(2015) 08 OHC CK 0042

In the Orissa High Court

Case No : Writ Petition (C) Nos. 22202, 22589 of 2010, 1462, 9778, 9779, 10332, 15437, 25765, 18190, 4178, 4199, 4679, 6264 and 7722 of 2011

Krishna Poultry Farm and Others APPELLANT

Vs

State of Orissa RESPONDENT

Date of Decision : 18-08-2015

Acts Referred:

Citation : (2015) 08 OHC CK 0042

Hon'ble Judges : B.R. Sarangi, J

Bench : Single Bench

Advocate : S.D. Das, Senior Advocate, H.S. Satpathy, A.N. Sahu, S. Biswal and M.M. Swain, for the Appellant

Final Decision : Allowed

Judgement

Dr. B.R. Sarangi, J—All the cases having similar cause of action, have been heard together and disposed of by this common judgment. For better appreciation, the fact in W.P.(C) No. 22202 of 2010 has been taken into consideration for adjudication of the matter.

The petitioner in W.P.(C) No. 22202 of 2010 has filed this application seeking to quash the letter/order dated 27.11.2010 issued by the opposite party No. 4 under Annexure-3 whereby the petitioner''s farm has been re-classified as ''Commercial'' category instead of ''Agro Industries'' category and directed to revise assessed amount without any notice regarding reclassification as per Regulation 82 of O.E.R.C. (Distribution, Conditions of Supply) Code, 2004.

2. The short fact of the case in hand is that the petitioner''s Farm is an Agricultural Unit actively associated with Poultry Farming and for the said purpose and as a part and parcel of the said unit a poultry feed processing machineries has been installed by the petitioner to supply adequate feed to the live birds to meet the daily feed requirement of the birds inside the poultry farm.

The main and foremost activity of the petitioner-farm is to raise the live birds in the farm and to produce and sale the eggs to cater to the needs of the consumers of the local market. As the petitioner''s farm is a unit where a large numbers of birds have been raised for production of eggs, the feed processing machineries have been installed being an indispensable part of the Farm to provide feeds to the birds inside the poultry farm. The petitioner''s farm being a poultry farm, the main concern is to raise the poultry live birds for production of eggs, the farm in question comes under the definition of "Agriculture" and the petitioner''s farm is entitled to all sorts of benefits and incentives as admissible for agriculture as per the prevailing policy of the Government. The petitioner''s farm has been approved by the APICOL for poultry farming and at present more than 40,000 live birds are being raised by the petitioner for the purpose of extensive production of eggs. In order to raise large number of birds in the poultry and to meet the day to day need of the feed and to produce the feed in a more hygienic manner, the petitioner has installed mini poultry feed processing machineries inside the premises of the farm itself which was also duly approved by the APICOL and as such the petitioner farm has not indulged in any other commercial activities except raising of the live birds and production of the eggs to meet the requirement of the local market. In order to meet the requirement the petitioner entered into an agreement with the opposite party for supply of 20 KW electrical energy @110 paisa per KWH on the units consumed with an intention to promote and expand the arena of poultry farming and to accelerate the production of poultry product, the Govt. of Odisha has decided to classify/ include poultry farming with ''Agriculture'' and the sole and equivocal intention is to infuse seer attraction towards the poultry farming incentives as is offered by the various departments like Revenue, Finance, Labour, Energy etc. for the agriculture. Pursuant to the resolution of the Govt. bearing No. 27560/10V(A)49/04 dated 19.08.2005 since the poultry farming and poultry products constitute an integral part of human consumption having increased nutritional value. In spite of availability of favourable condition for extensive production of poultry products, the State of Odisha could not explore it to its hilt for which poultry is required to be considered as a priority sector for which the incentives and benefits which are offered to Agriculture by the aforesaid departments of Government is also admissible to the poultry. Instead of adhering to the aforesaid resolution issued by the Agriculture Department, opposite party Nos. 3 and 4 issued a letter on 27.11.2010 specifying therein for reclassification of tariff in respect of petitioner farm which was availing power supply towards poultry feed unit along with farming activities. It is stated that as per clause-80(5)(ii), having regard to Annual Revenue requirement and tariff order for Financial Year 2010-11 activities of cattle/poultry/fish feed unit and food/agro products processing unit have been excluded from allied "agricultural activities". Accordingly, opposite party Nos. 3 and 4 called upon the petitioner to show cause why his poultry farm will not be reclassified under GP(LT) tariff and deposit a sum of Rs. 37,692/- towards additional security deposit within 15 days of receipt of the said letter failing which power supply to the petitioner farm will be disconnected. Against the said order, the petitioner has approached this Court by filing the present writ petition.

