
(2015) 05 JH CK 0012

In the Jharkhand High Court

Case No : C.W.J.C. Nos. 2758, 1515, 2647, 2757, 3045, 3107 of 2000(R), 1503 of 2001 and W.P. (C) No. 2887 of 2001

Tata Yodogawa Ltd. and Others

APPELLANT

Vs

Bihar State Electricity Board and Others

RESPONDENT

Date of Decision : 08-05-2015

Acts Referred:

Bihar Reorganisation Act, 2000 — Section 62
Constitution of India, 1950 — Article 226

Citation : (2015) 3 AJR 259 : (2015) 3 JLJR 223

Hon'ble Judges : Prashant Kumar, J

Bench : Single Bench

Advocate : M.S. Mittal, Senior Advocate and Shilpi John, for the Appellant; Ajit Kumar, Sr. S.C., Advocates for the Respondent

Final Decision : Dismissed

Judgement

Prashant Kumar, J.—In these writ applications, petitioners pray for quashing the Circular No. 345, dated 11.7.2000, by which the rate of fuel surcharge have been fixed for the financial years 1996-97, 1997-98 and 1998-99 in compliance of the Judgment dated 20.6.2000 of the Division Bench of Patna High Court delivered in M/s. Pulak Enterprises and analogous cases. Petitioners further pray for quashing the Circular No. 428, dated 16.8.2002, by which the provisional rate of fuel surcharge has been fixed for the financial year 1999-2000. In some of the cases, petitioners pray for quashing the Circular No. 78, dated 17.3.2000, whereby the rate of fuel surcharge for the financial year 2000-01 has been fixed. Petitioners also pray for quashing the supplementary bills annexed in their writ applications, whereby fuel surcharge levied on the basis of revised rate fixed by the aforesaid Circulars. Petitioners further pray for a direction commanding the respondents to rework out the rate of fuel surcharge.

2. It is relevant to mention that decision of Bihar State Electricity Board (B.S.E.B.) to levy fuel surcharge was initially challenged in Bihar 440 Volts Vidyut

Upbhokta Sangh Vrs. Chairman, BSEB case. However, the same was upheld by the Patna High Court as well as by the Hon''ble Supreme Court. Later on, the B.S.E.B. vide its notification dated 27.5.1999, (published in Bihar Gazette on 29.5.1999) and Circular No. AC-Costing-44/98-99-1239 dated 31.5.1999, had revised the rate of fuel surcharge for the financial years 1993-94, 1994-95, 1995-96, 1996-97 and 1997-98, which were assailed in M/s. Pulak Enterprises and analogous cases. It is relevant to mention that some of the petitioners are petitioners in the above cases.

3. In the said writ applications, petitioners had not questioned the validity of fixation of rate of fuel surcharge for the financial years 1993-94, 1994-95 and 1995-96. In those writ applications, only the rate of fuel surcharge fixed for the financial years 1996-97 and onward have been challenged.

The aforesaid cases disposed of by a Division Bench of the Patna High Court vide judgment dated 26.6.2000 and the same was reported in Pulak Enterprises Vs. The Bihar State Electricity Board and Others, (2000) 3 PLJR 552 . In the said judgment, the Division Bench of the Patna High Court had concluded that there is no infirmity in the fixation of rate of the fuel surcharge except on two grounds viz. inclusion of the so called increase in the average unit rate of purchase from TVNL as a component of H3 and charging of a different unit rate of purchase with respect to supply of electricity by the D.V.C. to the TISCO as deemed supply by the B.S.E.B. to TISCO. Accordingly, the Division Bench of Patna High Court at para-44 of the judgment held as follows-

"44. In the result, the Board is directed to re-work out the rates of fuel surcharge for the years 1996-97 onwards after (a) deleting the purchase of electricity from the TVNL, as a component of H3, and (b) treating the so called "deemed supply" i.e. the supply of electricity by DVC to Tisco as supply made by DVC to the Board, as an element of D3. After re-working out the rates the Board will serve fresh bills on the concerned consumers which they shall pay within the stipulated period, failing which their electric line (s) will be disconnected in accordance with law."

