(2009) 07 P&H CK 0235

In the Punjab And Haryana At Chandigarh

Siel Ltd. APPELLANT

Vs

State of Punjab and Others RESPONDENT

Date of Decision : 28-07-2009

Acts Referred:

Constitution of India, 1950 — Article 245, 246, 246(2), 246(3)
Electricity Act, 2003 — Section 61, 65
Punjab Electricity (Duty) Act, 1958 — Section 4
Punjab Electricity (Duty) Act, 2005 — Section 3, 3(1), 4

Citation : AIR 2010 P&H 121 : (2009) 4 RCR(Civil) 632

Hon'ble Judges : M.M. Kumar, J;Jaswant Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. The petitioner has approached this Court with a prayer for issuance of appropriate writ, order or direction declaring the Punjab Electricity (Duty) Act, 2005 (for brevity ''the 2005 Act'') to be ultra vires of the Constitution and also quashing notification dated 1.3.2005 issued by the State of Punjab, Department of Power. According to the notification the electricity duty on the electricity supplied by the Punjab State Electricity Board-respondent No. 2 (for brevity ''the Board'') is charged @ 10 per cent, ad valorem from the consumers except the consumers to whom electricity is supplied for agricultural purposes.

2. The petitioner has a manufacturing unit in Rajpura, District Patiala with the name of Siel Chemical Complex. It is engaged in the production of caustic soda and chlorine by electro chemical process. The unit was set up in 1998 and its commercial production commenced in 1999. The electricity is one of the major raw material and accounts for almost 65% of the input cost for producing caustic soda by electro chemical process. The unit is classified as a Power Intensive Unit. Its monthly energy bill is Rs. 6 to 7 crores. In addition, the petitioner is also obliged to pay electricity duty under the provisions of the Punjab Electricity (Duty) Act, 1958. It was granted exemption from payment of electricity duty for a period of five years upto 31.1.2004 and it started paying duty w.e.f. 1.2.2004.

The object of levy of electricity duty was to off-set the additional burden undertaken by the State Government for providing free education and related issues. The electricity duty is payable @ 5% ad valorem. By virtue of Section 4 of the 1958 Act (for brevity ''the 1958 Act''), the Board is supposed to collect the electricity duty and pay it to the State Government which according to the petitioner has not been done. According to the allegations made, the duty has been collected and utilized by the Board instead of utilising the same by respondent No. 2 for the purpose of imparting free education which was the object for which the 1958 Act was enacted. The State Government has permitted the Board to utilize its duty by treating it as subsidy advanced to the Board.

3. The petitioner has also highlighted that Electricity Act, 2003 was promulgated by the Parliament and accordingly responsibility of fixing the electricity tariff was entrusted to the Punjab State Electricity Regulatory Commission (PSERC) which has been constituted by the State. For the year 2003-04, the PSERC increased the tariff of various types of consumers. The State Government protested against the proposal to reduce the tariff for the year 2004-05 and urged for increase of the same. The tariff payable by the petitioner for the year 2004-05 was Rs. 3,37 per unit which also rate ably reduced the electricity duty collected by the Board. As a result, the State of Punjab felt aggrieved and wonder as to how it could run the Board profitably and efficiently. Accordingly, the Board filed CWP No. 1876 of 2005 challenging the tariff order for the year 2004-05. However, no interim order was granted in favour of the Board. Eventually the State Government was persuaded by the Board to generate more revenue by increasing the amount of electricity duty.

4. On 1.3.2005, the State Government promulgated the Punjab Electricity (Duty) Ordinance, 2005. As per Section 3 of the Ordinance, electricity duty is leviable at such rate not exceeding 25 % ad valorem as the State Government may notify. Section 4 of the Ordinance deals with the computation of electricity duty. On 1.3.2005, the impugned notification was issued by the State of Punjab levying electricity duty @ 10% ad valorem on all consumers except the consumers to whom the electricity is supplied for agricultural purposes. Eventually, on 5.5.2005, the 2005 Act was passed and the Ordinance was repealed. The petitioner has also referred to the tariff order of 2005-06 (P.7) and 2006-07(P.8) The grievance made is that the hike in electricity duty has adversely affected the petitioner and additional burden of Rs. 30 lakhs per month is incurred by it.

