IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.10495 of 2002

==

M/S Patrons (India) Enterprises, a partnership firm, having its factory at C-20, Industrial Area, Pataliputra, P.S. Pataliputra, District Patna, through its Partner Sri Birendra Gandhi.

.... Petitioner/s

Versus

1. Bihar State Electricity Board, Vidyut Bhawn, Bailey Road, Patna through its Chairman.
2. The Chief Engineer (Commercial),
   Bihar State Electricity Board, Vidyut Bhawn, Bailey Road, Patna.
3. The General Manager cum-Chief Engineer, PESU, St rand Road, Patna.
4. The Electrical Superintending Engineer, PESU, West, Mangles Road, Patna.

.. .... Respondent/s

==

Appearance :
For the Petitioner/s : **Mr. S.D.Sanjay, Sr. Adv.**
For the Respondent/s : Mr. Vinay Kirti Singh, Adv.

==

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
ORAL JUDGMENT
Date: 22-06-2015

Heard counsel for the petitioner and the respondents.

In this case, prayer has been made for quashing the letter No. 321 (HT) dated 24th July 2002 whereby in respect to the petitioner, notice dated 8th September 2000 served under Clause 9 of the HT agreement entered in between the petitioner and the Bihar State Electricity Board (hereinafter referred to as the 'Board') which requires service of prior 12 months' notice for final determination of the agreement. The respondents have treated the agreement determined with effect from 30th June 2002 in stead of 7th September 2001 which has been treated for reckoning 12 months' period of notice. Another prayer has been made for quashing the bill dated 24th July 2002 issued by the respondent Executive Engineer raising a demand of Rs.46,94,961/- upto June 2000 describing the said bill as provisional final bill upto June 2002 as the demand in the said bill is calculated upto 30 June 2002 in stead of upto 7th September 2001. A further prayer has been made that a writ of mandamus be issued to treat the agreement in respect of supply of electricity entered into between the petitioner and the respondent Board, as having stood determined with effect from 8th September 2001 in terms of Clause 9 of the agreement.

The petitioner has established a factory way back in 1984 and entered into an agreement with the Board for grant of electric connection, a contract demand of 125 KVA for the purpose of running a rolling Mill of the petitioner which commenced on 9th May 1984. The Factory was expanded, the contract demand was increased from 125 KVA to 300 KVA and for the increase a fresh agreement was executed between the petitioner and the Board on 12th December 1995.

On account of expansion of the plant, the petitioner applied for enhancement of contract demand from 300 KVA to 535 KVA. Accordingly, the petitioner entered into a fresh agreement on contract demand of 535 KVA on 26th June 1999. After running the plant for few months, it was found that the plant was not fisible and the petitioner was incurring loss. On that account the petitioner served notice on 8th September 2000 for determination of the agreement. As it was required to give 12 months' notice, accordingly 7th September 2001 will be deemed that the power has been disconnected.

Before completion of 12 months, the power which was given was disconnected on 23rd July 2001 on account of non-payment of bill for the months of May and June 2001. The Board treated that the petitioner has entered into a fresh agreement on 26th September 1999 and according to the terms of agreement, the agreement cannot be terminated before 1st July 2002. Accordingly, the Board treated, the agreement came to an end on 1st July 2002 and treating the same, raised bill against the petitioner of AMG charge for the period from 7th September 2001 to 1st July 2002.

Claim of the petitioner is that in terms of agreement (Annexure-1), Clause 8 of the agreement provides that the agreement shall be for three yeas in the first instance and thereafter it will continue from year to year until the agreement is determined. As per clause 9(a) of the agreement it provides that the consumer shall not be at liberty to determine this agreement before the expiration of three years from the date of commencement of the supply of energy. The consumer may determine this agreement with effect from any date after the said period on giving to the Board not less than twelve calendar months previous notice in writing in that behalf and upon the expiration of the period of such notice this agreement shall cease and determine without prejudice to any right which may then have accrued to the Board, hereunder provided always that the consumer may at any time with the previous consent of the Board transfer and assign the agreement of any other person and upon subscription of such transfer, this agreement shall be binding on the transferee and the Board and take effect in all respect as if the transferee had originally been a party hereto in place of the consumer who shall henceforth be discharged from all liabilities under or in respect thereof.

Clause 11 of the agreement provides that the agreement shall be read and construed as subject in all respect 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 an the terms and conditions of this agreement.

