

# **M/S. Kanoria Chemicals And Industries ... vs U.P. State Electricity Board & Ors on 10 March, 1997**

**Equivalent citations: AIRONLINE 1997 SC 741**

**Author: B.P. Jeevan Reddy**

**Bench: B.P. Jeevan Reddy, K.S. Paripoornan**

PETITIONER:

M/S. KANORIA CHEMICALS AND INDUSTRIES LTD. ETC.

Vs.

RESPONDENT:

U.P. STATE ELECTRICITY BOARD & ORS.

DATE OF JUDGMENT: 10/03/1997

BENCH:

B.P. JEEVAN REDDY, K.S. PARIPOORNAN

ACT:

HEADNOTE:

JUDGMENT:

**J U D G M E N T** B.P. JEEVAN REDDY, J.

Civil Appeals [Arising out of SLP (C) Nos.6588/94, 21905-06/93, 21913-14/93, 6479/94 & 23250/94 Leave granted in Special Leave Petitions. These appeals are preferred against the judgment of a Division Bench of the Allahabad High Court dismissing the writ petitions filed by the appellants. The appellants are large consumers of electricity.

By a Notification dated April 21, 1990, the Uttar Pradesh State Electricity Board had revised the electricity Board had revised the electricity rates/tariffs under Section 49 of the Electricity (Supply) Act, 1948. The Notification inter alia provided for payment of interest in case the bill amount is not paid within the specified period. Clause 7(b) read as follows:

"7(b) For delayed payment:

In the event of any bill of whatever nature it may be not being paid by the due date specified therein, the consumer shall pay an additional charge per day of seven paise per hundred rupees or part thereof on the unpaid amount of the bill for the period by which the payment is delayed, beyond the due date specified in the bill, without prejudice to the right of the Board to disconnect the supply."

The validity of the aforesaid Notification was questioned in the Allahabad High Court by way of a writ petition filed by the Eastern U.P. Chamber of commerce and Industry, Allahabad and certain individual consumers. On the Interlocutory Application filed in the said writ petition, the High Court passed the following Order on July 25, 1990:

"In this case S/Sri Sudhir Agarwal and S.C. Budhwar have filed appearance on behalf of Respondents. They pray for and are granted two weeks' time for filing rejoinder affidavit. List this petition for disposal, if possible at the admission stage, on 16th August, 1990. This is necessary in view of recurrence of this matter in large number of cases and revenue in large scale being affected for electricity charges.

Meanwhile till 23-8-1990 unless recalled earlier, the operation of the notification dated 21.4.1990 shall remain stayed. The respondents are restrained from realising the additional amount of electricity charges from petitioners in pursuance of the said notification. However, the petitioner shall continue to pay at the old rate."

[Emphasis added] The said order was continued by subsequent Order dated August 30, 1990 and September 7, 1990.

It appears that besides the above writ petition, several other writ petitions were filed questioning the aforesaid Notification. In every writ petition, there was an Interlocutory Application praying for stay of operation of the said Notification but there does not appear to be any uniformity in the interim orders made by the High Court in those writ petitions. For example, in Writ Petition No.300097 of 1990 filed by the Employer Association of Northern India, the interim order was to the following effect:

"Meanwhile effect shall not be given to the notification dated 21st April, 1990 as against the petitioners. However, it is made clear that in the event of failure of the writ petition the petitions shall deposit with the relevant authority within a period of one month from the date of dismissal of the writ petition the difference between the amount of electricity dues, which will be paid hereinafter by the petitioners under our order and the sum which may be calculated on the basis of the impugned notification."

[Emphasis added] All the said writ petitions challenging the said Notification were ultimately dismissed by a Division Bench on March 1, 1993.

From this stage onwards, we will refer to the facts and contentions in civil appeal arising from Special Leave Petition (C) No.6588 of 1990 [preferred by M/s. Kanoria Chemicals and Industries Limited], as representative of the facts and contention in all the matters being disposed of under this judgment. Though the individual facts vary, the questions arising in these appeals are common.

