

(1988) 09 KL CK 0004

In the High Court Of Kerala

Case No : O.P. No's. 10252/84, 723, 794/85, 4418, 5688/86 and 431, 498, 1303, etc./87

Chackolas Spinning and Weaving Mills Ltd. and Others

APPELLANT

Vs

K.S.E. Board and Others

RESPONDENT

Date of Decision : 27-09-1988

Acts Referred:

Constitution of India, 1950 — Article 14, 265
Electricity (Supply) Act, 1948 — Section 63
Electricity Act, 1910 — Section 22B
Finance Act, 1978 — Section 36
Kerala Essential Article Control Act, 1986 — Section 3, 3(1), 3(2), 32
Kerala Essential Article Control Ordinance, 1984 — Section 3
Kerala Essential Articles Control (Temporary Powers) Act, 1961 — Section 3

Citation : (1988) 09 KL CK 0004

Hon'ble Judges : V.S. Malimath, C.J.; Bhaskaran Nambiar, J

Bench : Division Bench

Advocate : M. Pathrose Mathai, Joseph Vellappally, S. Siri Jagan and K.A. Nayar, N. Sugathan, for the Appellant; Kallada Sukumaran, for the Respondent

Final Decision : Allowed

Judgement

Bhaskaran Nambiar, J.—The challenge in these writ petitions is to the validity of the Kerala State Electricity Supply (Kerala State Electricity Board and Licensees Areas) Surcharge Order, 1984.

2. The Petitioners are either extra high tension or high tension consumers of electricity in this State, bound to pay the price of energy supplied to them by the Kerala State Electricity Board at the rates fixed by the Board from time to time. But, under the surcharge order issued by the Government, there is a levy of a surcharge at the rate of 2-5 paise per unit of electrical energy supplied, collected by the board and remitted to the Government after retaining one per cent collection charge.

3. It is this levy that is challenged by the Petitioners mainly on the ground that

the surcharge that is levied is in substance a compulsory exaction intended to enrich the coffers of the State and in effect partakes the character of a tax on electricity and that the Government, acting as a delegate under the Kerala Essential Articles Control Act, 1986 (Act 13 of 1986) is not competent to impose any tax. In fact, it is contended, that the parent Act itself is no taxing measure, does not impose any tax and does not authorise the imposition of any tax.

4. The State Government and the Electricity Board, met this plea by contending that the surcharge levied only increases the price of energy, and is only an addition to the price structure and thus well within the powers conferred u/s 3(2) (b) and (e) of the Act.

5. The impugned order was issued on 24th October, 1984 in exercise of the powers conferred by Section 3 of the Kerala Essential Articles Control Ordinance, 1984 (58 of 1984) and in supersession of an earlier surcharge order of 1979. The ordinance has been replaced by an Act, the Kerala Essential Articles Control Act, 1986, Act 13 of 1986, which has been given retrospective effect from 11th day of March 1982. We shall, therefore, refer to the relevant provisions of this Act.

3. Power to control production, supply, distribution, etc. of essential articles.-(1) If the Government are of opinion that it is necessary or expedient so to do for maintaining or increasing the supplies of any essential article or for securing their equitable distribution and availability at fair prices, they may, by notified order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by Sub-section (1), an order made thereunder may provide-

(a) * * * * (b) for controlling the price at which any essential article may be brought or sold;

(c) * * * * (d) * * * * (e) for requiring any person holding in stock any essential article to sell the whole or a specified part of the stock to the Government or to an officer or agent of the Government or to such other person or class of persons and in such circumstances as may be specified in the order;

* * * *.

6. The relevant clause of the surcharge order of 1984. are extracted below:

1. (i) This order may be called the Kerala State Electricity Supply (Kerala State Electricity Board and Licensees Areas) Surcharge Order, 1984.

(ii) It shall apply to extra high tension and high tension supplies of Electrical Energy by the Kerala State Electricity Board either directly or through licensees and shall include sales of energy by the Kerala State Electricity Board to sanction holders within the State as well as to other agencies outside Kerala.

(iii) It shall come into force in respect of consumption of electrical energy by

each consumer including those in the licensees Areas with effect from the 1st October 1984.

3. Notwithstanding anything to the contrary contained in any agreement entered into with any consumer or the conditions of service agreed upon by the Kerala State Electricity Board, the Kerala State Electricity Board shall levy a surcharge in accordance with Clause 4 on all supplies of electrical energy made by it either directly or through licensees.

