

CASE NO.:
Appeal (civil) 8261 of 2001

PETITIONER:
WEST BENGAL STATE ELECTRICITY BOARD

Vs.

RESPONDENT:
CALCUTTA ELECTRIC SUPPLY CORPN. LTD.

DATE OF JUDGMENT: 04/12/2001

BENCH:
G.B. Pattanaik & Ruma Pal

JUDGMENT:

PATTANAIAK, J.

Leave Granted.

The West Bengal State Electricity Board is in appeal against the Judgment of the Division Bench of Calcutta High Court. The respondent is the licensee. The licensee, on 27th of December, 1989 submitted an application to the Board for getting its consent for establishment of new Thermal Generating Station at Budge Budge and a Project Report was enclosed with the said application. Under Section 44 of the Electricity (Supply) Act, 1948, [hereinafter referred to as the Supply Act], no licensee can establish a new generating station without the previous consent in writing of the Board. Under Sub-section 2A of Section 44, the Board before giving consent to a licensee for establishing a new generating station, shall consult the Authority. The expression Authority has been defined in Section 2(1) of the Supply Act to mean the Central Electricity Authority constituted under Section 3 of the Act. On 23.2.1990, the Board accorded sanction under Section 44 of the Supply Act for setting up a new generating station in Budge Budge with an installed capacity of 2 x 250 M.W. Units, operating on pulverised fuel fired boilers. The Board forwarded the Project Report to the CEA, requesting the authority to consider the proposal in the light of likely gap in system demand that would exist in the year 1995, after taking into account the plans of the Board to set up the Sagardighi Thermal Project, which was at that point of time awaiting techno-economic clearance from CEA. The C.E.A. replied to the Board that issues may be resolved through Government of West Bengal and intimated that the techno-economic examination of the proposal was being withheld by CEA till the final views on the matter is conveyed by the Board. The Board in its letter dated 23rd of April, 1990, informed the CEA that the issues raised had been resolved and the consent already given may be treated as final and, therefore, CEA may take up the techno-economic examination. On 29th of January, 1991, CEA communicated its in principle clearance to the Budge Budge Project, subject to certain conditions mentioned therein. It also

informed that any clearance required under Section 44 of the Supply Act would be made after the Department of Power, Ministry of Energy, Govt. of India, clears the project. Finally on 11th of November, 1991, CEA intimated its clearance of the Budge Budge Project under Section 44 of the Act at a total cost of Rs. 1285.70 crores, subject to the conditions mentioned in the letter. The licensee informed the CEA by its letter dated 23rd April, 1992, indicating that there has been an enhancement of Project cost which stands revised to Rs. 2220 crores and requested the CEA to convey its approval, after examining the estimates and other required particulars. On 24th of April, 1992, a revised breakup of the Project cost was furnished to the CEA. The Government of India, Ministry of Power by its letter dated 21st October, 1992 intimated its approval of the revised financial plan for the project at Rs. 1638 crores, with certain conditions mentioned in the said letter. The CEA then wrote a letter to the Government of West Bengal on 26th of September, 1996 regarding escalation of the Budge Budge Project cost to Rs. 2220 crores and it was stated therein that the CEA has not received any revised cost estimates from the Board though the same was required under Section 44 of the Supply Act. The Board then called upon the licensee by its letter dated 4th of December, 1996 to furnish the detailed break-up of the cost estimates as well as the revised cost of the Project which was then at Rs. 2220 crores. The Government of West Bengal, through its Power Department also made correspondence with the licensee, seeking information as to whether the licensee has submitted the detailed proposal for revision of the Project cost, as required under Section 44 of the Supply Act and also further requested that the copies of the Project cost be furnished to the Government. On 17th of January, 1997, the licensee wrote to the petitioner Board, giving groupwise break-up of the escalated project cost as in July, 1996, amounting to Rs. 2220 crores and also intimated that the cost is being revised by the Financial Institution I.C.I.C.I. The licensee then informed the Board by letter dated 24 of February, 1997 that the revised cost which has been approved by the financial institution in January, 1997 work out at Rs. 2308 crores. On 30th of July, 1997, the Board sought for clarification, details and reasonings from the licensee, regarding the revised cost and those clarifications were duly communicated by the licensee to the Board. Unit I of the Project was commissioned on 15th of September, 1997 and on 20th of February, 1998, the licensee requested the Board to give its consent to the revised project cost at Rs. 2460 crores, as in the interregnum, the project cost had further got escalated. The Board then constituted a Committee for determining the quantum as to what would be the reasonable cost of the Budge Budge Project and the said Committee arrived at a figure at Rs. 1853 crores. On 22nd of May, 1998, West Bengal State Electricity Board approved the revised cost by Resolution at Rs. 1853 crores and the same was intimated to the licensee. Along with the Resolution, the Committees Report also had been appended. On 4th of June, 1998, the Government of West Bengal, Department of Power, directed the Board to communicate the decision of the Board, approving the revised project cost under Section 44 of the Supply Act to the licensee. Finally on 11th of June, 1998, the Board intimated the licensee with regard to its approval of the revised project cost of Budge Budge Project at Rs. 1853 crores under Section 44 of the Supply Act and along with it forwarded the copy of the Report of the Committee and the Minutes of the Boards Resolution. Since entire project cost furnished by the

