

**(1973) 11 GUJ CK 0019**  
**In the Gujarat High Court**

**Case No :** Appeal No. 1 of 1973 from Company Application No. 76 of 1972 in  
Company Petition No. 21 of 1966

Gujarat Electricity Board

APPELLANT

Vs

Rajratna Naranbhai Mills Co. Ltd. (In Liquidation)

RESPONDENT

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**Date of Decision :** 03-11-1973

**Acts Referred:**

Companies (Court) Rules, 1959 — Rule 156  
Companies Act, 1910 — Section 24  
Companies Act, 1956 — Section 528, 529  
Provincial Insolvency Act, 1920 — Section 34

**Citation :** (1974) 44 CompCas 127 : (1975) 16 GLR 90

**Hon'ble Judges :** T.U. Mehta, J;B.J. Divan, J

**Bench :** Division Bench

**Advocate :** J.M. Thakore, for the Appellant; A.L. Shah, for the Respondent

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## Judgement

Divan, J.—This appeal u/s 483 of the Companies Act, 1956, has been filed against the order of our learned brother, D. A. Desai J., in Company Application No. 76 of 1972 in Company Petition No. 21 of 1966. The company under liquidation is Rajratna Naranbhai Mills and it is common ground between the parties before us that this company is in insolvent circumstances. The company had entered into an agreement on January 8, 1962, with the Gujarat Electricity Board for the purpose of getting bulk supply of electricity for the purpose of its mills at Petlad in Kaira District. It appears that some time prior to 1966, the company fell in arrears of payment of its dues to the Gujarat Electricity Board (hereinafter referred to as "the Board") and the Board wrote a letter dated September 27/28, 1966, pointing out to the company that the arrears of bills had accumulated and the Board informed the company that the supply of electricity to the company would be disconnected. On September 28 or 29, 1966, the supply of electricity was disconnected and thus discontinued. On November 1, 1966, a winding-up petition was presented in this court and that is Company Petition No. 21 of 1966. Actual order for winding-up was passed by the court on

June 26, 1967. Between the date when the winding-up petition was presented and the date when the order for winding-up was passed, on December 31, 1966, the company wrote a letter treating the disconnection of the supply as summary termination by the Board of the agreement dated January 8, 1962. By this letter the company purported to treat this discontinuance of the supply as summary termination under clause 12 of the agreement and the company was contending that the Board was not entitled to claim any minimum charges after such discontinuance of supply. After the company was ordered to be wound up, the official liquidator of this company wrote a letter on August 24, 1967, and by this letter the official liquidator maintained that by the letter dated December 31, 1966, the company had terminated the agreement with the Board for the supply of electric power and he also disclaimed the liability to pay the bill thereafter. The official liquidator contended in this letter that the bills after June 30, 1967, were not payable as in the ordinary course the agreement came to an end on March 31, 1967. The Board, however, insisted that the company was liable to pay and after the winding-up order the official liquidator was liable to pay minimum charges for the period from September 29, 1966, to March 31, 1968. The official liquidator disallowed the claim of the Board for the minimum charges and other amounts which the Board was claiming for the period between July 1, 1967, to March 31, 1968. This amount which was disallowed consisted of two items : (1) Rs. 38,295 for minimum charges, and (2) Rs. 1,999 by way of delayed payment charges. The Board's claim for Rs. 1,33,308 was allowed except for a small amount of Rs. 200 and odd and there is no dispute between the Board and the official liquidator regarding that item of Rs. 1,33,308 which was for arrears of bills and minimum charges for the period from September 1, 1964, to June 30, 1967. The official liquidator having disallowed the claim of the Board for the amount of Rs. 40,294 for the period July 1, 1967, to March 31, 1968, the matter was taken by way of a company application to the learned judge under rule 164 of the Companies (Court) Rules, 1959, by taking out a judge's summons challenging the order of the official liquidator. The judge's summons, that is, Company Application No. 76 of 1972, came up for hearing before our learned brother, D. A. Desai J., and our learned brother rejected the summons with costs and this present appeal has been filed against the judgment of our learned brother. The main bone of contention between the Board on the one hand and the company as represented by the official liquidator on the other is as to whether the Board was entitled to get minimum charges for keeping the power connections at the company's premises even though the supply of electrical energy was discontinued after September 29, 1966. Our learned brother held that it was incomprehensible that even after the supply was discontinued, the Board continued to demand the minimum charges and charges for the delayed payment of minimum charges. Our learned brother further held that once the supply was disconnected, there might be a right to get reconnection either under the agreement or under the law but unless reconnection was granted, by a unilateral act of the Board to disconnect supply, the agreement between the parties came to an end and he further observed that too much sanctity should

