

THE STATE OF HIMACHAL PRADESH & ORS.

v.

M/S. GUJARAT AMBUJA CEMENTS LTD. & ORS.

(Civil Appeal No. 2652 of 2006)

OCTOBER 04, 2017

[**RANJAN GOGOI AND NAVIN SINHA, JJ.**]

Electricity: Power Tariff Freeze – Benefit of – Cement manufacturing unit’s entitlement to the benefit of power tariff freeze, whether includes right to reimbursement of all the amounts paid by the industrial unit on account of Peak Load Exemption Charge (PLEC) – Held: Company-industrial unit was clearly informed that the State is going through a phase of acute shortage of power affecting peak load hour supply – Board accorded sanction for supply of electricity during peak load hours to the unit subject to certain terms and conditions – Furthermore, by notification dated 30.10.1995, power during peak hours was to be provided as a special dispensation for industries which could not afford to remain without continuous power/electricity – Normal supply of electricity for which there was a normal tariff was infact discontinued during the peak hours – Thus, incentive provided under the Incentive Rules would not include PLEC – Company not entitled to reimbursement towards PLEC paid by it during the period of four years commencing from the date of commercial production, for availing power supply by way of special dispensation – Any reimbursement made to the company to be returned to the State/Board with interest @ 6% p.a. – Revised Rules regarding Grant of Incentive to Industrial Units in Himachal Pradesh, 1991

Allowing the appeal, the Court

HELD: 1.1 It is abundantly clear from the sequence of facts that what was provided for by way of an incentive under the Incentive Rules framed under the Industrial Policy of the State is ‘power tariff freeze’ for a period of four years from the date of commercial production by reimbursement of the amount of increase in tariff during the said period of four years. Even before the cement manufacturing unit had gone into the commercial production, by letter dated 28.01.1994 the respondents-writ

A petitioners were clearly informed that the State is going through a phase of acute shortage of power affecting peak load hour supply. The schedule of tariff published by the Board by Notification dated 31.05.1994 made an unequivocal reiteration on the part of the Board that power supply during peak load hours, as may be notified by the Board from time to time, shall not be available and in case of continuous process and like industries electricity supply during peak load hours would be provided only for special reasons and by means of a separate agreement to be entered into with the Board. In fact, an Office order dated 23.08.1995 was passed by the Chief Engineer (Commercial) of the Board according sanction for supply of electricity during peak load hours to the respondents-writ petitioners' unit subject to the terms and conditions mentioned therein. Finally by notification dated 30.10.1995 another schedule of tariff was published levying peak load exemption charge (PLEC) at the rate of Rs.1/- per unit over and above the normal tariff. Power during peak hours was to be provided as a special dispensation for industries which could not afford to remain without continuous power/electricity. The mode of making available the power was also different inasmuch as the Notification dated 30.10.1995 contemplated installation of separate meters for the said purpose. In the counter affidavit filed by the Board before this Court it has been stated that power, to make electricity supply available during the peak load hours, was obtained from other sources. The normal supply of electricity for which there was a normal tariff was infact discontinued during the peak hours. Normal supply of electricity therefore, has to be distinguished from the supply of electricity during peak load hours which was an act of special dispensation and upon payment of PLEC which change, in the facts noted, would assume the character of a surcharge. The question is not one whether PLEC is a part of the tariff having regard to the dictionary and the natural meaning of the word 'tariff'. The question is how the word/ expression 'tariff' is to be understood in the context in which such meaning is required to be determined. The meaning that has to be assigned must, naturally, be contextual having regard to what was promised i.e. tariff freeze. The nature of the charge imposed i.e. PLEC has to be understood keeping in mind that supply of power during the peak load hours was an exception; a

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special dispensation involving a special arrangement i.e. A
procurement from other sources. [Para 10] [9-E-H; 10-A-F]

