

(1971) 08 KL CK 0005

In the High Court Of Kerala

Case No : O.P. No's. 1288, 1683, 2724 and 2827 of 1970

Indian Aluminum Co. Ltd. and Others

APPELLANT

Vs

Kerala State Electricity Board and Others

RESPONDENT

Date of Decision : 19-08-1971

Acts Referred:

Constitution of India, 1950 — Article 19(1)

Electricity (Supply) Act, 1948 — Section 49, 49(1), 49(3), 49(4), 57

Citation : AIR 1972 Ker 206

Hon'ble Judges : T.C. Raghavan, Acting C.J.; V.P. Gopalan Nambiyar, J

Bench : Division Bench

Advocate : Joseph, Kurien, Menon and Pai, for the Appellant; V. Narayana Menon and A.N. Kuttan and Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Gopalan Nambiyar, J.—These writ petitions challenge the validity of the action of the Kerala State Electricity Board in revising tariffs for the supply of electricity to the prejudice of the petitioner and contrary to certain agreements made with them. Arguments were advanced in O. P. No. 2827 of 1970 which, was treated as the main writ petition; and Counsel in the other writ petitions associated themselves with the arguments thus advanced. Such supplemental arguments as were advanced by them, did not add materially to the contentions urged in O. P. No. 2827 of 1970. We shall therefore turn to the facts in O. P. No. 2827 of 1970.

O. P. No. 2827/1970,

2. The petitioner in this writ petition is the Indian Aluminium Co. Ltd., having its registered office in Calcutta, in 1940 it commenced part of its business in the then State of Travancore. It is alleged that the then State of Travancore was keen in getting industries established in the State and therefore afforded the petitioner various amenities including the supply of electrical energy at reasonable rates for a long period of time, and that the petitioner-company set up its smelting factory in a Alupuram near Alwaye, on account of these concessions offered, despite its

having had other attractive offers at the relevant time. On 30-7-1943 an agreement was concluded between the petitioner-company and the then Travancore State. A copy of this agreement as subsequently amended and modified from time to time, has been produced by the petitioner as Ex. P-I. The first agreement concluded in 1941, was for a term of 34 years, with a right in the Company for an extension for a further twenty years. Clause 4 of the agreement provided for the rates at which the electric power supplied by the Government to the company had to be paid for. Sub-clause (d) of the said clause, in so far as is material provided:

"The rates provided for in clause 4 (.....) shall be deemed to include any surcharge or other similar impositions now or hereafter to be imposed on consumers of Electricity in Travancore-Cochin by or in consequence of any present or future Legislation of the Government which may be or come into force during the continuance of the (.....),1 Agreement or any renewal or extended period thereof and accordingly the (.....) rates hereinafter provided for shall not be affected by any such legislation or any alteration in rates for the supply of electricity effected pursuant thereto".

On 16-8-1955 a supplemental agreement was entered into between the petitioner-company and the Government of the Travancore-Cochin State (which had come into being by then), a copy of which is Ext. R-I filed by the Board. It is unnecessary to notice the variations effected by this supplemental agreement in regard to the rates of supply and other matters, By clause II of this agreement. Clause 4 of the principal agreement was deleted and a new clause 4 was substituted. Clause III of the supplemental agreement stated:--

"III. The rates provided for in Clause 4 of the Principal Agreement as amended by Clause II (iv) of this Supplemental Agreement shall be deemed to include any surcharge or other similar impositions now or hereafter to be imposed on consumers of electricity in Travancore-Cochin by or in consequence of any present or future legislation of the Government which may be or come into force during the continuance of the Principal Agreement or any renewal or extended period thereof and accordingly the new rates hereinbefore provided for shall not be affected by any such legislation or any alteration in rates for the supply of electricity effected pursuant thereto".

