

SUPREME COURT OF INDIA

Nava Bharat Ferro Alloys Ltd.

Vs.

Transmission Corporation of A.P.Ltd.

C.A.No.1607 of 2004

(Markandey Katju and T.S. Thakur JJ.)

18.11.2010

JUDGMENT

T.S.Thakur, J.

1. These appeals by special leave arise out of an order dated 6th June, 2002 passed by the High Court of Andhra Pradesh whereby Writ Petitions No.9081 of 1999 and 13458 of 1993 filed by the appellant have been dismissed and the demand for additional charges/surcharge payable on the delayed payment of outstanding electricity dues raised under Clause 32.2.1 and 34 of the Terms and Conditions of supply (TCS) upheld. Facts necessary for the disposal of these appeals may be summarised as under:

2. The appellant is a public limited company engaged in the manufacture of Ferro Silicon. The industry set up by the appellant is energy intensive in as much as it consumes approximately 10,000 units of electricity for every ton of Ferro Silicon produced. The appellant's case is that the respondent-Electricity Board had initially agreed to supply power to the appellant @ 6 paise per unit but revised the said rate to 11 paise per unit in the year 1975. The revised rate was in the beginning applicable only to four consumers who were similarly situate but the number of such power intensive consumers gradually rose to 84. On 13th December, 1983 the Board revised the general tariff but a separate order applicable to power intensive consumers like the appellant was issued on 29th January, 1984. Aggrieved by the said order which permitted charging of a higher rate of tariff, the appellant and few others filed writ petitions before the High Court of Andhra Pradesh, which were dismissed by a Division Bench of that Court on 3rd April, 1985. During the pendency of the writ petition, however, the High Court had granted an interim order of stay against the collection of the disputed amount in the following terms:

“There shall be stay of operation of the order in so far as writ petition is concerned, subject to the condition if the writ petitioner pays at the rate of 47.89 paise per unit with effect from April 1984 onwards, furnishing Bank guarantee for the balance to the satisfaction of the Superintending Engineer concerned in four weeks from today. In

default of any of the conditions, the stay stands vacated. The bank guarantee furnished shall be renewed for every 3 months. If the petitioner has already paid the demand for the month of April, on the basis of the impugned order, this order passed by me shall be effective from the month of May 1984 otherwise it will be operative from April, 1984.”

3. The dismissal of the writ petitions filed by the appellants was assailed by them before this Court by way of special leave petitions nos.9206-9207/1985 (C.A. Nos.2569-2570/1985). This Court by an order dated 22nd July, 1985 while granting leave to appeal directed continuation of interim arrangement made by the High Court in the following terms:

“As regards stay, after hearing learned counsel for the parties we felt that the order passed by the High Court dated 24.4.1984 which operated during the pendency of the writ petitions will continue to operate during the pendency of the appeals with the modification that the rate of 47.89 paise per unit mentioned in the order is rounded to 48 paise per unit.

We would, however, like to make it clear that because of the High Court's order dated 13.4.1985, for a couple of months, there was no such orders in regard to future payments and the Electricity Board has received the dues at the enhanced rates in lump sum from some of the consumers. There will no question of refunding the amounts back to these consumers.

The bank guarantee already furnished by the petitioners/appellants will be kept alive from time to time and will cover all the differences including the future difference.”

4. It is not in dispute that the above order was modified subsequently in respect of the bills issued from 16th March, 1990 onwards. The appeals, eventually failed and were dismissed by this Court by an order dated 2 nd May, 1991. In I.As. filed by the appellant post-dismissal of the appeals, this Court passed an order on 9th May, 1991 to the effect that the appellants could after paying outstanding 50% of the amount due under the subsisting bank guarantee make representation to the Board for payment of the balance amount in instalments keeping in view the circumstances and the hardships in each individual case. Consequently, the appellants made a representation to the Board praying for grant of installments for payment of the balance amount. While the said request was under consideration, the appellant received a communication dated 14th June, 1991 from the Superintending Engineer pointing out that an amount of Rs.5,57,66,539.18 was recoverable from the appellant for the period April 1984 to August 1987. For the recover of the outstanding amount the Board invoked the bank guarantee furnished to it for a sum of Rs.2,83,53,120.93 thereby leaving a balance of Rs.2,74,13,218.25 due and payable which amount the appellant was requested to arrange. The communication also pointed out that in addition to the above amount arrears of Rs.4,45,63,903.21 for the period from August 1987 to July 1989 were also payable besides additional charges for delayed payments of the said amount which the latter proposed to communicate separately.

