(2014) 04 P&H CK 0221

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 4945 of 2011

Sukhninder Singh APPELLANT

Vs

State of Punjab and Others RESPONDENT

Date of Decision : 04-04-2014

Acts Referred:
Electricity Act, 2003 — Section 3, 61, 62, 63, 76

Citation : (2014) 04 P&H CK 0221

Hon'ble Judges : Sanjay Kishan Kaul, C.J;Arun Palli, J

Bench : Division Bench

Advocate : R.S. Bains, Advocate for the Appellant; Ashwani Talwar, Additional Advocate General, Punjab, Mr. S.K. Vashisht, Assistant Advocate General, Punjab, Mr. S.K. Pabbi, Advocate for Respondent No. 3 and Ms. Madhu Dayal, Advocate for Respondents No. 5 and 6, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Sanjay Kishan Kaul, C.J.—The present petition, styled as a Public Interest Litigation, seeks to assail certain clauses of the Power Generation Policy, 2010 for the State of Punjab as being violative of para 5.1 of the Tariff Policy read with Section 63 of the Electricity Act, 2003 (hereinafter referred to as ''the said Act''). The specific clauses sought to be assailed are 1.5, 9.1, 10.3, 10.7 and 10.8. The alternative prayer is that the Power Generation Policy be reviewed and suitably amended to bring it in conformity with the Tariff Policy and the said Act. Petitioner is a retired Additional Superintending Engineer of the Punjab State Electricity Board and he claims that the Board is on the verge of a financial collapse due to the instructions and policies of the Punjab Government, which are directly in conflict with the regulatory Statute.

2. The petitioner pleads that the Regulatory Commissions, both at the Central and the State level, have been constituted under Sections 76 and 82 of the said Act, respectively. Qua the issue of tariff determination by the Regulatory Commissions, there are stated to be two methodologies-(i) the cost plus

approach, which is stated to be based on ''first come first serve'' principle, and (ii) competitive bidding method to be carried out as per the guidelines notified by the Government of India. In this context, Part VII of the said Act deals with tariff and Section 61 of the said Act authorises the Appropriate Commission to determine the tariff, guided by the factors set out in the said Section. The first alternative is stated to be in accordance with Section 62 while the second one is as per Section 63 of the said Act. The Tariff Policy, in turn, is issued by the Central Government in consultation with the State Governments and the Authority for development of the power system, as per sub-Section (1) of Section 3 of the said Act, which is stated to have been so issued on 5.1.2006. This Tariff Policy, in clause 5.1, provided for future procurement of power through competitive bidding process but gave a five years'' relaxation to Government companies to set up new generation systems without opting for the open auction bidding route.

3. It is the case of the petitioner that on analysis of competitive bid tariff of 14 thermal projects as compared to those which had cost plus approach, 12 out of 14 projects showed that the competitive bidding tariffs were substantially lower. This competitive bidding process is stated to have been applied to 1980 Mega Watts Talwandi Sabo Thermal Project and, thereafter, to 1320 Mega Watts Rajpura Thermal Project.

4. The petitioner makes a grievance that whereas the Tariff Policy as well as the statutory advice of the Central Electricity Regulatory Commission (hereinafter referred to as ''the CERC'') was in favour of adopting competitive bidding process for award of new thermal power projects, the Government of Punjab in its impugned Policy of 2010, adopted the opposite approach. In view of statutory force u/s 3 of the Government of India Policy, it is submitted that the Punjab State Electricity Regulatory Commission is to be guided by that Tariff Policy. There is, thus, stated to be a direct conflict between the Tariff Policy of the Government of India made in consultation with the State Government, as against the impugned Policy. The rates through the two methods work out differently, as is apparent from the rates set out in the petition.

5. The question of the sanctity of the National Electricity Policy dated 12.2.2005 framed u/s 3 of the said Act and the powers of the State Electricity Regulatory Commission to act beyond the same, came up for consideration in CWP 20562 of 2012 (Mawana Sugar Limited v. State of Punjab and others). On 4.3.2014, we took note of the respective stands of the State Commission and Union of India. The stand of the State Commission was that it can act in derogation of the National Electricity Policy in framing regulations, which is a statutory function. The Union of India took a categorical stand that the State Commission could not derogate from the National Electricity Policy.

6. The State of Punjab has explained that as per clause 5.1 of the Tariff Policy, all future requirements of power are to be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is

State controlled/owned company as an identified developer. The State Government is quite clear that in the State, it is the State Regulatory Commission rather than the State Government which will decide the issue of tariff determination. In fact, it is pleaded that clause 5.1 of the Tariff Policy providing for bidding process as the sole criteria is in violation of the provisions of the said Act, as section 62 specifically provides for determination of the tariff by other modes. In these circumstances, it is contended that the Power Generation Policy, 2010 and its clauses are in conformity with the provisions of the said Act.

7. The CERC, on the other hand, pleads that the Generation Policy, in terms of letter dated 17.9.2010, aims to encourage private investment in generation of power in the State, which recently successfully concluded the bidding for two thermal power stations on cost plus basis. The necessary clarification is stated to have been issued to the effect that the Generation Policy did not give any exemption from complying with the provisions of the said Act.

8. The Punjab State Electricity Regulatory Commission seeks to contend that the said Act itself provides for mechanism for determination of electricity tariff. Section 62 of the said Act itself provides for the methodology on cost plus basis where the power is purchased through Power Purchase Agreements. Section 63, which refers to competitive bidding method, does not exclude the methodology set out in Section 62 of the said Act. In this regard, reference has also been made to Section 86(1)(b) of the said Act, which confers on the State Commission the power to perform functions of regulating electricity purchase and procurement process of distribution licensees through agreements for purchase of power for distribution and supply within the State. It is once again pleaded that the National Tariff Policy ought not to exclude the other modes of tariff determination.

9. In our view, the subject matter sought to be raised in the present case is very general in nature and is sought to be styled as a Public Interest Litigation. No doubt, the Central Government u/s 3 of the said Act prepares the National Electricity Policy and Tariff Policy in consultation with the State Governments and the same having an element of statutory force, every one is expected to abide by, in principle, to the same. However, what is prepared is a general tariff policy. How tariff has to be fixed, the power has been conferred on the State Commission and the Central Commission. The Policy framed u/s 3 of the said Act does not take away the power conferred under the said Act. It is also to be noticed that both the methodologies of fixation of tariff are envisaged under Sections 62 and 63 of the said Act. Section 62 of the said Act has not been removed from the Statute. If bidding process was the sole method, then, only Section 63 of the said Act would have existed in the Statute. The Legislature in its wisdom has, thus, kept both methodologies open.

10. It is undoubtedly true that there should be an open and transparent policy but, then, open bidding process is not the only such policy. Further, electricity

generation and tariff fixation are, as such, governed by the Statute and not left to general terms. The authorities entrusted with this task would always endeavour to have a transparent process.

11. There is also another aspect to the matter. Since reference has been made only to two thermal power projects, one of which has been commissioned and the other is in an advance stage of commissioning, there are no material facts available viz. any other case, to substantiate the plea of the petitioner. In view of the aforesaid reasons, we are not inclined to continue this Public Interest Litigation any further and the same is hereby disposed of.