On 1-11-1956, the Kerala State was formed; and on 1-4-57, the Kerala State Electricity Board (referred to as the Board), was constituted in pursuance of the relevant notifications issued u/s 5 (1) of the Electricity Supply Act 1948. u/s 60 of the said Act, all contracts entered into and all matters and things engaged to be done by, with, or for, the State Government for the purposes of this Act, before the constitution of the Board shall be deemed to have been entered into etc. by, with, or for, the Board. The Board itself entered into an agreement with the petitioner company, a copy of which has been produced by it, as Ext. R-2 dated 30-3-1963 (referred to later as the 1963 agreement). By clause 2 of this agreement the petitioner was to purchase 12,500 kilowatts of electric power. By

clause 3, the agreement was to continue for 25 years from 1-1-1965 with option to renew for a further term of 25 years. Clause 5 (c) of the Agreement stated:--

"5 (c): The rate of Rupees one hundred thirty (Rs. 130) per kilowatt of maximum demand per year provided for in Clause (5) (a) shall be exclusive of electricity duty of ten per cent. (10%) of the said rate payable to the Government. No further imposition by way of tax, duty, surcharge, levy, toll or otherwise now or hereafter to be imposed on consumers of electricity in the State of Kerala by or in consequence of any present or future legislation of the State which may be in force or come into force during the continuance of this Agreement or any renewal or extended period thereof shall be payable by the Consumer".

By Clause 21, the rights and obligations of the Agreement are binding on the successors and assignees

3. Then came Ext. R-3, styled the Second Supplemental Agreement dated 4-4-1963. Clause 2 (b) of the said Agreement reads:--

"2 (d): The rate of Rupees one hundred and thirty (Rs. 130) per kilowatt of maximum demand per year provided for in Clause (2) (a) shall be exclusive of electricity duty of ten per cent (10%) of the said rate payable to the Government, No further impositions by way of tax, duty, surcharge, levy toll, or otherwise now or hereafter to be imposed on consumers of electricity in the State of Kerala by or in consequence of any present or future legislation of the State which may be in force or come into force during the continuance of this supplemental Agreement or any renewal or extended period thereof shall be payable by the consumer".

Clause 5 keeps alive the provisions of the Principal Agreement of 1941 as modified by the first Supplemental Agreement (Ex. R-I).

4. Next came Ex. P-2 Agreement dated 18-9-1965. also between the Board and the petitioner. Clause 2 (a) thereof provides for the supply by the Board to the petitioner, of 12,500 kilowatts of electric power; in addition to the amount of power stipulated in the 1963 Agreement, Clause 3 provides that the Agreement shall continue for a period of 24 years from 1-1-1966, with option to continue for a further period of 25 years, on the same terms.

Clause 5 (c) reads:--

"The rate of Rupees one hundred and thirty (Rs. 130) per kilowatt of maximum demand per year provided for in Clause (5) (a) shall be exclusive of electricity duty of ten Per cent (10%) of the said rate payable to the Government. No further imposition by way of tax, duty, surcharge, levy, toll or otherwise now or hereafter to be imposed on consumers of electricity in the State of Kerala by or in consequence of any present or future legislation of the State which may be in force or come into force during the continuance of this Agreement or any renewal or extended period thereof shall be payable by the Consumer, provided that the provisions of this Clause 5 (c) shall not be deemed to mean that any liability shall

accrue to the Board on account of taxes imposed by the Government on the Consumer".

By Clause 24, the previous Agreements are kept alive. The circumstances leading to the execution of these agreements are set out in paragraphs 2 to 8 of the Board's counter-affidavit.

5. While these agreements were current, the Board promulgated Ex. R-4 Regulations on 28-10-1966. Clause 4 enables the Board to prescribe different terms and conditions for different classes of consumers; Clause 10 enables the Board by negotiations or otherwise to fix special terms and conditions for supply; and Clause 11 enables the Board to amend the terms and conditions for supply from time to time, provided that any amendment having the effect of enhancement of charges, payable by a consumer, was to come into force, on a date not earlier than thirty days from the date of notification. of the amendment, in the gazette. Ext. R-5 is an amendment effected by the Board to R4 Regulation. By this amendment, Clauses 6 and 8 were substituted, enabling the Board to fix different tariffs for different classes of services under various heads, such as low tension supply, high tension supply, and extra high tension supply, in pursuance of this, by Ex. P-3 notification dated 28-11-1969 the Board notified the rates of tariffs applicable to extra high tension consumers, (in which category the petitioners before us fall). Clause 6 of Ex. P-3 shows that the rates so notified will be applied notwithstanding anything to the contrary contained in any agreement entered into with any extra high tension consumer either by the Board or by the Government. The petitioner protested by Ex. P-4 letter, and thereafter, has filed this writ petition.

