BISRA STONE LIME COMPANY LTD. & ANR. ETC.

v.

ORISSA STATE ELECTRICITY BOARD & ANR.

October 21, 1975

[P. K. GOSWAMI AND N. L. UNTWALIA, JJ.]

Electricity (Supply) Act, 1948—*S.* 49—*Surcharge on electricity—Whether Electricity Board could levy.*

Dispute between parties referred to arbitrator—If court could withdraw and deal with it.

Under cl. 13 of the agreement between the parties the tariff and conditions of supply of electricity were subject to any revision that may be made by the supplier from time to time. Clause 23 states that any dispute or difference arising between the consumer and the supplier shall be referred to an arbitrator. The respondent issued a press note deciding to levy a surchage of 10 per cent on certain categories of customers, which included the appellants. The appellants challenged the levy but the High Court dismissed their writ petitions.

On appeal to this Court it was contended that (1) the Board had no power under the Act to levy a surcharge, (2) cl. 13 of the Agreement could not take in the levy of surcharge and as such it is not a matter for reference to arbitration under cl. 23 of the agreement and (3) in exempting certain categories and imposing surcharge upon the appellants the Board was guilty of discrimination, which is impermissible under s. 49 of the Act and cl. 2 of Schedule I to the Agreement.

Dismissing the appeals,

HELD : (1) Enhancement of the rates by way of surcharge is well within the power of the Board to fix or revise the rates of tariff under the provisions of the Act. The word "surcharge" is not defined in the Act. Etymologically it stands for an additional or extra charge or payment, and in the present case it is in substance an addition to the stipulated rate of tariff. [311 A-B; 310H]

(2) (i) It is only where there is nothing in a special agreement with regard to revision of rates during the subsistence of the agreement that the existence of the special agreements prevents any increase of the rates stipulated in the special agreements by adding the surcharge. In the present case cl. 13 of the agreement provides for revision of rates and the surcharge is not absolutely different from rates of tariff because the effect of the levy of surcharge would be to enhance the rates of supply of electricity stipulated under the agreement. [312 A-B]

M/s. Titagarh Paper Mills Ltd. v. *Orissa State Electricity Board and Another*, [1975] 2 S.C.C. 436, followed.

Indian Aluminium Company v. *Kerala State Electricity Board*, [1975] 2 S.C.C. 414, explained.

Therefore, the matter in dispute is covered by the arbitration clause of the Agreement. [313 B]

(ii) Although the press note did not recite any provision of the Act, mere omission to do so did not disentitle the Board to rely upon clause 13 for a claim to revision of the rates. [314 C]

(iii) This is not a fit case for the Court in its discretion, to withhold the matter from arbitration and itself deal with it merely because the Court has discretion to do so under s. 34 of the Arbitration Act or under Art. 226 of the

A Constitution and that the Court is better posted to decide such questions. The arbitration clause is of wide amplitude, taking in its sweep even interpretation of the agreement and necessarily, therefore, of cl. 13. [314 F]

(3) The totality of the provisions under s. 49 does not give any scope for the plea of discrimination raised in this case and in view of cl. 13 of the agreement itself. As regards the various industries which have not been subjected to the charge, it is not known whether there is a similar provision like cl. 13 in the agreements. [313 G-H]

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When the law makes it obligatory for certain special agreements to continue in full force during their currency stultifying the power of the Board to revise the rates during the period, no ground of discrimination can be made out on the score of exempting such industries as are governed by special agreements. [314 B]

M/s. Titagarh Paper Mills Ltd. v. *Orissa State Electricity Board and Another*, [1975] 2 S.C.C. 436, applied.

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CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 106 and 107 of 1975.

Appeals by Special Leave from the Judgment and Order dated 18-10-74 of the Orissa High Court in O.J.C. Nos. 851 and 850 of 1972 respectively.

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S. V. Gupte (In CA 107/75) and *Vinoo Bhagat* for the Appellant.

G. Rath, Advocate General, and *B. Parthasarthi* for Respondent No. 1 (In CA 106/75 and Respondent in CA 107/75).

The Judgment of the Court was delivered by

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GOSWAMI, J. This judgment will govern both the above mentioned appeals.

We may take the facts briefly from Civil Appeal No. 107 of 1975.

The Orissa Textile Mills Limited is a public limited company (briefly the company) and is engaged in manufacture of textile articles. It is located at Choudwar in the District of Cuttack (Orissa). On May 12, 1960, the company (described in the agreement as Consumer) entered into an agreement with the State of Orissa (described in the agreement as the Supplier) for supply of electric power. The contract was for a period of five years from the date of supply of electric power, namely, February 1, 1963 and it was thereafter to so continue unless and until the same was determined by either party giving to the other six calendar months' notice in writing of the intention to terminate the agreement. It is common ground that the agreement has not been terminated.

