

(1976) 05 OHC CK 0003

In the Orissa High Court

Case No : Original Jurisdiction Case No. 1353 of 1975

Indian Metals and Ferro Alloys Ltd. and Another

APPELLANT

Vs

The Orissa State Electricity Board and Another

RESPONDENT

Date of Decision : 12-05-1976

Acts Referred:

Constitution of India, 1950 — Article 226

Electricity (Supply) Act, 1948 — Section 49(1), 49(2), 59

Orissa State Electricity Board (General Tariffs) Regulations, 1973 — Regulation 6

Citation : AIR 1977 Ori 31 : (1976) 42 CLT 870

Hon'ble Judges : S.K. Ray, Acting C.J.; P.K. Mohanti, J

Bench : Division Bench

Advocate : Gouri Mitra, B.K. Mohanti, Devananda Misra, P.K. Misra, S.R. Das, K.K. Rath, R.L. Bose and P.N. Misra, for the Appellant; Standing Counsel, G. Rath, R.K. Rath and N.C. Panigrahi, for the Respondent

Final Decision : Partly Allowed

Judgement

Mohanti, J.—The principal question for consideration in this writ application is whether the State Electricity Board (hereinafter referred to as the "Board") set up under the Electricity (Supply) Act, 1948 (hereinafter referred to as the "Act") has power to unilaterally enhance the energy rate for supply of electricity in derogation of contractual stipulations as to rates in the binding agreements between the Board and the petitioners when it finds that the contractual rates are not sufficient to meet the cost of generation, distribution and supply of electricity and thereby causing it operational loss.

2. Shorn of unnecessary details, the relevant facts are these: Petitioner No. 1 is a Public Limited Company incorporated under the Companies Act, 1 of 1956 with the objects, inter alia, of manufacturing ferro alloys and is at present engaged in the manufacture of ferro silicon and silicon metals by modern and sophisticated processes. Electricity is one of the main raw materials for such manufacture. The Company possesses two furnaces which are of 10 MVA and 24 MVA capacities

respectively. When the Company set up its first furnace, it entered into an agreement on 3-4-1967 for the supply of electric energy (hereinafter referred to as the "first agreement"). This agreement was to remain in force for a period of fifteen years commencing from the date of actual supply of electrical energy and was terminable by either party by giving to the other six calendar months" notice in writing of his intention to terminate the contract. Clause 13 of the first agreement contains a schedule of rates for the purposes of computation of energy charges. Clause 16 (a) of the first agreement prescribes for revision of rates of tariff and conditions of supply and runs thus:

"16 (a). The tariff and conditions of supply mentioned in this agreement shall be subject to any revision during the period of the agreement in the event of ex-factory price of Ferro-silicon produced, goes up beyond Rs. 1,300 per ton and such advance notice as may be feasible may be given to the consumer before any such revision is effected."

Clause 24 contains a stipulation for arbitration and runs thus:

"Any dispute or difference arising between the consumer and the supplier as to the supply of Electrical Energy hereunder or the pressure thereof or as to the interpretation of this agreement or the right of the supplier or the consumer respectively to determine the same or any other question, matter or thing arising hereunder shall be referred to a single Arbitrator who shall be mutually agreed upon by both parties. The Arbitrator's decision thereon shall be final and the provisions of the Arbitration Act, 1940 (X of 1940) with any other statutory modification thereof for the time being in force shall apply to any such reference.""

3. When the second furnace of the Company was set up, another agreement with the Board was entered into on 2-1-1974 (hereinafter referred to as the "second agreement") which was also to remain in force for a period of fifteen years commencing from 31st of December, 1973. There was a similar provision for its determination by six months" written notice. Clause 13 of the second agreement also provided a schedule of rates for computation of energy charges Clause 14 of the second agreement which provided for revision of rates of tariff and conditions of supply, reads as follows :

"The tariff and conditions of supply mentioned in this agreement shall be subject to any revision that may be made by the supplier from time to time and such advance notice as may be feasible may be given to the consumer before any such revision is effected."

Clause 22 containing the arbitration clause ran thus:

"Any dispute or difference arising between the consumer and the supplier as to the supply of electrical energy hereunder or as to the interpretation of this agreement shall be referred to the sole arbitration of an officer of the rank of Chief Engineer unconnected with the dispute to be nominated by the Chairman of

the Orissa State Electricity Board in consultation with the consumer and if no such Chief Engineer is available all such disputes shall be referred to the sole arbitration of the Chairman himself. The arbitration shall proceed in accordance with the provisions of Indian Arbitration Act, 1940 (X of 1940) with any other statutory modification thereof for the time being in force and the decision of the Arbitrator shall be final and binding between the parties;

Provided that any dispute or difference with regard to the rates of tariff, surcharge or any other dues payable under this agreement shall not be deemed to be a dispute within the meaning of this clause."

