(1987) 01 OHC CK 0004

In the Orissa High Court

Case No : Original Jurisdiction Case No. 2466 of 1981

Messrs. Orient Paper and Industries Ltd. and Another APPELLANT

Vs

Electrical Inspector and Another RESPONDENT

Date of Decision : 28-01-1987

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226, 265, 300A
Electricity (Supply) Act, 1948 — Section 46(1), 79
Orissa Electricity Duty Act, 1961 — Section 3, 3(2)

Citation : (1987) 63 CLT 458

Hon'ble Judges : H.L. Agrawal, C.J;R.C. Patnaik, J

Bench : Division Bench

Advocate : B.K. Mohanti, P.K. Misra and J.P. Patnaik, for the Appellant; Addl. Standing Counsel and R.K. Patra, Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Patnaik, J.—The Petitioners in this writ application under Article 226 of the Constitution of India have challenged the levy and realisation of electricity duty from August, 1979 under the provisions of the Orissa Electricity (Duty) Act, 1961 (Orissa Act 14 of 1961), as amended with effect from 18-8-1979 by the Orissa Act 15 of 1980, as violative of Articles 14, 19,265 and 300-A of the Constitution of India and have sought a mandamus directing the opposite parties for refund the amount realised.

2. The Petitioner No. I, a company incorporated under the Companies Act, 1956, manufactures paper and paper boards of diverse varieties and caustic soda for use in manufacture of paper and paper boards. Its requirement of electrical energy is met partly by generation of its own and partly by the energy supplied to it by the Orissa State Electricity Board.

3. With a view to augmenting its resources by levy of electricity duty on the energy consumed, the State of Orissa enacted the Orissa Electricity (Duty) Act,

1961. The statement of objects and reasons reads as under:

Additional resources have to be found by the State Government to maintain and further expand the development activities during the Third Five-year Plan. For this purpose the possible sources of taxation have been investigated by the State Taxation Enquiry Committee and they have recommended that the rate of electricity prevalent in the State can admit of a levy of electricity duty on the energy consumed. They had suggested different rates for different categories of loads. After careful consideration of the recommendations of the committee the State Government propose to levy duty at the rate of 15 per cent on the rates applicable to different categories of consumption.

Though section 3 has been amended from time to time, we are concerned here with the amendment effected to Sub-sections (2) and (3) of section 3 by Orissa Act 15 of 1980. Section 3 (2) (iv) and section 3 (3), before amendment, read as under:

3. Electricity duty on energy supplied to consumers:

(1) xx xx xx

(2) There shall also be levied for and paid to the State Government electricity duty at the aforesaid rate on the energy which is

(i) to (iii) xx xx

(iv) used or consumed by a person, who, not being a licensee or Board, generates such energy for his own use or consumption.

(3) The rate charged for the purposes of Sub-section (2) shall be deemed to be

(a) xx xx xx

(b) the rate charged by the Board for consumption of energy in respect of similar categories of consumers, in cases under Clauses (iii) and (iv) thereof.

(4) xx xx xx

After amendment:

"3. Electricity duty on energy supplied to consumers:

(1) xx xx xx

(2) There shall also be levied for and paid to the State Government electricity duty at the aforesaid rate on the energy which is

(i) to (iii) xx xx

(iv) used or consumed by a person or a licensee who not being a board, generates such energy for his own use or consumption.

(3) The rate charged for the purpose of Sub-section (2) shall be the rate charged

by the Board for consumption of energy in respectof similar categories of consumers.

(4) xx xx xx

4. The learned Counsel has challenged the levy on two grounds. Firstly, levy of duty with reference to and On the basis of the rate charged was ultra vires, and secondly, in the absence of prescribed procedure and machinery for determination of liability and for assessment, no levy or collection could be made. A faint argument has also been made that no duty could be imposed on energy generated and consumed by self.

5. The charging section is section 3. It provides for incidence of levy, its quantum. Sub-section (1) of section 3 provides for levy of duty on the energy consumed by the consumer computed on the basis of the rate charged therefor by a licensee, by the Board or by any Government at the rates specified thereunder. Sub-section (2) of section 3 enumerates the other kinds of consumers. Clause (iv) of Sub-section (2) of section 3 envisages a consumer not being the Board or any Government, who uses or consumes the energy generated by himself. Sub-section (3) of Section 3 provides that the rate charged as regards a consumer in Clause (iv) of Sub-section (2) shall be the rate charged by the Board for consumption of energy in respect of similar categories of consumers. The substance of this provision is that a person using or consuming energy generated by himself shall be liable to pay electricity duty like and in the same manner a consumer under Sub-section (1) of section 3. By the amendment of Clause (iv) of Sub-section (2) of section 3, the exemption in favour of a licensee was taken away. The amendment of Clause (iv) therefore has no relevance for our purpose. Sub-section (3) was amended to make the provision clear and concise and to bring it in accord with amendment made to Sub-section (2). Section 2 (g) defines the expression ''rate charged'' which is as under:

2. Definitions:

In this Act, unless there is anything repugnant in the subject or context

(a) to (f) xx xx xx

(g) "rate charged" does not include hire for meter or service line but includes

(i) where any rebate is allowed on account of payment being made within any specified period, the rebate so allowed;

(ii) the minimum charges, if any, payable by the consumer ;

(iii) in the case of two-part tariff the fixed charge and also the unit charge;

(iv) in the case of the unmetered supply the periodical charge made therefor; and

(v) any surcharge on the rates whether imposed by the licensee, Board, the State Government or the Central Government.

