
(1979) 08 OHC CK 0014
In the Orissa High Court
Case No : O.J.C. No. 1578 of 1978

Kartik Enterprise (Pvt.) Ltd.	Vs	APPELLANT
The Orissa State Electricity Board and Another		RESPONDENT

Date of Decision : 10-08-1979

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Electricity (Supply) Act, 1948 — Section 18, 49, 59

Citation : AIR 1980 Ori 3

Hon'ble Judges : R.N. Misra, J;P.K. Mohanti, J

Bench : Division Bench

Advocate : Bijoy Mohanty and B.K. Mohanty, for the Appellant; S. Mohanty and A.S. Naidu, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—Petitioner is a private company with its registered office located at Cuttack and is engaged in general fabrication on small scale. In terms of the industrial policy laid down by the Union Government and the State Government of Orissa, petitioner is treated as a small scale industry. Under the Orissa State Electricity Board (General Tariff) Regulations of 1973 (hereinafter referred to as "Tariff Regulations"), petitioner has also been treated as a small scale industry in the classification. The company entered into a contract with the Orissa State Electricity Board (hereinafter referred to as the "Board") for supply of electricity of 15 kws. and started paying tariff in terms of Board's notification dated 30th of November, 1974, in the following manner:--

(A) Monthly charges calculated at the rate of:--

- (i) 18 paise per KWH for first 200 units per k.w. of contract demand;
- (ii) 17 paise per KWH for all units in excess of above without prejudice to the payment of minimum charge per month.

(B) The monthly minimum charge was to be calculated at Rs. 8/- per k. w. of

connected load. The Board purporting to act in exercise of powers conferred on it u/s 49 of the Indian Electricity (Supply) Act of 1948 (hereinafter referred to as the "Supply Act") and the provisions of the Tariff Regulations prescribed standard tariff rates applicable to power-intensive industries and heavy industries as per notification dated 3rd of March, 1975. By notification dated 31st of August, 1978 (Annex-ure-3), the Board revised the rates of standard tariff applicable to different categories of consumers including the petitioner and in terms of this notification, petitioner's liability was enhanced in the manner indicated below :

(a) monthly charges calculated unilaterally at 22 paise per K.W.H. without prejudice to payment of minimum charges as against the two varying rates of 18 paise and 17 paise;

(b) The minimum charge calculated at Rs. 10/- per K.W.H. of the connected load;

(c) low-power-factor penalty of 5 paise per cent on the billed amount for each one per cent or part thereof by which the power factor is below 90% beginning from 3 months from the date on which the power factor falls below 90% till the date when the power-factor has been improved to 90 per cent. This unilateral provision by the Board as per Annexure-3 is assailed in this writ application.

2. According to the petitioner:--

(i) In the absence of a pro rata increase in cases of all classes of consumers and on account of exclusion of power-intensive and heavy industries from the ambit of revision of rates, the Board which comes within the meaning of "State" has practised discrimination violative of Article 14 of the Constitution;

(ii) Even though the Board is entitled to unilaterally revise the tariff, in View of the provisions of the Act, the Board had statutory obligation to operate economically and efficiently. It is true that the Board has a legislative mandate u/s 50 of the Supply Act not to carry on its operation at a loss and had to adjust its charges accordingly from time to time and, after the amendment of that provision by Central Act 23 of 1978 with effect from 3-6-1978, it has to give credit for all the subventions from the State Government and carry on its operation and adjust its tariff so as to ensure that after meeting its expenses and charges under the various heads, there should be such surplus as may be prescribed by the State Government. Yet, the Board having a statutory obligation to operate efficiently and economically, would not be entitled to adjust the tariff by way of enhancement of the same in exercise of its statutory powers unless corresponding statutory obligations are fulfilled;

(iii) The Supply Act confers monopolistic powers on the Board and, therefore, the statutory obligations are to be strictly performed and in the event of breach or failure to act up to the obligation, the matter would become justiciable and the Board can be called upon to perform its obligations either as a condition precedent to, or simultaneously with, exercise of its rights;

(iv). The Board has all the rights and the obligations of a licensee provided for u/

s 26 of the Supply Act and, therefore, the corresponding obligations of a licensee should be discharged by the Board.