not be attached to such an agreement between unequally placed parties, namely, the Gujarat Electricity Board and a consumer like the company. Our learned brother held that if the Board exercised this power to disconnect supply when the consumer was in arrears, it was inconceivable that the consumer should go on paying minimum charges even though the Board was unable to show that it had to maintain some installations and had to incur expenditure in the maintenance of the installations which would justify the claim of minimum charges. It was on this reasoning that our learned brother dismissed the judge's summons with costs.

2. In order to appreciate the rival contentions between the parties, it is necessary to refer to some of the provisions of the Indian Electricity Act, 1910, and the Electricity (Supply) Act, 1948. Sections 18A to 27 of the Indian Electricity Act, 1910 (hereinafter referred to as "the 1910 Act"), provide for supply of energy. u/s 22 the licensee to whom licence has been granted under the Act of 1910 is under an obligation to supply energy to every person within the area of supply but the proviso to section 22 is material. It is in these terms :-

"Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of energy for any premises having a separate supply unless he has agreed with the licensee to pay to him such minimum annual sum as will give him a reasonable return on the capital expenditure, and will cover other standing charges incurred by him in order to meet the possible maximum demand for those premises, the sum payable to be determined in case of difference or dispute by arbitration."

3. u/s 23 provision is made for charges for energy to be made without undue preference to any person. Under sub-section (3), in the absence of an agreement to the contrary, a licensee may charge for energy supplied by him to any consumer, by the actual amount of energy so supplied, or by the electrical quantity contained in the supply, or by such other method as may be approved by the State Government. Under sub-section (4), it has been provided that any charges made by a licensee under clause (c) of sub-section (3) may be based upon, and vary in accordance with, any one or more of the following considerations, namely, the consumer's load factor, or the power factor of his load, or his total consumption of energy during any stated period, or the hours at which the supply of energy is required. u/s 24 of the Act the licensee is empowered to discontinue supply to a consumer neglecting to pay charges and under sub-section (1) of section 24, where any person neglects to pay any charge for energy or any sum, other than a charge for energy, due from him to a licensee in respect of the supply of energy to him, the licensee may, after giving not less than seven clear days' notice in writing to such person and without prejudice to his right to recover such charge or other sum by suit, cut off the supply and for that purpose cut or disconnect any electric supply line or other works, being the property of the licensee, through which energy may be supplied, and may discontinue the supply until such charge or other sum,

together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no longer. Thus, it is clear that the right of the licensee to discontinue electric supply comes into existence when the consumer neglects to pay the charges to the licensee and as soon as the arrears and the expenses incurred by the licensee in cutting off and reconnecting the supply are paid, the licensee is bound to resume the supply and start supplying the electrical energy to the consumer once again. That obligation of the licensee has to be borne in mind in the context of the dispute before us. The Schedule to the 1910 Act sets out provisions which are deemed to be incorporated with, and to form part of, every licence granted under Part II of the 1910 Act. Under clause VI it is open to the owner or occupier of any premises to make a requisition requiring the licensee to supply energy for such premises, and the licensee shall, within one month from the making of the requisition, supply, and, save in so far as he is prevented from doing so by cyclones, floods, storms or other occurrences beyond his control, continue to supply, energy in accordance with the requisition. Under sub-clauses (1) and (2) of clause X, provision is made for the methods of charging by the licensee for the electricity supplied by him to the consumer. Under sub-clause (2), before commencing to supply energy through any distributing main, the licensee shall give notice, by public advertisement, of the method by which he proposes to charge for energy so supplied, and, where the licensee has given such notice, he shall not be entitled to change that method of charging without giving not less than one month's notice in writing of such change to the State Government and to every consumer of energy who is supplied by him from such distributing main. Once the method has been so notified, any consumer who objects to that method may, by not less than one month's notice in writing, require the licensee to charge him, at the licensee's option, either by the actual amount of energy supplied to him or by the electrical quantity contained in the supply, and, thereafter, the licensee shall not, except with the consent of the consumer, charge him by another method.

