

(1981) 12 PAT CK 0011

In the Patna High Court

Case No : Civil Writ Jurn. Case No's. 1236, 1237, 1462, 1528, 1529, 1533, 1535 and 1572 of 1981 (R)

Shriram Bearing Limited, Ranchi

APPELLANT

Vs

Bihar State Electricity Board, Patna and Others

RESPONDENT

Date of Decision : 08-12-1981

Acts Referred:

Constitution of India, 1950 — Article 14, 254

Electricity (Supply) Act, 1948 — Section 18, 49, 49(1), 49(2), 51

Citation : AIR 1982 Patna 91 : (1982) 30 BLJR 230 : (1982) PLJR 91

Hon'ble Judges : P.S. Sahay, J;Nagendra Prasad Singh, J

Bench : Division Bench

Advocate : A.K. Sen, S.K. Kapoor, Bar-at-Law, R.N. Jhunjhunwala, Attorney-at-Law, G.C. Bharuka and Navaniti Prasad Singh, L.K. Bajla, A.S. Dayal, Hari Shankar and Prabha Shanker Mishra, for the Appellant; R.B. Mahato, A.A.G. Harendra Prasad, Jr. Counsel to A.A.G. and Shok Haran Singh, for the Respondent

Final Decision : Dismissed

Judgement

Nagendra Prasad Singh, J.—The petitioners in these writ applications have questioned the authority of the respondent-Bihar State Electricity Board to issue bills in respect of fuel surcharge at an enhanced rate for the financial years 1979-80 and 1980-81.

2. The petitioners Companies have factories in the different parts of the State of Bihar for which they have entered into agreements with the Bihar State Electricity Board (hereinafter to be referred to as "the Board") for supply of high tension line. From time to time notifications relating to tariff have been issued by the respondent-Board in the exercise of powers conferred on them by Sections 46 and 49 of the Electricity (Supply) Act, 1948 (hereinafter to be referred to as "the Act"). The last tariff, which is in force, was issued on 1-4-1979 setting out the details of the charges which a consumer of the electric energy has to pay. The petitioners are required to pay fuel surcharge as well. In the year 1979 fuel surcharge at a provisional rate of 1 paise per unit was levied which was

subsequently increased to 3 paise per unit. However, in the final bill submitted for the financial year 1979-80 it was raised from 3 paise per unit to 6.242 paise per unit. Along with the final bill of fuel surcharge for the year 1979-80 a provisional bill of fuel surcharge for financial year 1980-81 was also submitted to the petitioners Companies at the rate of 8 paise per unit. According to the petitioners, the increase in the rate of fuel surcharge has neither sanction of law nor it has been arrived at in accordance with the procedure prescribed under the aforesaid tariff.

3. The Board has been constituted u/s 5 of the Act and one of the functions of the Board as provided in Section 18 of the Act is to arrange in co-ordination with the generating companies operating in the State, for supply of electricity that may be required within the State, and for transmission and distribution of the same "in the most efficient and economical manner". Section 46 of the Act provides "that a Tariff to be known as Grid Tariff shall in accordance with any requirements made in this behalf be fixed from time to time by the Board." Section 49 vests power in the Board to supply electricity to any person upon such terms and conditions as the Board thinks fit and may for the purpose of such supply frame uniform Tariff. Sub-section (2) of Section 49 lays down that while fixing uniform tariff the Board shall have regard to factors mentioned therein, i.e., the nature of supply, purposes for which it is required, coordinated supply and distribution of electricity within the State in most efficient and economical manner. Section 51 authorises the Board to submit provisional bills. Section 59 enables the Board to "adjust its tariffs so as to ensure that the total revenues in any year of account shall, after meeting all expenses properly chargeable to revenue leave such surplus, as the State Government may, from time to time, specify". Section 61 requires the Board to submit in February to the State Government a statement in prescribed form of estimated capital and revenue receipts and expenditure for the ensuing year. The State Government has to lay the said statement on the table of the State Legislature. Some of the provisions vest supervisory power in the State Government.

