GRID CORPORATION OF ORISSA LIMITED

v.

INDIAN CHARGE CHROME LIMITED

MAY 13, 1998

[G.T. NANAVATI AND S.P. KURDUKAR, JJ.]

Arbitration & Conciliation Act, 1996—Section 11-Maintainability of Application under—Proceedings before Regulatory Commission under Orissa Electricity Reform Act, 1995—One of the parties later applying under Section 11 of the Arbitration Act before the High Court—Proceeding before the Regulatory Commission adjourned by it on an application filed by the party approaching High Court under Section 11 of the Arbitration Act—High Court on erroneous assumption that Regulatory Commission has failed to arbitrate under Section 37(1) of the Reform Act, entertained the application under Section 11—Held, application under Section 11 was premature and High Court exceeded its jurisdiction in entertaining the same—Orissa Electricity Reform Act, 1995, Section 37(1).

Orissa Electricity Reform Act, 1995—Sections 37(1), 33, 2(e) and (f) and 14—Arbitrability of dispute—Licensee—Respondent was authorised/ engaged in supplying electricity through its captive power plant to Electricity Board and later to appellant, its successor—No formal licence issued to respondent under the Electricity Act or under the Reform Act—Held, High court erred in taking the view that the respondent was licensee under the Section 2(h) of Electricity Act and continued to be the same even after coming into force of the Reform Act—Hence the dispute was arbitrable under Section37(1) read with Section 33 of the Reform Act—Electricity Act, 1910, Section 2(h).

Electricity Act, 1910-Section 24—Notice for payment of arrears of electricity bill or else power supply would be disconnected-Application for injunction—Held, injunction orders could be passed only if **prima facie** *case existed and balance of convenience in favour of the party—Financial constraint cannot be a ground to allow the party to use power without charges—However, instalments fixed for payment of undisputed outstanding arrears—Arbitration & Conciliation Act, 1996, Section 9—Civil Procedure Code, 1908, Order 39, Rules 1& 2.*

A Respondent set up a Captive Power Plant in 1989 after due permission from the state for supplying power to its sister concerns IMFA and PPL and surplus power to State Electricity Board (OSEB) and accordingly an agreement was signed between the respondent and the OSEB. This arrangement continued until a MOU of 1994 followed by an agreement of 1995 signed between the respondent and OSEB. Under the MOU of 1994 the B power supplied by the respondent to OSEB was charged at 77 paise per unit and a wheeling charge @ 15% Appellant became the successor of OSEB in 1996. Appellant thereafter called upon respondent to pay outstanding dues for the period December 1994 to December 1996 amounting to Rs. 24.8281 crores. During this period the OSEB and thereafter appellant had been C wheeling/supplying power to respondent.

Respondent filed an application before the Regulatory Commission in February 1997 constituted under the Orissa Electricity Reform Act raising a dispute as regard bill amounts and its liability to pay to appellant. In April 1997 appellant informed respondent that unless the arrears are paid, they D would be compelled to discontinue the power supply in accordance with law. When no payment was, made the appellant issued another notice under Section 24(1) of the Electricity Act calling upon the respondent to pay the arrears within seven days or else face disconnection. The respondent on the contrary moved a petition under Section 9 of the Arbitration & Conciliation Act in the Court of District Judge for relief of injunction which was granted E by it ex-parte. Appellant thereafter filed an appeal before the High Court which stayed the operation of the order of the District Judge. However the High Court recalled its earlier Order and directed the appellant to restore the supply which was disconnected subject to the condition that 5 crores would be deposited out of the total areas. Aggrieved by that order of the High F Court, an SLP was filed before this Court which confirmed the order of the High Court but granted facility to make the payment in two instalments.

In the meantime the Regulatory Commission asked respondent to clarify as to how its petition could be treated as reference under Section 37(1) of the Reform Act since it was not a licensee under the said Act. G Respondent filed an application to treat them a licencee under the Reform Act, which was objected by the appellant.

After the payment of Rs. 5 crores pursuant to the orders of this Court, the respondent again defaulted in making payments of further bills and again a disconnection notice was issued by the appellant. The respondent H again challenged the said notice before the Addl. District Judge, which

granted interim order staying the notice without any condition. Respondent also moved an application before the High Court under Section 11 of the Arbitration & Conciliation Act for appointment of an arbitrator. In the meantime, District Judge confirmed the two earlier order passed by it directing the appellant not to disconnect the supply.

