

(1993) 02 BOM CK 0028

In the Bombay High Court

Case No : Writ Petition No. 3511 of 1986

Gopikrishna S. Kyal

APPELLANT

Vs

Maharashtra State Electricity Board

RESPONDENT

Date of Decision : 11-02-1993

Acts Referred:

Constitution of India, 1950 — Article 1(4), 226
Electricity (Supply) Act, 1948 — Section 49

Citation : (1994) 1 BomCR 328 : (1993) 95 BOMLR 109

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : Praveer Diwan, D.O.S. Malvi and Shabnam Patni, instructed by Eastley Lam and Co, for the Appellant; Atul Rajadhyaksha and Deepa Chavan, instructed by Little and Co., for the Respondent

Judgement

D.R. Dhanuka, J.—This petition involves consideration of two Principal questions formulated a under :

(a) Whether the impugned demand made by the respondent for payment of minimum charges and delayed payment charges from the petitioner for the period 1st January, 1982 to 31st October, 1985 is without authority of law?

(b) Whether the petitioner is entitled to concession in respect of the said demand in view of the fact that the unit of the petitioner was a sick unit at the material time relying on Departmental Circular No. 350 dated 9th July, 1980 read with Departmental Circular No. 327 dated 23rd March, 1979, copies whereof are Exhibit No. 2 and Exhibit No. 1 to the affidavit of Shri Suresh Kashinath Behere dated 8th September, 1992 and the impugned decision of the respondent denying the benefit of such concession to the petitioner is liable to be quashed?

2. The relevant facts having bearing on the subject matter of this petition are as under:

(a) The petitioner carries on business of a mini steel plant in the name and style

of M/s. G.T. Iron & Steel Works as the sole proprietor thereof. The respondent is a body corporate constituted under the Electricity (Supply) Act, 1948 with an object of supplying and distributing electricity to the consumers thereof within the State of Maharashtra. The respondent is liable to be treated as "State" or instrumentality of the State within meaning of Article 12 of Constitution of India. The respondent is a public authority. The respondent is bound to perform its duties and discharge its obligations in accordance with Part III of the Constitution. The petitioner has established a steel rolling mill for manufacture of rounds, flats and angles on plot No. C-14 of the Dombivili Industrial Area at Dombivili in District Thane.

(b) On 13th July, 1973, a written agreement was arrived at between the petitioner and the respondent whereunder respondent agreed to supply and petitioner's sole proprietary concern referred to hereinabove agreed to receive electrical energy upto 480 KVA on the Terms and Conditions set out therein. By Clause 10(a) of the said agreement, it was provided that subject to the provisions of Clause 11 thereof the minimum period of supply under the agreement shall be from 13th July, 1973 to 31st March, 1977 and from year to year basis thereafter determinable by six calendar months' notice on either side expiring at the end of the said two years or and at the end of any such subsequent year. The petitioner has extracted Clause 10(a) of the said agreement in paragraph 3 of the petition. Clause 8 of the said agreement provided for payment of the minimum charges by the petitioners - consumer to the respondent Board as per tariff schedule during subsistence of the agreement whether electricity was consumed by the petitioner or not.

(c) The said unit became a sick industrial unit for the first time in the year 1978-79. A sum of Rs. 1,78,405.76 was due and payable by the petitioner to the respondent on account of arrears of electricity charges as on 12th September, 1979. The factory of the petitioner remained closed for part of the years 1978-79 as a result of the said unit becoming sick.

(d) On 23rd March, 1979, the respondent announced concessions to be provided by the respondent Board to sick industrial units by its Departmental Circular No. 327 dated 23rd March 1979. By the said circular, it was provided that as industrial unit will be deemed to be a sick unit which was closed for 6 months for reasons beyond the control of the unit. By the said circular it was provided that during any billing year or years into which such period of sickness extended, the charges payable of account of monthly minimum guarantee shall be calculated on 20% of the Board's capital investment in giving supply. By the said circular, detailed formula regarding extent of concessions to be available to a sick industrial unit in respect of monthly minimum charges was announced. By the said circular it was also provided that the amount due from the sick unit in respect of arrears of minimum guarantee charges etc., will be calculated after taking into account the concessions prescribed by the said circular and the amount so computed shall be made payable by the consumer by equal monthly

instalments not exceeding 48. The concessions announced by the Board are substantial. The said circular confers a right on the sick unit to avail of concessions in respect of bills for minimum guarantee charges etc. and imposes an obligation on the Board to provide such benefit to all the sick units covered thereunder without, any differentiation or discrimination.

