

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NO.8486 OF 2019

<u>Petitioner</u>	:		RattanIndia Power Limited, A Company established under Companies Act, 1956 having its registered office at 5 th Floor, Tower-B, Worldmark 1 and its power plant situated at Plot No.D2 &D2(Part), Additional Industrial Area, Nandgaon Peth, M.I.D.C., Amravati, 444901, through its Authorized Signatory.
			– Versus –
<u>Respondents</u>	:	1.	State of Maharashtra, Through Water Resources Department, Mantralaya, Mumbai– 32, Through its Secretary.
		2.	The Chief Engineer, Water Resources Department, Amravati.
		3.	The Superintending Engineer, Upper Wardha Project Circle, Amravati.
		4.	The Executive Engineer, Upper Wardha Irrigation Division, Amravati.
		5.	Vidarbha Irrigation Development Corporation, Sinchan Bhavan, Nagpur, through its Executive Director.

Shri M.G. Bhangde, Senior Advocate with Shri Shyam Dewani,
Advocate for the Petitioner.

Shri D.P. Thakare, Additional Government Pleader, for Respondent
No.1.

Shri M.V. Samarth, Senior Advocate with Shri H.D. Marathe,
Advocate for Respondent Nos.2 to 5.

CORAM : **A. S. CHANDURKAR AND M.W.
CHANDWANI, JJ.**

RESERVED ON : **15 NOVEMBER, 2022.**

PRONOUNCED ON : **10 FEBRUARY, 2023**

J U D G M E N T : (Per M.W. Chandwani, J.)

The petition challenges the demand letters/notices dated 26/10/2017, 26/10/2018, 16/10/2019, 23/10/2020, 13/10/2021 and 17/10/2022, whereby respondent No.4 demanded the amount towards Commitment Charges from the year 2017 to 2022 from the petitioner. The petitioner also seeks implementation of the letter dated 20.07.2020 sent by respondent No. 4.

2. The petitioner is a company and has set up Thermal Power Plants at Amravati in the State of Maharashtra. respondent No.1, the State of Maharashtra maintains and supply water for irrigation and non-irrigation purpose. Respondent No.5 acts as a link between the industry and respondent No.1. Respondent Nos. 2, 3 and 4 through whom respondent Nos.1 and 5 work in water irrigation affairs. For running the Thermal Power Plants, water is the basic requirement, therefore, on 22/05/2012 an agreement was executed between the petitioner and respondent No.4 for allocation of water for a maximum quantity of 87.60 Million Cubic Meters (for short 'MCM') per year. The said agreement was for a period of six years i.e. up to 21/05/2018. As per the conditions of the said agreement, every year the petitioner has

to inform in advance requirement for annual water requirement to respondent No.4. Accordingly, every year supplementary agreement is being executed for the said annual water demand.

3. As per agreement the petitioner had to pay Rs. 232.18 crores one time charges in installments towards Irrigation Restoration Charges @ Rs.1,00,000/- per hector for deprivation of water/irrigation for 23218 hectors of land affected due to reservation of the water of 87.6 MCM for the petitioner. Vide order dated 05/05/2016 in Writ Petition no. 4968/2015 filed by the petition, this court reduced the said rate from Rs.1,00,000/- per hector to Rs.50000/- per hector. Against which the respondents preferred Special Leave Petition before the Supreme Court.

4. Respondent No.4 started charging the Commitment Charges @ 5% for the reduction of annual demand of water in reserved quota of 87.6 MCM, which was under challenge in Writ Petition no. 1372/2016. This court, vide order dated 14/07/2017 has held that the agreement dated 22/05/2012 does not provide for payment of Commitment Charges and quashed demand of Commitment Charges. Grievance of the petitioner is that despite the order of this court, respondent No.4 is still charging the Commitment Charges on the

reduction in annual demand of water for the year 2017-18 and for subsequent years till 2022-23 by calculating the difference between annual water demand and reserved quota of 87.60 MCM. The petitioner had no option, but to pay the amount under protest.

