SUPREME COURT OF INDIA

S.V.A.Steel Re-rolling Mills Ltd.

Vs.

State of Kerala

C.A.Nos.10103-10106 of 2010

(Anil R.Dave and A.K. Sikri JJ.)

06.02.2014

JUDGMENT

ANIL R. DAVE, J.

1. Being aggrieved by the common Judgment dated 24th February, 2005 delivered by the High Court of Kerala at Ernakulam in W.P.(C) No.5795/2004, W.P.(C) No.5877/2004, W.P.(C) No.5984/2004 and O.P. No.9816/2001, the appellants, original petitioners before the High Court have approached this Court by way of these appeals.

2. The facts giving rise to the present appeals, in a nut-shell, are as under:

> The appellants are businessmen having their manufacturing units in the State of Kerala and they are manufacturing different articles with the help of electricity, which is generated/supplied by the Kerala State Electricity Board (hereinafter referred to as 'the Board'). The respondent-Government was desirous of having industrial development in the State of Kerala and therefore, it had framed certain policies so as to encourage and invite businessmen for setting up their manufacturing units in the State of Kerala. Due to shortage of electricity supply in the State of Kerala, interested entrepreneurs were not inclined to set up their units in the State of Kerala. In view of the aforestated circumstances, the State Government had laid down a policy whereby it declared to give continuous electricity supply at a particular rate to certain new manufacturing units.

3. So as to put the aforestated policy in practice, the respondent-State had issued a Government Order dated 21st May, 1990 which read as under:

> "Government have been considering the question of giving some incentives to new industries in the matter of power connection. Taking into consideration the announcements made by the Minister (Finance) in the current year's budget speech and after discussions with all concerned, Government are now pleased to issue the following orders in this context which will have effect from 1-4-1990.
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> 1. Power connection will be given on completion of any project irrespective of whether a general power cut is in force or not.
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> 2. New units commencing industrial production will be exempted from power cut for a period of 5 years from the date of commercial production.
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> 3. Exemption from payment of electricity duty for a period of 5 years from the date of commencement of commercial production will be given to the new units.
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> 4. In future the electricity duty will not be collected from the industries if they are eligible for exemption.
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> 5. Service connection charges will not be levied if no extension is required or if the additional line to be provided is less than 500 meters in length."
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> The aforestated State Government Order had been adopted by the Board by its Order dated 19th June, 1990.

4. By virtue of the aforestated policy declared under the order dated 21st May, 1990, the respondent-State had assured the manufacturing units to be set up in the State of Kerala that electricity connection would be given to the projects which might be set up and they would be exempted from power cut for a period of 5 years from the date of commencement of commercial production. Such new units were also given certain exemption in relation to payment of electricity duty for a period of five years.

5. It is not in dispute that in pursuance of the aforestated policy the appellants had established their manufacturing units (hereinafter referred to as 'the new units') in

the respondent-State. It is also not in dispute that the requisite conditions, which had been imposed upon such new units, had been fully complied with by the appellants and therefore, the appellants were entitled to an uninterrupted electricity supply for a period of 5 years from the date on which they had commenced their commercial production.

6. The respondent-State had thereafter passed a further order on 6th February, 1992, whereby the new units were exempted for 5 years from the payment of enhanced power tariff on certain conditions. According to the appellants, they were also entitled to benefit under the aforestated G.O. dated 6th February, 1992.

7. In spite of the assurance given by the respondent-State to the new units that they would not suffer any power cut, because of certain difficulties faced by the Board with regard to supply of electricity to new units, there used to be power cuts which adversely affected the new units. In view of the said fact, to alleviate the difficulties of the units set up under the aforestated policy, the respondent-State passed further order on 26th October, 1999, whereby it granted extension of period of assured power supply to the new units, who were adversely affected because of the power cut in certain circumstances. Under the aforestated order, it was decided and declared to extend the benefit which had been given under G.O. dated 25th May, 1990 and 6th February, 1992 to the new units by number of days during which supply of electricity to them had been cut to the extent of 50% or more. The respondent-State also decided to reimburse the Board with the amount of benefit which was given to the new units on account of power cut beyond 50%.

