

(1993) 12 KL CK 0010

In the High Court Of Kerala

Case No : O.P. No's. 3406 and 7022 of 1983

Travancore Electro Chemical Industries Ltd.

APPELLANT

Vs

K.S.E.B.

RESPONDENT

Date of Decision : 10-12-1993

Acts Referred:

Constitution of India, 1950 — Article 166
Electricity (Supply) Act, 1948 — Section 24, 79

Citation : (1993) 12 KL CK 0010

Hon'ble Judges : T.L. Viswanatha Iyer, J;P. Krishnamoorthy, J

Bench : Division Bench

Advocate : M. Pathrose Mathai, for the Appellant; George C.P. Tharakan and K.C Joseph, for the Respondent

Final Decision : Allowed

Judgement

T.L. Viswanthaiyer, J.—We shall deal with O.P. No. 7022 of 1983 in the first instance as it is the more comprehensive of the two writ petitions and embraces within it the grounds stated in the other writ petition as well.

2. The petitioner is a company engaged in the manufacture of Calcium Carbide and Acetylene Black. It is stated to be a power intensive industry for which the first respondent Kerala State Electricity Board (herein after referred to as the Board) has agreed to supply electric power subject to the terms and conditions specified in the agreement entered into from time to time, there are three such agreements between the parties, of which Ext.P12 is the earnest one dated 14-3-1966 which was supplemented by another agreement Ext.P13 dated 26-6-1975. These agreements were superseded by the agreement dated 7-3-1970, a copy of which is Ext.P 11. We may even at this juncture mention that the first two agreements Exts.P12 and P13 did not specifically provide for payment of any penal interest on belated payments of power charges, but Ext.P11 contained such a provision.

3. There had been long standing disputed between the parties on various

matters, with the petitioner claiming rebate under various heads and with the Board making its claim for charges, surcharge, interest and the like the genesis of the dispute in these writ petitions is the demand made by the Board by the notice Ext.P1 dated 22-7-1981 for payment of an amount of Rs. 45,97,913-91 as arrears of energy charges of electricity from the petitioner, the details as to how this amount was arrived at were mentioned in Ext.P1 with a note that the demand did not include the penal interest on the arrears outstanding, which it was stated, will be assessed separately. The petitioner objected to the demand and did not make payment of the amount which resulted in the notice Ext.P2 from the Chief Engineer of the Board threatening disconnection for non-payment of the amount. The petitioner thereupon filed writ petition O.P. No. 6562 of 1981 challenging the demand, which was disposed of by a Division Bench by the judgment Ext.P3 dated 16-8-1982. It was agreed by the parties before this Court that the disputes between them may be left for determination by a committee of three persons, such determination to be final and binding on both the parties, the mode of appointing the nominees of the petitioner and the Board was detailed in the order and Kum Justice P. Janaki Amma was appointed as the Chairman. This court expressly recorded the agreement between the parties that the committee's adjudication will be binding on them and that the majority decision of the committee will be the binding adjudication.

4. After deliberations the award of the committee by majority was rendered on 15-2-1983 by the Chairman Kum. Justice P. Janaki Amma. The said award is extracted in paragraph 18 of the writ petition. It will be seen therefrom that the amount demanded of the petitioner was reduced from Rs. 45,97,913-91 to 22,51,490-76. The award stated that the Board will issue a revised notice of demand for the amount so arrived at and that on receipt of the same it will be open to the petitioner to approach the Board for permission to pay the amount in instalments. Accordingly, the Board issued a revised demand Ext.P4 dated 11-3-1983 which apart from making demand for the amount of Rs. 22,51,490-76 due by way of arrears of electricity charges, also demanded penal interest of Rs. 6,07,902-51 on the said amount from 29-9-1981 upto the date of Ext.P4. The petitioner was given time till 28-3-1983 to make payment of the amount demanded, without liability for surcharge. Ext.P4 inter alia mentioned that the interest due and payable on the amount upto 29-9-1981 which was the date of the earlier demand, will be claimed separately and that the demand under Ext.P4 was made without prejudice to the demand to be made for penal interest for the period upto 29-9-1981.