3. Mr. S.D. Das, learned Sr. Counsel for the petitioner vehemently urged that the petitioner''s unit having classified under the category of ''agriculture'', he being entitled to the benefit as per the said category and in fact the benefit has been extended to it under ''Agro Industries'' category scheme. The subsequent modification and direction given for execution of fresh agreement to change the category to GP (LT) Tariff under ''commercial'' category cannot sustain and as such the demand so raised is also absolutely misconceived one having been raised following due procedure of law envisaged under the statute. Therefore, he seeks for quashing of the same. It is further urged that the feed unit being an integral part of the poultry farm, change of category from ''agriculture'' to ''commercial'' is absolutely misconceived one. To substantiate his contention, reliance has been placed on the judgment in The Executive Engineer (Electrical), The Executive Engineer (Electrical) NESCO, Baripada Electrical Division Vs. OMBUDSMAN-II, (Electricity) and Another, (2013) 115 CLT 601 .

4. Mr. B. Senapati, learned Addl. Govt. Advocate states that since the dispute is between the petitioner vis-?-vis opposite party Nos. 3 and 4, the dispute can only be resolved, if adjudication is made between the petitioner vis-?-vis opposite party Nos. 3 and 4.

5. Mr. P.K. Mohanty, learned Sr. Counsel for opposite party Nos. 3 and 4 states that the petitioner has been given due notice to show cause why its unit should not be reclassified as GP(LT) tariff vide letter dated 27.11.2010, but as he did not turn up or submit any cause, vide Annexure-A/4 dated 25.12.2010, he was intimated that his unit will be re-classified to GP(LT) Tariff and saddled an amount of Rs. 1,58,480/- towards differential bill arising out of such reclassification with effect from 9.10.2009 pursuant to the notification of the OERC shall be added to the bill of Dec, 2010 and as such he was called upon to pay the bill for December, 2010. It is further urged that while the petitioner established its poultry farm and availed the power supply to the said unit, he had not established the poultry feed unit at that point of time as per the Orissa Gazette Notification dated 31.10.2007. The OERC had introduced a class of consumer, namely, "Agro Industrial Consumers". By amendment to Regulation 80(5) of the Supply Code, ''poultry'' is included into the meaning of section 80(5)(ii), as a result of which, there is change of classification of consumers as the feed unit attached to the poultry farm cannot be treated as "Agro Industrial Consumers" category. But it should be treated as poultry farm within the meaning of clause 80(5)(ii) of the Code. Reference has also been made to the order dated 26.8.2009 passed in W.P.(C) No. 6515 of 2009 (M/s. Prithivraj Dairy Products v. State of Orissa and others), wherein while setting aside paragraphs-255 and 258 of OERC Retail Supply Tariff Order for the Financial Year 2009-10, this Court directed the OERC to consider the feasibility of creating an additional tariff category for Agro based industries applicable to non-agriculturist

consumers and fix appropriate tariff for the said category which seems to be the real intention of Regulation 80(5) of Supply Code. Therefore, with the above intention if there is amendment to the provisions contained in the Code and as such by introduction of Code 80(5)(ii), the petitioner is liable to pay on GP (LT) Tariff instead of Agro Industrial category for its poultry farm for captive feed unit, no fault can be found with the same. In order to substantiate his case, reliance has been placed on West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd. etc. etc., AIR 2002 SC 3588 : (2002) 7 JT 578 : (2002) 7 SCALE 217 : (2002) 8 SCC 715 , The Maharashtra State Electricity Distribution Co. Ltd. Vs. Lloyds Steel Industries Ltd., AIR 2008 SC 1042 : (2007) 10 JT 375 : (2007) 10 SCALE 284 , Chhattisgarh State Electricity Board Vs. Central Electricity Regulatory Commission and Others, (2010) ELR 313 : (2010) 9 JT 451 : (2010) 4 SCR 680 : (2010) 4 UJ 1755 ,Nazir Ahmad vs. EmperorAIR 1936 253 (Privy Council) , Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others, AIR 1975 SC 915 : (1975) 1 SCC 559 : (1975) 3 SCR 839 , Deep Chand Vs. The State of Rajasthan, AIR 1961 SC 1527 : (1962) 1 SCR 662 , State of U.P. and Others Vs. Jagjeet Singh and Others, (2003) 8 JT 40 : (2003) 8 SCALE 747 : (2003) 8 SCC 270 : (2003) 4 SCR 837 Supp , Capital Bar Association, Bhubaneswar v. State of Odisha and two others, 2013 (I) OLR 344 .

