the petition does not lie because it seeks to challenge the exercise of discretion vested by law in the trial Court. The revision petitions of the two defendants, therefore, must fail. I may observe here that the conditional leave given in the other suit was given in somewhat similar, though not identical, circumstances, and in that case the learned Judge took the view that it could not be said that the defence raised would make out a good case for the defendant. In this case too, therefore, it was purely a matter of the exercise of discretion given to the Court by law.

These two petitions must, therefore, be dismissed, but in the circumstances of the case I make no order as to costs. The defendants will be allowed one month's time (as ordered by the trial Court) with effect from today to furnish security for the amount claimed.

In the two cross-revision petitions the prayer is that the leave should not be granted. I have already discussed the matter above and since the view taken is that the defences do raise triable issues, these revision petitions must also fail and are dismissed. The parties are directed to appear before the trial Court on the 21st of May, 1953.

APPELLATE CIVIL

Before Falshaw and Kapur, JJ.

1953

May, 21st

MESSRS WATKINS MAYOR AND COMPANY, JULLUNDUR CITY,—*Defendant-Appellant*

versus

THE JULLUNDUR ELECTRIC SUPPLY COMPANY, LIMITED, OF JULLUNDUR, THROUGH CHAIRMAN OF THE COMPANY,—*Plaintiff-Respondent*

Regular Second Appeal No. 787 of 1948.

Indian Electricity Act (IX of 1910)—Sections 22 and 23—Levy of minimum charge—Whether legal—Minimum charge—Object of—Practice—Plea not taken but evidence recorded—Whether such evidence can be looked into.

On the 4th May 1940, defendants entered into an agreement with the plaintiff, an Electric Supply Company, whereby they guaranteed a minimum consumption of 120,000 units in two years at the rate of Re 0-1-3 per unit.

Clause 4 of the agreement provided that in case the defendants failed to consume the guaranteed 120,000 units in the period of two years from the date of agreement, they would pay to the company the cost of 120,000 units at the stipulated rate of Re 0-1-3 per unit. In the contracted period of two years the defendants consumed only 82,605 units and the plaintiff sued the defendants for the cost of the balance of the units unconsumed out of the guaranteed units, i.e., 37,395 units. The trial Judge awarded damages for the breach of contract and not the price of the energy that had remained unconsumed, the measure of damages being the amount of unexpended energy multiplied by the difference between the stipulated rate and the rate which the plaintiff company would have paid to the Government for the supply of bulk energy. On appeal the District Judge decreed the suit for the price of the unexpended energy. The defendant appealed to the High Court.

Held, that—

(1) the suit which had been brought was not a suit based on a breach of contract, but was for the enforcement of clause 4 given in the agreement;

(2) according to the Indian Electricity Act, the Company was entitled to a fair return on its additional plant taking into account all the factors which are prescribed by section 23, read with clause VI of the Schedule to the Electricity Act;

(3) the parties having agreed at the time of entering into the agreement as to what would be fair return, the plaintiff company were entitled to enforce clause 4 of the agreement;

(4) the stipulation regarding minimum charge is legal. It is really to provide for a reasonable return, the plaintiff company were entitled to provided for which is payable notwithstanding the fact that no energy has been used by the consumer during the period for which such minimum charge is made;

(5) no amount of evidence can be looked into upon a plea which was never put forward.

London Electric Supply Corporation v. *Priddis* (1), *Attorney-General* v. *Hackney Borough Council* (2), *Shaila Bala Ray* v. *Chairman, Darjeeling Municipality* (3), *Messrs Amin Chand Bhola Nath* v. *The Jullundur Electric Supply Co., Ltd.* (4), and *Siddik Mohamed Shah* v. *Mst. Saran and others* (5), relied on.

Regular Second Appeal from the decree of Shri Rajinder Kishan Kaul, Additional District Judge, Jullundur,

(1) 18 T.L.R. 64
(2) 86 L.J. Ch. 632
(3) I.L.R. 53 Cal. 1047
(4) 1953 P.L.R. 7
(5) A.I.R. 1930 P.C. 57 (1)

dated the 22nd day of July, 1948, modifying that of Shri Y. L. Taneja, Subordinate Judge, 1st Class, Jullundur, dated the 28th August 1946, to the extent that the plaintiff is granted a decree for Rs 2,443-10-3 (in addition to that which had already been passed by the trial Court) against the defendant-respondents and further ordering that the defendant-respondents will also pay the proportionate costs on the total amount for both the courts to the plaintiff-appellant.

