

(1998) 02 BOM CK 0041
In the Bombay High Court
Case No : Writ Petition No. 63 of 1997

Dr. J.C. Almeida, IAS (Retd.)

APPELLANT

Vs

State of Goa and Another

RESPONDENT

Date of Decision : 12-02-1998

Acts Referred:

Constitution of India, 1950 — Article 226
Electricity (Supply) Act, 1948 — Section 49

Citation : AIR 1998 Bom 191

Hon'ble Judges : R.K. Batta, J; N.J. Pandya, J

Bench : Division Bench

Advocate : Norma Alvares, for the Appellant; V.B. Nadkarni, General, C.A. Ferreira, Additional Government Advocate, Milind Sathe, A.N.S. Nadkarni, Ravi Gandhi and P.A. Kamat, (for No. 2), for the Respondent

Final Decision : Dismissed

Judgement

Pandya, J.—Admit. The letter dated 19th February, 1997, written by the petitioner addressed to the Senior Judge of this Court was received by the office. It was placed before the concerned learned Judge and he along with his companion learned Judge passed an Order on 3rd March, 1997. Noting the fact that according to the said Communication the cost of electricity which would be Rs. 2.69 p. per unit as against the present rate of Rs. 0.95 p. per unit, which is substantially low because the State receives power from the Southern Grid at 0.95 p. and the Western Grid at 0.25 p. respectively, this wide difference would raise suspicion about the intention behind the power Purchase Agreement. The learned Judges therefore felt that the allegations contained in the letter were required to be gone into and therefore, it was converted into a Writ Petition. This set a chain of events in motion which during the pendency of the petition had attracted interveners represented by Ms. Norma Alvares. The petitioner had chosen to argue the matter in person.

2. The petitioner is a retired I.A.S. Officer and had occasion to serve the State in

various posts, including that of Chief Secretary of the erstwhile Union Territory of Goa, Daman and Diu. After retirement also, he had held many important positions.

3. In paragraph 2 of the said letter he has drawn attention to the fact that the proposed power plant is going to be naptha based. Naptha is known to be expensive and highly volatile. It is also noted that the fuel is required to be imported. This and other factors referred to in paragraph 2 led the petitioner to believe that as result of the entire exercise consumers of energy in Goa are going to be burdened with higher costs.

4. He has also referred to the consultants who were brought into the picture to evaluate the project. The name of the consultants is M/s. CRISIL, the full name being Credit Rating Information Services of India Limited, an advisory services group. As per the Report of this group the cost of energy is going to be somewhere at Rs. 2.69 p. per unit. Thereafter the letter refers to allotment of electricity energy to the extent of 380 MW as against which the State Electricity Department is found to be drawing 210 MW to 240 MW of power. From other sources also as recorded in the letter at page 2, power is available but Government has decided not to take it because the rates are likely to be Rs. 2.20 p. per unit. This had led the petitioner to believe that the power Purchase Agreement entailing higher cost per unit is likely to be for some personal benefit at the cost of the public. He also felt that the State of Goa is not short of energy, but transmission line and distribution system are to be strengthened.

5. Later on he refers to the fact that he is a consumer of energy and he is not in a position to afford any higher price for the cost of energy and therefore, had approached various authorities in the State Government to obtain the certified copy of the agreement and other related papers. He waited for five weeks, but did not receive any response. He therefore approached this Court by way of the aforesaid letter requesting it to intervene in the matter. In paragraph 5 he has specifically requested the Court to issue appropriate direction to the Government of Goa to make available to the petitioner the certified copies of the agreements and other related papers. The petitioner is right in pointing out that only on these documents being produced can it be found out as to whether the said Agreement is against the interest of the people of Goa or not.

