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(1975) 07 SC CK 0037

Supreme Court of India

Case No: Civil Appeals Nos. 1653-1654 Of 1974

Titagarh Paper Mills Ltd.		APPELLANT
	Vs	
Orissa State Electricity Board and Another Orissa Textiles Mills Ltd. Vs Orissa State Electricity Board and Another		RESPONDENT

Date of Decision: July 23, 1975

Acts Referred:

- Electricity (Supply) Act, 1948 - Section 59

Citation: (1975) 2 SCC 436

Hon'ble Judges: P. N. Bhagwati, J; P. K. Goswami, J; A Alagiriswami, J

Bench: Full Bench

Final Decision: Dismissed

Judgement

P.N. BHAGWATI, J.-This appeal, by special leave, is brought against an order of the High Court of Orissa dismissing a writ petition filed by the appellant for quashing a press note dated February 1, 1971, levying a coal surcharge at the rate of 0.62 p. per unit on electricity supplied by the Orissa State Electricity Board from the Talcher-Hirakud grid. The writ petition came to be filed by the appellant in the following circumstances.

2. The appellant is a limited liability company carrying on business of manufacture of board and Paper. The appellant wanted to set up its factory at a place which would be convenient from the point of view of availability of facilities such as electric power. The State of Orissa had, about this time, commissioned hydroelectric station at the site of Hirakud dam with a view to stepping up the production of electricity and making it available for industrial purposes. It offered to supply electricity to the appellant at reasonable rates as also to make other facilities available to the appellant if the appellant set up its factory at Choudwar in Cuttack district. An agreement dated December 3, 1960 was accordingly entered into between the

appellant and the State of Orissa for supply of electricity at certain mutually agreed rates and on the terms and conditions set out in the agreement. Clause (1) of the agreement provided that it shall be deemed to be in force for a period of five years from the date of supply of hydro-power i.e. February 1, 1958 and thereafter shall so continue unless and until the same shall be determined by either party giving to the other six calendar months'' notice in writing of his intention to terminate the agreement. It was common ground between the parties that neither had given notice terminating the agreement as contemplated in clause (1) and in the circumstances, the agreement continued to be in force. Clauses (7), (14) and (22) specified the charges payable by the appellant for the electricity supplied by the State Electricity Board under the agreement. Clause (13) provided that:

"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 (23) laid down the machinery of arbitration. It said:

"Any dispute or difference arising between the consumer and the supplier or their respective Electrical Engineer as to the supply of electrical energy hereunder or the pressure thereof or as to the Supplier or the Consumer respectively to determine the same or any question, matter or thing arising hereunder shall be referred to a single arbitration (sic arbitrator) who shall be mutually agreed upon by both parties."

And lastly, clause (24) declared that

"the supply of electrical energy under this agreement shall be subject to the provisions of all Acts of the Union Parliament and the rules made thereunder and the special orders of the Government of Orissa for the time being in force with reference to the supply of electrical energy from the Hirakud hydroelectric station and the provisions of such Acts of the Union Parliament and the rules made thereunder and Special Orders of the Government of Orissa shall be deemed to be incorporated with and form part of this agreement so far as they are not inconsistent therewith."

This last mentioned clause clearly posited that under the agreement electricity was to be supplied by the State from the Hirakud hydroelectric station a position reinforced by the use of the words "hydro-power" in clause (1). In view of this agreement, the appellant set up its factory for manufacture of board and paper at Choudwar, a backward area, even though it is situated far from the source of raw materials and the consumer market and the State supplied electricity to the appellant at the rates stipulated in the agreement.

3. In or about 1962 the State Government, by a notification issued under Section 5, sub-section (1) of the Electricity (Supply) Act, 1948 (hereinafter referred to as the Supply Act) constituted the Orissa State Electricity Board (for shortness called the

Board). Section 60 of the Supply Act provides inter alia that

"all contracts entered into by, with . . the State Government for any of the purposes of this Act before the first constitution of the Board shall be deemed to have been ... entered into ... by, with . . . the Board".

Therefore, as soon as the Board was constituted, the agreement dated December 3, 1960 was deemed to have been entered into by the appellant with the Board and for all the purposes of the Supply Act it was to be treated as an agreement entered into with the Board. The Board in its turn supplied electricity to the appellant from the Hirakud hydro-power station at the rates and in accordance with the terms and conditions set out in the said agreement.

