Tega India Ltd. and Others Vs West Bengal State Electricity Board and Others

Court: Calcutta High Court

Date of Decision: July 22, 2004

Acts Referred: Electricity (Supply) Act, 1948 â€" Section 49

Citation: AIR 2005 Cal 62

Hon'ble Judges: Sengupta, J

Bench: Single Bench

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Sengupta, J.
By this application the petitioner consumer being the limited company has challenged the constitutional validity of Clause 16.

(1) of the Agreement entered into between the petitioner No. 1 and, the respondent No. 1 to the extent the same mandates Annual Minimum

Guarantee Charges (hereinafter referred to in short as ''AMQR'') even during the period the petitioner''s supply line remains disconnected, and also

asks for relief by setting aside and/or quashing the bill for payment Of AMGR for the period 1996-97 and 1997-98.

2. The petitioner had been a consumer of bulk supply from the respondent No. 1 for which a written agreement in specified format was entered

into between them. Under the format the period of contract was for five years during which neither of the parties could unilaterally determine the

same. There was no dispute and differences with regard to the performance of the contractual obligation of the parties mutually till September

1994. The petitioner had paid all the dues and charges including the AMGR irrespective of consumption of electric energy till 1994. The five

years'' period expired some time in 1991, and after expiry of the first five years'' period the petitioner continued to consume the electric energy

without any dispute whatsoever till 11th January, 1992 when fire broke out in the factory premises of the petitioner destroying amongst others all

electrical installations and thereby the petitioner was prevented from consuming electric energy. The intimation of such breaking out of the fire was

given to the Board. Since then there has been no consumption as stated by the writ petitioner. Ultimately, the Board disconnected the supply line in

the month of September 1994 and there was no resumption of supply line since then. It appears on 15th July, 1996 the writ petitioner asked the

Board for restoration of supply line on certain terms and conditions. However, the Board by its letter dated 3rd September, 1996 declined to

accept those terms and conditions. Rather the Board put forward certain terms and conditions and asked for execution of the fresh agreement. The

aforesaid facts are not denied in the Affidavit in Opposition, I rather comment that the same are more or less admitted.

3. Thereafter the Board, instead of restoring the supply line, raised a bill and demanded payment of the AMGR for the period 1996-97 amounting

to Rs. 9,08,2007-and for the period 1997-98 amounting to Rs. 20,46,000/-, thus aggregating more or less 30 lakhs. The Board had also

threatened to invoke the bank guarantee as it was not renewed.

4. On the aforesaid factual matrix and background. Mr. Sudipta Sarkar, learned senior counsel, submits that going by the terms of the agreement it

would appear that the contract has come to ah end in the month of September 1991 inasmuch as the line was disconnected. In spite Of request the

same was not restored, rather the Board wanted to have a fresh agreement. He has drawn my attention to Clauses 16(1) and 16 (3) of the

agreement and submits that formal notice for determination after expiry of the locked period of five years is not necessary, and such determination

from the side of the Board can be inferred irresistibly by its act and conduct for abandonment of the contract. He further submits that when the

subject-matter of the contract has been destroyed and/or diminished; the liability of his client in terms of the earlier contract has ceased.

Accordingly, the demands are contrary to the terms of the aforesaid contract and furthermore the same are unconscionable and unjust, He has not

pressed his case for striking down of Clause 16 (1) of the contract.

5. Mr. Sumit Panja, learned counsel for the Board submits that if Clause 16 and Clause 20 are read together harmoniously, then it would appear

that liability to pay the aforesaid AMGR for the period 1996-97 and 1997-98 still subsists. From the act and conduct, he submits, the Board has

not abandoned the contract. The Board has merely stopped supply of energy as there has been failure in payment of the dues and charges which

includes annual minimum guarantee. If the letters of both the parties are read properly and attentively, it would reveal that the contract still subsists

as there was no determination by either of the parties by serving three months" prior notice required to be done under Clause 20(1) of the said

agreement. Therefore, the liability of the petitioner has riot ceased. In support of his submissions he has relied on a decision of the Division Bench

of this Court reported in 1998 (1) Cal HN 464.

6. Having heard the respective contentions of the learned counsel and having perused the materials produced before me. I think the issue as on the

aforesaid factual background is whether the petitioner is liable to pay the annual minimum guarantee charge for the aforesaid two periods. Since the

question of vires of Clause 16(1) of the Agreement has not been pressed, I am to accept the same being valid and to apply the same. I agree with

Mr. Panja that Clauses 16 and 20 of the agreement have to be read harmoniously to address the issues involved in this case. The liability of

payment of AMGR has been provided in Clause 16 and this Clause 16 has to be reproduced for better understanding of this case.

Clause 16 : ""(1) Subject to the provision of Clause 16(3) so long as the agreement is not determined or the Consumer/Consumers

continues/continue to obtain supply of energy, the consumer/consumers shall pay minimum change provided in Schedule I hereto, irrespective of

the fact that the consumer/consumers could not consume electricity to cover such minimum charge during the respective years due to disconnection

of supply for any reason whatsoever.

(2) For calculation, of annual minimum charge, one year period shall be taken from April to the following March. When connection is given in any

intermediate month, the minimum charge shall be calculated from the month of connection to the following March on monthly pro rata basis :

Provided when connection is given after the 15th day of any month, that month shall not be counted in calculating the year of minimum charge.

