CASE NO.:
Appeal (civil) 2335 of 2006

PETITIONER:
Oswal Woolen Mills Ltd.

RESPONDENT:
Punjab State Electricity Board & Anr.

DATE OF JUDGMENT: 28/04/2006

BENCH:
S.B. Sinha & P.K. Balasubramanyan

JUDGMENT:
J U D G M E N T

[Arising out of SLP (Civil) Nos.1398-1442 of 2005]
WITH
CIVIL APPEAL NOS. 2334 OF 2006
[Arising out of SLP (Civil) Nos,15357-15358 of 2005]

S.B. SINHA, J :

Leave granted.

The appellant is a mill represented by its authorized representative. For the purpose of its working, it at all material times was and still is a consumer of electrical energy. It had for the said purpose taken electrical connection from the respondent-Board. The connected load is 6664 KW. In terms of the tariff framed by the Board, the Appellant herein (Company) comes under the category of 'general industry'. The Board on or about 21.01.1991 issued a circular whereby it proposed to levy surcharge @ 17 = % on the actual consumption of electricity in respect of those industrial consumers who had been sanctioned load exceeding 5000 KW or sanctioned contract demand exceeding 5000 KVA and had supply from a 11 KV line. The said circular stipulated that surcharge would continue to be levied till conversion of supply to 33 KV or higher voltage by the consumers. It is, however, not in dispute that a letter was issued to the company intimating that for installation of 66 KV Sub Station, a site plan was required to be supplied.

Yet again by circular dated 30.05.1991, it was stipulated :

"Continuation to CC No.5/91 dt. 21.1.91 vide which it was decided to levy surcharge @ 17% on general industrial consumers having sanctioned load/demand exceeding 5000 KW/KVA and running at 11 KV till conversion of supply to 33 KV or higher voltage. The matter has been reconsidered by the Board and it has been decided that the surcharge @ 17 =% shall be levied on such consumers who do not switch over their supply system to 33 KV and higher voltage in line with the following provisions :

i) A lead time of 12 months may be given to all the existing consumers having load/demand above 5000 KW/KVA and running at 11 KV to convert supply to higher voltage within stipulated period.

This period includes the time spent on getting estimated cost of works, deposit of charges with the PSEB and erection of 33 KV or higher voltage works by the consumer as well as by the PSEB . The time schedule for different activities involved for erection/completion of higher voltage works shall be fixed by the load sanctioning authority, and any slippage/evasion in adhering to the laid down targets on the part of the consumer shall attract levy of surcharge @ 17 =%. In case after the stipulated period, the higher voltage works of the consumers are ready but the works of the PSEB are not ready, surcharge shall not be levied and also likewise if the Board's works of higher voltage are ready but the consumers are not ready this surcharge shall be leviable

The validity of the said circular dated 21.01.1991 came to be questioned by the company in a writ petition, filed before the High Court, which was marked as CWP No.7069 of 1991. In the meanwhile, the said circular letter was modified by the Board, in terms whereof it was stipulated that a time of 12 months extendable upto the maximum of 18 months was to be granted to all the existing consumers having load above 5000 KW/KVA and running at 11 KV to convert supply system to higher voltage.

Another letter dated 19.09.1991 was issued by the Board intimating it that electric supply had to be converted to 66 KV and hence the company was required to show the place of installation of 66 KV sub-station, failing which a penalty @ 17 =% would be levied. A further letter was issued by the Board demanding a sum of Rs.34 lacs towards the tentative cost of conversion. The writ petition filed by the company, however, was disposed of stating :

"\005In the short reply filed on behalf of the Electricity Board, it is stated that from the petitioners 17 =% surcharge collected will be adjusted in the subsequent bills. It is further mentioned that there would be conversion from 11 KV to 33 KV or 66 KV. Certain formalities are to be observed by both the parties in that connection and one year's time has been given to the petitioners to comply with the directions. However, it is made clear that the period of one year would start from the pointing out of feasible point for installation of sub station at the factory premises by the Board."

[Underlining is ours for emphasis]

Yet again, without complying with the said directions, a demand was made by the Board from the company for depositing the said amount of Rs.34 lacs. On or about 14.02.1992, the company replied to the said letter stating that the matter was pending adjudication before the civil court and furthermore no other feasible point had been pointed out by the officers of the Board so far. A site plan was again sought for from the company by the Board by a letter dated 13.05.1992, wherein it was stated :

"Your kind attention is drawn to above references and it is requested that the site plan and site for the construction of 33/66 KV Sub grid must be shown to the undersigned within 7 days and according to the instructions of the Board required amount may be deposited so that further action may be taken otherwise

17 =% surcharge will be levied."