(e) On 12th September, 1979, an agreement was executed between the respondent and the petitioner a copy where of is annexed as Exhibit 1 to the affidavit of Shri M.P. Bhide dated 10th March, 1987. In view of the said unit having become sick and in view of the petitioner being entitled to benefit of concession under said circular dated 23rd March, 1979, the liability of the petitioner to pay a sum of Rs. 1,78,405.76 was reduced to Rs. 1,10,799.36 in order to enable the petitioner to revive the operational activities of the industrial unit in question. By the said agreement dated 12th September, 1979, it was provided that the petitioner shall be liable to pay the said amount of Rs. 1,10,799.36 by monthly instalment of Rs. 3077.76, first of such instalment to be paid on or before 15th of September, 1979. By Clause 3 of the said agreement it was provided that if the petitioner committed any default in payment of any monthly instalment on its due date, the entire amount of unpaid arrears of Rs. 1,78,405.76 will become due and payable forthwith and the petitioner shall pay the amount to the board with interest as specified therein from the date of default until payment. By Clause 4 of the said agreement it was provided that the petitioner consumer shall pay current energy bills regularly, alongwith the monthly instalment fixed.

(f) The petitioner paid the said sum of Rs. 1,10,799.36 to the respondent though not punctually. It is the case of the petitioner on affidavit that the petitioner paid a sum of Rs. 1,51,061.62 to the respondent between 12th September, 1979 and 25th November, 1981 as per receipt copies whereof are annexed as Exhibit B-1 to B-26 to the affidavit of the petitioner dated 2nd February, 1993. It is the case of the petitioner that the said payment of Rs. 1,51,061.62 included the said liability to pay Rs. 1,10,799.36. The respondent never invoked the "default clause". The respondent thus waived invocation of "default clause". The respondent never addressed any letter to the petitioner invoking Clause 3 of the said letter. Ultimately all the amounts payable under the said agreement were paid. A sum of Rs. 83,660.52 was payable by the petitioner to the respondent in respect of current bills for payment of electricity charges for the period ending 31st December, 1981. The petitioner has already paid the said amounts to the respondent though late as indicated in annexure "B" to the petition. It was open to the Board not to invoke the default clause and take a practical liberal view in the matter instead of strict view as to dates stipulated for payment. Thus the alleged unpunctuality, if any, in respect of payment of the said amount of Rs. 1,10,799.36 or of the current energy bills for the period upto December, 1981 appears to me to be of no practical consequence for deciding this petition. The petitioner has already paid all the amounts payable to the Board under the said agreement long time back more particularly set out in the affidavit of petitioner

dated 2nd February, 1993. I accept the said affidavit as correct in view of the annexure to the said affidavit.

(g) Unfortunately the said unit once again became a sick unit, sometime in the middle of the year 1981. On or about 1st September, 1981, the said unit was closed. Sometime in January, 1982 electric supply at the factory of the said unit was disconnected by the respondent. Prior to such disconnection, the respondent had issued notice dated 5th January, 1982 to the petitioner. The said unit remained totally closed during the period commencing from January, 1982 to 31st October, 1985. The petitioner went on making efforts to revive the said unit with help of its Bankers and Director of Industries.