4. Under the Electricity (Supply) Act, 1948 (hereinafter referred to as "the 1948 Act"), by virtue of the provisions of section 96 and section 70(2), the Gujarat Electricity Board is a licensee for the purposes of the 1910 Act. Section 46 of the 1948 Act provides for the Grid Tariff. Sub-section (1) of section 46 provides that a tariff to be known as the Grid Tariff shall, in accordance with any regulations made in this behalf, be "fixed from time to time by the Board in respect of each area for which a scheme is in force, and tariffs fixed under this section may, if the Board thinks fit, differ for different areas. Under sub-section (3) the Grid Tariff shall be so framed as to include as part of the charge and show separately a fixed kilowatt charges component and a running Charges component that if in respect of any area the electricity to be sold by the Board is wholly or substantially derived from hydro-electric sources, the running charges component may be omitted. Under sub-section (4) it is permissible to fix the kilowatt charges component in the Grid Tariff in such manner as to vary with the magnitude of maximum demand and under sub-section (6) the Grid Tariff may

contain provisions for a minimum charge related to a past or prospective demand of a licensee on the Board. Thus, it is obvious that it is competent to the Board to fix its tariff in such a manner as to make provision for a minimum charge so long as the agreement between the Board and the consumer continues and over and above such minimum charge to make provision for actual energy consumed by the consumer during the billing period. The agreement dated January 8, 1962, in terms provides that even if the power supply is discontinued, the minimum charges shall be continued to be paid to the Board even during the period of such discontinuance. Clause 11 of the agreement is as follows :

"In the event of the supply of electrical energy being discontinued by the supplier in consequence of any breach or default on the part of consumer entitling the supplier so to do under the provisions of the Act and the rules, the amount of charges for the electrical energy already supplied and all other moneys then payable under this agreement shall become due and recoverable forthwith provided always and it is hereby agreed and declared that during the period of such discontinuance the consumer shall continue to pay the minimum charges and minimum guarantee payable thereunder."

5. Thus, it is obvious that by the very terms of the agreement between the company and the Board, the company has agreed to pay minimum charges even during the period of discontinuance of supply. It is obvious that the termination of the agreement between the parties is quite different from the discontinuance of the supply. The right to discontinue the supply of electrical energy is derived from section 24 of the 1910 Act, whereas the termination of the agreement is provided for in two distinct clauses of the agreement dated January 8, 1962. Clause 10 of this agreement provided for the period of agreement and is in these terms :

"Subject to the provisions of clause 11 hereof the period of supply under this agreement shall be a minimum period of one year ending March next after one year's period from the date of the commencement of supply and from year to year thereafter, etc., determinable by a six calendar months' notice on either side expiring at the end of the said minimum period of one year or at the end of any such subsequent year and upon the expiration of any such notice this agreement shall determine, but without prejudice to the rights and liabilities of the parties in respect of any matter antecedent to such determination."