5. Another grievance of the petitioner is that due to adoption of modern techniques for water conservation and implemented Zero Effluent Discharge System, the petitioner reassessed its requirement of water to 60.00 MCM. By letter dated 13/10/2017, the petitioner showed it's wish to surrender 27.60 MCM from the total allocation of 87.60 MCM of reserved water quota and requested for refund of the proportionate amount of Rs.36.57 crores paid by it 87.6 MCM towards Irrigation Restoration Charges, but no decision had been taken by the respondents.

6. Meanwhile, the original agreement was to expire on 21/05/2018. The petitioner requested to respondent No.1 to renew the agreement with reduced quantity of 60.00 MCQ of water as reserved quota. Respondent No.4 by its letter dated 14/01/2018 informed that the proposal for reducing the quantity to 27.60 MCQ of water is pending with the Government and the action on the same will be taken according to the decision in the matter by the Government,

and till then, the original agreement which was for reserved quota 87.60 MCM of water will have to be renewed. The petitioner was left with no other option and was compelled to enter into fresh/renewal of main agreement on 22/05/2018 under protest for entire allocated quota of 87.60 MCM of water.

7. During the pendency of the present petition, respondent No.1 the State Government, pursuant to the direction given by this Court on 05/06/2020, decided the application of the petitioner. Respondent No.1 accepted the request of surrender of water of 27.6 MCM from reserved quota of 87.6 MCM on paying balanced amount of Irrigation Restoration Charges due towards the petitioner. This was informed to the petitioner by letter dated 29/07/2020 of respondent No.4. According to the petitioner, it had already paid Irrigation Restoration Charges @ 50000/- per hector as per judgment in the Writ Petition No. 4968/2015.

8. In above set of facts, the petitioner has filed this writ petition seeking quashing of the demands letters issued towards Commitment Charges from 2017-18 to 2022-23 and refund of the amount paid towards Commitment Charges for these years. The petitioner also seek direction of the implementation of acceptance of surrender of water quota of

water of 27.6 MCM with effect from 13.10.2017 i. e. date of application/letter of the petitioner without payment of remaining Irrigation Restoration Charges. The direction is sought to refund the Irrigation Restoration Charges of Rs.36.57 crores in the wake of acceptance of surrender of quantity of 27.6 MCM by respondent No.1.

9. Respondent Nos.2 to 5 filed affidavit in reply, *inter alia*, contending that the petitioner has not come with clean hand and suppressed material facts of earlier lis between the respondents and the petitioner-power company, which was earlier known as "Sofia". The petitioner has not exhausted the alternate remedy. It is contended that surrender of partially reserved water quantity cannot be done with retrospective effect, therefore, there is no question of refund of amount already recovered from the petitioner that too which was expressly agreed. The Commitment Charges leveled do not have any relevance with surrender of reserved water quota. There is a lis about Irrigation Restoration Charges, which is pending in Special Leave Petition No.28161/2016. In Writ Petition No.1372/2016, the Court has already considered the issue of Commitment Charges. After the judgment in said writ petition, revised agreement was executed on 18/05/2018, which also provides levy of the Commitment Charges. The terms of the agreement are binding upon both the parties.

10. It is also contended in the reply that the purpose and intention behind the agreement was to reserve 87.60 MCM quantity of water for the petitioner. There was public agitation opposing the reservation of so much water in favour of the petitioner. It was then assured to the agriculturists that their demand of water will be fulfilled. For meeting the demand of the agriculturists, the respondents arranged water for agriculturists by incurring huge expenses. The judgment in P.I.L. Nos.19 and 20 of 2011 speaks about how the demand of irrigation by farmers would be met. Now the petitioner is stopped from changing its stand on the reservation of water. The expenditure incurred due to reservation of water in favour of the Petitioner, therefore Irrigation Restoration Charges were levied, now, it cannot be refunded. Respondent Nos. 2 to 5 sought rejection of the petition.

11. Respondent No.1 has also filed its reply. It has also contended that the terms and financial liabilities of the petitioner are governed by an agreement which is signed by both the parties and any change in the agreement cannot be unilaterally dictated by the petitioner. The petitioner cannot compel the Government that the Government should accept the surrender of reserved quota of water by 27.60 MCM. Effect cannot be given retrospectively as the same is governed

by the agreement between the parties which is duly signed by them. Hence, it is prayed for rejection of the petition.

12. We have given our anxious consideration to the submissions made by learned Senior Counsel appearing for the respective parties.

