

(1994) 12 GUJ CK 0018
In the Gujarat High Court

Hotel Natraj

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 07-12-1994

Acts Referred:

Bombay Electricity Duty Act, 1958 — Section 3
Constitution of India, 1950 — Article 226
Electricity Act, 1910 — Section 2(h), 23(3)

Citation : (1995) 2 GLR 1381

Hon'ble Judges : C.V. Jani, J

Bench : Single Bench

Judgement

C.V. Jani, J.—In these ten identical petitions under Article 226 of the Constitution of India, the Hoteliers of Ahmedabad, have challenged the recovery of electricity charges by Ahmedabad Electricity Company Ltd. respondent No. 2 in each of the petitions under various heads of fixed charges, fuel surcharge, and electricity duty.

2. After the petitions were admitted, the learned Advocate appearing for the petitioners was elevated as a Judge of this High Court and so a personal notice to each of the petitioner was issued, but none of the petitioners has chosen to appear either personally or through any other Advocate at the time of final hearing. Thus, none of the petitioners appears to be interested in getting a decision of this Court on the various contentions raised by him. Special C.A. No. 1714 of 1984 was filed by Official Receiver of Messrs Kwaliti Restaurant and the notice returned back unserved with the remark "the said Restaurant has been closed since long". Similarly, a notice to the petitioner Ritz Hotel in Spl. C.A. No. 1763 of 1984 has also returned unserved with the remark that the hotel building had been demolished and the land is covered in Municipal compound. So instead of dismissing the petitions for default, this Court has taken sufficient care to go through the petitions and to apply its mind to each of the contentions raised by the petitioners with the able assistance of Mr. H.B. Shah, learned Advocate appearing for respondent No. 2 and Mr. T.H. Sompura for respondent No. 1 -

State of Gujarat, who relied on a few judgments of the Supreme Court and the High Court for facilitating the disposal of these petitions.

3. As the petitions are couched in indetical language, and most of them are cyclostyled, the indetical contentions raised in these petitions are required to be disposed of by a common judgment.

4. The petitioners have prayed as under:

(a) That the Hon"ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction directing the second respondent not to charge amount by way of electricity charges from the petitioner beyond the maximum prescribed under the extract of licence at Annexure "A";

(b) That the Hon"ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction declaring that recovery of electricity charges made by the second respondent under the various heads of charges, fuel surcharge, etc., is illegal and ultra vires and be pleased to direct the second respondent to refund the said amount of various bills which they have recovered from the petitioner ;

(c) That the Hon"ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction declaring that the respondents are not entitled to recover any ad hoc amount under the heading of "fixed charges" and are also not entitled to levy electricity duty on ad valorem basis.

5. Some of the petitioners are companies registered under the Companies Act, some others are partnership firms, and the rest of them are Managers of reputed hotels. Their business of running hotels in the city of Ahmedabad, has been approved by the Tourism Department of the Government of Gujarat. The respondent No. 2, Ahmedabad Electricity Company Ltd. issues bills from time to time for consumption of electricity energy by the petitioners. Respondent No. 2 which is a Company registered under the provisions of the Companies Act, was established for generation and supply of electrical energy in the city of Ahmedabad, and as such it is a "Licensee", as defined in Section 2(h) of the Indian Electricity Act, 1910 under which the licence is granted to respondent No. 2 by the State Government for supply of electrical energy. The generation and supply of electricity is regarded as an essential service and under the provisions of Electricity (Supply) Act, 1948, a Board has been constituted by every State for generation and supply of electricity which is empowered to terminate the licence. The petitioners, as consumers, has challenged the recovery of fuel surcharge, in addition to energy charges and recovery of electricity duty calculated on the gross demand, i.e., the total of demand charges, energy charges, fuel surcharge and excise duty, which, according to the petitioners, exceeds the maximum prescribed under the licence granted to the respondent No. 2 under the provisions of the Indian Electricity Act. The petitioners have stated that every month they are receiving bills for consumption of electrical energy from respondent No. 2 which include energy charge, fuel charge, excise duty and

Government electricity duty, as well as meter rent.

