

(2015) 07 CAL CK 0117
In the Calcutta High Court
Case No : W.P. No. 17031 (W) of 2013

Besco Limited (Foundry Division) and Others	APPELLANT
Vs	
The West Bengal State Electricity Distribution Company Limited and Others	RESPONDENT

Date of Decision : 21-07-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Contract Act, 1872 — Section 56
Electricity Act, 2003 — Section 61(d)

Citation : AIR 2015 Cal 288

Hon'ble Judges : Aniruddha Bose, J.

Bench : Single Bench

Advocate : Subir Sanyal, Shaunak Ghosh and Rajib Mullick, for the Appellant;
S.K. Panja, S. Ghosh, Pratik Dhar and Ritwik Pattanayak, for the Respondent

Judgement

Aniruddha Bose, J.—The dispute in this writ petition is over plea of the petitioners for reduction of contract demand or load in relation to supply of electricity to their manufacturing unit at Baruipur. The petitioners contend that their request for such reduction was not complied with. The petitioner No. 1 is engaged in the business of manufacture of railway wagon components and other engineering items. The first petitioner had entered into an agreement with the West Bengal State Electricity Distribution Company Limited (the distribution company) on 16 January, 2010 for supply of high voltage supply of electricity, specifying their contract demand to be 5500 KVA for the first year and 6500 KVA for the next four years in respect of their production unit of Baruipur, 24 Parganas (South). Clause 17 of this agreement, a copy of which has been Annexure "P1" to the writ petition, stipulates:

"17(1) In the event of the Consumer(s) desiring to increase his/its/their contract demand during the continuance of the Agreement, the WBSEDCL may require the Consumer(s) to intimate in the writing stating the quantity of the power required for the next 5 year period of operation whereupon the WBSEDCL shall

take steps as per WBERC's Regulation applicable thereof subject to compliance of necessary formalities including those specified herein below by the consumer.

(2) The Consumer(s) shall pay to the WBSEDCL any expense incurred by reason of alteration and/or extension in respect of any Service Line, Switchgear, Meters and other equipment necessitated to meet such altered Contract demand.

(3) The security deposit may be increased to take into account the altered Contract demand.

(4) The request for downward revision of contract demand will be considered as per WBERC's Regulation applicable thereof."

It has been submitted on behalf of the petitioners in this case that their workmen had resorted to an illegal strike with effect from 4 March, 2013 which ultimately led to declaration of suspension of work with effect from 11 March, 2013. Because of this situation, which the petitioners refer to as "Force Majeure" situation, the petitioners allege to have written a letter seeking reduction of contract demand 100 KVA. A copy of this letter dated 12 March, 2013 has been annexure "P4" to the writ petition. This letter stipulates:

"To The Regional Manager 24 Parganas (South), Baruipur, Kolkata - 700 144

Consumer No. C - 11004

Sub: Reduction of contract demand to 100 KVA

Sir,

We would like to inform you that due to gross Industrial unrest, the Management has been forced to declare "Suspension of Work" w.e.f. 10.03.2013 until further Notice. We enclose a copy of Notice dated 10.03.2013 in this respect which is self explanatory.

You are under the circumstances requested to reduce our Contract Demand to 100 KVA for lighting load only till further notice.

Thanking you

Yours faithfully, For BESCO LIMITED (Foundry Division) MIHIR MUKHERJEE
General Manager (Legal & Admn.)

Enclo: as above"

2. Complaint of the petitioners in this proceeding is that this request was not acceded to and the distribution company went on raising bills on the basis of their original contract and demands for payment of charges were raised on the petitioners as per the original contract. In the writ petition, the petitioners have applied for quashing of two bills raised on them by the respondent company dated 7th May, 2013 and 31st May, 2013, copies of which have been made Annexures "P-9" and "P-16" to the writ petition. The bill dated 7th May, 2013

requires payment of Rs. 29,09,457/- which includes demand charge of Rs. 17,47,046/-, whereas payment required to be made as per the bill dated 4th May, 2013 is Rs. 27,77,312/-, that includes demand charge for Rs. 17,31,545/-. The petitioners also seek a declaration to the effect that clause 4.3.6 of the East Bengal Electricity Regulatory Commission (Terms of Conditions of Tariff) Regulations, 2011 is ultra vires the provisions of Article 14 of the Constitution of India and contrary to the provisions of Section 61(d) of the Electricity Act, 2003. As per the said clause, (i.e. 4.3.6), a distribution company under the 2003 Act has the benefit of resorting to "Force Majeure" events for failing to supply electricity under certain conditions, while a consumer is not granted such benefit so far as his part of obligation is concerned, even in "Force Majeure" situations.

