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(2012) 12 OHC CK 0015

In the Orissa High Court

Case No : Writ Petition (C) No. 10405 of 2012

The Executive Engineer (Electrical) NESCO, Baripada Electrical Division — APPELLANT

Vs

OMBUDSMAN-II, (Electricity) and Another — RESPONDENT

Date of Decision : 04-12-2012

Acts Referred:
Electricity Act, 2003 — Section 14(b)
Income Tax Act, 1961 — Section 10(27)

Citation : (2013) 115 CLT 601

Hon'ble Judges : B.N. Mahapatra, J

Bench : Single Bench

Advocate : S.C. Dash, for the Appellant; Falguni Rajguru Mohapatra, M.K. Panda and R.K. Nayak, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Mahapatra, J.—This Writ Petition has been filed with a prayer to quash the Order Dated 12.03.2012 passed under Annexure-8 in C.R. Case No. 70 of 2011 by the OMBUDSMAN-II holding that the "Hatchery" Unit M/s. Bharasa Hatchery is coming under Allied Agricultural Activities under Regulation 80(5)(ii) of OERC Supply Code & directing the Petitioner-licensee to revise the agreement & bills from February, 2011 till the date on the basis of the applicable tariff & not in General Purpose Tariff (in short, ''G.P. Tariff'') within 30 days from the date of issue of the order, with further direction to the Opp. Party-consumer to resolve the dispute in complaint handling procedure under the licensee to avail benefits under Own Your Transformer (OYT) Scheme on the ground that the said order is illegal, contrary to law & without jurisdiction. Petitioner''s case in a nutshell is that the Respondent-Opp. Party No. 1 in the forum below is one of the supply Engineers of NESCO (Licensee). The Petitioner-company (NESCO) is one of the distribution companies, which is granted with the licence by OERC u/s 14(b) of the Electricity Act, 2003 (for short, ''Act'', 2003) to distribute electricity as a distribution licensee within the Northern Zone of Orissa. Thus, the Petitioner is engaged in business of retail supply of electricity to various consumers within its area of supply. The Petitioner as a supply Engineer of NESCO is in charge of the Electrical Division, Baripada in the district of Mayurbhanj. One Bhabani Shankar Jena, Proprietor of M/s. Bharasa Hatchery-Opp. Party No. 2 has executed an agreement on 18.12.2010 for supply of power for a load of 15.00 KW to his Hatchery unit. In terms of such agreement the charges to be paid by the consumer as mentioned in Clause-6 of the agreement is General Purpose Tariff which is otherwise known as ''Commercial Tariff''. As the business activities of the consumer is purely commercial in nature, commercial tariff is applicable to him. The consumer is liable to pay the charges in accordance with the provisions of OERC Distribution (Conditions of Supply) Code, 2004 (in short, "Code, 2004") as notified in the Tariff Notification from time to time: Opp. Party No. 2 while running his Hatchery unit as commercial purpose for profit motive continued to pay the charges demanded on G.P. (Commercial Tariff) as stipulated in agreement. While doing so, Opp. Party No. 2 raised a complaint before the Grievance Redressal Forum (in short, ''GRF'') of the licensee-NESCO in GRFCC No. 321/2011 praying for revision of the bills from February, 2011 to June, 2011 on the basis of Tariff applicable for the categories of consumers covered under "Allied Agricultural Activities" introduced by OERC in its Retail Supply Tariff order for 2008-2009. Opp. Party No. 2-Petitioner filed its counter reply objecting applicability of the Allied Agricultural tariff to the complainant-consumer''s Hatchery unit. The GRF, Balasore upon hearing the parties & after analyzing the factual as well as legal aspects disposed of C.C. No. 231 of 2011 vide its Order Dated 29.10.2011 observing that classification of Hatchery unit of Opp. Party No. 2 under the G.P.S. (commercial) Tariff is legally correct & justified. Opp. Party No. 2 being aggrieved by the said order of GRF dated 29.10.2011 approached the OMBUDSMAN-II (Electricity), Bhubaneswar on 29.11.2011 by filing a representation which was registered as C.R. Case No. 70 of 2011. Before the OMBUDSMAN, the present Petitioner filed his objection along with the written notes of argument. After hearing both the parties, the OMBUDSMAN passed the impugned Order Dated 12.3.2012. Hence, the present Writ Petition.

