

(1994) 12 DEL CK 0002
In the Delhi High Court
Case No : Suit No. 1329 of 1991

Kwality Steel

APPELLANT

Vs

Delhi Electric Supply Undertaking

RESPONDENT

Date of Decision : 20-12-1994

Acts Referred:

Arbitration Act, 1940 — Section 20

Citation : (1995) 1 AD 202 : (1995) 57 DLT 143 : (1995) 32 DRJ 737

Hon'ble Judges : R.C. Lahoti, J

Bench : Single Bench

Advocate : Vinay Bhasin, Harish Malhotra, A.K. Sood, Jayant Nath, Vinod Kumar and Navin Kumar, for the Appellant;

Judgement

R.C. Lahoti, J.

(1) There is a bunch of several petitions u/s 20 of the Arbitration Act, 1940. There are three categories of petitioners :(i) Mixed Load H.T. consumers, (ii) Large Industrial power (Lip, for short) consumers, and(iii) Lip consumers running induction/arc furnaces arrayed on the one side and Municipal Corporation of Delhi through the General manager (E), Desu on the other side. The controversy centers around the Tariff for the year 1991-92 as the bills under challenge relate to the period March, 1991 onwards, the tariff for 1991=92 being effective from 1.3.1991.

(2) Though the disputes raised in the main petition are several-different in different petitions but two of them are common to the petitions in the bunch and they are relating to the applicability or working mechanism of the recovery of demand charges and of the minimum consumption guarantee clause inserted in the form of a Note in the relevant clause of tariff. Several interim orders have been passed in this bunch of the petitions in exercise of powers conferred on the court by Section 41 read with Schedule Ii of the Arbitration Act 1940. Disconnections of electric supply to several petitioners have been restrained, the petitioners having been protected against the recovery of demand charges and/

or minimum consumption guarantee charges. Mr Ashwani Kumar, learned senior advocate appearing for Desu has placed heavy and implicit reliance on the decision of their Lordships of the Supreme Court in *Municipal Corporation of Delhi Vs. Asian Art Printers (P) Ltd. and others*, etc. etc., in support of his submissions that while this Court may proceed to hear and dispose of the main petitions at its convenience but must vacate forthwith the interim stay orders to the extent to which they restrain the Desu from recovering the demand charges and/or minimum consumption guarantee charges or from disconnection for non payment thereof, as the accumulated arrears against the several petitioners on this singular head have run into crores of rupees. By this order, it is proposed to dispose of this limited part of the controversy.

(3) At the very outset, let the relevant part of the Tariff be reproduced from the Tariff for the year 1991-92 supplied in the form of a booklet at the bar at the time of hearing. It reads as under: " B) Large Industrial Power (LIP); a) Availability: Available as primary power to Large Industrial consumers having connected load above 100 Kw including lighting load. b) Character of service. A.C. 50 cycles, 3 phase, 11 KV. c) Tariff Demand Charges: Rs.60.00 per month per Kva or part thereof of the connected load or as per load or as per load in the test report, whichever is higher. Plus Energy Charges: 200 paise per unit subject to minimum payment as laid down in item (d) below and adjustment clause (xviii) above under General Conditions of Application. D) Minimum bill: The amount of the demand charges as laid down in C" under head Tariff above. NOTE: i) Lighting category load consumption under Lip cases will be included in the main Ht (LIP) category load consumption itself. ∴ ii) Ice factories and cold storages under HT(LIP) category will be treated as other normal Ht (LIP) consumers. . " , E) PAYMENT: The above rates are net. In the event of the monthly bill not being paid in full within the time specified in the energy bill, a surcharge of 3% of the amount of the bill not paid, shall be levied for each 30 days successive period or part thereof until the payment is paid in full, without prejudice to the right of the undertaking to disconnect supply after the due date in the event of non-payment in accordance with the Section 24 of the Indian - Electricity Act, 1910. - F) The above tariff is based on the supply being given through a single delivery and metering point at a single voltage. Supply at other pointer at other voltage shall be separately metered and billed. G) Supply at extra high voltage of 33 Kv or 66 Kv may be given at the discretion of the Undertaking in which case incumbent shall be entitled for a rebate of 2.5% on 11 Kv rates. Supply at medium voltage may be given to the option of the undertaking in which case the tariff shall be higher by 10% . H) In case of misuse, the energy consumption shall be billed from the billing month of the date of misuse at the rate of 50% over the relevant category and shall be applied for 3 years prior to the date of detection of misuse unless evidence is produced by the consumer to substantiate that the misuse started afterwards. Further, this is without prejudice to any other action as may be called for under the rules/ regulations. 1) Where the connected load exceeds load as in test report a

