

(1958) 09 AHC CK 0012

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 2934 of 1956

Baboo Halwai

APPELLANT

Vs

Mirzapur Electric Supply Co. and Another

RESPONDENT

Date of Decision : 29-09-1958

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Electricity Act, 1910 — Section 4, 4(3)

Citation : AIR 1959 All 220

Hon'ble Judges : B.R. James, J

Bench : Single Bench

Advocate : Shambhu Prasad, for the Appellant; Gopal Behari, for the Respondent

Final Decision : Dismissed

Judgement

B.R. James, J.—The Mirzapur Electric Supply Co. Ltd., (hereinafter referred to as the licencee) has since 1929 held a licence for the supply of electrical energy in Mirzapur. The petitioner, Babu Halwai, manufactures utensils, and for this purpose employs an electric motor of 13 h. p. For twenty years he has been taking energy from the licencee for running this motor and paying for it according to authorised rates, which until recently were calculated on the basis of the amount of energy actually consumed. In 1944 the licencee, with the consent of the Government, introduced an extra charge termed the "War Cost Surcharge" amounting to 15 per cent, of the prevailing rates.

Then in 1954 it made an application to the State Government for the approval of an amendment of Clause 2(b) of the Fourth Annexure (which deals with maximum charges) of its licence so as to permit it to levy a minimum charge of Rs. 5/- per b. h. p. per month of connected load in respect of consumers of power. On receipt of the application the U. P. Government adopted the procedure prescribed by Rule 24 of the Electricity Rules. The petitioner preferred no objection to the proposed levy. The Government then issued the following Notification dated 25-6-1955:

"In exercise of the powers conferred by Clause (b) of Sub-section (3) of Section 4 of the Indian Electricity Act, 1910 (Act IX of 1910), the Governor is pleased to sanction the following amendments in the Fourth Annexure to the Mirzapur Electric Licence, 1929, published under Notification No. 1601-E1/26/1920 dated 24-8-1920.

AMENDMENT

Clause 2(b) shall now read as follows:

For power and purposes other than those specified in 2(a) at the rate of annas four per unit. This rate shall, however, only apply to energy consumed between the hours of 1 a. m. and 5 p. m. For energy used between the hours of 5 p. m. and 1 a. m. Clause 2(a) will apply. A minimum charge of Rs. 5/- per month per b. h. p. of connected load exclusive of meter rent will be made." By virtue of this Notification the licensee demanded from the petitioner a minimum charge of Rs. 60/- per mensem for his 13 h. p. motor, i.e., at the rate of Rs. 5/- per h. p. irrespective of the fact that in a particular month the petitioner may not use the motor at all or consume energy costing less than Rs. 65/-.

2. The petitioner has now come up to this Court under Arts. 226 and 227 of the Constitution and prays for the issue of an appropriate writ or Order (1) quashing that part of the aforequoted Notification which imposes a minimum charge of Rs. 5/- p. m. per b. h. p. (2) restraining the licensee from charging him the "War Cost Surcharge," and (3) restraining it from charging him the minimum rate of Rs. 65/- per month, and the contention is that the Notification and the charges in question contravene the law.

3. The petition has been contested by both the licensee and the State Government, and counter-affidavits have been filed on behalf of the former by its Resident Engineer and on behalf of the latter by its Assistant Electric Inspector.

4. Different considerations apply to the two charges against which the petitioner has grievance, hence they will be dealt with separately.

5. As to the "War Cost Surcharge" it appears that it was authorised by the Government in 1944 under its powers under Clause 4 of the U. P. Electricity Supply (Licensed Undertaking War Cost) Order which had been made under Rule 81 of the Defence of India Rules; thereafter the authorisation continued to remain valid u/s 5 of the U. P. Electricity (Temporary Powers of Control) Act of 1947.

In view of these statutory provisions the petitioner has found it impossible to contend that the "War Cost Surcharge" is unlawful. All that his learned counsel has been able to submit is that the War having terminated many years ago no justification remains for the levy, and in support of his argument he points to the large profits which the licensee is supposedly making.

These are however considerations which the Court, in the exercise of its writ

jurisdiction, cannot take into consideration; its duty is merely to see whether or not the Surcharge is authorised by law. The statutory provision just referred to makes it perfectly lawful. Besides, the petitioner has been paying it without demur since 1944. The Constitution came into force in January 1950, so that it is too late in the day for him to complain now that the charge is improper.

