CASE NO.:
Appeal (civil) 1005 of 2003

PETITIONER:
The Tata Hydro-Electric Power Supply Co. Ltd. & Ors.

RESPONDENT:
Union of India

DATE OF JUDGMENT: 05/02/2003

BENCH:
M.B. SHAH, B.P. SINGH & H.K. SEMA.

JUDGMENT:

J U D G M E N T

Arising Out of S.L.P.(C) NO.4123 OF 2001

B.P.SINGH, J.

Special leave granted.

This appeal is directed against the judgment and order of the High Court of Judicature at Bombay dated 5.10.2000 in Appeal No.144 of 2000 whereby the Division Bench of the High Court affirmed the judgment of the learned Single Judge allowing the Arbitration Petition filed by the respondent under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award of the Umpire dated 30th March, 1998 on the ground of an error of law apparent on the face of the Award.

The appellant-companies are licensees under the Indian Electricity Act, 1910 (hereinafter referred to as "the Act"). A Power Supply Agreement was executed on 7th July 1971 between the aforesaid companies and President of India represented by Central Railways and Western Railways. Under the agreement electric power is supplied to the railways at a number of points on the railways electrified track route for the operation of the railways electric trains services. Clause 20 of the said agreement contains an arbitration clause which reads as under:-

"20.0: In the event of any dispute or difference at any time arising between the Government and the Companies in regard to any matter arising out of or in connection with this Agreement such dispute or difference shall be referred to arbitration of two arbitrators one to be appointed by each party hereto and an Umpire to be appointed by the Arbitrators before entering upon the reference and decision or award of the said Arbitrators or Umpire shall be final and binding on the parties hereto and any reference made under this clause shall be deemed to be a submission to arbitration under the Arbitration Act, 1940, or any statutory modification thereof for the time being in force. The venue of arbitration shall be Bombay".

The facts of the case are that on 7th June, 1993 the appellants found that Western Railways Feeder No.36 Red phase current was lower (0.4 amps.) than Blue phase current (14 amps.). The respondent was accordingly advised by message dated 9th June, 1993 indicating that the appellants would be carrying out further

investigation. On 13th June, 1993 further investigation was carried out in the presence of representative of Western Railways and it was confirmed that in Feeder No.36, the main Current Transformer (CT) in Red phase had developed inter-turn short resulting in lower output from its secondary windings. The appellants, therefore, replaced the defective CT and installed a new CT after showing the test results on the defective CT to the representative of the Western Railways. The meter was checked and found satisfactory. Subsequent to the replacement of the defective CT on 13th June, 1993 the off take of the Trivector Meter and the sum of the energy recorded on the two energy meters at Dharavi were found to be higher by 28.7 per cent.

On 22.6.1993 the appellants informed the Western Railways about the defect that had been detected and rectified and also that they shall advise the Railways the exact period of under registration and the estimation of the quantum of energy that had not been registered by the tariff meter due to the defective CT. By their subsequent letter of 16th July, 1993, they informed the respondent that the Western Railway's off take recorded at Dharavi between October, 91 and June, 1993 was lower by about 34 per cent compared to the off take prior to October, 1991 and that the recorded off take of Western Railways after replacement of the defective CT on 13th June, 1993 had come back to the level prevailing before October, 1991. The appellants, therefore, expressed the need to make an adjustment of about 20.20 per cent of the total monthly energy off take of Railways at Dharavi billed since October, 1991 up to 13th June, 1993.

On 26th July, 1993, the appellants submitted a supplementary bill to the respondent dated 26th July, 1993 for Rs.8,89,32,367.50 for the period of under registration i.e. from 20th October, 1991 to 13th June, 1993 giving inter-alia the extent of adjustment in energy off take and M.D. Fuel, Adjustment charges etc. A request was made for early payment of the bill. The respondent vide its letter of 6th August, 1993 drew the attention of the appellants to paras 10.1 and 10.3 of the contract agreement between the parties and stated that the metering responsibility as a whole lay with the appellants and that there is no interference by the Railways in this regard. Moreover, para 10.3 of the contract agreement provided a period of three months as a corrective period during which the defective meter should have been put back to the required accuracy level. Considering the date of the bill as 26.7.1993, the respondent expressed its readiness to consider the period of under registration for a maximum period of three preceding months i.e. w.e.f. May, 1993. If so advised, the appellants were required to submit a revised bill.