surcharge of 30% shall be levied on the total amount of bill till the excess load is removed. The surcharge so levied shall be without prejudice to any action as may be called for under the rules/regulations. NOTE: In the case of induction/arc furnace, the above tariff and stipulations of Lip will also be applicable with further provision of clause as minimum consumption guarantee @ Rs. 340.00 per Kva or part thereof per month of the connected load. 3. The tariff for Mixed Load Ht is also similarly worded in so far as relevant here i.e. where it provides for recovery of demand charges Plus energy charges. 3.2 .The connected load is defined in the tariff as under: " The "connected load." shall mean the sum of the rated capacities of all energy consuming apparatus; duly wired and connected to the power supply system including portable apparatus in the consumer's premises. This shall not include the stand by or spare energy consuming apparatus installed authorized through change-over switch and cannot be operated simultaneously. However, the equipment which stand installed but lying disconnected from consumer's installation, is not to be considered as "connected load". The consumer shall be allowed the change-over switch with the permission Of the competent authority, subject to the condition that the particular machinery supposed to be operated through particular motor whose change over switch is deployed, should be specified in the test report-itself and verified as such, at the time of release of load or later on applied for the installation of change over switch Along with test report and the bigger of the two motor shall be taken into account while computing the connected. load "3.3 With effect from 1st October, 1993, the rate of Demand Charges has been revived and increased from Rs. 60.00 to RS. 100/ per month.

(4) The petitioners place their own interpretation of the Tariff. Their contention is that all the Lip consumers are billed on the basis of two part tariff system i.e. minimum consumption guarantee charges, called the Demand Charges and the Energy Charges for the actual consumption of energy. Under this system, all the Lip consumers pay the minimum consumption guarantee charges at the rate fixed by the respondents. If an Lip consumer does not consume specified minimum guarantee consumption or no energy at all even then he has to pay mini- mum consumption guarantee charges. In case a consumer consumes more electricity then the minimum the consumer pays the minimum consumption, guarantee charges and also pays electricity charges for the actual consumption of electricity beyond the minimum consumption guarantee in such a manner that, the minimum consumption guarantee charges are merged in the total bill for electricity consumed and a rebate is given to the consumer. In other words, if a consumer consumed more than the specified minimum guarantee of electricity then in effect he will pay for the electricity which is actually consumed by him. This has been the billing system followed by Desu till the end of the month of February, 1st 1991. With effect from 1.3.1991 the new tariff having been notified the Desu has shifted to an objectionable system of billing as illustrated by the bill for the period commencing from 1.3.1991 in suit No. 1329/91 Kwality Steel vs Mcd the remand Charges at the rate of Rs. 60.00 per Kva per month being added

in the total amount of the bill irrespective of the fact whether minimum consumption guarantee charges are more less than the cost of the units consumed during the period in question. By including the Demand Charges at the rate of Rs 60.00 per Kva per month in the bills the respondents have illegally included the amount of the Demand Charges in the bill. The petitioners have submitted that the " respondents are not entitled to include the Demand Charges of Rs. Rs.60.00 per Kva per month by multiplying the same with the sanctioned load as the petitioners are also paying the minimum consumption guarantees-charges at the rate of Rs 340 per Kva per month. By adding the " Demand Charges the Desu has in fact added this figure in the cost of the actual units consumed which are on the face of it more than the minimum consumption guarantee units. According to the petitioners, if the cost of the units consumed is admittedly more than the minimum consumption guarantee charges, then the petitioners ought to have been billed only on the basis of the units actually consumed without the inclusion of the Demand Charges.