licensee had not been approved by the Board, as stated earlier, the licensee wrote a letter to the CEA, requesting him to refer the dispute to the Arbitration under Section 44(3) of the Supply Act. Before the CEA, the licensee also filed his Statement of claims on 16th of December, 1998. The Board, on the other hand, filed an application under Section 16(2) and 16(3) of the Arbitration & Conciliation Act, 1996 against the appointment of CEA as arbitrator, contending inter alia that the approval of the revised project cost was not contemplated under Section 44 of the Supply Act and, therefore, CEA had no authority to arbitrate on the dispute, if any. Board then filed an application under Section 13(2) of the Arbitration & Conciliation Act, 1996, challenging the appointment of the Arbitral Tribunal. The arbitrator passed an Award on 13th of July, 1999, dismissing the applications filed by the Board under Section 13 and Section 16 of the Act. The Board then filed a writ petition in Delhi High Court, but that was withdrawn with liberty to file in the appropriate forum. Arbitrator then passed an award, determining the revised project cost at Rs.2295.57 crores on 12th of January, 2000. Against the Award, an objection was filed by the Board, which was heard by a learned Single Judge of the Calcutta High Court. The objection was essentially on the ground that the dispute regarding escalated project cost would not be a dispute under Section 44 of the Supply Act and, therefore, provisions contained in Section 44(3) will not apply and consequently, the Award is without jurisdiction and a nullity. The licensee, on the other hand reiterated before the Single Judge that the project cost as well as the revised project cost would be a matter coming under Section 44 of the Supply Act and, therefore, any dispute in relation to the same would be arbitrable under Section 44(3). It was also contended that all the parties namely the licensee, the Board, the State Government, as well as the Electricity Authority have understood that the project cost was the matter covered under Section 44 and, therefore, it would not be open for the Board to take a stand that such project cost is outside the purview of Section 44 and as such is not arbitrable under Sub-section (3) of Section 44 of the Supply Act. The learned Single Judge on an analysis of Section 44 of the Supply Act, was persuaded to accept the contention of the Board and held that the subject matter of arbitration was beyond the scope of the statutory provision under Sub-section (3) of Section 44 and as such the award passed by the Electricity Authority is without jurisdiction and is liable to be set aside. The licensee being aggrieved by the aforesaid order of the learned Single Judge, filed an appeal before the Division Bench and the Division Bench of Calcutta High Court by the impugned judgment, having allowed the appeal, on setting aside the conclusions and finding of the Single Judge, the present appeal by grant of special leave has been filed in this Court by the Board.

Mr. V.R. Reddy, the learned senior counsel, appearing for the appellant-Board, contended that on a plain reading of Section 44 of the Supply Act, it is difficult to comprehend that the approval of the project cost comes within the purview of the said Act and as such any dispute relating to the project cost, will not be a dispute arising out of the provisions contained in Section 44 and as such is not arbitrable under Sub-section (3) of Section 44 of the Supply Act. Mr. Reddy further contended that it is true that the Board itself has approved and given its consent to the revised cost to the tune of Rs. 1853 crores, but that was under the pressure from the State Government and such decision of the

Board cannot be construed to bring within the sweep of Section 44 of the Act, any dispute on the project cost. Mr. Reddy also urged that Section 44 of the Supply Act, confers power on the Board to give consent in writing for establishment of a new generating station or to extend or replace any major unit of plant or works pertaining to the generation of electricity in a generating station and under the proviso to Sub-section (1) of Section 44, such a consent can be withheld within three months from the date of receipt of an application only under two contingencies, as provided in Clauses (a)(i) & (ii). According to Mr. Reddy, on a fair reading of the provisions contained in Section 44 of the Supply Act, the question of approval of the project cost of a generating station, would not come within the ambit of Section 44 and as such, the Division Bench of Calcutta High Court committed serious error in holding that the dispute relating to the project cost is an arbitrable dispute under Section 44(3) of the said Act.