6. It may be mentioned here that the Power Purchase Agreement and other supplementary documents are all produced on record. The copy of the Report of the CRISIL is also produced. In the course of this Judgment the agreement between the respondent No. 2, Company and the respondent No. 1, State, will hereinafter be referred to as "P.P.A." (Power Purchase Agreement). The respondent No. 2 shall be referred to as "supplier". So far as the intervenors are concerned, they being before the Court supporting the petitioner, only where necessary, reference, will be made to them. There is one more reason for adopting this course, because the petitioner having gone abroad and as it was found that he is not likely to come back till the month of February, 1998, in the

month of December, 1997, the learned advocate Mrs. Norma Alvares, appearing for the intervenors was requested to obtain necessary instructions and, if possible, to argue the case on behalf of the petitioner as well. We are happy to place on record with approval the approach of the said learned advocate and the case of the petitioner as also that of the intervenors has been put by her in the best possible manner that she could.

7. From the brief summary of the letter, the direction in which the enquiry was held during the pendency of the petition can well be understood. The affidavit-in-reply are on record and so are the rejoinder and the counter. Needless to say, so far as the petitioner is concerned, he had the handicap of record not being available and therefore, he had chosen to rely on answers given to various Legislative Questions put during the session of the Legislative Assembly from time-to-time by the respective Minister of the respondent No. 1. The State of Goa, the respondent No. 1 and the supplier, respondent No. 2, have come out with all the details that they had and to that extent, it must be said that all the parties to the litigation have approached the problem not in an adversarial manner, but in true public spirit of putting everything before the Court so that on enquiry it would be found out whether the avowed beneficial purpose for which the P.P.A. was entered into is made out or not.

8. It is an accepted position that the State of Goa has no generating capacity of its own. Having acquired Statehood, like all other States of the Union, it too would like to establish its identity in keeping with the current trend of advancing in the field of industry, trade and commerce. Otherwise also for its population all over its Territory, the State of Goa in keeping with the national policy is keen to bring electricity in the farthest corner. Apparently, from the record the State has succeeded in taking it to the farthest corner, but in the process has over-stretched the distribution system. The State of Goa therefore, has a well-thought out plan of strengthening the system and boosting it wherever necessary as per the documents produced in the course of final hearing. The farthest Taluka of Pernem towards the North, Canacona towards the South and Sanguem and Ponda towards the East will be well-attended to on this score as per the power Map of Goa produced on the penultimate day of the hearing.

9. In this backward, if the State is taking steps towards self-reliance in the field of generation of electricity, its aspiration could be well understood. There were seven bidders including respondent No. 2 and no one has thrown challenge to the award of tender in favour of respondent No. 2.

10. Merely because the present arrangement may turn out to be costlier on comparison as per the petitioner and without examining the merits or demerits and just going by the figures as set out in the said letter and taking the figure at its face value, he asserts that the source of the southern grid and western grid are sufficient. So far as the policy decision of going in for generation plant by the State is concerned, in our opinion the Court will not evaluate the same. In public Interest litigation also, in respect of adversarial litigation as well, it is well-

established that a matter of policy is not to be examined by the Court.

11. While laying down the policy, if extraneous considerations creep in and in the process it can be established from the record that in what purports to be an implementation of the policy, the authorities are either violating the norms or are not keeping the interest of the State in mind, the Court to that limited extent may look into it.

12. In the aforesaid background, in the course of final hearing, the learned advocates appearing on both sides had concentrated on the relative benefits of the implementation of the policy as borne out by the P.P.A. and other related documents, also, at the same time, commenting on the likely increase in the cost on account of various factors which will be stated hereafter as also the consumers of electricity in the entire State of Goa being made to pay higher charges only because a section of the Territory is going to benefit out of it. First we will refer to the factors relating to the likely increase in the charges. Thereafter, the second part of the submission as to the part of the Territory of Goa being benefitted will be dealt with.