(5) Reliance is placed by the petitioners on a Division Bench decision of this Court in Gulab Rai Vs. Municipal Corporation of Delhi and Others, , wherein it has been held:- "

"For the levy of charges for the supply of electricity, there are two systems of tariff which are followed, one is the flat rate system and the other is known as two part tariff system. Under the former a flat rate is charged, on the units of energy consumed while the latter system is meant for big consumer of electricity i.e. industrial power and it is Comprised of two charges one minimum consumption guarantee charges (called demand charges) and two energy charges for the actual amount of energy consumed."

".....IT is two part tariff system which is applicable to the petitioner who are large industrial power consumer. Under this system an Lip consumer pays a minimum guarantee consumption charges at the rate fixed by the respondent. If an Lip consumer does not consume specified minimum guarantee of electricity or no energy at all, even then he has to pay minimum guarantee charges. But in case the consumer consumes more electricity then what is prescribed by the minimum guarantee charges then the consumer pay the minimum guarantee charges also pay the electricity charges for the actual consumption of electricity beyond the minimum guarantee charges in such a manner that the minimum guarantee charges are merged in the total bill for the electricity consumed and a rebate is given to the consumer. In other words, if a consumer consumes more than the specified minimum guarantee electricity, then, in effect ,he will pay electricity which is actually consumed by him."

(6) The Division Bench decision of this Court has been upheld by the Supreme Court in Ashok Soap Factory Vs Mcd 1993 (3) Scc 37.

(7) According to the petitioners, the Desu is not at all justified in including the Demand Charges Rs.60.00 per Kva per month if the petitioners have consumed

power more than the minimum consumption guarantee.

(8) The case of Desu is that the petitioners are, no doubt, governed by two-part tariff system, which has been elaborately incorporated in the Tariff for the year 1991-92, but the petitioners are misinterpreting the relevant tariff and confusing its application. According to Desu, an Lip consumer has to pay Demand Charges @ Rs.60.00 per Kva (Rs. 100.00 w.e.f. 1.10.93.) per month or part thereof of the connected load or as per the load in the test report whichever is higher Plus energy charges at the rate of 200 paise per unit for the number of units consumed by the consumer during the billing period. In case Lip consumer has also installed induction/arc furnace a further provision of minimum consumption guarantee charges is applicable according to which a consumer has to pay minimum consumption guarantee charges at the rate of Rs 340 per Kva or part thereof per month of the connected load. Thirdly, and simply put, according to the Desu, an Lip (arc/furnace) shall have to pay Demand Charges @ Rs 60/ or Rs 100/ per Kva per month plus energy charges at the rate of Rs 2 per unit for the number of units consumed for the billing period. In case the demand charges and energy charges taken together is less than the minimum consumption guarantee charges calculated @ 340.00 per KVA per month the Lip (arc/furnace) shall have to pay only the minimum consumption guarantee charges and the Demand Charges plus energy charges will not be payable by him. As to the Division Bench Decision of this Court in Gulab Rai's case confirmed by the Supreme Court in Ashoka Soap Factories case it is submitted by Mr Ashwani Kumar Sr Adv for Desu that the same stand explained in Asian Art Printers' case and read in the light of Asian Art Printers' case, the contention of the petitioners is demonstrably false.

(9) Explaining the basis and logic behind the two part tariff system, the counsel for the respondent Desu pointed out that the two part tariff system contemplates and stipulates payment of Demand charges i.e. fixed costs and the Energy charges i.e. the variable costs together against the supply of electricity to consumer premises. 9.1 The first part of the tariff rate relates to fixed costs (i.e. demand charges), which is based on performance at normative parameters. The fixed costs cover: .. i) Interest on loan capital ii) depreciation iii) operational and maintenance expenses iv) taxes on income, if any. v) Return on equity component; and vi) interest on working capital. 9.2 On the Other hand, the second part of the two part tariff relates to all variable costs or the running cost, based on units of electricity actually supplied. This variable costs comprise of: i) cost of primary fuel, such as coal, gas or oil; and ii) cost of secondary fuel. " 9.3 A bare perusal of the above factors forming the very basis of the two charges would reveal that the demand charges are based on the fixed cost, which does not take into account the amount of energy purchased and/or delivered at the consumer's end. It only covers the expenditure incurred by the Undertaking to maintain the entire infrastructure and installations in order to keep the energy required at the consumer's end in readiness of being consumed on demand. In fact, it is the second part, i.e. Energy Charges , which accounts for the

expenditure incurred towards the cost of energy purchased and delivered at the consumer's premises. It is only when these two components are charged simultaneously that the Undertaking receives the average expenditure incurred by it to supply the required electricity at the consumer's end with 3% of return.

