
(2015) 07 PAT CK 0123

In the Patna High Court

Case No : Letters Patent Appeal No. 777 of 2010 in Civil Writ Jurisdiction Case No. 12790 of 2002

Jaisal Polyplast

APPELLANT

Vs

Bihar State Electricity Board and Others

RESPONDENT

Date of Decision : 28-07-2015

Acts Referred:

Electricity Act, 1910 — Section 24(1), 26

Citation : (2016) 1 PLJR 63

Hon'ble Judges : N.P. Singh, J; Nilu Agrawal, J

Bench : Division Bench

Advocate : Suraj Samdarshi and S.S. Rekhi, for the Appellant; Vinay Kirti Singh and Akhileshwar Singh, Advocates for the Respondent

Final Decision : Allowed

Judgement

N.P. Singh, J—With leave of Court a supplementary affidavit has been filed on behalf of the appellant bringing on record certain additional documents to show purchase of generator, exemption from sales tax under the Industrial Policy, 1995 of the State Government in respect of new industrial units, the income tax returns showing initially the firm to be a profit making concern and continuing production well after disconnection as well. Heard the parties at length.

2. The appellant is the unsuccessful writ petitioner/appellant. The facts are not in dispute. In 1995, the State Government came with the new Industrial Policy to give incentive of setting up of industries including small scale industry. There were manifold incentives. One of the incentives was in relation to exemption of sales tax for a period of 8 years from the date of production. The other was that industrial units would not be liable to pay Monthly Minimum Guarantee (hereinafter in short referred to as "MMG") charges and/or Annual Minimum Guarantee Charges in respect of electricity. The effect of this later incentive was that the unit would be liable to be billed only on the actual consumption charges. As is well known that was a period when this State was under acute shortage of

electricity. Industrial units, who required electricity, were reluctant to set up their industries for fear of having to pay huge amount of MMG charges without there being adequate supply of electricity. There was subsidy for installation of generator to ensure the units had sufficient electricity to run the unit. Keeping in view these incentives that were available under the Industrial Policy, 1995 which was up to 31.08.2000, the appellant firm, which is a partnership firm, was constituted, applied for registration as a small scale industry and it was duly granted the said registration by the General Manager of the District Industries Center, Patna. It then applied for registration to the Commercial Taxes Department and was duly registered. As it had intended to set up a unit for making plastic pipes for delivery of water, which has sophisticated machineries including electrical components thereof, it applied for and entered into an agreement on 14.01.2000 with the then Bihar State Electricity Board (hereinafter in short referred to as the "Board"), for supply of electricity as a low tension consumer having installed load of 50 HP i.e. 37.3 KW. The agreement has certain clauses which are of some importance. The first is that for shortfall or no supply of electricity, the consumer will have no claim against the Board. The second is that once an agreement is entered into, it will not be terminable before the end of 2 years. In other words, once a consumer entered into an agreement, he is stuck with the Board whether there is supply or no supply or deficient supply. There is yet another clause in the agreement which obliges the Board to supply electricity to the unit at 440 volts. Under Indian Electricity Rules, 1956 there is a statutory obligation on the part of the Board to do so as well. Having entered into the said agreement and having installed machineries including backup generator, the electric connection of the appellant's unit was energized on 03.04.2000. On 01.06.2000, the appellant firm started commercial production as certified by the General Manager of the District Industries Centre, Patna. Having started production, the appellant firm felt difficulty in running the unit solely on electricity to be supplied by Board. The reason was simple. The supply voltage was so low that except of domestic lighting and domestic fan, the unit itself could not run. There were frequent disconnections. It managed to survive as the firm had its own captive generator. This fact of low voltage is evident from the report of the meter reader, as endorsed on the meter reading card, which has been recorded for first few months. The meter reader has recorded extremely low voltage for meter to record any consumption. Even thereafter, there is hardly any consumption on record rather letters of the appellant protesting to the extremely low voltage and protesting that it was forced to incur heavy losses because it had to run unit on generator and, at the same time, the electricity bills which were being raised on basis of MMG charges.

3. In view of Industrial Policy, 1995, as has been adopted by the Board in terms of Section-78A of the Indian Electricity Act then in force, the writ petitioner/appellant was exempted from payment of MMG charges still bills were being raised and for non-payment thereof, on 19.03.2001, the electricity connection was disconnected in purported exercise of powers under Section-24(1) of the

Indian Electricity Act, 1910. Soon thereafter, on 14.05.2001, the Board suo motu removed the meter and declared it defective and then justified the billing on MMG basis right from inception on the ground that Clause-16.8 of the Board's Tariff, as applicable then, which provided that where the meter was found burnt or defective (not tampered) then so long as the meter was not replaced by a correct meter, the consumer would be billed on the basis of MMG forgetting the statutory duty under Section-26 of the Electricity Act to supply and maintain a correct meter. This obligation to supply correct meter, apart from under Section-26 of the Electricity Act, is contained in Clause-23 of the agreement as well. Thus, unilaterally, without intervention of the Electrical Inspector, the meter was removed declaring it defective. The Board then sought to justify the charging of MMG on basis of Clause-16.8 of the tariff.

