

(1979) 09 OHC CK 0005

In the Orissa High Court

Case No : Civil Revision No"s. 296, 410 and 411 of 1976 and 89 of 1977 and
Miscellaneous Appeal No. 189 of 1977

Chairman, The Orissa State Electricity Board and Another

APPELLANT

Vs

Jayashree Chemicals Ltd. and Others

RESPONDENT

Date of Decision : 19-09-1979

Acts Referred:

Arbitration Act, 1940 — Section 16(1), 20, 30, 31

Citation : AIR 1980 Ori 20 : (1980) 49 CLT 487

Hon'ble Judges : K.B. Panda, J

Bench : Single Bench

Advocate : S. Chatterjee, S. Mohanty and S.D. Das, in C.R. Nos. 296, 410 and 411 of 1976 and 89 of 1977, R. Mohanty, R.C. Patnaik, R. Sharma and A.K. Tripathy, in M.A. No 189 of 1977, for the Appellant; R. Mohanty, R. Sharma, A.K. Tripathy and A.S. Naidu, in C.R. Nos. 296, 410 and 411 of 1976 and 89 of 1977, S. Chatterjee, S. Mohanty and S.D. Das, in M.A. No. 189 of 1977, for the Respondent

Judgement

K.B. Panda, J.—Civil Revision No. 296 of 1976, M. A. No. 189 of 1976, C. R. Nos. 410 and 411 of 1976 and C. R. No. 89 of 1977 were heard analogously and they arise in the following background,

2. Orissa State Electricity . Board (hereinafter referred to as the "Board") is a statutory body created on 1st March, 1961. It is the sole monopolist for supply of electric power to the consumers in the State of Orissa. In pursuance of its development scheme, Government of Orissa invited interested parties for establishing industries in the State on concessional rate of electricity and other advantages. Consequently, one Bangoor Brothers Limited, promoters of Jayashree Chemicals Limited (hereinafter referred to as the "Company"), applied to the State for starting a caustic soda and chlorine factory at Ganjam in the manufacturing process of which electricity is a raw material and so is a must Government of Orissa in the Industries Department on 16th Nov., 1962, wrote to the Company (Ext. 1) in the following terms-

"Sub; Establishment of Caustic Soda plant in Orissa -- fixation of power rate.
Gentlemen,

I am directed to invite a reference to your letter No. 88/PR/ND/1010/61 dated 27-1-62 on the above subject and say that the State Government have decided that power for the proposed caustic soda plant can be supplied to you from Machkund grid at the rate of 3 np. per unit with the additional charge of 15% as duty. The Works Department are being informed. You are advised to contact them for necessary power agreements. Receipt of the letter may please be acknowledged.

Yours faithfully, Deputy Secretary to Govt.

Memo No. I Bhubaneswar, the Feb. 1962.

Copy forwarded to the Works Department for information and necessary action. Approval of the Chief Minister has been obtained in fixing up this rate."

Again the Commercial Engineer on behalf of the Orissa State Electricity Board on 7-11-63 wrote to the Company Ext, 2 in the following terms:--

"In continuation of the letters quoted above and further to the discussions you had with the Chairman, Orissa State Electricity Board on 7-1-63, I am directed to state that the Board is willing to supply electricity to your Caustic Soda Plant near Ganjam up to a maximum demand of 10,000 K.Ws. at the rate of 3 np. per K. Whr. subject to your accepting the usual terms and conditions of supply by the Board and subject further to the agreement being signed by you." As it appears, on land being acquired by the State and given to the Company, it went ahead with the establishment of its plant and factory, for production of soda and chlorine etc. On 28-7-65, the Commercial Engineer, Orissa State Electricity Board wrote to the Company (Ext 3) thus:--

"Sub: Power supply to your Caustic Soda Chlorine Plant at Ganjam.

Ref : Your Letter No. Nil dated 27th July, 1965.

