
(2008) 03 MP CK 0035
In the Madhya Pradesh High Court

M.P. Cement Manufacturers Association and etc.	APPELLANT
Vs	
State of M.P. and Another	RESPONDENT

Date of Decision : 04-03-2008

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : AIR 2008 MP 232 : (2008) ILR (MP) 1665

Hon'ble Judges : Shantanu Kemkar, J; R.S. Garg, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

R.S. Garg, J.—The two petitions filed by the different petitioners are raising identical question, therefore, the arguments were simultaneously heard. This common order shall decide both the writ petitions.

2. Short facts necessary for disposal of the present petitions are that the petitioners have filed these petitions submitting inter alia that the provisions contained in M.P. Upkar (Dwitiya Sansodhan) Adhiniyam, 2001 by which the Energy Development Cess which is payable by the distributor of the electricity energy to the State Government has been increased from 1 paise per unit to 10 paise per unit is ultra vires the M.P. Upkar Adhiniyam, 1981 and is also ultra vires Section 12(3) of the M.P. Vidyut Sudhar Adhiniyam, 2001. It is also submitted that the amendment made by the Amending Act is not unconstitutional and the same is arbitrary.

3. In the matter of M.P. Cement Manufacturers Association, it is the case of the petitioner that it is an association of cement manufacturers duly registered under the provisions of M.P. Societies Registrickaran Adhiniyam, 1973. According to them, they are entitled to challenge the constitutional validity of provisions of law, which run contrary to the interest of the industry and also of the members.

4. M.P. Upkar Adhiniyam, 1981 is an Act for levy of certain cess. The aforesaid Act was initially amended by M.P. Upkar (Sansodhan) Ordinance, 2001, Section 3

of M.P. Upkar Adhiniyam, 1981 was substituted. According to the amended Section 3(1) of M.P. Upkar Adhiniyam, 1981, every distributor of electrical energy was obliged to pay to the State Government the energy development cess at the rate of one paise per unit on the total units of electrical energy sold or supplied to a consumer or consumed by himself or employees during any month.

5. The State Legislature also enacted another Act namely M.P. Vidyut Sudhar Adhiniyam, 2000, which came into force in the State of Madhya Pradesh on 3rd July, 2001. Section 12 of the Act referred to general powers of the State Government before issuing any policy directive on the matters concerning electricity in the State including on measures which are considered necessary for the overall planning in the region for the development of electricity industry in the State etc. Sub-section (3) however provides that 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.

6. The State Government thereafter, came with Madhya Pradesh Upkar (Dwitiya Sansodhan) Adhiniyam, 2001 (Act No. 30 of 2001) and amended Sub-section (1) of Section 3 of M.P. Upkar Adhiniyam, 1981 and substituted ten paise in place of one paise.

7. According to the petitioners, before enhancing the cess/tax, the State Government did not have effective consultation with the M.P. Electricity Regulatory Commission, therefore, the enhancement from one paise to 10 paise was bad and not only that the provisions contained in Act No. 30 of 2001 are ultra vires the Constitution.

8. Shri R.P. Agrawal and Shri Alok Aradhe, learned senior counsel appearing for the petitioners submitted that undisputedly before making amendment in Sub-section (1) of Section 3 of the M.P. Upkar Adhiniyam, 1981, there was no consultation with the M.P. Electricity Regulatory Commission, therefore, the Act is ultra vires the Constitution. It is also submitted that the levy of the energy is to be used and utilised at the discretion of the State Government for the purposes given in Sub-section (4) of Section 3 of the M.P. Upkar Adhiniyam and undisputedly the State Government is not utilising the money in accordance with the provisions of law, the levy itself is bad.

9. Referring to certain decisions (which we shall consider at appropriate stage) it was submitted that non-consultation with the M.P. Electricity Regulatory Commission may not make the Act ultra vires the Constitution or constitutionally invalid however the provisions would be open to attack under Article 14 of the Constitution of India on the ground of arbitrariness.

