

(SUPREME COURT OF INDIA)

Jayshree Chemicals and Another

Vs

Orissa State Electricity Board and Others

HON'BLE JUSTICE R. C. LAHOTI AND HON'BLE JUSTICE ASHOK BHAN

05/02/2004

Civil Appeal Nos. 15478 of 1996

JUDGMENT

The Order of the Court is as follows
Hon'ble Justice Ashok Bhan:-

1. Aggrieved against the order passed by the High Court in dismissing the writ petition filed under Article 226 of the Constitution of India (Original Jurisdiction Case No. 165 of 1992) the writ petitioners-appellants have filed the present appeal.

2. In the writ petition the appellants challenged their liability to pay minimum charges to the Orissa State Electricity Board (for short "the Board") under the provisions of the State Electricity Board (General Conditions of Supply) Regulations of 1981 (for short "the Regulations") framed under Section 79(j) & (k) read with Section 49A of the Electricity (Supply) Act, 1948 (for short "Supply Act"). Clause 31 (e) of the Regulations provides:

"Every consumer shall during the continuance of agreement also pay, when required, the monthly minimum charges even if no electricity is consumed for any reasons, wheresover, or supply has been disconnected and also if the monthly charges for electricity actually consumed much less than the minimum charges subject to exempted, if any, provided in the agreement or under these regulations."

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3. The appellant No. 1 under the Regulations has been categorised as "a power intensive Industry" * , i.e., it consumes power as a raw material. It has entered into two subsisting agreements with the

Board (dated 31.10.1980 and 19.2.1983) for supply of electricity to its Sodium Hydrosulphite and Caustic Soda Plants. In the normal production year of the electricity the consumer is permitted to consume electricity as per its contracted demand. Appellant No. 2 is a share holder of appellant No. 1. Under Section 22 B of the Indian Electricity Act, 1910 (for short "the Act") the power vests in the State Government to control the distribution and consumption of the electricity. Section 22B reads as under:

*"22B, Power to control the distribution and consumption of energy- (1) 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. **

(2) Without prejudice of the generality of the powers conferred by sub-section (1) an order made thereunder may direct the licensee not to comply, except with the permission of the State Government with-

(i) the provisions of any contract, agreement or requisition whether made before or after the commencement of the Indian Electricity (Amendment) Act, 1959, for the supply (other than the resumption of a supply) or an increase in the supply of energy to any person, or

(ii) any requisition for the resumption of supply of energy to a consumer after a period of six months, from the date of its discontinuance, or

*(iii) any requisition for the resumption of supply of energy made within six months of its discontinuance, where the requisitioning consumer was not himself the consumer of the supply at the time of its discontinuance." **

Under this provision the State Government irrespective of any contract or agreement entered into can restrict the supply of electricity to the consumer if the State Government is of the opinion that it is necessary or expedient so to do for maintaining the supply and securing the equitable distribution of energy. #

4. Because of the chronic shortage of power the State Government has for the last many years starting from 1979 been passing orders/notifications under Section 22B of the Act. these notifications were coming in several different ways to prohibit industrial consumers from consuming the entire extent of power under their respective contracts. The current pattern of such notification since 1984 was to provide restrictions for an entire year, i.e. from the first day of July of one year to the end of the June of the next year, which was known as a "water year".

5. Though a water year commenced on the first of July each year, but, the power resources of the State being largely dependent on hydel generation, i.e., rainfall and storage of water in the Hirakud and Balimela reservoirs, it was not possible for either the Electricity Board or the State Government to assess or evaluate the generation prospects of power and accordingly made industry wise allocation until the monsoon fully settled all over the State. Power control orders/notifications under Section 22B of the Act used to be passed after the commencement of the water year sometimes after 2-3 months followed by subsequent notifications each modifying the preceding one, but making them retrospective from 1st of July of every year. During the period notification under Section 22B remained in operation, obligation to pay minimum charges under clause 31(e) of the regulations

stood waived. Following is the statement depicting the situation since the water years 1984-85 till 1990-91.

Water Year (July to June)

Order of Govt of Orissa Irrigation & Power Deptt.

Suspension of Contract demand

1984-84

Order No. 3176 dt. 22.1.85

78-66%

1985-86

Order No. 3777 dt. 31.8.85

78-66%

1986-87

Order No. 46885 dt. 31.10.86

78.66%

1987-88

Order No. 30826 dt. 16.7.87

70.13%

1988-89

Order No. 31060 dt. 13.7.88

79.29%

1989-90

Order No. EL/111/15/89/6873 dt. 14.2.90

79.29%

1990-91

i) Order No. E1/111-87/90/92-B/EGdt. 6.8.90 ii) Order No. E1/11-87/90/5021 dt. 24.10.90

64.87%

6. These notifications contained a specific rider that the same "would remain in force until further order" * . In the notification issued for the water years stating from 1984-85 to 1989-90 apart from the allotment made for that particular 'water year' provisional allotment of energy for the next water year starting from the next year was also made. For example, in order dated 31.8.1985 imposing restriction under Section 22B of the Act for the water year 1985-86 it was expressly stated:

"The quantity allotted in Annexure - for the water year 1985-86 may be treated as the provisional allotment of energy for the water year 1986-87 starting from 1.7.86 unless otherwise revised by the State Government. The order shall come into force with immediate effect and shall remain in force until further orders."