4. It is worth mentioning that aggrieved with the aforesaid decisions of the Division Bench of the Patna High Court, both the parties i.e., B.S.E.B. and petitioners had filed Special Leave Petitions before the Hon''ble Supreme Court. It is relevant to mention that while the aforesaid Special Leave Petitions were pending before the Hon''ble Supreme Court, the B.S.E.B. had provisionally revised the rate of fuel surcharge vide Circular No. 345, dated 10.07.2000 for different financial years, which are as follows:

5. Later on, the B.S.E.B. vide Circular No. 428, dated 16.8.2000, had fixed the rate of fuel surcharge for the financial year 1999-2000 and onwards @ 204.40 paise per unit. It is also worth mentioning that vide Circular No. 78, date 17.3.2001, the B.S.E.B. had fixed the rate of fuel surcharge for the financial year 2000-2001 @ 244.01 paise per unit. Accordingly, supplementary bills issued to

the petitioners and other consumers levying the fuel surcharge at the revised rate. The aforesaid Circulars and bills are challenged in these writ application. The main ground of challenge by the petitioners is that the aforesaid rates of fuel surcharge had not been calculated according to the direction of the Division Bench of the Patna High Court given in the M/s. Pulak Enterprises Case.

6. It is submitted that the Division Bench of the Hon''ble Patna High Court held that TVNL component cannot be deleted from H1 and H2. The Hon''ble Patna High Court only directed the B.S.E.B. to delete TVNL component from H3. But the B.S.E.B. while calculating the revised rate of fuel surcharge for the aforesaid financial years had deleted TVNL component from H1, H2 and H3, which is against the direction given in the M/s. Pulak Enterprises case. Therefore, the rate of fuel surcharge again require to be recalculated. It is, then, submitted that while calculating the rate of fuel surcharge for the aforesaid financial years, the B.S.E.B. took into consideration the supply of electricity by DVC to TISCO, which cannot be taken in to consideration at all. It is submitted that for the purpose of computing the fuel surcharge, the B.S.E.B. is only entitled to take into consideration the supply made by the DVC to B.S.E.B. Accordingly, it is submitted that on this score also, calculation made by the B.S.E.B. cannot be sustained. It is submitted by the learned counsels for the petitioners that B.S.E.B. issued a Circular on 17.9.1999, whereby it decided to levy fuel surcharge on unconsumed unit of two categories of consumers namely, CS and LT, with retrospective effect. According to the petitioners, if the fuel surcharge is levied on unconsumed unit, then those units have to be added in the denominator and if it will be done then, rate of fuel surcharge would further reduce. Accordingly, petitioners submit that on this ground also, the B.S.E.B. is require to recalculate the rate of fuel surcharge.

7. Learned counsels for the petitioners further submits that during the pendency of these writ applications, the Special Leave Petitions filed by the B.S.E.B. and petitioners have been disposed of by the Hon''ble Supreme Court. It is submitted that while upholding the judgment of the Division Bench of the Hon''ble Patna High Court, the Hon''ble Supreme Court directed the B.S.E.B. to take into consideration Rs. 100 crores, which the B.S.E.B. received or going to receive from Coal Companies, towards slippage, short supply and supply of stones, while calculating the rate of fuel surcharge for the financial year 1998-99. It is then submitted that in the impugned Circulars, the B.S.E.B. has not taken into consideration the aforesaid aspect of the matter. Therefore, on that ground also, the rate of fuel surcharge for the aforesaid financial year is require to be recalculated.

8. It is then submitted that after the Judgment of the Hon''ble Supreme Court, the B.S.E.B. vide its Office Order No. 3570, dated 01.12.2010 had revised the rates of fuel surcharge by reducing it from 164.83 paise to 158.78 paise for the financial year 1998-99, but made a stipulation that the aforesaid rate will become effective after the amount of Rs. 100 crores will be received from Coal

Companies. It is submitted that the calculation chart of the Board reveals that instead of considering Rs. 100 crores, the Board had considered only Rs. 23.22 crores while recalculating the rates of fuel surcharge for the financial year 1998-99. Thus, the Board circumvented the order of the Hon''ble Supreme Court. Accordingly, it is submitted that a suitable direction be given to the Board for recalculating the fuel surcharge, after taking into consideration Rs. 100 crores, which the Board had received from Coal Companies.

9. It is then submitted that after reorganisation of the State of Bihar, the B.S.E.B. has also been bifurcated with effect from 01.4.2001 and Jharkhand State Electricity Board (J.S.E.B.) came into existence. It is submitted that after bifurcation of the State of Bihar, the generating station namely, Barauni and Muzaffarpur Thermal Power Stations remain in the State of Bihar, whereas Partatu Thermal Power Station comes in the State of Jharkhand. Thus, after bifurcation, the formula for calculating the fuel surcharge had changed. Therefore, the fuel surcharge is require to be recalculated as per the new formula.