4. In 1968, the State Government set up a thermal power station at Talcher and the transmission lines from the Hirakud hydro-power station were integrated with those from the Talcher thermal power station. The thermal project, thereafter in June 1970, was transferred from the State Government to the Board. Both the Hirakud hydel project and the Talcher thermal project were then operated by the Board. Now, in a thermal project, coal is an essential raw material as it constitutes the fuel necessary for generation of electricity and the cost of generation of electricity is, therefore, directly linked with the price of coal. The Board, after it had taken over Talcher thermal project, found that, owing to steep rise in the price of coal, the cost of generation of electricity at Talcher thermal power station had gone up considerably and in order to offset this rise in the cost of generation, it was necessary to levy a coal surcharge on consumers receiving electricity from the Talcher-Hirakud grid. The Board accordingly, after obtaining the approval of the Government, decided to levy a coal surcharge at the rate of 0.62 p. per unit of the electricity supplied from the Talcher-Hirakud grid and notified its decision in a press note issued on February 1, 1971. The relevant part of the press note was in the following terms:

"Owing to steep rise in the price of coal which is necessary for generation of thermal power at Talcher, the cost of generation has gone up considerably and the Board felt that the additional cost could be met only by the levy of a coal surcharge on consumers receiving power supply from Talcher-Hirakud grid, as is levied by other Electricity Boards who have thermal generation. As per the provisions of Sections 49 and 59 and the Sixth Schedule of the Indian Electricity (Supply) Act, 1948, the levy of coal surcharge is permissible under the aforesaid circumstances.

The quantum of coal surcharge is, however, dependent on the rise or fall in the cost of coal delivered at the Talcher thermal power station and on the basis of the present cost of coal supplied to the power station the Board proposes to levy coal surcharge at 0.62 paise per unit provisionally. This coal surcharge will be in addition to the present tariff at which the power is being supplied to the consumer fed from the Talcher-Hirakud grid and is also exclusive of the electricity duty and other

charges, if any, levied by Government from time to time. The coal surcharge will, however, not apply to the consumers getting supply of power from diesel power stations run by the Board.

The coal surcharge at the above mentioned rate of 0.62 paise per unit will be levied on all supplies of energy from the Talcher-Hirakud grid with effect from February 1, 1971. As the Machkund power system is not integrated with the Hirakud-Talcher grid, consumers receiving power from Machkund power system are exempted from the above levy for the present."

It would be seen that the press note excluded from the coal surcharge consumers of electricity supplied from diesel power stations as also Machkund power station. The only consumers subjected to the coal surcharge were those receiving electricity from the Talcher-Hirakud grid. Relying on the press note, the Board claimed to recover the coal surcharge from the appellant, but the appellant disputed its liability and filed Writ Petition No. 605 of 1971 challenging the validity of the press note and praying for quashing the demand for coal surcharge.

5. There were various contentions raised on behalf of the appellant in support of the writ petition. Since, according to the press note, the coal surcharge was sought to be imposed by the Board under Sections 49 and 59 and the Sixth Schedule to the Supply Act, the principal contention of the appellant was directed towards showing that none of these provisions authorised the Board to levy the coal surcharge and thereby enhance the rates for supply of electricity unilaterally in derogation of the stipulation as to rates contained in the agreement. It was also urged on behalf of the appellant that in any event the coal surcharge could not be levied on the appellant, since electricity to be supplied to the appellant under the agreement was to be from the Hirakud hydro-power station as clearly indicated in clauses (1) and (24) of the agreement and rise in the price of coal was, therefore, irrelevant so far as the cost of supply of electricity to the appellant was concerned. Even if the electric supply from the Talcher thermal power station was integrated with that from the Hirakud hydro-power station - a position seriously disputed by the appellant - it did not, according to the appellant, make any difference to the position because, in the first place, the Talcher thermal power station was not established and inter-connected with the Hirakud hydro-power station pursuant to any scheme under the Supply Act, and secondly, there was sufficient electricity generated in the Hirakud hydro-power station which would meet the requirements of the appellant under the agreement and it was not necessary for the Board to draw upon the electricity generated at the Talcher thermal power station for the purpose of discharging its obligations under the agreement. Though the press note referred only to Sections 49 and 59 and the Sixth Schedule to the Supply Act as the source of the power to levy the coal surcharge, the Board also sought to justify its claim by reference to clause (13) of the agreement and it, therefore, became necessary for the appellant to repel this contention of the Board. The appellant urged that clause

