Narayanan Sankaran Mooss

Vs

The State of Kerala and Another

Civil Appeal No. 1279 of 1967

(P. Jagmohan Reddy, P. K. Goswami, S. N. Dwivedi JJ)

12.10.1973

JUDGMENT

DWIVEDI, J. –

The Kottayam Electric Supply Agency, Kottayam, is the licensee for the supply of electric energy in Kottayam in the State of Kerala. The appellant, N. S. Mooss, is the proprietor of the licensee. By an order dated May 17, 1963, the State of Kerala revoked the licence with effect from August 1, 1963. The order was made under Section 5 (1) (a) of the Indian Electricity Act. 1910 (hereinafter called the Act). On the same date, the State of Kerala made another order under Section 5 (1) (c) and (3) of the Act directing the appellant to deliver the undertaking to the Kerala Electricity Board (hereinafter called the Board) on or before July 1, 1963. The appellant filed a writ petition under Article 226 of the Constitution challenging the two orders. The High Court has dismissed the petition. Hence the appeal.

2. Sri Sen. Counsel for the appellant, has urged four points before us. One of those points is : The Board endorsed the State proposal for the revocation of the licence before the explanation of the appellant reached the State. The explanation was not placed before the Board and accordingly not considered by the Board. So there was no due consultation of the Board and the order of revocation is void. As we are accepting this point, it is not necessary to notice his remaining points. We shall state only such facts as are necessary for the decision of the aforesaid point.

3. On August 17, 1962 the State Government issued a notice to the appellant under Section 4 (3) of the Act asking him to show cause why the licence should not be revoked. He was asked to send his explanation within three months and three days from the date of the receipt of the notice. Much before the issue of this notice, on June 21, 1962, the State Government sent the letter No. 11795-EL-I/61/17/PW to the board. The letter states that the Government considered that the licence of the appellant should be revoked under Section 4 (1) (a) and requested the Board to communicate its views to the Government. On July 26, 1962 the Board sent its reply to the Government. The reply letter is No. B. VI/5705/62. The Board recommended the revocation of the licence. On November 5, 1962, within three months of the issue of the notice under Section 4 (3), the appellant sent his explanation to the Government. The Government was not satisfied with the explanation. It passed the impugned order on May 17, 1963 revoking the licence. These facts support Sri Sen's contention that the Board's recommendation was made without looking into the appellant's explanation. Indeed, it was humanly impossible for the Board to have looked into the explanation.

4. Counsel for the State Government and the Board have raised a preliminary objection. They point out that the argument advanced by Sri Sen was neither raised in the writ petition nor urged before

the High Court. According to them it should not be allowed to be raised in this Court. It is true that the point is not specifically raised in the writ petition. But, in our view, it is embedded in paragraphs 6 and 22 of the affidavit accompanying the petition. Paragraph 6 asserts that the aforesaid two orders are "illegal and void and of no effect". Paragraph 22 states that "the entire proceedings culminating in the issue of (the two orders) constitute a gross violation of the.... provisions of the Act". Paragraph 22 clearly asserts that the impugned orders have been made in breach of the statutory conditions for revoking a licence. Earlier we have said that Sri Sen's contention is embedded in paragraphs 6 and 22. We are re-assured of our construction of these paragraphs by the fact that the Government as well as the Board have also construed the petition in the same sense and have controverted it in their affidavits. Paragraph 3 of the affidavit filed on behalf of the Government states :" (The appellant's) objections were considered and the Government formed an opinion that it was in public interest to revoke the licence and after consulting the Electricity Board revoked the licence as the Government were satisfied that in their opinion the petitioners had made wilful and unreasonably prolonged default in doing several things required of him by or under the Indian Electricity Act. " In reply to paragraph 22 of the petition, the Government's affidavit states that "orders were passed in accordance with the provisions of all the relevant Acts and the Rules and after considering the objections raised by the licensee". Paragraph 5 of the Board's affidavit is more outspoken and elaborate. It states : "The State Government consulted the Board in the matter of revoking the licence of the Kottayam Electric Supply Agency by invoking Section 4 (1) (a) dated July 26. 1962 endorsed the views of the Government on the matter (and) recommended the revocation of the licence". Paragraph 18 of the Board's affidavit is a reply to paragraph 22 of the appellant's affidavit. Paragraph 18 asserts that the impugned orders "were passed in accordance with Law and the Rules thereunder". It is thus unmistakably plain that the Government as well as the Board understood the petition as raising a challenge to the orders on the ground of want of due consultation of the Board before the making of the impugned orders. And they have replied to that implicit challenge in the petition. It appears to us that there is little force in the preliminary objection that Sri Sen's contention is not raised in the petition.