In exercise of its powers under Sections 46 and 49 of the Electricity (Supply) Act, 1948, (for short, 'the Act') the Board made a tariff which came into force with effect from 01.02.1994. Section (B) of the said tariff refers to the schedule thereof the relevant portion of which reads as under :

"Schedule of Tariff

Schedule LS.-Large Industrial Power Supply

1. Availability

(i) This tariff shall apply to consumers having industrial connected load above 100 KW. Their contract demand shall not be less than 100 KVA (85 KW).

(ii) No consumer availing supply of energy at high tension 11000 volts and above (33 KV and above for Arc furnace) shall increase his connected load without approval of the Board. The consumer availing supply at high tension shall indicate the rating capacity of all the step-down transformer(s) installed in his premises and shall not increase the capacity of such step-down transformer(s) without prior approval of the Board."

Clause 3 of the Schedule of Tariff reads as under :

"(A) General Category

a) Consumers with connected load less than 1000 KW 153 Paise/Unit

b) Consumers with connected load 1000 KW and above :

| | |
|---|---|
| Demand Charges | Rs.90/KVA |
| PLUS | |
| Energy Charges | 128 Paise/Unit |
| Maximum overall rate | 163 Paise/Unit |

(B) Power Intensive Units

a) Consumers with connected load less than 1000 KW 158 Paise/Unit

b) Consumers with connected load 1000 KW and above

| | |
|---|---|
| Demand Charges | Rs.90/KVA |
| PLUS | |
| Energy charges | 133 Paise/Unit |
| Maximum overall rate | 168 Paise/Unit |

The energy charges under category (A) and (B) above shall be without prejudice to the Monthly Minimum Charges leviable under item 7 of this Schedule L.S.

Note (i) \005

(ii) Surcharge of 17 =% on the above tariff shall be leviable for all the Arc furnace load consumers which are being given supply at 11 KV."

From note (ii) of the aforesaid tariff, it is, therefore, evident that surcharge @ 17=% thereupon was leviable only for all the Arc Furnace load consumers which were being given supply at 11 KV. Moreover, these other mills which were liable to bear the specified surcharge were specifically mentioned in the tariff notification. It is also not in dispute that prior to issuance of the said notification, executive orders had been issued levying such surcharge. The said executive order, however, was later on made part of the tariff.

However, on 26.07.1991, a notification was issued under Sections 46 and 49 of the Act inter alia stating :

"(b) For consumers with connected load of 1 MW and above

Demand Charges Rs.60/- per KVA
Plus Plus
Energy charges Rs.83 paise/unit

Subject to max. rate of 107 P/Unit without prejudice to the MMC under item \026 7 of this Schedule \026 LS

i) \005

ii) Surcharge of 17 =% on the above tariff shall be leviable for all the Arc furnace load consumers which are being given supply at 11 KV.

iii) \005"

Questioning the said demand, admittedly, a suit was filed by the company. The trial court as also the appellate court on the basis of the materials brought on record came to the conclusion that the Board could levy such surcharge only with effect from 13.05.1992.

By reason of the impugned judgment the High Court opined :

"Learned counsel for the appellant could not point out any clause in the circular which stipulates the modification or suppression of the earlier circular dated 21.01.1991 and 03.05.1991. In the absence of any supersession of notifications, I am unable to hold that such notification stood superceded by virtue of a fresh notification dealing with revision of tariff for general category consumers as well as contemplate levy of surcharge for the ARC furnace load consumers. There is no clause in the said circular that surcharge will be leviable only on the ARC furnace. Still further, such argument was not raised before the courts below. Therefore, it is apparent that levy of surcharge by notification dated 21.01.1991 and 03.05.1991 was never superceded."

A limited notice was issued by this Court on the special leave petition filed by the company as to whether revision of tariff issued as per the memo. No.10061/10761/CC/T/2/Rev./Vol.XIII dated 01.02.1994 was applicable to the company or not. The Board has also approached this Court in regard to the question as to whether the one year period should be calculated from 13.05.1992 or from the date of issuance of the notification.

Two questions, thus, arise for our consideration in these appeals : (i) Whether the High Court is correct in holding that in view of the fact the matter relating to payment of surcharge was governed by circulars, which having not been superseded by the notification dated 21.01.1991 and 03.05.1991 the impugned demand was valid in law; and (ii) what would be the proper interpretation of the judgment of the Division Bench of the Punjab and Haryana High Court dated 29.01.1992

The Board is a creature of the statute. It is constituted in terms of Section 5 of the Act. It is incorporated and can sue and be sued in its own name in terms of Section 12 thereof. Section 46 of the Act provides for the Grid Tariff and Section 49 thereof empowers the Board to make provision for the sale of electricity by it to persons other than the licensees. While exercising the said power the Board would be governed by the general terms which may be issued by the State in terms of Section 79 of the Act. Surcharge by way of additional rate or penalty can be levied only in terms of a tariff notification. Such a power, therefore, can be exercised by the Board only in exercise of its statutory power and not by reason of an executive power. In terms of a circular letter issued by the Board, therefore, neither any surcharge nor any penalty could be levied.

