(2003) 08 UK CK 0020

In the Uttarakhand High Court

Case No : Writ Petition No. 207 (M/B) 2001

Venus Cement Ltd. APPELLANT

Vs

U.P. Power Corporation and Another RESPONDENT

Date of Decision : 26-08-2003

Acts Referred:

Electricity (Supply) Act, 1948 — Section 49, 49(2), 49(3)

Citation : (2004) 1 UC 212

Hon'ble Judges : S.H. Kapadia, C.J;Rajesh Tandon, J

Bench : Division Bench

Advocate : L.P. Naithani, for the Appellant; S.K. Jain, for the Respondent

Final Decision : Allowed

Judgement

S.H. Kapadia, C.J.—M/s Venus Cement Limited (Petitioner) seeks to challenge notification dated 21st April 1990 by which the assured concession given to the Petitioner was withdrawn.

2. This petition is transferred from Allahabad High Court. It was heard from time to time. On 26th August 2003 we have pronounced the operative part of the order, which reads as follows:

3. "For reasons to be recorded, rule is made absolute in terms of prayer Clause-ii. No order as to costs."

4. Accordingly we now propose to give our reasons.

FACTS

5. Petitioner is a bulk consumer of electric energy for their mini cement plant situate at Ranipokhri, district Dehradun. Petitioner started functioning in April 1985 when U.P. Power Corporation started supplying electric energy i.e. 100 KVA. Petitioner has a factory at Ranipokhri, District Dehradun which is a hill district, to which rate Schedule HV-2 was applicable. u/s 49 of the Electricity Supply Act, 1948, U.P. Power Corporation was empowered to give concession to

hilly and backward areas consisting of Almora, Chamoli, Pauri Garhwal, Pithoragarh, Tehri Garhwal, Uttarkashi, Dehradun and Nainital. On 28th January 1986, a notification was issued to the effect that if the connection was located in any of the hill districts of Uttar Pradesh, whose existing height was above 2000 feet above mean sea level then a development rebate of 33-1/3 % in the amount of the bill shall be given. In this connection Respondents sought a certificate from Survey of India in respect of the height of the village Ranipokhri from mean sea level. The factory of the Petitioner is situated in village Ranipokhri. Accordingly, on 30th March 1990, a certificate was issued by Survey of India stating that village Ranipokhri was situated at the height of 640 metres above sea level which is 2049 feet above sea level. In the month of June 1988, Petitioner received a bill from Respondent No. 2 i.e. Executive Engineer, Electricity Distribution Division, Uttar Pradesh State Electricity Board (whose successor is U.P. Power Corporation). In that bill, Petitioner was not given the hill rebate, therefore, Petitioner filed a Civil Suit No. 445 of 1998 in the Court of Civil Judge, Dehradun. Pursuant to the order of the court, the Petitioner received the hill rebate. In the meantime, there was correspondence between Superintending Engineer and the Chief Engineer of Garhwal Zone, U.P. State Electricity Board. By letter dated 24th November 1988, finally, the Superintending Engineer wrote a letter to the Chief Engineer to resolve the dispute arisen on the interpretation of notification dated 28th January 1986 because the department took the stand that under the notification dated 28th January 1986, the Connection given to the consumers should be located above 2000 feet; that the rebate was to be given not to the area but it was to be given to the Connection; that since the Connection was given to the Petitioner''s factory at the main gate, which was below 2000 feet the Petitioner was not entitled to the rebate. According to the Superintending Engineer, this dispute was required to be solved and therefore, he referred the matter for interpretation to the Chief Engineer, Garhwal Zone, U.P. State Electricity Board. By letter dated 26th November 1988, the Chief Engineer came to the conclusion that it is very difficult to get the height of each factory in the village to be measured for the purposes of giving rebate, particularly in the hilly areas. That, under the above notification and under Government of India''s Orders dated 3rd July 1979, the height of a hill station should be the height of the highest point within the notified area as decided by Survey of India. Hence, the Chief Engineer came to the conclusion that hill rebate was allowable to the Petitioner as the factory was located in the village, which was above 2000 feet.

6. On 17th October 1989, an Amending Notification was issued by which it was clarified that in respect of Connections in Bundelkhand region and in respect of Connections in 8 hill districts of U.P. including Dehradun and Nainital, where the height of the highest point of the village is 2000 feet and above the sea level then industries situated in such village shall get a development rebate of 33-1/3 % on the amount of bill. Under this Amended Notification, rebate was also admissible for the un-expired period of 5 years calculated from the date of

commencement of supply to the existing consumers who have not completed 5 years on 17th October 1989. At this stage, it may be noted that the factory of the Petitioner commenced business in April 1985; the first notification is dated 28 January 1986 whereas the Amended Notification is dated 17th October 1989. Consequently, the Petitioner was entitled to rebate for four un-expired years i.e. upto 28 January 1990.

