
(1996) 07 PAT CK 0016

In the Patna High Court

Case No : Letters Patent Appeal No. 72 of 1986

Bihar State Electricity Board

APPELLANT

Vs

Patna Aluminium Udyog and Others

RESPONDENT

Date of Decision : 15-07-1996

Acts Referred:

Citation : (1996) 07 PAT CK 0016

Judgement

Sachchida Nand Jha and M.Y. Eqbal, JJ.—In 1973 the Government of Bihar announced its industrial policy as contained in Resolution No. 16808 dated 29.9.73 of the Department of Industries & Technical Education granting different kinds of incentives and concessions to Small-scale Industrial units. One such incentive was in the form of concessional supply of electricals energy. Paragraph 6 of the Resolution contains the details of the incentive in that regard. The relevant part of the said Resolution which, in fact, is the basis of the claim of the writ petitioners, reads as follows:

Concessional rates of electricity tariff

6(a) No minimum fixed charge will be levied by electricity undertaking under the control of State Government for five years from the date of production.

(b) Small-scale units will be given subsidy of 9paise per unit over the electrical energy actually consumed. Electricity Board/Supply Cos. will prepare bills of consumers after deducting the amount available as subsidy.

By Resolution No. 9137 dated 17.4.76 published in the official gazette on 19.5.76 the State Government decided to put a ceiling on the exemption of AMG charges at Rs. 1,000/- during one year making it clear that the balance amount, if any, will have to be paid by the entrepreneurs themselves.

2. According to the writ petitioners, respondent herein, it was entitled to total exemption from AMG charges for a period of 5 years from 1.4.76 and the amended resolution dated 17.4.76 was not applicable. The Bihar State Electricity Board, however, during the past realised a sum of Rs. 2,04,445.25 paise under

"threat and coercion" and had raised demand for subsequent period and also, in default of payment thereof, had disconnected the electric supply. The respondent, in the circumstances, filled a writ petition for quashing the order and refund of the amount said to have illegally realised under threat and coercion and for immediate restoration of the supply of electrical energy.

3. According to the Bihar State Electricity Board (hereinafter called, the Board), in terms of the decision of the Government of the State Government as contained in letter dated 18.3.76 of the Industrial Development Commissioner, the existing arrangement of exemption at source was to continue only upto 31.3.76. The industrial units were required to pay the amount to the Board and thereafter claim reimbursement from the State Government through the agency of the Bihar State Credit and Investment Corporation (BISCICO in short) one of the financial institutions through which the different kinds of incentives are canalised. In other words, the incentive is now available in the form of reimbursement. The Board thus does not deny claim of the respondent. In fact, according to it, the question of incentive/requirement is entirely between the consumers and the government. According to the respondent, on the other hand, since the industrial policy resolution conferred complete exemption from payment, there was no question of its paying to the Board first and then recover the amount from the State Government by way of reimbursement.

4. Before the learned single Judge the dispute that appears to have been raised was whether the respondents were entitled to exemption for the period of five years or the same was to continue upto 30.9.79 in terms of the amended resolution, learned Judge in paragraph-2 of the judgment framed the question in these words, "whether the petitioner is entitled to avail of the concession for full period of five years to be computed from the date it went into production, i.e. 1.4.76 taking it to 31.3.81 or a lesser period." But it is clear, in the premises set out above, that the real dispute between the parties was/is whether the Board is entitled to realise the AMG charges. In other words, whether the petitioner is, bound to pay the AMG charge with the facility of reimbursement or is entitled to exemption from such payment at source.