10. On the other hand, learned counsel appearing for the respondents-B.S.E.B. and J.S.E.B. has submitted that while calculating the rates of fuel surcharge, as per the direction given in the M/s. Pulak Enterprises case, the respondent-Board had excluded the total purchase of the electricity from TVNL and recalculated the rate of fuel surcharge. It is submitted that petitioners are in wrong impression that if entire purchase of electricity from TVNL is excluded from H3 component then the H3 will be reduced to "0" (zero). It is submitted that in the formula, "H" denotes to electricity purchased from "other sources including TVNL". Thus, if the cost of purchase of TVNL will be deleted as a component of H3, then other components of H3 i.e., cost of purchase of the electricity from other sources (except TVNL), will remain intact. Therefore, if units purchased from TVNL will not be deleted from H1 and H2, then instead of decreasing, the fuel surcharge will increase. Accordingly, it is submitted that due to recalculation of the fuel surcharge (after deleting the purchase of the electricity from the TVNL, from H1, H2 and H3) no substantial injustice caused to the petitioners Therefore, the impugned Circulars are not require to be interfered in these cases.

11. It is submitted that so far the deemed supply of electricity by DVC to TISCO is concerned, the Hon''ble Patna High Court had held that the fuel surcharge be reworked out treating the so called deemed supply i.e., the supply of electricity by the DVC to TISCO, as supply made by the DVC to the respondent-Board as an element of D3. It is submitted that the respondent-Board has strictly followed the direction of the Hon''ble Patna High Court in the matter of deemed supply to TISCO, while reworking the fuel surcharge for the years 1996-97 and onwards. It is submitted that the petitioner has challenged the said calculation on the wrong assumption that the Hon''ble Patna High Court had directed that the entire purchase of electricity by the TISCO from the DVC be deleted from D3. It is submitted that the Hon''ble Patna High Court in its judgment at paragraph No. 44 had clearly laid down that "while reworking the rates of the fuel surcharge, the

Board shall treat the so called "deemed supply" i.e., the supply of electricity by DVC to TISCO as supply made by DVC to the Board as an element of D3". Accordingly, it is submitted that the aforesaid contention of the petitioners cannot be sustained. It is then submitted that while recalculating the fuel surcharge, the Board treated DVC as a single source and has applied normal rate of purchase of power from DVC while recalculating the fuel surcharge for the years 1996-97 and onwards. The Board had treated the power purchased by the TISCO from DVC, as the power directly purchased by it from DVC. Accordingly, it is submitted that the contention raised by the learned counsels for the petitioners on this issue is liable to be rejected.

12. It is further submitted that the submission of learned counsel for the petitioners, that entire calculation of the rates of fuel surcharge is unsustainable because unconsumed units, on which fuel surcharge levied, had not been taken into consideration, is not correct. It is submitted that while calculating the fuel surcharge right from the year 1993-94, the unconsumed units, on which fuel surcharge levied from the CS and LT consumers, had been taken into consideration and had always formed integral part of the calculation of the fuel surcharge. It is submitted that by the Circular dated 14.9.1999, the Board had not included new category of consumer from whom fuel surcharge could be levied, rather it had issued a clarification to its field officers regarding the method of billing to CS and LT consumers. It is submitted that some confusion arose in some of the districts as to whether fuel surcharge is leviable on the minimum consumption unit or not? Thus, with a view to clarify the confusion, the aforesaid Circular (dated 14.9.1999) issued. It is submitted that before the Hon'ble Patna High Court in the M/s. Pulak Enterprises case, the audited accounts, charts and tables have been produced, which were taken into consideration for calculation of the fuel surcharge. This fact will be clear from para-41 of the said Judgment. Accordingly, it is submitted that the aforesaid points raised by the petitioners in these writ applications are available in the earlier case, but petitioner had not raised the same, thus, now the petitioners are debarred from raising the same, on the ground of constructive res-judicata. It is submitted that at para-43 of the aforesaid judgment, the Hon'ble Patna High Court concluded that there is no infirmity in fixing the rates of the fuel surcharge, except on two grounds i.e., inclusion of so called increase in the average unit rate of purchase from TVNL as a component of H3 and charging of different unit rates of purchase with respect to supply of electricity by the DVC to the TISCO as deemed supply by the Board to the TISCO. Accordingly, it is submitted that now, it is not open for the petitioner to re-agitate the entire matter, which were set at rest in M/s. Pulak Enterprises case. Thus, the learned counsel for the respondent submits that the aforesaid contention raised by the petitioners is liable to be rejected.

