
(1994) 04 KAR CK 0028

In the Karnataka High Court

Case No : W.Ps. No's. 8328, 12373 to 12375, 12389, 12390, 13484 and 14334 of 1987

Sri Venkateswara Agricultural Farm

APPELLANT

Vs

Karnataka Electricity Board

RESPONDENT

Date of Decision : 05-04-1994

Acts Referred:

Constitution of India, 1950 — Article 14, 19 (1) (g)
Electricity (Supply) Act, 1948 — Section 49, 79 (j)

Citation : (1994) ILR (Kar) 1578 : (1995) 1 KarLJ 566

Hon'ble Judges : Hanumanthappa, J

Bench : Single Bench

Advocate : Vassan Associates, J.V. Hulsoor, K. Srinivasan and T.S. Ramachandra, for the Appellant; Murthy and Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Hanumanthappa, J.—Since the question of law involved in all these Petitions are common these Petitions are clubbed together and disposed of by a common Order.

2. In all these Petitions the reliefs sought for by the petitioners are almost identical, i.e., for a direction to the respondents to insert Clause VII of the General Conditions for the supply of electrical energy which was in force upto 2-5-1987 in the Notification dated 2-5-1987 with effect from 2-5-1987; to quash the demand notices issued to the petitioners and also to declare that the omission of Clause VII of the General Conditions for the supply of electrical energy in Notification No. KEB/BIO/2083/86-87 dated 2-5-1987 as illegal and violative of Articles 14 and 19(1)(g) of the Constitution of India.

3. A few facts which are necessary to dispose of these Petitions are: The petitioners are Khandasari Sugar Mills. They entered into agreements with the Karnataka Electricity Board to supply of electrical energy. According to them, their Mills are seasonal industries and Clause VII of the General Conditions

imposed by the KEB u/s 49 of the Electricity (Supply) Act, 1948, was applicable to them. Clause VII was in force till May, 1987. The said Clause is extracted hereunder:

"VII. Seasonal Industries -

i) The installations shall not work to full capacity for more than nine calendar months in each year and during the remaining months of the year, utilise power for administrative offices etc. and for overhauling and repairing plant and machinery.

ii) "Working-season" months and "off-season" months shall be determined by an order issued by the Executive Engineer of the concerned O & M Division as per the request of the consumer and will continue from year to year unless otherwise altered. The consumer shall give a clear one month's notice in case he intends to change his "working season".

iii) The "Working-season" and "off-season" months shall be full calendar months. If the power availed during a month exceeds the allotment for the "off-season" month it shall be taken for calculating the billing demand as if the month is the "working-season" month.

iv) The consumer shall forfeit the concession admissible to seasonal industries, if

a) The working season exceeds nine months in a year

OR

b) The Maximum Demand/consumption during any month of the off-seasonal months is more than 25 percent of contract demand/average consumption of previous working season."

The seasonal months are determined by the Board in consultation with the respective parties. Once the seasonal months are determined, the same cannot be changed or cancelled by the Board unilaterally. But the KEB issued Notification dated 2-5-1987 revising the tariff from the first meter reading. The said Notification has been issued by exercising the powers under Sections 49 and 79(j) of the Electricity Supply Act, 1948 (hereinafter referred to as the Act). But the same is inapplicable as Section 79(j) confers powers on the Board to make regulations for the supply of electricity by the Board to persons other than licencees u/s 49. Board cannot confer upon itself power to revise rates in such cases where the Board fixed special tariffs under agreements with consumers as held by the Supreme Court in *Indian Aluminium Company Vs. Kerala State Electricity Board*, The Supreme Court held that the Board cannot ignore the contractual stipulations and enhance the tariffs unilaterally. The revision of tariffs in the cases of the petitioners is not only unilateral but also arbitrary and the deletion of Clause VII is in direct contravention of Section 49 of the Act. To support the contentions, the learned Counsel for the petitioners placed reliance on the following Decisions, viz., (1) *Indian Aluminium Company v. Kerala State*

