

ALLAHABAD HIGH COURT

Bhagwan Industries

Vs.

U.P.S.E. Board, Lucknow

Civil Misc. Writ Nos. 4015, 1119, 3260, 4017 and 4046 of 1975

(K.N. Seth and R.M. Sahai, JJ.)

29.03.1979

JUDGEMENT

K.N. Seth, J.

1. The petitioners entered into separate but identical agreements with the U.P. State Electricity Board for supply of electrical energy for industrial purposes. At that time the rate schedule of 1972 framed by the Board under Section 49 of the Electricity (Supply) Act, 1948 (hereinafter referred to as the Act) was in force. The relevant rate schedule applicable to the petitioners was Rate Schedule HV-28. By a notification dated Oct. 12, 1974 the Board, in exercise of powers under Section 49 of the Act, issued revised rate schedules for supply of electricity. Besides revising the rates for demand charge, energy charge etc., a charge called minimum consumption guarantee charge was introduced for large and heavy consumers, the category to which the petitioners belong. In these petitions validity of the revised rates in the tariff as also imposition of the minimum consumption guarantee charge has been challenged. During the course of hearing it was conceded that the dispute regarding charges other than minimum consumption guarantee charge was covered by the arbitration clause of the agreement and only the validity of the minimum consumption guarantee charge was pressed for consideration.

2. In the revised tariff of 1974 the minimum consumption guarantee charge was fixed at Rs. 360/- per KVA per annum of the contracted demand (including fuel cost variation adjustment) chargeable at the rate of Rs. 30/- per KVA per month of the contracted demand. It also provided that the demand charge and the additional charge on excess demand drawn over and above the contracted demand shall not be taken into account towards the aforesaid amount

guaranteed. It was urged that this imposition was invalid as it was not warranted by the agreement between the parties which alone governed the terms and conditions of supply of electrical energy to the petitioners. It was further urged that since the Board was not in a position to supply electricity in accordance with the terms of the agreement the imposition of a minimum guarantee charge was unjustified. It was last contended that the exercise of power under Section 49 of the Act in fixing a minimum charge was an arbitrary exercise of power and wholly untenable.

3. The agreement between the parties, by clause (2), provided that the agreement shall be read and construed in all respects in conformity with all provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 or any subsequent amendments thereof and the rules and regulations made there under from time to time. By clause (8) it was provided that the consumer shall pay for the supply of electrical energy in accordance with rate schedule attached to the agreement. In Clause (13) it was provided that the rates stipulated in the agreement were subject to revision by the State Electricity Board from time to time under the provisions of the Act. As noted earlier, the agreement was entered into when the rate schedule of 1972 was in force. By notification dated October 12, 1974 the rate schedule of 1974 framed in exercise of powers under Section 49 of the Act was brought into force. It was issued in supersession of all previous notifications, orders and instructions on the subject. Paragraph 2 of the notification provided that the rates of charges, conditions of supply and other, matters specified in the schedules shall replace the existing rates of charges and the corresponding provisions in the existing schedules and in the existing agreements, if any, with effect from Oct. 12, 1974.

4. Section 49 of the Act empowers the Board to lay down terms and conditions, popularly known as tariffs, for supply of electricity to persons other than licensees. Under Section 49(1)(2) uniform tariffs are framed covering various categories of consumers. Sub-section (3) provides for framing different and special tariffs for a consumer or a class of consumers. Under the aforesaid provision the Board, is empowered to lay down rate schedules from time to time. The notification of 12th Oct., 1974 issued in exercise of this power superseded the 1972 tariff and replaced the existing rates of charges and the corresponding provisions in the existing schedules and in the existing

agreements between the parties. The rate schedule of 1972, which was a part and parcel of the agreement between the parties, stood replaced by the new tariff enforced under the aforesaid notification. In place of 1972 tariff the new tariff became a part and parcel of the agreement between the parties. As laid down by this Court in *Hari Shankar v. U.P. State Electricity Board*¹ ".....the term 'tariff' includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. When the electrical supply is being made on the footing that the consumer will pay the minimum guaranteed charges, this charge is one of the terms or conditions for the supply." It is, therefore, idle to contend that the imposition of the minimum guarantee charges was not warranted by the agreement between the parties.