9.4 In order to clarify the same the learned counsel further pointed out that to put it in other words, as per the engineering economics the fixed costs component comprises of the generation, transmission, distribution, servicing and billing expenditure's besides interest on annually utilised funds etc. The running cost component comprises of the cost of fuel both primary and secondary, which in case of Desu is further dominated by the average cost of purchase of energy from the neighbouring States/agencies, its wheeling/transmission charges and loss etc. The two components when clubbed together, the average cost of energy delivered at the consumer's end (including 3% of return). This two part tariff rate is also justified on the ground that fixed charges cover sunken costs and do not vary with levels of generation, whereas, the variable charges are additional costs related to actual generation varying directly with levels of generation achieved. In order to further simplify the same, attention of the court was invited to the graphic statistics filed as ANNEXURE-A which clearly illustrates the entire pattern/system of computation of the two part tariff charges.

9.5 The entire exposition, as stated above goes a long way to justify that the undertaking is quite within its legitimate and legal rights to raise bills against the consumers, taking the two factors of demand charges and actual consumption charges, together and in addition to each other. It is precisely for these reasons that under the Tariff the consumers are liable to pay the demand charges towards the fixed costs and the consumption charges towards the variable expenses simultaneously.

9.6 Why a special provision was required to be made by way of inserting a note in the tariff (above quoted), the learned counsel for Desu has read the following extract from para 9 of Gulab Rai's case (supra) wherein statement on affidavit made by the General Manager of Desu has been quoted: "The Commercial losses are also attributed to pilferage/fraudulent abstraction of energy etc. The minimum consumption guarantee being quite low also attributes to the tendency of fraudulent abstraction of energy. After giving a serious thought to reduce the pilferage/fraudulent abstraction of energy, it has been felt desirable to revise the rate of minimum consumption guarantee to a reasonable level so that consumers are not attracted for such unfair means and the rates are commensurate with the fixed expenditure being measured by the undertaking." It was this reasoning which had persuaded Desu to fix minimum consumption guarantee charges in the case of induction/arc furnace at Rs. 340.00 per KVA.

9.7 As to how this figure of Rs. 340.00 was arrived at, the basis was demonstrated before the Division Bench in Gulab Rai's case in the following words: "According to Shri Sibal, learned counsel for the respondents, if an industry consumes only 60% of the load sanctioned, then it will not have to pay the minimum demand charges and the rate per unit payable is the same in respect of all industries. According to the learned counsel, if any industry works for 25 days in a month for 24 hours a day, then on 60% of

the load factor, for every 12 Kw of electricity used, the industry would have consumed 360 units per month. At the rate of Rs. 1.10 per unit it will have to pay Rs. 396 per month. The minimum demand charge is only Rs. 340.00 per month." . 9.8 The same formula was demonstrated with approval before their Lordship of the Supreme Court in M/S Ashok Soap Factories case (vide para30): "In the present case the respondents themselves have placed figures to demonstrate the formula on the basis of which the rate of Rs. 340.00 per KVA has been fixed. The formula shows that if 60% of the load sanctioned is utilised then there is no unreasonableness or excessiveness in the tariff. It was explained that if the furnaces in question work for 24 hours a day for 25 days in a month at a load factor of 60% the consumption against 1KW would be equal to $1 \times 24 \times 25 \times 60 = 360$ units. Over all energy consumption rate (demand charges proportionate to one unit = per unit energy rate) is Rs. 1.10 per unit. The total amount per Kw per month = $360 \times 1.10 = \text{Rs.}6.00$. Again the consumption per Kva at the rate of 0.85 (power factor) would come to 306 .units and a total amount per KVA per month at the rate of Rs. 1.10. per unit would come to Rs. 336.60 ps i.e. rounded to Rs. 340.00 for the purpose of minimum consumption guarantee charges." 9.8 As to how the minimum consumption guarantee clause is being applied in case of such Lip consumers who have induction/arc furnace, the learned counsel for Desu has placed the following illustration before the court: Energy charges are taken on 306 units basis per Kva calculated on 60% load factor. It may be mentioned here that the energy charges of a minimum of 306 units per Kva per month in the case of arc furnaces is presumed on account of large scale theft of electricity of which fact the Supreme Court has taken judicial notice of and also because it is not viable to run an arc furnace at less than 60% load factor for 24 hours for 25 days in a month. If the demand charges + energy charges are more than minimum. consumption guarantee fixed in the note (1990-91) then the consumers are liable to pay this amount, alternatively MCG will have to be. paid. Illustrations given below further clarify the above factual position, The Demand 1000 Kva . Consumption = 3,00,000 units MCG amount will be $1000 \times 340 = \text{Rs.}3,40,000.00$ A Actual Bill will be as Under: Demand Charges $1000 \times 40 = (990/91)\text{Rs.}40,000.00$ Plus. Energy charges $3,00,000 @ 85 \text{ p.} = \text{Rs.}2,55,000/ \text{Rs.}2,95,000$ B As "A" is higher than "B" Therefore, "A" is payable. Now presume a situation when the units consumed are 4 lakh units then actual billing will be as under : Demand Charges $1000 \times 40 = \text{Rs.}40,000/$ plus Energy charges $4,00,000 @ 85 \text{ p.} = \text{Rs.}3,40,000/ - \text{Rs.}3,80,000$ C Since actual billing (C) is more than "A" above MCG Therefore "C" is payable.

