

(1997) 01 CAL CK 0026

In the Calcutta High Court

Case No : F.M.A. No's. 337, 338, 339, 341 and 342 of 1988 with A.P.O. No. 38 of 1987

West Bengal State Electricity Board and others

APPELLANT

Vs

Siddharta Ferro Alloys Ltd. and others

RESPONDENT

Date of Decision : 29-01-1997

Acts Referred:

Constitution of India, 1950 — Article 226

Contract Act, 1872 — Section 72

Electricity Act, 1910 — Section 18, 2(8), 22, 22B, 22B

Citation : AIR 1997 Cal 221

Hon'ble Judges : Visheshwar Nath Khare, C.J.; Barin Ghosh, J

Bench : Division Bench

Advocate : P.K. Roy, Bhaskar Mitra, Kalyan Kr. Dasgupta and Samir Kumar Ghosh, for the Appellant; S.K. Kapoor, Nilava Mitra, Dipak Deb, P.K. Jhunjhunwalla, P.K. Mullick, Ganesh Srivastva and Swapan Dutta, for the Respondent

Judgement

Barin Ghosh, J.—The only question in these appeals is whether the appellant made unjust enrichment, and if so, to what extent? The trial Judge held against the appellant and directed it to give appropriate adjustment.

2. The appellant, in these appeals, is the West Bengal State Electricity Board, being supplier of electricity. The writ petitioners are consumers of electricity, supplied by the appellant exclusively. The terms and conditions of supply of electricity are recorded in written contracts. The principal terms and conditions are identical. Those terms and conditions provide that the appellant will supply to the writ petitioners electricity at an agreed pressure of 33000 Kva. The agreements further provide that the writ petitioners will be entitled to draw power to the extent but not exceeding maximum number of kilovolt ampere for each of the first five years of supply as mentioned in schedule one of the agreements, called "contract demand". The agreement say that there shall be installed a meter which will record the maximum demand, i.e., maximum drawal

of power. These meters, we have been told, record consumption of electricity at the highest pressure during a particular month. The needle recording the same in the meter moves upwardly and never comes down unless mechanically turned. The needle moves up-ward only when electricity is consumed at a higher pressure for a continuous period of 30 minutes during any part of a month than any previous consumption. In addition to such meters, the agreements say, that there shall be meters to record actual consumption of electricity measured in Kwh. In the event the writ petitioners consume electricity the first meter will record the highest pressure at which electric was consumed and the second meter will record the actual consumption. In one of the writ petitioners consumes electricity in a given month, say at 1000 Kva continuously for 30 minutes during any of the hours of any of the days of a given month, then the first meter will record that the said writ petitioner has consumed electricity at the highest pressure of 1000 Kva during that month, even if the said writ petitioner has not consumed electricity beyond that particular 30 minutes period of the month. During the period of such consumption the actual consumption, measured in Kwh, made by him will be recorded in the second meter. Thus, if the consumer during a particular month consumes electricity at the highest pressure of 1000 Kva for any 30 minutes during that month, the first meter will show 1000 Kva consumption, and in the second meter the actual consumption in Kwh will be reflected. Suppose one of the writ petitioners consumes electricity only for half an hour during a particular month and does not consume electricity for the rest of the month, then in the first meter the pressure at which he had consumed electricity would be reflected and in the second meter his actual consumption of electricity will be reflected. Suppose these are 1000 Kva and 50 Kwh respectively, the same will be recorded accordingly. In the second month if the said writ petitioner consumes electricity all throughout the month at variable pressures ranging from 400 Kva to 800 Kva then the first meter will show consumption of electricity at the peak pressure during the month at 800 Kva. Since during the whole month the consumer has consumed electricity, the second meter may record, while recording the actual consumption, at 1000 Kwh.

3. The provision for installation of two meters, one for recording the consumption at the highest pressure and the other for recording the actual consumption, have been provided for in the agreements entered by the appellant with the writ petitioners inasmuch as the writ petitioners are industrial consumers. The industrial consumers need bulk electrical energy at very high pressure. When an industrial machine is started, it needs electricity at a high pressure, but when it starts, running, it can work at a much lesser pressure. At the time of setting up an industry, the industrialists, as the writ petitioners are, known at what pressure they need electricity to start up and to run their machinery. They inform the supplier of electricity accordingly, The supplier of electricity as the appellant is, then agrees to supply electricity at such pressure. All the agreements in these cases records such agreement. As recorded in these agreements consideration of the supplier of electricity agreeing to supply and supplying electricity at such