6. On the basis of the fact pleaded above, it is to be considered whether the petitioner poultry unit having captive feed unit can be considered as ''agriculture industrial'' tariff basis or GP (LT) tariff basis so as to enable the opposite parties to realize the demand raised in accordance with the revised reclassification of the consumers as per Regulation 82 of the OERC (Conditions and Supply) Code, 2004.

7. The Govt. of Odisha in Agriculture Department with a intention to promote and expand the arena of poultry farming and to accelerate the production of poultry product in the State decided and resolved to classify poultry as ''agriculture'' so that the poultry farmers/entrepreneurs will have access to the same incentives as being offered for agriculture by other concerned departments like Revenue, Finance, Labour, Energy etc. vide letter dated 10.8.2005. The O.E.R.C. amended the Regulation 80(5) of OERC distribution (Condition of Supply) Code, 2004 vide its 4th Amendment which was published vide Orissa Gazette Notification No. 2066 dated 31.10.2007 and classified poultry as an ''Agro Industrial Consumer'' as per Regulation 80(5)(1) of the said Code, which reads as follows:

"80(5)(1) - Agro Industrial Consumers: This category relates to supply of power for Pisciculture, Horticulture, Floriculture, Sericulture and other allied agricultural activities including animal husbandry, poultry and cold storage (i.e. temperature controlled storage where flowers, fruits, vegetables, meat, fish and food etc. can be kept fresh or frozen until it is needed)."

8. Basing upon the aforesaid meaning of Regulation 80(5)(1), the petitioner entered with an agreement with opposite party No. 3-SOUTHCO on 21.7.2008 by reclassifying the petitioner farm under ''Agro Industrial Category'' and

accordingly energy charges was fixed as applicable to the consumers under ''Agro Industrial Category'' and the said agreement was executed for a period of five years. When the agreement in Annexure-1 is in subsistence, there was an amendment to the OERC Code under Regulation 80(5) by notification dated 19.10.2009 to the following effect:--

"80(5)(i) - Irrigation, Pumping and Agriculture: This category relates to supply of power for pumping of water in lift irrigation, flow irrigation and for lifting of water from wells/bore-wells, dug-wells, nallahs, streams, rivulets, rivers, exclusively for agricultural purpose.

80(5)(ii) - Allied Agriculture Activities : This category relates to supply of power for Aquaculture (which includes Pisciculture/Prawn Culture), Horticulture, Floriculture, Sericulture, Animal Husbandry and Poultry, Activities such as Ice Factories, Chilling Plants, Cold Storages, Cattle/Poultry/Fish Feed units and food/ agri-products processing units are excluded.

80(5)(iii) - Allied Agro-Industrial Activities : This category relates to supply of power to "Cold Storages (i.e. a temperature controlled storage where flowers, fruits, vegetables, meat and fish can be kept fresh or frozen unit it is needed) and includes chilling plant for milk and only the cold storages attached to processing units for meat, fish prawns, flowers, fruits and vegetables."

9. The opposite party No. 4-Executive Engineer, Berhampur without following due procedure of law all on a sudden issued a letter stating reclassification of the petitioner farm under ''commercial'' category instead of ''Allied Agriculture Industry'' without any rhyme and reason and directed to deposit the differential amount of Rs. 37,692/- towards additional security deposit within fifteen days, failing which there shall be disconnection of power supply vide Annexure-3 dated 27.11.2010. Such reclassification has been made taking into consideration that the petitioner has established the poultry feed unit in the premises of the poultry farm to meet the day to day consumption of live birds and as such the same has never been established for any commercial purpose except for its own consumption of the farm. As the poultry feed unit has been utilized for the benefit of the poultry and not by commercial purpose, it should not be charged on the basis of commercial tariff basis instead of agro industrial tariff basis. It is stated by learned counsel for the opposite party Nos. 3 and 4 that as per requirement of the provision under Regulation 82 of OERC (Conditions of Supply) Code, 2004 since the petitioner did not respond within the time stipulated in the notice referred to in letter dated 25.12.2010 vide Annexure-A/4, it has been reclassified as GP (LT) Tariff basis and accordingly demand has been raised on the basis of such reclassification w.e.f. 9.10.2009 as per the notification of OERC and the petitioner has been called upon to make payment of the amount on receipt of the bill. It is further vehemently urged by learned counsel for opposite party Nos. 3 and 4 that by the time the petitioner established the poultry farm and availed the power supply at that point of time, he had not established the poultry feed unit and at that point of time as per the gazette notification dated