Thus, the agreement dated January 8, 1962, would expire in the ordinary course on March 31, 1963, because that would be the date after year from the commencement of supply of electrical energy. But, after 31st March, 1963, if either party to the agreement wanted to terminate agreement by six months' calendar notice, the said notice must expire with the 31st of March of any subsequent year. Under clause 12 provision, is made for summary termination of agreement. The clause is in terms :

"If at any time during the continuance of this agreement consumers shall -

(a) being a limited company pass a resolution for winding up of ordered to be wound up by a court of competent jurisdiction, ....

the supplier shall be at liberty to terminate the agreement by giving seven days" notice to the consumer and upon such termination the consumer shall forthwith pay to the supplier at the office of the Chief Engineer or, as the case may be, otherwise required all the moneys then due and payable under this agreement together with a further sum equal to the amount of the minimum guarantee for the unexpired minimum period of supply as and by way of liquidated damages."

It is clear that the supplier, the Board, becomes entitled to the summary termination of the agreement by seven days" notice after the limited company is ordered to be wound up by the court of competent jurisdiction. Therefore, this right of the Board to terminate the agreement of January 8, 1962, summarily would arise on the facts of this case only on June 26, 1967, when this court passed an order for winding up of the company. Any action taken by the Board before June 26, 1967, cannot be referable and in fact cannot derive any support from clause 12.

6. We have already pointed out that the Board discontinued the supply of electricity with effect from September 28 or 29, 1966, but before disconnecting the supply, the Board had addressed certain letters to the company. The first letter to be noticed in this connection is the letter of September 27/28, 1966. Apparently, even before that date, the Board had demanding payment of the arrears of its bills and by this letter the Board informed the company that more than the normal consideration had been shown to the company regarding the payment of the arrears of its dues and the company had been informed that in order to avoid disconnection the company must pay up its dues and all arrears immediately. Since the dues were not paid, the supply was disconnected on September 28/29, 1966. The footnote to the notice is very important; it was addressed to the Executive Engineer, Gujarat Electricity Board, Divisional Office, Petlad, and the note was :

"The disconnection should without fail be carried out on the 29th instant if the arrears are not paid by then"

and apparently in pursuance of this direction from the Chief Engineer, the Executive Engineer at Petlad disconnected the supply on September 29, 1966. By the letter of December 31, 1966, that is, before the order for winding up was passed by this court, the company wrote to Gujarat Electricity Board stating that the letter of September 27, 1966, was treated by the company as summary termination of the agreement. The letter proceeded :

"Your action of disconnection is not merely discontinuance of supply, clause 11 of the agreement, but is a summary termination of the agreement, vide clause 12, and, therefore, you are not entitled to claim any minimum charges thereafter."

7. The company contended in this letter that the action of the Board of

disconnecting the supply was summary termination of the agreement as provided in clause 12 and the company was, therefore, disclaiming any liability for the minimum charges bills sent after the date of disconnection. Then the letter proceeded :

"Without prejudice to the above contentions on our part, we hereby give this notice to you and state that we accept your such a summary termination of the agreement from that date and further state that in any case we are required to give you any notice of termination, this notice also be treated and taken as a notice terminating the agreement on our part from the said date of disconnection or from this date as per agreement."

8. In the final paragraph of the letter the company said that this notice of December 31, 1966, should be treated as a notice terminating the agreement with effect from March 31, 1967. Pausing here, it must be noticed that in view of clause 10 of the agreement of January 8, 1962, to which we have already referred, the notice of six months was required to expire with 31st of March of a particular year. Since the period between December 31, 1966, when this notice was given and the next 31st of March, that is, 31st March, 1967, was less than six months, this notice must be deemed to have terminated the agreement between the Board and the company with effect from March 31, 1968. It is because of such termination of the agreement that the minimum charges are claimed by the Board from the company up to 31st March, 1968.