1.2 Viewing the matter from the aforesaid perspective, it is
concluded that the incentive provided under the Incentive Rules
would not include PLEC and the respondents-writ petitioners
would not be entitled to reimbursement towards the PLEC paid B
for availing power supply by way of special dispensation in force.
The fact that in the revised Incentive Rules of 1996 PLEC has
been specifically excluded from the scope of reimbursement made
on account of power tariff will not fundamentally alter the situation.
The said declaration can be reasonably understood to be C
clarificatory and intended to clear all doubts, queries and issues
raised on the aforesaid score. [Para 11] [10-F-G]

1.3 The respondents-writ petitioners are not entitled to
reimbursement towards PLEC paid by it during the period of
four years commencing from the date of commercial production
i.e. 26.09.1995. It is directed that in the event any reimbursement D
had been made the same be returned forthwith by the respondents
to the appellants with interest thereon at the rate of 6% per
annum. In the light thereof, the order of the High Court is set
aside.[Para 12, 13] [10-II; 11-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2652 E
of 2006.

From the Judgment and Order dated 05.09.2003 of the High Court
of Himachal Pradesh at Shimla in Civil Writ Petition No. 603 of 2001.

D. K. Thakur, AAG, Anoop George Chaudhari, Ms. June F
Chaudhari, A. P. Datar, Sr. Advs., Shariq Ahmed, Ms. B. Gupta, Varinder
Kumar Sharma, U. A. Rana, Himanshu Mehta (For M/s. Gagrut and
Co.), Ms. Parul, Advs. for the appearing parties.

The Judgment of the Court was delivered

RANJAN GOGOI, J. 1. The State of Himachal Pradesh is in G
appeal before this court challenging an order of the High Court of
Himachal Pradesh dated 5th September, 2003 allowing the writ petition
filed by the respondents – M/s Gujarat Ambuja Cements Ltd. and holding
that the respondents - writ petitioners' entitlement to the benefit of
power tariff freeze, would include the right to reimbursement of all the
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A amounts paid by it on account of Peak Load Exemption Charge (hereinafter referred to as “PLEC”).

2. The core facts that will be necessary to be noticed are as follows:

B The respondent – writ petitioner no.1 – M/s Gujarat Ambuja Cements Ltd. set up an industrial unit for manufacture of portland cement in Darlaghat, District Solan, Himachal Pradesh. The approval of the State Government for establishment of the said unit was accorded on 23rd January, 1990. The cement manufacturing unit of the respondents – writ petitioners was accorded the “prestigious status” to avail of incentives in accordance with the Revised Rules Regarding Grant of Incentive to Industrial Units in Himachal Pradesh, 1991 (hereinafter referred to as “Incentive Rules”), as amended from time to time. To be entitled to the incentives under the aforesaid Incentive Rules the respondents – writ petitioners had to and in fact had satisfied the stipulated requirement of capital investment at least of Rs. 50 crores and guaranteed employment of minimum of 200 persons on permanent/regular basis who are bona fide residents of Himachal Pradesh. The cement manufacturing unit of the respondents – writ petitioners commenced commercial production on 26th September, 1995. At that point of time, under the Incentive Rules, the respondents – writ petitioners were entitled, *inter alia*, to a ‘power tariff freeze’ for a period of four years from the date of commencement of commercial production. Specifically, the tariff freeze was to be worked out by granting to the respondents – writ petitioners reimbursement of any increase in industrial power tariff after the date of commencement of commercial production for a period of four years. The formula for calculating the increase in power tariff to be reimbursed was the rate of electricity per unit billed minus the rate of electricity as on date of commercial production.

3. On 28th January, 1994 (before commencement of commercial production) the respondent – writ petitioner was informed by the Chief Engineer (Commercial) of the Himachal Pradesh State Electricity Board (hereinafter referred to as “the Board”) that the power required by its cement unit (i.e. 21000 KW) can be made available subject to certain terms and conditions mentioned in the aforesaid letter (dated 28th January, 1994). By the said letter the respondent – writ petitioner was informed that Peak Load hours restrictions will be imposed between 6 p.m. to 9 p.m. for the summer months (April to October) and 5 p.m. to 9 p.m. for

the winter months (November to March). Thereafter, it appears that in exercise of powers under Sections 49 and 59 of the Electricity (Supply) Act, 1948, the Board brought into force a schedule of electricity tariff known as "Himachal Pradesh State Electricity Board Schedule of Electricity Tariff, 1994 w.e.f. 31st May, 1994. Clause (m) of the said Schedule which deals with "Peak Load Hour Supply" is as follows:

"m) PEAK LOAD HOUR SUPPLY

Supplies under Schedule Agriculture pumping (A.P.), Small Industrial Power (S.P), Medium Industrial Power Supply (Schedule M.S.), Large Industrial Power Supply for Mini Steel Mills etc. and for others (Schedule L.S.-1 and L.S.-2) and Water and Irrigation pumping (Schedule W.I.P.) shall not be available during the peak load hours as may be notified by the Board from time to time. However, in the case of continuous process industries, or where a particular industrial consumer wants to run his industry during the peak load hours for any special reasons, a separate agreement shall have to be entered into with the Board."

4. On 23rd August, 1995, the Chief Engineer (Commercial) of the Board issued an Office Order according sanction in favour of the respondent – writ petitioner for running of its cement manufacturing unit during the evening peak load hours subject to the conditions enumerated in the said Office Order (dated 23rd August, 1995)

5. After the respondent – writ petitioner's unit went into commercial production, on 30th October, 1995 the Board issued another Notification in exercise of power under Sections 49 and 59 of the Electricity (Supply) Act, 1948 publishing another schedule of tariff and general conditions for supply of electricity to various categories of consumers in Himachal Pradesh with effect from 1st November, 1995. The aforesaid Notification (dated 30th October, 1995) dealing with the "Peak Load Hour Supply" which is relevant to the present case is as follows:

"1) PEAK LOAD HOUR SUPPLY

Supplies under Schedule Agriculture pumping (A.P.), Small Industrial Power (S.P), Medium Industrial Power Supply (Schedule M.S.), Large Industrial Power Supply for Mini Steel Mills etc. and for others (Schedule L.S.-1 and L.S.-2) and Water and Irrigation pumping (Schedule W.I.P.) shall not be available

A during the peak load hours. The duration of peak load hours in summer and winter shall be as under:

i) Summer

(April to Oct) 6 PM to 9 PM

ii) Winter

B (Nov. to March) 5.30PM TO 8.30PM

C However, in the case of continuous process industries, or where a particular industrial consumer wants to run his industry during the peak load hours for any special reasons, a separate agreement shall have to be entered into with the Board. Such consumers shall be billed for additional charge as specified in the relevant schedules of tariff'

In part II of the aforesaid Notification (dated 30th October, 1995) under the "Schedule of Tariffs" the provision with regard to "Peak Load Exemption Charge (PLEC)" were stated in the following terms:

D "5. Peak Load Exemption Charge (PLEC)

E The consumers availing special dispensation or exemption during evening peak load hours stipulated under Part-I General of this notification shall be billed at extra charges of Rs.1/- per unit over and above the normal tariff. For this purpose, time of the day (T.O.D.) meters shall be provided. Till such time, these meters are provided, the monthly peak load exemption charges shall be Rs.70/- per KVA of exemption/relaxation sought."

F 6. After the commencement of the commercial production by the cement manufacturing unit of the respondent – writ petitioner, in the year 1996, the Incentive Rules were revised and the incentive of power tariff freeze, though continued, underwent certain modifications. While the said notification may not be strictly relevant for the present what was clearly provided in the revised Incentive Rules is that the power tariff to be reimbursed will not include any other charge/surcharge/peak load charge/fuel adjustment charge etc. as may be levied by the competent authority. It may be noticed, at this stage, that the aforesaid revised Incentive Rules were made applicable to new industrial units which fact is borne out from clause 1.2(a) of the Revised Incentive Rules (which came into force with effect from 1st October, 1996) dealing with eligibility which is in the following terms.

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“1.2 Eligibility

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(a) New Industrial units as defined in these rules, shall be eligible for grant of incentives as provided for under these rules. Units which have commenced commercial production before the appointed day will continue to be governed for grant of all incentives under the Revised Rules regarding Grant of Incentives to Industrial Units in HP-1991 as amended from time to time, unless otherwise provided in these rules. Such industrial units will be eligible for incentives, concessions and facilities only if they meet the minimum employment criteria as laid down under these rules.”