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It may be appropriate at this stage to refer to a few clauses in the agreement. Clause 12 provides for charges to be paid by the consumer as well as about maximum demand. Clause 13 reads as follows :—

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"The tariff and conditions of supply mentioned in this Agreement shall be subject to any revision that may be made by the Supplier from time to time".

Clause 22 deals with extra charge regarding domestic lighting, fans, domestic power and street lighting, etc. in the colony of the Mills. Clause 23 reads as follows :— A

> "Any dispute or difference arising between the Consumer and the Supplier or their respective Electrical Engineers as to the supply of electrical energy hereunder or the pressure thereof or as to the interpretation of this Agreement or the right of the Supplier or the consumer respectively to determine the same or any other question, matter or thing arising hereunder shall be referred to a single arbitrator who shall be mutually agreed upon by both parties. The arbitrator's decision thereon shall be final and the provisions of the Arbitration Act of 1940 (X of 1940) or of any other statutory modification thereof for the time being in force shall apply to any such reference". B C

On April 1, 1962, the Orissa State Electricty Board (briefly the Board) was constituted by the State Government under section 5 of the Electricity (Supply) Act, 1948 (briefly the Act). Under section 60(1) of the Act "all debts and obligations incurred, all contracts entered into and all matters and things engaged to be done by, with or for the State Government for any of the purposes of this Act before the first constitution of the Board shall be deemed to have been incurred, entered into or engaged to be done by, with or for the Board...." By this section, therefore, the Board assumed all obligations of the State Government in respect of matters to which the Act applied. It is common ground that the contract entered between the company and the State Government is binding on both. D E

The Board decided to levy a surcharge of 10 per cent on the power tariff then in force with effect from July 1, 1972, and a Press Note was issued accordingly. The material portion of the Press Note may be extracted : F

> "The Orissa State Electricity Board has decided to levy a general and uniform surcharge of 10 per cent on the power tariff now in force except on the following categories of consumers who will pay the existing tariff :—
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> (1) Power Intensive Industries which are governed by Special Agreements.
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> (2) Domestic power and lighting. G
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> In respect of irrigation loads (pumping and agriculture) the power tariff will be Re. 0.16p (sixteen paise) per unit (Kwh) with a rebate of Re. 0.01p (one paise) per unit 'KwhP' for timely payment....
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> The above levy of surcharge of 10 per cent is also applicable to the power supply to the Hindustan Steel Ltd., Rourkela and Kalinga Iron Works, Barbil. H

A The levy of 10 per cent surcharge will be on demand charges, unit charges, maximum and minimum charges and reservation charges.

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The levy of surcharge and revised tariff for irrigation loads has become necessary for improving the Board's B overall financial return and enabling it to undertake larger developmental programmes like rural electrification.

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It appears that the second purpose in the above Press Note with reference to "larger developmental programmes like rural electrification" C was omitted by a revised Press Note.

The company unsuccessfully challenged the levy of the surcharge by an application under article 226 of the Constitution in the Orissa High Court. Several contentions were raised in the petition before the High Court. The surcharge was, *inter alia,* challenged as being violative of article 14 of the Constitution. This objection was repelled by the High Court and the learned counsel apearing on behalf of D the company was unable to press the same before us in view of the Presidential suspension of that article during the emergency.

Some other grounds, including that clause 13 is *ultra vires* the Act, were taken before the High Court but have not been pressed before us.

Mr. Gupte, the learned counsel appearing on behalf of the appel- E lants, submits as follows :—

(1) The Board has no power to levy a surcharge under the provisions of the Act.

(2) Clause 13 of the agreement cannot take in the levy of surcharge. It is, therefore, not a matter for reference to arbitration under clause 23 of the agree- F ment.

(3) Assuming it has power under the Act or under clause 13 to levy a surcharge, the Board in exempting certain categories and imposing surcharge upon the appellants is guilty of discrimination which is impermissible under section 49 of the Act and clause (2) G of Schedule I to the agreement.

With regard to his first contention Mr. Gupte submits that surcharge is unknown to the provisions in the Act and the Board has no power under the Act to levy a surcharge. It is not possible to accede to the submission that the demand of surcharge cannot be included in the revision of rates of tariff.