pressure, the consumer of electricity agrees to pay a charge therefore which is calculated by multiplying the figure recorded in the first meter, (consumption at the highest pressure in any continuous half an hour during the month) by the agreed amount; and in consideration of the supplier of electricity agreeing to supply and supplying electrical energy to the consumer, a charge is paid which is calculated by multiplying the quantum of energy supplied as recorded in the second meter, by another agreed amount. Thus, the writ petitioners are charged for the pressure of energy availed and for the, quantum of energy consumed separately. If for some reason the first meter has not been installed or the same do not function, then by applying a certain formula in relation to what have been recorded in the second meter one can ascertain the approximate highest pressure at which electricity was supplied and consumed. The aforesaid have all been provided for in the subject agreements. The relevant clauses of the agreement are as follows:--

System, Voltage and frequency of supply.

"2. The electrical energy so supplied shall be of three phase, alternating current at a declared pressure of 3300 volts between phases, and frequency of fifty complete cycles per second at the Consumer's/ Consumers' terminals."

Contract Demand

"3. Subject to the provisions of clause 21 hereinafter contained the Consumer/s shall be entitled for the said purpose to such supply upto but not exceeding maximum number of Kilovolt ampere for each of the first five years of supply as mentioned in schedule I hereto (hereinafter referred to as the "Contract Demand") which shall be deemed to be part of the agreement."

Commencements of supply.

"4. (1) The Consumer shall begin to take electrical energy from the Board under the conditions of this Agreement from the date (hereinafter referred to as the date of commencement of supply) to be mutually agreed upon but not exceeding two months from the date on which intimation is sent in writing to the Consumer/s by the. Board that the supply of electrical energy to the full extent of the Contract Demand is available under this Agreement."

"4. (2) If the Consumer/s fail and/or neglect/s to obtain the supply of electrical energy as from the date when the same is available for supply the consumer/s shall be liable to pay to the Board from the date when the Consumer should have taken the supply in terms of clause 4(1) the minimum charge which are provided hereinafter to be payable by the consumer/s irrespective of the fact that the Consumer/s has/have not consumed any electrical energy."

Failure of Supply.

"11. (1) The Board shall not in any way be held responsible nor shall be liable to pay compensation for any loss suffered by the consumer as a result of any failure

interruption, defect or diminution in the supply due to the breakage or damage of any plan, machinery, service or distributing lines or any accessories in connection therewith or due to the development of faults in any part of the system for transmission of energy or due to acts of God, War, Riot, Civil Commotion, Strikes, Lockouts, Labour troubles, Pestilence, Fire. Storm, Tempest, Floods, Earthquakes, Lightning, Theft, Larceny or other force or accident or due to any cause whatsoever beyond the reasonable control of the Board."

"11 (2) Without prejudice to the generality of the foregoing provision the Board in particular shall not be liable in any way for any claim for loss, damage or compensation whatsoever arising out of failure interruption, defect or diminution in the supply due to shortfall, deficit, insufficiency or reduction in the total electrical energy available for distribution by the Board for any cause whatsoever."

Meter Reading.

"13. (1) The metering equipment shall generally include instrument transformers, polyphones integrating kilowatthour meter. KW KVA maximum demand indicator and RKVAH KVAH meter. The integrating period of the maximum demand indicator shall be controlled by time swith of a suitable type."

"13. (2) The reading of the said meters shall be taken by the representative the Board owner in a calendar month on or as near as practicable the same day of each calendar month. The readings so taken shall be binding and conclusive between the Consumer/s and the Board as the amount of demand and electrical energy supplied to the Consumer/s. The Consumer/s may send his their, its representative at the time of the reading of meters but in case the Consumer/s does, do not arrange for his their, its representative to be present for the reading of the meters. The readings of the meters taken by the representative of the Board shall be conclusive and Consumer"s shall not have these right to raise any objection regarding the correctness or accuracy of such readings."

"13 (3) In the event of any meter being found defective and check meter not having been installed, the power and energy consumption during the period when the meter was decreed to be defective shall be determined by taking an average consumption and other parameters for the proceeding three months or during any previous or subsequent period that may be reasonably comparable."

"13. (4) Monthly Maximum demand of the Consumer"s for the supply of power in each month shall be the largest Kilovoltamperes delivered to the Consumer/s at the point of supply during any consecutive thirty minutes in the month. In the case where KVA-demand indicator is not installed, monthly maximum demand in KVA for tariff purpose will be estimated by dividing the reading in Kilowatts of the maximum demand indicator by the monthly average power factor calculated from the number of units of Kilowatthours and reactive Kilovoliampcrehours as recorded in the meters during the same month. Fraction of KVA less than 0.5 will be discarded and that of 0.5 and above will be taken as IKVA."

