BIHAR STATE ELECTRICITY BOARD, PATNA AND ORS

v.

GREEN RUBBER INDUSTRIES AND ORS.

NOVEMBER 24, 1989

[K.N. SAIKIA AND M. FATHIMA BEEVI, JJ.]

Electricity Supply Act 1948—Sections 5-7, 23 and 49—Consumer—Liability to pay minimum guaranteed charges—Agreement—Validity of.

The Respondent firm made an application to the appellant-Electricity Board for the supply of 60 KVA electricity and the Board entered into an agreement with the Respondent-firm in that behalf and gave electricity connection on 13.4.1981. Thereafter the Respondent-firm applied for reduction of electricity from 60 KVA to 45 KVA and a fresh agreement was executed on May 2, 1981 and fresh connection of 45 KVA was given on 29.5.1981. It is respondent's case that it had requested the Electricity Board on 19.6.1981 to cut off the Electricity. The firm received Bills for minimum guaranteed charges for four months i.e. from June to September 1981. The firm refuted its liability to pay the bill on the ground that it consumed no electricity during the aforesaid period of 4 months. Consequent upon the firm's failure to pay the Bill, the Board disconnected the electricity connection on 28.9.1981. The firm ultimately received a bill for Rs.22,951.50p for the period commencing from June to August 1981. On the firm's failure to pay the Bill, the Board sent a requisition to the Certificate Officer who sent a notice to the firm on 6.7.1981. The Certificate Officer rejected the plea of the firm that it was not liable to pay the Bill and proceeded to attach the property of the firm. Being dissatisfied with the action, the respondent firm filed a Writ Petition in the High Court for quashing the bills as also the certificate proceedings.

The High Court took the view that the Board itself having disonnected the connection, it was not entitled to any charges for the period after September 1981 and it was not open to the Board to contend that under clause 9 of the agreement it was not open to either party to terminate the agreement of minimum guaranteed charges before the expiry of two years from the date of the agreement. The High Court accordingly quashed the bills as well as the certificate proceedings but allowed the charges for July, August and September 1981 to be adjusted against the security money.

The Electricity Board has therefore filed this appeal after obtaining Special Leave.

Allowing the appeal, this Court,

HELD: A supply agreement to a consumer makes his relation with the Board mainly contractual, where the basis of supply is held to be statutory rather than contractual. In cases where such agreements are made, the terms are supposed to have been negotiated between the consumer and the Board, and unless specifically assigned, the agreement normally would have affected the consumer with whom it is made. [286D-E]

The agreement was reasonable and valid and it was not determined with the disconnection of supply to the respondent-firm. The liability to pay the minimum guaranted charges, therefore, continued till the determination of the contract. The Board was therefore entitled to submit the bills and make the demand on that account and recover the same according to law. [285F-G]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 220 of 1987.

From the Judgment and Order dated 22.5.1986 of the Patna High Court in Civil Writ Jurisdiction Case No. 1915 of 1986.

Soli J. Sorabjee and Ranjit Kumar for the Appellants.

B.D. Sharma and S.K. Jain for the Respondents.

The Judgment of the Court was delivered by

K.N. SAIKIA, J. This appeal by special leave is from the Judgment of the High Court of Judicature at Patna dated May 22, 1986 in Civil Writ Jurisdiction Case No. 1915 of 1986 quashig the bills issued by the appellants demanding minimum guaranteed charges from the respondents.

The appellants Bihar State Electricity Board, Patna, hereinafter referred to as 'the Board', entered into an agreement with the respondent—M/s. Green Rubber Industries, a partnership firm, hereinafter referred to as 'the firm', on the latter's application dated 26th July, 1978, for supplying the electricity of 60 KVA and on 13.4.1981 gave electricity connection. The firm later applied that it

may be given 45 KVA instead of 60 KVA and it deposited the requisite sum of Rs.2700 and a fresh agreement was executed on May 2, 1981. On May 29, 1981 the firm was given fresh connection of 45KVA. According to the firm it requested the Board on 19.6.1981 to cut off the connection. The firm received the bills for minimum guaranteed charges for the months of June, July, August and September, 1981, though according to it no electricity was consumed by it during that period. According to the Board on failure to pay the bills, the supply was disonnected on 28th September, 1981. The firm ultimately received a demand notice in October, 1981 for the minimum guaranteed charges from June, 1981 to August, 1981 amounting to Rs.22,951.50p. The firm having not paid the amount, the Board sent a reqquisition to the Certificate Officer who sent a notice to the firm on July 6, 1984. Rejecting the contention of the firm that it was not liable to pay, the Certificate Officer proceeded to pass an order for attachment of the firm's property wherefore the firm filed a writ petition in the High Court of Judicature at Patna under Article 226 and 227 of the Constitution of India for quashing the bills as well as the certificate proceedings.

