

SUPREME COURT OF INDIA

Nipha Steels Ltd. and another

Versus

West Bengal State Electricity Board and Ors.

7.5.2003

(Shivaraj V. Patil and Arijit Pasayat, JJ.)

C.A. No. 5550 of 1997 with C.A. No. 5551-5554 of 1997.

JUDGMENT

Arijit Pasayat, J. - All these appeals involve identical disputes and, therefore, are taken together for disposal. The only issue involved is whether the monthly maximum demand charges for the supply of power was rightly demanded by the West Bengal State Electricity Board (hereinafter referred to as 'the Board') notwithstanding disruption and irregular supply of electricity by it.

2. According to the appellants (hereinafter referred to as the 'consumers') when the true essence of the agreement made between them the Board was un-interruption and/or regular power of supply, analogy can be drawn from the deductions granted in respect of the minimum charges in case of disruption/interrupted supply. The plea found favour with a learned Single Judge of the Calcutta High Court, but in appeal filed by the Board the view was reversed.

3. Factual background is almost undisputed and, therefore, a brief reference thereto would suffice.

4. Consumers entered into the agreements with the Board for supply of power. The agreement in the standard form is common for all the appellants who are large industrial consumers. The agreements were in terms of the Indian Electricity Act, 1910 (in short 'the Act'), West Bengal Electricity Energy (Maintenance and Supply) Order, 1977 (in short 'the Order') and the Electricity (Supply) Act, 1948 (in short 'the Supply Act'). The appellants on receipt of bills from the Board took the stand that in view of interrupted supply of electricity, the demand of maximum demand charges at the rate fixed in the agreement was not proper. The agreement itself provided for remission under identical circumstances in respect of minimum charges under certain circumstances. There was no reason as to why the departure should be made in the case of maximum demand charges. It was pointed out that under certain circumstances notwithstanding the Board's inability to supply power without interruption, minimum charges were specifically provided to be payable. There was no such provision so far as maximum demand charges are concerned. Previously, Board used to grant remission even in respect of maximum demand charges and without any logic and/or basis the same was abandoned. Intention of the parties to the agreement can be clearly discerned from the fact that even in the absence of any specific prescription in the agreement, remissions were being granted. That is how the parties interpreted the agreement and to crystalise this understanding into a concrete form, the subsequent agreements contain clauses similar to those in respect of minimum charges. When the plea was not accepted by the Board, the High Court was approached and as noted supra

the learned Single Judge accepted the view but the Division Bench took a contrary view.

5. Mr. S. Ganesh, learned Senior counsel appearing for the appellants in C.A. No. 5551/1997 with reference to various clauses of the agreement submitted that learned Single Judge was justified in his view. Whenever intention was that levies are to be made in respect of irregular supply position, specific provision was made in the agreement. When the Board itself had understood that way as evident from the past practice, it was not open to take an opposite view.