13. Indisputably, under the original agreement, the respondents have to keep the water reserved for the petitioner up to maximum limit of 87.6 MCM. For keeping this much of quantity the petitioner had to pay one time Irrigation Restoration Charges to the respondents. Apart from this, the petitioner has to inform respondent No. 4 in advance for demand of annual water not more than 87.6 MCM, to be used by the petitioner for the next year. Respondent No. 4 started charging Commitment Charge @ 5% on the difference between reserved water quantity of 87.6 MCM and quantity of annual water demand. This Court by its judgment and order, dated 14/07/2017 Writ Petition No.1372/2016, quashed and set aside the demand notices of 5% Commitment Charges issued by respondent No.4 by holding that there is no such condition either in agreement dated 16/05/2012 or in the Act and Rules and Regulations to which the agreement was subjected to. The special leave petition filed by the respondents against the judgment and order dated 14/07/2017 in Writ Petition

No.1372/2016 has been dismissed, therefore the order in Writ Petition No.1372/2016, quashing the Commitment Charges levied by the respondents during subsistence of earlier agreement became final.

14. Notably, after expiry period of agreement dated 22/10/2012, which was for six year, another agreement came to be executed on 18/05/2018. Perusal of the new agreement dated 18/05/2018 shows that there is covenant in clause 11(i) (ii) and (iii) regarding paying of Commitment Charges annually by the company on drawing of less water than allocated. The said clauses of agreement are reproduced as under:

“(i) As stated above, the Government has sanctioned and allocated 87,600 million liters of water per annum to the company. If the company would draw less than 90% of the sanctioned and allocated water per annum then irrespective of the quantity of water drawn during the year, the company shall be liable to pay the charges at the agreed rate for 90% of the sanctioned and allocated quantity. For the remaining 10% of the quantity of sanctioned and allocated quantity of water, the company shall pay the commitment charges @ 5% of the agreed rates. If the total water drawn by the company during the year would exceed 115% of the yearly sanctioned and allocated quantity of water then excess quantity of water exceeding 115% of the yearly sanctioned and allocated quantity of water, will be charged at 1.5 times the agreed rate.

(ii) For any unforeseen reason, if the company would like to reduce/increase the demand of water made earlier/entered in

the agreement, they will be required to make the revised acceptance of such revised demand and the company will be charged as per changed demand for period specified, other conditions remaining the same. A supplementary agreement on One thousand rupees stamp paper for this changed quantity shall be executed which will form part of this main agreement. If the company would draw less than 90% of the quantity of water for which the annual demand shall be made by it before 1st of November every year, then irrespective of the quantity of water drawn during the year, the company shall be liable to pay the charges at the agreed rate for 90% of the quantity of water for which annual demand would be made. For the remaining 10% of the quantity of water for which the annual demand would be made, the company shall pay the commitment charges @ 5% of the agreed rates. If the total water drawn by the company during the year would exceed 110% of the quantity for which the annual demand would be made then excess quantity of water exceeding 110% of the quantity for which the annual demand would be made, will be charged at 1.5 times the agreed rate.

(iii) Whenever the company shall make a revised yearly demand proposing to reduce the demand of water as compared to the sanctioned and allocated 87600 million liters of water per annum, as contemplated by clause-ii(ii) above then in addition to the charges that would be payable by the company as stated in clause-11(ii) above, the company shall also be liable to pay the commitment charges @ 5% in respect of the difference of the total quantity of water by which the annual demand shall be reduced as compared to the sanctioned and allocated 87600 million liters of water per annum."

15. In view of the above unequivocally clauses in the new agreement which speak voluminous that respondent No.4 is

entitled to the Commitment Charges for fetching less water than allocated quota per annum from the date 18/05/2018 when new agreement came to be executed. Thus, the question regarding charging of Commitment Charges at the rate of 5% and other charges is settled after the execution of new agreement i.e. with effect from 22/05/2018.

16. The above undisputed facts would resolve the controversy to the effect that respondent No.4 would be entitled to the Commitment Charges and other charges only after the date of execution of new agreement. Thus, we hold that the demand letter dated 26/10/2017, demanding Commitment Charges for year 2017-18 prior to execution of new agreement dated 18/05/2018 does not stand in wake of judgment dated 14/07/2017 in Writ Petition No.1372/2016.