6. The legislative competence of the Orissa State Legislature under Entry 54 of List-II of the Seventh Schedule to the Constitution of India to enact the Orissa Electricity (Duty) Act, 1961 and the subsequent amending Acts, is not disputed. Challenge is made to the levy by reference, i.e., levy of duty with reference to the rate charged for the energy. This contention has no substance. When tax or duty is levied it is done with reference to certain basis it may be the value of the property assessed, its quantum, etc. But, the validity of the law cannot be assailed on the ground that it is based on a basis with reference to an object outside the Act. Some basis has to be taken with reference to which the levy is to be made.

7. I will give an illustration. Under the Orissa Cess Act, cess is levied with reference to the annual value, which in the case of land on which mining operations are carried, is either the royalty or the dead-rent payable, as the case may be, by the person carrying on mining operation. The royalty or the dead-rent is fixed on the mining leases granted under the Mines and Minerals (Regulation & Development) Act, 1957.. Under the Orissa Act 14 of 1961, the rate of levy is prescribed and the person or persons on whom the incidence shall fall and the principle for quantification are also indicated. The imposition is not bad merely because the quantification has to be made on the basis of or with reference to royalty or dead-rent payable under the Mines and Minerals (Regulation & Development Act, 1957. See Laxmi Narayan Agarwalla v. State of Orissa and Ors. 55 (1983) C.L.T. 362 (F. B).

8. The second ground of attack is absence of any procedure or machinery for determination and assessment. Section 4 obliges the consumer to pay electricity duty levied u/s 3. Section 6 provides for maintenance of record and submission of returns by person generating energy for his own consumption. If there is any controversy, section 8 provides for its resolution. Thought he heading of section 8 is "Disputes between the licensee and the consumer", the provision contained therein has a wider amplitude. It reads as under:

8. Disputes between the licensee and consumer:

(1) The Electric Inspector or such other officer net below the rank of an Assistant Engineer or an Assistant Electric Inspector as may be authorised by the State Government in that behalf shall have the power to decide all disputes relating to the liability for payment of the electricity duty or exemption therefrom.

(2) Subject to the decision in appeal before such authority as may be constituted by the State Government in that behalf by a notified order, preferred within three months from the date of the order under Sub-section (I), such order shall be final."

(Under lining supplied).

The provision embraces within its sweep "all disputes" relating to liability for payment of electricity duty or exemption therefrom. In my opinion, therefore, reliance on the heading for giving a constructed meaning to a provision wide in its amplitude is misconceived.

Even otherwise assessment of electricity duty is not a complicated and independent exercise but is determined on the basis of and with reference to the rate charged for consumption of energy. On the determination of rate payable for the energy consumed, the electricity duty payable gets crystalised.

A similar question was raised in Laxmi Narayan Agarwalla v. State of Orissa and Ors. 55 (1983) C.L.T. 362 (F. B). It was held by a Full Bench of this Court that the assessment of cess was not an independent exercise. Cess was quantified with reference to royalty or dead-rent, as the case may be. Absence of detailed provision as to assessment and a fair hearing therein, were not violative of Article 14 of the Constitution of India. Reliance was placed in Ahmedabad Manufacturing and Calico Printing Co. Ltd., Ahmedabad and Others Vs. State of Gujarat and Others, , wherein vires of the Gujurat Levy of Education Cess was challenged on the ground that the Act did not provide a procedure for assessment and for hearing. Their Lordships observed:

The cess is nothing more than an addition to existing taxes. As it is a percentage of another tax, the determination of the case is not by an independent assessment. It is an arithmetical calculation based on the result of assessment under other Act or Acts...

The parimateria reasoning equally applies to this case.

9. It is submitted that the Act not having provided that levy of duty shall be within reference to the rate charged from time to time, the basis is the rate charged when Orissa Act 14 of 1961 came into force. This contention is unsustainable. The rate prescribed, in the absence of any provision indicating the contrary, means the rate charged at the relevant time.

10. The learned Counsel for the Petitioners has relied upon the case of Bolani Ores Ltd., , to prop up his submission that when there is an incorporation in a latter Act by reference to a former Act, any subsequent amendment of the former Act would not affect the latter Act. In the said case, the question was, if the definition of ''Motor Vehicle'' in the Orissa Motor Vehicle Taxation Act is the same as the meaning of the expression in the Motor Vehicles Act, as it stood when the Taxation Act was enacted, or it would carry the meaning given to it by way of a subsequent amendment. The Supreme Court held that the legislature intended to incorporate the definition of "Motor Vehicle" in the Motor Vehicles Act as it then stood and not as it might be from time to time. The decision is not an opposite one. In the Orissa State Electricity (Duty) Act, there is no incorporation by reference. It provide a mode of determination of duty payable, prescribes the rate and says that the duty shall be computed with reference to an object or basis at the relevant time.

11. The Learned Additional Government Advocate relying on the decision in U.P.

State Electricity Board Lucknow Vs. City Board, Mussoorie and Others, , Mussoorie and others4 has contended that even without detailed provision as to assessment, levy of electricity duty was competent. It was held in aforesaid case that section 46 (1) of the Electricity (supply) Act, 1948 did not say that no Grid Tariff could be fixed until such regulations u/s 79 (h) were made. It only provided that the Grid Tariff should be in accordance with any regulations made in that behalf which connoted that if there were any regulations, the Grid Tariff should be fixed in accordance with such regulations. The framing of regulations u/s 79 (h) of the Act could not be a condition precedent for fixing the Grid Tariff.

12. All the contentions raised having failed, I see no merit in the writ application which is accordingly dismissed. But, in the circumstances, there would be no order as to costs.

H.L. Agrawal, C.J.

13. I agree.

