Maruti Tea Industries Vs Assam State Electricity Board and Others

Court: Gauhati High Court

Date of Decision: Oct. 15, 2004

Acts Referred: Electricity (Supply) Act, 1948 â€" Section 28(3), 49(1)
Mines and Minerals (Development and Regulation) Act, 1957 â€" Section 15

Citation: (2005) 2 GLR 589

Hon'ble Judges: D. Biswas, Acting C.J.; Amitava Roy, J

Bench: Division Bench

Advocate: K.N. Choudhury and S.K. Kejriwal, for the Appellant; B.D. Das, for the Respondent

Final Decision: Dismissed

Judgement

Amitava Roy, J.
The appellant is aggrieved by the rejection of its plea pertaining of the amendment to the Terms and Conditions of Supply,

1988, introduced by the impugned resolution dated 7.2.1991 and the consequential demand as per the impugned assessment bill dated

12.12.1994. Being unsuccessful before the learned Single Judge, the appellant is before us.

2. We have heard Mr. KN Choudhury, learned senior counsel assisted by Mr. SK Kejriwal, Advocate for the appellant and Mr. BD Das, learned

Standing counsel ASEB.

3. The facts in short leading to the filing of this appeal may be stated. The appellant, a registered partnership firm carries on business of

manufacturing and sale of black tea. It has its processing factory at Makum Junction at Tinsukia. For the purpose of running its factory, the

appellant obtained electricity from the Assam State Electricity Board (for short the ""Board") with sanctioned load of 240 KW. By letter dated

3.8.1992, the Board informed the appellant that on physical verification of its installations excess connected load of 26 KW was detected. Not

accepting the said finding, the appellant by letter dated 4.8.1992 conveyed its stand and requested the Executive Engineer of the Board at Tinsukia

to make a physical verification. It was after a lapse of about 2 years, that a bill being No. 168/794 dated 12.12.1994 raising a demand of Rs.

1,23,981.46 including an amount of Rs. 39,312.00 as compensation for malpractice and Rs. 53,071.00 by way of surcharge was served on it.

The impugned bill referred to an earlier bill dated 20.7.1992 of Rs. 39,312.00 as compensation. The appellant under protest paid a sum of Rs.

70,910.26 (Rs. 1,23,981.46 - Rs. 53,071.20) with a request to condone the surcharge amount. The appellant was thereafter informed that in

terms of Clause 23(e) of the Terms and Conditions of Supply, electric supply to its factory premises would be discontinued for its act of

malpractice, i.e., drawing electric energy in excess of the connected load, if the balance amount was not paid. It was at that stage that the appellant

came to learn that Clause (22) of the aforementioned Terms and Conditions of Supply had been amended by the resolution No. 24 dated

7.2.1991 by adding the phrase ""Tea Coffee and Rubber garden"" under Clause 22(a)(iii). According to the appellant, no prior notice whatsoever

was given to the consumers before such amendment as required under Clause 27(ii) of the Terms and Conditions of Supply. It was, therefore,

contended that the amendment to the above effect was per Se illegal being in contravention of Clause 27(ii) of the Terms and Conditions of Supply

and consequently the demand made in the impugned notice dated 12.12.1994 was nonest in law.

4. The Board''s stand as can be gathered from its counter is that on a verification of the electrical installations in the premises of the appellant made

on 4.7.1992 by its authorities in presence of the Manager of the tea estate, the connected load in the appellant''s factory was found to be in excess

of the sanctioned load by 26 KW. As the same amounted to malpractice in terms of Clause 21(ii)(b) of the Terms and Conditions of Supply an

assessment bill dated 27.7.1992 for Rs. 39,312.00 was served on the appellant. As it transpired that the appellant had not cleared the said

amount, the impugned bill was served including the above amount as well as the surcharge of Rs. 53,071.20. Supporting the amendment brought

about in Clause 22 of the Terms and Conditions of Supply, the Board maintained that it was so done by a resolution No. 24 dated 7.2.1991.

According to it, a public notification of the said amendment was made but as it was not traceable by way of abundant caution, a reminder was

published on 30.11.1996 in the local daily ""The Assam Tribune"". It was asserted that even if prior notice as required under Clause 22(ii) of the

Terms and Conditions of Supply is issued, the amendment per se would not be rendered illegal thereby. It is the categorical stand that the decision

of the Board introducing the amendment was communicated by the letter dated 15.3.1991 to all concerned and that the appellant was also aware

of the same. The Board in its counter annexed the communication dated 15.3.1991 containing the amendment as well as the reminder notice

referred to above as Annexures 9 and 10 to its counter. No reply affidavit has been filed by the appellant controverting the above statements.

