Western U.P. Electric Power and Supply Co. Ltd.

Vs

State of U.P. & Others

Writ Petition No. 151 of 1967

(J. M. Shelat, C. A. Vaidialingam, V. Bhargava JJ)

23.02.1968

JUDGMENT

SHELAT, J.

On August 17, 1934 the Governor-in-Council of the then United Provinces, in exercise of powers under s. 3(1) of the Indian Electricity Act, IX of 1910 issued three licences to M/s. Alopi Parshad & Sons Ltd. for the supply of electrical energy within the tahsil areas of Firozabad in the district of Agra Shikohabad in the district of Manipur and Etawah in the district of Etawah. The licences inter alia provided that the licensee would be supplied electrical energy in bulk by the Public Works Department, U.P. and the licensee in its turn should transmit the same on its own high tension mains within the areas of the licences. The licences also provided that the responsibility for the maintenance of supply of electrical energy in the licensee's plant shall be borne entirely by the Public Works Department and thereafter by the licensee. In 1937 the licences were assigned by the said M/s. Alopi Parshad and Sons Ltd. to the petitioner company with the consent of the Government. The petitioner company has since then been supplying under the said licences electricity to consumers within the said areas of the licences. It is an admitted position that though the petitioner company had the said licences assigned to it it did not acquire any exclusive or monopolistic right of supplying electrical energy within the said areas. Clause (e) of sec. 3(2) of 1910 Act which governed the said licences provides that the grant of a licence thereunder shall not in any way hinder or restrict the grant of a licence to another person within the same area of supply for a like purpose.

The Electricity (Supply) Act, LIV of 1948 (hereinafter referred to as 1948 Act) by sec. 5(1) enjoins upon the State Government to constitute a State Electricity Board. Sec. 19(1) provides that the Board may, subject to the provisions of this Act, supply electricity to any licensee or person requiring such supply in any area in which a scheme sanctioned under Chapter V is in force. The proviso to Sec. 19(1), however, lays down that the Board shall not :-

> "(b) supply electricity for any purpose to any person, not being a licensee for use in any part of the area of supply of a licence without the consent of the licensee, unless the maximum demand of the licensee, being a distributing licensee and taking a supply of energy in bulk is, at the time of the request, less than twice the maximum demand asked for by any such person; or the licensee is unable or unwilling to supply electricity for such purpose in the said part of such area on reasonable terms and conditions and within a reasonable time."

Section 26 provides that

> "Subject to the provisions of this Act, the Board shall, in respect of the whole State, have all the powers and obligations of a licensee under the Indian Electricity Act, 1910, and this Act shall be deemed to be the licence of the Board for the purposes of that Act."

The definition of a licensee in s. 2(6) of 1948 Act, however, states that it would not include the Board. Though the Board is not a licensee for the purposes of the 1948 Act the Act being deemed to be the licence for the Board under Sec. 26 it is a licensee under the 1910 Act. Sec. 26 however is subject to the provisions of the Act which means that it is inter alia subject to the provisions of Sec. 19. Therefore, in the absence of a scheme under Chapter V, the Board, though a licensee under the 1910 Act, was not competent to supply directly electrical energy to consumers such as the 3rd respondent. This was the position until 1961, when the U.P. legislature to remove this disability of the Board, passed the Indian Electricity (U.P.) Amendment Act, XXX of 1961. Section 2 of the Amendment Act substituted the following for cl. (e) of Sec. 3(2) of the 1910 Act:

> "(e) grant of a licence under this Part for any purpose shall not in any way hinder or restrict -
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> (i) the grant of licence to another person within the same area of supply for a like purpose; or
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> (ii) the supply of energy by the State Government or the State Electricity Board within the same area, where the State Government deems such supply necessary in public interest."

It also added after sub-sec. 2, the following sub-sec. 3 :

> "(3) Where the supply of energy in any area of the State Electricity Board is deemed necessary under sub-clause (ii) of clause (e) of sub-section (2), the Board may, subject to any terms and conditions that may be laid down by the State Government, supply energy in that area notwithstanding anything to the contrary contained in this Act or the Electricity Supply Act, 1948."

Sec. 3 of the Amendment Act also added a new sub-sec. (1-B) in Sec. 28 of the 1910 Act. The new sub-section reads as under :-

> "(1-B). The State Government may notwithstanding that sanction for engaging in the business of supplying energy to the consumer in an area has been given to any person under sub-section (1), whether before or after coming into force of the Indian Electricity (U.P. Sanshodhan) Adhiniyam, 1961, give direct supply, or authorise the State Electricity Board to give direct supply, in the same area."

