BOMBEY HIGH COURT

Mukand Iron and Steel Works Ltd

Vs.

M.S.E. Board

Misc. Petn. No.717 of 1978

(Bharucha, J.)

25.08.1982

ORDER

Bharucha, J.

1. The effect of a power cut upon minimum demand charge payable by a consumer of electricity to the supplier there-of has to be determined in this writ petition.

2. The petitioners, Mukand Iron and Steel Works Ltd., are manufacturers of iron and steel products. They have a plant at Kalwe, Thane. They are large consumers of electricity supplied to them by the 1st respon-dent, the Maharashtra State Electricity Board. On 3rd August, 1965 the Board entered into an agreement with the company. Clause 3 of the agreement states that the Board shall supply to the company and the company shall take from the Board all the electrical energy required at its plant at Kalwe up to a maximum of 15,000 K.V.A. (kilo volt amperes), which quantum is referred to as the "contract demand". Under Clause 7(a) the company is entitled to supply to the Board for supply in excess of the con-tract demand and the Board is obliged to make it available within the stated priod provided it has the additional energy avail-able and it is economical to do so. Under Clause 7(c), if additional supply is made available, the contract demand specified in Clause 3 is increased to that extent. (It must here be stated that the contract demand was in fact raised at the company's request to 48, 500 K.V.A.). Under Clause 8 (a) The company is obliged to pay to the Board every month charges "for electrical energy supplied to the consumer during the preced-ing month at the rates specified in the sup-pliers' standard tariff schedule", which is at- tached to the agreement, and in force from time to time. If, during the "currency of this agreement the above referred standard tariff schedule is revised, increased or decreased, such revised, increased or decreased, tariff from the date specified shall apply to the consumer during and for the unexpired period of the present agreement". Under clause 9, the agreement is to operate for a minimum period of 7 years and from year to year thereafter terminable by six months' notice on either side. Under clause 10, if the supplier

discontinues electrical supply in consequence of any breach or default on the part of the company entitling the Board to do so, the amount of charges for electrical energy already supplied and all other moneys then payable under the agreement become due and recoverable forthwith, and during the period of such discontinuance the com-pany continues to remain liable "to pay the minimum charges and minimum guarantee payable hereunder". Under the terms of the tariff annexed to the agreement the "demand charge" is stated to be Rs. 16.00 per month per K.V.A. of the billing demand. The "energy charge" is separately stated. The tariff states that for consumers opting for payment of monthly minimum charges, demand charges based on the KVA of the billing demand would be the mini-mum bill. A minimum annual bill at Rs. 240.00 per K.V.A. demand would be charged on the actual highest demand estab-lished by the consumer during the 12 month period or 75% of the contract demand. "Maximum demand" is defined to mean the average KW/KVA supplied during the 30 minutes' period (or any such shorter period as may be prescribed by the Board) of maximum use. "Contract demand" is defin-ed to mean the maximum KW/KVA for the supply of which the Board undertakes to provide facilities from time to time. "Billing demand" is defined to mean the demand used for billing purposes and is computed as the highest of the following the maxi-mum demand established during the month; 75% of the contract demand.

3. It will be seen that for the purposes of billing a two-tier system is adopted. For the units of energy supplied there is one form of charge based on the kilo watt hours (KWH) of supply and for the energy demand there is a rate of charge based upon the K.V.A. The contract sets out the contract demand; the Board is obliged to supply to the company the contract demand and the company is liable to pay to the Board a minimum of 75% of the contract demand.

4. A power cut was imposed by the Gov-ernment of Maharashtra on 1st Oct., 1974 by reason whereof the Board could not sup-ply and the consumer could not consume more units of energy and more than the K.V.A. therein specified. The permissible quotas imposed by the power cut varied from time to time.

5. The petitioner submits that it was in-cumbent upon the Board to take the permissible quota as the revised contract demand under the agreement and to take into con-sideration 75% thereof for the purposes of computing the minimum billing demand. It was urged by Mr. Bhabha, learned coun-sel for the company, that, for the purposes of billing, the basis had to be the permis-sible quota available to the company; the same had to be treated as the contract demand and the billing demand, consequently, had to be either 75% of the per-missible quota or the actual consumption, whichever was higher. In Mr. Bhabha's submission, this was a reasonable and com-mercial way to read the agreement, having regard to the supervening circumstance namely, the imposition of the power cut. He placed reliance in this regard upon clause 8 of the agreement.

