

(1991) 07 AHC CK 0037

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 2628 of 1986, (connected with S.M.W. No. 2674, 2675, 2676 and 3581 of 1986

Modi Industries Limited (Steels), Modinagar, Ghaziabad

APPELLANT

Vs

Executive Engineer, Electricity Distribution Division,
Modinagar, Ghaziabad and another

RESPONDENT

Date of Decision : 26-07-1991

Acts Referred:

Central Sales Tax Act, 1956 — Section 11, 7(2A), 9(2)
Constitution of India, 1950 — Article 14, 19, 19(1)
Contract Act, 1872 — Section 2, 50, 74
Electricity (Supply) Act, 1948 — Section 49, 49(1), 8
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14

Citation : AIR 1991 All 351 : (1991) 2 UPLBEC 1213

Hon'ble Judges : V.K. Khanna, J;K.K. Birla, J

Bench : Division Bench

Advocate : Sri Sunil Gupta, for the Appellant; S.C. and Mr. V.M. Sahai, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Khanna, J.—These are five connected writ petitions raising similar questions of fact and law. Learned counsel for the petitioner in these writ petitions and the learned counsel appearing for the respondents have raised common arguments in these writ petitions and thus they are being disposed of by a common judgment. Besides oral arguments, the petitioners in these cases have also submitted written arguments twice. The last written argument was submitted by the petitioners on 10th July 1991. The contentions raised in the written arguments have also been taken into account while disposing of these writ petitions.

2. All the petitioners are running various industries and for running their industries, are taking the electrical energy under written agreements from the respondents. The U.P. State Electricity Board, by different notifications issued

from time to time u/S. 49(1) of the Electricity (Supply) Act, 1948 imposed additional charges described as "coal variation adjustment "Fuel Gas variation Adjustment" and "fuel Surcharge". The validity of the aforesaid additional charges was challenged by filing writ petitions which were admitted and during the pendency of the writ petitions different orders were passed which are contained in Annexures 1 to 18 to writ petition No. 2628 of 1986. Broadly speaking the nature of the interim orders passed by this Hon"ble Court in the aforesaid writ petitions fell in two categories, viz. (j) disconnection of electric supply was stayed subject to the condition that the petitioner furnishes Bank Guarantee for the entire demand raised by the U.P. State Electricity Board and (ii) disconnection of electrical energy was stayed subject to the petitioner's depositing half of the impugned demand in cash and for the remaining half amount the petitioner was allowed to furnish Bank Guarantee. In respect of future demand of additional charges. The interim order was clarified by this court and the petitioner had to deposit half of the additional charge in cash within the time stipulated in the demand bill and for the remaining half of the amount Bank Guarantee had been furnished within the time granted by this Court.

3. According to the petitioner, the conditions laid down in the interim order had been complied with. So far as the future demand is concerned, according to the petitioner himself, the U.P. State Electricity Board during the pendency of the writ petition issued bills for electricity charges in respect of which on each of the bills the Board had endorsed the following remark by means of a rubber stamp:

"The liability of surcharge on late payment on unpaid amount accrued, exists and shall be charged after decision of Court."

4. All the aforesaid writ petitions were finally heard by this Court and were dismissed by a Division Bench on January 16, 1986. The decision of this court is reported in Modi Industries Limited Vs. U.P. State Electricity Board, Lucknow and Others, .

5. According to the petitioner after the dismissal of the writ petition the liability of the additional charges which had not been deposited and in respect of which Bank Guarantees had been furnished in pursuance of the orders of the Court were discharged by the petitioner by making payment. U.P. State Electricity Board, however, issued fresh demands against the petitioner on account of the alleged delay in payment of the aforesaid amount of additional charges which had not been deposited in cash in view of the interim orders passed by the High Court and in respect of which the petitioners had furnished Bank Guarantees. The Board had demanded the late payment charges under clause (b) of para 10 of the rate schedule. In writ petition No. 2628 of 1986 it is contained in Annexure 19 to the writ petition. It was clearly stated that the writ petitions have been dismissed on 16-1-1986 and the bill for payment of additional charges from 20th February 1979 to 16th January, 1986 amounting to Rupees 68,77,438.12 p. was being sent which represents the amount which could not be realised within the time granted under the bill because of the order of stay passed by the Court.