Sir,

In continuation of this office letter No. XIV-23/63-17023 Com. dated the 7th Nov. 1963, I am directed to state that Board is taking action to supply power up to a maximum demand of 10,000 K.W. for your caustic soda chlorine plant at Ganjam at a rate of 4 paise/unit with a rebate of 1 paise/unit for the initial period of 5 years. This is subject to the execution of necessary agreement with the Electricity Board and accepting the usual terms and conditions of supply as prevalent in the Board."

3. On 29-4-64, the Company had written (Ext. 17) for execution of the formal agreement as envisaged under Exts. 1 and 2. According to the Company, the Board wanted certain terms to be incorporated in the contract which were never agreed upon between the parties. Also according to the Company, since it had proceeded for in establishing its factory investing some crores with "foreign

collaboration and could not afford to retrace its steps, the Board was out to exploit the situation to its advantage. With that attitude the Company alleged that the Board did not lay out the transmission tower and purposely delayed supply of energy as a consequence of which trial runs were delayed for over a year and so, the foreign personnels had to be disbanded.

4. Towards the middle of 1965, all the constructions were completed and the erection of the plant was finalised by the first part of 1966. The Company executed the agreement with the Board (Ext K-1) on 5-7-67 and thereafter intimation was given to the Company for supply of power under Ext. E. On 5-7-57 supply of energy commenced. The Company's case is that it had to sign Ext. K-1 as it had no other alternative since supply of energy had already been delayed by one year even though the Company had spent about 65 thousand by bringing fabricated materials for putting up the transmission tower which was not its job. On 13-7-67 under Ext. 7, the Company represented to the Chief Minister Orissa, that Ext. K-1 was signed under compelling circumstances and, therefore, the rate of tariff should be reconsidered. Government directed that rate at 3 np, per unit has to be charged as decided by the Cabinet Sub-Committee and undertook to pay the Board's deficit but a slab rate was introduced (Ext. 8). The Company went on representing against the terms included in the agreement (Ext. K-1) and ultimately on 7-5-70 a fresh agreement (Ext. K-2) was entered into between the Board and the "Company wherein the electricity charges were modified to some extent in favour of the Company. Yet there were certain clauses in this agreement, according to the Company, which were not in conformity with Exts. 1 and 2 and the Standard Form, which according to it, was "the completed contract". On the other hand, the Board stuck to the written agreement dated 7-5-70 (Ext. K-2) and when the Company did not act according to it, threatened disconnection of power to its factory. The Company thus appealed to the Board to refer the matter to an arbitrator as per Clause 24 of the agreement dated 7-5-70 (Ext. K-2, hereinafter referred to as the "Agreement"). As the Board was averse to it, the Company, as plaintiff, initiated a proceeding u/s 20 of the Arbitration Act in the court of the Subordinate Judge, Berhampur numbered as T. S. No. 36 of 1970. The Board and some of its officers were impleaded as defendants in the suit who opposed the plaintiff's application for reference. The Court considered the objection and by its order dated 22-3-71 directed that the agreement between the parties be filed and the dispute be referred to an arbitrator. The parties did not agree on a common arbitrator and so, the court suggested that Sri B. N. Sahu, a retired Chief Engineer staying at Bhubaneswar, should be appointed as Arbitrator and the various points of dispute as formulated by the parties be referred to him. An objection was taken by the Board that Sri B. N. Sahu was not an electrical engineer and so will not be a fit person to appreciate the controversy between the parties. But it did not find favour with the court. Thereafter, the Arbitrator Sri B. N. Sahu entered on the reference and finally submitted his award on 9-1-74. With the filing of the award, Title Suit No. 3 of 1974 (T. S. 36/70) was registered.

5. The plaintiff-Company supported the award and urged that it should be made a rule of the court while defendant-Board and its officers strongly opposed it. Their stand was that the arbitrator manifestly misconducted himself and went beyond his jurisdiction in considering the validity of the agreement dated 7-5-70 (Ext. K-2) which he finally held to be "invalid" although he had been specifically instructed in the reference to adjudicate matters flowing from the agreement and not the agreement itself.

