

(1984) 01 RAJ CK 0034

In the Rajasthan High Court

Case No : Civil Writ Petition No. 1014 of 1983

Birla Jute and Industries Ltd., Chittorgarh and Another

APPELLANT

Vs

Rajasthan State Electricity Board, Jaipur and Others

RESPONDENT

Date of Decision : 16-01-1984

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Electricity (Supply) Act, 1948 — Section 49, 78A
Electricity Act, 1910 — Section 22A, 22B

Citation : AIR 1984 Raj 78 : (1984) WLN 116

Hon'ble Judges : K.S. Sidhu, J

Bench : Single Bench

Advocate : Shanti Bhushan, Panna Chand Jain and Prem Ashopa, for the Appellant; A.R. Chitaley, L.L. Sharma, M.I. Khan, Government Advocate, H.C. Rastogi and B.P. Gupta, for the Respondent

Judgement

K.S. Sidhu, J.—Birla Jute and Industries Ltd. (petitioner 1 herein) is the proprietor of Birla Cement Works Chittorgarh; and M. M. Goswami (petitioner 2 herein) is the Senior Vice-President of Birla Cement Works Chittorgarh. The petitioners filed this application for issue to the State of Rajasthan (respondent 2) and the Rajasthan State Electricity Board (R.S.E.B.) direction, order or writ including writ in the nature of mandamus directing them to supply continuous electric energy of 10824 KVA to the petitioners' Cement Works at Chittorgarh and to refrain from showing discrimination in favour of M/s. Modi Alkalies and Chemicals Ltd. Alwar (respondent 4) as is being done pursuant to the letter, dated Dec. 20, 1982. The impugned letter which was addressed by the Special Secretary to the Rajasthan Government in the Industries (GR. I) Department to respondent 4 is as under:

I am directed to refer to your representation dated the 23rd November, 1982 regarding power supply to your unit being established at Alwar (Rajasthan) and to say that considering the special circumstances of your Company, it has been decided that in case power cuts become unavoidable, you will be given on

continuous basis a minimum of 8 MW of power at 60% load factors barring unforeseen circumstances for a period of six months from the date of regular power connection. This arrangement will be reviewed after the lapse of the said period of six months.

2. The petitioners' case briefly stated is that by issuing this letter the State Government has discriminated against the petitioners and in favour of respondent 4, thus ensuring supply of electric energy of a minimum of 8 MW at 60% load factor by the R. S. E. B. to the respondent's factory on continuous basis for a period of six months from the date of regular power connection, although such facility has been denied to the petitioners in spite of repeated request by them in that behalf. It is admitted in the writ petition that respondent 4 who proposes to set up a factory for the production of caustic soda would need to run the factory continuously in order to avoid damage to the capital equipment, plant and machinery, but it is further pleaded that the petitioners' Cement factory at Chittorgarh will also have to suffer similar damage if minimum quantity of power is not supplied to them to enable them to keep their kilns rotating. While the respondent is assured of a regular and continuous supply of a minimum of 8 MW of power at 60% load factor even during the period of a 100% power-cut, the petitioners who have contracted for the supply of 10.824 MW are not being supplied any power during such periods.

3. The petitioners grievance is that the action of the State Government and the R. S. E. B., in showing favour to respondent 4 in the matter of supply of continuous power to their factory and denying the same facility to the petitioners' factory, although both the factories are similarly placed in their need for continuous supply of minimum power, is violative of their fundamental rights of equal protection of the laws and equality before the law as guaranteed by Article 14 of the Constitution. The petitioners have mentioned in this context that respondent 4 is not the only industrial unit manufacturing caustic soda in Rajasthan and that other such units, for example, the Shriram Fertilizers and Chemicals Kola, have also not been assured of any minimum power supply on continuous basis.

4. The petitioners' case further is that there was a grave and drastic power cut at the time of filing this writ petition and that unless some power supply was assured to their factory on continuous basis there was the likelihood of serious and irreparable damage to their plant and machinery.

5. It was on these pleadings that the petitioners prayed for directions to the respondents to supply them uninterrupted and continuous power of 10824 KVA and to refrain from showing undue preference to respondent 4 in that behalf.

