

PETITIONER:

(WITH C.A.NOS.1934, 1938, 1940-43 OF 1989,C.A.NO.8956/96

Vs.

RESPONDENT:

DATE OF JUDGMENT: 27/05/1996

BENCH:

B.L. HANSARIA

ACT:

HEADNOTE:

JUDGMENT:

[With C.A. Nos.1934, 1938, 1940-43 of 1989, C.A.Nos of 1996 (arising out of SLP (C) Nos.11085, 10377, 11907, 9282, 9184, 8644, 7164, 9646, 9534, 9430, 11605, 10408, 10246, 10255, 10257, 10285, 10329, 15187, 14467, 11949, 11948, 10085, 11951, 9538, 9419, 9142, 9288 and 9259 of 1989, 17538, 17522, 17521, 17520, 17519, 17529, 17528, 17543, 17525, 17524, 17523, 17542, 17541, 17540-40A, 17539, 17536, 17535, 17534, 17533, 17532, 17531, 17530, 17527, 17526 of 1993, CC Nos.1269, 1084 and 1055 of 1989]

Bihar State Electricity Board and others

V.

Parmeshwar Kumar Agarwala etc.etc.

J U D G M E N T

HANSARIA, J.

Theft of electricity has become so chronic a disease that there can be no doubt that all efforts must be made to curb the same; not only to make the State Electricity Boards viable, but also to ensure regular supply of electricity to the lawful consumers at reasonable tariff.

2. The facet of theft of electricity with which these appeals are concerned relates to the mischief of consumers to tamper with the meters, first to slow it down and then to make the same defective. The basic idea behind this is that the general terms and conditions governing the agreement between Electricity Boards and the consumers require that in such a case reading of the meter shall be based on the average reading of previous three months, in which the meter ran correctly and reading was duly recorded. Section 26 of the Indian Electricity Act, 1910, hereinafter the 1910 Act, is on the subject of "Meters" and sub-section (1) of this section requires that the amount of energy applied to the consumer shall be ascertained by means of a correct meter. Sub-section (6) has provided that where any difference or dispute arises as to whether any meter is or is not correct, the matter shall be decided, upon the application of either party, by an Electrical Inspector. Further steps are required to be taken as per the opinion of such Inspector.

3. Confronted with the aforesaid position, the Bihar State Electricity Board (for short, the Board) found itself

suffering heavy financial loss to the tune of several crores. It, therefore, arranged a meeting of the General Managers - cum - Chief Engineers on 12.6.1982 and decided, inter alia, that the assessment of the aforesaid type of consumers, should be made, in the case of low tension industrial consumers at 30% load factor and in case of high tension industrial consumers at 45% load factor, during the period their meters remained defective.

4. On the aforesaid decision put to implementation, some consumers approached the High Court of Judicature at Patna by filing a writ petition (CWJC No.2250 of 1984) in which it was held that the decision dated 12.6.1982 having far reaching consequences and having not been taken by the Board itself, could not be sustained. It was also pointed out that the power to amend tariff lay with the Board in exercise of powers under sections 46 and 49 of the Electricity (Supply) Act, 1948 to be referred hereinafter as the 1948 Act. The High Court, therefore, quashed the decision dated 12.6.1982.

5. The Board thereafter issued a Notification on 16.2.1987 invoking its power under sections 46 and 49 of 1948 Act and decided to bill industrial consumers in the line of the decision taken earlier. The Notification reads as below :

"In view of the observations of the Hon'ble High Court in its order dated 25.8.86 passed in C.W.J.C.No.2250/84 filed by Sri Vishnu Re-Rolling Mills against the Bihar State Electricity Board and others, the B.S.E.Board, in its resolution No.5873 taken in the 388th meeting of the Board held on 23.1.1987, after taking into consideration all the aspects of the matter, has decided and resolved to bill L.T.I.S. (meaning, Low Tension Industrial Sector?) consumers at 30% load factor, H.T. (meaning, High Tension) consumers at 45% load factor, for the period the meter remained defective or non-working, with effect from 12.6.92.

Accordingly, it is hereby notified that by virtue of the power conferred under sec.46 and 49 of the Electric Supply Act, 1948, the Bihar State Electricity Board, has decided to bill LTIS consumers at 30% load factors, H.T. consumers at 45% load factors and commercial consumers at 30% load factors for the period meter remained defective or non-working with effect from 12.6.82."

6. This notification came to be challenged by a number of consumers and the judgments impugned in these appeals relate to the view taken by the High Court qua this notification. The High Court has quashed the notification, not only the retrospective part of it, but the whole of it, being of the view that the Board had no power to issue the same. In these appeals by special leave, the Board has challenged the legality of the view taken by the High Court.

7. Shri Sibal, appearing for the appellant-Board, made a submission, when the appeals were taken for hearing, that he was not in a position to find fault with that part of the

judgment of the High Court by which retrospective operation of the notification has been set aside. He, however, strenuously contended that the notification could not have been quashed in its entirety by regarding the same as ultra vires. We would, therefore, address ourselves to this stand only of Shri Sibal.

