In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No.27059 of 2017

Surya Alloy Industries Limited and another
Vs.
State of West Bengal and others

For the petitioners	:	Mr. Jaydeep Kar, Mr. Tanoy Chakraborty, Mr. Siddharth Shroff
For the State	:	Mr. S.N. Mukherjee Mr. Sk. Md. Galib
For the DVC	:	Mr. Subir Pal
Hearing concluded on	:	16.01.2023
Judgment on	:	16.02.2023

Sabyasachi Bhattacharyya, J:-

1. The petitioners have raised **four** primary questions/**issues**:

2. **First, whether the West Bengal Electricity Duty Act, 1935 (in brief, "the 1935 Act") is *ultra vires* to Article 288 of the Constitution of India as the same does not fulfill the pre-requisites under Article 288.**

3. **Secondly, whether the levy of tax by the State of West Bengal on consumption of electricity by consumers of the Damodar Valley Corporation (DVC) in the state of West Bengal tantamounts to levy of tax on an inter-state sale.**

4. **Thirdly, whether levy of duty under the 1935 on consumption of electricity supplied by the DVC is beyond the Legislative competence of the State.**

5. **Fourth, whether any duty or tax can be levied on demand charges**.

6. As regards the first, second and third issues, learned Senior Counsel appearing for the petitioner argues that the 1935 Act does not have Presidential assent as required under Article 288 of the Constitution of India, which is applicable to the DVC as the said corporation is an inter-state valley authority.

7. Section 12 of the Damodar Valley Corporation Act, 1948 (in short, "the DVC Act") lays down the functions of the DVC. In terms of Sections 18 and 20 of the DVC Act, it has the right to sell electricity and collect charges for supply.

8. With the promulgation of the Electricity Act, 2003 (in brief, "the 2003 Act"), the autonomous status of the DVC was changed and it became a 'licensee' under Section 14 of the 2003 Act. However, insofar as the provisions of the DVC Act are not inconsistent with the 2003 Act, the former holds the field till date. For such proposition, learned Senior Counsel relies on *Bhaskar Shrachi Alloys Limited & Ors. v. DVC & Ors.*, reported at *(2018) 8 SCC 281*.

9. So long sale of electricity by the DVC was guided by the DVC Act, a Central Act, duty was being levied by the State Government of West Bengal under the West Bengal Duty on Inter-State River Valley Authority Electricity Act, 1973 ("the 1973 Act"), in respect of which assent of the President was obtained in compliance with Article 288 of the Constitution.

10. However, after the DVC became a licensee under the 2003 Act, the State Government started imposing duty on consumption of electricity under the 1935 Act, which was a pre-independence law for which no assent was obtained from the President. Since DVC is an authority established by a law made by the Parliament, a State law cannot impose a tax or authorize imposition of a tax in respect of electricity sold by the DVC, it is contended.

11. Learned Senior Counsel for the petitioner places several provisions of the 1935 Act to explain its scheme. From a plain reading of the definition clauses of the two Acts, it is argued, the word "sale" and "supply" are seen to be used interchangeably. The sale of electricity is interlinked with its consumption, since, unless a consumer consumes electricity, there is no sale. Electricity bills are raised at the end of the month by taking note of the meter reading and based on the units consumed. Due to the special nature of electricity, it is contended, the sale is complete only when it is consumed.

12. Section 3 of the 1935 Act, it is submitted, is the charging Section. It stipulates the duty to be levied on net charge for energy consumed or the units of energy consumed, as the case may be. "Net charge" is the aggregate amount charged by a licensee for sale of electricity to its consumer after deduction of rebate. Thus, under Section 3, duty is charged on the sale price of the energy sold by a licensee to its consumer.

13. Again, Section 5 of the 1935 Act clarifies that the electricity duty payable under Section 3 is "on the energy supplied by him to consumers".

14. Schedule B under the First Schedule of the 1935 Act also mentions that the rate imposed as electricity duty is based on the aggregate amount charged by a licensee for sale of electricity to its consumers.

15. Thus, the 1935 Act requires Presidential assent as per Article 288 of the Constitution, in the absence of which it is *ultra vires*.

