(2009) 03 OHC CK 0048

In the Orissa High Court

VISA Steel APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 31-03-2009

Acts Referred:
Constitution of India, 1950 — Article 226, 227
Electricity Act, 2003 — Section 108, 111, 61, 62, 63

Citation : (2009) 107 CLT 857 : (2009) ELR 512 : (2009) 1 OLR 1044 Supp

Hon'ble Judges : A.S. Naidu, J

Bench : Single Bench

Judgement

A.S. Naidu, J.—VISA Steel Limited, hereinafter to be called as ''VISA'', in short, is a Company incorporated under the Companies Act, 1956 and has established an Integrated Steel Plant at Kalinga Nagar, Duburi in the district of Jajpur. The said Company, as Petitioner, has filed this Writ Petition assailing the order/direction dated March 23, 2007 issued by the Orissa Electricity Regulatory Commission, hereinafter to be called as "OERC" increasing the electricity supply tariff by withdrawing the incentives given to the Petitioner''s unit on the ground that the said decision was illegal, arbitrary and issued in gross violation of the direction/ policy of the State Government. There is also a prayer to direct refund of all excess amount paid in excess of the bills that would have been generated if the tariff concession would have been allowed to continue.

2. The scenario of facts reveals that Northern Electricity Supply Company of Orissa Ltd, hereinafter to be called as ''NESCO'', in short, Opposite Party No. 2 entered into an power supply agreement with VISA on October 16/17, 2007 agreeing to supply electricity to its unit. The unit was classified under the category of "Large Industry". Opposite Party No. 2 in the said agreement had agreed to give/allow incentives to the Petitioner''s plant for three years if the Petitioner does not reduce the contractual demand during the agreement period. It is alleged that by-passing the terms of the agreement, incentives have been withdrawn that too, contrary to the policy decision of the Government.

3. Mr. Bijan Roy, Learned Senior Counsel appearing for the Petitioner forcefully submitted that such action of the Opposite Parties is contrary to law and it is a fit case where the decision taken to withdraw the incentives should be quashed and other consequential orders may also be passed.

4. After receiving notice, NESCO, Opposite Party No. 2 appeared and filed counter affidavit taking the stand that in consonance with the provisions of Section 64 of the Electricity Act, opportunity of hearing was afforded and considering the submissions made by the objectors, the OERC determined the annual revenue requirement and retail supply tariff for the financial year 2007-08 by its Order Dated March 23, 2007. It is alleged that VISA (Petitioner) did not file any objection and was also not an objector before the OERC. It is further averred that any person aggrieved by the order passed by the OERC have a right to prefer an appeal to the Appellate Tribunal constituted u/s 111 of the Electricity Act, 2003. It is stated that the Petitioner did not prefer any appeal though some other consumers similarly placed as the Petitioner had preferred appeals before the Appellate Tribunal and the said Appeals are still subjudice. In the counter, it is averred that the OERC in fact had not withdrawn the incentives that has been allowed to HT and EHT consumers in fact there was a revision of slab rate. It is stated that no policy directive was ever issued by the State Government u/s 108 of the Electricity Act, 2003 not to enhance the tariff. Relying upon clause 7 of the agreement, it is averred that the said clause stipulates that tariff and conditions of supply mentioned in the agreement shall be subject to any revision that may be made from time to time, in short, according to Opposite Party No. 2 the decision taken by the OERC is in consonance with the prevailing law and policy of the Government and the Petitioner having not preferred any appeal against the said order u/s 111 of the Electricity Act, 2003, the Writ Petition is liable to be dismissed in limine.

5. Opposite Party No. 3, OERC also filed counter affidavit taking the stand that the tariff Order Dated March, 23, 2007 for the year 2007-08 has not withdrawn any incentive tariff that had been allowed to HT/EHT consumers and that there was only revision of slab rates, i.e., rate of incentives for HT/EHT consumers for higher level consumption, 4thus no latches whatsoever can be attributed to the O.E.R.C.

6. The State Government, which has been impleaded as Opposite Party No. 1, also filed counter affidavit taking the stand that no policy decision was ever taken nor directive''s were issued to the OERC u/s 108 of the Electricity Act, 2003.

7. In course of hearing Mr. Roy, Learned Senior Counsel appearing for the Petitioner submitted that the OERC is a quasi judicial authority and the decision taken by such authority can be assailed before this Court in a writ jurisdiction. It is further submitted that the OERC being the foster-father of CESU, cannot in law hike the tariff to meet the loss sustained by the latter. The plea of CESU that the impugned notification has not hiked the tariff is strongly repudiated and it is contended that the decision taken and the notification issued by the OERC was

without jurisdiction, contrary to law and amounts to hike of tariff and is liable to be quashed. It is stated that the contract demand having not been reduced in consonance with the agreement, the Petitioner is entitled to enjoy the incentives as stipulated in the agreement and the same cannot be unilaterally withdrawn before 2009. It is also forcefully submitted that the Government had issued a directive in February, 2007 that there should not be any hike of tariff till 2009 and such policy directive is binding upon the OERC and the impugned order should be set aside on that ground alone. So far as availability of alternative remedy is concerned, Mr. Roy relying upon catena of decisions submitted that alternative remedy is not a bar as the issue relates to jurisdiction of OERC and promissory estoppel. So far as the decision with regard to availability of alternative remedy vis-a- vis writ jurisdiction is concerned, as there is no quarrel with the legal proposition and the ratio is almost settled, this Court refrains from citing the same so far to reduce the bulk of this decisions.