It appears that several meetings took place between the parties, but they could not come to an agreement. On 2nd June, 1995, the appellants wrote to the respondent referring to its supplementary bill and the discussions which the parties had on the subject. However, since the issue remained unresolved the appellants informed the respondent that they were resorting to Clause 20 of the Power Supply Agreement and refer the matter to two arbitrators, one each to be appointed by the parties. This was followed by letter dated 27th July, 1995 informing the respondent that the appellants had appointed Mr. A.D. Limaye, (Retd.) Asstt. General Manager (Supply) BEST as their arbitrator in terms of Clause 20 of the Agreement. The respondent was requested to name its arbitrator and advise the appellants. Accordingly by letter dated 2nd February, 1996, the respondent appointed Shri R.K. Sinha, Financial Advisor and Chief Accounts Officer, Western Railways as its arbitrator and endorsed a copy of this letter to the appellants for information. The arbitrators entered upon the

arbitration but since they failed to agree, they referred the dispute to the Umpire by their letter dated 29th November, 1996. Thereafter the Umpire received the documents from both the arbitrators in January, 1997. The claim was filed by the appellants before the Umpire and a reply filed thereto by the respondent in the months of March and April, 1997. The Umpire entered upon the reference on 15th April, 1997 and ultimately passed an award on 30th March, 1998 awarding a lump sum of Rs. 4 crores to the appellants with interest @ 12 per cent per annum from August, 1993 till the passing of the decree.

The respondent filed an Arbitration Petition 210 of 1998 under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award on the ground of error of law apparent on the face of the award contending that the decision of the arbitrator was clearly contrary to the law laid down by the Supreme Court by its Judgment and Order dated 17th December, 1999. A learned Single Judge of the High Court set aside the award on the ground that it was contrary to the law as declared by the Supreme Court in UPSEB Vs. Atma Steels and others : AIR 1998 SC 846. He also held that the Umpire had no jurisdiction in the matter since the dispute could be resolved only under Section 26 of the Indian Electricity Act, 1910, which precluded private arbitration. The dispute, therefore, could be resolved only by the Electrical Inspector as provided in Section 26 of the Act.

The appellants preferred an appeal against the judgment and order of the learned Single Judge setting aside the award but the said appeal was dismissed by the Division Bench of the High Court in Appeal No. 144 of 2000 by judgment and order dated 5th October, 2000 affirming the judgment and order of the learned Single Judge. The judgment and order of the Division Bench is the subject matter of challenge in this appeal.

Section 26 of the Indian Electricity Act provides inter-alia that in the absence of an agreement to the contrary, the amount of energy supplied to a consumer or the electrical quantity contained in the supply shall be ascertained by means of a correct meter, and the licensee shall, if required by the consumer, cause the consumer to be supplied with such a meter. Sub-sections (6) & (7) of Section 26 of the Act are relevant and read thus:-

"(6) Where any difference or dispute arises as to whether any meter referred to in sub-section (1) is or is not correct, the matter shall be decided, upon the application of either party, by an Electrical Inspector; and where the meter has, in the opinion of such Inspector ceased to be correct, such Inspector shall estimate the amount of the energy supplied to the consumer or the electrical quantity contained in the supply, during such time, not exceeding six months, as the meter shall not, in the opinion of such Inspector, have been correct; but save as aforesaid, the register of the meter shall, in the absence of fraud, be conclusive proof of such amount or quantity:

Provided that before either a licensee or a consumer applies to the Electrical Inspector under this sub-section, he shall give to the other party not less than seven days' notice of his intention so to do.

(7) In addition to any meter which may be placed upon the premises of a consumer in

pursuance of the provisions of sub-section (1), the licensee may place upon such premises such meter, maximum demand indicator or other apparatus as he may think fit for the purpose of ascertaining or regulating either the amount of energy supplied to the consumer, or the number of hours during which the supply is given, or the rate per unit of time at which energy is supplied to the consumer, or any other quantity or time connected with the supply:

Provided that the meter, indicator or apparatus shall not, in the absence of an agreement to the contrary be placed otherwise than between the distributing mains of the licensee and any meter referred to in sub-section (1);

Provided also that, where the charges for the supply of energy depend wholly or partly upon the reading or indication of any such meter, indicator or apparatus as aforesaid, the licensee shall, in the absence of an agreement to the contrary, keep the meter, indicator or apparatus correct; and the provisions of sub-sections (4), (5) and (6) shall in that case apply as though the meter, indicator or apparatus were a meter referred to in sub-section (1).

Explanation. A meter shall be deemed to be "correct" if it registers the amount of energy supplied, or the electrical quantity contained in the supply, within the prescribed limits of error, and a maximum demand indicator or other apparatus referred to in sub-section (7) shall be deemed to be "correct" if it complies with such conditions as may be prescribed in the case of any such indicator or other apparatus".