4. The surcharge referred to in Clause 3 shall be at the rate of 2-5 paise per unit of energy supplied; provided however that in respect of electrical energy supplied to the State of Karnataka and the State of Tamil Nadu, the surcharge rates shall be as fixed by Government separately. The surcharge so levied shall be remitted to Government by the Kerala State Electricity Board after retaining one per cent collection charge.

5. It shall not be lawful for the Kerala State Electricity Board or for the Licensees receiving bulk supply from the Kerala State Electricity Board to supply energy for a price which does not include the surcharge leviable by or under this order.

7. The explanatory Note, not part of the Notification, but "intended to indicate its general purport" reads:

Government of India had imposed an excise duty of 2 paise per unit of generation of electricity from 1st March 1978. As per Notification No. 10114/ELA1/79/PW and E, dated 6th April 1979 issued under the powers conferred by Section 3 of the Kerala Essential Articles Control (Temporary Power) Act, 1961 (3 of 1962) Government had imposed a surcharge on all Extra High Tension and High Tension Consumers to facilitate realisation of the excise duty. The excise duty so collected was being passed on to the State.

Now the Government of India have decided to discontinue the realisation of the excise duty with effect from 1st October 1984. As the State Government is financing the Kerala State Electricity Board for the generation, maintenance and supply of electricity, the State, Government will be a loser when the levy of surcharge as per the order is abolished. In order to make good the above loss, Government have decided to impose a new surcharge and specifying that the amount (SIC) collected shall be paid to the State, by issuing an order under the powers conferred by the Section 3 of the Kerala Essential Articles Control Ordinance, 1984. This notification is intended to achieve the above object.

8. This explanatory note thus gives the background for the issuance of the new surcharge order in 1984. Excise duty at the rate of two paise per kilowatt hour was imposed on electricity by Section 36 of the Finance Act 19 of 1978. The Electricity Board, as the authority generating and producing electricity was therefore primarily liable to pay this excise duty. There was no provision in the Finance Act enabling the Board to recoup this amount from the consumers of electric energy. The State Government, therefore, invoked the powers conferred

u/s 3 of the Kerala Essential Articles Control (Temporary, powers). Act, 1961 and issued a notification on 6th April 1979, published on 7th April 1979 under which the Board was authorised "to levy a surcharge on all supplies of electrical energy made by it either directly or through licencees at the rate of 2"5 paise per unit of energy"supplied. It was specifically provided that it shall not be lawful for the Board to supply energy for a price which does not include the surcharge so levied. This 1974 Government order was intended to enable the Board "to realise the excise duty charged by the Central Government from all E.H.T. and H.T. consumers" as is evident from the explanatory note to that order.

9. The excise duty on electrical energy levied by the Central Government was withdrawn with effect from 1st October, 1984 and there was thus no necessity for the Board to recoup any amount from the consumers. There was no longer any need or demand for the continuance of the 1979 surcharge order, as the object and purpose for which it was issued ceased to exist. It was then, the Government thought that the levy can be continued-not to enable the Board to recoup any amount from the consumers-but to augment its own Revenue. Thus from 1st October 1984 itself, the day from which the excise duty was withdrawn by the Centre, the State Government authorised the new levy under the impugned surcharge order. The Board is made a collecting agent compelled to collect the surcharge along with the price of energy fixed by the Board. The Board has to remit the amount to the Government and can appropriate one per cent towards collection charges. It is, therefore, clear that the surcharge imposed adds the revenue of the State and surcharge order is a fiscal measure intended to augment the financial resources of the State. The question for determination is whether the parent Act, the Kerala Essential Articles Control Act, 1986 (Act 13 of 1986), has authorised this levy.

10. Section 3 of the Act gives power to control production, supply and distribution etc. of essential articles. Electrical energy is admitted to be an essential article amenable to the control and regulation under the Act vide *John v. Dy. Chief Accountant* 1970 KLT 805. Section 3 of the Act does not clothe the Government with any arbitrary power, but canalises the power to control and regulate on condition of the fulfilment of certain essential requirements. Thus the Government can exercise its powers under this provision only if the Government forms an opinion that it is necessary or expedient so to do "for maintaining or increasing the supplies of any essential article or for securing their equitable distribution and availability at fair prices". When once this opinion is formed, a notified order may be issued ""for controlling the price at which any essential article may be sold" and for the other purposes specifically mentioned in Clause 2 of Section 3. When no opinion as contemplated u/s 3(i) is formed, there is no cause for the exercise of jurisdiction u/s 3 of the Act. The "opinion of the Government" contemplated under the section is a condition precedent for the exercise of, the control of the essential articles under this section.

