
(2002) 08 MP CK 0087
In the Madhya Pradesh High Court
Case No : Writ Petition No. 4 of 2002

Superpack

APPELLANT

Vs

M.P. State Electricity Board and Others

RESPONDENT

Date of Decision : 27-08-2002

Acts Referred:

Constitution of India, 1950 — Article 162
Electricity (Supply) Act, 1948 — Section 34, 35, 36, 44, 44(2)
Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 — Section 21, 21(3)

Citation : (2002) 5 MPHT 327 : (2002) 2 MPJR 373 : (2002) 4 MPLJ 572

Hon'ble Judges : A.K. Mishra, J

Bench : Single Bench

Advocate : Akshay Dharmadhikari, for the Appellant; M.L. Jaiswal and Mohd. Atiq, for the Respondent Nos. 1, 3, 4 and 5 and Ashok Agrawal, Panel Lawyer for the Respondent No. 2, for the Respondent

Final Decision : Allowed

Judgement

Arun Mishra, J.

Petitioner in this writ petition is seeking quashment of the order (P-12) dated 4-4-2001 issued by the Superintendent Engineer, Madhya Pradesh State Electricity Board, Chhindwara, and the bills (P-10 and P-11) dated 16-8-2001. This challenge is based on the ground that Captive Power Policy, 2001 issued on 20th February, 2001, by the State Government is not applicable with respect to the petitioner Unit.

As per Captive Power Policy, 2001, captive power plant shall have to be used by the consumer to whom permission is granted. After issue of this notification, he shall be bound to draw atleast 50% of electricity from Madhya Pradesh Electricity Board out of its total monthly requirement. The bills have been raised by the M.P: Electricity Board applying new policy in case of petitioner.

The petitioner is a company having its factory at Village Sausar, District

Chhindwara, manufacture HDPE/PP Woven Fabrics, Bags and Master Batches, For running of the factory, the petitioner entered into power supply agreements with the respondent Madhya Pradesh State Electricity Board. Petitioner has installed Captive Power Generating Sets (DG sets) for meeting its power requirement before coming into force of new Captive Power Policy on 21-2-2001, As per new Policy, petitioner is being asked to draw atleast 50% of the electricity from Madhya Pradesh State Electricity Board, successor of Madhya Pradesh Electricity Board. Madhya Pradesh Electricity Board, now succeeded by Madhya Pradesh State Electricity Board (hereinafter referred to as "Board"), is established u/s 5 of Indian Electricity (Supply) Act, 1948. In the year 1992-93, petitioner was fulfilling the requirement of 2900 KVA by purchasing electricity from erstwhile Madhya Pradesh Electricity Board, The demand of the petitioner Company thereafter reduced to 1000 KVA, The agreement (P-1) for 1000 KVA was entered into on 16th September, 1998. Supplementary agreement (P-2) for 600 KVA was entered into on 16-3-2001. Petitioner is drawing 1600 KVA from the M.P. State Electricity Board to meet its demand.

Petitioner company had also installed four Captive Power Generating Plants under the due permission granted by the Madhya Pradesh State Electricity Board. The first Captive Power Plant was set up by permission granted on 10-2-1986 for the capacity 1250 KVA. Second Captive Power Plant is DG-1 set for the capacity 750 KVA, for which permission was granted on 19-4-1995 for a period of 5 years. For Captive Power Plant, DG-2 Set, permission (P-7) was granted on 20-1-1997. It is for the capacity 850 KVA without any time limit. Similarly, another Captive Power Plant, DG-3 Set was allowed under permission dated 20-10-1997 for capacity 1250 KVA. It is also relevant to mention that it is without any time limit. This is also not a stand by set. Thus, petitioner without any limit of time to enjoy the facility of Captive Power Plant, DG Sets 2/3 to the strength of 2100 KVA as per permissions granted in which condition No. 6 was imposed to the effect that rules, regulations, directions issued by the State Government and Central Government time to time shall be binding on the petitioner.

