
(2003) 10 MP CK 0008
In the Madhya Pradesh High Court
Case No : L.P.A. No. 202 of 1997

Grasim Cement	Vs	APPELLANT
Madhya Pradesh Electricity Board		RESPONDENT

Date of Decision : 09-10-2003

Acts Referred:

Electricity (Supply) Act, 1948 — Section 49

Citation : AIR 2004 MP 176 : (2004) 3 MPLJ 231

Hon'ble Judges : S.K. Pande, J; Dipak Misra, J

Bench : Division Bench

Advocate : Kishore Shrivastava, for the Appellant; P.S. Nair, P.K. Jaiswal, S.C.,
Anoop Nair and Mohd. Arif, for the Respondent

Final Decision : Allowed

Judgement

Dipak Misra, J.

In this appeal preferred under Clause 10 of the Letters Patent the appellant has called in question the pregnability and penetrability of the order dated 30-4-1997 passed by the learned single Judge in W.P. No. 4723/96 where he has declined to grant relief to the appellant and upheld the action of the M.P. Electricity Board (hereinafter referred to as "the Board").

The facts which are requisite to be stated are that the appellant-company is a consumer of electricity and had entered into an agreement with the Board. In the agreement a stipulation was made in Clause 27(a) that if the appellant would be required to deposit certain sum as security deposit it would be adjusted in the regular bill amount. In the said clause there was a postulate that the Board would pay interest on the aforesaid security deposit. It is relevant to mention here that the rate of interest was provided therein. When the matter stood thus the Board in exercise of its powers vested in it u/s 49 of the Electricity Supply Act, 1948 (for brevity "the Act") issued a notification dated 24-1-1996. After the notification was issued the authority of the Board communicated to the appellant

that no interest would be payable on the security deposit.

Before the learned single Judge it was contended by the writ petitioner, the present appellant, that when a condition of this nature had been incorporated in the agreement the same cannot be extinguished by virtue of notification inasmuch as the same has nothing to do with the fixation of tariff or supply of power. It was also contended that once a bilateral agreement had been entered into between the parties the same could not have been amended in a unilateral manner as that is not permissible, *moreso* in the obtaining factual matrix. It was also the argument that the Board has no jurisdiction to issue such a notification u/s 49 of the Act as basically and essentially the aforesaid provision deals with tariff and supply of electricity and such other ancillary matters and has nothing to do with the cash deposit which is called "security amount."

On behalf of the Board upon placing reliance on the counter-affidavit, it was contended before the learned single Judge that Section 49 confers power on the Board which is legislative in nature and, therefore, the Board can, by issue of such notification delete the clause from the general conditions of contract. It was also canvassed that though the notification did not convey the meaning that the agreement would stand amended, but for all practical purposes such notification will apply *mutatis mutandis* and get the agreement amended. A reference was made to Rule 27 of the Indian Electricity Rules, 1956 which provides for model conditions of supply and the Board having adopted model form of conditions which is in consonance with the rules the deletion of certain clauses by issue of notification cannot be flawed and such withdrawal is permissible in law and does not smack of any kind of arbitrariness.

Before the learned single Judge reliance was placed on the decisions rendered in the cases of *Indian Aluminium Company Vs. Kerala State Electricity Board*, ; *Bisra Stone Lime Co. Ltd. and Another Vs. Orissa State Electricity Board and Another*, ; *Jagdamba Paper Industries (Pvt.) Ltd. and Others Vs. Haryana State Electricity Board and Others*, and *Fertilisers and Chemicals Travancore Ltd. Vs. Kerala State Electricity Board and Another*, . It is worth noting here that before the learned single Judge both the parties place reliance on the decision rendered in the case of *Ferro Alloys Corpn. Ltd. Vs. A.P. State Electricity Board and another*, , The learned single Judge after considering the ratio of the aforesaid judgment came to hold that the Board had the jurisdiction and authority to delete the said condition and there is no impropriety to the decision-making process.