9. On August 24, 1967, the official liquidator who was appointed by thin court after the winding up order dated June 26, 1967, wrote a letter to the Board contending that he was disclaiming his liability to pay for energy bill after the appointment of the official liquidator as liquidator of the mills as the supply of power was not needed and used by the mill company. The official liquidator also pointed out in this letter of August 24, 1967, that the company had by a notice dated December 31, 1966, terminated the agreement with the Board for supply of electric power and had also disclaimed their liability to pay the bill thereafter. In any event, according to the official liquidator, the bills after June 30, 1967, were not payable in the ordinary course as the agreement had come to an end on March 31, 1967, according to the official liquidator. On September 6, 1967, the Board replied to this letter of the official liquidator dated August 24, 1967, and contended that the company was liable to pay minimum charges minimum guarantee payable under the agreement even during the period of discontinuance, until the agreement was terminated by the company by giving six months" notice expiring at the end of 31st of March of any year. In the last paragraph it was pointed out that even if the company"s letter of December 31, 1966, is treated as a notice given by the company to terminate the agreement, the agreement cannot be terminated before the expiry of six months ending on 31 st of March of any particular year and the agreement can stand terminated only on March 31, 1968, and not earlier.

10. It is clear on this correspondence that so far as the Board was concerned, the

Board was insisting that so long as the agreement between the Board and the company continued, that is, so long as it was not validly terminated in accordance with the provisions of clause 10 or clause 12, as the case might be, the company was bound to pay for the minimum charges even during the period when the supply was discontinued. It is obvious the company by its letter dated December 31, 1966, had not terminated the agreement with effect from March 31, 1967, but it can only to have terminated the agreement with effect from March 31, 1968. Discontinuance of the supply under the power given to the Board by section 24 of the 1910 Act cannot be said to amount to the exercise of the power of the Board of summary termination of the agreement under clause 12 because at that date the company had not been ordered to be wound up by an order of this court. The letter was written on December 31, 1966, by the company itself whereas the winding up order was passed on June 26, 1967. Moreover, the discontinuance of supply is a different thing altogether from termination of the agreement. Even when there is a summary termination of agreement under clause 12, the supplier, the Board, was required to give seven days" notice to the consumer terminating the agreement. No such notice was given by the Board to the company and mere discontinuance of supply cannot amount to summary termination of the agreement as the company contended in the course of the correspondence. It is, therefore, clear that the agreement between the parties, namely, the Board and the company, continued up to March 31, 1968, on which date it stood terminated by the notice given by the company on December 31, 1966.

11. The question then arises as to whether there is anything unconscionable or incomprehensible, as our learned brother, D. A. Desai J., has observed, in the Board insisting on the payment of minimum charges during the period of discontinuance of supply between September 29, 1966, and March 31, 1968, when the agreement between the Board and the company came to an end. It must be borne in mind that, u/s 24 of the 1910 Act, a licensee is entitled to discontinue the supply but. at the the same time, the moment all the dues of the licensee are paid up and the charges for disconnection and reconnection are paid, the licensee is bound to resume the supply to the consumer concerned. It is in the light of this obligation to resume the electric supply and reconnect the electric supply we have to read the terms of the agreement and particularly the s of clause 11 regarding payment of minimum charges during the period of discontinuance of supply. This question of minimum charges has come up before different High Courts in India and also the courts in England.

12. In *Saila Bala Roy and on her death Malti Rose Vs. Chairman, Darjeeling Municipality*, , the question of minimum charges was considered by R. C. Mitter J., sitting singly. The scheme of the provisions of the 1910 Act was considered and it was observed :

"A minimum charge is not really a charge which has for its basis the consumption of electric energy. It is really based on the principle that every consumer"s

installation involved the licensee in a certain amount of capital expenditure in plant and mains on which he is to have a reasonable return. He gets a return when energy is actually consumed, in the shape of payments for energy consumed.

When no such energy is consumed by a consumer, or a very small amount is consumed in a long period, he is allowed to charge minimum charges by his licence, but these minimum charges are really interest on his capital outlay incurred for the particular consumer."

It has to be borne in mind that under the agreement between the Board and the company in the instant case, provision was made for the maximum load factor, namely, 600 kilowatts, and the Board was bound to keep that load factor available for the benefit of this particular consumer and it was on the basis of such maximum demand being made by the company that the mains and other plant and machinery had to be installed by the Board for the use of this particular consumer.