Charges of Supply.

"15. (1) The Consumer/s shall pay to the Boards for electrical energy supplied under the Agreement in accordance with the provision and scale of rates under Rate E(b) as set forth in the Schedule II hereto which shall be deemed to be part of this Agreement."

"15. (2) If the Board by a notification makes any alteration in the aforesaid rates for energy, tariff and its associated stipulations such altered rates, tariff and its associated stipulations shall be treated as if the same were part of this Agreement in supersession of the charge set forth in the Schedule II hereto with effect from the date fixed in the Notification"

"16. (1) Subject to the provision of Clause 16(3) so long as the agreement is not determined or the Consumer continues to obtain supply of energy, the consumer shall pay Minimum Charge provided in Schedule-I hereto, irrespective of the fact that the Consumer could not consume electricity to cover such Minimum Charge during the respective years due to disconnection of supply for any reason whatsoever"

"16. (2) For calculation of annual minimum charge, one year period shall be taken from April to the following March. When connection is given in any intermediate month, the minimum charge shall be calculated from the month of connection to the following March on monthly pro rata basis.

Provided when connection is given after the 15th day of any month, that month shall not be counted in calculating the year of minimum charge."

"16. (3) If at any time the Consumer/s is are prevented from receiving or using the electrical energy to be supplied under this Agreement either in whole or in part owing to any strike, riots, insurrections, command of a civil or military authority, fire, explosions, act of God or any other causes beyond his their control or if the Board is prevented from supplying or is unable to supply such electrical energy owing to all or any of the causes mentioned, then the minimum charge of guarantee payable by the Consumer shall be reduced in proportion to the ability of the Consumer/s to take or the Board to supply such power, provided the Consumer/s notifies the Board in writing within fifteen days of occurrence of any event as noted above with necessary detail to prove that the occurrence is preventing has prevented the Consumer/s from receiving or using the full amount of contractual demand. The Consumer s shall also keep the Board informed once in every fortnight of further development regarding the event. No remission in the agreed minimum charge as mentioned in Schedule I hereof, will be considered if no such notice is received by the Board Subject as aforesaid the Consumer/s shall (sic) any event be liable to pay the minimum charge every year as mentioned in Schedule I thereof."

Revision of Contract Demand.

"21. (1) In the event of the Consumer/s desiring to increase his/ its/their

Contract Demand in any year during the continuance of the Agreement, the Board may require the Consumer/s to give the Board one year's notice in writing stating the quantity of power required"

"21. (2) The Consumer/s shall pay to the Board any expense incurred by reason of alteration and/or extension in respect of any service line, switchgear, meters and other equipment necessitated to meet such altered Contract Demand."

"21. (3) The minimum charge as provided in Schedule 1 may be increased to take into account the altered Contract Demand."

4. The Schedules referred to above in one of the agreements are as follows:-

"SCHEDULE-1

Year of operation Contract Demand Minimum amount payable by the Consumer per annum for the Contract Demand.

1st Year 7500....KVA Rs. 19,54,200.00

2nd Year 7500.. ..KVA Rs. 19,54,200.00

3rd Year 8000.. ..KVA Rs. 20,80,800.00

4th Year 8000....KVA Rs. 20,80,800.00

5th Year 8000....KVA Rs. 20,80,800.00

5. The consumers during the continuance of the Agreement shall be entitled to consume electrical power upto but not exceeding the contract demand.

6. Where the actual Maximum Demand in any month of a year of operation will exceed the corresponding contract demand such Maximum demand will be deemed to be the contract demand for that particular year based on which Minimum amount payable by the consumer per annum will be charged.

7. The consumer's during the continuance of the Agreement guarantee to pay for such amount of electrical energy as will in aggregate (excluding fuel surcharge) at the current rates produce annually the above minimum guaranteed amounts."

"SCHEDULE-11

Rates E(b) Industrial Purposes

(i) Demand Charge Rs. 33.00 Per KVA per month

PLUS

(ii) Energy Charge Rs. 12.8 paise per KWh."

8. Therefore, the agreements while obliging the consumer to pay for a charge for availing electricity at highest pressure for a consecutive half an hour during any part of the month does not provide for any contingency when supply is not

effected during any other part of or rest of the month, while they provide for the contingencies when quantum of energy either supplied or consumed is less than the quantum of electricity agreed to be supplied or consumed, covered by the minimum guarantee.