13. It is submitted that after the direction of the Hon'ble Supreme Court, the Board has revised the rate of fuel surcharge vide its Office Order No. 3570, dated 01.12.2010. It is submitted that for implementing the aforesaid judgment of the

Hon''ble Supreme Court, some of the consumers filed contempt application in the Hon''ble Supreme Court, being Contempt Petition (C) No. 240 of 2010. In that contempt petition, the respondent-Board had filed its show cause and annexed aforesaid office order, along with the charts, on the basis of which the rate of fuel surcharge recalculated after adjusting Rs. 100 crores receivable from Coal Companies and submitted before the Hon''ble Supreme Court that it had complied the order. It is submitted that in the said contempt petition, some of the consumers filed their rejoinders. It is submitted that after going through the rejoinders, the Hon''ble Supreme Court rejected the contempt application. The Hon''ble Supreme Court further ordered that if the consumers have any grievance, they may seek remedy before the appropriate forum. It is submitted that petitioners have not challenged the aforesaid office order dated 01.12.2010, even by filing an amendment petition in these writ applications. Under the said circumstance, Office Order No. 3570, dated 01.12.2010, still hold the filed and petitioners cannot contend that the rate of fuel surcharge has not been modified after adjusting Rs. 100 crores, receivable from Coal Companies. Accordingly, it is submitted that the aforesaid submission of the learned counsels for the petitioners is liable to be rejected.

14. Learned counsels for the respondent-Boards further submit that the submission of learned counsels for the petitioners that the formula of calculation of fuel surcharge after bifurcation of the State of Bihar be revised and the entire fuel surcharge be reworked out, is wholly misconceived and misleading. It is submitted that the impugned Circulars have been issued prior to bifurcation of the State of Bihar i.e., in the year 1999-2000. It is further submitted that even the Circular No. 78, dated 17.3.2001, was issued by the B.S.E.B. for the period 2000-2001 before the creation of J.S.E.B., thus, the same is applicable in the area of State of Jharkhand as per the provisions contained under the Bihar Reorganisation Act. Accordingly, it is submitted that the said contention of learned counsel for the petitioners is liable to be rejected.

15. For better appreciation of the contentions raised by the learned counsel for the parties, it is appropriate to reproduce the formula for calculation of fuel surcharge, which is as follows:

Formula of Fuel Surcharge

WHEREAS,

S1 = Average fuel surcharge per unit in paisa applicable during the financial year

A1, B1, C1 = Units generated from PTPS, BTPS and MTPS respectively

D1, E1, F1, G1, H1 = Units purchased from DVC, U.P., SEB, OSEB, NTPC, PGCIL and any other source respectively

A2, B2, C2 = Units sold, out of sent out from PTPS, BTPS, and MTPS on which fuel surcharge is leviable

D2, E2, F2, G2, H2 = Units sold out of purchased from DVC, U.P., SEB, OSEB, NTPC, PGCIL and any other source respectively during the year in which fuel surcharge is leviable.

A3, B3, C3 = Increase in average cost of fuel surcharge in paise per unit computed for Board's generation at PTPS, BTPS and MTPS

D3, E3, F3, G3, H3 = Increase in average unit rate of purchase of energy from DVC, U.P., SEB, OSEB, NTPC, PGCIL and any other source respectively during the year for which the surcharge is to be calculated.

The said increase to be calculated with respect to the year 1992-1993 (after amendment, read 1991-1992).

(In the above, PTPS stands for Patratu Thermal Power Station, BTPS for Barauni Thermal Power Station, MTPS for Muzaffarpur Thermal Power Station. They are Board's own generating station. Likewise, DVC stands for Damodar Valley Corporation, U.P. SEB for Uttar Pradesh State Electricity Board, OSEB for Orissa State Electricity Board, NTPC for National Thermal Power Corporation, and PGCIL for Power Grid Corporation of India Limited. They are external sources of supply of electricity to the Board).

16. It appears from the Division Bench judgment of the Patna High Court in M/s. Pulak Enterprises case that the validity of formula has been upheld by the Patna High Court as well as by the Hon'ble Supreme Court in Bihar 440 Volts Vidyut Upbhokta Sangh Vrs. Chairman, BSEB case. Thus, there is no scope to challenge the same.

17. From the pleadings of the parties and the arguments of their counsels, the following points emerged in these cases for consideration:

I. Whether deletion of TVNL component from H1 and H2 along with H3 is against the mandates of the Hon'ble Patna High Court in M/s. Pulak Enterprises case and if so, on that ground the impugned Circulars are liable to be quashed?