(10) It may be placed on record that the learned counsel for the Desu has made a clear statement on behalf of the Desu after seeking instructions that in the tariff quoted vide para 3 of this order, the "minimum consumption guarantee charges" for industrial /arc furnace are not be read in substitution of "demand charges" merely. As demonstrated by the illustration given hereinabove, the minimum consumption guarantee charges are to be recovered only when the

demand charges Plus energy charges taken together did not exceed the minimum consumption guarantee charges.

(11) The learned counsel for Desu has brought to the notice of the court the tariff for 1993-94 submitting that Desu having become wiser by the litigation which it is facing in law courts, has removed the ambiguity whatever it might have been earlier and has stated very clearly in the Tariff for 1993-94, (supplied in the form of a booklet) at page 22 :

"IN case of induction/arc furnace, the tariff and associated stipulations of Lip tariff shall also be applicable with further provision .of minimum consumption guarantee Comprising of the Demand Charges Plus consumption charges of 306 units per month per Kva or part thereof of the billing demand, subject to adjustment for increase or decrease in fuel and purchase cost of power from time to time . In case of misuse, the demand charges, plus the energy consumption charges, or the minimum consumption guarantee whichever is higher, shall be billed on higher of the two tariffs with 100% surcharge."

(12) It was also stated by the learned counsel for Desu that although in a decision of Division Bench in Gulab Rai's case (supra) and of the -Supreme Court in M/S Ashok Soap Factory (para 5 and 26) the phrases demand charges and minimum consumption guarantee charges have been used inter changeably or as synonyms but that was not so, and such use of the two phrases was only inadvertent. In any case, whether the two phrases mean one and the same thing or carry the same. meaning was not a question before the courts in Gulab Rai's case or Ashok Soap Factories case.

(13) The learned counsel for the petitioners have tried to distinguish the Asian Art Printers" case by submitting that the case is applicable only to mixed load Ht consumers which" the petitioners before their Lordship were and has no applicability to Lip arc/furnace consumers. However, this-contention has been stated only to be rejected.

(14) A bare reading of the Asian Art Printers" case shows that though it was a case of mixed load Ht, non-industrial consumers but they were all placing reliance on Gulab Rai's case and Ashoka Soap Factories case, though these cases were of Lip furnace considers and, Therefore, the portion of Tariff applicable to Lip consumers as also to Lip arc/furnace consumers did arise for the consideration of their Lordships as is clear from the paragraphs", 7 and 13 of the Asian Art Printer"s case. In so" far as, clause (c) of the Tariff is concerned, their Lordships have clearly stated that the word "PLUS" occurring therein has to be read as Plus and not as OR. Their Lordships have noticed the relevant part of the Tariff having been quoted in the Division Bench decision in Gulab Rai's case erroneously with the omission of the word Plus and the" same mistake having percolated in the judgment of the Supreme Court in Ashoka Soap Factories case presumably because" of the tariff having been picked up and reproduced in the judgment of the Supreme Court from the judgment of High Court. Their