4. Now, when the appellant invoked the Industrial Policy, 1995 stating that it was liable to pay only actual consumption charges and not MMG charges, the plea was not entertained. That led to the appellant to approach this Court in a writ petition bearing C.W.J.C. No. 13415 of 2001. Pursuant to directions by the Writ Court, while disposing of the writ petition on 23.11.2001, the Board then entertained the representation of the appellant to consider grant of exemption from payment of MMG charges as per the Industrial Policy which the Board had adopted. The learned Financial Controller of the Board considered the matter and rejected the claim of the petitioner not on the ground that he was not entitled to benefit under the Industrial Policy, 1995 but on the ground that having suffered disconnection of electricity on 19.03.2001, the appellant cannot seek the exemption, because, on this solitary fact, he inferred and held that there was no intention to run the unit. Accordingly, the industrial incentive of non-liability to pay MMG was refused. This brought the appellant to this Court in the present writ petition bearing C.W.J.C. No. 12790 of 2002. Before the learned Single Judge, it was urged that it was the inability of the Board to supply the electricity at the correct voltage all along and insufficient quantity as evident from the notes of the meter reader, which was not in dispute and for that failure of the Board, the petitioner, who was a new small scale industry, was being coerced to pay MMG charges notwithstanding exemption granted by the Industrial Policy, 1995. Having failed to pay the same, which was not payable, the line was disconnected. An industry cannot keep suffering such financial demands and survive, therefore, reconnection was not sought for. The demands continued. The learned Single Judge accepted the plea of the Board that mere fact that the writ petitioner/appellant had sought no reconnection, it would show that he had no intention to run the industry, therefore, the industrial incentives were not to be wasted on it. The writ petition was dismissed. Being aggrieved, the present appeal has been filed.

5. As noted at the very beginning, the appellant has brought on record the facts to show that it is incorrect to assume and there were no facts for the assumption that merely because the electric supply was disconnected, the industry had shut down. It was an unwarranted assumption unsupported by facts. The Financial

Controller of the Board and the learned Single Judge fell in error in assuming this conduct without factual background. They based their assumption merely on the ground that petitioner had not sought reconnection. We fail to agree with this submission or line of reasoning. Firstly, because as the facts have shown that the whole problem started because petitioner took electric connection. There being no obligation on the Board to supply electricity at the required voltage and the required quantity, an industry was being bled to death by MMG bills for virtually no supply or no usable supply. There being no denial of extreme low voltage on electric supply then to ask the industry to renew and/or reconnect and, that too, after full payment of all outstanding dues would itself be a death blow for the unit. Thus, to infer that this act of not asking for reconnection itself shows, that the industry was not intended to run, has no foundation. To the contrary, the letters which had been annexed to the writ petition itself being letters of protest by the petitioner/appellant clearly mentions that on one hand, they are being asked to pay MMG charges and on the other hand, they are to bear the cost of generator to run the industry. That would amount to double charging making industry financially sick. Therefore, the industry did not seek reconnection so that whatever they could produce, they will do it with uninterrupted electric supply by their generator. Thus, the facts do not justify the inference that the industry did not intend to run. The income tax returns show that industry functioned even after disconnection.

6. There is another paradox in this regard. First, an incentive is promised in the shape of no MMG, and then when the liability comes, instead of not enforcing the liability, it is enforced, and the unit is disconnected from electric supply and forced to get reconnection. It has to pay the entire dues and then again suffer the same. Is it not paradoxical that on the one hand, an industrial policy assures an industry that it would not be liable to pay MMG charges and, on the other hand, there being default in supply, the MMG is enforced and the supply disconnected. If we keep this in mind then why the Board took steps to unilaterally remove the meter and to declare defective is understandable. Let it be noted that in terms of the Electricity Act, it is the Electrical Inspector who can declare a meter to be defective and not the Board suo motu. The reason is to give them another justification to charge MMG, for that the Tariff Clause-16.8 provides that where the meter is defective, the billing would be done on the basis of MMG, which would be deemed to be the consumer's actual consumption. It is only to avoid giving benefit to the industry, the Board, in order to raise its own revenue, sacrifices the industry.

7. We are unable to uphold the manner in which the issue was dealt with. Accordingly, we have no option but to hold that the denial of the industrial policy incentive was wrong in terms of Industrial Policy, 1995. The appellant would not be billed for MMG charges and the payments being unenforceable, the disconnection for enforcement of the said payment would not be legal. That being so, the disconnection per se being thus illegal, there would be no liability to pay MMG charges even for the first two years of the compulsory contractual

period. A party cannot say that I wrongly disconnected but you are bound by the agreement to pay for full two years notwithstanding wrong full disconnection. We hold accordingly.

8. Accordingly, this appeal is allowed. The judgment of the learned Single Judge is set aside. The order of the Financial Controller dated 10.01.2002, being Annexure-1 to the writ petition is quashed. The Board is directed to give full benefit of the Industrial Policy and full remission of the MMG to the appellant for the period under consideration and if any amount has been charged by the Board on this account, the Board will be obliged to refund the same.