these two items could not be taken into consideration for working out the formula for an increase in fuel adjustment charges.

7. Learned Single Judge also set aside the award in so far as it held that demurrage charges could not be included in the cost of fuel.

8. The appellants who were aggrieved by the judgment and order of learned Single Judge preferred an appeal before a Division Bench of the High Court. The Division Bench of the High Court partly allowed the appeal on the question of demurrage. It, however, upheld the findings of learned Single Judge on the question of transmission and distribution losses being taken into account in calculating fuel adjustment charges. The present appeals before us are from the judgment of the Division Bench. The question of demurrage charges has not been pressed before us. Hence the only question we have to consider is the one relating to transmission and distribution losses.

9. The appellants have challenged the findings of the High Court. They contend that it was not open either to the learned Single Judge or to the Division Bench of the High Court to examine the correctness of the award. The award is binding on the parties. The respondents contend that the arbitrator acted beyond the scope of his reference in examining whether transmission and distribution losses could be taken into account while applying the formula for calculating fuel adjustment charges.

10. In considering the scope of reference before the arbitrator we have to bear in mind the observations of the reference Court to the effect that it was not open to the arbitrator to examine either the correctness of the formula statutorily laid down in the Tariff or the correctness of the accounts and figures supplied by DESU. The arbitrator was required to examine whether the formula was correctly applied and the amount of increase in fuel adjustment charges was correctly calculated by taking into account all relevant factors. In this light if we examine the formula for fuel adjustment charges, it lays down that the actual cost of fuel used during any period in DESU's

Thermal Generating Plants plus the actual cost of energy purchased from other power plants by DESU will together constitute the cost of fuel. This shall be divided by the KWH sold. This increase or decrease in the cost per KWH of energy sold during the same period in order to arrive at the basis average cost per unit of KWH sold as against the energy rates already specified will be the final adjustment charge. Thus in essence, what requires to be ascertained is: (1) the actual cost of fuel used in the undertaking's power plants during any specified period; (2) the actual cost of energy purchased by the undertaking for that period from other power plants; and (3) the KWHs sold by the undertaking during the period. This formula has been consistently followed right from 1977 onwards. Learned Single Judge in his judgment has set out how this formula has been worked by the second respondent all these years. He has given comparative figures for the years 1977-78 and 1980-81.

S.No. Particulars 1977-78 1980-81

(Actuals) (Actuals)

1.Kw hrs. generated 1593.194 1313.179

(Million Kw hrs.)

2.Auxiliaries 137.661 129.541

consumption

3.Net Generation 1455.533 1183.638

4.Kw hrs. Purchase 548.267 1613.019

5. Net Generation & 2003.800 2796.657

Purchase (3+4)

6.Transmission and 277.539 424.499

Distribution losses

7.Units sold (5-6) 1726.261 2372.158

(Million Kw hrs.)

8.Cost of Fuel 1637.95 2443.86

(Rs. in lakhs)

9.Cost of Power purchases

1024.98
4301.60

10.Total 8+9 Rs.(lac) 2662.93 6745.46

11. Fuel & Purchase 15.43 28.44

cost per units (10 + 7) (Paise)

12. Round up for Tariff base 15.25 15.25

13. Fuel & Purchase - 13.19

Surcharge The table in items 1 to 5 shows the total net power units available (generation + purchase) which is the figure at serial No.5 In order to arrive at the number of units sold, the second respondent has deducted from net units generated and purchased, the number of units lost in the process of transmission and distribution. The rest have been sold. This is how the figure of units sold at serial number 7 is arrived at. The calculation appears to be correct. Everything which is generated and purchased has not, and cannot be sold. There are losses of power during transmission and distribution for various reason. Some of the causes of such loss have been eloquently expressed and deprecated in the two judgments or the High Court. Inefficiency in transmission, not preventing loss on account of theft of power and not being able to reduce transmission and distribution losses to an acceptable level by international standards, undoubtedly result in a heavy financial burden being imposed on the nation and on the consumers of electricity. When there is acute shortage of power, such losses become even more unacceptable. But that is not the question before us. The formula requires that the cost of fuel used for generation of power and the cost of energy purchased from other power plants has to be divided by the number of units of energy sold by respondent No.2. Units which are sold are clearly units generated plus purchased, less units lost in transmission and distribution. It is the balance units which actually reach the consumer and are sold. Therefore, transmission and distribution losses have to be taken into account in order to arrive at the correct figure of units which are sold to consumers. There is nothing extraneous in taking into account losses during transit when energy is transmitted from the point of generation to the consumer. The units sold are units which reach the consumer.

