

(2001) 03 JH CK 0036

In the Jharkhand High Court

Case No : CWJC No's. 2757 and 2758 of 2000

Tata Yodogawa Ltd. with Usha Beltron Ltd.

APPELLANT

Vs

B.S. Electricity Board and Others

RESPONDENT

Date of Decision : 30-03-2001

Acts Referred:

Constitution of India, 1950 — Article 226
Electricity Act, 2003 — Section 69

Citation : (2001) 49 BLJR 1624

Hon'ble Judges : S.J. Mukhopadhyaya, J

Bench : Single Bench

Advocate : S.S. Ray and S.K. Kapoor, Biren Poddar, A.R. Choudhary, D.P. Mishra and Joy Saha, for the Appellant; V.R. Reddy V.P. Singh, Mihir Kumar Jha, Naveen Prakash and Rajesh Shankar, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Mukhopadhyaya, J.

In these cases, the dispute raised relating to calculation of fuel surcharge, as circulated by the Bihar State Electricity Board (the Board), vide Circulars, as contained in letter No. 345 dated 11th July. 2000 and letter No. 428 dated 16th August, 2000.

2. The fuel surcharge fixed, vide aforesaid letters are provisional and interim, in nature, the question of method of calculation and fixation of rate of fuel surcharge of the period is pending before the Supreme Court.

3. The validity of levy of fuel surcharge was initially challenged and was upheld by the Patna High Court as well as by the Supreme Court in B.S.E.B v. Bihar 440 Volt Vidyut Upbhokta Sangh, (1997) 11 SCC 380 .

Subsequently, a dispute was raised relating to method of calculation and the fixation of rate of fuel surcharge, which was heard and finally decided by the Patna High Court in Pulak Enterprises v. Bihar State Electricity Board and others.

reported in 2000 (3) PLJR 552.

The petitioners also raised dispute relating to method of calculation and fixation of rate of fuel surcharge by filing separate writ petitions i.e. CWJC No. 1655/99 (R) (Tata Yodogawa Ltd.) and C.W.C.J. No. 5592/99 (R) (Usha Beltron Ltd.), which were also decided along with other cases with the case of M/s. Pulak Enterprises (supra).

The decision aforesaid has been challenged by both the parties, including petitioners and pending consideration before the Supreme Court in SLP (Civil) No. 19436/2000; SLP (Civil) No. 20035-20054 etc., wherein leave granted, but prayer for interim relief stated to have been rejected.

The Board, though challenged the judgment in M/s. Pulak Enterprises (supra), before the Supreme Court, but in absence of stay, decided to implement the judgment for collection of fuel surcharge, subject, to the decision of the Supreme Court, in pursuance of which the impugned letters aforesaid i.e. 11th July, 2000 and 16th August, 2000 were issued and the following rate fixed for different financial years :

year Rate of Fuel surcharge

1996-97 86.25 ps./Kwh.

1997-98 137.20 ps./Kwh.

1998-99 164.83 ps./Kwh.

(by letter No. 345 dated 11th July. 2000)

1999-2000 204.40 ps./Kwh.

(by letter No. 428 dated 16th August, 2000)

This time the parties (petitioners herein) again raised dispute relating to calculation and fixation of fuel surcharge, as made and shown above, on the ground that the fixation has not been made in terms with decision of Patna High Court in M/s. Pulak Enterprises (supra).

4. To appreciate the stand of petitioners, it would be appropriate to refer the formula for computation of fuel surcharge, laid down in clause 16.10.3 of 1993 Tariff, as set out hereunder :

$$S1 = \frac{A1 \times A3 + B1 \times B3 + C1 \times C3 + D1 \times D3 + E1 \times E3 + F1 \times F3 + G1 \times G3 + H1 \times H3}{(A2 + E2 + C2 + D2 + E2 + F2 + G2 + H2)}.$$

Alphabets A, B and C in the formula denote Board's own generating stations, namely, FTPS, DTPS and MTPS.

Alphabets D, E and F in the formula denote sources of outside purchase, namely, DVC, UPSEB OSEB, NTPS, PGCL etc.

Alphabet "H" in the formula denotes "any other source" of outside purchase other than above, and includes TVNL.

Whereas,

S1 = Average Fuel Surcharge per unit in paise applicable during the financial year.

A1, B1, C1 = Unit generated from PTPS, BTPS & MTPS respectively.