4. Mr. Ram Balak Mahto, learned Counsel for the appellant relying on the letter dated 18.3.76 (supra) submitted that the respondent-unit having commenced production on 1.4.76, the letter was applicable on all fours. The letter so far as relevant runs as follows:

It has been decided that for the electrical energy consumed from 1st April, 1976, the power incentives will not be allowed at source by the State Electricity Board as is the practice at present. Instead, the Bihar State Credit and Investment Corporation will implement this scheme from 1st April, 1970 for which detailed procedures are being worked out for the Corporation. The State Electricity Board will allow power incentives to these units for the electrical energy consumed upto March, 1976 only. In other words industrial units eligible for power incentives who have not availed of this facility for some reason or the other will continue to

avail of this incentive from the State Electricity Board as before upto the period ending the 31st March, 1976. For the period starting from 1st April, 1976, such units will get this incentive from the Bihar State Credit and Investment Corporation.

6. Mr. Keshav Srivastava, learned Counsel for the respondent submitted that industrial policy resolution which has been interpreted by the Board itself as direction u/s 78A of the Electricity (Supply) Act, cannot be modified by executive instructions as contained in the aforesaid letter dated 18.3.76. He placed reliance on *Rajeshwar Singh and Others Vs. State of Bihar and Others*, . The submission of Mr. Ram Balak Mahto in this regard was that the letter does not amount to modification of the terms of the policy resolution; it only effects a change of procedure. He also contended that Section 49 of the Electricity (Supply) Act provides for fixation of tariff. The State Government has not power to revise the same by issuing direction u/s 78A of the said Act.

7. In *Rajeshwar Singh and Others Vs. State of Bihar and Others*, the unit had gone into production on 12.8.74. When dispute arose, taking recourse to the policy resolution dated 29.9.73 it pleaded that there was no liability at all to pay AMG charges. The Board took the plea, amount brothers, that in view of the amendment resolution dated 17.4.76 (supra) ceiling on exemption had been fixed at Rs. 1,000/- and the petitioner (of that case) was, therefore, not entitled to total exemption. That point for consideration was whether the right to claim total exemption in terms of the resolution dated 29.9.73 could be taken away by the said amended resolution. This Court held that the amended resolution dated 17.4.76 was not retrospective. It, therefore, could not have taken away the rights which had already accrued to the entrepreneurs under the original policy resolution of 29.9.73. The claim for total exemption for the period of five years was accordingly upheld.

8. The decision in *Rajeshwar Singh and Others Vs. State of Bihar and Others*, is not applicably in the present case. In that case, after commencement of production, if the amended resolution would have been given effect to, the petitioner that case) would have been liable to pay AMG charges beyond Rs. 1000/-. That would have obviously increased its liability. The plea of the Board was therefore not accepted as otherwise the consumer would have been adversely affected. SC far as the present case is concerned admittedly, the respondent had commenced production on 1.4.76. Therefore, there was no question of letter dated 18.3.76 taking away any accrued rights. So far as the letter dated 18.3.76 is concerned, it does not affect the rights of the respondent. The entitlement to exemption remains in fact. The only change that the letter brings about is as to the mode of payment/reimbursement. Thus in actual terms there is no material. The decision in *Rajeshwar Singh and Others Vs. State of Bihar and Others*, was rendered in the context of amended resolution dated 17.4.76. The applicability of the letter dated 18.3.76 was not at issue in that case. The said decision, therefore, is distinguishable and cannot be taken as

binding.

9. The point for consideration is whether the letter dated 18.3.76 takes away or adversely affects the rights of such industrial units which commenced production on or after 1.4.76. From bare perusal of the letter it is clear that such industrial units which were eligible for incentive but for some reason or the other could not avail of the same could avail of the benefits of the incentive from the upto 31.3.76. For the period thereafter too the incentive would continue to be available but from State Government through the BISCICO. In other words, the units have to pay to the Board at the first instance and thereafter claim reimbursement from the Government through BISCICO.