Before the High Court the Board contended that the firm was liable to pay the minimum guaranteed charges in terms of the agreement, the disconnection itself having been in terms thereof.

The High Court took the view that the Board itself having effected the disconnection it was not entitled to any charges for the period after September, 1981 and it was not open to the Board to contend that under clause 9 of the agreement it was not open to either party to terminate the agreement of minimum guaranteed charges before the expiry of two years from the date of the agreement. In that view of the matter, the High Court quashed the bills as well as the certificate proceedings, but allowed the charges for the months of July, August and September, 1981 to be adjusted against the security money.

Mr. Soli J. Sorabjee, the learned counsel for the appellants, submits, *inter alia*, that the firm under the agreement was liable to pay the minimum guaranteed charges irrespective of whether enregy was consumed or not during the period of the agreement and that disconnection of the supply on failure of the firm to pay the energy bills would not affect the obligation; and that the High Court fell into error in holding that the Board itself having disconnected the energy supply line it could not claim minimum guaranteed charges thereafter.

None appears for the respondents despite notice in the regular as well as substituted manner of service. A

The question to be decided is whether despite the fact that the supply line was disconnected on September 28, 1981, the firm was still liable to pay the minimum guaranteed charges under the agreement. The answer depends on the agreement itself and the relevant provisions of law. Clause 4 of the agreement says: B

> "The Consumer shall pay to the Board for the energy so supplied and registered or taken to have been supplied as aforesaid at the appropriate rates applicable to the Consumer according to the tariffs framed by the Board and enforced from time to time, the presently enforced tariffs being indicated in the Schedule to this agreement for easy reference. Such reference is subject to provisions of clause 15 appearing hereinafter. C
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> Provided that notwithstanding anything said above but subject to the provisions of clause 13 hereinafter, the Consumer shall have to pay minimum charges as specified in the abovesaid tariffs framed by the Board and enforced from time to time irrespective of whether energy to that extent has been consumed or not. (Such minimum charges are referred to as "the minimum guaranteed charges" in other places in this agreement.) D E
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> That part of minimum guaranteed charges as is not billed monthly, the assessment for the same will be generally made at the end of the year commencing from the 1st April, and ending with the 31st March of the following year which is the financial year of the Board. In case any agreement is entered into in between this period the abovesaid part of the minimum guaranteed charges will be proportionate to the period for which the Consumer is connected. Any bill on account of the minimum guaranteed consumption for the year or part thereof will be submitted by the end of June in each year." F G

From a perusal of the above clause it would be clear that the minimum guaranteed charges would be payable by the consumer irrespective of whether energy to that extent has been consumed or not. Indeed, there would be no need for such a provision if the charges were to H

depend only on the energy actually consumed.

Clause 5 of the agreement is to the following effect:

> "(a) Readings of meter shall be taken by the Board once in each month or such other intervals or times as the Board shall deem expedient and the Board's meter reader shall have access to the consumer's premises at all reasonable time for the purpose of taking such readings. The Board shall within reasonable time deliver to the Consumer the bill for energy consumed during the month in accordance with the readings of the meters and subject to the minimum guaranteed charges. The consumer shall pay the amount under the bill so delivered within the due date specified therein as per terms of the tariffs framed by the Board and enforced from time to time.
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> (b) If the consumer fails to pay the amount of any bill due under this agreement within the due date specified in the bill referred to in clause 5(a) above, he shall pay a surcharge at the rate given in the tariffs framed by the Board and enforced from time to time. If the amount of such a bill remains unpaid after the due date specified in the bill, the Board may discontinue the supply after giving the Consumer not less than 7 clear days' notice. The service will be reconnected only on receipt of full payment for all obligations outstanding up to the date of reconnection and charges for the work of disconnection and reconnection of service."