4. In view of Sections 49 and 59, there is no escape from the conclusion that the Board can frame uniform tariff for supply of electricity to the consumers and can also adjust its tariffs so as to ensure that after meeting all expenses detailed in Section 59, leave such surplus as the State Government may, from time to time, specify. The nature of the power u/s 49 has been examined by the Supreme Court in the case of Maharashtra State Electricity Board Vs. Kalyan Borough Municipality and Another, where it was pointed out that u/s 49, as it now stands, "the Legislature has empowered the Board to frame uniform Tariff and it has also indicated the factors to be taken into account in fixing uniform tariff." It was also held that Section 49 does not give an unguided and arbitrary power to the Board to fix the tariffs as it likes. After referring to different provisions it was observed (at p. 1001):

"..... all these provisions have the effect of properly guiding the activities of the

Board, in its dealings with the consumers including the levy of tariffs. Section 49 itself is hedged in by various restrictions and directions which the Board will have to comply in the matter of framing uniform tariffs or in the matter of fixing different tariffs, and that section, also in our opinion, provides a proper guideline for framing uniform tariffs and different tariffs" Learned counsel appearing for the petitioners in different writ applications, perhaps, in view of the aforesaid provision did not seriously challenge the power of the Board to issue Tariff dated 1st April, 1979 (hereinafter to be referred to as the Tariff") which is in force at present,

5. The word Tariff according to the Chambers"s dictionary, means "list of charges". According to the Words and Phrases (Butter Worth) "tariff means "book of rates". The Tariff in question contains provisions in respect of terms and conditions of supply of electricity, regarding payment of bills, rebate, interest, surcharge and fuel surcharge. In the Schedule to the said Tariff, charges in respect of different types of electric supply e.g. domestic service, low tension industrial service, irrigation and agriculture service, high tension service, etc. have been specified. The provision regarding the fuel surcharge is contained in Clauses 16.7 to 16.7.4. Clause 16.7.1 is as follows :--

"Tariff rates of L. T. Industrial Service, H. T. Service, E. H. T. Service and Railway Traction Service are subject to fuel surcharge which shall be determined in the following manner i. e., all consumers of the aforesaid categories shall be required to pay fuel surcharge at a rate to be determined every year in accordance with the formula given below, in addition to the other charges as laid down in the Tariff Schedule." Clause 16.7.2 contains formula for determining the fuel surcharge applicable during the financial year in paise per unit. By a mathematical formula the average of fuel surcharge in paise per unit has to be determined taking into account--

(i) the rate of the fuel surcharge in paise per unit computed for Board"s generation at Patratu and Barauni Thermal Power Stations during the financial year.

(ii) Units purchased from D. V. C., Orissa and U. P. State Electricity Boards during the year.

(iii) Increase in the average unit rate of purchase of energy from the D. V. C., Orissa and U. P. State Electricity Boards, during the year for which surcharge is to be calculated. The said increase is to be calculated with respect to the base year 1977-78.

(iv) Units sent out from Patratu and Barauni Thermal Power Stations and units sold out of the units sent out from the aforesaid Thermal Power Stations.

(v) Units sold out of purchases from D. V. C., Orissa and U. P. State Electricity Boards.

The relevant portion of Clause 16.7.3 is as follows :

"At the end of each year, the fuel surcharge in respect of energy generated from Board's own generating Station at Patrattu and Barauni Thermal Power Stations shall be computed in the manner indicated below. For energy purchased from other sources, the actual fuel surcharge of and units purchased from respective source will apply." After that there are two Sub-clauses (a) and (b) containing a formula for calculating the fuel surcharge at the two Thermal Power Stations at Patrattu and Barauni. The calculation is linked with the rate of fuel supplied to those two Thermal Power Stations. I shall refer to clause 16.7.4 later.

