
(1992) 03 RAJ CK 0012

In the Rajasthan High Court

Case No : Civil Writ Petition No. 5472 of 1991

Banswara Syntex Ltd.

APPELLANT

Vs

Rajasthan State Electricity and Others

RESPONDENT

Date of Decision : 13-03-1992

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Electricity (Supply) Act, 1948 — Section 49, 59, 78A

Citation : (1992) 1 RLW 147 : (1993) 3 WLC 383 : (1992) 1 WLN 317

Hon'ble Judges : K.C. Agarwal, C.J;A.K. Mathur, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

A.K. Mathur, J.—This petition filed by M/s Banswara Syntex Ltd., seeks quashing of the notification dated 11th Sept. 1991 (annexure 1 to the petition) and the demand created vide bills, annexure 2 to the writ petition. It has further sought the relief of mandamus restraining the Rajasthan State Electricity Board (hereinafter referred to as the Board) from recovering final rate of fuel surcharge on the basis of Annexure A-1 to the writ petition. By annexure A-1, the fuel surcharge had been approved by the Board at the rate of 23.68 per unit under the provisions of Cost Variation and Fuel Adjustment Clause" appearing in the "Tarrif for supply of Electricity, 1885".

2. The aforesaid notification dated 11.9.1991 also directed that the bills of all medium and large industrial consumers for the year 1989-90, i.e. for billing month of May 1989 to April 1990, be revised accordingly. The final rate of fuel surcharge for 1989-90 is worked out in accordance with tariffs for supply of electricity, 1985, which had been approved by the Board as given at the bottom of the said notification.

3. The Schedule appended to "Cost Variation and Fuel Adjustment Clause" has been quoted in the writ petition. It lays down that except State Govt. run hospitals and hostels, the bulk supply for mixed load consumers shall be varied

according to the annual rate of fuel surcharge, which shall be worked out as per the following formula:

$$\frac{A1 \times A2 + C1 \times C2 + D1 \times D2}{(A2 \times B2 + C2 \times D2 + E) \times 0.80}$$

Where:

A1 =Rate of fuel surcharge per unit to be worked out for Kota Thermal Power Station (KTPS) in the manner as mentioned hereunder.

B1 = Rate of fuel surcharge per unit worked out for Satpura Thermal Power Station (STPS) as mentioned hereunder.

B2 = Units sent out against Board's share from STPS

C1 = Heavy Water & Fuel surcharge in paise per unit as may be levied by the RAPS authorities due to variation in the rate of Heavy Water and Fuel consumed at the Raj. Atomic Power Station.

C2 = Units purchased by the Board from RAPS

D1 = The difference in the average rate in paise/unit at which the power is purchased from agencies like Singrauli, BTPS and other systems excluding RAPS and the basic rate of 33.72 Paise per unit. For this purpose the average rate shall be computed on the basis of different rates at which the different quantum of energy is purchased from these sources.

D2 = The energy purchased by the Board from Singrauli BTPS and other neighbouring systems excluding RAPS

E = Units received in Rajasthan from Hydel sources.

4. The cost of generating power stations, from where electricity was being obtained or purchased, were different. In respect of Kota Thermal Power Station, the relevant clause, as mentioned at page 15 of the petition, is quoted below:

The variation shall be determined yearly by multiplying the variation in the cost of fuel above or below the basic cost of fuel having basic calorific value : with the total fuel burnt at the KTPS during the year and dividing by the units sent out by the KTPS.

The cost of fuel burnt shall be determined by taking the average cost of fuel at bankers of the power house during each year ending 31st March and shall be as furnished by the Chief Engineer (KTPS).

5. For the purpose of this case, it is not necessary to give the details of cost of fuel burnt in respect of those from where the Board used to receive supply. What is relevant is the last clause of the Schedule, which has bearing, and the same is quoted below:

The variation shall be determined yearly by multiplying the variation in the cost of fuel above or below the basic cost of fuel having basic calorific value : with the total fuel burnt at the KTPS during the year and dividing by the units sent out by the KTPS.