5. The request made by the appellant for payment of the balance amount of tariff arrears was accepted by the Board in terms of communication dated 9th July, 1999. It was in the above background that the appellant filed writ petitions No.9081 of 1999 and 13458 of 1993 raising common questions of law relevant to two different periods in the High Court of Andhra Pradesh, inter alia, assailing the demand of additional charges and interest on the delayed payment of the amounts determined pursuant to the judgment of this Court. By the order impugned in these appeals the said petitions have been dismissed by the High Court. The High Court held that the Terms and Conditions of Supply (TCS) were statutory in character and were not in conflict with any provision of the Electricity Supply Act or the Constitution of India. It also held that Clause 32.2.1 and Clause 34 of the said Terms and Conditions of Supply upon which the Board placed reliance for its demand did not violate any constitutional or statutory provision. The stipulated terms and conditions were, according to the High Court, intended to achieve the objective mentioned in Clause (b) of sub-section 2 of Section 49 of the Act, namely, to discourage delayed payment of electricity dues and to compensate the Board in cases of delay in the making of the payment. Both these conditions, according to the High Court were intended to sustain the economic health of the Board.

6. The High Court further held that the decisions of this Court in *Kerala State Electricity Board v. MRF Limited*¹ and *Kanoria Chemicals and Industries Ltd. v. U.P. State Electricity Board*² were of no assistance to the appellants. The High Court noted the factual background in which the said decisions were rendered and found that in cases before it there was no justification for nullifying the effect of the Clauses 32.2.1 and 34 of the T.C.S.

7. Appearing for the appellants Mr. Sudheer Chandra Agarwal, learned senior counsel, strenuously agued that the High Court had fallen in error in declining relief to the appellant which according to the learned counsel was due to it on the analogy of the orders of this Court in Kerala State Electricity Board's case (supra). It was submitted that in the light of the decision of this Court in Kerala State Electricity Board's case (supra) the appellant-consumers could not be said to be in default of payment of the outstanding amount during the period the interim order passed by the High Court in its favour had remained operative. It was further contended that this Court had in the above case and in Kanoria Chemicals's case (supra) dealt with a similar fact situation and granted relief, by awarding interest @ 18% to the Board to compensate it for the monetary loss that it may have suffered on account of delay in the making of such payment and to prevent any prejudice and consequent injustice to the Board on account of the direction issued by the Court. It was argued that the appellant-company was ready and willing to pay interest @ 18% p.a. on the outstanding amount for the relevant period but the demand raised by the Board being far in excess, deserves to be suitably reduced.

8. On behalf of the respondent it was, on the other hand, argued by Mr. C. Kodanda Ram, learned senior counsel, that the High Court was, in the facts and circumstances of the case, right in distinguishing the decisions relied upon by the appellant and declining the relief prayed for before it. It was submitted that the facts situation in which the relief was granted

in those cases was different from that of the present case. It was further argued that the additional charges and interest were payable in terms of the TCS which was statutory in character and to which the appellant had agreed to abide by. The amount which the appellant had not paid would have been utilized by it in its commercial ventures to make profits. Non-payment of the dues recoverable from the appellant would, therefore, expose the Board to serious financial prejudice and loss.

9. The case of the appellant-company rests entirely upon the decisions of this Court in the case of Kerala State Electricity Board (supra) and that delivered in the case of Kanoria Chemicals Ltd. (supra). The argument advanced on behalf of the appellant in essence is that the fact situation in the said two cases being similar to the one at hand grant of interest @ 18% p.a. on the outstanding amount would meet the ends of justice in the instant case also.

10. There is, in our opinion, a basic fallacy in the analogy which the appellant draws between its case and the cases referred to above. What is overlooked by the appellant is the fact that the decision of this Court in the Kerala State Electricity Board's case (supra) has enforced the terms under which the supply of energy was made to the consumers in that case. Award of interest @ 18% p.a. is not an innovation of this Court. The consequence of non-payment of the amount within the time stipulated was on the contrary prescribed in the tariff/ conditions subject to which energy was supplied to MRF the consumer in that case. It would not, therefore, be correct to apply the tariff conditions relevant to that case to the case at hand where such conditions are materially different. It is on the contrary necessary to cull out the principle of law settled in the said case for application to the case at hand. This may require recapitulation of a few facts in the backdrop whereof the decision in the Kerala State Electricity Board's case (supra) was delivered.