5. It is true that this point was not urged on behalf of the appellant in the High Court. But as the facts requisite for deciding the issue are on record, we think that we should allow the point to be raised as it goes to the root of the matter. It may be noted that the appellant has raised this point in ground No. 6 of his statement of case. That ground is : "The Government without any further thought and relying solely on this report proceeded to revoke the licence and sought the view of the Electricity Board on the matter. The Board with the Managing Director of the Company as one of its members readily accepted the report and agreed with the suggestion of the Government for revocation of the licence. It is after having made up its mind to revoke the licence, as seen from Ex. R-2, that the Government issued notice to the appellant to show cause against revocation. " It cannot be said that the respondents have been taken by surprise. They already knew that the point would be agitated in the Court.

6. Counsel for the Government says that if the point had been clearly taken in the petition and raised in the High Court, the Government could have led evidence to show that the Board was consulted a second time after receipt of the appellant's explanation and that the Board, after considering the explanation, had again agreed with the Government's proposal. He has advanced an extreme argument that even telephone consultation could have been held between the Government and the Board after the receipt of the explanation.

7. Telephonic consultation is out of question. The Board is constituted under the Indian Electricity (Supply) Act, 1948. It is a corporate body. It consists of at least three members. One of them has

experience of commercial matters and administration; the other is an Electrical Engineer with wide experience and the third has experience of accounting and financial matter in a public utility undertaking, preferably an electricity supply undertaking. Section 13 of the said Act provides that all orders and decisions of the Board shall be authenticated by the signature of the Chairman. It is obvious that telephonic consultation could not be held with three members of the Board at one and the same time, nor could the members bestow collective consideration on the matter before giving the Board's opinion thereon. We have little doubt in our mind that there was no second consultation between the Government and the Board after the receipt of the explanation. Had there been a second consultation, the Board would surely have disclosed it in its counter-affidavit. The evidence already on record excludes the possibility of a second consultation after the receipt of the explanation. We have earlier quoted the number and date of the Government letter by which the Government asked for the Board's opinion on the issue of revoking the licence. The number and date of the Board's letter recommending revocation of the licence has also been mentioned earlier. On receiving the Board's letter is : "Electricity - Kottayam Electric Supply Agency - Acquisition of". The letter makes reference to two earlier letters : (1) "Government letter No. 11795-ELI/51/17/PW; (2) your reply No. BVI/5705/62 dated July 26, 1962".

8. It may be seen that the Government letter referred to above is the letter by which the Government asked for the opinion of the Board on the question of revocation of the licence. The second letter is the reply of the Board recommending revocation of the licence. We have already referred to these letters. The Government letter of April 6, 1963 states that the Government "have considered the explanation furnished by the Kottayam Electric Supply Agency.... to the show cause notice served on him. (No. 11795/ELI/61/19/PW dated August 17, 1963) under Section 4 (3) of the Indian Electricity Act, 1910. Since the explanation is not satisfactory, the Government in public interest have decided to revoke the licence granted to the said Agency". It adds : "I am therefore directed to enquire as required under Section 5 (b) of the said Act whether the Kerala State Electricity Board is willing to purchase the undertaking. If so, the willingness of the Board may be communicated to the Government at the earliest".

9. The Board replied to this letter. The reply is dated April 20, 1963. The letter's number is LAW I 5705-62, dated April 20, 1963. The letter informs the Government that the Board was willing to purchase the undertaking with effect from August 1, 1963. The same day another order was passed by the Government. The number of the Order is 11975-EL 1/61-31/PW. The material portion of the order is :

> "Whereas the Government have, under Section 5, sub-section (1), clause (c) of the Act enquired from the Kerala State Electricity Board whether the Board is willing to purchase the under taking owned by the Kottayam Electric Supply Agency;
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> And whereas, the Kerala State Electricity Board has in its letter No. Law-I-5705/62 dated April 20, 1963 intimated the Government that it is willing to purchase the said undertaking;
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> Now, therefore in exercise of the powers conferred by Section 5, sub-section (1), clause (c) and Section 5, sub-section (3) (of the Act) the Government of Kerala hereby give notice to the Kottayam Electric Supply Agency to sell and deliver possession of the said undertaking to the Kerala State Electricity Board on or before the first day of July, 1963."