13. Firstly, so far as the factors leading to the likely increase are concerned, a reference was made for naptha, the prime source of energy for generating steam, which in turn will run the turbine and with the help of that prime mover, electricity will be generated. As it so happens, the CRISIL as well as the supplier and the State as well have all borne in mind the possibility of increase in the market price of naptha. Simultaneously, on the night of 16th/17th January, 1998, the Central Government has announced reduction in the price of naptha by 10%, which none could have imagined, because when the bidding documents were floated, tenders invited, CRISIL Report prepared and P.P.A. was being drafted, the country was under administered price regime for petroleum products. During the past six months there have been a lot many changes in this field and the price of petroleum products is allowed to float and fluctuate with the oil prices. This would mean that the open market forces are allowed to operate in this field as well. The direct impact of it as stated above, is that the naptha prices have been decreased by the Central Government. This point has been referred to though it was not before the learned advocates at the time when the hearing concluded on 13th January, 1998. All along everyone was under an impression that the prices always have a tendency of going up. The near impossible and remote possibility of reduction in the price having taken place, in fact, cannot be ignored either.

14. None-the-less, so far as the purchase price is concerned, it is an admitted position as per the P.P.A. that the respondent No. 1 is going to pay Rs. 2.29 p. or thereabout per unit. There are various clauses regulating the same. Yet their impact on different consumers as set out in the documents that are placed before us clearly indicate as per pages 328 to 338 that there will be an increase of Rs. 0.16 p. on an average. In supplementary affidavit dated 16th September, 1997, filed by the Chief Electrical Engineer, Government of Goa, it is affirmed in

para 6 as under :

"As a result of adopting the Combined Cycle Process, the average purchase price which the Open Cycle worked out to Rs. 2.05 would now be Rs. 2.02. In fact, there would be a further reduction of 2 paise & accordingly, the average purchase price would now be Rs. 2/- as against Rs. 2.03 in case of Open Cycle. It may be clarified that the average rate has been worked out as the average for the entire period of Agreement viz. fifteen years."

The rates at which Gandhar and Kakrapar have offered to supply electricity are Rs. 3.18 per unit and Rs. 2.84 per unit, respectively. In para 7, of the said affidavit it is assured that the State Government, as far as practicable, will not enhance the tariff payable by a domestic consumer more than 10 to 15% annually. The domestic tariff rates in Goa are already lowest in India, except for Gujarat, as can be seen from the Statement at page 31 of the record.

15. Different rates are prescribed for different domestic consumers-depending upon the consumption of electrical energy. As expected, small consumers not exceeding consumption of 50 units per month will be charged less and those who are consuming higher units, slabwise, will be charged more. The aforesaid figure of Rs. 1.10 p. as against the existing figure of Rs. 0.94 is therefore an average which has been worked out and on that basis the said difference of Rs. 0.16 p. per unit has been quoted. This marginal increase in domestic tariff rate would therefore, take care of the interest of the domestic consumer in the circumstances. This, in fact, is going to be the impact on the domestic consumer. The petitioner is a domestic consumer. So far as the intervenors are concerned, they too are of the same category.

16. As this juncture, the statutory provisions may be referred to The Electricity (Supply) Act, 1948, hereinafter referred to as "Supply Act", provides in Section 49 that there may be uniform rates of tariffs and in fixing those rates factors that are to be considered are set out in Sub-section (2). In Sub-section (3) however, it is left open to the supplier of the electrical energy, which in the instant case for the said statutory purpose will be the respondent No. 1, State, if it considers necessary or expedient, to fix different tariffs having regard to the geographical position of any area, the nature of supply and the purpose for which the supply is required and other relevant factors, to fix different tariffs for the supply of energy.

17. That is exactly the position available throughout the State even under the present dispensation. There are not only different rates prescribed for domestic consumers as a cause dependent upon their monthly consumption of energy, there is a marked difference between domestic consumers on one hand and industrial consumers on the other. Again, amongst the latter category dependent upon the sanctioned load and the actual load consumed and dependent again upon the voltage at which it is supplied, there are different tariffs.

18. So far as Section 49 of the Supply Act is concerned, its vires is not under challenge before us. However, it would be apposite at this stage to refer to the

decision rendered in the case of Maharashtra State Electricity Board Vs. Kalyan Borough Municipality and Another, , cited on behalf of the respondent No. 1, State, by the learned Advocate General. The vires of Section 49 of the Supply Act was under challenge and the challenge has failed. The vires has been upheld. It was challenged on the ground that the levy, either at uniform rate or at different rate, found to have been sufficiently restricted and guidelines having been set out and there being provisions required to be complied with, the provisions of Section 49 of the Supply Act were found to be quite proper.