5A. Assailing the aforesaid judgment it is submitted by Mr. Kishore Shrivastava, learned counsel for the appellant, that the learned single Judge has erred in law by placing reliance on the decision which dealt with the fixation of tariff as the writ petitioner, the appellant herein, has no grievance whatsoever in regard to the fixation of tariff and anything that is attached to it but the grievance pertains to grant of interest which was a part of general condition of contract that has been withdrawn unilaterally after the same has been executed. It is urged by him

assuming the Board has the power to withdraw a condition of this nature by issue of notification the same is not permissible within the ambit and sweep of Section 49 of the Act. Pyramiding the aforesaid facet of submission it is urged by Mr. Shrivastava that even if the aforesaid notification comes within the four corners of Section 49 of the Act, the definition, the manner in which it is couched, is prospective and, therefore, it cannot destroy the essential facet of the agreement when it had already been executed. It is also canvassed by him that once the Board has made a provision in the agreement for grant of interest on the security deposit the same cannot be withdrawn as it becomes a part of the scheme framed by the Board. To buttress the aforesaid spectrum Mr. Shrivastava has placed reliance on the decision rendered in the case of B.S.E.B v. Bihar 440 Volt Vidyut Upbhokta Sangh, (1997) 11 SCC 380 .

Mr. P. S. Nair, learned senior counsel being assisted by Mr. Anoop Nair as well as Mr. P. K. Jaiswal, learned senior counsel being assisted by Mr. Mohd. Arif have submitted that the order passed by the learned single Judge is absolutely impeccable and does not warrant any interference inasmuch as the learned single Judge has studiously analysed the ratio decidendi of the decision cited before him and arrived at the conclusion that the Board was within its domain while issuing the notification. It is vehemently urged by them that the notification is statutory in nature and a statutory notification can always delete a clause in the contract. It is further proposed by them that the notification is not at all prospective but partly prospective and partly retrospective and if a notification expressly provides for retrospective applicability the same cannot be flawed and, therefore, no relief can be granted to the appellant. Apart from placing reliance on the decisions which were pressed into service before the learned single Judge, the learned senior counsel appearing for the Board have also placed reliance on the decision rendered in the case of M/s. Hyderabad Vanaspathi Limited Vs. Andhra Pradesh State Electricity Board and Others, .

Before we appreciate the submission raised at the Bar it is appropriate to refer to Clause 21(f) and 21(g) of the general conditions for supply of electrical energy. They read as under :--

"21(f) The case security deposits of Rs. 100/- or more shall bear interest at a rate declared by the Board from time to time. The interest shall be worked out in the month of July every year. The interest will be calculated for full calendar months only; fraction of a month in which deposit received or refunded being ignored. Interest accrued on the deposit will be credited in the bill of August each year and in subsequent months if not adjusted completely in one month bill.

21(g) No interest shall be payable on the security deposited by the prospective consumer if the connection is not taken and security is required to be refunded. However, if a prospective consumer is not issued demand notice within a year of registration of his application and he requests to withdraw his application and refund of security deposit after one year from the date of registration, his security deposit shall be refunded in full with interest as mentioned above.

Interest shall not be paid on the security deposited against the temporary connection."

It is relevant to mention here that these two clauses occur in the general conditions for supply of electrical energy. At this juncture we think it seems to refer to clause in the agreement entered with the appellant in his individual capacity. The relevant clause is 27(a). The same reads as under :--

"27(a) The consumer shall be required to deposit where demanded in case and or any other form as may be prescribed by the Board a sum not less than two months consumption as security for purpose next hereinafter mentioned, and shall the like requisition from time to time replenish such security in the event of the same become exhausted or insufficient or otherwise considered inadequate; the Board shall pay interest on the amount deposited in case towards security at the rate declared by the Board from time to time. The Board shall be at liberty at any time and from time to time to appropriate and apply any security so deposited as aforesaid in or towards payment or satisfaction of all or any moneys which shall become due or owing by the consumer to the Board in respect of supply of energy or otherwise under this agreement, but the provision in this clause contained shall not prejudice any other remedy to which the Board may be entitled for the recovery of such moneys. The Board shall be at liberty to enhance the amount of security deposit at any time during the period of this agreement."

