
(2005) 02 KL CK 0019
In the High Court Of Kerala
Case No : W.A. No. 1741 of 2002

MRF Ltd.

APPELLANT

Vs

K.S.E.B.

RESPONDENT

Date of Decision : 18-02-2005

Acts Referred:

Constitution of India, 1950 — Article 14
Electricity (Supply) Act, 1948 — Section 49, 59, 79

Citation : AIR 2005 Ker 164 : (2005) 2 KLT 230

Hon'ble Judges : M.N. Krishnan, J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : M. Pathrose Mathai, for the Appellant; P. Shanthalingam, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, J.—Petitioner is a company incorporated under the Companies Act. They had entered into the agreement Ext.PI dated 6.10.1993 by which the K.S.E.Board had assured uninterrupted and firm supply of electricity subject to certain terms and conditions agreed to therein. Agreement has also referred to the Government Order dated 6.2.1992 which was adopted by the Board providing for special concessional tariff to industries undertaking expansion or diversification and also the order dated 13.4.1993 issued by the Government of Kerala in consultation with the Board the petitioner would be eligible for the special concessional tariff for 5 years from the date of commercial production. It was in pursuance of the agreement Ext.PI the Board issued proceedings dated 23.2.1998 declaring that the petitioner shall be entitled to special concessional tariff in electricity consumed for its expanded and diversified portion.

2. Petitioner submitted that acting on the offers and promises held out by the Board and the Government they invested more than Rs. 100 crores and undertook substantial expansion and diversification of the factory. Board had

later issued Ext.P4 notification revising the electricity tariff for extra high tension consumers with effect from 1.2.1997. Petitioner submitted that the tariffs fixed under the said order are much higher rates than the tariffs in Ext.P3 order which is the pre-1992 tariff applicable to the petitioner. Ext.P4 order further provided for different methods of billing and also "differential pricing system" with the aid of TOD meter. Petitioner submitted by the differential pricing system higher tariff rates are to be imposed under Ext.P4 order. Later Ext.P5 notification was also issued by the Board pertaining to differential pricing of extra high tension consumers. Petitioner was later served with Ext.P6 bill. Aggrieved by the same petitioner preferred an appeal. Appeal was directed to be disposed of by this Court by judgment in O.P. No. 3182 of 1999 and the Board passed Ext.P8 order dated 7.7.1999 disposing of the petitioner's appeal. Petitioner is aggrieved by Exts.P6 and P8 and has approached this Court seeking a declaration that petitioner is not liable to pay any charges or tariff or price in excess of the pre-1992 tariff as provided in Ext.P1 agreement and Ext.P2 order and also challenging the levy of increased charges on the electricity supplied to the expanded and diversified portion of the petitioner's industrial unit under the differential pricing system with the aid of TOD meter.

3. A counter affidavit was earlier filed through the then standing counsel of the Board without adverting to any of the contentions raised in the writ petition. Lawyer appointed by the Board has a duty to file a proper counter affidavit dealing with all legal contentions raised by the petitioner. We have therefore to rely much on the reply given by the Secretary, Electricity Board to the petitioner vide Ext.P8 communication dated 7.7.1999 to examine the various contentions raised in this Writ Petition.

4. Counsel appearing for the writ petitioner Sri. Pathrose Mathai took us through various terms and conditions in Ext.P1 as well as to Ext.P4 notification. Reference was also made to the decision of the Apex Court in Indian Aluminium Company Vs. Kerala State Electricity Board, . Counsel appearing for the Board Sri. P. Santhalingam on the other hand placed reliance on the decision of the Apex Court in The Adoni Cotton Mills Ltd. and Others Vs. The Andhra Pradesh State Electricity Board and Others, . Reference was also made to the decision reported in N.J. Cyriac and Others Vs. State of Kerala and Others, .

5. Petitioner has not challenged the validity of Ext.P4 notification dt. 29.1.1997. Notification was issued by the Electricity Board in exercise of the powers conferred under Sections 49 59 and Sub-section (i) of Section 79 of Electricity (Supply) Act, 1948. By virtue of the notification Board has issued The Kerala State Electricity Board Extra High Tension Tariff Revision Order, 1997. The order came into force on 1.2.1977. Notification says that the escalation in prices of all commodities and services including plant and equipment, construction materials etc., resulting in increased operation and maintenance cost of the supply systems, increased rate of interest payable on loans etc. and the subsidised tariffs given to certain categories of consumers due to social obligations have all

resulted in the present tariff rates becoming inadequate for the Board to make the minimum surplus of 3%. Under such circumstance Board was constrained to issue the Kerala State Electricity Board Extra High Tension Tariff Revision Order, 1997. Clause V of the order reads as follows:

"V. This Order shall apply to all Extra High Tension Consumers to whom the Board has undertaken or undertakes to supply energy, notwithstanding anything to the contrary contained in any agreement entered into with any Extra High Tension Consumer earlier by the government or by the Board or in any of the Tariff Regulations or Rules and/or Orders previously issued."