5. Two separate written statements have been filed on behalf of respondent Nos. 1 and 2. The Board-respondent No. 2 has not disputed the broad factual version disclosed by the petitioner. However, it has been pointed out that the Board has been collecting electricity duty strictly in accordance with the provisions of law, maintaining meticulous accounts and the amount is collected by each sub-divisional office with the designated Bank through its local branch from where the funds to the main accounts of the Board with the State Bank of Patiala, Patiala are transferred. The duty so collected is transferred to the Government of Punjab

on monthly basis. Out of 10 % electricity duty 5 % electricity duty is deposited with the Government of Punjab on monthly basis towards social welfare fund set up by the Punjab Government and balance 5% is paid to the State Government simultaneously with the lease of subsidy by the Board to the Government of Punjab. The interpretation given to Section 65 of the Electricity Act, 2003 by the petitioner has been contested and it has been clarified that when the State Government asks the PSERC to fix the lower tariff than the one already determined for any consumer or class of consumers then the State Government is required to pay in advance sufficient subsidy to the Board-respondent No. 2 to compensate the persons affected by the grant of subsidy. Such subsidy payable by the State Government is credited to the Board who has suffered a financial loss on account of lower tariff charged from the consumer or class of consumers at the State Government''s bidding. Subsidy given to the consumers is sought to be projected by the petitioner. The perception of the petitioner appears to be that on account of free supply of electricity to agricultural sector the financial burden has been spread over to the other consumers of electricity which according to the averments made in para 12 of the reply of the Board is incorrect. The quantum, class of subsidy and the identification of consumers who had received subsidy are determined solely by the PSERC; and the Board has nothing to do with it. The Government pays subsidy in its general budget and not from the amount paid by the consumers of the electricity.

6. With regard to CWP No. 1876 of 2005 which was filed by the Board against the tariff order it has been submitted that the High Court dismissed the petition with the observation that the matter do not fall within its jurisdiction. Accordingly, the Board had filed an appeal before the Appellate Tribunal of Electricity in Patiala which started functioning from July, 2005. The matter was decided against the Board by the Tribunal and the C.A. No. 4510 of 2006 against the order passed by the Tribunal is pending before Hon''ble the Supreme Court. Supplying the reasoning for enacting the 2005 Act, respondent No. 2 has pointed out that additional financial burden was being undertaken by the State Government on account of requirement to provide subsidy to different class of consumers u/s 65 of the 2003 Act and for the investment in infrastructure and social services in the State. To mobilize resources for meeting these responsibilities the levy and collection of electricity needed to be rationalized.

7. On behalf of respondent No. 1 separate written statement has been filed. In para 1 of the preliminary submissions it has been asserted that there is a clear distinction between general subjects of legislation and taxation. The power to tax has to be derived from distinct entry. ''Electricity'' is Entry No. 38 of-List III (Concurrent List). The Electricity Act, 2003 is referable to Entry 38 of List III. With regard to 2005 Act it has been asserted that it is referable to Entry 53 of List II (State List) which states ''Taxes on consumption or sale of electricity'' Under Entry 38 List III the Parliament cannot legislate with regard to taxes on consumption or sale of electricity. The Electricity Act, 2003 does not deal with the subject of taxation on the sale and consumption of electricity. It is, therefore,

incorrect for the petitioner to contend that Electricity Act, 2003 has dealt with all aspects of electricity including taxation. The Electricity Act, 2003 and Electricity (Duty) Act, 2005 operate in totally different fields and they do not overlap. In para 11 reliance has been placed on Section 61 of the 2003 Act (as Amended in 2007) which clothe the Regulatory Commission with the power to satisfy the terms and conditions for determination of tariff and it is to be guided by various considerations given in Section 61. The aforesaid provision clarify that cross-subsidy are to be released only through the medium of tariff which is to be determined by the Regulatory Commission. It is to be done gradually over a time as per the regulations framed by the Commission. It is claimed that electricity duty is not included in the definition of cross-subsidy and it would have no bearing at all on the extent, reduction or elimination of cross-subsidies in the system. It has also been pointed out that in the last 3-4 tariff orders, the Regulatory Commission has invariably concluded that cross-subsidies are continuously going down and that the level of cross-subsidies in Punjab are among the lowest in the country.