K. S. THAPAR, S. D. BAHRI and KRISHAN LAL, for Appellant.

K. C. NAYAR and D. K. KAPUR, for Respondent.

JUDGMENT

Kapur, J.

KAPUR, J. This is a defendants' appeal against an appellate decree of the Additional District Judge, Jullundur, dated the 22nd July, 1948, varying the decree of the trial Court which had decreed the plaintiff's suit but had awarded damages of only Rs 333-3-9 against the claim of the plaintiff of Rs 2,921-7-9.

On the 4th of May 1940, an agreement was entered into between the plaintiff, the Jullundur Electric Supply Company, Limited (hereinafter termed the Company), and the defendants, Messrs. Watkins Mayor and Company, Jullundur (hereinafter called the consumers), for the supply of electric energy. The relevant conditions of this contract were that the consumers required a maximum load of 100 kilowatts and they guaranteed a minimum consumption of 120,000 units in two years and the Company was to charge in that case at the rate of Re 0-1-3 per unit of energy consumed and if the consumption exceeded 300,000 units in two years, the rate was to be Re 0-1-0 per unit subject to certain conditions. Clause 4 of the agreement was as follows :—

> "4. In case the consumer fails to consume the guaranteed 120,000 units as in clause (3), in the period of two years from the date of agreement, he shall pay to the Company the cost of 120,000 (one lac and twenty thousand) units at the stipulated rate of Re 0-1-3 per unit."

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As the defendants did not consume the minimum amount of energy guaranteed by the agreement, the plaintiff brought a suit on the 4th of May 1945, claiming a sum of Rs 2,921-7-9, alleging that there was a contract between the parties by which the consumers had given a guarantee to consume 120,000 units in two years and as they had only consumed 82,605 units, they were liable to pay for the balance of the units unconsumed out of the guaranteed units, i.e., 37,395 units. The defendants pleaded that the plaintiff Company did not put up a transformer of sufficient power, it being only of 88 kilowatts although, according to the contract, they had to erect a transformer of 100 kilowatts or over, that they were unable to supply sufficient amount of energy as a result of which the pole fuses were constantly being burnt out and in spite of the complaint made they took no action, that the plaintiff could not, therefore, sue on the basis of the contract which was never acted upon and the minimum guarantee clause was, therefore, unenforceable. They also pleaded that they had deposited the money claimed by the plaintiff with the Electrical Inspector but he had returned the money to them on the ground that he had no jurisdiction to go into the matter of compensation. In their replication the plaintiff Company denied the statements made by the defendants and stated that the transformer which they had put up was of sufficient power, that according to the contract they had only agreed to give the stipulated amount of energy, that there was no breach of contract on their part and that the burning out of the fuses was due to the unbalanced load which the defendants had put on the mains of the Company.

Mohan Lal, Chief Engineer of the Plaintiff Company, was examined before issues and he stated that the agreement was that the defendants were to take the maximum load of 100 kilowatts but there was no possibility of their taking this load at any time, that at no time could there be a diversity factor of more than 50 per cent and even if 90 kilowatts load was taken, the fuses would not burn out because there was an overload capacity

of the transformer. Upon this the Court struck the following issues :—

(1) What was the effect of the plaintiff Company fixing a transformer of 88 kilowatts on the agreement between the parties when the plaintiff Company had contracted to meet a maximum load of 100 kilowatts ?

(2) What was the effect of the giving of energy from the above transformer to others on the rights of the parties ?

(3) Could the defendants take advantage of the reduction of rates by the Punjab Government and how ?

(4) Relief.

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Mr. Y. L. Taneja, who tried the suit, held that the transformer which had been set up by the plaintiff Company was sufficient for the needs of the defendants. In coming to this conclusion he relied upon the evidence of Mr. S. N. Khosla, Assistant to Electrical Inspector, Punjab Government, who had deposed as follows :—

> "110 K.V.A. Transformer is more than sufficient to meet the demand due to 85.25 H.P. connected load. If another 39 kilowatts load was added to the subsection the above transformer would be able to carry the load.
>
> If a consumer consumes 82,605 units in two years, the average operative load for a working day of 9 hours and a month of 25 days would be 15 kilowatts load."