6. Mr. P. S. Mishra appearing for the petitioner in one of the cases took a stand that the Tariff in question has been issued u/s 49 of the Act and unless the said section authorises the Board to make Tariff containing a provision for adjustment of the rate of the fuel surcharge with the rise of the price of fuel it was not open to the Board to make provisions like Clauses 16.7.2 and 16.7.3 aforesaid. In this connection, reference was made to Section 46 of the Act which is a provision regarding Grid Tariff which is applicable in cases of supply of electricity to other licensees, meaning thereby the persons licensed under the Indian Electricity Supply Act, 1910 to supply energy (vide the definition u/s 2(6)). Sub-section (6) of Section 46 says that Grid Tariff issued under that section may contain provisions for "adjustment of price having regard to the power factor of supply taken or the cost of fuel or both". According to Mr. Mishra whereas a specific provision has been made in Section 46(6) enabling the Board to make Grid Tariff containing provision for adjustment of price having regard to the power factor or cost of fuel, no such provision has been made u/s 49 which is applicable to the cases of petitioners and from that it should be inferred that the framers of the Act never authorised the Board to make Tariff u/s 49 containing provisions for adjustment of price of energy having regard to the rise of the cost of fuel. Section 46, as I have already pointed out, is applicable to licensees who generate and supply electricity which is in a sense a parallel body to the Board, and, as such, the provision regarding adjustment of price of energy was specifically incorporated in Section 46 itself. Section 49 although does not contain any such specific provision, but it vests a discretion in the Board while fixing the terms and conditions of supply of energy. Sub-section (1) of Section 49 which is relevant, is as follows :--

"Subject to the provisions of this Act and all requirements, if any, made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform Tariffs".

In view of the aforesaid sub-section the Board may supply electricity to any person upon such terms and conditions as the Board thinks fit. Sub-section (2) of Section 49, however, provides a guideline while fixing a uniform Tariff and factors mentioned therein have to be taken into account. One of the facts which has been impressed in Sub-section (2) of Section 49 as well as u/s 18 that supply and distribution of electricity should be in most efficient and economical manner.

But in view of Sub-section (1), the Board can certainly incorporate a provision in the Tariff framed by it enabling it to adjust the fuel surcharge having regard to the cost of fuel. In my view, the Clauses 16.7.2 and 16.7.3 of the Tariff cannot be held to be ultra vires on the ground that there is no express provision u/s 49 authorising the Board to adjust rate of the fuel surcharge having regard to the rise in the cost of the fuel.

7. Mr. P. S. Mishra then challenged the validity of Clause 16.7.2 which contains the formula for determining fuel surcharge during the financial year in question. He urged that from the said formula it will appear that the Board has to calculate the fuel surcharge in paise per unit for its generation at Patratu and Barauni Thermal Power Stations, according to the Clause 16.7.3. Then the total units sent out from these two Thermal Power Stations have to be taken note of. Thereafter, increase in the average units rate of purchase of energy from D. V. C., Orissa and U. P. State Electricity Boards have to be calculated along with the units purchased from those three agencies. It was submitted that although the total amount of fuel surcharge is to be worked out with reference to total units generated or purchase from the aforesaid 5 sources, but it has to be realised only from the consumers of L. T. Industrial Service, H. T. Service, E. H. T. Service and Railway Traction Service, the types of electricity consumed by the petitioners. This, according to the learned counsel, is an arbitrary formula where burden of others has been saddled on the petitioners. On a first impression this argument appeared to be attractive. Learned Additional Advocate General appearing for the respondent-Board admitted that according to the formula the fuel surcharge has to be determined with reference to the total units generated and purchased, but it has to be paid by the consumers of particular types of energy which have been detailed in Clause 16.7.1. In this connection, he has drawn our attention to the Schedule of the Tariff and pointed out that the charge of the types of energy which the petitioner-Companies are consuming is much lower than the charge payable for consumption by other citizens, for domestic, commercial, or irrigation purposes, who have not to pay the fuel surcharge. From the Tariff Schedule it appears that the energy charge for domestic service is 38 and 43 paise per unit, for the commercial service at 48 and 58 paise per unit, whereas the L. T. Industrial Service is 34 and 36 paise per unit, for H. T. Service between 24.80 to 29.80 paise per unit and the E. H. T. service between 20 to 25 paise per unit. The stand of the Board appears to be that the total amount of the fuel surcharge for the whole State is linked with the rise of price of fuel which is worked out with reference to the total unit generated and purchased, but is leviable only on the consumers of L. T. Industrial Service, H. T. Service, E. H. T. Service and Railway Traction service as mentioned in Clause 16.7.1 because the general rate of charge for supply of these types of energy is much lower. In my opinion, the Board u/s 49 read with Section 59 is empowered to frame Tariff and adjust the same in order to meet its genuine expenses and to run the business. The variations in the cost of fuel have to be borne by some or all. As there is a difference in the rate of supply of energy it cannot be said to be unreasonable on

the part of the Board to decide to realise the fuel surcharge only from consumers who are being supplied electricity at a cheaper rate for industrial purposes. If the argument of the petitioners is accepted then consumers of domestic service, commercial service can as well make out a case of discrimination as to why they are being asked to pay at a higher rate. In my view, the formula in question cannot be held to be invalid on this ground.

