

(1998) 11 DEL CK 0042

In the Delhi High Court

Case No : Suit No. 1629 of 1994 And Suit No. 1641 of 1994

Kathuria and Sons

APPELLANT

Vs

M.C.D. (DESU)

RESPONDENT

Date of Decision : 03-11-1998

Acts Referred:

Citation : (1998) 47 DRJ 717

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Mr. Mukul Dhawan, for the Appellant; Mr. Ajay Jha, for the Respondent

Judgement

Dr. M.K. Sharma, J

1. As identical questions are arising for consideration, by this common judgment and order, I propose to dispose of two petitions u/s 20 of the Arbitration Act filed by the petitioner.

2. Before entering into the arena of contentions raised by the rival counsel for the parties and deciding the disputes arising for my consideration, it would be necessary to put on record the background facts leading to the filing of the present suits.

Suit No. 1629/1994.

3. The petitioner wanted to set up an industry and for the purpose applied for large industrial power connection. The respondent sanctioned a load of 1627 KVA for industrial purpose and thereupon the parties entered into an agreement for supply of electricity as provided for under the Indian Electricity Act. It is necessary to mention at this stage that for the purpose of charging for supply of electricity, the consumers have been divided in different categories like domestic, agriculture, small industrial power and large industrial power. Those consumers who use industrial load of more than 100 KW are charged at what is known as

the Large Industrial Power (LIP) tariff. Large industrial power tariff consumers are billed on what is known as two part tariff system. The first part contains minimum demand charges to be paid by the consumers and the second part contains energy charges, i.e., consumption in units recorded by the metering equipment installed in the factory.

4. The petitioner received a bill for consumption of electricity for the month of June, 1994 in respect of its industrial unit. According to the petitioner in the said bill an amount of Rs.85,150.07 has been demanded by the respondent on account of shortfall for Minimum Consumption Guarantee charges, which according to the petitioner is illegal. It is also stated that in view of the aforesaid demand and raising of the bill by the respondent difference and disputes have arisen between the parties which are required to be referred to arbitration in accordance with the arbitration agreement between the parties as per Clause 25 of the agreement. Clause 25 of the agreement provides that if any question or difference arises between the parties, the same shall be referred to arbitration and that the provisions of the Arbitration Act would apply to any such arbitration.

5. In paragraph 19 of the arbitration, the petitioner has set out three disputes which according to the petitioner are disputes arising between the parties and are referable to arbitrator in terms of the arbitration clause.

6. The respondent has contested the present petition by filing a written statement which is on record. According to the respondent the disputes sought to be raised do not fall within the arbitration clause as the respondents are free to fix the tariff under powers conferred by the Statute and the same is not controlled or curtailed by any agreement on contract. It is further stated that the petitioner having a load of more than 100 KW has been given connection under LIP category and is liable to pay for the electricity as per provisions of tariff schedule as applicable to LIP consumers with further provision as applicable to the consumers having installed induction/Arc furnace. It is also stated that under the LIP category, the consumers are required to pay on the basis of the part tariff which includes demand charges, energy charges and also induction/Arc furnace. In such a case, the tariff and associated stipulations of LIP shall also be fully applicable with further provisions of Minimum Consumption Guarantee comprising of the demand charges plus consumption charges of 306 units per month per KVA of part thereof of the billing demand, subject to adjustment for increase or decrease in fuel and purchase cost of power from time to time.

Suit No. 1641/1994.

7. The respondent herein sanctioned a load of 1524 KVA in respect of the industrial unit of the petitioner and accordingly was granted Large Industrial Power connection. In respect of the said connection also the parties entered into an agreement for supply of electricity as provided for under the Indian Electricity Act.

8. The petitioner received a bill in respect of the aforesaid connection for the

month of June, 1994 and in the said bill the respondent levied low power factor surcharge on the petitioner amounting to Rs.2,22,106.68 which according to the petitioner is arbitrary and illegal. It is also stated that the respondent in the said bill has also arbitrarily and illegally raised an amount of Rs.1,33,045.76 due to shortfall in Minimum Consumption Guarantee which according to the petitioner is illegal and arbitrary. In view of the submission of the aforesaid bill, the petitioner has filed the present petition contending, inter alia, that disputes have arisen between the parties as set out in paragraph 21 of the petition which are referable to arbitration in terms of Clause 25 of the agreement which the arbitration agreement.

9. In the background of the aforesaid facts, I have heard Mr. Mukul Dhawan, counsel appearing for the petitioner and Mr. Ajay Jha, counsel appearing for the respondent.