H The word surcharge is not defined in the Act, but etymologically, *inter alia,* surcharge stands for an additional or extra charge or payment (see Shorter Oxford English Dictionary). Surcharge is thus a

superadded charge, a charge over and above the usual or current dues. Although, therefore, in the present case it is in the form of a surcharge, it is in substance an addition to the stipulated rates of tariff. The nomenclature, therefore, does not alter the position. Enhancement of the rates by way of surcharge is well within the power of the Board to fix or revise the rates of tariff under the provisions of the Act. The first submission of counsel is, therefore, of no avail.

Before we deal with the second submission of counsel, we may refer to a recent decision of this Court in *M/s Titagarh Paper Mills Ltd.* v. *Orissa State Electricity Board and Another*(1) (briefly the *Titagarh's* case) to which one of us was a party. This Court following the decision in the *Indian Aluminium Company* v. *Kerala State Electricity Board*(2) with regard to the scope of sections 49 and 59 of the Act held in the *Titagarh's* case (supra) as follows :—

> "....neither section 49 nor section 59 confers any authority on the Board to enhance the rates for supply of electricity where they are fixed under a stipulation made in an agreement. The Board has no authority under either of these two sections to override a contractual stipulation and enhance unilaterally the rates for the supply of electricity".

It is clear from the above decision that an agreement entered in exercise of the power conferred by the statute, such as under section 49(3) of the Act, cannot be set at naught by unilateral exercise of power by the Board under the Act to enhance the rates agreed upon between the parties in the absence of any provision in that behalf in the agreement itself. In the *Indian Aluminium Company's* case (supra) there was no provision in the agreement with regard to the revision of tariff, such as we find in clause 13 of the present agreement. This Court, therefore, had not to consider in that case about the effect of a clause like clause 13. In the *Titagarh's* case (supra), however, this Court had to take into consideration clause 13 of the agreement therein which is the identical clause in the present case.

Sub-sections (1) and (2) of section 49 empower the Board to fix uniform rates of tariff. Sub-section (3) of section 49 on the other hand reserves to the Board the power of fixing different tariffs having regard to certain factors mentioned therein. Section 49(3) contemplates what are known as 'special agreements'. Power under section 49(1) and (2) cannot be invoked during the subsistence of special agreements providing for stipulation of rates of tariff in absence of any reservation therein. Exercise of power under section 49(1) and (2) as also under section 59 will remain suspended during the currency of the special agreements between the parties and no unilateral enhancement of rates is permissible under law. There is only a *pro tempore* ban on revision of rates during the subsistence of statutory special agreements entered in conformity with section 49(3) of the Act.

(1) [1975] 2 S. C. C. 436.
(2) [1975] 2. S C. C. 414.

A Mr. Gupte, however, submits that since there have been special agreements between the parties the stipulated rates could not be increased by adding the surcharge in question. This argument proceeds on a wrong assumption that surcharge is absolutely different from rates of tariff. Besides the submission fails to take count of clause 13 of the agreement with regard to revision of rates. The ratio of the *Indian Aluminium Company's* case (supra) will be available on B all fours only where there is nothing in the special agreement with regard to revision of rates during the subsistence of the agreement.

With regard to the second submission, which overlaps to some extent with the first, Mr. Gupte points out that revision of tariff under clause 13 cannot include levy of surcharge which is distinct from tariff. He also draws our attention to the various clauses in the Press C Note where both the expressions 'surcharge and tariff' are freely used. On the other hand, the learned Advocate General submits that the import of surcharge depends upon the nature of the original charge. If the surcharge is appended to a tariff it partakes of the character of tariff.

When the Press Note introduces the surcharge in addition to tariff D rates, not much can be made of for use of the two words separately. We have already noted the meaning of the word 'surcharge' while dealing with the first submission of the learned counsel. We may only add that this Court in *Titagarh's* case (supra) put the matter beyond controversy in the following words :—

> "Now, the effect of the levy of coal surcharge would be E to enhance the rates for the supply of electricity stipulated under the agreement".

Besides in the *Titagarh's* case (supra) this Court further observed as follows :—

> "Questions such as : whether the Board has power under clause (13) of the agreement to levy any coal surcharge at F all when no such power was conferred on it by the Act, whether the action of the Board in levying the coal surcharge on the appellant under clause (13) of the agreement was arbitrary and unreasonable or whether it was based on extraneous and irrelevant considerations and whether, on the facts and circumstances of the case, the Board was justified under clause (13) of the agreement to levy the coal sur- G charge on the appellant, are plainly questions arising under the agreement and they are covered by the arbitration provision contained in clause (23) of the agreement. All the contentions raised by the appellant against the claim to justify the levy of the coal surcharge by reference to clause (13) of the agreement would, therefore, seem to be covered by the arbitration agreement and there is no reason why H the appellant should not pursue the remedy of arbitration which it has solemnly accepted under clause (23) of the agreement and instead invoke the extraordinary

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jurisdiction of the High Court under Article 226 of the Constitution to determine questions which really form the subject-matter of the arbitration agreement."