After the dismissal of the writ petitions on March 1, 1993 as aforesaid, Kanoria says, it deposited the difference amount between pre-revised and the revised electricity rates. It did not, however, deposit the "additional charges"

leviable under clause 7(b), referred to above, which are generally referred to - and referred to hereinafter - as "late payment surcharge". Thereupon, the Board issued a notice of demand calling upon Kanoria to pay the late payment surcharge in a sum of Rs.3,27,01,408.88p. [calculated upto February 28, 1993]. Similar demand notices were served upon other appellants also. A fresh batch of writ petitions were filed by several consumers including the appellants herein questioning the notices demanding late payment surcharge under clause 7(b). The main contention of the appellants before the High Court was that inasmuch as the High Court had stayed the operation of the Notification dated April 21, 1990 [by its Order dated July 25, 1990 as continued from time to time], clause 7(b) remained inoperative during the period July 25, 1990 to March 1, 1993 and, therefore, no late payment surcharge can be levied on the amount withheld by appellants under the orders of the court, even though their writ petitions were dismissed ultimately. According to the appellants, it was not a case where the court enjoined the Board from collection the dues according to the aforesaid Notification, or was it a case where the collection of bill amount was stayed simplicitor. It was a case, they submitted, where the operation of the very Notification was stayed which meant that from the date of the stay order, clause 7(b) did not operate and was not effective till the dismissal of the writ petitions. Strong reliance was placed upon the decision of this Court in *Adoni Ginning Factory v. Secretary, Andhra Pradesh State Electricity Board* [1979 (4) S.C.C. 560]. The said contention has been rejected by the Division Bench. R.A. Sharma, J., speaking for the Division Bench, first examined the nature and effect of the interim orders passed by courts pending disposal of substantive matters and then opined that in *Adoni Ginning*, this Court cannot be said to have held that in the case of stay of operation of the Notification, interest does not accrue at all. Sharma, J. pointed out that the said decision was concerned only with the period during which an order of injunction restraining the Board from collecting the revised charges was in operation and this Court opined that an order of injunction does not prevent the accrual of interest provided by the relevant tariffs/rules. Sharma, J. pointed out that the recoverability of the interest amount of the period covered by an order of stay of the Notification was not at all in issue in *Adoni Ginning* and, therefore, it cannot be said that there is any decision on the said question. Affirming the opt-repeated principle

that a decision is an authority only for what it actually decides, the learned Judge opined that the consumers are liable to pay the late payment surcharge under clause 7(b) of the said Notification even for the period covered by the aforementioned order dated July 25, 1990 [as extended from time to time]. The learned Judge also pointed out that the interim orders passed in various writ petitions were not uniform and by way illustration set out in the interim order in Writ Petition No.30097 of 1990 [quoted by us hereinabove]. The correctness of the judgment is called in question in this batch of appeals.

Sri R. Vaidyanathan, who lead the arguments on behalf of the appellants, submitted that the impugned decision of the High Court is clearly contrary to the principles enunciated by this Court in Adoni Ginning and cannot, therefore, stand. Counsel relied upon another order this Court dated April 23, 1996 in special leave Petition (C) No.9087-88 of 1996 [M/s. Hindalco Industries Limited v. State of Uttar Pradesh]. Learned counsel submitted that clause 7(b) of the Notification dated April 21, 1990 was penal in nature inasmuch as the late payment surcharge provided by it works out to 25.5 interest per annum. Such high rate of interest, learned counsel submitted, cannot but be characterized as penal.

Inasmuch as the decision in Adoni Ginning constitutes the sheet-anchor of the appellant's case, it is necessary to closely examine the facts and ratio of the said decision. Electricity charges were enhanced by the Government of Andhra Pradesh under an Order dated 30th January, 1955. The enhancement was questioned by certain consumer by way of writ petitions in Andhra Pradesh High Court. The High Court stayed the operation of the Government Order enhancing the rates. The writ petitions came up for hearing before a learned Single Judge on February 22, 1957 and were allowed. The Government of Andhra Pradesh preferred writ appeals which were allowed by a Division Bench of that court on 19th December, 1958 upholding the validity of the enhancement. Thereafter, the Andhra Pradesh State Electricity Undertaking with effect from 1st April, 1959 issued bills to several consumer call in upon them to pay the arrears of enhanced charges. No demand was made under these notices for surcharge [for delayed payment of Bill amount] on the arrears. Meanwhile several consumers approached this court and obtained order of injunction restraining the Government/Board from realising from them the "amount of arrears occasioned by the enhancement of rates". Injunction was granted by this Court subject to certain conditions including the condition that in the event of the dismissal of their appeals, the appellants shall pay the arrears with interest calculated @ one percent per annum. All the appeals were dismissed by this Court on 25th March, 1964. Thereafter, the Electricity Board issued demand notices calling upon the consumers to pay surcharge @ twelve percent per annum on the arrears in respect of which they had obtained order of injunction pending their appeals before this court. On receipt of these demand notices, the consumers again approached the High Court by way of writ petitions questioning the demand. Their writ petitions were allowed by a learned Single Judge observing that no surcharge was leviable during the period