11. The provisions of the impugned surcharge order, 1984, and the explanatory

note stating the objects and reasons for issuing the order make it abundantly clear that this order was not issued for maintaining or increasing the supply of electrical energy or for securing its equitable distribution. This order was issued for an entirely different object, namely, to raise revenues of the State. The order challenged (Ext. P-2) is thus plainly beyond the powers conferred u/s 3 of the Kerala Essential Articles Control Act, 1986, Act 13 of 1986.

12. The Act does not impose any tax, nor does it authorise the Government to levy any tax. To be fair to the Government Pleader, it has to be stated that he had no case and rightly too, that the Act is a taxing measure intended to raise revenue for the state. If, therefore, the surcharge order of 1984 in effect, and in substance, imposed a tax, it is clearly beyond the powers delegated under the Act.

13. A tax is a pecuniary burden, not a voluntary payment but a compulsory exaction enforced pursuant to legislative authority for the avowed purpose of raising revenues and for support of the Government. The surcharge levied, on the face of it, partakes the character of tax. It is a compulsory levy. It is levied for the benefit of the State and intended to augment its revenue resources. The Board receives the amount to transmit it to the State, acting only as a collecting agent. Non-payment entails penal action and coercive processes can be initiated for recovery of the amount and to disconnect electric supply. The taxing element is the predominant if not the prime content of the surcharge order. When the Act does not purport to impose any tax; the Government as a statutory delegate cannot, under the guise of a surcharge order, levy any tax. This is what has been done and the surcharge order has no legislative support. It is elementary that when the Act does not impose any tax and authorise any imposition of tax, any delegated authority cannot in the exercise of the powers conferred under the Act or in exercise of its rule making power profess to impose any tax. What cannot be done directly cannot be done indirectly and any impost by the delegated authority without any legislative support, does not receive legal sanction even if it is sought to be protected under any deceptive label. It is unnecessary to refer to the several decisions on this aspect, but, we shall refer to a decision of the Supreme Court which is almost on all fours with the case at hand. That decision is reported in *A. Venkata Subba Rao Vs. State of Andhra Pradesh*, . In that case, the Appellants, owners or lessees of rice mills, were carrying on business, subject to the provisions of the Food grains Procurement and Licensing Orders. Under these orders, they were entitled to sell the stocks with them at the prices fixed under the Price Control Order and prevailing on the date of the sale. The prices at which the Appellant could sell rice, were enhanced on three occasions/ July 1947, December 1947 and November, 1948 and, on each occasion, they were directed to submit statements regarding the stocks of paddy and rice held by them on the day just previous to that on which the increased prices were to come into effect and they were directed to pay as a "surcharge" the amount representing that increase on the stocks held by them. Instructions were issued to the Collectors and revenue officials to ascertain the quantity of rice and paddy

lying with procuring agents as also wholesalers at the end of the day's transactions on July 26th 1947 i.e., the stock remaining unsold which had been obtained by them at prices prevailing before the enhancement of price which was to have effect from the next day and required them to pay over to the Government as "a surcharge" the enhanced prices at which they were permitted to sell after that date. Under the impugned orders in those cases the difference between the old and the new prices was directed to be collected as "surcharge". The Supreme Court held that this demand was in the nature of tax, that there was no legal bar for these demands and "they were imposed compulsorily by the executive and are sought to be collected by the State by the exercise inter alia of coercive statutory powers, though these latter are vested in Government for very different purposes". The Supreme Court accepted with approval the decision of the Chancery Division in *The Attorney General v. Wilts United Dairies Ltd.* 1921 (1) C.W.N. 252. Where the facts and the decision are stated thus:

The information alleged that the Defendants were liable to pay to His Majesty the sum of 150,271 under five agreements made in April and May 1919, whereby the Defendants contracted with the Food Controller that, in consideration of the grant to the Defendants of licences to purchase milk in Cornwall, Devon, Dorset, and Somerset for the purpose of their business in Wiltshire, they would pay to the Food Controller 2 d. per imperial gallon of milk so purchased. The Defendants refused to pay on the ground that the imposition of 2 d. a gallon was a tax or charge on the subject/without any legal authority.

