

(2002) 12 GAU CK 0002
In the Gauhati High Court
Case No : Writ Petition (C) . No. 3116 of 2001

Ganeshka Kanoi Tea Co. (P) Ltd.

APPELLANT

Vs

Assam State Electricity Board and Others

RESPONDENT

Date of Decision : 18-12-2002

Acts Referred:

Electricity (Supply) Act, 1948 — Section 49, 79, 79A

Citation : (2003) 3 GLR 233 : (2003) 2 GLT 11

Hon'ble Judges : D. Biswas, J

Bench : Single Bench

Advocate : S.K. Kejriwal, S. Kejriwal, B.P. Borah, J. Borah, A.K. Saraf, S. Saikia, D. Baruah, S.K. Agarwal, S.P. Roy, C. Baruah, N.N. Jha, B. Das, B.R. Das, M. Hazarika, I. Gohain, Ahsan, A. Ajitsaria, S.S. Dey, M. Nath, C. Bhattacharjee, G. Uzir and S.K. Medhi, for the Appellant; B.D. Das, SC., for the Respondent

Judgement

D. Biswas, J.—The writ petitions listed above pose identical questions. Hence, all the petitions are disposed of by this common judgment.

2. The petitioners are existing consumers of power supplied by the Assam State Electricity Board, hereinafter referred to as the "Board". The writ petitioners have been served with notices of additional demand for payment of enhanced load security in pursuance of the amendment of Clause 7(c) of the Terms and Conditions of Supply, 1998 carried out by Resolution No. 9 dated 29.7.2000. The amendment was circulated by the Chief Engineer (Commercial) by letter dated 16.8.2000 which provide for deposit of an amount in cash/bank draft/bank guarantee against connected load as load security by the prospective and existing customers raised as per revised schedule of tariff. The petitioners, aggrieved by the demand, have filed the petitions challenging the amendment and the additional bills raised on such amendment.

3. The grounds of challenge available in the writ petitions and the additional affidavits are summarized below :-

(a) The amendment carried out by the Resolution No. 9 dated 29.7.2000 has not been notified in the Official Gazette as provided u/s 79 of the Electricity (Supply) Act, 1948 ;

(b) The Resolution No. 9 dated 29.7.2000 was not laid before the State Assembly as per provisions of Section 79(A) of the Electricity (Supply) Act, 1948 ;

(c) The provisions of Clause 27(ii) of the Terms and Conditions of Supply 1988 and Clause 28(ii) of the Terms and Conditions of Supply, 1998 which provide for prior publication of the proposed amendment have not been complied with before the amendment was carried out;

(d) The petitioners, being existing consumers, not having applied for any upward change in their connected load are not liable to pay any additional/enhanced load security ;

(e) The bills are inconsistent with the provisions of Clause 7(c)(iii), as amended, insofar they relate to mode and rate of payment.

4. With regard to the objection raised about the publication of the notification in the Official Gazette, we may refer to the provisions in Section 79 of the Electricity (Supply) Act, 1948. The Section provides -"The Board may, by notification in the Official Gazette, make regulations not inconsistent with this Act and the rules made thereunder to provide for all or any or the following matters, namely."

It is, therefore, clear that any regulation made or Rules framed by the Board should not only be consistent with the provisions of Act, but will also have to be notified in the Official Gazette. Mr. B.D. Das, learned Standing Counsel for the Board, in his argument submitted that a notification was published in the issue dated 22.8.2000 of the English Daily "Assam Tribune" and produced a copy thereof. Mr. Kejriwal, learned counsel for the petitioners submitted that the aforesaid publication of the notice is not in compliance with the provisions of Section 79 and therefore, the impugned amendment cannot be invoked to levy additional load security. The notification in question appears to be a notice of the amendment already carried out with certain relaxation with regard to the mode of payment. The first part of the notice also suggest that it does not meet the requirement of Section 79. It reads as follows :-

"In response to the difficulty expressed by both L.T. (Low Tension) H.T. (High Tension) consumers to deposit Load Security introduced earlier, Load Security Clause of the Terms & Conditions of Supply, ASEB has been amended by the Board. This amendment will take immediate effect."