10. Mr. Mukul Dhawan, counsel appearing for the petitioner submitted that the respondent is not entitled to charge minimum demand charges having failed to provide electricity of the guarantee load. He further submitted that in terms of Clause 15(B) of the agreement, in case of non-supply of electricity, proportionate reduction should be given to the consumers and the minimum charge payable by the consumer is to be reduced in proportion to the ability of the consumer to take, or the undertaking to supply such power. It is stated that the petitioner has clearly informed the respondent by various communications that for a total period of 201 hours, the respondent has failed to supply electricity and thus, at least to that extent the petitioner was entitled to proportionate reduction. In support of his contention, the learned counsel for the petitioner relied upon the decision of the Supreme Court in Northern India Iron and Steel Co. and Others Vs. State of Haryana and Another, and the decision of this Court in M/s. Hari Steel & General Industries Vs. M.C.D. Suit No. 3557A/1990 delivered on 8th July, 1991.

11. Mr. Ajay Jha, counsel appearing for the respondent on the other hand, submitted that the disputes sought to be raised do not fall within the arbitration clause. He also submitted that the petitioner is liable to pay the bills in view of Clauses 15(A) and 16 of the agreement which states that a consumer is liable to pay the charges on increase in those rates and current LIP tariff as prevailing on that date as applicable. He also submitted that shortfall of minimum consumption guarantee is not arbitrary as the same is fully payable as consumer is not in a position to use energy equal to minimum consumption guarantee. He further states that no details have been given in the petition as to on what date and particular hours, low voltage, if any, had taken place and that a vague plea that the respondent has not supplied at 11,000 volts does not give rise to any dispute. In support of his submission, the learned counsel relied upon the decisions of this Court in M/s. Hari Steel & General Industries (supra) and M/s. Metal Forgings Pvt. Ltd. Vs. Municipal Corporation of Delhi & Anr.; (Suit No. 569A/1990) disposed of on 31.3.1995.

12. In the light of the aforesaid submissions of the learned counsel appearing for the parties and also in the light of the decision of this Court, let me now examine whether the disputes as stated to have arisen between the parties could be referred to arbitrator for adjudication through the process of arbitration.

13. the disputes have been set out in paragraph 19 of the petition in Suit No. 1629/1994 which read as follows:-

(A) Whether the Respondents are justified in levying shortfall in MCG charges for the month of June 1994 or in future bills, particularly when the Respondents have failed to supply electricity for 201 hrs for the month of June 1994 to the Petitioners, there by acting contrary to the provisions of the agreement?

(B) Whether the Respondents can recover the entire demand charges from the Petitioner when there has been a clear and apparent failure on the part of the Respondents to supply the contracted demand of electricity?

(C) Whether the Respondents have supplied electricity at 11000 Volts cycle 50, and if not, at what Volts and cycle the electricity has been supplied and in case it has been supplied at lesser volts and cycle, does it amount to violation of the terms of the agreement and is the Petitioner entitled to any proportionate reduction on that account?

14. The disputes as raised in (B) and (C) relate to supply of electricity at low voltage, whereas dispute (A) relates to irregular supply of electricity.

15. Under the agreement, the respondent was to supply the electricity at 11,000 volts. It has been pleaded that the respondent had supplied at lower voltage and even did not supply electricity at all because of which 201 hours were lost. Under Rule 54 of the Indian Electricity Rules, there could be variation in the voltage to the extent of 10% on the higher side and 12-1/2% on the lower side. Besides it is not pleaded in the plaint as to on what day and what time low voltage was suffered by the petitioner. There is only a vague plea that due to power cuts and load shedding there has not been a continuous supply of electricity and 210 hours were lost by the petitioner during which there was no supply of electricity at the premises of the petitioner.

16. In M/s. Hari Steel & General Industries (supra), this Court held that a vague plea that there occurred fluctuation of voltage even up to 9000 KVA does not disclose that any dispute is referable for arbitration in absence of any particulars pleaded in the petition and that on what date and what time such low voltage was suffered. The aforesaid decision in M/s. Hari Steel & General Industries (supra) was also relied upon in the case of M/s. Metal Forgings Pvt. Ltd. (supra). In my considered opinion, the ratio of the aforesaid decision is fully applicable to the facts of the present case. In the case in hand also, the petitioner has not given any data and details from which the said disputes could be said to have arisen. It is not stated on which date and during which period the electricity supplied was less than 11000 KVA and how much was the deficiency so as to find

out whether there was in fact any such deficient supply and if so, whether it was within the limit of permitted variation or not. It also appears from the impugned bill that rebate for load shedding has been granted to the petitioner. Thus, the disputes as raised by the petitioner do not amount to raising any dispute which could be referred for arbitration.

17. It is the case of the respondent that as per the tariff applicable to large industrial power (Arc furnace), consumption demand has been charged from the petitioner after calculating on the highest of the (i) connected load (ii) load as per test report/contact demand (iii) reading of the maximum demand indicator as indicated during the month. In *M/s. Matsya Metal Udyog Vs. Municipal Corporation of Delhi*; disposed of on 30.1.1995 in Suit No. 3289/1992, this Court held that the billing demand has been defined to mean the highest of (i) the connected load (ii) the maximum demand (iii) the contact demand or as per load in the test report.