8. The notification having been issued in exercise of powers under sections 46 and 49 of the 1948 Act the learned counsel first referred us to section 49 of this Act, which is on the subject of "Effect of other laws". In sub-section (1) of this section, it has been stated that no provision of the Indian Electricity Act, 1910 or of any rules made thereunder, shall have any effect, so far as it is inconsistent with any of the provisions of 1948 Act. It was, therefore, urged that in case of conflict between the two statutes, namely, 1910 and 1948 Acts, the provision contained in the latter shall prevail. This legal position cannot assist the Board, as what has been provided in section 70 cannot protect the notification, because the same is not a part of the provision of the 1948 Act, but has been issued with the aid of the provision of this Act.

9. It is because of this that the learned counsel referred us to section 49 of the 1948 Act and we were addressed on the width of the power given to the Board by various sub-sections of this section. The one which was specifically mentioned is sub-section (3), which has laid down that nothing in the foregoing provisions of the section shall derogate from the power of the Board to fix different tariffs for the supply of electricity to any person not being a licensee, having regard to some objects mentioned in the sub-section and "any other relevant factors".

10. Shri Sibal referred us to certain decisions of this Court in which the width of the power of the Board conferred by section 49 had come to be examined. These decisions are:

(1) New Central Jute Mills Co. Ltd. v. U.P. State Electricity Board, 1993 (Supp) SCC 581; and (2) Ferro Alloys Corporation Ltd. v. A.P. State Electricity Board, 1993 (Supp) 4 SCC 136. In the first of these decisions the view taken by a two-Judge Bench of this Court was that the expression "any other relevant factors" appearing in section 49(3) was not to be construed ejusdem generis; and that the combined effect of section 49 and the terms and conditions of supply was that having regard to the nature of supply and other relevant factors, the Board had the power to enhance the tariff rates. What had happened in New Central Jute Mills's case was that the U.P. Electricity Board had levied a surcharge of 5.5 paise per unit of electricity drawn in excess of the permissible 70% authorised by the State Government. As the State Government had imposed a ban on drawing electricity in excess of 70% in exercise of powers under section 22-B of the 1910 Act, it was contended that the Board had no legal authority to levy the surcharge. This contention was not accepted by pointing out the agreement with the Board being silent on this aspect, the Board was justified in invoking its power under section 49(3).

11. In the second of the aforesaid decisions, this Court, while upholding the validity of section 49, approved the condition imposed by the regulations framed by the Board, which required a consumer to make security deposit, as under clause VI of the Schedule to the 1948 Act, supply of energy by the Board is to be made after a written contract is executed with sufficient security. Another provision of the Act noted by the Court also permitted Board to require any consumer to deposit security for payment of the monthly energy bills. The non-payment of interest by the Board on

the deposit made was approved as none of the concerned statutes created such an obligation.

12. Thus, these two decisions do not advance the case of the Board qua the validity of the notification (except that different tariffs could have been charged from different industrial concerns, which, as per the High Court, however, could not have been done) because in those cases the Board had done nothing against the terms and conditions on which it had agreed to supply energy, which the Board is said to be doing hereby force of the notification.

13. This takes us to the main objection of the High Court to the notification which is that it is inconsistent with the terms and conditions of the agreement entered into between the Board and the consumers. The submission of Shri Sibal on this facet of the case was that clause 11 of the agreement, read with clause 14, permits the Board to vary the conditions which find place in clauses 3(c) and 6, which are the two clauses said to have been violated by the notification.

14. To appreciate this submission, let the aforesaid four clauses be noted. These read as below:

"3.(a) *** **

(b) *** **

(c) Subject to clause 6 appearing hereinafter in the agreement, in the event of any meter ceasing to register or found to be defective or the Board's employee having been unable to read meter. the reading during the period of each cessation or defective registration or non-reading shall be based on the average reading of the previous three months, in which the meter ran correctly and reading was duly recorded. In taking such average due regard shall be given to the conditions of working month under dispute and during the previous three months. In case of failure to take reading by the Board's employee, proper adjustment shall be made when actual reading is taken next.

6. Should the consumer dispute the accuracy of any meter not being his own property, the consumer may upon giving notice and paying the prescribed fee have the meter officially tested by the Electric Inspector, Government of Bihar, in accordance with sub-section (6) of Section 26 of the Indian Electricity Act, 1910. In the event of the meter being tested by the Electric Inspector, Government of Bihar, and found to be beyond the limits of accuracy as prescribed in the Indian Electricity Rules, 1956, or any other statutory modification thereof as may be in force from time to time the testing fee will be refunded and the amount in respect of the meter readings of three months prior to the month in

which the dispute has arisen or of three months as provided in clause 3(c) above, as the case may be, will be adjusted in accordance with the result of the test taken, due regard being paid to the conditions of working during the month under dispute and during the previous three months.

11. This agreement shall be read and construed as subject in all respects to the provisions of the Indian Electricity Act, 1910, rules framed thereunder and the Electricity (Supply) Act, 1948 together with rules, regulations (if any) tariffs and terms and conditions for supply of electricity framed and issued thereunder and for the time being in force as far as the same may respectively be applicable and all such provisions shall prevail in case of any conflict or inconsistency between them and the terms and conditions of this agreement.

