
(1998) 08 GAU CK 0044

In the Gauhati High Court

Case No : Writ Appeal No's. 343, 344, 358, 426, 445, 451 and 541 of 1997 and 38 of 1998 and Civil Rule No's. 1580, 4519, 4920, 4921, 4922, 4923, 4924, 4925, 4927, 4928, 4929, 4934 and 4935 of 1997

National Boards Ltd.

APPELLANT

Vs

Assam State Electricity Board

RESPONDENT

Date of Decision : 21-08-1998

Acts Referred:

Electricity (Supply) Act, 1948 — Section 49(1)

Citation : (1999) 1 GLR 242

Hon'ble Judges : N.C. Jain, Acting C.J.; P.G. Agarwal, J

Bench : Division Bench

Advocate : M. Hazarika, in WA Nos. 343, 344, 358, 451, 445 and 541 of 1997 and in CR Nos. 4920, 4921, 4922, 4923, 4924, 4925, 4934 and 4935 of 1997, R. Bhattacharjee, in WA No. 343, 344, 358 and 445 of 1997, C.K.S. Baruah, in WA 38/98, A. Dey, in WA 38/98, S. Shyarn, in WA 38/98, J. Parajull, in WA 38/98, D. Thakur, in WA 358/97 and in CR Nos. 4934 and 4935 of 1997, N.M. Lahiri, N. Choudhury, G.C. Kayal and B.W. Phira, in W.A. 426/97, C. Baruah, in CR No, 1580/97, S.K. Kejriwal and S. Kejriwal, in CR No, 1580/97, S.P. Roy, S.D. Nath and S. Ahmed, in CR No. 4519/97, A.K. Das, in CR No. 4920, 4921, 4922, 1923, 4924, 4925, 4935 and 4935 and P.K. Goswami, in WA Nos. 343 and 344 of 1997, for the Appellant; N.N. Saikia, Standing Counsel, ASEB, for the Respondent

Final Decision : Allowed

Judgement

P.G. Agarwal, J.—By this, common judgment we propose to dispose of the above mentioned writ appeals and the Civil Rules. All the Appellants/Petitioners are consumers of electricity except Appellant in Writ Appeal No. 343/97 which happens to be Federation of Industries. N.E. Region (FINER) representing various Associations of Industry. The Assam State Electricity Board hereinafter referred to as the "Board" issued a notification revising tariff w.e.f. 8.9.94. Thereupon the present Appellants and other consumers approached the High Courtly filing writ petitions, Vide order passed on 3.9.94 in Civil Rule 3428/94 this Court directed that during the pendency of (he writ petition the Board may prepare the hills on

the basis of revised tariff but the enhanced amount shall not be realised until further orders, The Board approached the Hon'ble Supreme Court in SLP (Civil) No. 15734/94. The Apex Court directed that the revised tariff may be recovered from the consumers to the tune of 50% of the enhancement and stayed the realisation of balance 50%.

2. Vide order dated 17.2.95 the learned Single Judge allowed the writ petition whereupon the Board preferred Writ Appeal No. 51/95. The Division Bench of this Court vide interim order dated 23.2.95 allowed the Board to recover the revised tariff to the tune of 25% but restrained the Board from adjusting the excess payment made by the consumers, the matter again went to the Supreme Court and the Apex Court directed that the Board is entitled to recover 50% of the revised tariff and for the remaining 50% the Respondent-consumers are to furnish bank guarantee. The bank guarantees were furnished as per the direction of the Court.

3. Vide order dated 22.9.95 the Division Bench of this Court allowed the writ appeal filed by the Board and also dismissed the cross appeal filed by the consumers. The consumers thereafter preferred SLP (SLP) but the same was rejected. after disposal of the writ appeal the Board issued bill demanding the balance 50%.of the enhanced tariff and surcharge @ 5% p.m. as provided under Clause 18(c) of the Terms and Conditions of Supply, 1988, Thereupon, a number of writ petitions were filed by the consumers challenging the imposition of surcharge mainly on the following grounds:

(i) That there was no fault on the part of the consumers and the payment was made as per the order of the court?