D1, E1, F1, G1, H1 = Unit purchased from DVC, UPSEB, OSEB, NTPS, PGCL and any other source respectively.

A2, B2, C2 = Unit sold, out of sent out from PTPS, BTPS & MTPS on which fuel surcharge is leviable.

D2, E2, F2, G2, H2 = Unit sold, out of purchased from DVC, UPSEB, OSEB, NTPC, PGCL and any other source respectively during the year on 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, UPSEB, OSEB, NTPC & PGCL & 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- 93 (after amendment, read 1991-92).

5. In the present case, we are mainly concerned with Alphabet "D", which stands for D.V.C. (Damodar Valley Corporation) and Alphabet "H" i.e. any other source, which includes T.V.N.L. (Tenughat Vidyut Nigam Ltd.).

6. In the case of M/s. Pulak Enterprises (supra). One of the issues raised relating to inclusion of purchase of electricity from the T.V.N.L., as a component of "H3" of the formula. It was pleaded by the petitioners that the TVNL came into existence only in the year 1996-97 and could not be treated as a relevant factor having regard to the fact that in computing the Fuel Surcharge, increase in the average unit rate of purchase of electricity has to be calculated treating 1991-92 as the base year.

The Patna High Court, vide Judgment in M/s. Pulak Enterprises (supra), held that the purchase of electricity from T.V.N.L. cannot be made as a component of "H3" and ordered to delete such purchase of electricity from TVNL as a component of "H3".

7. The other issue related to supply of electricity by D.V.C. to TISCO, the petitioners of the aforesaid cases contended that the Board had treated the supply of electricity by the D.V.C. to the TISCO as a "deemed supply" by the Board to TISCO at different rate which was not in accordance with the formula.

The Patna High Court in *M/s. Pulak Enterprises (supra)*, as regards "deemed supply" held that two rates of supply/sale cannot be permitted for the purposes of computing "D3" and ordered to treat the supply of electricity by D.V.C. to TISCO as supply made by D.V.C. to Board as "deemed supply" by D.V.C. to the Board, as an element of D3".

8. After the decision, the Board stated to have re-calculated fuel surcharge for the year 1996-97 to 1999-2000 on the basis of judgment in *M/s. Pulak Enterprises (supra)*, and issued impugned letters dated 11th July, 2000 and 16th August, 2000, but again grievance made by consumers like petitioners that the calculation is not in accordance with decision of Patna High Court and higher rate of fuel surcharge illegally fixed.

9. The case of the petitioners that the judgment of Patna High Court in *M/s. Pulak Enterprises (supra)*, not followed, inter alia, (a) regarding direction of "H3", (b) in the matter of computation of "D3"; (c) in respect of payment of Rs. 100 crores by coal companies.

This apart, a fresh allegation made that the impact of fuel surcharge on un-consumed units not considered.

10. The issue relating to non-observation of Court's directions in respect to "H3" :

The Patna High Court in *M/s. Pulak Enterprises (supra)*, held that the purchase of electricity from TVNL cannot be made as a component of "H3" and ordered to delete such purchase of electricity from TVNL as a component of "H3" will be evident from the observations, as quoted hereunder :

".....It has been contended that the purchase of electricity from Tenughat Vidyut Nigam Limited (TVNL) has been treated as a component of H3 i.e. "any other source", but as the TVNL came into existence only in the year 1996-97 it could not be treated as a relevant factor having regard to the fact that in computing the fuel surcharge, increase in the average unit rate of purchase of electricity has to be calculated treating 1991-92 as the base year. Secondly, it has been contended that the Board has treated the supply of electricity by the DVC to the TISCO as "deemed supply" by the Board to TISCO at a different rate which is not in accordance with the formula. Both the objections in my opinion are well founded."

"It is not in dispute that TVNL came into existence in 1996-97 whereas while calculating the increase in the average unit rate of purchase of electricity 1991-92 is to be treated as the base year. As a matter of fact, as seen above, it was on that ground, namely, that a different base year i.e. 1992-93 was provided for computing the increase in the average unit rate of purchase of electricity from external sources, that this Court directed the Board to consider amending clause 16.10.3 so as to provide for the same base year i.e. 1991-92 with respect to both the increase in the average cost of generation and increase in the rates of

purchase, and accepting the verdict of this Court the Board amended the last part of clause 16.10.3. Purchase of electricity from TVNL, which admittedly came into existence in the year 1996-97, therefore, cannot be treated as component of H3 i.e. increase in the average unit rate of purchase of electricity from "any other source".....The fact that TVNL did not exist in the year 1991-92 and came into existence only in the year 1996-97 is sufficient to justify its deletion as a component of H3....."