He was then cross-examined on hypothetical matters, which do not take away the effect of what he had said in his examination-in-chief. He also held that the giving of electrical energy to several consumers was of no effect and the defendants could not take advantage of the reduction of rates, but while giving relief he held that the plaintiff Company were entitled to get damages for breach of contract and not the price of energy that they had not supplied and he then calculated that the

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correct measure was the amount of unexpended energy multiplied by the difference between the stipulated rate and the rate which the plaintiff Company would have paid to the Government for the supply of bulk energy from the Hydro-Electric Branch and gave a decree for Rs 333-3-9. This was calculated on the basis of the consumed energy to be 84,456 units. On appeal being taken, the learned District Judge decreed the plaintiff's claim for a sum of Rs. 2,776-14-0 which, according to his calculation, was the amount payable. The learned Judge found that the suit was not for damages but was for price of the unexpended energy as given in the contract. He also said—

> "The question of damages was raised neither in the plaint nor in the written statement. The trial Court had passed a decree for Rs. 333-3-9 on the ground that the plaintiff could only claim damages equal to the profit which he would have made if the defendant had consumed the full guaranteed 120,000 units."

He treated the suit as one which was for the enforcement of the terms of the contract. The defendants have come up in appeal to this Court.

It has been argued in the first instance that the plaintiff was unable to supply the energy which it was under the agreement bound to supply. We have heard counsel and have gone through the evidence also. The statement of Mr. S. N. Khosla, who was a wholly independent witness is, in our opinion, quite clear and shows that for the amount of energy which was required by the defendant Company the transformer which was set up by the plaintiff Company was quite sufficient. There is no evidence contrary to this which one could rely upon. The statement of Mr. B. N. Kashyap, I do not think, can be preferred to that of the evidence of Mr. Khosla. Besides, there is no proof on the record showing that the defendants at any time required the use of full load of 100 kilowatts and could not use it because of any default on the part

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of the plaintiff and there is no allegation or proof that energy more than was consumed by them was not available to the defendants for consumption. I would, therefore, confirm the findings of the learned Subordinate Judge on the first issue.

The next point raised by counsel for the defendants-appellants was that the plaintiff was not entitled to recover the price of unconsumed amount of energy which the defendants had undertaken to take as a minimum and that the plaintiff would be entitled only to that amount of damages which they proved to have suffered in this case. In the plaint the claim was not based on any breach of contract but for price of the goods as provided for in the contract itself. No plea was ever taken by the defendants that the plaintiff was not entitled to the enforcement of clause 4 of the contract. All that they pleaded was that the plaintiff did not set up a transformer of a sufficient power and, therefore, they were not entitled to claim anything under the contract. On the pleadings, in my opinion, no question arose of the measure of damages.

Counsel then submitted that evidence had been led by the plaintiff to show the amount of loss which it suffered because of the non-consumption of energy. As was pointed out by their Lordships of the Privy Council, no amount of evidence can be looked into upon a plea which was never put forward (see *Siddik Mohomed Shah* v. *Mst. Saran and others* (1). In the present case no plea dealing with the measure of damages was ever taken. That question, therefore, could not be tried.

Sections 22 and 23 of the Indian Electricity Act, are as follows :—

> "22. Where energy is supplied by a licensee, every person within the area of supply shall, except in so far as is otherwise provided by the terms and conditions

(1) A.I.R. 1930 P.C. 57(1)

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of the license, be entitled, on application, to a supply on the same terms as those on which any other person in the same area is entitled in similar circumstances to a corresponding supply :

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of energy for any premises having a separate supply unless he has agreed with the licensee to pay to him such minimum annual sum as will give him a reasonable return on the capital expenditure, and will cover other standing charges incurred by him in order to meet the possible maximum demand for those premises, the sum payable to be determined in case of difference or dispute by arbitration.

23. (1) A licensee shall not, in making any agreement for the supply of energy, show undue preference to any person, but may, save as aforesaid, make such charges for the supply of energy as may be agreed upon, not exceeding the limits imposed by his license.

(2) No consumer shall, except with the consent in writing of the licensee, use energy supplied to him under one method of charging in a manner for which a higher method of charging is in force.

(3) In the absence of an agreement to the contrary, a licensee may charge for energy supplied by him to any consumer—

(a) by the actual amount of energy so supplied, or

(b) by the electrical quantity contained in the supply, or

(c) by such other method as may be approved by the Provincial Government.