3. The receipt of the said letter of 12th March, 2013 has been denied by the distribution company. Alternatively, it has been urged that the said letter in any event was sent to a wrong office, as for high tension consumers, the appropriate office is the superintendent engineer of the distribution company having his office at Bidyut Bhavan, Salt Lake. The said letter, the text of which has been reproduced in the earlier part of this judgment, was sent to the Regional Manager of the company at their Baruipur office. The other submission of the distribution company, so far as the letter dated 12 March, 2013 is concerned, is that the petitioners themselves had abandoned this request by making subsequent communication on 17th April, 2013 requesting reduction of contract demand to 5200 KVA.

4. Clause 4.3.6 of the West Bengal Electricity Regulatory Commission (terms and conditions of tariff) Regulations 2011, provides:

4.3.6 No demand charge shall be payable by any consumer for that period when load of the consumer is interrupted/totally shed/partially restricted because of any fault of the licensee or its system or for non-availability of power with the licensee due to lower availability of power from its own generating station and/or its other suppliers of power or imposition of any restriction by the licensee on drawal of power by consumer. However, such exemption from demand charge shall not be available if the interruption is caused by grid failure or automatic under-frequency relay tripping or any force majeure event not related to licensee or due to disconnection of supply for any fault on the part of the consumer. Accordingly, after taking into consideration regulations 4.3.2, 4.3.3, 4.3.4, and 4.3.5, the demand charge in a billing period for a consumer shall be determined in accordance with the following formula:

Where

DC = Computed Demand Charge applicable to a consumer for billing period

DCA = Applicable rate of demand charge for a consumer.

H = Total hours in the billing period.

Hi = The duration involved for the incidence of interruption/total shed/partial

restriction in supplying power to the consumer which is not to be considered as per this regulation.

MD = Maximum Demand considered for levying demand charge as per regulation 4.3.5.

RDi = Restricted load imposed on the consumer corresponding to the incidence or actual drawal during the period of such restriction whichever is higher."

5. So far as the petitioner's request for reduction of load is concerned, the distribution company has denied receiving the communication of 12th March, 2013. But there was a subsequent communication of the petitioners dated 22nd April, 2013 addressed to the Superintendent Engineer of the licensee, to which the letter dated 12th March, 2013 was enclosed. This was preceded by another letter of the petitioners, dated 17th April, 2013, in which the petitioner sought reduction of their contract demand from 6500 KVA to 5200 KVA. On 25th April, 2013, the licensee wrote to the petitioners requesting them to clarify the quantum of reduced load as requested by them, in view of their proposal dated 17th April, 2013 (for reduction of contract demand from 6500 KVA to 5200 KVA) and their subsequent proposal of 22nd April, 2013. In a later communication of 30th April, 2013 the petitioners reiterated their demand for reduction of contract demand to 5500 KVA with effect from 17th December, 2011 and to 100 KVA from 10th March, 2013. From the second week of the month of May, 2013 normalcy in the manufacturing unit of the petitioners was restored and the petitioners wanted continuance of supply of electricity having contract demand of 5200 KVA. On 17th May, 2013 another communication was addressed to the distribution company, requesting waiver of minimum demand charge. Such plea has not been accepted by the respondents and a demand notice was raised by the distribution company on 20th May, 2013 seeking clearance of the bill raised for the month of April, 2013 for a sum of Rs. 19,31,634/-. This was responded to by the petitioners seeking clearance of the dues through installments. In further communication of the distribution company, it was indicated that reference to request of downward revision of contract demand in the year 2011 could not be linked to the request made on 16th May, 2013, but such request was being accepted with effect from the billing cycle of 2013. Subsequently, bills were raised from the billing cycle May, 2013 (Annexure "P16"), treating the contract demand to be 6500 KVA. For the earlier cycle, April, 2013, bill was also raised on the basis of contract demand of 6500 KVA (Annexure "P9"), also on the basis of the same contract demand. The billing date for the said bill was 7th May, 2013, based on meter reading on 5th April, 2013.