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7. Similarly, notification issued for the water years 1985-86, 1986-87, 1987-88, 1988-89, 1989-90 also contained the provisional allotments for the next water year. It was clearly mentioned that any consumption already made in accordance with the provisional orders shall be adjusted against the allotment made under the notification. In order words, in the said orders not only the provision was made to lay down the allotment of the current year but also provisional allotment was made for the coming year as well. In contrast to these notifications issued under Section 22-B of the Act, for the water year 1990-91, restriction was imposed by fixing the percentage of the estimated annual requirement to be allotted by the Board and it was left to the Board to make the actual calculation and fix the total million units of energy to be used by the consumer during the water year. Unlike the previous notifications for the water years from 1984-85 to 1989-90 in the notification for the water year 1990-91 provisional allotment for the ensuing water year 1991-92 was not made.

8. On 20-9.1991 the Board wrote a letter bearing No. 1733 informing the appellant No. 1 that for the water year 1991-92 notification under Section 22B was not issued and as such there was no restriction in monthly drawal of such power from July 1991 and therefore with effect from July 1991 the appellant No. 1 shall be liable to pay minimum charges as prescribed in Orissa tariff rate schedule. Appellant No. 1 was also informed that the bills for July 1991 and August 1991 already claimed without considering minimum charges was liable to be revised as there was no restriction for drawal of energy by the industry. The appellant No. 1 did not pay the minimum charges as demanded by the Board. On 26.12.1991 the Board wrote a letter to the appellant No. 1 informing it that supply of energy would be disconnected in case it fails to clear the outstanding demand.

9. Aggrieved against this action of the Board the appellants filed the writ petition challenging the claim of minimum charges from July 1991 to December 1991 being ultra vires the provisions of Articles 14 and 19(1)(g) of the Constitution of India and commanding the Board to rescind or cancel or withdraw the letter dated 26.12.1991 and the subsequent letters demanding the minimum charges. The High Court dismissed the writ petition holding that since for the water year 1991-92 a notification under Section 22B of the Act had not been issued the appellants were liable to pay the minimum charges for the period from July 1991 as demanded by the Board till the notification under Section 22B was issued on 16.1.1992.

10. Shri G.L. Sanghi, learned Senior counsel appearing for the appellants contended that after the commencement of the water year 1991-92 w.e.f. 1.7.1991 the appellants believed in good faith that the previous water year's regulated allotment made on provisional basis was to be treated as

continuing with all the incidents thereof. This impression was created considering the practice consistently followed by the State Government and the orders passed in the previous years. Though there was no specific notification issued under Section 22B for the water year 1991-92 till 16.1.1992 the appellants bona fide believed that the Board was not in a position to meet the full contract demand of industrial consumers in the State due to chronic shortage of power and therefore supply of electricity to the industries has to be restricted. Board by its previous conduct also induced the appellants to believe that no adverse consequences like imposition of minimum charges would be fastened upon the appellants pending the passing of an order under Section 22B which besides regulating the allotment of supply was coupled with the inevitable legal incidence of relieving consumers from liability to pay minimum charges. This bona fide belief was further strengthened by the wording of the order which clearly stated that the order "*would remain in force until further orders*" * . That even the Board was not sure as to whether a notification under Section 22B would be issued or not and that is why it had issued bills for the months of July and August 1991 as per the provisional allocation and not on the basis of the minimum charges. Another submission made by the counsel for the appellants is that the notification issued under Section 22B for the water year 1990-91 which was to continue in operation till further orders could not be rescinded or varied by a Government order. It could be done by issuing a fresh notification under Section 22B of the Act.

11. We do not find force in either of the submissions made on behalf of the appellants. Section 22B (1) of the Act which is relevant for the present purpose provides that if the State Government is of the 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. # Sub-section (1) of Section 78-A of the Supply Act lays down that in the discharge of its functions the Board shall be guided by such directions on questions of policy as may be given to it by the State Government. The order under Section 22B is passed in respect of a particular water year. In the allotment orders for the water years 1984-85, 1985-86- 1986-87, 1987-88, 1988-89 and 1989-90 contained a provisional allotment for the next water as well. It was clearly mentioned in these orders that any consumption already made in accordance with the provisional orders shall be adjusted against the allotment made under the notification. In other words, in the said orders not only the provision was made to lay down the allotment for the current year but also provisional allotment was made for the coming year as well. Undisputedly in the regulatory order dated 6th August, 1990 for the water year 1990-91 the State Government made a departure from the orders passed during the previous periods in not stating therein any provisional allotment of power for the ensuing water year. All that was stated in the said order was that the restriction imposed in it would remain in force until further orders. Section 22B(1) vests discretionary power in the State Government to regulate supply, distribution, consumption and use of power if in its opinion it is necessary or expedient so to do. Exercise of the statutory discretion depends upon the situation prevailing during the period. It would not be either fair or proper to hold that merely because restrictions in the use of power had been imposed during the previous years, the consumers would take it that such restrictions would be imposed during the next water year also even in the absence of any statutory order passed by the State Government. The words "this shall remain in force until further orders" only mean that the State Government was free to revise, modify, alter or rescind their order even after issue of the aforesaid orders. The power to amend or rescind the order issued under Section 22B was available to the government under the provisions of General Clauses Act which provides that the power to make orders, rules or by-laws includes the power exercisable in the like manner and subject to the like conditions to act to amend, verify or rescind or revise. # Lest the same would be questioned at any time by way