Clause 12 of the agreement provides that if the consumer desires to increase his contract demand the Board may require him to give twenty-four months' notice in writing stating the quantity of energy required but it will not be obligatory on the part of the Board to supply the energy on such requisition.

On the strength of such agreement, counsel for the petitioner submits that the petitioner entered into an agreement dated 26th March 1984, as per clause 12 of agreement, for increase in the contract demand, he had applied for enhancement to 535 KV of contract demand on 26th September 1999, would not be treated to be a fresh agreement and notice given on 8th September 2000 for determination of agreement for 12-months' notice, required for determination of the agreement, would be deemed to have been concluded on 7th September 2001 but the Board has wrongly treated the agreement dated 26th June 1999 as the fresh agreement between the petitioner and the Board and three years' period has been reckoned for the purpose of determination of the agreement. As in terms of Clause 9(a) the agreement cannot be determined without there being expiration of three years from the date of commencement of supply of energy.

He has further submitted that as per the tenor of Clause 12, he has applied for enhancement of contract demand, which does not mean, he has entered into a fresh agreement with the Board and stipulation of three years will be applied mandatorily. As has been claimed that three years' period will be counted from 26th March 1984 as on that date for the first time petitioner was provided power under the agreement. In support of his contention, he has relied on 2002(2) PLJR 230 and 400.

Counsel for the Board has submitted that Clause 12 the agreement will have to be read along with Clause 9 of the agreement. He has further submitted that the petitioner had applied for enhancement of load, vide Annexure-3 and vide order dated 8th June 1999 (Annexure-A) sanctioned the enhancement of load with some formality and, accordingly, both have entered into an agreement on 26th June 1999 (Annexure-5). In pursuance of agreement, a new transformer was installed which is apparent from inspection report contained in Annexure-G and supply was made with the new load. As per Clause 8 & 9 of the agreement dated 26th June 1999 (Annexure-C) the period of three years will be counted for the purpose of determination of the agreement as the consumer cannot determine the agreement before the expiration of three years from the date of the parties have entered into agreement. He has further submitted that once power has been given consequent to enhancement of load through another agreement will be treated to be a fresh agreement even though the parties have entered into an agreement earlier for supply of power.

In support of his contention, petitioner has relied on 2002(2) PLJR 230 (Para 10 to 12) and AIR 1990 SC 699 (Para-8, 9 and 21). He has further relied on the judgment reported in 1995(2) PLJR 715 (Para-7).

Having considered the rival contention of the parties, this Court has to consider as to whether the agreement arrived for enhancing the contract demand for 535 KVA dated 26th June 1999 will be treated to be a fresh agreement for the purpose of reckoning three years for determination of the agreement or the first agreement dated 26th March 1984 by which for the first time the Board started giving power will be treated to be the basis for recounting three years for determination of the agreement. This Court will also have to decide the effect of Clause 12 of the agreement whether the application for enhancement and subsequent agreement whereby the power is enhanced will attract Clause 9(a) of the agreement.

For determining the issue it will be appropriate to consider the terms of agreement reached between the parties and the relevant clauses of agreement are Clause 8, 9, 11 and 12 which are as follows:

8. The agreement shall be ordinarily in force for a period of not less than three years in the first instance from the date of commencement of supply, i.e. …. And thereafter shall continue from year to year until the agreement is determined as hereinafter provided.

9 (a) The consumer shall not be at liberty to determine this agreement before the expiration of three years from the date of commencement of the supply of energy. The consumer may determine this agreement with effect from any date after the said period on giving to the Board not less than twelve calendar months previous notice in writing in that behalf and upon the expiration of the period of such notice this agreement shall cease and determine without prejudice to any right which may then have accrued to the Board hereinafter provided always that the consumer may at any time with the previous consent of the Board transfer and assign this agreement of any other person and upon subscription of such transfer this agreement shall be binding on the transferee and Board and take effect

in all respect as if the transferee had originally been a party hereto in place of the consumer who shall henceforth be discharged from all liabilities under or in respect thereof.

(b) In case the consumer's supply is disconnected by the Board in exercise of its power under the agreement and/or law and the consumer does not apply for reconnection in accordance with law within the remainder period of the compulsorily availing of supply as stated above r the period of notice whichever be longer, he will be deemed to have been a notice on the date of the disconnection in terms of aforesaid clause 9(a) for the determination of the agreement and on expiration of the above said remainder period of compulsorily availing of supply or the period of notice whichever is longer, this agreement shall cease and determine in the same way as above.

11. The agreement shall be read and construed as subject in all respect 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 fort 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.