16. Learned Senior Counsel further argues that the expression "sold" in Article 288 contemplates and includes "consumption", because in case of electricity, the two concepts are interlinked, as there is no hiatus between sale and consumption. In this context, the petitioner cites *Indian Aluminium Company v. State of Kerala [(1996) 7 SCC 637]* which was, in turn, relied upon in *2016 SCC OnLine Kar 8965 (Vijaya Steels Limited v. Bengaluru Electricity Supply Co. Ltd. Bengaluru & Ors.)*, cited by the respondents.

17. The definitions of "net charge" along with "energy charge" and "gross charge" in the 1935 Act, it is contended, clearly indicate that such charges are basically charged by a licensee for sale of electricity to the consumers for consumption. Thus, Section 3 of the 1935 Act is in effect a tax imposed by a pre-Constitutional Act for sale on consumption of electricity.

18. The sale of electricity by the DVC, it is submitted, is an inter-state sale as it has its generation, transmission and distribution in both the states of Jharkhand and West Bengal. The power generated in Jharkhand and West Bengal are transmitted into an integrated system and distributed by the DVC through a common and inseparable grid. Hence, the supply to consumers is also an inter-state transaction.

19. By placing reliance on *State of A.P. v. NTPCL & Ors.*, reported at *(2002) 5 SCC 203*, it is argued that inter-state sale of electricity/goods is covered by entry 92A of List I of the Seventh Schedule of the Constitution of India. Therefore no levy of tax is permissible under a State Act. Learned Senior Counsel next argues that the definition of "goods" in Article 366 (12) of the Constitution includes electricity. The definition of "goods" in Article 366 (12) of the Constitution includes electricity.

20. On the other hand, an entry in List II of the Seventh Schedule shall always remain subject to the limits of Constitutional empowerments. Thus, sale or purchase taking place in the course of inter-state trade or commerce has been excluded from the competence of the State Legislature. The *situs* of the sale or purchase is wholly immaterial as regards inter-state trade or commerce. The entire transaction of generation in one state and supply to another state where it is consumed is one and is an inter-state sale on account of instantaneous movement of goods from one state to another. *Vijaya Steel (supra)* and *2020 (4) MR.L.J.430 (Rukminirama Steel Rollers Pvt. Ltd. Goa & Ors. v. State of Goa & Anr.)*, both cited by the respondents for the proposition that levy of duty on consumption cannot be an inter-state sale, are sought to be distinguished by the petitioners on the ground that in both cases, generation, supply and consumption were taking place within one state, unlike that of the DVC.

21. Next addressing the fourth issue of demand charges, learned Senior Counsel for the petitioners argues that no duty is payable on demand charges as the same is not levied on consumption, as apparent from Clauses 4.3.1 and 4.3.4 of the relevant Regulation.

22. The petitioners seek to distinguish *Northern India Iron & Steel Co. v. State of Haryana & Anr.*, reported at *(1976) 2 SCC 877*, which is cited by the respondents for the proposition that duty can be levied even on demand charges. It is contended that the said judgment was based on interpretation of a rule contained in the Punjab Electricity (Duty) Rules, 1958, which dealt with duty leviable on "price of the energy recoverable at the net rate of the Board which will include the demand charge when the supply is governed by a two-part tariff". However, the provisions of the 1935 Act are totally different, as duty is not leviable on price of energy recoverable including demand charge under the same. Moreover, the relevant rule for charging duty as interpreted in the said judgment is completely different from the charging Sections under the 1935 Act, it is argued.

23. Hence, the petitioners pray that the writ petition be allowed and the respondents directed to refund electricity duty collected by the State government illegally.

24. On the other hand, the learned Advocate General (AG), appearing for the State, submits that Article 288 (1) of the Constitution, in the absence of an order of the President to the contrary, prohibits any pre-Constitution law of a State from imposing or authorizing the imposition of a tax in respect of any water or electricity "stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by the Parliament for regulating or developing any inter-State river or river-valley".

25. In essence, Article 288 (2) stipulates that no legislature of a State shall make a law referred to in Article 288 (1) without Presidential assent.

