State of Kerala

Vs

Indian Aluminium Co. Ltd.

Civil Appeal No. 2007 of 1990

(V.N. Khare, R.P. Sethi JJ)

06.04.1999

JUDGMENT

V.N. Khare, J.

1. These appeals are directed against the judgment and order dated 17.2.1989 of the Kerala High Court in O.P. NO. 10002 of 1983, whereby the High Court has held, that the concessional rates for supply of electricity incorporated in special agreement under Section 49(3) of the Electricity Supply Act, 1948 (hereinafter referred to as the `Act') entered into between the Indian Aluminium Company Ltd. (hereinafter referred to as the `company') and the Kerala State Electricity Board (hereinafter referred to as the `Board') was validly rescinded by the statutory amendment incorporating sub-section (5) in Section 49 of the Act by the Act No. 7 of 1983. The High Court has further found that the demand of duty at the rate specified under the Kerala Electricity Duty Act which was in excess of concessional duty was invalid. Consequently, the said demand of duty was quashed. It is in this way the State of Kerala is in appeal against the quashing of demand of duty, whereas the company has come up to this Court against that part of the judgment whereby the High Court has upheld the validity of sub-section (5) of Section 49 of the Act. The State of Kerala after the judgment under appeal was delivered filed a review petition but the same was also rejected. The said order is also under challenge in Civil Appeal No. 2008 of 1990.

2. The appellant-company is engaged in the business of manufacturing aliminium, having its head office at Calcutta. The company after having been assured of supply of electricity which is raw material for manufacture of alminium at concessional rates decided to set up its factory at Alumpram in the then State of Travancore. It was in this context that on 30.7.1941 an agreement was entered into between the company and the then State of Travancore for supply of electricity at fixed rate for a period of 35 years w.e.f. 1.7.1941. It was alleged that on the basis of assurance and undertaking given by the erstwhile State of Travancore for supply of regular electricity of cheaper rate, the company had set up its aliminium factory at Alupuram, although aluming required for manufacture of aluminium was brought from far off places, like Bihar incurring heavy freight and other expenses. In the year 1948, the State of Travancore was integrated with the Cochin State and the agreement entered into in the year 1941 was treated as binding. The agreement of 1941 was subsequently modified by another agreement dated 15.8.1955 and continued to be in force when the State of Kerala was formed under the State Reorganization Act, 1956. On 1.4.1957 the Board was constituted and the earlier agreement entered into was treated as agreement under sub-section (3) of Section 49 of the Act. Again, in the year 1963, a fresh agreement was entered into which was to be in force for a period of 25 years from 1.1.1965. Subsequently, again on 18.9.1965, another agreement was entered into for supply of 12.500 KWs for another period of 25 years from 1.1.1996 with an option for renewal in favour of the company for a further period of 25 years. In these

agreements, it was stipulated that the Board would supply electricity at concessional rates to the company. In the year 1969 the Board in exercise of its power under Section 79 read with Sections 49 and 59 of Electricity (Supply) Act issued an Order dated 28.11.1969 known as "The Kerala State Electricity Board Extra High Tension Tariff Order 1969" fixing the rate of tariff for supply of electricity to Extra High Tension consumers. On the basis of the said Order the Board demanded from the Company High Tension Consumption charges at higher rates fixed by the Tariff Order ignoring the terms of agreement entered into under sub-section (3) of Section 49 of the Act. The said demand was challenged by the Company and ultimately this Court struck down the said demand holding that the Board was not entitled to claim more than the charges specified in the special tariff agreement entered into between the parties. Thereafter, the Government of Kerala issued on ordinance which was subsequently replaced by an Act known as Electricity (Supply) Amendment Act, 1983, whereby a new sub-section (5) was inserted in Section 49 of the Electricity (Supply) Act. Based on this new provision, the Board issued demands claiming electricity charges at rates notified for Extra High Tension consumers prescribed by the Kerala Electricity Board Extra High Tension Tariff Revision Order 1982. The Board also demanded duty at higher rates other than the concessional rates - a rate of which the duty was being paid by the company. It is in this way the company challenged the validity of sub-section (5) of Section 49 of the Electricity (Supply) Act, whereby the electricity supply to the company at concessional rates was rescinded and the company was brought under the uniform tariff.