6. The contentions urged on behalf of the petitioner are:--

(1) that the provision applicable, for revision of tariffs, to the petitioner-company is, if at all only Section 49 (3) of the Electricity Supply Act 1948, and not Section 49 (1);

(2) that even if Section 49 (1) applies, no revision of tariffs can be effected in supersession of lawful contracts entered into by, or binding upon, the Board;

(3) that assuming Section 49 (1) applies, the Board is barred by the principle of equitable estoppel from revising tariffs to the prejudice of the petitioner;

(4) that the right of the petitioner under the contracts or agreements is a right to property and the extinction of this right violates Article 31 of the Constitution; and

(5) that in any event, the petitioner should have been afforded an opportunity before the revision was effected. We may observe that Ex. P-3 which fixes the tariff rates, applicable to the petitioner and others, was directly in pursuance of Exts. R-4 and R-5 Regulations. These regulations have not been expressly challenged in the writ petition, and there was no express prayer to quash the same. Para. 6 of the reply-affidavit of the petitioner raises in some way, the

question of the validity of Ex. R-4, but the same was not seriously argued before us, and we think, quite rightly. Being so, the grounds of attack available against Ex. P-3 notification appear to us to be feeble. We may however the arguments advanced on the merits.

7. Section 59 of the Act enjoins that the Board shall not, as far as practicable, and after taking credit for any subventions from the State Government u/s 63, carry on its operations under the Act at a loss, and shall adjust its charges accordingly from time to time. Section 49 of the Act reads as follows:

"49. Provision for the sale of electricity by the Board to persons other than licensees--

(1) Subject to the provisions of this Act and of Regulations, if any, made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit, and may, for the purposes of such supply, frame uniform tariffs.

(2) in fixing the uniform tariffs, the Board shall have regard to all or any of the following factors :--

(a) the nature of supply and the purposes for which it is required :

(b) the co-ordinated development of supply and distribution of electricity within the State in the most efficient and economical manner, with particular reference to such development in areas not for the time being served or adequately served by the licensee;

(c) the simplification and standardisation of methods and rates of charges for such supplies;

(d) the extension and cheapening of supplies of electricity to sparsely developed areas.

(3) Nothing in the foregoing provisions of this Section shall derogate from the power of the Board, if it considers necessary or expedient to fix different tariffs for the supply of electricity to any person not being a licensee, having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and any other relevant factors.

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

It has been ruled by the Supreme Court in Maharashtra State Electricity Board Vs. Kalyan Borough Municipality and Another, that though prima facie it would appear that Subsection (4) will govern Sub-sections (1) to (3) of Section 49, the proper way to interpret Sub-section (4) will be to read with it Sub-section (3). Going by the language of the section, we entertain no doubt that the power to frame uniform tariffs is given to the Board by Sub-section (1), and that the power under Sub-section (3) to fix different tariffs in exceptional cases, is not in

derogation of the power under Sub-section (1) but supplementary to it. This latter power is optional, not obligatory. Being so, we are unable to understand the petitioners' argument that the provision applicable to the petitioner is only Section 49 (3) and not Section 49 (1). We reject the same.

