2023INSC607

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLETE JURISDICTION

CIVIL APPEAL NOS.7224-7226 of 2009

THE MADRAS ALUMINIUM CO. LTD. ...APPELLANT(S)

VERSUS

THE TAMIL NADU ELECTRICITY BOARD ...RESPONDENT(S) AND ANR.

J U D G M E N T

SANJAY KAROL, J.

1. The questions that this Court has been called upon to decide are, whether the action of the Respondents in taking considerable time from when the application was made for reduction to 10000 KVA, to when the revised agreement was entered into, was arbitrary and unreasonable? Contingently, whether the Appellant is entitled to refund of the amount of difference between the amounts payable for 23000 KVA and 10000 KVA which, have been paid under protest?

2. This judgement will dispose of a cluster of appeals arising out of a judgment and order dated 15th December,2008, in WA Nos.3806, 3807 and 3808 of 2003 passed by the High Court of Madras.[1]

3. By way of the impugned judgment, the Court below sitting in Writ Appellate Jurisdiction upheld the judgment and order passed by the Learned Single Judge in WP Nos. 19050-19052 of 2002, dismissing the said writ petitions, holding that the petitioners (Appellant herein, The Madras Aluminum Co. Ltd.) were bound to pay charges as per the contract irrespective of the consumption of 23000 KVA[2] being the maximum contracted load of electricity. The High Court, in appeal held that such a dispute is not one to be adjudicated under Article 226 of the Constitution of India.

4. Past events require recall to lend context to the instant appeals.

4.1. The Appellant is a company set up in 1965 for the manufacture of aluminium, which is a power and electricity

[1] Hereafter, "the impugned judgment"
[2] Kilovolt-ampere.

intensive process. With the passage of time, it was declared a 'sick industrial unit' as per Section 3(1)(O) of the Sick Industrial Companies Act, 1985 by the Board for Industrial and Financial Reconstruction, Government of India[3], vide order dated 8th September, 1987.

4.2. In 1994, the present management approached the Board with a plan for revival, pursuant to which a fresh scheme with certain additional concessions was issued in terms of the Government Office Memoranda bearing numbers 165 dated 21st December 1994 and 37, dated 10th February, 1995 respectively. With affairs so taken over by the present management, production commenced in February, 1995.

4.3. Originally, the maximum demand for electricity of the Appellant's plant as per the agreement was 67000 KVA. Given that cost of consumption of such power constituted more than 40 percent of the cost of production, and that the company itself had established a captive power plant, a request was made and consequently agreed to, to reduce the contracted maximum demand to 23000 KVA. This was done vide agreement 3rd May,1999[4].

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[3] Abbreviated as BIFR. Hereafter, "the Board"

[4] Hereafter, the "1999 Agreement"

4.4. The Appellant then made a further request on 24th December, 2001, to reduce the contracted maximum demand to 10000 KVA with effect from 27th January, 2002, along with an offer to pay the one-time charge payable on effecting such a reduction.

4.5. Despite such request being made and some initial communication, no steps effectuating such request were taken. Therefore, the Appellant was being forced to pay as per the contracted demand of 23000 KVA @ 320 Rupees per KVA.

4.6. With the previous concessional power tariffs withdrawn and repeated high value demands apart from Seventy-Eight Lakhs (78,00,000) already paid on 25th May, 2002 as also the amounts paid subsequently, forced the filing of the petitions before different fora.

The Impugned Judgement

5. The Impugned Judgment records the stand of the Respondents, placing reliance on various clauses of the 1999 agreement and the Terms and Conditions of Supply of Electricity to justify their stand as being entirely permissible. Having referred to the contents of the clauses, the High Court held that it was not open for the Appellant to pay lesser

charges than that of the contracted demand in absence of a sanction in respect thereof by the board.

5.1 It was further held that simply because the board took time in consideration of the application of the Appellants, this would not enable them to begin automatically paying a reduced amount.