(3) If at any time the consumer/s is/are prevented from receiving or using the electrical energy to be supplied under this agreement either in whole

or in part owing to any strike, riots, insurrections, command of a civil or military authority, fire, explosions, act of God or any other causes beyond

his/ their/its control or if the Board is prevented from supplying or is unable to supply such electrical energy owing to all or any of the causes

mentioned, then the minimum charge or guarantee payable by the consumer shall be reduced in proportion to the ability of the consumer/s to take

or the Board to supply power, provided the consumer/s notifies/notify the Board in writing fifteen days of occurrence of any event as noted above

with necessary detail to prove that the occurrence is preventing/has prevented the consumer/s from receiving or using the full amount of contractual

demand. The consumer/s shall also keep the Board informed once in every fortnight of further development regarding the event. No remission in

the agreed minimum charge as mentioned in Schedule I hereof will be considered if no such notice is received by the Board. Subject as aforesaid

the consumer/s shall in any event be liable to pay the minimum charge every year as mentioned in Schedule I hereof.

7. While reading the aforesaid clause it appears to me that consumer is liable to pay the minimum charges as provided in Schedule I irrespective of

the consumption by the consumer during the respective years if the agreement is not determined or the consumer continues to obtain supply of

energy. The expression consumer continues to obtain supply of energy'' means obtaining not the actual supply of energy but technical supply of

energy meaning thereby existence of the supply line physically and it does not mean the supply line is energised with the electricity, and this shall be

subject to Sub-clause (3) of Clause 16. Sub-clause (3), however, gives relief to the consumer in certain situation and circumstances when the

consumer need not pay the AMGR. Therefore, according to me, the petitioner shall be exempted from paying the AMGR, provided the petitioner

comes within the four corners of the aforesaid Clause 16.

8. Clause 20 has to be considered to ascertain when and how the agreement is determined. Therefore, Clause 20 is set out herein :

(1) Save with the consent of the other party in writing neither party shall be at liberty to determine this Agreement before the expiration of five

years from* (the date of commencement of the supply as stated in Clause 4(1)). Either party may determine this Agreement at any time after the

aforesaid period on giving the other party not less than 3 calendar months'' notice in writing in that behalf and upon the expiration of the period of

such notice this Agreement shall cease and determine save and except for the settlement of all accounts outstanding between the Board and the

Consumer/s and without prejudice to the rights or remedies (if any) which may have accrued to the Board hereunder in the meantime. So long as

the Agreement is not determined as aforesaid or the Consumer continues to obtain the supply of the energy, the terms and conditions herein

contained shall be binding. In such case the Contract Demand and minimum amount payable as provided in Schedule-I shall be same as for the

fifth year of operation unless otherwise agreed upon.

N.B. If it be the first Agreement, the bracketed portioned marked ** is to be deleted. In case of renewal of agreement the bracketed portion

marked * is to be deleted and the, two blank spaces under bracketed portion marked ** are to be filled in.

(2) Upon the determination of this Agreement, from any cause whatsoever, security deposited by the Consumer/s with the Board under the terms

of Clause 19 hereof, or so much thereof as shall not have already been applied by the Board in satisfaction of its claims under this Agreement shall

be forthwith applied in satisfaction, pro-tanto, of any claim then outstanding, and the same or balance thereof as the case may be, shall not be

returnable to the Consumer/s until all accounts between the Board and the Consumer/s have been finally settled and all balances (if any) due to the

Board by the Consumer/s have been finally paid and discharged.

9. It appears from careful reading of the aforesaid clauses that neither of the parties is entitled to terminate for the first period without having

concurrence of the counterpart. However, after expiry of live years of the aforesaid locked period either of the parties is free to determine the

agreement with a 3 calendar months'' notice in writing on its behalf and upon expiration of the period of such notice this agreement shall cease and

stand determined.

10. Mr. Panja a has taken advantage of the aforesaid clause as in this case no notice in writing has been given. In my view, the essence of the

clause is determination of the contract and the mode is not an essential part of the contract. Determination, in my view, apart from by serving

notice, can be made by the provisions of the Contract Act as well. It appears from the records here that the Board disconnected the supply line in

September 1994 without any notice whatsoever. So I hold that by this act the Board has abandoned the contract by not performing its part of

supplying electricity. The consumer petitioner could have asked for remedy for illegal disconnection or termination of contract, but the consumer

has also accepted it. In 1996 a letter was written by the consumer to restore the supply line on different terms and conditions. However, this offer

was not accepted nor the supply line was restored. On the contrary, the Board expressed its intention to enter into a fresh contract, and I think the

language used exactly by the Board should be quoted here.

It may be mentioned that the execution of fresh agreement with a downward revision of our contract demand as stated in your letter dated 24th

April, 1996 would be taken up after settlement of claims for the existing contractual supply.

11. I think that the notice was not given in terms of the clause as aforesaid to terminate the agreement. By the act and conduct the agreement stood

determined on expiry of 3 months from the date of disconnection of supply line meaning thereby in November, 1994. There is no dispute that the

petitioner had paid AMGR till the date of disconnection even after expiry of the first five years'' locked period. There is no dispute that the

petitioner had paid till 1995 the AMGR. The trouble started When the minimum guarantee was asked to be paid for the periods 1996-97 and

1997-98, I am of the view that the contract stands determined. So the petitioner has no liability to make payment nor the Board has any right to

ask for payment of the AMGR for the aforesaid periods. Consequently, I set aside and quash the demand of the Board. The decision cited by Mr.

Panja as mentioned above is wholly misplaced in this case. In the case cited, dispute was regarding legality and validity of mode of calculation of

AMGR in an admitted case where the contract was not terminated. But here factually whether the contract exists or not is the issue precisely.

Therefore, the above decision is of no help in this case.

12. Thus the writ petition succeeds. There would be no order as to costs. Interim order, if passed, stands confirmed.

13. Xerox certified copy of this judgment and order shall be made available to the parties, if applied for.