In the clause relating to maximum demand charges, the stress is on the expression 'per month' and that itself is indicative of the fact that the parties to the agreement intended that there should be uninterrupted supply and the charges were to suffer abatement in case of interruption/part supply. When a contract is for continuous supply then there is an in built intention that there should be abatement of the charges when continuous supply is not there. The interpretation by learned Single Judge of various clauses cannot be said to be unreasonable and the Division Bench ought not to have interfered with the same. Though there is no specific provision for varying the rate, the same has to be read into the agreement, and both in law and equity was to be granted. It is not that the appellants were seeking total waiver; what was really called for related to remission for interrupted/non-supply. Strong reliance was placed on several decisions to buttress their arguments. Specific reference was made to *Orissa State Electricity Board and Anr. v. IPI Steel Ltd. and Ors., 1995(4) SCC 320*, *M/s. Northern India Iron and Steel Co. v. State of Haryana and Anr., 1976(2) SCC 877*, *Bihar State Electricity Board, Patna and Ors. v. M/s Green Rubber Industries and Ors., 1990(1) SCC 731* and *Raymond Ltd. and anr. v. M.P. Electricity Board and ors. (2001(1) Sc 534)*. Mr. Pratik Dhar, learned counsel appearing for the appellants in C.A. Nos. 5550-53/97 adopted the arguments of Mr. Ganesh; but added that the maximum demand charge is relatable to electrical energy supply. When for a major portion of a month there is no supply, question of levy at the stipulated rate does not arise. Mr. Parijat Sinha, learned counsel appearing for the appellants in C.A. No 5554/97 adopted the arguments of Mr. H.K. Puri, learned counsel for the respondent-Board submitted that the minimum guaranteed charges and the maximum demand charges stand indifferent footings and logic applicable to one cannot be applied to the other. In case of minimum guaranteed charges, the basis is consumption; if power could not be supplied up to the agreed quantum, except in certain circumstances, the rebate when specifically provided for could be granted. But where the foundation is different, as in the case of maximum demand charges, the rate agreed is applied for the purpose of computation of the charges. Therefore, the Division Bench was justified in reversing views of learned Single Judge.

6. Before we cogitate and analyse the rival contentions in detail, it would be proper to pore over several clauses in the agreement to which reference has been made by learned counsel for the parties.

"2. The electrical energy so supplied shall be of three phase, alternating current at a declared pressure of volts between phases and frequency of fifty complete cycles per second at the Consumer's/Consumers' terminals.

3. Subjects to the provisions of clause 21 hereinafter contained the Consumer/shall be entitled for the said purposes to such supply upto but not exceeding maximum number of kilovoltampere for each of the first five years of supply as mentioned in Schedule here to (hereinafter referred to as the 'Contract Demand') which deemed to be part of this agreement.

4. (i) The Consumer shall begin to take electrical energy from the Board under the conditions of this

Agreement from the date (hereinafter referred to as the date of commencement of supply) to be mutually agreed upon but not exceeding two months from the date on which intimation is sent in writing to the Consumer/s by the Board that the supply of electrical energy to the full extent of the Contract Demand is available under this Agreement.

(ii) If the Consumer/s fail/s and or neglect/s to obtain the supply of electrical energy as from the date when the same is available for supply the consumer/s shall be liable to pay to the Board from the date when the consumer should have taken the supply in terms of clause 4(i) the minimum charges which are provided hereinafter to be payable by the consumer/s irrespective of the fact that the Consumer/s has/have not consumed any electrical energy.

11. The Board shall not in any way be held responsible nor shall be liable to pay compensation for any loss suffered by the consumer as a result of and failure interruption, defect or diminution in the supply due to the breakdown, breakage or damage of any plant, machinery, service or distributing lines or any accessories in connection therewith or due to the development of faults in any part or the system for transmission of energy or due to acts of God, War, Riot, Civil Commotion, Strikes, Lockouts, Labour troubles, Pestilence, Fire, Storm, Tempest, Floods, Earthquakes, Lightning, Theft, Larceny or other force or accident or due to any cause whatsoever beyond the reasonable control of the Board.

13. (1) The metering equipment shall generally include instrument transformers, polyphase integrating kilowatthour meter, KW/KVA maximum demand indicator and RKVAH/KVAH meter. The integrating period of the maximum demand indicator shall be controlled by time switch of a suitable type.

(2) The readings of the said meters shall be taken by the representative of the Board once in a calendar month on or as near as practicable the same day of each calendar month. The readings so taken shall be binding and conclusive between the consumer/s and the Board as to the amount of demand and electrical energy supplies to the consumer/s. The consumer/s may send his/their/its representative at the time of the reading of meters but in case the consumer/s does/do not arrange for his/their/its representative to be present for the reading of the meters, the readings of the meters taken by the representative of the Board shall be conclusive and consumer/s shall not have the right to raise any objection regarding the correctness or accuracy of such readings.