8. Different counsel appearing for the petitioners in different writ applications then challenged the correctness of different bills issued to different petitioners saying that they have not been issued in accordance with the Tariff in question. Mr. A. K. Sen, learned counsel appearing in one of the cases submitted that on a plain reading of Clause 16.7.3 at the end of year the fuel surcharge in respect of energy generated at Patratu and Barauni Thermal Power Stations have to be computed according to formula given therein which is Jinked with the cost of the fuel delivered to the said Thermal Power Stations, meaning thereby coal, etc. Similarly, in respect of the energy purchased from other sources, i.e., from D. V. C., Orissa and U. P. State Electricity Boards, only "actual fuel surcharge" paid over the purchase of such units has to be taken note of and not the cost of purchase of such units. In other words, according to the petitioners, the respondent Board while submitting the bills for fuel surcharge has calculated the rate of the fuel surcharge not on the basis of the actual fuel surcharge paid to D. V. C., Orissa and U. P. State Electricity Boards, but on the basis of the price paid for units of electricity purchased from them and because of that they have increased the rate from 3 paise per unit to 8 paise per unit.

9. In support of the aforesaid contention reference was made on behalf of the petitioners to Clause 16.7.3 where it has been mentioned that "for energy purchased from other sources actual fuel charge of and units purchased from the respective sources will apply". According to the petitioners, on a proper reading there is no scope of taking note if the price paid for the units purchased from the three sources mentioned above. No doubt, the aforesaid expressions are little ambiguous and it would have been better that the Board had framed the aforesaid clause in a more specific and explicit manner. However, if the said clause is read along with Clause 16.7.2, then, in my opinion, there is no ambiguity on that account. Clause 16.7.2, which contains the formula meant for calculating the fuel surcharge, says in so many words that note has to be taken of the units purchased from D. V. C., Orissa and U. P. State Electricity Boards, and of the increase of the rate of purchase from the aforesaid sources taking 1977-78 as the base year. Both the clauses are complimentary and they have to be read in a harmonious manner. In my view, it is difficult to accept the contention that for purpose of calculation of fuel surcharge, only the fuel surcharge, if any, paid to the D. V. C., Orissa and U. P. State Electricity Boards has to be taken into account.

10. It was then submitted that there is a conflict and repugnancy between Clauses 16.7.2 and 16.7.3 inasmuch as Clause 16.7.3 directs the Board to take

into account only the fuel surcharge paid to the three sources aforesaid whereas Clause 16.7.2 takes into account units purchased from them and increase in the rate of supply of electricity by them. According to the petitioners, in such a situation, Clause 16.7.3 shall prevail over Clause 16.7.2. In this connection reference was made to the cases of K.M. Nanavati Vs. The State of Bombay, and the King v. Dominion Engineering Co. Ltd. AIR 1947 PC 94 where it has been pointed out that where two sections are repugnant, the last should prevail. In my view, there is no repugnancy or conflict between the two clauses. Even Clause 16.7.3, in respect of energy from other sources says, "the actual fuel surcharge of and units purchased from respective sources will apply". For accepting the contention of the petitioners the word "and" has to be read as "on", which, in my opinion, is not possible. On a proper reading of the said clause the actual fuel surcharge as well as the units purchased from respective sources have to be taken note of and in that view of the matter it is consistent with Clause 16.7.2.