8. Mr. Sarin, learned Counsel for the petitioner has argued that under Article 245 of the Constitution there is distribution of legislative powers among the Parliament and the State Legislature. According to the learned Counsel the Parliament can frame law for the whole or any part of the territory of India whereas the Legislature of the State can make laws for the whole or any part of the State. He has then referred to Article 246 of the Constitution to point out that Parliament has the exclusive right to frame law with respect to any of the matters enumerated in List I of the 7th Schedule which is known as ''Union List''. The Parliament as well as the State Legislature have power to make law with respect to any of the matters in List III of the 7th Schedule which is known as ''Concurrent List''. However, the State Legislature has exclusive power to make laws for whole of the State or any part thereof with regard to any of the matters enumerated in List II of the 7th Schedule which is known as State List. According to the learned Counsel, the legislative power in respect of electricity is referable to Item No. 38 in List III of Concurrent List which would mean that laws relating to electricity could be framed either by the Parliament or by the State Legislature. The argument is that once the Parliament has enacted the Electricity Act, 2003, the Electricity (Duty) Act of 2005 is beyond the competence of the State Legislature as it would operate in the field already occupied by central legislation. Accordingly it is claimed that Act of 2005 and the notification dated 1.3.2005 issued u/s 3(1) are liable to be declared beyond the competence of the State Legislature.

9. Mr. P.K. Jain, learned State Counsel along with other counsel for the respondents have argued that the argument is wholly misconceived. According to the learned Counsel, the Electricity (Duty) Act, 2005 has been enacted under the provisions of Entry 53 of List II which is a State List and it authorizes the State to frame laws concerning taxation on consumers or sale of electricity. Likewise on the subject of electricity there is a distinct Entry 38 in the Concurrent List which

is List III. The competence to frame law with regard to taxes is derived by the State Legislature from Entry 53 whereas no law with regard to electricity in its general import has been framed by the State which is a subject on concurrent list.

10. After hearing learned Counsel for the parties and perusing the various provisions of the Constitution and statute we are of the considered view that the instant petition proceeds on misconceived notion. The State Legislature derived its competence to frame law from various subjects enumerated in the State List-List II of the 7th Schedule. Entry 53 deals with taxes on consumption or sale of electricity. As per Article 246(3) of the Constitution, the Legislature of the State has exclusive power to make laws for such State or any part thereof with regard to any of the matters enumerated in List II of the 7th Schedule. The power to tax the consumption or sale of electricity is entirely different than the power referable to Entry 38 of the Concurrent List-List III. According to Article 246(2) of the Constitution, the Parliament and the State Legislature have the power to make law with respect to any of the matters enumerated in List III in the 7th Schedule which is known as Concurrent List. It would be necessary to read Article 246 of the Constitution which is as under:

246. Subject matter of laws made by Parliament and by the Legislatures of States: (1) Notwithstanding anything in Clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the ''Union List'')

(1) Notwithstanding anything in Clause (3), Parliament, and, subject to Clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the ''Concurrent List'')

Subject to Clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the ''State List'')

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List.

11. It is pertinent to notice that if on a matter under the Concurrent List-List III any provision of law is made by the Legislature of the State which is repugnant to any provision of the law made by the Parliament as it is also competent to enact then the law made by the Parliament has to prevail and the law made by the State Legislature to the extent of repugnance would be void. The supremacy to frame law on any subject of Concurrent List is that of Parliament and law framed by State Legislature has to give way to the piece of legislation framed by Parliament.