THE COURT (Bankes, Scutcheon and Atkin L.JJ.) allowed the appeal. They held that the imposition of the 2 d. a gallon was a levying of money for or to the use of the Crown within the Bill of Rights for which the Food controller had no statutory authority. They accordingly gave judgment for the Defendants.

On appeal, the House of Lords dismissed the appeal thus:

THE HOUSE (Lord Buckmaster, Lord Atkinson, Lord Sumner Lord Wrenbury and Lord Carson) without calling on counsel for the Respondents, dismissed the appeal.

LORD BUCKMASTER said that neither of the sources from which alone the Food Controller could derive his powers, namely, the new Ministers and Secretaries Act, 1916, and the Defence of the Realm Regulations, though they gave him drastic powers in regard to the regulation and control of the milk supply, enabled him to levy any sum of money on any of His Majesty's subjects. The imposition of the charge of 2 d. for the licence to trade could only be properly described as a tax, which could not be levied except under statutory authority.

14. Similarly, in AIR 1975 152 (SC) where the levy of administrative surcharge on export of tapioca sought to be imposed under a scheme under the Essential Commodities Act, was challenged, the Supreme Court held thus:

It merely provided for levying of administrative surcharge for the export of

tapioca and its products at the specified rates which varied from time to time. In substance and in effect it was an impost on export which indisputably the State had no power to do.

15. Apart from the fact that the Kerala Essential Articles Control Act itself does not provide for the imposition of any tax, it has not delegated to any authority including the Government, expressly or by any necessary implication any power to issue any "notified order" to impose any tax on electrical energy.

16. The principles of delegation in a taxing law seem to be well settled by a catena of decisions of the Supreme Court. It is sufficient to cite only a few of them.

17. In *Pandit Banarsi Das Bhanot Vs. The State of Madhya Pradesh and Others*, , it was held thus:

Now, the authorities are clear that it is not unconstitutional for the legislature to leave it to the executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be laid, the rates at which it is to be charged in respect of different classes of goods, and the like.

18. In *Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc.*, , it was stated thus:

No tax can be imposed by any byelaw or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule making authority. A rule making authority has no plenary power. It has to act within the limits of the power granted to it.

19. A tax can be imposed only under the authority of law and Article 265 of the Constitution insists, "No tax shall be levied or collected except by authority of law". The surcharge is not sanctioned by law and is thus opposed to the constitutional mandate of Article 265.

20. It is, however contended by the State and the Board that the surcharge order only regulates the price of energy and the power to increase the price is comprehended in the concept of "regulation" conceded under the Act. The word "regulate" occurring in a similar enactment, the Madras Essential Articles Control and Requisitioning (Temporary powers) Act 29 of 1949, was construed by the Supreme Court in *Sri Venkata Seetaramanjaneya Rice and Oil Mills and Others Vs. State of Andhra Pradesh etc.*, . It was held thus:

The word "regulate" is wide enough to confer power on the Respondent to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices. The concept of fair prices to which

Section 3(1) expressly refers does not mean that the price once fixed must either remain stationary, or must be reduced in order to attract the power to regulate. The power to regulate can be exercised for ensuring the payment of a fair price, and the fixation of a fair price would inevitably depend upon a consideration of all relevant and economic factors which contribute to the determination of such a fair price. If the fair price indicated on a dispassionate consideration of all relevant factors turns out to be higher than the price fixed and prevailing, then the power to regulate the price must necessarily include the power to increase so as to make it fair. That is why we do not think Mr. Setalvad is right in Contending that even though the Respondent may have the power to regulate the price to which electrical energy should be supplied by it to the Appellants, it had no power to enhance the said price.