11. Mr. S. K. Kapoor in one of the writ applications urged that from marginal note of Clause 16.7 it will appear that it contains a provision for fuel surcharge and the board in garb of levying fuel surcharge cannot increase the general charge of the electric supply. In other words, according to the petitioners the Board has to raise rate of fuel surcharge only taking note of increase in the rate of the fuel. It is difficult to accept this contention as well. Fuel surcharge is in substance a surcharge and its scope cannot be circumscribed by its nomenclature. Every surcharge is an extra charge, and, as such, part of Tariff. The Supreme Court in the case of Bisra Stone Lime Co. Ltd. and Another Vs. Orissa State Electricity Board and Another, observed as follows (at p. 130):--

"The word surcharge is not defined in the Act. but etymologically, inter alia, surcharge stands for an additional or extra charge or payment (see Shorter Oxford English Dictionary). Surcharge is thus a superadded charge, a charge over and above the usual or current dues. Although, therefore, in the present case it is in the form of a surcharge, it is in substance an addition to the stipulated rates of tariff. The nomenclature, therefore, does not alter the position." It is well known that marginal note cannot take away the effect of the substantive provision. Reference in this connection may be made to the cases of Tara Prasad Singh and Others Vs. Union of India (UOI) and Others, and Board of Muslim Wakfs, Rajasthan Vs. Radha Kishan and Others, . If Clauses 16.7.2 and 16.7.3 require the Board to not only take note of the rise of the cost of fuel but also to take into account increase in the average unit rate of purchase of energy from D. V. C., Orissa and U. P. State Electricity Boards, then the said substantive provision cannot be held to be invalid because the clause has been labelled as fuel surcharge.

12. On behalf of the petitioners, provisional bill for fuel surcharge for the financial year 1980-81 was challenged on the ground that they have been submitted in May, 1981 after expiry of the financial year which is not permissible in view of Clause 16.7.4 of the Tariff. The said Clause 16.7.4 is as follows :--

"The fuel surcharge for a financial year shall be calculated by the Board after the expiry of the financial year. Till actual calculation of the fuel surcharge for a financial year, in the manner laid down hereinbefore, is made, a fuel surcharge during that financial year will be levied at a rate provisionally calculated on monthly or quarterly or half yearly basis as decided by the Board. In case of short or excess realisation, the same shall be adjusted in the next bill to be served on the consumer."

From the aforesaid clause it is apparent that till actual calculation of the fuel surcharge for a financial year in the manner laid down in the Tariff is made, a fuel surcharge during that financial year will be levied at a rate provisionally calculated. This is an enabling provision under which the Board can issue a provisional bill and difference, if any, with the final bill, can be adjusted later. It also presupposes that such bills are submitted within the financial year in question. To that extent there has been a breach of the said provision in the present cases. But, can such provisional bills be quashed or be declared to be invalid being in contravention of requirement of Clause 16.7.4? This leads to the question whether the said provision is mandatory or directory. In my view, it cannot be held to be mandatory so as to nullify the bills solely on this ground. It is well known that merely because a Statute provides a time limit for performance of an act or duty, such provision cannot be held to be mandatory. If from other circumstances it can be established that Statute fixed the time limit within which the act or duty must be performed, the matter shall be different.

13. In my view, from the language of Clause 16.7.4 it cannot be held that if such bills are submitted after the financial year in question, they shall be per se invalid. It cannot be disputed that the said clause read with Section 51 of the Act enables the Board to issue provisional bill before the final rate of fuel surcharge has been determined, and in that sense it is for the benefit of the Board and an exception to the general rule, that the bill must be a final one. I am not able to appreciate as to how the petitioners can make grievance of submission of such bills after the expiry of the financial year. Of course, in some cases where such bills have been submitted after a long lapse of time which causes prejudice to the person concerned, he may seek appropriate remedy. However, it is expected that the Board should exercise power of submitting provisional bills in accordance with the procedure prescribed by the Tariff itself and not as and when they liked.

14. So far as the increase in the rate of provisional bill is concerned, it has been stated on behalf of the respondent Board in the original counter-affidavit as well as in the supplementary counter-affidavit that the price of coal and other oil required for generation of electricity has gone up during the financial year 1980-81 and taking that factor into consideration the provisional rate of fuel surcharge for the financial year 1980-81 was fixed at 0.8 paise per unit which is subject to final adjustment on actual calculation of the rate. Clause 16.7.4 vests power in the Board to calculate provisionally the rate of fuel surcharge on monthly, quarterly or half-yearly basis and it says, "in case of short or excess

realisation the same shall be adjusted in the next bill to be served". In my view, the provisional bills cannot be quashed holding them to be invalid. However, I direct that the Board shall issue final bills to the petitioners for the year 1980-81 as early as possible adjusting the amount of provisional bills.

