

(1997) 07 DEL CK 0040

In the Delhi High Court

Case No : Civil Writ Petition No's. 4516, 4580, 4581, 4582, 4602, 4663, 4792, 4804, 4808, 4861, 4909, 4944 and 4956 of 1995 and 194, 218, 493, 581, 587 and 634 of 1996

G.D. Ferro Alloys (P) Ltd.

APPELLANT

Vs

Delhi Electric Supply Undertaking

RESPONDENT

Date of Decision : 25-07-1997

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1997) 4 AD 985 : AIR 1998 Delhi 17 : (1997) 68 DLT 212 : (1997) 42 DRJ 747 : (1998) 2 ILR Delhi 615

Hon'ble Judges : D.K. Jain, J

Bench : Single Bench

Advocate : Vinay Bhasin, H.L. Raina, Rakesh Tikku, R.K. Chadha, Mukul Dhawan, Sunil Malhotra, Harish Malhotra, Pramod Saigal, D.R. Thandani, M.R. Chawla, Jayant Nath and B.C. Pandey, for the Appellant;

Judgement

D.K. Jain, J.

(1) The issue involved in this bunch of writ petitions under Article 226 of the Constitution of India, which we propose to dispose of by this common judgment, is identical. The petitioners have assailed the office order dated 20th October, 1995, issued by the Chief Engineer (COML) on behalf of Delhi Electric Supply Undertaking (for short the DESU), which announces the approval by the special officer, exercising powers of Delhi Electric Supply Committee (for short the DESC), the levy and recovery of fuel adjustment charges (hereinafter referred to as FAC) for different periods commencing from 1st October, 1993. For the sake of ready reference the impugned office order is reproduced hereunder :-

"DELHI Electric Supply Undertaking No.COI/5/Com.26/35/95-96/24 Dated 20.10.95 Office Order Subject : Recovery of Fac from various consumers from the period 1.10.93 to 1995-96.

SPECIAL Officer exercising the powers of DESC/MCD vide decision No. 4874/GW/

Corp, dated 11.10.95 has approved levy and recovery of fuel adjustment charges in supersession of earlier decision in this regard from Large Industrial Power (LIP) and Mixed load (H.T.) (ML:H.T.) consumers in suitable installments fixed by Desu for the period from 1.10.93 to 1.4.95 and for the period 1995-96 from all categories of consumers except domestic and agricultural consumers at the following rates :

A) Period from 1.10.93 to 31.3.94 @4.19 Ps/Unit.

B) For the year 1994-95 @ 33.25 Ps/Unit.

C) For the year 1995-96 @ 31.85 Ps/Unit.

sd/- (H.R.BHATIA) Chief Engineer (COML)"

(2) As is evident from the office order, for the period from 1st October, 1993 to 1st April, 1994 the Fag at the prescribed rates are to be levied and recovered only from large industrial power (for short LIP) and high tension mixed load (MLHT) consumers and for the period 1995-96 from all categories of consumers except domestic and agricultural consumers.

(3) Although Mcd has been imp leaded as one of the respondents in most of the petitions, the main contesting respondent is the Desu, imp leaded through its General Manager.

(4) For the purpose of charging, the consumers have been divided in different categories/classes and different tariffs have been provided for each category. These categories are : i) Domestic, ii) Non-domestic, iii) Small Industrial Power (SIP), iv) Large Industrial Power (LIP) and v) agricultural. The consumers having sanctioned load of 100 Kw and above fall in the category of large industrial power. In these cases we are concerned with Lip consumers as each one of them has sanctioned load of more than 100 KW. For levy of charges for the supply of electricity two systems of tariff are followed. One is the flat rate system and the other is known as two part system. Under the former, a flat specified rate is charged from all consumers on the units of energy consumed while the latter system is meant for big consumers of electricity i.e., industrial power and it comprises of two charges namely i) fixed charges called demand charges and ii) variable charges called energy charges for the actual amount of energy consumed. The demand charges are calculated at a fixed rate per month per Kva or part thereof of the committed load and although energy charges are also calculated at a particular rate fixed per unit but these are subject to adjustment in accordance with the formula laid down in the tariff itself.

