
(2009) 12 AHC CK 0051
In the Allahabad High Court
Case No : C.M.W.P. No. 24281 of 1998

Modern Steel Industries

APPELLANT

Vs

State of U. P. and Others

RESPONDENT

Date of Decision : 18-12-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Electricity Act, 1910 — Section 2, 22, 23
Electricity Supply (Consumers) Regulations, 1984 — Regulation 17, 2
Uttar Pradesh Government Electrical Undertakings (Dues Recovery) Act, 1958 —
Section 5

Citation : (2010) 5 AWC 5234 : (2010) 1 CompLJ 751 : (2010) 2 UPLBEC 1345

Hon'ble Judges : Ashok Srivastava, J; Amitava Lata, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Amitava Lala, J.—The Petitioner has filed this writ petition under Article 226 of the Constitution of India praying therein as under:

(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned orders dated 20.4.1998 and 20.5.1998 (Annexures 18 and 20 to the writ petition) passed by the Respondent No. 1 ;

(ii) Issue a writ, order or direction in the nature of certiorari quashing the citation dated 23.7.1998 (Annexure 21 to the writ petition) ;

(iii) Issue a writ, order or direction in the nature of mandamus restraining the Respondents from recovering the amounts mentioned in the said citation and the orders dated 20.4.1998 and 20.5.1998 as arrears of land revenue ;

(iv) Issue a writ, order or direction in the nature of mandamus directing the Respondents to adjust and refund the amounts which the U.P.S.E.B. owes to the Petitioner ;

(v) In the alternative to issue a writ, order or direction declaring Regulation 17

(ii) of the Electricity Supply (Consumers) Regulations 1984 in-sofar as it is being sought to be applied by the Respondents to old consumers like the Petitioner covered under Regulation 17 (vi) as being ultra vires of Article 14 of the Constitution of India and as also against the letter and spirit of Section 23 of the Indian Contract Act;

(vi) Issue any other suitable writ, order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case ; and

(vii) To award costs of this petition to the Petitioner.

2. The fact remains that the Petitioner is a partnership concern, engaged in the manufacture of Steel Strips. For the purpose of manufacturing in the Rolling Mills, the Petitioner entered into an agreement with the U. P. State Electricity Board on 6th March, 1987 for supply of electrical energy of 580 KVA load on 11 KV supply voltage. Subsequently, the Petitioner applied for an additional power load of 220 KVA, which was sanctioned and another agreement was entered into between the parties on 7th August, 1989 for the total supply of 800 KVA. Thereafter the Petitioner applied for further additional load of 700 KVA, which was sanctioned by the Uttar Pradesh State Electricity Board, Respondent No. 2 and the agreement in regard thereto was entered into on 14th October, 1993. The old line of 800 KVA was dismantled and the old meter was removed. New line and equipments for supplying 1500 KVA load were erected and new Sangamo Meter No. 2963332 was fixed on the spot and supply of 1500 KVA on 33 KV was commenced on 14th September, 1994. Thereafter on 29th June, 1.996 the Petitioner applied for reduction of load which was allowed by the Respondent No. 3 and the agreement was entered into on 1st July, 1996. The load was reduced but no change in line, equipments, meter etc. had taken place on the spot and the supply, which was already continuing with effect from 14th September, 1994, continued till 18th September, 1996 when the Respondent No. 3 temporarily disconnected the electricity supply of the Petitioner allegedly on account of non-payment of electricity dues of bill dated August, 1996. After disconnection of the Petitioner's supply on 18th September, 1996 it never moved for reconnection rather applied for permanent disconnection and the Petitioner never consumed the electricity after 18th September, 1996. The representatives of the Petitioner immediately thereafter personally met the Respondent No. 3, who, however, maintained the position that six months Minimum Consumption Guarantee charge (for short MCG) will be chargeable after 18th September, 1996 allegedly in view of the fact that the agreement for load reduction was entered into on 1st July, 1996.

3. According to the Petitioner, being aggrieved by the said irrational and unreasonable stand taken by the Respondents, matter was represented before the Respondent No. 3 and entire history relating to the said dispute was brought to the notice of the authorities. While all this exercise was going on, and despite the fact that the representations made against notices issued to the Petitioner were still pending before the said authority, the Petitioner was shocked and

dismayed to learn that the Respondents had issued a certificate u/s 5 of the U. P. Government Electrical Undertaking (Dues Recovery) Act, 1958 for recovery of Rs. 16,19,026.00 along with interest and other charges as arrears of land revenue and ultimately a citation was issued. Against the citation the Petitioner preferred a writ petition, which was disposed of by this Court directing the Respondents to decide the representations of the Petitioner. The Petitioner moved a fresh representation and the Respondents rejected the same without disclosing any reason. Hence, the Petitioner filed present writ petition.