17. This takes us to next submission of learned Senior Counsel for the petitioner. It is submitted that the petitioner has moved the application for partial surrender of quota of 27.60 MCM of water on 13/10/2017, which has been allowed by the Government on 29/07/2020. The Government already sat on the said application for almost three years. According to him, for inordinate and unexplained delay on the part of the State Government, the petitioner cannot be made liable to pay for intermediate period. Therefore, he submits that the effect of

partial surrender should be made from the date of application i. e. with effect from 13.10.2017. According to him, once the State Government has found the application genuine and opined to accept the surrender of partial quota by 27.60 MCM of water, such acceptance must relate back to the date of application or at least from the date of fresh agreement dated 22/05/2018. To buttress his submission, he seeks to rely on the following judgments :

“Commissioner of Central Excise vs. M.P.V. & Engg. Industries - (2003) 5 SCC 333,
wherein the Apex Court in paragraph 11 has held that -

“11. It was then submitted by the Appellant that in construing a notification granting exemption, the notification must be strictly construed without stretching the language of the notification to confer any unintended benefit. Similar argument was advanced before the Tribunal. In dealing with the submission the Tribunal noticed the decision of this Court in CCE v. Parle Exports (P) Ltd., wherein this Court held that exemption should be strictly construed although the exemption clause in the notification may be construed liberally. In other words, eligibility criteria should be construed strictly but a liberal approach may be adopted in construing other conditions. Reliance was also placed in UOI v. Wood Papers Ltd. We may apply this principle to the case in hand. No doubt, so far the authorities are concerned they must examine the claim of the respondent to be a small scale industry strictly and in accordance with the rules. However, once it is found that the industry qualifies as a small scale industry, in the matter of grant of exemption a liberal approach is permissible if it does no violence to the language of the notification. In a case of this

nature it is only reasonable to take the view that the benefit of exemption will accrue to a unit found to be small scale industrial unit from the date on which the application was made for grant of registration certificate. Such a unit should not be deprived of the benefit to which it is otherwise entitled as a small scale industrial unit merely because the authorities concerned took their own time in disposing of the application. We therefore, agree with the majority view of the Tribunal and hold that the benefit of exemption under the notification in question should be extended to the respondent with effect from the date on which the application for grant of registration was made by it before the competent authority. This is also in accord with the principle which found favour with this Court in State of U.P. v. Haji Ismail Noor Mohd. & Co. and Assessing Authority v. Patiala Biscuits Manufacturers (P) Ltd.”

Adani Ports and Special Economic Zone Limited & 1 vs. Union of India & 2 - 2017 SCC OnLine Guj 1837, wherein the Gujarat High Court at Ahmedabad in paragraph 10 has held that -

“10. Taking us through the materials on record, the learned counsel for the petitioners submitted that there was no requirement for the petitioners to apply for waiver of the cost recovery charges in terms of circular dated 10/04/2016. The circular provided for an inbuilt mechanism under which, the Commissioner would suo motu examined the requirements of the circular and recommend the case accordingly to the concerned departments who would take a decision based on such report. Even otherwise, the petitioners had without any delay, applied for the exemption on 12/04/2013 itself. No further details or documents were called for from the petitioners by the department. Whatever delay that took place in processing and granting the application for exemption, can be attributed only to the

respondents. Once the competent authority was of the opinion that the petitioners satisfied necessary requirements for grant of exemption, such exemption must relate back to the date of application. Counsel further submitted that the petitioners fulfilled all the requirements. At no stage, there was any communication from the respondents that in view of the outstanding payments for cost recovery charges, application of the petitioners would not be considered for such period.”