While both the agreements were in force, the Board on 12-1-1974 framed Regulation u/s 79 (j) read with Sections 49 and 59 of the Act called as the Orissa State Electricity Board (General Tariffs) Regulations. 1973 (Annexure 30). Regulation 3 empowered the Board to prescribe different terms and conditions of supply for different classes of consumers and/or under different schemes for different areas. Regulation 6 makes the following provision:

"Notwithstanding any contract to the contrary, the Board may revise tariffs, impose surcharges after giving minimum 30 days" notice and disconnect the supply of the consumers in case of default in payment of bills or for breach of any conditions of the agreement and/ or for violation of any of the statutory orders and directions provided that no dispute arising out of revision on tariff or discontinuance of the supply effected under this regulation shall be referable to arbitration."

4-5. On March 3, 1975, the Board invoking powers conferred u/s 49 of the 1948 Act and the Regulation issued A notification as under Annexure 31 laying down the revised rates of tariff applicable to Power Intensive and Heavy Industries. The notification provided:

"..... Notwithstanding any agreement to the contrary, these tariffs shall be applicable to all categories of consumers specified in the schedule. These rates shall come into force with effect from 3rd-April, 1975 and all consumption of electricity made by the specified categories of consumers, on and after 3rd April, 1975 shall be charged in accordance with these revised tariffs."

6. On 29th March, 1975, the Board issued a letter under Annexure 32 to petitioner No. 1 enclosing therewith , a copy of the notification, under Annexure 31 and intimating the rates applicable to Power Intensive Industries and farther intimating that the rates under Power Intensive Industries-- I category of the notification shell be applicable to the petitioners" factory. Thus the Board claimed entitlement to recover from the petitioners tariffs at a higher rate than what had been provided under the first and the second agreements which were still in force. This writ application has been filed by the Company (Petitioner No. 1) and its promoter and presently Managing Director (petitioner No. 2) challenging the validity of the Regulation as also the notification under Annexures 31 and 32.

7. It is contended that Regulation 6 gives unbridled and unguided power to the Board in fixing unilateral rate of tariff, imposing penalties, causing disconnections, raising surcharges, stopping or reducing supply of power and thus conferment of such wide, unguided, arbitrary and unbridled power made the provision vulnerable to attack under Article 14 of the Constitution.

8. Opposite parties 1 and 2 are the Board and the State of Oriss respectively. Two separate counter-affidavits have been filed by them. As the stands "taken by both these opposite parties are similar, they may now be indicated. According to them, the two agreements enable the Board to revise the tariff from time to time and the revision effected by the Board in its notification under Annexure 31 is legal, valid and binding. The pre-conditions for revision of tariffs have been fully complied with and are satisfied and appropriate advance notice of revision of tariff has been given. The agreements entered into between the parties provide for unilateral revision of tariff lay the Board and the said power can be exercised from time to time. The Board is competent to revise the tariff by virtue of the powers vested in it u/s 49 read with Section 59 of the Act. Even assuming that there is a provision in the agreements restricting the Board from revising the tariff unilaterally, such agreement or engagement does not and cannot supersede the statutory power conferred on the Board. The Board cannot abdicate its statutory powers by agreement. It is further contended that the Board had been sustaining loss as the cost of generation and transmission have substantially gone up and without raising the tariff, the Board is unable to run its affairs and meet its statutory obligations as Laid down in Section 59 of the Act.

9. On 19-3-76, petitioners made an application in this case for stay of further proceedings in view of the Presidential Order under Article 359(1) of the Constitution suspending enforcement of Article 14 during the subsistence of the Emergency. Both parties, however, agreed that the question of stay may not be pressed and the writ application be heard early. When the writ application was taken up for hearing, learned counsel for the petitioners did not challenge the revision of rates as being violative of Article 14 of the Constitution obviously in view of the Presidential Order.

10. The main question for consideration is whether the Board can enhance the rates in exercise of powers u/s 49(1) and (2) of the Act during the subsistence of the binding contracts. Sub-sections (1) and (2) of Section 49 clothe the Board with power to fix uniform rates of tariffs. Sub-section (3) on the other hand authorises the Board to fix different tariffs having regard to the special factors mentioned therein. This sub-section makes reference to special agreements.

