

(1998) 11 AP CK 0066

In the Andhra Pradesh High Court

Case No : Writ Petition No. 15149 of 1988

Sri Vishnu Cements Ltd., Seethapuram, Dhondapadu,
Nalgonda District

APPELLANT

Vs

A.P.S.E.B., Vidyut Soudha, Somajiguda, Hyd. and another

RESPONDENT

Date of Decision : 27-11-1998

Acts Referred:

Contract Act, 1872 — Section 74

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

Citation : AIR 1999 AP 103 : (1999) 1 ALD 269 : (1999) 1 ALT 193

Hon'ble Judges : C.V.N. Sastri, J

Bench : Single Bench

Advocate : Mr. Duba V. Nagarjuna Babu, for the Appellant; Mr. K.N. Jwala, SC for APSEB, for the Respondent

Judgement

1. The petitioner is a cement manufacturing Company. It is a high tension consumer of electricity supplied by the A.P. State Electricity Board (APSEB), first respondent herein. The petitioner assails the action of the second respondent i.e., Senior Accounts Officer, Operation Circle, APSEB, Khammam, in levying penalty to the tune of Rs.9,92,466.91 ps. towards proportionate energy consumed by the petitioner in excess of the Contracted Maximum Demand (CMD) in the bill dated 28-9-1988 for the Month of September, 1988, as being arbitrary and illegal.

2. It is not in dispute that the petitioner's CMD is 15,000 KVA. As against the CMD of 15,000 KVA, the maximum demand recorded during the month of September, 1988 was 16,320 KVA. The petitioner has thus exceeded the contracted demand by 1,320 KVA. There is no dispute that for the portion of the demand in excess of the contracted demand, the Board is entitled to collect at twice the normal charge, which is Rs.36/- per KVA. Accordingly, in the bill in question a sum of Rs.95,040/- was charged for the excess demand of 1,320 KVA at the rate of Rs.72/- per KVA. This amount is not disputed by the petitioner. The petitioner, however, questions the demand for a sum of Rs.9,92,466.91 ps.

towards the energy consumed by the petitioner proportionate to the demand exceeded at twice the normal charges. It may be mentioned that the total energy consumed during the relevant period was 75,12,240 units for which the petitioner was charged at the normal rate of 67 paise per unit. The petitioner does not dispute the same. However, in addition to the same, penalty at twice the normal rate was also levied on 6,07,608 units, which is arrived at as the proportionate energy consumed in excess of the contracted demand. According to the petitioner the Board is not entitled to collect this amount there was no power-cut at the relevant time and there was no ceiling fixed on the energy consumed and there was no basis at all to notionally arrive at the energy consumed in excess of the contracted demand and levy penalty thereon.

3. The respondents, however, rely on Clause 7 of B.P.Ms. No.671 (Commercial) Dated 10-6-1987 which reads as follows:

"7) Additional charges for Maximum Demand in excess of the Contracted Demand:

If in any month the recorded maximum demand of the consumer exceeds his contracted demand by more than 5%, that portion of the demand in excess of the contracted demand and that portion of the proportionate energy will be billed as follows:

Demand, Energy and Fuel cost adjustment charges will be billed at twice the normal charges."

4. The main contention of the petitioner is that Demand and Energy are distinct and separate and that when no ceiling is fixed on the energy consumed, there is no basis at all to arrive at the quantity of energy consumed proportionate to the demand exceeded and that the Board is not entitled to levy or collect any penalty on the energy notionally which is not supplied or consumed. It is further contended that no loss has accrued to the Board at all and, therefore, the question of levying any penalty does not arise. It is also pointed out that the Board realising this mistake subsequently deleted the above Clause in B.P.Ms. No.225, dated 16-10-1990.

5. The learned Counsel for the respondents, however, contends that the Board is empowered u/s 49(1) of the Electricity (Supply) Act, 1948, to fix the terms and conditions of supply; that in exercise of the said power the Board issued B.P.Ms. No.671 dated 10-6-1987; that the same is perfectly valid and binding on the petitioner; that according to Clause 9 of the H.T. agreement also the consumer has an obligation to pay all the charges levied by the Board and as such the Writ Petition is without any merit and it is liable to be dismissed. The learned Counsel for the respondents has also submitted that in view of the subsequent improvement in supply position, the Board took a policy decision to remove the penalty on the consumption of excess energy and accordingly issued B.P.Ms. No.225 dated 16-10-1990 deleting the words "that portion of the proportionate energy" from Clause 7 of B.P.Ms. No.671 and the same has no bearing on the

instant case.

6. The learned Counsel for both the parties have cited several judgments in support of their respective contentions.

7. In Hyderabad Engineering Industries Ltd. and Others Vs. A.P. State Electricity Board and Others, , it was held that the Board has power unilaterally to alter the conditions of supply and the notification issued by the Board unilaterally altering the conditions of supply for high tension consumers of electricity was upheld.

8. In Ferro Alloys Corpn. Ltd. Vs. A.P. State Electricity Board and another, , the Supreme Court upheld the validity of Section 49 of the Electricity (Supply) Act. It was held that the Section was not bad for want of guidelines. It was also held that the collection of consumption deposit and additional consumption deposit under Clause 28 of the terms and conditions of supply cannot be characterised as unreasonable or arbitrary and the Board is not liable to pay interest thereon to the high tension consumers of electricity.