Similar notices of demand were raised by the U.P. State Electricity Board in respect of petitioners in other connected writ petitions.

6. The amount which is being sought to be realized under the impugned notices of demand is being challenged by the petitioners firstly on the ground that furnishing of Bank Guarantee constitutes a contract between the petitioners and the Board whereunder the Board has agreed to defer the demand raised through the bills. Thus the date of payment having been postponed sine die there was no question of any delay as contemplated under cl. 10 of the Schedule, This very argument has been put in another form by Sri Sudhir Chandra, learned counsel appearing for some of the petitioners and it has been urged that interim order of the High Court had the effect of satisfying the bills of the Board and there remained no dues at all and at best the demand was actionable when the writ petitions were dismissed. Sri S. N. Varma learned counsel appearing for other petitioners has urged that furnishing of Bank Guarantee means payment of amount in cash.

7. Let us now consider the first question raised by the learned counsel for the petitioners to the effect that furnishing of Bank Guarantee constitutes a contract between the petitioners and the Board whereunder the Board had agreed to defer the demands raised through the bills as the date of payment had been postponed sine die and thus there was no question of any delay. According to the learned counsel for the petitioners the clear intent and import of the interim orders passed by this Court was that in case the petitioners complied with the directions contained in the aforesaid interim orders the demands stood postponed. Thus the due date according to clause 10(b) of the rate schedule did not at all arise and the imposition of additional surcharge on account of late payment is totally without any authority of law. Reliance has been placed on the decisions of the Supreme Court in the cases of Tarapore and Co. Vs. V/O Tractoroexport and Another, , United Commercial Bank Vs. Bank of India and Others, and Centax (India) Ltd. Vs. Vinmar Impex Inc. and Others, . On the basis of the aforesaid cases it has been urged that furnishing of Bank Guarantee constitutes a contract which was ancillary to the main contract/agreement executed between the petitioners and the Board and thus it could not be reasonably said that there was any default on the part of the petitioners in paying the bills as required by clause 11 of the agreement or clause 10 of the rate schedule. In this connection it has also been urged that u/ S. 50 of the Contract Act the performance of any promise may be made in any manner or at any time which the promissory prescribes or sanctions. According to the petitioners if the clause "the promissory prescribes or sanctions" is substituted or supplanted by the order granted by the High Court, it would be absolutely clear that the Board sanctioned or prescribed payment of the bills through a Bank Guarantee. Furnishing of Bank Guarantee, therefore, satisfied the bills and there remained no dues at all. Reliance has been placed in this connection on the Supreme Court case Narayandas Shreeram Somani Vs. The Sangli Bank Ltd., .

8. So far as the first case cited by the learned counsel for the petitioner is concerned i.e. the case of M/ s Tarapore and Co, Madras (supra) it may be mentioned that a contract was entered into between M/s Tarapore and Co.Madras and M/s Tractoroexport Moscow under which Tractoroexport Moscow had to supply construction machinery such as Scrapers and Bulldozers to the Indian Firm which had taken up a contract for excavation of a cannot as a part of the Farakka Barrage Project. In pursuance of that contract the Indian Firm opened a confirmed, irrevocable and divisible letter of credit with the Bank of India Ltd. for the entire value of equipment i.e. Rs. 6609372/- in favour of the Russian Firm negotiable through the Bank for Foreign Trade of the U.S.S.R. Moscow. Under the said letter of credit the Bank of India was required to pay to the Russian Firm on production of the documents particularised in the letter of credit along with the drafts. One of the conditions of the letter of credit was that 25 percent of the amount should be paid on the presentation of the specified documents and the balance of 75 percent to be paid within one year from the .date of the first payment. The agreement entered into between the Bank of India and the Russian firm under the letter of credit was "subject to the Uniform Customs and Practice for documentary Credits (1962 Revision), International Chamber of Commerce Brochure No. 222." The controversy before the Supreme Court arose out of a suit which had been filed by the Indian Firm praying for an injunction that the Russian Firm be not allowed to take away the money secured to it by the letter of credit as the Russian Firm has no assets in this country and therefore any decree that it may be able to obtain cannot be executed. Injunction had been granted by the trial court. The appellate court had set aside that injunction and the matter had thereafter gone to the Supreme Court. The Supreme Court in the aforesaid case has held :

".....An irrevocable letter of credit has a definite implication. It is a mechanism of great importance in international trade. Any interference with that mechanism is bound to have serious repercussions on the international trade of this country. Except under very exceptional circumstances, the Courts should not interfere with that mechanism."