Although this Court was dealing with the coal surcharge in the above decision, there is no distinction in principle between the coal surcharge or a surcharge *simpliciter* and the ratio of the above decision will be applicable in this case. The second submission of the learned B counsel, therefore, fails and the point is squarely covered by the above decision. The matter is, therefore, covered by the arbitration clause 23 of the agreement.

With regard to the last submission regarding discrimination founded upon section 49 of the Act and clause (2) of the Schedule I to the agreement, Mr. Gupte relied upon sub-section (4) of section 49 which C provides that in fixing the tariff and terms and conditions for the supply of electricity, the Board shall not show undue preference to any person. He also draws our attention to clause (2) of the conditions of supply in the First Schedule to the agreement to the effect that "the Department shall not be entitled to discriminate between different consumers in fixing the charges for the supply of energy". The agreement is entered under the provisions of section 49(3) of the Act. If D we read section 49 as a whole we find that under sub-section (1) of that section, the Board in supplying electricity to any person not being a licensee "may for the purposes of such supply frame uniform tariffs". However, under sub-section (2) of that section in fixing the uniform tariffs the Board shall have regard to the various factors under four heads (a), (b), (c) and (d). Then comes sub-section (3) which preserves the power of the Board, "if it considers it necessary or expe- E dient to fix different tariffs for the supply of electricity to any person not being a licensee having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and any other relevant factors".

Mr. Gupte submits that there is no reason why the power-intensive industries, which are governed by special agreements, should have been F exempted from the levy of surcharge in the Press Note. He further points out that there are eight industries referred to in paragraph 20 of the Special Leave Petition which have not been subjected to the aforesaid 10 per cent surcharge even though the rates of electricity charged per unit in their case are less than those of the Orissa Textile Mills.

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It is enough to point out that the industries referred to in the Special Leave Petition were covered by special agreements and we are not even told whether these special agreements had a similar clause like clause 13 in the present case. This Court has held that special agreements entered under section 49(3) cannot be given a go-by while exercising the power of revision of rates under section 49 read with section 59. That being the position, the objection on the score H of discrimination loses all importance. The totality of the provisions under section 49 does not give any scope for the plea of discrimination raised in this case and in view of clause 13 in the agreement itself.

A We can appreciate the handicap of counsel in advancing his arguments under the head of discrimination having lost the protective amulet of article 14 of the Constitution under the Presidential embargo during the emergency. A plea of discrimination which is available when article 14 is in free play is not at par with the interdict of 'undue favour' under section 49 of the Act. Apart from this, when law makes it obligatory for certain special agreements to continue in full B force during their currency stultifying the power of the Board to revise the rates during the period, no ground of discrimination can be made out on the score of exempting such industries as are governed by special agreements.

Although the Press Note in the instant case did not recite any provisions of the Act under which the same was issued, mere omission to C do so does not disentitle the Board to reply upon clause 13 of the agreement for a claim to revision of the rates, although in the form of a surcharge in this case. We, therefore, do not give any significance to the omission in the Press Note to refer to clause 13 or to any other provision of the Act. The matter is, therefore, covered by the arbitration clause 23 of the agreement. It is not for this Court to speculate what answers the Arbitrator will enter with regard to the dis- D puted questions that may be raised before him. We are not to be understood as expressing any opinion on the merits of the dispute or difference between the parties with regard to the surcharge.

It is then submitted that this Court should not use its discretion in favour of arbitration in a matter where it is a pure question of law as to the power of the Board to levy a surcharge. This submission E would have great force if the sole question involved were the scope and ambit of the power of the Board under sections 49 and 59 of the Act to levy a surcharge, as it was sought to be initially argued. The question in that event may not have been within the content of clause 23 of the agreement. But all questions of law, one of which may be interpretation of the agreement, need not necessarily be withdrawn from the domestic forum because the court has discretion under section F 34 of the Arbitration Act or under article 226 of the Constitution and that the court is better posted to decide such questions. The arbitration clause 23 is a clause of wide amplitude taking in its sweep even interpretation of the agreement and necessarily, therefore, of clause 13 therein. We are, therefore, unable to accede to the submission that we should exercise our discretion to withhold the matter from arbitration and deal with it ourselves.

G We, therefore, find no justification in interfering with the conclusion of the High Court in dismising the writ application. In the result the appeals fail and are dismissed. We will, however, make no order as to costs.

P.B.R. *Appeals dismissed.*