8. The next contention is that even if Section 49 (1) applies, action cannot be taken in supersession of any lawful contracts entered into between the petitioner and the Board. Before dealing with the argument, we may quote Section 79 (j) of the Act:

"79. Power to make regulations.-- The Board may make regulations not inconsistent with this Act and the Rules made thereunder to provide for all or any of the following matters, namely:--

x x x x x x

(j) principles governing the supply of electricity by the Board to persons other than licensees u/s 49". Exts. R-4 and R-5 Regulations take power u/s 49, Section 59, and Section 79 (i). The only limitations on the Board's power to take action u/s 49 are the provisions of the Act, and the Rules and Regulations framed thereunder. So too, the only requirement u/s 79 (i) is, that the Regulations should not be inconsistent with the Act and the Rules. In the face of the power, granted in such amplitude, the absence of the words "notwithstanding any contract to the contrary" is not material at all. We are quite unable to see how the provisions of a contract entered into even between high contracting parties can override the provisions of a statute or a statutory rule or regulation. Especially is it so when the statutory power has been conferred on an autonomous Corporation like the Board, in public interest or for the benefit of the public. We may usefully extract the following classic observations made by Gwyer, C. J. in AIR 1943 29 (Federal Court) :

"We desire, however, to point out that what they are now claiming is that no Legislature in India has any right to alter the arrangements embodied in their sanads nearly a century ago; and for all we know, they would deny the right of Parliament itself to do so. We hope that no responsible Legislature or Government would ever treat as of no account solemn pledges given by their predecessors; but the readjustment of rights and duties is an inevitable process, and one of the functions of the Legislature in a modern State is to effect that readjustment, where circumstances have made it necessary, with justice to all concerned. It is, however not for this Court to pronounce upon the wisdom or the justice, in the broader sense, of legislative Acts; it can only say whether they were validly enacted. ,....."

The decision was confirmed by the Privy Council in Jagannath Baksh Singh v. United Provinces. AIR 1946 FC 127.

9. We are not impressed by the argument that u/s 57 of the Act read with Schedule VI. a licensee --" which expression does not include the Board -- gets

power expressis verbis to override contracts, and that the Board has not been granted such power. The short answer to this, is, that in the case of the Board there was no need for any express conferment of the power, which was necessary in the case of the licensee. The statutory provisions being thus clear, there is really no need to refer to authorities. In *Nandlal Bhandari Mills Ltd., Indore Vs. Madhya Pradesh Electricity Board*, the agreements themselves contained a power to revise tariffs; but dehors these provisions, the power to do so was found in Sections 49 and 59 of the Act, in *Aditya Mills Ltd., Madanganj-Kishengarh and Others Vs. Rajasthan State Electricity Board, Jaipur and Others*, it was recognised that u/s 49 it was open to the Board to revise terms and conditions even unilaterally. The Supreme Court decision in *The Amalgamated Electricity Co. Ltd. Vs. N.S. Bhathena and Another*, paras. 43 and 49) recognised such adjustment as possible with respect to Section 57 and Schedule VI of the Act.

10. The Board has justified the action not only on legal grounds, but even on the ethical and moral plane. Paragraphs 9 and 10 of the counter-affidavit have detailed the financial stringency experienced by the Board and the highly concessional and very low rates at which extra high tension consumers (Including the petitioners) who consume 60 per cent of the current generated in the State, were being charged for electrical power. The position has been indicated in a tabular statement in Ext. R-6. The data disclosed are sufficient to show that, even as the biggest single consumer of electricity in this State, enough has been made out for revision of tariffs to subserve the purposes of the Act. viz., a rational distribution of electricity to all consumers.

11. The plea of equitable estoppel need not occupy us long. We were pressed with the decision of the Supreme Court in *Anglo Afghan Agencies case* AIR 1968 SC 718 and in the *Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another*, . The arguments based on these decisions covered familiar ground. On the pleadings, we are not satisfied, that the picture sought to be presented of the Board (or its predecessor) being a supplicant before the petitioner for the establishment of its industry in this State, of representations made, hopes raised, vast expenditure incurred, sacrifices made, and expectations blasted, has been either complete or correct. As pointed out by Counsel for the Board, there is enough in the agreements themselves to show that the petitioner was equally desirous of obtaining electric power and had negotiated for the supply of the same. See for instance the preamble to Ex. P-I, Ext. R 2. Ext. R3 etc. Again, it is well settled that there can be no estoppel against the provisions of a statute or the exercise of statutory power. With reference to the principle laid down in the *Anglo Afghan Agencies case*, the matter was fully considered in this Court in *Sankaranarayanan v. State of Kerala* ILR (1968) KER 664 . See the discussion in paragraphs 3 to 16 of the judgment. The decision was affirmed by the Supreme Court (See 1971 Ker LT 422). There, estoppel was pleaded against the exercise of the constitutional power under Article 309 of the Constitution, and the plea was repelled. The