19. In this background, the challenge largely based on the apprehension of great increase in the price of electricity supply to domestic consumers, as expressed in the letter by the petitioner has no basis and even if it had some basis, looking to the said statutory provision, it cannot be accepted. In fact, it has been found that the apprehension is totally unfounded.

20. Incidentally, it may be mentioned here that this very petitioner in the course of his correspondence with the respondent No. 2, supplier, had written on 5th May, 1997, a letter at page 160 annexed to the affidavit of the respondent No. 2. It makes interesting reading. Reiterating his stand as set out in the first letter treated as a petition by this Court, which is dated 19th February, 1997, in the end part of paragraph concluding at page 160, he says as under:-

"I have no objection if the Government gives an assurance to the High Court that the power generated by the plant will be supplied only to high tension consumers and its energy sale rate will be charged only to them and not to domestic, commercial consumers and SSI units."

21. The aforesaid averments in the letter, in our opinion to a great extent knocks out the very basis of the petitioner's letter which is largely based on concern for the entire territory of Goa. The activity of electrical generation or even without it, the activity of distribution of electrical energy obtained through outside source by very nature, save for the provisions of Section 49 of the said Supply Act, in relation to fixation of tariff, cannot be dealt with in the manner suggested by the petitioner in the aforesaid quotation.

22. As it happens in the instant case and the petitioner is well aware of it, the Western source is found to be cheaper than the Southern source. This is largely due to the fact that the electricity generated in the Western grid system has the advantage of Hydel Power Generation, while the Southern grid has the disadvantage of Thermal Power System. In between the two systems the power generated by Hydel source is always cheaper. None-the-less, if the aforesaid logic of the petitioner is to be accepted, the entire area of the State will have to be marked out in rates and proportion to the power received from these two sources for charging electricity tariffs at rates at which they are received from the different grids, or they will have to be charged at an average refund rate, no doubt maintaining the distinction of different classes of consumers as is being done today. Almost identical question has arisen before the learned Judges of the

Allahabad High Court in the case of Modi Industries Limited Vs. U.P. State Electricity Board, Lucknow and Others, . The State of Goa, as noted above, draws power from two different sources. The case before the Allahabad High Court indicated that energy was procured from four different sources. An occasion arose for coal prices variation adjustment, fuel price variation adjustment or fuel surcharge in respect of supply.

23. The State Electricity Board of Uttar Pradesh had decided to spread out the charges to be levied on all the consumers making out a case that the surcharge related to 60% of the supply received entailing the same, the levy of surcharge on all consumers is bad and it should be restricted to 60% of the energy supplied. The attempt was that that area of the territory covered by the Electricity Board for supplying energy where power from the source entailing the surcharge is being felt, alone should bear the additional surcharge. Repelling the contention, the learned Judges held that in an integrated grid system it is not possible to find out as to from what source the energy supplied to a particular consumer was procured by the Board. It was found to be impossible to identify for the relevant period as to which was that energy which will have to be charged additionally by surcharge of 60% and therefore, the prayer on the aforesaid line was rejected.

24. The learned Judges also held that the levy of surcharge on consumers of energy by the Electricity Board and the exercise of fixation of rates are all in the domain of the executive and the Court cannot enter into minor scrutiny, nor would it enter into disputed questions of fact. These observations are found to be at paragraphs 22 and 26 of the Judgment which has been cited on behalf of the respondent No. 1 by the learned Advocate General. We entirely agree with the same.

25. All that is going to happen under the P.P.A. is that the State of Goa, which for the present has only two sources of supply, the Western grid and the Southern grid, will have a small power unit of its own, no doubt of a private ownership of the supplier, the respondent No. 2. The fact remains that the power generated by it is going to come into the grid.

As this aspect as to the supply being made into the common grid is another head of submission, it will be discussed at length hereafter.

26. The net result therefore is that apprehension with regard to the inordinate increase or exorbitant increase is not made out.