6. The learned Subordinate Judge held that "the arbitrator has thoroughly misconceived the scope of investigation entrusted to him and further misconceived the various points of dispute referred to him. The arbitrator's finding that the agreement was invalid is a finding which was not warranted of him". Consequently, he held that the award was "wholly invalid and cannot be acted upon". He further held that there was no factual misconduct on the part of the arbitrator and the erroneous finding was because of his misconception of the nature of the investigation entrusted to him", and, therefore, did not find anything wrong in referring back the dispute to the same arbitrator Sri B.N. Sahu. The operative portion of the order of the learned Subordinate Judge is:

"In the result, on the above findings, the award made by Sri B.N. Sahu is set aside as invalid and also vitiated by legal error apparent on the face of the award. The dispute be referred back to the arbitrator with a direction to enter on the reference on the basis of the arbitration agreement dated 7-5-70 and make his award in due time."

7. It is as against this order (in Title Suit No. 3/74) that the plaintiff-Company has filed Misc. Appeal No. 189 of 1976. The Company's grievance is that the learned Subordinate Judge was wrong in not accepting the award and making the same the rule of the Court.

As against that order, the Board has filed C R. No. 296 of 1976. The Board's grievance is that referring back the dispute to the same arbitrator is improper and unjustified in the facts and circumstances of the case. Therefore, the two points that arise for consideration in M. A. No. 189 of 1976 and C. R. No. 296 of 1976 are :--

(i) Is the learned Subordinate Judge correct in rejecting the award and not making the same the rule of the court; and

(ii) Is the learned Subordinate Judge justified in referring back the dispute between the parties to Sri B.N. Sahu, the same arbitrator?

The only point of dispute in C. K. No. 410 of 76/411 of 76 and C. R. No. 89 of 1977 is at what rate the Company should pay to the Board for its supply of power during the period the matter remains pending with the arbitrator,

8. Point No. I :--

To appreciate the scope of reference to the arbitrator, the order of the then

Subordinate Judge who ordered the reference may be quoted:

"In this case the defendants urged that the matter may be decided by the court when it is alleged by the plaintiff that the several clauses of the agreement are not binding on the plaintiff. On the other hand, the learned advocate for the petitioner-plaintiff urged that the main question for decision is the rate at which energy consumed will be adopted at the trial period, break-down, strike and lockout and cyclonic period. These matters, as contended by the learned advocate for the defendants, can be decided by the arbitrator alone provided the existence of a valid contract is admitted. In the result, I hold that the matter cannot be referred to the arbitrator to whether any clauses of the agreement entered into between the parties are valid and binding and can be only referred to the arbitrator for deciding about the other disputes that has been raised by the parties and will be raised before the arbitrator"

Again in a subsequent order dated 15-5-71, he held:

"..... I have already held that the .Arbitrator cannot be asked to decide as to the validity of the agreement entered into between the parties but certainly the disputes arising out of the arbitration clause can be referred to him....."

This Court while disposing of C. R. Nos. 190 and 191 of 1971 on 18-7-72 observed:--

"Admittedly the arbitration clause is in broad terms and all disputes arising out of the contract are referable....."

(a) The plaintiff-Company submitted 18 points and the defendant-Board 4 points for reference. It would be clear from the order of reference quoted above that the arbitrator had not been called upon to adjudicate over the validity or invalidity of the agreement (Ex. K-2), not even on any of the clauses therein, but only on the rate of tariff during trial period and in certain contingencies, viz., "break-downs, strikes, lock-out etc,

(b) A mere look at the award reveals that the learned arbitrator has gone much beyond the scope of the reference and has characterised the agreement (Ext. K-2) as "invalid". The learned Arbitrator was conscious of the fact that he had been prohibited from considering anything pertaining to the agreement as he has quoted, in the award the order of the learned "Subordinate Judge mentioned earlier. Yet, firstly because of the contention on behalf of the Company that the arbitrator could go into the validity of the agreement and secondly because he thought that this court in civil revisions Nos. 190 and 191 of 1971 had enlarged the scope of reference, held that he could decide on the validity or otherwise of the agreement. This finding is utterly untenable. Neither the party could argue like that nor, in fact, the High Court's order had or could enlarge the scope of reference-The pith of the Company's case was that the two letters quoted above i.e. Exts. 1 and 2 dated 16-2-62 and 17-11-63 coupled with the Standard Form then existing constituted the contract between parties and the written