(h) Since the year 1984, the petitioner started making efforts for revival of the said unit and for nursing of the said unit by Central Bank of India. By letter dated 3rd March, 1984, the Deputy Director of Industries informed the Chief Engineer of Maharashtra State Electricity Board that the said unit was declared as a sick unit by Central Bank of India and after making all considerable efforts by the Directorate of Industries the said bank was persuaded to take the said unit under its nursing programme. By the said letter of recommendation, the Deputy Director of industries requested the respondent to waive the minimum electricity charges for the period when the unit was closed and thereby grant concession to the petitioner in terms of Departmental Circular No. 327 dated 23rd March, 1979. The Superintending Engineer followed up the matter by addressing his letter dated 13th March, 1984, to the Chief Engineer. A copy of the said letter is annexed as Exhibit "E" to the petition. It must be mentioned here and now that the aforesaid circular of concession dated 23rd March, 1979 was slightly modified by Departmental Circular No. 352 dated 9th July, 1980. By the said circular dated 9th July, 1980 it was provided that a sick industrial unit may be defined as "a unit in which either there was no production or the production was less than 10% of the normal for a continuous period of not less than 6 months for the seasonal consumers. As far as the petitioner is concerned the unit remained totally closed during the material period for the reasons beyond control of the unit. There is no dispute regarding the said unit being a sick unit. The unit of the petitioner was thus a sick industrial unit within the definition of the expression "Sick Industrial Unit" under circular dated 23rd March, 1979 as well as circular dated 9th July, 1980. By the said circular dated 9th July, 1980, the extent of concession to be available to sick unit remained the same i.e. amount of minimum tariff charges to be reduced to an amount equal to 20% of the capital cost of the service connection during the period of sickness. In view of the efforts made by the petitioner and the recommendation made by the Deputy Director of Industries and the intended nursing programme of the bank, it was decided by the respondent that the power supply at the factory of the said unit be restored. By letter dated 5th March, 1985, the respondent agreed to restore power supply to the said industrial unit of the petitioner at Thane. By the said letter (Exhibit "F" to the petition) it was stipulated that the petitioner must pay initially a sum of Rs. 50,000/- alongwith the prescribed reconnection charges before the power

supply was restored. It was stipulated by the respondents that the petitioner will have also to pay Rs. 5,000/- every month for four months in respect of arrears. The petitioner agreed. The petitioner complied with the prescribed conditions. Power supply was restored. The real problem faced by the petitioner was in respect of waiver of minimum tariff charges and charges for delayed payment for the period 1st January, 1982 to end of October, 1985, the period during which the unit had remained closed. It appears that at one stage the respondent had claimed a sum of Rs. 3,40,124/- from the petitioner in respect of minimum charges and delayed payment charges for the said period as particularised in Exhibit "C" to the petition. No electricity was supplied to the petitioner during the said period. The factory of the petitioner had remained closed during the period 1-1-1982 to 31-10-1985 in view of the unit being genuinely sick for second time as obvious from letter of recommendation addressed by Dy. Director of Industries to the respondent on 3rd March, 1984. The respondent has never disputed the fact that the said unit was a sick unit during the said period. The petitioner was and is pressing the respondent for giving the benefit of concessions in respect of the said claim for minimum guarantee charges and delayed payment charges. The respondent agreed to consider the representation of the petitioner in this behalf. The said letter dated 5th March, 1985 addressed by the respondent to the petitioner inter alia reads as under :

"Your request for exonerating defaults when sick unit concession were given to you earlier and for the second time concession as a sick unit will be processed. However, decision of the board will be binding on you and you should give undertaking to this effect apart from other conditions."

(i) The petitioner has annexed copies of letters addressed by the respondent to the petitioner in respect of the subject matter of waiver of memo charges. It is necessary to make reference to some of these letters. By letter dated 14th October, 1986 (Exhibit "G" to the petition) the respondent informed M/s. G.T. Iron and Steel Works, the unit of the petitioner that the request made by the petitioner "for second time concession" from July, 1981 when the unit of the petitioner again fell sick could not be considered. The fact that for the second time the said unit had fallen sick was never disputed and is even now not disputed on behalf of the respondent. Nothing else was stated in the said letter as and by way of reason for denying benefit of concession circular dated 9th July, 1980 to the petitioner. The claim of Rs. 3,40,124/- was revised to Rs. 4,06,443.61. By the said letter, the respondent offered facility to the petitioner to pay the said amount by instalment at the rate of Rs. 20,000/- per month. By the said letter the respondent refused to waive the said demand for minimum charges or grant benefit of concession to the petitioner merely on the ground that no "second time concession" could be granted to the petitioner. Further correspondence ensued. On 18th December, 1986, the petitioner filed this petition.