8. In the aforestated admitted facts and circumstances, the respondent- State should have given the benefits which had been assured to the new units but for the reasons beyond control of the State as well as the Board, the benefits assured to the new units could not be given and therefore, along with other industrial units, the present appellants had filed writ petitions before the High Court of Kerala praying that the benefits which had been assured to them should be given and they should not be constrained to pay tariff at the enhanced rate.

9. Thus, according to the appellants, in fact, they did not get real benefit of the policy because their production was adversely affected whenever there was power cut and the five years' period of exemption from power cut was not extended by the Government which was in violation of the promise given to the appellants and other similarly situated new units.

10. All these grievances were ventilated before the High Court by filing different petitions which were ultimately rejected by the High Court by virtue of the impugned order.

11. The learned counsel appearing for the appellants had vehemently submitted that it was unfair on the part of the respondent -State not to adhere to the promise given to the appellants with regard to uninterrupted 100% electricity supply. The appellants had set up their industries in the State of Kerala because of the promise given by the respondent-State that at least for a period of first 5 years from the date of commencement of the commercial production, there would be uninterrupted power supply and there would not be any increase in the tariff and therefore, the respondent-State was bound by the said policy. The principle of promissory estoppel was also invoked by the appellants.

12. The learned counsel had further submitted that if for some reason it was not possible for the respondent- State to give uninterrupted 100% electricity supply to the appellants on a particular day, the said period or the said day should have been added to the period of 5 years for which the respondent-State had promised uninterrupted 100% electricity supply to the new units. According to the learned counsel, though, the period had been extended, but not in a fair and reasonable manner because the days during which there was cut of electricity supply to the extent of 50% or more, were added to the period of 5 years. According to the learned counsel, whenever there was any reduction in power supply, even if the reduction or cut was 50% or less, the said period should have been added to the period of 5 years, for the reason that in case of continuing process industries, for proper functioning of the manufacturing units, uninterrupted 100% supply of electricity is a sine qua non.

13. The learned counsel had shown us some material whereby it was shown that out of first 5 years during which the appellants were to be given benefit, there was electricity cut for 921 days and out of those 921 days there were 214 days when the cut in electricity supply was for more than 50%. It had been further submitted that the period during which even the electricity cut was less than 50%, the new units could not work at its optimum level, which had resulted into several problems for the appellants.

14. He had further added that the respondent Board had accepted the policy of the State with regard to giving benefit to the new units for uninterrupted power supply on same tariff and therefore, the Board could not have asked for additional tariff

during the period of 5 years, as extended by the period during which there was power cut.

15. The learned counsel had also alleged that the respondent- State had given discriminatory treatment to the appellants by not giving uninterrupted 100% electricity supply because the State had given uninterrupted 100% electricity supply to certain other manufacturing units like Malabar Cement and the industries set up within the Export Processing Zone. It had been asserted that if the above stated manufacturing units could be given 100% uninterrupted electricity supply, there was no reason for denying the same benefit to the appellants.

16. So as to substantiate the submission with regard to promissory estoppel, the learned counsel had relied upon certain judgments delivered by this Court.

17. On the other hand, the learned counsel appearing for the respondent -State had submitted that the prayers made by the appellants before the High Court were unjust and therefore, their petitions and other petitions, praying for similar relief had rightly been rejected by the impugned order of the High Court.

18. It had been also submitted that Section 22 B of the Indian Electricity Act, 1910 (hereinafter referred to as 'the Act') enables the respondent-State to impose control on distribution and consumption of energy. Section 22 B of the Act reads as under:

> "Sector 22B. (1) Power to control the distribution and consumption of energy:- If the State Government is of opinion that it is necessary or expedient so to do, for maintaining the supply and securing the equitable distribution of energy, it may by order provide for regulating the supply, distribution, consumption or use thereof."