11. MRF was engaged in manufacturing automobile tubes and tread rubber in the State of Kerala. The company entered into an agreement with the Kerala State Electricity Board for supply of power to the factory set up by it. The agreement contained a provision for payment of power and energy supplied to the company by the Board within 15 days from the date of the receipt of the invoice by the consumer-company. The agreement further provided that in the event of a default in the payment of the amount within the stipulated period, interest @ 18% p.a. or at such other rate as may be fixed by the Board from time to time would be chargeable.

12. The Board revised the tariff for the electricity supplied by it in 1980, 1982 and 1984. These revisions were challenged by MRF in a writ petition filed before the High Court of Kerala, which was together with other similar petitions disposed of by a common order by which the revisions made by the Board were struck down. Consequently MRF Limited and other consumers became entitled to the refund of the excess amount paid by them pursuant to the revised tariffs. The High Court of Kerala directed the adjustment of such amounts towards future bills to be issued by the Board.

13. Aggrieved by the order passed by the Kerala High Court the Board filed special leave petitions before this Court which were entertained by this Court and an interim order passed, inter alia, directing that pending disposal of the appeals before this Court, the refund of charges already collected shall remain stayed. It was further directed that the future charges would be collected to the extent of 50% only and the balance adjusted towards the past charges.

14. The appeals filed by the Board were finally allowed by this Court by its judgment dated 26th August, 1986 upholding the validity of the revision of the tariffs by the Board. The inevitable conclusion flowing from that decision was that the consumer-company and other consumers became liable to pay the amounts due on the basis of the revision of tariffs including those that had since been adjusted by them pursuant to the interim directions of this Court. Consequently, the Board raised a demand for the payment of the amount inclusive of interest @ 18% p.a. While the company did not challenge the liability to pay the excess amount pursuant to the revision that had been upheld by this Court it refused to pay the interest and challenged the demand to that extent before the High Court of Kerala in a writ petition filed before it. The Single Judge as also the Division Bench of the High Court in appeal held that the consumer- company could not be said to be in default for non- payment of liability which did not factually exist at the relevant time and struck down the demand for payment of interest.

15. The Electricity Board appealed to this Court against the said judgment of the High Court. Allowing the appeals preferred by the Board this Court took the view that while the consumers had no obligation to take notice of the revised tariffs and to make any payment on the basis thereof after the judgment of the High Court of Kerala till the said decision was reversed by this Court, yet no sooner the decision of this Court upheld the upward revision of the tariffs, the Board's entitlement to draw bills on the basis of the revisions and consequently enforce payment of such bills by the consumers revived with full force. This Court repelled the contention that the liability to pay the revised tariffs accrued only after the pronouncement of the judgment of this Court upholding the upward revision and not from any date prior to that. This Court held that once the upward revision was found to be valid and enforceable such revision would be effective from the date the revision was made, no matter such revision had remained unenforceable for some period on account of the decision of the High Court. The following passage from the decision of this Court is in this regard apposite:

“But after the decision of this Court upholding upward revisions of tariffs, the Board's entitlement to draw bills on the basis of upward revisions and consequential enforceability of payment of such bills by the consumers revived with full force.

Hence, it would not be correct to contend that although the Company or for that matter other consumers were required to pay on the basis of revisions of tariffs from the dates when such revisions became effective, liability for such payment would accrue only from the date of pronouncement of the judgment by this Court upholding

upward revisions and not from any date prior to that. If the upward revisions are held as valid, enforceability of such upward revisions being consequential to such revisions, though it had remained unenforceable for some period on account of the decision of the High Court, cannot but revive from the dates of upward revisions.”

16. This Court then applied the principle of restitution as enunciated by the Privy Council in *Rodger v. Comptoir D'Escompte de Paris*³ and held that it will be the endeavour of the Court to ensure that a party who had suffered on account of a decision that is finally reversed should be put back in the same position as far as the same is practicable, in which he would have been if the decision of the Court adversely affecting him had not been passed. This Court observed:

“In giving full and complete relief in an action for restitution, the court has not only power but also a duty to order for mesne profits, damages, costs, interest etc. as may deem expedient and fair conforming to justice to be done in the facts of the case. But in giving such relief, the court should not be oblivious of any unmerited hardship to be suffered by the party against whom action by way of restitution is taken. In deciding appropriate action by way of restitution, the court should take a pragmatic view and frame relief in such a manner as may be reasonable, fair and practicable and does not bring about unmerited hardship to either of the parties.”