Two issues were highlighted before the High Court by the parties. While it was contended on behalf of the appellants that a Current Transformer (C.T.) is not a "meter" within the meaning of Section 26 of the Act, the respondent contended that a Current Transformer being an "apparatus" for the purpose of ascertaining or regulating the amount of energy supplied to the consumer, it was an apparatus contemplated by Section 26(7) of the Act, and for this, reliance was placed on the decision of the Supreme Court in Atma Steels (supra). Secondly, the respondents contended that the dispute, since it related to a defective meter and consequent under registering of electricity supplied, was a dispute within the contemplation of Section 26(6) of the Act and, therefore, such a dispute could be resolved only by the Electrical Inspector as provided in sub-section (6) of Section 26. A statutory arbitration provided in the aforesaid sub-section ruled out any private arbitration and therefore the Umpire had no jurisdiction to pass an award in respect of such a dispute even if referred to it by the parties.

The appellants sought to sustain the award contending that since the parties had submitted a specific question to the arbitrator for his decision viz whether a CT was an "apparatus" within the meaning of the proviso to Section 26(7) of the Act which could confer exclusive jurisdiction on the Electrical Inspector to decide the dispute, even if the specific question was decided erroneously

by the arbitrator, the award could not be set aside on that ground. On these questions the learned Single Judge as well as Appellate Bench have held in favour of the respondents.

A perusal of the award of the Umpire would disclose that he has noticed in detail the submissions urged before him by the parties. The Umpire had also before him the statements of monthly energy consumption as recorded by the appellants billed figures and the Western Railways aggregate figures of the energy recorded by Western Railways own meters at Railway's end of the 5 Western Railway feeders. These were furnished by the Western Railways in Annexure 12 of their letter dated 28.4.1997. The chart which is incorporated in the award itself is as follows :-

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Col.1 Month & Year	Col.2 Total energy consumed by Railways as per Summation of KMhr readings at Rly's end of 5 feeders	Col.3 Energy consummed by W.Rly 5 as per TEC's in Vector Meter	Col.4 Ratio of consumption per TEC Col.3 & Col.4 vis--vis Rly's aggregate as per Rly's Meters
July'91	6,271,200	7,364,763	1.174
Aug.'91	6,371,260	7,503,409	1.178
Sept.'91	6,339,740	7,349,398	1.159
Oct.'91	7,145,300	6,251,070	0.875
Nov.'91	6,802,400	4,944,667	0.727
Dec.'91	6,792,860	4,977,564	0.734
Jan.'92	7,068,760	5,183,124	0.731
Feb.'92	6,508,380	4,769,028	0.733
March'92	6,492,100	4,813,383	0.741
April'92	6,878,300	5,010,531	0.729
May'92	6,695,240	5,001,012	0.747
June'92	6,551,360	4,799,810	0.798
July,92	6,896,000	5,028,104	0,729
Aug.'92	6,637,300	4,722,777	0.712
Sept.'92	6,203,700	4,713,970	0.780
Oct.'92	7,066,000	5,169,855	0.782
Nov.'92	7,264,480	5,019,352	0.691
Dec.'92	7,822,600	5,229,249	0.668
Jan.'93	7,255,200	5,034,874	0.694
Feb.'93	7,112,540	4,930,264	0.693
March'93	7,639,460	5,481,025	0.715
April'93	7,399,900	5,267,613	0.712
May'93	7,443,700	5,096,903	0.688
June'93	7,450,500	7,396,796	0.992
July'93	9,046,800	8,563,222	0.947
Aug.'93	7,847,400	8.490,753	1.082
Sept.'93	7,156,600	7,592,191	1.061

It is observed from Col. 4 of the table that the ratio of energy consumption as recorded by W. Rly's meter to that recorded by Rly's meters at the receiving end which was around 1.159 to 1.178 dropped to 0.875 in June 91 and from July 91 to May 93 remained in the range of 0.685 to 0.760. The ratio changed to 0.993 in June'93 and picked upto 1.061 in Sept.'93. Notwithstanding W. Rly's foot note that Railway's meters are not periodically calibrated and therefore could not be relied upon (though there was a contradiction on

this front in the remarks of Mr. P.P. Sharma Sr. Sec. Engineer (S/S) of W. Rly's observation that the KWhr. Elements of TVMs were being calibrated once in 5 years) and Mr. Jain of W. Rly later clarifying in W. Rly's letter of 23.12.97 that this practice was not being rigidly adhered to and the further fact that aggregation of readings also results in aggregation of errors of individual meters, some positive and some negative is worth noting that this comparison corroborates the fact of the meter registration at Dharavi RS dropped down from October 1991 onwards till in June 1993 when the defective CT was replaced".