6. The prayer made in Para 23(a) relates to recovery of electricity charges exceeding the maximum prescribed under the licence granted to respondent No. 2 under the provisions of the Indian Electricity Act, 1910. According to the petitioners respondent No. 2 would be bound to comply with condition No. 9 in the licence granted by the State Government on 29th November, 1944, and this condition stipulates that the price to be charged by the licensee shall not exceed the maxima set out therein or the maxima, as the Government may fix on approving the method under Clause (c) of Sub-section (3) of Section 23 of the Indian Electricity Act. The relevant Sub-section (3) of Section 23 of the Indian Electricity Act reads as under:

(3) In the absence of an agreement to the contrary, a licensee may charge for energy supplied by him to any consumer-

(a) by the actual amount of energy so supplied, or

(b) by the electrical quantity contained in supply, or

(c) by such other method as may be approved by the State Government.

7. This submission overlooks the statutory provisions brought into force later on by enactment of the Electricity (Supply) Act, 1948. The relevant portion of Section 57 of the Electricity (Supply) Act, 1948, reads as under:

57. Licensee's charges to consumers: The provisions of the Sixth Schedule shall be deemed to be incorporated in the licence of every licensee, not being a local authority-

(a) In the case of a licence granted before the commencement of this Act, from the date of the commencement of the licensee's next succeeding year of account; and

(b) in the case of a licence granted after the commencement of this Act, from the date of commencement of supply.

and as from the said date, the licensee shall comply with the provisions of the said Schedule accordingly, and any provisions of the Indian Electricity Act, 1910 (IX of 1910), and the licence granted to him thereunder and of any other law, agreement or instrument applicable to the licensee shall, in relation to the licensee, be void and of no effect in so far as they are inconsistent with the provisions of Section 57-A and the said Schedule.

8. This section clearly provides that any provision of the Indian Electricity Act, and the licence granted to him thereunder and of any other law, agreement or instrument applicable to the licensee, shall be void and of no effect in so far as they are inconsistent with the provisions of Section 57-A and the Sixth Schedule. So the only test to determine whether recovery is illegal, is contained in the Sixth Schedule of the Electricity (Supply) Act and Section 57-A, which relates to

constitution of a rating committee on account of the failure of the licensee to comply with any provision of Sixth Schedule. Where a State Electricity Board is constituted under the Act, the rating committee would consist of three members, namely, one member nominated by State Government who has been a judicial officer not below the rank of District Judge; one member having experience of accounting and financial matters, and one member co-opted jointly by the other members from an association of licensees. In the Sixth Schedule the following provision is made empowering the licensee to adjust his charges for the sale of electricity whether by enhancement or reduction, in such a way that clear profit in any accounting year shall not exceed the amount of reasonable return. There is also a restriction against enhancing the charges more than once in any accounting year, and it is also provided that if clear profit in any accounting year has not exceeded by 20% of the amount of reasonable return, the licensee shall not be deemed to have failed to adjust his charges legally. The exact terms in which this provision is made in Para-1 of the Sixth Schedule to the Electricity (Supply) Act, 1948 are as under:

1. Notwithstanding anything contained in the Indian Electricity Act, 1910 (IX of 1910) except Sub-section (2) of Section 22-A, and the provisions in the licence of a licensee, the licensee shall so adjust his charges for the sale of electricity whether by enhancing or reducing them that his clear profit in any year of account shall not, as far as possible, exceed the amount of reasonable return;

9. The submission, therefore, made on the basis of the restriction contained in the licence or any provision in the Indian Electricity Act would not hold good after the enactment of Electricity (Supply) Act in the year 1948 and Section 57 substituted therein in the year 1956.