3. The first question which arises for consideration of the Court is whether the

impugned demand for minimum charges and delayed payment charges is without authority of law. Prima facie there is no merit in the challenge of the petitioner on this aspect. In its judgments in the case of Bihar State Electricity Board, Patna and Others Vs. Green Rubber Industries and Others, and in the case of General Manager-cum-Chief Engineer, Bihar State Electricity Board and Others Vs. Rajeshwar Singh and Others, , the Apex Court held that mere disconnection of electricity supply did not lead to termination of contract and the liability to pay minimum guarantee charges under the agreement continued to subsist. Prima facie, the said agreement was never terminated and the supply is restored under the same agreement i.e. agreement dated 13th July, 1973, and not under a new agreement. However, I need not pursue the discussion on this question any further in view of the relief which I propose to grant to the petitioner while dealing with the second question.

4. I shall now straight way deal with the second question formulated by me in the opening part of this judgment.

5. By his advocate's letter dated 7th April, 1992, addressed to the Chief Engineer (Commercial) the petitioner claimed waiver of minimum guarantee charges and delayed payment charges for the period 1st January, 1982 to 31st October, 1985. The Chief Engineer dealt with the representation of the petitioner made in this behalf. The Chief Engineer Shri Vithal Hanumant Kalooskar has filed his own affidavit dated 18th January, 1993, stating reasons for rejecting the application of the petitioner for waiver of minimum guarantee charges and delayed payment charges. The Chief Engineer had not passed any specific written order on the representation of the petitioner made by his advocate's letter dated 7th April, 1992 as such. That, however, makes no difference as the Chief Engineer has in terms recorded his reasons for rejecting the claim of the petitioner in letter dated 4th September, 1992 addressed by him to the Superintending Engineer, copy whereof is Exhibit 7 to the said affidavit dated 18th January, 1993. The Court proposes to examine the validity of the reasons recorded in letter Exhibit "7" to the said affidavit. It is not the case of the respondent that the unit of the petitioner is not a sick unit. The said circulars dated 9th July, 1980 read with Circular dated 23rd March, 1979, do not provide for concession in respect of electricity charges for electricity actually consumed. The said circulars merely provides for concession in respect of minimum guarantee charges etc. payable by the petitioner for the period when the unit is a sick unit provided the unit is a "sick unit" within meaning of the said expression as defined in the said circulars. On receipt of the said representation dated 7th April, 1992, the Chief Engineer called for remarks, from the Superintendent Engineer concerned. The Superintending Engineer submitted his report by his letter dated 16th June, 1992, copy whereof is Exhibit 3 to the affidavit of Chief Engineer dated 18th January, 1993. The Superintending Engineer appears to have made out two points in the said letter dated 16th June, 1992 against the petitioner. It was contended that the petitioner had not punctually paid the amounts payable under the agreement dated 12th September, 1979 including

energy bills for the period July, 1981 to December, 1981. It was stated in the said letter that the petitioner had caused delay in respect of payment of 7 instalments out of 36 equal monthly instalments payable under agreement dated 12th September, 1979. By the said letter annexed as Exhibit 7 to the above referred affidavit i.e. being letter dated 4th September, 1992, the Chief Engineer informed the Superintendent Engineer to inform this Court as under :

"..... that the board has already considered their request and not agreed for grant of concession for the second time."

The Representation of the petitioner was never placed by Officers concerned before the Board in view of powers delegated by the Board to the Chief Engineer (Commercial) under the said circulars.

6. The respondent also relied on copy of the affidavit filled on behalf of the respondent in this Court, in Appeal No. 1431 of 1990, in Notice of Motion No. 2096 of 1990, in Suit No. 2236 of 1990, for purpose of indicating the reasons for not waiving the minimum demand charges.