6. I turn now to a consideration of the validity of the minimum charge of Rs. 5/- p. m. per b. h. p. which has been sanctioned by the Notification dated 25-6-1955 under Clause (b) of Section 4(3) of the Electricity Act, 1910. The words of this provision material to the case in hand run as follows:

"Where in its opinion the public interest so permits, the State Government may, on the application or with the consent of the licensee..... make such alterations or amendments including the provisions specified in Section 3, Sub-section (2), Clause (f) as it thinks fit."

The crucial words in this provision of the law are; "Where in its i.e., the Government's opinion the public interest so permits." I have already quoted in full the relevant Notification issued by the State Government. It nowhere contains an express or implied indication of the fact that it was the Governor's opinion that the public interest permitted that the impugned amendment in the licensee's licence be made, nor does it refer to the material on which the Government based its opinion.

The petitioner contends that for the Notification to be valid the Governor was bound to embody in it in the material he examined and the fact that on such examination he had formed the opinion that the proposed amendment was in the public interest, and that since this course was not adopted his order must be struck down as invalid.

The respondents on the other hand contend that the omission complained of is not fatal and that u/s 114 of the Evidence Act the Court should presume that before passing his order the Governor considered the relevant material and as a result formed the opinion required by the law.

7. These rival contentions raise a point of some difficulty which does not appear to be directly covered by authority. The only case under the appropriate provision of the Electricity Act of 1910 of which I am aware is the AIR 1949 136 (Privy Council) decided by the Privy Council. That was a case under Sub-section (1) (a) of Section 4, the opening words of which are similar to those of Sub-section (3) under which the U. P. Government has passed the order which is now challenged.

The Government of Bombay passed an order which after cataloguing the various defects from which the working of the licensee's undertaking suffered, stated that it was satisfied that there were sufficient grounds for revoking the licence u/s 4(1), but instead of revoking it forthwith, imposed certain new conditions; when these were not complied with the licence was revoked.

The imposition of these fresh conditions was challenged before their Lordships,

but the substantial dispute between the parties was not that the Government did not entertain the opinion referred to in Section 4(1) (a) but that it had no grounds for entertaining that opinion, so that the point at issue was not on all fours with that before me.

But it is noteworthy that their Lordships held that in terms the relevant matter was the opinion and not the grounds on which it was based, and further that the language of the section left no room for the relevance of a judicial examination as to the sufficiency of the grounds on which the Government acted in forming its opinion. From their Lordships' observations it follows that there is no force in the contention that the Government must place before the Court the material on which it based its opinion.

Nevertheless it is implied from their judgment that the requisite opinion must be clearly expressed, and force is lent to this view by this sentence which occurs towards the end of the judgment; "The Government held and sufficiently expressed the opinion required by Section 4(I)(a)" A reading of the judgment makes it extremely doubtful if the Bombay Government's order would have been held valid had it omitted to state specifically that it was "satisfied that there are sufficient grounds" for revoking the licence.

8. A large number of reported cases have been cited before me, but I will refer only to those which in my opinion help to clarify the principles which should apply when a statute requires a public authority to be satisfied, or hold an opinion, with regard to a particular matter. *A. K. Gopalan v. District Magistrate, Malbar* AIR 1949 Mad 596 was a case under the Madras Maintenance of Public Order Act of 1947 Section 2(I)(a), of which empowers the Provincial Government to pass a detention order

"if satisfied with respect to a particular person that he is acting or is about to act in any manner prejudicial to the public safety or the maintenance of public order and with a view to preventing him, it is necessary so to do."

The District Magistrate passed an order merely stating that he was "satisfied that the detention of A. K. Gopalan is necessary for the maintenance of law and order and public safety." On a difference of opinion between two learned Judges who heard the case it was referred to a third Judge. That learned Judge held that it was not open to the court to consider the reasonableness of the material on which a detention order was made or to see whether the ground given justified the order; but the very foundation of the exercise of jurisdiction u/s 2(1) (a) was the "satisfaction" of the detaining authority that the person concerned was acting or was about to act in a manner prejudicial to the public safety, and that if there was such satisfaction the authority concerned with the object of preventing the person from so acting could direct detention.

Since this requirement was lacking in the District Magistrate's order the detention was held to be without jurisdiction and hence, illegal. The learned Judge further emphasised;

"The authority is not bound to give the reasons for his "satisfaction" in the order of detention, nor is he bound to discuss the material on which his "satisfaction" is based. The "satisfaction" is a subjective state of mind and can be known only by what is recited in the order. I should like to lay stress on the words: "The satisfaction can be known only by what is recited in the order."