6. Contention of the writ petitioners is that because of suspension of work, it became impossible for the petitioners to undertake their part of the contract in the form of consumption of electricity as asked for and for that reason the petitioners wanted to resile from their part of performance of the contract invoking the plea of supervening impossibility, as contained in Section 56 of the Contract Act, 1872. The impugned bills have also been assailed by the petitioners

invoking the principles of Force Majeure. On this point, the petitioners have questioned the legality of Clause 4.3.6 of the West Bengal Electricity Regulatory Commission (Terms of Conditions of Tariff) Regulations, 2011, which I have referred to earlier in this judgment. According to the petitioners the benefit of relying upon Force Majeure situation ought to have been extended to the consumers as well and the aforesaid clause is assailed as being arbitrary and discriminatory.

7. In my opinion, the petitioners cannot rely on Section 56 of the Contract Act to be exempted from undertaking their part of obligation under the applicable contract. In the case of *Narmada Bachao Andolan Vs. State of Madhya Pradesh and Another*, it has been held that law cannot compel a person to do something the performance of which is impossible. But the impossibility of a situation has to be judged in the perspective of the provisions of a contract, in a situation where relationship of the parties is guided by a contract. In the instant case, the relationship of the parties is guided by contracts having statutory basis. To invoke the doctrine of supervening impossibility as contained in section 56 of the Contract Act, the intervening event ought to be of such dimension which would render the entire contract impossible to perform. So far as the petitioners' case is concerned, the petitioners seek to address certain period during which, according to them, for reasons beyond their control, they could not consume the contractual demand. The contract, in its entirety, cannot be said to have become impossible to perform in this case. The petitioners' plea on this count cannot be sustained. Respondents had relied on the decision of the Supreme Court in the case of *Mary Vs. State of Kerala and Others*, and argued that in respect of statutory contracts where a party undertakes absolute responsibility cannot escape liability relying on the doctrine of frustration. But in this case, I do not consider it necessary to refer to the ratio of this judgment as on facts I have found that the said doctrine is not applicable, as the petitioners have not made out a case that because of the events referred to above, it has become impossible on their part to perform their obligations as per the contract.

8. The petitioners have also sought to found their case on the principles of Force Majeure. The contract itself does not contain any Force Majeure clause, which clause in a contract intends to save the performing party from the consequence of something over which he has no control. In the Regulation, however, the licensee has been given the benefit of such a clause. Referring to the provisions of Section 61(d) of the Electricity Act, 2003, it has been contended on behalf of the petitioners that such a clause is discriminatory against the consumers, being contrary to their interest, and hence ought to be struck down. Section 61(d) of the 2003 Act requires the Regulatory Commission to be guided by "safeguarding consumers" interest and at the same time, recovery of cost of electricity in a reasonable manner" while specifying the terms and conditions for the determination of tariff. In this regard, the petitioners have cited similar Regulations of certain other States in support of their contention, in which, according to the petitioners, the consumers enjoy the benefit of resorting to

Force Majeure situation. What the petitioners really seek is extension of the benefit of Force Majeure clause in the 2011 Regulations.

9. This plea has been resisted by the respondents relying on several authorities. *Namit Sharma Vs. Union of India (UOI)*, has been cited to contend that there is presumption of constitutionality in favour of a statutory instrument. It has been urged, referring to *Greater Bombay Co-op. Bank Ltd. Vs. United Yarn Tex. Pvt. Ltd. and Others*, that the impugned clause is validly enacted, by a competent body and no fundamental right of the petitioners have been breached. It is also contention of the respondents that the question of vires of a statutory instrument cannot be determined taking into account an isolated case of hardship referring to the cases of *Avishek Goenka Vs. Union of India (UOI)* and *Another, and Government of Andhra Pradesh and Others Vs. Smt. P. Laxmi Devi*, .

