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(2015) 12 OHC CK 0008

In the Orissa High Court

Case No : W.P.(C) No. 5840 of 2014

The Executive Engineer, Electrical (NESCO), Keonjhar Electrical Division, Keonjhar	APPELLANT
Vs	
President Grievance Redressal Forum, Jajpur and Others	RESPONDENT

Date of Decision : 24-12-2015

Acts Referred:
Electricity Act, 2003 — Section 181, 42(5)

Citation : (2015) 12 OHC CK 0008

Hon'ble Judges : B.R. Sarangi, J.

Bench : Single Bench

Advocate : S.C. Dash, for the Appellant

Final Decision : Dismissed

Judgement

Dr. B.R. Sarangi, J.—The petitioner, who is one of the Supply Engineers of the Distribution Licensee North Electricity Supply Company (hereinafter referred to as NESCO) engaged in the business for retail sale and supply of electricity to various categories of consumers within its area has filed this application to quash the order dated 30.09.2013 passed by the Grievance Redressal Forum, Jajpur in Consumer Complaint No. 232 of 2013 vide Annexure-2.

2. The factual matrix of the case in hand is that opposite party No. 2-M/s. Orissa State Cooperative Milk Producers Federation Ltd. (hereinafter referred to OMFED) for its Keonjhar Dairy executed power supply agreement with the petitioner-NESCO for a contract demand of 69 KW for the purpose of chilling, processing, packing of milk and milk products and has been categorized under "LT Industrial (M) Supply" Tariff category. In exercise of power conferred under Section 181 of the Electricity Act, 2003 the Orissa Electricity Regulatory Commission (hereinafter referred to as the OERC) made a regulation known as OERC Distribution (Condition of Supply) Code, 2004 (hereinafter referred to as 2004 Code) to govern distribution and supply of electricity and procedure thereof such as system of billing, modality of payment of bills, the powers, functions and

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obligations of the distribution licensee and or suppliers and the rights and obligations of the consumers. 2004 Code forms part of the agreement and binding on the parties. Opposite party No. 2 on entering into the agreement paid the demand raised by the supplier regularly. By notification dated 11.09.2007 published in the Orissa Gazette on 31.10.2007, the OERC introduced a new category of consumer namely "Agro Industrial Consumer" by way of an amendment to Regulation-80 (5) of the 2004 Code, which is as follows:

"This category relates to supply of power for Pisciculture, Horticulture, Floriculture, Sericulture and other allied agricultural activities including animal husbandry, poultry and cold storage (i.e. a temperature controlled storage where flowers, fruits, vegetables, meat, fish and food, etc. can be kept fresh or frozen until it is needed"

The Commission further amended the above mentioned consumer category by virtue of the OERC (Distribution and conditions of supply 5th Amendment) Code 2009. In the said amendment, three new categories were introduced substituting Regulation 80 (5) of the 2004 Code. The said three categories introduced by the Commission vide Odisha Gazette Notification No. 1586 dated 19.10.2009 are as follows:--

"80(5)(i) Irrigation, Pumping and Agriculture: This category relates to supply of power for pumping of water in lift irrigation, flow irrigation and for lifting of water from wells/bore-wells, dug-wells, nallahs, streams, rivulets, rivers, exclusively for agricultural purposes.

80 (5)(ii) Allied Agricultural Activities: This category relates to supply of power for Aquaculture (which includes Pisciculture/Prawn culture), Horticulture, Floriculture, Sericulture, Animal Husbandry and Poultry. Activities such as ice factories, chilling plants, cold storages, cattle/poultry/fish feed units and food/ agricultural products processing units are excluded.

80(5)(iii) Allied Agro Industrial Activities: This category relates to supply of power to ''Cold Storages (i.e. a temperature controlled storage where flowers, fruits, vegetables, meat and fish can be kept fresh or frozen until it is needed) and includes chilling plant for milk and only the cold storages attached to processing units for meal, fish prawns, flowers, fruits and vegetables."

The OMFED-Keonjhar Dairy-opposite party No. 2 being a unit of chilling plant involved in processing of milk and milk products is coming under "Allied Agro Industrial Activities Tariff" category. Therefore, billing has to be made in accordance with the categories of the consumer by virtue of the amendment made on 19.10.2009. After the introduction of this category i.e. "Allied Agro Industrial Activities Tariff" under Regulation 80 (5) (iii) which has been categorized by virtue of the notification dated 19.10.2009, request was made by opposite party No. 2 to the petitioner to change its category to "Allied Agro Industrial Activities Tariff" category and also requested to revise the energy bills on 9.11.2009, 5.6.2012, 27.4.2012, 12.7.2012 and 4.8.2012. But the petitioner

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did not give any heed to the same and referring to paragraph-258 of the Retail Supply Tariff Order for the financial year 2009-10, refused to classify the opposite party No. 2 unit under the "Allied Agro Industrial Activities Tariff" and raised a demand. Consequence thereof opposite party No. 2 filed Complaint Case No. 232 of 2013 before the G.R.F., NESCO, Jajpur invoking exercise of power under Section 42 (5) of the Electricity Act, 2003 with following prayer:

"(i) Categorize the petitioner under the Allied Agro Industrial Activities tariff category as per the Amended Regulation-80 (5) (iii) of OERC Distribution (Conditions of Supply) Code.