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The definition of ‘New Industrial Unit’ contained in clause 2(s) of the aforesaid Revised Incentive Rules (of 1996) may also be extracted below for convenience.

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“2(s) “New industrial unit” means a registered SSSBE, tiny, small, ancillary, medium or large scale industrial unit as defined in clauses 2(x) and 2(za) of these rules, located within the State of Himachal Pradesh which commences commercial production on or after the appointed day and includes any existing unit which is eligible to get fresh registration as per the guidelines provided by the Development Commissioner, Small Scale Industries, Govt. of India, from time to time.”

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The “appointed day” was notified as 1st day of October, 1996.

7. It is in the above backdrop of the core facts that the issue arising in the case, namely, the entitlement of the respondent – writ petitioner to reimbursement of the PLEC will have to be decided.

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8. The argument advanced by Shri Anoop George Chaudhari, learned Senior Counsel appearing for the appellant State of Himachal Pradesh centres around two principal issues. The first is that on the date when the cement unit was set up and had commenced its commercial production i.e. 26th September, 1995 the PLEC had not come into force. The promise of reimbursement of increased power tariff did not and, in fact, could not have, therefore, cover/covered reimbursement of PLEC. Additionally, it has been contended that even before the cement manufacturing unit had commenced commercial production the respondent – writ petitioner was informed by letter dated 28th January, 1994 that there will be restrictions on availability of power during the

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A peak load hours which hours also were specifically mentioned in the said letter (dated 28th January, 1994). It has been contended on behalf of the State that in the Notification dated 30th October, 1995 it is clearly and categorically reiterated that electricity supply during the peak load hours would not be available except as a matter of special dispensation to a industry that needed a continuous supply of power. In the said
B Notification (dated 30th October, 1995) it was also mentioned that supply of power during the peak load hours would entail an additional charge of Rs. 1/- per unit over and above the normal tariff and further that a separate meter for reading of electricity consumed during the peak load hours would be installed. All these facts, according to the learned Senior
C counsel, would go to show that PLEC is a special/additional charge over and above the normal tariff in cases where the power is made available during the peak load hours as a special dispensation. In this regard, Shri Chaudhari has also drawn the attention of the Court to the affidavit filed
D before this Court by the Board wherein it has been, *inter alia*, stated that the power for supply during peak load hours had to be procured by the Board from other sources. Therefore, it is contended that PLEC is not a part of the normal/regular tariff in respect of which alone there is a promise of reimbursement by way of an incentive in the event of increase of such tariff during the eligibility period i.e. four years from the date of commencement of commercial production. According to the
E learned Senior Counsel, in the present case there is no dispute with regard to the issue of reimbursement of charges on account of hike/increase of normal tariff.

9. In reply, Shri Arvind P. Datar, learned Senior Counsel appearing for the respondents – writ petitioners has submitted that tariff is not a
F defined expression either under the Electricity (Supply) Act, 1948 which would govern the parties or even in the succeeding statute i.e. the Electricity Act, 2003. The dictionary meaning of tariff is not very helpful either; tariff has been conveyed to mean a charge or list of charges either for services or on goods entering a country. Shri Datar has pointed
G out that the object and effect test must, therefore be applied to hold that PLEC is included within the meaning of electricity tariff. Exclusion of such charges from an understanding of the expression “tariff” would be counter-productive in a situation where incentive has been offered under the industrial policy of the State to attract investments. Shri Datar has submitted that any exclusion of PLEC from the meaning of the expression
H ‘tariff’ in the present context would be to permit the appellant to destroy

the very purpose of the incentive scheme. Such an interpretation would enable the appellant to load the normal tariff with various other additional charges and surcharges by giving such additions different nomenclatures with a view to distinguish the same from the expression 'tariff'. Shri Datar has also pointed out to the very language of the Notification dated 30th October, 1995 and the provisions of Sections 49 and 59 of the Electricity (Supply) Act, 1948 to contend that PLEC is nothing but tariff inasmuch as it is by revision of the schedule of tariff made by the said Notification that PLEC had been introduced. Shri Datar has further submitted that even under the Notification of 1992 granting the incentive of "tariff freeze" the method of calculation prescribed is a simple one, namely, difference between the amount actually billed and the amount that would have been billed as per the tariff in force on the date of commercial production. The said formula, if applied, would definitely include reimbursement of PLEC within the ambit of the incentive granted. Lastly, Shri Datar has submitted that the Revised Rules of 1996 which specifically excludes PLEC from the power tariff to be reimbursed makes the position amply clear that PLEC had always been and is a part of the tariff.