7. By impugned notification dated 21st April 1990, the notification dated 17th October 1989 was further modified. By impugned notification dated 21st April 1990 all previous notifications were superseded. The rate schedule was revised. The revised Rate Schedule was to come into force from 17th October 1989. By the impugned notification dated 21st April 1990, the rebate, which was given to the Petitioner earlier, was withdrawn, therefore, the Petitioner has challenged the notification dated 21st April 1990. The Petitioner has also sought a declaration that this impugned notification dated 21st April 1990 can not be applied retrospectively.

ARGUMENTS

8. Mr. Naithani, learned Senior Counsel, appearing on behalf of the Petitioner, submitted that the Electricity Board had given the concession to an area and not to the connection. He pointed out that u/s 49(3) of the Electricity Act, 1948, the Board was empowered to fix different tariffs for the supply of electricity having regard to the position of area, nature of supply of electricity and purpose of full supply was required to be given. He submitted that Section 49(2) dealt with fixation of unilateral tariff whereas Section 49(3) dealt with fixation of different tariffs. He submitted that the notification dated 28th January 1986 read with the Amended Notification dated 17th October 1989 shows that they were issued u/s 49(3) of the Act. That, Section 49(3) refers to fixation of tariffs area-wise and not connection-wise. In the alternative, he contended that concession in the form of rebate was given to the consumer area-wise and such rebate or concession was in the nature of incentive for consumers to set up their factory in the backward and hilly areas. He contended that on the basis of that representation by State Electricity Board, the consumer has set up the factory in the hilly area. That, on the basis of the representation made by the Respondents, in the form of rebate, the consumer invested huge capital to set up the factory and therefore, it was not open to the State Electricity Board, to withdraw unilaterally in future the concession, retrospectively. He invoked the doctrine of promissory estoppels and doctrine of legitimate expediency and he submitted that in view of the said two doctrines, which were applicable to this case, it was not open to the State Electricity Board to withdraw the rebate/concession retrospectively.

9. Mr. Jain learned Counsel appearing on behalf of the State Electricity Board, on the other hand, argued that concession was admissible under the original notification dated 28th January 1986 read with notification dated 21st April 1990. He invited our attention to page 16 of the paper book in which the Concession is spelt out. He contended that in that concession it is expressly mentioned that

rebate shall be given to connections located in any of the 8 hill districts in U.P. excluding those at the height of less than 2000 feet above sea level, in Dehradun and Nainital districts. He admitted that village Ranipokhri was above 2000 feet. He, however, contended that a portion of the factory of the Petitioner where the connection is given at the main gate of the factory was below 2000 feet and therefore, the Petitioner was not entitled to rebate. He also invited our attention to the impugned Notification dated 21st April 1990, partially amending the notification dated 17th October 1989 and he submitted that only connections above 2000 feet in the village were entitled to rebate. He further contended that the Petitioner was not entitled to rebate at any time, even under the notification dated 28th January 1986 read with notification dated 17th October 1989. He submitted that the State Electricity Board had to give rebate because the Petitioner had moved the Civil Judge, Dehradun for injunction and it was pursuant of the order passed by the Civil Judge, Dehradun that the rebate was given by State Electricity Board. He, therefore, contended that the doctrine of promissory estoppel and the doctrine of legitimate expediency were not applicable. He further submitted that the Petitioner should return the rebates which they have received under the Civil Court''s order. In the alternative, he submitted that in any event in view of the impugned notification dated 21st April 1990 all such concession have been withdrawn. That, new rate schedule have come into force from 17th October 1989. It was, therefore, argued that all the notifications were connection wise and not area wise.

FINDINGS

10. We find merit in this petition. Petitioner is a bulk consumer of electric energy for his cement plant situated at Ranipokhri, district Dehradun. As per the certificate, issued by Survey of India, village Ranipokhri is above 2000 feet above the sea level. Being a bulk consumer in a hill district Rate Schedule HV-2 was applicable.

11. Clause-9 of the rate schedule, reads as follows:

INCENTIVE TO NEW INDUSTRY:

Provided that in respect of connections as may be located in any of the eight hill districts in U.P. whose names are given below, but excluding those existing at a height of less than 2000 feet above M.S.L. in Dehradun and Nainital districts, a development rebate of 33-1/3 percent on the amount of the bill as computed under items 4 and 7 above will be given to a new industrial unit and cold storage for a period of five years from the date of commencement of supply. This rebate will also be admissible for the unexpired period of five years, to those existing industrial units and cold storages, which have not completed five years on Feb. 1, 1986 from the date of commencement of supply. This development rebate shall, however, not be allowed to the departments/corporations/undertakings of Central and State Governments and local bodies.

Names of the eight Hill Districts:

1. Almora,

2. Chamoli,

3. Pauri-Garhwal,

4. Pithoragarh,

5. Tehri Garhwal,

6. Uttarkashi,

7. Dehradun,

8. Nainital.

Provided further that in respect of connections as may be located in Bundelkhand region, comprising Jhansi, Lalitpur, Harirpur, Jalaun and Banda districts, a development rebate of 50 percent on the amount of the bill as computed under items 4 and 7 above will be given to a new industrial/agro-industrial unit and cold storage, connected on or after February 1, 1986 for a period of five years from the date of commencement of supply. This rebate will also be admissible for the unexpired period of five years to those existing industrial/agro-industrial units and cold storages of the above districts of Bundelkhand region who have not completed five years on February 1, 1986, from the date of commencement of supply. This development rebate of 50% in Bundelkhand region shall, however, not be allowed to the State Tube wells, Pumped Canals, Lift Irrigation Schemes, Drinking water supply Schemes, Railways, Departments/Corporations/ Undertakings of the State and Central Government and local bodies.

