

(1997) 09 AP CK 0103

In the Andhra Pradesh High Court

Case No : Writ Petition No. 10174 of 1991 and Batch

Rayalaseema Roller Flour Mills, Cuddapah

APPELLANT

Vs

A.P. State Electricity Board, Vidyut Soudha, Somajiguda,
Hyderabad and Another

RESPONDENT

Date of Decision : 29-09-1997

Acts Referred:

Constitution of India, 1950 — Article 142, 226
Electricity (Supply) Act, 1948 — Section 49

Citation : AIR 1998 AP 118 : (1998) 1 ALD 543 : (1997) 6 ALT 254

Hon'ble Judges : P. Venkatarama Reddi, J;A.S. Bhate, J

Bench : Division Bench

Advocate : M/s. S. Ravi, Duba V.N. Babu, K. Srinivasa Murthy, C. Kodandaram, K.V. Upendra Gupta and S. Satyanarayana Prasad, for the Appellant; Mr. K.N. Jwala, SC for APSEB, for the Respondent

Judgement

P. Venkatarama Reddi, J.—The petitioners are all High Tension Consumers of electricity, drawing power from A.P. State Electricity Board (hereinafter referred to as "Board" or "APSEB") for their industries. They challenge the demands raised or collections made by APSEB in the years 1990 and 1991 towards additional charges for the belated clearance of the energy bills. It appears that this additional charge is also known as "surcharge for late payment". The additional charge or surcharge is payable under clause 32.2.1 of the Terms and Conditions of Supply of Electrical Energy framed by the Board u/s 49 of the Electricity (Supply) Act. The clause reads as follows :

"Bills shall be paid by the High Tension Consumers within fifteen days and by low tension consumers within thirty" days from the date of the bill failing which the consumer shall be liable to pay an additional charge of 2% per month or part thereof for the period of delay on the amount of the bill, subject to minimum of Re. 1/-."

2. This batch of writ petitions can be sub-divided into two categories, though the

issue involved is broadly the same. Writ Petition Nos.8950/91, 9150/91, 9159/91, 9160/91 and 10686/91, fall under second category. The other 29 writ petitions come under first category.

3. In many of the writ petitions, the vires and validity of the clause 32.2.1 of the Terms and Conditions providing for additional charge has been challenged- But in view of the recent decision of the Supreme Court in Kanoria Chemicals and Industries Ltd. and Others Vs. U.P. State Electricity Board and Others, and also a recent Division Bench decision of this Court in Writ Appeal No.727 of 1991 etc., dated 1 -4-1997 holding the point against the consumers, this point has not been pressed before us. The limited relief sought for by the Counsel who argued the matters before us is to relieve the petitioners of the burden of paying additional charge at the rate of 24% and above by reducing the rate, having regard to the facts and circumstances of the case. In making this submission, the petitioner's Counsel have drawn their inspiration from the recent decision of the Supreme Court in Kanoria Chemicals, case (supra), Some of the Counsel also seek support from another judgment of the Supreme Court in Kerala State Electricity Board through its special officer (revenue) and Another Vs. M.R.F. Limited and Others, , though the same decision is relied upon by the Counsel for APSEB also.

4. It is not in dispute that in a recent judgment rendered in WA No.727/91 etc., a Division Bench of this Court consisting of Bhaskar Rao and Ranga Raju, JJ. negatived the contention of the petitioners that they were not liable to pay the additional charge for the late payment of electricity bills for the period during which the stay order of the Court was in force or the judgment of the learned single Judge striking down the tariff notification was operative. The partial relief granted by the " learned single Judge was nullified by the Division Bench, This decision in WA No.727/91 covers the cases of the petitioners as well and if that judgment has to be implicitly followed, all the writ petitions are liable to be dismissed. But, it is urged by the learned Counsel for the petitioners that by the date the Division Bench decided WA No. 727/91 etc., the Supreme Court's decision in Kanoria Chemicals case (supra) was not reported. The judgment of the Supreme Court was pronounced on 10-3-1997. Three weeks later, the Division Bench rendered the decision in WA No.727 of 1991 etc. It is also urged by some of the Counsel that the Division Bench did not notice the decision of the Supreme Court in Kerala State Electricity Board's case (supra) which has a crucial bearing in the present case.