This sub-section has no application to the licensees for, it empowers the State Government either to supply directly or authorise the Board to directly supply energy even in an area for which it has given sanction to a person other than a licensee to engage in the business of supplying energy to the public in such area.

A perusal of these provisions makes it clear that the Board can directly supply electricity to the consumers and the State Government also can authorise the Board to do so provided the State Government deems it necessary in public interest that it should be so done. The condition precedent

for the direct supply by the Board to the consumers in the area where a licence has been granted to a licensee is that such supply by the Board must be deemed necessary by the State Government in public interest.

In pursuance of the powers under Secs. 46 and 49 of the 1948 Act, the Board by a notification dated April 24, 1962 fixed the rates and tariffs for electrical energy for the Ganga-Sarda Grid. These were to apply to both the licensees obtaining bulk supply from the Board and to consumers to whom electrical energy was being supplied direct by the Board in the area covered by the said Grid. According to these rates, consumers to whom electrical energy was being supplied direct by the Board would pay a demand charge at the rate of Rs. 8/- per KVA and on energy charge at the rate of 4.5 nP per KWH for the first 170 KWH per KVA, at the rate of 3.5 nP for the next 170 KWH per KVA and at the rate of 3.0 nP per KWH for the remaining KVA consumed during the month. For the licensees, the rates were Rs. 12.75 per KVA for the demand charge for the first 500 KVA, Rs. 10 per KVA for the next 1500 KVA and Rs. 8.50 per KVA for above 2000 KVA of the chargeable demand during the month. For energy charge, the rates were 5 nP per KWH for the first 170 KWH per KVA, 4 nP per KWH for the next 170 KWH per KVA and 3 nP per KWH for the remaining KWH per KVA of chargeable demand consumed during the month. The rates chargeable from licensees were thus higher than those applicable to the consumers both in respect of demand and energy charges even though licensees would be larger customers who in the normal course of business would be charged lower rates than the consumers. The notification is not under challenge before us and therefore it is not necessary for us to consider its validity.

As the Board was not yet authorised by the State Government to supply electricity directly to the consumers within the areas of the petitioner company's licences the 3rd respondent entered into an agreement in 1964 for a period of 3 years under which the petitioner company was to supply electricity to it. On September 21, 1966 the State Government issued a notification which stated that the Governor deemed it necessary in public interest that the State should supply energy to the 3rd respondent and in exercise of the power under Sec. 3(2)(e) of the 1910 Act as amended by Act XXX of 1961 directed the Board to give direct supply of energy to the 3rd respondent on the same terms and conditions on which the Board was supplying energy to other consumers. Thereupon the 3rd respondent by its notice dated January 19, 1967 terminated the said agreement. It seems that the Board was still not ready to supply energy direct to the 3rd respondent and therefore on April 18, 1967, only one day before the said agreement would have ended, the 3rd respondent withdrew the said notice. On June 23, 1967, the 3rd respondent, however, give a fresh notice terminating the said agreement as from September 23, 1967. The result of the notification dated September 21, 1966 was two-fold : (1) that notwithstanding the subsistence of the petitioner company's licences and its right thereunder to supply energy to consumers within the areas of its licences, the Board was directed to supply energy to the 3rd respondent and (2) that the Board was directed to supply energy to the 3rd respondent at rates lower than the rate charged by the Board from the petitioner company as the licensee.

Mr. Chagla appearing for the petitioner company raised the following three contentions :

> (1) that the amended Sec. 3(2)(e) was invalid on the ground that it amounted to acquisition of the petitioner company's property and as no compensation has been provided for such acquisition cl. (e) of s. 3(2) was in violation of Art. 31(2) of the Constitution;
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> (2) that the notification dated September 21, 1966 was ultra vires Sec. 3(2)(e) as the

direction by the State Government to the Board to supply electricity directly to the 3rd respondent was not founded on public interest; and

(3) that the said direction to supply electricity at rates chargeable from the consumers as against the rates chargeable to the licensees was discriminatory.