5. The petitioner challenged this notice Ext.P4 by filing O.P. No. 3406 of 19183. Petitioner paid the amount due under Ext.P4 in instalments as allowed by this Court.

6. As had been reserved in Ext.P4 the Board issued another notice Ext.P5 dated 28-7-1983 calling upon the petitioner to make payment of an amount of Rs. 65,60,969-40 as penal interest on or before 1-9-1983 with a threat of

disconnection of the supply of energy on default, the notice stated that this amount represented the penal interest on the amounts found from the petitioner as arrears by the committee appointed by this Court by the judgment in O.P. No. 6562 of 1981 and that the penal interest had been calculated on the amounts which had become due from time to time and not paid from the respective dates of default. A detailed statement showing the arrears due as well as the calculation of the interest was also appended to the notice. Another notice Ext.P6 dated 23-7-1983 was also served on the petitioner calling upon them to make payment of an amount Rs. 52,515-08 as the interest on the arrears of current charges as adjudged by the Justice Janaki Amma committee for the period from 28-3-1983 to 11-7-1983 when the amount was paid in full. The petitioner has challenged both these demands in O.P. No. 7022 of 1983.

7. It will be seen from the above narration of facts that interest on the amount of electricity charges of Rs. 22,51,490-76 has been demanded in Ext.P4 for the period subsequent to 29-9-1981 upto 11-3-1983 and for the period from 28-3-1983 upto 11-7-1983 when the amount paid in full/in instalments by the notice Ext.P6 Ext.P5 states that the amount of interest mentioned therein is the interest due on the aforesaid amount for the period upto 29-9-1981, but it is admitted before us that the said statement is incorrect and that the amount of Rs. 65,60,969-40 demanded as per Ext.P5 comprised interest also on an amount of Rs. 74,20,980-44 which was in arrear from the petitioner upto May 1977.

8. So far as this admitted arrears of Rs. 74,20,980-44 is concerned, there was discussion between the parties on 27-12-1977 when it was agreed that the amount may be paid in 20 monthly instalments, commencing from January 1978, the first twelve instalments being of Rs. 3.5 lakhs per month, seven instalments of Rs. 4 lakhs each and the 20th instalment of Rs. 4,20,980-44. A copy of the minute discussion between the parties is Ext.P7 which states that interest is payable on the arrears at 18% per annum from 1st January 1978 "unless the Government exempts the consumer from payment of interest"; Ext.P8 dated 24-9-1979 is a communication from the special Secretary to Government to the Chairman of the Board requesting the latter not to charge any penal interest from the petitioner on the deferred payment of enhanced tariff for electricity which came to force from 1-7-1975. The Chief Engineer evidently sought some clarification from Government by his letter dated 23-1-1980 to which government responded by Ext.P9 dated 22-7-1980 stating as follows:

The advice not to charge penal interest was issued on the order of the Council of Ministers based on discussions held in the room of the former Chief Minister on 11-12-1978. The facts of the case have since been seen by the Minister of Electricity also and it has been ordered by him that the advice of the Council of Ministers should be accepted and no penal interest should be charged.

It is stated by the petitioner that because of Exts.P8 and P9 no further action was taken to collect any penal interest on the admitted amount of arrears till the notice Ext.P5 was issued as if interest was payable on the amount of Rs.

74,20,980-44.

9. The petitioner has no challenge to the quantum of arrears of Rs. 22,51,490-76 fixed and demanded as per Ext.P4. for that matter they cannot challenge the said amount for the reason that parties had agreed before this Court in O.P. No. 6562 of 1981 that the majority decision of the Janaki Amma Committee will be binding on all of them. The amount of Rs. 22,51,490-76 is the amount fixed by the Janaki Amma committee and is therefore unassailable. The only dispute raised by the petitioner about Ext.P4 is regarding the interest charged on the said amount for the period from 29-9-1981 to 11-3-1983. This forms the subject matter of the challenge in O.P. No. 3406 of 1983. Though the petitioner has challenged the demand under Ext.P6 for interest on this amount from 28-3-1983 to 11-7-1983 as well, counsel for the petitioner fairly submitted that he is not pressing the said claim and that the amount demanded under Ext.P6 is payable. We are therefore concerned first with the legality or otherwise of the demand for interest in Ext.P4. We shall deal with the demand under Ext.P5 separately as it involves different considerations.