9. In these appeals, we are not concerned with the quantum of electricity supplied and consumed. We are only concerned with supply and consumption of electricity at the highest pressure as reflected in the first meter. The writ petitioners contend that by reason of the orders of the State Government, issued u/s 22B of the Indian Electricity Act, 1948, the appellant was prevented from supplying electrical energy during certain specified hours of each day of each month for a long period of time and in addition thereto there were widespread load-shedding during which period also no energy was supplied. The writ petitioners, therefore, contended that they are entitled to appropriate adjustments in relation to Maximum Demand i.e. consumption of electricity at highest pressure for a consecutive period of half an hour in any day of the month, as recorded in the first meter. They contend that in view of the appellant being ready and able to supply energy at such highest pressure during the whole month, the writ petitioners agreed to pay charges therefore. They, therefore, contend that when by reason of the Order of the State Government, issued u/s 22B of the Indian Electricity Act, 1910, the appellant was unable to effect supply of any electrical energy at any pressure during certain particular hours of everyday of a month or when the appellant for its own fault was unable to supply electrical energy at any pressure, the appellant cannot claim anything at least during the period of non-supply. They say that the contract is to supply electrical energy for 24 hours for 30 days, being the billing period. Thus, they contend, the appellant is required to supply energy for 720 hours a month. If, out of 720 hours the appellant supplies energy for 500 hours and is unable to supply for the rest of the 220 hours by reason of the order of the State Government, issued u/s 22B of the said Act or otherwise than the charges for supply of electrical energy at maximum pressure during the month as reflected in the first meter, should be proportionately reduced. They also contended that on an earlier occasion such reduction was accorded by the appellant of its own volition.

10. On the other hand, the appellant contended that the charges for consumption of electricity at the highest pressure are collected by it and are paid by the writ petitioners, not in consideration of the appellant being able to supply electrical energy at such pressure during all 720 hours a month but to recover its original as well as recurring investments made or to be made in order to enable it to supply electrical energy at such pressure. The appellant, further contended that in the event of the writ petitioners having had necessary installations of their own for obtaining such supply by generation of energy, the investments therefore would have remained idle during the period when the order of the State Government issued u/s 22B of the Act remained effective, if the order was binding on such generation, since no electrical energy during that period could be generated for consumption by the writ petitioners, but during the period when no

such order was in force, electrical energy could be generated for consumption and the cost of installations for such generation as well as the investments therefore could have been recovered proportionately. The appellant explained that it has installations or it has installed necessary equipment to generate electricity at the agreed highest pressure at which it has agreed to supply and the writ petitioners had agreed to consume electricity. The investments for such installation were made by the appellant. In order to recover such investments, cost of replacement and depreciation, the appellant collects maximum demand charge and while doing so it does not collect charges on the basis of the contract demand or contract pressure at which the writ petitioners had agreed to obtain supply, but on the basis of actual pressure at which the writ petitioners had actually consumed electricity; and in doing so gives certain concession to the consumers, since consumption at a lesser pressure than the contract demand entails lesser charges, though investments have been made to meet the contract demand. Appellant contended that the demand charge has no nexus with the charges for consummation since charges for consumption are collected to cover the charges for generation of electricity and thus the consumers are required to pay such charges proportionate to their actual consumption. It was submitted that the minimum charges payable on account of quantum of electricity to be consumed signifies the fixed over-head for generation of the quantity of electricity to be consumed. That is why, it was submitted on behalf of the appellant, that the agreement provide for contingencies for less supply or less consumption. It was lastly contended on behalf of the appellant that in the event what is being claimed by the writ petitioners is accepted, the same would tantamount to altering the agreement between the parties and the same will be wholly inequitable having regard to the facts and circumstances of the case. Simply put, the appellant contended that it charges for the peak pressure of consumption and for the quantity of electricity consumed. It contended that despite having drawn power at a particular pressure, as measured by the first meter, if the writ petitioners propose to pay less on the ground that supply could not be effected during a particular period due to Government order, issued u/s 22B of the Act, the same would tantamount to non-payment of the charges due to the appellant. The appellant denied widespread load-shedding beyond the hours of restriction imposed by the Government.