6. Mr. Bhabha relied upon the judgment of the Supreme Court in *M/s. Northern India Iron and Steel Co. v. State of Haryana*[1], One of the questions before the Court was whether the Haryana

State Electricity Board was entitled to claim the demand charge from the appellant-com-pany. There was a contract between the appellant and the H.S.E.B. It contained a force majeure clause. A substantial power cut was imposed and the appellant was not able to get the supply of energy according to the contract. A dispute arose as to whe-ther the H.S.E.B. was, in the circum-stances, entitled to get any demand charge. The two-tier system of the tariff was em-ployed. The Supreme Court stated that it was meant for big consumers of electricity and it comprised (a) demand charges to cover investment, installation and the standing charges to some extent, and (b) energy charges

[1] AIR 1976 SC 1100

for the actual amount of energy consumed. It was argued by the appellant that since the H.S.E.B. was not ready to serve it when it was ready to consume the maximum energy, the H.S.E.B. was not entitled to ask for the demand charge. On behalf of the H.S.E.B. it was asserted that it was entitled to assess and claim the foil demand charge, irrespective of whether it was in a position to supply energy according to the demand of the consumer. The Supreme Court felt that the difficulty was not easy to solve. If it were to hold that for the H.S.E.B.'s inability to supply a fraction of the contract demand it could claim only the energy charge and not the demand charge, it would be very hard and injurious to it and the consumer would un-justifiably get energy at a very cheap rate. If, on the other hand, it were to hold that the consumer was liable to pay the entire demand charge even when, for no fault of it, it could get only a fraction of its demand resulting in its not being able to run its in-dustry to its full capacity, it would be liable to pay a huge amount per month, which would not only be uneconomical but would seriously affect its economic structure. The Supreme Court was happy to find a just, equitable and legal solution of the difficulty by reason of the force majeure clause and it, therefore, felt that it was not necessary to resolve the extreme stands taken on either side. The Supreme Court held that the circumstances of the power cut which disabled the H.S.E.B. from giving the full supply to the appellant undoubtedly was a circum-stance which disabled the appellant from consuming electricity as per the contract; this was a circumstance which was beyond its control and could not be considered otherwise by the Board. It entitled the appellant to a proportionate reduction of the demand charge under the force majeure clause.

7. Mr. Andhyarujina, learned counsel for the Board, drew my attention to the judgment of the Supreme Court in *Amal-gamated Electricity Co. Ltd. v. Jalgaon Borough Municipality*[2], He placed emphasis upon para 9 of that judgment which reads thus:

> "Moreover it is obvious that if the plain-tiff-company was to give bulk supply of electricity at a concessional rate of 0.5 anna per unit it had to lay down lines and to keep the power ready for being supplied as and when required. The consumers could put their switches on whenever they liked and therefore the plaintiff had to keep everything ready so that power is supplied the moment the switch was put on. In these circum-stances it was absolutely essential that the plaintiff should have been ensured the pay-ment of the minimum charges for the supply of electrical energy whether consumed or not so that it

may be able to meet the bare maintenance expenses."

8. Mr. Andhyarujina also referred to a judgment of the Gujarat High Court in *Gujarat Electricity Board v. Shri Rajratna Naranbhai Mills Co. Ltd*[3]*.,* After considering decisions of the Bom-bay, Calcutta, Madras and Punjab High Courts, Divan, C.J. observed that they cor-rectly pointed out that the provision of a minimum charge in the agreement between a consumer and a supplier of electricity was but one of the modes of providing for a reasonable return to the supplier for the investment and capital outlay that it had made.

9. Mr. Andhyarujina drew my attention to the affidavit in reply to the petition filed by W.D. Paraskar, Superintending Engineer of the Board, in which it is stated that the requirement of billing a consumer for a minimum of 75% of the contract demand was