It is no doubt true that before the Umpire it was seriously urged on behalf of the Railways that CT was an "apparatus" within the meaning of the proviso to section 26(7) of the Indian Electricity Act, 1910 while on the other hand it was contended on behalf of the appellant that CT is not such an apparatus and, therefore, any defect in the CT will not amount to a defect in the meter. The Umpire in his award upheld the contention of the appellant.

It was urged before the High Court as also before us that having regard to the judgment of this Court in U.P.S.E.B. vs. Atma Steel (supra) it is no longer open to the appellant to contend that CT was not an apparatus within the meaning of section 26(7) of the Act. Having perused the judgment of this Court in Atma Steel's case (supra), we also entertain no doubt that CT is an apparatus within the meaning of section 26(7) of the Act.

The question that still survives consideration is whether the dispute before the Umpire was in fact a dispute contemplated by section 26(6) of the Act. Sub-section 6 of section 26 begins with the words "where any difference or dispute arises as to whether any meter referred to in sub-section (1) is or is not correct, the matter shall be decided, upon the application of either party, by an Electrical Inspector; .". Sub-section 6 contemplates a difference or dispute, where one party contends that the meter has rightly recorded the energy supplied while the other controverts that position and contends that it has not correctly recorded the supply of electrical energy. If such a dispute arises between the parties, the matter is required to be decided by an electrical inspector and it is he who can pronounce upon the question as to whether the meter was or was not correct. Based upon his finding, he is authorized to estimate the amount of the energy supplied during such time, not exceeding six months, as the meter shall not in his opinion have been correct. A dispute as to whether CT is an apparatus within the meaning of sub-section 7 of section 26 is not such a dispute, unless it is further contended that the CT which is an "apparatus" within the meaning of sub-section 7 of section 26 was in fact defective, and, therefore, the meter had incorrectly recorded the supply of electrical energy. In short, before an electrical inspector can be called upon to decide a dispute under sub-section 6 of section 26, it must be shown that while one party contends that the meter, including the CT, is defective the other contends to the contrary. In the facts of this case we find that there was in fact no dispute that the CT was defective and it had, therefore, to be replaced. In fact when the supplementary bill was submitted by the appellant, the Western Railways did not dispute the position that the CT was defective, but only denied their liability to pay the amount of Rs.8.89 crores demanded in the supplementary bill and contended that at best they were liable to pay only Rs.12,20,740/- since demand for under registration by the

meter could be permitted for a maximum period of 3 months of the demand as per the Power Supply Agreement. Considering the date of the bill as 26th July, 1993, the respondent expressed its readiness to consider the period of under registration for a maximum period of three preceding months i.e. with effect from May, 1993 and wrote to the appellant that if so advised it may submit a revised bill. It, therefore, appears that there was really no dispute between the parties that the meter was defective. Even if we proceed on the basis that CT is a meter/apparatus within the meaning of sub-section 7 of section 26 of the Act, the only dispute was whether the respondent was liable to pay the entire supplementary bill as claimed by the appellant or whether their liability was limited to a period of three months preceding the date of the bill.

Where there is no dispute that the meter is defective, such a dispute is not one contemplated by sub-section (6) of section 26 of the Act. It is no doubt true that if a dispute as contemplated by sub-section (6) of section 26 of the Act arises, the matter has to be referred to the Electrical Inspector, and in view of the statutory provisions, private arbitration in the case of such a dispute is not permissible in law. However, if there is no dispute as to whether the meter is defective or not, there is nothing which prevents the parties from referring their other disputes to arbitration for determining the liability of the consumer in such cases. It is only where any difference or dispute arises as to whether any meter referred to in sub-section (1) of Section 26 is or is not correct, that dispute has mandatorily to be resolved by the Electrical Inspector. In resolving the dispute, the Electrical Inspector can make an estimate of the electrical energy supplied during such time, not exceeding six months, as the meter shall not in his opinion have been correct. For the remaining period, the register of the meter is deemed to be conclusive proof of such amount or quantity, in the absence of fraud. All this pre-supposes the existence of a dispute contemplated by Section 26(6) of the Act which has to be resolved by the Electrical Inspector.