(5) This adjustment is more commonly known as Fac, with which, as noticed above, we are concerned in the present petitions.

(6) To appreciate the controversy, it will be appropriate to refer to the tariff applicable to Lip consumers. The relevant clause `c' of the tariff for the year 1993-94 reads as follows :-

"LARGEINDUSTRIAL Power (L.I.P.)

A)Availability :

AVAILABILITY as primary power to Large Industrial consumers having connected load above 100 Kw including lighting load.

B)Character of service :

A.C.50 cycles, 3 phase, 11 KV.

C)Tariff

DEMAND charges :

RS.60.00 per month per Kva or part thereof of the highest of the following :-

I)Connected load.

II)Load as per test report/contract demand.

III)Reading of the Maximum Demand Indicator as indicated during the month.

Plus

ENERGY charges :

200paise per unit for all consumption. Subject to minimum payment as laid down in item (d) below and adjustment Clause (xix) above under General Conditions of Application.

D).....

ADJUSTMENT Clause (xix) reads as follows :-

The tariff for the Large Industrial Power and non-domestic Mixed load (HT) consumers and Railway Traction will be subject to adjustment as under :-

a) The energy charges specified in this schedule are based on the average fuel and purchase cost of 107 paise per KWH.

b) The actual cost of fuel used during any period shall be the amount in rupees of the cost of all types of fuel burnt in Undertaking's generating plants (including gas turbines) in that period;

C)The actual cost of energy purchased shall be the amount paid in rupees for import of energy for that period.;

D)The fuel and purchase cost of energy per Kwh sold shall be the quotient computed on dividing the sum of (b) and (c) by the Kwh sold during that period.

E)The increase or decrease in fuel and purchase cost of power Kwh sold shall be the difference of (d) and (a) above and accordingly shall be added or subtracted to the energy charges:

FINAL adjustment on account of variation in energy charges will be made as soon as possible after the close of the period of account, but adjustment as may be provisionally fixed by the Desu Management from time to time will be incorporated as a part of the monthly bill and shall be payable by the consumer. Such provisional rates as and when finalised shall have retrospective effect from the beginning of that financial year."

(7) For the purpose of making adjustment in energy charges, according to the afore noted general conditions, the energy charges are based on the average fuel and purchase cost of 107 paise per Kwh which is liable to variation. As per Clause (d) the cost of energy per Kwh sold is the quotient computed on dividing the sum of the actual cost of the fuel used and actual cost of energy purchased by the Kwh sold during that period. As per Clause (e) the increase or decrease in the cost per Kwh sold is the difference between the quotient computed under Clause 'd' and the basic average fuel and purchase cost of 107 paise per KWH. These conditions stipulate that final adjustment on account of the variation in energy charges is to be made as soon as possible after the close of the period of account. It authorises Desu management to make adjustment as may be provisionally fixed by them from time to time, which is to be incorporated as a part of the monthly bill and is payable by the consumer and further provides that the provisional rates, as and when finalised, take retrospective effect from the beginning of that financial year. Acting under these conditions the Desu has fixed the Fac for different periods and made the office order, impugned in the present petitions.

(8) Being alive to the view taken in various decisions of this Court, upholding the power of Desu to increase the rates of energy charges from time to time depending on variation in Fac, except the client of Mr. Thadani, the petitioners have not seriously questioned the right of the Desu to make adjustments for Fac prospectively i.e., for the period commencing from 20th October, 1995. Their main grievance is the revision and enforcement of revised energy charges with retrospective effect from 1st October, 1993. The case set up by the petitioners is that recovery of energy charges on account of revision in Fac for the period from 1st October, 1993 to 20th October, 1995 is illegal because : i) Section 293 of the Delhi Municipal Corporation Act, 1957, which is the charging section, does not permit levy of any charge for the supply of power with retrospective effect, ii) The Desu has been revising energy charges periodically in the subsequent tariffs indicating that exact figures for variation in fuel charges for the preceding period of account were available at the end of each year with the Desu and Therefore, if there was any difference between the provisional and final rate on account of escalation in fuel cost, the rates would have been revised at the end of the year and the Desu having not done so is now estopped from effecting any revision in rates after a lapse of almost two years; iii) the petitioners having made payments of the regular bills raised on them in accordance with the revised tariff on the understanding that the bills had been raised on the basis of final rates, raising of additional demands at this stage amounts to creating a new obligation/