[2] AIR 1975 SC 2235

[3](1975) 16 Guj LR 90

because, according to the agreement be-tween the consumer and the Board, the Board was obliged to make available the supply to the extent of the contract demand at all times during the currency of the agreement. A minimum charge was justified in view of the fact that the Board had to main-tain in constant readiness such generating capacity irrespective of whether it was utilized by the consumer or not. It required an amount of capital cost to keep such generating capacity and facilities in constant readiness for a large consumer like the com-pany. The Board also incurred the cost of maintaining the plant and provided for de-preciation. The Board was entitled to be reimbursed for these. The Board had built a major grid receiving station at Kalwe where power was received from the Koyna Hydro Project, the Nasik Thermal Station and the Nuclear Station at Tarapur. It had a capacity of 500 MVA. It received power at 2,20,000 volts transmission, stepped-down to 1 lakh voltage through 4 step-down trans-formers of 125 MVA capacity. There were two more transformers of 25,000 KVA capa-city which stepped-down voltage from 1,00,000 to 20,000 volts. The Board had laid a network of 100 KV transmission feeders emanating from Kalwe and reaching various load centres. The Board had also constructed 100 KV (1 lakh voltage) trans-mission feeders to serve major industrial loads like Standard Alkali, Nocil and the petitioner-company. To serve the company exclusively two circuits of 100 KV transmission feeders had been laid and two cir-cuits were provided so that adequate capa-city was available even in case of the break- down of one circuit.

10. Mr. Andhyarujina submitted that the Board remained liable to supply to the company the contract demand the moment the power cut was lifted. To do so, the Board bad to maintain in readiness the requisite generating capacity and facilities. The au-thirties showed that the minimum charge was levied for this purpose. The company, therefore, remained liable to pay the mini-mum charge even during the period of the power cut.

11. Mr. Bhabha contended that the Board was not required to maintain generating capacity and facilities for supply up to the contract demand during power cuts. He submitted that, in any event, what was stated in the affidavit made on behalf of the company in rejoinder showed that

the Board was not in a position to supply the contract demand by reason of its own defaults and it could not take advantage of its own wrong. A statement in the Board's publi- cised figures showed that while the Board's generating capacity had in the period 1960-61 to 1977-78 gone up 3.55 times its con-nected load had increased 32.96 times. Mr. Bhabha also referred in this connection to the statements made in a letter written by the Board's instructing attorneys to the com- pany's instructing attorneys.

12. As I see it, Mr. Andhyarujina's sub-mission is justified. The authorities show and, in fact, Mr. Bhabha has not disputed that the minimum charge is intended to compensate the supplier for keeping in a state of readiness the generating capacity and facilities for supplying to a large consumer the quantum of the contract demand. The power cut operates for periods of time, not forever. The Board remains liable to supply to the consumer the quantum of the con-tract demand no sooner the power cut is lifted. Therefore, even during the period of the power cut the Board is obliged to maintain in a state of readiness the requisite generating capacity and facilities. Obviously, the Board cannot dismantle or even cease to maintain all its facilities and equipment during the period of the power cut. It must follow that even during the period of the power cut the company is obliged to make payment of the minimum charge. There is no provision in the agreement which con-templates a diminution of the minimum bill-ing demand. I am not impressed by the argument on behalf of the company that the Board was not in a position to supply the quantum of the contract demand by reason of its own default. This case is made out in the company's affidavit in rejoinder. This case would, even if pleaded in the petition, require an investigation of facts outside the scope of a writ petition. And, if this were a fact, the company would have asked for a reduction of the contract demand, which it is entitled to do, not merely a reduction of the minimum charge during power cuts.

13. It must be pointed out that the Board has taken the existence of the power cut into account where the power cut has impos-ed a permissible quota which is lower than 75% of the contract demand; the Board has then treated the permissible quota as the minimum billing demand. As for example: The contract demand is 1000 KVA and the minimum billing demand is 750 KVA. If the permissible quota under the power cut is 650 KVA, the Board treats 650 KVA as the minimum billing demand. Mr. Bhabha's argument was, of course, that this was not enough and that in all cases the minimum billing demand should be deemed to be 75% of the permissible quota under the power cut. For the reasons that I have already stated, I am not inclined to accept this argument. It is also true that, as the Board has pointed out, where the permissible quota is greater than the minimum billing demand nothing prevents the consumer from consuming energy, roughly, up to the former. The power cut does impose, as Mr. Bhabha emphasised, a ceiling both on units of energy and on KVA but there is little material on record to uphold Mr. Bhabha's assertion that the com-pany could not possibly reach the minimum billing demand having regard to the ceiling on the units of energy consumable by the Company.