Mr. Shanti Bhushan, the learned senior counsel, appearing for the licensee-respondent, on the other hand contended that all the parties namely the CEA, the Government of West Bengal and the Board have all along understood that the project cost comes within the purview of Section 44 of the Act and various documents would establish the aforesaid understanding of the provisions of the Act. That being the position and parties having acted on the said understanding and the Board itself having approved the project cost on 22.5.1998 at Rs. 1853 crores, and thereby having exercised power under Section 44, is not entitled to raise the question that the cost of the project would not come within the purview of Section 44 and, therefore, the dispute in relation to the project cost, cannot be an arbitrable dispute under Section 44(3) and consequently, challenging the jurisdiction of the arbitrator. Mr. Shanti Bhushan also contended that Board's power to withhold consent in the event the Board can show to the applicant that the electricity required by him could be more economically obtained within a reasonable time from another appropriate source, as provided in Section 44(1) proviso (b)(ii) indicate that the Board must know the project cost of the applicant or else it will not be possible for the Board to find out whether the required electricity could be economically obtained from any other appropriate source. That being the position, the project cost would be a matter within the ambit of Section 44 and consequently, any dispute relating to the project cost will be an arbitrable dispute under Section 44(3). Mr. Shanti Bhushan further urged that the cost of the project being an essential particular, required to be furnished in every application filed under sub-section (1) of Section 44, on the basis of which, the Board has given a consent, any escalated revised cost will be a material variation to the said particular for which a further consent of the Board would be necessary under sub-section (2) of Section 44. In the case in hand, the Board in fact has given its further consent to the revised cost of Rs. 1853 crores, and thus the dispute arises between the Board and the licensee with regard to the said revised cost in respect of which, further consent has been given by the Board and in this view of the matter, the Division Bench of the Calcutta High Court was fully justified in holding that the dispute is in relation to the provisions contained in Section 44 and as such arbitrable and the Award cannot be held to be without jurisdiction.

In view of the rival submissions, the sole question that arises for consideration is whether a dispute relating to escalated project cost of a generating station would come within the purview of sub-section (3) of Section 44 of the Supply Act? The Ministry of Power, Government of India is primarily responsible for development of electrical energy in the country. It is concerned with perspective planning, policy formulation, processing of projects for investment decisions, monitoring of the projects, training and manpower development and the administration and enactment of legislation with regard to power generation, transmission and distribution. It is also responsible for the administration of the Supply Act as well as the Indian Electricity Act, 1910. Government of India, under the Ministry of Power, constituted the Investment Promotion Cell as a nodal agency to provide information and assistance to prospective entrepreneurs in the electricity sector. Setting up of the aforesaid Cell provided initiative to involve the private sector in power generation in a much bigger way. It provides information on the policy regarding private sector participation and provides guidance on the clearances to be obtained and the modalities for obtaining these. Under Section 3 of the Supply Act, 1948, a statutory body has been constituted, called the Central Electricity Authority [for short CEA]. This authority is charged with the responsibilities to develop a sound, adequate and uniform National Policy in relation to the control and utilization of national power resources. The said authority also conducts the techno-economic appraisal of the Project reports in respect of setting up of generating stations in the country. Under the aforesaid Supply Act of 1948, the Board is constituted by the State Government and the main functions of the Board are to generate, transmit and distribute electricity in coordination with the generating companies, if any, operating in the State and with the Central Government or any other Board or agency having control over a power system; transmission and distribution of electricity within the State; and exercise of control in relation to generation, distribution and utilization of electricity within the State. A Licensee is one, who has been granted a license by the State Government, in consultation with the State Electricity Board to supply energy in any specified area, under Section 3 of the Indian Electricity Act, 1910 as well as Supply Act of 1948. Generating company is set-up under Section 15A of the Supply Act. The Parliament has enacted the Electricity Regulatory Commissions Act of 1998, under which the Central Electricity Regulatory Commission has been set up, the main functions of which are to regulate the tariff of generating companies owned or controlled by the Central Government, to regulate the tariff of generating companies other than those owned or controlled by the Central Government and to regulate the inter-State transmission of energy including tariff of the transmission utilities. Besides, it regulates inter-State bulk sale of power and to aid and advise the Central Government in formulation of tariff policy. This Regulatory Commission has been constituted since 24th of July, 1998. Under Section 17(1) of the Regulatory Commissions Act of 1998, even the State Electricity Regulatory Commission is envisaged. In the case in hand, we are not concerned with the Regulatory Commission or its role. The respondent, admittedly is the licensee. Under the Electricity (Supply) Act, 1948, Chapter V deals with the preparation and sanctioning of scheme. Ordinarily, the Board or a generating company may prepare a scheme relating to the establishment or acquisition of