4. However, upon hearing the parties, this writ petition was dismissed on 29th July. 1998 by holding a view that the dispute amongst the parties is squarely covered by the arbitration clause available in the agreement entered into between the parties. Against such order an appeal was preferred by the Petitioner and a three Judges' Bench of the Supreme Court by its order dated 27th October. 1999 held that the dispute should not have been resolved by referring the same to the Arbitrator because the questions raised in the writ petition are required to be examined by the High Court specially when vires of Regulation 17 (ii) of the Electricity Supply (Consumers) Regulations, 1984 (in short the Regulations) has been questioned. As a result whereof, the matter has been remanded back to the High Court for the purpose of reconsideration on merit. According to us, both, the statute and the agreement provide respective arbitration clauses but the dispute herein rests to interpretation of the Regulation to meet the question of ultra vires, therefore, we are bound to intervene in the issue under the writ jurisdiction of the High Court irrespective of the order, as aforesaid.

5. Ultra vires only means an act performed without any authority to act on subject, i.e., something has been done by a person or body of persons which was beyond his or their power.

6. So far as the merit is concerned, the dispute lies in a narrow compass. According to the Petitioner, since it has entered into an agreement for supply of electrical energy on 6th March, 1987, any subsequent reduction or increase of the load by execution of fresh agreement, it cannot be deemed to be a new consumer so as to attract Regulation 17(ii), in view of Regulation 17(vi) of the Regulations. Regulation 17(ii) cannot be read in isolation but in conjunction with Regulation 17(vi) in case of old registered consumer. Both the regulations, i.e., 17 (ii) and 17 (vi) are quoted hereunder:

(ii) If the supply to a consumer is disconnected on request or in default before the compulsory period of two years is over, he shall be liable for payment of minimum charge for the remaining period by which it falls short of two years or for the period of six months from the date of disconnection, whichever is less, together with the estimated expenditure on the erection and demolition of the sub-station and the line (not paid by the consumer) actually dismantled due to the disconnection, together with the estimated expenditure on the cartage of the salvaged materials to stores and the cost of unsalvaged materials plus 15 %

supervision charges on the labour and cartage only.

(vi) If the consumer, after execution of declaration/ agreement, reduces or increases his load, or changes the process or shifts his connection, he shall have to execute a fresh declaration/agreement before doing so but shall be deemed as an old registered consumer of the Supplier and a clause in the fresh declaration/agreement shall also be incorporated accordingly.

7. Factually we refer again that several agreements were entered into by or between the parties to increase the load capacity subsequent to 6th March, 1987 but ultimately last agreement was executed on 1st July, 1996 to reduce the load.

8. Mr. S.N. Verma, learned senior counsel appearing for the Petitioner, by his vast experience, apprehended a question of the Respondents that when the Petitioner is governed by the contract executed by or between the parties, one of the contracting parties cannot turn around challenging rules or regulations which are implicit in the contract and, called upon us to give revised look to the well celebrated judgment of the Supreme Court in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, The moot point of such judgment is that when the parties are in unequal bargaining position and no option is left to the party except to execute the contract on the terms and conditions unilaterally dictated by any Governmental authority such contract is amenable under writ jurisdiction of the Court. Though the aforesaid judgment is related to service contract but by now the scope is expanded. Following such ratio in D.C.M. Ltd. and Anr. v. Assistant Engineer (HMT Sub-Division), Rajasthan State Electricity Board, Kota and Anr. AIR 1988 Raj 64 , a Division Bench of the Rajasthan High Court held that the relevant provisions in the Indian Electricity Act, 1910 may first be noticed. Section 22 obliges the Board to supply to every person within the area of supply energy on the same terms at which it supplies to other similar consumers within that area and at the same time a corresponding liability is fastened on the consumer to agree to pay to the licensee the minimum charges which would be a reasonable return on the licensee's capital expenditure to meet the maximum possible demand of the consumer. These statutory provisions provide for the consumers' obligation to pay minimum charges specified by the Board and require him to execute an agreement containing such a condition in order to raise the obligation of the Board to supply electricity to that consumer. These provisions also clearly indicate the rationale behind the provision for recovery of minimum charges from the consumer. When the charges for, actual consumption of energy by the consumer fall short of the minimum charges the consumer's obligation arises to pay an amount in excess of the cost of electricity consumed. The minimum charges are to be paid by the consumer to ensure a reasonable return on the capital expenditure incurred by the Board as cost of the service line required to comply with the requisition of that consumer. In M/s. Pawan Alloys and Casting Pvt. Ltd., Meerut etc, etc. Vs. U.P. State Electricity Board and others, the Supreme Court found that the observations in D.C.M. Ltd. and Anr. (supra) are in

accord with correct legal position. Following the ratio of Central Inland Water Transport Corporation Ltd. (supra) again in the judgment in Hindustan Times and Others Vs. State of U.P. and Another, Supreme Court held that a State, cannot in view of the equality doctrine contained in Article 14 of the Constitution of India, resort to the theory of "take it or leave it" in a case where the State is on one side and unequal person on the other. Any unjust condition thrust upon the Petitioners by the State in such matters would attract the wrath of Article 14 of the Constitution of India as also Section 23 of the Indian Contract Act.