Petitioner submits that petitioner company has installed four Captive Power Generating Plants under the aforesaid permissions. Now as per the Bills (P-10 and P-11), he is being asked not to operate the DG Sets beyond 50% of the total consumption. In other words, the production made by the petitioner by utilising raw material is being charged by M.P.S.E.B. as if that is the electricity supplied by the M.P.S.E.B. presumably on the basis that they are entitled to do so under Captive Power Policy, 2001 issued by the State Government w.e.f. 20th February, 2001. Petitioner further submits that said Captive Power Policy, 2001 is not applicable in the case of the petitioner as it applies to those Captive Power Plants to whom permission is granted after issue of notification dated 20th February, 2001 on which date the Captive Power Policy was published by the State Government.

Reliance has been placed by the petitioner on Clause 3 of the Policy. Petitioner

further submits that statutory consent has been granted by the Board in exercise of powers under Sections 44 and 45 of Electricity (Supply) Act, 1948. The provision does not empower the Board to grant consent for a fixed period of time. The consent once granted u/s 44 is dependent upon and subject only to the conditions mentioned in the said Section and no other condition can be imposed. Petitioner submits that for DG-2 and DG-3 Sets, consent is for unlimited period.

Petitioner further placed reliance on statement made by the learned Advocate General of the State in W.P. No. 518/2001. The writ petition was disposed of on the statement of learned Advocate General that Captive Power Policy enforced with effect from 20th February, 2001 is prospective and will not affect D.G. Sets installed lawfully with the prior permission under the old Captive Power Policy. It is also the case of the petitioner that imposition of such restriction in the Policy would be illegal and void.

In the return filed by the respondent M.P. State Electricity Board and others, it is denied that D.G. Sets are being operated under valid permission. The petitioner is obliged to avail 50% of requirement from the Board's system. Standby D.G. Sets were allowed to be installed by the petitioner for emergency use only when the Board's supply is not available and these permissions were for a limited time which required renewal. Petitioner has installed the actual capacity of 4200 KVA instead of 4100 KVA. It is also denied that D.G. Sets of 2100 KVA total capacity were permitted by the respondent Board to run continuously even when the Board's supply was available. It has been disputed that new Power Policy is not applicable. It is contended that it is applicable even to those who have installed their plants prior to 21-2-2001. All the Captive Power Consumers are liable to consume 50% requirement from the Board's system. Grant of permissions has been admitted. It is also contended that Board has applied standard for giving consent to install and run generating sets by its consumers wherein in aforesaid provision, availing of 50% of its requirement from the Board is laid down. Conditions are placed on record as R-1. Condition No. 11 provides "the Consumer shall be required to ensure at least 50% consumption of his monthly requirement (consumption) from MPEB's supply. In case the consumption from MPEB's supply falls short of 50% in any month, the deficit units shall be billed at applicable tariffs to the consumer and the consumer shall have to pay the same in time."

Additional submissions have also been filed on 11-3-2002 by the respondents pointing out that Board has constituted a committee known as Dues Settlement Committee, which is a statutory body and has been vested with the power to resolve the dispute about dues between the consumer and the Board. The petitioner has an alternative remedy to seek redress before the dues Settlement Committee of the Board. Yet another additional submission has been filed by the respondents on 29-7-2002 in which additional grounds have been urged to the effect that the main source of its revenue to compensate the loss is borne by industrial and commercial consumers. If their consumption receives a steep fall

due to development of their own generating capacity, which may cause great imbalance and the economy of the Board will be shattered and the public purpose for which it has been constituted shall receive a great set back. The Board has not been able to earn a reasonable return of 3% as laid down u/s 59 of the Supply Act and is running in loss. Keeping the aforesaid in view, the State Government in exercise of its powers framed Captive Power Policy of 2001 whereunder it is compulsory to those who were having Captive Generating Plants to avail minimum 50% of the total requirement from the Board's system. The Board has accepted the said policy of the State Government and Said-down the conditions for operation of Captive Generation Plants. Thus, the course adopted by the State Government and the Board is just and proper. It is also submitted that the installation done on 30-4-1998 was without permission as it was installed under the general permission vide Circular dated 20th September, 1996. The permission was granted on 20th October, 1997 but installation was done on 30th April, 1998. In the meanwhile, general circular dated 20th September, 1996 was superseded on 1-1-1998. It is also contended that M.P. Electricity Regulatory Commission has the jurisdiction u/s 21 (3) of M.P. Vidyut Sudhar Adhiniyam, 2000, as such this Court has no jurisdiction to look into the matter and the remedy of the petitioner lies before M.P. Electricity Regulatory Commission.