Aggrieved by these orders, the appellant filed appeal before the High Court. the High Court clubbed the appeals of the appellant and the application of respondent for appointment of arbitrator. The High Court held that there was a dispute between respondent and appellant which was arbitrable falling within the jurisdiction of Regulatory Commission under Section 37 of the Reform Act and also arbitrable under Section 3 read with schedule of the Electricity Act. The High Court further held that as the Regulatory Commission failed to arbitrate, it nominated a sole arbitrator. Hence this appeal.

Allowing the appeal, this Court

HELD : 1. The High Court has exceeded its jurisdiction while entertaining the application of the respondent under Section 11 of the Arbitration & Conciliation Act. The High Court erroneously assumed that the Regulatory Commission had failed to arbitrate under Section 37(1) of the Orissa Electricity Reform Act. This finding is factually incorrect because by why of an application, respondent asked the Regulatory Commission to adjourn the proceedings pending before it on the ground that it held filed an application under Section 11 of the Arbitration Act in the High Court. In view of this application the Regulatory Commission did not proceed in the matter. If this be so the High Court was wrong in holding that there was failure on the part of Regulatory Commission to arbitrate and consequently the application filed by respondent under Section 11 of Arbitration Act is maintainable. The application made by respondent was premature and the High Court could not have entertained the same and granted desired relief to respondent. [383-E-H]

2. It is not seriously disputed that respondent after a long drawn correspondence with the Orissa Government had received no objection to put up the Captive Power plant to generate power. Accordingly in 1989 the Captive Power Plant started generating power which was supplied to the OSEB. This arrangement continued till 1994 when MOU and agreement were entered into between respondent and OSEB. The appellant being a successor of OSEB, naturally the MOU of 1994 and agreement of 1995 will

A be binding upon the appellant in the absence of any material to the contrary. It is not the contention of the appellant that respondent did not supply any power at all during the period for which the bills were raised on respondent. Despite this factual position it appears that no formal licence was issued under Section 2(h) of the Indian Electricity Act or under the Orissa Electricity Reform Act. It cannot be ignored that the investment of respondent in putting B up a Captive Power Plant is running into few hundred crores. From the facts and in view of Section 14(1) of the Reform Act it is quite clear that respondent was/is authorised and engaged in supplying the electricity to OSEB and thereafter to appellant and respondent could be arbitrable under Section 37(1) read with Section 33 of the Reform Act. The specious claim pressed C on behalf of respondent cannot be accepted at this interlocutory stage. It is not denied by respondent that back up power was available to its sister concern IMFA and PPL and the manufacturing process was continuing. At this interlocutory stage what the Courts are required to bear in mind is as to whether a prima facie case for recovery of arrears of energy charge is made out and on whose side the balance of convenience lies. In the facts and D circumstances of the case whether interim order should be passed by imposing certain conditions or without condition. The net result of the impugned order is that the appellant is required to maintain back up power to the constituents of respondent but for such supply latter was not required to make any payment for power consumed. It also needs mentioned that under E the MOU of 1994 and the agreement of 1995 respondent is required to pay for consumption of energy @ Rs. 2.30 per unit which is far less then the rate at which power is supplied to other commercial units. It is true that respondent when supplies power to appellant the latter pays at the rate of 77 paise per unit to former. [384-D-E; 386-D-G]

F 3. As regard payment of the amount as reflected on the basis of monthly bills payable to the appellant by respondent, viz. Rs 46.193 crores less 15% wheeling charges, the fair and proper order to meet the ends of justice at this interim stage would be to direct respondent to pay Rs. 39.273 crores in seven equal instalment of Rs. 5 crores payable on or before 10th G of each month to appellant and the 8th instalment would be for the balance amount. The Regulatory Commission while making the award, will pass appropriate orders as regards interest on the amount if found refundable to respondent or recoverable by appellant on there respective claims in accordance with law. In the event of any two default, facility of payment by instalment would stand vacated, disconnection notices will revive and appellant H will be at liberty to take such steps as permissible in law. As regard the

recurring charges if respondent wants to use power it will have to make payment of such bills as and when served upon them. Respondent may raise a dispute before the Regulatory Commission. If there be any occasion to consider such application the Regulatory Commission will pass interim orders in accordance with law. These calculation and directions are without prejudice to the rights and contentions of the parties. [387-D-H]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2686-88 of 1998.