9. Mr. H.P. Dubey, learned Counsel appearing for the Respondents on the other hand firstly cited a judgment of the Supreme Court in Bihar State Electricity Board, Patna and Others Vs. Green Rubber Industries and Others, to establish that the stipulation of minimum guarantee charges cannot be held to be ultra vires on the ground that it is incompatible with the statutory duty. Difference between contractual element and the statutory duty have to be observed. A supply agreement to a consumer makes his relation with the Board mainly contractual, where the basis of supply is held to be statutory rather than contractual. He further placed reliance on the Division Bench judgment of this High Court in M/s. Pilibhit Ispat (Private) Limited and Others Vs. U.P. State Electricity Board and Others, to show that mere disconnection of electricity supply would not amount to termination of the contract and if there was no application for restoration within seven days of disconnection, that would be deemed to be a notice for termination, and the contract would be terminated either at the end of this period of the notice or the tenure of the agreement, whichever was longer. He further relied upon a Full Bench judgment of the Madhya Pradesh High Court in Raymond Ltd. and Another Vs. State of Madhya Pradesh and Others, , wherein it was held that since the consumer has entered into an agreement with all eyes open, he is bound by the terms of contract and it is not open for him to plead that if the Board is unable to supply the power, there should be a proportionate reduction in the minimum charges but it would be travesty of justice to construe that irrespective of the fact whether the Board is unable to supply the minimum energy which covers the minimum charges, even then the consumer is under obligation to pay the minimum guarantee charges. A three Judges' Bench of the Supreme Court particularly held in the judgment in Raymond Ltd. and Anr. v. M. P. Electricity Board and Ors. (2001) 1 SCC 532, that the contract for the supply of electrical energy cannot be treated on a par with any other contracts of mutual rights and obligations, having regard to the peculiar problems.

10. We have no quarrel with any of the propositions laid down by the Supreme Court and various High Courts on several issues as envisaged herein. We are on short point that whether the Clause (ii) of Regulation 17 will be read in isolation or conjointly with Clause (vi). There is a reason in saying so. If Clause (ii) of Regulation 17 is read in isolation then Clause (vi) to the extent of treating a consumer as old registered consumer from the very beginning of the minimum guarantee agreement will seem to be obiter.

11. Fact situation is that though the Petitioner's supply of energy has been disconnected on 18th September, 1996 and about a month after the said disconnection the consumer itself applied for permanent disconnection, the electricity Corporation or Board will be able to realize the minimum guarantee charges on the basis of fresh consumer agreement on account of reduction of load from 1st July, 1996 or on the original agreement dated 6th March, 1987. If Clause (vi) says that a consumer is deemed to be old registered consumer of the supplier irrespective of execution of further agreement subsequent thereto in increasing or decreasing the load capacity, then the period of realisation of minimum guarantee under Clause (ii) has to be read from the date of original agreement. Agreement for fresh load capacity cannot create a fresh period for realisation of minimum guarantee money.

12. Moreover, u/s 2(c) of the Indian Electricity Act, 1910, after disconnection of the electricity, the consumer can be called as consumer at all for realization of any amount subsequent thereto. Section 2(c) of the Electricity Act is quoted hereunder:

"consumer" means any person who is supplied with, energy by a licensee or the Government or by any other person engaged in the business of supplying energy to the public under this Act or any other law for the time being in force, and includes any person whose premises are for the time being connected for the purpose of receiving energy with the works of a licensee, the Government or such other person, as the case may be ;

It is true to say that the agreement between the Corporation or the Board and the consumer is contractual when the discharge of duty by the licensee is statutory one but in case the disconnection has been made, no question of any statutory duty is to be discharged beyond the period of disconnection. If at all it is construed that the word "consumer" includes both, an intended consumer and a disconnected consumer under Regulation 2(b), which cannot supersede the determination of the Act, yet a claim cannot arise when there was no supply or consumption of electricity. Though the agreement is contractual in nature and supply of electricity is statutory but such duty is in the nature of performance of contract and when performance is no more available, no claim can arise for such period. In further, if we construe that the disconnection of electricity cannot be construed as termination of contract but the same is applicable only for the period when services are rendered by the licensee to the consumer. Though the issue is not directly connected with the dispute herein but there should be clearest understanding with regard to unjust enrichment. Present case is in the nature of contract of indemnity for any loss of the licensee for the period less than two years or for six months whichever is less. Therefore, such recovery is in the nature of damages. Thus, such recovery cannot be held bad for the newly registered consumer under Regulation 17 (ii), hence, it is intra vires. But when the consumer is old registered consumer where fresh agreement/s is/are executed only for load capacity, cannot be treated to be newly registered

consumer in view of Regulation 17 (vi), therefore, claim of licensee against consumer is ultra vires by operation.

13. Hence, the order impugned is quashed. The Petitioner is entitled to the relief of refund upon adjustment of admitted sum, if any, within a period of two months from the date of communication of this order. In such circumstances, the application for amendment in the prayer of the writ petition which relates to only refund etc., on which parties have been heard at length for a couple of days, seems to be innocuous in nature and therefore, the writ petition is disposed of treating the same as allowed.

No order is passed as to costs.