9. The case of *Amrita Lal Chatterjee Vs. The State*, decided by a Division Bench of the Calcutta High Court, is another relevant case. That was a case under the West Bengal Security Act, 1950. Their Lordships laid down that it was not enough to say that the authority was satisfied that an order of externment was necessary with a view to preventing a person from doing a subversive act, but that there should be satisfaction upon the point that he was doing or was about to do or was likely to do a subversive act; because the latter condition was not satisfied in the case before them the conviction of the accused person was reversed. The sentence in the judgment to which I should like to draw attention is:

"Without a recital of that satisfaction the order is not in my view in accordance with the Act."

10. The respondents rely on certain observations of the Supreme Court in *Dattatreya Moreshwar Pangarkar Vs. The State of Bombay and Others*, and *The State of Bombay Vs. Bhanji Munji and Another*, . I do not think that either of these decisions gives any support to the proposition that expression of the authority's satisfaction is not necessary or that from the fact that the order has been passed it should be presumed that the satisfaction which is a condition precedent to its passing has been duly reached.

The first was a case under the Preventive Detention Act, 1950, and merely states that while the Act requires an executive decision it does not itself prescribe any particular form of expression of that executive decision and that all that the procedure prescribed by law requires is that the appropriate Government must take a decision as to whether the detention order should be confirmed or not u/s 11(1), and further that where such decision has been in fact taken there is no breach of the procedure established by law. The second case merely reiterates the principles of the decision in *Biswabhusan Naik Vs. The State of Orissa*, , which deals with a sanction to prosecute and is therefore of no help in settling the present controversy.

11. It is worthy of note and I wish to lay particular stress on this - that the respondents have been unable to cite a single decision in which an order in the form of the impugned notification has been upheld.

12. The principles deducible from the aforementioned case law appear to be these. The satisfaction or opinion of the Government that the order it proposes to pass is permitted by the public interest is a condition precedent to the passing of a valid order. The relevant matter is the opinion and not the grounds on which it is based, so that the Government is not called upon to place before the Court the material on which it has based its opinion; nevertheless it is essential for the

requisite opinion to be specifically expressed, and without a recital of that opinion the order would not be in accordance with the Act. It follows that since the impugned Notification does not mention that in the Government's "opinion the public interest so permits" the Notification must be held invalid.

13. I have further examined the question whether on the record before me there is any evidence from which I might be in a position to conclude that the State Government applied its mind to the relevant material and in consequence came to entertain the required opinion, but I find none. In the affidavits filed on behalf of the Government and the licensee I have looked in vain for any assertion that while passing his order the Governor at all considered whether the introduction of the new terms in the licence was permissible in the public interest.

On the other hand, it is perfectly obvious that charging a consumer a fixed minimum rate although in a particular month he may not use any electrical energy at all. or may use energy worth less than the amount demanded from him, is contrary to the interest of the general public. Some indication of the manner in which the Government's mind has been working with regard to the public interest is to be found in paragraph 4 of the counter-affidavit of its Assistant Electric Inspector. No doubt this paragraph is confined to a justification of the War Cost Surcharge, but the first sentence in it is highly significant. It runs:

"In order to maintain the finances of the Electric Supply Co. in a healthy condition which is of public interest and to insure that the share-holders got a reasonable return of their investments so that there may be no incentive to take unfair advantage of these circumstances by the Electric Supply Co. to increase their scale of charges, the State Government issued an order....."

This would go to indicate that the State Government equates the public interest with the financial position of the licensee and the dividends of its share-holders. The instance of the minimum charge is even worse, for the rates which power-consumers are required to pay are in effect being increased, yet the court is asked to hold that this is permitted by the public interest.

14. Realising the weakness of the Government's case in this behalf the learned Junior Standing Counsel requested for time to enable him to produce before me the material which, according to him, was examined by the Government on the basis of which it agreed to allow the minimum charge desired by the licensee. I turned down the request on the ground that the petition has been pending since October 1956 and that the State Government had almost two years' time at its disposal in which to make good the lacunae in its case, (15) In these circumstances I am obliged to hold that the impugned order was passed by the State Government in contravention of Clause "(3) of Section 4 of the Electricity Act and in consequence deserves to be set aside. The War Cost Surcharge can however not be challenged now. Accordingly the petition is allowed to this extent that the Notification dated the 25th June 1955 is quashed and the licensee

commanded to refrain from charging the petitioner the minimum rate for his motor which the Notification prescribes. In view of the time taken over the hearing of this petition I award the petitioner Rs. 100/- as costs.