27. Coming to the said head of submission as to the fact of the power supplied by the unit being made into the common grid is concerned, all throughout it was sought to be made out by the " petitioner and intervenors that it is meant entirely for the area of Vascodagama and Mormugao. To understand this submission reference may be made to the Power Map marked as I shown. It being a coastal State, major part of the territory of the State and most of its talukas are all along the coast. The State is therefore having a longer length and

a narrower breadth. The point at which the power is received from the aforesaid two grids is situated in the town of Ponda. From there it is being distributed at present throughout the State. The power plant of the respondent No. 2 is to come up at a place called Sancoale, To the East of Sancoale is Verna and to the West of Sancoale is Mormugao.

28. The submission made on behalf of the petitioner was that the plant in question is therefore meant exclusively for this purpose, namely to supply to the consumers of Sancoale-Vasco da Gama-Mormugao area. It may be noted here that this submission is not made lightly. There is a gazetted Notification at pages 290 to 292 in relation to the power plant of the respondent No. 2 u/s 29 of the Supply Act. While referring to the benefits accruing from the scheme at paragraph 8 at page 290, on the following page 292, it has been stated in no uncertain terms in Clauses (ii) and (iii), that the proposed power plant will be a reliable source of power to Mormugao Taluka and will therefore, accelerate the Industrial Development of the region. In Clause (iii) again it has been indicated that the location of the power plant is at the load centre of Mormugao Taluka, which will improve voltage profile and reliability of the power system.

29. This Notification as well as the CRISIL Report at page 7 point No. 3. 12 is relied on to further make out a case that this power plant will be functioning in isolation of the existing grid. The CRISIL Report given in the month of May, 1996, in the said paragraph 3.12 at page 7, no doubt refers to the fact that the different characteristics of the power coming from the existing source in terms of voltage, frequency, etc. makes it impossible to synchronize the power from the proposed source. The discussion of the experts of the CRISIL with the Department of Electricity officials led them to believe that it would be difficult to synchronize the two sources.

30. However, in the course of the hearing it has been categorically assured by the respondents No. 1 and 2 both, that synchronization is going to be a rule. The Chief Electrical Engineer in his note dated 16th October, 1997 on "Islanding and Synchronization of the proposed power plant at Sancoale with the grid", has stated that:

"The islanding will be carried out when there are grid disturbances i.e. when frequency is very low and/or collapse of the regional/neighboring state grid. (In fact we had grid disturbances for eight different days totalling 67 hrs. 30 minutes during the year 1995-96)."

No doubt, for the safety of the power plant which is an independent generating unit by itself, provision for cutting it off from the grid and islanding it has been made for the safety of the plant.

31. There are provisions to that effect in the P.P.A. about which there is no dispute. In making out a case of synchronization being a rule, Power Flow Diagram marked as III was submitted which clearly indicates that in the existing 33/11KV supply system at Sancoale, the electricity generated will be loaded into

the grid. There is also an existing supply system emanating from Ponda of the aforesaid capacity and voltage touching Kundaim - Madkaim, which is proposed, coming upto Verna, passing through Sancoale, Vasco da Gama going upto Mormugao Port. The 110/33 KV supply system from the southern grid goes upto Verna as 110/33 KV supply system and there again it merges with the aforesaid 33/11 KV supply system at Verna. The isolation, if necessary, can be from the 110/33 KV supply system of the southern grid and in case of emergency Verna town to Mormugao Sancoale Power Plant will remain isolated as provided in the P.P.A. and envisaged as an emergency measure.

32. The concept of synchronization and islanding may now be commented upon. Synchronization is necessarily of different sources of power supply into one so that the power received from different sources can be fed into the grid for being taken to the end consumers. Islanding, would necessarily mean that generation will continue, but instead of being fed into the common grid making use of the existing supply system, after cutting it off from the grid the supply generated will be made available to a limited area served by the cut off portion of the grid. In the instant case as stated above, as per Power Flow Diagram III, this will be down towards Sancoale from verna upto Mormugao Port area. The aforesaid apprehension based on the CRISIL Report of the year 1996 will therefore, be of no avail. Things have charged considerably as per the details supplied alongwith Power Map of Goa marked as II with regard to the improvement and strengthening of the supply system and providing boosters wherever necessary throughout the State. Though the State has got only 11 talukas, Sub-stations are proposed in 32 different places all over the State, new transformers are being put and generally the supply distribution system is being strengthened. On this score also therefore, in our opinion, the petitioner has not succeeded in making out a case.