10. So far as respondent-unit is concerned, having commenced production on 1.4.76, there was no question of its availing of the facility because there are no occasion for it pay AMG charges to the Board prior to that date. The point is whether for the subsequent period it can claim the same facility i.e. total exemption from payment as a matter of right. That instead of paying AMG charges direct to the Board and then claiming the refund from the State Government by way of reimbursement, it would not pay AMG charges at all for the period of 5 years. The Supreme Court in a receipt case of Commissioner of Sales Tax, Orissa and Another Vs. Jagannath Cotton Company and Another, , has held that the industrial policy resolutions are not enough to provide exemption unless corresponding provisions are made in the statute concerned. In that case, the Court was dealing with the case of exemption from sales tax. The Court observed that the High Court ought to have considered whether the provisions of industrial policy resolutions were the same or different from the corresponding provisions of the Sales Tax Act, Rules and Notifications issued thereunder before expressing any final opinion in the matter.

11. Admittedly the tariffs are framed u/s 49 and therefore, have a statutory character. Even if the submission of the learned Counsel for the respondent that the industrial policy resolution is to be treated a direction u/s 78A of the Act be assumed to be correct (without holding it to be so), the fact remain that suitable corresponding amendment in the tariff was never made.

12. No case of promissory estoppel has been made out by the respondent. As a matter of fact, the respondent continued to pay AMG charges which it now says was done under "threat and coercion". The writ petition was filed on 15.4.81 i.e. after expiry of the eligibility period of five years. The respondent, it is true, had come to this Court earlier also in CWJC No. 2745 of 1988 but that was also after four years. Counsel sought to explain the period stating that the respondent had made representations. It is, however, well settled that pendency of unprovided for representations cannot be a valid ground for condonation of delay see Jagdish Narain Maltiar Vs. The State of Bihar and Others, It thus appears to us that the respondent continued to pay AMG charges to the Board without any objection for four years. It started making the claim and took recourse to the provisions of resolution dated 29.9.73 only when the dispute arose with respect to the

impugned bills.

13. The question, thus, is whether the Board should refund the amount which has been realised from the respondent or the State Government should. Of course, as noticed at the outset, the respondent had also challenged the correctness of certain bills and prayed for quashing a relief which even the learned single Judge did not grant. In the premises set out above, we have no doubt that recourse to the provisions of the policy resolution dated 29.9.73 was an after thought. Had the amount involved in the impugned bills been paid or is ultimately paid, that amount too would have been liable to be refunded. In our opinion, in the circumstances, the respondent cannot say that it has been put to any adverse situation. We also do not think that the letter dated 18.3.76 either affects its right or creates prejudice or hardships except that getting refund may be a somewhat cumbersome affair.

14. The learned single Judge in his impugned judgment has held that the respondent is entitled to the incentives for him denied from the date of production upto 31.8.1981. We are in full agreement with this finding. The learned single Judge has further held that the respondent would be entitled to refund or adjustment of any excess amount realised to it "in the manner indicated above". While agreeing with the finding of the learned Judge about the entitlement of the respondent to get the refund, we would clarify that the refund is to be claimed by the respondent by way of reimbursement from the State Government through the BISCICO and, accordingly, modify the judgment to that extent.

15. It would appear from the judgment of the learned single Judge while accepting the case of the respondent that it was entitled to total exemption from payment of AMG charges observed that if the plea of the Board is accepted "many industries may be ruined" by paying the electrical bills in full and thereafter to chase the remedial remedy from the BISCICO. Having regard to the prevailing hierarchical bottlenecks, what is called in administrative parlance "red tapism" the revised procedure may no doubt cause some inconvenience to the respondent and other similarly situated industrial units but that, in our opinion, cannot be a ground to hold that the letter itself will not be applicable or to invalidate the same.

16. Nevertheless we think that the interests of the respondent should be protected by issuing suitable directions to the State. We accordingly direct the State Government through the Secretary, Department of Industries, to pass final order regarding refund of amount as the respondent may be entitled to, after necessary verification etc. and effectuate the order by making the actual refund within the period of four months from the date of receipt of copy of this order. The status quo as of date regarding recovery so far as the respondent is concerned, shall continue in the meantime.

17. This appeal is disposed of with the observations and modification in the

judgment, in the manner as mentioned above. No cost