

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No.243 of 2006

Dated the March 29, 2007.

Present: - Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member
Hon'ble Mr. H.L. Bajaj – Technical Member

M/s Bharat Alloys & Energy Limited
Kurnool Distt. A.P.

...Appellant

Versus

1. Central Power Distribution Company of A.P.
Red Hills, Hyderabad

2. A.P. Electricity Regulatory Commission
Red Hills, Hyderabad

....Respondents

For the Appellants : Mr.A.T.M. Rangaramanujam, Sr. Advocate
With Ms Anu Gupta, Advocate
Mrs. Gouri K.Das, Advocate

For the Respondents : Mr. Rakesh Kumar Sharma, Advocate
Ms Gulnar Md Khan for Mr. Rakesh K.Sharma,
Advocate for Resp. 1.

Mr. K.V. Mohan and
Mr. K.V. Balakrishnan, Advocates for Resp.2.

Judgment

Per Hon'ble Mr. H.L. Bajaj, Technical Member

This appeal has been preferred by the appellant under Section 111(1) of The Electricity Act, 2003 (for short the Act) against the order dated July 6, 2006 of the Andhra Pradesh Regulatory Commission (for short the Commission or APERC) in OP 18 of 2005 whereby appellant's petition seeking waiver of the requirement of maintaining 85% of the load factor of the contract demand on annual basis. The facts leading to this appeal lie in a narrow compass and are briefly stated as under:

2. The appellant is a manufacturer of Ferro Alloys using submerged Electric Arc Furnace. On December 4, 2003, the appellant contracted a demand of one (1) MVA from the first respondent, Central Distribution Company of Andhra Pradesh Ltd. (for short APCDCL) and increased this demand to 12 MVA effective from June 4, 2004.

3. On May 27, 2005, the appellant applied for drastic reduction in the contract demand from 12 MVA to 200 kVA due to the declining demand of its produce and the increase in the input costs, particularly 35% increase in the cost of power. The request of the appellant was rejected by the first respondent on the ground that the minimum period of two years, which is stipulated in the

agreement between APCDCL and the appellant, was not completed from the date of the agreement. Appellant was badly affected by the declining market prices and had to stop/suspend its operations as the appellant could not pay deemed consumption charges equivalent to 85% Load Factor of contract Maximum Demand as required in the Commission's order.

4. Appellant filed a petition before the Commission seeking waiver of the requirement of maintaining 85% Load Factor of the Contracted Demand on annual basis during the periods of suspension/stoppage of production at the ferro alloys production unit of the appellant. This petition before APERC was dismissed vide the impugned order dated July 6,2006 leading to this appeal.
5. The appellant has sought the following reliefs:
 - i) To set aside the impugned order dated July 6,2006 passed by APERC.
 - ii) To suspend operation of 85% load factor condition and deemed consumption charges for initial two years period for the appellant.

6. The learned senior counsel appearing for the appellant contends that while determining tariff the Commission has erred in not properly considering the paying capacity of the category of consumers in line with the Section 26 (C) of A.P. Electricity Reforms Act. He asserted that the appellant had not sought a blanket approval for exemption from the applicability of maintaining 85% Load Factor but only to exempt them from enforcing the payment of deemed consumption charges of 85% Load Factor after disconnection of power to the

unit during which period the power is not drawn from the APCDCL. Learned counsel tried to draw a parallel between the Section 26(7) of the A.P. Electricity Reforms Act, 1998 and Section 62(b) of the Act. Appellant further submitted that Commission's order dismissing its petition is violative of principles of natural justice. The Commission has not taken into account the hardships caused to the appellant's units which ran into trouble on account of forces which were beyond the control of the appellant and despite its prudent and diligent management.

7. Learned counsel for the first respondent, APCDL, submitted that it had to enter into various power purchase agreements with various companies to procure power and whether or not it draws power, it had the obligation to meet the expenses as per power purchase agreement. Concedingly the appellant had entered into agreement to draw power at 85% load factor. Having entered into such an agreement it is not open to the appellant to contend that due to its financial condition, stipulation of power consumption corresponding 85% Load Factor may be waived.

8. On the other hand, Mr. K.V. Mohan, learned counsel for the respondent Commission submitted that by order dated September 26, 2002, the state Commission fixed a tariff of Rs. 2.12 per unit applicable to Ferro Alloys units as a separate category. These units were exempt from paying demand or any fixed charges. However, such units were required to maintain a Load Factor of 85% on an annual basis and if the load factor was to fall below 85%, such units were

required to pay on a deemed consumption of 85% of the contracted minimum demand. This rate was revised to Rs. 2.87 per unit by Tariff Order dated March 22,2005 and to Rs. 2.55 per unit by Tariff Order dated March 23,2006. These rates were applicable to all the Ferro Alloys units as a separate category in the state of Andhra Pradesh. The appellant, in this present appeal has not challenged the tariff fixed by the Commission for the Ferro Alloys units.

9. Learned counsel for the respondent Commission further contended that the Ferro Alloys units were categorized as a special category after considering certain distinct features of such units including such units being power-intensive in nature. Ferro Alloys units enjoy a rate that is substantially lower than the rate applicable to other HT consumers of the distribution companies in the state of Andhra Pradesh. The following table gives a comparison of the rates, as fixed by the latest tariff order dated March 23,2006, applicable to the Ferro Alloys units compared to other HT consumers of the distribution companies in the state of Andhra Pradesh.