10. These provisions were taken into consideration by the Supreme Court in *The Amalgamated Electricity Co. Ltd. Vs. N.S. Bhathena and Another*, which laid down that the licensee has a statutory right to unilaterally adjust his rates provided he conformed to the requirements of para-1 of Schedule Six of the Electricity (Supply) Act, 1948. It was held that if any restriction incorporated in the licence granted under the Electricity Act, 1910, is inconsistent with the rate which a licensee might charge under Para-1 of Schedule VI of the Supply Act, 1948, the former would, to that extent, be superseded and the latter would prevail. It was accordingly held that the maxima prescribed by the State Government which bound the licensee under the Indian Electricity Act, 1910 no longer limited the amount which a licensee would charge after the Supply Act, 1948, came into force since "clear profit" and "reasonable return" which determined the rate to be charged was to be computed on the basis of very different criteria and factors than what obtained under the Electricity Act. The Supreme Court also rejected the argument to the effect that the onus of proving that the rates charged by the Electricity Company were within the statutory limits was on the Company itself; the Supreme Court observed that there is no presumption that the rate charged by a licensee contravenes the statutory

prohibition and it is for the party who alleges his right to a relief to establish the facts upon which such relief could be obtained. Admittedly in the present petitions, nothing is brought on record to show that the rates charged by the respondent No. 2 exceeded the statutory limit.

11. The aforesaid judgment of the Supreme Court was followed by the Division Bench of this Court in Wadhvan City Municipality at Wadhavan City, Surendrangar Vs. The Zalawad Electric Supply Co., . The matter came up before the Division Bench under a certificate granted by the learned single Judge under Clause 15 of the Latters Patent in respect of a decision given by him in a Second Appeal. The Bench observed that the charges fixed by the Government for supply of power to consumers u/s 57 before its amendment in 1956 can be enhanced unilaterally by the licensee by virtue of the amendment, in accordance with the provisions of Schedule VI which have to be read with the licence, and that such unilateral power of the licence is unfettered by any provision of the Electricity Act or licence granted thereunder.

12. In view of this settled law the main prayer contained in Para-23(a) in each case of the petition does not survive.

13. The petitioners have also challenged the recovery of electricity charges under different heads of fixed charge, fuel surcharges and electricity duty levied on the total amount of all charges. It is vaguely alleged that a licensee under the Indian Electricity Act should not be permitted to make huge profits in its monopolistic activity of supplying electricity which is a public utility service. It is further alleged that the petitioners have to get the lodging rates approved by Tourism Department and they would not be in a position to unilaterally increase the lodging rates from time to time even if respondent No. 2 issues bills containing varying charges under the aforesaid heads. According to the petitioners it should be possible for them to know well in advance the estimated cost which they would be required to incur per room or per accommodation, so as to enable them to remain in business; otherwise it would be impossible for them to recover the difference attributable to higher cost of electrical energy supplied to them for extending the facilities to lodgers after the lodgers have left the hotels and the burden placed on the hoteliers would not be passed on to the lodgers. It is the petitioners' grievance that the fuel surcharge varies from month to month and the basis for such variation is not known to the consumers. It is also alleged that the State Government has not permitted the respondent No. 2 to recover any amount under the head of fuel surcharge.

14. Similar submissions made on behalf of certain Ice Factories in a group of First Appeals were repelled by a Division Bench of this Court in First Appeal No. 681 of 1974 and cognate matters which arose from Civil suits filed by the petitioners for a declaration that new tariff for electricity introduced by Ahmedabad Electricity Company Ltd. was illegal, and also for an injunction restraining the Company from enforcing new tariff. The Division Bench referred to a notification dated 24th October, 1969, issued by the Government of Gujarat