14. The Board shall be at liberty at any time to alter the demand charges, energy charges including fuel-surcharge and minimum guarantee charges as set out in the Schedule appended hereto and this Schedule shall be deemed as having been automatically revised with effect from the date the Board enforces new tariff for the consumer."

15. Shri Ganguli, who addressed us on behalf some of the respondents, urged orally, as well as in A submissions, that the aforesaid clauses have to be read and construed harmoniously. To this, it was added by Shri Sanyal, appearing for other respondents, that clause 11 has not mentioned about any "notification".

16. Before we advert to the effect produced by a combined reading of the four clauses, it deserves to be pointed out that the terms and conditions have sacrosanctity, in that Rule 27 of the Indian Electricity Rules, 1956, framed by the Central Electricity Board in exercise of power under section 37 of 1910 Act has, read with Annexure VI thereof, provided the model conditions of supply which are required to be adopted by the State Boards. It is on the basis of this statutorily prescribed model, with suitable variations, that energy had been supplied by the Board to the consumers. The model conditions can be said to be akin to the model Standing Orders prescribed by Industrial Employment (Standing Orders) Act, 1946, which, when certified, become part of the statutory terms and conditions of service between the employer and employees and they govern the relationship between the parties, as held in *Workmen v. Firestone Tyle & Rubber Co.Ltd.*, 1973 (1) SCC 813(832). We are inclined to think that similar is the effect of terms and conditions, on which a State Board supplies energy to the consumers.

17. We may now see what clause 11 has provided. It has

stated that the provisions 1910 and 1948 Acts together with the rules and regulations, if any, shall prevail, in case of any conflict or inconsistency between them and the terms and condition of the agreement. Nothing has been mentioned in this clause about any notification issued by the Board; and the agreements at hand being earlier in point of time to the impugned notification, we are of the view that the stipulation made in the notification cannot override the terms and conditions mentioned in clauses 3(c) and 6.

18. Clause 14 deals with alteration of various energy charges and states that on the charges being altered, the tariff shall become realisable accordingly. This clause has dealt with : (1) demand charges; (2) energy charges; and (3) minimum guarantee charges. The expression 'demand charges' means minimum consumption guarantee charges. (See para 5 of *Ashok Soap Factory v. Municipal Corporation of Delhi*, 1993 (2) SCC 37). A perusal of this para also shows that for big consumers of electricity, there is two-part tariff system, i.e. it is comprised of two charges : (1) minimum consumption guarantee charges (called demand charges); and (2) energy charges for actual amount of energy consumed. In the Schedule to this present agreement also, para 5(a) deals with demand charge and 5(b) with energy charge. Rates of each has also been mentioned. Clause 14 has empowered the Board to alter rates of these charges.

19. In *Ashok Soap Factory* case, this Court dealt with the power of the Board to alter the rate of demand charges (which had been enhanced from Rs.40/- per KVA to Rs.340/-) and the same was sustained, because valid reasons existed for the enhancement (theft of electricity and defective meters recording extremely low consumption causing loss of huge revenue) and the particular clause in the agreement (quoted in para 15) permitted increase in the rates.

20. Though in the case at hand, the motivating factor for the issuance of the notification is similar to the one as was in the aforementioned case, we don't think if clause 14 can be pressed into service to sustain the notification, as present is not a case of alteration of charges mentioned in the clause; it really seeks to introduce an unknown mode of charging for energy, which is not visualised by the agreement entered into between the parties. This apart, a harmonious reading of clauses 3(c), 6 and 14 would not permit us to say that clause 14 has overridden what has been provided in clauses 3(c) and 6.

21. This is not all, as it has been held by this Court in *M.P. Electricity Board vs. Bassantibai*, 1988 (1) SCC 23, that section 26(6) of the 1910 Act does not authorise the Electricity Boards to issue any supplementary bill in respect of the energy consumed during the pendency of the dispute with an Electrical Inspector. We have mentioned about this decision because pursuant to the notification, the Board did submit supplementary bills to the respondent-consumers. It seems to us that this action was really in conflict with the statutory provision contained in section 26(6) of 1910 Act, as interpreted by this Court in *Basantibai's* case.

22. The only other point urged by Shri Sibal, which needs to be dealt with, is relatable to the power of the Board under section 26 of the 1948 Act. We do not think the provisions of this section can assist the appellant Board in any way to sustain the notification, as that section has only provided that the Board shall have, in respect of the whole of any State, all the powers and obligations of a licensee under the 1910 Act. This section thus provides no shield to the Board insofar as its present dispute with the respondents is

concerned.

23. For the reasons aforesaid, we are constrained to dismiss the appeals, much though we would have liked to lend our support to the Board in its effort in effectively deal with theft of electricity caused by manipulation of meters, which is a known evil. Despite the laudable object which the Board sought to achieve by issuing the notification, we are of the view that the same has not been done in accordance with law.

24. The appeals are, therefore, dismissed, leaving the parties to bear their own costs throughout.

JUDIS