(4) Any charge made by a licensee under clause (c) of subsection (3) may be based upon, and vary in accordance with any one or more of the following considerations, namely :—

(a) the consumer's load factor, or

(b) the power factor of his load, or

(c) his total consumption of energy during any stated period, or

(d) the hours at which the supply of energy is required."

A clause, clause XI-A, has been added to the Schedule to the Indian Electricity Act, which legalises the customary minimum charge. This clause provides—

"XI-A. A licensee may charge a consumer a minimum charge for energy of such amount and determined in such manner as may be specified by his licence, and such minimum charge shall be payable notwithstanding that no energy has been used by the consumer during the period for which such minimum charge is made."

The above clause was added to set at rest doubts as to the legality of minimum charges, which were authorized by most licences. The minimum charge has long been in force in Great Britain, and it has a substantial foundation, viz., that every consumer's installation involves the licensee in a certain amount of capital expenditure in plant and mains and labour on which he is entitled to a reasonable return (see clause VI of the Schedule)

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and it was decided by a Divisional Court in England that the charge is legal [*London Electric Supply Corporation* v. *Priddis* (1)]. The various systems of making charges for the electricity supplied are provided for in section 23(3) of the Electricity Act.

One of the principal objects of an electric light undertaking is to utilise its plant to the best advantage, and one method of accomplishing this result is to obtain customers for energy during the day as well as during the dark hours, so that the plant can satisfy a greater number of hours' maximum demand than would otherwise be the case. The proportion of the actual number of units sold to the output capacity of the plant is called the "load factor" of the station, and the difference between the ratio of the load actually observed at the station to the sum of the loads at the consumers' terminals is called the "diversity factor." Power users have a better load and diversity factor than light users, which is the reason for their being usually charged at a lower rate. The increase of the load and diversity factors, therefore, is of the greatest importance, and tariffs are framed to obtain customers and classes of customers whose consumption contributes to this result. This aspect of the case has been discussed in a judgment of Astbury, J., in *Attorney-General* v. *Hackney Borough Council* (2). The same is deducible from a combined consideration of sections 22 and 23 of the Electricity Act read with clauses VI to X of the Schedule to the Electricity Act. In clause IX (2), which is at page 329 of Meares' Law relating to Electrical Energy in India, it is provided that the consumer shall, if so required by the licensee, enter into an agreement to take such energy upon special terms (including a minimum annual sum to be paid to the licensee). In clause IX, as also in clause VI, a reasonable return is the underlying object. It will be noticed that in arriving at a reasonable

(1) 18 T.L.R. 64
(2) 86 L.J. Ch. 682

return, as used in clause IX(1)(b), any additional plant required to be installed has to be taken into account.

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It is really to provide for a reasonable return to the licensee that a minimum charge is provided for which is payable notwithstanding the fact that no energy has been used by the consumer during the period for which such minimum charge is made. And all this is calculated and arrived at by taking into consideration the factors which are mentioned in section 23(4) of the Indian Electricity Act.

The whole scheme of the Act seems to show that the provision made in any contract for a minimum charge is really to provide for a fair return on the outlay of the licensee, and it is for this reason that the law allows a contract of this kind to be entered into and as has been said by Meares in the book that I have referred to above at p. 79, one of the conditions precedent is—

> "An agreement must, if asked for by the licensee, be entered into with security, so as to give the licensee a 'reasonable return' on his expenditure for not less than two years."

The claim as laid in the plaint also seems to indicate that the suit was to enforce clause 4 of the agreement and not for a breach of contract and compensation for loss. The object of the agreement entered into between the parties was to give effect to the provisions of the Electricity Act rather than enter into an ordinary contract which may contemplate indemnification in the form of damages for breach of contract. A minimum charge is not really a charge which has for its basis the consumption of electrical energy. It is based on the principle that every consumer's installation involves the licensee in a certain amount of capital expenditure in plant and mains on which he is to have a reasonable return. He gets a return when energy is actually consumed,

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and when no such energy is consumed by a consumer, he is allowed to charge minimum charges by his licence, but these minimum charges are really a return on his capital outlay incurred for the particular consumer. This was the view taken by Mitter, J., in *Shaila Bala Ray* v. *Chairman, Darjeeling Municipality* (1), at p. 1051, and it appears reasonable to me that such a provision should be there in an agreement of this kind. When a licensee agrees to charge a lesser rate for the supply of electricity he takes into consideration the various factors, i.e., consumer's load factor, the power factor of his load and the total consumption of energy during any stated period, and the only consideration for charging a lesser rate seems to be that the licensee has a consumer who takes energy in bulk at a time which is most advantageous to the licensee.