17. Applying the above principle to the case before it this Court held that the consumer-company was an on-going business concern who must have gainfully utilized the money saved on account of the decision of the High Court, in its commercial activities. The Court further held that the Board had to suffer financial loss because of the erroneous decision delivered by the High Court and that conforming to equity as well as well-established principle of restitution the Board could claim interest @ 18% p.a. on the unpaid portion of the bill drawn on the basis of the revised tariffs to which the consumer- company had agreed. The Court observed: "The Company is an ongoing business concern and must have utilised the money, saved on account of the decision of the High Court, gainfully in its commercial activities. Similarly, other consumers have gainfully utilised the amount saved for being not required to pay on the basis of revised tariffs. The Board had to suffer financial loss because of the said erroneous decision of the High Court. In the aforesaid circumstances, it will be lawful, conforming to equity and well-established principle of restitution for the Board to claim interest at 18% on the unpaid portion of the Bill drawn on the basis of revised tariffs. The Company had agreed to pay interest at 18% on the bills if not paid when it became due and payable."

18. It is quite evident that this Court had upheld the claim for payment of interest @ 18% p.a. primarily because of the stipulation contained in the tariffs/agreement executed between the Board and the consumer providing for payment of interest at that rate in the event of delay in the payment/discharge of the bills raised against the consumer. It is not as though this Court had refused to enforce the stipulation contained in the tariffs providing for recovery of interest from the consumer if the latter failed to pay the amounts within the time stipulated. It

is also manifest that this Court had in no uncertain terms held that even after the upward revisions of the tariffs had remained unenforceable for a certain period on account of erroneous judgment of the High Court, the moment the said judgment was set aside in appeal, the liability to pay revived with full force from the date the revisions were made effective. The very fact there was during the intervening period an erroneous decision of the High Court obliterating the revision in full or in part would make little difference in so far as the liability to pay the amount under the revised tariffs was concerned. So also the fact that the consumers were not deliberately in default on account of the judgment of the High Court did not affect the enforceability of the demand arising from the revised tariffs or the stipulation regarding payment of interest demanded on the same on account of the non-payment or delayed payment of the amount recoverable by the Board.

19. Suffice it so say that the decision of this Court in the case of Kerala State Electricity Board (supra) does not grant any relief to a defaulting consumer once the demand is upheld nor does it interfere with the principle of restitution which would entitle the successful party to be relegated back to the position it would hold had there been no judgment adverse to it.

20. Super added to all this is the fact that this Court was dealing with a case where the High Court had finally struck down the revised tariff, but the said decision was reversed in appeal. In the present case the appellant had obtained only an ad interim order of stay against the enforcement of the tariffs. There is a qualitative difference in the two situations. Even if one were to take a charitable view of the legal effect of any direction of the High Court, pending adjudication by the Court, cases in which the High Court finally held the tariffs to be bad would in our opinion stand on a different footing than cases where the party obtains an order granting interim protection to it. While there is an element of finality in the case of a final adjudication by a competent Court in so far as that Court is concerned, an interim order can be vacated at any stage. The interim order may not even prevent a prudent party from paying the charges according to the revised tariffs if it does not propose to take any chance and suffer recovery of an additional amount on account of the non-payment of the dues by the date stipulated for the purpose. We may in this regard refer to the following observations of this Court in *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association CSI Cinod Secretariat, Madras*⁴:

“While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence.”

21. Suffice it to say that the decision of this Court in Kerala State Electricity Board's case (supra) does not lend any support to the appellant-company in its endeavour to avoid

payment of the amount which became recoverable from it no sooner the judgment of the High Court was reversed in the earlier round of litigation upholding the revision of the tariffs.