26. The 1935 Act (as amended), it is argued, does not impose any tax on storage, generation, consumption, distribution, or sale of electricity *by* the DVC as contemplated under Article 288 of the Constitution. It merely imposes tax on consumption of electricity by consumers of electricity in the state of West Bengal, where such electricity has been supplied by a licensee or the Government.

27. To strengthen such argument, the learned AG places reliance on several provisions of the 1935 Act, including its Preamble, Section 3, various sub-sections of Section 2, etc. where the expression "consumed" has been used with regard to energy or electrical energy.

28. The taxable event is, thus, consumption of electricity by the consumer, not the sale of electricity by the DVC.

29. Distinguishing the judgment of *State of A.P. v. NTPCL (supra)*, the learned AG contends that the limited question involved there was whether sales of energy by the NTPCL to several Electricity Boards situated outside the state of Andhra Pradesh and the state of Goa attract the incidence of taxation under Section 3 of the Act discussed therein. The Supreme Court further clarified that it was not concerned in the said case with levy of duty on consumption.

30. The present controversy does not relate to a duty/tax on inter-state sale of electricity. The taxable event here is the consumption of electricity by consumers in West Bengal and not DVC, either as seller or consumer.

31. The Supreme Court was considering whether tax on sale of electricity could be imposed by State law under Entry 54 of List II of the Seventh Schedule. However, the duty levied under the 1935 Act is a duty on consumption of electricity by consumers within the State. The same falls within Entry 53 in List II of the Seventh Schedule of the Constitution, which reads *"Taxes on the consumption or sale of electricity"*. On a plain reading of the same, it is seen that tax on consumption (alone) of electricity is permissible.

32. The learned AG places reliance on the judgment of *Vijaya Steels (supra)* of the Karnataka High Court and *Rukminirama Steel (supra)* by the Goa Bench of the Bombay High Court, both of which deal with the *NTPCL* judgment.

33. In *Vijaya Steels*, the High Court concluded that the Supreme Court, in *NTPCL*, has nowhere laid down any law in respect of tax on consumption of electricity. The Goa decision also held on similar lines, it is contended.

34. It is argued that the 1935 Act does not levy a duty on sale of electricity payable by the seller. Instead, it levies a duty on the act of consumption of electricity which is payable by the consumer.

35. Next addressing the issue of Demand Charges, the learned AG controverts the petitioners' argument that it is impermissible to include 'demand charge' within 'energy charge' because demand charge is not attributable to consumption. It is submitted that 'demand charge' would be subsumed within the general word 'consumption' under Entry 53 of List II of the Seventh Schedule.

36. Citing the Supreme Court judgment in *State of Haryana & Ors. v. Sant Lal*, reported at *(1993) 4 SCC 380*, it is argued that legislative entries in Schedule VII are not to be read in a restrictive, but in a wide manner. All general words are to be read so as to include all matters which are ancillary or subsidiary thereto which could fairly and reasonably be said to be comprehended within the legislative entry.

37. It is argued that the demand charge is justified because of the investment and expenditure incurred by licensees to provide the necessary infrastructure to provide electricity for consumption. Hence, a demand charge is a component of the broader category of consumption charge or 'energy charge' as mentioned in the 1935 Act.

38. The Supreme Court, it is contended, has upheld the levy of a duty on demand charge under a two-part tariff system in its decision *Northern India Iron and Steel Co. v. State of Haryana [(1976) 2 SCC 877]*. While dealing with the issue, whether any duty is leviable on demand charge and, if so, to what extent, the Supreme Court discussed the two well-known systems of tariff – flat rate system and two-part tariff system. The latter is meant for big consumers of electricity and is comprised of demand charges (to cover investment, installation and the standing charges to some extent) and energy charges (for actual amount of energy used). The Supreme Court held that the price of energy in a two-part tariff system would mean and include the energy charge as also the demand charge.

39. In the instant case, it is submitted, the Power Tariff Agreement dated August 14, 2006 reflects that the demand charge is part of the price of energy.

40. Thus, it is submitted that since demand charges are part of price of energy and relatable to consumption, it is permissible for the State to levy a duty on demand charge.