11. Therefore, the question is whether the claim of the appellant for the charges on account of drawl of electricity at the highest pressure during a month as recorded in the first meter is an unjust claim, when admittedly by reason of the order of the State Government issued u/s 22B of the Indian Electricity Act, 1910 no supply could be effected during certain hours each day of the months for a long period of time? This question could be answered by taking re- course to the arbitration clause contained in the agreements. However, the writ petitioners approached this Court seeking an answer to such question. While the matter was being heard before the Trial Court, it was probably thought that this legal question be answered by this Court. Before us, the learned Counsel appearing on

behalf of the appellant, specifically sought the answer from us rather than the arbitrator, when one of us pointed out to the learned counsel, appearing on behalf of the appellant, the arbitration clause contained in the agreements.

12. In order to answer this question, one has to consider what is demand charge or charge for drawing electricity at the highest pressure. The Electricity (Supply) Act, 1948 was enacted to provide for the rationalisation of the production and supply of electricity and generally for taking measures conducive to electrical development. Section 2(8) of the Act defines maximum demand as follows :--

"(8) "maximum demand" in relation to any period shall, unless otherwise provided in any general or special order of the State Government, mean twice the largest number of kilowatt hours or kilo-volt-ampere-hours supplied and taken during any consecutive thirty minutes in that period."

The Trial Judge gave emphasis to the words "supplied and taken". Unless supply is effected, the same cannot be taken and unless a device is installed largest supply taken during any consecutive thirty minutes cannot be measured. We think the emphasis should be given to the words "to any period", occurring after the words "maximum demand in relation to" as well as the words "in that period" occurring after the words "thirty minutes". We shall explain this in our own way. The object of ascertaining maximum demand is to determine the maximum pressure at which electricity was consumed. The statute says that twice the largest number of kilowatt-hour or kilo-volt-ampere-hour supplied and taken during any consecutive thirty minutes of the period in relation to which maximum demand is being ascertained shall be the maximum demand for that period. Therefore, in relation to any period for which maximum demand is being ascertained, one has to measure the largest number of Kwh or Kva supplied and taken during any consecutive thirty minutes in that period. It does not matter whether electricity was supplied and consumed at the same pressure during the whole of that period, since the object is to ascertain the peak supply and consumption during that period and not ability to supply or anything else.

13. Section 22 of the Indian Electricity Act, 1910 provides as follows:--

"22. Obligation on licensee to supply energy.-- Where energy is supplied by a licensee, every person within the area of supply shall, except in so far as is otherwise provided by the terms and conditions of the license, be entitled, on application, to a supply on the same terms as those on which any other person in the same area is entitled in similar circumstances to a corresponding supply:

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of energy for any premises having a separate supply unless he has agreed with the licensee to pay to him such minimum annual sum as will give him a reasonable return on the capital expenditure, and will cover other standing charges incurred by him in order to meet the possible maximum demand for those premises, the sum payable to be determined in case of difference or dispute by arbitration."

Here the minimum annual sum to be paid by the consumer is for giving the supplier a reasonable return on the capital expenditure and to cover others standing charges incurred by the supplier in order to enable him to meet the possible maximum demand of the consumer. It was urged on behalf of the writ petitioners that the minimum charges to be paid by them as provided in the agreements take care of reasonable return on capital expenditure and covers other standing charges. Therefore, it was submitted on behalf of the writ-petitioners, that the charges for maximum demand, as held by the Trial Court, is for readiness on the part of the supplier to supply electrical energy all throughout the period in relation to Which maximum demand is being ascertained.

14. Before coming into force the Electricity Supply Act, 1948 there was no statutory formula of determining maximum demand. There was also no concept of State Electricity Boards. By that Act the legislature authorised constitution of State Electricity Boards and directed it, inter alia, to arrange in co-ordination with the generating company or generating companies operating in the State for supply of electricity that may be required within the State and for the transmission and distribution of the same in the most efficient and economical manner with particular reference to those areas which are not for the time being supplied or adequately supplied with the electricity and to supply electricity as soon as practicable to a licensee or other persons requiring such supply if the Board is competent under the Act so to do, as provided in Section 18 of the said Act. For the purpose, the Board has been authorised by Section 28 of the Act to prepare and sanction schemes and certain schemes with the sanction of the authorities as mentioned in Section 29 of the Act. By Section 33 of the Act, the State Government has also been authorised to prepare schemes in aid of the object of the statute. The statute has also authorised the Board to borrow and the State Government to lend to implement such schemes. At the same time, by Section 59 of the Electricity Supply Act, 1948, the State Electricity Boards have been statutorily obliged to make a profit not less than at least 3 per cent of the value of the fixed assets of the Boards in service at the beginning of the year after meeting all expenses properly chargeable to revenues, including operation, maintenance and management expenses, taxes on income and profits, depreciation and interest payable on all debenture bonds and loans. In order to generate funds to make such profit, the Boards have been authorised by Section 49 of the said Act to supply electricity upon such terms and conditions as the Boards think fit but at the same time has been obliged to charge uniform tariff. The object, therefore, to expand supply of electricity, collect uniform tariff consumer-wise, and while doing so, earned a reasonable return on the investment. It is, therefore, a business-cum-social obligation.