3. The opposite parties have made a return to the rule nisi through the Secretary of the Board and they have denied that there has been any arbitrary or discriminatory act in the matter of enhancement of the tariff. Power-intensive and heavy industries constitute separate classes by themselves and even if they had been left out at the time of enhancement of the tariff by the impugned notification no challenge on the plea of discrimination is available. That apart, it is pointed out that subsequently tariff for those industries has also been revised. It has been further contended that it is not open to the petitioner -- or for the matter of that any consumer --to insist upon pro rata enhancement with reference to other classes of consumers. Reliance has been placed both on provisions of the statute as also on the contract in justification of the enhancement. It has further been pointed out that the cost of generation of energy has gone up tremendously and the petitioner is being still supplied taking the enhancement into account at a rate lower than the cost of production itself. In paragraph 12 of the counter-affidavit, it has been pleaded thus:--

"..... Board is not required to establish that it is running in the most efficient and economical manner so as to justify tariff revision. Certainly, it is not a condition precedent for revision of tariff as would be obvious from Section 49, Sub-section (1). Section 59, on the other hand, authorises Board to adjust its charges so as not to operate at loss. Board is incurring losses from year to year as would be evident from its audited accounts and as such tariff revision is permissible u/s 59. Moreover, the statute does not lay down any yardstick for the most efficient and economical working of the Board nor stipulates any authority before whom the same is to be established....."

A rejoinder was filed on behalf of the petitioner to the counter-affidavit. It has been pointed out that the Board has classified its consumers into 27 categories and the notification under Annexure 3 dealt with only 22 categories and 5 categories had been left out. It has been contended that this amounts to discrimination and Art 14 is violated. Even if subsequently the other classifications have been subjected to revision, the notification being violative of Article 14 at the point of commencement cannot be taken to have become valid by a subsequent removal of discrimination. The allegation that the cost of production of energy per unit was high has been disputed as a blatant falsehood. Detailed particulars have been given to indicate the huge wastage of stores, unusual high transmission losses and various other inefficiencies. Petitioner filed a further affidavit supplying more details on these allegations. It has been maintained that though a larger portion of the energy produced by the Board is from "hydel" source -- and, therefore, should be made available at a comparatively cheap rate -- the tariff prescribed by the Board is high in comparison to the rates of tariff of Boards depending on thermal source. These have been refuted on behalf of the Board.

4. In the case of Indian Aluminium Company Ltd. Vs. The Orissa State Electricity Board and Another, this Court had observed that the Board could unilaterally revise the tariff by framing Regulations u/s 79(j) of the Supply Act. The Supreme Court in the case of Indian Aluminium Company etc. v. Kerala State Electricity Board AIR 1975 SC 1967, observed:--

".....Even if they (Regulations) were made, they should not have conferred authority on the Board to unilaterally exonerate itself from the stipulation contained in the two contracts and enhance the rates, notwithstanding such contractual stipulation....."

The position has, however, been subsequently clarified in the case of Indian Aluminium Company Vs. Kerala State Electricity Board, and what was observed in the first case is said to be with reference to cases of special contracts entered in exercise of powers u/s 49(3) of the Act. Board's unilateral power of revision is not disputed by counsel for the petitioner. The legal position has now been set at a point beyond controversy that if the contract authorises unilateral revision, the Board is entitled to exercise contractual power. It has been conceded at the Bar that the contract in the instant case is not a special contract. Therefore, there is no dispute before us that the Board had power to revise the stipulated rates in the contract existing between the parties.