6. The respondents contested this petition and filed separate returns in answer to it. The State of Rajasthan (respondent 2) who issued the impugned letter sought to be annulled as discriminatory, admitted that they had issued this letter to ensure supply of minimum power of 8 MW on continuous basis for a period of six

months to the factory of respondents 4, and that no such facility had been granted to the petitioners' factory at Chittorgarh. It however pleaded in this context that petitioners had been allowed to generate electricity by installing captive generating sets to meet their minimum requirements of power in the event of a 100% power-cut by the RSEB, It further pleaded that M/s. Shriram Fertilizers and Chemicals who are also engaged in the production of caustic soda were also allowed to have their own generating sets and they do not have any grievance against the RSEB about the power-cuts and the alleged discrimination in favour of respondent 4. The State Government explained in their reply that minimum supply of electric energy has been assured to respondent 4 on short-term basis so that in the meantime the respondent could procure for itself captive generating sets. As for the power-cuts, the State Government admitted that they are there and that they are unavoidable because the demand for power far exceeds the generating capacity of the RSEB and the power available to it from other sources. Minimum supply on continuous basis was assured to respondent 4 to induce its proprietors to agree to set up the caustic soda production plant in Rajasthan. Moreover, if minimum supply is not assured to such a plant and it does not have its own generating sets to meet its minimum needs, there is a possibility of explosion which may endanger human lives. The State Government further defended its action in assuring minimum supply to the respondent 4, pleading that it was legally competent to take such action under Sections 22A and 22B, Electricity Act, 1910 and u/s 78A, Electricity (Supply) Act, 1948. It pleaded that the decision to assure supply of minimum power to the factory of respondent 4 had been taken on the advice of the Task Force Energy Committee consisting of Chief Secretary, Industries Secretary, Secretary to the Chief Minister, Chief Engineer RSEB, Director Industries and Secretary Energy.

7. M/s. Modi Alkalies & Chemicals Ltd., respondent 4, pleaded that the concession made by the State Government and the RSEB for continuous supply of electricity at a minimum of 8 MW power to its factory at Alwar has been made on reasonable basis and on the consideration of the special circumstances of public safety and industrial development of the State. It denied that such a concession involved any discrimination against the petitioners. It pleaded that it had decided to set up its plant in Rajasthan in preference to Punjab on the basis of the assurance by the State Government of Rajasthan that such a concession would be granted to it. According to respondent 4, the State Government issued a direction to the RSEB to supply on continuous basis electric energy to the respondent to the extent of a minimum of 8 MW as a matter of policy u/s 78A, Electricity (Supply) Act, 1948, to encourage the establishment in Rajasthan of such a big and sophisticated industry like that of respondent 4. The respondent pleaded that it could not immediately arrange for captive power plant to produce continuous supply of a minimum of 8 MW power from its own generation and that it is taking steps to install its own captive power plant at a cost of rupees five crores, but it would take time before such a plant could be of any help to the respondents. It explained that its position does not bear any fair comparison to

M/s. Shriram fertilizers and Chemicals for the reason that the latter had set up their caustic soda production plant at a time when power supply situation in Rajasthan was relatively easy and moreover they had enough time to instal their own captive power plant simultaneously.

8. Similarly, the RSEB also defended this concession granted to respondent 4 pleading that the respondent had represented to the Task Force For Energy that caustic soda is highly capital intensive and power intensive and that there is a danger of damage to the plant and injury to workmen as a result of explosion if power supply is reduced below the minimum level, and that Task Force For Energy considered the said representation and agreed as the RSEB put it "as a very special case" that assurance be given to the respondent that in the event of power-cut their supply would not be reduced below 8 MW at 60% load factor for a period of six months from the date of regular power connection.

9. The Union of India stated in their return that they had issued a letter, dated, January 9, 1978, requesting the State Governments to exempt cement factories like the petitioners" from power-cuts. The Union Government however pleaded, that the said letter cannot possibly impinge upon the powers of the State Governments and the State Electricity Boards to regulate the supply, distribution, consumption and use of electricity for the purpose of maintaining such supply and securing its equitable distribution in their respective States.

10. After hearing arguments on both sides, I find that the petitioners learned counsel does not question the validity of the power of the State Government u/s 22B, Electricity Act, 1910, to control the distribution and consumption of energy and for that end in view to direct the RSEB to subject all consumers, notwithstanding any contract to the contrary, to power-cuts from time to time. Counsel also frankly conceded that the State Government has power u/s 22A of the said Act to give directions to the RSEB to supply energy to certain class of consumers on preferential basis in accordance with the provisions of that section. No argument was , therefore, made by counsel in support of the petitioners" prayer for an order on the RSEB and the State Government directing them to supply continuous and uninterrupted power of 10824 KVA to the petitioners" factory at Chittorgarh. The writ petition must therefore fail 1o that extent.