At this juncture it is also relevant to reproduce Clauses 39(a) and (b) of the agreement entered with the consumer. They read as under :--

"39(a) The consumer shall conform to conditions of supply prescribed by the Board from time to time in its booklet "General conditions for supply of electrical energy" and also the provisions of the Indian Electricity Act, 1910 and of Electricity (Supply) Act, 1948 and any modification or re-enactment thereof for the time being in force, and to the rules and regulations thereunder; for time being in force in so far as the same respectively may be applicable. A copy of the booklet "general conditions for supply of electrical energy" has been supplied by the Board to the Consumer and the Consumer hereby acknowledge the receipt thereof.

(b) Nothing contained in this agreement or any amendment thereon shall restrict any rights, obligations and discretions which the Board or the consumer has derived under the law and also Board may derive under any legislation relating to supply and consumption of electricity enacted during the period of this agreement."

To appreciate the aforesaid terms and conditions which find mention in the general conditions for supply of electrical energy and individual contract, it is appropriate to refer to Section 49 of the Act. The aforesaid provision reads as under :--

"49. Provisions for the sale of electricity by the Board to persons other than licensees.-- (1) Subject to the provisions of this Act and of regulations, if any, made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply, frame uniform tariffs.

(2) In fixing the uniform tariffs, the Board shall have regard to all or any of the following factors, namely,--

(a) the nature of the supply and the purpose for which it is required;

(b) the coordinated development of the supply and distribution of electricity within the State in the most efficient and economical manner, with particular reference to such development in areas not for the time being served or adequately served by the licensees;

(c) the simplification and standardisation of methods and rates of charges for such supplies;

(d) the extension and cheapening of supplies of electricity to sparsely developed areas.

(3) Nothing in foregoing provisions of this section shall derogate from the power of the Board, if it considers it necessary or expedient to fix different tariffs for the supply of electricity to any person not being a licensee having regard to the geographical position of any area the nature of the supply and purpose for which the supply is required and any other relevant factors.

(4) In fixing the tariff and terms and conditions for the supply of electricity, the Board shall not show undue preference to any person."

In the case of Ferro Alloys Corpn. Ltd. Vs. A.P. State Electricity Board and another, the Apex Court in paragraph 102 held as under :--

"102. The legislative sanction behind the power of the Board to direct a consumer to furnish security may be examined. It has already been seen that the Supply Act is complementary to the Electricity Act, 1910. Section 26 of the Supply Act states that the Board shall have all the powers and obligations of a licensee under the Electricity Act. And this shall be deemed to be a licence of the Board for the purpose of the Act. Under the regulations framed by the Board in exercise of powers of Section 49 read with Section 79(j) the consumer is only entitled and the Board has an obligation to supply energy to the consumer upon such terms and conditions as laid down in the regulations. If, therefore, the regulations prescribed a security deposit that will have to be complied with. It also requires to be noticed under Clause VI of the Schedule to the Electricity Act that the requisition for supply of energy by the Board is to be made under provision (a) after a written contract is duly executed with sufficient security. This, together with the regulations stated above, could be enough to clothe it with legal sanction. In cases where regulations have not been made Rule 27 of

the Rules made under the Electricity Act enables the adoption of model form of draft conditions of supply. Annexure VI in Clause 14 states that the licensee may require any consumer to deposit security for the payment of his monthly bills of energy supplied and for the value of the meter and other apparatus installed in his premises. Thus, the Board has the power to make regulations to demand security from the consumers."

Thereafter, their Lordships addressed themselves with regard to the object in demanding security and stated that the deposit though called security deposit is really an adjustable advance payment of consumption charges. Security deposit is revisable from time to time on the basis of average consumption charges depending upon the actual consumption over a period. Thereafter, their Lordships addressed themselves with regard to the clause in the agreement providing for non-payment of interest and its reasonableness. In that context, in paragraphs 134 and 135 their Lordships held as under :--

"134. While the terms and conditions of supply of Andhra Pradesh, Uttar Pradesh and Bihar provide for payment of interest at certain rate, in the case of Rajasthan and Orissa the Boards have clearly stipulated that no interest shall be payable on the securities furnished to the Board. Whether that clause would be considered unconstitutional or arbitrary? In examining the constitutionality of this provision, in that it is violative of Article 14 of the Constitution of India, the following factors have to be borne in mind :

1. Article 14 does not mandate mathematical exactitude or scientific precision.

The mode and the period of security vis-a-vis the billing practice must form the consideration.