9. The Supreme Court in the aforesaid case also referred to a Queens Bench Division" case reported in Hamzeh Walas and Sons v. British Imex Industries Ltd. 1958-2 QB 127. In the aforesaid case Jenkins LJ who spoke for the court observed thus:--

"We have been referred to a number of authorities and it seems to be plain enough that the opening of a confirmed letter of credit, constitutes a bargain between the Banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice."

10. It is in these circumstances that the Supreme Court refused to grant an injunction in favour of the Indian Firm restraining the Russian Firm to take advantage from the letter of credit which had been furnished in pursuance of the contract which had been arrived at between the parties.

11. Now, if we look to the facts of the present case it is clear that no letter of credit has been agreed to be furnished by any of the parties from the banks at the time of making an agreement of supplying the electricity to the petitioner by the U.P. State Electricity Board. Bank Guarantees have been directed to be furnished for availing the benefit under the interim orders of this Court. If we read the interim orders carefully it does not, as stated above, wipe off the liability of the petitioners to pay the additional charges as the operation of the notification under which the additional charges have been levied have not been stayed. Only advantage which the petitioners have by furnishing bank guarantee and depositing part of the amount is that their electric connections will not be disconnected. In these circumstances by no stretch of imagination it can be said that furnishing of the Bank Guarantee either constituted a contract between the petitioner and the Board whereunder the Board had agreed to defer the demands raised through the bills or it amounted to payment of the additional charges in cash on the date that Bank Guarantees have been furnished. Bank Gurantees have been furnished as a security which makes the Bankers liable to pay the amount in pursuance of the directions of this court.

12. To the same effect is the other case of the Supreme Court reported in "United Commercial Bank" (supra). In the case of the "United Commercial Bank" the Supreme Court has held (at p. 1438 of AIR):

"41. A letter of credit some times resembles and is analogous to a contract of guarantee, in *Eliau v. Matsas* (1966) 2 LJR 495, Lord Denning, M.R. while refusing to grant an Injunction stated :a bank guarantee is very much like a letter of credit. The courts will do their utmost to enforce it according to its terms. They will not in the ordinary course of things, interfere by way of injunction to prevent its due implementation. Thus they refused in *Malas v. British Imex Industries Ltd.* But that is not an absolute rule. Circumstances may arise such as to warrant interference by injunction."

A bank which gives a performance guarantee must honour that guarantee according to its terms. In *R. D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.* (1977) 3 WLR 752, Kerr. J. considered the position in principle. We would like to adopt a passage from his judgment at p. 761. It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by bank. They are the life blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibility in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts. The courts are not concerned with their difficulties to enforce such claims; these are

risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts, otherwise trust in international commerce could be irreparably damaged.

13. From the aforesaid it is thus clear that what was being examined in these two cases was as to whether the letters of credit from the contractors and Bank Guarantees which have been furnished by the Bankers in pursuance of a contract which had been arrived to between the parties for the payment of the amount to the seller can be varied or not by the law courts and whether the same should be honoured free from interference from the, courts. It had been stated that in case courts interfere with the machinery and commitment of Banks, the trade in international commerce would be irreparably damaged.

14. So far as the case of "Centex (India) Ltd. (supra is concerned the principle laid down in the case of "United Commercial Bank" was approved after noticing increase of Centax (India) Ltd. Vs. Vinmar Impex Inc. and Others, . The argument raised by the learned counsel that the Board sanctioned or prescribed payment of bills through a Bank Guarantee appears to be ill founded inasmuch as there was neither such an agreement between the petitioners and the U.P. State Electricity Board nor could such an agreement be inferred from the circumstances of the case. The Court had granted an interim order giving benefit to the petitioners that their electric supply will not be disconnected in case they comply with the directions of the Court by furnishing a Bank Guarantee. However, it may be made clear that the court had not stayed the operation of the notification under which the additional charge had been levied.