33. Much was said about the requirement of water which was noted to be 4 MLD per day. By any yardstick, this will be an enormous quantity of water. It being a steam based unit which was" initially going to be open cycle which has been combined with closed cycle as well, the requirement of water can well be understood. However, if there is a provision in the P.P.A. for the aforesaid quantity of water, the petitioner and more particularly, the intervenors, were alarmed, again, on closer scrutiny it will be ground that there is no cause for alarm at all. The daily working details as projected by the respondent No. 2 would clearly indicate that if at all there be any need for replenishment of water everyday, it will be within the range of 10 to 15% only because after treatment and cooling water discharged will be recycled continuously at the rate of 1 MLD per hour (45 m³/hr. = 1 MLD). This enormous amount of water is required because once the water is stored to the capacity of 8000 cu. mts. as per the P.P.A. and for carrying it out effectively the storage capacity of 16 cu. mts. at any given moment in the entire plant for cooling purposes as well as for generating steam, for every hour at least 78 cu mts. will be used for the latter and 4589 cu. mts. per hour for the former. The total quantity of water in the plant at any

moment therefore, will be 4,667 cu. mts. on hourly basis. An impression sought to be created that everyday the plant will have consumed the aforesaid enormous quantity of water is therefore, totally out of hand. In any case, the consumption of water is incidental to the generation of electricity. The State having decided to go in for generation through a private party and that private party being opted for thermal plant for generating electricity use of water will be consequential and thus directly flowing from a policy decision. The Court will, therefore, not interfere with the same.

34. The learned advocate Mrs. Alvares referred to the fact that bid document floated in the year 1995 followed by subsequent negotiations resulting into eventual contract in January, 1997, the P.P.A. bring about qualitative change in the final agreement. At page 48 of the bid document the water was to be arranged by the bidder. As per the P.P.A., it is the State which has agreed to make it available. Not only that, but in the Force Majeure clause which is found at page 70 of the P.P.A. and the Clause to be found in the bid document, there is a marked change with reference to the availability of water. This will have a direct bearing as to deemed generation particularly with reference to water supply which is now made the responsibility of the Government of Goa, the respondent No. 1, and the State is made to pay unnecessarily. In our opinion, all these submissions will be of the nature of policy decisions and also calling into meticulous enquiry into the details. As stated above, this Court will not enter into the same.

35. Before concluding, we may note here that originally what was contemplated was a power project involving only rupees 100 crores and later on it was changed to rupees 200 crores and the actual capital outlay by the respondent No. 2 is going to be in the area of rupees 180 crores. If in this background on account of market forces, dictates of commercial requirements and providing for such huge financial outlay after negotiations the parties have finally bound themselves as per the P.P.A., apart from it being a matter of policy, in our opinion, it being a matter of commercial exigency, that too in connection with a specialized project like power project, all the aforesaid submissions, in our opinion, cannot be gone into by the Court.

36. Thus, when the matter is examined from the point of view of the eventual benefit of the people of Goa either from the tariff point of view or from the point of view of improvement in the quality of power being made available to the consumers, in view of the aforesaid position of synchronization and for the reasons stated above, we do not find any reason to interfere with the arrangement arrived at between respondent No. 1 and respondent No. 2. There is no scope for grant of any relief whatsoever. This is not to say that the submissions made before us were lightly made and were in the category of an irresponsible and unwarranted exercise of the right of a public spirited citizen to approach the Court, that is now well-recognized in India. However, the apprehension made on different scores on scrutiny, having been found as not

made out, the result will be the dismissal of the petition without any costs being imposed on the losing party. In other words, parties are left to bear their own costs.