In the year 1991, indisputably, the said circular letter dated 21.01.1991 was followed by the tariff notification issued in terms of Sections 46 and 49 of the Act. The subsequent circular letter dated 03.05.1991 was, however, not followed by any notification making the tariff applicable with retrospective effect.

We have noticed hereinbefore that the tariff notification dated 26.07.1991 speaks of levy of such surcharge inter alia on Arc furnaces. Similar is the position in regard to the notification dated 01.02.1994. The Board, therefore, could levy surcharge only in terms of the notification and not by reason of any circular letter. As in the notification, it has clearly been stated that 17 =% surcharge on the above tariff should be leviable for all the Arc furnace load consumers which were being given the supply at 11 KV, the High Court clearly fell in error in arriving at the finding that by reason of the said notification, the circular letters dated 21.01.1991 and 03.05.1991 were not superseded. The Board being a statutory authority, its power to issue bills for consumption of the electricity would be governed solely by the tariff notification. It being a statutory authority must act within the four-corners of the statute.

The High Court, therefore, in our opinion was clearly wrong in arriving at the finding that the earlier notifications dated 21.01.1991 and 03.05.1991 were not superseded. The High Court failed to pose unto itself the correct question, namely, as to whether after issuance of the tariff notification, the Board could levy any surcharge @ 17 =% on the tariff on those consumers who did not have Arc furnace. The High Court, therefore, misdirected itself in law in passing the impugned order.

The question which falls for consideration is from which date the

period of one year could have started. Although on the basis of the aforementioned finding, the Company could have contended that from 13.05.1991, no surcharge could have been levied, but it did not raise such a contention before the High Court.

We have seen that herein also a limited notice was issued.

It is not in dispute that for the purpose of giving effect to the offer made by the Board in terms of its letter dated 30.05.1991, no surcharge could have been levied immediately. A Division Bench of the High Court, as noticed hereinbefore, by an order dated 29.01.1992 clearly stated that the period of one year would start from the date when the feasible point is pointed out.

The observation of the High Court in the earlier writ petition was in the nature of a direction.

The submission of Mr. Ranjit Kumar, the learned Senior Counsel appearing on behalf of the Board, in this behalf, cannot be accepted. Normally the period should be counted from the date of issuance of the notification and not from the date of the High Court's judgment. The High Court, however, made observations, whereupon both the parties acted. The said observations were made in terms of the affidavit affirmed on behalf of the Board itself.

The High Court's direction leads only to one conclusion that the cut-off date would be considered to be one in futuro, i.e., a date after 29.01.1992 alone was required to be fixed.

Once the final notice by the Board had been issued, the negligence on the part of the consumer to point out the actual site had not been condoned by the courts.

The High Court's observations might be incorrect; but then the same was accepted. As indicated hereinbefore, the parties acted thereupon. The period of one year in terms of the judgment of the High Court, therefore, was to start from the date when the feasible point for installation of Sub Station at the factory premises by the Board was pointed out. Selection of a site for the purpose of drawing 33 KV line was not an empty formality. Several factors including the convenience of the Board were required to be taken into consideration. In some cases probably compensation for acquisition of land was required to be paid.

All the courts had arrived at a finding of fact, having regard to the Board's letter dated 03.12.1992 that the final notice in terms of the said circular had been given only on 13.05.1992. The company had contended that actual feasibility was found out on 28.05.1994, but as noticed hereinbefore, the court did not accept its plea that even the date of the said notice could not have been considered to be the date for the purpose of the starting point of the period of one year.

For the reasons aforementioned, although Mr. R.K. Jain, the learned Senior Counsel appearing for the company, may be right in his submission that the Board has no jurisdiction to levy surcharge after 29.01.1992, but as the said contention had not been raised and furthermore as notice was issued by the court on a limited question, we are of the opinion that the company is liable to pay the surcharge with effect from 13.05.1992. We may furthermore notice that the actual amount of surcharge payable from that date has already been paid by the company to the Board. However, in view

of our findings aforementioned, there cannot be any doubt that the surcharge @ 17 =% was not required to be paid in terms of the tariff notification dated 01.02.1994.

For the reasons aforementioned, the Civil Appeals arising out of S.L.P. (Civil) Nos. 1398-1442 of 2005 preferred by the Company are allowed to the aforementioned extent and the Civil Appeals arising out S.L.P. (Civil) Nos. 15357-58 of 2005 preferred by the Board are dismissed. In the facts and circumstances of the case, the parties shall pay and bear their own costs.