Shri Akshay Dharmadhikari, learned Counsel appearing for the petitioner, has submitted that the Captive Power Policy, 2001 (hereinafter referred to as "Policy") is not applicable in the case of petitioner. It is not to operative retrospectively. Petitioner is having the permission of producing 2100 KVA as per DG Sets 2 and 3 which permission has been granted in accordance with Section 44 and Policy cannot come in the way of the Statutory permission granted u/s 44. It is also urged petitioner need not approach Electricity Regulatory Commission u/s 21 (3) of M.P. Vidyut Sudhar Adhiniyam, 2000 which is also a prospective provision and the dispute of this nature which is with respect to the retrospective effect of the policy and illegally taking away the right of the petitioner under the valid permissions has to be decided only in writ petition. Matter need not to go before the Dues Settlement Committee as it is not a dispute about the bills but as to the application of the policy.

Shri M.L. Jaiswal, learned Senior Counsel appearing for the respondent Board, contends that this Court has no jurisdiction. The petitioner be asked to avail the remedy before the M.P. Electricity Regulatory Commission which is an expert body and various considerations of public policy have to be taken into consideration by Electricity Regulatory Commission u/s 21 (3) of M.P. Vidyut Sudhar Adhiniyam, 2000 (hereinafter referred to as "Adhiniyam"). It is also contended that the Policy of 2001 should be interpreted in such a manner so as to make it applicable for all the consumers alike. If it is not given effect with respect to the consumers who have installed the Captive Power Plants earlier in point of time to the date of notification dated 20th February, 2001, anomalous result may occur. As such the policy is applied in a reasonable manner to the consumers situated similarly. It is also the submission of Shri Jaiswal, learned

Senior Counsel for the Board that the directive issued u/s 78A of Electricity (Supply) Act, 1948, is binding on the Board when State has framed the Policy of 2001. It has been accepted and implemented by the Board to all the consumers alike and Board's income depends upon the consumption by the industries as such and if the policy is not applied to all the industries who have established their Captive Power Plants, though under the permission granted before the date of notification on which the Policy has been enforced, the Board is already in financial crisis, it will not be able to bear the burden of electricity supply to the general consumers making the deficit good from the supply made to the industries on the higher rates. Reliance has also been placed by learned Senior Counsel for the Board on Article 162 of the Constitution that policy directive issued by the State Government are binding. The conditions mentioned in R-1 have also been invoked by the Board to contend that its action is fair, equal, equitable and in accordance with law.

The first question is with respect to the jurisdiction of this Court and is based on Section 21 of the Adhiniyam. Section 21 of Adhiniyam provides restrictions of licensees and Generating Companies. Sub-section (3) of Section 21 has effect of amending the provisions of Section 44 of Electricity (Supply) Act, 1948. Section 44 shall apply in the State after coming into force of Adhiniyam, 2000 with the amendment that the consents required in the said Section shall be granted by the commission, instead of by the Board as provided under that Section, Thus, wherever word finds place has to be read as reference to the Commission and Commission has the right under Clause (b) of Sub-section (3) of Section 21 to refuse the consent if in the opinion of the Commission, the consent granted will adversely affect the operation of the power system or the development of the electricity industry in the State in an efficient manner or otherwise the public interest. The Sub-section (3) of Section 21 makes it clear that matter need not travel to the Electricity Regulatory Commission with respect to the permission which has been granted u/s 44 by the Board. No permission is being sought by the petitioner. Permissions have been granted. It is not a case of renewal of the permission. Two permissions granted to the petitioner for DG Set-2 and DG Set-3 are unlimited in point of time. Thus, in my opinion, the matter need not to travel to the Electricity Regulatory Commission under Clauses (a) and (b) of Sub-section (3) of Section 21 of the Adhiniyam.

The prime question for determination in the instant case is whether the Captive Power Policy, 2001, is retrospective and the restriction has to be read on the generating sets established prior to 20th February, 2001, Para 3 of the Captive Power Policy is relevant and is reproduced under :--

"3. Use of Captive Power Plant.--The Captive Power Plant shall have to be used only as following :--

(i) For such consumers, to whom permission is granted after issue of this notification, it shall be binding to draw at least 50% of electricity from Madhya Pradesh Electricity Board out of their total monthly requirement.