3. As stated above, the High Court by its judgment and order under appeal, upheld the validity of sub-section (5) of the Act, (sic) rates. It is in this way the State of Kerala being aggrieved, is in appeal before us.

4. The argument of learned counsel appearing for the State of Kerala is that once the special agreement stipulating supply of electricity at concessional rates was annulled by virtue of sub-section (5) of Section 49 of the Act, the concession granted to the company for paying duty at concessional rates also stood abrogated and, therefore, the company was not entitled to any concession in the matter of payment of duty and liable to pay at the uniform rates under the Kerala Electricity Duty Act, and the view taken by the High Court is erroneous. In order to appreciate the argument of learned counsel appearing for the State of Kerala, it is necessary to extract sub-section (5) of Section 49 of the Act which was brought in, in Section 49 by the Amendment Act of 1983 which runs as under :-

> "(5) *The party to an agreement or any other arrangement entered into prior to the commencement of (Kerala Amendment) Act, 1983 and providing for supply of electricity by the Board shall, notwithstanding anything contained in the instrument of such agreement or other arrangement or in any law including this Act, in force at such commencement, pay, in respect of the electricity supplied after such commencement, such price (by whatever name called) calculated in accordance with the uniform tariff framed or modified from time to time under sub-section (1) and applicable to the category to which such party belongs."*

On a perusal of sub-section (5) it is clear that by this amendment the agreement entered into between the company and the Board was not rescinded. What was rescinded, was the concessional rates at which the company was receiving electricity. The agreement, as a whole, was not rescinded. For other purposes it remained intact. It is also clear from the fact that, on insertion of sub-section (5) in Section 49 of the Act in the year 1983, no fresh agreement was entered into between the Board and the company and the old agreement continued. Had there been an abrogation of the entire

agreement, the Board would not have supplied electricity to the company. At no point of time, the Board after passing of the Amendment Act stopped supplying electricity to the company or entered into any fresh agreement for supply of electricity. Similar situation arose in the case of *Indian Aluminium Company Ltd. v. Karnataka Electricity Board, 1993(2) SCC 266,* wherein this Court clarified that by virtue of sub-section (5) and sub-section (6) of Section 49 of Electricity (Supply) Act, the entire agreement was not annulled as a whole, but the agreement insofar as it related to rate and price of the electricity consumed by the company, stood annulled. The relevant passage runs as under :-

> "*It is, therefore, made clear that the Tripartite agreement which was operative at the time of enforcement of the amended provisions of Section 49 of the Electricity (Supply) Act does not stand annulled as a whole but provisions of the said agreement relating to the applicability of the rate and price of the electricity consumed by the appellant-company stand annulled in view of the said amended provisions of the Act. The annulment of the said Tripartite agreement should, therefore, be understood in such limited extent whenever such expression appears in our judgment."*

We are, therefore, of the view that by virtue of insertion of sub-section (5) in Section 49 of the Act the special agreement entered into between the Board and company as a whole was not annulled and only thing that was annulled was the agreement relating to rates of electricity payable by the company under the agreement and further the said Amendment Act did not in any manner affect the payment of duty by the Company at the concessional rates.

5. Yet there is another reason to hold that under law the Company was not required to pay duty as demanded by the Board and of the State.

6. Section 4 of the Kerala Electricity Duty Act provides that every consumer is required to pay to the Government a duty calculated at the rate specified therein. It is also provided therein that it is open to the State Government to reduce the rate at which the duty is leviable on such consumer or to exempt such consumer from payment of duty subject to the terms and condition imposed by the Government. Section 4 of the Act is quoted below :-

> "4. *Levy of Electricity Duty on consumers.* - Every consumer belonging to any of the classes specified in column (2) of the Schedule shall pay every month to the Government in the prescribed manner a duty calculated at the rate specified against that class in column (3) thereof :
>
> Provided that in cases where the supply of energy to a consumer is regulated by an agreement entered into between the Government or the licensee and the consumer it shall be competent for the Government either to reduce the rate at which duty is leviable on such consumer or to exempt such consumer from payment of duty under this section subject to such terms and conditions as may be imposed by the Government."