agreements dated 5-7-67 and 7-5-70 Exts. K-1 and K-2 respectively, obtained under compelling circumstances, included certain clauses never agreed upon by them and so should be deleted. The case of the Board was that it could not under the Electric Supply Act, supply energy on letters and there must be a written agreement and so, the final agreement of 5-7-70 which superseded the earlier agreement dated 5-6-67 alleged by the Company to be more onerous, is the contract. The learned arbitrator seems to have accepted the case of the Company in toto when he finally says:--

"After going through the authorities I am of the view that the letter quoted above fills the requirement of a valid contract."

(c) Thereafter while discussing dispute No. 1, he weighs the letters relied on by the Company against the agreement relied on by the Board and holds that the letters contained "all the four ingredients of a valid agreement, i.e., competent parties, 2, free consent, 3, consideration which must also be lawful and 4. Lawful subject-matter" and so, strikes down the various clauses, such as, 3, 9, 13 and 16 of the agreement (Ext. K-2). In this context he says thus:--

"Surcharge in place of interest and the schedule also cannot go together with the specific contract as per the Exhibit 2.50, these also must go. The first party submitted that Exhibit 2 along with the printed form has to be construed in a harmonious way and accepted as a completed contract. I entirely agree with this contention. Taking the legal principle enunciated in the decisions I hold that the termination notice, phasing surcharge in place of interest, period of 15 years inserted in several clauses and insertion other than the rate and quantity in clause 13, and also Clause 16 and condition 9 are inoperative..... The second party wanted me to accept 1970 agreement as the only valid agreement. I have looked to the principle of law placed by the second party. It is not applicable to the facts of the case....."

(d) Further, while discussing this aspect, he wrongly holds that the onus of proving that the agreement (Ext. K-2) had not been obtained by undue influence was on the defendant and so, in that context says:--

"No suggestion that the agreement of 1967 and 1970 are not extracted from the first party. The second party is to prove that there was no undue influence." Over dispute No. 2, he further holds thus:--

"..... All the circumstances go to show that the two agreements (1967 and 1970) are not executed voluntarily but the first party was compelled to do so. The exhibit 2 along with the printed form without alterations is the valid agreements between the parties. In view of this finding, termination notice in Clause 1, insertions in Clause 3 regarding phasing schedule appended to general conditions, insertion in Clause 13 other than the rate and quantity, levying penalty, for drawal below 10,000 K.Whs., clauses providing alterations of the rate in Exhibit 2, insertion of period of 15 years in several clauses of the agreement, are inoperative and invalid....."

(e) Again while disposing of some other points of reference he holds that certain amount from the security deposit has to be refunded; surcharge, if collected, has to be refunded; penalty if levied and collected has to be refunded; quantity of electric supply below 10,000 K. Whs. cannot be reduced etc. and finally concludes thus:--

"In view of the above findings, my award is Ext. 2 i.e. the letter No. XIV-23/63-17023/Com. dated 7th Nov., 1963 with the printed form and usual conditions appended thereto of the second party is the valid agreement between the parties. Agreements dated 20-5-67 and 7-5-70 are not valid."