5. The learned Single Judge was of the view that the impugned amendment was in compliance of Clause 27(ii) of the Terms and Conditions of

Supply and in view of Section 49(1) of the Electricity (Supply) Act, 1948 (hereinafter called the ""Act"") and in the light of the decision of the Apex

Court in Hyderabad Engineering Industries Ltd. and Others Vs. A.P. State Electricity Board and Others, the Board had the power to alter the

Terms and Conditions of Supply unilaterally. It held that the omission to issue a prior notice as contemplated in Clause 27(ii) of the Terms and

Conditions of Supply did not result in prejudice to the appellant, inasmuch as, the impugned bill was issued on 12.12.1994 after more than 2 years

of the amendment and, therefore, non-issuance of the notice did not invalidate the amendment. The learned Single Judge considered the omission

of issuing prior notice to be a minor irregularity cured by the expiry of one month from the date on which the amendment was brought into effect. It

was, however, held that the appellant was liable to pay surcharge at the rate of 18% per annum instead of 5% per month claimed by the Board.

6. Mr. Choudhury has argued that the Terms and Conditions of Supply having been framed in exercise of power u/s 49(1) of the Act, those are

statutory in nature and in that view of the matter, the omission to issue a prior notice as required under Clause 27(ii) thereof per Se rendered the

impugned amendment illegal and nonest in law. He urged that the requirement of prior notice was mandatory and, therefore, the question of

prejudice on account of non-issuance thereof is wholly irrelevant. As the omission to issue a prior notice as contemplated under Clause 27(ii) of the

Terms and Conditions of Supply has been categorically admitted by the Board, the same being in blatant violation of the peremptory edict of the

said clause, the amendment was ex facie illegal. The Terms and Conditions of Supply having prescribed the manner in which any amendment etc.

thereto is to be introduced, any other mode was by implication prohibited and, therefore, in face of the admitted facts in the instant case, the

impugned amendment is liable to be adjudged unsustainable in law. Consequently according to the learned senior counsel, the impugned bill is

liable to be quashed. Two decisions of the Apex Court in Martin Burn Ltd. Vs. The Corporation of Calcutta, and A.R. Antulay Vs. R.S. Nayak

and Another, have been cited to reinforce the above submissions.

7. The learned standing counsel for the Board in reply has urged that the non-issuance of a prior notice before the impugned amendment was a

mere irregularity, inasmuch as, it could not be construed on a plain reading of Clause 27(ii) having regard to the underlying object of framing the

Terms and Conditions of Supply, that such a requirement was mandatory, in nature. According to him, the same amounted to an insignificance

omission in the procedure for amendment of the Terms and Conditions of Supply which is indubitably within the power and authority of the Board.

He further argued that the nature of the amendment so far as the appellant is concerned is also relevant. The appellant being admittedly a consumer

under the Board, it was liable under the Terms and Conditions of Supply for the consequences prescribed for indulging in malpractice(s). The

amendment in Clause 22(a)(iii) was by all means clarificatory in nature and being so was beyond the purview of Clause 27. In any view of the

matter, as the amendment has not resulted in any prejudice to the appellant, it has no cause of action to be aggrieved, he urged. The learned

standing counsel argued that on a proper interpretation of Clause 27(ii), the requirement of prior notice cannot be construed to be mandatory and,

therefore, the impugned amendment and the consequential assessment bill are inassailable. He relied on the following decisions of the Apex Court

in H.C. Suman and another Vs. Rehabilitation Ministry Employees Co-operative House Building Society Ltd. New Delhi and others, State Bank

of Patiala and others Vs. S.K. Sharma, The Quarry Owners Association Vs. The State of Bihar and Others, He also relied on a decision of this

Court in Ganeshka Kanot Tea Company Pvt. Ltd. v. ASEB and Ors., WP(C) No. 3116/2001.

8. Before adverting to rival contentions it would be expedient to have a feel of the relevant provisions of the Act and the Terms and Conditions of

Supply, 1988. Section 49(1) of the Act, which empowers the board to frame the Terms and Conditions of Supply is extracted hereinablow :

49. Provision for the sale of electricity by the Board to persons other than licensees. - (1) Subject to the provisions of this Act and/or regulations,

if any, made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions, as the Board thinks

fit and may for the purposes of such supply framed uniform tariffs."".