The above excerpt clearly indicate that it was an information given to the consumer about the amendment already made and cannot be treated as a notification as provided in Section 79 of the Act of 1948.

In this connection, the decision in Padma Dhar Deka v. A.S.E.B and Ors. reported

in 2000 (2) GLT 2 appears to be of immense significance. The Learned Single Judge quashed the amendments made in 1992 and 1995 on the ground of failure of the Board to notify the aforesaid amendment in the Official Gazette. Argument was advanced that the Board does not have any Official Gazette and, as such, the question of publication in the Official Gazette does not arise. The learned Single Judge overruled the contention on the ground that the Official Gazette as defined in the General Clauses Act means the Official Gazette of India or Official Gazette of the State. The Learned Single further observed -

"The power of making regulations conferred upon the Board u/s 79 of the Act, 1948 is in the nature of delegated legislation. The power to make regulations cannot be treated at par with an administrative act. Certain modes/methods have been prescribed and that also by amendment of the section and if it is not adhered to the rule will not be deemed to be rules in the eye of law. Delegated legislations are made by virtue of powers conferred by the statute and if certain conditions are imposed by the statute, it must be adhered to. No compliance with the requirements of the statute shall invalidate such a rule."

On appeal (Writ Appeal No. 148/2000) the Division Bench modified the Judgment of the Learned Single Judge with the observation that the amendments made in 1992 and 1995 will take effect from the date of their publication. This decision lead to the conclusion that the amendments made in 2000 will have to be laid before the State Assembly and published in the Official Gazette, i.e., the Official Gazette of the State Government.

5. Mr. Kejriwal learned Counsel submitted that the Resolution No. 9 dated 29.7.2000 by which the amendment has been made was not laid before the State Legislature as per provisions of Section 79(A) of the Act of 1948 and hence, in his opinion, the amendment cannot have statutory force. Mr. B.D. Das, learned Counsel for the Board in his oral as well as written argument did not make any mention of the aforesaid omission on the part of the Board. There is nothing on record to show that the said notification was laid before the State Legislature. Section 79(A) provides that every Rule made by the State Government u/s 78 and every Regulation made by the Board u/s 79 shall be laid, as soon as may be, before the State Legislature. Records do not show that the amendments of 2000 was laid before the State Legislature. Therefore, the impugned amendment for not having been laid before the State Legislature suffers from serious legal infirmity. In *Atlas Cycle Industries Ltd. v. State of Haryana* (1979) 2 SCC 196 : AIR 1979 SC 1149 it was held by the Apex Court the requirements of laying every order issued under sub-para (3) of Para 16 of the Sixth Schedule to the Constitution is mandatory as the State Legislature has been given the powers either to approve or to reject the same. This logic is also applicable in the instant case because the provision in Section 79(A) of the Electricity (Supply) Act, 1948 cannot be construed as an empty formality. Discretion is made available by this provision with the State Legislature either to approve or to reject the amendments sought to be made by the Board.

6. With regard to prior publication of the proposed amendment, Mr. Kejriwal highlighted the provisions of Clause 27(ii) Of the Terms and Conditions of Supply 1988 and Clause 28(ii) of the Terms and Conditions of Supply, 1998 and submitted that for want of prior publication, the amendment made in 2000 cannot be enforced. Shri Kejriwal also submitted that the aforesaid clauses provide an opportunity of hearing to the consumer likely to be affected adversely and, the same not having been provided, is violative of the provisions of Section 23 of the General Clauses Act and the principles of natural justice.

The respondent Board could not show that the draft amendment was published prior to the date of resolution adopted to amend Terms and Conditions of Supply. Clause 27(ii) of the Terms and Conditions of Supply 1988 reads as follows :-

"27. (ii) The Board reserves the right to amend, subtract from or add to any of the above terms and conditions at any time. Provided that prior notice of not less than 30 days shall be given for amendment subtraction and addition to these terms and conditions of supply,"

Clause 28(ii) of the Terms and Conditions of Supply, 1998 reads as follows :-

"28. (ii) The Board reserves the right at any time to amend, subtract from or add to any of the above terms and conditions of supply and to revise the schedule of tariff with prior notification."