12. In case the consumer desires to increase his contract demand the Board may require him to give twenty-four months' notice in writing stating the quantity of energy required but will not be obligatory on the part of the Board to supply the energy on such requisition".

Clause 8 provides the agreement will not be for a period less than three years in the first instance and thereafter shall continue from year to year until the agreement is determined. Clause 9(a) provides that consumer will not be at liberty to determine the agreement before expiration of three years from the date of commencement of the supply of energy. The consumer may determine this agreement with effect from any date after the said period after giving to the Board not less than twelve calendar months previous notice in writing in that behalf and upon the expiration of the period of such notice, this agreement shall cease.

The issue with regard to status of such agreement came for consideration before the Hon'ble Supreme Court in AIR 1990 SC 699 :: (1990)1 SCC 731 (BSEB v. Green Rubber Industries) where the Hon'ble Supreme Court has considered the clauses of agreement and the argument advanced by the parties about the nature of agreement providing the power to the consumer and the Court relying on the judgment of House of Lords reported in 1974 (3) All ER 616 (Schroeder v. Macaulay) quoted in affirmance the part which states that fairness or reasonableness are relevant for their enforceability.

It is settled law that a person who signs a document which contains contractual terms is normally bound by the them even though he has not read them and is ignorant of the precise legal effect. In view of the clause providing for liability of consumer to pay minimum guarantee charges irrespective of whether any energy is used or not.

The Hon'ble Supreme Court says that every contract is to be considered with reference to its object and the whole of its terms and accordingly the whole context must be considered in endeavoring to collect the intention of the parties, even though the immediate object of enquiry is the meaning of an isolated clause. This agreement with the stipulation of minimum guaranteed charges cannot be held to be ultra vires on the ground that it is incompatible with the statutory duty. Difference between this contractual element and the statutory duty have to be observed. A supply agreement to a consumer makes his relation with the Board mainly contractual, where the basis of supply is held to be statutory rather than contractual.

It will be relevant to quote Para-21 and 22 of the judgment.

> "21. It is true that the agreement is in a standard form of contract. The standard clauses of this contract have been settled over the years and have been widely adopted because experience shows that they facilitate the supply of electric energy. Lord Diplock has observed : "If fairness or reasonableness were relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable." A Schroeder Music Publishing Co. Ltd. v. Macaulay, (1974) 3 All ER 616 (624). In such contracts a standard form enables the supplier

to say: "If you want these goods or services at all, these are the only terms on which they are available. Take it or leave it." It is a type of contract on which the conditions are fixed by one of the parties in advance and are open to acceptance by anyone. The contract, which frequently contains many conditions is presented for acceptance and is not open to discussion. It is settled law that a person who signs a document which contains contractual terms is normally bound by them even though he has not read them, even though he is ignorant of the precise legal effect. In view of clause 4 having formed one of the stipulations in the contract along with others it cannot be said to be nudum pactum and the maxim nudum pactum ex quo nonoritur actio does not apply. Considered by the test of reasonableness it cannot be said to be unreasonable inasmuch as the supply of electricity to a consumer involves incurring of overhead installation expenses by the Board which do not vary with the quantity of electricity consumed and the installation has to be continued irrespective of whether the energy is consumed or not until the agreement comes to an end. Every contract is to be considered with reference to its object and the whole of its terms and accordingly the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of enquiry is the meaning of an isolated clause. This agreement with the stipulation of minimum guaranteed charges cannot be held to be ultra vires on the ground that it is incompatible with the statutory duty. Difference between this contractual element and the statutory duty have to be observed. A supply agreement to a consumer makes his relation with the Board mainly contractual, where the basis of supply is held to be statutory rather than contractual. In cases where such agreements are made the terms are supposed to have been negotiated between the consumer and the Board, and unless specifically assigned, the agreement normally would have affected the consumer with whom it is made, as was held in Northern Ontario Power Co. Ltd. v. La Roche Mines Ltd. (1938) 3

All ER 755.

22. For the foregoing reasons we have no hesitation in holding that the agreement was reasonable and valid and it was not determined with the disconnection of supply to the respondent firm by the Board on 28th September, 1981 but only according to the stipulations in Cl.9(b) of the agreement as discussed above. The liability to pay the minimum guaranteed . charges' therefore, continued till the determination of the contract. The Board was, therefore, entitled to submit the bills and make the demand on that account, and recover the same according to law."