5.2 In respect of the other examples cited by the Appellants where similar applications by similarly placed persons were considered and decided upon by the Board with promptitude, it was held that such a plea was raised for the first time at the appellate stage. It was further observed that the manner in which the Appellant's application was considered was not arbitrary or unfair and that interpretation of such an agreement could not be undertaken in writ jurisdiction.

6. We have heard the Learned Senior Counsel; Mr. C.A. Sundaram, for the Appellant and Mr. K Radhakrishnan for the Respondents at length.

7. The 1999 Agreement[4] acknowledging the changed scenario vis-à-vis the allocation and the requirement of the supply of electricity, more so, in view of the policy framed by the

Central Government encouraging the industrial units to have captive power plants, while reducing the total energy quota to a maximum of 23000 KVA *inter alia* contained the following terms:

"LOAD MAXIMUM DEMAND	NOW IT HEREBY DECLARED AND AGREED AS FOLLOWS: Subject to the provisions hereinafter contained, the Board supply and the consumer shall take from the Board electrical energy for a maximum demand not exceeding 23000 KVA which shall be in contracted load for its exclusive use for the purpose above mentioned at the premises of its factory at P.N. Patty Village, Mettur Tk. Salem Dt. The contracted load shall be 23000 KVA for their Smelter Plant and Extraction Plant HT SC No.20 (illegible). The consumer shall not effect any change in maximum demand as contracted load."
	*** *** ***
OBLIGATION OF CONSUMER TO PAY ALL CHARGES LEVIED BY BOARD	6. From the date this agreement comes into force the consumer, shall be bound by and shall pay to the Board, maximum demand charges, energy charges, surcharges, meter rent and other charges, if any, in accordance with the tariff applicable and the terms and conditions of Supply of Electricity notified by the Board from time to time for the appropriate class of consumers to which it belongs.

BOARD'S RIGHT TO VARY TERMS OF AGREEMENT	7. The consumer agrees that the board shall have the right to vary, from time to time, tariffs, general and miscellaneous charges and the terms and conditions of supply of electricity under this agreement, by special or general proceedings. The consumer, in particular, agrees that the board shall have the right to enhance the rates etc. chageable for supply of electricity according to exigencies. It is also open to Board to restrict or impose powe cuts totally or partially at any time as it deems fit.
	*** *** ***
PERIOD OF AGREEMENT	11. This agreement shall remain in force for a period of five years from the date of its commencement as defined in clause 2 and shall remain in force until it is terminated by either party as provided in the conditions of supply."

8. Pursuant thereto, the Appellant finding the requirement of supply of electricity from the Respondents to be reduced, by a communication dated 24th December 2001 forwarded a request for reduction of maximum demand of supply of electricity to 10000 KVA. This was followed vide a reminder dated 27th January, 2002 which facts were acknowledged by the Respondents vide their communication dated 22nd January 2002 informing the Appellant of the matter pending consideration with the competent authority, awaiting necessary response.

9. Pending such consideration, with the Respondents generating bills for monthly charges for the demand stipulated in terms of the 1999 agreement[4], the Appellant being left with no option, was forced to have its rights adjudicated before different fora, including the High Court, also in terms of the subject matter of the instant *lis*.

10. Pending such adjudication, in response to the Appellant's request dated 24th December 2001, the Respondents communicated as under:

> "i. Sanction of the proposal for reduction by the competent authority after ascertaining the litigancy with the Board, if any.
>
> ii. Modification of the metering arrangement for the reduced demand it warrants and also after examining the technical necessity for continuance of existing 230 KVA Malco S.S. for the reduced demand.
>
> iii. One time payment of twice the demand charges at the notified rate per KVA for each KVA of the demand reduced as per the clause 22.07 of terms and conditions of supply before effecting reduction in demand.
>
> iv. The company have to execute revised agreement for the Reduced demand and Revised test report has to be taken.
>
> v. The CC bill for the reduced demand will be raised only after completion of the formalities. Until then the CC bill will be levied for the existing sanctioned maximum demand only."