41. Upon considering the rival contentions of parties, the Court comes to the following conclusions:

42. To answer the first question, regarding the *vires* of the 1935 law vis-à-vis Article 288 of the Constitution, we have to look into the language of Article 288 (1). The same refers to a law of a State in force immediately before the commencement of the Constitution, which criterion is fulfilled by the 1935 Act.

43. Clause (1) precludes any such law from imposing or authorizing to impose a tax in respect of *any water or electricity stored, generated, consumed, distributed or sold* ***by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley.***

44. There is no doubt that the DVC Act, being enacted in 1948, pre-dates the Constitution and is a law 'made by Parliament' and that the DVC is an authority regulating or developing an inter-State river-valley.

45. The specific language of Clause (1) of Article 288, in the present context, refers unambiguously to electricity stored, generated, consumed, distributed or sold **by** such an authority.

46. However, the 1935 clearly provides for taxation on consumption of electricity by consumers in Bengal, and not consumption by the DVC itself. This is because Section 2 (1) of the 1935 Act defines "consumer" to mean any person, *other than a distributing licensee*, who is supplied with energy by a licensee or by the State Government. The DVC is admittedly a deemed licensee under Section 14 the 2003 Act and, under the regime of the 2003

Act, is by definition excluded from the purview of the term "consumer" in the 1935 Act.

47. Hence, the applicability of Clause (1) of Article 288 to the 1935 Act is excluded at the outset.

48. Although the petitioners have sought to create confusion regarding the use of words in Article 288 (1), a plain reading of the clause leaves no scope of ambiguity that, in case of electricity consumed, the same has to be consumed by a river-valley authority created by a Parliamentary Act to come within the fold of Article 288 (1). As Clause (2) of Article 288 derives meaning from Clause (1), the same is also not attracted.

49. Thus, the bar in Article 288 of the Constitution is inapplicable to the 1935 Act.

50. As such, **the first issue, as regards whether the 1935 Act is *ultra vires* to Article 288, has to be answered in the negative**.

51. Coming to the second issue, the petitioners have consistently attempted to argue that the consumption of electricity in West Bengal cannot be segregated from the inter-State sale or supply of electricity by the DVC. The argument has been two-pronged: first, that the supply and sale are identical and it happens through an inter-State power grid spread over the states of West Bengal and Jharkhand; secondly, that electricity is such a commodity which does not permit of any distinction between sale and consumption, since one is inextricably linked with the other and the entire transaction is instantaneous.

52. Let us take this line of reasoning to its logical culmination. Testing margins, if the transaction is made out to be 'instantaneous' as in 'simultaneous', the same is not entirely correct. Even the speed of light is a finite number of units, however high it might be. At the level of electrons, the generation and consumption point of supply are discrete, though they appear to be a continuum. There are three distinct components of the transaction – generation at one end, transmission from that end to the other and consumption at the other end. Otherwise, the terms 'sale' and 'consumption' would lose their distinct meanings and merge into synonimity.

53. Just like other 'goods', with which definition electricity has been equated by the petitioners themselves, electricity is generated at a point and consumed at the other. The process of 'supply' includes the 'generation' and the 'transmission' components, but is distinct from consumption, segregated clearly at the point when it reaches the meter of the consumer. Although supply may be measured by units of consumption, the two are entirely different concepts, one being the production and carriage of the product to the doorstep of the consumer and the other the act of consumption or use of electricity. The two are, obviously, as distinct as the means and the end. Strictly speaking, supply is the bridge between generation and consumption. At the seller's end, the generation and supply take place and at the user's end, the consumption.

54. In fact, the Electricity Act, 2003, which is a special statute governing electricity, defines "consumer" in Section 2 (15) thereof as "any person who is supplied with electricity for his own use… and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee.., etc." Thus supply or sale ends where consumption begins.

55. The legislature clearly distinguishes between the two concepts in not only the 2003 Act, which is a special statute on electricity, but also the 1935 Act, which contemplates "consumer" as any person other than a distributing licensee who is supplied with electricity.

56. Even Article 288 of the Constitution differentiates between "stored", "generated", "consumed" and "distributed' or "sold"; otherwise the terms would not have been used separately to connote different ideas.

57. Thus, the petitioners' arguments seeking to portray a sort of interchangeability of the terms 'sold' and 'consumed', inasmuch as electricity is concerned, is unacceptable.