(13) of the agreement could not clothe the Board with the authority to levy the coal surcharge, when it had no such authority under the provisions of the Supply Act. It was also contended on behalf of the appellant that, in any event, the power conferred under clause (13) of the agreement could not be exercised by the Board arbitrarily or unreasonably, or on an extraneous or irrelevant ground, and since electricity to be supplied to the appellant under the agreement was to be from the Hirakud hydro-power station, levy of coal surcharge on the appellant on the ground that there was steep rise in the price of coal, when coal is not at all a necessary raw material in the generation of hydroelectric power, was arbitrary and unreasonable and, to say the least, founded on a wholly irrelevant ground. The appellant also contended that there was nothing to show that the cost of generation of electricity at the Hirakud hydro-power station was more than the rates for the supply of electricity stipulated in the agreement. Even if the combined cost of generation of electricity at the Hirakud hydro-power station and the Talcher thermal power station were taken into account, there was no material, said the appellant, to show that the rates for the supply of electricity provided in the agreement were not sufficient to meet the cost of generation so as to justify revision of such rates under clause (13) of the agreement.

6. Though these contentions were pressed on behalf of the appellant at the hearing of the writ petition, the Division Bench of the High Court of Orissa, which heard the writ petition, declined to entertain the merits of these contentions and dismissed the writ petition on a short preliminary ground. That ground may be stated as follows in the words of the Division Bench:

"Clause 23 of the agreement provides for arbitration in the event of any dispute arising out of it. We are of the view that the petitioner must avail of the specific remedy provided in the agreement, if so advised, to resolve its dispute with the Board as in our opinion, even if on an examination of the several contentions advanced before us it turns out that adequate power under the statute is wanting, the Board may yet justify its action relying upon the contractual provision. Whether the levy is justified under the agreement is a matter well within the scope of the arbitration proceeding. If the petitioner disputed the levy in a civil action, Section 34 of the Arbitration Act, 1940, could have been relied upon by the Board to divert the action to the private forum chosen by the parties. The petitioner should not be permitted to invoke our extraordinary jurisdiction,"

and on this view the Division Bench dismissed the writ petition "without examination of the merits of the several contentions". The appellant applied to the High Court for leave to appeal to this Court, but the application was refused and hence the appellant brought the present appeal with special leave obtained from this Court.

7. It is apparent from the press note that when the Board decided to levy the coal surcharge on the consumers receiving electricity from the Talcher-Hirakud grid, it

claimed to do so under Sections 49 and 59 and the Sixth Schedule to the Supply Act. We must, therefore, first examine whether any of these provisions of the Supply Act empowered the Board to levy the coal surcharge. We fail to see how the machinery of arbitration contained in clause (23) of the agreement can possibly cover such a question. The arbitration agreement in that clause applies only to a dispute or difference

"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".

The question as to whether the Board had the power under Sections 49 and 59 and the Sixth Schedule to the Supply Act to levy the coal surcharge is not a question, matter or thing arising under the agreement. It is a claim founded on the provisions of the Supply Act to impose the coal surcharge in addition to the rates payable by the appellant to the Board under the agreement. Such a claim clearly falls outside the ambit and coverage of the arbitration provision contained in clause (23) of the agreement. The arbitration agreement cannot therefore, be regarded as a relevant factor which should legitimately influence the discretion of the Court in declining to entertain the writ petition on merits. So we proceed to consider how far Sections 49 and 59 and the Sixth Schedule to the Supply Act could be regarded as providing statutory authority of the Board to levy coal surcharge on the appellants.