The consumer with open eyes has entered into the agreement and solemnly undertaken to abide by the conditions regarding non-payment of interest. He cannot resile from the condition because there is nothing inherently objectionable about such a condition nor is such a condition per se illegal or void as opposed to public policy. It is not uncommon in commercial transaction such a provision is entered into.

The argument that the Board is monopolistic in character and, therefore, the consumers have no other option but to enter into contract appears to be misconceived. The Board u/s 49 of the Supply Act is entitled, apart from framing uniform tariff, to insist upon such terms and conditions as the Board thinks fit. This has also been so stated in *Jagdamba Paper Industries (Pvt.) Ltd. and Others Vs. Haryana State Electricity Board and Others*, . The consumption security deposit whether or not it carries interest is a condition precedent for the supply of electric energy. We are clearly of the view that the scrutiny by the Court in determining the unconstitutionality of a provision not providing for interest must be tested on the following touchstone :

In imposing such a condition has the Board acted as a private trader and thereby

shed off its public utility character?"

After so stating their Lordships in paragraph 149 expressed the view as under :--

"148. It requires to be carefully noted that the question of interest on security was not raised before the Court. Therefore, the Court had no occasion to decide this issue of interest. That part of the judgment, as rightly contended by Mr. Soli J. Sorabjee, learned counsel, is sub silentio. However, the learned counsel for the consumers pressed into service the various orders passed by this Court in relation to interest and urged that it is concluded by those orders. We are unable to accept this argument. All the orders have their root in Interlocutory Application No. 1 of 1989 in Writ Petition No. 578 of 1987. That order is extracted in full :

"We have heard counsel for the parties, Mr. Gopal Subramaniam, counsel for the State Electricity Board on instructions states that the initial deposit which has been made by the consumer petitioner, to the tune of Rs. 10,07,378.81 was intended as security for payment of energy dues. In terms of our order of May 5. 1988, the petitioner would be entitled to the interest on that amount from the date of the deposit at the rate of 12% per annum. Mr. Gobind Mukhoty, counsel for the petitioner now agrees to deposit the balance amount of Rs. 6,91,621 minus the interest which is said to be the additional security and while making the deposit of the additional amount, the petitioner is entitled to deduct the interest already accrued on the deposit of Rs. 10,07,378.81 from the date of the deposit at the rate of 12% per annum. The balance amount after deduction of the interest shall be deposited in two equal quarterly instalments, the first being due by October 15, 1989.

The application for directions is disposed of accordingly."

In paragraph 160 their Lordships enumerated the conclusion which we respectfully quote :--

"160. In conclusion, we hold :

- (1) Section 49 of the Supply Act is valid.
- (2) The nature of consumption deposit is to secure prompt payment and is intended for appropriation.
- (3) There is no liability on the Electricity Board either under the statute or common law or equity to pay interest.
- (4) Conditions and the terms of supply providing for non-payment of interest is not so unconscionable as to shock the conscience of the Court.
- (5) No person need be given for enhancement of additional security deposit."