5. Mr. Mohanty for the petitioner conceded also that it has been decided in this Court and the decision has been upheld in appeal by the Supreme Court that if there be a contractual authority of the Board to revise the rates, and the Board exercises that power, the revision cannot be assailed in a writ petition and the revision in exercise of the power under the contract may give rise to dispute before the arbitrator. In the case of Titagarh Paper Mills Ltd. v. Orissa State Electricity Board, (1975) 2 SCC 436 , the Supreme Court said:--

".....Questions such as: whether the Board had power under Clause (13) of the agreement to levy any coal surcharge at all when no such power was conferred on it by the Act, whether the action of the Board in levying the coal surcharge on the appellant under Clause (13) of the agreement was arbitrary and unreasonable or whether it was based on extraneous and irrelevant considerations and whether, on the facts and circumstances of the case the Board was justified under Clause (13) of the agreement to levy the coal surcharge on the appellant, are plainly questions arising under the agreement and they are covered by the arbitration provision contained in Clause (23) of the agreement. All the contentions raised by the appellant against the claim to justify the levy of the coal surcharge by reference to Clause (13) of the agreement would, therefore, seem to be covered by the arbitration agreement and there is no reason why the appellant should not pursue the remedy of arbitration which it has solemnly accepted under Clause (23) of the agreement and instead invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution to determine questions which really form the subject-matter of the arbitration agreement....."

Counsel, however, contended that since the Board was resting its action in the instant case both on statute and contract, dispute before the arbitrator may not succeed. Accordingly, while conceding that if the power to revise the rates was referable to contract only, the matter should be disputed in arbitration proceedings, he maintained that the validity of the revision of the tariff with reference to the statutory power may be examined by us. The submission of learned counsel for the petitioner about the handicap in the arbitration proceeding is not seriously disputed by counsel for the opposite parties. We would accordingly confine our examination to the validity of the enhancement with reference to the statute.

6. The Board is "State" within the meaning of Article 12 as has been decided by the Supreme Court in the case of Rajasthan State Electricity Board, Jaipur Vs. Mohan Lal and Others, . As such, it is not entitled to deny to any " person equality by its treatment and the Board cannot mete, out discriminatory treatment by preferring some consumers to others. As already noticed, initially five classifications of consumers had been left out. It is the case of the Board that I subsequently they have been brought into the ambit of the enhancement of the tariff and by now there does not exist any discrimination on that ground. We do not see any force in the contention of petitioner"s counsel that if there was discrimination at the inception and even if that discrimination has now been removed, yet, the notification would be bad on account of discrimination having existed at one point of time.

There is force in the submission of the Board that power-intensive and heavy industries are two separate classes by themselves, distinct and different from the other classes of consumers and within the framework prescribed by the Supply Act, the Board is entitled to adopt classifications. Sub-section (4) of Section 49 of the Supply Act provides that in fixing the tariff and terms and conditions for the supply of electricity, the Board shall not show undue preference to any person. The Supreme Court pointed out in the case of The Adoni Cotton Mills Ltd. and Others Vs. The Andhra Pradesh State Electricity Board and Others, ;--

".....This section embodies the same principle which is enunciated in Article 14 of our Constitution. The Board is a State for the purpose of Part III of our Constitution. In the present case, we are, however, not concerned with the application of Article 14. All that requires to be appreciated is that the provisions of Article 14 of our Constitution and Section 49(4) of the 1948 Act are similar in principle. It is the principle of equality or non-discrimination. Section 49(4) of the 1948 Act does not mean a mechanical equal treatment. It is fairly settled that equality before the law does not mean that things which are different shall be treated as though they were the same. The obligation not to discriminate involves both the right and the obligation to make reasonable classification on the basis of relevant factors....."

This observation would support the position that the Board is entitled to classify and on the basis of the classifications so adjust its treatment that ultimately no

inequality results.

7. The Statement of Objects and Reasons of the Supply Act is to the following effect:--

"The co-ordinated development of electricity in India on a regional basis is a matter of increasingly urgent importance for post-war reconstruction and development. The absence of coordinated system, in which generation is concentrated in the most efficient units and bulk supply of energy centralised under the direction and control of one authority is one of the factors that impedes the healthy and economical growth of electrical development in this country. Besides, it is becoming more and more apparent that if the benefits of electricity are to be extended to semi-urban and rural areas in the most efficient and economical manner consistent with the needs of an entire region, the area of development must transcend the geographical limits of a Municipality, a Cantonment Board or a Notified Area Committee, as the case may be. It has, therefore, become necessary that the appropriate Governments should be vested with the necessary legislative powers to link together under one control electrical development in contiguous areas by the establishment of what is generally known as the "Grid System". In the circumstances of this country such a system need not necessarily involve inter-connection through out the length and breadth of a Province; regional co-ordination inclusive of some measure of inter-connection may be all that is needed. An essential pre-requisite is however, the acquisition of necessary legislative power not only to facilitate the establishment of this system in newly licensed areas but also to control the operations of existing licensees so as to secure fully coordinated development.