10. Shri V.K. Shukla, learned Deputy Advocate General for the State, on the other hand, submitted that in the matter of M.P. Cement Manufacturers' Association Vs. State of Madhya Pradesh and Others, , the Supreme Court after

considering the provisions has held that the provisions are not ultra vires the Constitution nor the same is incompetent piece of legislation therefore, the provisions brought into force by amendment cannot be held to be ultra vires the Constitution. It is also submitted by Shri V.K. Shukla that the applicability of Section 12(3) which requires consultation with the M.P. Electricity Regulatory Commission was held to be non-mandatory by a Division Bench of this Court in the matter of Flex Industries Limited v. State of M.P. and Ors. W.P. No. 2828/2004 decided on 31-8-2007. Placing reliance upon the said judgment, Shri Shukla submitted that once the scope and applicability of Section 12(3) of the M.P. Vidyut Sudhar Adhiniyam, 2000 has been considered by the Division Bench of this Court then there is no scope for any interference in the matter.

11. In the matter of M.P. Cement Manufacturers Association (supra), the question before the Supreme Court was that whether amendment of Sub-section (2) of Section 3 brought into service by M.P. Upkar Adhiniyam/ Adhiniyam, 2001 was ultra vires the Constitution or not. The Apex Court after considering" the legal issue observed that the said Sub-section (2) of Section 3 of M.P. Upkar Adhiniyam was ultra vires the Constitution on the ground of constitutional incompetence. Scope and applicability of Section 12(3) of M.P. Vidyut Sudhar Adhiniyam, 2000 was also pressed into service. However the Supreme Court held that in absence of consultation with M.P. Electricity Regulatory Commission, the provision would not become ultra vires.

12. The Apex Court further observed that it was not necessary for the Court to decide scope and applicability of Section 12(3) of the M.P. Vidyut Sudhar Adhiniyam but they were considering the matter as the scope and applicability of Section 12(3) of the M.P. Vidyut Sudhar Adhiniyam was argued in detail. After considering the pros and cons, the Supreme Court has in paragraphs 38 and 39 held as under:

38. In our opinion, the consequence of non-consultation in terms of Section 12(3) of the Sudhar Adhiniyam would not be an incompetent piece of legislation but a legislation introduced in breach of a salutary requirement to consult an expert statutory body. The statutory requirement for consultation with a body of experts before proposing legislation will serve as an inbuilt safeguard against a challenge under Article 14 of the Constitution apart from anything else.

39. Nevertheless, we do not propose to decide, whether by reason only of such non-consultation, Section 3(2) of the 1981 Adhiniyam is violative of Article 14, nor do we propose to decide whether the cess of 20 paise is excessive, nor the other grounds urged by the appellants pertaining to Art, 14. We have referred to the provisions of the Sudhar Adhiniyam so that the State Government may in future act in consonance with Section 12(3).

13. A fair reading and understanding of paragraph 38 would make it clear that the Supreme Court in clear terms observed that the consequence of non-consultation in terms of Section 12(3) of the "Sudhar Adhiniyam" would not be

an incompetent piece of legislation. However, the Supreme Court was of the opinion that the non-consultation would lead to a decision wherein legislation was introduced in breach of a salutary requirement to consult an expert statutory body. The Supreme Court if has already held that non-consultation would not make the amendment in M.P. Upkar Adhiniyam unconstitutional then at this stage anything contrary to the judgment of the Supreme Court can be observed. However, the liberty would be available to the petitioners to challenge the provisions on the ground that if a particular provision is not introduced in consultation with the expert body then the piece of legislation is arbitrary and would run contrary to the Article 14 of the Constitution of India.

14. Shri Alok Aradhe, learned senior counsel appearing for the petitioner has referred to certain judgments of the Supreme Court, which we shall now take into consideration. In the matter of State of U.P. and Others Vs. Renusagar Power Co. and Others, , the Supreme Court had observed that "the exercise of power whether legislative or administrative will be set aside if there is manifest error in the exercise of such power or the exercise of power is manifestly arbitrary. Similarly, if the power has been exercised on a non-consideration or non-application of mind to relevant factors the exercise of power will be regarded as manifestly erroneous."

15. Shri Aradhe, learned senior counsel submitted that in the present matter as there was no consultation with the M.P. Electricity Regulatory Commission, the power has been exercised in a manner which is not known to law and, therefore, the power has been exercised in an arbitrary manner.

16. In the matter of M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, , the Supreme Court had observed that a repository of power acts ultra vires either when he acts in excess of his power in the narrow sense or when he abuses his power by acting in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. The Supreme Court also observed that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it.