(ii) that the imposition of surcharge at 5% p.m. i.e. 6% p.a. is arbitrary, unjust and unreasonable.

4. The Appellants also challenged the validity of Clause 18(e) of the Terms and Conditions of Supply, 1988.

5. Vide judgment and order dated 24.4.97 the learned Single Judge passed the following order:

Accordingly, all the petitions are dismissed. It is directed that the Petitioners shall pay the surcharge as and when it becomes due with interest @ 18% from the due date till realisation. All the petitions are dismissed with costs of Rs. 10,000, The cost shall be shared equally by all the Petitioners. Stay orders are vacated. It is needless to say that as the amount of surcharge is a heavy one, the parties may approach the ASICB for granting them a reasonable time to pay it by way of instalments.

6. In the impugned judgment it is stated that these matters and similar are covered by the judgment passed in Kamrup Paper Mills Ltd. v. ASEB and Ors. reported in 1997 (1) GLT 887. Against the said judgment, writ appeal being Writ Appeal No. 1186/95 has been filed and the same is disposed of by this common

judgment.

7. We have heard learned Counsel for both sides. The learned Counsel for the Appellant have submitted that the payments at the revised tariff were not made by the consumers in view of the grant of stay by this Court and also by the Hon"ble Supreme Court and, as such, they are not liable to pay the surcharge.

8. In the case of Kanoria Chemicals and Industries Ltd. and Others Vs. U.P. State Electricity Board and Others, it was held:

It is equally well settled that an order of stay granted pending disposal of a writ petition suit or other proceedings, comes to an end with the dismissal of the substantive proceedings and that it is the duty of the Court in such a case to put the parties in the same position they would have been but for the interim orders of the Court. Any other view would result in the act or order of the Court prejudicing a party (Board in this case) for no fault of its and would also mean rewarding a writ Petitioner in spite of the failure.

9. In the case of Adoni Ginning Factory and Others Vs. Secretary, Andhra Pradesh Electricity Board, Hyderabad and Others, the penalty in payment, of the electricity bill was due to an injection obtained by the consumer. The Apex Court held that levy of surcharge will have to be paid when the appeal was rejected by the Apex Court.

10. In the case of Kerala State Electricity Board through its special officer (revenue) and Another Vs. M.R.F. Limited and Others, a similar situation has arisen. The notification for revision of tariff was struck down by the High Court and the matter went upto the Supreme Court. The appeal was allowed upholding the validity of the tariff revision. During the pendency of the appeal stay in respect of 50% was granted by the High Court. After disposal of the appeal the Kerala State Electricity Board raised demand for the amount together with interest. We are tempted to reproduce the relevant portion of the observation of the Apex Court which reads as under:

There is no manner of doubt that it is an imperative duty of the Court to ensure that the party to the lis does not suffer any unmerited hardship on account of an order passed by the Court. The principle of restitution as enunciated by the Privy Council in Rodger case has been followed by the Privy Council in later decisions and such principle being in conformity to the justice and fair play should be followed. It should, however, be noted that in an action by way of restitution, no inflexible rule can be laid down. It will be the endeavour of the court to ensure that a party who had suffered on account of decision of the court, since finally reversed, should be put back to the position, as far as practicable, in which he would have been If the decision of the court adversely affecting him had not been passed. In giving full and complete relief in an action of restitution, the court has not only power but also a duty to order for mesne profit, damages, costs, interest, etc., and may deem expedient and fair conforming to justice to be done In the facts of the case, But, in giving such relief the court, should not be oblivious of any

unmerited hardship to be suffered by the party against whom action by way of restitution is taken, in deciding appropriate action by way of restitution, the Court should take pragmatic view and frame relief in such a manner as may be reasonable fair and practicable and does not bring about unmerited hardship to either of the parties.

11. Mr. P.K. Goswami, learned Counsel for the Appellants fairly submitted that in view of the decision of the Apex Court in Kerala State Electricity Board and Kanoria Chemicals and Industries Ltd. (supra) it is well established that the electricity consumers cannot be absolved of the liability to pay interest or late payment of the surcharge in reaped of the bills issued during the period of operation of stay order or Injunction order or even during the period when revised tariff notification could not be acted upon due to the decision of the Court.

