

BIHAR STATE ELECTRICITY BOARD AND ANR.

v.

USHA MARTIN INDUSTRIES AND ANR.

MAY 8, 1997

[S.C. SEN AND K.T. THOMAS, JJ.]

Electricity (Supply) Act, 1948: Section 49.

Tariff—Fixation of—Central Excise duty on electricity abolished—However, uniform tariff not reduced—Held: Entire price inclusive of central excise duty would be the uniform tariff—Therefore, even if central excise duty is abolished, Board not liable to reduce uniform tariff—As there is no agreement regarding such reduction S.64-A of Sale of Goods Act, not applicable—Sale of Goods Act, 1930, S.64-A.

Constitution of India 1950: Article 226.

Judicial review—Fixation of price—Held: Fixation of electricity tariff is a statutory power conferred on the Electricity Board and State Government—Therefore, High Court cannot lay down what should be the proper price and direct the Board to reduce the tariff accordingly—Fixation of tariff is a matter of policy.

The appellant-Board after imposition of Central Excise Duty on production of electricity at the rate of 0.02 paise per unit, did not revise the uniform tariff, but decided to levy a surcharge of 0.03 paise per unit even though the duty payable was only 2 paise per unit. Reasons have been given in justification for surcharge of 3 paise per unit even though the duty levied was only 2 paise per unit, which were found valid by the High Court. Subsequently, the surcharge was merged in uniform tariff by a notification issued by the Board. Later on the Central Excise Duty on electricity was abolished. The High Court held that the charge levied by the appellant-Board for supply of electricity to the respondents was excessive as the uniform tariff was not reduced even when the Central Excise Duty on electricity was abolished. Being aggrieved the appellant-Board preferred the present appeal.

Allowing the appeal, this Court

A HELD: 1.1. The respondent is the purchaser of electricity. The price it pays will include cost of production, profits plus taxes. But the purchaser pays nothing but the price. The consideration for the sale of electricity is the price charged by the Board. The sale price would be the entire price inclusive of excise duty because that would be the consideration payable by the purchaser for the sale of goods. There is no dispute that the uniform tariff was fixed in conformity with the principles contained in Section 49 of the Electricity (Supply) Act, 1948. Along with other costs incurred by it, the Board also took into account the excise duty payable by the Board. It is not the case of the respondent-Company that the Board is making excessive profit or any profit at all. The excise duty is only one small item in the total expenditure incurred by the Board for generation of electricity. There is no law, which requires the Board to reduce the tariff, if any one of the items of expenditure incurred by the Board has been reduced. [288-C-D; G-H]

D *Hindustan Sugar Mills v. State of Rajasthan & Ors.*, [1978] 4 SCC 271; *Parag Ice & Oil Mills v. Union of India*, [1978] 3 SCR 293; *Rohtas Industries Ltd. v. Chairman, Bihar State Electricity Board & Ors.*, [1984] Supp. SCC 161, relied on.

Love v. Norman Right (Builders), Ltd., [1944] 1 All ER 618, referred to.

E 1.2. The applicability of Section 64-A of the Sale of Goods Act, 1930 will depend upon the agreement between the parties. No evidence was led before the authorities below to show that the parties intended that the relief of excise duty if abolished or reduced would be passed on to the consumers. It was specifically stated in one of the clauses of Tariff Notification, that if the excise duty were enhanced, the tariff would be raised. No provision was made for reduction of tariff under any circumstance. The specific provision for raising tariff in case of enhancement of excise duty and absence of any such provision for reduction of tariff in case of lowering or abolition of excise duty go to show that there was no intention on the part of the Board to reduce the tariff in case of lowering or abolition of the excise duty. The provision of Section 64-A can only apply if intention to the contrary did not appear from the terms of the contract. [286-D-G]

H 2.1. Moreover, the tariff is fixed by exercise of statutory power. It is not fixed as a result of any bargaining by and between the board and the consumers. It is a uniform tariff, which every consumer will have to pay

for the electricity consumed by him. In fact, the consumer has no option but to pay the tariff fixed by the Board in exercise of power conferred by Section 49 of the Act. [286-G-H] A