On a perusal of this clause there arises no doubt that if the amount of a bill submitted accordinng to law remains unpaid after the due date specified in the bill, the Board may discontinue the supply after giving the consumer not less than 7 clear days' notice. There is no dispute about notice in this case.

Clauses 8 and 9 of the agreement deal with its duration and termination. Clause 8 of the agreement says:

> "The agreement shall be ordinarily enforced for a period of not less than two years in the first instance (except in exceptional cases in which written consent of the Board will

be taken) from the date of commencement of supply, i.e. ..... and thereafter shall continue from year to year until the agreement is determined as hereinafter provided.

Note: In case where the date of commencement of supply is a date subsequent to that of the execution of this agreement, the Board is given power to fill in the date in the blank space provided for the same in this clause with prior intimation to the Consumer. The Consumer can produce his copy of the agreement to have such date filled in by the Board."

Clause 9 Provides:

"(a) The consumers shall not be at liberty to determine this agreement before the expiration of two years from the date of commencement of supply of energy. The consumer may determine this agreement with effect from any date after the said period of giving to the Board not less than one calendar month's previous notice in writing in that behalf and upon the expiration of the period of such notice this agreement shall cease and determine without prejudice to any right which may then have accrued to the Board hereunder, provided always that the consumer may at any time with the previous consent of the Board transfer or assign this agreement to any other person and upon subscription of such transfer this agreement shall be binding on the transferee and the Board and take effect in all respects as if the transferee had originally been a party hereto in place of the consumer who shall henceforth be discharged from all liability under or in respect thereof.

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

Thus it is seen that the consumer cannot determine the agreement before expiry of two years and there is nothing to show in this case that he did so after expiry thereof with previous notice. In fact the supply was disconnected by the Board for default. What would be its effect on the agreement? A

It is seen that in case of disconnection of the supply by the Board in exercise of its powers under the agreement it would be open for the consumer to apply for reconnection in accordance with the law within the remainder period of the above given compulsorily availing of supply or that of notice whichever is longer, he will be deemed to have given a notice on the date of disconnection in terms of aforesaid clause 9(a) for determination of the agreement and on expiry of the remainder period of compulsorily availing of supply or notice, whichever is longer, the agreement shall cease and determine. It is therefore clear that in the instant case the disconnection on the default of the cosumer having been effected on 28.9.1981 and the consumer having not applied for reconnection, it would be deemed to have given a notice on the date of disconnection in terms of clause 9(a) for the determination of the agreement and the agreement must be taken to have ceased and determined either at the end of the notice or at the end of the period of compulsorily availing of supply i.e. two years of the agreement whichever was longer. The (fresh) agreement having been executed on May 4, 1981 it would expire on May 1, 1983. The disconnection having been effected on September 28, 1981 the period of deemed notice of seven days expired before the period of compulsorily availing of supply under the agreement expired and hence the agreement must be deemed to have determined only on May 1, 1983. During this period the consumer's liability to pay the minimum guaranteed charges must be held to have continued. B C D E F

Mr. Soli J. Sorabjee submits, and we think rightly, that the High Court overlooked this important stipulation in the agreement which was binding on both the parties. However, as the respondents are not before us, it is necessary to consider the reasonability of the stipulation as to minimum guaranteed charges as argued by the learned counsel for the appellant Board. Was there any power of the Board to enter into the agreement? If so, to what extent? G

The Indian Electricity Act, 1910, hereinafter called 'the Act', provides the law relating to the supply and use of electrical energy. As defined in s. 2(11) of the Act "State Electricity Board" in relation to any State means the State Electricity Board, if any consituted for the H

A State under section 5 of the Electricity (Supply) Act, 1948 (54 of 1948) and includes any Board which functions in that State under sections 6 and 7 of the said Act. The appellant—the Bihar State Electricity Board is a Board. As defined in section 2(h) "licensee" means any person licensed under Part II to supply energy. The appellant Board is such a licensee under this provision. As defined in section 2(c) "consumer" B means any person who is supplied with energy by a licensee or the Government or by any other person engaged in the business of supplying energy to the public under this Act or any other law for the time being in force, and includes any person whose premises are for the time being connected for the purpose of receiving energy with the works of a licensee, the Government or such other person, as the case C may be. There is no doubt that the respondent was consumer.