58. As such, the levy of tax by the State of West Bengal on consumption of electricity by consumers of the Damodar Valley Corporation (DVC) in the state of West Bengal does not tantamount to levy of tax on an inter-state sale. Hence **the second issue is also answered in the negative**.

59. Seen in such perspective, what the 1935 Act does is to empower the State Government to levy duty or tax only on the 'consumption' of electricity by non-licensees and not on its sale by licensees like the DVC.

60. Entry 92A of List I (Union List) of the Seventh Schedule of the Constitution of India speaks about taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce. In contrast thereto, the 1935 Act levies duty not on any inter-state sale or supply but merely on the 'consumption' component at the individual (as in non-licensee) user's end.

61. Rather, Entry 53 of List II (State List) of the Seventh Schedule specifically provides for taxes on consumption or sale of electricity.

62. Reading harmoniously the two entries in Lists I and II respectively, it is entirely within the domain of the State to legislate on consumption of electricity within the State, which is precisely the scope of operation of the 1935 Act.

63. Hence, there is no fetter, Constitutional or Legislative, on the levy of duty under the 1935 Act by the State of West Bengal for consumption of electricity by non-licensees within its territory.

64. *Bhaskar Shrachi Alloys (supra)* dealt exclusively with the interplay between the DVC Act, 1948 and Electricity Act, 2003 (both Central Acts framed by the Parliament) and the Tariff Regulations framed thereunder. The Supreme Court, in the said case, did not deal with the levy of taxes by the State for consumption of electricity within the State at all. Hence, the ratio laid down therein and the discussions made to arrive at such ratio are not germane for the adjudication of the instant *lis* in any manner.

65. In paragraph no. 4 of the *NTPCL Case*, it is observed that the Andhra Pradesh Electricity Duty Act, 1939 provides for levy of duty on certain *sales and consumption of electricity by licensees* in the State of Andhra Pradesh. In paragraph no. 5, it is recorded, inter alia, that duty is also leviable on all energy consumed by the licensee. As per the Supreme Court, the limited question which arose for its consideration was – whether sales of energy by NTPCL to several Electricity Boards situated outside the State of Andhra Pradesh and to the State of Goa attract the incidence of taxation under Section 3 of the Act.

66. In such context, the Supreme Court opined on the inter-relation between Entry 92-A in List I and Entries 52, 53 and 54 of the Seventh Schedule of the Constitution.

67. In the present case, however, the question which has arisen concerns only the consumption of electricity by non-licensees within the State of West Bengal. The scope of examination here is whether the State has the authority to impose duty on the same. The inter-play to be considered here is between Entry 53 of List II and Entry 92-A of List I of the Seventh Schedule, as discussed above.

68. Hence, the ratio laid down by the Supreme Court in the *NTPCL* judgment does not have any bearing on the issues involved in the case at hand and the petitioners' reliance on the same is misplaced.

69. Rather, in *Vijaya Steels (supra)*, the Karnataka High Court held (correctly, in my humble opinion) that *NTPCL* nowhere laid down any law in respect of tax on consumption of electricity.

70. Again, as rightly argued by the State in the present case, the Bombay High Court, in *Rukminirama Steel Rollings (supra)*, also held in tune with the Karnataka High Court that *NTPCL* did not deal with the Constitutional validity of tax on consumption of electricity payable by consumers but only dealt with tax on the sale of energy payable by the seller of energy. In the said Bombay judgment, the provisions of the Goa Electricity Duty Act, 1986 which levied duty on units of energy consumed, fell for consideration and it was held that the legislation came under Entry 53 of List II of the Seventh Schedule of the Constitution and was, thus, fell within the domain of State legislation.

71. Hence, even taking into consideration the judgments cited by the parties, it is found that the levy of tax/duty on consumption of electricity within the State of West Bengal falls under Entry 53 of List II (State List), as opposed to Entry 92-A of List I (Union List), of the Seventh Schedule of the Constitution of India and, thus, well within the legislative competence of the State. Thus, **the third issue is also answered in the negative**.

