(2002) 12 MP CK 0031

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 781 of 2002

Maihar Cement APPELLANT

Vs

M.P. State Electricity Board and Others RESPONDENT

Date of Decision : 19-12-2002

Acts Referred:
Electricity (Supply) Act, 1948 — Section 44
Madhya Pradesh Sudhar Adhiniyam, 2000 — Section 12, 21, 21(3), 41

Citation : (2003) 1 MPHT 428 : (2003) 3 MPLJ 308

Hon'ble Judges : S.P. Khare, J

Bench : Single Bench

Advocate : Alok Aradhe and K.P. Kushwaha, for the Appellant; M.L. Jaiswal and Mohd. Asif, for the Respondent

Final Decision : Allowed

Judgement

S.P. Khare, J.

This is an appeal by applicant Maihar Cement u/s 41 of the M.P. Vidyut Sudhar Adhiniyam, 2000 (hereinafter to be referred to as the ''Adhiniyam'') against the order by which the M.P. Electricity Regulatory Commission (hereinafter to be referred to as the ''Commission'') has declined to give consent to it to install additional 15 MW thermal captive power plant on its application u/s 21 of the Adhiniyam.

It is not in dispute that the petitioner is a company registered under the Companies Act, 1956 and it is manufacturing cement at Maihar. It requires uninterrupted supply of electricity. It has been provided at HT connection at 132 KV with a contract demand of 23 MVA by the M.P. Electricity Board (hereinafter to be referred to as the ''Board''). The petitioner company has already installed "captive power plants" of 30.3 MW after obtaining consent of the Board u/s 44 of the Electricity (Supply) Act, 1948 (hereinafter to be referred to as the ''Act''). By order dated 27-8-1996 the Board granted permission to the petitioner company for installation of additional 15 MW captive power plant. But it could not be installed by the petitioner company within the stipulated period of five years. The petitioner company submitted an application on 14-1-2002 u/s 21 of the Adhiniyam before the Commission for its consent to install 15 MW thermal captive power plant with a request to relax the condition of drawal of 50% of the total monthly requirement of electricity from the Board. That application has been rejected by the impugned order.

The petitioner''s case is that the installation of additional 15 MW captive thermal power plant in its cement factory has become necessary to run the factory efficiently and economically. It is alleged that the Board is not in a position to assure uninterrupted supply of power to the extent required at proper voltage and frequency as it is having power shortage. The petitioner company obtained the consent of the Board to install this captive power plant in the year 1996 but it could not establish the same due to some financial constraints. Now it can do so. According to the petitioner company the cost of electricity from such a plant works out to Rs. 2.57 paise per unit. It would be much less than the average cost of supply from the HT connection provided by the Board which is Rs. 4.71 per unit. By adoption of economical and efficient methods the production of cement would increase and that would bring more revenue to the State also in the form of various taxes. Keeping in view the present power scenario in the State the installation of this captive power plant is not going to adversely affect the operation of the power system or development of electricity industry. The installation of the captive power plant would increase the power supply and that would be in overall public interest. It is submitted that the Commission has illegally rejected the application of the petitioner u/s 21 of the Adhiniyam.

The application of the petitioner has been opposed by the Board. It has taken the stand that it is in a position to supply the electricity as required by the petitioner company. It is stated in para 1 of the reply : "The only constraint is shortage of financial resources. The power is being purchased corresponding to availability of funds. It is expected that the financial condition of the Board is going to improve in near future and then power as per requirement shall be purchased by the Board. During rabi season, to meet the requirement of agricultural sector, power is diverted to agricultural sector resulting in temporary shortage of power during rabi season". The cost per unit charged by the Board is higher than the cost of production by thermal captive power plant. It is stated that the Board is required to supply power to certain category of consumers at highly subsidised rates and the cross-subsidization reflects on HT/LT industrial consumers. It is, therefore, necessary that the Board''s power to the extent of 50% must be utilised by captive power consumers else its economy would be shattered. That is in tune with the power policy of the State Government issued on 20-2-2001 and this policy is binding on the petitioner. That has legal force. The policy has been framed in public interest and therefore the petitioner cannot be exempted from drawing at least 50% of its requirement from the Board.

The Commission in the impugned order has taken the view that the power policy framed by the State Government is not binding on it as it has not been framed "under the provision of the Adhiniyam". The application has been rejected on the ground of "categorical comment" of the Board that it is in a position to meet entire power requirement of the petitioner.