(ii) The consumer shall have to install a high precision electricity meter at his own cost as per the standards laid by the Board, so that MPEB may record the reading of power generation from time to time."

It is apparent from Clause 3 of aforesaid policy that the restriction to draw at least 50% from MPEB out of their total monthly requirement is applicable only to those to whom permission is granted after issue of this notification. It is not the case where the permission has been granted to the petitioner to install the Captive Power Plant DG Sets after issue of this notification. The reading of Clause 3 leave no room to doubt that it is meant to apply prospectively. Policy is prospective as apparent from other provisions also. Clause 2 provides eligibility for installation of Captive Power Plants in future. A person is eligible to install Captive Power Plant who is a consumer of Electricity Board (High Tension or Low Tension) and does not owe any arrears/amounts to Electricity Board. Duration is also dealt with in Clause 4. The permission to run Captive Power Plant shall be given for a period not exceeding 10 years at a time. Clause 5 makes a provision with respect to wheeling. Clause 6 provides provision with respect to wheeling charges. Clause 9 provides for cess on electrical energy generated by Captive Power Plant which shall be levied @ 20 paise per unit from Captive Power Plant. A committee is constituted as per Clause 10 to grant consent of Captive Power Plant. The policy nowhere deals with the existing Captive Power Plants to whom permission has already been given by the Board u/s 44 prior to issue of policy on 20th February, 2001. Clause 3 cannot be interpreted to have the retrospective operation when the words used are plain and simple. Language is clear. There is no ambiguity. It has to be interpreted only in the manner in which it has been laid down by State Govt. Interpretation as suggested by the Board if adopted, would amount to rewriting of the policy itself. When State has not chosen to put any fatter on the use of CPP/DG Sets already installed before issue of policy, it is not for this Court to read the provision in that manner. Policy making is domain of the State and the directive issued u/s 78A is binding on the Board as such policy cannot be interpreted in arbitrary manner and submission that Board is empowered to make an interpretation applying policy retrospectively which in my opinion is not permissible to be adopted. Clause 3 of the said policy makes it clear that provision is not applicable to already installed sets.

13-A. Reliance has been placed by the petitioner on Section 44 of Electricity (Supply) Act, 1948. Section 44 is quoted below :--

"44. Restriction on establishment of new generating stations or major additions or replacement of plant in generating stations.-- (1) Notwithstanding anything contained in any other law for the time being in force or in any licence, but subject to the provisions of this Act, it shall not be lawful for a licensee, or any other person, not being the Central Government or any corporation created by a Central Act or any Generating Company, except with the previous consent in writing of the Board, to establish or acquire a new generating station or to extend or replace any major unit of plant or works pertaining to the generation

of electricity in a generating station :

Provided that such consent shall not, except in relation to a controlled station, be withheld unless within three months from the date of receipt of an application--

(a) for consent to the establishment or acquisition of a new generating station the Board--

(i) gives to the applicant being a licensee an undertaking that it is competent to, and will, within twenty four months from the said date, afford to him a supply of electricity sufficient for his requirements pursuant to his application; or

(ii) shows to the applicant that the electricity required by him, pursuant to his application, could be more economically obtained within a reasonable time from another appropriate source;

(b) for consent to the extension of any major unit of plant or works as aforesaid, the Board--

(i) gives to the applicant being a licensee an undertaking that within twenty four months from the said date either the station to which the application pertains will become a controlled station in terms of Section 34, or the Board will make a declaration to the applicant in terms of Section 35 offering him a supply of electricity sufficient for his requirements, pursuant to his application, or the Board will make a declaration to him in terms of Section 36; or

(ii) shows to the applicant that the electricity required by him, pursuant to his application, could be more economically obtained within a reasonable time from another appropriate source or by other appropriate means;

(c) for consent to the replacement of any major unit of plant or works, the Board--

(i) gives to the applicant being a licensee an undertaking that within eighteen months from the said date either the station to which the application pertains will become a controlled station in terms of Section 34 or the Board will make a declaration to him in terms of Section 36; or

(ii) shows to the applicant that the electricity required by him pursuant to his application could be more economically obtained within a reasonable time from another appropriate source or by other appropriate means.