11. Mr. Shanti Bhushan, learned counsel for the petitioners concentrated his arguments in support of the petitioners" prayer for issue of a writ to the State Government and the RSEB directing them to refrain from discriminating against the petitioners and in favour of respondent 4 in the matter of guaranteeing supply of minimum power for the avoidance of damage to plant and machinery. . He submitted in this connection that it is not denied by the respondents that even a cement production plant, like a caustic soda production plant, may suffer damage in the event of its sudden stoppage for want of power. As for the alleged apprehension of explosion and consequent danger of injury to the workers in a caustic soda factory in the event of such stoppage, counsel argued that such apprehension is not genuine for, according to him, it can always be avoided by

taking timely action in anticipation of a power-cut. He rightly pointed out that assurance or no assurance power-cuts do become un-avoidable even in the case of consumers, like respondent 4, who have with them written assurances of a guaranteed minimum supply of power, if power generation and supply is disrupted by vis major or of her unforeseen circumstances. Any prudent factory owner, counsel argued, would adopt advance safety measures to prevent such mishaps.

12. Learned counsel for the petitioners did not challenge the legal or Constitutional validity of any of the provisions of the Electricity Act, 1910 (for short, the 1910 Act) and the Electricity (Supply) Act. 1948 (for short the 1948 Act) under which power is given to the State Government to issue orders to the RSEB directing it to subject general consumers to power-cuts and also to exempt from such power-cuts certain class of consumers. Counsel referred in this connection to Sections 22A and 22B of the 1910 Act, and to Sections 26, 49 and 78A of the 1948 Act and argued that in issuing the impugned letter, containing assurance of continuous supply of minimum of 8 MW of power at 60% load factor to the factory of respondent 4 even during periods of " 100% power-cut, the State Government and the RSEB have acted in utter disregard of legislative object, command and policy as stated in the aforementioned sections, and that therefore their action must be annulled as violative of the petitioners' fundamental right of equality before the law and equal protection of the law as guaranteed by Article 14 of the Constitution.

13. Before going into the specifics of the argument raised by the petitioners' learned counsel, it may be right-way mentioned here that the law is well settled that executive action violating a fundamental right is also open to challenge under Article 14, and that if it is shown in a given case "hat the executive has exercised its powers under a statute in disregard of the provisions of the statute or contrary to its declared policy and object, such exercise could be challenged and quashed under Article 14 which includes within its purview both legislative and executive acts. Counsel contended that the impugned letter reproduced above which was communicated by the State Government in the form of a directive to the RSEB for compliance and which has in fact been complied with by it is an executive act which is contrary to the provisions of the 1910 Act and the 1948 Act and must therefore be annulled as violative of the petitioners' fundamental right of equality before the law and equal protection of the law.

14. Let us now read the relevant provisions of the two Acts. Sections 22A and 22B of the 1910 Act, are as under:

22-A. Powers of the State Government to give direction to a licensee in regard to the supply of energy to certain class of consumers: --

(1) The Staff Government may, if in its opinion it is necessary in the public interest so to do, direct any licensee to supply in preference to any other consumer, energy required by any establishment which being in the opinion of

the State Government an establishment used or intended to be used for maintaining supplies and services essential to the community, is notified by that Government in the Official Gazette in this behalf.

(2) & (3)

(4) Notwithstanding anything contained in this Ad, or in the Electricity (Supply) Act, 1948, or in his license or in any agreement entered into by him for the supply of energy, a licensee shall be bound to comply with any direction given to him under Sub-section (1) and any action taken by him in pursuance of any such direction shall not be deemed to be a contravention of S. 23. Sections 26, 49 and 78A of the 1948 Act are as follows:--

26. Board to have powers and obligations of licensee under Act 9 of 1910.-- Subject to the provisions of this Act, the Board shall, in respect of the whole State, have all the powers and obligations of a licensee under the Electricity Act, 1910 (9 of 1910) and this Act shall be deemed to be the licence of the Board for the purposes of that Act:

Provided that nothing in Sections 3 to 11 Sub-sections (2) and (3) of Section 21 and Section 22, Sub-section (2) of Section 22A and Sections 23 and 27 of that Act or in Clauses I to V. Clause VII to Clauses IX and XII of the Schedule to that Act relating to the duties and obligations of a licensee shall apply to the Board:

49. Provisions for the sale of electricity by the Board to persons other than licensees:

(1) to (3)

(4) In fixing the tariff and terms and conditions for the supply of electricity, the Board shall not show undue preference to any person,

78-A. Directions by the State Government :--

(1) In the discharge of its functions, the Board shall be guided by such directions on question of policy as may be given to it by the State Government.