liability which stood discharged and ; iv) the petitioners having priced and sold their product on the basis of the announced tariff cannot now recover the additional cost of the electricity consumed, a major raw material component for their product from their customers and would thus, suffer losses running into lacs of rupees which might result in civil death for them. The other grievance of the petitioners is with regard to the factual aspect of actual working of FAC. Although the petitioners have feigned ignorance about the actual components which have gone into the working out of final rate they have alleged that one of the extraneous factors which have been taken into consideration is the transmission and distribution losses, which they assert, cannot be charged and recovered only from Lip consumers, because the same have already been taken into account while fixing the tariff. The contention is that an irrelevant factor having been taken into consideration, the entire exercise for revision of Fac is arbitrary. In the alternative, it is pleaded that the impugned enhancement of Fac is wholly arbitrary and discriminatory for the simple reason that while working out the Fac, the respondents have taken into consideration the entire transmission and distribution losses, which the Desu had to incur while providing and supplying electricity not only to the petitioners but also to several other classes of consumers. Relying on certain adverse observations in Vasant Committee's report on large scale theft of power in Desu (submitted on 5th April, 1995) it is alleged that the petitioners cannot be saddled with losses to the extent of 23%, which Desu has to incur on account of its inefficiency and negligence in checking large scale theft of electricity, taking place during transmission and distribution of electricity.

(9) In the counter affidavit filed on behalf of Desu it is asserted that enhancement in energy charges on account of variation in Fac w.e.f. 1st October, 1993 cannot be said to be retrospective because it is implicit in the tariff and the general conditions of application itself that adjustment on account of variation in Fac can be and is to be made only after the close of the period of account which will have retrospective effect from the beginning of the financial year and, Therefore, cause of action on that account would arise only on the expiry of the relevant current year. Besides, the counter affidavit also points out that a similar contention, raised in various petitions filed u/s 20 of the Arbitration Act, 1940 has been rejected by this Court. As regards the plea that the variation in Fac at a later stage amounts to taking away existing rights or creating new obligations, it is urged that the language of the relevant provisions of the tariff was sufficient notice to the petitioners that energy charges realised in the bills were provisional till the accounts were taken at the end of the relevant year. In answer to the allegation that the petitioners were being burdened with the cost of power stolen, it is clarified that the cost of power has been calculated by taking into account the transmission and distribution losses at 20% only, which is the national average loss on that account, and the balance transmission and distribution loss is borne by the DESU. In support of the said stand a statement giving calculation of transmission and distribution losses over and above 20% as

borne by Desu, for the year 1993-94 has been filed by the respondents.

(10) We have heard S/S. Harish Malhotra, Vinay Bhasin, D.R. Thadani and Ashish Kumar, Advocates on behalf of the petitioners and Sh. Jayant Nath, Advocate on behalf of Desu at considerable length. We have given our anxious consideration to the submissions of Id. counsel for the petitioners but have not been able to persuade ourselves to accept any of the points canvassed by them.

(11) There is no quarrel with the proposition urged on behalf of the petitioners that unless the terms of the Statute expressly or impliedly provide or necessarily require it, retrospective operation should not be given to a statutory provision so as to take away or impair the existing right or create a new obligation or impose a new liability otherwise than as regards the matters of procedure but the prime question for consideration is whether revision of energy charges on account of variation in Fac, Vide DESC/MCD decision dated 20th October, 1995, for the period commencing 1st October, 1993 is tantamount to a retrospective amendment of any of the provisions of the tariff for the relevant periods so as to take away a settled right of the petitioners.