11. It being a matter of record that eventually and notwithstanding the pending *lis, inter se* the parties, by way of its own right, the Respondents by taking a conscious decision revised the 1999 agreement[4] reducing the maximum required demand from 23000 KVA to 10000 KVA. This was in July, 2004.

12. It is also a matter of record that vide communication dated 11th August, 1994, the Respondents, in principle, had already taken a decision of generally accepting the request for reduction of the load, relevant extract thereof is as under:

> "Sub: Reduction of demand requested by H.T. Consumers – Certain Clarifications – Issued _ Reg.
> Ref: CE/D/Trichy lr.No.161666/Accts/A1/94 dt.21.7.94.
>
> With reference to the above, it is informed that,
>
> (1) As per Clause 21.03 of Terms and Conditions of supply, "No additional load/demand will be sanctioned unless all outstanding dues in the same service connection has been paid". The same may be adopted while permitting reduction of load.
> (2) Reduction of load requested by the disputant H.T. Consumers may be sent to Headquarters office before processing the same.
> (3) Request for reduction of load within a period of one year from the date of earlier reduction may be permitted"

13. A perusal of the record reveals that a request for the reduction of the contracted demand to 10000 KVA was made on 24th December,2001 and thereafter, repeated letters and communications in this regard have been made. Vide letter dated 30th January, 2002 it was informed to the Appellants that the assumption in respect of the reduction being effectuated from 27th January, 2002 was incorrect and the same would be subject to certain conditions.

14. Further, vide a letter dated 20th May, 2002, a meeting was requested with the concerned authority. Subsequently, conceding to the threat of disconnection of the supply a payment of Rs.78,00,000/- was made under protest. The said payment was acknowledged vide letter dated 27th May, 2002, and it was stated that the 'under protest' nature of the same was not acceptable. It was also informed thereby that a delayed payment surcharge @ 1.5% per month would also be applicable.

15. Revised bills were requested in line with the interim order of the High Court dated 28th November,2002, in terms of letter dated 4th June, 2002, but the same does not appear from the record to have been responded to.

16. The High Court, in appeal, considered at length the various clauses of the agreement to hold that no such right to pay the reduced amount arose in the absence of such a request being sanctioned by the Board.

17. It is submitted that the unilateral call by the Board not to alter the contract as requested saddles the Appellant with unfair cost. It is then submitted that the Board is bound to grant such permission for reduction so long as the payment as according to Clause 19.02 is being made.

18. As per Clause 13.04 which states that the agreement of supply may be terminated by any consumer by giving one month's notice, it is urged that the Appellant's application dated 24th December, 2001 seeking the reduction to 10000 KVA with effect from 27th January, 2002, must be treated a notice of termination of the agreement with respect to the 13000 KVA that is sought to be reduced.

19. On the basis of certain other instances where similar applications were decided upon within a short period of time, it is submitted that taking such a large time to deliberate

upon the Appellant's application is arbitrary and unreasonable.

20. The primary thrust of the Respondents' argument is a clause in the 1999 agreement reproduced Supra. The effect of this Clause, as per the Respondents, is that the request for a reduction in maximum demand as made by the Appellant, does not acquire any status as till the time such request is processed by the Board, and a decision allowing such reduction is taken.

21. It is a settled principle of law that a contract cannot be amended unilaterally. It has been observed by this court in **Ssangyong Engg. & Construction Co. Ltd. v. National Highways Authority of India**[5] that, "This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be

[5] (2019) 15 SCC 131

contrary to fundamental principles of justice as followed in this country,…"

22. Parties on either side have urged that a unilateral decision has been taken. The Respondents contend that the Appellant has unilaterally amended the contract to reduce the maximum demand to 10000 KVA when no such decision stands taken by them. The Appellant, per contra, contends that the unilateral decision on the part of the board not to act on the application submitted by them has caused prejudice to them.

23. It is a matter of record that a fresh agreement with the reduced maximum demand of 10000 KVA was entered into between the parties in July, 2004. Undisputedly, such fresh agreement was inked more than two and a half years after the application was made on 24th December, 2001.