2. Mr. S.C. Dash, Learned Counsel appearing for the Petitioner submitted that the Order Dated 12.3.2012 passed by the OMBUDSMAN under Annexure-8 is without jurisdiction as the same has been passed in violation of Regulation 7(4) of OERC (Grievances-Redressal Forum & Ombudsman) Regulations, 2004 being passed after statutory time limit of two months without recording any reason for such inordinate delay in disposing of the case. OMBUDSMAN-II (Opp. Party No. 1) has erroneously classified the consumer (O.P. No. 2) under "Allied Agricultural Activities" as provided under Regulation 80(5) (it) of OERC Code, 2004. The OMBUDSMAN should not have compared the hatching unit of the consumer with that of the ''Poultry'' farm & held that hatchery is coming under ''Allied Agricultural Activities'' tariff category for the purpose of billing. Mr. Dash further submitted that in the amendment notified on 19.10.2009, the OERC clarified the types of units to be covered under any of the aforesaid categories. Hatchery

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cannot be said as poultry farming which comes under Regulation 80(5)(ii). Hatching & poultry farming are completely separate activities. Therefore, similar tariff cannot be made applicable. The OMBUDSMAN has not taken into consideration the meaning of the word ''activities'' while deciding the case. Activity like lighting, sprinkling water, lifting water for drinking by the live birds, cattle & cleaning from shade would qualify tariff as applicable to other allied agricultural activities. So, the aforesaid activities are absent in a hatchery unit & that cannot be covered under Animal Husbandry & poultry but it is a separate commercial unit. The OMBUDSMAN has wrongly held that hatching unit is a part of the poultry farm. The OMBUDSMAN has not discussed about the physical verification report dated 28.10.2011. In the power supply agreement executed between the parties, it has been agreed under clause-6 that the tariff applicable is general purpose (commercial) & hence the consumer being a commercial & profit motive Unit, the activities never come under Allied Agricultural activities.

3. Mr. Falguni Rajguru Mohapatra, Learned Counsel appearing on behalf of Opp. Party No. 2 submitted that Opp. Party No. 2 is a hatchery unit which comes under the poultry activity. The basic aim & objective vis-a-vis purpose as welt as the function of the unit is to provide hatching (hatch the eggs to produce chicks). Without chicks poultry activities could not be happened. The OERC introduced a new category of consumer namely, "agro-industrial consumer" vide OERC Distribution (Conditions of Supply) (4th Amendment) Code, 2007. As per Regulation 80(5)(1) of OERC Distribution (Conditions of Supply) Code which defines that "this category relates to supply of power to Pisciculture, Horticulture, Floriculture & other allied agricultural activities including animal husbandry, poultry & cold storage (i.e. a temperature controlled storage where flowers, fruits, vegetables, meat, fish & food etc. can be kept fresh or frozen until it is needed)". The OERC white determining the annual revenue & retail supply tariff for the Financial Year 2008-09, in paragraph 276 of the tariff Order Dated 2.3.2008 decided to allow tariff equal to irrigation & pumping category at HT/LT for rapid development of Agro-Industrial Consumer & it was made statutorily effective with effect from 11.9.2007 granting certain tariff benefit to the said category of consumers. By virtue of such amended enactment & the expansion in Regulation 80 of the Code this unit became entitled to be treated as an agro-industrial consumer. The OERC further brought an amendment to the OERC Code as 5th Amendment, 2009 which was published on 9th October, 2009. The Amendment to Regulation 80(5), Chapter-VIII classifies different categories of consumers. Opp. Party No. 2-unit is coming under 80(5)(ii). Since Opp. Party No. 2-unit comes under allied agricultural category, the Petitioner should have issued bills according to this category. Without considering the request of Opp. Party No. 2, the Petitioner issued bills applying tariff for G.P. category. Referring to the Order Dated 27.1.2010 passed by the OERC in Case No. 127 of 2009 it is submitted that the hatchery unit, comes within the purview of poultry. The OMBUDSMAN after carefully observing the materials has passed the impugned order. The Petitioner being a statutory body under the Act, 2003 & OERC Code,

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2004 is duty bound to implement the OERC tariff order in letter & spirit.