(12) It is not in dispute that Section 283 of the Delhi Municipal Corporation Act, 1957 empowers the Corporation to levy charges for the supply of electricity on such rates as may be fixed from time to time by the corporation in accordance with law. In exercise of this power, charges for supply of electricity called electricity tariff are fixed from time to time for each of the categories, almost yearly and the tariff is, Therefore, statutory. There is no challenge to any of the provisions in the tariff. The tariff, read with the general conditions, extracted above, clearly stipulates that the energy charges are subject to adjustment under Clause (xix) of general conditions of application. Having regard to the clear and unambiguous language of the relevant entry in the tariff, in our view, answer to the question posed has necessarily to be in the negative.

(13) As noticed above, in addition to the fixed demand charges, the tariff provides for payment of energy charges at the prescribed rate, which evidently is subject to some minimum payment as laid down in item (d) of the tariff conditions and adjustment under Clause (xix) of the general conditions of application. The tariff and the conditions, forming integral part of the tariff, make it abundantly clear that energy charges realised are provisional till variation in fuel adjustment charges is determined on taking the final accounts at the end of the relevant year. This is also borne out from the latter part of the general conditions, which authorises the Desu Management to make adjustment provisionally from time to time; incorporate it as part of the monthly bill for payment by the consumer; and on finalisation of the accounts levy and recover the same retrospectively from the beginning of the financial year.

(14) In view of such a stipulation in the statutory tariff, and even otherwise any rates which may be fixed for recovery in the monthly bills raised during the current year would obviously be provisional in nature because they were neither

based on the actual generation cost or the cost of purchase of power from other sources. It will remain so till final accounts are taken by Desu, calculations made and final rates notified. This is clearly borne out from the relevant tariff and it was within the knowledge of the petitioners, who claim to be the major consumers of electricity as basic raw material for their end products. Thus the contention of the petitioners that energy charges levied and collected after the end of the current year should be taken to be the final charges, in our view, is based on misinterpretation and misunderstanding of the provision relating to FAC. The latter part of the general conditions, authorising Desu to make final adjustment on account of variation in energy charges after the close of period of account is an enabling provision for Desu to determine and fix the final rate qua each year and cannot be said to be laying down a mandatory outer limit within which final rates must be fixed, though the provision reflects the legislative intent that the requisite exercise must be made as soon as possible after the close of the period of account. Having come to the conclusion that energy charges paid by the petitioners were provisional and they were fully conscious of the nature of the charges levied as energy charges, it cannot be said that by revising energy charges on account of the variation in Fac, the respondents have brought out some retrospective amendment in the tariff itself. The consequential enhancement in the energy charges on account of the variation in Fac, in our opinion, has no element of retro-activity, as alleged by the petitioners.

(15) In Delhi Cloth and General Mills Co. Ltd., Kota Vs. Rajasthan State Electricity Board and Others, , a similar controversy came up for consideration before the Rajasthan High Court. Dealing with a similar clause pertaining to fuel adjustment, the Court observed that whenever fuel surcharge was mentioned on provisional basis it was made clear in the relevant tariffs that it would be subject to adjustment till final figures were worked out by the Board after the end of each year on the basis of formula devised for working out the annual rate of surcharge. The Court held that liability to pay fuel surcharge arose under the fuel adjustment clause contained in the tariffs and the issue related to the working out of the final rates and there was hardly any question of the Board being estopped from levying fuel surcharge retrospectively.