7. It was held by the Hon"ble Supreme Court in paras 10 and 11 of its judgment in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, that "An executive agency must be rigorously held to the standards by which it professes its action to be judged and that the said principle was applicable also to the "grant of largess" also. The State cannot refuse to grant concession to a sick unit if it is entitled to such concession under a Circular published by the State or instrumentality of State in view of statutory obligation of the State not to discriminate between citizen and citizen. The same principle is applicable to all instrumentalities of the State. It is not disputed that the unit of the petitioner became sick unit once again in the middle of the year 1981 for no fault of the petitioner and it continued to be so till about October, 1985 by reason of circumstances beyond its control. Two contentions are urged by the learned Counsel on behalf of the board, in an attempt to justify the action of the board in denying benefit of circular dated 9th July, 1980 to the petitioner. It is contended that the petitioner had committed breach of agreement dated 12th September, 1979 by not paying the reduced amount punctually and in time. It is contended in the affidavits filed on behalf of the board at this stage that as a matter of fact the board ought to have invoked default clauses and claimed difference between the figure of Rs. 1,78,405.76 minus Rs. 1,10,799.36 plus interest from the petitioner, while restoring the power supply but the respondent did not do so inadvertantly. No such reason is to be found in Letter Exhibit "7" to the affidavit of the Chief Engineer dated 18th January, 1993 setting out reasons for rejection of application of the petitioner for benefit in terms of the said circular. The fact remains that all the concerned dues were paid by the petitioner though not punctually as stated in the affidavits filed on behalf of the petitioner and not controverted on behalf of respondents. The default clause contained in agreement dated 12th September, 1979, was never invoked by the respondent. Not a single letter is brought on record of this proceeding to show that the Board

had complained of alleged breach of agreement dated 12-9-1979 at any time by reason of some of the instalments having been paid by petitioner late. The default clause contained in Clause No. 3 of the agreement dated 12th September, 1979 was restricted in its applicability to the payment of Rs. 1,10,799.36 only. It is not possible to accept the submission of the learned Counsel for the respondent that the said sum of Rs. 3,65,042.69 was mistakenly calculated by the respondent as the total amount of arrears due and payable by the petitioner at the time of restoration of power supply and the amount of arrears ought to have been computed on the footing of invocation of default clause with interest. The respondent was justified in being liberal to a sick unit by not invoking the default clause. I have no doubt in my mind that the above referred plea now raised is an after thought. I do not appreciate the observations made in last paragraph of letter Exhibit "7" annexed to the affidavit of the Chief Engineer dated 18th January, 1993 to the effect that the Field Officers must discourage granting of concessions to the sick industries. Sick industries are being assisted by a welfare State and its instrumentalities in public interest and it is not for the Chief Engineer of the Board or any other officer to state that the sick industries must be discouraged from availing of concession publicly announced by the State or instrumentalities of the State like the respondent. Even the nationalised Banks grant concessions to sick industrial units. The Officers of the Board are expected to be considerate to sick units keeping the objective of granting assistance and concession to Sick Industrial Units in the interest of Society. If the sick units are revived, workmen get jobs and the Society benefits.

8. The next question which arises for consideration of the Court as to whether there is anything in the circular dated 9th July, 1980, to show that no second time concession can be available to a unit at all the terms of the said circular. The question to be asked is as to whether the said circular prohibits the Board from granting concession for the second time expressly or by necessary implication. The above referred circulars must be interpreted according to their plain language. The said circulars do not provide expressly or by necessary implication that benefit of concessions announced can be available to the Sick units only once. The interpretation placed on the said circulars on the part of the officers of the board does violence to the language of the circulars. One cannot add words in the circular so as to restrict its applicability artificially. At the time when the decision was taken by the Board to restore the power supply by letter dated 5-3-1985, the Board had represented to the petitioner that the request of the petitioner for grant the "second time concession" as a sick unit "will be processed". If the said circulars prohibited the grant of second time concession to a sick unit, there was nothing to process and the Chief Engineer would not have given the assurance to the petitioner that the petitioner's request for second time concession shall be processed as set out in letter dated 5th March, 1985 referred to hereinabove. For quite sometime during the course of correspondence, a plea was taken on behalf of the board that it was in the discretion of the board as to whether the second time concession would be given