Electricity Board 1 ; (2) Bisra Stone Lime Co. Ltd. and Another Vs. Orissa State Electricity Board and Another, and (3) Delhi Cloth and General Mills Co. Ltd. and Another Vs. Rajasthan State Electricity Board and Another, it is contended that from the principle laid down in the Indian Aluminium Company's case when tariff is fixed by entering into agreement with consumers the said charges cannot be enhanced by the Board unilaterally in breach of the stipulations in the contract. The contention of the learned Counsel that there cannot be any enhancement of tariff by way of surcharge is supported by the Decision in Bisra Stone Lime's case. They also argued that there cannot be any review of tariff unless there is a stipulation to that effect in the agreement and for this proposition they placed reliance on the Decision of the Supreme Court in Delhi Cloth's case. Thus arguing, the learned Counsel for the petitioners submitted that these Petitions be allowed.

4. The case of the respondent/Board is that the agreement between the petitioners and the Board is general in nature and as such Section 79(j) has no application. As per the terms of the agreement the Board is competent to alter the conditions whenever necessary. The agreements are general in nature subject to the statutory benefits and other limitations. Prior to 2-12-1987 all seasonal industries were brought under the caption of Tariff Schedule. The seasonal industries and other industries for the purpose of tariff were classified and different charges were levied. However, the 1987 Tariff Committee suggested that categorisation of seasonal industries be deleted for the reason that the benefits given earlier to sugar industries under the category of seasonal industries were dropped. The benefits that were given earlier were withdrawn by the Notification dated 2-5-1987 bringing the seasonal industries under Chapter II Category and such action is quite valid and in conformity with Section 49 of the Act Bringing an industry under seasonal industry and fixing a particular tariff are exclusively under the domain of the Board and it cannot be questioned under Article 226 of the Constitution and this Court cannot substitute the view, If the contention of the petitioners is accepted, this Court will be directing the Board to create separate classification for the purpose of Tariff Schedule. Creation or deletion of clause is concerned is the exclusive power of the Board. Since some industries have been brought under one category, such action cannot be said to be violative of Article 14 of the Constitution of India. Further, in no way it affects the petitioners' right to carry on their business or to say it is in violation of Article 19(1)(g) of the Constitution. The revision of tariff applies not only to the petitioners but also to all who are obtaining power supply. The revision is on account of acute shortage of power supply, problem of distribution and the loss that is incurred to the Board. To support this contention, learned Counsel for the Board placed reliance on the Decision in Rohtas Industries Ltd. and Others Vs. Chairman, Bihar State Electricity Board and Others, wherein the Supreme Court considering the scope of Sections 49(3) and 59 of the Act held that levy of fuel surcharge on consumers receiving high tension supply to factories is not arbitrary and violative of Article 14 of the Constitution of India and by observing thus the

Supreme Court further held that since the Board was selling the energy at the rates which were lower than the actual cost incurred by it per unit of production notwithstanding the mandatory provisions of Section 59, the tariffs fixation effected by the Board could not be said to be arbitrary and also that in view of Section 49 of the Act there cannot be different tariffs in case of persons similarly placed. The learned Counsel for the respondent/Board placed reliance on another Decision of the Supreme Court in Indian Aluminium Company Limited and another Vs. Karnataka Electricity Board and others, wherein the Supreme Court held that increase of tariff rate by virtue of amending Act does not suffer from any infirmity affecting its vires either on the score of legislative competence or for offending Articles 19(1)(g) or Article 14 of the Constitution and also that subsequent annulment of agreement by amendment of Act and imposition of uniform tariff rate on industries classified under one category are not hit by promissory estoppel. Thus contending the learned Counsel for the respondent submitted that the Writ Petitions be dismissed.