11. There is no dispute before us that the first and the second agreements in the instant case, being Annexures 11 and 28, are in the nature of such agreements as are referred to in Sub-section (3) of Section 49. It is now settled beyond dispute that power under Sub-sections (1) and (2) cannot be invoked during the subsistence of the special agreements providing for stipulation of rates of tariff in absence of a clear reservation of such right therein. The power u/s 49(1) and (2)

as also u/s 59 of the Act shall remain dormant, suspended and unenforceable during the currency of the special agreements between the parties and no unilateral enhancement of rates is permissible under the statute, The Board has no power under Sections 49 and 59 to override contractual stipulations as to the rate and cannot enhance the rates in derogation of such contractual stipulations even if it finds that the rates stipulated in the contract are not sufficient to meet the cost of generation and supply of power and, consequently, there is operational loss. See *Indian Aluminium Company Vs. Kerala State Electricity Board*, ; *Indian Aluminium Company Vs. Kerala State Electricity Board*, and *Bisra Stone Lime Co. Ltd. and Another Vs. Orissa State Electricity Board and Another*, . To two of these cases, the Board itself is party.

12. It, was, however, claimed by the Board as also the State Government that even if power under Sections 49 and 59 of the Act is not invocable for revising energy rates, revision could be justified by resorting to the power under the terms and conditions of the two agreements. In other words, it is maintained that even though, in the notification, the Board has relied upon Sections 49 and 59 of the Act and the Regulation as the source of its power for revision of rates and that the Board cannot avail of these provisions, yet, it could justify its revision of rates, in the alternative, under the terms of the two agreements. Learned Advocate General placed reliance on the following observations of the Supreme Court in the case of *Indian Aluminium Company Vs. Kerala State Electricity Board*, :

"But, if there is one principle more well settled than any other, it is that, when an authority takes action which is within its competence, it cannot be held to be invalid, merely because it purports to be made under a wrong provision, if it can be shown to be within its power under any other provision. A mere wrong description of the source of power--a mere wrong label -- cannot invalidate the action of an authority, if it is otherwise within its power."

13. As indicated earlier, the first agreement provided that any dispute or difference relating to a question, thing or matter arising under the agreement shall be referred to arbitration of a single Arbitrator. So, whether the Board had power under the agreement to enhance the rate unilaterally when no such power is conferred on it by the Act and whether the rates were revised without fulfilling the pre-conditions and whether the revision of rates was arbitrary, unconscionable and unreasonable, are questions arising under the agreement and, therefore, covered by the arbitration clause contained in the agreement. It is, therefore, open to the petitioners to pursue the remedy of arbitration instead of invoking the jurisdiction of the High Court under Article 226 of the Constitution for determination of questions which really form the subject-matter of arbitration agreement. The contentions raised on behalf of the petitioners would have to be decided by arbitration as provided under the agreement. It was contended on behalf of the petitioners that under arbitration Clause 22 of the second agreement, a dispute or difference with regard to the rates of tariff would be

deemed not to be a dispute within the meaning of that clause and hence such a dispute is not referable to arbitration. No doubt, such a dispute cannot be referred to arbitration under the terms of the contract, but the rights and liabilities of the petitioners flow from contract and in case of breach of contract, remedy would lie in suit for damages or for specific performance of the contract, as the case may be, in an appropriate court and extraordinary jurisdiction of this Court under Article 226 cannot be invoked.

14. It was next contended on behalf of the petitioners that the impugned Regulation and the notification nullified the arbitration clause providing for making reference of disputes arising out of the contracts to arbitration. As already stated, Regulation 6 provides that notwithstanding any contract to the contrary, no dispute arising out of revision of tariff is referable to arbitration. Similarly, the notification in Annexure "31" also provides that notwithstanding any agreement to the contrary, the revised rates of tariff shall be applicable to all categories of consumers specified in the schedule. Such action on the part of the Board is not supportable. Section 79(j) empowered the Board to make Regulations not inconsistent with the Act. The power to make regulations, therefore, had to be exercised consistently with the statute. If the power to override the contractual stipulations was not conferred by the statute, the Board cannot acquire it under the regulation made under the Act; The provision in the Regulation imposing ban on arbitration with reference to disputes arising under the contract in relation " to revision of the rates of tariff, where the agreement expressly authorises arbitration, is thus without jurisdiction and cannot be justified. We would, accordingly issue a writ quashing, Regulation 6 and the notifications in Annexure 30 in so far as they seek to take away the right of the petitioners to refer their disputes to arbitration arising out of the contract to the extent indicated.

15. In the result, the writ application is allowed in part, but in the circumstances of the case, without costs.

S.K. Ray, Ag. C.J.

16. I agree.