The respondents, on the other hand, contended that the 3rd respondent was a concern in which the Government has an interest to the extent of 51% of its share capital, that therefore it was almost a public utility concern, that supply by the petitioner company to the 3rd respondent was found to be defective resulting in lay off of labour on several occasions and consequent loss in production and that therefore the Government was justified in public interest to issue the said notification. In support of these allegations the respondents filed an annexure to their counter-affidavit showing low voltage and high tension trippings during the months of April, May and June 1966. It was alleged that owing to defective and short supply by the petitioner company there were high tension trippings on numerous occasions resulting in low voltage, the consequence whereof was that the 3rd respondent was obliged to stop the working of the mills sometimes for several hours. The petitioner company's case, however, was that these allegations were an afterthought and that the real object in issuing the notification dated September 21, 1966 was to subvert the petitioner company's rights under the said licences.

We are inclined to think that there is considerable force in the contention of the petitioner company. Though the allegation was that supply of energy by the petitioner company to the 3rd respondent suffered from shortage and other defects the 3rd respondent does not seem to have at any time made any complaint about such shortage or defects either to the petitioner company or to the Board or to the State Government. Similarly, the Board also does not seem to have at any time complained to the petitioner company about such defective supply. Even when the petitioner company, after the said notification was issued, made a representation to the State Government to reconsider its decision the Government did not, while rejecting it, rely upon the fact that the petitioner company was not in a position to give full and proper supply of energy to the 3rd respondent or that supply by it was, as now alleged, short or defective. It is an undisputed fact that the petitioner company has been throughout all these years supplying high tension energy to the 3rd respondent and the 3rd respondent has been converting such high tension energy into low tension energy through its own transformers. The aforesaid annexure shows that though the high tension trippings were only for a few minutes except on three or four occasions low voltage was for several hours. In some cases though there was no tripping at all there was low voltage for as long as sixteen hours. It is clear, therefore, that the petitioner company had no difficulty in maintaining supply of high tension electrical energy to the 3rd respondent and there must have been some defect in the stepping down system of the 3rd respondent resulting in low voltage. It is impossible thus to find from the annexure that the petitioner company was guilty in any manner of shortage or defective supply of high tension energy to the 3rd respondent. The allegation therefore that the 3rd respondent suffered in production and losses as a result of short or defective supply by the petitioner company is not borne out by the record in this case. If there was any justification for the allegation now made by the respondents it is inconceivable that for all these years the 3rd respondent would not have made any complaint for such defective supply either to the Board or to the State Government.

It is certain that but for the amendment of Sec. 3(2)(e) of 1910 Act, the Board, though a licensee under that Act, could not have supplied energy directly to the 3rd respondent in the absence of a scheme under Sec. 19 of 1948 Act. Under the proviso to that section the Board would not have been entitled to supply energy for any purpose to any person not being a licensee for use in any part of

the area of supply of a licensee without the consent of such licensee. It is true that under its licences the petitioner company was not conferred monopolistic rights to supply energy to the consumers and the Government could have granted another licence to another licensee. But the Government has not granted such licence to any other person. But it was said that the Board was another such licensee. As already stated the Board could not have distributed energy to the consumers though it is a licensee under 1910 Act unless (a) there was a scheme or (b) that it was authorised in public interest under the amended Sec. 3(2)(e). Neither of these two conditions having been fulfilled it is clear that the notification of September 21, 1966 and the direction contained therein to the Board to supply energy to the 3rd respondent were in breach of the petitioner company's rights under its licences and the requirements of the amended Sec. 3(2)(e).

Apart from its being in breach of the amended Sec. 3(2)(e) and the petitioner company's rights under its licences, the notification and the Government's direct on to the Board therein results in clear discrimination. If the Board were to supply energy directly to the 3rd respondent it has to do so at rates lower than the rates at which electricity is supplied by it to the petitioner company. The petitioner company being thus charged at higher rates must as a distributor charge higher rates from its other consumers with the result that the 3rd respondent would get energy at substantially lower rates than other consumers including other industrial establishments in the area. The notification thus results in discrimination between the 3rd respondent on the one hand and the other consumers on the other as also between the 3rd respondent and the petitioner company.

It follows therefore that the notification of September 21, 1966 cannot be sustained as a valid notification as it is discriminatory and is also in breach of the amended Sec. 3(2)(e) of 1910 Act. In that view the Board is not entitled to supply directly electricity to the 3rd respondent as the direction contained in the said notification which is the only authority under which it could so supply is invalid in law. In this view, it is not necessary for us to decide the question whether the amended Sec. 3(2)(e) amounts to acquisition and whether such acquisition is in violation of Art. 31 of the Constitution. The said notification being thus invalid respondents 1 and 2 are directed not to supply electrical energy directly to the 3rd respondent. The respondents will pay to the petitioner company the costs of this petition.