11. The grievance of the petitioners is that the Board deleted the component of TVNL not only from "H3", but also from "H1" and "H2", though there was no such order. In result, because of change of numerators and wrong reduction of denominator of the formula, higher rates of fuel surcharge reflected.

The Respondents Board have accepted that the unit purchased and sold from TVNL has been deleted as component, not only from "H3", but also from "H1" and "H2".

12. The stand of the Board is that the incremental rise has taken place from other sources, including TVNL. If the purchase of electricity from TVNL to be deleted as component from Alphabet "H", such deletion of TVNL component to be made from all the three factors, namely, "H1", "H2" and "H3".

Before the Patna High Court in M/s. Pulak Enterprises (supra), similar stand was taken by the Board that if the Court comes to the conclusion that the supply from TVNL cannot be included, the consequence will be that the units purchased from TVNL would have to be kept out; but the aforesaid stand was not accepted.

The aforesaid stand of the Board may be logistic, but no finding can be given in the present case as the aforesaid question relating to deletion of purchase of electricity from TVNL as component of H3, has already been decided by a Division Bench of Patna High Court in M/s. Pulak Enterprises (supra), and the matter is pending consideration before the Supreme Court.

So far as the judgment in M/s. Pulak Enterprises (supra), is concerned, therein the High Court only directed to delete the purchase of electricity from the TVNL as a component of "H3" and there being no other decision or direction given in respect to "H1" and "H2", the Board while fixing rate of fuel surcharge in terms with High Court's directions should not have deleted, such purchase of electricity or units sold out of such purchase from TVNL as component out of "H1" or "H2". Thereby, the fixation of rate of fuel surcharge, as made by impugned letters dated 11th July, 2000 and 16th August, 2000 cannot be held to be in accordance with the decision of Patna High Court in M/s. Pulak Enterprises (supra).

13. Issue relating to direction of Patna High Court regarding "D3" :

Admittedly, the Board purchased electricity from DVC. The DVC also sold electricity to TISCO in pursuance of tripartite agreement reached between the DVC; Board and TISCO, as detailed in the judgment of M/s. Pulak Enterprises (supra). The purchase of electricity by TISCO from DVC has been defined as

"deemed purchase" in the aforesaid judgment, for the purpose of calculation of fuel surcharge according to the formula.

14. According to the petitioners, there was no increase in rate of purchase of energy from DVC since the base year 1991-92, as the Board purchased and paid at same rate without any increase, it was suggested that no increase being made since 1991-92, "D3" should have been reflected as "zero" and calculation should have been made accordingly. The allegation made that the Respondents intentionally gave incorrect dates to compute "D3" with intention to inflate the rate of fuel surcharge of the year 1996-97 to 1999-2000, as reflected in impugned letters dated 11th July, 2000 and 16th August, 2000.

Reliance was placed on observations of Patna High Court in M/s. Pulak Enterprises (supra), as quoted hereunder :

".....It is an admitted position that though the DVC has revised its tariff from year to year the Board so far has not recognised the revision and has been paying it at the rates applicable in the year 1991-92. In the agenda note dated 26th November. 1998 it has been clearly mentioned that during the 1996-97, the DVC rates for the purchase remained unchanged but the rate applicable to deemed supply to TISCO rose upto 13p/kwh. In these premises I am unable to appreciate how the Board can treat the sale of electricity by the DVC to the TISCO as a separate clause or category for the purpose computing D3. The computation of D3 to this extent, therefore does not appear to be correct."

15. The counter affidavit of the Board filed in CWJC No. 2758 of 2000(R) (Tata Yodogawa Ltd.) was vague. For the said reason, the Court asked the counsel for the Board to state specifically the rate of purchase of electricity from DVC as was prevailing in the base year 1990-91 and onwards and the year when it was raised and actually paid to DVC. Any proof in support of such payment in revised rate was also asked to be enclosed.

In pursuance of Court's order, an additional counter affidavit filed on behalf of the Board and the counsel relied on certain documents including Annexure-G series to show revision of purchase rate of electricity from DVC. It was stated that the revised tariff was to be made effective since 1990 but the Board agreed for one revision w.e.f. 1.5.1997 and another w.e.f. 1.7.1998.