From the Judgment and Order dated 10.2.98 of the Orissa High Court in M.A.No 599-600 and M.J.C.No. 229 of 1997.

F.S. Nariman, G.L. Sanghi, M.G. Ramachandran, N.C. Panigrahi and Raj Kumar Mehta for the Appellant.

K.K. Venugopal, Ms. Indra Jai Singh, Ms. Anuradha Dutt and Ms. Vijay Lakshmi Memon for the Respondent.

The Judgment of the Court was delivered by

S.P. KURDUKAR, J. Leave granted.

(2) These appeals are directed against a common Judgment and order dated 10.2.98 passed by the Learned Chief Justice of Orissa High Court, Cuttack in Miscellaneous Appeal Nos. 599/97, 600/97 and MJC No. 229/97. All these appeals are being disposed of by this Judgment.

The brief facts leading to the present controversy may be summarised as under:-

(3) The GRID Corporation of Orissa Ltd., (for short 'the GRIDCO') is the appellant in all these appeals whereas M/S Indian charge Chrome ltd., (for short 'ICCL') is the respondent. GRIDCO was the appellant in Miscellaneous Appeal Nos. 599/97-600/97 whereas ICCL was the petitioner in MJC No. 229/97 before the Orissa High Court.

(4) The GRIDCO became the successor of the Orissa State Electricity Board (hereinafter referred to as 'OSEB') w.e.f. 1.4.1996 and was engaged in the business of transmission, distribution and supply of electricity to various consumers in the State of Orissa. Indian metals and Ferro Alloys Company (for short 'IMFA') is a sister concern of ICCL. ICCL sometime in 1984 corresponded with the Government of Orissa seeking permission to generate

power. Accordingly after completing the formalities ICCL sometimes in 1989 set up the Captive Power Plant to generate power in the State of Orissa at Choudwar. Power generated at Choudwar was to be wheeled to The Indian Metals and Ferro Alloys Company (IMFA) at Therubali a sister concern of ICCL and PPL and the surplus power was to be sold to OSEB. For the purposes of administrative convenience ICCL was incorporated. Accordingly, an agreement dated February 14, 1989 was entered into between OSEB and ICCL and under the said agreement the power generated by ICCL at Choudwar was fed to the GRID of OSEB for further transmission to the Charge Chrome Manufacturing Plant of IMFA at Therubali. The arrangement between OSEB and ICCL continued until a Memorandum of Understanding dated 15.11.1994 was arrived at and signed by ICCL and OSEB and thereafter followed by an agreement dated 4.3.1995 w.e.f. 1.12.94. Under this MOU of 1994 power supplied by ICCL to OSEB was charged at 77 paise per unit; wheeling of power by OSEB (from ICCL) was charged @ 15%, (known as wheeling charges). ICCL was permitted to draw power from OSEB for supply to PPL/IMFA/PPT on payment of Rs. 2.31 per unit (back- up power); ICCL guaranteed supply of power to OSEB at least 10 MW per day. Although this agreement was valid for six months, however the exchange of power on both sides continued even thereafter. OSEB used to raise the monthly bills as per the readings recorded on TOD meters with 30 minutes' recording time. GRIDCO who became the successor of OSEB w.e.f. 1.4.96, called upon ICCL to pay outstanding dues for the period December, 1994 to December, 1996 amounting to Rs. 24.8281 crores. ICCL failed to make the payment. During this period the OSEB and thereafter GRIDCO had been wheeling/supplying electricity to ICCL in terms of MOU dated 15.11.1994.