(ii) Charge the demand charges on the basis of the recording in the static meter and not on the basis of the contract demand.

(iii) Revision of energy bills from the date of introduction of the Allied-Agro Industrial Activities tariff category i.e. from 19.10.2009/

(iv) Revision of the demand charges from 01.04.2005 onwards when in the tariff order for financial year, 2005-06, the commission clarified the same in its tariff order in Para-7.5.1.3.

(v) Refund the excess amount paid to the Respondent or Supply Engineer with interest as per the provisions of the OERC Distribution (Condition of Supply) Code, 2004."

The petitioner has also filed objection to the said complaint case filed by opposite party No. 2 denying the prayer of the opposite party No. 2 as per Regulation 80 (5) (iii) of the 2004 Code to treat as "Allied Agro Industrial Activities Tariff". On consideration of the objection so raised, the GRF passed order vide Annexure-2 dated 30.09.2013 directing to change the category of opposite party No. 2 to "Allied Agro Industrial Activities Tariff" and revise the energy bill of opposite party No. 2 as per the tariff prescribed w.e.f. 09.11.2009 onwards and from 04/2013 onwards with billing demand as per highest demand recorded during the financial year 2013-14 irrespective of the contract demand. Hence, this application.

3. Mr. S.C. Dash, learned counsel for the petitioner argued with vehemence that opposite party No. 2 having entered with an agreement with the petitioner on 16.08.1983 for availing power supply to their milk chilling centre situated at Silisuan, Keonjhar with a load of 69 KW under Medium Industry Category, the power supply has been effected through the departmental distribution transformer at L.T. Supply system and the consumption is being measured through LTCT metering arrangements. In fact, billing is continuing in Medium Industry Tariff. In view of change of category of consumer pursuant to Regulation 80 (5) of the 2004 Code, the opposite party No. 2 consumer is not eligible to be billed under the "Allied Agro Industrial Activities Tariff" category since OERC has excluded the commercial and industrial activities of chilling plants as per para-258 of Tariff Order, 2009-10. Therefore, it is stated that the relief claimed

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by the opposite party No. 2 is not admissible under law and as such the direction given by the GRF to change the category of the unit is absolutely misconceived one and basing upon the same, the revision of bills also cannot sustain in the eye of law. It is further urged that the direction given by the GRF on 30.09.2013 being not based on rules and regulations of OERC code 2004, the clarification issued by the OERC in the tariff orders cannot override the regulation. Therefore, the clarification vide para-179 (b) of RST order of the GRF cannot sustain in the eye of law. Therefore, he seeks for quashing of the order passed by the GRF.

4. Mr. S.K. Mishra, learned counsel for the opposite party No. 2 states that the relief sought by opposite party No. 2 is in conformity with the provisions of the Electricity Act 2003 read with Code 2004 with amended Code 2009 and as such the refusal to recategorize opposite party No. 2-industry as "Allied Agro Industrial Activities Tariff" relying on para-258 of the tariff order cannot sustain in the eye of law. It is urged that in M/s. Prithwiraj Dairy Products (Pvt.) Ltd. v. State of Orissa and others (W.P.(C) No. 6516 of 2009, disposed of on 26.08.2009), this Court set aside the finding given by the OERC in paragraphs 255 and 258 of the notification of the OERC of the Retail Supply tariff order and remitted the matter back to the OERC to reconsider the feasibility of creating an additional tariff category for agro-based industries applicable to non-agriculturist consumers and fix appropriate tariff for this category. Basing upon the same, there was an amendment to Regulation 80 (5) of Code 2004, therefore opposite party No. 2 being a chilling plant of milk which is coming under the Regulation 80 (5) (iii) of the Code, 2004 is entitled to get the relief sought in conformity with the provisions of law and non-extension of such benefit amounts to arbitrary and unreasonable exercise of powers conferred on the authorities. To substantiate his contention, reliance has been placed on M/s. Prithwiraj Dairy Products (Pvt.) Ltd. v. State of Orissa and others (W.P.(C) No. 6516 of 2009, disposed of on 26.08.2009), Executive Engineer, CDD-II, CESU, CTC. Vs. Grievance Redressal Forum and Another--> and M/s. Krishna Poultry Farm v. State of Orissa and others, (W.P.(C) No. 22202 of 2010 and batch of matters, disposed of on 18.08.2015).

5. On the basis of the facts pleaded above, it is to be considered:

"i. Whether the opposite party No. 2 can be categorized as "Allied Agro Industrial Activities Tariff" category as contemplated under Code 2004 read with Regulation 80 (5) (iii).

ii. Whether the GRF is justified in the impugned order issuing direction for categorization of opposite party No. 2 under the category of "Allied Agro Industrial Activities Tariff" and revise/recast of energy bills under the said category."