72. The fourth issue raised is that of leviability of duty on 'demand charges'. To explore the said question, it is required first to understand the nature of demand charges in the present context. "Demand charges" is a concept evolved by licensees. It is basically an additional fee payable by the commercial consumers to licensees in order to compensate for the infrastructural maintenance charges spent by the licensees to maintain constant power supply to the commercial consumers. However, such charges cannot arbitrarily include all expenses required to maintain the entire power supply grid of the licensee but has an element of specificity to the particular consumer concerned.

73. When charged from the consumer, demand charges are costs borne by the consumer for *consumption of electricity* proportionate to the money spent by the licensee for the said consumer. Unless there is consumption of electricity, the question of demand charges does not arise. Hence, by whatever name called, it cannot be gainsaid that demand charges are an integral part of the consumption charges paid by commercial consumers.

74. "Energy charge", as defined in Section 2 (a) of the 1935 Act, means the amount charged (whether as energy charge or some other charge) by a licensee for the supply of energy to a consumer….". Hence, the entire amount charged, including energy charge "or some other charge" in included.

75. "Demand charge" finds place in Clause 4.3.1 of the West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2011, which specifies the cases in which it is applicable.

76. Again, Clause 4.3.3 of the same Regulations provides that the demand charge shall be based on the data available from recording in consumers' meter on average supply in terms of demand for every minute time block as is applicable and its availability based on tariff mechanism.

77. Thus, it is clear that demand charge is an essential component of "energy charge" which is payable by the consumer and is relatable to the extent of use of the consumer. Hence, demand charge is consumer-specific, depending on data available from a particular consumer's meter recording.

78. In this context, it is worthwhile to consider the judgment of *M/s Northern India Iron & Steel Co. (supra)*, cited by the State.

79. The very first paragraph thereof lays down, as one of the issues raised therein, whether the State of Haryana is entitled to charge any duty under the Punjab Electricity (Duty) Act, 1958 on the demand charge. Read with this, the second question, as formulated in paragraph no. 6 thereof, is whether any duty is leviable on the demand charge; if so, to what extent?

80. In paragraph no. 10 of the decision, the Supreme Court holds, in unambiguous terms, that it was rejecting the contention that no duty is leviable at all on the demand charge.

81. Coming back to the 1935 Act, as per Section 2 (2b) thereof, "gross charge" means the aggregate amount of energy charge and fuel surcharge, if any, made by the licensee for the supply of energy. Clause (3a) defines "net charge" as the amount of gross charge that remains after deduction therefrom of any rebate or refund of fuel surcharge, if any.

82. Again, Section 3 of the 1935 Act stipulates that there shall be charged, levied and paid to the State Government a duty ('electricity duty') on the net charge for energy consumed or the units of energy consumed, as the case may be.

83. Therefore, any "other charge" apart from energy charges, including "demand charge", is included within the energy charge for certain large consumers as stipulated in the aforementioned Regulations of 2011.

84. Thus, the Supreme Court's view in *M/s Northern India Iron & Steel Co. (supra)*, interpreted in conjunction with Section 3 of the 1935 Act, unerringly indicates that demand charges are included in "energy charge" and the State can levy duty on the same as a component of the charges paid for consumption of electricity.

85. The State has also cited *State of Haryana & Ors. v. Sant Lal & Anr.(supra)* where the Supreme Court held that legislative entries have to be read in a very wide manner so as to include all subsidiary and ancillary matters. Considering the issue at hand from such perspective, Entry 53 of List II (State List) of the Seventh Schedule is required to be given its widest amplitude. This would definitely bring demand charges within the fold of energy charges paid by the consumers for consumption of electricity. Hence, the State is entirely within its legislative authority in imposing duty on demand charges as well under the regime of the 1935 Act.

86. Hence, **the fourth issue cannot but be answered in the affirmative.**

87. All the issues, thus, are decided against the petitioners.

88. Accordingly, WPA 27059 of 2017 is dismissed on contest. The West Bengal Electricity Duty Act, 1935 is declared *intra vires* vis-à-vis Article 288 of the Constitution of India and the duty levied thereunder by the State of West Bengal is held to be well within its legislative competence.

89. There will be no order as to costs.

90. Urgent certified copies, if applied for, be issued to the applicants subject to compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)