matter was further discussed by a Full Bench of this Court in *Achuthan Pillai and Others Vs. State of Kerala and Others*, and it was ruled that the decision of the Supreme Court in the *Anglo Afghan Agencies case AIR 1968 SC 718* (and the *Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another*, referred to earlier) did not consider whether a representation can operate as estoppel against the exercise of constitutional or discretionary power vested for public good, or for the good of a third party. We do not wish to cover the same ground again, or to refer to the still later decisions of this Court. On the principle of these decisions, we have no hesitation in rejecting the plea of equitable estoppel.

12. The argument of violation of the fundamental right to hold property, under Article 19(1)(f) of the Constitution, is hardly presentable. The petitioner, being a company, is not a citizen, and therefore has no such fundamental right. If the contract, as properly construed by us, is subject to the right of the Board to make unilateral adjustments under the provisions of the Act. This attenuated right of property cannot come in for any violation of Article 19(1)(f), by reason of such statutory action.

13. The last contention, that the petitioner should have been afforded an opportunity before the action complained of, has no merit. The power of unilateral adjustment being there under the provisions of the Statute, no question of affording opportunity to the petitioner arises. Under clause II of Ext. R-4, the amendment of the terms and conditions of supply having the effect of enhancement of charges payable by a consumer, shall come into force only, at least thirty days after notification in the gazette. This is the only notice or opportunity to which the petitioner is entitled. It is not contended that this provision has been violated. As notice, there is no express prayer to quash Exs. R-4 and R-5; and even in the arguments advanced, it was not contended that these were outside the frame work of the statutory power conferred by Section 79 (j), read with Sections 49 and 59.

14. Before we conclude, we wish to refer briefly to an unreported judgment of a learned Judge of the Rajasthan High Court in Section B. Civil Writ No. 1561 of 1966 (Raj) in the case of the *Delhi Cloth and General Mills Co. v. Rajasthan Electricity Board*. A copy of the judgment was placed in our hands. Going through the same very carefully, we cannot, with respect, agree with its reasoning or conclusion. It seems to have found that there is no power in the Board of making a unilateral adjustment under Sections 49 and 59 of the Act. In so holding it was largely influenced by the provisions of Section 57 read with Schedule VI. We have considered these, and have come to the contrary conclusion. The judgment seems also to accept the plea of equitable estoppel. We have found the plea has no warrant in law, or foundation on facts, in the circumstances of his case. All the contentions urged by the petitioner therefore fail.

15. We may now notice the other writ petitions. O. P. Nos. 1283. 1583 and 2724 of 1970.

16. These writ petitions stand on much slender ground. The petitioners in all these writ petitions are also companies, being, the Cominco Binani Zinc Ltd. (in O. P. 1288/1970), the Cochin Refineries Ltd. (in O. P. No. 1683/1970), and the Travancore Cochin Chemicals Ltd. (in O. P. No. 2724/1970). The relevant agreements are, Exts. P-I dated 26-10-1964 (in O. P. 1288/1970) Ext. P-I dated 14-11-1965 (in O. P. No. 1683/1970) and Exts. P-I and P-2 both dated 7-9-1967 (in O. P. No. 2724/1970). These agreements do not contain any clause of the type that we noticed in the agreements with the Indian Aluminium. Company, evidencing a wholesale fetter of legislative action or surrender of statutory obligations for ever, or for any specified term. Indeed, we should have been surprised to find such a clause entered into in the Nineteen Sixties, with all the experience that has gone before. Nothing contained in these contracts can avail the petitioners against the statutory provisions of the Act, under which proper action has been taken by the Board.

17. In the result, we dismiss all these writ petitions, but make no order as to costs. The interim orders, if any, passed in all these writ petitions will stand vacated and the C. M. Ps. will stand dismissed.