Government feel that it is not possible to legislate for this purpose within the framework of the Indian Electricity Act, 1910, which was conceived for a very different purpose. In their view what is needed is specific legislation; on the broad lines of the Electricity (Supply) Act, 1926, in force in the United Kingdom, which will enable Provincial Governments to set up suitable organisations to work out "Grid Schemes" within the territorial limits of the Provinces. Although executive power under the proposed Bill will necessarily vest in the Provinces, two considerations indicate the necessity for Central legislation:

(i) the need for uniformity in the organisation and development of the "Grid System", and

(ii) the necessity for the constitution of semi-autonomous bodies like Electricity Boards to administer the "Grid Systems"....."

As the long title of the Supply Act shows, it came in to provide for the rationalisation of the production and supply of electricity and generally for taking measures conducive to electrical development and for all matters incidental thereto. Keeping these in view, the Supply Act made provisions for various purposes. It conferred monopolistic powers on the Board in the matter of generation, transmission and supply of electricity. It made several provisions to

give effect to this purpose. If there existed generating companies it vested powers on the Board to control the same. The Board was vested with powers to control licensees. Provision for sale of electricity by the Board to persons other than licensees was also made and u/s 59, while indicating general principles for the Board's finance Parliament provided that the Board should not operate at a loss, but its activities need not be run with a view to making profits. There can be no two opinions about the position that large powers have been vested on the Board and necessarily, the Board has been given certain duties. u/s 18 of the Supply Act, the Board has been directed to arrange in co-ordination with generating companies, if any, operating within the State in the most efficient and economical manner. The power to revise tariffs u/s 49 and the guideline indicated in Section 5-9 of the Supply Act are parts of the same scheme. Under the different provisions of the statute, the Board has been entrusted with the duty of expanding and cheapening the supply of electricity to sparsely developed areas and to co-ordinate development of supply and distribution of electricity in a most efficient and economical manner with particular reference to areas not for the time being served or adequately served by the licensees. Section 59 of the Act before the amendment provided that the Board was not to run at a loss and should adjust its tariffs so as to ensure that result. After the amendment, the Board has to adjust its tariffs so as to ensure that after meeting all the expenses indicated, there is such surplus as the State Government may from time to time specify. With a view to meeting this purpose, Section 49 of the Act has authorised revision of tariffs, while the Supply Act provides general guideline indicating the principles to be followed in the matter of the Board's finance and contains authorisation to revise the rates, it has simultaneously cast an obligation on the Board to operate efficiently and economically, with a view to keeping control over the financial aspect, in Chapter-VI of the Supply Act, provision has been made for the annual financial statement of the Board to be furnished to the State Government and the State Government has been obliged to place the statement on the table of the Legislature. The accounts of the Board are to be audited by the Comptroller and Auditor-General of India as required by Section 69 of the Supply Act and the audit report has to be placed before the Legislature.

8. The entire scheme under the statute is one and the duties cast on the Board u/s 18 go along with the wide powers conferred on the Board by the other provisions of the Supply Act. The Legislature has conferred these wide powers taking into consideration the mandatory obligation that the Board must act efficiently and economically and it is not open to the Board to act in an irresponsible manner, operate uneconomically and allow any type of inefficiency in its activities. If the Board does not operate efficiently and economically and thereby allows inflation of its operational cost and yet in exercise of powers under Sections 49 and 59 of the Act raises the rates of tariff and in exercise of its monopoly powers forces the consumer to pay for electricity at a higher tariff, it would lead to situation of harassment and the purpose of the Supply Act would