when the order of injunction granted by this Court was operation. The writ appeal preferred by the Board were, however, allowed by a Division Bench against which decision some of the consumers approach this Court again. It is, therefore, clear that the only dispute in Adoni Ginning pertained to the liability of the consumers to pay surcharge @ twelve percent per annum on the amount not collected from them under the orders of injunction granted by this Court pending their appeals. It is significant to notice that the dispute in the said case did not pertain to the liability of the consumers to pay the surcharge amount for the period covered by the order of stay granted by the High Court; the Board did not choose to demand any surcharge for that period. The contention of the appellants in Adoni Ginning was that by virtue of the injunction order granted by this Court, the consumers cannot be said to be in default in paying the electricity charges and, therefore, no surcharge was leviable. The contention was rejected by this Court [D.A. Desai and O. Chinnappa Reddy, JJ.]. The Court pointed out that according to clause (9), a consumer was liable to pay the bill amount within thirty days, in default of which he was liable to pay "an additional charge of one percent on the amount of the bill for every month delay or part thereof". The contention urged by the appellant therein was repelled in the following words:

"The injunction granted by this court restrained the government from realising the arrears of enhanced charges..... All that the injunction did was to restrain the Board from realising the arrears which meant that the Board was restrained from taking any coercive action such as disconnection of supply of electricity etc. for the realisation of the arrears. The operation of G.O. No.187 dated 30th January, 1955, as such was not stayed. Thus the obligation of the consumers to pay charges at the enhanced rates was not suspended though the Electricity Board was prevented from realising the arrears. It was up to the consumers to pay or not to pay the arrears.

If they paid the arrears they relieved themselves against the liability to pay surcharge. If they did not pay the arrears they were bound to pay the surcharge if they failed in the appeals before the Supreme Court. This was precisely what was pointed out by the Electricity Board in the Bills issued to the consumers after the Supreme Court granted the injunction. We may mention here that the Electricity Board is not demanding any surcharge on the arrears for the period during which the Andhra Pradesh High Court had granted stay. It was explained by the learned Counsel for the Electricity Board that no surcharge was claimed for that period as the operation of G.O.No.187 dated 30th January 1955 had itself been stayed at that time. Surcharge was claimed for the period during which the appeals were pending in the Supreme court since the Supreme Court did not stay the operation of G.O.No.187 but only restrained the Board from collecting the arrears.

That no stay of G.O.No.187 was ever intended to be granted by the Supreme Court is also clear from the circumstance that there was no injunction restraining the Electricity Board from collecting future charge at the enhanced rates. the Electricity

Board was, therefore, right in claiming surcharge for the period the during which the appeals were pending in the Supreme Court and not Claiming surcharge for the period during which the Writ Petition and Writ appeals were pending in the High Court."

[Emphasis added] The learned counsel for the appellants in the appeals before us rely upon the portions underlined in the above passage as a decision supporting their contention that where the operation of Government Order is stayed, no surcharge can be demanded upon the amount withheld. We find it difficult to agree. In our respectful opinion, the underlined portions do not constitute the decision of the court. They merely refer to the fact that the Board itself did not make a demand for surcharge amount in respect of the period covered by stay under its own understanding of the effect of the stayed order granted by the High Court and that it was justified in its opinion. The demand was , the court pointed out, in respect of the period covered by the order of injunction granted by this Court. This Court held expressly that the grant of and injunction does not relieve the consumers of their obligation to pay the charges at the enhanced rates and, therefore, the demand for surcharge/interest for such period is not illegal. The portions underlined cannot be understood as laying down the proposition that in respect of the period covered by stay, no demand can be made. No such proposition can be deduced from the said passage for the reason that the liability for the said was not at all in issue in the said decision. Unless put in issue and pronounced upon, it cannot be said that there was a decision on the said issue. There was no list between the parties with respect to the period covered by the stay order of the High Court. If so, it cannot be said that any decision was rendered by this court on the said issue or aspect, as it may be called. We, therefore, agree with the High Court that Adoni Ginning cannot be read as laying down the proposition that the grant of stay of a Notification revising the electricity charges has the effect of relieving the consumers/petitioners of their obligation to pay late payment surcharge/interest on the amount withheld by them even when their writ petitions are dismissed ultimately. Holding otherwise would mean that even though the Electricity Board, who was the respondent in the writ petitions succeeded therein, is yet deprived of the late payment surcharge which is due to it under the tariff rules/regulation. It would be a case where the Board suffers prejudice on account of the order of the court and for no fault of it's. It succeeds in the writ petition and yet loses. The consumer files the writ petition, obtains stay of operation of the Notification revising the rates and fails in his attack upon the validity of the Notification and yet he is relieved of the obligation to pay the late payment surcharge for the period of stay, which he is liable to pay according to the statutory terms and conditions indeed form part of the contract of supply entered into by him with the Board. We do not think that any such unfair and inequitable proposition can be sustained in law. No such proposition flows from Adoni Ginning. It is a matter of common knowledge that several petitioners [their counsel] word the stay petition differently. On petitioner may ask for injunction, another may ask for stay of demand notice, the third on may ask for stay of collection of the amount demanded and the