8. According to NESCO, Opposite Party No. 2, OERC fixes retail supply tariff every year, which is valid for one financial year. Mr. Sanjit Mohanty, Learned Senior Counsel appearing for NESCO submitted that in fact NESCO had made an application for approval of annual revenue requirement and retail supply tariff for the financial year 2007-08 before the OERC in consonance with the provisions of Sections 61 - 64 of the Electricity Act, 2003 read with Determination of tariff Regulation, 2004 and Conduct of Business Regulation, 2004. It is stated that in view to break even the loss sustained by the electricity supply companies, the OERC was approached to revise the tariff. On receipt of the same, the OERC called for objections and after following the paraphernalias issued the order on 23rd March, 2007. According to Mr. Mohanty, the State Government has never issued any policy directive u/s 108 of the Electricity Act, 2003. It is stated that in fact by the tariff Order Dated March 23, 2007 issued for. the year 2007-08, the OERC has not withdrawn the incentive tariff that had been allowed to HT and EHT consumers except revision of slab rates, i.e., rate of incentives for HT and EHT consumers for higher level of consumption. The reasons for such hike has been clearly spelt out in the tariff order itself, in short, according to Mr. Mohanty the incentive tariff had not been withdrawn, but only slab rate of incentive for HT and EHT consumers for higher level of consumption has been revised and as such, the prayer made in the writ application is not tenable. The OERC having given elaborate reasons for revision of slab rate of incentive for HT and EHT consumers and reasonings given are neither unreasonable nor perverse, on the contrary they are based on material particulars more fully specified in the order itself, this Court may not entertain this Writ Petition.

9. Learned Counsel for the State more or less reiterated the submissions made by OERC and added that the State Government had not issued any policy directives as required u/s 108 of the Electricity Act, 2003 and thus, there was no bar for the OERC to pass necessary orders.

10. Heard Learned Counsel for the Petitioner at length, perused the pleadings

and documents annexed thereto meticulously and considered the submissions of the parties.

11. In the decision reported in West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd. etc. etc., , the Supreme Court observed that the State Electricity Regulatory Commission is constituted as High Power Expert Committee with autonomous authority and is expected to function independently. It is further observed that the price fixation is in the nature of legislative action and no rule or natural justice is applicable. The said principle cannot be applied where the statute itself has provided a right of representation to the party concerned.

12. As would be evident from the pleadings, the OERC before taking any decision had called for objections and only after hearing the objections, issued the tariff order. The fact also remains that the Petitioner had not availed the opportunity nor filed any objection before the Commission. That apart, Clause 7 of the agreement entered by the Petitioner with NESCO provides that the tariff and conditions of supply mentioned in the agreement shall be subject to any revision that may be made from time to time. The Petitioner being a signatory to the said agreement is bound by the aforesaid provision. Apart from all these facts, as would be evident from Section 111 of the Electricity Act, 2003, the person aggrieved by the tariff order can prefer an appeal before the Appellate authority. As stated earlier, two of the companies, who were similarly placed as the Petitioner, have preferred appeals raising identical issues and the said appeals are still pending. Perusal of Section 111 of the Electricity Act, 2003 reveals that the Appellate authority can delve into both facts and law. The jurisdiction of this Court while exercising power under Articles 226 and 227 is rather circumscribed inasmuch as it can neither sit in appeal against the order passed by the OERC nor it can decide disputed questions of fact efficaciously. That apart, the tariff Order Dated March 23, 2007 relates to the year 2007-08 and in course of hearing it appears that in the meanwhile another tariff order has been passed by OERC, i.e., for the year 2008-09 and the said order has not been assailed by the Petitioner till date.

13. In view of the discussions made above, this Court is not inclined to interfere with the impugned tariff Order Dated March 23, 2007 issued by the OEREC vide Annexure-1, but then permits the Petitioner to prefer an appeal u/s 111 of the Electricity Act, 2003. If such an appeal is filed along with a petition for condonation of delay, in view of the fact that similar matters are pending before the Appellate authority, the latter shall dispose of the limitation petition sympathetically and deal with the merits of the appeal and dispose it of in accordance with law along with other appeals.

14. The Writ Petition stands disposed of accordingly.

B.N. Mahapatra, J.

15. I agree.