The Electricity (Supply) Act, 1948, hereinafter called the 'Supply Act', is an Act to provide for the realisation of the production and supply of electricity, and generally for taking measures conducive to electrical development and for all matters incidental thereto. D

Under sub-section (1) of section 23 of the Act, a licensee shall not, in making any agreement for the supply of energy, show any undue preference to any person. Thus, this section envisages making of an agreement by the licensee with the consumer for the supply of energy. The instant agreement has, therefore, to be held as one E envisaged by this provision. Was the stipulation to pay minimum guaranteed charges, irrespective of whether energy was consumed or not, reasonable and valid? What is the consideration when less or no energy is consumed?

F Section 49 of the Supply Act makes provision for the sale of electricity by the Board to persons other than licensees. Under sub-section (1), subject to the provisions of the Supply Act and the Regulations, if any, made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purpose of such supply frame uniform tariff. Under sub-section (2) thereof nothing in sub-sections (1) and (2) G shall derogate from the power of the Board if it considers it necessary or expedient to fix different tariffs for the supply of electricity to any person not being a licensee, having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and any other relevant factors. Sub-section (2) enumerates the factors to be considerd by the Board in fixing the uniform tariffs. H

It is seen that the rule of charging minimum guaranteed charges has been in vogue since long. In the *London Electric Supply Corporation (Limited)* v. *Priddis,* 18 TLR 64, the agreement between the appellant company and the consumer to supply electricity in clause 4 provided that the "consumer shall have the option at or after the expiration of five years from the date of installation" of purchasing the installation at a price. Cl. 7 said: "The consumer shall until purchase as aforesaid pay quarterly to the supply company for the use of the installation 3/4d. per Board of Trade Unit for every unit of electrical energy supplied to the said premises and the minimum payment in any year shall be 1s. for each eight-candle power lamp or its equivalent installed." During the period from Mid-summer to Michaelmas, 1900, the defendant did not use any electricity supplied by the plaintiff, and the question was whether under the agreement the defendant was bound to pay the minimum payment provided for by cl. 7, even though in fact he had used none of the plaintiff's electricity during the quarter. The Lord Chief Justice in giving judgment said that "it was sufficiently clear that the installation was put in on the terms that the customer should have the right to purchase the installation after five years, and during that five years the customer should be liable to pay minimum rent whether the current was *de facto* used or not. The minimum rent had no reference to the amount of current used, and it was, therefore, clear that the mere fact that the defendant had not taken any current or a small current did not affect the case." Channel, J. concurring said that the "meaning of the clause was that the minimum rent did not merely cover the actual use but the right to use the current. The customer had to pay for the right to use the current, although he did not in fact use it."

In *Saila Bala* v. *Darjeeling Municipality,* AIR 1936 Calcutta 265, it was held by a learned single Judge that the minimum charge was not really a charge which had for its basis the consumption of electric energy. It was really based on the principle that every consumer's installation involved the licensee in certain amount of capital expenditure in plant and mains on which he was to have a reasonable return. He could get a return when the energy was actually consumed, in the shape of payments of energy consumed. When no such energy was consumed by the consumer, or a very small amount was consumed in a longer period, the licensee was allowed to charge minimum charges by his licence, but those minimum charges were really interest on his capital outlay incurred for the particular consumer.

Natesan, J. in *Natesa Chettiar* v. *The Madras State Electricity*

Board, [1969] 1 Madras L.J. 69, answering the question whether the provision for the minimum guarantee was just a stipulation by way of penalty or pre-determined damages for breach on the part of the consumer or something else, held the view that the minimum fixed was only consideration for keeping the energy available to the consumer at his end; it was not a penalty for not consuming a stated quantity of energy but was a concession shown up to the amount fixed, energy at a specified rates could be consumed free, consumption beyond only had to be paid for. The statutory basis for the terms in the agreement providing for minimum annual charge was found in section 22 of the Act and section 48 of the Supply Act. Section 22 deals with obligation on licensee to supply energy. The proviso to the section says:

> "No person shall be entitled to demand, or to continue to receive, from a licensee a supply of energy for any premises having a separate supply unless he has agreed with the licensee to pay to him such minimum annual sum as will give him a reasonable return on the capital expenditure, and will cover other standing charges incurred by him in order to meet the possible maximum demand for those premises, the sum payable to be determined in case of difference or dispute by arbitration."

Section 48 of the Supply Act empowers the licensee to carry out arrangement under that Act.