15. Learned counsel appearing for the respondents, however, relied upon a decision of the Supreme Court reported in the case of Adoni Ginning Factory and Others Vs. Secretary, Andhra Pradesh Electricity Board, Hyderabad and Others, and on the basis of the aforesaid has urged that in similar circumstances the Supreme Court has ruled that by passing of an injunction order the liability had not been suspended. It has been urged that by no stretch of imagination it can be said that furnishing of Bank Guarantee constituted a contract which was ancillary to the main contract or the agreement executed between the petitioners and the Board, specially in view of the fact that even on his own showing of the petitioners there was an endorsement on each bill to the effect that "the liability of surcharge on late payment on unpaid amount accrued exists and shall be charged after decision of court."

16. In our opinion the decision given by the Supreme Court in the case of "The Adoni Ginning Factory" (supra) squarely applies to the facts of the present case. In the aforesaid case by Government order No. 187 dated 30-1-1955 the Government of Andhra Pradesh purporting to act in exercise of its power u/ S. 3 of the Essential Articles Control and Requisitioning (Temporary powers) Act, enhanced the rates of supply of electrical energy over and above the contracted

rates. The aforesaid Government order was challenged by filing writ petitions by various petitioners. Pending the disposal of the writ petition stay orders were obtained by which the collection of enhanced charges were stayed. The writ petition was finally allowed on 22-2-1957 and the Government order dated 30th January, 1955 was struck down. Government of Andhra Pradesh preferred an appeal u/S. 15 of the Letters Patent. The aforesaid appeals were allowed and the Government order dated 30th January 1955 was upheld. After the allowing of the appeals the Andhra Pradesh State Electricity Board, to whom the Government had transferred the electricity undertakings with effect from 1st April, 1959 issued bills to pay the arrears of enhanced charges. Appeals were filed in the Supreme Court and on 10th August, 1959 injunction orders were obtained restraining the Government from realising from them the "amount of arrears occasioned by the enhancement of rates." The injunction was subject to the condition that they offered security for such amount of arrears intimation of which was directed to be given to them by the Government. Bills were raised on the consumers and each consumer was specifically told that if his contentions were eventually rejected by the Supreme Court he would have to pay the amount of arrears with surcharge thereon calculated at two percent per rupee per month. It may be stated that the appellants and others were expressly put on notice of the claim of the Electricity Board for payment of surcharge in the event of the appellants failing in their appeals in the Supreme Court the appellants did not seek to get any clarification from the Supreme Court. The Supreme Court ultimately dismissed all the appeals on 25th March, 1964. Thereafter the Board called upon the appellants to pay surcharge at the rate of twelve percent per annum on the arrears in regard to which they had obtained orders of injunction during the pendency of the appeals in the Supreme Court. Once again the appellants and others filed writ petitions in the High Court questioning the demand of the Electricity Board for payment of surcharge. The writ petitions were allowed by a learned single Judge on the ground that no surcharge was leviable for the period during which the order of injunction passed by the Supreme Court was in operation. An appeal preferred under the letter's patent was allowed. Thereafter some of the consumers preferred appeal before the Supreme Court.

17. From the facts narrated above, it would thus be seen that the facts in the case of "Adoni Ginning Factory" (supra) are similar to the facts of the present case. In the aforesaid case of "Adoni Ginning Factory" (supra) the Supreme Court held AIR 1979 SC 1512 :--

"The primary submission of the learned counsel was that there was no default on the part of the appellant in view of the injunction granted by the Supreme Court. We are unable to agree. The injunction granted by this Court restrained the Government from realising the arrears of enhanced charges. For the purposes of these appeals we may proceed on the assumption that the order of injunction bound the Electricity Board also. All that the injunction did was to restrain the Board from realising the arrears which meant that the Board was restrained from

taking any coercive action such as disconnection of supply of electricity etc. for the realisation of arrears. The operation of G.O. No. 187 dated 30th January 1955, as such was not stayed. Thus the obligation of the consumers to pay charges at the enhanced rates was not suspended though the Electricity Board was prevented from realising the arrears. It was up to the consumers to pay or not to pay the arrears. If they paid the arrears they relieved themselves against the liability to pay surcharge. If they did not pay the arrears they were bound to pay the surcharge if they failed in the appeals before the Supreme Court. This was precisely what was pointed out by the Electricity Board in the Bills issued to the consumers after the Supreme Court granted the injunction..... The Electricity board was, therefore, right in claiming surcharge for the period during which the appeals were pending in the Supreme Court.....