(f) The question is if this award is in conformity with the reference and, therefore, should be sustained. The Board asserts that it is not only contrary to the reference but in violation of the prohibition contained in it. According to the Board the learned arbitrator assumed jurisdiction on the presumption that he could go into the validity of the agreement (Ext. K-2). So, he threw to the winds the agreement that embodies the arbitration clause, on the basis of which the entire proceeding including his appointment and the award rests. Again going beyond his jurisdiction he characterised the agreements between the parties as invalid and the several clauses therein inoperative which he had been specifically debarred from doing. On the other hand, it was contended by Mr. Mohanty the learned counsel on "behalf of the Company that the operative portion of the award "agreement dated 20-5-67 and 7-5-70 are not valid" is just an inadvertent error committed by the arbitrator for it is not in consonance with the earlier discussion. Suffice it to say that this contention raised on behalf of the Company at this stage, namely, that "it is an inadvertent error" was not before the learned Subordinate Judge, On the other hand, it appears that, as had been argued before the learned arbitrator that he was competent to go into the validity of the agreements so was it argued before the learned Subordinate Judge also. The learned court below has very elaborately dealt with this aspect and rightly came to the conclusion that the "learned arbitrator has travelled beyond his jurisdiction and completely ignored the agreement which is the basis of his appointment. Therefore, the award is wholly invalid and also vitiated by legal errors apparent on the face of the award". In the petition u/s 20 of the Arbitration Act (T. S. No. 36/70) although the defendant-Company alleged that "the defendants forced the plaintiff to sign an agreement (para 10) and other clauses of the agreement are thrust upon the plaintiff (para 13)" yet finally it was this agreement (Ext. K-2) that was sought to be produced. Evidently (it was) on the basis of Clause 24 of that Ext. K-2 that the dispute between the parties was referred to the Arbitrator. While making reference the learned Subordinate Judge had made it clear that the scope of the reference was the dispute that flowed from the agreement Ext. K-2 and not the agreement itself. Yet, as would be apparent from the various extracts of the award mentioned earlier, the learned Arbitrator has acted contrary to the direction, transgressed the limit and dubbed the agreement Ext. K-2, the basis of his appointment and the consequent Award, as "not valid". It is not an "inadvertent error" or "accidental slip" but a deliberate and conscious finding--

consistent in itself, though unfortunately violative of the direction in the reference.

Ext. K-2 is the axis round which the differences and the dispute between the contracting parties revolve. To strike down the agreement Ext. K-2 is therefore, to knock down the very basis. That is not the case of any party; not even of the plaintiff-Company. The dispute is within the agreement Ext. K-2, not without it. In other words the dispute flows from the agreement and not de hors the agreement (Ext K-2). Agreeing with the learned lower court I would therefore hold that the Award vitiated as it is of error apparent on the face of it must be struck down.

Point No. 2:--

9. The next question is whether the learned Subordinate Judge was justified in referring back the disputes to the same arbitrator. The Board alleged that the arbitrator has, all through evinced a hostile attitude to it; has miscondacted the proceeding and miscondacted himself in pleading before the Board on behalf of Messrs. Konark Industries -- of which he was a promoter. Certain correspondence of the arbitrator to the Board in favour of Messrs. Konark Rubber Industries, pleading for reduction of electricity charges levied by the Board against that Company have been produced in court and marked as Exts. 1, 2 and 3. The learned lower court has held:--

"These letters it can be seen that Sri Sahu was only pleading with the electricity Board to consider reduction in supply of energy to this unit and to execute a fresh agreement which would be in conformity with the power actually required by them. There is no matter of principle involved much less was the arbitrator trying to build any case in favour of his Company or against the Board and all that was being asked for was only remission in the electricity charges. From these letters it cannot be inferred that Sri Sahu was taking hostile instances against the Board or that he was attempting to raise a dispute with the Board on any point....."

Hence he held that

"It would be wholly unjust to attribute to the arbitrator any bias or want of bona fides from this circumstance alone."

Further according to him

"The erroneous findings made by him in his award are on account of misconception of the nature of investigation entrusted to him. That would not be sufficient to brand him as guilty of personal or judicial misconduct. There is thus no justification for appointing another arbitrator."

For the reasons given below on this point,, I am not in one with the learned Subordinate Judge. It is not a petition u/s 11 of the Arbitration Act for removal of an arbitrator because of his factual misconduct in course of the proceeding. The

