

(2005) 11 KL CK 0002

In the High Court Of Kerala

Case No : W.P.C. No"s. 34322, 26806 etc. and W.A. No"s. 1371 etc. of 2003

M. Sainalabdeen

APPELLANT

Vs

Kerala State Electricity Board and others

RESPONDENT

Date of Decision : 28-11-2005

Acts Referred:

Electricity Act, 2003 — Section 185, 82, 82(1), 85, 86
Electricity Regulatory Commission Act, 1998 — Section 17, 22(1)(a), 29, 29(2)
Factories Act, 1948 — Section 2(k), 2(k)(i)

Citation : (2006) 2 KLJ 18

Hon'ble Judges : K.T. Sankaran, J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : V. Jayakumar, for the Appellant; P. Santhalingam (SC, KSEB) and K. Lakshmi Narayan (GP), for the Respondent

Final Decision : Allowed

Judgement

K.S. Radhakrishnan, J.—The question posed in all these cases is whether cashew packing units would fall under LT - IV industrial tariff or under LT-VII-A commercial tariff. Earlier original petition No.31706 of 2002 was filed before this court which was disposed of by a learned single judge of this court directing the fourth respondent therein, the Deputy Chief Engineer, to take a decision on the petitioner's representation. Following that direction, it is seen, on the basis of the note submitted by the Deputy Chief Engineer, Kottayam, Kerala State Electricity Board issued Circular dated 19-04-2003 which clarified that cashew packing units may be charged under commercial tariff, legality of which is challenged in these writ petitions.

2. Kerala State Electricity Board has issued a Circular in the wake of the direction of the learned single judge to dispose of the representation. Petitioners questioned the power of the Board to fix the tariff for cashew packing units placing them under LT VII-A commercial tariff. Petitioners contend that packing of cashew kernels is the last stage of cashew manufacturing process. Petitioners

in all these cases are cashew exporters. They manufacture cashew kernel from raw cashew nuts by roasting the cashew nuts and removal of the shell and recovery of cashew kernel is done in the cashew factories. A few of the petitioners have got their own attached factories and certain others elsewhere. Petitioners submit that cashew packing units are integrally connected with the manufacturing process, being part of the industry and hence falls under LT IV industrial and not under LT VII-A commercial.

3. Petitioners submit as per the Conditions of Supply of Electrical Energy, energy supplied to an industry has to be charged at LT-IV rates as per the Tariff Revision Order, 2001. The activities carried on the petitioners' packing unit are part of cashew processing, which according to them, is an industrial activity and cannot be separated from it. Further they also carry on pooling, packing, gas infusion and sealing mechanically using electrical power and that is the final stage of cashew processing. Further it is stated that packing units cannot be divorced from the industrial activity of cashew processing. Referring to Section 2(k) of the Factories Act they contended that the "manufacturing process" includes packing with a view to its use, sale, transport, delivery or disposal. They have referred to the definition of "manufacturing process". Reference was also made to the decision of the apex court in V. P. Gopala Rao Vs. Public Prosecutor, Andhra Pradesh, and submitted that manufacturing process in Section 2(k)(i) is widely worded and includes in Section 2(k)(i) is widely worded and includes the process of "making, altering, repairing, ornamenting, furnishing, packing, oiling, washing, cleaning, demolishing or otherwise treating, breaking up, adaptation and packing of the tobacco leaves" done with a view to its use, sale, transportation, delivery or disposal. Reference was also made to the Division Bench decision of the Andhra Pradesh High Court in Kotecha v. Regional Inspector of Factories 1960 (1) L.L.J. 55).

4. Standing Counsel appearing for the Board on the other hand contended that the meaning of the expression that we get in the Factories Act or in the Kerala Shops & Commercial Establishment Act cannot be imported in the matter of fixation of tariff under the Electricity Act. Further counsel submitted that it was on the basis of the direction of this Court the Board has issued Circular which has been made uniformly applicable to all the packing units. Counsel for petitioners submitted that packing is an essential part of the manufacturing process and the activity carried on in the units is an industrial activity and cannot be considered as part of commercial activity. Hence cashew packing units can be charged only under industrial tariff. Learned single judge repelled the contention raised by the petitioners in the case Kailas Cashew Exports v. State of Kerala (2003 (3) KLT Short Notes 64 at 45).