It is not disputed that State of Kerala has granted partial exemption in the matter of payment of duty to the company. It is not the case of State of Kerala that the exemption so granted has been annulled or abrogated or rescinded by any fresh Order. Therefore, so long as the exemption Order continued to remain in force, the Company was not liable to pay specified duty under Section 4 of the Kerala Electricity Duty Act. Neither the State Government nor the Board was within its rights to demand

from the company electricity duty at the rate over and above what has been provided in the exemption Order. We are, therefore, of the opinion that the High Court was right in setting aside the demand of duty which was based without reference to the statutory exemption provided to the appellant-company.

7. In C.A. No. 155/1998, it was urged on behalf of the company that by virtue of sub-section (5) of Section 49 of the Act, the appellant company has been picked up for hostile discrimination and as such the said provision is violative of Article 14 of the Constitution. According to the learned counsel it is open to the Board to enter into a special agreement under the provisions of sub-section (3) of Section 49 with other similarly situated consumers, but the appellant-company alone been denied that benefit, and in future the appellant-company has been deprived of from entering into a special agreement under sub-section (3) of Section 49 of the Act. We find the argument of learned counsel is totally misplaced. We have seen in the earlier part of the judgment that the appellant-company was the only consumer with whom the Board had a special agreement when sub-section (5) was inserted in Section 49 of the Act, and, therefore, it was that agreement which was to be dealt with to enable the Board to collect the normal tariff under section (1) of Section 49 of the Act. This was done only to bring the appellant-company under the umbrella of uniform tariff. Thus, there was a reasonable basis for classification deducible from the objects and reasons to make the uniform tariff rate applicable to the appellant-company and to rescind the concessional rate which the appellant-company was enjoying. By the said provision the appellant-company was brought at par with the other similarly situated consumers. The appellant-company has been treated alike and the said amendment has made the Company liable to pay the electricity charges at normal tariff applicable to other similar situated consumers. By the Amendment Act, sub-section (3) of Section 49 has not been affected. It still exists in the Act and it is always open to the Board to enter into a special agreement under sub-section (3) of Section 49 of the Act with any consumer, including the appellant-company. So long as Section 49(3) remains in force, there is nothing to prevent the Board to exercise that power in favour of the consumers, including the appellant-company. However, this power under Section 49(3) is subject to sub-section (4) of Section 49 of the Act, whereby the said power has to be exercised without showing any undue influence to any consumer. Neither sub-section (3) nor sub-section (5) of Section 49 places any restriction on exercise of power of the Board to enter into a fresh agreement with the appellant-company in case the appellant-company makes out a case for supplying electricity at a concessional rates. Had the legislature intended that in future no special agreement was to be entered into under sub-section (3) of Section 49, the legislature could have very well omitted sub-section (3) of Section 49 of the Act, but has deliberately retained it with the result that, if in future circumstances demand, the Board can enter into a special agreement subject to the provisions of sub-section (4) of Section 49 of the Act. Sub-section (5) has been enacted only to rescind the agreement for supply of electricity at concessional rates incorporated in the special agreement prior to the Act of 1983 and it did not create any bar in future to enter into an agreement under Section 49(3) of the Act. The appellant-company, as well as other similarly situated consumers, are entitled to enter into an agreement with the Board if circumstances so demand, so long as sub-section (3) of Section 49 is in force. Before the High Court, as well as here in this appeal, it was stated on behalf of the State that sub-section (5) of Section 49 has not taken away the right of the Board to exercise its power to enter into an agreement with the appellant-company if the circumstances so demand. Under such circumstances we do not find any merit in the contention that by the Amendment Act that it is open to the Board to enter into special agreement with other consumers while denying such benefit to the appellants-company. We, therefore, hold that sub-section (5) of Section 49 is not violative of Article 14 of the Constitution.

8. For all these reasons, we do not find any merit in these appeals. The appeals are accordingly

dismissed. There shall be no order as to costs.