The cost of fuel burnt shall be determined by taking the average cost of fuel at bankers of the power house during each year ending 31st March and shall be as furnished by the Chief Engineer (KTPS).

6. In accordance with the aforesaid Schedule and the various clauses, that annexure A-1 was issued to the petitioner followed by demand notice contained in Annexure A-2. The contention of the petitioner was that it was under obligation to pay the enhanced fuel surcharge but it could not be asked in the grab of liability of the amount falling in the aforesaid categories, something not due from the petitioner. The argument of the petitioner has been that "for arriving at the rise in the prices of the fuel during the relevant year, it is the price at the commencement of the year which is relevant and not the price of the fuel in the year 1985 when the tariff was amended. The fair play required that the Board should have taken into consideration the rise in the prices of the fuel from 1st of April in each year till the end of the relevant year. Fixing of the basic price by the Board was absolutely arbitrary.

7. The writ petition has been contested by the Raj. State Electricity Board on the ground that the fuel surcharged had been claimed in accordance with the terms and conditions settled under the agreement in between the parties. Clause 16 of the agreement has been referred to in the counter affidavit as the basis for the claim. Clause 16(a) and (b) of the agreement reads as under:

16(a). The consumer shall pay to the Board every month charges for electrical energy supplied to the consumer during the preceding month under this agreement in accordance with the provisions and scale of rates set forth in the tariff schedule attached hereto and which shall be deemed to be part of this agreement.

16(b). If the Board by notification makes any alternation in the aforesaid scale of charges, such altered rates shall be treated as if the same were part of this agreement in supersession of the charges set out in the schedule attached here to with effect from the date fixed in the notification and if no date is fixed in the notification then from the date of publication of such notification.

8. According to the Board, the tariff Schedule was a part of the agreement which provided that the consumer would pay in accordance with the provisions and scales of rates set forth in the tariff Schedule, such altered rates, as may be made by the Board from time to time, was final and binding on the petitioner. Section 49 of the Electricity Supply Act empowers the Board to frame uniform tariffs from time to time. The tariff has been changed by the Board in exercise of that power. In the beginning, electricity was mostly generated by Thermal Power Stations situated in several different places. In Rajasthan, under the princely

States, such as Jaipur, Jodhpur, Bikaner, Kota., etc., the fuel surcharge was related only to the cost of coal of which the basic price was fixed at Rs. 50 per M.T. at Power House Bunkers. But, subsequently, the Board, in order to meet the growing need of electricity, started taking electricity from Satpura Thermal Power Station, Madhya Pradesh, Atomic Power Project Rawat Bhata, Kota etc. the Atomic Power Project was owned by Govt. of India and it used Uranium and Heavy Water as fuel.

9. In order to meet the shortage of supply of electricity, the Board started producing electricity from Atomic Power Station by paying fuel surcharge levied by the Atomic Power Project in addition to the rates fixed by that Project for supply of electricity to the Board from time to time. On that account, all the additional sources of supply of electricity became available to the Board. It was pleaded by the Board that electricity was being received at a lower cost in the year 1974 and as a portion of the supply was from Hydel sources, the cost of fuel was zero. Although, the Board asserted that in 10 years from 1964 to 1974, the prices of coal had gone up quite appreciably, but still in the formula, the basic rate of coal was kept that same as Rs. 50 per MX. at the Power House Bunkers. Thereafter, the Board introduced another tariff in 1976 which continued to be in force till another tariff came into force in 1981. In 1981; the Cost Variation and Fuel Adjustment Clause was also provided. In this clause, apart from other components, which were included, a fresh component covering the fuel surcharge for the power purchase from Badarpur Thermal Power Station was also brought in. Since the Board started producing electricity from Badarpur, the same was also included in the formula. 1981 tariff remained in force upto Aug. 1985 but that was changed in 1985. In this year, the tariff provided that apart from the other elements, as contained in previous tariffs, that fuel surcharge for the purchase of electricity from Singrauli and other neighbouring systems were also included.

