
(2014) 02 KL CK 0030
In the High Court Of Kerala
Case No : W.A. No. 1876 of 2013

Kerala State Electricity Board and Others	APPELLANT
Vs	
Hamsaveni Carbides and Another	RESPONDENT

Date of Decision : 05-02-2014

Acts Referred:

Constitution of India, 1950 — Article 12
Electricity Act, 2003 — Section 43, 46

Citation : AIR 2014 Ker 57 : (2014) 1 ILR 921 : (2014) 1 KHC 563 : (2014) 1 KLJ 657

Hon'ble Judges : Antony Dominic, J; Anil K. Narendran, J

Bench : Division Bench

Advocate : P. Santhalingam (Sr.) and S. Sharan (SC), Advocate for the Appellant; J. Julian Xavier and Firoz K. Robin, Advocate for the Respondent

Judgement

Antony Dominic, J.—This appeal is filed by respondents 1 to 3 and 6 in WP(C) No. 6134/09, who are aggrieved by the judgment of the learned Single Judge allowing the writ petition filed by the 1st respondent herein.

2. Briefly stated, the facts of the case are that the 1st respondent herein, who filed the writ petition, is a small scale industrial unit engaged in the production of Calcium Carbide. They started commercial production on 30/1/95 availing of power supply from the first appellant as a High Tension consumer. According to them, there was a major machinery break down on 27/9/01 and as a result, the production in the unit came to a halt. While this position was continuing, on 2/8/2008, State of Kerala issued GO(Rt) No. 209/08/PD ordering waiver of minimum demand charges/fixed charges for electricity for the period of closure in respect of all closed HT/LT plantations and industrial units which will be restarting their operation on or before 31/12/2008.

3. The first appellant Board in its meeting held on 18/8/2008 adopted the Government Order and issued Ext. P3 Board order dated 30/8/2008 for implementation of the Government Order, subject to the following conditions;

- 1) To extend the cut-off date for waiver of MD charges in respect of closed industrial units/plantations specified in the G.O(Rt) No. 35/07/PD dated 24/2/2007 for a further period upto 31/12/2008.
- 2) To extend the benefit of waiver of fixed charges in respect of LT industrial units and plantations, if they re-open on or before 31/12/2008.
- 3) The firm availing the benefit of waiver shall have to function for a minimum period of 6 months after re-opening, failing which the benefit will be withdrawn.
- 4) Government Order shall be applicable only to the units reopening on or before 31/12/2008 and subject to the condition that the package for repayment will be considered by the Board by processing individual cases of plantations and industrial units (both HT and LT) on production of a certificate regarding closure and reopening obtained from the competent authority.
- 5) To extend the benefit of waiver of MD charges to consumers whose service connection was dismantled, if they re-open on or before 31/12/2008.
- 6) To effect the reconnection on remittance of 1/3rd of arrears and interest for instalment and allowing a maximum of six instalments for the balance amount subject to the condition that arrear instalments and monthly electricity charges shall be paid promptly by the consumer failing which, waiver of MD/fixed charges for closed period will be withdrawn and supply disconnected.
- 7) When there are more than one spell of closure intervened by a spell of operation, the last spell of closure only shall be taken for granting waiver of minimum demand charges.

4. Coming to know of Ext. P3, the 1st respondent submitted Ext. P4 representation dated 29/11/2008 requesting the second appellant to extend them the benefit of Ext. P3 Board order According to them, there was delay in considering the request and therefore they filed WP(C) No. 36490/08 before this Court. That writ petition was disposed of by Ext. P6 judgment rendered on 9/1/2009 recording the undertaking of the standing counsel for the first appellant that they will consider Ext. P4 in accordance with law within a period of one week.

5. While the matter stood thus, the 3rd respondent issued Ext. P7 communication requesting several High Tension consumers including the 1st respondent to attend a meeting convened on 24/1/2009 in the chamber of the 2nd respondent. Accordingly, a meeting was held and the representative of the 1st respondent also attended the same. The minutes of the meeting is Ext. P8 and in so far as the 1st respondent is concerned, it reads thus;

Hamsaveni Carbides (File No. 35123/J3/08/ID): Chairman is requested to accept the principal amount alone and give power connection to the unit. He may also consider the request of waiver of MD charges etc. separately provided the company resumes production by 15th February, 2009.