10. This entire chain of correspondence between the Government and the Board would unmistakably show that there was no second consultation between the Government and the Board regarding the revocation of the licence after the Government had received the appellant's explanation to the show cause notice served on him. In the circumstances of the case we are satisfied that no prejudice will be caused to the respondents if the point is permitted to be raised in this Court. So we permit Sri Sen to argue the point.

11. In State of U.P. v. Mambodhan Lal Srivastava, Hamdard Dwakhana (Wakf), Delhi and another v. Union of India and others, Karpagathachi and others v. Nagarathinathachi, and State of Mysore v. Guduthur Thimmappa and son and another this Court did not permit a new issue of fact to be urged by the appellant. In Motibhai Fulabhai Patel & Co. v. M/s. R. Prasad and others the case was remanded to the High Court and the appellant was allowed to urge before the High Court his new contention. The facts of all these cases are different from the facts of the present case. The Government cannot derive any assistance from them.

12. It is necessary to consider whether the Act obligates the Board to consider the explanation of the licensee before recommending any action against him. Section 4 as it stood originally read :

> " (1) The State Government may, if in its opinion the public interest so requires, revoke a licence in any of the following cases, namely :
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> (a) where the licensee in the opinion of the State Government makes wilful and unreasonably prolonged default in doing anything required of him by or under this Act;
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> (b) where the licensee breaks any of the terms or conditions of his licence the breach of which is expressly declared by such licence to render it liable to revocation;
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> (c) where the licensee fails, within the period fixed in this behalf by his licence or any longer period which the State Government may substitute therefor by order under sub-section (3), clause (b) and before exercising any of the powers conferred on him thereby in relation to the execution of works :
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> (i) to show, to the satisfaction of the State Government, that he is in a position fully and efficiently to discharge the duties and obligations imposed on him by his licence, or
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> (ii) to make the deposit or furnish the security required by his licence;
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> (d) where the licensee is, in the opinion of the State Government, unable, by reason of his insolvency fully and efficiently to discharge the duties and obligations imposed on him by his licence.
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> (2) Where the State Government might, under sub-section (1) revoke a licence, it may, instead of revoking the licence, permit it to remain in force subject to such further terms and conditions as it thinks fit to impose and any further terms or conditions so imposed shall be binding upon, and observed by, the licensee, and shall be of like force and effect as if they were contained in the licence."

13. The original Section 4 was considered by the Privy Council in Hubli Electricity Company v.

The Province of Bombay. The Privy Council held that in Section 4 (1) (a) the opinion of the Government was not subject to any objective tests. The Privy Council said : "The language leaves no room for the relevance of a judicial examination as to the sufficiency of the grounds on which the Government acted in forming an opinion. " However, it was held that the opinion should relate to "anything required under the Act". The Privy Council said : "If it relates to something which was not required under the Act, the revocation of the licence would be invalid."

14. Then there came our Constitution with its Article 19 (1) (g) conferring on the citizens the right to carry on business subject to reasonable restrictions in public interest. This Court in Dr. N. B. Khare v. The State of Delhi held that if an Act which imposes restrictions on the rights specified in Article 19, does not provide for a reasonable hearing to the party affected, the restriction could not be said to be reasonable in certain circumstances. It seems that Parliament realised, though late, in 1958, that Section 4 may not stand the test of Article 19 (1) (g). Accordingly it made radical amendments in Section 4. The amended Section 4 reads :

> " (1) The State Government may, if in its opinion the public interest so requires, and after consulting the State Electricity Board, revoke a licence in any of the following cases, namely :
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> (a) where the licensee, in the opinion of the State Government, makes wilful and unreasonably prolonged default in doing anything required of him by or under this Act;
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> (b) where the licensee breaks any of the terms or conditions of his licence the breach of which is expressly declared by such licence to render it liable to revocation;
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> (c) where the licensee fails, within the period fixed in this behalf by his licence or any longer period which the State Government may substitute therefor by order under Section 4-A, sub-section (1) and before exercising any of the powers conferred on him thereby in relation to the execution of works -
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> (i) to show, to the satisfaction of the State Government, that he is in a position fully and efficiently to discharge the duties and obligations imposed on him by this licence, or
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> (ii) to make the deposit or furnish the security required by his licence;
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> (d) where in the opinion of the State Government the financial position of the licensee is such that he is unable fully and efficiently to discharge the duties and obligations imposed on him by his licence;
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> (e) where a licensee, in the opinion of the State Government, has made default in complying with any direction issued under Section 22-A.
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> (2) Where in its opinion the public interest so permits, the State Government may, on the application or with the consent of the licensee, and after consulting the State Electricity Board, and the Central Government where that Government is interested, and if the licensee is not a local authority, after consulting also the local authority, if any, concerned, revoke a licence as to the whole or any part of the area of supply upon such terms and conditions as it thinks fit.