15. Section 22 of the Indian Electricity Act, 1910, was to protect interests of individuals as well as licensees. While, however, protecting the interests of the State Electricity Board the Act ordained that the tariff to be charged by the Board should be uniformed having regard to the, inter alia, the nature of supply and the purpose for which it is required but upon such terms and conditions as the

supplying Board think fit. Therefore, it would not be proper to take recourse to the proviso to Section 22 of the Indian Electricity Act, 1910 to determine the rights or obligations of supplying Board the minimum annual sum as provided in the said proviso, is required to be determined having regard to reasonable return on the capital expenditure and other standing charges in order to meet the possible maximum demand of the consumer. The Board, however, though has been obliged to apply uniform tariff and to earn a reasonable profit on investment, has been given a free-hand to impose terms and conditions for supply of electricity.

16. It is now well-recognised that consumers of bulk electricity are charged two way tariffs; one is determined on the basis of the first meter, called maximum demand charges and the other determined on the basis of the second meter, called charges for actual consumption. Maximum demand charge has not been defined in any of the Acts but maximum demand has been. A charge payable for the maximum demand as defined by the Electricity Supply Act, 1948, is and should be maximum demand charge. The agreement inter se the parties also obliges the consumer to pay such charges and entitles the Board to collect the same. What for; is the controversy. Such charges are "to cover investment, installation and the standing charges to some extent" as held by the Supreme Court in Northern India Iron and Steel Co. and Others Vs. State of Haryana and Another, and re-affirmed by the Supreme Court in Orissa State Electricity Board and another etc. Vs. M/s. IPI Steel Ltd., etc., . If, therefore, demand charges are to cover investment, installation and standing charges to some extent, i.e., fixed costs, the same have no nexus with the costs of generation i.e. variable charges. In those circumstances, demand charges are to cover the fixed costs and the supply charges are to cover variable costs. The Board is obliged to meet both these costs and thereupon to generate reasonable return on investment.

17. The fixed costs remains fixed. It has no nexus with actual physical production. Fixed cost is incurred to install necessary plants and machinery to enable the supplier to meet the demand Installation of such plants and machinery needs investments. Costs are incurred therefor. Such plants and machinery need replacements, for which further investments are needed. In order to make such investments, monies are required to be borrowed. Such plants and machinery to be maintained, for which maintenance personnel are required to be employed who in turn are required to be paid their wages and salaries. Supplying Board is required to recover all such fixed costs i.e., cost of investment, cost of replacement, depreciation and cost of keeping maintenance staff or employees who are required to be permanently employed to man the installations. The supplying Boards incur variable costs as and when it generates electricity. It recovers fixed costs by charging demand charges and variable cost charge by the recovering charges for supply. If no supply is effected, the supplying board can. neither recover fixed costs nor can recover variable costs but if supply is effected for half-an-hour or more during a month it can recover both. In order to effect supply for half-an-hour the fixed cost that the supplying

Boards incur remains same if supply is effected throughout the month, it does not vary.

18. By the West Bengal Electricity Energy (Maintenance of Supply) Order, 1977, issued by the Government of West Bengal, u/s 22B of the Indian Electricity Act, 1910, restrictions were imposed on the consumers of electricity running Mini Steel Plants. These restrictions were two way, (1) restricting the maximum demand and (2) restriction of supply during certain hours of everyday. The supply in so far as the writ petitioners are concerned were well within the restricted maximum demand except in case of one of the writ petitioners and that too during a particular month. The controversy is in relation to non-supply during certain specified hours of everyday during the subsistence of the said order issued by the State Government u/s 22B of the Indian Electricity Act, 1910.

19. Section 22B of the Indian Electricity Act, 1910, is as follows:--

"22-B. Power to control the distribution and consumption of energy:--

(1) If the State Government is of opinion that it is necessary or expedient so to do, for maintaining the supply and securing the equitable distribution of energy, it may by order provide for regulating the supply, distribution, consumption or use thereof.