(5) On 25.2.1997 ICCL filed an application before the Regulatory Commission constituted under the Orissa Electricity Reform Act, 1955 (for Short Reform Act') raising a dispute as regards bill amounts and its liability to pay to GRIDCO. On 7.4.1997 GRIDCO informed ICCL that unless the arrears of Rs. 24.8281 crore are paid on or before 22.4.97, it will be compelled to discontinue the power supply in accordance with law. On 8.4.97 ICCL filed another petition before Regulatory Commission alleging that the claim of the GRIDCO for the arrears for the period from December, 1994 to December, 1996 is untenable inasmuch as the same is contrary to the MOU and the agreement. ICCL then alleged that because of variation of frequency in the GRID, the power generated by its Captive Power Plant could not be inducted into the GRID. It was an obligation of GRIDCO to check variation of frequency in the GRID and because of its negligence its captive power plant got damaged. The

billing done by GRIDCO on the basis of half hourly reading was totally unjustified. The GRIDCO in this reply denied the allegations and stated that variations of frequency in the GRID was maintained by using proper electric system. The frequency was maintained as prescribed under the Indian Electricity Rules. The power was wheeled according to the MOU dated 15.11.1994 and the agreement dated 4.3.1995. As regards the maintenance of frequency it was stated that it depends upon all operators in the GIRD Which is coordinated by the Eastern Regional Load Despatch Centre. The GRIDCO used to receive power from various sources. The claim set up by ICCL as regards the damage to their Captive Power Plant is untenable. As regards the billing it was stated that it is established practice for all heavy industrial consumers that though billing is done on a monthly basis, but for billing purposes exchange of energy/power supplied to the consumers is measured on the basis of consumption for each 30 minutes block separately. To facilitate this TOD meters are installed at the supply point. Clause 16(2) of the Agreement dated 4.3.95 provides for such billing.

(6) Despite the notice no payment was made by ICCL and therefore, vide notice dated 24.4.97 under Section 24(1) of the Indian Electricity ACT the ICCL was called upon to pay the arrears within seven days, in default power supply will be discontinued.

(7) The ICCL did not make any payment. But on the contrary on 30.4.97 ICCL filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (for short 'Arbitration Act') in the Court of District Judge, Puri which was numbered as Arbitration Case No. 195/97 for relief of injunction. The District Judge on 30.4.97 granted ex-parte injunction restraining GRIDCO from disconnecting back up power supply to ICCL, IMFA and PPL. GRIDCO aggrieved by this order filed appeal before the Orissa High Court on 15.5.97. The High Court Stayed the operation of the order of the District Judge dated 30.4.97. on 16.5.97 ICCL appeared before the High Court and prayed for recall of the order of stay dated 15.5.97. The High Court recalled its order and directed to restore the electric supply which was disconnected, subject to deposit of Rs.5 crores by ICCL as against the arrears of Rs. 24.8281 crores. Aggrieved by this order dated 16.5.1997 ICCL filed SLP in this Court which came to be disposed of on 27.5.97 confirming the direction of payment of Rs. 5 crore but, however, this Court granted facility to make payment in two instalments. As regards the recurring charges the Court observed as under:-

"We are not passing any order with regard to recurring charges. The

matter is left open. The appeals are disposed of accordingly".

(8) In the meantime the Regulatory Commission on 21.5.97 asked ICCL to clarify as to how its petition could be treated as Reference under Section 37(1) of the Reform Act since it is not a licensee under the said Act. On 2.6.97 ICCL filed another application before the Regulatory Commission stating that the same may be treated as a Reference under Section 37(1) of the Reform Act. On 9.6.97 GRIDCO filed its reply and took a preliminary objection to the maintainability of the application for Reference under Section 37(1) of the Reform Act. The Regulatory Commission adjourned the matter to 19.7.97 for hearing on the question of maintainability.

(9) On payment of rupees five crores by ICCL in pursuance of the order of this Court the GRIDCO restored power supply to ICCL. Again for the period of January, 1997 to May, 1997 the ICCL failed to pay the bills amounting to Rs. 5,12,45,546.06 and, therefore, on 19.6.97/20.6.97 the GRIDCO issued a notice to ICCL to pay the said amount within seven days in default power supply will be disconnected. The ICCL approached the Additional District judge Challenging the said notice and the Court on 27.6.1997 granted interim order staying the operation of the notice dated 19/20.6.97 of disconnection without imposing any condition. On 14.7.97 the ICCL filed a petition before the Orissa High Court under Section 11 of the Arbitration Act being MJC No. 229/97 for appointment of an Arbitrator. In the meantime the Additional District Judge who was seized of the two applications disposed of the same by two separate orders dated 26.7.97 restraining GRIDCO from disconnecting power supply to ICCL/IMFA till disposal of Case No. 15/97 pending before the Regulatory Commission. Both these orders did not impose any condition for payment of arrears or current charges except stating therein that in the event ICCL failed to comply with the order of the Supreme Court, GRIDCO may take appropriate action.