10. The challenge to Ext.P4 is based on Regulation 27 of the Conditions of supply of Electrical Energy framed by the Board in exercise of the powers conferred on it by Section 79(i) of the Electricity (Supply) Act, Central Act 54 of 1948. this Regulation deals with payment of bills, Clause (a) thereof requires the consumer to pay the amount of the bill "on or before the due date mentioned in the invoice (bill)". If the consumer fails to pay the amount demanded on or before the due date, action may be taken u/s 24 of the Indian Electricity Act, 1910 and the supply of electricity may cut off after giving notice in writing of not less than seven clear days. Clause(e) of the Regulation provides that if the bill is not paid on or before the due date, penalty will be levied at 12% per annum, (1% per mensem) subject to a minimum of 25 paise per invoice, this was subsequently enhanced to 18% and currently it is 24%. Counsel for the petitioner submits that the electricity charges become payable only on a bill begin served, and on the due date mentioned therein. Till then, it is not due even though energy might have been consumed. Penal interest thus accrues only form the date on which the amount becomes due, that is, the due date mentioned in the bill, and not from any anterior date. Whatever be the position in relation to the amount crystallized by the Justice Janaki Amma Committee, the fact is that there were disputes relating to the demands made on the petitioner, which stood settled only by the binding adjudication of the said Committee. Justice Janaki Amma has in her decision dated 15-2-1983 directed the Board to issue revised notice of demand for the amount determined as payable by the committee. Petitioner therefore states that all the earlier demands stood obliterated with a fresh crystallization of liability. Penal interest could run only form the due date 28-3-1983 fixed for payment in the revised notice of demand namely Ext.P4. He relies on the decision of this Court in O.P. No. 7686 of 1986 which was confirmed by the Division Bench in Writ Appeal No. 49 of 1989, as also on a decision of the Supreme Court in *Income Tax Officer, Kolar Circle v. Seghu Buchiah Setty Air*

1964 SC 1473. We shall examine this contention.

11. The petitioner was being supplied electrical energy under the agreements entered into by them with the Board from time to time to which we have made reference earlier. The first two agreements did not provide for payment of any interest, but the third one contained such a provision. But the supply is governed by Clause 27 of the Conditions of supply and the liability or otherwise for penal interest has to be decided thereunder.

12. The resolution of the disputes between the parties was left by this Court, by the judgment Ext.P3, to the committee headed by Justice Janaki Amma. Pursuant to the decision of the said committee, the demand of Rs. 45,97,913-91 made earlier in Ext.P1 stood scaled down to Rs. 22,51,490-76. It is thus evident that the contentions raised by the petitioner were substantial which resulted in a considerable reduction of the amount payable. Justice Janaki Amma had directed the issue of a fresh revised notice of demand for the amount fixed by the committee and it was accordingly that the notice Ext.P4 was issued fixing the due date for payment as 28-3-1983. The earlier demands which the Board had made of the Petitioner thus stood set aside and were replaced by the revised demand issued as per the decision of the Committee, the contention of counsel for the Board that portions of the amount finally fixed by the Justice Janaki Amma Committee were due from time to time and therefore, interest should run from the dates on which those amounts were payable, does not appeal to us for the reason that Justice Janaki Amma had directed the issue of a fresh notice of demand for the amount found due. This is what she said after rendering her decision:

In the light of the findings, the Board has to issue a revised demand notice. On receipt of the same, it is open to the company to approach the Board for permission to pay the amount due in instalments....

13. Be it noted that the direction is to issue a revised notice of demand and not a mere intimation of the amount determined as payable. The effect of this direction is therefore to supersede all the earlier demands made on the petitioner and to make the amount determined payable on the "due date" fixed in revised notice of demand to be issued pursuant to the decision and direction of the Committee.