13. In *Watkins Mayor and Co. Vs. Jullundur Electric Supply Co. Ltd.*, a Division Bench of the Punjab High Court, consisting of Kapur and Falshaw JJ., has explained the basis why licensees are permitted to levy such minimum charges. From paragraph 10 onwards, on page 136, Kapur J. has pointed out the rationale behind such minimum charges. He pointed out :

"The minimum charge has long been in force in Great Britain, and has a substantial foundation, viz., that every consumer's installation involves the licensee in a certain amount of capital expenditure in plant and mains, and labour on which he is entitled to a reasonable return ....."

In paragraph 11 of the judgment, Kapur J. has pointed out :

"One of the principal objects of an electric light undertaking is to utilise its plant to the best advantage, and one method of accomplishing this result is to obtain customers for energy during the day as well as during the dark hours, so that the plant can satisfy a greater number of hours of maximum demand than would otherwise be the case. The proportion of the actual number of units sold to the output capacity of the plant, is called the "load factor" of the station, and the difference between the ratio of the load actually observed at the station to the sum of the loads at the consumers' terminals is called the "diversity factor". Power users have a better load and diversity factor than light users, which is the reason for their being usually charged at a lower rate. The increase of the load and diversity factors, therefore, is of the greatest importance, and tariffs are framed to obtain customers and classes of customers whose consumption contributes to this result."

In paragraph 12 it is pointed out :

"It is really to provide for a reasonable return to the licensee that a minimum charge is provided for which is payable notwithstanding the fact that no energy

has been used by the consumer during the period for which such minimum charge is made. And all this is calculated and arrived at by taking into consideration the factors which are mentioned in section 23(4), Indian Electricity Act."

14. According to Kapur J., the whole scheme of the Act of 1910 goes to show that the provision made in any contract for a minimum charge is really to provide for a fair return on the outlay of the licensee, and it is for this reason that the law allows a contract of the kind to be entered into and as has been said by Meares in his book on the Law relating to electric Energy in India, one of the conditions precedent to an agreement must, if asked for by the licensee, be entered into with security, so as to give the licensee a "reasonable return" on his expenditure for not less than two years. The minimum charge, according to this Division Bench judgment, is not really a charge which has for its basis the consumption of electrical energy. It is based on the principle that every consumers' installation involves the licensee in a certain amount of capital expenditure in plant and mains on which he is to have a reasonable return. He gets a return when energy is actually consumed, and when no such energy is consumed, he is allowed to charge minimum charges by his licence, but these minimum charges are really a return on his capital outlay incurred for the particular consumer. The observations to that effect by Mitter J. in *Saila Bala Roy and on her death Malti Rose Vs. Chairman, Darjeeling Municipality*, were approved by the Division Bench. In our opinion, the important passage in Kapur J.'s judgment is as follows *Watkins Mayor and Co. Vs. Jullundur Electric Supply Co. Ltd.*, :

"When a licensee agrees to charge a lesser rate for the supply of electricity he takes into consideration the various factors, i.e., consumer's load-factor, the power factor of his load and the total consumption of energy during any stated period, and the only consideration for charging a lesser rate seems to be that the licensee has a consumer who takes energy in bulk at a time which is most advantageous to the licensee."

15. In *Maharashtra State Electricity Board Vs. Madhusudandass and Brothers*, a Division Bench of the Bombay High Court consisting of Patel and Wagle JJ. had occasion to consider the question of minimum charges. The Division Bench held that a State Electricity Board functioning under the 1948 Act was entitled u/s 24(1) of the 1910 Act to discontinue the supply of a consumer if there was a neglect on the part of the consumer to pay the electrical charges. After considering the provisions of section 46 of the 1948 Act, the Division Bench observed that the demand charge is a part of the tariff and the consumer was bound to pay this charge as well as the charge for the actual energy consumed.

16. Again, the Madras High Court has held in *M.G. Natesa Chettiar Vs. The Madras State Electricity Board*, , that there is a statutory basis for the term in the agreement providing for a minimum annual charge. There is nothing illegal in the insertion of a term for payment of a minimum charge in the agreement for

supply of energy, and it has not been made out that it is an unreasonable levy, and the clause providing for the payment of minimum charges cannot be read as a penalty clause.