The provisions of the terms and conditions of supply of 1988 and 1998 are statutory having been made under provisions of Section 49(0 of the Electricity (Supply) Act, 1948. Therefore, there is violation of the aforesaid provisions by the Board which failed to publish the proposed amendment before hand. Where a power is given to do a thing in a certain way, the thing must be done in that way or not at all. In the instance case, this rule of law has not been adhered to while the amendment was carried out.

The decision in Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others, is relevant to the above issue.

7. The next question comes for consideration is whether the existing consumer not having applied for upward change in their connected load are liable to pay any additional security on revision of the tariff.

The provisions in Clause 28 of the Terms and Condition Supply, 1988 read follows :-

"28. No security deposit shall be realized from the existing consumer till their connected load remains same."

By the impugned amendment of 2000, the existing consumers have been made for payment of additional load security deposit whose security deposit falls short 3/2 times of the average bill amount during a calendar year. This provision is in complete negation of the provisions of Clause 28 quoted above. The provisions in Clause 28 clearly bars realization of any security deposit from the existing

consumer till their connected load remains same. Additional load security, therefore, can be levied on the existing consumer when their connected load capacity is increased and not otherwise. Clause 28 is still in force since the amendment made in 2000, by which this Clause has been deleted, is yet to be in force.

8. The last ground of challenge is that the bills raised are inconsistent with the provisions of Section 7(c)(iii) so far they relate to the mode of payment. To appreciate this contention, we may refer to the provisions in Clause 7(c)(i) wherein the existing consumer have been allowed to deposit the load security amount in cash/bank draft/bank guarantee. Clause 7(c)(iii) render the existing consumer liable for additional load security only when the security deposit falls short of 2/3 times of the average bill amount during the calendar year. The impugned notice issued to the writ petitioner in W.P.(C) No. 3116/ 2000 clearly shows that there is a departure from the prescribed mode of payment. In the notice (annexure-E), the petitioner has been asked to pay Rs. 1 lakh by local cheque/bank draft ; 75% of the balance amount by local cheque/bank draft and remaining 25% by bank guarantee. Apparently, the mode of payment permitted in the notice of demand is contrary to the provisions of Clause 7(c)(i) of the amended provisions which provide for deposit in cash or by bank draft or bank guarantee. The same defects are also noticeable in the notices issued to other writ petitioners. The learned Counsel for the Board could not explain this inconsistency between the amended provisions and the demand notice. That apart, the demand is also inconsistent with the provisions of Clause 7(c)(iii).

9. Mr. B.D. Das learned Counsel for the respondent Board referring to a Judgment delivered by a Learned Single Judge in a batch of writ petitions, W.P. (C) No. 788 of 2001 and other similar petitions, disposed of on 2.5.2002, argued that the amendment dated 29.7.2000 was challenged in that petition and the learned Single Judge after hearing the parties and relying upon the decision of the Apex Court in Ferro Alloys Corpn. Ltd. Vs. A.P. State Electricity Board and another, held that the Board have the powers to demand security deposit and can demand three times of the probable monthly current charges and dismissed the writ petitions filed seeking identical relief. Eventually the writ petitions were dismissed meaning thereby that the impugned notification dated 29.7.2000 is legal and valid. The judgment in this petition (W.P.(C) No. 788/2000) was delivered on 2.5.2002, whereas the Division Bench disposed of the Writ Appeal No. 149/2000 on 9.2.2001. Obviously, the Judgment of the Division Bench was not brought to the notice of the Learned Single Judge. In view of the aforesaid decision of the learned Single Judge, the question relating to the legality and validity of the Amendment of 2000 (notification dated 29.7.2000) cannot be reopened by this Court. This Court is of the opinion that the Amendment of 2000 cannot be given effect to unless it is laid before the State Legislature and published in the Official Gazette. The learned Single Judge in W.P.(C) No. 788 of 2000 refused relief to the similarly situated persons. It is, therefore, desirable that the matter has to be placed before a larger Bench for adjudication.

10. Hence, the Registry is directed to place the matter before the Hon''ble Chief Justice for appropriate orders.