(3) In the event if any meter being found defective and check meter not having been installed, the power and energy consumption during the period when the meter was deemed to be defective shall be determined by taking an average consumption and other parameters for the preceding three months or during any previous or subsequent period that may be reasonably comparable.

(4) Monthly maximum demand of the consumer/s for the supply of power in each month shall be the largest average Kilovolt amperes delivered to the consumer/s at the point of supply during any consecutive thirty minutes in the month. In the case where KVA demand indicator is not installed, monthly maximum demand in KVA for tariff purpose will be estimated by dividing the reading in kilowatts of the maximum demand indicator by the monthly average power factor calculated from the number of units of kilowatthours and reactive kilovolt ampere hours as recorded in the meters during the same month. Fraction of KVA less than 0.5 will be discarded and that of 0.5 and above will be taken as 1 KVA.

15. (1) The consumers shall pay to the Board for electrical energy supplied under Agreement in

accordance with the tariff under Rates E(b) as set forth in the Schedule II hereto which shall be deemed to be part of this Agreement.

(2) If the Board by a notification makes any alteration in the aforesaid rates for energy, tariff and its associated stipulations, such altered rates, tariff and the associated stipulations shall be treated as if the same, were part of this Agreement in supersession of the tariff set forth in the Schedule II hereto with effect from the date fixed in the notification.

(3) If energy used for domestic purposes (vide general conditions of supply) in a month exceeds 10% of the total monthly energy consumption, then instead of Rate E(a) the scale of rates under Rate F set forth in Schedule II, shall be applicable.

16. (1) Subject to the provision of the clause 16(3) so long as the agreement is not determined the consumer/consumers shall pay minimum charges provided in Schedule I hereto irrespective of the fact that the consumer/consumers could not consume electricity to cover such minimum charge during respective years due to disconnection of supply for any laches or default on the part of the consumer.

(2) For calculation of annual minimum charge, one year period shall be taken from April to the following March. When connection is given in any intermediate month, the minimum charge shall be calculated from the month of connection to the following March on monthly pro-rata basis :

Provided when connection is given after the 15th day of any month, that month shall not be counted in calculating the year of minimum charge.

(3) If at any time the consumer/s is/are prevented from receiving or using the electrical energy to be supplied under this Agreement either in whole or in part owing to any strike, riots, insurrections, command of a civil or military authority, fire, explosions, act of God or any other causes beyond his/their/its control or if the Board is prevented from supplying or is unable to supply such electrical energy owing to all or any of the causes mentioned, then the minimum charge or guarantee payable by the consumer shall be reduced in proportion to the ability of the consumer/s to take or the Board to supply such power provided the consumer/s notifies the Board in writing within fifteen days of occurrence of any event as noted above with necessary detail to prove that the occurrence is preventing/has prevented the consumer/s from receiving or using the full amount of contractual demand. The consumer/s shall also keep the Board informed once in every fortnight of further developments regarding the event. No remission in the agreed minimum charge as mentioned in Schedule I hereof, will be considered if no such motive is received by the Board. Subject as aforesaid the consumer/s shall in any event be liable to pay the minimum charge every year as mentioned in Schedule I hereof.

21. (1) In the event if the consumer/s desiring to increase his/its/their contract demand in any year during the continuance of the Agreement, the Board may require the consumer/s to give the Board one year's notice in writing stating the quantity of power required.

(2) The consumer/s shall pay to the Board any expense incurred by reason of alteration and/or extension in respect of any service, switch gear

meters and other equipment necessitated to meet such altered contract Demand.

(3) The minimum charge as provided in Schedule I may be increased to take into account the altered

contract demand".

7. The rate applicable for the purpose of levying maximum demand charges is indicated in Schedule II. In Schedule I, it is stated that the consumer/s during the continuance of the agreement shall be entitled to consume electrical power upto but not exceeding the contract demand. The relevant portions in Schedules I and II in one of the agreements (taken as sample) read as follows :

SCHEDULE - I

X X X X X X

"The consumer/s during the continuance of the Agreement shall be entitled to consume electrical power upto but not exceeding the contract demand.