24. The contention that others similar agreements have been processed by the Respondents with promptitude and it is only the Appellant whose application was singled out, was rejected by the High Court on the ground that even the fresh agreement entered into by the parties in July 2004 specifically indicates that the consumer shall not affect any

change in the maximum demand or the contracted demand and, that the supplemental agreement is subject to and in addition to the terms of the subsisting agreement.

25. It appears that the force of this observation of the High Court is that the 1999 agreement also stated, as reproduced above, that the consumer shall not effect any change in maximum demand; and the same restriction has found its place in the supplemental agreement as well and so, without approval of the board no change in the maximum demand is possible, allegedly done by the Appellant herein.

26. The Appellant in pursuance of the reduction of maximum demand made its application and followed up repeatedly with the authorities. Save and except two letters on behalf of the Board one, acknowledging the said application and stating that same has been put up before the authorities for consideration: and two, rejecting the date of such reduction being effectuated and listing down certain conditions upon which the same would be granted, no other communication on part of the board forms the record.

27. No reason whatsoever is forthcoming as to why this particular application required such a vast length of time to be acted upon. In the mean while the Appellant has been faced with the threat of disconnection, and has had to pay, due to such inaction, large amounts of money for electricity which it has not utilized.

28. It is true that the agreement states that the consumer, (Appellant herein) is bound to pay such maximum demand amount irrespective of utilization and also that such an agreement will be in effect for a period of five years but in the considered view of this Court, the Board cannot be allowed to take refuge of these clauses while the company on the other side is saddled with heavy cost in the interregnum of such decision. More so in view of the communication dated 11th August 1994.

29. The Writ Court had observed that in the other instances cited by the Appellant herein, the reduction sought was a small amount of KVA as opposed to the 13000 KVA reduction sought vide the instant application. While that may be true,

it does not supply reason to the act of keeping an application pending for such a long period of time.

30. The above discussion gives way to the question whether such an action of the application remaining pending for an unreasonable period could in itself be classified as an arbitrary and unreasonable act.

31. A Constitution Bench of this Court in **Natural Resources Allocation, IN Re, Special Reference No.1 of 2012**[6] speaking through J.S. Khehar, J. (as His Lordship then was) observed in regards to contracts having the State as a party, as hereinunder reproduced:-

> **"183.** The parameters laid down by this Court on the scope of applicability of Article 14 of the Constitution of India, in matters where the State, its instrumentalities, and their functionaries, are engaged in contractual obligations (as they emerge from the judgments extracted in paras 159 to 182, above) are being briefly paraphrased. For an action to be able to withstand the test of Article 14 of the Constitution of India, it has already been expressed in the main opinion that it has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. The judgments referred to, endorse all those requirements where the State, its instrumentalities, and their functionaries, are engaged in contractual transactions. Therefore, all "governmental policy" drawn with reference to

[6] (2012) 10 SCC 1

> contractual matters, it has been held, must conform to the aforesaid parameters. While Article 14 of the Constitution of India permits a reasonable classification having a rational nexus to the object sought to be achieved, it does not permit the power of pick and choose arbitrarily out of several persons falling in the same category. Therefore, criteria or procedure have to be adopted so that the choice among those falling in the same category is based on reason, fair play and non-arbitrariness. Even if there are only two contenders falling in the zone of consideration, there should be a clear, transparent and objective criteria or procedure to indicate which out of the two is to be preferred. It is this, which would ensure transparency."
>
> (emphasis supplied)

32. A Bench of two learned Judges of this Court in **Kumari Shrilekha Vidyarthi and Others v. State of U.P. and Others**[7] observed that there exists "an obvious difference" between contracts concerning private parties to those which have State as a party. The primary difference being that the State while exercising its powers and discharging its functions "acts indubitably, as is expected of it, for public good and in public interest". The said factor singularly is sufficient to bring into any transaction the minimal requirements of public law, to which the State is a party. The fact that a dispute falls into the contractual realm does not

[7] (1991) 1 SCC 212

relieve the State of its obligation to comply with the requirements of Article 14.