In view of the decision of the Hon'ble Supreme Court, the terms of agreement is binding on the parties. The clause of agreement has been held to be intra vires and terms of contract which is statutory in nature.

Further judgment that has come for consideration before this Court is 1995(2) PLJR 715 (M/s Gaya Roller Flour Mills Pvt. Ltd. V. BSEB) where Clause 9 of the agreement came for consideration and this Court has held that even though the line was disconnected but the consumer is bound to pay the minimum guarantee charge for the period mentioned in the agreement. It will be relevant to quote Para7 and 8 of the judgment which are as follows:

> "Para 7: I am unable to accept the contention advanced on behalf of the petitioner. It would be quite anomalous to hold that notwithstanding the fact that the petitioner continued to receive and utilize energy after 20.4.1989, he would not be able to pay for it because he had given a notice for disconnection on 20.4.1988. In my opinion, clause 9(a) of the H.T. Agreement gives the consumer a right to determine the agreement after the expiry of one year from the date of the notice. Now, the accrual of the right of determination of the contract is one thing and the actual determination of the contract, in exercise of that right is something quite different. In the instant case, a right might have accrued to the consumer on the basis of the notice dated 20.4.1988 but notwithstanding the notice the contract was kept alive and subsisting by the action of the consumer in continuing to receive and utilize electricity. He would, therefore, be liable to all the

obligations in terms of the contract. I have also perused the decisions relied upon by Mr. Agrawal but I am unable to see how the petitioner in this case can derive any support from them.

Para 8: Mr. Agrawal next contended that the Electrical Superintending Engineer had found, in the impugned order, that during the relevant period the meter was not recording correctly and in view of that finding the only course open to the authorities was to raise a bill in terms of clause 16.8 of the tariff. I find no substance in this submission either. The Superintending Engineer has calculated the charges payable by the petitioner on the basis of the annual minimum guarantee which is one of the modes envisaged in clause 16.8 of the tariff for raising the bill in case of a defective meter. It is to be noted that the Superintending Engineer has made a detailed calculation of the charges payable by the petitioner in the light of the supreme court decision in Bihar State Electricity Board v. Vishnu Roller, Flour and Oil Mills, Gaya. No infirmity was pointed out in these calculations."

The issue of interpretation and effect of the agreement between the Board and the consumer came for consideration in 2002(2) PLJR 230 [M/s Mahakali Milling Company(P) Ltd. V. BSEB] where the Court has said that there is no dispute between the parties that even though it is allowed, a fresh agreement has to be entered into between the parties after observing the formality.

The Court held that the agreement was to be for a period of three years and thereafter to continue them from year to year basis until it was determined in terms of clause 9 of the agreement. It was further held that under clause 9 of the agreement, the consumer could not determine the agreement before expiry of three years and then he could determine the agreement only by giving a notice in writing of 12 months.

In the light of the view taken by the Hon'ble Supreme Court as well as by this Court it has to be seen whether the point of initiation of agreement for three years will start on 26th March 1984 or as per the Board, the fresh agreement provided for contact determination of 535 VA on 26th June 1999 will be the point for reckoning of three years' period for determination of contract.

It has been held by the Hon'ble Supreme Court, if the parties have entered into an agreement, it is binding, if the terms of agreement are clear and reasonable. The Hon'ble Supreme Court and this Court have interpreted the terms of agreement and found that the minimum guarantee charge cannot be said to be unreasonable as it has connection with the investment made by the licensee and for three years, the consumer cannot go for determination of the contract. Had there been any protest when the petitioner had entered into an agreement on 26th June 1999 rather with the open eyes they entered into the agreement for providing contract demand of 535 KVA and the agreement continued to operate till the notice for determination of agreement was given on 8th September 2000. Clause 12 would have an effect if the original agreement had continued but as fresh agreement has been entered into between the parties on 26th September 1999, the period of three years will be calculated from this date and the claim of petitioner is that he has given the 12 months' notice on 8/9/2000 for determination of agreement is not sustainable in view of clause 8 and 9(a) of the agreement which provides compulsory continuation of agreement for three years, after its expiry the consumer of liberty to determine the agreement. Even though the petitioner had given notice for determination of agreement on 8th September 2000 but the statutory period of there years comes to an end on 1st July 2002 and, as such, the petitioner/consumer cannot disown to make payment of minimum guarantee charge though power was disconnected on 23rd July 2001 on account of non-payment of bill.

In this view of the matter, this Court does not find any merit in this case. Accordingly, this petition is dismissed.

(Shivaji Pandey, J)

Jay/-

U			