5. The question may be considered from another angle. As noted above, Clause (13) of the agreement provided that the rates stipulated in the agreement were subject to the revision by the State Electricity Board from time to time under the provisions of the Act. In view of Section 14 of the General Clauses Act all statutory power is exercisable from time to time. The power exercised by the Board under Section 49 of the Act was with the positive intention of replacing the 1972 tariff with the tariff dated 12th Oct. 1974. Apart from the condition incorporated in Clause (13) of the agreement that the rate shall be subject to the revision by the Board from time to time under the provisions of the Act, the new tariff enforced in exercise of the statutory power under Section 49 of the Act would be legally valid and enforceable.

6. In support of the contention that the Board could not impose the minimum consumption guarantee charge which was a new imposition as it was not covered by the agreement entered into between the parties, reliance was placed on *Indian Aluminium Co. v. Kerala State Electricity Board*² That was a case of special tariff for supply of electricity in exercise of power conferred under Sub-section (3) of Section 49. As observed by the Supreme Court the fixation of special tariffs can be a unilateral act on the part of the Board, but more often than not, it would be result of negotiations between the Board and the consumer and hence a matter of agreement between them. Unilaterally revising the charge would mean that the stipulations had no binding effect, or in other words, the Board had no power to enter into such stipulations The Supreme Court further observed that the Board was also not competent to enhance the charges under

the guise of fixing uniform tariffs under Sub-section (1) of Section 49, because Sub-section (1) is, on its plain language, subject to Sub-section (3) of Section 49 and once special tariffs were fixed under Sub-section (3) of Section 49, there could be no question of fixing uniform tariffs under Sub-section (1) of Section 49. The power to fix uniform tariffs under Sub-section (1) of Section 49 could not be exercised in derogation of the stipulations fixing special tariffs made under Sub-section (3) of Section 49. The principle laid down in the above noted case could not be pressed into service in the present cases which related to fixation of tariff in exercise of power under Section 49(1) of the Act. Moreover, as noted above, the terms of agreement between the parties provided for revision of the rate schedules applicable to the petitioners, a feature which was absent in the agreement in the Indian Aluminium Company's case. The Supreme Court itself explained the ratio of the decision in the case of Indian Aluminium Co. in *Bisra Stone Lime Co. Limited v. Orissa State Electricity Board* ³ The same distinction as been brought out by the Kerala High Court in *Travancore-Cochin Chemicals Ltd. v. Kerala State Electricity Board* ⁴

7. The stand taken by the petitioners that since the Board was not in a position to supply energy in accordance with the terms of the agreement because of shortage of supply, it was not justified in imposing a minimum consumption guarantee charge which is attracted even if no supply is made. According to the petitioners on 19th January, 1974 a notification was issued imposing restriction on all the industries which have non continuous process of manufacture to utilize electrical energy only from 9 P.M. to 6 A.M. the next day and by a further notification dated 17th September, 1974 factories were required to remain closed on two days in a week besides Sunday. It has further been alleged that the petitioners have not been supplied with any power since September, 1974. It is not disputed that certain restrictions have been imposed for use of electrical energy but it has been specifically asserted in paragraph '18' of the second counter-affidavit sworn by Deoraj Prasad that when supply was not made available on certain days, relief has been granted under Board's orders dated 2nd December, 1974 and 15th January, 1975 which have been annexed to the first counter-affidavit as C.A. 1 and C.A. 2. This relief has been granted both with regard to the Demand as well as the Minimum Charge. It is significant that the petitioners while asserting that they have not been supplied with any power since Sept. 1975 (paragraph 14 of the petition) nowhere alleged

that bills on the basis of Minimum Charge were submitted and paid for during the period when no supply was made. At the time of hearing it was not disputed that no bills were submitted to the petitioners for the period when no supply was made. It is not in dispute that cuts and restrictions were imposed by the Board in pursuance of Government orders issues from time to time. The first proviso to clause (1) of the agreement gave immunity to the Board for interruption of supply or stoppage or deficiency of energy caused by any order or direction issued by the Government of Uttar Pradesh.

8. It appears from the agreements made in the counter-affidavit that energy was made available by the Board to the consumers generally at least for about 6 to 9 hours a day, except on days when they were not permitted to consume energy under statutory orders passed by the Government, and the supply given was always more than sufficient to cover the amount of minimum charge. According to the respondents the consumers of the category to which the petitioners belong can consume sufficient electricity to meet the minimum charges if he runs his contracted load for 4 to 6 hours a day and even if he runs the contracted load at 60%, he can consume sufficient electricity to meet the minimum charges by using energy for 7.7 hours a day. The assertion has not been shown to be incorrect or without basis.