(2) Without prejudice to the generality of the powers conferred by sub-section (1) an order made thereunder may direct the licensee not to comply, except with the permission of the State Government, with -

(i) the provisions of any contract, agreement or requisition whether made before or after the commencement of the Indian Electricity (Amendment) Act, 1959, for the supply (other than the resumption of a supply) or an increase in the supply of energy to any person, or

(ii) any requisition for the resumption of supply of energy to a consumer after a period of six months, from the date of its discontinuance, or

(iii) any requisition for the resumption of supply of energy made within six months of its discontinuance, where the requisition consumer was not himself the consumer of the supply at the time of its discontinuance."

20. The said order provided, inter alia, "no industrial consumer included in Schedule-B of the order taking supply of electric energy at 3300 volts and above from Calcutta Electricity Supply Corporation (India) Ltd., or the West Bengal State Electricity Board or the Durgapur Projects Ltd. shall draw any power for industrial purposes between 6 p.m. and 10 p.m. on any day." Each of the writ petitioners had been included in Schedule-B of the said order. The effect of the said order was, inter alia, suspension of the agreements between the Board and the writ petitioners during the period between 6 p.m. and 10 p.m. on each day when the said order was subsisting. In other words, by that order the Board was directed not to comply with the agreement it entered with the writ petitioners

between 6 p.m. and 10 p.m. on everyday when the said order was subsisting. This was done by a statutory mandate. As the Board was, so were the writ petitioners obliged to comply with such statutory mandate. Neither the Board, nor the writ petitioners suspended nor by any other statutory mandate, the agreement between the parties remained suspended during the rest of the hours. The mutual rights and obligations for sale and purchase of electricity for the remaining 20 hours a day remained governed by the agreements. In order to effect supply for the 20 hours a day, the board has incurred fixed cost equivalent to what it had incurred for effecting supply during 24 hours. If that be so, then the question of board making any unjust enrichment by claiming demand charges for effecting supply of electricity in accordance with the agreements does not, nor can at all arise.

21. When supply is not being effected by reason of a statutory mandate, the supplier cannot recover charges for supply, since the second meter will not record supply of energy. Similarly if supply is not effected altogether by reason of a statutory mandate, the supplier cannot recover demand charges since the first meter will not record the maximum demand of the consumer. But, however, if supply is effected, except during the hours when restrictions are imposed by a statutory mandate, the first meter will record the maximum demand during the supply hours and the second meter will record actual consumption during that period. In Northern India Iron and Steel Co. and Others Vs. State of Haryana and Another, the State Government issued orders u/s 22B of the Indian Electricity Act, 1910 restricting considerably the supply of electricity by the Haryana State Electricity Board to the large industrial consumers as a result of which power cut was introduced. In that case also the Board was charging two part tariff. An argument was advanced to the effect that since the Board was not ready to serve the consumer and the consumer was ready to consume maximum electric energy, the former was not entitled to ask for any demand charge. On behalf of the Board it was asserted that it is entitled to assess and claim the full demand charge as per Clause 4 of the tariff irrespective of the fact whether it was in a position to supply energy according to the demand of the consumer or not. Such extreme stand on either side puzzled the Supreme Court and it felt that the same lead to inequitable results. The Supreme Court then observed (at p. 1103 of AIR) :--

"The difficulty was not easy to solve. If we were to hold that for the Board's inability to supply a fraction of the consumers demand as per the contract it could claim only the energy charge and not the demand charge, it would have been very hard and injurious to the Board and the consumer would have unjustifiably get the supply at a very cheap rate. If on the other hand, we were to say that the consumer was liable to pay the entire demand charge as per the method of assessment provided in Clause 4 of the tariff even when for no fault of it, it could get only a fraction of its demand fulfilled, resulting in its not being able to run the industry to its full capacity, it would be liable to pay a huge amount per month, and this will not only be uneconomical but would seriously

affect its economic structure. But we were happy to find that a just equitable and legal solution of the difficulty was provided during the course of the argument on either side and that is with reference to sub-clause (f) of Clause 4 of the tariff. It is therefore not necessary to resolve the extreme stand taken on the either side."