Lordships have clearly stated that in the Tariff of 1991=92 the Demand Charges are payable in addition to energy charges, the word Plus being all important. The fallacy lies in the petitioners reading the Demand .Charges as synonymous with minimum consumption guarantee charges which it is not. In the decision relied on by the petitioners there are several passages where the court has proceeded to employ language- "minimum consumption guarantee charges called the Demand Charges". However, that does not mean that at any place either the Division Bench of this Court in Gulab Rai's case or the Supreme Court in Ashoka Soap Factories case has so interpreted the tariff or laid down a law holding that the minimum consumption guarantee charges mean the Demand Charges. Their Lordships have clearly pointed out by Asian Art Printer's case vide para 14 that the challenge in the writ petitions before the .Delhi High Court in Gulab Rai's case was to the resolution of the M.C.D whereby it had approved the proposal of Delhi Electric Supply Committee to enhance the minimum consumption guarantee charges from Rs. 40.00 per Kva to Rs. 340.00 per Kva in respect of arc/induction furnaces which challenge had failed".

(15) A perusal of the Tariff applicable to Lip mixed load Ht consumers makes it clear: (i) An Lip or mixed Load H.T. consumer is liable to pay the Demand Charges plus energy charges. Both are to be worked out separately and then added to each other. ii) The Demand Charges are not to be confused with minimum consumption guarantee charges. The two are not synonymous. iii) It is erroneous to assume and suggest that when the Lip or Mixed Load H.T. consumer consumes more than the demand or that When the energy charges exceed the Demand Charges, the Demand Charges get merged into energy charges. iv) Induction/arc furnaces are governed by all the provisions of the Tariff and stipulations applicable to Lip consumers. The induction/arc furnace Lip consumers though they are Lip consumer under the Tariff are yet governed additionally by an overriding provision. They have to guarantee a minimum consumption charge calculated @ Rs. 340.00 per Kva or part thereof per month of the connected load. This overriding provision inserted in the Tariff in the form of a note is not to be read and confined in its application or in substitution of the demand charges and then interpreted as suggested by the petitioners. The charges calculated as the Demand Charges are recoverable so long as the Demand Charges Plus energy charges do not exceed the minimum consumption guarantee charges.

(16) In Ashok Soap Factories case supra challenge was also laid on the ground of unreasonableness or arbitrariness to the enhancement of minimum consumption guarantee charges to Rs.340/ per Kva per month for the first 1000 Kva in the case of industrial/arc furnace but was turned down and the enhancement has been adjudged to be neither unreasonable nor arbitrary. Their Lordships have further held that Lip category consumer having arc/induction furnaces are a class by themselves and can be treated separately without facing the charge of hostile discrimination.

(17) That being the position of law no fault can be found with the bills raised by the respondents Desu to that extent. The dispute raised by the petitioners in this regard cannot be said to be a dispute raised bonafide and available to be referred for adjudication by the Arbitrator under the arbitration clause. The petitioners are not entitled to any interim relief under this head.

(18) All the interim orders passed in the bunch of petitions to the extent to which they restrain the recovery of demand charges and/or Minimum Consumption guarantee charges are liable to be vacated and hence stand vacated accordingly. This order shall govern all the interim orders passed in the bunch of petitions and would take effect accordingly though for sake of certainty separate orders in other matters are also being placed on records thereof.

(19) It is held that the dispute raised by the petitioner challenging respondent DESU'S right to recover demand charges or Mcg charges, as the case may be, is not available for reference to arbitrator.

(20) On a prayer made by the learned counsel for the petitioners it is made clear that in so far as liability of Lip arc/furnace consumers to pay Mcg charges is concerned what has been disposed off by this order is the controversy relating to interpretation of Mcg clause. If there be other disputes relating to any petitioner's liability to pay Mcg charges as levied such as claim for proportionate reduction on account of break down, shut down, low voltage etc. in spite of the said interpretation they are yet to be decided after hearing the counsel.

(21) I.AS No. 2072/94,5356-57/93 in this suit stand disposed of accordingly.

(22) Consequent to the interim orders being vacated/modified the several petitioners are allowed time till 10-01-1995 to clear their outstanding liabilities.