9. The relevant excerpts of Clauses 22 and 27 of the Terms and Conditions of Supply, 1988, are also extracted herein below to complete the

picture :

22. Payment of Compensation for Malpractices -:

Where a consumer is found to be indulging in Malpractice with regard to use of electricity and use of device to commit theft of energy the

authorised officer may without prejudice to any other action that may be taken against such a consumer ask him to pay compensation which shall

be assessed as stated here in below:

A. Denotes the sanctioned load:

B. Denotes the total connected load detected at the time of inspection.

(a) Unauthorised supply of Electricity/Load exceeding sanctioned load : (Metered)

For such nature of malpractice assessment bill will be made for the category specified below as per the formula application.

(i) Domestic : - M(B-A)X6 = Rupees

(ii) Commercial : - 2MX(B-A)X6 = Rupees

(iii) Industry/Bulk : - 3XMX(B-A)X6 = Rupees.

27. Savings Rights:

(i) The decision of the Board shall be final with regard to the interpretation of terms and conditions.

(ii) The Board reserves the right to amend, subtract from or add to any of the above terms and conditions at any time. Provided that prior notice of

not less than 30 days shall be given for amendment substration and addition to these terms and conditions of supply"".

After the impugned amendment Clause 22(a)(iii) reads as hereunder :

(iii) Industry/Bulk/Tea, Coffee and Rubber gardens : - 3x M x (B-A) x 6 rupees."".

10. It is clear from the communication dated 15.3.1991 carrying the amendment that it was effective from that date. As marked hereinabove, the

stand in the Board''s counter that the decision of the Board, vis-a-vis, the amendment was communicated by the said letter to all concerned and

that the original public notification of the amendment being untraceable a reminder public notice was published on 30.11.1996 has remained

unrebutted.

That the first demand for compensation on account of malpractice was raised by the assessment bill dated 20.7.1992 is not disputed by the

appellant. According to the Board, the amount being not paid the impugned bill dated 12.12.1994 was raised.

11. The central question that pleads to be answered is whether the requirement of prior notice as prescribed by Clause 27(ii) of the Terms and

Conditions of Supply is mandatory so much so that any amendment without complying with the said requirement would render it incurably invalid.

The answer evidently lies in the correct interpretation of Clause 27(ii) in the context of the powers conferred on the Board by the Act and the

object and purpose of framing the Terms and Conditions of Supply.

12. The Apex Court in Martin Burn Ltd. (supra) ruled that a Court has no power to ignore a statutory provision to relieve what it considers a

distress resulting from its operation and that the statute must be given effect to whether the Court approves the result or not.

13. It was reiterated by the Apex Court in AR Antulay (supra) that violation of the fundamental right itself renders the impugned action void and no

prejudice need be proved. The legal principles enunciated in the above decisions relied on behalf of the appellant are so well settled that no

discussion thereon is warranted. Are these of any assistance to the appellant qua the controversy remains to be tested.

14. To complete the narration, vis-a-vis, the precedents, the authorities relied upon on behalf of the Board may also be briefly noticed at this stage.

The decision in HC Suman and another (supra) has been pressed into service to drive home the point that where it appears on reading a statute

that some words have been accidentally omitted, it is permissible to supply the same to make it meaningful as well as to advance the underlying

intention of the legislature.

15. The Apex Court in State Bank of Patiala and others (supra) dealing with a disciplinary proceeding held that in case of a procedural provision

which is not of mandatory character, the complain of violation has to be examined from the stand point of substantial compliance and ultimate test

is that of ensuing prejudice consequent upon such violation. If no prejudice is established no interference is called for, it observed.

16. The primary question which fell for consideration in Quarry Stone Association (supra) was whether the delegation of power to the State

Government u/s 15 of the Mines and Minerals (Regulation and Development) Act, 1957, was unfettered to render it invalid. While answering the

question in the negative in the contextual facts, the Apex Court also took note of the contention assailing the related notification on the ground that

the same had not been placed before each House of legislature as required u/s 28(3) of the Act. The Apex Court was of the view that as the

impugned notification was within the ambit of delegation and that there were enough guidelines and control over the State Government in that

regard, non-compliance of Section 28(3) of the Act would not render it invalid. The Apex Court, however, underlined the requirement of placing

the notification in terms of Section 28(3) of the Act and directed the State to place the same at the earliest with the mandate of doing so in future as

well.

17. The Terms and Conditions of Supply understandably encompasses all conceivable aspects of supply of electric energy of the consumers.

Adequate provisions have been made for inspection of energy lines and connections by visiting the consumers'' premises. Measures have also been

prescribed for metering of the energy consumed and payment of the energy charges. Penal provisions like compensation for malpractice and

disconnection of energy supply on enumerated eventualities have also been made.