5. In order to understand properly the correctness or otherwise in revising the tariff in the case of seasonal industries and how the petitioners are right in challenging the said tariff rates it is proper to extract hereunder Section 49(3) and (4) and Section 79(j) of the Act and Clause VII of the Agreement: Section 49(3); and (4) reads as under:

"49 Provisions for the sale of electricity by the Board to persons other than licensees. -

xxx xxx xxx (3) Nothing in foregoing provisions of this section shall derogate from the power of the Board, if it considers it necessary or expedient to fix different tariffs for the supply of electricity to any person not being a licensee having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and any other relevant factors.

(4) In fixing the tariff and terms and conditions for the supply of electricity", the Board shall not show undue preference to any persons."

Section 79(j) of the Act reads as follows:

"79. Power to make regulations. -

The Board may by notification in the official Gazette, make regulations not inconsistent with this Act and the rules made thereunder to provide for all or any of the following matters, namely:

XXX XXX XXX (j) principles governing the supply of electricity by the Board to person other than licensees u/s 49;

xxx xxx xxx Provided that regulations under Clauses (a), (d) and (jj) shall be made only with the previous approval of the State Government and regulations under Clauses (h) and (i) shall be made with the concurrence of the Authority:"

Clause VII of the Agreement has already been extracted above. The said

agreement was made with a specific understanding that the Board is always empowered to revise the tariff even in the case of seasonal industries, if circumstances so warrant. Classifying a particular industry or group of industries under a particular category, fixing tariff, extending any benefit, etc. are within the power of the Board. Once the Board exercises its discretion either in classifying consumers or revising tariff, this Court cannot substitute its opinion. Whether Clause VII which was earlier governing the supply be continued or not is also within the exclusive discretion of the Board. The contention that in the absence of any agreement to the effect that there cannot be any alteration or modification in respect of tariff without notifying the petitioners is also incorrect. The petitioners' industries were treated as seasonal industries periodically. In none of the agreements it is stated that treating the industries as seasonal industries is a permanent one. The Board thought that, in view of the changed circumstances, including all the industries under one category and meeting the increased demand of power supply out of the available energy and meeting the cost of production, it is proper to revise the tariff. Hence, it cannot be said that the revision of tariff by the Board is arbitrary or discriminatory or illegal. The Decisions relied upon by the learned Counsel for the petitioners in fact have no application to the present case. On the other hand, if it is properly understood, the Supreme Court has not stated that the Board has no power to increase or decrease the tariff. This position has been clarified by the Supreme Court in Rohtas' case and also in Indian Aluminium Company's case Paragraphs 33, 34 and 35 of Indian Aluminium Company's case wherein the contentions of the learned Counsel for the petitioners have been answered and the Supreme Court held that the Board has power to revise the tariff and demand that the consumers shall pay the amount as demanded are reproduced hereunder:

"Mr. Narasimhamurthy has submitted that Sub-sections (1) and (2) of Section 49 of the Electricity (Supply) Act envisage supply of electric energy to different consumers at uniform tariffs. It, however, empowers the Board to charge a different tariff in appropriate case u/s 49(3) of the Act, by the amending Act, Section 49 of the Electricity (Supply) Act has been amended in its application in the State of Karnataka. Sub-section (5), Sub-section (6) and Sub-section (7) to Section 49 have been inserted after Sub-section (4) of Section 49 of the Electricity (Supply) Act. Sub-sections (5) and (6) of Section 49 of the Electricity (Supply) Act as applicable to Karnataka in view of the aforesaid amendment are to the following effect:

"(5) The party to an agreement or any other arrangement entered into prior to the commencement of the Electricity (Supply) (Karnataka Amendment) Act, 1981 and providing for supply of electricity by the Board shall, notwithstanding anything contained in the instrument of agreement or other arrangement or in any law including this Act, in force at such commencement, pay, in respect of electricity so supplied after such commencement, price (by whatever name called) calculated in accordance with the uniform tariff framed or modified from time to time, under Sub-section (1) and applicable to the category to which such

party belongs.