6. Admittedly, opposite party No. 2 unit being a chilling plant is involved in processing of milk and milk products by virtue of the agreement executed between the parties. The nature and function of opposite party No. 2 starts from

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collecting the milk, processing, packing and till its consumption, the milk and milk products are required to be kept at cold storages attached to the processing unit. Considering the activities of the opposite party No. 2 and taking into account the condition stipulated in the agreement itself, it should be adjudged whether the opposite party No. 2 can be reclassified as "Allied Agro Industrial Activities Tariff" category as per the regulation 80 (5) (iii) of the Code, 2004. The Director, Factories And Boiler, Orissa issued licence bearing No. KJ-39 to opposite party No. 2 wherein it has been clearly mentioned that the unit consists of chilling, pasteurizing, packing of milk and milk products. Taking into consideration the nature of activities of opposite party No. 2 and on the basis of licence granted by the competent authority, it can be said that opposite party No. 2 can be categorized under "Allied Agro Industrial Activities Tariff" within the meaning of Regulation 80 (5) (iii) of the Code 2004. Though request was made by the opposite party No. 2 to bring the unit under the said category, the same has been refused in view of para-258 of the tariff order, which reads as follows:--

"xxx xxx At the processing plant also there may be large chilling plants for storage before processing is undertaken either for fresh marketing of milk in its liquid form or as various milk products such as curd, cheese, powered milk and other milk based sweets. Such chilling plants are a part of commercial activities or industrial processing subsequent to production in the farm. These are not activities relating to on-farm storage or temporary storage immediately following farm production. We cannot therefore, consider such chilling plants as agricultural activity or even allied agricultural activity. Such commercial and industrial activity is clearly outside the scope of our tariff classification."

7. Referring to para-258 of the tariff order as mentioned above, it appears that the chilling plant which are not relating to on farm storage or temporary storage immediately following farm production. Such chilling plants cannot be considered as Agriculture Activities or Allied Agriculture Activities. The chilling plants involved in commercial and industrial activities are outside the scope of tariff classification as made under regulation 80 of the Code, 2004. The provision contained in paragraphs-255 and 258 of the Retail Supply Tariff Order for the financial year 2009-10 was considered by this Court in M/s. Prithwiraj Dairy Products (Pvt.) Ltd. (supra) and this Court was pleased to set aside the findings given by the OERC in paras-255 and 258 of the tariff orders vide order dated 26.8.2009 and remitted the matter back to the OERC to reconsider the feasibility of creating an additional tariff category for agro-based industries applicable to non-agriculturist consumers and fix appropriate tariff of the said category. In view of the aforesaid order, OERC has taken steps for amendment of the code, 2004 by substituting the regulation 80 (5) of the code, 2004 by categorizing the same as Regulation 80 (5) (i) to (iii). The opposite party No. 2 being a chilling plant of milk and its operation consists of chilling, pasteurizing, packing of milks and milk products, it should be categorized as "Allied Agro Industrial Activities Tariff" category. The validity of the amendment to the Regulation 80 (5) Code, 2004 was challenged before this Court in Executive Engineer, CDD-II, CESU,

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Cuttack (supra) and after due adjudication, this Court did not feel inclined to quash the notification and upheld the validity of such classification. In paragraph-11 of the said judgment, this Court observed as follows:--

"11. In the 19th October, 2009 Notification, Regulation 80 (5) was substituted and the said Regulation was divided into three categories as quoted earlier. In the 2nd category it has been specifically mentioned that activities such as ice factories, chilling plants, cold storages, cattle/poultry/fish feed units and food/ agri-products processing units are excluded. So the consumer cannot get the benefit or reduced rate of tariff after the aforesaid Notification was made effective. In such view of the matter, the Notifications dated 19.10.2009 and 30.10.2009 cannot be quashed as prayed for in W.P.(C) No. 1577 of 2010. So far the demand notice dated 19.1.2010 is concerned, it stands quashed."

8. Similarly, the feed unit attached to the poultry was considered by this Court in M/s. Krishna Poultry Farm and batch of matters (supra), wherein considering the nature of functioning, this Court held that the captive feed unit attached to the poultry being treated as integral part of poultry, the same has to be reclassified as ''Allied Agro Industrial Category'' not on GP (LT) Tariff basis.

9. Applying the same analogy to the present context even though opposite party No. 2 entered into an agreement with the petitioner for its chilling plant, taking into account the nature of functioning of the unit and on consideration of the licence granted by the competent authority, this Court is of the considered view that opposite party No. 2 should be reclassified as "Allied Agro Industrial Activities Tariff" category as envisaged under the amended provisions of Regulation 80 (5) (iii) of the Code, 2004. Therefore, the direction given by the GRF in Annexure-2 dated 30.09.2013 to change the category of opposite party No. 2 as per the tariff prescribed w.e.f. 9.11.2009 onwards is well within its jurisdiction and fully in compliance with the provisions of law and consequential order to revise/recast the bills of opposite party No. 2 having been in conformity with the provisions of law, this Court is not inclined to interfere with the same.

10. Accordingly, the writ petition stands dismissed. However, there would be no order to costs.

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