In this connection, the Board's agenda contained in Item No. 63/98-99, as contained in Annexure-G was relied wherein proposal made for such revision w.e.f. 1.5.1997 and another revision w.e.f. 1.7.1998, which was approved by Board by Resolution No. 7211 in its meeting held on 25th June, 1998, vide Annexure G1.

Reliance was also placed on letter dated 6th July, 1998, whereby the Board's officials were intimated of aforesaid Resolution No. 7211 to adopt the DVC's revised tariff w.e.f. 1.5.1997 to 1.7.1998 respectively.

The revised rate applied by DVC as taken for computation of fuel surcharge

shown at Annexure-H series wherein Rs. 90.10 ps/kwh, shown for the base year 1991-92, as also the rate of subsequent years. Though the aforesaid documents enclosed by the Board to show the demand of DVC to increase the purchase rate as also the decision of Board to increase the purchase rate from DVC w.e.f. 1.5.1997 and 1.7.1998, but nothing brought on record to show the rate at which actual payment was made by the Board to the DVC since the year 1991-92 onwards.

16. The counsel for the Board tried to rely on one or other document to show that certain payments were released by the Central Govt. to DVC but it is not possible for this Court to find out the actual position relating to payment on the basis of such document, nor it is permissible to make such calculation and accountancy in a writ petition under Article 226 of the Constitution of India.

The observations of the Patna High Court in *M/s. Pulak Enterprises (supra)*, as quoted above also raises doubt relating to the stand taken by the Board that the payment was actually made at enhanced rate w.e.f. 1.5.1997 or 1.7.1998.

17. The issue relating to Rs. 100 crores paid by Coal Companies :

One of the grievance of the petitioners, as referred above, that a sum of Rs. 100 crores as refunded by the Coal Co's to the Board has not been accounted while computing fuel surcharge.

18. The Board initially took plea that the amount of Rs. 100 crores having not received from Coal Co's. It was not accounted, nor taken into consideration for computation of fuel surcharge.

19. The aforesaid issue was raised before the Patna High Court in *M/s. Pulak Enterprises (supra)*, as evident from paragraph 40 of the said judgment.

In the said judgment, it was accepted that the payment of such amount would be relevant consideration while calculating the rate of fuel surcharge for the year 1998-99 and not 1997-98.

20. The counsel for the Board rightly placed reliance on their additional counter affidavit wherein the copy of SLP has been enclosed. The aforesaid question of non-accounting of Rs. 100/- crores for computing the rate of fuel surcharge has been raised for decision of Supreme Court. In the background, as the issue is now directly pending consideration before the Supreme Court, it is not desirable for this Court to give any finding in the present cases, the writ petitions having preferred against orders, interim in nature, subject to the decision of Supreme Court.

21. Issue relating to unconsumed units :

It was submitted on behalf of the petitioners that though the Board published its accounts for every year showing details of number of consumers, their category, connected load and their consumption of electrical units, but they never included the unconsumed units forming part of minimum grantee units in the case of

LTIS, CS II and CS III categories of consumer in the total number of units sold, which figures are required to be taken for computing rate for the denominators "A2", "B2", "C2" etc. The balance-sheet of the year 1993-94 to 1997-98 shows beyond any doubt that the rates of fuel surcharge worked out by the Board earlier for the years and notified by different circulars were never based on the unconsumed units, which should have been included for calculation of rate of fuel surcharge.

22. The counsel for the petitioners made reliance on different provisions of Indian (Electricity) Act and Rules. To suggest that the accounts prepared for different financial years, placed and passed by Legislature in Assembly, can only be relied upon for figure and calculation.

23. Reliance was also placed on Section 69 of Indian (Electricity) Act and different Rules framed thereunder, as also statement-9 of the accounts to show that the unconsumed units were not properly reflected in computation of the rate of fuel surcharge.

24. The Respondents initially made vague statement that the total connected load as projected by the consumers are taken from the statement of Board's account. The total connected load appearing in the Board's account is theoretical and purely academic and statistical figure which does not allow discount/regression for disconnected consumers and consumers who ceased to exist. It was suggested on behalf of the Board that for all practical purposes, the dates shown in the Board's account is of no use, which stand was rightly deprecated by the counsel for the petitioners, as the Board cannot discard their own account as was placed and passed by the Board and the Legislature.

The Court being not satisfied, directed the Board to file additional affidavit and to state the documents wherein unconsumed units reflected and to state whether such unconsumed units were included for computation of rate of fuel surcharge with supporting evidence.