12. At the first instance there is no challenge to any law dealing with generation of electricity, National Election Policy and Plan, Licensing, Transmission of electricity, Distribution of electricity, tariff, works, investigation and enforcement etc. which are subject-matter of Electricity Act, 2003. The subject of ''Electricity'' is very well covered by Entry 38 of List III of Concurrent List. Entry 38 does not contemplate vesting of any power to tax the consumption and sale of electricity. The power of the legislature concerning taxes on the consumption and sale of electricity has been saved in favour of the State Legislature by Entry 53 of List II of the State List. Therefore, there is no conflict between the two Acts which are distinct and operate in their separate areas. In that regard reliance may first be placed on the observation made by a Constitution Bench judgment of Hon''ble the Supreme Court in the case of The Jiyajeerao Cotton Mills Ltd. Vs. State of Madhya Pradesh, . It was held that levy of duty upon consumption of electrical energy under the Central Province and Berar Electricity Duty Act, 1949 was traceable to Entry 53 of List II of the Seventh Schedule of the Constitution because the taxable event was consumption of electrical energy. The unsuccessful argument was that the levy of duty was traceable to Entry 84 List I of Union List as it amounted to levy of duty on production of electrical energy. The argument had arisen because the industry was producing as well as consuming the electrical energy.

13. The question was then considered in Indian Aluminium Co. etc. etc. Vs. State of Kerala and others, . Leaning in favour of liberal construction to sustain the constitutional validity of the Kerala Electricity Surcharge (Levy and Collection) Act, 1989, their Lordships in para 12 observed as under:

12. The primary question, therefore, is: whether the impugned Act enacted by the State Legislature is one under Entry 53 of the State List, viz., "Taxes on the consumption or sale of electricity." Indisputably, the title of the Act as well as the charging Section 3 employ the words "duty on supply of electricity". Under Article 246 (3) of the Constitution, every State Legislature has explicit power to make law for that State with respect to the matters enumerated in List II (State List) of the Seventh Schedule to the Constitution. The State''s power to impose tax is derived from the Constitution. The Entries in the three Lists of the Seventh Schedule are not power of legislation but merely fields of legislation. The power is derived under Article 246 and other related Articles of the Constitution. The legislative fields are of enabling character designed to define and delimit the respective areas of legislative competence of the respective legislatures. There is neither implied restriction imposed on the legislature nor is any duty prescribed to exercise that legislative power in a particular manner. But the legislation must be subject to the limitations prescribed under the Constitution.

14. After referring to various precedents in paras 13 to 18, Hon''ble the Supreme Court concluded thus:

19. In view of the legal position referred to hereinbefore, it must be held that the words ''sale or consumption'' used in Entry 53 of State List and the Act made in

exercise of the power under Article 246(3) of the Constitution, would receive wide interpretation so as to sustain the constitutionality of the Act unless it is affirmatively established that the Act is unconstitutional.

15. It is thus evident that the exclusive power of the State Legislature to frame law on consumption or sale of electricity under Entry 53 of List II-State List of Seventh Schedule is judicially well recognised and conceded. Therefore, no fault could be found with the provisions of Punjab Electricity (Duty) Act, 2005 nor it could be held that Punjab Legislative Assembly lacked competence to frame law.

16. We find no merit in the contention of the counsel for the petitioner that burden of subsidy is shared by the consumers like the petitioner. It is clear from the reading of para 14 of the reply filed by respondent No. 1 that wherever the State Government is required to pay subsidy, it is to be paid to the supplier of electricity i.e. the Board. The subsidy is paid by the Government out of its general budget and such issues are determined by the PSERC after hearing all parties. An elaborate procedure has been prescribed by Section 65 of the 2003 Act which postulate issuance of notice to the whole public, the members representing industry or general public are given hearing. The PSERC determined the rate of tariff by issuing tariff order every year. The PSERC is an independent agency beyond the control of the State Government. In other words, it is misconceived argument that consumers like the petitioner share the burden of subsidy given to agricultural class which in fact the Government pays to the Board as per the requirements of Section 65 of the Electricity Act, 2003. The petition is wholly devoid of merit and does not warrant admission.

17. For the reasons aforementioned this petition fails and the same is dismissed.