In this regard we may refer to the decision rendered in the case of B.S.E.B v. Bihar 440 Volt Vidyut Upbhokta Sangh, (1997) 11 SCC 380 . In the aforesaid case the consumer raised two questions before the Apex Court. One of the

question raised before the Apex Court was relatable to the quantum of security. While dealing with the said aspect in paragraph 5 their Lordships expressed the view as under :--

"5. Mr. Reddy, learned Additional Solicitor General has challenged the findings of the High Court on second part of issue (g), issues (i) and (1). We see no force in the contention of the learned Additional Solicitor General so far as issues (g) and (i) are concerned. This Court in *Ferro Alloys Corporation. Ltd. v. A. P. S. E. B.* (AIR 1983 SC 2005): (para 158) has held that the Electricity Board which have framed a provision for payment of interest by adjusting its finances, cannot be allowed to delete such provision. Since the Board in this case has provided for payment of interest it cannot be permitted to withdraw the same. So far as the provision relating to providing for levy of operational surcharge is concerned, we are of the view that it is arbitrary on the face of it. The surcharge has been levied on a wholly vague basis. The "operation of the Electricity Board" in general has no relation with the generation of electricity. It is no doubt correct that this Court has upheld the levy on fuel surcharge, but that has a direct relation to the generation of electricity. We, therefore, reject the contention of the learned Additional Solicitor General based on issue (i)."

Mr. P. S. Nair and Mr. Jatswal, learned senior counsel, have submitted that the Board can always modify the terms and conditions. In the case of *M/s. Hyderabad Vanaspathi Limited Vs. Andhra Pradesh State Electricity Board and Others*, a three-Judge Bench in paragraphs 20 and 25 held as under :--

"20. We have already seen that Section 49 of the Supply Act empowers the Board to prescribe such terms and conditions as it thinks fit for supplying electricity to any person other than a licensee. The section empowers the Board also to frame uniform tariffs for such supply. u/s 79(j) the Board could have made regulation therefore but admittedly no regulation has so far been made by the Board. The Terms and Conditions of Supply were notified in B.P. Ms. No. 690 dated 17-9-1975 in exercise of the powers conferred by Section 49 of the Supply Act. They came into effect from 20-10-1975. They were made applicable to all consumers availing supply of electricity from the Board. The section in the Act does not require the Board to enter into a contract with individual consumers. Even in the absence of an individual contract the terms and conditions of supply notified by the Board will be applicable to the consumer and he will be bound by them. Probably in order to avoid any possible plea by the consumer that he had no knowledge of the terms and conditions of supply, agreements in writing are entered with each consumer. That will not make the terms purely contractual. The Board in performance of a statutory duty supplied energy on certain specific terms and conditions framed in exercise of a statutory power. Undoubtedly the terms and conditions are statutory in character and they cannot be said to be purely contractual.

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We are unable to uphold the view expressed by the Full Bench in the judgment under appeal that the terms and conditions of supply are purely contractual. in our opinion the terms and conditions of supply are statutory in character."

Mr. Jaiswal, learned senior counsel endeavoured hard to impress upon us that when the contract is statutory the Board has the authority to statutorily modify the terms and conditions. On a careful and purposeful reading of the provision and what their Lordships have said in the case of M/s. Hyderabad Vanaspathi Limited Vs. Andhra Pradesh State Electricity Board and Others, we are of the considered view that the said provisions deal with the supply of electricity and the framing of uniform tariff and making of rehabilitation. On the contrary the law laid down in the case of Bihar State Electricity Board (1997 (1) SCC 380) (supra) would apply on all fours to the present case. That was what exactly said in paragraph 158 of Ferro Alloys Corpn. Ltd. Vs. A.P. State Electricity Board and another, . We would like to clarify the position that the Board may refuse to incorporate any condition for grant of interest while demanding security deposit and no consumer can compel the Board or challenge the said clause as arbitrary only on this facet or spectrum but once the Board has made provision for grant of interest, keeping in view its financial position and taking objective view of the matter as has been held by their Lordships, the same cannot be withdrawn. As the present notification has withdrawn the said benefit, we are impelled to hold that such action by the Board is not correct and we have no hesitation in stating that the Board has bound to pay interest as per the agreement as well as on the basis of the general terms and conditions of the agreement to the present appellant and cannot deny the same on the basis of the notification dated 24-1-1996.

In view of our preceding analysis we are unable to concur with the view of the learned single Judge and accordingly we set aside the same.

Accordingly, the Letters Patent Appeal is allowed. In the peculiar facts and circumstances of the case there shall be no order as to costs.