2.2. Electricity has to be supplied by the Board to persons other than licensees at a price fixed by the Board. In fixing the price, the Board has to take into consideration various factors laid down in Section 49 of the Act. The Board is also under a statutory mandate to charge price from its customers in such a way that the total revenue received by it in a year is more than its expenditure. Section 59 enjoins the Board to generate profit of at least 3 percent of the value of the fixed assets of the Board. The State Government may direct the Board to generate even larger profits. [281-H; 282-A-B] B C

2.3. Pricing is a matter of policy. It is for the Board and the State to decide the rate at which electricity will be supplied. Under no circumstances, can the Court lay down what should be the proper price and direct the Board to reduce its tariff fixed under Section 49. In effect, what the High Court has done is to direct a loss-making public undertaking to incur further losses by lowering its tariff. By giving this direction, the High Court clearly exceeded its jurisdiction and lost sight of the statutory provisions. [282-C] D

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2347-48 Of 1988 Etc. Etc. E

From the Judgment and Order dated 7.4.88 of the Patna High Court in L.P.A. No.6/88 and C.W.J.C. No.1082 of 1987.

Dushyant Dave, Ranjit Kumar, Binu Tamta, Padam Khaitan, Suman Khaitan, P.N. Misra and Pramod Swarup for the appearing parties. F

The Judgment of the Court was delivered by :

SEN, J. This is an appeal from an order passed by the Patna High Court, Ranchi Bench, holding that the charge levied by Bihar State Electricity Board for supply of electricity to M/s. Usha Martin Industries, the respondents herein, was excessive as the uniform tariff was not reduced even when Excise Duty on electricity was abolished. G

We are of the view that the High Court was clearly in error in coming to this decision. Electricity has to be supplied by the Board to persons other than licensees at a price fixed by the Board. In fixing the price, the H

- A** Board has to take into consideration various factors laid down in Section 49 of the Electricity (Supply) Act, 1948. The Board is also under a statutory mandate to charge price from its customers in such a way that the total revenue received by it in a year is more than its expenditure. Section 59 enjoins the Board to generate profit of at least 3 per cent of the value of the fixed assets of the Board. The State Government may direct the Board to generate even larger profits.

- B** Pricing is a matter of policy. It is for the Board and the State to decide the rate at which electricity will be supplied. Under no circumstances, can the Court lay down what should be the proper price and direct the Board to reduce its tariff fixed under Section 49. In effect, what the High Court has done is to direct a loss-making public undertaking to incur further losses by lowering its tariff. By giving this direction, the High Court clearly exceeded its jurisdiction and lost sight of the statutory provisions.

- C** We are of the view that the High Court should not have interfered with the pricing of the electricity sold by the Board on the ground that the liability to pay central excise duty had come to an end on and from 1st October, 1984. Mr. Dave, appearing on behalf of the respondent-company, has contended that the tariff fixed by the Board was inclusive of excise duty. Therefore, when the duty was withdrawn, the Board was under a legal obligation to reduce the tariff. There is nothing in the Electricity (Supply) Act, 1948 which casts upon the Board a duty to reduce the tariff which has been fixed by it in consultation with the State Government merely because any tax payable by the Board has been reduced or withdrawn. The Electricity (Supply) Act, 1948 lays down the principles on the basis of which uniform tariff for supply of electricity has to be fixed. It does not lay down anywhere in the Act that the tariff fixed by the Board in consultation with the State Government must be reduced, if for any reason the costs estimated to be incurred by the Board stands reduced on any account. Reduction of costs may take place for very many reasons including lowering or abolition of any duty payable by the Board. As a result of abolition of the central excise duty, the Board could have decided to reduce the uniform tariff. But having regard to the economic realities, the Board chose not to do so. The Board cannot be compelled to reduce the tariff regardless of the economic factors and the losses incurred by it.

- D** Mr. Dave contended that, to start with, central excise duty was

charged separately by the Board. It was not treated as part of the uniform tariff. But that practice was abandoned by the Board on and from the 6th April, 1979. Central excise duty was imposed on generation of electricity at the rate of 0.02 paise per unit for the first time in 1978. The Board thereupon levied a surcharge at the rate of 0.03 paise per unit on consumption of electricity by a Notification which was as under :-

"BIHAR STATE ELECTRICITY BOARD, PATNA

NOTIFICATION

No.Com/TAR-1003/78/265/Patna

the 13th May, 1978

In partial modification of notification No.Com/IAR/1037/75/315 dated the 12th July, 1975, it is hereby notified for general information that consequent upon imposition of Central Excise Duty by the Govt. of India on electricity generation and by virtue of the powers conferred under Sections 46 and 49 of the Electricity (Supply) Act, 1948 the Bihar State Electricity Board hereby levies a surcharge at the rate of three paise per unit on electricity consumption by all categories of every cess except agricultural service with effect from 1.3.1978.