Category	Demand Charges (Rs./KVA/Month of billing demand	Energy Charge (paise/unit)
Ferro Alloys units	Nil	255
11 kVHT consumer	195	330
33 kV HT consumer	230	310
132 kV and abovt HT consumer	250	280

10. Learned counsel for the Commission further contended that the special rate applicable to Ferro Alloys units are on the condition that the consumer draws his entire power requirement from the distribution companies and that the Ferro Alloys units maintain an annual Load Factor of 85% of the Contracted Minimum Demand. For the other HT consumers, the billing demand is calculated on the maximum demand recorded during the month or 80% of the contracted demand whichever is higher. The energy charges applicable to the HT consumers are billed on the basis of actual energy consumption or 50 units per kVA of billing demand, whichever is higher. Learned counsel asserted that the appellant in this present case has not challenged the tariff fixed by the state Commission by its order dated March 23,2006.

11. Counsel for the Commission stated that while determining tariff it is guided by the provisions of The Electricity Act, 2003 and the provisions of the Andhra Pradesh Electricity Reforms Act, 1998 to the extent that the AP Reforms Act is not inconsistent with the Electricity Act, 2003. In this context the counsel drew our attention to the relevant Sub-Sections of the A.P. Reforms Act and The Electricity Act, 2003 which are reproduced below.

Section 26(7) of the A.P. Reforms Act reads as under:-

“26(7) Any Tariff implemented under this section:

- (a) shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's Load Factor or Power Factor, the consumer's total consumption of energy during any specified period, or the time at which supply is required; or paying capacity of category of consumers and need for cross-subsidization".*
- (b) Shall be just and reasonable and be such as to promote economic efficiency in the supply and consumption of electricity; and*
- (c) Shall satisfy all other relevant provisions of this Act and the conditions of the relevant licence".*

Section 62(3) of The Electricity Act, 2003 reads as under:-

"62. Determination of tariff-

.....

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required".

12. Learned counsel for the Commission asserted that the Commission is prohibited from showing any undue preference to any individual consumer. The Commission can differentiate on the basis of certain factors, but such differentiation can be made only for a category of consumers. Any consumer

falling under a particular category cannot claim any exemption or preference not available to other consumers falling under the same category. Giving any such exemption or preference would amount to showing undue preference which is prohibited by both Section 62(3) of The Electricity Act, 2003 as well as Section 26(7) of the AP Reforms Act.

13. In the light of rival contentions, the main question which arises for our determination is whether APERC was justified in denying waiver of the condition of minimum consumption corresponding to 85% Load Factor due to the poor financial condition of the appellant.

14. During the arguments Mr. Rangaramanujam, learned Sr. Advocate for the appellant also drew our attention to para 84 of the judgment of Hon'ble Supreme Court reported in AIR 1986 SC 1571 which is reproduced below:-

84. " Yet another theory which has made its emergence in recent years in the sphere of the law of contracts is the test of reasonableness or fairness of a clause in a contract where there is inequality of bargaining power. Lord Denning M.R., appears to have been the propounder, and perhaps the originator- at least in England, of this theory. In Gillespie Brothers & Co. Ltd. V. Roy Bowles Transport Ltd. (1973) 1 QB 400. Where the question was whether an indemnity clause in a contract, on its true construction, relieved the indemnifier from liability arising to the indemnified from his own negligence, Lord Denning said (at pages 415-6):

‘ The time may come when this process of construing the contract can be pursued no further. The words are too clear to permit of it. Are the courts then powerless? Are they to permit the party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable? When it gets to this point, I would say, as I said many years ago:

There is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused: John Lee & Son (Grantham) Ltd. v Railway Executive (1949) 2 All ER 581, 584. It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so’

In the above case the Court of Appeal negated the defence of the indemnifier that the indemnity clause did not cover the negligence of the indemnified. It was in Lloyds Bank v Bundy, (1974) 3 All ER 757 that Lord Denning first clearly enunciated his theory of “inequality of bargaining power”. He began his discussion on this part of the case by stating (at page 763):

“ There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms, when the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we

should seek to find a principle to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the Court”.

He then referred to various categories of cases and ultimately deduced therefrom a general principle in these words (at page 765);

“ Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on inequality of bargaining power. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word ‘undue’ I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one bring ‘dominated’ or ‘overcome’ by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again I do not mean to suggest that every transaction is saved by independent advice.

But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases”.

15. Mr. Rangaramunujam, Sr. Advocate tried to persuade us that the contract agreement between the appellant and the APCDCL enforces an unreasonable clause on the appellant.

16. We find that the agreement between the appellant and the APCDCL applies equally to all the Ferro Alloys units falling in a category. It is also apparent from the table appearing at para 9 above that the tariff for the Ferro Alloys units is rather lower as compared to other HT consumers and in no way prejudices the appellant. Ferro Alloys units are not required to pay any demand charges as in other cases and for them only energy charge, which is also lower than variable charges payable by the HT consumer, is applicable with the condition of deemed consumption corresponding to 85% load factor.

17. We note that admittedly the appellant had entered into an agreement with the first respondent and thereby agreed to the maintenance of 85% load factor. Be that so, it is not now open to the appellant to take the plea that since it is not able to draw power at 85% load factor as its operations are not at optimum level and its financial condition is bad and, therefore, condition of 85% load factor should be waived off in its case. Both the Andhra Pradesh Reforms Act and The Electricity Act, 2003 are clear that no preferential treatment can be given to a particular consumer falling in a particular category. Though, the A.P. Reforms Act

permitted categorization on the basis of the paying capacity of category of consumers, The Electricity Act, 2003 does not permit even this criteria for categorization. In view of this, gleaned from any angle, we are not convinced of the various contentions and arguments put forth by the learned counsel for the appellant.

18. In the circumstances, therefore, we do not find any merit in the appeal. Accordingly the same is dismissed.

(H.L. Bajaj)
Technical Member

(A.A. Khan)
Technical Member

(Justice Anil Dev Singh)
Chairperson