proceeding is over and the award) submitted by the arbitrator has been attacked by the Board on several grounds including factual misconduct and finally jettisoned. The question, therefore, is what would be the legitimate and reasonable reaction and/or impression in the mind of the Board when pushed to the same arbitrator? Can the Board have the feeling that the matter has been referred back to an arbitrator who has an open mind? I am of the view that it would be forcing the Board to accept an arbitrator who has already formed a strong opinion against it when the document on which it relies has been held to be invalid and obtained under compulsion. There might not be any factual misconduct but the course of events in the case cannot but leave a lurking suspicion in the mind of the Board that its case would not receive a fair deal at his hands. The Board initially had objected to the appointment of Sri B. N. Sahu and had taken the matter to the High Court though failed ultimately. In course of the proceedings, as the order dated 2-10-74 shows, the Board wanted of the arbitrator to state a case to the Court. But that was neither accepted nor rejected in the sense that the learned arbitrator disposed it of saying that at the time of giving the award, if necessary, he shall state a case and give the award according to the opinion of the court. But it was never done. The line of reasoning adopted and the strong words used in the award while accepting the Company's case and discarding the Board's case, is a feature to lend support to the apprehension of the Board against, the arbitrator.

(a) While dealing with the grounds for setting aside the award, it is said in Halsbury's Laws of England p. 662 Vol. II, Fourth Edition:--

"It is difficult to give an exhaustive definition of what may amount to misconduct on the part of an arbitrator or umpire."

Even then while categorising some of the items, it is stated that misconduct occurs, for example:--

"If by his award the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement of reference, for example where the arbitrator construed the lease (wrongly) instead of determining the rental and the value of the buildings to be maintained on the land; or where the award contains unauthorised directions to the parties; or where the arbitrator has power to direct what shall be done but his directions affect the interests of third person; or where he decided as to be parties' rights, not under the contract upon which the arbitration had proceeded but under another contract, (6) if the arbitrator or umpire refuses to state a special case himself or allow an opportunity of applying to the court for an order directing the statement of a special case."

Here, as I have stated earlier, the Board initially objected to the appointment of Sri B.N. Sahu. In course of the proceeding when the Board wanted a case to be referred to the court the arbitrator deferred it and finally did not do it. In the preceding he went beyond the terms of reference. He went round the prohibition

from going into the validity or otherwise of the agreements. He has strongly expressed himself while accepting all the contentions on behalf of the plaintiff-Company and discarding the case of the Board. Finally he has held that the agreements are invalid inasmuch as they have been obtained by compulsion and the real agreements are the letters Exts. 1 and 2 along with the Standard Form as existed then. Is there any change in the situation, any subsequent development for which that arbitrator will take a different view? The entire dispute would be referred back to him and he would reconsider the same evidence, the same document, the same letters and the agreements in the background of a fresh reference only. The old saying goes that one convinced against his will is of the same opinion still. Even otherwise if he comes to a different conclusion than what he has done earlier, the Company can legitimately argue that here is an arbitrator who, like a weather cock changes his opinion for no rhyme or reason and if he adheres to his previous conclusion, the Board has reason to complain that it was a foregone conclusion.

Thus in either case the position of the same Arbitrator is vulnerable indeed. Besides, the law is that not only justice should be done but it must manifestly appear to be so done. In the circumstances, would it be proper to hold that there should not be any apprehension in the mind of the Board that it will not get justice at the hands of the same arbitrator? I think, such an apprehension is very natural and legitimate. However, as I have already held, the learned arbitrator has, though not factually but legally misconducted the proceeding in a manner which disentitles him to arbitrate upon the matter for the second time, Law does not warrant it, equity does not approve of it and good conscience does not support it and so the matter cannot be referred back to Sri B.N. Sahu.

In this connection it was contended by Mr. Mohanty, the learned counsel for the Company, that when it is a remittance u/s 16(1)(c), it must be to the same arbitrator. I do not think this, contention to be correct. It is not a remittance u/s 16(1)(c). The entire award is vitiated and has no legal existence. It is only when an award is sustained, either in full or in part, that the question of remittance arises. The learned Subordinate Judge also has not viewed it and rightly in that light, If he had taken the award to be incorrect in some respect and so would have remitted it back u/s 16 of the Act, he would have provided a fixed time within which the modified award would have been submitted. Anyway, that is not at all the case here and I do like to dwell much, on it. The second point, therefore, is decided in favour of the Board and against the Company and that the learned Subordinate Judge's order that it should be referred back to the same arbitrator is set aside. Point No. 3:--