5. In order to appreciate the limited question arising for our consideration from a proper perspective, it is better to make a brief reference to the background in which the impugned demands have been raised. First we will refer to the history of litigation in the first group of 29 cases. The petitioners therein filed writ petitions earlier questioning the increase of tariffs by B.P. Ms. No.671. dated 10-6-1987 and B.P.Ms.No.353, dated 15-4-1989. A learned single Judge of this Court partly allowed the writ petitions, finding fault with the fixation of tariff on the basis of an uneven apportionment of fuel cost expenditure-Pending the writ

petitions, there was stay of collection of enhanced tariffs subject to the condition of paying 50%. As regards the 1989 tariffs, it appears that unconditional stay was granted in some cases. As already mentioned, the writ petitions were allowed on 6-9-1989 and the notifications enhancing the tariffs were quashed. Fresh demands were directed to be raised after properly adjusting the fuel cost. The Electricity Board filed appeals against the said judgment. The order of the learned single Judge was not suspended pending the appeals. But, the writ petitioners were directed to deposit 50% of the enhanced tariffs. Writ Appeal No. 1590 of 1990 etc., were allowed by the Division Bench on 2-4-1990 setting aside the judgment of the learned single Judge. The petitioners and other consumers were permitted to pay the arrears in six equal monthly instalments. We may mention here that this judgment of the Division Bench was affirmed by the Supreme Court vide judgment in M/s. Real Food Products Ltd. and others, etc. etc., Vs. Andhra Pradesh State Electricity Board and others, . After the disposal of writ appeals, APSEB granted six monthly instalments for payment of the additional charges too. Detailed calculations of additional charge as per clause 32.2.1 were furnished to the petitioners.

6. Questioning the levy of additional charges at the rate specified in clause 32.2.1, a spate of writ petitions including the 1st group of present writ petitions were filed. Pending these writ petitions, collection of additional charge was not stayed by this Court. But, in some cases, time for payment was extended by a few weeks. Some of these writ petitions came up for hearing before Neeladri Rao, J. who, by a judgment dated 10-4-1991 in WP Nos.10441 of 1990 etc., allowed the writ petitions partly. The learned Judge held that the rate of additional charge was not unreasonable or penal in nature. It was also held that the liability to pay additional charge arises even for the non-clearance of the consumption charges bill during the period covered by the stay order granted by the Court. However, the learned Judge held that for the period between the date of striking down the notification by the learned single Judge by his judgment dated 6-9-1989 and on which the said judgment was set aside by the Division Bench i.e., 2-4-1990, the petitioners were not liable to pay the additional charge as no demands could have been raised during that period. The learned Judge also read down the language of clause 32.2.1 so as to confine the rate of interest only to 24% uniformly. As already noted, it is this judgment that was reversed by the Division Bench recently in \\VA No.727/91 etc. It may be stated that the present batch of writ petitions did not come up for hearing before Neeladri Rao, J. or before the Division Bench which heard the batch of writ appeals against the judgment of Neeladri Rao, J. The bulk of the remaining cases have now been posted before us.

7. In this back-drop of the earlier litigation and in the light of the two decisions of the Supreme Court referred to supra, the question is whether the petitioners deserve any relief as regards the payment of additional charges, notwithstanding the fact that the relief was denied in toto by the Division Bench in WA Nos.727/91 etc. At the outset, we would like to mention that in substance, the

petitioners want us to grant the relief by way of reduction of rate of additional charge on equitable considerations. As already slated, their claim is based on the two Supreme Court decisions referred to supra, which we shall presently advert to.