10. We have considered the submissions advanced on behalf of the rival parties. The sequence of facts recited in the preceding paragraphs makes it abundantly clear that what was provided for by way of an incentive under the Incentive Rules framed under the Industrial Policy of the State is 'power tariff freeze' for a period of four years from the date of commercial production by reimbursement of the amount of increase in tariff during the aforesaid period of four years. It cannot be lost sight of that even before the cement manufacturing unit had gone into the commercial production, by letter dated 28th January, 1994 the respondents – writ petitioners were clearly informed that the State is going through a phase of acute shortage of power affecting peak load hour supply. The schedule of tariff published by the Board by Notification dated 31st May, 1994 made an unequivocal reiteration on the part of the Board that power supply during peak load hours, as may be notified by the Board from time to time, shall not be available and in case of continuous process and like industries electricity supply during peak load hours would be provided only for special reasons and by means of a separate agreement to be entered into with the Board. In fact, an Office order dated 23rd August, 1995 was passed by the Chief Engineer (Commercial) of the Board according sanction for supply of electricity during peak

A load hours to the respondents – writ petitioners’ unit subject to the terms and conditions mentioned therein. Finally by notification dated 30th October, 1995 another schedule of tariff was published levying peak load exemption charge (PLEC) at the rate of Rs.1/- per unit over and above the normal tariff. Power during peak hours was to be provided as a special dispensation for industries which could not afford to remain without continuous power/electricity. The mode of making available the power was also different inasmuch as the Notification dated 30th October, 1995 contemplated installation of separate meters for the said purpose. As already noticed, in the counter affidavit filed by the Board before this Court it has been stated that power, to make electricity supply available during the peak load hours, was obtained from other sources. The normal supply of electricity for which there was a normal tariff was in fact discontinued during the peak hours. Normal supply of electricity therefore has to be distinguished from the supply of electricity during peak load hours which was an act of special dispensation and upon payment of PLEC which change, in the facts noted, would assume the character of a surcharge. The question is not one whether PLEC is a part of the tariff having regard to the dictionary and the natural meaning of the word ‘tariff’. The question is how the word/expression ‘tariff’ is to be understood in the context in which such meaning is required to be determined. The meaning that has to be assigned must, naturally, be contextual having regard to what was promised i.e. tariff freeze. The nature of the charge imposed i.e. PLEC has to be understood keeping in mind that supply of power during the peak load hours was an exception; a special dispensation involving a special arrangement i.e. procurement from other sources.

F 11. If the matter is to be viewed from the aforesaid perspective we have to arrive at the conclusion that the incentive provided under the Incentive Rules would not include PLEC and the respondents – writ petitioners would not be entitled to reimbursement towards the PLEC paid for availing power supply by way of special dispensation in force. The fact that in the revised Incentive Rules of 1996 PLEC has been specifically excluded from the scope of reimbursement made on account of power tariff will not fundamentally alter the situation. The said declaration can be reasonably understood to be clarificatory and intended to clear all doubts, queries and issues raised on the aforesaid score.

H 12. For the aforesaid reasons, we hold that the respondents – writ petitioners are not entitled to reimbursement towards PLEC paid by it

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during the period of four years commencing from the date of commercial production i.e. 26th September, 1995. We order accordingly and direct that in the event any reimbursement had been made the same be returned forthwith by the respondents – writ petitioners to the appellants with interest thereon at the rate of 6% per annum. A

13. Consequently and in the light of the above, the order of the High Court is set aside and the appeal is allowed in the above terms. B

Nidhi Jain

Appeal allowed.