31.10.2007 the OERC introduced a class of consumer called ''Agro Industrial Consumers''. Therefore, the petitioner was charged on ''Agro industrial tariff basis instead of GP (LT) Tariff basis. Since the said code undergone amendment, demand has been raised accordingly. It is urged by learned counsel for the opposite party Nos. 3 and 4 that it has been categorically explained that with the object of achieving the commercial purpose of generating electricity revenue, the poultry and cattle feed units, which manufacture feeds for poultry and cattle by using raw materials and uses the power supply for production of the same cannot be included within the Regulation 80(5)(ii) as allied agricultural activities. Reliance has been placed on Rama Chandra Keshor Adke (dead) by LRs. (supra), wherein the apex Court held "where a power is given to do certain things in a certain way, the things must be done in that way or not at all. The same principle has been upheld in Nazir Ahmmed v. King Emperor (supra), Ramachandra Keshor Adke (dead) by Lrs. (supra), Deep Chand (supra), Jagjeet Singh and others (supra), Capital Bar Association, Bhubaneswar (surpa).

10. No doubt the principles laid down by the apex Court is well recognized but the same is not applicable to the present context in view of the fact that the live birds cannot grow without the feed. If the feed processing unit has been established for the purpose of own utilization for growth of live birds, it is to be construed that it is attached to the word ''poultry'' and as such the word ''poultry'' cannot be segregated with the meaning of without any feed. Therefore, manufacturing of poultry feed being an integral part of growth of live birds in a poultry, that itself cannot be segregated and as such shall form part of the poultry unit. The categorization of poultry as commercial category instead of agro industrial category is absolutely misconceived notion by the authority concerned and that direction for realization of dues on allied agricultural activities under Regulation 80(5)(ii) cannot sustain. It is stated that this Court has already held in W.P.(C) No. 9434 of 2009 disposed of 15.9.2009 that poultry includes hen, roster, pullet, capon, chick, which means a living bird. Poultry is different from production of ''cattle and poultry feed''.

11. The production of cattle and poultry feed may be different but the condition in which it is to be used that is most important than that of the categorization of the farm itself. In the present context, the feed has been manufactured for the purpose of growth of live birds, therefore they form part of the poultry which cannot be segregated in any manner whatsoever. Therefore, categorization of farm under a commercial category cannot sustain in the eye of law. It is stated that poultry farm is distinguishable from poultry with feed unit, but no material has been produced before this Court to show that poultry with feed unit is utilized for commercial purpose and therefore is categorized as commercial category under GP (LT) tariff basis; hence, the same cannot be sustained in the eye of law.

12. So far as applicability of West Bengal Electricity Regulatory Commission and Chhatisgarh State Electricity Board (supra) are concerned, those cases have

been decided on their own facts and circumstances and this question was never raised and considered in the said judgments. Therefore, those judgments are not applicable to the present context. Similarly, in Maharashtra State Electricity Distribution Co. Ltd. (supra) also it has been held that every consumer has remedy to file his grievance before the GRF or before the Ombudsman as provided under Sections 42(5) and 42(6) of the Act. Even if there is availability of alternative remedy, the way the authority have proceeded with for determination of benefit admissible to the petitioner, finding no other way out, he has approached this Court invoking its extra ordinary jurisdiction and that ipso facto cannot be a bar to approach this Court by filing the present writ petition. Hence, the reliance placed cannot be sustained in the present circumstances when the petitioners have been directed to act in a manner which they are not required to do. Pursuant to the direction given by this Court on 15.4.2014, the petitioner has filed letter No. 2359 dated 24.2.2014 issued by the Commissioner-cum-Chief Secretary, Govt. of Orissa, Fisheries and HRD Department along with the minutes of the meeting on Egg Production Strategy held on 22.02.2014 in the Conference Hall of the Chief Secretary wherein under decision No. 3 it was decided to refer the matter to the Energy Department for seeking further clarification from OERC in the matter of charging electricity tariff from the poultry farmers for electricity usages in their captive feed plants at the non-agricultural tariff rate by SOUTHCO. Decision No. 3 reads as follows:--

"It was submitted that SOUTHCO Authority were charging electricity tariff from the poultry farmers for electricity usage in their captive feed plants at the non-agricultural tariff rate. Because captive feed plants is an integral part of poultry units and the feed is used for the poultry farms, it was decided to refer the matter to Energy Department for seeking further clarification from OERC on the matter."