(16) Having held so, the argument that enhancement in rates amounts to creating a new obligation/liability which otherwise stood discharged is equally unsustainable. As noticed earlier, the liability to pay energy charges, as adjusted, arises under the statutory tariff and the adjustment relates to the working out of the final rates of fuel charges. The formula for adjustment given in the general conditions, envisages the adjustment of energy charges on the basis of increase or decrease in fuel cost and increase or decrease in the cost of fuel consumed and the cost of energy purchased, which, factual information of course, would become available only after the electricity is sold to the consumers i.e., much after the end of the relevant year. Therefore, liability to pay the final energy charges remains till final accounts are taken and final rate announced even after the payment of bills raised against the petitioners and, Therefore, there is no

question of the petitioners having been made to change their position in any manner on account of revision of energy charges by the Desu after the end of the relevant year. We do not find that Desu had ever made a representation that the energy charges, levied were final, rather as noticed above, the relevant entry in the tariff is to the contrary. In the absence of any representation to that effect, there is no question of petitioners altering their position to their detriment. In this view, of the matter, the argument that the petitioners would suffer huge losses on account of under pricing of their final products by taking into account the cost of energy as per the bills raised is equally meritless. As observed by the Supreme Court in *Nazeria Motor Service etc. Vs. State of Andhra Pradesh and Another*, , such enhancements/liabilities do not constitute impediment to the trade so as to attract Article 19(1)(g) of the Constitution; at the most it would result in diminution of profits.

(17) Coming to the main argument of learned counsel for the petitioners that Lip and non-domestic Mixed Load (MT) consumers cannot be burdened with the transmission and distribution losses which have been incurred by Desu while producing or supplying the electricity to different classes of consumers in Delhi and, Therefore, the formula adopted by the Desu, for determining the fuel adjustment charges is arbitrary and malafide, we find that the issue raised is no longer rest integra. While dealing with a similar controversy pertaining to the tariff for the year 1985-86, having almost identical provision for adjustment of tariff for Lip consumers and Railway traction, a Division Bench of this Court in *D.C.M Ltd. Vs. M.C.D.* Air 1989 Del 30 , applying the ratio of judgment of the Supreme Court in *Rohtas Industries Ltd. and Others Vs. Chairman, Bihar State Electricity Board and Others*, held as follows :-

"UNDER the Tariff the energy charges are variable depending upon the actual cost of fuel used plus the actual cost of energy purchased and the quotient computed on dividing the sum of two by Kwh sold during the period. The increase or decrease in cost of per Kwh sold is the difference. The formula for working out fuel adjustment charges forms part of the Tariff as approved by the respondents from time to time. This Tariff is approved by the respondents in exercise of their statutory powers vested in them u/s 283 of the Act. The challenge to the virus of Section 283 was given up. There is no policy or direction indicated by the Legislature in Section 283 that the Corporation is to fix uniform rates to be paid by all classes of consumers. The discretion to fix different rates from different classes of consumers has not been touched. The petitioners and other Lip consumers pay the transmission and distribution losses indirectly on the units of electricity consumed by them. In working out the fuel and purchase cost, the total number of units sold to consumers are taken into consideration. It is only the net sale which has been taken into consideration for working out the cost of electricity per unit. Once the figure has been worked out, it is charged on power units basis from the petitioners and other Lip consumers on the basis of electricity consumed. The petitioners do not pay transmission and distribution losses for electricity consumed by other consumers and what is charged from

them is the price of electricity sold worked on a specified formula."

(18) The decision in DCM's case concludes this controversy against the petitioners and we are in respectful agreement with the view expressed therein.