permitting the Ahmedabad Electricity Company "to introduce two parts Tariff for supply at Low Tension related either to the connected load in BHP or maximum demand in KW or KVA of the installation and the levy of fuel cost adjustment charges as well as introduction of power factors adjustment clause in the Companies Tariff for L.T. supply". It was urged that even if the new tariff was in accordance with the Government sanction, the very sanction was invalid in so far as the sanction went far beyond the scope of Sub-section (4) of Section 23 of the Indian Electricity Act. The Bench considered the provisions of Section 23 in this context, and came to the conclusion that Electricity Company must be ready to meet the contracted demand and for that purpose fixed charges were provided for meeting the over all costs. The Bench also refused to assume that Clauses (a), (b),(c) & (d) of Section 23 of the Act govern Clause (c) of Sub-section (3) of Section 23 of the Act. The Bench found on facts that the tariff was based on and it varied in accordance with the two relevant factors, namely, the consumers load factor and the power factor of his load. The Bench also rejected the submission that fuel cost adjustment is not contemplated by either Sub-section (3) or Sub-section (4) of Section 23 of the Indian Electricity Act. The Bench also referred to the submission of the petitioners" Advocate that fluctuation of the fuel cost adjustment from month to month would violate the proviso in Clause (1) of Sixth Schedule which laid down that "such charges shall not be enhanced more than once in any year of account". The Bench gave a clear-cut finding that the fuel cost adjustments would not amount to enhancement of the charges or enhancement of rates as such; once the formula for variation is fixed. Though the aforesaid common appellate judgment of the Division Bench arose from civil suits in which evidence was led by the parties in the trial Court, the principles kept in the mind by the Bench while deciding the appeals would bind me as a single Judge as ratio decidendi. The second prayer of the petitioners, therefore, fails.

15. The third challenge is to the recovery of electricity duty on ad valorem basis, i.e., on the total amount of energy charges, fuel surcharge, excise duty and fixed charges. Reliance is placed on Section 3 of the Bombay Electricity Duty Act, 1958 which creates an obligation on the part of a consumer of electricity to pay "a duty on the consumption of electricity". The petitioners" submission is that electricity duty can be levied only on consumption of electricity as reflected in the number of units recorded by the meter and addition of other charges like fuel, surcharge, excise duty and fixed charge cannot form a basis for calculation of electricity duty. Since these charges do not reflect consumption of electricity, and, in fact, they are levied artificially as a kind of tax. Now these submissions proceed on a narrow interpretation of the term "consumption of electricity". The consumer has to pay some price for consumption of electrical energy and that price is described as consumption charges. If these charges include certain charges related to consumption as recorded by the meter it cannot be said that they do not form part of "consumption charges" unless they are specifically excluded. No doubt, generation and supply of electricity is a monopolistic activity

entrusted to licensees, but then there are checks and counterchecks placed by the legislature in levying surcharge, and Rating Committee is also provided by the statute. So by no technical or legalistic gymnastics, it can be said that consumption charges do not include fuel surcharge or excise duty or fixed charge which are all levied after anxious consideration of the interests of the consumers as well as generators. My attention was drawn to Explanation-I to Part-I of Schedule I relating to the rates of duty payable by consumers other than those referred to in Section 2(a)(i) and (ii). The Explanation-I reads as under:

Explanation-I: For the purposes of this Part, the expression "consumption charges" means the charges payable by a consumer to a licensee or any person who generates energy for the energy supplied by such licensee or person, but shall not be deemed to include any of the following charges, namely:

- (i) Meter charges
- (ii) Interest on delayed payment
- (iii) Fuse-off call charges and reconnection charges.

Thus the meter charges, interest on delayed payment and fuse-off call charges and reconnection charges have been specifically excluded from the meaning of "consumption charges". Thus the term "consumption charges" would mean all the different types of charges payable by the consumer of electricity to a licensee or any person who generates energy. This last submission of the petitioners has, therefore, no merit.