Where the actual Maximum Demand in any month of a year of operation will exceed the corresponding contract demand such Maximum demand will be deemed to be the contract demand for that particular year based on which Minimum amount payable by the consumer per annum will be charged.

The consumers during the continuance of the Agreement guarantee to pay for such amount of electrical energy as well in aggregate (excluding fuel surcharge) at the current rates produce annually the above minimum guarantee amounts.

SCHEDULE - II

Rate E(b) Industrial Purposes

i) Demand Charge ... Rs. 33.00 per KVA per month

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ii) energy ... Rs. 12.8 per Kwh."

It is to be noted that in exercise of power under Section 22-B of the Act, the Board was prevented from supplying electrical energy during certain specified hours of each day of each month.

Definition of "maximum demand" in terms of section 2(8) of the Supply Act is as follow :

"2(8)- 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."

While Section 22 is enacted to protect interests of individuals as well as licensees, Section 22-B deals with States, power to control the distribution and consumption of energy. Under sub-section (1) thereof, if the State Government is of opinion that it is necessary or expedient so to do, for maintaining the supply and securing the equitable distribution of energy it may by order provide for regulating the supply, distribution, consumption or use thereof.

It is necessary to elaborate what does the expression "maximum demand" mean and signify ? In the case of bulk consumers and large-scale consumers, the Electricity Boards all over the country generally adopt a two part level system. One part is called "the maximum demand charges" and the

other part "consumption charges". Every such consumer is provided with two meters. One is called the "trivector meter" and the other is the normal meter which records the total quantity of energy consumed over a given period which is ordinarily a month. The meter which records the total consumption requires no explanation or elaboration. It is the other meter which requires some explanation. Every large-scale consumer knows the amount of energy required by him and requests for it from the Board. If the Board agrees to supply that or any other particular amount of energy, it makes necessary arrangements therefor by laying the lines to the extent necessary and installing other requisite equipments. It is obvious that if a factory uses energy at a particular level/load and for a particular period, it consumes a particular quantity of energy. The trivector meter records the highest level/load at which the energy is drawn over any thirty-minute period in a month while the other meter records the total consumption of energy in units in the month. The position was highlighted by this court in Orissa State Electricity Board's case (supra).

The importance and significance of maximum demand is that the consumption of a given plant and machinery determines the type of lines to be laid and power of transformers and other equipments to be installed for the purpose.

It is to be noted that minimum charges and maximum charges operate in different areas. While consumption and the ability to supply can be reckoned for the purpose of fixing minimum charges, the same is really not of significance for the purpose of maximum demand. What may be applicable to the case of minimum charges do not *per se* become applicable to maximum demand. As was noted in Raymond Ltd. case (supra), minimum guaranteed charges relate to consumer's obligation to pay under specific agreement with the Board. It operates irrespective of actual quantum of consumption by consumer which may be lower than the minimum agreed extent and irrespective of the required or agreed quantum of supply by the Board which may fall below even the minimum level of the contract demanded, but when the minimum guaranteed charge is not any fixed amount and is in terms of electrical energy to be consumed, consumer's obligation to pay the same would depend upon the implied corresponding obligation of the Board to supply energy at least to the minimum extent. The actual supply made by the Board in individual cases has to be worked out for determining consumers's liability. The demand would obviously be in terms of the agreement. In Raymond Ltd.'s case (supra), it was observed that the contract for supply of electrical energy cannot be treated on a par with any other contracts of mutual rights and obligations. The terms and conditions of supply as envisaged in the contract and the standardized for provisions and general conditions have been standardized for uniform application among consumers with variations merely necessitated by the different class or categories of consumers and there is no scope otherwise for expecting any individual or free bargaining right in this regard by each consumer with the Board.