2. Consumers will be billed accordingly for the consumption for March 1978 onwards."

On April 6, 1979, the Board revised the electricity charges and framed a fresh uniform tariff by another Notification in exercise of the powers conferred by Sections 46 and 49 of the Electricity (Supply) Act. The energy charges for HTS-II i.e. High Tension Service consumers ranged between 22 paise to 26 paise per unit. By Clause 16.4 of the said Tariff Notification, it was provided that duty that had already been levied by the Government of India on generation of power stood merged in the rates of tariff provided in the Schedule to the said tariff. The surcharge of 0.03 paise per unit was abolished.

In the Schedule to the tariff applicable to the respondent- Company, no separate charge was shown on account of duty of Central Excise.

A Thereafter, electricity charges were revised from time to time. For this purpose further Tariff Notifications were issued in the year 1981 and again in the year 1983.

B The Tariff Notification dated 18th September, 1981 starts with the recital that "the State Government hereby frames revised tariff for all categories of consumers served or to be served by the Board and lays down the terms and conditions for supply of electricity to its consumers." The revised tariff was to come into effect from 1st October, 1981. A tariff Schedule was annexed to the Notification. Clause 16.4 of the Notification provided :-

C "16.4. *Central Excise Duty.*- The Central Excise Duty already levied by the Government of India on generation of power has been merged in the above mentioned rates where applicable. The impact of any subsequent increase notified by the Government of India in the existing rate of central Excise Duty will be computed and realised from the consumers."

D In the Tariff Schedule the rates payable by the consumers were stated. There was no surcharge or separate charge on account of Central Excise Duty.

E Similarly, in the Tariff Notification dated 17th June, 1983 it was stated that by virtue of the powers conferred under Sections 46 and 49 of the Electricity (Supply) Act, 1948, the Bihar State Electricity Board with the approval of the State Government framed the revised tariff for all categories of consumers served or to be served by the Board and laid down the terms and conditions for supply of electricity to its consumers. It was repeated in Clause 16.4 that Central Excise Duty on generation of power had been merged "in the above mentioned rates where applicable". It was specified that the impact of any subsequent increase notified by the Government of India in the existing rates would be computed and realised from the consumers.

G The charge of Central Excise on electricity was withdrawn with effect from 1st October, 1984. The contention on behalf of the respondent-Company which found favour with the High Court was that the Board was under an obligation to reduce its tariff when the Central Government withdrew the duty of excise payable by the Board on generation of electricity.

H

This argument overlooks the statutory scheme for charging tariff for supply of electricity. By the Notifications of 1981 and 1983, the Board had fixed a rate of tariff to be paid by its customers. The tariff may have included in it the burden of Central Excise Duty payable by the Board. But what the consumers paid was nothing but the uniform tariff fixed by the Board. It was specifically stated in the Tariff Notification that the amount of Central Excise payable by the Board had been merged in the uniform tariff. By Clause 16.4 power was reserved for the Board to raise tariff in case the Central Government enhanced the duty of excise. It does not follow from this that if the duty was reduced or done away with altogether, the rate of tariff will have to be brought down automatically.

On behalf of the respondents, Mr. Dave drew our attention to Section 64-A of the Sale of Goods Act which lays down :-

"64-A. In contracts of sale, amount of increased or decreased taxes to be added or deducted.- (1) Unless different intention appears from the terms of the contract in the event of any tax of the nature described in sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax paid where tax was chargeable at that time,-

(a) if such imposition or increase so takes effect that the decreased tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

A (2) The provisions of sub-section (1) apply to the following taxes, namely :

(a) any duty of customs or excise on goods;

(b) any tax on the sale or purchase of goods."