8. In Kanoria Chemicals case (supra) the U.P. State Electricity Board demanded the late payment surcharge payable under clause 7(b) consequent upon the dismissal of writ petitions by Allahabad High Court questioning the notification dated 21-4-1990 revising the tariffs. During the pendency of the writ petitions, the High Court passed an interim order not to give effect to the impugned notification as against the petitioners therein. The amount of additional charge for delayed payment as per clause 7(b) works out to 25.5%. The writ petitions were ultimately dismissed on 1-3-1993. The differential amount due on account of revised tariff was paid by the petitioner. The question arose whether late payment surcharge could be demanded from the consumers. Allahabad High Court dismissed the writ petitions holding that the consumers were liable to pay the late payment surcharge under clause 7(b) even for the period covered by the stay order of the Court. On appeal, to Supreme Court by Konoria Chemicals and others, the Supreme court affirmed the view taken by Allahabad High Court. But, having regard to the particular facts and circumstances of the case, the Supreme Court considered it just and proper to reduce the rate of additional charge payable under clause 7(b) to 18 per cent as far as the period covered by stay order in writ petition.

9. Strong reliance was placed by the appellants before the Supreme Court on Adoni Ginning Factory and Others Vs. Secretary, Andhra Pradesh Electricity Board, Hyderabad and Others, . After an elaborate reference to the said decision, the Supreme Court ruled that the decision in Adoni Ginning Factory case (supra) did not come to the rescue of the appellants. Their Lordships observed :

""We, therefore, agree with the High Court that Adoni Ginning cannot be read as laying down the proposition that the grant of stay of a notification revising the electricity charges has the effect of relieving the consumers/petitioners of their obligation to pay late payment surcharge/ interest on the amount withheld by them even when their writ petitions are dismissed ultimately. Holding otherwise would mean that even though the Electricity Board, who was the respondent in the writ petitions succeeded therein, is yet deprived of the late payment surcharge which is due to it under the tariff rules/regulations. It would be a case where the Board suffers prejudice on account of the orders of the Court and for no fault of its. It succeeds in the writ petition and yet loses. The consumer files the writ petition, obtains stay of operation of the notification revising the rates and fails in his attack upon the validity of the notification and yet he is relieved of the obligation to pay the late payment surcharge for the period of stay, which he is liable to pay according to the statutory terms and conditions of supply-which terms and conditions indeed form part of the contract of supply entered into by him with the Board. We do not think that any such unfair and inequitable

proposition can be sustained in law. No such proposition flows from Adoni Ginning."''

The following observations are also apposite :

"It is equally well settled that an order of stay granted pending disposal of a writ petition/suit or other proceeding, comes to an end with the dismissal of the substantive proceeding 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 inspite of his failure. We do not think that any such unjust consequence can be countenanced by the Courts..... It is ununderstandable how the enhanced rates can be said to be payable but not the late payment surcharge thereon, when both the enhancement and the late payment surcharge are provided by the same notification-the operation of which was stayed."

Thus for the judgment of the Supreme Court is wholly against the petitioners herein. What, however, is sought to be relied upon by the learned Counsel for petitioners is the penultimate para in the judgment wherein the relief by way of reduction of interest to 18% was granted. We quote para 14 :

"Shri Vaidyanathan then contended that the rate of "late payment surcharge" provided by clause 7(b) is really penal in nature inasmuch as it works out to 25.5. per cent per annum. The learned Counsel also submitted that the petitioners understood the decision in Adoni Ginning as relieving them of their obligation to pay interest for the period covered by the interim order and that since they were acting bona fide they should not be mulcted with such high rate of interest. We cannot agree that the rate of late payment surcharge provided by clause 7(b) is penal, but having regard to the particular facts and circumstances of this case and having regard to the fact that the petitioners could possibly have understood the decision in Adoni Ginning as relieving of their obligation to pay interest/late payment surcharge payable under clause 7(b) to eighteen per cent. But this direction is confined only to the period covered by the stay orders in writ petitions filed challenging the notification dated 21-4-1990 and limited to 1-3-1993, the date on which those writ petitions were dismissed."