Therefore Clause V of the notification takes in Ext.P1 agreement dated 6.10.1993 entered into between the Board and the petitioner. The Apex Court in Adoni Cotton Mill's case referring to the Indian Aluminium Co. 's case held as follows while interpreting Section 49 of the Electricity Supply Act.

"Section 49(4) of the 1948 Act states that in fixing the tariffs and terms and conditions for the supply of electricity the Board shall not show undue preference to any person. This section embodies the same principle which is enunciated in Article 14 of our Constitution. The Board is a State for the purpose of Part III of our Constitution. In the present case, we are, however, not concerned with the application of Article 14. All that requires to be appreciated is that the provisions of Article 14 of our Constitution and Section 49(4) of the 1948 Act are similar in principle. It is the principle of equality or non-discrimination. Section 49(4) of the 1948 Act does not mean a mechanical equal treatment. It is fairly settled that equality before the law does not mean that things which are different shall be treated as though they were the same. The obligation not to discriminate involves both the right and the obligation to make reasonable classification on the basis of relevant factors. To illustrate, cutting down 50 per cent of the needs of a hospital and the needs of industries producing consumer goods cannot be treated on the same footing. It would be justifiable to treat them with reference to their urgency, their social utility and also the impact on the conservation and economies in the available supply of electric power. The guidance is clearly furnished by the principles embodied in Section 49(4) of the 1948 Act similar to Article 14 of our Constitution."

Section 22(B) also empowers the Government to direct the Board not to comply with the provisions of any contract for the supply or increase in the supply of energy. Section also enables the Government to control the distribution and consumption of energy for maintaining the supply and secure equivalent distribution of energy.

6. Ext.P4 further stipulates as follows:

"X. The EHT consumers will be billed on differential pricing system with the aid of Time Of Day (TOD) meter. The rates applicable for different timings shall be as follows:-- 0500 hrs. to 1800 hrs. --Normal ruling rate 1800 hrs. to 2200 hrs. -- Double the normal ruling rate 2200 hrs. to 0500 hrs. -- 75% of the normal ruling

rate."

Differential pricing system has got an object to achieve. The Board wanted to encourage industrial consumption at late night hours and a disincentive is provided for consumption at peak hours, that is between 6 p.m. and 10 p.m. While disincentive is provided for peak hour consumption by charging double the normal ruling rate, there is a corresponding incentive of 75% of the normal ruling rate being charged for the consumption at lean hours, that is from 10 p.m. to 5 a.m. Normal ruling rate referred to in Clause X is pre-1992 tariff. In other words, petitioner has availed of benefit of pre-1992 tariff in the differential pricing system. There was no compulsion on the petitioner to consume power during peak hours and if they regulated the consumption in such a way as to operate the plant during late night hours during 10 p.m. to 5 a.m. the petitioner would have been the beneficiary of the impugned tariff revision order. In fact the petitioner has got the benefit at 75% of the tariff as against the full tariff payable for consumption between 10 p.m. to 5 a.m. Petitioner obviously has got 25% rebate for the power consumption during this time. The above being the factual situation we are of the view the decision in the Indian Aluminium Company's case relied on by the petitioner is not applicable. Further Clause V of the Tariff Order 1997 overrides all agreements.

7. We may point out the Board had to regulate supply due to acute power shortage in the State. Board shall have the right to stagger or curtail supply of the electricity to any consumer according to operational and other exigencies. It can also impose sanctions which can take any reasonable form, either disconnection in case of gross and persistent defaults or the lesser sanction of enhanced tariff. On facts as well as on law we are of the view no illegality has been committed by the Board to prejudice the petitioner. We also find there is no violation of the agreement executed between the Board and the consumer. Further the agreement itself will have no legal effect by virtue of Clause V of Ext.P4 notification dated 29th January, 1997.

Under such circumstance appeal lacks merits and the same would stand dismissed.