17. With respect, we agree with these four decisions which we have referred to above because they set out the effect of the legal provisions which we have set out hereinabove and they correctly point out that provision of minimum charge in the agreement between a consumer and a licensee is but one of the modes of providing for reasonable return to the licensee for the investment that it has made and on the capital outlay that it has made and merely because the agreement provides for a minimum charge, it cannot be said that the terms are unreasonable or that a monopoly concern has taken undue advantage over the consumer in the area of supply. Whether a licensee is a State Electricity Board or a single license operating within the area of supply, it is always a monopoly concern and there is a statutory obligation on that monopoly concern to supply electricity to every person asking for supply of electricity. The entire operation and levying of charges is strictly controlled by the rules and provisions of statutes and one of the provisions is that, in the case of bulk supply, a minimum charge can be provided for in the agreement between the parties, With respect to our learned brother, D. A. Desai J., we are unable to agree with him that too much sanctity should not be attached to such an agreement between unequally placed parties or that, once electric supply was disconnected or supply of power was discontinued, the agreement came to an end. As we have pointed out, the agreement did not come to an end nor was the Board disentitled to levy minimum charges during the period of discontinuance of supply.

18. On behalf of the official liquidator, it was urged by Mr. Shah, firstly, that the agreement of January 8, 1962, was terminated by mutual agreement of the parties with effect from December 31, 1966. He contended in this connection that the Board had discontinued the supply with effect from September 29, 1966, and on December 31, 1966, the company expressed its consent to such discontinuance of supply and by reason of such consent on the part of the company as set out in the letter of December 31, 1966, the agreement of January 8, 1962, can be said to have come to an end by mutual consent of the parties. We are unable to accept this contention because all that the Board had done on September 29, 1966, was to exercise its power u/s 24 of the 1910 Act to discontinue the supply for the default committed by the company in payment of the bills to the Board. There was no mutual agreement or even the parties ad idem to terminate the agreement of January 8, 1962, and, therefore, the letter of December 31, 1966, whereby the company agreed to the supply being discontinued, cannot amount to a novatio or a new agreement by which the agreement of 1962 was put end to.

19. It was next contended on behalf of the official liquidator that, after June 6, 1967, the Board must come in as a creditor and must prove the debts provable in winding up. In this connection we may point out that u/s 528 debts of all

descriptions are required to be admitted to proof. If the company is an insolvent company, then the provisions of the law of insolvency are brought into play, but subject to the provisions of the law of insolvency, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims, as may be subject to any contingency, or may sound only in damages, or for some other reason may not bear a certain value. It is clear that from the date of the winding-up order of June 26, 1967, till March 31, 1968, that is till the termination of the agreement of 1962, the company was under a liability to pay the minimum charge that might be referable up to any date after the date of the winding-up order would still be debts provable on winding up. u/s 529, in the winding up of an insolvent company, the same rules shall prevail and be observed with regard to the debts provable as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent.

20. u/s 34 of the Provincial Insolvency Act, debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust shall not be provable under the Act and barring the debts mentioned in sub-section (1) all debts and liabilities, present or future, certain or contingent to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before the date of such adjudication, shall be deemed to be debts provable under the Act. It is, therefore, clear reading the provisions of section 34 of the Provincial Insolvency Act which is applicable to this particular case and the provisions of sections 528 and 529 of the Companies Act that the liability of the company to pay the minimum charges under the existing agreement which was to terminate on March 31, 1968, was a debt provable in winding up against this insolvent company and, therefore, the official liquidator was bound to admit this claim as a debt provable in the course of winding up.