of abundant caution the government in the notification issued mentioned "that this shall remain in force until further orders". For example, the order dated 31st October, 1986 for the water year 1986-87 was revised by notification dated 6th March, 1987. The allotment made under order dated 14.2.1990 was partially modified by a notification dated 11th June, 1990 before the expiry of the period. Similarly, the restriction order dated 6th August, 1990 for the water year 1990-91 was revised by notification dated 24th October, 1990. The use of the expression "the shall remain in force until further orders" only means that the order can be changed or revised or amended or even withdrawn even in the middle of the year, before the expiry of the period. It did not mean that when the period of allotment is expressly and specifically mentioned, the order can be construed to mean that its life shall extend beyond the external termini mentioned in the order. Unlike the notification issued for the previous years where the provisional allocation was made for the next water year as well, in the order issued under Section 22B dated 6th August, 1990 for the water year 1990-91 there was no provisional allotment for the next water year. This order could not be construed to mean that its life shall continue beyond 30th June, 1991. Any construction to the contrary would be in conflict with the express language of the notification dated 6th August, 1990. This view is fortified by the subsequent order for the water year 1991-92 issued on 16th January, 1992. It is expressly mentioned in the said order under Section 22B that it shall come into force w.e.f. 17th January, 1992 and come to an end on 30th June, 1992. It was stated:

"Whereas the different categories of consumers have been getting unrestricted supply of power as per their contract demand (subject to peak load restriction) from 1.7.1991 to 16.1.1992.

Whereas the total availability of power during the water year 1991-92 from 17th January, 1992 to 30.6.1992 from the generating stations in Orissa will fall short of the requirement for power in State..."

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12. This clearly shows that there was no restriction during the period from 1st July, 1991 to 16th January, 1992 and the restriction for the water year 1991-92 became effective only from 17th January, 1992.

13. No restrictions were imposed for drawal of power between 1st July, 1991 to 16th January, 1992 as the water level in the various reservoirs was adequate which is also confirmed by the appellant in their letter dated 10th September, 1991 in which it has been, inter alia, stated that "the present water level in all dams/reservoirs are satisfactorily good, we expect better allotment of plans power at the earliest so that we can plan our production and consumption of power in a better way". This letter clearly goes to show that the appellant is taking contradictory stand. The appellants were at all times aware that the power was available and no restrictions had been imposed for drawal of power during the period from 1st July, 1991 to 16th January, 1992. Issuance of the bills for the months of July and August, 1991 as per the provisional allocation and not on the basis of minimum charges does not mean that the board could either not revise the bills or rectify its mistake. The issuance of the bills for the months of July and August 1991 on provisional basis would not lead to the conclusion that this act of the Board had induced the appellants to believe that the previous water year's regulated allotment could be treated as continuing for the next water year 1991-92 as well. In this view of the matter, the revised bills issued to the appellant No. 1 which is a power intensive industry to pay the 'minimum charges' under the terms of the agreement as well as the tariff notification, is in accordance with law and the claim of the appellants that since the restriction order for the water year

1990-91 was operative for the water year 1991-92 they are not liable to pay minimum charges, cannot be accepted.

14. Submissions made on behalf of the appellants that the notification issued under Section 22B for the water year 1990-91 which was to continue in operation till further orders could not be rescinded or varied by the government order is without substance. It has to be simply noticed and rejected. Notification issued for the water year 1990-91 was restrictive in its operation for the water year starting from 1st July, 1990 to 30th June, 1991. It came to an end with the cessation of its operative period. This contention has been advanced on the presumption that notification for the water year 1990-91 was to remain in force until further orders including the next water year. Question of rescinding the notification for the water year 1990-91 did not arise as it came to an end with the expiry of its durative period. The notifications were restrictive in its period of operation and were issued from year to year. The words "would remain in force until further orders" were used in the notifications to enable the State government to modify or vary the conditions of supply of energy within the same water year. **The letter dated 20th September, 1991 is only clarificatory informing the appellant No. 1 that there was no restriction imposed by the Government regarding the consumption of electricity for the water year 1991-92 and the industries were liable to pay the minimum charges in case they did not consume the contracted load of energy. It does not rescind or vary the notification for the water year 1990-91. #**

15. **For the reasons stated above, we do not find any merit in this appeal and dismissed the same with no order as to costs. #**