As noticed hereinabove, as per Clause 27(ii), the Board is the final authority with regard to interpretation of the Terms and Conditions of Supply.

Exclusive right to amend, substract from or add to any of the Terms and Conditions has been reserved to it. The Terms and Conditions of Supply

having been framed in exercise of powers u/s 49(1) of the Act, the same are statutory and binding on the consumers. Can the provision of prior

notice as contained in Clause 27(ii) be construed to be an absolute check on the power of the Board to amend, substract or and add to the Terms

and Conditions of Supply so much so that any exercise without such notice would render the consequential amendment etc. ab initio void and

nonest in law? Such construction in our view per Se is incompatible with the conferment of the power on the Board as envisaged in Section 49(1)

of the Act. No such restraint is discernible in the empowering statutory provision. Should the self imposed restraint envisaged in Clause 27(ii) be

interpreted to signify total denotation of the Board''s power to amend the Terms and Conditions of Supply without complying with the requirement

of prior notice ? Having regard to the nature of the activities in which it is engaged, the answer according to us has to be in the negative. Being in

charge of providing electrical energy to the members of the public, its associated exploits have to be guided by a set of guidelines in order to ensure

smooth and safe supply of electricity. The Board necessarily, therefore, has to exercise an effective and vigilant control for which adequate

measures as and when necessary have to be taken. Considering the commodity involved, i.e., electric power, depending on the demands of

situations, the Board may necessarily have to alter the existing Terms and Condition of Supply and at times quite urgently. The service in which the

Board is engaged essentially has a public element and, therefore, some leeway has to be conceded in negotiating the Terms and Conditions of

Supply for effective functioning of the system. To impose on the Board an inflexible and rigid pre-condition of prior notice of 30 days for every bit

of amendment to the Terms and Condition of Supply unmindful of the necessity therefore would in our view amount to attentuating the power

conferred on it under the Act by imposing an unwarranted restriction thereon. If such a trammel on the Board''s power is countenanced, it would

not only be illogical and unrealistic but would render the Terms and Conditions of Supply unworkable in a given fact situation. We would,

therefore, see the prescription of prior notice in Clause 27(ii) to be a requirement, directory in nature.

18. This view of ours finds reinforcement from the relevant principles of interpretation of statutes. We wish to extract hereinbelow the following

excerpts from ""Interpretation of Statutes"" by Maxwell which we consider apt in the present backdrop of facts .

Ut res magis Waleat Quam Pereat

If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a

construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would

legislate only for the purpose of bringing about an effective result"". ""Where alternative constructions are equally open, that alternative is to be

chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be

rejected which will introduce uncertainty, friction or confusion into the working of the system"".

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In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention

which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed

to be the true one. ""An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available"".

Where to apply words literally would ""defeat the obvious intention of the legislation and produce a wholly unreasonable result"" we must do some

violence to the words"" and so achieve that obvious intention and produce a rational construction."".

Not only are unreasonable or artificial or anomalous constructions to be avoided : it appears to be an assumption (often unspoken) of the courts

that when two possible constructions present themselves, the more reasonable one is to be chosen."".

19. The Apex Court in Balram Kumawat Vs. Union of India (UOI) and Others, while holding that the statute must be construed as workable

instrument, observed as hereunder recalling the earlier decisions of various Courts on the issue :

25. A statute must be construed as a workable instrument. Ut res magis Waleat Quam Pereat is a well known principle of law. In Tinsukhia

Electric Supply Co. Ltd. v. State of Assam this Court stated that law thus : (SCC p. 754, paras 118-120)

118. The courts strongly lean against any construction which tends to reduce a statute to futility. The provision of the statute must be so construed

as to make it effective and operative, on the principle ''Ut res magis Waleat Quam Pereat''. It is, no doubt, true that if a statute is absolutely vague

and its language wholly intractable and absolutely meaningless, the statute could be declared void for vagueness. This is not in judicial review by

testing the law for arbitrariness or unreasonableness under Article 14; but what a Court or construction, dealing with the language of a statute, docs

in order to ascertain from, and accord to, the statute the meaning and purpose which the legislature intended for it. In Manchester Ship Canal Co.

v. Manchester Racecourse Co. Farwell, J. said: (pp. 360-61)

''Unless the words were so absolutely senseless that I could do nothing at all with them, I should be bound to find some meaning and not to declare

them void for uncertainty."