9. It is also clear that minimum consumption charge is correlated to energy, charge as also to the demand charge. In paragraph '30' of the first counter-affidavit it has been asserted that even though the minimum charge of Rs. 30/- per KVA per month is payable every month yet it is subject to final adjustment at Rs. 360/- per KVA per year so that if a consumer, for some reason or the other, could not consume energy during a particular month, worth Rs. 30/- per KVA, he has an opportunity to make good the short-fall in the other months during a year of account. This clearly flows from paragraph '5' of the rate schedule applicable to the petitioners. To take an illustration, if on the basis of rates given in the tariff the total amount of money payable for the demand charge and the energy charge works out to say, Rs. 29,000/- only in a month, and the minimum charge agreed between the parties is Rs. 30,000/-, the bill for that month would be for Rs. 30,000/-. But if in the next month, the demand relating to the demand charge and the energy charge worked out to Rs. 35,000/- what is payable would be Rs. 34,000/- only giving credit for that extra Rs.

1000/- paid in the preceding month. Such adjustments are to be finally made in the last bill of any accounting year, so that over the span of a year the provisions for a minimum charge only remains a guarantee that a minimum amount of money would be paid by the consumer to the Board. The grievance of the petitioners on this score is wholly unfounded. There also does not appear to be any justification for the assumption that there could be no provision for minimum guarantee charge if the tariff provides for demand charge.

10. The decision of the Supreme Court in *Northern India Iron and Steel Co. v. State of Haryana* ⁵ is of no assistance to the petitioners. In that case the petitioners were held entitled to proportionate reduction of the demand charge, on account of the inability of the Board to supply electric energy due to circumstances beyond its control, in view of Clause 4(f) of the tariff. As noted earlier the petitioners have been granted relief in such situations under Board's orders dated 2-12-1974 and 15-1-1975.

11. It was next contended that the rate of minimum guarantee charge has been arbitrarily and capriciously fixed in the tariff and is not based on relevant consideration and is consequently invalid being violative of Article 14 of the Constitution. In this connection our attention was invited to rule laid down in *Rasbihari Panda etc. v. State of Orissa* ⁶ and *Maneka Gandhi v. Union of India* ⁷ The principle laid down in these cases is not applicable to the facts of the present case. The Board has set out in detail the circumstances and the factors which weighed with it imposing the minimum consumption guarantee charge and fixing the rate in the 1974 tariff. None of the factors which weighed with the Board could be characterized as irrelevant or unconnected with the object sought to be achieved, that is, supply of energy to the consumer at a reasonable rate and at the same time ensuring the financial stability of the Board.

12. Sri S. N. Kacker, Solicitor General of India, appearing for the Board, contended that the present petitions were incompetent as the petitioners had an alternative remedy. It was urged that the minimum consumption guarantee charge was a part of the tariff and whether it was leviable or not and whether it contravened the agreement or not were all matters squarely covered by Clause 18 of the agreement and consequently the petitioners had an alternative remedy by way of arbitration. Reliance was placed on the rule laid down in *Indian Aluminium Co. v. Kerala State Electricity Board*⁸ and *Bisra Stone Lime Co. Ltd.*

v. Orissa State Electricity Board ⁹

Clause '18' of the agreement provided :

"All disputes and differences arising between the Board and the consumer (the settlement or adjustment of which is not hereinabove provided for) as to the interpretation or construction of any of the provisions of this agreement or the rights and obligations of the respective parties hereto or as to any other matter or thing concerning or arising out of this agreement, shall be referred to a single arbitrator if the parties agree upon one, otherwise to two arbitrators one to be appointed by the Board and one by the consumer which arbitrators shall appoint an umpire before proceeding with the reference and the decision of the sole arbitrator or the arbitrators or the Umpire as the case may be shall be final and binding on the parties.....".

13. In our opinion, the objection is well founded. Under cl.'18' of the agreement even the dispute relating to the levy of minimum consumption guarantee charge could be the subject matter of arbitration. The principle laid down in the above noted cases apply with greater vigour after the amendment of Article 226 of the Constitution by the Constitution Forty-second Amendment Act, 1976. Since the petitioner has an alternative remedy by resorting to arbitration for redress of their grievance relating to the minimum consumption guarantee charge, the present petitions are not maintainable.

In the result, the petitions are dismissed. Parties shall bear their own costs.

Petitions dismissed.

Cases Referred.

1. (AIR 1974 All 70)
2. (AIR 1975 SC 1967)
3. AIR 1976 SC 127)
4. (AIR 1978 Ker 144)
5. (AIR 1976 SC 1100)
6. (AIR 1969 SC 1081)

7. (AIR 1978 SC 597)
8. (AIR 1975 SC 1967)
9. (AIR 1976 SC 127)