10. The following assertions made at page 6 of the counter affidavit are relevant and are quoted below:

It is submitted that in order to meet the increasing demand of electricity of Raj. by new industries coming up the Board had been constantly exploring the possibility of setting up new generating stations. Recently four thermal stations have been put in Kota having an aggregate capacity of 880 MW. As is well known, all thermal stations whether situated in Raj. or outside Raj. from where power is purchased by the Board, consume coal and oil as the fuel. The Atomic Power Station owned by the Govt. of India as stated earlier, consume Uranium and Heavy Water as fuel. It is pertinent to submit here that about 70% of the energy made available to the Board for distribution comes from its own generating stations, neighbouring thermal stations and Atomic Power Station. This 70% energy necessarily attracts the incidence of fuel surcharge. It is well known and judicial notice may be taken of the fact which has also been done by the Supreme Court and the cost of all kinds of fuel used in generating electricity

is increasing by leaps and bounds and on this account the fuel surcharge is bound to increase from time to time. It is already stated that the tariff of 1985 has taken into consideration the prices prevailing the year 1983-84 and the same prices have been taken as the basic rate for the different components in the formula for fuel adjustment. The increase in the rate of fuel has not been included in the normal tariff since 1985. The increase in the rate of tariffs is on account of various other factors such as wages of workmen, salary of staff, cost of material and equipment, interest on loan, taxes etc., but not the increase escalation in the price of fuel and its transportation to the Power House Bunkers or the increase in the rate of power purchased from other generating stations or the increase in the fuel surcharge levied by the Atomic Power Station. All these increase are only contained in the fuel surcharge.

Therefore, it was wrong to contend that the provision of tariff every time after 1985 included the element of fuel surcharge also or embodied the rise in the cost of fuel or purchase of electricity or fuel surcharge levied by Atomic Power Project..

11. Shri Purohit, learned Counsel for the petitioner urged that coal surcharge fixed by the Board was arbitrary and as such is hit by Article 14 of the Constitution. His submission was that if the action of the State Govt. is arbitrary and hit by Article 14 of the Constitution, the acts and deeds of the instrumentality of the State would also be liable to be considered as arbitrary and in violation of the Constitution of India.

12. We have already given above the various factors which have to be taken into account in preparing a tariff. Coal surcharge is worked out under the heading "Cost Variation and Fuel Adjustment Clause". The Board has pleaded in the counter affidavit that in the year 1983-84, basic tariff had been fixed by taking into account the various factors necessary to constitute the same. As it was not possible to change the tariff every year, rise of fuel surcharge was added from year to year. In the tariffs for supply of electricity in 1985 and onwards, each constituent has been explained. For working out element A1 A2, B1B2, C1C2 and D1D2, relevant factors are mentioned above. Each one of the item represent different fuel surcharge received by the Board from different sources. According to Sri Purohit, all these factors have been arbitrarily worked out and have no relevance to the facts in existence. Shri H.P. Gupta, learned Counsel appearing for the Board produced before us two charts meant for A1A2 and B1B2. These charts give the various figures which were taken into consideration by the Board in arriving at the figures. On scrutiny, we have found these figures to be relevant for fixing coal surcharge. No irrelevant fact had been considered.

13. Section 49 of the Electricity (Supply) Act, 1948 (hereinafter referred to as the "Act"), as amended in 1966 does not give an unguided and arbitrary power to the Board to fix tariffs as it likes. There are sufficient restrictions in the provision required to be complied by the Board in fixing uniform tariff or different tariff. Such provision does not make any discretion by treating the consumer supplied by the Board differently from consumers supplied by other licences. u/s

78A of the Act, the State Govt. is empowered to give binding policy directions to the State Electricity Board. A combined reading of the statutory provisions would mean that the legislature enjoins that the Board should not show under preference to anyone or any individual consumer. It is undoubted that the surcharge is a super charge added, or a charge over and above the usual or current dues. It is, in substance, an addition to the stipulated rates of tariffs. Enhancement of the rates by way of surcharge is well within the power of the Board to fix or revise the rates tariff under the Act. The charging of surcharge is within the power conferred by the Act.