(3) No licence shall be revoked under Sub-section (1) unless the State Government has given to the licensee not less than three months' notice in writing, stating the grounds on which it is proposed to revoke the licence and has considered any cause shown by the licensee within the period of that notice, against the proposed revocation.

(4) Where the State Government might under sub-section (1) revoke a licence it may instead of revoking the licence permit it to remain in force subject to such further terms and conditions as it thinks fit to impose and any further terms or conditions so imposed shall be binding upon, and be observed by, the licensee, and shall be of like force and effect as if they were contained in the licence."

15. The amending Act adds sub-sections (2) and (3) and converts the former sub-section (2) into sub-section. (4). It adds clause (e) to sub-section (1). It also adds "and after consulting the State Electricity Board" in the opening part of sub-section (1). The amendments relevant in this case are the phrase "after consulting the State Electricity Board" and sub-section (3) which now provides for a hearing to the licensee before revocation of his licence.

16. It appears from a reading of Section 4 that when the Government consults the Board on the question of revocation of a licence under Section 4, the Board is to make up its mind as to whether it should recommend : (1) to revoke the licence, or (2) not to revoke the licence, or (3) to permit the licence to remain in force subject to such further terms and conditions as may be thought proper. It is difficult to conceive how the Board will make a choice out of these three courses without considering the explanation of the licensee. The explanation may make out a case for not revoking the licence or a case for continuance of the licence with certain over-added conditions. In a particular case the Government may propose to revoke the licence under Section 4 (1) (c) on the ground that the licensee has failed to show that he is in a position fully and efficiently to discharge the duties and obligations imposed on him by his licence. Similarly, it may propose to revoke the licence under Section 4 (1) (d) where the financial position of the licensee is such that he is unable fully and efficiently to discharge the duties and obligations imposed on him by his licence. In none of these cases the Board will be able to make a just choice out of the aforesaid three courses without applying its mind to the explanation of the licensee. In case of a charge under Section 4 (1) (d) it is open to the Board to advance a loan to the licensee and recommend against the proposed revocation of his licence. We are accordingly of opinion that Section 4 contemplates that the Board should make its recommendation only after considering the explanation of the licensee. It would follow that the Board should be consulted by the Government after the licensee's explanation has been received. We have already said that in the present case the Board was consulted much before the receipt of the appellant's explanation and that the Board consequently could not consider the explanation at the time of making its recommendation in favour of revocation of the licence.

17. Counsel for the Board has submitted that the Board is to be consulted only as regards 'public interest'. It is sufficient to state that we find no force at all in this argument. In the alternative, it is said that the Board is to be consulted only at the stage when the Government takes a provisional decision to revoke the licence. The words 'after consulting the Board' have been added by an amendment. The suggested construction would make the amendment a mere pompous work-spinning.

18. It is not to be seen as to what is the effect of this premature consultation of the Board by the Government on the impugned order. The Act does not expressly provide for the consequence of

premature consultation. It does not say that the order of revocation is void. Sri Sen contends that the order will be void. Counsel for the Board, on the other hand, contends that it will not be void. According to him, the provision regarding consultation of the Board is directory, and not mandatory. Non-compliance with a directory provision does not nullify the order. It is not disputed that if the provision is mandatory, the order of revocation will be void.

19. The object and setting of the phrase "after consulting the Board" in Section 4 will have to be examined for deciding whether the provision is mandatory or directory.