21. It is therefore, clear that the power to regulate includes the power to increase the tariff rate. What can be increased therefore is the price of electrical energy. But what is demanded is not the increased "price". The price of energy payable to the Board has not been increased under the impugned orders. It is the Electricity Board which generates energy. The Board is a body corporate having perpetual succession and common seal under the Electricity, Supply Act. It is the Board that supplies electricity upon such terms and conditions as the Board thinks fit; and the Board has the power to enhance the rates. The price of energy is payable to the Board. This price is not increased. The Board gets the same price which it was receiving even prior to the issuance of the impugned order for the energy, supplies by the Board. The impugned order thus does not regulate the price. When the price of energy is payable to the Board, and the demand for an additional amount is to be paid to the Government, the additional levy cannot be treated as part of the price payable to the authority generating and supplying the energy. Moreover, the Supreme Court in the decision in *Sri Venkata Seetaramanjaneya Rice and Oil Mills and Others Vs. State of Andhra Pradesh etc.*, states that the fixation of a price has to depend on a dispassionate consideration of all relevant and economic factors contributing to the determination of fair price. The impugned order does not show that the surcharge demanded is fixed with reference to any relevant economic factors requiring any increase of the price rate; on the other hand it shows that the surcharge is levied for an extraneous purpose, unconnected with the price structure to provide additional revenue to the State. The surcharge order of 1984 is thus not a regulation enhancing the tariff rate of electrical energy payable to the Board. The fact that the surcharge is collected along with the price of energy or the provision in the surcharge order that it shall not be lawful for the Board to supply energy for a price which does not include the surcharge does not convert the surcharge as a price? for supplying energy, for, they are only. enabling provisions for the smooth collection of the surcharge by the Board for and on behalf of the State Government.

22. It is significant to note that the State Government has power to impose a duty on electricity by appropriate legislative measures under entry 53, list 2 of

the Seventh Schedule. "Taxes on the consumption of sale of electricity". Acting within this legislative field, the State has imposed duty under the Kerala Electricity Duty Act, 1963. The authority to levy, tax on electricity is under that Act and not under the Kerala Essential Articles Control Act, 1986, which was enacted for an entirely different purpose, namely, to maintain regular supply of essential articles. The source to levy a duty under the guise of surcharge cannot therefore be found in the Essential Supplies Act.

23. It was then contended in defence that the surcharge can be supported under Section 22-B of the Indian Electricity Act. Section 22-B can be invoked only if the Government is of opinion "that it is necessary or expedient so to do, for maintaining the supply and securing the equitable distribution of energy". Apart from the fact, the impugned order does not state that the power has been exercised under this section, there is nothing to show that the Government at any time, formed any "opinion" as contemplated under this provision to invoke those powers. Moreover, this is not a provision which enables the Government to impose any tax on the consumers of electrical energy.

24. It was also argued that u/s 63 of the Electricity (Supply) Act, the State Government may make subventions to the Board and this surcharge is demanded to enable the Government to make subventions. Section 63 does not authorise the Government to raise its revenues from the consumers of electric energy to enable it to make subventions to the Board. u/s 63, there is no obligation on the Government to make any subventions and the grant depends "entirely on the bounty of the Government" vide *Kerala State Electricity Board Vs. S.N. Govinda Prabhu and Bros. and Others*, .

25. If the intention was that the Board should be benefitted by this surcharge, there was no necessity for the Government to collect the same and then make subvention to the Board. The argument seems to be too far fetched to require any consideration at all. It has to be mentioned that there is no defence taken and we think rightly too, that the surcharge demanded would be "fees". Of course, it is not pretended that any service is rendered by the Government for demanding this additional levy and none is contemplated under the Act for this purpose. When the generation and supply of electricity exclusively vest, in a statutory Corporation, there is no question of any service being rendered by the Government to the consumers entitling the Government to collect any amount as fees u/s 63 of the Electricity (Supply) Act.

26. The Petitioners contended that there is violation of Article 14, in that certain concessions or privileges are conferred on certain licencees of the Board. Different tariffs for high and low tension consumers and for different classes of consumers have been accepted as reasonable classification by the Supreme Court in *Kerala State Electricity Board Vs. S.N. Govinda Prabhu and Bros. and Others*, Classification of consumers for purposes of fixing the tariffs is contemplated by the Electricity (Supply) Act. There is no discrimination if there are varying degree of liability and the E.H.T. and H.T. consumers are treated

differently. This contention cannot succeed.

27. In the result, we declare that the Kerala State Electricity Supply (Kerala State Electricity Board and Licensees Areas) Surcharge Order, 1984, is ultra vires of the powers conferred under the Kerala Essential Articles Control Act, 1986, unconstitutional and void and thus unenforceable.

28. We, therefore quash the Kerala State Electricity Supply (Kerala State Electricity Board and Licensees Areas) Surcharge Order, 1984, and the levy and collection of surcharge on the strength of that order, and direct that the State Government and the Board shall not enforce the said order or collect any surcharge from the Petitioners and shall refund or adjust in their accounts, the amounts already collected under the said order. The original petitions are allowed to the above extent. The parties shall bear their costs.