6. Following the -foresaid meeting, the matter was placed before the rail time members of the 1st appellant Board and Ext. P10 is the note submitted. The matter was considered by the Board and the 2nd appellant issued Ext. P11 communication to the 1st respondent on 3/2/2009 and this communication reads thus;

Your request has been examined by Board and acceded to effect reconnection of supply if you pay Principal amount (without MD) and duty arrears and also agrees to withdraw all Court cases. It is noticed that you have paid Principal amount excluding duty arrears. Therefore, you are requested to remit the duty arrears amounting to Rs. 2,34,522/- at the earliest.

You are also required to produce an undertaking regarding withdrawal of Court cases if any, and pay the interest as per One Time Settlement.

7. On receipt of Ext. P 11, the 1st respondent responded by Ext. P12 dated 4/2/2009 stating that the amount due from them has been remitted and requesting to effect reconnection of electricity supplied to their unit immediately. On 4/2/2009 itself, the 2nd appellant issued Ext. P13 whereby he requested the 3rd appellant to do the needful for effecting reconnection as per rules, so that the 1st respondent can resume production by 15th February, 2009. This letter reads thus;

As per the decision taken in the Government meeting vide (1) ante, the dismantled HT consumer M/s. Hamsaveni Carbides has remitted the entire principal arrear amount as suggested by the Chairman, K.S.E. Board in the meeting in order to effect reconnection as a revival measure. Since the firm have complied the direction of Chairman K.S.E. Board you are requested to do the needful for effecting reconnection as per rules so as to resume production by 15th February, 2009. As per records maintained by this office the consumer has at credit an amount of Rs. 4,25,816/- (Rupees Four Lakhs Twenty Five Thousand and Eight Hundred and Sixteen only) towards Security Deposit.

8. This was followed by Ext. P 16 board order dated 19/2/2009 whereby the Secretary of the Board conveyed the Board's decision to provide reconnection of HT supply to the 1st respondent, as a special case, overlooking all other pending applications for power allocation subject to feasibility of power at 220 kV Sub station, Kanjikode after collecting the cost for construction of a new 22 kV feeder at Distribution and Transmission wing. It is also directed that if it is not feasible to cater the load from 220 kV Sub Station, Kanjikode, to consider the request of the 1st respondent after collecting proportionate cost for enhancing the capacity of 220 kV Sub Station, Kanjikode in addition to the charges mentioned above. In this Board order, after explaining the position up to Ext. P 13 mentioned above, the Secretary stated thus;

In response to this, the Deputy Chief Engineer, Electrical Circle, Palakkad vide 3rd paper read above has reported that M/s. Hamsaveni Carbides was engaged in the manufacture of Calcium carbide, which is classified as power intensive

unit. The dismantled consumer requested reconnection vide their letter dated 28/1/2009. The 500 KVA load of the consumer was fed from 22 KV Gasha feeder of 220 kV Substation, Kanjikode and now there is no spare capacity available in this feeder. Also, presently there is no other feeder in the vicinity of M/s. Hamsaveni Carbides to which the firm can be connected. Besides, the 220 kV Substation at Kanjikode from which 22 kV Gasha feeder originates is already overloaded and KSE Board is not able to allocate power to 23 prospective applicants, some of whom have applied as early as 2005. M/s. Hamsaveni Carbide is a Power Intensive unit. There is specific ban imposed by KSE Board against granting power connection to Power Intensive units vide Board order read as 5th above. Board has accorded sanction to issue power allocation to all non-power intensive units subject to availability of power. Accordingly, the process of issuing power allocation to 10 units have been initiated.

Having considered the matter in detail, Board decided the following:--

(i) to consider the request of M/s. Hamsaveni Carbides, a dismantled power intensive unit under Electrical Section, Kanjikode, for reconnection of HT supply, as a special case, by overlooking all other applications pending for power allocation subject to feasibility of power at 220 kV Sub station, Kanjikode after collecting the cost for construction of a new 22 kV feeder at Distribution and Transmission Wing.