(19) We may now examine the factual position with regard to the actual working of the FAC" because based on Vasant Committee's report the allegation of the petitioners is that Desu has arbitrarily recovered its entire loss suffered by it on account of transmission and distribution losses from the petitioners by reducing the units available for sale and in the process escalating the cost of power purchased. Mr. Jayant Nath, Id. counsel for Desu, has placed before us a statement containing an illustrative example as to how Desu has borne the cost of energy lost in transmission and distribution (for short T&D) exceeding 20% norm, (national average loss being 20.3% in 1994) as also the statement showing the actual working of the Fac for the year 1993-94. For the sake of brevity the statements are not being reproduced herein. We shall only make a brief reference to them. As per the first statement the actual energy lost in T&D was 3260.102 Mu (Total energy available from own generation (2108.407 MU) and purchased (10,753.237 MU) minus energy sold (8644.830 MU) = (7493.135 MU), and in this manner T&D loss is reflected at 30.32% but the statement shows that excess of over and above 20% of units lost (1886.818 MU) has been borne by Desu giving the net figure of 7258.012 Mu (total units purchased 8644.830 - 1386.818 MU) as the power purchased. The second statement reflects that although the total cost of power purchased (8644.830 MU) is 99920.37 lacs but what has been shown to be recoverable from the consumers is the cost of only 7258.012 Mu, indicating that the entire loss incurred by Desu on account of T&D losses has not been passed on to the L.I.P. consumers. Therefore, so far as the challenge to the costing pattern is concerned, we do not find any reason to disbelieve the facts and figures furnished by the respondents. Determination of Fac appear to be based on objective criteria and cannot be said to be arbitrary or unreasonable. Having satisfied ourselves on this aspect, it is neither necessary nor within our province to, examine the price structure in minute details and to determine what would be the reasonable FAC. No other cogent material, except some observations in Vasant Committee's report, which is per the figures furnished are also not applicable here, has been brought on record to hold Desu having acted arbitrarily, whimsically or capriciously in the matter of revising Fac for the periods in question. As often reiterated by the Supreme Court the mechanics of price fixation is necessarily to be left to the judgment of the executive and unless it is not based on an intelligible criteria or there is patent hostile discrimination, the processual basis of price fixation is to be accepted in the generality of cases as valid. The Court has neither the means nor the expertise to evaluate the factual basis (See : Rohtas Industries Ltd. and Others Vs. Chairman, Bihar State Electricity Board and Others, ; M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, and Kerala State Electricity Board Vs. S.N. Govinda Prabhu and Bros. and Others, . Following Rohtas Engineering's Case (Supra) and Prag Ice and Oil Mills and Another Vs.

Union of India (UOI), , the Supreme Court, in a very recent judgment, delivered on 8 May 1997 and reported as Bihar State Electricity Board and another Vs. M/s. Usha Martin Industries and another, has again expressed the same view.

(20) We are, Therefore, unable to accept the contention that by including T&D losses some extraneous matter has been taken into consideration rendering the entire evaluation of Fac as arbitrary and unreasonable, attracting the power of judicial review. It may not be out of place to mention that the impression given by the petitioners that Desu is always burdening the Lip consumers with unreasonably excessive tariff also stands belied by the figures in Vasant Committee's report, relied upon the petitioners. According to the report, the upward revision of tariff in October, 1993 effected an average increase of 51.4% for domestic consumers, 60% for commercial consumers, 69.39% for small scale industry and 25.32% for large industrial power.

(21) In view of the judgments of the Supreme Court in Kerala State Electricity Board Vs. S.N. Govinda Prabhu and Bros. and Others, and M/s. Hindustan Zinc Ltd. etc. Vs. Andhra Pradesh State Electricity Board and others, , inter alia, holding that u/s 49 of the Electricity (Supply) Act, 1949, the State Electricity Boards are empowered to fix different tariffs for different classes of consumers, and apply and make fuel cost adjustments only to high tension consumer, under similar provisions, it is unnecessary to deal with the argument advanced by Mr. Thadani that in the absence of any provision in the Electricity Act regarding levy of provisional charges, no such provision could be incorporated in the tariff. His other argument that Desu should have completed the accounts within six months is already covered in the earlier part of our discussion.

(22) All the petitioners are devoid of any merit and are accordingly dismissed with costs. Rule is discharged.

(23) While granting stay of disconnection of electricity on petitioners making payment of 50% amount of fuel adjustment charges in terms of the impugned office order, it was observed that in case petitioners fail, the interest rate in respect of the balance amount would be decided at the time of final decision in the writ petitions. Now in view of the fact that the petitioners have failed, we direct that the petitioners shall pay the balance 50% amount in six equal monthly installments with simple interest 12% p.a. from the dates of the supplementary bills till the date of last payment. The first Installment will be payable on or before 31 August 1997. If, however, the petitioners make full payment of the balance amount in lump sum on or before 31 August 1997 the rate of interest shall stand reduced to 9% p.a.