or not to the petitioner. Now it is being contended that the circular does not contemplate giving of concession to a sick unit which becomes sick for the second time. It is not possible to accept this submission as the submission is not supported by the language used in the said circular. The interpretation placed on the circular by and on behalf of the respondent is also opposed to the object of scheme of concession. Generally speaking, the power vested in an authority coupled with duty can always be exercised from time to time depending upon the exigency of the situation. The power is not exhausted merely because it is exercised once. The petitioner is availing of concession under circular dated 9-7-1980, for the first time. The under-lined object of these circulars is to assist sick units and help the sick units to revive their operation. I am not prepared to construe the beneficial circulars under consideration by reading artificial limitation therein contrary to their plain language.

9. At an early stage of the hearing, I had visualised a theoretical possibility of the matter being required to be remanded to the board for computation of amount of concession which will have to be granted to the petitioner in case it was held by the Court that the petitioner was entitled to benefit of concession under the circular dated 9th July, 1980. By my order dated 6th January, 1993, I had directed the board to calculate the figures in respect of the amount which would be payable by the petitioner to respondent in case it was held by the Court that the petitioner was entitled to avail of concessions announced by circular dated 9th July, 1980, referred to hereinabove and file the necessary statement of figures with the Court without prejudice to its contention to the effect that the petitioner was not entitled to avail of concessions under the said circular dated 9-7-1980. The respondent has been good enough to file the necessary statement of computations in this Court. According to the respondent, the petitioner shall be liable to pay a sum of Rs. 23,467.23 if it is held by the Court that the petitioner is entitled to benefit of concessions under the said circular dated 9th July, 1980. Without prejudice to all their other contentions, the respondent has computed the relevant figures as under :---

(a) Amount of bills for minimum guarantee charges, delayed payment charges, meter rent and interest for the period 1st January, 1982 to October, 1985. Rs.4,77,539.52

(b) Total amount of concession under the said circular if the petitioner is held entitled thereto. Rs. 4,54,072.29

(c) Balance of amount payable by the petitioner. Rs. 23,467.23

10. I accept the relevant computation of figures by the respondent as correct.

11. It was held in the recent judgment of our High Court in the case of Changunabai Chanoo Palkar Vs. Khatau Makanji Mills Ltd. and others, . as under:

"What the tribunal may in its discretion do, the High Court too, under Article 226, can, if facts compell, do. Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel

Tubes Mazdoor Sabha and Others, followed".

In my opinion, no useful purpose shall be served by remaining the matter to the Board for further consideration.

12. In the result I pass the following Orders :---

Rule is made absolute to the extent set out hereinafter;

(a) The impugned decision of the respondent rejecting the application of the petitioner for concession as a sick unit in terms of circular dated 9th July, 1980 read with circular dated 23rd March, 1979, contained in letter Exhibit "7" to the affidavit of Chief Engineer dated 18th January, 1993 or elsewhere is quashed and set aside.

(b) The impugned demands in respect of tariff minimum charges for the period January, 1982 to October, 1985, delayed payment charges for the said period, Meter rent and interest in respect thereof are also quashed and set aside except to the extent of Rs. 23,467.23p. only.

(c) It is hereby declared that the petitioner is entitled to avail of concession in terms of Board circular dated 9th July, 1980; bearing No. 352, a copy whereof is annexed as Exhibit II to the affidavit of Suresh Kashinath Behere, Chief Accounts Officer being affidavit dated 8th September, 1992;

(d) The petitioner do pay a sum of Rs. 23,467.23 to the respondent within 4 weeks from today. On payment of the said amount the petitioner shall stand exonerated from his liability to pay the amounts claimed by the respondent in the above respect.

13. The statements filed by the Board setting out the necessary calculations referred to hereinabove is marked "A". The said statement shall form integral part of this writ petition.

14. Having regard to the facts and circumstances of the case there shall be no order as to costs.

15. Issue of certified copy is expedited.