18. Let us state here that the transaction between the petitioner and respondent No.4 is governed by the agreement executed between them. Any modification in the term of agreement is to be done, mutually. Thus, if any proposal is made by the petitioner, unless the respondents agree to accept the said proposal it cannot become part of agreement. If any condition is to be modified, then unless both the parties agree, effect cannot be given to such proposal. By letter dated 24/08/2020, respondent No.4 agreed to accept the request made by the petitioner about the surrender of water quota of 27.60 MCM of water. Therefore, the effect cannot be given to this surrender from the date of the application i. e. from 13.10.2017. So far as the cases of *M.P.V. & Engg. Industries* and *Adani Ports and Special Economic Zone* (*supra*) are concerned, in those cases, there were statutory obligations on the State Government to perform an act as a State under the scheme introduced by the State and, therefore, the delay in deciding the application of the petitioner in those cases did not

take away the benefit during intervening period, which was available to them. In that scenario, the Apex Court has held that the benefit shall be given to the petitioner-Industry from the date of application. Whereas, in the present case, there is mutual agreement in between the parties and the respondents were not under the statutory obligation to process the application as a State. Rather the respondents acted as a party to the agreement and if any condition is to be altered, it cannot be given effect from the date of proposal, but can have effect from the date of acceptance of proposal as envisaged in the Contract Act. So, unless the proposal is accepted, the proposal cannot be termed as an enforceable contract. Therefore, we do not find force in the argument of the learned Senior Counsel for the petitioner that the partial surrender of water allocation of 27.60 MCM shall be given effect from the date of application i.e. from 13/10/2017 or from the date of fresh agreement.

19. It is germane to note here that respondent No.1 accepted the proposal of the petitioner for the surrender of 27.6 MCM of water from reserved water on the condition of the payment of remaining outstanding due of Irrigation Restoration charges. Though, this court by judgment dated 05/05/2016 in Writ Petition No.4968/2015 reduced the Irrigation Restoration Charges from Rs.100000/- per hector of land to Rs.50000/-, recently, the apex court by its judgment

dated 13/01/2023 allowed the Civil Appeal No. 8550/2022 arising out of Special Leave petition (C) No. 28161/2016 filed by the respondents and set aside the order of this court. In wake of the judgment of the supreme court, the petitioner is liable to pay Irrigation Restoration Charges @ Rs. 1,00,000/- per hector. Therefore, the petitioner is liable to pay the remaining outstanding dues towards Irrigaion Restoration Charges, as mentioned in the letter dated 20.07.2020 of respondent No. 1. Thus, we find force in the argument of the respondents that unless the petitioner pays the remaining outstanding dues to it towards Irrigation Restoration Charges, the effect cannot be given to the surrender of water quota of 27.6 MCM, since the acceptance of the proposal for surrender of water quota was conditional one i. e. on payment of the remaining outstanding towards the Irrigation Restoration Charges.

20. So far as question of refund of Irrigation Restoration Charges is concerned, it is submitted on behalf of the petitioner that in wake of acceptance of surrender of quota of 27.6 by the respondents, the petitioner would not be liable to pay Irrigation Restoration Charges on entire water quota of 87.6 MCM, but on the reduced water quota of 60 MCM. According to learned Senior Counsel for the petitioner, the water Irrigation Restoration Charges paid by the petitioner excess in excess to water quota

of 60 MCM are required to be refunded to the petitioner. On the other hand, the learned senior Counsel Shri M.V. Samarth appearing for respondent Nos. 2 to 5 for the respondents submits that Irrigation Restoration Charges is imposed only once when the initial demand of water quota of 87.6 was made by the petitioner that too under old agreement which is already expired, now subsequent surrender of the water quota would not give any right to the petitioner for refund of Irrigation Restoration Charges. According to him, the minimum requirement was fixed so as to meet the capital expenditure incurred by the respondents for arranging the water for affected land due to reservation of water for the petitioner.

21. We find force in the argument of the learned senior counsel for the respondents for the reason that the Irrigation Restoration Charges were levied only once under the first agreement on the quantity of water quota demanded by the petitioner i.e. 87.6 MCM. Water Irrigation Restoration Charges are not recurring charges and it was a capital expenditure. Those charges under earlier agreement were levied to make alternate arrangement for the irrigation of 23218 hector land affected due to the storage/reservation of water for the petitioner for six years. This was agreed by the petitioner under the agreement. Thus, we do not find force in the argument of the petitioner in this regard.

22. In the light of above observations, the petition is partly allowed. The demand letter date 26/10/2017 is quashed and set aside. The petitioner is entitled to refund of the Commitment Charges paid by it for the year 2017-18.

(M.W. CHANDWANI, J.)

(A.S. CHANDURKAR, J.)

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