15. During the hearing of these writ applications a controversy arose as to whether the final calculation of the rate of fuel surcharge for the year 1979-80 at the rate of 6.242 paise per unit was in accordance with Clause 16.7.2 and Clause 16.7.3. On behalf of the petitioners it was asserted that it should be 6.227 paise per unit. The Board was directed to file an affidavit stating the mode of calculation and pursuant to that direction a chart was filed on behalf of the Board along with an affidavit. From the chart it appeared that the increase in the basic cost of the fuel for Patratu and Barauni Thermal Power Stations in accordance with Sub-clauses (a) and (b) of Clause 16.7.3, the Board had been arrived at 27.15 % and 15.42 %, respectively. The aforesaid Sub-clauses (a) and (b) require the Board to calculate the variation in cost of fuel as follows :--

"Percentage variation of 0.5 and above will be treated as the next higher percentage and percentage variation below 0.5 will be ignored."

According to the aforesaid provision 0.15% in the case of Patratu and 0.42% in case of Barauni should have been ignored. Admittedly, this has not been done. Learned Additional Advocate General stated that rate of increase in fuel has been worked out with reference to the actual increase as directed by the aforesaid Sub-clauses (a) and (b). He submitted that it was up to the Board to ignore the variation of 0.5% for purpose of mathematical calculation, but it was not obligatory. It is difficult to accept this contention. The method provided for calculating the rate of fuel surcharge at the two Thermal Power Stations requires the percentage variation below 0.5 to be ignored and 0.5 and above to be added. How it can be urged that it is not obligatory to follow the said direction? In my opinion, the Board while calculating the final amount of fuel surcharge payable by these petitioners had to ignore the variation of 0.15% and 0.42% aforesaid.

16. Now the question is as to whether on this ground the bills submitted to the different petitioners have to be quashed. Learned Additional Advocate General referred to the chart aforesaid and pointed out that at the rate of 6.242 paise per unit the total fuel surcharge payable by different consumers in the State of Bihar shall be Rs. 11,99,78,714 whereas according to the rate of 6.227 paise per unit, i. e., after ignoring the variation of 0.15% and 0.42% it shall be Rs. 11,96,98,992, i.e., the difference will be of Rs. 2,79,722 in the whole State of Bihar which will be an insignificant amount vis-a-vis different petitioners. The petitionerwise difference will be that the petitioner in C. W. J. C. No. 1237 shall have to pay Rs. 446.16 paise, in excess, petitioner in C. W. J. C. No. 1528 shall have to pay Rs. 33.52 paise, petitioner in C. W. J. C. No. 1529 shall have to pay Rs. 83.70, petitioner in C. W. J. C. No. 1462 shall have to pay Rs. 37.78 paise, petitioner in C. W. J. C. No. 1535 shall have to pay Rs. 60.67 paise, petitioner in C. W. J. C. No. 1572 shall have to pay Rs. 30.80 paise, petitioner in C. W. J. C.

No. 1533 shall have to pay Rs. 25.05 paise and petitioner in C. W. J. C. No. 1236 shall have to pay Rs. 128.51 paise in excess, for the financial year 1979-80. Comparing the excess amount charged with reference to the amount of total bills which is of several thousand rupees in each case, the amount charged in excess is not a substantial amount so as to saddle the petitioners with an unreasonable burden. Learned Additional General appearing on behalf of the Board gave an undertaking that this excess amount which has been charged under a bona fide mistake, shall be adjusted in the next bill which shall be submitted to the petitioners. In view of this undertaking, I do not consider it necessary to quash the bills submitted to the petitioners for different periods.

17. The writ applications are, accordingly, dismissed. In the circumstances of the case, however, parties shall bear their own costs.

P.S. Sahay, J.

18. I agree.