10. The learned Counsel for the consumers have strenuously contended that the relief modulated by the Supreme Court in the light of the fact situation therein would apply a fortiori to the cases on hand. We do not think that the basis on which the limited relief was extended to the appellants the Supreme Court probably in exercise of its plenary power under Article 142 of the Constitution would equally hold good in the present cases. In the cases decided by the Supreme Court, there was a plea that the appellants understood the decision in Adoni Ginning Factory case (supra) in a particular manner and that led to a bona fide impression that they need not have to pay the additional charge at that high

rate. It may be stated that the High Court while granting the interim stay of the operation of the notification dated 21-4-1990 specifically stated that from the date of disposal of the writ petition, the differential amount calculated on the basis of the impugned notification shall be paid. There was no express condition for payment of interest.

11. But, the situation is different in the cases with which we are concerned. No plea or contention based on Adoni Ginning case (supra) has been raised by the petitioners in the writ petition. That makes all the difference as regards the applicability of the relief granted by the Supreme Court. It must be noted that the Supreme Court guardedly said that the relief was being granted on the particular facts and circumstances of the case. The learned Counsel for the petitioners submit that the impugned tariff notifications having been struck down by a learned single Judge, the petitioners herein are in a better position than the appellants before the Supreme Court and that the equities are very much in their favour. The question whether and how far the petitioners are entitled to relief in the matter of payment of additional charge by reason of the single Judge's decision striking down the enhanced tariff will be adverted to by us later after referring to the decision in Kerala State Electricity Board case (supra). But, in Kanoria Chemicals case (supra) the relief was not granted on that basis. At best, we may understand the decision in Kanoria Chemicals case (supra) as empowering the Court to relieve the consumers of the burden of additional charge to some extent if the facts and circumstances of the case so warrant. We are not unmindful of the fact that equitable considerations are not out of place while exercising the constitutional jurisdiction under Article 226 (vide observations in Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills and another, , Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, . But, in an area, covered by contract or regulated by legislation, the Court should be slow, cautious and even reluctant to grant a relief not falling strictly within the parameters of contractual or statutory provisions. That is why we feel that we should not stretch the relief based on equity beyond the path shown by the decisions of Supreme Court in Kanoria Chemicals case (supra) and Kerala Electricity Board case (supra).

12. In Kerala State Electricity Board case (supra), the Supreme Court had to deal with a similar situation and to address itself to the question whether and on what basis the Electricity Board could recover 18% interest on the dues of energy charges. There also, as in the present case, the High Court by a judgment dated 19-12-1985 struck down the revision of tariff by the Electricity Board. The Kerala High Court directed the amounts paid in excess to be adjusted towards future bills. The Board then filed appeals in the Supreme Court. The Supreme Court allowed the appeals preferred by the Board by a judgment dated 26-8-1986 and upheld the validity of tariff revision. Pending the appeals, the Supreme Court while granting stay of refund directed future charges to be collected at 50% and the balance to be adjusted towards the past charges. The consumer-companies accordingly paid 50% of the demands for the months of March to June, 1986 and

adjusted 50% of the balance towards the refund due to them. The Kerala Electricity Board then raised demands for payment of the billed amounts together with interest at 18% per annum. The relevant provision in the Agreement provided that in default of payment within the stipulated time, the payment was to be made with interest at 18% per annum or at such other percentage as may be fixed by the Board from time to time. Contesting the liability to pay interest at 18% for the adjusted amounts, the consumers again filed writ petitions just as in the present case. The Division Bench of Kerala High Court held that the liability to honour future bills had ceased on account of the judgment of the High Court on 19-12-1985 till the excess payment was adjusted. As there was no enforceable demand, the Division Bench agreed with the view of the learned single Judge that the respondent-company could not be said to have defaulted in not discharging the liability which did not factually exist at the relevant time. Again, it was the turn of the Electricity Board to take up the matter in appeal to the Supreme Court. The Supreme Court reversed the decision of Kerala High Court and allowed the appeals. The claim of interest at 18% on the unpaid portion of the bills drawn up on the basis of revised tariffs was upheld.