21. It was further contended on behalf of the company and the official liquidator that the minimum charges under the agreement are in the nature of a penalty and for this purpose reliance was placed on section 74 of Indian Contract Act. Section 74 provides for compensation for breach of contract where penalty is stipulated for. The main question that we have to consider is whether the provision for minimum charges under clause 11 of the agreement of January 8, 1962, is a provision for compensation for breach of this agreement. The right of the Board to discontinue the supply arises u/s 24 of the 1910 Act. The agreement was not terminated by the Board nor could discontinuance of supply for the non-payment of the bills for supply of electrical energy, etc., by the Board to the company be said to amount to a breach of the contract or breach of the agreement between the parties. Therefore, the provision in clause 11 of the agreement of 1962 that during the period of discontinuance of supply minimum

charges would still be payable by the company to the Board cannot be said to be in the nature of penalty.

22. The further argument of Mr. Shah on behalf of the official liquidator of the company was that by the letter of August 24, 1967, the then official liquidator had disclaimed his liability in respect of the minimum charges payable after the date of the winding-up order. We are unable to accept this contention because the only right which the official liquidator has is to disclaim such contract u/s 535(1)(d); where any part of the property of a company which is being wound up consists of unprofitable contracts, the liquidator may, with the leave of the court and subject to the provisions of the section, by writing signed by him, at any time within twelve months after the commencement of the winding-up or such extended period as may be allowed by the court, disclaim the property, in this case the agreement of January 8, 1962. It is nobody's case that prior to writing the letter of August 24, 1967, the leave of the court was obtained for the purpose of such disclaimer or that the procedure laid down in section 525 for disclaiming any such contract was gone through by the official liquidator. Under these circumstances the letter of August 24, 1967, cannot help the official liquidator on the ground of disclaimer of liability by the official liquidator.

However, there is considerable substance in the last contention of Mr. Shah, on behalf of the official liquidator. As we have pointed out already, the claim of Rs. 40,294 consists of two items : (1) minimum charges for the period up to March 31, 1968, aggregating to Rs. 38,295 and (2) delayed payment charges amounting to Rs. 1,999. Under the provisions of the tariff for high tension industrial users, provision is made for various charges and, under "delayed payment charges", the following provisions are made :

"(1) No delayed payment charges if the bill is paid within 20 days from the date of billing.

(2) 1% of the bill if the bill is paid after 20 days but within 30 days from the date of billing.

(3) If the payment of the bill is delayed over 30 days from the date of billing, 1% of the bill for the first 30 days delayed and 2% for each successive 30 days" delay or part thereof.

The above delayed payment charges does not take away the Board's right of disconnecting the supply for non-payment of the bill, electricity duty and other charges due to the Board."

23. It is clear under the scheme of these delayed payment charges that the charges for delayed payment go on accruing from month to month and in the same manner as interest accrues on the principal amount of a debt. For every additional delay of one month beyond the period of three months of the date of billing, two per cent. of the bill for each additional month's delay can be charged as delayed payment charge. This seems to be by way of a provision for penal

interest to induce the consumer concerned to pay up the bill promptly but it partakes of all the characteristics of interest on the outstanding amount due by the consumer to the Board. Mr. Shah is right when he contends that interest from the date of the winding-up cannot be allowed under ordinary circumstances until all the claims are paid up in full. At present this company is in insolvent circumstances and, therefore, the delayed payment charges for the period commencing from June 26, 1967, cannot be allowed to be levied by the Board. It is obvious that the delayed payment charges aggregating to Rs. 1,999 are for the period July 1, 1967, to March 31, 1968, that is, after the company was ordered to be wound up by this court. In view of rule 156 of the Companies (Court) Rules, interest on the outstanding amount of the claim cannot be allowed as a debt provable in winding-up and under these circumstances the only debt which can be admitted to claim is the amount of the minimum charges aggregating to Rs. 38,295 for the period July 1, 1967, to March 31, 1968. The amount of Rs. 1,999 for delayed payment charges must, therefore, be disallowed.

24. Under these circumstances, we allow the appeal and make the judge's summons absolute as regards the amount of Rs. 38,295 only and we disallow the claim of Rs. 1,999 for delayed payment charges. The official liquidator will pay the costs all throughout, that is, of the Company Application No. 76 of 1972 as well as of this appeal.