(6) The party to any such agreement or arrangement entered into after the commencement of the Electricity (Supply) (Karnataka Amendment) Act, 1981, shall, notwithstanding anything contained in this Act, or in such agreement or other arrangement, pay, in respect of electricity supplied by the Board, price (by whatever name called) calculated in "accordance with the uniform tariff framed or modified from time to time under Sub-section (1) and applicable to the category to which such party belongs."

Mr. Narasimhamurthy has contended that the smelter plant of the petitioner-Company had always been categorised by the Board as industries included in HT-1A. He has drawn the attention of the Court to tariff rates of 1974 and 1978. It appears that for 1978 tariff rates, the plant of the petitioner-Company was included in HT-1A category. Mr. Narasimhamurthy has contended that such categorisation by the Electricity Board made as far back as in 1978 is not under challenge, and no protest had been made by the petitioner-Company for categorising the plant of the petitioner-Company in HT-1A. Mr. Narasimhamurthy has also contended that industries may have some distinctive features but still then a broader classification is possible taking into consideration, the power intensive nature of various industries. The Board has taken into consideration such power intensive in the manufacturing process and has made a broad based categorisation. The smelter plant has been included in HT-1A not only for the first time for the purpose of applying the amended provisions of Section 49 of the Act but such categorisation was made long back. Even in 1978 such categorisation was made without any protest from the petitioner-Company. If such categorisation has a rational basis and not arbitrary, capricious or illusory, no exception need be made to such categorisation. Accordingly, Sub-sections (5) and (6) of Section 49 are squarely applicable to the petitioner-Company and the Board is justified in treating the agreement as annulled and subjecting the petitioner-company to the uniform tariff rate applicable to all the industries categorised as HT-1A. He has submitted that if in terms of the statutory provision, an uniform rate of tariff is applicable to the petitioner-Company on the basis of category of the industry to which it belongs, and the agreement of 1976 stands annulled in view of the amended provision, there cannot be any question of promissory estoppel against statute even if it is assumed that in the facts of the case, a case of promissory estoppel has otherwise been made out. He has, therefore, submitted that there is no occasion to interfere with the judgment under appeal and the appeal should be dismissed with costs.

After giving our anxious consideration to the respective contentions of the learned counsel for the parties, it appears to us that the agreement of 1966 and 1976 were not the outcome of any unilateral promise or assurance held out by the State or the Board to the petitioner-Company. Such agreement was the result of negotiations between the parties and on such negotiations, the terms and conditions were agreed upon between the parties. Accordingly the

foundation of promissory estoppel is absent and the case of promissory estoppel as sought to be made out by the petitioner-Company cannot be accepted. In our view Mr. Narasimhamurthy is justified in his contention that since the agreement stood annulled in view of the amended provisions of Section 49 of the Act, the Board was empowered to ask for uniform tariff rate from the industries classified under one category. It is true that the smelter plant has distinctive features in its manufacturing mechanism and in the process of electrolytic operation. It also appears to us that the smelter plant is not only power intensive industry but the power assumes a very significant role and constitutes one of the important raw materials in the productive process. But it does not appear to us that categorisation of the smelter plant a high power intensive industry by itself is illegal or perverse, or without any basis and wholly unjustified. In the broader classification, the smelter plant is certainly a high power intensive industry and such categorisation was made by the Board not for the purpose of enforcing the amended Section 49 with an object to annul the agreement but such categorisation was made even in 1978. In the circumstances, we are unable to accept the contention that the broader categorisation of the smelter plant is arbitrary, capricious and unreasonable resulting in treating the unequal as equal thereby offending Article 14 of the Constitution. We, therefore, find no justification to interfere with the impugned decision of the High Court and the appeal, therefore, fails but in the facts of the case, there will be no order as to costs."

The principle laid down by the Supreme Court in the above case is a complete answer to the contentions raised by the learned Counsel for the petitioners. Apart from revising the tariff rate in respect of the seasonal industries, the Board has not infringed the petitioners' right to carry on the business. The amendment and the demand made by the Board are well within the competence of the Board and reasonable in nature and, therefore, no interference is warranted. Hence, these Petitions are dismissed. No costs.