14. S. 24 of the Indian Electricity Act, 1910 permits the Board to cut off the supply of energy only if the consumer neglects to pay the charges for energy due from him and a notice in writing of not less than seven clear days is given to him. regulation 27 implements this provision in the Act, and prescribes the date on which the charges for energy become due under the Regulation. Charges do not become due as and when the energy is consumer. They become payable under the statutory Regulation 27 only on service of a bill on the consumer and from the date fixed therein for payment. The service of a bill is a condition precedent for the consumption charges to become due, and it is only if default is committed in making payment of the amount on the due date, that the liability

for penal interest is incurred.

15. If, as held by us Supra, the previous demands made on the petitioner stood set aside by the decision of the Justice Janaki Amma Committee, and a fresh demand had to be issued as directed by the Committee, whose decision is binding on the parties under the judgment Ext.P3, the liability for penal interest is cast only for the period subsequent to the due date on or before which the amount was payable, that was 28-3-1983 in this case as per Ext. P4. The petitioner was therefore liable to pay penal interest on the amount of Rs. 51,490-76 mentioned in Ext.P4 only for the period subsequent to that date. The demand for interest for the anterior period from 29-9-1981 upto 11-3-1983 is therefore unauthorised and illegal. Ext.P4 is liable to be quashed.

16. For the same reason, if Ext.P5 comprises any interest on the said amount of Rs. 22,51,490-76 for the period upto 29-9-1981, that is also illegal and it has to be declared as such.

17. We shall now come to the dispute regarding Ext.P5. It is now admitted on behalf of the Board (though Ext.P5 stated otherwise) that Ext.P5 relates substantially to interest on the amount of Rs. 74,20,980-44 which was due as arrears from the petitioner in May 1977 and which was allowed to be paid in instalment as per the decision taken at the meeting on 27-12-1977 (vide Ext.P7) Petitioner's case regarding this demand is that the payment of interest in question was liable to be exempted by Government and that Government had rendered its decision in Exts.P8 and P9 not to charge any interest. Counsel would submit that apart from the provision contained in Ext.P7 making the liability for interest subject to the decision of the Government with power to exempt any consumer from payment of the penal interest the said Regulation states that nothing contained in the Conditions of Supply shall abridge the power of the State Government to relax in any individual case on its merits, and its discretion, any or all of the conditions contained in the Regulations which includes Regulation 27 relating to payment of interest. According to counsel, government's decision as evident from Exts. P8 and P9 is binding on the Board and therefore no interest could be demanded as done under Ext.P5.

18. This contention of the petitioner is supported by the government in a statement which they filed in which they reiterate their stand that no interest could be charged from the petitioner. Government does not dispute the issue of Exts. P8 and P9, though counsel for the Board stated that a communication like Ext. P9 was not traceable in the Board's files.

19. Counsel for the Board, on the other hand, took the stand that the decision of government has not been expressed to be in the name of the Governor or authenticated in accordance with Article 166 of the constitution, and therefore the Board was not bound by what was contained in the communications Exts.P8 and P9.

20. Clause (1) of Article 166 provides that all executive action of the government

of a State shall be expressed to be taken in the name of the Governor; and under Clause (2) orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

21. What Ext.P7 provides is a liability on the petitioner to pay interest unless the government exempts them therefrom. What is required is a decision of the government and that decision has been rendered, as seen from Ext.P8, reaffirmed in Ext.P9. There is no reason why this decision is not sufficient to meet the requirements of Ext.P7. In fact, government stands by its decision to exempt the petitioner from payment of interest as affirmed in the statement filed in this Court.

22. Is this decision of government liable to be ignored because it is not expressed or authenticated as prescribed in Article 166? We may even at the outset mention that there is no case for the Board that the decision has not been taken by the proper authority to whom that business has been allocated by the Rules of Business framed by the Governor.