22. That brings us to the decision of this Court in *Kanoria Chemicals and Industries Ltd. and Ors. v. U.P. State Electricity Board and Ors.*⁵. That was also a case where the validity of a notification issued by the U.P. State Electricity Board revising the electricity rates/tariffs under Section 49 of the Electricity (Supply) Act, 1948 was challenged by the consumers. Interlocutory applications filed in the writ petitions for stay of the operation of the impugned notification were eventually dismissed by the High Court whereupon the consumers deposited the differential amount between the pre-revised and the revised electricity rates. Consumers did not, however, deposit the late payment surcharge "recoverable" in terms of Clause 7(b) of the notification. Notices of demand were, therefore, issued to the consumers which were challenged in a fresh batch of writ petitions filed by them. The main contention urged by the consumers before the High Court was that since the operation of the notification revising the tariffs had been stayed between 25th July, 1990 and 1st March, 1993, no late payment surcharge could be levied on the amount withheld by the petitioners under the orders of the Court, no matter the writ petitions were finally dismissed. That contention was rejected by a Division Bench of the High Court of Allahabad. The matter was then brought up to this Court in appeal by the consumers, inter alia, contending that the stay of the operation of the impugned notification relieved the consumers of the obligation to pay the revised tariffs/rates and consequently additional charges for late payment, if any. Reliance in support of that submission was placed by the consumers upon the decision of this Court in *Adoni Ginning Factory v. Secy. A.P. Electricity Board*⁶. Speaking for the Court, Hon'ble B.P. Jeevan Reddy, J. held that the decision of this Court in Adoni Ginning Factory's case (supra) had no application to the case at hand nor could it be understood to mean that during the period covered by the stay no demand could be made against the consumers as no such issue has been raised before this Court in Adoni Ginning Factory's case (supra). This Court observed:

“.....We, therefore, agree with the High Court that Adoni Ginning¹ cannot be read as laying down the proposition that the grant of stay of a notification revising the electricity charges has the effect of relieving the consumers/petitioners of their obligation to pay late payment surcharge/interest on the amount withheld by them even when their writ petitions are dismissed ultimately. Holding otherwise would mean that even though the Electricity Board, who was the respondent in the writ petitions succeeded therein, is yet deprived of the late payment surcharge which is due to it under the tariff rules/regulations. It would be a case where the Board suffers prejudice on account of the orders of the court and for no fault of its. It succeeds in the writ petition and yet loses. The consumer files the writ petition, obtains stay of operation of the notification revising the rates and fails in his attack upon the validity of the notification and yet he is relieved of the obligation to pay the late payment surcharge for the period of stay, which he is liable to pay according to the statutory terms and conditions of supply -- which terms and conditions indeed form part of the

contract of supply entered into by him with the Board. We do not think that any such unfair and inequitable proposition can be sustained in law.....”

23. This Court further clarified that the terms in which the prayer in the stay application was made by the consumers did not determine the effect of the order issued by the Court in the writ petitions raising similar questions of law. The phraseology used in the prayer for interim orders could be materially different though in essence the relief may be similar. On a question of principle this Court held that the impugned order coming to an end upon dismissal of the substantive proceedings, it is the duty of the Court to put the parties in the same position as they would have occupied but for the interim orders of the Court for otherwise it would give rise to unjust results. This Court said: ".....It is equally well settled that an order of stay granted pending disposal of a writ petition/suit or other proceeding, comes to an end with the dismissal of the substantive proceeding and that it is the duty of the court in such a case to put the parties in the same position they would have been but for the interim orders of the court. Any other view would result in the act or order of the court prejudicing a party (Board in this case) for no fault of its and would also mean rewarding a writ petitioner in spite of his failure. We do not think that any such unjust consequence can be countenanced by the courts. As a matter of fact, the contention of the consumers herein, extended logically should mean that even the enhanced rates are also not payable for the period covered by the order of stay because the operation of the very notification revising/enhancing the tariff rates was stayed. Mercifully, no such argument was urged by the appellants. It is understandable how the enhanced rates can be said to be payable but not the late payment surcharge thereon, when both the enhancement and the late payment surcharge are provided by the same notification - the operation of which was stayed....."

24. It is manifest from the above that both on the question of restitution of the benefit drawn by a party during legal proceedings that eventually fail as also on the general principle that a party who fails in the main proceedings cannot benefit from the interim order issued during the pendency of such proceedings, this Court found against the consumers and upheld the demand for payment of additional charges recoverable on account of the delay in the payment of the outstanding dues. Far from lending any assistance to the appellant-company the decision squarely goes against it and has been correctly appreciated and applied by the High Court.

25. In the result these appeals fail and are hereby dismissed but without any orders as to costs.

¹(1996) 1 SCC 597

²(1997) 5 SCC 772

³1871 (3) PC 465

⁴1992 (3) SCC 1

⁵(1997) 5 SCC 772

⁶(1979) 4 SCC 560