8. We have already had occasion to consider the true scope and ambit of Sections 49 and 59 of the Supply Act in Indian Aluminium Company v. Kerala State Electricity Board1 in which we have pronounced our judgment this morning. It is clear from our judgment in that case that 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. Now, the effect of the levy of coal surcharge would be to enhance the rates for the supply of electricity stipulated under the agreement. It would, therefore, appear to be clear that the Board cannot claim to justify the levy of coal surcharge on the appellant by resort to Sections 49 and 59. It is futile for the Board to rely on either of these two sections. Equally futile is the reliance placed by the Board on the Sixth Schedule to the Supply Act. The Sixth Schedule is, by a fiction enacted in Section 57, deemed to be incorporated in the licence of every licensee and if the Board were a licensee for the purpose of this section, the provisions of the Sixth Schedule would also apply to it and it would be entitled under clause (1) of the Sixth Schedule to so adjust its charges for the sale of electricity by enhancing them that its clear profit in any year of account does not as far as possible, exceed the amount of reasonable return. But the definition of "licensee" given in Section 2, sub-section (6) says that, the provisions of Section 26 of

the Supply Act notwithstanding, "licensee" does not include the Board. The Board is, therefore, by express enactment taken out of the category of licensee for the purpose of the Supply Act. Section 57 cannot, in the circumstances, have any application to the Board and if that be so, the provisions of the Sixth Schedule cannot be invoked by the Board in support of its claim to enhance the rates by the addition of the coal surcharge.

9. But that does not put an end to the controversy between the parties. It is true that in the press note the Board relied only on Sections 49 and 59 and the Sixth Schedule of the Supply Act as the source of the power under which it claimed to levy the coal surcharge and these provisions have been found not to contain the power sought in them. But, if there is one principle more well settled than any other, it is that, when an authority takes action which is within its competence, it cannot be held to be invalid, merely because it purports to be made under a wrong provision, if it can be shown to be within its power under any other provision. A mere wrong description of the source of power - a mere wrong label - cannot invalidate the action of an authority, if it is otherwise within its power. The Board claimed that, in any event, even if Sections 49 and 59 and the Sixth Schedule to the Supply Act could not be construed as authorising the Board to enhance unilaterally the rates for supply of electricity, the Board had the power under clause (13) of the agreement to levy the coal surcharge on the appellant and the decision to levy the coal surcharge could be justified by reference to this power. Now, if this claim of the Board were well founded, it would afford a complete answer to the challenge made on behalf of the appellant. But the appellant raised various contentions in answer to this plea based on clause (13) of the agreement. We may have referred to some of these contentions in an earlier part of the judgment. It is here that the case of the appellant founders on the rock of the preliminary objection. Clause (23) of the agreement provides that any dispute or difference relating to a question, thing or matter arising under the agreement shall be referred to the arbitration of a single arbitrator. Questions such as: whether the Board had power under clause (13) of the agreement to levy any coal surcharge at 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 surcharge 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 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 jurisdiction of the High Court

under Article 226 of the Constitution to determine questions which really form the subject-matter of the arbitration agreement. We are, therefore, of the view that the High Court was right in exercising its discretion against entertaining the writ petition on merits, insofar as it was directed against the validity of the levy of the coal surcharge under clause (13) of the agreement. The merits of the contentions raised by the appellant would have to be decided by arbitration as provided in clause (23) of the agreement.

10. We, therefore, dismiss the appeal, but, in the peculiar circumstances of the case, make no order as to costs.

11. This appeal, by special leave, is directed against the order of the High Court of Orissa dismissing Writ Petition No. 527 of 1971 filed by the appellant against the Orissa State Electricity Board (hereinafter referred to as "the Board"). Writ Petition No. 527 of 1971 challenged the validity of the same press note dated February 1, 1971, which also formed the subject-matter of challenge in Writ Petition No. 605 of 1971 leading to Civil Appeal No. 1653 of 1974. The facts giving rise to Writ Petition No. 527 of 1971 are identical with those of Writ Petition No. 605 of 1971 barring only the difference that whereas the appellant in Writ Petition No. 605 of 1971 carried on the business of manufacture of board and paper, the appellant in Writ Petition No. 527 of 1971 carried on the business of running a textile mill and while the agreement between the appellant and the State of Orissa for supply of electricity in Writ Petition No. 605 of 1971 was dated December 8, 1960, the agreement in Writ Petition No. 527 of 1971 was dated May 12, 1960. The material terms and conditions of both the agreements were, however, the same. The judgment given by us in Titagarh Paper Mills Co. Ltd. v. Orissa State Electricity Board (Civil Appeal 1653 of 1974)2 must also, therefore, govern the decision of this appeal and whatever we have said in Titagarh Paper Mills Co. Ltd. v. Orissa State Electricity Board (Civil Appeal 1653 of 1974) must apply equally in the present case.
12. We, therefore, dismiss, the appeal with no order as to costs.