The judgment that I have referred to, *London Electric Supply Corporation* v. *Priddis* (2), was of such a nature. One of the terms there was—

> "The consumer shall until purchase as aforesaid pay quarterly to the Supply Company for the use of the installation ¾*d* per Board of Trade unit for every unit of electrical energy supplied to the said premises and the *minimum* payment in any year shall be 1*s* for each eight-candle power lamp or its equivalent installed."

Lord Alverstone, C. J., giving his judgment said that he thought it sufficiently clear that the customer should be liable to pay a *minimum* rent whether the current was *de facto* used or not. The *minimum* rent had no reference to the amount of current used. Mr. Justice Channel concurred and said that the meaning of the clause was that the *minimum* rent did not merely cover the actual use but the right to use the current. The customer had to pay for the right to use the current, although he did not in fact use it and Mr. Justice Darling was of the same opinion.

(1) I.L.R. 53 Cal. 1047
(2) 18 T.L.R. 64

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In America also the same view has been taken. In Volume 29 of Corpus Juris Secundum under the heading "Electricity" in paragraph 28 this subject has been discussed where it is said:—

> "It has been held that where the consumer did not take delivery of, or use the electrical energy covered by, the contract, the Company is entitled to recover the minimum charge which the consumer agreed to pay, and that a statute providing that the measure of damages on breach of an agreement of sale of personal property is the difference between the net proceeds received on a resale of the property and the contract price is not applicable."

A similar case and of the same Company came to this Court and was decided by a Bench consisting of Bhandari and Soni, JJ., in *Messrs Amin Chand-Bhola Nath* v. *The Jullundur Electric Supply Co., Ltd.* (1), where at p. 13 Bhandari, J., said:—

> "Section 22 of the Electricity Act appears to have provided an adequate machinery for determining with precision the minimum annual sum which will give the licensee a reasonable return on the capital expenditure and other charges, for it is stated clearly and in unambiguous language that if a dispute arises between the licensee and the consumer in regard to this amount, the matters in controyersy should be referred to and decided by an arbitrator. If the licensee and the consumer come to a mutual agreement in regard to this sum and the matter is not referred to an arbitrator, the Court is entitled to presume that the figure has been arrived at correctly. It will thus be wholly unnecessary for the Court to intervene or to re-assess reasonable compensation

(1) 1953 P.L.R. 7

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although technically it has power to do so under the relevant provisions of the Contract Act."

In the case before me the reasonable return was converted into monetary value which was to be calculated at the rate of Re 0-1-3 per unit at a minimum of 120,000 units in two years and if that was what was calculated at the time of making the contract, it does not seem to be necessary for the Court to re-determine the same. The object of putting in this clause was in my opinion to fix by agreement the amount of reasonable return which the licensee Company was entitled to.

I am, therefore, of the opinion that (1) it has not been proved that there was a breach of the agreement by the licensee Company ; (2) the evidence discloses that the transformer which was installed by the Company was sufficient for the purpose of giving the energy required by the defendants ;(3) the suit, which has been brought, is not a suit based on a breach of contract, but for the enforcement of clause 4 given in the agreement ; (4) according to the Indian Electricity Act the Company is entitled to a fair return on its additional plant taking into account all the factors which are prescribed by section 23 read with clause VI of the Schedule to the Electricity Act ; and (5) the parties having agreed at the time of entering into the agreement as to what would be fair return, the plaintiff Company are entitled to enforce that clause.

In the result this appeal fails and is dismissed with costs.

FALSHAW, J.—I agree.

1953

May, 25th

APPELLATE CIVIL

Before Khosla and Soni, JJ.

BIRBAL AND OTHERS,—*Defendants-Appellants*

versus

HARLAL AND OTHERS,—*Defendants-Respondents*

Regular Second Appeal No. 648 of 1952

Code of Civil Procedure (Act V of 1908), Order 22—Abatement—Setting aside of—Ignorance of party's death—Whether sufficient ground—Decree passed after abatement—Whether a nullity—Procedure to be adopted after setting