Under Clause 4(f) of the Tariff, the consumer was entitled to a proportionate reduction of demand charges in the event of lookout, fire or any other circumstances, considered by the supplier beyond the control of the consumer; that is to say, if the consumer is not able to consume any part of the electric energy due to any circumstance beyond its control and which is considered by the Board to be so, unlike the case in hand where no provision has been made. The observations of the Supreme Court, as quoted above, were therefore, ultimately resolved through the agreement between the parties. The Supreme Court did not say either of the extreme claims is inequitable. At the same time in Bihar State Electricity Board and Another Vs. Dhanawat Rice and Oil Mills, , Bihar State Electricity Board, Patna and Others Vs. Green Rubber Industries and Others, , General Manager-cum-Chief Engineer, Bihar State Electricity Board and Others Vs. Rajeshwar Singh and Others, and Ferro Alloys Corpn. Ltd. Vs. A.P. State Electricity Board and another, , the Supreme Court upheld the agreements entered by different State Electricity Boards with consumers of bulk electricity relating to supply of electricity, even though such contracts as observed by the Supreme Court, contain conditions fixed by the Boards in advance and are open to acceptance by the prospective consumers. If, therefore, the contract remains in force, which have been entered by the parties with their eyes open, the parties to such contract are bound by the terms contained therein. In the present case the contract remained in force during the entire period except a few hours everyday when restrictions were imposed u/s 22B by the State Government. During that time when the contract remained in force, the parties thereto were obliged to discharge their respective obligations. If any other consequence is even conceived, the same would tantamount to altering agreements entered by parties which is beyond competence of the Court. It is, however, true that at times Court is empowered to strike down an unconscionable bargain but having regard to the facts of this case, can it be said that claim for demand charges in terms of the agreement for effecting supplies during the unrestricted period is an unconscionable bargain. We do not think so. It is preposterous to suggest that a claim which is otherwise conscionable would become unconscionable by reason of coming into force of a statutory mandate imposed for public good. In such event the option is to avoid bargain altogether. In the event of the parties is apprehensive of being over-charged, such party by approaching a Court of law cannot asked such Court of law to re-write a contract to his advantage.

22. In Orissa State Electricity Board and another etc. Vs. M/s. IPI Steel Ltd., etc., the effect of the order issued u/s 22B was a 50 per cent cut in the maximum demand. The Board gave an option to the consumer in the matter of utilisation of 50 per cent allowed to him. It was open to him to avail of the maximum demand every month but in such a case he could run his factory only for six months. If,

however, the consumer wanted to operate his plant for 12 months in the year, he had to reduce his maximum demand to half of his maximum demand allowed under the agreement. It was equally open to the consumer to distribute maximum demand permitted to him in such a manner that his plant works for nine months. In the present case the contract remains suspended for 4 hours everyday during the subsistence of the order. In that case the Supreme Court observed, "in no event, consumer is made to pay maximum demand charges for more than what he actually availed. As stated above, the order of limitation is that he must have remained within the fifty per cent quota allowed to him during the year of restriction. We are unable to see any arbitrariness in the said proviso. It means and says that during such period of restricted supply, the consumer pays the energy charges for the actual consumption plus maximum demand charges for the maximum demand availed by him at the rate prescribed in the agreement." In this case too, the consumer has been asked to pay the energy charges for the actual consumption plus maximum demand charges for the maximum demand available by him during the period when no restriction was imposed.

23. There is another aspect of the matter. In Schedule-B of the West Bengal Electricity Energy (Maintenance of Supply) Order, 1977, issued u/s 22B of the Indian Electricity Act, 1910, all the consumers of electricity for running mini Steel Plants have been named but all of them have not approached this Court. The present writ petitions are not public interest litigations. The orders in the present writ petitions will govern the contracts being the subject-matter of the writ petitions. By reason of the order of the Trial Court some of such consumers named in Schedule-B will get the benefits proposed to be given by the Trial Court but the others will not. The same will bring about a disparity in tariff recoverable from the same class of consumers despite there being a statutory mandate to the effect that the Board shall collect uniform tariff from consumers who are similarly situate.

24. Power cuts beyond 4 hours restoration asserted by the writ petitioners and denied by the Board is a question of fact, which should not be decided in writ petitions.

25. In that view of the matter we see no reason to sustain the order under appeal. We, therefore, allow the appeal and set aside the order under appeal. All interim orders stand vacated.

26. After the judgment was pronounced, learned counsel for the respondents prayed for stay of operation of the judgment. We do not find any reason to stay operation of our judgment.

27. Accordingly the prayer is refused.

28. Thereafter the learned counsel for the respondents prayed for grant of certificate for filing appeal before the Supreme Court. After we have considered the matter, we find there is no substantial question of law which requires

consideration of the Supreme Court.

29. Hence such prayer for leave to appeal to Supreme Court is refused.

30. Appeal allowed.