20. The power to evoke the licence is a drastic power. The revocation of licence results in severe abridgment of the right to carry on business. Having in mind the requirements of Article 19 (1) (g), Parliament has, it seems to us, prescribed certain conditions to prevent the abuse of power and to ensure just exercise of power. Clauses (a) to (d) of Section 4 prescribe some of the conditions precedent for the exercise of power. The order of revocation, in breach of any one of those conditions, will undoubtedly be void. The clause "if in its opinion the public interest so requires" is also a condition precedent. On a successful showing that the order of revocation has been made without the Government applying its mind to the aspect of public interest or without forming on honest opinion on that aspect, it will, we have no doubt, be void. The phrase "after consulting the State Electricity Board" is sandwiched between the clause "if in its opinion the public interest so requires" and clauses (a) and (d). In this context it appears to us that consultation with the Board is also a condition precedent for making he order of revocation. Accordingly the breach of this condition precedent should also entail the same consequence in the breach of the other conditions referred to earlier. It may be observed that the phrase "after consulting the State Electricity Board" did not find place in Section 4 as it stood originally. It was introduced in Section 4 in 1959 by the amendment. It seems to us that it was introduced in Section 4 with the object of providing an additional safeguard to the licensee. When revoking a licensee, the State Government acts in two stages. At first it forms a tentative opinion in favour of revoking the licence. Then it calls for an explanation from the licensee. When the explanation is received, it considers the explanation. If not satisfied with the explanation, it passes the final order of revocation. First impressions and provisional judgments have a tendency to become ultimate ideas and final judgments. They would settle unconsciously on the investigator's mind as the imperceptible dust-particles on an optical lens. They would dim his understanding and obfuscate his observation. Facts which will dovetail with them would arrest his attention; facts which will conflict with them would flit this observation. If by any chance he happens to notice refractory facts, he would seek to reconcile them with his first impressions and provisional judgments. This understanding of human psychology seems to have persuaded Parliament to interpose the condition of the Board's consultation to the Government's action. The Board is an independent body. It consists of three members. One of them is a technical expert, the other a financial expert, and the third an administrative expert. While considering the facts presented to it by the Government and by the licensee in his explanation, the Board will undoubtedly act with an open and unconditioned mind and will be able to offer unbiased counsel to the Government. Having regard to the object and context, we are of the view that the condition of consulting the Board is mandatory and the breach of this condition will make the order of revocation void. We have already held that the Board was not consulted after the explanation was received. Accordingly we are of opinion that the word is void. Then consequential order of acquisition will ipso facto fall down.

21. Counsel for the Board has relied on State of U.P. v. Mambodhan Lal Srivastava (supra), Ram Gopal Chaturvedi v. State of Madhya Pradesh and The State of Bombay v. D. A. Korgaonkar. He has also relied on Rollousd v. Minister of Town and Country Planning and Dersham v. Church

Commissioners for England. Ram Gopal Chaturvedi v. State of Madhya Pradesh (supra) and State of Bombay v. D. A. Korgaonkar (supra) have followed Mambodhan Lal Srivastava (supra). In Mambodhan Lal Case this Court held that Article 320 (c) of the Constitution is directory and not mandatory. A Government employee was dismissed from service after complying with the provisions of Article 311 (2) of the Constitution. The U.P. Public Service Commission was insulated as to the punishment to be imposed on him. But it was consulted before the explanation of the employee was received by the Government. The argument was that as the Commission did not have the opportunity of considering his explanation, there was no real consultation as required by Article 320 (c). It was also urged that Article 320 (c) was mandatory and that accordingly the order of dismissal was void. This Court pointed out several reasons for the view that Article 320 (c) is directory. The Proviso to Article 320 empowers the appropriate Government to issue directions as to the classes of cases in which consultation of the Commission will not be necessary. The Proviso therefore indicates that the provision is directory. Another reason given by the Court is that Article 320 (c) does not occur in the chapter in which Article 311 occurs. It finds place in the chapter dealing with the Public Service Commission. Accordingly, it cannot be said that it confers any right on Government employees. The third reasons given is that consultation of the Commission is not binding on the Government. The first two reasons do not apply in our case. We have shown earlier that the condition of consulting the Board has been inserted by an amendment of Section 4 with the object of creating a safeguard in favour of the licensee. There is no provision in the Act authorising the Government to waive the condition of consultation in any case. It is true that the third reason given by the Court in Mambodhan Lal Case (supra) applies in this case. As there, so here the opinion of the Board is not binding on the Government. In spite of the Board advising against revocation, the Government, if satisfied that it is necessary to revoke the licence may revoke it. But having regard to the object and context of Section 4, we are of opinion that it should not be regarded as an over-weighing consideration. It will normally be difficult for the Government to ignore the Board's expert advice. We are satisfied from the object and context of Section 4 that Parliament intended to make consultation of the Board an imperative condition to revoking a licence.

22. In the result, we allow the appeal and set aside the order of the High Court. The petition of the appellant under Article 226 of the Constitution is allowed and the notice No. 11795-EL 1/61/19 PW dated August 17, 1962, the order of revocation No. 11795-EL 1/61-31 PW dated May 17, 1963 directing the appellant to hand over the undertaking to the Board are quashed. The appellant shall not get his costs here as well as in the High Court, as the point on which the appeal is allowed was not raised in the High Court.

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