The development rebates under this clause shall be allowed subject to the condition that the net amount payable after allowing these rebates would not be less than the amount of minimum consumption guarantee, if in operation under item 5 above.

12. Reading Clause-9 of the Rate Schedule, shows that the rebate is given area-wise. The word ''connection'' has not been defined. On reading Clause-9 of the Rate Schedule, it is clear that if a connection is located in any of the 8 hill districts above 2000 feet a development rebate is admissible. Clause-9, therefore, gives concession area-wise. Our interpretation also finds support in Section 49(3) of the Electricity Act 1948. Section 49(2) refers to power of the Electricity Board to fix uniform tariffs whereas Section 49(3) refers to power of the Electricity Board to fix different tariffs for supply of electricity, having regard to the geographical position of any area. Therefore, the Clause-9 of the Rate Schedule, reproduced above contemplates rebates area-wise. Further, Clause-I of the Rate Schedule HV-2 states that the Rate Schedule shall apply to all consumers who have a demand of more than 75KW for industry and or processing purposes. Clause-3 of the rate Schedule states that power will be supplied to the consumer at a single point for the entire premises. That, on the request of the consumer, power can be supplied at more than one point. On the

other hand, Clause-9 provides for incentive and it states that such incentives will be given in respect of connections located in hill districts above 2000 feet. Therefore, Clause-9 does not refer to connection at a single point and nor does Clause-9 refer to consumers. Clause-9 gives incentives, it is to be read in a broad manner. Clause-9 does not refer to consumers. The word ''Connection'' is not defined. Clause-9 is to be read as a whole. Under Clause-9 if the premises are located above 2000 feet, then such factory premises were entitled to rebate. If the argument of State Electricity Board was to be accepted, it would mean that even if the factory is above 2000 feet but a Sub-Station/Connection is located below 2000 feet, rebate will be denied. This cannot be a purpose of Clause-9. In the present case, the Petitioner''s factory is located in Ranipokhri. It is a village above sea level. It is a village above 2000 feet and therefore, Clause-9 is applicable. In the circumstances, we are of the view that the case of the Petitioner stood covered by notification dated 28th January 1986 read with Amended Notification dated 17.10.1989 and the Petitioner was entitled to rebate for un-expired period of 4 years. Even the interpretation given by the Chief Engineer on 26 November 1988 supports the case of the consumer. He has allowed the rebate to the consumer/Petitioner. He has pointed out the difficulty in the argument of the State Electricity Board. If the argument of the State Electricity Board was to be accepted it would mean that each and every premises of every consumer in the village was required to be measured. It would render Clause-9 nugatory. Under the above circumstances, the impugned Notification dated 21st April 1990 cannot be applied retrospectively and under the impugned notification the rebate admissible, cannot be unilaterally withdrawn. In any event, in this case, the doctrine of Promissory estoppel will also be applicable. Petitioner commenced their business on the basis of representation made by the State Electricity Board offering concession. On that representation, the Petitioner acted by investing capital to establish the factory in a backward and hilly area. But for that representation, Petitioner would not have set up the factory. Therefore, the State Electricity Board is estopped from unilaterally withdrawing that concession. In this petition, the point is of interpretation of Clause-9, which has to be read as a whole. If one reads Clause-9 as a whole, it refers to a connection being located in the hill district in which villages are located above 2000 feet. The factory of the Petitioner is in such village. Hence the Petitioner was entitled to rebate.

13. In the case of Motilal Padampat Sugar Mills Company Ltd. v. The State of Uttar Pradesh and Ors. reported in AIR 1979 621, it has been held that doctrine of promissory estoppel is a principle evolved by equity to avoid injustice. It is neither in the realm of contract nor in the realm of estoppel. Where one party has by his words or conduct makes to the other, a clear and unequivocal promise, which is creates a legal relation in future, knowing that it would be acted upon by the other party to whom the promise is made and if the promisee acts to its detriment, then the promise would be binding on the party making such promise and the promisor would not be entitled to go back upon it, if it is

equitable. In this case, there was a controversy initially on interpretation to Clause-9 of the notification dated 21st January 1986. That controversy was settled in favour of the Petitioner by the Chief Engineer vide letter dated 26th November 1988. In the circumstances we hold firstly, that rebate was admissible area-wise and the State Electricity Board was not entitled to withdraw the rebate retrospectively and unilaterally. Consequently, the Petitioner was entitled to the rebate for the un-expired period.

14. Writ petition stands allowed in terms of prayer Clause-ii with no order as to costs.

15. During the pendency of the petition, the Petitioner had deposited Rs. 5,00,000/- (Rs. Five Lacs Only) with the Registry. Since the Petitioner has succeeded, we are directing the Registry to return the amount to the Petitioner.