The Umpire no doubt held that CT was not an "apparatus" within the meaning of sub-section (7) of section 26 of the Act. Since an argument was raised before him that CT is such an apparatus within the meaning of sub-section (7) of section 26, he expressed his opinion in the matter and may be, he decided wrongly. But that by itself will not bring the dispute under sub-section (6) of section 26 of the Act. It was neither contended before the Umpire nor was it decided by the Umpire, that the CT was not defective. This was so because the parties were agreed that the CT was defective. In any event that is not the basis of the award. All that the Umpire had to decide was whether there was under registration of supply of electrical energy to the respondent and if so, the extent thereof and the liability of the respondent to pay for such electrical energy supplied but not recorded. From a perusal of the award it appears that that is precisely what the Umpire has done. Having noticed all the facts and circumstances of the case the Umpire recorded his finding in the following words:-

"In the event, taking into account the facts

1) That it is nobody’s case that the Railway has not been paying regularly according to the bills preferred by TEC based on the energy consumption and MD recorded by their meter, the maintenance of whose accuracy is entirely the responsibility of TEC in terms of the power supply agreement as well as the I.E. Act and which meter incidentally had been tested to be

working properly in the tests carried out by TEC in Nov.,91 and March 93 in the presence of Railway's representative.

2) That the traffic level handled by the W. Rly. During the dispute period had not decreased or remained static but had on the contrary increased, while the aggregate energy consumed had dropped despite the Railway not having undertaken any improved methods of operation or implementation of any energy saving techniques and further that after the disputed period the level of energy consumed had attained higher levels in the consonance with the traffic levels obtaining in these later periods, establishes the fact that during the disputed period there has been some part of the energy consumed that has escaped metering.

3) That the time taken by TEC to discover the defect that had arisen in their metering CT was an abnormally long one and that the consumer cannot be penalized for TEC's failure to discover this defect, for whatever reasons they be, in a reasonable time, particularly when they had the obligation to maintain the meter and metering system in a state of good repair as well as accuracy level and that the customer cannot be penalized for the failure of the Ct attributable to probable manufacturing defect, if any, and with a view to answering that the ends of natural justice, equity and fairplay are properly met with, with respect to both the parties I pronounce my lumpsum award of Rs. 4 crores only (Rupees Four Crores only) in favour of the claimant, payable by the Railway, I hold that the payment becomes due w.e.f. Aug. 93. I also award interest charges of 12% p.a. w.e.f. Aug. 93 till the passing of the court decree".

As noticed earlier the Umpire took into account the readings of the meters maintained by the Railways themselves, but did not give to the appellant the full benefit thereof, otherwise the amount would have been much higher. Only a lumpsum award of Rs. 4 crores was made.

In fact, during the pendency of the special leave petition before this Court as well, the Court had noticed the fact that the Western Railways was also maintaining meters at their end and the said meters revealed the total energy consumed at the railways end at 5 feeder stations. This was noticed by the Umpire as well. There appeared to be no reason why the railways should not pay the amount as per their own meters. It appeared unfair and inequitable that the Union Government should deny to pay the amount for the electricity consumed as per their own record. Counsel for the Union of India was given time to consider the matter and obtain necessary instructions. It, however, appears that the Union of India was not inclined to settle the dispute and, therefore, the matter had to be heard.

We, therefore, hold that the High Court erred in setting aside the award of the Umpire on a finding that the dispute before him was one contemplated by sub-section (6) of section 26 of the Act and, therefore, not arbitrable. We hold that the parties never

disputed the fact that the CT, which is an "apparatus" within the meaning of sub-section (7) of section 26 of the Act, was in fact defective. There being therefore, no dispute as to whether the meter had ceased to be correct, the dispute was not one contemplated by sub-section 6 of section 26 of the Act. In fact none of the parties even raised a contention before the Umpire that the CT was not defective, and therefore the Umpire was not required to give his finding on the question, which in a dispute under Section 26(6) of the Act is the primary question to be decided. The dispute related only to the claim of the appellant who had submitted a supplementary bill for the electrical energy supplied but not recorded. In the absence of a dispute as to whether the meter was or was not correct, such a dispute was arbitrable. The Umpire on the basis of the material before him particularly total energy consumed by the Railways as per summation of KWhr readings at Railways end of 5 feeders for which there is no dispute, made an Award, which in our view, he was entitled to make. However, on one aspect of the matter we feel that the award requires to be modified. The Umpire has awarded interest @ 12% per annum with effect from August, 1993 till the passing of the court decree. In the facts and circumstances of the case the award is required to be modified to the extent that interest be awarded at the same rate, but with effect from the date of the award i.e. 30th March, 1998 instead of August, 1993. The impugned judgment and order of the High Court is set aside. The appeal is accordingly allowed with the said modification. Let a decree be drawn up accordingly. There shall be no order as to costs.