12. The second contention of the learned Counsel for the Appellants is that the demand of surcharge at 60% by the Board and grant of additional interest (c) 18% by the learned Single Judge is unreasonable, unjust and improper. Mr. N.N. Saikia, learned Counsel appearing for the Board has submitted that surcharge has been demanded as provided under Clause 18(c) of the Terms and conditions of Supply, 1989 which Were enacted in exercise of powers conferred by Section 49(1) of the Electricity Supply Act, 1948. The Mined counsel has also submitted that these are the statutory provisions as held by the Supreme Court, in the case of M/s. Hyderabad Vanaspathi Limited Vs. Andhra Pradesh State Electricity Board and Others, . There is no dispute on that count. Clause 18(c) of the Terms and Conditions of Supply, 1988 reads as under:

18(c) Surcharged for delayed payment: Except in case of categories of consumers mentioned below a surcharge of 2% per month (or part thereof) in simple interest shall be levied if payment is not made on or before the due date of payment specified in the bill.

Expectations:

1. Commercial
2. L.T. Industry.
3. Medium Industry
4. Large Industry.
5. Tea, Coffee and rubber

In case of above consumers a surcharge of 5% P.M. (or part thereof) will be charged for delayed payment. However, for payment on or before the due date fixed therefore a rebate of 3% on the energy consumption to be admissible to the above categories.

13. Although the word "surcharge" has been used in Clause 18(c), perusal of the provisions, it is clear that it is a levy for delayed payment. Apparently the

surcharge in the instant case is not an additional (tariff which the word "surcharge" generally means.

14. In Adoni Ginning Factory (supra) the Supreme Court observed:

The very rate of levy of surcharge stipulated in the agreement, namely, one per cent per mensem, i.e., twelve per cent per annum, is a clear indication that levy is not meant to be a penalty but is provision for interest by way of compensation for delayed payment. There is therefore, no question of relieving the Appellants against any penalty

15. In Kanoria Chemicals and Industries Ltd. (supra) the word "surcharge" has been equated with interest. We have no doubt whatsoever that the surcharge referred in Clause 18(c) is nothing But an interest for delayed payment provided to ensure speedy payment of bills by the consumers. As a matter of fact, an incentive of 3% has also been provide in Clause 18(c) to the consumers if they make the payment within due date. There could not have been any incentive in case of surcharge. Thus the nomenclature surcharge, additional charge, compensatory interest in the facts and circumstances mean only one thing that it is interest for delayed payment.

16. We, therefore, hold that the grant of further interest of 18% on the surcharge by the learned Single Judge was unwarranted. In the instant case, the Appellants have also challenged the vires and validity of Clause 18(c) of the Terms and Conditions of Supply, 1983 providing for surcharge @ 5% per annum in respect of certain consumers. However, during the course of hearing, learned Counsel appearing for the Board has submitted that a new tariff is going to be notified which will come into force from September 1998 and the question of reduction of surcharge is under consideration by the Board. The learned Counsel for the Appellant has also submit d that under the facts and circumstances of the case and in view of the decision of the learned Single Judge, quashing the notification, the Appellants were under bona fide belief that enhanced tariff need not be paid and as such, limited relief by reducing the rate of surcharge/interest may be granted.

17. In the light of the decision of the Supreme Court in Kanoria Chemicals and Kerala State Electricity Board (supra) we are of the view that the Appellants in the present cases cannot be termed as defaulters in the usual sense of the term. In the above two cased, relief was granted by directing payment of additional charge/interest @ 18% per annum for the unpaid amount.

18. The learned Counsel for the Board has drawn our attention to a decision of the Andhra Pradesh High Court in the Case of Rayalaseema Roller Flour Mills, Cuddapah Vs. A.P. State Electricity Board, Vidyut Soudha, Somajiguda, Hyderabad and Another, In the above case also the learned Single Judge in spite of contrary decision of the Division Bench of the said court granted relief to the consumers following the above mentioned two decisions of the Apex Court.

19. In the result, the appeals and writs are allowed. The impugned under is set aside. The Appellants are liable to pay surcharge @ 18% per annum on the due amount. There will be no order as to costs.