(10) Aggrieved by the tow orders dated 26.7.97 passed by the additional District Judge the GRIDCO on 14.8.97 filed two appeals before the Orissa High Court being M.A. Nos. 599-600 of 1997 challenging the legality and correctness of the said orders.

(11) In view of the blanket stay order dated 26.7.97, ICCL did not make any payment for the amounts due from June, 1997 to September, 1997 in the aggregate sum of Rs. 13,18,88000. On 7.11.1997 GRIDCO, therefore, issued a notice of disconnection for non payment of the dues of Rs. 13,18,88000.

On receipt of this notice ICCL on 10.11.1997 filed an application before the High court praying for stay of the notice dated 7.11.97 of disconnection and the High Court on 11.11.1997 granted the interim relief. A

(12) The Learned Chief Justice of Orissa High Court took up for final disposal Miscellaneous appeal Nos. 599/600 of 1997 filled by GRIDCO and MJC No. 229 of 1997 filled by ICCL. The High Court by its order dated 10.2.98 held that there was a dispute between ICCL and the GRIDCO which is arbitrable falling within the jurisdiction of the Regulatory Commission under Section 37 of t he Reform Act and also arbitrable under Section 3 read with Schedule of Electricity Act. The High Court further held that since the Regulatory Commission failed to arbitrate in the matter and/or failed to appoint an Arbitrator, nominated a Retired Chief Justice of India as the sole Arbitrator. The High court further directed that stay of disconnection shall continue. From the return filed on behalf of ICCL it appears that ICCL without loss of any time, on 25.2.98 filed statement of claim on its behalf before the sole arbitrator. B C D

(13) The GRIDCO aggrieved by the common judgment and order passed by the High Court filed these three appeals challenging the legality and correctness thereof.

E

(14) We have gone through the judgment of the High Court and in our considered view it had exceeded the jurisdiction while entertaining the application of ICCL under Section 11 of the Arbitration and Conciliation Act, 1996. The High Court erroneously assumed that the Regulatory Commission had failed to arbitrate under Section 37(1) of the Reform Act. this finding is factually incorrect because vide application dated 19.797 ICCL asked the Regulatory Commission to adjourn the proceedings pending before it on the ground that it had filed MJC No. 229/97 in the High Court . In view of this application the Regulatory Commission did not proceed in the matter. If this be so the High Court in our opinion was wrong in holding that there was failure on the part of Regulatory Commission to arbitrate and consequently the application made by ICCL under Section 11 of Arbitration Act is maintainable. In our considered view the application made by ICCL under Section 11 of the Arbitration Act, 1996 (MJC No. 229/97) was premature and the High Court could not have entertained the same and granted desired relief to ICCL. F G H

(15) Another question which was seriously contested on behalf of GRIDCO before the Regulatory Commission as well as before the High Court was that ICCL is not a licensee within the meaning of Section 2(h) of Indian Electricity Act, 1910 and also under Section 2(e) and (f) of the Reform Act, 1995. The High Court recorded a finding that ICCL is a licensee under the Indian Electricity Act, 1910 and it continued to be a licensee even after Reform Act, 1995 came into force. The High Court placed reliance on Section 14(1) of the Reform Act and held that ICCL is authorised by the State Authority in the business of supplying the electricity. It was thus concluded that ICCL in view of Section 14 of the Reform Act, 1995 shall continue to be a licensee. In view of this finding the High Court held that the dispute is arbitrable under Section 37(1) read with Section 33 of the Reform Act, 1995. It is not seriously disputed that ICCL after a long drawn correspondence with the Orissa Government had received no objection to put up the Captive Power Plant at Choudwar to generate power. Accordingly in 1989 the Captive Power Plant started generating power which was supplied to the OSEB. This arrangement continued till 1994 When MOU and agreement were entered into between ICCL and OSEB. The GRIDCO being a successor of OSEB naturally the MOU of 1994 and agreement of 1995 will be binding upon the GRIDCO in the absence of any material to the contrary. It is not the contention of the GRIDCO that ICCL did not supply any power at all during the period for which the bills were raised on ICCL. Despite this factual position it appears that no formal licence was issued under Section 2(h) of Indian Electricity Act, 1910 or under the Reform Act, 1995. It cannot be ignored that the investment of ICCL in putting up a Captive Power Plant at Choudwar is running into few hundred crores. Section 2(e) and (f) of the Reform Act read as under:

> "(e) "licence" means a licence granted under Chapter VI;
>
> (f) "licence" or "licence holder" means a person licensed under Chapter VI to transmit or supply energy including Gridco".

CHAPTER VI DEALS WITH LICENSING OF TRANSMISSION AND SUPPLY

Section 14(1) reads as under:

> No person, other than those authorised to do so by licence or by virtue of exemption under this Act or authorised or exempted by any other authority under the Electricity (Supply) Act, 1948 shall engage in the State in the business of

(a) transmitting; or

(b) supplying electricity.

From the facts noted hereinabove and in view of Section 14(1) of the Reform Act it is quite clear that ICCL was/is authorised and engaged in supplying the electricity to OSEB and thereafter to GRIDCO and if this be so the dispute between the GRIDCO and ICCL could be arbitrable under Section 37(1) read with Section 33 of the Reform Act, 1995.

((16) Mr. F.S. Nariman, Learned Senior Counsel in support of these appeals urged that not only the District Judge but even the High Court had totally ignored a well settled rule while injuncting the GRIDCO from performing its statutory function of disconnection of power supply to ICCL for non payment of arrears of electricity bills without imposing any condition as regards payment of arrears and recurring charges and consequently the GRIDCO is obliged to continue power supply. The order passed by the High Court is neither just nor fair and is opposed to the rule of balance of convenience. As regards the amount of arrears of Rs. 24 crore recoverable pursuant to the first demand/disconnection notice for the period December, 1994 to December, 1996 at the moment it is covered by the interim order of this Court. His grievance is as regards the subsequent arrears from January, 1997 to March, 1998 come to Rs. 46.193 crores (approximately) on monthly settlement basis. On half hourly settlement basis the amount payable would come to Rs. 62.52 crores including delayed payment surcharge @ 2% per month. Demand/disconnection notices have already been served but in view of various orders passed by the courts the GRIDCO is unable to recover arrears and in addition it has been injuncted from disconnecting power supply. The only equitable order in such circumstances ought to be to call upon ICCL to pay all the arrears since ICCL had availed facility of power/energy to run its plants IMFA and PPL. He urged that no reasons whatsoever are given by the Courts below while granting unconditional interim orders in favour of ICCL.

(17) Mr. K.K. Venugopal, Learned Senior Counsel while countering these submissions urged that ICCL was neither in arrears nor it neglected to pay the bill amount. According to him the bills served on ICCL were patently wrong because billing was done on the basis of half hourly consumption recorded on TOD meter. ICCL was not obliged to honour such bills. He also urged that ICCL was generating power but it was because of high frequency in the GRID it could not absorb power generated by ICCL and as a result

A thereof its Captive Plant and boilers were required to be shut down. At times the boilers were closed down for several hours. Though the high rise frequency was intermittent but once the boilers were shut down they used to take more than two hours to produce the steam which is supplied to the turbines to generate power. The GRID high frequency had caused damage to the blades of the turbines costing about couple of crores in replacing the same. Mr. B Venugopal then urged that in fact the GRIDCO owed certain amounts to ICCL and had received Rs. 10 crores and for the balance the matter is pending before the high power Committee set up by Government of Orissa. As regards the wheeling charges counsel disputed any liability thereof and urged that there was no question of paying any wheeling charges when power was not C wheeled by GRIDCO by reason of time to time shutting down to turbines and boilors of ICCL. It was, therefore, urged that the GRIDCO had no claim whatsoever against the ICCL and therefore the courts below were right in staying the disconnection notices without imposing any condition.