B It was contended by Mr. Dave that Section 64-A of the Sale of Goods Act Clearly recognises the right of the purchaser (Usha Martin Industries) to claim that the relief of abolition of Central Excise Duty must be given to the purchaser by decreasing the rate of tariff for the consumption of electricity. It was contended that the tariff payable, though statutorily fixed, is nothing but the price of the electricity supplied by the Board to consumers. The price included Central Excise Duty. Therefore, on abolition of Central Excise Duty, this price had to be brought down by excluding the amount of the Central Excise Duty.

D There are several difficulties in accepting this argument. The first and foremost is that this contention was not taken before the lower authorities including the Tribunal. The applicability of Section 64-A will depend upon the agreement between the parties. No evidence was led before the authorities below to show that the parties intended that the relief of excise duty if abolished or reduced would be passed on to the consumers. It was specifically stated in Clause 16.4, one of the clauses of Tariff Notification, that if the excise duty was enhanced, the tariff would be raised. No provision was made for reduction of tariff under any circumstance. The specific provision for raising tariff in case of enhancement of excise duty and absence of any such provision for reduction of tariff in case of lowering or abolition of excise duty go to show that there was no intention on the part of the Board to reduce the tariff in case of lowering or abolition of the excise duty. The provision of Section 64-A can only apply if intention to the contrary did not appear from the terms of the contract.

G Moreover, the tariff is fixed by exercise of statutory power. It is not fixed as a result of any bargaining by and between the Board and the consumers. It is a uniform tariff which every consumer will have to pay for the electricity consumed by him. In fact, the consumer has no option but to pay the tariff fixed by the Board in exercise of power conferred by

H section 49.

It has been contended by Mr. Dave that tariff is nothing but a series of schedules or rates of duties or taxes or a table of rates. The Board has agreed to supply energy to the consumers at certain rates. The contract between the Board and the respondent- Company is for sale of goods (electricity). Section 9 of the Sale of Goods Act provides that the price in a contract to sell may be fixed by the contract or may be left to be fixed in a manner thereby agreed or may even be determined by the course of dealings between the parties.

This argument overlooks the fact that the price in the instant case was fixed in exercise of statutory power. It included Central Excise Duty on electricity with effect from 1.3.1978. On 6.4.1979 the Central Excise Duty payable on generation of electricity was merged in the tariff. The result was that the excise duty was included in the price for supply of electricity charged by the Board and lost its separate identity.

The general principle of law to be applied in cases like this was stated by Lord Goddard LJ in *Love v. Norman Right (Builders) Ltd.*, (1944) 1 All E.R. 618, as under :-

"So far as the purchaser is concerned, he pays for goods what the seller demands, namely, the price even though it may include taxes. That is the whole consideration for the sale and there is no reason why the whole amount paid to the seller by the purchaser should not be treated as the consideration for the sale and included in the turnover."

This decision was cited with approval by this Court in the case of *Hindustan Sugar Mills v. State of Rajasthan & Ors.*, [1978] 4 SCC 271, where it was observed :-

"Take for example excise duty payable by a dealer who is a manufacturer..... Ordinarily, it is not shown as a separate item in the bill but it is included in the price charged by him. The "Sale Price" in such a case could be the entire price inclusive of excise duty because that would be the consideration payable by the purchaser for the sale of the goods..... But even so it would be part of the sale price because it forms a component of the consideration payable by the purchaser to the dealer ... and on this reasoning, it would make no difference whether the amount of

A excise duty is included in the price charged by the dealer or is shown as a separate item in the bills. In either case, it would be part of the sale price."

B Mr. Dave contended that even on general principle of law the rates fixed under the tariff included Central Excise Duty, even if it was not mentioned separately in express words.

C We are unable to uphold any of these arguments. The proposition laid down in the case of *Love v. Norman Right (Builders) Ltd.*, [1994] 1 All E.R. 618, goes directly against the argument advanced by Mr. Dave. M/s. Usha Martin Industries is the purchaser of electricity. The price it pays will include costs of production, profits plus taxes. But the purchaser pays nothing but the price. The consideration for the sale of electricity is the price charged by the Board. The law laid down by Lord Goddard LJ in *Love v. Norman Right (Builders) Ltd.*, in a case under purchase tax was applied by this Court in the case of *Hindustan Sugar Mills v. State of Rajasthan & Ors.* (Supra). After referring to the judgment of Goddard LJ, it was reiterated that the sale price would be the entire price inclusive of excise duty because that would be the consideration payable by the purchaser for the sale of goods.