(2) There shall be stated in every application under this Section such particulars as the Board may reasonably require of the station, plant or works as the case may be, in respect of which it is made, and where consent is given thereto, in acting in pursuance of such consent, the applicant shall not, without the further consent of the Board, make any material variation in the particulars so stated.

[(2-A) The Board shall, before giving consent under Sub-section (1), to the establishment or acquisition of a new generating station or to the extension or replacement of any major unit of plant or works, consult the Authority, in ease

where the capacity of the new generating station or, as the case may be, the additional capacity proposed to be created by the extension or replacement exceeds twenty-five thousand kilowatts.]

(3) Any difference or dispute, arising out of the provisions of this section shall be referred to the arbitration of the authority."

In my opinion when the consent has been granted under statutory provisions of Section 44, it can only be dealt in accordance with the parameters, conditions, restrictions statutorily prescribed u/s 44. I do not read anything in the Captive Power Policy, 2001 issued by the State Government which curtails any of the rights granted under valid permission to the petitioner. Thus, in my opinion, petitioner is not obliged to draw atleast 50% of electricity from Madhya Pradesh Electricity Board out of their total monthly requirement. Petitioner is entitled to produce the electricity as per the permission granted subject off course to payment of development cess with respect to the electricity produced by the petitioner to the extent of 2100 KVA as per the permission (P-7 and P-8). In *Associated Cement Companies v. M.P.E.B.* 2001(1) MPLJ 641, this Court held that :--

"19. True it is that in view of Section 44(2) of the Act, person seeking consent is required to state in the application such particulars as the Board may reasonable require but these particulars have to be of the Station, Plant or Works, as the ease may be in respect of which request for grant of consent is made and is granted. The word "particulars" in relation to "station", "plant" or "works" are facts or details about them and not in relation to other things. Considering the plain language of Section 44(2) of the Act, I am of the opinion that while asking an applicant to state particulars the Board cannot compel an industry to continue with the existing contract demand or can force the Industry to be the Board's consumer for a definite amount of electricity."

In the instant case it is not in dispute that petitioner is obliged to have the contract demand. To that extent, the Board is empowered to work out modalities but Board on the basis of policy has no right to levy the demand even on the production which has been allowed to the extent of 2100 KVA as per permission (P-7 and P-8) which are for unlimited time. It is not the case that any of the permission has been violated. It is also true that it is mentioned in Condition No. 6 of these permissions that rules, regulations, instructions issued time to time shall be binding on the petitioner but no such binding instruction has been indicated which has been violated. The Captive Power Policy which has been issued is not applicable with retrospective effect with respect to CPP DG sets established without permission. Thus, it cannot be said that the petitioner has violated any of the provisions of Captive Power Policy. Firstly, Board is not empowered under the policy to ask those industries which have established their Captive Power Plants D.G. Sets prior to issue of policy on 20-2-2001 to obtain and consume 50% of total requirement of electricity from Board. Secondly, it cannot be said that any discrimination would be caused in case policy is not

applied to the consumers who have been given permission earlier in the point of time. They are to be treated as a class totally different. The policy itself applies to the industries who are to establish their Captive Power Plants subsequent in point of time. Thus, in my opinion, the plea of avoidance of discrimination raised by the Board is not permissible to be invoked. The policy has to be applied in the form it has been couched by the State.

Learned Counsel for the State has stated that dispute is in between the Board and the petitioner, however, the fact remains that learned Advocate General of the State stated before the Gwalior Bench of this Court recorded in order dated 18-1-2001 in W. P. No. 518/2001 that "At the outset, learned Advocate General informed the Court that the Captive Power Policy enforced with effect from 20-2-2001 is prospective and will not affect D.G. sets installed lawfully with the prior permission under the old Captive Power Policy." In any view of the matter, in my opinion on plain interpretation of policy, it is clear that said stand of State of M.P. is right.

In view of aforesaid, the writ petition is allowed. It is held that Captive Power Policy, 2001 is not applicable in the cases of those generating sets installed with prior permission granted by the Board for unlimited period of time u/s 44 of the Electricity (Supply) Act, 1948. Consequently, the demand raised as per P-10 and P-11 are quashed. The respondents are directed to raise the demand afresh in accordance with this decision. If any amount has been deposited by the petitioner, that be adjusted by the Board in future bills. In the facts and circumstances of the case, costs on parties.