(ii) If it is not feasible to cater the load from 220 kV substation, Kanjikode, consider the request of M/s. Hamsaveni Carbides after collecting proportionate cost for enhancing capacity of 220 kV Substation, Kanjikode in addition to the charges mentioned in point (1).

Orders are issued accordingly.

9. Relying on Ext. P16, the 3rd appellant issued Ext. P14 demanding remittance of the cost and also requiring the 1st respondent to submit HT service connection application. The relevant portion of this letter reads thus;

You are therefore advised to remit an amount of Rs. 13,50,493/- (Rupees Thirteen Lakhs fifty thousand four hundred and ninety three only) at Electrical Section, Kanjikode towards the cost of works in the Distribution side for effecting supply to your firm.

The estimate amount for the works in the Transmission side may be remitted at Transmission Circle, Kanjikode as per the direction of Deputy Chief Engineer, Transmission Circle, Kanjikode and reported for further action from this end.

The HT service connection application in the prescribed form may also be submitted at Electrical Section, Kanjikode along with the connected papers.

10. It was in these circumstances, the 1st respondent filed the writ petition seeking to quash Exts. P14 and P16 and to declare that they are entitled to get reconnection of power supply in the light of Ext. P3 without paying any amount

towards cost of works in the distribution side.

11. Statements were filed by the Board and in para 5 of the additional statement dated 12/7/11, the Board has justified its demand on the following basis;

The petitioner's connection was dismantled on 30/5/2003. Subsequent to this, two other high tension consumers have been energized on the same feeder line, that supplied power to the petitioner prior to its dismantling. M/s. Scotfree Steels was given connection on 21/11/2003 for a contract demand of 996 KVA. Thereafter, another consumer by the name Premier Alloys was given HT connection on 7/10/2005 for a contract demand of 1800 KVA from the same feeder line. Similarly, new connections have been given on other feeders also originating from the 220 KV Kanjikode Sub Station. Just as the 22 KV gasha feeder was incapacitated to carry any additional load over and above the existing capacity, the 220 KV Kanjikode Sub Station also got loaded to brim and hence incapacitated to cater for any additional loads. The capacity at the 220 KV Kanjikode Sub Station at 22 KV level is 75 MVA (75,000 KVA). The safe limit fixed for continuous supply of electricity is 80% of the installed capacity which works out to 60,000 KVA. At present, the continuous load supplied through the 220 KV Kanjikode Sub Station at 22 KV level is 67,500 KVA, which is 90% of the installed capacity. This is dangerously high as far as the 220 KV Kanjikode Sub Station is concerned. Hence, applications for power dating back to the year 2005 from this Sub Station are being put on hold. In order to tackle the precarious situation, an additional 50 MVA transformer, to capacitate the additional load, is being installed in this sub station and the same will be commissioned shortly, in order to meet the additional power requirements of the existing High Tension Consumers in the industrial area and new applicants who have applied for power since 2005. Since, the aforesaid enhancement work is specifically intended for the aforesaid units, and the general public is not being benefited by this work, the expenses to be incurred for this work cannot be met from the own fund of K.S.E.B. Hence, power is provided on the basis of a pro- rata contributions collected from such intending consumers.

12. Moreover, in the statement dated 12/7/11, they also stated that the amount to be remitted by the 1st respondent has been quantified thus;

(i) Cost in the distribution side towards drawing the new 22 KV feeder (Power line)-

Rs. 7,07,562/-.

(ii) Cost in the Transmission wing towards installing a circuit breaker and a feeder bay inside the substation for feeding power to the feeder-

Rs. 14,00,000/-

(iii) costs in the transmission wing towards pro rata contribution towards enhancement of substation -

Rs. 11,00,000/-

(iv)Addl. Cash Deposit to be paid-

Rs. 4,25,816/-

(over and above Rs. 16 lakhs already paid by the petitioner as per order in W.A. No. 925/2009).