11. This is how the formula has been worked throughout, in fact the figure of basic average fuel and purchase cost of Rs.15.25 paise per KWH mentioned in Clause 1 sub-clause (i) of the 1082-83 Tariff was also arrived at in the same fashion. The further increases in fuel adjustment charges are also on the same basis. Learned Single Judge, therefore, rightly observed that the elements which went into the calculation to arrive at the figure of Rs.15.25 paise would be quite relevant for arriving at the increase. These elements cannot be the subject-matter of challenge before the arbitrator. The arbitrator has also erred in considering transmission and distribution losses as a separate item of charge under the adjustment formula. We agree with the reasoning and conclusion arrived at by the learned Single Judge in this regard which has been upheld by the Division Bench.

12. The arbitrator was required to examine the narrow question whether the formula had been properly applied. It was not open to him to examine the correctness or otherwise of the formula. He had to examine how the formula had been worked. The formula had clearly set out the various factors to be taken into account. To arrive at the units which were sold, the second respondent had deducted from the total units available for distributions, units which are lost in transit. This is not something which is irrelevant to the formula, it is an essential element which has to be taken into account in order to decide one basic item of the formula, namely the units which were sold. The arbitrator, therefore, was not right in distorting this formula by removing the factor of transmission and distribution losses from calculation of the units sold. The arbitrator's jurisdiction was confined to examining whether the calculation were in accordance with the formula. Therefore, in effect, the

arbitrator has acted beyond the scope of his reference in eliminating an important factor in calculation of the formula. This can also be looked upon as error of law apparent on the face of the record. The figure of units sold cannot take into account units which were, in fact, not sold but were lost during transmission and distribution. By ignoring the manner in which this formula had been applied for more than 10 years uniformly in the case of all large industrial corporations, the arbitrator has committed an error of law apparent on the face of record because he has thereby distorted the formula and thus acted beyond the scope of his reference which was confined to examining a proper qualification of the increase in fuel adjustment charges in accordance with the formula.

13. The appellants have urged before us that the views of the arbitrator are binding upon the parties; and if a question of law is referred to the arbitrator his decision will be binding on the parties. They have relied upon the well-known decision in the case of Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Anr. (1984 2 SCC 680) and a series of other cases in support of the submission that if a question of law is specifically referred by the parties to the arbitrator for decision, the award of the arbitrator would be binding on the parties and the Court will have no jurisdiction to interfere with the award even on the ground of error of law apparent on the record. We are not citing these decisions because in the present case, as was rightly held by Learned Single Judge of the High Court, there is no specific question of law which has been referred to arbitration. The limited reference to arbitration was whether the fuel adjustment charges were being demand in accordance with the Tariff and the formula laid down, for the year in question.

14. It was further submitted by the appellants that the arbitrator was required to examine whether the fuel adjustment charges were in accordance with the formula laid down in the tariff and, therefore, it was open to the arbitrator to examined all the ingredients of this formula. If such an examination results in the arbitrator eliminating some important ingredients of the formula and this results in a total distortion of the formula which is agreed to be applied by both the parties, the arbitrator exceeds the scope of the reference when he does so. This is a jurisdictional error which can be examined by the court in deciding whether to uphold the award or not.

15. One of the decisions which was quoted by the appellants in this connection in support of their argument was in the case Hind Builders Vs. Union of India (1990 3 SCC 338) where, in the case of a non-speaking award, the arbitrators without overlooking any term of the contract acted upon an interpretation of certain clauses in the contract on which two views were possible, this court said that this was not a case of any error apparent on the face of the award. The facts of the present case are very different. In the first place, there is a speaking award. The arbitrator was required to examine the application of the formula on which there was no dispute, to calculate the increase in fuel adjustment charges. In doing so, the arbitrator examined the various ingredients which went to determine: (1) the cost of the units generated; (2) the cost of the units purchased from other power plants; and (3) the number of units sold. The formula in effect was very simple. The total cost of units available for being set in transmission for supply to the consumers was to be divided by the number of units sold. This would give the cost per unit of each unit sold. There was no dispute with this formula. What the arbitrator in effect did was to say that the units sold are no different from the total number of units available to the second respondent for being put in transmission in order that they may be distributed to the consumers. He, therefore, held that the cost of all units which were made available for transmission and distribution should be determined by dividing the total cost by the number of units which were so made available. He, in effect, replaced the third factor in the formula "Units Sold" by "Units manufactured plus units bought from other power stations". This has clearly changed the statutory formula. The arbitrator was not authorized to examine the validity of

the formula or to change it. He has, therefore, committed a jurisdictional error in so "interpreting" the formula. This is a jurisdictional error which is also apparent on the face of the award.

16. We need not examine the number of cases which were cited before us setting out the grounds on which an award can be set aside partly or wholly. It is well established that an arbitrator cannot go beyond the scope of his reference. If he has exceeded his jurisdiction, the award to that extent can be set aside provided that the part of the award being quashed is severable from the rest. In the present case, therefore, the High Court was right in setting aside the award to the extent that it excluded transmission and distribution losses.

17. No other issue was raised before us. Therefore, we are not examining any other aspect of the award. In the premises, the appeals are dismissed with costs.