(18) In our considered view the spacious claim pressed before us on D behalf of ICCL cannot be accepted at this interlocutory stage. It is not denied by ICCL that back up power was available to its sister concern IMFA and PPL and the manufacturing process was continuing. At this interlocutory stage what the courts are required to bear in mind is as to whether a prima facie case for recovery of arrears of energy charges is made out and on whose side E the balance of convenience lies. In the facts and circumstances of the case whether interim order should be passed by imposing certain conditions or without any condition. The net result of the impugned order is that the GRIDCO is required o maintain back up power to the constituents of ICCL but for such supply latter was not required to make any payment for power consumed. It also needs to be mentioned that under the MOU dated 15.11.94 F and agreement dated 4.3.95 ICCL is required to pay for consumption of energy @ Rs. 2.31 per unit which is far less than the rate at which power is supplied to other commercial units. It is true that ICCL when supplies power to GRIDCO the latter pays at the rate of 77 paise per unit to former. Some dispute is also raised as regards interpretation of MOU and agreement but we do not think it appropriate to deal with these contentions at this point of time. G

(19) Mr. Venugopal also disputed the recording of consumption of power on half hourly basis. It was according to learned counsel wholly illegal and as a result thereof the amounts in the bills stood inflated, and consequently ICCL is not liable to honour such bills. On the other hand Mr. Nariman urged H that it is not open to ICCL to challenge the half hourly recording because it

was specifically agreed upon between the parties under MOU and the agreement. We do not propose to deal with these rival contentions at this interlocutory stage and, therefore, they are kept open.

(20) Mr. Nariman alternatively urged that at any rate on the basis of monthly billing, the amounts payable by ICCL to GRIDCO would come to Rs. 46.193 crores and, therefore, at this interlocutory stage without touching the controversy as regards half hourly recording is right or wrong, ICCL must make the full payment of this amount. Another dispute also relates to wheeling charges @ 15%. According the GRIDCO power was in fact wheeled but according to Mr. Venugopal when the turbines were shut down though intermittantly there was no question of wheeling the power. This issue again needs further investigation in depth and at this interlocutory stage it would not be proper to conclude one way or the other. We, therefore, proceed on the assumption that the amount reflected on the basis of monthly bills payable to the GRIDCO by ICCL would be Rs. 46.193 crores less 15% wheeling charges which would come Rs. 6.92 crores approximately. At this interlocutory stage even if we give benefit of this amount of Rs. 6.92 crores payable by ICCL to GRIDCO under the various bills still the outstanding arrears payable by ICCL to GRIDCO would come to Rs. 39.273 crores.

(21) Now the question is what could be the fair and just order as regards the payment of these arrears. Mr. Venugopal although expressed the financial constraints of ICCL to make any payment but that cannot be a ground to allow ICCL to use power without any charges. We, therefore, feel that the fair and proper order to meet the ends of justice at this interim stage would be to direct ICCL to pay Rs. 39.273 crores in seven equal instalments of Rs. 5 crores payable on or before 10th of each month to GRIDCO and the 8th instalment would be for the balance amount. First instalment of Rs. 5 crores will be payable in the month of June, 1998. The Regulatory Commission while making the award, will pass appropriate orders as regards interest on the amount if found refundable to ICCL or recoverable by GRIDCO on their respective claims in accordance with law. In the event of any two defaults, facility of payment by instalment to stand vacated. Disconnection notices will revive and GRIDCO will be at liberty to take such steps as permissible in law. As regards the recurring charges if ICCL wants to use power it will have to make payment of such bills as and when served upon them. ICCL may raise a dispute before the Regulatory Commission. If there be any occasion to consider such application the Regulatory Commission will pass interim orders in accordance with law. These calculations and directions are without prejudice

A to the rights and contentions of the parties.

(22) For the conclusions recorded hereinabove all the three appeals are allowed. The judgment and order dated 10.2.98 passed by the High Court is set aside and resultantly the appointment of the Arbitrator stands quashed. The ICCL is directed to make the payment of arrears as indicated above. The
B application made by ICCL to the Regulatory Commission to arbitrate will stand revived and the Regulatory Commission will dispose of the matter in accordance with law. In the facts and circumstances of the case the parties are directed to bear their own costs.

R.K.S. Appeals allowed.