9. In M/s. Hyderabad Vanaspathi Limited Vs. Andhra Pradesh State Electricity Board and Others, , it was held that the terms and conditions of supply are statutory in character but not merely contractual even though the Board has entered into agreement with individual consumers. In the said judgment it was further held that Clause 39 of the terms and conditions of supply relating to malpractice, pilferage of energy and fraud played by consumers, was not in conflict with the provisions of the Act.

10. The said judgments, however, are not directly applicable and they do not throw much light on the question involved in the present case.

11. In The Adoni Cotton Mills Ltd. and Others Vs. The Andhra Pradesh State Electricity Board and Others, , it was held that the Board has power u/s 49 to regulate supply and to fix higher rates for consumption of excess of energy. This case, however, deals with the situation during power-cut period only and it has no application for non-R&C period.

12. In the counter-affidavit filed on behalf of the respondents, it is categorically admitted that the Board has lifted the power restrictions imposed on H.T. consumers with effect from August, 1988 and that during non-R & C period the consumers are at liberty to consume power as much as required by them. It is, however, stated in the counter affidavit that as the petitioner has excess consumed 1320 K.VA, excess over CMD was billed twice the normal tariff rate and energy consumed by the petitioner proportionate to the demand exceeded was also billed at twice the normal charges as per the general condition 7 of the tariffs notified vide B.P.Ms. No.67I, dated 10-6-1987. It is further stated that though there is no power restriction so far as energy is concerned and one can consume any quantum of power as required by him, the petitioner is expected to be within the CMD and as such the levy of penalty on the energy consumed is not illegal, unjust and arbitrary. There is thus an obvious inconsistency in the

stand taken in the counter affidavit. Admittedly, when there is no restriction on the quantity of power consumed, it is not explained on what basis penalty could be levied on any portion of the total quantity of energy consumed by linking it with the CMD for which a ceiling is fixed in the agreement itself. Merely because there is a general clause in the form of H.T. agreement that there is an obligation on the part of the consumer to pay all the charges levied by the Board, it does not mean that the Board can levy and collect penalty without any basis whatsoever. Further, it is not shown that any loss has accrued to the Board by the consumption of so much energy by the petitioner. In the absence of any breach of contract and in the absence of any loss or damage caused to the Board thereby, the question of levying any penalty does not arise. Even in the case of breach of contract, Section 74 of the Indian Contract Act entitles a person complaining of breach of contract to get reasonable compensation and it does not entitle him to realise anything by way of penalty. In *State of U.P. Vs. Chandra Gupta and Co.*, , it was held that if a contract is not duly performed but still no damage is suffered on account of non-performance, the promisee would not be entitled to get damages. In *Maula Bux Vs. Union of India (UOI)*, , it was held that:

"In every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money Can be determined, the party claiming compensation must prove the loss suffered by him."

13. In *Union of India (UOI) Vs. Rampur Distillery and Chemical Co., Ltd.*, , it was held that the party to a contract taking security deposit from the other party to ensure due performance of the contract is "not entitled to forfeit the deposit on ground of default when no loss is caused to him in consequence of such default.

14. On the facts of the instant case I am satisfied that the respondents are not entitled to collect any penalty from the petitioner on the so-called excess energy consumed by the petitioner proportionate to the demand exceeded. This conclusion is also fortified by the fact that the Board itself made the position clear in B.P.Ms. No.225, dated 16-10-1990 by removing the impugned clause in B.P.Ms. No.671, dated 10-6-1987.

15. The learned Counsel for the respondents by placing reliance on the decisions of the Supreme Court in M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, , Prag Ice and Oil Mills and Another Vs. Union of India (UOI), , Bihar State Electricity Board and another Vs. M/s. Usha Martin Industries and another, , and Gupta Sugar Works Vs. State of U.P. and Ors, , has contended that fixation of electricity tariff is a policy matter to be decided by the Board and the Court is not concerned with economic policy or price fixation. I do not think that the said judgments have any relevance to the case on hand. Here we are not concerned with fixation of any tariff or price and we are concerned with the legality of the levy and collection of penalty by the Board in the absence of any restriction on the quantity of energy consumed and in the absence of any specific provision in that behalf in the agreement.

16. The learned Counsel for the respondents has also drawn my attention to the un-reported judgment of this Court in WP No.24771 of 1998, dated 3-9-1998 wherein it was held that merely because a concession was given to some consumers by collecting only additional consumption deposit equivalent to two months current consumption charges instead of three months current consumption charges as per clause 28 of the terms and conditions of supply, the same cannot be treated as a precedent to claim the same benefit contrary to the statutory provisions. I fail to see how the said judgment has any application to the case on hand.

17. The learned Counsel for the respondents has finally cited another un-reported judgment of this Court in WP No.24566 of 1998, dated 2-9-1998 for the proposition that a writ petition filed without exhausting the alternative remedies provided under the statute should not be entertained. It is not, however, shown that the petitioner has any effective alternative remedy for obtaining the relief claimed in this writ petition. That apart, this writ petition was admitted in the year 1988 and a conditional order of stay was also granted by this Court on 6-10-1988. Under the circumstances, it would not be just and proper to direct the petitioner to resort to some other alternative remedy at this stage.

18. For all the foregoing reasons, the writ petition is allowed declaring that the respondents are not entitled to levy or collect any penalty on the energy consumed by the petitioner proportionate to the demand exceeded. The amount of such penalty if any collected from the petitioner under the Bill dated 28-9-1988 shall be refunded or adjusted towards the future bills of the petitioner. There will be no order as to costs.