10. The petitioners' case before me is that there has been violation of the provisions of Article 14 of the Constitution in that in Clause 4.3.6 of the said Regulations, as the right to rely on Force Majeure clause has been preserved only for the licensee or the distribution company. This provision involves an element of discrimination, between two sets or classes of persons, the distribution company and the consumers. These are two distinct classes, and under Article 14 of the Constitution, reasonable classification based on intelligible criteria is permissible. It is the petitioners' case that in terms of Section 61(d) of the 2003 Act, the Regulations are required to be made for the benefit of the consumers. The said provision, (i.e. Section 61(d) of the Act) however, also contemplates one of the objects of the Regulation to be recovery of cost of electricity in a reasonable manner.

11. As I have already observed, the petitioners in reality are seeking extension of the advantage of the Force Majeure clause in favour of the consumers, so that they can get the benefit of revision of contract demand charge for the period their normal operations had to be suspended. While testing the constitutionality of a Regulation assailed on the ground of being discriminatory. Court has the power to strike down such a clause if satisfied that classification sought to be made is irrational. But an extraordinary case would have to be made out if the petitioners seek implant of the same benefit in their favour in the statutory instrument. But law Courts traditionally has been reluctant to supply a *causis omissus* in a statute. Moreover, to undertake this exercise, I would have to look at the impact of the statute upon the consumers as a class, and this question cannot be determined while dealing with a one-off situation like that of the petitioners since the petitioners are not seeking striking off of Force Majeure clause as provided in the said clause but want it to be extended in their case. In my opinion, sufficient materials have not been provided pertaining to operation of the said Regulations which would justify extension of this principle in favour of the petitioners. I do not want to test in this judgment as to whether retention of such a clause in favour of the distribution company is valid or not, as that would be an academic exercise and the petitioners have not come with such a prayer.

In any event, in exercise of jurisdiction under Article 226 of the Constitution of India, I do not think I can decide as to whether a particular event qualifies to be a Force Majeure permitting one party to a contract to resile from performance of their part of the contract.

12. The petitioners' case on fact is that on 12th March, 2013 they had written to the Regional Manager of the distribution company at 24-Parganas, South seeking reduction of contract demand to 100 KVA. I have already discussed the applicable Regulation in relation to reduction of contract demand under the earlier part of this judgment. The main case of the respondents, for which an affidavit has been filed affirmed by one Amitava Sil on 23rd December, 2014 is that such letter of 12th March, 2013 was never served upon the Regional office nor upon the Head Office of the company. It is also contention of the distribution company that for industrial consumer like the petitioner No. 1, the Head Office has always been the proper office and all past correspondences of the petitioners have been with the Head Office only.

13. Further submission of the distribution company is that the petitioners in a subsequent letter dated 13th May, 2013 had written to the Chief Engineer Administration at the Head Office of the company for reduction of load from 6500 KVA to 5200 KVA and the subsequent letter would reflect the actual intention of the company as the same was issued even after the notice of suspension of work was in operation. The petitioners on the other hand has submitted that though the initial letter was addressed to their Regional office, in a subsequent letter dated 22nd April, 2013 addressed to the Superintendent Engineer of the distribution company, the letter dated 12th March, 2013 was annexed which would cover their request for reduction or downward revision of load to 100 KVA.

14. In the notification bearing No. 46/WBERC dated 31st May, 2010, (Annexure "P17"), Clause 12.3 deals with the question of reduction of load and this clause stipulates:---

"Reduction of load--On receiving the application for reduction of load such reduction will be effected within the next billing cycle from the date of receipt of the request from the consumer and the effect of it on tariff will be from the next billing cycle;

Provided that if the gap between the date of completion of all the formalities and starting date of next billing cycle is less than 7 working days, then such conversion will be effected from the second next billing cycle.

Provided further that reduction of load or downward revision of contract demand shall be effected on the basis of application not before one year from the date of effect of service connection.

Provided also that any subsequent request for reduction of load/downward revision of contract demand shall be made effective not before one year from the date of previous reduction."