5. Facts would evidently show that for the last so many years packing units attached to cashew factories were treated under LT-IV industrial tariff and not under LT VII-A commercial tariff. The board had to issue the Circular because there was no uniformity in the fixation of tariff so far as packing units are

concerned. The Electricity Regulatory Commission Act, 1988 had conferred considerable powers on the State Commission which had the jurisdiction and not the State Government or the Board in fixing the tariff. Tariff also can be enhanced only after getting approval of the Commission and the decision of the commission was treated to be final and binding and it was not permissible for the licensee or anyone else to charge a different tariff. Electricity Regulatory Commission Act had also conferred powers u/s 22 (1)(a) and 29 to adjudicate upon the charges and to take a decision on the fixation of tariff. Scope of the Electricity Regulatory Commission Act came up for consideration before the apex Court in BSES Ltd. Vs. Tata Power Co. Ltd. and Others, . Earlier the apex court in West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd. etc. etc., took the view that consumers have the right of hearing/representation in proceeding u/s 29 (2) of the Act. The court held that statute conferred right on persons affected to make representation before the Commission. Powers of the Regulatory Commission were elaborately considered by the apex Court in the above mentioned case. State Government in exercise of the powers u/s 17 of the Electricity Regulatory Commission Act, 1998 constituted Kerala State Electricity Regulatory Commission, vide notification dated 14-11-2002. Kerala State Electricity Regulatory Commission Conduct of Business Regulations 2003 was also framed.

6. The new Electricity Act 2003 was enacted and the Electricity Regulatory commission Act 1998 was repealed u/s 185 of the Electricity Act, 2003. However, Section 82 of the Electricity Act 2003 requires emphasis, which is extracted below for easy reference.

82. Constitution of State Commission. - (1) Every State Government shall within six months from the appointed date, by notification, constitute for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission.

Provided that the State Electricity Regulatory Commission, established by a State Government u/s 17 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule, and functioning as such immediately before the appointed dated, shall be the State Commission for the purposes of this Act and the Chairperson, Members, Secretary and officers and other employees thereof shall continue to hold office, on the same terms and conditions on which they were appointed under those Acts:

(1) Provided further that the Chairperson and other Members of the State Commission appointed, before the commencement of this Act, under the Electricity Regulatory Commissions Act, 1998 (14 of 1998) or under the enactments specified in the Schedule, may, on the recommendations of the Selection Committee constituted under sub-section (1) of Section 85, be allowed to opt for the terms and conditions under this Act by the concerned State Government.

(2) The State Commission shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.

(3) The head office of the State Commission shall be at such place as the State Government may, by notification, specify.

(4) The State Commission shall consist of not more than three members, including the Chairperson.

(5) The Chairperson and Members of the State Commission shall be appointed by the State Government on the recommendation of a Selection Committee referred to in Section 85.

Proviso to Section 82(1) stipulates that the State Electricity Regulatory Commission established by a State Government u/s 17 of the Electricity Regulatory Commission Act, 1998 and functioning as such immediately before the appointed date, shall be the State Commission for the purposes of the Act and the Chairperson, Members, Secretary and offices and other employees thereof shall continue to hold office, on the same terms and conditions on which they were appointed under those Acts. Section 86 of the Electricity Act 2003 confers power on the State Commission to determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be within the State. Powers have already been conferred u/s 86 (1)(f) to adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration. After the coming into force of the Electricity Act, 2003 it is no longer open to the Board to unilaterally increase the tariff. Same can be done only after getting approval from the Commission. No power has been conferred on the Board under the Electricity Act, 2003 to resolve any dispute with regard to the category under which a particular group of establishments falls; either industrial or commercial. Since no power has been conferred on the Board under the 2003 Act for fixation of tariff as well, we feel in the facts and circumstances of these cases, it would be appropriate that a direction be given to the Kerala State Electricity Regulatory Commission to decide as to whether cashew packing units would fall under LT IV Industrial tariff or under LT VII-A commercial tariff. Commission would give opportunity of being heard to the Board Officials as well as to the petitioners. Petitioners may make available all the relevant materials before the Commission. In such circumstances, we are inclined to allow all the writ appeals and writ petitions and set aside the judgment of the learned single judge as well as the Circular issued by the Board on 9-4-2003 and direct the Regulatory, Commission to pass appropriate orders in accordance with law within a period of four months from the date of receipt of a copy of this judgment, till that time the petitioners would be treated as falling under LT IV industrial. The K.S.E. Board will place the matter before the Regulatory Commission.