14. There is, in my judgment, nothing in the agreement which warrants the company's

contention. In fact, to accept the contention would be tantamount to rewriting it. Nor can it be said that the Board is being un-reasonable, which-as a public body-it can-not be permitted to be, in not adopting 75% of the permissible quota under the power cut as the minimum billing demand.

15. I pass on the two subsidiary conten-tions. On 25th February, 1975 the Board issued a circular giving a concession in mini-mum charges due to the power cut. The circular recorded that in view of the power cut the Board had decided "to give percentage pro rata concession in minimum monthly billing demand to H.T. consumers .....equal to relevant percentage of energy cuts applicable from time to time." The circular made it clear that the concessions were not to be extended to consumers who defaulted even once in observing the power cut. On 6th April, 1976 the Board issued a circular modifying the circular of 28th February, 1975 and stated *inter alia* that "..... the relief in minimum charges due to power cut should be based on the percentage of either energy cut or demand cut (whichever is higher) as may be applicable from time to time to the relevant class of consumers, with effect from 1-4-1975."

16. On 11th June, 1976 the Board wrote to the company that the concession in minimum charges was not applicable for the period from October 1974 to December 1974 because the company had violated the power cut order and for the periods from January 1975 to April 1975, June 1975 to August 1975 and December 1975 to April 1976 it was under dispute and the matter was referred to the Head Office and field officers for neces-sary clarification. The concession was not made available to the company.

17. It is the case of the company that by reason of clause 5(2)(a) of the Maharashtra Electricity Consumption of Electrical Energy (Restriction) Order, 1974, (the power cut order) as amended in April 1975, no consumer could be said to have committed a violation of the power cut unless the excess consump-tion exceeded one day's quota, and that it had not exceeded the consumption by one day's quota in any of the relevant months. Clause 5(2)(a) as amended reads thus :

> "Industrial consumer:- If a consumer consumes electrical energy in any week/'two weeks'/month, as the case may be in excess of his ceiling per week/per two weeks/per month, then his supply of electrical energy shall be disconnected forthwith and shall remain disconnected for such number of days as are equivalent to the excess consumption." I am at a loss to understand, nor has any explanation been given by Mr. Bhabha, how this clause enables the company to submit that no consumer could be said to have com-mitted a violation of the power cut unless its excess consumption exceeded one day's con-sumption.

18. Pursuant to the circulars of 25th February 1975 and 6th April, 1976 refunds were given by the Board to the company be-tween May 1975 and February 1977 in the aggregate sum of Rs. 7,75,330/-. Between March, 1977 and January, 1978 bills were issued on a different billing

pattern and the company paid them under protest. On 23rd February, 1978 a circular was issued by the Board purporting to clarify the correct inter-pretation of the concessions contained in the two earlier circulars. The clarification was that the billing demand should be the higher of the actual maximum demand registered of 75% of the contract demand. On 18th March 1978 the Board wrote to the company that the earlier bills were under revision in view of revised instructions received and the total amount of Rs. 7,75,330/- would be recover-able from the company in six equal instal-ments effective from February, 1978. On 23rd April, 1978 this petition was filed and a stay was obtained.

19. It is contended in the affidavit in reply, but not seriously pressed by Mr. Andhyarujina, that the circular of 23rd Feb., 1978 sets out the correct interpretation of the two earlier circulars and, since the refund fund in the sum of Rs. 7,75,330/- was given upon an erroneous interpretation of the ear- lier circulars, the Board was entitled to re-cover that sum from the company. The cir-cular of 23rd Feb., 1978 purports to place upon the earlier circulars an interpretation which they cannot possibly bear. In the guise of interpreting the earlier circulars, the Board cannot retrospectively revise the terms thereof. The Board has acted on the earlier circulars and has conferred the benefit there-of on consumers, including the company. The Board's claim for repayment of the sum of Rs. 7,75,330/- is, therefore, not tenable.

No prayer of the petition seems to be apposite in this regard.
20. In the circumstances, it is ordered that the 1st respondent is permanently restrained from recovering from the petitioners in any manner the sum of Rs. 7,75,330/- or any part thereof.

21. Having regard to the fact that the petitioners have succeeded only in respect of the Board's claim to recover the sum of Rs. 7,75,330/-, there shall be no order as to costs.

22. The 1st respondent shall not take any action to recover from the company the amounts staled in the letter dated 18th Mar., 1978 and consequential arrears for a period of 8 weeks from today.
Ordered accordingly.