generating stations, sub-stations or transmission lines and such scheme estimated to involve a capital expenditure exceeding such sum, as may be fixed by the Central Government by notification in the official Gazette, must get the concurrence of the authority. Section 29 occurring in Chapter V, provides the procedure to be adopted and Section 30 deals with the matters required to be considered by the authority before concurring to a scheme, submitted to it under sub-section (1) of Section 29. Apart from the Board or a generating company being the author for production of power, any licensee also has a right to establish new generating stations, as provided in Section 44 of the Supply Act. The provision contained in Section 44 is an independent one and has nothing to do with the general scheme, contemplated in Chapter V and the provisions of Section 44 start with a non obstante clause. Under Sub-section (1) of Section 44, it shall not be lawful for a licensee, except with the previous consent in writing of the Board to establish or acquire a new generating station, but such a consent being sought for, the Board has a limited right within the prescribed period to withhold the consent, if the Board gives an undertaking to the licensee that it is competent to, and will, within twenty four months from the said date, afford to the licensee, a supply of electricity sufficient for his requirements, pursuant to his application or if the Board shows to the applicant that the electricity required, could be more economically obtained within a reasonable time from another appropriate source, then it can withhold the consent, required under Section 44(1), but that again has to be done within three months from the date of receipt of the application. It would thus appear that the Board can withhold the consent under two clauses of Section 44(1) proviso (a), but that has to be within three months from the receipt of the application. Section 44(2) of the Supply Act is materials for our purpose and the same may be extracted hereinbelow in extenso:

Sec. 44(2). There shall be stated in every application under this section such particulars as the Board may reasonably require of the station plant or works, as the case may be, in respect of which it is made, and where consent is given thereto, in acting in pursuance of such consent, the applicant shall not, without the further consent of the Board, make any material variation in the particulars as stated.

A plain reading of the aforesaid sub-section would indicate that an applicant is bound to furnish all such particulars which the Board may reasonably require to enable the Board to give its consent and where a consent is given, then while acting in pursuance of that consent, the applicant shall not without further consent of the Board, make any material variation in the particulars, so stated. If the project cost is one of the particulars required to be given by an applicant, while making an application under sub-section (1) of Section 44, then in the event, Board gives the consent and while acting in pursuance of that consent, the project cost varies, then for such variation, further consent of the Board would be necessary, as provided under sub-section(2) of Section 44. Since the Board could withheld the consent, if it shows to the applicant that the electricity required by him could be more economically obtained within a reasonable time from another appropriate source, to arrive at such conclusion, it would be reasonable to infer that the applicant must indicate the project

cost in its application for consent. If the project cost is not indicated in the application for consent, then the Board will not be in a position to find out whether the electricity required by the applicant could be more economically obtained from another appropriate source within a reasonable time and, therefore, in our view it is necessary for every applicant while invoking power of the Board under sub-section (1) of Section 44 to obtain the previous consent in writing for establishment of a generating station to indicate the cost of the project. This being the position, where consent is received on the basis of the project cost indicated in the application, while acting in pursuance of such consent, if the project cost varies, then it would be a material variation of an important particular and consequently, a further consent of the Board would be necessary under sub-section (2) of Section 44. In the case in hand, the original consent of the Board had been obtained and while acting in pursuance of such consent, it was found that the project cost has got escalated and application for further consent was made to the Board and the Board also did accord its further consent at Rs. 1853 crores, which was communicated to the applicant-licensee. While the applicant-licensee had indicated the revised project cost at a much higher figure but the Board approved the revised cost at Rs.1853 crores and this further consent on the basis of revised cost can only be under sub-section (2) of Section 44 and in fact the Board also communicated the same in the purported exercise of power under sub-section (2) of Section 44. The further consent in respect of the revised project cost having been given under sub-section (2) of Section 44, a dispute did arise within the ambit of sub-section (3) of Section 44 and, therefore, the authority concerned contemplated under sub-section (3) of Section 44, gets jurisdiction to arbitrate upon the dispute between the parties and in the case in hand, the said authority ultimately passed an award. In view of our analysis, as stated above, it is difficult for us to sustain the argument of Mr. Reddy, appearing for the Board that the so-called dispute regarding the project cost, cannot be a dispute arising out of the provision of Section 44 and as such would not be arbitrable under sub-section (3) of the said Section. We, therefore, are in agreement with the conclusion of the Division Bench of Calcutta High Court and hold that the dispute in question did come within the purview of sub-section (2) of Section 44 and as such was arbitrable under sub-section (3) thereof and the award cannot be held to be without jurisdiction, as contended by the Board.