(Emphasis provided)

18. In our case also a bare perusal of the stay orders which have been granted by this Court would show that the various notifications issued by the State Electricity Board u/S. 49(1) of the Electricity Supply Act, 1948 had not been stayed by the Court. What has been done by granting interim order is precisely what was done by the Supreme Court in the case of "The Adoni Ginning Factory" (supra) by granting injunction during the pendency of the appeal before the Supreme Court. The law laid down by the Supreme Court in the case of "The Adoni Ginning Factory" (supra), therefore, is clearly applicable specially in view of the fact that the stage Electricity Board while issuing the bills had also clearly intimated the consumers that the liability of surcharge on late payment on unpaid amount accrued which shall be charged after decision of the court, we are thus of the opinion that the contentions raised by the learned counsel for the petitioners in this respect are without force and are liable to be rejected.

19. The next argument which has been raised by the learned counsel for the petitioners is that the default being not willful or deliberate, clause 10 of the rate schedule will not be attracted since it amounts to imposition of penalty. Reliance has been placed by the learned counsel for the petitioners on two cases of Supreme Court i.e. (1) Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others, and (2) Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others, for the purposes of showing that the default being not willful or deliberate provisions of clause 10 of the rate schedule will not be attracted.

20. It may be submitted that the very first question which has to be determined in this case is as to whether additional charge is in the nature of penalty or it is nothing but increased interest which the consumer has to pay for retaining the amount which has accrued to the Board.

21. Learned counsel for the respondent has relied upon the unreported decision of the Lucknow Bench given in the case of the petitioners i.e. in writ petition No. 7058 of 1986 M/s Modi Steels (Unit of Modi Industries) Ltd. v. U.P. State

Electricity Board and others connected with other writ petitions.

22. The first question which has therefore to be considered is as to whether the additional charge being claimed under cl. 10(b) of the rate schedule is in the nature of penalty. For adjudicating this question it will be appropriate to make a reference to S. 74 of the Indian Contract Act. S. 74 of the Indian Contract Act reads as under:--

"74. Compensation for breach of contract where penalty stipulated for:-- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains, any other stipulation by way Of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

Explanation: -- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

23. In the leading case of Mackintosh v. Crow (1883) ILR 9 Cal 689 it was held that where money is borrowed under a contract for repayment with interest on a certain day and the contract stipulated that if the money is not paid at the due date it shall thenceforth carry interest at an enhanced rate, such a stipulation is not a penalty and the enhanced rate agreed to be paid may be recovered in its entirety.

24. In Umarkhan Mahamadkhan Desh-mukh v. Salekhan ILR (1893) 17 Bom 106 (FB) it was decided by the Full Bench that :--

"A proviso for retrospective enhancement of interest, in default of payment of the interest at a due date, is generally a penalty which should be relieved against, but a proviso for enhanced interest in the future cannot be considered as penalty unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties."

25. From the aforesaid case it is, therefore, clear that if, the increased interest is payable from the date of the breach, then the stipulation may or may not be by way of penalty, depending on all the facts and circumstances of the case. This indeed is also clear from the Explanation to S. 74. This Explanation not only does not preclude the court from holding such a stipulation not to amount to a penalty.

26. We have thus to first consider as to whether an additional charge as has been contemplated by clause 10(b) of the rate schedule could be treated to be a part of the primary contract between the parties. Cl. 10(b) of the rate schedule runs as follows:--

"10(b) For Payment Delayed : In the event of any bill not being paid by the date specified therein the consumer shall pay an additional charge per day of seven

paise per hundred rupees or part thereof on the unpaid amount of the bill for the period by which the payment is delayed, beyond the due date specified in the bill, without prejudice to the right of the board to disconnect the supply."

Clause 8 of the agreement executed between the petitioners and the U.P. State Electricity Board is to the following effect :

"8 A. The consumer shall pay for the supply of electric energy at the rates enforced by the supplier from time to time as may be applicable to the consumer....."