II. Whether while recalculating the rates of fuel surcharge, as per the decision of M/s. Pulak Enterprises case, it was imperative for the Board to exclude the power supply by the DVC to the TISCO from the arena of consideration?

III. Whether the Board can be directed to recalculate the rates of fuel surcharge after taking into account the unconsumed units of CS and LT consumers, on which the Board levied fuel surcharge?

IV. Whether the Board could be directed to recalculate the rates of fuel surcharge after adjusting Rs. 100 crores receivable by the Boards from the Coal Companies?

V. Whether after the creation of the State of Jharkhand, the formula prescribed for calculation of the rates of fuel surcharge is required to be reformulated and consequently rates be reworked out?

18. Ref. Point No. I: As noticed above, the Hon'ble Patna High Court in M/s.

Pulak Enterprises case at paragraph No. 44 has held that while recalculating the rates of fuel surcharge for the years 1996-97 and onwards, the Board shall delete the purchase of electricity from the TVNL as a component of H3. It is worth mentioning that the Board has admitted that it had deleted the units purchased from the TVNL as a component of not only H3 but also from H1 and H2. Apparently, the aforesaid action of the Board is against the decision of the Hon'ble Patna High Court in M/s. Pulak Enterprises case. However, it is submitted by the learned counsels for the Boards that exclusion of the purchase of power from TVNL solely from the component of H3 and retaining the same in the component of H1 and H2 would increase the rates of fuel surcharge. The Board had tried to substantiate the aforesaid contention by annexing calculation made in this regard as Annexure-"L". From perusal of Annexure-"L", it appears that the rate of fuel surcharge in case of deletion of TVNL component only from the H3 comes to 88.06 P/KWH, whereas if the same deleted from the components of H1, H2 and H3, the rate comes to 86.25 P/KWH.

19. It is the contended on behalf of the petitioners that if the purchase from the TVNL is excluded from the component of H3 then, the H3 will be reduced to "0" (zero) and if "0" (zero) is multiplied H1, the resultant will be "0" (zero). The aforesaid submission does not appears to logical. It is relevant to mention that in the formula, "H" denotes to power purchased from other sources including TVNL. The Board in its counter affidavit had annexed the chart. From perusal of the same, it appears that in the financial year 1996-97, the Board had purchased 737.82 MKWH power from other sources including TVNL. It also appears that out of the aforesaid power, the Board purchased 574.83 MKWH power from TVNL. Thus, if the power purchased from the TVNL is deleted, then also the Board purchased 162.99 MKWH power from other sources (except TVNL). Consequently, the H3 component cannot become "0" (zero).

20. It is then submitted by the learned counsels for the petitioners that in the formula for calculation of the rate of fuel surcharge "H" denotes to any other source, respectively. The word "respectively" clearly means each source (not named in formula) has to be treated as an independent source and all such sources other than those specifically mentioned had to be given a separate nomenclature and further, they cannot be clubbed together. Thus, TVNL has to be treated as an independent source.

21. The aforesaid submission of learned counsels for the petitioners cannot be accepted in view of the fact that formula for calculating the rates of fuel surcharge has already been upheld by the Patna High Court and the Hon'ble Supreme Court in Bihar 440 Volts Vidyut Upbhokta Sangh Vrs. Chairman, BSEB case. In that view of the matter, again the validity of the formula cannot be reopened.

22. As noticed, it is clear from the calculation chart annexed with the additional counter affidavit that if the TVNL component will be deleted only from H3, then the rate of fuel surcharge in a particular year will increase, whereas if same will

be deleted from all the components of "H" i.e., H1, H2 and H3, the rate of fuel surcharge will decrease. In that view of the matter, even if the impugned Circulars continue, no substantiate injustice caused to the petitioners and other consumers.

23. The Hon^{ble} Supreme Court in Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, AIR 1955 SC 425 : (1955) 2 SCR 1 has held as follows:

14. That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case."

24. The Hon^{ble} Supreme Court again reiterated aforesaid view in Ritesh Tewari and Another Vs. State of U.P. and Others, AIR 2010 SC 3823 : (2011) 111 CLT 137 : (2010) 10 JT 1 : (2010) 10 SCALE 38 : (2010) 10 SCC 677 , which runs as follows:

"26. The power under Article 226 of the Constitution is discretionary and supervisory in nature. It is not issued merely because it is lawful to do so. The extraordinary power in the writ jurisdiction does not exist to set right mere errors of law which do not occasion any substantial injustice. A writ can be issued only in case of a grave miscarriage of justice or where there has been a flagrant violation of law. The writ court has not only to protect a person from being subjected to a violation of law but also to advance justice and not to thwart it. The Constitution does not place any fetter on the power of the extraordinary jurisdiction but leaves it to the discretion of the court. However, being that the power is discretionary, the court has to balance competing interests, keeping in mind that the interests of justice and public interest coalesce generally. A court of equity, when exercising its equitable jurisdiction must act so as to prevent perpetration of a legal fraud and promote good faith and equity. An order in equity is one which is equitable to all the parties concerned. The petition can be entertained only after being fully satisfied about the factual statements and not in a casual and cavalier manner."

25. The Hon^{ble} Supreme Court recently, in Eastern Coalfields Limited and others Vrs. Bajrang Rabidas, reported in (2014) 13 SCC 681 has followed the aforesaid decision rendered in Sangram Singh Vrs. Election Tribunal and another (supra)

and had held that jurisdiction of High Court under Article 226 of the Constitution is not to be exercised, whenever there is an error of law, if there is no substantial injustice cause to the parties. The relevant portion of paragraph No. 19 of the aforesaid judgment is quoted hereinafter for ready reference:

".... jurisdiction of High Court under Art. 226 is equitable and discretionary, and should be exercised along recognised lines and not arbitrarily keeping in mind principles of equity i.e. it should not be exercised unless substantial injustice had ensued or was likely to ensue - Furthermore, High Court while exercising such jurisdiction can always take cognizance of entire facts and circumstances and pass appropriate orders to balance justice, and promote honesty and fair play "

26. Keeping in mind aforesaid law laid down by the Hon"ble Supreme Court, I am advertng to the facts of these cases. It is clear that B.S.E.B. had deleted TVNL Component from H1 and H2, against the decision of Division Bench judgment of Patna High Court in M/s. Pulak Enterprises case, but by the aforesaid action of the Boards the rate of fuel surcharge had not increased, rather the same had decreased, therefore, I find that no substantial injustice caused or likely to be caused to the parties. In that circumstance, I am not inclined to exercise the jurisdiction of this Court under Article 226 of the Constitution of India for quashing the impugned Circulars.

27. Ref. Point No. II: It is submitted by the learned counsels for the petitioners that while recalculating the rates of fuel surcharge as per the direction of Hon"ble Patna High Court in M/s. Pulak Enterprises case, it is incumbent upon the Board to exclude the deemed power supply made by the DVC to the TISCO. It is submitted that the Board is only entitled to calculate the rates of fuel surcharge on the basis of purchase of electricity made by B.S.E.B. from the DVC. The aforesaid contention of the learned counsels for the petitioners runs counter to the directions given by the Hon"ble Patna High Court in M/s. Pulak Enterprises case. At paragraph-44 of the said judgment, the Division Bench of Patna High Court had clearly held that while recalculating the rates of fuel surcharge, the Board shall treat the so called deemed supply i.e., the supply of electricity by the DVC to the TISCO as supply made by the DVC to the Board as an element of "D3". Thus, now it is not open for the petitioners to say that the Division Bench of Patna High Court has directed that the Board should exclude the deemed supply from the arena of recalculation of the rates of fuel surcharge. The Board in its additional counter affidavit had categorically stated that while issuing the Circulars dated 11.7.2000 and 16.8.2000, the Board has treated the DVC as a single source and has applied normal rate of purchase of power from the DVC in the calculation of fuel surcharge from the year 1996-97 and onwards. The rate for purchase of power by the TISCO from the DVC had also been treated to be same on which the Board directly purchased power from the DVC. To substantiate the aforesaid facts, the Board had enclosed various documents in its counter affidavit. From perusal of the same, I find that the Board had

substantially complied the direction given in the M/s. Pulak Enterprises case. Thus, the rates of fuel surcharge fixed by the Board does not require interference on this ground.

28. Ref. Point No. III: It is submitted by learned counsels for the petitioners that the B.S.E.B. vide Circular dated 17.9.1999, had decided to levy fuel surcharge on unconsumed units of two categories of consumers, namely, "CS" and "LT" with retrospective effect. Accordingly, it is submitted that after issuance of the said Circular, the formula for calculation of rates of fuel surcharge is require to be amended. It is submitted that while calculating the rates of fuel surcharge, from the financial year 1993-94 and onwards, the Board had not included the unconsumed units of "CS" and "LT" category of consumers in the total number of units sold. It is submitted that if such units would have been included in the units sold, then the denominator A2, B2 and C2 would have substantially increased, consequently, the rates of fuel surcharge would be reduced. Accordingly, it is submitted that the Boards may be directed to recalculate the fuel surcharge from the year 1993-94 and onwards after taking into account the unconsumed units sold to the "CS" and "LT" consumers.