There is yet another facet in the case in hand, namely how the Board itself as well as the authority have themselves understood the provisions of the Act. The concerned authority, who was the statutory arbitrator under sub-section (3) of Section 44, while deciding the question of jurisdiction, unequivocally came to the conclusion that Section 44(1)(a)(ii) brings within its sweep the cost aspect of the project which is important for taking decision regarding establishment or acquisition of a generating station and the revision of cost is also being done under said section 44. With this conclusion it rejected the prayer of the Board, challenging the jurisdiction of the arbitrator. When the question of revision of project cost cropped up, the Chief Engineer of the Board by its letter dated 4.12.1996 called upon the licensee to furnish the detailed break up of the cost estimate, while it furnished the application originally in the year 1991 and the revised cost claimed by the licensee to the tune of Rs.2220 crores. On 18th of December, 1996, the

Joint Secretary to the Government of West Bengal also called upon the licensee to submit a detailed proposal for revision of the project cost, as required under Section 44 of the Supply Act. Again on 4th June, 1998, the Government wrote to the Board, requiring the approval of the Board to the revised project cost under Section 44 of the Act. On the very same date, that is on 4th June, 1998, the Government also wrote to the licensee that under the provisions of the Electricity Supply Act, the revised cost of the project of the licensee has to be worked out and approved by the State Electricity Board under Section 44 of the said Act and in the event the licensee is not satisfied with the decision of the Board, then the relief is available in the Supply Act itself, obviously referring to an arbitrator under sub-section (3) of Section 44. On 11th June, 1998, the Board wrote to the licensee that after careful and detailed examination of all data and records furnished by the licensee, the Board in its 505th meeting held on 22nd May, 1998, resolved that the reasonable project cost would be Rs. 1853 crores and as such the Board approves the revised project cost at Rs. 1853 crores under Section 44 of the Electricity (Supply) Act. The Board, therefore not only understood that the project cost is required to be approved under Section 44, but did take a decision, approving the reasonable revised project cost at a particular figure in exercise of its power under Section 44. The Board having exercised power under Section 44 and having approved the revised cost at a particular figure, cannot take a stand when the dispute regarding the project cost was referred to the authority for arbitration that the project cost does not come within the purview of Section 44. Thus, apart from our conclusion on interpreting the provisions of Section 44 of the Electricity (Supply) Act, the conduct of the Board itself disentitles it to take a stand that the revised project cost would not come within the ambit of Section 44 of the Supply Act. In the aforesaid premises, we do not find any merits in the contention of Mr. Reddy, challenging the jurisdiction of the arbitrator to entertain the dispute regarding the reasonability of the revised project cost. In our considered opinion, the dispute is one, which comes within the ambit of Section 44 and as such arbitrable under sub-section (3) of Section 44 and the Award cannot be held to be without jurisdiction. The conclusion of the Division Bench of the Calcutta High Court on this score remains unassailable.

Mr. Reddy, then contended that the High Court was not justified in making any observations with regard to the impact of the revised project cost on the tariff, as the same was not a subject matter and the only question that had been raised before the High Court was whether the arbitrator had the jurisdiction or not. We find sufficient force in the aforesaid contention of Mr. Reddy and Mr. Shanti Bhushan, the learned senior counsel, appearing for the licensee also fairly stated that it was not necessary for the High Court to make any observation as to what would be the effect of the reasonable project cost on the tariff structure. While, therefore, upholding the Division Bench Judgment of the Calcutta High Court, we further observe that it was not at all necessary for the High Court to go into the question of impact of the project cost upon the tariff structure and any observations made in respect of the same are set aside.

This appeal is accordingly dismissed with the aforesaid observations. There will be no order as to costs.

.....J.
(G.B. PATTANAIAK)

.....J.
(RUMA PAL)

December 04, 2001.

JUDIS