4. On the rival contentions of the parties, the only question that fails for consideration by this Court is as to whether the "hatchery" comes under "poultry" farming which is covered under Regulation 80(5)(ii) i.e. allied agricultural activities.

5. Undisputedly, Opp. Party No. 2 is a hatchery unit. The activities carried on by the unit is to provide hatching i.e. "hatching the eggs to produce chicks". As per amendment to Regulation 80(5) Chapter-VIII, the categories of consumers are classified as follows:

80(5)(i) Irrigation Pumping & Agriculture

80(5)(ii) Allied Agricultural Activities &,

80(5)(iii) Allied Agro Industrial Activities

6. Claim of Opp. Party No. 2 is that it is coming under 80(5)(ii) i.e. Allied Agricultural Activities. This category relates to supply of power for aquaculture (which includes pisciculture/prawn culture), Horticulture, floriculture, sericulture, animal husbandry & poultry. Activities such as Ice Factories, Chilling Plants, Cold Plants, cattle/poultry/fish feed units & food agri-products processing units are excluded. Therefore, poultry is covered under the Regulation 80(5)(ii) i.e. allied agricultural activities.

7. From the order of the OMBUDSMAN, it appears that it has referred to Clauses 9 & 13 of the Order Dated 27.1.2010 passed in Case No. 127 of 2009 of OERC to come to a conclusion that the activity of hatchery unit comes within the purview of poultry. For better appreciation, the relevant portion of order of the OMBUDSMAN under Annexure-8 is quoted below:

3. The meaning of word "Poultry" includes hen, roster, pullet, capon & chick, which means a living bird, as per Clause 9 of the Order Dated 27.01.2010 under Case No. 127 of 2009 of OERC. With reference to Clause-13 of the above order, supply of power for "Allied Agricultural Activities" includes poultry & for rearing of poultry (many things are needed for the purpose of lightening, sprinkling water, lifting water for drinking by the live birds & cleaning farm shade) as applicable for other Allied Agricultural Activities. Only manufacture of poultry feed is not covered under Poultry. The meaning of "hatching" is to produce young birds (chicks) from eggs. From the above, it is understood that the hatching unit where the young birds (chicks) are produced from eggs, is a part of the poultry firm, otherwise the poultry firm will not survive. Hence, it will be more appropriate to consider the activities of "hatchery unit" be within the purview of poultry.

It is nobody''s case that the order of OERC dated 27.01.2010 passed in Case No. 127 of 2009 has been challenged & varied by any superior authority.

8. At this juncture, it would be relevant to refer to the Judgment of the Hon''ble

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Supreme Court in the case of Commissioner of Income Tax, Bangalore Vs. Venkateswara Hatcheries (P) Ltd. etc. etc., , wherein the Hon''ble Supreme Court held that the purpose of enacting Section 10(27) of the Income Tax Act, 1961 was to, provide incentive to poultry farming, which includes the business of hatchery, by way of giving exemption from income tax on income from such business.

9. In view of the above, this Court is of the opinion that poultry includes hatchery & is covered under Regulation 80(5)(ii) i.e. allied agricultural activities. Thus, this Court does not find any infirmity or illegality in the Order Dated 12.3.2012 passed by the OMBUDSMAN under Annexure-8 holding that activities of "hatchery unit" come within the purview of "poultry" warranting any interference. The Petitioner is directed to implement the order of the OMBUDSMAN immediately. For the reasons stated above, this Writ Petition is devoid of any merit & liable to be dismissed, & the same is accordingly dismissed.

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