In *Watkins Mayor & Co.* v. *Jullundhur Electric Supply Co.*, AIR 1955 Punj. 133 (136), it was observed that the whole scheme of the Act seems to show that the provision made in any contract for a minimum charge was really to provide for a fair return on the outlay of the licensee, and it was for this reason that the law allowed the contract of this kind to be entered into. Clause XI A of the schedule to the Act, as it then stood, provided:

> "A licensee may charge a consumer a minimum charge for energy of such amount and determine in such manner as may be specified by his licence, and such minimum charge shall be payable notwithstanding that no energy has been used by the consumer during the period for which such minimum charge is made."

The Court accordingly held that there was nothing illegal in the insertion of the term for payment of a minimum charge in the agreement for

supply of energy and held that it had not been made out that it was an unreasonable levy. A

A Division Bench of Allahabad High Court, in *Hari Shankar & Ors.* v. *U.P. State Electricity Board & Anr.,* AIR 1974 Allahabad 70, held that when the electrical supply was being made on the footing that the consumer would pay the minimum guaranteed charges that charge was one of the terms and conditions for supply and the fixation of that would be included in the fixation rates for the supply of electricity. Similarly in *M/s. Bhagwan Industries Pvt. Ltd. Lucknow* v. *U.P. State Electricity Board, Lucknow,* AIR 1979 Allahabad 249, a Division Bench held that an agreement for supply of electricity with the Board empowered it to revise the rates and that imposition of minimum consumption guarantee charge imposed by new tariff schedule under section 49 of the Supply Act was valid. A Division Bench of the Andhra Pradesh High Court in *Md. Abdul Gaffar* v. *Andhra Pradesh Electricity Board,* [1975] 1 APLJ 119, also held that fixation of monthly minimum charges based on connected load and revisional rates for electrical consumption by non-domestic consumers in accordance with the factors in section 49(2) was neither *ultra vires* nor arbitrary. B C D

The High Court in the case at hand relied on *Rajeshwar Singh* v. *State of Bihar,* AIR 1983 Patna 194, wherein it was held that when the disconnection of electric energy was effected by the Board then it could not ask for the minimum guaranteed charges. That decision must be confined to the facts of that case only. E

It is true that the agreement is in a standard form of contract. The standard clauses of this contract have been settled over the years and have been widely adopted because experience shows that they facilitate the supply of electric energy. Lord Diplock has observed: "If fairness or reasonableness were relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable." *Schroder Music Co. Ltd.* v. *Macaulay,* [1974] 3 All ER 616 (624). In such contracts a standard form enables the supplier to say: "If you want these goods or services at all, these are the only terms on which they are available. Take it or leave it." It is a type of contract on which the conditions are fixed by one of the parties in advance and are open to acceptance by anyone. The contract, which frequently contains many conditions is presented for acceptance and is not open to discussion. It is settled law that a person who signs a F G H

A document which contains contractual terms is normally bound by them even though he has not read them, even though he is ignorant of the precise legal effect. In view of clause 4 having formed one of the stipulations in the contract along with others it cannot be said to be *nudum pactum* and the maxim *nudum pactum ex quo non oritur actio* does not apply. Considered by the test of reasonableness it cannot be B said to be unreasonable inasmuch as the supply of electricity to a consumer involves incurring of overhead installation expenses by the Board which do not vary with the quantity of electricity consumed and the installation has to be continued irrespective of whether the energy is consumed or not until the agreement comes to an end. Every contract is to be considered with reference to its object and the whole of C its terms and accordingly the whole context must be considered in endeavouring to colllect the intention of the parties, even though the immediate object of enquiry is the meaning of an isolated clause. This agreement with the stipulation of minimum guaranteed charges cannot be held to be *ultra vires* on the ground that it is incompatible with the statutory duty. Differences between this contractual element and the D statutory duty have to be observed. A supply agreement to a consumer makes his relation with the Board mainly contractual, where the basis of supply is held to be statutory rather than contractual. In cases where such agreements are made the terms are supposed to have been negotiated between the consumer and the Board, and unless specifically assigned, the agreement normally would have affected the con- E sumer with whom it is made, as was held in *Northern Ontario Power Co. Ltd.* v. *La Roche Mines Ltd.*, [1938] 3 All ER 755.

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

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In the result, the impugned judgment is set aside and the appeal is allowed. No order as to costs.

Y. Lal Appeal allowed.