27. It may now be seen whether the U.P. State Electricity Board can statutorily levy a charge like what has been provided in clause 10(b) of the rate schedule.

28. Section 49(a) of the Indian Electricity (Supply) Act specifically provides that the Board may supply electricity to any person not being the licensee upon such terms and conditions as the Board thinks fit and may for the purpose of such supply frame uniform tariffs. The language of S. 49 in our opinion, is wide enough to cover the charge in question. The Lucknow Bench in the unreported case of M/s. Modi Steels Ltd. (Writ Petition No. 7058 of 1986 connected with 70 other writ " petitions has taken the same view with which we are in respectful agreement.

29. Section 49 authorises the Board not only to charge the price of the electricity supplied but also authorises the U.P. State Electricity Board to supply electricity on "such terms and conditions as the Board thinks fit." Under this clause the Board could impose a term which would ensure timely payment of its bills. Additional charge for delayed payment is, therefore, nothing but a device for ensuring timely payment of the Board's bills. Timely payment of the Board's bills is necessary for its efficient working. The additional charge for delayed payment, therefore, is squarely covered by S. 49 of the Act. In view of S. 9(a) of the agreement such a provision could, therefore, be made in the tariffs applicable to the petitioners. Cl. 10(b) of the rate schedule, therefore, providing for the additional charge will be deemed to be a part of the primary contract between the parties.

30. It has now to be seen as to whether charging of seven paise per hundred rupees or part thereof on the unpaid amount of the bill if there be special circumstances can be termed either unconscionable or unreasonable.

31. Admittedly the petitioners and other consumers for whom the aforesaid additional charge has been provided, under clause 10(b) of the rate schedule are big industrialists and their monthly bills for consumption of electricity runs into several crores. If the payment of bills is not made by such heavy consumers of electric energy several crores of bills payable to the Board will be blocked and the working of the U.P. State Electricity Board will be seriously affected.

32. The main emphasis of the learned counsel for the petitioners for holding that the additional charge was unconscionable or unreasonable is on the ground that

the rate of the charge comes to about Rs. 25.5 percent per annum. It has not been disputed that the petitioners in case they take loan from their bankers have to pay interest at the rate of about 10 percent per annum. In case either this rate of 18 percent or any lesser rate has been provided, in our opinion the same would not have been sufficient incentive for big industrialists to make timely payment as they would have earned much more by utilizing the huge demands in their own industry. In our opinion the fixing of the additional charge cannot be termed as penalty and it is nothing but a device for ensuring timely payment of the Board's bills by its heavy consumers whose bills would run into several crores per month and the early realization of the amount of the bills is absolutely necessary for the efficient working of the Board. The provision made, therefore, under Clause 10(b) of the rate schedule cannot be said to be either unconscionable or unreasonable on the facts and circumstances of the case.

33. The two Supreme Court cases, relied upon by the petitioners i.e. Cement Marketing Company of India and Associated Cement Company (supra) in our opinion do not help the case of the petitioners. In the case of Cement Marketing Company of India (supra) the question which arose for consideration before the Supreme Court was whether penalty could be levied without recording a finding that the return submitted by the assessee was a "false return". This finding had necessarily to be recorded in view of the specific provisions of S. 43 of the Madhya Pradesh General Sales Tax Act, 1958 and S. 9(2) of the Central Sales Tax Act, 1956.

34. As far as the provisions of S. 10(b) of the rate schedule is concerned the additional charge is payable not on the ground that consumer had willfully failed to pay the amount. The additional charge becomes payable if the amount is not paid by a certain date.