E In the instant case, after imposition of Central Excise Duty on production of electricity at the rate of 0.02 paise per unit, the Board did not revise the uniform tariff, but decided to levy a surcharge of 0.03 paise per unit even though the duty payable was only 2 paise per unit. Reasons have been given in justification for surcharge of 3 paise per unit even though the duty levied was only 2 paise per unit which were found valid by F the Division Bench of the Patna High Court. On and from 2.6.1979, the surcharge was merged in uniform tariff by a notification issued by the Board. There is no dispute that the uniform tariff was fixed in conformity with the principles contained in section 49 of the Act. Along with other costs incurred by it, the Board also took into account the excise duty G payable by the Board. It is not the case of the respondent-Company that the Board is making excessive profit or any profit at all. The excise duty is only one small item in the total expenditure incurred by the Board for generation of electricity. There is no law which requires the Board to reduce the tariff, if any one of the items of expenditure incurred by the H Board has been reduced.

This Court pointed out in the case of *Parag Ice & Oil Mills v. Union of India*, [1978] 3 SCR 293, that in the ultimate analysis the mechanics of price fixation is necessarily to be left to the judgment of the executive. This principle was reiterated in the case of *Rohtas Industries Ltd. & Ors. v. Chairman, Bihar State Electricity Board & Ors.*, [1984] Supp SCC 161, where fuel surcharge levied by the Board was challenged as arbitrary and unreasonable.

"The learned Attorney-General appearing on behalf of the Board has placed before us tabulated statements showing the working results (financial) of the Board in the years subsequent to 1977-78. It is found therefrom that the net result of the Board's working in each of the years 1978-79 to 1981-82 was a substantial deficit or loss. The deficit in 1978-79 was Rs. 15.31 crores, in 1979-80 Rs. 10.27 crores, in 1980-81 Rs. 32.69 crores and in 1981-82 Rs. 18.60 crores. The statement also shows that the revenue earned per unit of electric energy sold was much lower than the actual cost of production incurred by the Board per unit. The cost of production per unit in the four years aforementioned was 51.00 p., 65.10 p., 73.86 p., and 87.16 p. respectively, whereas the revenue per unit was only 38.48 p., 47.17 p., 53.07 p., and 66.39 p. respectively. It is thus found that notwithstanding the mandatory provision contained in Section 59 of the Act, the Board has been selling energy at rates which are lower than the actual cost incurred by it per unit of production. Such being the factual situation, there is absolutely no basis for the contention urged on behalf of the appellants that the tariff fixation effected by the Board suffers from the vice of arbitrariness and is liable to be interfered with by the Court on that ground."

The period involved in that dispute was the years 1978-79 and 1981-82 (This period is also relevant for the purpose of this case). In that case scope of Section 59 of the Act was examined and it was observed that no attempt has been made on behalf of the respondent-Company to show that the Board was making undue profit. The Central Excise Duty has been merged in the uniform tariff. The petitioner, in effect, is seeking a reduction of the uniform tariff fixed by the Board. It is not the case of the petitioner that the tariff has been fixed regardless of considerations which have to be taken into account under section 49. The mechanics of price

A fixation has to be left to the judgment of the executive.

We are of the view, the High Court was clearly in error in directing modification of the tariff fixed by the Board.

B The appeal is allowed. The impugned judgment of the High Court is set aside. There will be no order as to costs.

CIVIL APPEALS Nos. 3409-3411 OF 1997 (ARISING OUT OF S.L.P. (C) NOS. 11094, 11098 & 11106 OF 1995).

Leave granted.

C In view of our judgment in Civil Appeal Nos. 2347-48 of 1988, the above appeals are also allowed. There will be no order as to costs.

CIVIL APPEALS NOS. 3461, 3462, 3462A of 1992

D In view of our judgment in Civil Appeal Nos. 2347-48 of 1988, the above appeals are dismissed. There will be no order as to costs.

V.S.S.

C.A. Nos. 2347-48/88 and

C.A. Nos. 3409-11/97 allowed.

C.A. Nos. 3461, 3462, 3462A/92 dismissed.