29. The Boards in its counter affidavit had stated that while calculating the fuel surcharge from the year 1993-94 and onwards, the unconsumed units, on which the fuel surcharge levied from "CS" and "LT" consumers, had been taken into consideration and they always formed integral part of the calculation of fuel surcharge. It is further stated that in fact by the Circular dated 14.9.1999, the Board had not decided to levy fuel surcharge from "CS and "LT" consumers for the first time, rather the Board used to levy fuel surcharge on the unconsumed unit of above consumers since long. It is stated that Circular dated 14.9.1999 is clarificatory in nature and the same had been issued to remove the confusion of the field officers regarding method of billing of consumers under the categories of "CS" and "LT", wherein the minimum mandatory consumption was chargeable as prescribed. It is submitted that while calculating the rates of fuel surcharge for the financial years 1993-94, 1994-95 and 1995-96, the same method has been adopted and the fuel surcharge levied from the aforesaid categories of consumer.

30. From the perusal of judgment of Patna High Court in M/s. Pulak Enterprises case, it is clear that all the accounts and charts, audited by the Accountant General, on the basis of which the fuel surcharge has been calculated, had been produced in the Court. It further appears that a Committee constituted by the Hon'ble Patna High Court (which includes the representatives of the present petitioners). The Committee after going through the accounts produced by the Board had reported that there is no flaw in the rates of fuel surcharge calculated for the financial years 1993-94, 1994-95 and 1995-96, accordingly, the petitioners had not challenged the said rates. Under the said circumstance, at this stage in these writ applications, the rates of fuel surcharge for the aforesaid financial years cannot be reopened.

31. Now, adverting to the question as to whether the Board can be directed to

recalculate the rates of fuel surcharge for the financial years 1996-97 and onwards after taking into account the unconsumed units, in my view, the answer is in negative. It is worth mentioning that the entire accounts, audited balance sheet of the Board are available before the petitioners representative, who was member of the Committee constituted by the Patna High Court, but in spite of that, petitioners had not challenged the calculation of rates of fuel surcharge on the aforesaid ground. It is also worth mentioning that even the Circular (dated 14.9.1999) was issued prior to the date of judgment in M/s. Pulak Enterprises case. One of the petitioners, namely, TATA Yodogawa Limited in its writ applications at para-26 stated that the aforesaid Circular came to its notice in the month of December, 1999. It is worth mentioning that the Judgment in M/s. Pulak Enterprises case delivered on 26.6.2000, but in spite of the same, the petitioners had not filed any application before the Hon"ble Patna High Court for recalculation of rates of fuel surcharge on the basis of levy of fuel surcharge on unconsumed units levied from "CS" and "LT" consumers. Under the said circumstance, in my view, now the petitioners prevented from raising the issue, on the ground of constructive res-judicata. In that view of the matter, I am not inclined to entertain this ground of attack and accordingly, the same is rejected.

32. Ref. Point No. IV: It is submitted by the learned counsels for the petitioners that during the pendency of these writ applications, Special Leave Petition filed by the B.S.E.B., petitioners and other consumers had been disposed of by the Hon"ble Supreme Court vide judgment dated 15.4.2009 reported in Bihar State Electricity Board Vs. Pulak Enterprises and Others, (2009) ELR 283 : (2009) 6 JT 282 : (2009) 5 SCALE 611 : (2009) 6 SCR 292 : (2009) 5 UJ 2500 : (2009) AIRSCW 3505 : (2009) 3 Supreme 778 , whereby the Hon"ble Supreme Court while affirming the judgment of the Hon"ble Patna High Court, further directed the B.S.E.B. to take into consideration Rs. 100 crores, which it received or going to receive from the Coal Companies, while calculating the rates of fuel surcharge for the financial year 1998-99. It is submitted that the B.S.E.B. vide its Office Order No. 3570, dated 01.12.2010 has revised the final rate of fuel surcharge for the financial year 1998-99 from 164.83 paise/KWH to 158.79 paise/KWH and had said that it had adjusted Rs. 100 crores, receivable from M/s. Coal India Limited. It is submitted that from the chart, it is clear that while revising the tariff, in fact B.S.E.B. has adjusted only Rs. 23.22 crore. Thus, it is submitted that the order of the Hon"ble Supreme Court, has not been implemented in its true sense. Accordingly, learned counsels for the petitioners submits that the electricity Boards may be directed to recalculate the rates of fuel surcharge for the financial year 1998-99 in the light of the judgment of the Hon"ble Supreme Court.