The State Government which has been impleaded as a respondent in this appeal has submitted in writing that there is "temporary deficit in the availability of power vis-a-vis demand". The reasons have been assigned which have led to the shortage of power and consequent "load shedding". It is admitted that in the evening peak hours the supply to HT consumers is also restricted. It has also taken the plea that the Board has to bear the transmission and distribution losses apart from losses on account of subsidised supply rate for the social welfare measures which adds to the cost factor. It is stated that as per power policy dated 20-2-2001 "for such consumers, to whom permission for establishing captive power plant is granted after the issue of this notification, it shall be binding to draw at least 50% of electricity from the Board out of their total monthly requirement".

The learned Counsel for both the sides have been heard at length. The appeal u/s 41 of the Adhiniyam against the orders of the Commission is permissible on "questions of law arising out of such order". Therefore, the point for determination in this appeal is whether the impugned order is contrary to law.

As stated above, it is an admitted fact that the petitioner company was given permission by the Board by order dated 27-8-1996 for installation and running of additional 15 MW TG Set (over and above 30.3 MW capacity) in parallel with the Board''s supply for five years in exercise of the power u/s 44 of the Act. The petitioner company says that it could not install this plant within five years due to financial constraints but it is now willing to do as its financial position has improved. It can be safely presumed that the Board must have examined the proposal of the petitioner company for installation of the additional 15 MW TG Set in light of the provisions of the Act and especially the provision contained in Section 44 of the Act. The power supply position of the Board has not improved since 1996. It has rather deteriorated. That can be gleaned from the replies submitted by the Board and the State Government. The Court can take judicial notice of the fact that there is acute shortage of power in the State leading to power cuts and load-shedding everyday.

The relevant statutory provisions of the Act and the Adhiniyam must be examined to ascertain the legislative intent and true legal position. Section 44 of the Act is as under :--

"44. Restriction on establishment of new generating stations or major additions or replacement of plant in generating stations.--(1) Notwithstanding anything contained in any other law for the time being in force or in any licence, but subject to the provisions of this Act, it shall not be lawful for a licensee, or any other person, not being the Central Government or any Corporation created by a

Central Act or any Generating Company, except with the previous consent in writing of the Board, to establish or acquire a new generating station or to extend or replace any major unit of plant or works pertaining to the generation of electricity in a generating station :

Provided that such consent shall not, except in relation to a controlled station, be withheld unless within three months from the date of receipt of an application :--

(a) for consent to the establishment or acquisition of a new generating station the Board-

(i) gives to the applicant being a licensee an undertaking that it is competent to, and will, within twenty-four months from the said date, afford to him a supply of electricity sufficient for his requirements pursuant to his application; or

(ii) shows to the applicant that the electricity required by him pursuant to his application could be more economically obtained within a reasonable time from another appropriate source;

(b) for consent to the extension of any major unit of plant or works as aforesaid, the Board-

(i) gives to the applicant being a licensee an undertaking that within twenty four months from the said date either the station to which the application pertains will become a controlled station in terms of Section 34, or the Board will make a declaration to the applicant in terms of Section 35 offering him a supply of electricity sufficient for his requirements pursuant to his application, or the Board will make a declaration to him in terms of Section 36 (ii) shows to the applicant that the electricity required by him pursuant to his application could be more economically obtained within a reasonable time from another appropriate source or by other appropriate means;

(c) for consent to the replacement of any major unit of plant or works, the Board-

(i) gives to the applicant being a licensee an undertaking that within eighteen months from the said date either the station to which the application pertains will become a controlled station in terms of Section 34 or the Board will make a declaration to him in terms of Section 36; or

(ii) shows to.the applicant that the electricity required by him pursuant to his application could be more economically obtained within a reasonable time from another appropriate source or by other appropriate means.

(2) There shall be stated in every application under this section such particulars as the Board may reasonably require of the station, plant or works, as the case may be, in respect of which it is made, and where consent is given thereto, in acting in pursuance of such consent, the applicant shall not, without the further consent of the Board, make any material variation in the particulars so stated.

(2-A) The Board shall, before giving consent under Sub-section (1), to the establishment or acquisition of a new generating station or to the extension or replacement of any major unit of plant or works, consult the authority, in cases where the capacity of the new generating station or, as the case may be, the additional capacity proposed to be created by the extension or replacement exceeds twenty five thousand kilowatts.

(3) Any difference or dispute arising out of the provisions of this section shall be referred to the arbitration of the authority."

Sections 12 and 21 of the Adhiniyam provide as follows :--

"12. General powers of State Government--(1) The State Government shall have the power to issue policy directives on matters concerning electricity in the State including on measures which are considered necessary for the overall planning and coordination for the development of Electricity Industry in the State.