35. So far as the case of Associated Cement Company (Supra) is concerned the part of the judgment relating to the observations made in connection with the imposition of penalty is not applicable to the petitioners' case on the same grounds which have been mentioned above in connection with the case of "cement marketing company of India (supra)

36. It may, however, be mentioned that in connection with the payment of the interest the observations made in the aforesaid case instead of going in favour of the petitioners in our opinion goes against them. The Supreme Court in connection with the payment of interest has observed:

"We are concerned in this case with the liability of the assessee to pay interest on the amount of tax which had remained unpaid, Tax, interest and penalty are three different concepts. Tax becomes payable by an assessee by virtue of charging provision in a taxing statute. Penalty ordinarily becomes payable when it is found that an assessee has willfully violated any of the provisions of the taxing statute. Interest is ordinarily claimed from an assessee who has withheld payment of any tax payable by him and it is always calculated at the prescribed

rate on the basis of the actual amount of tax withheld and the extent of delay in paying it. It may be wrong to say that such interest is compensatory in character and not penal (Emphasis provided)

37. After discussing various cases of the Supreme Court it was further held in the aforesaid case:

"We are of opinion that either by delaying the filing of the return or not filing it at all or by filing a return wrongly claiming that a certain part of the turnover is not taxable on. by not disclosing a part of the taxable turnover in the return an assessee cannot escape the liability to pay interest u/ S. 11-B(a) on the amount of tax withheld as a consequence of his own action or inaction from the last date on which it had to be paid as per sub-s. (2) or sub-s. (2A) of S. 7 as the case may be, read with the rules. An assessee can not contend that interest does not accrue u/ S. 11B(8) on the tax payable by him where the time to file the return has elapsed until he actually files a return admitting the liability to pay such tax or until assessment is made. We are of the view that the statutory liability u/ S. 11 B(a) arises wherever there is default in payment of the tax within the period allowed by law irrespective of any doubt which an assessee may be entertaining about the liability to pay the tax (Emphasis provided).

38. As we have above granting of the interim orders by this court did not preclude the petitioners from making the payments as has been held by the Supreme Court in the case of Adoni Ginning Factory (supra). Under clause 10(b) the liability to pay additional charge arose after the time for its payment had expired. We have already held that the nature of the additional charge is not that of penalty and it is a provision in the nature of payment of additional interest for the purposes of payment of the huge liability which the big industrialists who are petitioners under every month. On the principles laid down by the Supreme Court in the case of Associated Cement Company (supra) the nature of additional charge would thus be additional interest which is compensatory in character and not penal. Petitioners admittedly having not paid the amount within the time prescribed are thus liable to pay additional charges under cl. 10(b).

39. It has also been argued that in any view of the matter the nature of charge under cl. 10(b) of the schedule is in the nature of assessment of damages and the Board itself is not competent to assess the same and realise it from the petitioners. In the foregoing paras of this judgment we have already held that the nature of the additional charge is neither penalty nor damages. Its nature is that of payment of enhanced interest which we have held earlier could be charged by the Board. The argument raised therefore is without any force.

40. Sarvashri S. N. Varma and Ravi Kant raised an argument that there being no provision for payment of additional charge on account of delayed payment under the agreement, the respondents have no authority to impose the same in law and demand the same from the petitioners. We have in the foregoing paras of this judgment held that S. 49 of the Indian Electricity (Supply) Act authorises the

Board to supply electricity on "such terms and conditions as the Board thinks fit" and under this clause the Board could impose a term which could enforce timely payment of its bills. As stated in the earlier part of this judgment. The payment is covered by clause 8 of the agreement under which the consumer had agreed to pay for the supply of the electric energy at the. rate enforced by the supplier from time to time. The payment of additional charge would thus be deemed to be part of the agreement. The argument raised has thus no force.

41. Lastly it has been urged that assuming though not admitting that the liability to pay additional charge on account of late payment or delayed payment is there in the eye of law, it is submitted that the provision is clearly ultra vires of Arts. 14 and 19(1)(g) of the Constitution. Reliance has been placed on the decisions of the Supreme Court in the case of *E.P. Royappa Vs. State of Tamil Nadu and Another*, *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another*, *Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others*, *Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others*, and *Organo Chemical Industries v. Union of India* AIR 1979 SC 1803 : 1979 LabIC 1261.

42. The precise argument raised is that a cursory look to clause 10(b) of the rate schedule brings out that the provision is wholly naked and arbitrary and it does not contain any guideline. The power is couched in absolute terms and it is unfettered. There is no provision for affording any opportunity of hearing. A person may have a very reasonable and genuine cause for not making the payment.. A person may be incapacitated from making payment on account of floods and other factors i.e. his house may be damaged by floods or by fire. According to clause 10(b) the board has hardly any concern with. The very fact that the person is to make payment by the due dates he incurs the liability to make panel payment. There is no machinery provided for sorting out this dispute it has been held in *Union of India and Another Vs. Tulsiram Patel and Others*, that any provision which rules out the principle of natural justice is violative of Art. 14 of the Constitution.