Total

Rs. 36,33,378/-

13. After hearing the arguments on either side, learned Judge by his judgment dated 30th of November, 2012, held that in view of Exts. P3, P8 and P11, the Board was bound to give reconnection to the 1st respondent without realising the amounts demanded by Exts. P14 and P16. This was applying the principles of promissory estoppel and on that basis, quashing Exts. P14 and P16 and issuing consequential directions, the writ petition was allowed. It is aggrieved by this judgment, the appeal has been filed.

14. We heard the learned counsel for the appellants, learned counsel for the 1st respondent and the learned Government Pleader appearing for respondents 2 and 3.

15. Learned Senior counsel for the appellants contended that at no point of time, did the Board or the Government agree to waive any amount in addition to what is provided in Exts. P3, P8 and P11 and that in view of the provisions contained in the Electricity Act and the Kerala State Electricity Board Terms and Conditions of Supply 2005, they are entitled to realise the expenses which are to be incurred for providing supply to the premises of the 1st respondent. He also contended that the facts of the case reveal that the Board or the Government did not make any promise as sought to be made out by the 1st respondent to make them bound by such promise, invoking the principles of promissory estoppel. He also relied on various Apex Court judgments to contend that since under the Electricity Act and the Kerala State Electricity Board Terms and Conditions of Supply, 2005, Board is statutorily empowered to realise the charges, the Board cannot be prevented from doing so by invoking the principles of promissory estoppel.

16. On the other hand, the learned counsel for the 1st respondent contended that Exts. P3, P8 and P11 reflects a clear cut promise entitling the 1st respondent to get reconnection of the power supply without any additional payment which is sought to be recovered. Therefore, according to the counsel, the learned Judge was fully justified in quashing Exts. P 14 and P16 and allowing the writ petition in the manner it is ordered. He therefore, sought dismissal of the writ appeal.

17. We have considered the submissions made at the Bar.

18. The first issue is whether the 1st respondent has succeeded in establishing a

case that the Government had made a promise entitling them to invoke the principles of promissory estoppel. It is the settled legal position that to invoke the principle of promissory estoppel, the promise made by the Government should be clear and unequivocal and that the promisee should have acted upon such promise to his detriment. It is only a promise intended to be binding, intended to be acted upon and in fact acted upon is binding. In this context, it is fruitful to refer to *Monnet Ispat and Energy Ltd. Vs. Union of India (UOI) and Others*, , the Apex Court has summarised the guiding principles of promissory estoppel thus;

182. In my view, the following principles must guide a court where an issue of applicability of promissory estoppel arises;

182.1. Where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is, in fact, so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not.

182.2. The doctrine of promissory estoppel may be applied against the Government where the interest of justice, morality and common fairness dictate such a course. The doctrine is applicable against the State even in its governmental, public or sovereign capacity where it is necessary to prevent fraud or manifest injustice. However, the Government or even a private party under the doctrine of promissory estoppel cannot be asked to do an act prohibited in law. The nature and function which the Government discharges is not very relevant. The Government is subject to the rule of promissory estoppel and if the essential ingredients of this doctrine are satisfied, the Government can be compelled to carry out the promise made by it.

182.3. The doctrine of promissory estoppel is not limited in its application only to defence but it can also furnish a cause of action. In other words, the doctrine of promissory estoppel can by itself be the basis of action.

182.4. For invocation of the doctrine of promissory estoppel, it is necessary for the promisee to show that by acting on promise made by the other party, he altered his position. The alteration of position by the promisee is a sine qua non for the applicability of the doctrine. However, it is not necessary for him to prove any damage, detriment or prejudice because of alteration of such promise.

182.5. In no case, the doctrine of promissory estoppel can be pressed into aid to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. No promise can

be enforced which is statutorily prohibited or is against public policy.

182.6. It is necessary for invocation of the doctrine or promissory estoppel that a clear, sound and positive foundation is laid in the petition. Bald assertions, averments or allegations without any supporting material are not sufficient to press into aid the doctrine of promissory estoppel.

182.7. The doctrine of promissory estoppel cannot be invoked in abstract. When it is sought to be invoked, the court must consider all aspects including the result sought to be achieved and the public good at large. The fundamental principle of equity must forever be present to the mind of the court. Absence of it must not hold the Government or the public authority to its promise, assurance or representation.