(2) The policy directives under Sub-section (1) shall be in writing and shall be consistent with the objects sought to be achieved by this Act and they shall not adversely affect or interfere with the functions and powers of the Commission including but not limited to licensing and determination of tariffs under the powers vested in the Commission under the Act.

(3) The State Government shall consult the Commission in relation to any policy directive which it proposes to issue or any legislation is proposed to be enacted affecting the Electricity Industry it shall duly take into account the recommendation if any, given by the Commission within such reasonable time as the State Government may specify."

Restrictions of Licensees and Generating Companies.-

(1) No licensee or generating company shall, at any time, without the previous consent in writing of the Commission, acquire by purchase or otherwise the licence or the undertaking of, or associate with, so far as the business of generation, transmission, sub-transmission, distribution or supply of electricity is concerned, any other licensee or person generating, transmitting, supplying or intending to generate, transmit or supply electricity :

Provided that, before applying for such consent, the licensee shall give not less than one month''s notice of the application-

(a) to the Commission, and

(b) if the licensee holds a supply licence, to every local authority both in the licensee''s area of supply and also in the area, if any, in which such other person supplies, or intends to supply electricity.

Explanation :--For the purpose of this section a person shall be deemed to be associated with another if he is connected with the other by reasons of ownership, management or in any other, manner and is in pursuit of a joint business interest with the other.

(2) The licensee shall not, at any time, assign his licence or transfer his undertaking, or any part thereof, by sale, mortgage, lease, exchange or otherwise without the previous consent in writing of the Commission.

(3) The provisions of Section 44 of the Electricity (Supply) Act, 1948 (No. 54 of 1948) shall apply in the State after the coming into force of this Act with the following amendments :--

(a) that the consents required in the said section shall be taken from the Commission, instead of such consents to be obtained from the Board as provided under that section;

(b) notwithstanding anything contained in Clauses (a), (b) and (c) of the proviso to Sub-section (1) of the said Section 44, the Commission shall have the right to refuse the consent if in the opinion of the Commission, that the grant of consent will adversely affect the operation of the power system or the development of the electricity industry in the State in an efficient manner or otherwise the public interest; and

(c) the provisions of Sub-section (3) of said Section 44 will have no application in the State.

(4) A holder of a supply licence may, unless expressly prohibited by the terms of its licence or by a general or special order passed by the Commission, enter into arrangements for the purchase of electricity from-

(a) the holder of a supply licence which permits the holder of such licence to supply electricity to other licensees for distribution by them; and

(b) any generating company or other supplier of electricity in accordance with the regulations prescribed by the Commission governing the power purchase procurement process.

(5) Any agreement relating to any transaction of the nature described in Sub-section (1), (2), (3) or (4) unless made with, or subject to the provisions contained in the said provision, shall be void.

A close scrutiny of the statutory provisions given above would in substance indicate that a person could establish a plant for generation of electricity in a generating station "only with the previous consent of the Board". The proviso to Section 44(1) of the Act hastens to add that "such consent shall not be withheld" unless the condition mentioned in Clause (a), (b) or (c) is satisfied. These clauses reveal that the consent can be withheld if the Board can supply electricity to meet that person''s requirement or it can be made available to him more economically from another appropriate source. The words "such consent shall not be withheld" used in the proviso are very crucial and significant. These words convey the legislative intent in unmistakable language. In short the grant of consent is a rule and its refusal an exception. This is the cardinal principle around which Section 44 of the Act is woven. The monopoly is conferred on the Board on condition that it can meet the requirement of the consumers and if it is not in a position to do so it must give consent to the private players for generation of electricity. If the Board is not in a position to ensure adequate and regular supply the person having the capacity to set up captive power plant must be permitted to do so. The object is to increase the production of power.

Then came the statutory changes. The Adhiniyam has been enacted by the State Legislature. One of the objects of the Adhiniyam is rationalisation of generation and supply of electricity. Section 21 (3) of the Adhiniyam specifically retains Section 44 of the Act with some amendments. Now the power to give consent for generation of electricity by the private individuals has been conferred on the Commission instead of the Board. Clause (b) to Section 21 (3) provides that in addition to the grounds specified in Clauses (a), (b) and (c) of the proviso to Sub-section (1) of Section 44 of the Act the Commission shall have the right to refuse the consent on three additional grounds--(a) the grant of consent will adversely affect the operation of the power system, (b) it will affect the development of electricity industry in the State in an efficient manner, or (c) it will adversely affect public interest. Thus the grounds on which the consent can be refused have been clearly delineated in the Act. Still the salutary rule is that the consent shall not be withheld unless the case falls under any of the specified exceptions.