15. This issue raises a factual dispute. In the event the letter had only been sent to the Regional Manager, 24-Parganas (South), I would have straightway rejected the claim of the petitioners on the basis of submissions made on the part of the respondents that such letter was not received by them, and that the Regional office was not the proper office. But this communication has been followed with a copy of the letter being sent to the Superintendent, Engineer of the distribution company on 22nd April, 2013. There is also an element of inconsistency in the stand of the petitioners as in a subsequent letter, they had sought reduction of load to 5200 KVA. The petitioners sought to clarify such inconsistency contending that their plea for reduction of load to 5200 KVA was in pursuance of earlier request whereas reduction of load to 100 KVA was requested on account of suspension of work. In what context these letters were issued require adjudication of factual situation, which would possibly require witness action. The Writ Court is not the appropriate forum for determining that question. Moreover, if it is found that the letter seeking reduction of load was never sent on 12th March, 2013, but the distribution company had notice of the same on 22nd or 23rd April, 2013, even then the billing cycle from which such reduction would have had taken effect would vary.

16. The writ petition was entertained and heard extensively as questions of vires of certain Regulations had been raised. But that question, in the context of this case, has been answered against the petitioners. For reasons already discussed, the question which remain left to be determined require adjudication on disputed factual issues. It has been submitted on behalf of the respondents that the Grievance Redressal Officers are the proper authorities for adjudication of disputes of this nature. In my opinion, the petitioners ought to approach such officers with their plea, by making substantive representation. While dealing with the dispute, once raised, by the petitioners the concerned Grievance Redressal Officer shall consider, inter alia, as to whether any request was made by the petitioners for reduction of contract demand to 100 KVA, and if such a request was made, the date of making of such request. The date of receiving the request would have the impact on the billing cycle involved.

17. In Course of hearing, learned counsel for the distribution company has submitted that the petitioners had not been paying their dues in full in respect of bills raised after January, 2014, even after the petitioners had started normal operations and the total dues of the petitioners at this stage is little over Rs. 2 crore. It shall be open to the distribution company to take appropriate steps if there are any legitimate dues for that period. So far as the period in dispute is concerned, the petitioners should make payment within a period of four weeks a sum of Rs. 60,00,000/- without prejudice to their rights and contentions. If the amount of Rs. 60,00,000/- is paid within the time prescribed that is four weeks from date, then supply of the petitioners shall not be disconnected on the allegation of any pending dues pertaining to the period between billing cycles of April and December, 2013 until the Grievance Redressal Officer takes final decision in the matter. The petitioners shall raise their dispute before the

Grievance Redressal Officer within a period of four weeks. For the billing period subsequent to restoration of the petitioners normal operations on withdrawal of suspension of work notice, I am not making any comment in this writ petition as any dispute pertaining to that period is not in lis in this proceeding.

18. There are three applications taken out by the petitioners subsequent to filing of the writ petition, being CAN 26 of 2014, CAN 298 of 2014 and CAN 12111 of 2014. The petitioners have sought invalidation of a notice of 21st December, 2013 which is in the nature of disconnection notice for the bill period November, 2013 which includes outstanding up to October, 2013 in CAN 298 of 2014. A similar notice dated 3rd/4th December, 2014 is under challenge in the subsequent application, registered as CAN 12111 of 2014. Further notice of the same nature dated 9th January, 2014 pertaining to November, 2013 has also been challenged. All these notices also relate to "outstanding dues" and it has been submitted on behalf of the petitioners that such outstanding dues relate to consumption period which is the subject of dispute in this writ petition. If such dues are included in the amount demanded by these notices, it shall be open to the distribution company to issue fresh notices deducting therefrom the amount pertaining to bills for the disputed period. As I have already held that the said dispute ought to be adjudicated by the Grievance Redressal Officer, it shall be open to the distribution company to take any step as may be permissible in law in that regard for the dues arising beyond the period of dispute, but not without giving fifteen days" notice in advance. As regards the dues pertaining to the period in dispute, the Grievance Redressal Officer shall adjudicate such dispute.

19. The writ petition and three connected applications stand disposed of in the above terms.

20. There shall however no order as to costs. Urgent certified copy of this order be given to the parties expeditiously, if applied for.