19. The question is whether the Government or the Board have made any promise at all entitling the 1st respondent to claim that they are not bound to bear the cost involved as demanded by the Board in Exts. P14 and P16. This issue has to be decided by referring to Exts. P3, P8 and P11 relied on by the 1st respondent. We have already made reference to these documents. Ext. P3 is the Board order whereby the Board has adopted the Government Order dated 2/8/08 providing for waiver of minimum demand charges/fixed charges for electricity for the period of closure in respect of all closed HT/LT industrial units restarting their operation on or before 31/12/2008. Nowhere in this order is there any provision providing for waiver of anything other than minimum demand charges and fixed charges. Further, para 2 of this order also contains the decision of the Board to request the Government to pay in advance or reimburse to the Board the amount of minimum demand charges/fixed charges waived on implementation of the Government Order. Therefore, it is clear that all that is decided to be waived is the minimum demand charges/fixed charges and nothing else.

20. In so far as Ext. P8, the minutes of the meeting convened on 24/1/2009 is concerned, the relevant decision has been extracted elsewhere in the judgment, which show that the Government have requested the Chairman to accept the principal amount alone and to give power connection to the 1st respondent. The Chairman was further requested to consider the request for waiver of MD charges etc., separately, provided the company resumes production by 15th February, 2009. Such request to the Chairman was necessitated because, for some reason or the other, the Company did not restart their operations before 31/12/2008 as originally specified in the Government Order and Ext. P3. In other words, apart from containing a request in Ext. P8, that is made to the Chairman of the Board, it also does not contain any decision or a promise.

21. As we have already noticed, following Ext. P8, the matter was placed before the full members of the Board and Ext. P10 is the note. Based on Ext. P10, the decision taken by the Board was conveyed to the 1st respondent by Ext. P11 communication of the second appellant which also has been extracted in the earlier part: on of this judgment. In this communication also, what has been

conveyed to the 1st respondent is that the Board has acceded to their request to effect reconnection of supply if they pay principal amount (without minimum demand) and duty arrears and also agree to withdraw all court cases. Here again, there is no offer or promise of any kind to waive anything other than what is agreed in Ext. P3.

22. These communications, which are relied on by the learned counsel for the 1st respondent, therefore, in our view, do not contain any promise from the Government or Board to waive the cost, if any, that they are entitled to realise. Faced with such a situation, learned counsel for the 1st respondent contended that in Ext. P3 Board order, consumers like them whose power connection are dismantled, are ordered to be given reconnection and that when reconnection is given, no charges for infrastructural development is realised. Therefore, the attempt of the learned counsel for the 1st respondent was to persuade us to infer a promise from the terms of Ext. P3, Board order. As we have already held, a promise should be clear, definite, unequivocal and should be one meant to be acted upon, to set up a plea of promissory estoppel. This plea cannot be founded upon mere inferences and surmises, as attempted by the learned counsel for the 1st respondent. In other words, the 1st respondent did not establish any factual foundation for a case of promissory estoppel that was pleaded by it. Therefore, on facts, we conclude that there is no promissory estoppel made out by the 1st respondent.

23. Yet another aspect of the matter is whether promissory estoppel could be pressed into service against the Board to prevent it from realising the dues, which it is entitled to realise, under the statutory provisions. In this context, Section 46 of the Electricity Act, 2003 is to be referred. This provision reads thus;

46. Power to recover expenditure - The State Commission may, by regulations, authorise a distribution licensee to charge from a person requiring a supply of electricity in pursuance of Section 43 any expenses reasonably incurred in providing any electric line or electrical plant used for the purpose of giving that supply.