14. Coupled with the above question that next arises for consideration is as to what is the nature of power of price fixation. It has not been settled by the Supreme Court that the power of price fixation is statutory in nature as held in *M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others*, . In *Commissioner of Income Tax, West Bengal Vs. Gangadhar Banerjee and Co. (Private) Ltd.*, , Supreme Court held as under:

Price fixation is more in the nature of a legislative measure even though it may be based upon objective criteria found in a report or other material. It could not, therefore, give rise to a complaint that a rule of natural justice has not been followed in fixing the price.

15. In *Prag Ice and Oil Mills and Another Vs. Union of India (UOI)*, , Supreme Court held as under:

We think that unless, by the terms of a particular statute, or order, price fixation is made a quasi-judicial function for specified purpose or cases, it is really legislative in character in the type of control order which is now before us because it satisfied the tests of legislation. A legislative measure does not concerned itself with the facts of an individual case. It is meant to lay down a general rule applicable to all persons or objects or transactions of a particular kind or class.

16. There is no power of judicial review in a court entitling it to reverse the same by going into the merits when once the price has been fixed. In paragraph 57 of the decision in *Shri Sitaram (Supra)*, the Supreme Court held as under:

Judicial review is not concerned with matters of economic policy. The court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either.. The court does not supplant the "feel of the expert" by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness. In all such cases, judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land.

17. In *Gupta Sugar Works Vs. State of U.P. and Ors*, Hon''ble Shetty, J. of the

Supreme Court held as under:

... the court does not act like a chartered accountant nor acts like an income tax officer. The court is not concerned with any individual case or any particular problem. The court only examines whether the price determined was with due regard to considerations provided by the statute. And whether extraneous matters have been excluded from determination.

18. Price fixation is not within the province of the Court, Judicial function in respect of such matters is exhausted when it is found to be a rational basis for the conclusions reached by the concerned authority. In *Mississippi Valley Barge Line Co. v. United States of America* 292 US 282, Lord Cardozo stated as under:

The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form.... It is not the province of a Court to absorb this function to itself.. The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.

19. In the instant case, we have been shown the charts for the terms A1A2 and B1B2 and we have already indicated that every item included there is relevant for the purpose of fuel surcharge fixed by the Board. No irrelevant consideration had been taken into account.

20. Sri Mehta, learned Counsel appearing with Sri Purohit urged in respect of item C1C2 and D1D2 that the amount chargeable under these items had already been taken into consideration while arriving at the basic price. Hence, they could not be subsequently and separately taken into account for enhancing the rates. Allegations made with regard to C1C2 and D1D2 have been referred to by the learned Counsel for the petitioner by bringing to our notice paragraphs 9 and 10 of the writ petition. These paragraphs have been replied in paragraphs 9 and 10 of the counter affidavit filed on behalf of the Board. It has been stated therein that High Speed Diesel and Furnace Oil are different oils and of different values. Their rates were not the same. The relevant portion of the reply is quoted below:

... The two oils are different and of different values and their rates are not the same. As submitted, those are the rates prevailing for these commodities at Power House Bunkers in the year 1983-84 and the same are taken as the basic rates and they continue to be the basic rates. Nobody says that these are the basic rates on 1.4.89 and the Board has never said so. In the formula the increase in the rates from the basic cost has been taken care of and it is not practicable or feasible to fix basic cost and fuel surcharge for the preceding year can never be made available.

21. Similarly, with regard to D1D2, it has been averred by the Board that the basic rate of 33.72P per unit had been taken for power purchased from other thermal sources. This rate was the average purchase rate of electricity prevailing in 1983-84. That had been taken into account while arriving at basic cost and

fuel surcharge. It was wrong to say that this figure was taken twice. Consequently, these submissions are incorrect.