10. The next point is what should the Company pay towards tariff during the period the dispute lay with the arbitrator. The Board makes a grievance that because of the various orders and dilatory tactics adopted by the Company, an autonomous body like the Board is going to lose to the tune of five crores particularly when the amount is unsecured. The demand of the Board on the

Company by 20-4-79 is to the tune of Rupees 4,69,27,398-75 and because of the "stay orders" the Board is unable to realise the same. The Board drew my attention to an order of the Supreme Court passed on 19-4-79 in a similar case wherein their Lordships have observed against an order of this Court in Civil Appeals Nos. 1231 and 1232 of 1979 thus:--

"We are of the view that the High Court was not right in allowing the respondents to pay for the electrical energy consumed by them at the contract rates, without insisting on furnishing of security for payment of the differences between the contract rates and the revised rates.....

As against this, the contention of the Company is that it is regularly paying the admitted tariff of 3 np. per unit and is not in arrears. The energy charges demanded for the entire period is Rupees 3,15,44,806.49 and out of that, it has paid Rs. 3,03,41,274.96- Thus, in fact, so far as the energy charges are concerned, the difference is hardly 12 lakhs. Again in some O.J.Cs. the Central excise duty of 14 lakhs and odd, extra dues on current dues to the tune of roughly 70 lakhs of rupees and excise duty on delayed payment surcharge amounting roughly to 40 lakhs of rupees have been stayed. The Board revised its tariff in the meanwhile twice. On 3-3-1975 the rates have been revised to 8.35 p. per unit and again on 21-4-1979 to Re. 0.14 p. per unit. Evidently, this revised rate has been adopted in calculating the arrears by 2-8-1979 at Rupees 5,33,44,355.65 p. This amount includes surcharge and other dues for delayed payment, Central excise duty etc. So, in the light of the decision of the Supreme Court, I would order that the Company, so far as the arrears on the head of energy charges is concerned (calculated on the basis of the difference between the rates paid and the revised rate of the Board), the Company should furnish security or Bank guarantee, to the satisfaction of the trial Court within a period of two months from today. No order is passed on the demand over Central excise duty or excise duty on current dues or on delayed payment charges which have been stayed by the orders of the High Court in different original jurisdiction cases. It is open to the Board to take up the matter before the Bench where these original jurisdiction cases are pending to pass appropriate orders. The Company should pay electricity charges from 21st April, 1979 according to the revised rates of the Board and if the Board finally fails in establishing that it is entitled to the electric charges at that enhanced rate, then the Company will be entitled to get refund of the amount of excess paid by it.

11. In the result, I would hold that the Sub-Judge's order in striking down the entire award as invalid is correct, but his order for referring back the dispute to the same Arbitrator is not proper and hence that part of the order is set aside. In consequence, M. A. No. 189 of 1976 is dismissed in toto and C. R. No. 296 of 1976 is allowed. The Civil Revision Nos. 410 and 411 of 1976 and 89 of 1977 are disposed of in terms of my finding in the previous paragraphs. This disposes of all the appeals and revisions, namely. M. A. No. 189/76, C R. No. 296/ 76, C. R. Nos. 410, 411 of 1976, and C. R. No. 89/77.

In the circumstances, parties to bear their own costs.

12. Before parting with these cases, I may add that while holding that the matter should be referred back to another Arbitrator, regard being had to the nature of the dispute, there is nothing in it that would need the skill of an electrical engineer to decide it. The controversy can fittingly be decided by one having a legal background. The learned Arbitrator has, at one stage, observed, "Further it requires lot of time to study the reference law books submitted and as such I feel another extension is absolutely necessary". Mr. Mohanty, the learned counsel of the Company has also stated in his note, "It is humbly submitted that a mere look at disputes and particularly dispute Nos. 1, 3, 4, 6, 10, 16 and 17 and dispute No. 4 raised by the defendants are basically and essentially questions of law," Consequently I may suggest that, unless the parties agree on some particular arbitrator, the dispute should be referred to the Ex-Chief Justice Sri G. K. Misra- If he is not available then to ex-Justice Sri B. K. Patra.