be defeated. There can be no doubt that in consideration of the duties cast, provision has been made in Sections 49 and 59 of the Act giving power of revision and the Board has been allowed statutory right to transfer the entire operational liability in terms of money to the consumers, Without the corresponding obligation to act efficiently and economically, the Board is not intended to excise the power to adjust its tariffs so as not either to run at a loss or to have such surplus as the State Government may specify, We cannot accept a situation where the State or any of its instrumentalities would have power without any correlative duty to exercise such powers as are contemplated u/s 59 of the Act. The statute has an in-built scheme of supervision. The State and the Legislature have been conferred powers of control and the accounting aspect is subject to the thorough checking by the Comptroller and Auditor-General of India. The Board is a high-powered body and as Section 5 of the Act would show, Parliament has given special attention for the constitution of the Board. Such a high-powered Board is expected to function diligently and in a manner indicated in Section 18 of the Supply Act.

We agree with Mr. Mohanty for the petitioner that where the statute confers monopolistic powers, the obligations created by Statute should be strictly performed. In the counter-affidavit, the Board has taken the stand that it is not required to establish that it is running in the most efficient and economical manner. It has been further indicated that the statute does not lay down any yardstick for the most efficient and economical working nor stipulates any authority before whom the same is to be established. The Board is essentially a commercial institution. It has been conferred with certain powers of the State and has a monopolistic basis for operation. In a country governed, by Rule of Law, wherever there is conferment of power, of necessity there is bound to be control. Uncontrolled power is bound to lead to arbitrariness. We cannot lose sight of the dictum: "power corrupts; absolute power absolutely corrupts". Arbitrary power has the necessary tendency of leading to oppressive harassment. An authority vested with power owes an obligation to fulfil the purpose for which power is conferred and to act within, the framework of law. Parliament having prescribed the duty of operating economically and efficiently so far as the Board is concerned, it has to fulfil these obligations. Control has been vested in the executive Government the Legislature and the Comptroller and Auditor-General to see that the duties of the Board are performed and in case the machinery is not able to control, and the Board starts functioning arbitrarily, the machinery of the judicial system has to operate. Under the Rule of Law, whether the system of checks and balances appropriately operates is ultimately to be scrutinized by the Courts and in order that the system of Rule of Law be maintained, the Court has to strike down every arbitrary act and require the exercise of power to conform to the requirements of law. It was pointed out by the Supreme Court in the case of Bennett Coleman and Co. and Others Vs. Union of India (UOI) and Others, that all executive actions which operate to the prejudice of any person must have the authority of law to support It.

The Board must realise that it does not have arbitrary powers and it is obliged to operate efficiently and economically in order to discharge the statutory trust imposed upon it. If it fails to do so and yet seeks to exercise its powers, a situation might arise where the consumer would be entitled to seek protection of the common law forum to require the Board to conform to its obligations in order that the rights conferred on it may be exercisable. The Board must also be told that there is an in-built machinery in the Supply Act before which the Board has to establish that it is operating efficiently and economically and in case the in-built machinery is not able to control and check the working of the Board, the Court has to intervene in a suitable case. If executive functioning is amenable to judicial review, it would indeed be futile for the Board to contend that the Board does not have to satisfy anybody regarding performance of its statutory obligation.

9. It is difficult for us in our extraordinary jurisdiction to decide whether the Board is operating efficiently and economically. We are not in a position to hold that performance of the duty is "condition precedent" to exercise of the "power" though we must reiterate here that the Board is obliged to perform its statutory obligations and in suitable cases, the Board's exercise of its powers may not be permitted until statutory obligations are discharged.

10. On a review of the materials placed before us, we are not in a position to hold that in the instant case, the revision of tariff is liable to be struck down on account of violation of Article 14 of the Constitution. So far as the attack on the power of revision on account of non-performance of the obligations u/s 18 of the Act is concerned, the decision would essentially involve factual questions. The facts alleged by the petitioner have been denied and there is controversy over the issue. We do not think, in a writ petition such a question can be suitably examined. The other questions raised by the petitioner are also connected matters.

11. On the analysis indicated above, this writ application must fail. We would accordingly dismiss it. There would be no order for costs.

P.K. Mohanti, J.

12. I agree.