12. In Orissa State Electricity Board's case (supra) this Court explained the meaning of the expressions `maximum demand charges`, `consumption charges` and dealt with the rate as well as the purpose of the two meters. The normal meter as noted in the decision is made for recording the total quantum of energy consumed for a given period - invariably a month and the trivector meter is made for recording the highest level/load at which the energy is drawn over any thirty minutes period in a month. This is a part of two-part tariff. The levy is inextricably linked highest reading recorded and the foundation is "thirty minutes period in a month". It nowhere mandates or even by implication refers to uninterrupted or regular supply for the whole month.

13. Even a bare reading of the relevant clause relating to maximum demand shows that there was no scope for any remission in case of interrupted or irregular supply. It deals with computation on the basis of reading recorded by the meter installed for the purpose. If the contention of the learned

counsel for the appellants is accepted it would mean that the prescription of a particular rate in the Schedule II would become meaningless as it would become a variable figure.

14. Learned counsel for the appellants emphasized that whenever there was an intention that irrespective of the supply position a particular levy is to be made, specific provision was made therefor as in the case of minimum charges. Even if that logic is applied the reverse position can operate. Since there was no such specific provision made in the agreement it can be spelt out that the intention was not to grant any such remission.

15. The agreements of the Board in various cases contain different stipulations regarding minimum charges. In some cases prescriptions are there for remission in case of disruption/irregularity/non-supply. In other cases they provide for full levy notwithstanding any of the aforesaid situations. Appellants rely on those cases differently to buttress their stand. For the first category it is submitted as noted above, that remission is logical; while for the latter it is indicated that specific provision is necessary for the levy. It is trite law, so far the second category is concerned that the prescription is valid. (See Bihar State Electricity Board's case (supra), *Andhra Steel Corporation Ltd. and Ors. v. Andhra Pradesh State Electricity Board and Ors., 1991(3) SCC 263*. In Andhra Steel's case (supra) it was held that decision of the State Government under Section 78-A of the Supply Act, to fix concessional tariff is not sufficient to absolve the consumer from the liability undertaken to pay the minimum guaranteed charges. The liability flows from the agreement. As noted in Raymond Ltd.'s case (supra), the parties have agreed that the maximum demand of the supply is to be measured with reference to the month at the point of supply of the consumer and will be determined on the basis of the supply during any consecutive thirty minutes in that month as recorded by the trivector meter.

16. Strong reliance was placed by learned counsel for the appellants on certain observations made in the cases noted supra. They were made in different factual backdrops. None of them directly dealt with the issue of remission of maximum demand. Therefore, no support is available to the appellants from those cases.

17. Maximum demand and minimum charges are levied for different purposes. The former is charged to defray capital costs and latter to meet running charges. The various Boards require huge capital outlay for machinery, plants, equipments, transmission lines etc. As noted in Orissa State Electricity Board's case (supra) provision has to be made for depreciation of machineries and other depreciable of plants, transmission lines etc. has to be done requiring deployment of huge staff. At the cost of repetition, it has to be stated that demand charges are levied and collected to meet the capital outlay, while running charges are met by levy and collection of consumption charges. These distinctive features make the levies conceptually different.

The two do not in any way overlap and the provisions therefor do not contradict each other or create identical base for their operation. In *Ferro Alloys Corporation Ltd. v. A.P. State Electricity Board and Anr., AIR 1993 SC 2005*, it is noted that though the agreements contained conditions fixed by the Boards in advance and are open to acceptance by the prospective customers, the parties are bound by the terms if they have been entered by the parties with their eyes open.

18. So far as the applicable clauses are concerned in the present appeals, the terms are clear and unambiguous. In view of the purpose for which the maximum demand is levied, it is crystal clear that there is no scope for granting any remission in the manner claimed by the appellants. The appeals are without any merit; deserve dismissal, which we direct. Parties to bear their respective costs.