24. Further, Regulation 4(1) of the Kerala State Electricity Board Terms and Conditions of Supply, 2005 also empowers the Board to recover the expenditure, which reads thus;

4. Power to recover expenditure:--(1) Subject to the conditions under clause 8 of the Code, the Commission authorizes the Board u/s 46 of the Act, to recover in advance from the owner or occupier of any premises requiring supply the expenses reasonably incurred by the Board for providing any electric line or electrical plant required specifically for the purpose of giving such supply. The cost estimates for LT consumers shall include the cost of service line and terminal arrangements at the premises of the applicant but shall not include the cost of meter. For loads of 50 kVA and above connection shall be effected only after installation of separate transformer of adequate capacity, the cost of which shall

be recovered from the consumer. In such case the consumer shall provide the space for erecting such transformer.

25. From these statutory provisions that we have referred to, it is clear that the Board is entitled to recover in advance from the consumer requiring supply, the expenses reasonably incurred by it for providing electric line or electrical plant required for the purpose of giving such supply. One- we accept that the statutory provisions entitle the Board to recover such expenses, the further question that arises is whether the principles of promissory estoppel can in any manner come in the way of the Board in recovering such dues. In our view, the answer has to be in the negative and this position has been clarified by a line of judgments of the Apex Court. The three judgments that were cited at the Bar are Delhi Cloth and General Mills Ltd. Vs. Union of India (UOI), , M/s. Pawan Alloys and Casting Pvt. Ltd., Meerut etc, etc. Vs. U.P. State Electricity Board and others, and Monnet Ispat and Energy Ltd. Vs. Union of India (UOI) and Others, .

26. In para 25 of the Delhi Cloth and General Mills Ltd. (supra), the Apex Court has held that promissory estoppel cannot be used to compel the public bodies or the Government to carry out the representation or promise which is contrary to law or which is outside their authority or power. This paragraph reads thus;

25. It is, however, quite fundamental that the doctrine of promissory estoppel, cannot be used to compel the public bodies or the government to carry out the representation or promise which is contrary to law or which is outside their authority or power. Secondly, the estoppel stems from equitable doctrine. It, therefore, requires that he who seeks equity must do equity. The doctrine, therefore, cannot also be invoked if it is found to be inequitable or unjust in its enforcement.

This principle has been reiterated by the Apex Court in para 10 of Pawan Alloys & Casting Pvt. Ltd. (supra) as follows;

10. It is now well settled by a series of decisions of this court that the State authorities as well as its limbs like the Board covered by the sweep of Article 12 of the constitution of India being treated as "State" within the meaning of the said article, can be made subject to the equitable doctrine of promissory estoppel in cases where because of their representation the party claiming estoppel has changed its position and if such an estoppel does not fly in the face of any statutory prohibition, absence of power and authority of the promisor and is otherwise not opposed to public interest, and also when equity in favour of the promisee does not outweigh equity in favour of the promisor entitling the latter to legally get out of the promise.

Again, as already referred to by us, in Monnet Ispat and Energy Limited (supra), in para 182.5, this principle was stated thus;

182.5. In no case, the doctrine of promissory estoppel can be pressed into aid to compel the Government or a public authority to carry out a representation or

promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. No promise can be enforced which is statutorily prohibited or is against public policy.

27. The aforesaid statutory provisions and the principles laid down by the Apex Court leaves no room for doubt that even if it is assumed for the sake of argument that Exts. P3, P8 and P11 reflect a promise, the principles of promissory estoppel cannot be pressed into service to prevent the Board from realising the expenses, which it is statutorily empowered to realise.

28. Now the question survives is whether on facts, the Board was justified in demanding the amount mentioned in Exts. P 14 and P16. We have already referred to the justification offered by the Board in the additional statement dated 12/7/11 and also the quantification as given by the Board in the above statement. Nothing has been placed on record before us to infer that the facts and figures pleaded by the Board are erroneous. In fact, no such argument was raised before us. In such a situation, we have no reason to conclude that the demand made by the Board is without any factual foundation.

29. For the aforesaid reasons, we cannot sustain the view taken by the learned Single Judge that the appellants were not justified in issuing Exts. P14 and P16 or demanding the amounts due to it towards the cost involved for providing supply of electrical energy to the premises of the first respondent.

For these reasons, the judgment of the learned Single Judge is set aside. The appeal will stand allowed and the writ petition filed by the 1st respondent will stand dismissed without any order as to costs.