13. It is also stated in the affidavit filed by the petitioner on 16.5.2014 that similarly situated consumers/poultry farms under SOUTHCO having captive feed units are availing the tariff under allied agricultural activities category whereas the petitioners have been deprived of having equal treatment. On 16.2.2015 the petitioner has also filed a memo along with the information/letter obtained under Right to Information Act regarding the bill particulars/billing summary of poultry farms having feed unit, which transpires that SOUTHCO is charging electric bills to the said poultry farms under the category of allied agricultural category and not under general purposes/commercial category. Therefore, before reclassification made under Regulation 82, the petitioner should have been given opportunity in accordance with provisions of law. The conduct of the opposite party Nos. 3 and 4 in charging the petitioner on GP (LT) Tariff basis without charging the similarly situated units under the said category is absolutely arbitrary and unreasonable. In view of clause-80(5)(ii) since there was a ''full stop'' after the word ''poultry'' irresistible conclusion is that independent feed unit shall not be covered but captive feed unit which are existing and are very much necessary for rearing of the poultry as consumption of feed amounts to 47% i.e.

half of the production price should be covered under the allied agricultural category. But exclusive commercial activity of the feed is not included thereunder. Though hatchery was not included under clause 80(5)(ii) under Allied Agriculture Activities Category, by virtue of the judgment in The Executive Engineer (Electrical) NESCO, Baripada (supra), this Court has come to a conclusion that "Hatchery" comes under poultry and in the same analogy captive feed unit which amounts to approximately 50% of the expenses is to be included under Allied Agricultural Activities Category. Therefore, the same should come within the meaning of ''poultry'' and that cannot be segregated from the same. If similarly situated consumers i.e. poultry farms having captive feed unit are being charged under Allied Agricultural Activities Category, the petitioner could not have been deprived in any manner whatsoever, rather this amounts to an arbitrary and unreasonable act of the authority, which cannot be sustained in the eye of law.

14. The Retail Supply Tariff for the year 2014-15 under paragraphs-234, 235 and 236 reads as follows:

"234. CESU proposed to exclude the food processing units from Agro-based tariff. Some objectors stated that the present tariff for Agro-Industrial consumers was equitable and needed no change. Food processing is an allied Agro-based activity which should not be excluded from Allied Agro-Industrial activity as a category of consumer.

235. In this context, the Commission decides to introduce the concept of substantive activity, like cold storage for preservation of perishable commodities, to prevail upon the practical difficulties in segregating cold storage load from food processing, e.g. the food processing unit attached with cold storage shall be charged at Agro-Industrial Tariff if cold storage load is not less than 80% of the entire connected load.

236. If the load of the food processing unit other than cold storage unit exceeds 20% of the connected load, then the entire consumption by the cold storage and food processing unit taken together shall be charged with the tariff as applicable for general purpose or the industrial purpose as the case may be."

The aforementioned provisions clearly indicate that the food processing unit is an allied agro-based activity which should not be excluded from allied agro-industrial activity as a category of consumer. An example has been given that the food processing unit attached with cold storage shall be charged at Agro-Industrial Tariff if cold storage load is not less than 80% of the entire connected load and If the load of the food processing unit other than cold storage unit exceeds 20% of the connected load, then the entire consumption by the cold storage and food processing unit taken together shall be charged with the tariff as applicable for general purpose or the industrial purpose, as the case may be.

Applying the said Retail Supply Tariff for the year 2014-15, it is made clear that the captive feed unit attached to the poultry farm being treated as an integral part of poultry, if the consumption is less than 20% of total connected load, it should be charged on Allied Agro-Industrial category not on GP (LT) Tariff basis.

15. In view of the foregoing reasons, this Court is of the considered view that captive feed unit attached to the ''poultry farm'' can be considered to be its integral part and as such ''poultry'' should be charged on the basis of ''Agro Industrial Category'' and subsequent by virtue of the amendment made ''Allied Agriculture Activities'' not on the basis of GP (LT) Tariff basis.

16. Accordingly, the writ petitions are allowed. No costs.