16. Though a consequential specific prayer is not made in the petitions, a grievance is made that electricity duty has been charged at the rate of 60% under residuary entry (7) of Part I of Schedule-I to Bombay Electricity Duty Act, 1958 even though the petitioners who are running industrial undertakings cannot be burdened with any duty above 15% under entry (5) thereof dealing with industrial undertakings. As there is no affidavit-in-reply on record, on this aspect, we refer to the different bills annexed with the petitions, and it is found that electricity duty at the rate of 45% is levied, in respect of some hoteliers, while electricity duty at the rate of 60% is levied in respect of others. For the purpose of determining this vexed factual dispute it is necessary to refer to Schedule-I to the Bombay Electricity Duty Act, 1958, specifying the rates of duty payable by the consumers as per Section 3 of the Act. The relevant portion of Section 3 reads as under:

3. (1) Subject to the provisions of Sub-Sections (2), (2A), (2AA) and (3), there shall be levied and paid to the State Government a duty on the consumption of electricity hereinafter in this Act referred to as "electricity duty" at the rates specified below:

(a) the electricity duty shall be payable by consumers other than those referred to in Sub-clauses (i) and (ii) of Clause (a) of Section 2, at the rates specified in Schedule-I to this Act, and

(b) the electricity duty shall be payable by consumers referred to in Sub-clauses (i) and (ii) of Clause (a) of Section 2, at the rates specified in Schedule-II to this Act.

17. A look at Schedule-I shows that Entry-4 in Part-I relates to levy of 35% consumption charges in respect of manufacture of eatables or drinks and a levy of 45% of consumption charges in respect of consumption by hotels including residential hotels, restaurants, eating houses, and lodging and boarding houses. In this part there is also a residuary entry No. 7 which prescribes electricity duty at the rate of 60% of consumption charges in respect of any premises not covered by any entry. The grievance of the petitioners is that they are covered by specific entry 4(b) and not by residuary entry No. 7. Mr. Khumri, Collector of Electricity Duty, who is present in the Court has tried to explain the application of different rates to different hotels by saying that in some hotels a portion of the premises is let out for running shops or for rendering other services, and, therefore, the rate of 60% is being charged. It appears that if there is a specific entry regarding residential hotels and lodging houses, the electricity duty has to be charged at 45% of consumption charges, and if any part of the premises is being used by a third party, either under licence or under hire then the occupation of such premises itself would become illegal as per the licence, and that if the electricity is not disconnected on that count the residuary clause may come into operation in respect of the portions occupied by the third party in contravention of the contract. It is also open to the Electricity Company to call upon such hoteliers to obtain separate connections in respect of the portions utilised by the third party for commercial purpose, which would attract the duty prescribed in the residuary clause. In any case the petitioners' activity cannot be described as an industrial activity since there is a specific entry No. 4(b) of Schedule-I which applies to the petitioners' case, and since entry (5) itself being a general entry relating to industrial undertakings, in terms excludes the undertakings covered by entry (4). Now since the only dispute that remains is a dispute relating to application of entry No. 4(b) or entry No. 7 of Part-I of Schedule-I, the dispute has to be referred for decision to the specified authority. Even in the absence of specific prayer on this count, it would be in the interests of justice to treat each petition as a reference to the specified authority in order to find out the rate at which the duty has been calculated and should be calculated in each individual case, after taking into consideration the facility as provided by the hoteliers, either independently or through third parties, and for that purpose, opportunity of hearing will have to be given to each of the petitioners. It is hoped that if such an opportunity is given, the petitioners will not shirk from appearing before the specified authority, as they have done in the present case, and place all the relevant facts on record which may help the authorities in determining the exact entry applicable to their case. Such a reference is provided under Part-II of Sch. I of the Bombay Electricity Duty Act, 1958. Mr. Khumri states that he is the authority specified by the State Government by notification in the official gazette to decide the dispute. He also

states that it is not necessary for the State Government to make a formal reference in this regard and the present order will itself be treated as a reference for this purpose. After issuing the requisite notice to the petitioners and after giving him sufficient opportunity of hearing and production of evidence, the specified authority will decide the dispute in each case as early as possible, and preferably before the end of 31st March, 1995. This direction is issued on an assumption that the dispute. If any finding of the specified authority is in favour of the consumer, there is no doubt that the respondent No. 2 will take adequate steps for implementation thereof.

18. Rule is made absolute accordingly to the aforesaid extent with the aforesaid directions.