119. In Fawcett Properties Ltd. v. Buckingham County Council Lord Denning approving the dictum of Farwell, J. said: (All ER p.516)

"But when a statute has some meaning, even though it is obscure, or several meanings, even though there is little to chose between them, the courts

have to say what meaning the statute is to bear, rather than reject it as a nullity."

120. It is, therefore, the court"s duty to make what it can of the statute, knowing that the statutes are meant to be operative and not inept and that

nothing short of impossibility should allow a Court to declare a statute unworkable. In Whitney v. IRC Lord Denning said :

"A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear

direction makes that end unattainable."

The courts will therefore, reject that construction which will defeat the plain intention of the legislature even though there may be some inexactitude

in the language used (see Salmon v. Duncombe (Apex Court at p. 634)). Reducing the legislation futility shall be avoided and in a case where the

intention of the legislature cannot be given effect to, the courts would accept the bolder construction for the purpose of bringing about an effective

result. The courts, when rule of purposive construction is gaining momentum, should be very reluctant to hold that Parliament has achieved nothing

by the language it used when it is tolerably plain what it seeks to achieve (see BBC Enterprises v. Hi-Teck Xtravision Ltd. (All ER at pp. 122-

23))"".

20. In P.T. Rajan Vs. T.P.M. Sahir and Others, the Apex Court ruled that a statute must be read with text and the context thereof and whether it

is directory or mandatory would not depend on the words ""shall"" or ""may"" but on the purpose and object it seeks to achieve.

21. The Apex Court in order to determine as to whether a provision is directory or mandatory has outlined the principle in the State of Mysore and

Others Vs. V.K. Kangan and Others,

In determining the question whether a provision is mandatory or directory one must look into the subject-matter and consider the importance of

the provision disregarded and the relation of that provision to the general object intended to be secured. No doubt, all laws are mandatory in the

sense they impose the duty to obey on those who come within its purview. But it does not follow that every departure from it shall taint the

proceedings with a fatal blemish. The determination of the question whether a provision is mandatory or directory would in the ultimate analysis,

depend upon the intent of the law maker. And that has to be gathered not only from the phraseology of the provision but also by considering its

nature, its design and the consequences which would follow from construing it in one way or the other.

22. By applying the above judicially evolved principles of interpretation to the facts of the present case we hold that the requirement of prior notice

as contained in Clause 27(ii) is not a mandatory pre-condition for the exercise of the Board''s power to amend the Terms and Conditions of

Supply. The impugned resolution, therefore, cannot be held to be illegal and nonest in law for the Board''s omission to issue a prior notice before

adopting the same.

23. Reverting to the facts, it has already been noticed that the Board''s stand that its decision in terms of the impugned resolution had been

communicated to all concerned by letter dated 15.3.1991 has remained unrebutted. It is also indicated in the Board''s counter that after the

impugned resolution a public notification thereof was made and as the same was untraceable a reminder notice of the amendment was published on

30.11.1996 in the local daily ""The Assam Tribune"". This statement as well has not been refuted by the appellant. It is difficult to hold in the face of

the above, that notice or publication of the amendment made by the impugned resolution dated 7.2.1992 was not made. For the view that we have

taken on the requirement of notice as above, as a corollary we cannot persuade ourselves to hold that the impugned resolution also suffers from the

vice of non-publication of the amendment effected thereby.

24. The appellant is admittedly a consumer under the Board and the clauses in the Terms and Conditions of Supply of supply relating to

compensation for malpractice unquestionably would apply to it. The amendment to Clause 22(a)(ii) would be uniformly applicable to all Tea,

Coffee and Rubber gardens. As no argument has been advanced before us on the aspect of the culpability of the appellant, vis-a-vis, the charge of

malpractice levelled by the Board, we do not wish to dilate on that aspect of the controversy. We have, therefore, confined the discussion only to

the contentions pertaining to the notice under Clause 27(ii) of the Terms and Conditions of Supply.

25. Nevertheless, one cannot lose sight of the fact that the Board''s demand for compensation on account of malpractice was raised for the first

time against the appellant by its bill dated 20.7.1992 and as the amount remained unpaid, the impugned bill dated 12.12.1994 was issued. There is

evidently a gap of more than 2 years in between. Even if the bill dated 20.7.1992 is construed to be a notice of the amendment vide resolution

dated 7.2.1991, it can be concluded that the appellant had sufficient advance information thereof. We are, therefore, unable to up hold the

appellant"s contentions.

26. We have carefully weighed the reasonings recorded by the learned Single Judge and for the reasons recorded hereinabove, we concur wit, the

ultimate conclusions arrived at.

27. In the wake of the above, we do not find any merit in the appeal which dismissed accordingly. No costs.