23. It is now long established from the decision of the Supreme Court in *Dattatreya Moreshwar Pangarkar Vs. The State of Bombay and Others*, , that the provisions of Clauses (1) and (2) of Article 166 are only directory and not mandatory and that failure to comply with the requirements thereof will not render the executive action illegal or invalid. Article 166(1) does not prescribe as to how an executive action of the Government is to be performed. It only prescribes the mode in which the order is to be expressed. While Clause (1) relates to the mode of expression of the executive action, clause(2) lays down the way in which it is to be authenticated. The effect of the Article is that if the conditions laid down in it are complied with, the order cannot be called in question on the ground that it is not an order made by the Governor, (*The State of Bihar Vs. Rani Sonabati Kumari*,). Failure to comply with the Article does not nullify the order, but only takes away the constitutional immunity conferred by Clause (2) which otherwise attaches to it as an order made by the government. It may still be proved by other means, by production of the filed or the affidavit of a responsible officer that the order was in fact one made by the government. (See *Chaudhari v. Secretary, L.S.G. Department, Government of Bihar* AIR 1980 SC 363 and *R. Chitralekha and Another Vs. State of Mysore and Others*, .

24. The position therefore is that a decision of the government will nevertheless be an enforceable decision though it is not expressed in the manner provided in clause(1) or authenticated in the manner prescribed in Clause (2) or Article 166. *R. Chitralekha and Another Vs. State of Mysore and Others*, was a case which dealt with this question.

25. There an Under Secretary to Government communicated by a letter to the

Selection Committee for admission to the Technical College in the State, a government decision prescribing an interview to regulate the selection of candidates, and to take into account the marks obtained by them at the interview besides their marks in the written test. The selection so made was challenged on the ground that since the decision of government (described as an order) had not been issued in the name of the Governor, it was void, and no interview could be held in pursuance of it. Overruling the contention, the majority of four Judges of the Constitution Bench speaking through Subbarao, J. delineated the scope of Article 166, observing that if the conditions laid in Article 166 had been complied with, the order could not have been called in question on the ground that it was an order or instrument made by the Government. Though the letter in question did not conform to the provisions of the Article, attacks *facie* stated that an order to the effect mentioned therein had been issued by the Government and communicated to the selection committee, facts which were not denied by the petitioner. It was therefore clear from the evidence in the case that the communication in question was a decision of the government liable to be implemented. This decision should apply on all fours to the case on hand.

26. It is no doubt true that Exts. P8 and P9 do not conform to the requirements of Article 166. But they are communications from the Secretary to Government to the Board, with copy to the petitioner. The second of these communications namely Ext. P9, the issue of which is not denied by government, is categorical that the direction to the Board not to charge interest from the petitioner was a decision of the Council of Ministers. It was that decision that was communicated to the Board for its implementation. The statement dated 30-7-1993 filed on behalf of the State on 2-8-1993 affirms that the government stand in Ext. P9 should be accepted and no penal interest charged from the petitioner, there could therefore, be no doubt whatsoever that Exts. P8 and P9 embodied a decision of the government waiving the penal interest to be charged from the petitioner, and that government intended that decision to be implemented. This is sufficient to render the decision effective, though it has not been expressed or authenticated in the manner prescribed by Article 166.

27. The Board had also understood the position to be so as is inferable from their silence and inaction for over two years after the issue of Ext. P9. Even in the counter affidavit which they filed to the original petition, they did not have a case that the communications Exts. P8 and P9 did not embody any valid decision of government or that it was void for non-conformity with Article 166. The present argument about non-compliance with Article 166 came only late at the stage of the hearing of the original petition. But even that has proved to be of no substance in view of the categorical assertion made by the government that the decision in Exts. P8 and P9 was that of the Council of Minister and that government stood by it. The Board cannot take umbrage at the non-compliance with Article 166 or rely on it to nullify the government decision. This contention is bereft, of substance and is overruled.

28. Both the contentions raised by the Board are therefore without substance. It was not entitled to charge or demand interest on the amount found due by the Justice Janaki Amma Committee for the period upto 28-3-1983, or on the amount of arrears upto 1977, as mentioned in Ext.P%. The said demands are not sustainable. At the same time, the petitioner's challenge to the demand under Ext.P6 for the period subsequent to 28-3-1983 on the amount fixed by the Justice Janaki Amma Committee is unsustainable. The said demand is perfectly legal and valid.

29. Accordingly, we allow the original petitions in part and quash the notices Exts.P4 and P5 marked in O.P. No. 7022 of 1983 in so far as they make demand for interest from the petitioner. O.P. No. 7022 of 1983 is dismissed in so far as it relates to the demand under Ext.P6.

There will be no order as to costs.