33. Further the Court had observed that:

> "24. The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in pubic interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity."
>
> (emphasis supplied)

34. This case hinges on what would be construed to be 'reasonable time' to consider any application for reduction in

maximum demand, by the authorities. A Three-Judge Bench of this Court in **Adjudicating Officer, Securities and Exchange Board of India v. Bhavesh Pabari**[8] has observed that:

> "…There are judgments which hold that when the period of limitation is not prescribed, such power must be exercised within a reasonable time. What would be reasonable time, would depend upon the facts and circumstances of the case, nature of the default/statute, prejudice caused, whether the third-party rights had been created, etc.…."

35. In **Mansaram v. S.P. Pathak and Ors.**[9] this Court has observed that when a power exists to effectuate a purpose it must be exercised within a reasonable time. It has been observed that this is all too well-settled principle to require buttressing precedent. Nonetheless, the Court refers to State of Gujarat v. Patel Raghav Natha[10] wherein the period of one year was found to be too long for the Commissioner to exercise revisional jurisdiction under Section 211 of the Bombay Land Revenue Code. The principle of reasonable time as mentioned herein was followed recently by a Two-Judge Bench in **Securities and Exchange Board of India v. Sunil Krishna Khaitan and Ors.**[11]**.**

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[8] (2019) 5 SCC 90
[9] (1984) 1 SCC 125
[10] (1969) 2 SCC 187
[11] (2023) 2 SCC 643

36. Keeping in view the above-stated well established principles that State action irrespective of being in the contractual realm must abide by Article 14, and that a) after passage of a considerable period of time, in July, 2004 the reduction to 10000 KVA was agreed to and a new agreement to that effect was entered into; b) irrespective of the amount of reduction in KVA sought other applications were considered within a reasonable period of time; c) no reason has been put forth for keeping such application pending; d) that the Appellant duly and repeatedly followed up with the authorities to effectuate such reduction; and e) the Appellant has been unjustifiably asked to furnish costs for unutilized electricity which, in any case should not have extended beyond the period of six months (considering 'reasonable period' to consider an application, to be so), for a period much larger thereto, rendering such action unquestionably unreasonable and arbitrary.

37. In view of the factual narrative, it would not be open for the Respondents to contend that the petitioner is not liable for the refund of the amount deposited under protest towards the bills so generated taking the maximum load to be 23000

KVA. Particularly, when at no point in time, the Appellant neither sought for nor consumed the electricity more than the maximum demand of 10000 KVA.

38. Acknowledging the financial health of the Appellant, in the 1999 agreement[4], the Respondent ought to have taken a decision on the Appellant request with a reasonable dispatch and terms which ought to have been withing a period latest by six months and not two and a half years as was so eventually done.

39. For the aforesaid reasons, the appeals are allowed. Judgment dated 15th December 2008 in WA 3806-3807 & 3808 of 2003 passed by the High Court of Madras is set aside.

40. We direct the Respondent namely The Tamil Nadu Electricity Board to return the amount as may be calculated and verified, paid by the Appellant to it for 13000 KVA, in excess to its request of maximum sanctioned demand of 10000 KVA (23000-10000 = 13000 KVA). Such amount shall be calculable six months post making of application, i.e. on 24th December, 2001, till the date of execution of the new agreement in July, 2004. Clarifying that the period is to

commence from 23rd June, 2002 till 1st July, 2004 (both inclusive); interest applicable thereupon would be simple in nature @ 6 per cent per annum. All payments be made within two months from today.

41. Questions raised in the instant appeals are answered as above.

42. The appeals are allowed and pending applications, if any, stand disposed of.

.....J.
(B.R. GAVAI)

.....J.
(SANJAY KAROL)

.....J.
(ARAVIND KUMAR)

DATED : JULY 06, 2023
PLACE : NEW DELHI