13. The Supreme Court took the same view as that expressed by the Kerala High Court that the company cannot be held to be a defaulter for non-payment of the energy bills at the enhanced rates during the period the revision of tariff remained unenforceable on account of decision of the High Court. It may be noticed that the clause providing for payment of 18% interest is couched in almost similar language as clause 32.2.1 of APSEB Terms and Conditions. In the latter, the word used is "failure" and in the former, "default".

14. At the same time, their Lordships observed that after the decision of the Supreme Court upholding the upward revision of tariff, the Board's entitlement to draw the bills and consequential enforceability of payment on the basis of such bills "revived with full force". Hence, it would not be correct to contend that although the consumers were required to pay on the basis of revision of tariffs from the dates when such revisions became effective liability for such payment would accrue only from the date of pronouncement of the judgment by the Supreme Court upholding the upward revisions and not from any date prior to that. The Supreme Court then observed : "If the upward revisions are held as valid, enforceability of such upward revisions being consequential to such revisions, though it had remained unenforceable for some period on account of the decision of the High Court, cannot but revive from the dates of upward revisions."

15. The discussion that followed later at paragraph 24 is very crucial. Their Lordships indicated the real basis on which the liability to pay interest rests even for the period during which the enhanced tariff remained unenforceable on account of the decision of the High Court. The observations at paragraph 24 are more or less the same as those made in *Kanoria Chemicals* (supra). However, this particular decision lays down that the consumer cannot be held to have

defaulted in the payment of enhanced tariff during the period when the High Court's decision held the field. When once that judgment is set at naught, the consumer must be mulcted with liability to pay interest for the delay in payment on the principle of restitution. The approach of the Court which ordering restitution has been indicated by their Lordships in the following words :

"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 for restitution, the Court has not only power but also a duty to order for mesne profits, damages, costs, interest etc., as 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 a 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."

16. In paragraph 25, the Supreme Court proceeded to discuss whether on the facts of the case, the demand of interest at 18% on the unpaid portion of the bill amounts was just and proper. The Supreme Court came to the conclusion that the demand to pay interest at the rate of 18% was just and proper. In coming to the said conclusion, the Supreme Court took note of the fact that the consumers, apart from not paying the revised tariffs, got adjustment of payment already made prior to the decision of the High Court against future bills and the amount so saved was gainfully utilised by the company in its commercial activities, while the Board suffered financial loss because of the erroneous decision of the High Court. The Supreme Court then observed that in any case, the claim of 18% interest per annum "appears to be just and proper". If the demand of 18% interest during 1985-86 was considered to be just and proper, equally so the demand of 24% interest during the years 1990-91. That is, of course, one aspect of the matter.

17. The decision of Supreme Court in Kerala State Electricity Board (supra) read with the decision in Kanoria Chemicals (supra), puts the principle beyond doubt that the electricity consumers cannot be absolved of the liability to pay interest or late payment surcharge in respect of the bills issued during the period of operation of stay or injunction order or even during the period when the enhanced tariff notification could not be put in force by reason of the decision of the Court striking down the same. But, either of the two cases did not shut out the doors of the constitutional Courts to extend relief to mitigate the hardship of the unsuccessful party and to do justice between the parties. In doing so, the peculiar facts and circumstances of the case including the bona fide conduct or the bona fide impression formed by the party can be taken into account. In the light of these considerations and taking cue from what has been done by the