17. Placing reliance upon these observations of the Supreme Court, it was contended by the learned senior counsel for the petitioners that the action on the part of the Government is patently illegal and runs contrary to Section 12(3) of the M.P. Vidyut Sudhar Adhiniyam. It was then contended that the Apex Court had made observations in the matter of Babu Verghese and Others Vs. Bar Council of Kerala and Others, , that if an act is to be done in a particular manner as provided by law then such act should be done in such a manner or not at all. The submission in fact is that if effective consultation was to be made in accordance with Sub-section (3) of Section 12 of M.P. Vidyut Sudhar Adhiniyam then in absence of such consultation or without taking into consideration the

recommendations made by the Regulatory Commission, the State Government could not make amendment in Sub-section (1) of Section 3 of M.P. Upkar Adhiniyam, 1981.

18. The question, therefore, is that the State Government whether was obliged to have effective consultation with the M.P. Electricity Regulatory Commission and as it did not enter into such consultation the action of the Government can be challenged as arbitrary or unreasonable.

19. After the judgment of the Supreme Court wherein Section 3(2) was to be held ultra vires the Constitution, the State Government came with M.P. Upkar (Sanshodhan Tatha Vidhimanyatakaran) Adhiniyam, 2004 (Act No. 8 of 2004), amended Section 3 and also validated the recovery. The Constitutional validity of the Act No. 8 of 2004 was again challenged in number of writ petitions before this Court. The said writ petitions came up for hearing and decided by a Division Bench. In the matter of Flex Industries Limited (supra), the Division Bench of this Court was required to consider the question relating to challenges thrown by different petitions. In paragraph 12 of the said judgments, the Division Bench summarized the question No. 13 which reads as under:

(xiii) u/s 12(3) of M.P. Vidyut Sudhar Adhiniyam, 2003 it is mandatory for the State Government to consult the MPERC in relation to any legislation proposed to be enacted affected electricity industry but in the case at hand before enacting the Validation Act, 2004 though the State Government had sent the said proposal to the MPERC the same was not accepted and, therefore, the provisions contained in the Validation Act, 2004 are unsustainable.

20. The question relating to non-consultation u/s 12(3) of M.P. Vidyut Sudhar Adhiniyam was considered by Division Bench in paragraph 44 of the matter. After giving due consideration to the scope of Section 12(3) of Vidyut Sudhar Adhiniyam and Section 3 of M.P. Upkar Adhiniyam, 2001 the Division Bench observed that the provisions contained in Section 12 of Vidyut Sudhar are on general terms and the words used are "electricity industry." Section 12(3) was required to be given restricted meaning which only covers the field of M.P. Vidyut Sudhar Adhiniyam and Section 12(3) could not be allowed to entrench upon the field of tax/cess on electricity. The Division Bench also observed that the State Legislature enacted the law on the subject of imposition of tax/cess on electricity in exercise of legislative powers vested in it under Entry 53, List II of the VIIth Schedule to the Constitution of India. The Court clearly found the line of discretion between the two enactment. In paragraph 47 while summarizing the issues, the Court observed in Sub-para (F) of para 47 that the Validation Act is not hit by Article 14 of the Constitution as the classification is reasonable and further the provisions do not suffer from any arbitrariness. The Court further observed that the Validation Act cannot be regarded to be ultra vires because of non-compliance of the conditions precedent as engrafted u/s 12(3) of Vidyut Sudhar Adhiniyam because both the statutes operate in different spheres and, in any case another piece of legislation could not be regarded as invalid because

the Regulatory Commission as contemplated under Vidyut Sudhar Adhiniyam had not been consulted.

21. From these observations made by the Division Bench in the matter of Flex Industries Ltd. (supra), it is clear that the Acts namely M.P. Upkar Adhiniyam, 1981 and M.P. Vidyut Sudhar Adhiniyam, 2000 have been enacted to meet different exigencies and are to operate in different fields. M.P. Vidyut Sudhar Adhiniyam is an Act, which is to operate in relation to electrical industry and the policies etc. while M.P. Upkar Adhiniyam is an Act, which is general in nature and is to operate in relation to the cess/tax on certain items. If the two Acts are to operate in separate and different fields then provisions of one Act cannot be read into another Act nor it can be argued that the provisions of one Act should read in the other Act and non-compliance of the provisions of the other Act would make the action of the Government bad even though the Act in which action is taken does not ask for consultation.

22. After giving our thoughtful consideration to the totality of the circumstances and for the reasons aforesaid, we hold that these petitions have no merits. Both the petitions deserve to and are accordingly dismissed. There shall be no orders as to costs.