43. At the very outset we may make it clear that the argument proceeds on the principle that the liability to pay additional charge is penal in nature and that the provision is wholly naked and arbitrary,

44. As far as the nature of provision is concerned we have already discussed in detail as to whether the nature of the charge amounts to penalty or not. In the foregoing paras of this judgment we have recorded a finding that on the facts and circumstances of the case the additional charge amounts to payment of additional interest which is compensatory in character and not penal on the basis of the principles laid down in the case of *Associated Cement Company (supra)*. We have also held that the provision is neither arbitrary nor unconscionable. On the facts and circumstances we have on the other hand held that the Board was justified in levying such an additional charge. The cases relied upon by the

petitioners will have application only in case it is held that the additional charge is either arbitrary or unconscionable and not justified. There is no question of application of the principle of natural justice to the present case inasmuch as the additional charge is part of the agreement which had been arrived at between the petitioners and the U.P. State Electricity Board. As we have held in the foregoing paragraphs of this judgment the assesseees are bound by the aforesaid agreement and in case they fail to make payment within the prescribed time they are liable to pay the additional charge.. On the facts and circumstances of the case, therefore, it cannot be said that the provisions of cl. 10(b) are ultra vires of Arts. 14 and 19 of the Constitution.

45. Learned counsel for the petitioners have also placed reliance on the case of *Organo Chemical Industries v. Union of India* (AIR 1979 SC 1803): 1979 LabIC 1261 on the ground that in case the levy is compensatory in character, the provisions would be clearly ultra vires of the Art. 14 of the Constitution.

46. A careful reading of the aforesaid case would show that the same has no application to the present case, In the *Organo Chemical Industries* (supra) it was held that the power exercisable u/S. 14(b) of the Employees Provident Fund Act was punitive. The provision of S. 14(b) of the Act itself contemplates of an opportunity to be given to the employer. In the present case the provisions of clause 10(b) will be deemed to be part of the agreement arrived at between the parties in view of clause 8 of the Agreement. There is thus no question of providing any opportunity as the petitioners were bound to pay the additional charges under clause 10(b) in view of the specific provisions of the Agreement entered into between the petitioners and the U.P. State Electricity Board.

47. No other point has been pressed by the petitioners.

48. For the reasons stated above, the present writ petitions are dismissed with costs. The interim orders granted by this court are discharged.

49. Before parting with this case, it may be mentioned that at the time of the presentation of the writ petition no orders were passed on the stay applications moved by the petitioners in view of the statement made by learned counsel appearing for the U.P. State Electricity Board to the effect that the U.P. State Electricity Board will not disconnect the electricity supply of the petitioners. An application was later on moved by the counsel appearing for the State Electricity Board for withdrawing the undertaking given by him in the writ petition. On the aforesaid application, on 11-10-1988 we were of the opinion that the realisation of the impugned demand shall remain stayed during the pendency of the writ petition subject to the following conditions:

(i) In case of failure of the writ petition the petitioner will be liable to pay the impugned demand along with interest which may be fixed by the court at the time of the final disposal of the writ petition, (ii) The petitioners will pay the impugned demand within the time fixed by this court.

50. Now since the writ petitions have been dismissed, we are of the opinion that the petitioners will pay interest @ 12 percent per annum on the impugned demand from the date on which they were required to pay the late payment surcharge as per cl. 10(b) of the rate schedule till the date by which they make the aforesaid payment in accordance with the time granted by us. The petitioners are allowed time till 31st October, 1991 to make payment of the aforesaid demand. The U.P. State Electricity Board within period of one month from today will serve on the petitioners the details showing the amount of late payment surcharge as per cl. 10(b) of the rate schedule and the amount of interest calculated in accordance with the observations made by us in this order. In case the petitioners fail to pay the aforesaid amount to the U.P. State Electricity Board by 31st October 1991, aforesaid amount "will be recoverable from the petitioners forthwith in accordance with law as "electricity dues" payable by the petitioners to the Board.

51. Petitions dismissed.