The petitioner, it appears has been billed on the basis of the aforesaid tariff by calculating the bill demand on the connected load. The aforesaid disputes, Therefore, are not liable to be referred to arbitrator, particularly when the bill has been raised as per tariff schedule and pleadings in the petition are vague and uncertain.

18. `The disputes in Suit No. 1641/1994 as set out in paragraph 21 of the petitioner read as follows:-

(A) Whether the Respondents are justified in levying shunt capacitor charges/low power factor charges on the petitioner in the impugned bill for the month of June 1994 or in future bills?

(B) Whether the Respondents are justified in levying shortfall in MCG charges for the month of June 1994 or in future bills, particularly, when the Respondents have failed to supply electricity for 180 hrs. 35 mins. for the month of June 1994 to the petitioners, thereby acting contrary to the provisions of the agreement?

(C) Whether the Respondents can recover the entire demand charges from the Petitioner when there has been a clear and apparent failure on the part of the respondents to supply the contracted demand of electricity?

(D) Whether the Respondents have supplied electricity at 11000 Volts cycle 50, and if not, at what Volts and cycle the electricity has been supplied and in case it has been supplied at lesser volts and cycle, does it amount to violation of the terms of the agreement and is the Petitioner entitled to any proportionate reduction on that account?

(E) Whether the Respondents are justified in levying demand charges on a load higher than the sanctioned load?

19. In Suit No. 1641/1994, disputes "B", "C" and "D" are common to disputes "A", "B" and "C" as raised in Suit No. 1629/1994 and, thus, the decision given in

respect of disputes "A", "B" and "C" in Suit No. 1629/1994 is fully applicable and governs the disputes "B", "C" and "D" in Suit No. 1641/1994 and, Therefore, in the light thereof, it is held that the aforesaid disputes "B", "C" and "D" are not referable to arbitrator.

20. So far dispute "A" is concerned, it is stated by the counsel appearing for the respondent that low power factor charges have become effective with effect from 1.4.1992. It is also stated by the respondent that in case shunt capacitors of adequate rating are not installed and maintained in proper working order or average power factor is found to be below 0.85 on verification/computation, a surcharge of 20% shall be levied on the basic demand charges plus energy charges of the bill. It is also stated that the aforesaid demand is being made as per tariff.

21. It further appears from the records, particularly, from the bill available on record that the petitioner has already been given the benefit of load shedding. In that view of the matter, levy of minimum consumption guarantee charges is fully justified as rebate for load shedding has already been given to the petitioner and no other rebate is admissible as per tariff provision, particularly, in view of the provision of Clause 5 of the agreement which specifically states that no reduction in minimum consumption guarantee charges is admissible, if supply is effected due to cause over which the respondent has no control.

In this connection, reference may be made to a decision of this Court in *Ram Lal Aggarwal & Co. Vs. M.C.D.* disposed of on 29.5.1998. In the said decision, this Court has held that if the impugned bill is raised on the basis of low power factor which resulted in a higher demand charges, the petitioner cannot assail the terms of the tariff in the arbitration proceedings. It is settled law that the petitioner cannot challenge the levy of tariff as was held in a Division Bench decision of this Court in *C.W.P. No. 1315/1991* titled *Taxmaco Ltd. Vs. Chief Secretary, Delhi Administration*, wherein it was held that by virtue of Clause 15 of the agreement read with Section 283 of the D.M.C. Act, the petitioner cannot challenge the levy of tariff. Reference may also be made to the decision of the Supreme Court in *Asian Art Printers Vs. M.C.D.*; reported in *JT 1994 (5) SC 60*, wherein the petitioner was held liable to pay the demand charges plus energy charges. In *Asian Art Printers Vs. M.C.D.*, this Court has held that increase in the bill demand from 250 KVA to 559 KVA was not referable to arbitration, which has been even confirmed in appeal, reported in 44 DLT 390.

22. In my considered opinion, the respondent has been able to establish that the impugned bill is direct and inevitable result of the meter readings and the application of the terms of the tariff thereto. Thus, the reasonableness of the rates as per tariff or the formula provided for computation in the tariff which is statutory in nature cannot be the subject matter for reference as per the arbitration agreement. The aforesaid dispute also is accordingly not referable to arbitration. The petitioner has also sought for reference of dispute "E" to the arbitrator. The aforesaid dispute also in the light of the observations of the

decision in Ram Lal Aggarwal & Co. (supra) cannot be referred to for arbitration.

23. In view of the foregoing discussions, both the petitions u/s 20 of the Arbitration Act are dismissed as the disputes sought to be raised is not referable to arbitration.