BHARGAVA, J-.

I agree with my brother Shelat J. that the notification of September 21, 1966 cannot be sustained as a valid notification because it is discriminatory and consequently I concur in the order proposed by him. I am, however, not prepared to hold that that notification is also invalid on the other two grounds, viz., that the notification and the directions contained therein to the Electricity Board to supply energy to the third respondent were in breach of the petitioner Company's rights under its licence and of the requirements of the amended section 3(a)(e). I may briefly indicate the reasons for my view.

It is admitted on all hands that under its licences, the petitioner Company was not conferred monopolistic rights to supply energy to the consumers in the area covered by the licences and the Government could have granted another licence to another licensee to supply energy in the same areas without violating any provision of the Electricity Act of 1910 or of the conditions on which licences were granted to the petitioner Company. It is true that the Government has not granted any such licences to any other person but, in my opinion the effect of the subsequent legislation is to bring into existence another statutory licencee, viz., the Electricity Board and any directions permitting the Electricity Board to supply electricity in the areas covered by the petitioner

Company's licences cannot be held to be in violation of the conditions of those licences. By the Electric Supply Act 1948, the Board was constituted a licensee for purposes of the Electricity Act of 1910, though section 26, which brought about this result, provided that in that capacity, the Board was subject to other provisions of the Electric Supply Act 1948. One such provision is contained in s. 19(1) of the Act of 1948. The U.P. Electricity Amendment Act 1961, however, introduced provisions in the Act of 1910 the result of which was that the Board, in acting as a licensee under the Act of 1910, was no longer subject to the limitation laid down in s. 19(1) of the Act of 1948. It has not been contended that either the Supply Act of 1948 or the U.P. Electricity Amendment Act of 1961 was not competently enacted by the appropriate legislature. The Supply Act of 1948 was no doubt passed by the Central Legislature in respect of a concurrent subject but the U.P. Electricity Amendment Act of 1961 was reserved for the assent of the President and, having received the assent of the President, the provisions of that Act would prevail to the extent to which they may be inconsistent with the Central Act of 1948. The result of this legislation was that the Electricity Board became a licensee under the Electricity Act of 1910 and was no longer subject to the limitation laid down in s. 19(1) of the Electricity Supply Act of 1948. The only limitation after the enactment of the U.P. Electricity Amendment Act 1961 that remained was that the Board could supply electricity only after the State Government issued a valid notification under clause (e) of section 3(2) of the Act of 1910. If the State Government was competent under the original section 3(2)(e) of the Act of 1910 to grant a licence to any person for supply of electricity in the ares covered by the licences issued to the petitioner Company, I do not see why a similar result could not be validly brought about by legislation by the appropriate legislatures creating a statutory licensee for purposes of the Act of 1910. Consequently, the power granted to the Electricity Board by the notification of September 21, 1966 to supply electricity to a consumer in the area covered by one of the licences of the petitioner Company cannot be held to be in violation of the conditions of the licence.

I further considered that, in view of the language of the provisions contained in the amended section 3(2)(e) of the Act of 1910, it is not competent for this Court in this writ petition, on the material available, to declare that the notification of September 21, 1966 is invalid because the direction contained therein was not made by the State Government in public interest. The power under the amended 3(2)(e) is to be exercised when Government deems it necessary in public interest. The notification, on the face of it, shows that the State Government did apply its mind before issuing that notification and form the opinion that in this particular case it was necessary in public interest that the Board should be directed to supply electricity to respondent No. 3 in the area covered by one of the licences of the petitioner Company. The opinion was formed by the State Government on material which I do not think can be said to be totally irrelevant for the purpose of forming such opinion. As long as the State Government based its order on an opinion formed on relevant material, it is not open to the courts to examine and take a different view on the basis of other material such as want of complaints by respondent No. 3 to the Government that the supply of energy by the petitioner Company was not satisfactory. It is not for courts to sit in judgment over the view of the State Government which the State Government is required to form in order to make an order under the amended section 3(2)(e). Consequently, I cannot hold that the notification of September 21, 1966 was invalid on the ground that it was issued in breach of the amended section 3(2)(e) of the Act of 1910.

Petition allowed.##

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