fourth one may ask for the stay of the very Notification. Such distinctions are bound to occur where a large number of writ petitions are filed challenging the same Notification. the interim orders made by the Court may also vary in their phraseology in such a situation. Take this very case while the consumers has asked for stay of operation of the Government Order revising the rates, those very consumers asked for an injunction when they came to Supreme Court. Furthermore, as pointed out rightly by the High Court, the order of the stay granted by the High Court in writ petitions questioning the validity of the Notification dated April 21, 1990 were not uniform. In the case of writ petition filed by the Eastern U.P. Chamber of Commerce and Industry, Allahabad, the operation of the Notification was stayed while in the case of the writ petition filed by the Employers Association of Northern India, it was directed that "effect shall not be given to the notification dated 21st April, 1990 as against the petitioner shall deposit with the relevant authority within a period of one month from the date of dismissal of the writ petition the difference between the amount of electricity dues to be paid hereinafter by the petitioner under our orders and the sum which may be calculated on the basis of the impugned notification". The words "sum which may be calculated on the basis of the impugned notification"

in the later order clearly mean and include the late payment surcharge as well. The acceptance of the appellants' argument would thus bring about a discrimination between a petitioner and a petitioner just because of the variation of the language employed by the court while granting the interim order though in substance and in all relevant aspects, they are similarly situated. It is equally well settled that an order of stay granted pending disposal of a writ petition/suit or other proceeding, comes to an end with the dismissal of the substantive proceeding and that it is the duty of the court in such a case to put the parties in the same position they would have been but for the interim order of the court. Any other view would result in the act or order of the court prejudicing a party [Board in this case] for no fault of its and would also mean rewarding a writ petitioner inspite of his failure. We do not think that any such unjust consequence can be countenanced by the courts. As a matter of fact, the contention of the consumers herein, extended logically should mean that even the enhanced rates are also not payable for the period covered by the order of stay because the operation of the very Notification revising/enhancing the tariff rates was stayed. Mercifully, no such argument was urged by the appellants. It is understandable how the enhanced rates can be said to be payable but not the late payment surcharge are provided by the same Notification - the operation of which was stayed.

As has been pointed out by S.C. Agrawal, J., speaking for a three-Judge Bench in *Shree Chamundi Mopeds Ltd. vs. Church of South India Trust Association, Madras* [ 1992 (3) S.C.C.1], "while considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence."

Sri Vaidyanathan relied upon an unreported order dated April 23, 1996 in Special Leave Petition (C) Nos.9087-88 of 1996 [Hindalco Industries v. State of U.P.]. We have seen the order but we do not find anything in the said order supporting the contention of the learned counsel.

Sri Vaidyanathan contended that the rate of 'late payment surcharge' provided by clause 7(b) is really penal in nature inasmuch as it works out to 25.5 percent per annum. Learned counsel also submitted that the petitioners understood the decision in Adoni Ginning as relieving them of their obligation to pay interest for the period covered by the interim order and that since they were acting bonafide they should not be mulcted with such high rate of interest. We cannot agree that the rate of late payment surcharge provided by clause 7(b) is penal, but having regard to the particular facts and circumstances of this case and having regard to the fact that petitioners could possibly have understood the decision in Adoni Ginning as relieving them of their obligation to pay interest/late payment surcharge for the period of stay, we reduce the rate of late payment surcharge payable under clause 7(b) to eighteen percent. But this direction is confined only to the period covered by the stay orders in writ petitions filed challenging the Notification dated April 21, 1990 and limited to March 1, 1993, the date on which those writ petitions were dismissed.

For the above reasons, the appeals fail and are dismissed subject to the above mentioned direction with respect to the rate of levy of late payment surcharge under clause 7(b) of the Notification dated April 21, 1990.

Writ Petition (C) No.761 of 1993 Writ Petition (C) No.761 of 1993 too is dismissed for the same reasons.

No costs.