22. For what we have said above, the assertion of the petitioner that the price fixation was arbitrary, is wrong. At this juncture, we wish to point out that the power of court under Article 226 of the Constitution is no longer in controversy, which being only to find out that the procedure in arriving at the figure had been followed or not. It is not open to this Court under Article 226 of the Constitution to act as a court of appeal and to judge that the figure had not been correctly added, worked out or arrived at. In this regard, we quote the passage from R.B. Shreeram Durga Prasad and Fatechand Nursing Das Vs. Settlement Commission (It and Wt) and Another,

...In exercise of our power of judicial review of the decision of the Settlement Commission, we are concerned with the legality of procedure followed and not with validity of the order. See the observations of Lord Hailsham in Chief Constable of the North Wales Police v. Evans Judicial review is concerned not with the decision but with the decision making process.

23. We are, therefore, under Article 226 of the Constitution, concerned with the legality of the procedure. As in the instant case, no illegality has been pointed out, we are unable to find any substance in this petition. We are not prepared to uphold the submission of the learned Counsel for the petitioner that the power of the Board was to raise the fuel surcharge and that it could take into consideration many other aspect while revising the same. The submission is not justified. The powers conferred to the Board by the & Coast Variation and Fuel Adjustment Clause" is of wide nature for fixation of tariff for the supply of electricity and it could not be restricted only to fuel adjustment matters. Other considerations relevant for fuel adjustment were not prohibited.

24. The tariffs cannot be totally unrelated to the cost of generation of electricity . There must be a reasonable relationship between both. Hence, increase in generation of electricity is also a relevant factor. Reference be made to Section 59 of the Act which lays down the general principles which the Board must keep in mind and comply with in the conduct of its affaire. It has been amended more than once. As stood at present, it reads as under:

59. General Principles for Board's finance: (1) The Board shall after taking credit for any subvention from the State Government uls.63, carry on its operations under this Act and adjust its tariffs so as to ensure that the total revenue in any year of account shall, after meeting all expenses properly chargeable to revenues, including operating maintenance and management expenses, taxes (if any) one income and profits, depreciation and interest payable on all debentures, bonds and loans leave such surplus as is not less than three percent or such higher percentage, as the State Govt. may by notification in the Official Gazette specify in this behalf of the value of the fixed assets of the Board in service at the beginning of such years. Explanation : For the purposes of this sub-section

value of the fixed assets of the Board in service at the beginning of the year" means the original cost of such fixed assets as reduced by the aggregate of the cumulative depreciation in respect of such assets calculated in accordance with the provisions of this Act and Consumers' contribution for service lines.

25. Section 59 thus obliges the Board to carry on its operation and adjust its tariffs so as to ensure that the total revenue in any year of account yield a surplus of not less than 3% or such higher percentage as the State Govt. may specify in that behalf. The truth of the matter is that State Electricity Boards throughout the country are incurring losses at a substantial rate, which had to be made good from public exchequer in one form or the other. Hence, the statutory obligation to earn minimum surplus of 3% has got to be achieved but unluckily, that has not been one by the Rajasthan State Electricity Board. It is incurring huge losses every year. After all, the Board carries on a business. It should act on business principles. In the instant case the Board has acted well within its powers and realising fuel surcharge does not vitiate either notification dated 1st Sept. 1991 (Annexure 1) or the demand notices (Annexure 2).

26. At the end, learned Counsel for the petitioner relied upon *Rohtas Industries Ltd. and Others Vs. Chairman, Bihar State Electricity Board and Others*, . We have gone through this decision and are unable to appreciate the help which the learned Counsel for the petitioner derives from the same. Rather, it helps the Board. This authority supports the submission of Sri Gupta that the State Govt. could issue directions u/s 78A of the Act.

27. For what has been said above, we find no force in this writ petition and it is dismissed with cost, which is fixed at Rs. 1000 (Rupees One Thousand) only. This writ petition was in respect of 1989-90. The same points are involved in the writ petitions annexed with this judgment, in the earlier years. Learned Counsel for the parties adopted the arguments raised in this writ petition. There is nothing else to add to. Therefore, the cases, given in the list annexed with this judgment, are also dismissed with cost, which is fixed at Rs. 1000 in each case.