Now coming to the facts of the present case the Board granted permission to the petitioner company to establish additional thermal power plant of 15 MW capacity. That was done keeping in view the avowed object of the law enshrined in Section 44 of the Act. The petitioner company applied afresh to the Commission for grant of consent as per Section 21 of the Adhiniyam. The Commission has held, as stated above, that the power policy of the State notified earlier is not in conformity with Section 12 of the Adhiniyam as there has been no consultation with the Commission in this matter. That apart, the policy cannot run against the provisions of the Adhiniyam. It cannot be against Section 21. The Commission in the impugned order has not specifically stated the ground on which the consent has been refused. It has narrated the facts of the case and the contentions of both the sides. Then in the last para the Commission has concluded that in view of the Board''s "categorical comment" that it is in a position to meet entire require- ment of the petitioner the application has been rejected. The rejection is not on any of the three grounds specified in Clause (b) to Section 21 (3) of the Adhiniyam. The Commission ought to have seen that the Board had earlier granted permission to the petitioner company for establishing additional 15 MW Thermal Power Plant. That pre-supposes that the Board was not in a position to supply the required electricity to the petitioner company. It is not the case of the Board that the power position has improved after 1996 and it has abundance of power so as to exercise State monopoly. The rhetorical words used by the Board in its reply that it is in a position to meet the entire requirement of the petitioner are of no avail when after full consideration it has granted permission to the petitioner to set up additional thermal power plant of 15 MW. Therefore, it was necessary for the Commission to grant the consent.

It has been argued on behalf of the Board that it has to supply electricity to a certain section of the Society at subsidised rates and therefore it has to charge higher rate from industrial consumers and if they start setting up their own captive power plants it would shatter the economy of the Board and the Power Policy of the State. This argument is not acceptable. The law incorporated in the Act and the Adhiniyam must prevail. The consent can be withheld on specified grounds only and on no other grounds. One of the grounds for refusal of consent is "public interest". The Commission has not refused consent on that ground. Public interest means those interest which concern the public at large. The expression "public interest" is not capable of precise definition and has not a rigid meaning and is elastic and takes its colours from the statute in which it occurs, the concept varying with the time and State for society and its needs. (The State of Bihar Vs. Sir Kameshwar Singh,). There is scarcity of power. That is undeniable. Therefore, the Board or the Commission must have a pragmatic approach while dealing with the application for consent for establishing the generating station by private persons. It must follow the law engrafted in Section 44 of the Act and in Section 21 of the Adhiniyam in letter and spirit. The attempt should be to improve the power position. The increase in the generation and supply of electricity is the real solution and that has the sanction of the law. The increase in production of electricity would be in over all public interest. That would solve the problem of scarcity and shortage of power. The slogan is "increase production and bring happiness" ^^mRiknu c<+ko [kq''kgkyh ykvks**- This is the edifice of the Power Policy as projected in the statutory provisions mentioned above. No artificial barrier should be created in the laudable objection of increasing the power supply either by the public sector or by the private sector. There was a time when nationalisation was considered to be the panacea of all evils. That has not proved true. Now there is a shift and change in the policy. There is a trend towards privatisation to bring efficiency. Now the liberalisation and transparency are the buzz words. There is openness in the field of economy. The economic scenario is changing and the tools of law are being tuned in that direction. Therefore, the power policy also must change. The State monopoly has not yielded the desired result. If a private individual comes forward with a genuine proposal to set up a generating station consistent with the law to meet its own requirement then it should not be turned down. Rather he should be encouraged to do so. This is the way to augment and improve the power supply and that is in conformity with the law. As already stated the increase in the production of electricity would serve the real public interest and it would not in any way be adverse to public interest. The energy saved by the Board can be diverted to other priority sectors, e.g., for agricultural purposes. The grant of consent to set up captive power plant by the petitioner company would not affect public interest. The refusal of consent by the Commission in this case is contrary to law.

In the result the appeal is allowed. The impugned order of the Commission is set aside. The petitioner company is permitted to establish an additional 15 MW

Thermal Power Plant in its cement factory at Maihar and the condition of drawing 50% of its electricity requirement from the Board is also relaxed as that is in violation of Section 44 of the Act and Section 21 of the Adhiniyam. These provisions do not permit imposition of such condition.