33. On the other hand, learned counsels for the Boards submit that after the judgment of the Hon"ble Supreme Court, some of the consumers filed Contempt Petition (Civil) No. 240 of 2010, wherein the B.S.E.B. has filed its show cause and annexed the Office Order No. 3570, dated 01.12.2010 along with calculation chart. Thereafter, the consumers filed their reply and stated that the Board has

not complied the direction of the Hon''ble Supreme Court, while recomputing the rate of fuel surcharge for the financial year 1998-99. It is also stated that the benefit of only Rs. 23.22 crores had been given to the consumers and balance amount of Rs. 76.78 crores, out of Rs. 100 crores has not been accounted for.

34. It appears that the Hon''ble Supreme Court, after hearing the parties, vide order dated 15.4.2011, rejected the contempt petition and gave liberty to the consumers that if they have any grievance, they may seek the remedy before the appropriate forum. The aforesaid factual position brought to the notice of the Court by the learned counsels for the respondent-Board at the time of argument and the same has not been denied by learned counsel for the petitioners. Learned counsels for the respondent produced the photo copy of the certified copy of the order of the Hon''ble Supreme Court passed in Contempt Petition (Civil) No. 240 of 2010 for perusal of this Court.

35. It is worth mentioning that the aforesaid Circular has not been challenged in these writ applications. The petitioners have brought the said Circular to the notice of this Court through supplementary affidavit. On query, learned counsels for the petitioners accepted that the petitioner has not challenged the validity of the aforesaid Office Order No. 3570, dated 01.12.2010, before any Forum. Since the validity of the aforesaid order has not been challenged and the Hon''ble Supreme Court has rejected the contempt petition after noticing the grievance of the petitioner, in my view, in the absence of any prayer in these writ applications, the same cannot be entertained.

36. Ref. Point No. V: It is submitted that the B.S.E.B. had issued Circular No. 78, dated 17.3.2001, after creation of State of Jharkhand, thus, the same has no application in the State of Jharkhand. Accordingly, any bill issued to any consumer on the basis of aforesaid Circular No. 78, dated 17.3.2001, is not valid.

37. The aforesaid submission of learned counsels for the petitioners appears to be misconceived and against the provisions of Bihar Reorganization Act. As per Section 62 of the Bihar Reorganization Act, even after the bifurcation of the State of Bihar, the B.S.E.B. had continued to function in both the States till the creation of the Jharkhand State Electricity Board (J.S.E.B.) with effect from 01.04.2001. It is worth mentioning that even after creation of J.S.E.B., the earlier Notifications, Rules, Regulations, Circulars, Orders etc., issued by the B.S.E.B. are applicable in the territory of State of Jharkhand. In the said circumstance, the Circular No. 78, dated 17.3.2001 is applicable in the J.S.E.B.

38. It is submitted by learned counsels for the petitioners that after creation of the State of Jharkhand, the power generating stations namely, Barauni and Muzaffarpur Thermal Power Stations remain in the State of Bihar, whereas Partatu Thermal Power Station comes in the State of Jharkhand. Therefore, the formula for calculation of rates of fuel surcharge is liable to be reformulated after reorganization of the State of Bihar.

39. The aforesaid contention of the learned counsels for the petitioners cannot be

accepted, because even after creation of the State of Jharkhand (with effect from 15.11.2000) the B.S.E.B. continued to function in both the States, till the creation of the J.S.E.B. Thus, during that period all the three generating stations were owned by the B.S.E.B., irrespective of the place where they situate. It is worth mentioning that in these cases, the Circular No. 345, dated 10.7.2000; Circular No. 428, dated 16.8.2000 and Circular No. 78, dated 17.3.2001, whereby the rates of fuel surcharge fixed for the financial years 1996-97, 1997-98, 1998-99, 1999-2000 and 2000-2001, respectively, have been challenged. Thus, the same are operative in the area of State of Jharkhand from before the date on which the J.S.E.B. created. In that view of the matter, the aforesaid contentions raised by the learned counsels for the petitioners cannot be sustained and, accordingly, rejected.

40. In view of the discussions made above, I find no merit in these writ applications. Accordingly, the same are dismissed.

However, the parties shall bear their own costs.