In the additional counter affidavit, though certain statement made in paras 19 to 26, the counsel for the Board accepted that it was not possible to give the exact figure and the assessment was made on assumed figure on the basis of purchase and supply of energy.

25. Though I have recorded the stand taken by the parties, it may be mentioned that the aforesaid issue was not raised nor discussed by the Patna High Court in M/s. Pulak Enterprises (supra), though these petitioners were before the Court.

The counsel for the petitioners placed reliance on a letter dated 14th September, 1999 and submitted that the Board had not placed the aforesaid letter before the Court, when the case was pending. However, aforesaid submission on behalf of the petitioners cannot be accepted, as the letter is mere a clarification of the action which had already been taken and computation made. If the aforesaid issue of non-inclusion of unconsumed unit was vital for determination of fuel

surcharge, the petitioners should have raised the matter before the Patna High Court in M/s. Pulak Enterprises (supra), and/or may raise the issue before the Supreme Court, where their appeals are pending.

26. From the stand taken by the Respondents, it will be evident that the rate of fuel surcharge, as fixed by the Board vide impugned letters dated 11th July, 2000 and 16th August, 2000 is not strictly in accordance with the judgment of Patna High Court in M/s. Pulak Enterprises (supra), so far as it relates to deletion of TVNL as one of the component is concerned. Though, it has been rightly deleted from "H3", in terms with Patna High Court's decision, such component should not have been deleted from other two factors i.e. "H1" and "H2" respectively, in terms with the said judgment.

The increase in purchase of electricity from DVC i.e. the factor "D3" is concerned, no specific finding can be given by this Court in view of disputed question of fact and in absence of actual position relating to payment of tariff by Board to DVC as made since 1991-92 onwards.

27. The question relating to inclusion of Rs. 100 crores in computing the rate of fuel surcharge, being a direct issue pending before the Supreme Court, it is not desirable to answer in the present Cases.

28. Now, the question arises as to what relief can be granted to petitioners, the finding having given that the impugned letters dated 11th July, 2000 and 16th August, 2000 are not based on Patna High Court's decision in M/s. Pulak Enterprises (supra). It is to be kept in mind that the aforesaid two letters relate to fixation of rate of fuel surcharge for the years 1996-97; 1997-98; 1998-99 and 1999-2000 and are interim, in nature, having issued subject to the decision of the Supreme Court and as both the parties have moved before the Supreme Court separately. If any one or other party deposits towards fuel surcharge of the aforesaid years, the same will be subject to the decision of the Supreme Court.

29. It will be evident from the decision in M/s. Pulak Enterprises (supra), that while the writ petitions were pending before the Patna High Court, the parties made payment of fuel surcharge at such rate fixed by interim order of the Court. After the judgment, the effect of interim order having ceased, the Board issued impugned letters 11th July, 2000 and 16th August, 2000 for payment of fuel surcharge at a rate which is interim, in nature, subject to the decision of the Supreme Court. Both the petitioners and other parties moved before the Supreme Court, but the Supreme Court refused to grant interim relief. Even no interim order was passed by the Supreme Court fixing any interim rate for payment of fuel surcharge of the concerned financial years, by way of interim arrangement.

During the pendency of these cases, the petitioners were directed to pay full amount in terms with the rate prescribed vide impugned letters dated 11th July, 2000 and 16th August, 2000, but in instalments. One of the petitioners stated to have paid the full arrears in instalments, while the other paid about 75% of the

total in instalments, both by way of interim arrangement.

As some interim arrangement to be made for payment of fuel surcharge of the financial years, in question, and no interim order having passed by the Supreme Court, it is not desirable for this Court to disturb the interim arrangement of payment of fuel surcharge as made vide impugned letters dated 11th July, 2000 and 16th August, 2000, though they are not in accordance with Patna High Court's decision *M/s. Pulak Enterprises (supra)*. If one or other petitioner is not satisfied with such interim arrangement, as made by the Board, till the final decision of the Supreme Court, may ask for interim relief from Supreme Court for payment of fuel surcharge of the intervening period.

30. No relief, so far as this Court is concerned, can be granted, in the present cases, as the judgment, if any in these cases, will never reach finality, the impugned letters and decisions, being subject to the decision of special leave petition.

31. Both the writ petitions are, accordingly, dismissed.

32. Writ petitions dismissed.