(2) If any dispute arises between the Board and the State Government as to whether a question is or is not a question of policy, it shall be referred to the Authority whose decision thereon shall be final.

15. A combined reading of the statutory provisions reproduced above, in terms of their application to this case, would mean that the Legislature enjoins that the RSEB ""shall not show undue preference" to respondent 4 as compared to the petitioners or, for that matter, any other consumer, in the matter of supply of electricity. Of course, the State Government has been empowered by the Legislature to make exceptions in that behalf and direct the RSEB to supply energy to any establishment in preference to any other consumer, but in order to enable the State Government to exercise such power validly three conditions must co-exist, namely:--

(i) The consumer in whose favour the preference is sought to be shown is an establishment which, in the opinion of the State Government is used or intended to be used for maintaining supplies and services essential to the community:

(ii) The State Government further forms an opinion that it is necessary in the public interest to show preference to such establishment: and

(iii) The State Government notifies in the Official Gazette the requisite directive issued by it to the RSEB. In addition to its power to direct the RSEB to supply energy on preferential basis to an establishment which is used or intended to be used for maintaining supplies and services essential to the community the State Government has also been given power to issue orders to the RSEB to control the distribution and supply of energy with a view to securing its equitable distribution and maintaining the supply. It is in exercise of that power that the State Government directs power-cuts, partial or complete, of different durations, applicable to various classes of consumers. Moreover, the RSEB is bound by such other directions on questions of policy as may be issued by the State Government from time to time.

16. Learned counsel for the petitioners argued that the impugned order issued by the State Government directing the RSEB to supply energy to respondent 4 on preferential basis cannot be legally justified on the basis of any of the provisions of either the 1910 Act or the 1948 Act. On the contrary, counsel further contended, that Section 49(4) of the 1948 Act contains a clear prohibition enjoining the RSEB not to show undue preference to any consumer. The principle embodied in Section 49(4) is the same as in Article 14 inasmuch as it requires the RSEB to treat all consumers equally and justly. This does not mean that the equality of treatment is absolute, for, as already stated, Sections 22A and 22B of the 1910 Act provide for classifications and exceptions subject to the safeguards and conditions enumerated therein. The impugned letter, dated, Dec. 20, 1982, cannot be justified either u/s 22A or 22B. Learned Government Advocate admitted that it was not issued, and cannot therefore be defended u/s 22A. Obviously, respondent 4 is not an establishment which is used or intended to be used for maintaining supplies and services essential to the community, and, in any case, the State Government has not stated in its directive that it had formed an opinion to the effect that respondent 4 is such an establishment. Nor did the State Government mention in its directive that it had formed an opinion that it is necessary in the public interest to show preference to respondent 4. No such directive was ever published in the Official Gazette as required by Section 22A. Section 22A cannot therefore be of any help to the respondents. Section 22B is also of no avail, for it does not deal with preferential supplies and the like. On the other hand, it deals with discontinuance of supply to consumers, who have already contracted for its supply, with a view to maintaining the supply and securing its equitable distribution in periods of demand for energy exceeding its supply. Section 78A of the 1948 Act deals with directions on questions of policy. A decision by the State Government that a particular consumer should be given

preference over others in the matter of supply of energy cannot by any means be described as a decision on a question of policy. Decision on a question of policy is, in the very nature of things, is a decision of general application and not a decision in relation to a particular individual or consumer. Policy has first to be declared and communicated to the RSEB in general terms for its subsequent implementation by the RSEB on case to case basis. It would be absurd to say that the preference given to respondent 4 in the matter of supply of energy embodies any decision on a question of policy for future and general application by the RSEB in other cases.

17. The impugned action of the State Government cannot be defended even on general principles of equality and fair play. If the intention was to treat new caustic soda production plants on a preferential basis, it could perhaps be done under law by issuing a general directive in that behalf of uniform and equal application to all entrepreneurs who might have been desirous of setting up such factories in Rajasthan. It is not open to the State Government to hand-pick an entrepreneur and say that they are going to exempt him from all power-cuts if he were to set up a caustic soda production plant in Rajasthan.

18. For all these reasons, I have no hesitation in holding that the action of the State Government in giving assurance to respondent 4 of guaranteed, supply on continuous basis of 8 MW of power at 60% load factor for a period of six months in the first instance, vide letter dated, Dec. 20, 1982, and extended later for a further period of six months, is illegal and void. The impugned action is therefore annulled. The writ petition is allowed to that extent, but dismissed as respects the other relief. The parties are left to bear their own costs.