Supreme Court in Kanoria Chemicals (*supra*), we have approached the question whether on the facts of these cases, some relief has to be granted to the petitioners in the first group of cases. Having regard to the fact that the impugned tariff notifications of 1987 and 1989 were struck down by the learned single Judge of this Court and there was every reason for the petitioners to form a bonafide impression that the enhanced tariff need not be paid till the single Judge's decision was set aside by the Letters Patent Bench, we are inclined to grant limited relief by directing the collection of additional charge at 1.5% per month (18% per annum) in so far as the bills raised during the period September, 1989 to March, 1990 are concerned. In this context, we have also taken note of the fact that as per the regulations/conditions in force at the relevant point of time, the interest payable was 18% in case the APSEB granted instalments for clearance of the energy bills (*vide* clause 34), we have also taken note of the fact that the petitioners in the first group excepting in four cases i.e., WP Nos.5105, 5445, 7350 and 7356 of 1991 could not get the stay of payment of additional charges and therefore they paid the additional charges in almost all the cases during the pendency of this writ petitions. However, we direct that the benefit of relief shall not be extended to those who have not paid the additional charges demanded despite the fact that this Court did not grant stay. Such of those cases where the payment of additional charges was made beyond three months after expiry of the time granted by the Court or Electricity Board will also be disentitled to this relief. The refund due to the petitioners on account of the reduced rate of additional charge shall be extended to them by permitting the proportionate amount to be adjusted by the petitioners in the future bills to be issued from November, 1997 onwards.

18. The writ petitions falling within the first group i.e., WP Nos.10174, 10317, 10318, 10319, 10380, 10381, 10388, 10396, 10854, 10961, 11153, 13582, 15242, 16352, 16742, 16743, 16744 of 1990; 7770, 7783, 7786, 7831, 7844 and 7920 of 1991; 9521/91, 10820/90, 9173/91, 9723/91 and 10280/91 are accordingly disposed of without costs.

19. However, WP Nos.5105, 5445, 7350 and 7356 of 1991 though they fall within the first group of cases, we are not inclined to grant any relief therein because the petitioners, without any justification sought for stay of additional charges due and retained the benefit of stay till today, being fully conscious of the fact that no interest need be paid thereon. Those writ petitions are, therefore, dismissed without costs.

20. We are conscious of the fact that the limited relief which we have granted in the first group of cases is not in full conformity with the Division Bench decision in WA No.727/91 etc., dated 10-3-1997 wherein no relief was granted at all. In the normal course, we would have thought of reference to Full Bench as we are deviating a little from the ultimate decision in the said writ appeal. But, we do not consider it necessary to do so for the reason that we are giving effect to what was laid down or granted by the Supreme Court in the two decisions of

Kanoria Chemicals (supra) and Kerala State Electricity Board (supra). As we have already mentioned, the first decision was not available to their Lordships by the time the judgment in WA No.727/91 etc., was rendered and the second decision was not noted by the learned Judges. Incidentally, we may mention that the Division Bench placed reliance on the Allahabad High Court's judgment in Kanoria Chemicals (supra) which was partially modified by the Supreme Court on appeal.

Second group of writ petitions :

(WP Nos.8950, 9150, 9159, 9160 and 10686 of 1991)

21. The considerations which are germane for granting the limited relief in the first group of cases in the light of the decision of the Supreme Court referred to supra do not, in our view, hold good as far as the second group of writ petitions is concerned. The tariff notifications of 1984 and 1985 which were questioned by the petitioners were upheld by this Court and the writ petitions were dismissed. The Supreme Court affirmed the decision of the High Court by the judgment in M/s. Hindustan Zinc Ltd. etc. Vs. Andhra Pradesh State Electricity Board and others, . Thereafter, the differential tariff together with additional charges was demanded by APSEB. Then, the writ petitions were filed questioning the demand of additional charges. Thus, the tariff notifications remained intact throughout the entire gamut of litigation and there was no scope to entertain a bona fide impression that the dues were not payable or that the additional charge was not liable to be paid. In fact, there is no such plea. That apart, the petitioners obtained stay to the extent of 2/3rds of the additional charge and paid only 1/3rd. Thus, they had the benefit of nonpayment of the additional charges for more than four years without incurring any liability for interest thereon. In these circumstances, no equities arise in favour of the petitioners nor any extraordinary circumstances exist to warrant the grant of relief to any extent. It cannot be said that the demand of additional charges at the rate of 2% per month as per clause 32.2.1 is unfair or unreasonable in the light of the facts of these cases. The above writ petitions are, therefore, dismissed. The petitioners shall pay costs of Rs. 1,000/- to the respondents in each of the above writ petitions.