19. The aforestated provision, according to the learned counsel, enables the respondent-State to regulate the supply, distribution or consumption of electricity and as there was shortage of electricity supply, the respondent-State had to impose some electricity cut, so as to see that least problems were created to the residents and industrial units set up in the respondent-State. The Government authorities had to use their discretion in the matter of supply of electricity. The discretion which the respondent-State used was quite reasonable as it was not possible to give 100% electricity supply to all the consumers of electricity in the State. In the aforestated circumstances, the respondent- State had to regulate the supply by imposing some power cut, and unfortunately it resulted into some difficulties to the appellants.

20. It had been further submitted by the learned counsel that, so as to reduce the difficulties of the appellants, the Government had issued an order whereby the days, during which electricity supply was cut beyond 50%, had been added to the period of 5 years during which the appellants were entitled to the concession declared by the State of Kerala. Thus, sufficient efforts were made to see that the benefits assured to the appellants were provided.

21. It had been further submitted that the appellants cannot expect benefit of extension of period simply because there was negligible cut in the supply for very less period. Therefore, the respondent- State had decided that as and when the cut was 50% or more, the period for which such the cut had been effected would be added to the period of 5 years and the said decision was just and fair.

22. The learned counsel had also submitted that all consumers of electricity, including the appellants were informed well in advance about the stoppage of electricity supply and thus, all possible efforts were made to see that the appellants and other similarly situated consumers were not put to much hardship.

23. The learned counsel had further submitted that looking at the facts of the case, there would not be any promissory estoppel as submitted by the learned counsel appearing for the appellants. The learned counsel had relied upon the judgments delivered in the case of State of Haryana & Ors. v. Mahabir Vegetable Oils Pvt. Ltd., [2011 (3) SCC 778] and State of Rajasthan & Anr. v. M/s Mahaveer Oil Industries & Ors., [1999(4) SCC 357] to substantiate their case to the effect that there could not be any promissory estoppel in such cases.

24. We had heard the learned counsel at length and perused the impugned judgment and the judgments referred to in the course of hearing and the relevant material placed on record of this Court. It is not in dispute that the appellants had set up their new units in the State of Kerala only upon knowing the policy with regard to uninterrupted power supply and that too at the same tariff for a period of 5 years from the date of commercial production.

25. In the instant case, no case had been made out by the respondent- State that the appellants had committed any breach or were not entitled to any of the benefits or concessions which had been offered to them by the respondent-State. In the circumstances, the respondent-State was bound to give the benefits which had been assured to the appellants.

26. Though the respondent-State was bound to supply uninterrupted 100% electricity required by the appellants, one cannot lose sight of the fact that at times there would be circumstances which would put the respondent-State and the Board into such a difficulty that they would not be in a position to fulfill the assurance given to the new units. It is not in dispute that the State of Kerala is not generating enough electricity to cater the needs of all its consumers in the State of Kerala. The respondent-State is not having a magic wand which would enable the State to generate more electricity. There might be several factors which might be adversely affecting the respondents and as a result thereof, the respondents might not be generating sufficient electricity so as to fulfill the needs of the appellants and other residents of the State.

27. The question, thus, arises as to how the adversely affected persons who had been assured by a promise with regard to continuous supply of electricity for five years can be fairly compensated.

28. It is true that the respondent-State came out with Government Order dated 26th October, 1999, whereby it had decided that the period when there would be reduction or cut in supply of power to the extent of 50% or more, such period of power cut would be added to the period of 5 years, during which the appellants and other similarly situated persons were to be given continuous power supply.

29. The learned counsel appearing for the respondents could not show us any justifiable reason for deciding as to why the respondent-State decided to give the benefit of extended period only when the power cut was 50% or more. It is pertinent to know that the cases where the consumer is having a continuous process industry, even power cut below 50% would adversely affect the manufacturing unit. It is a matter of common knowledge that in several industries, the manufacturing process can not be stopped abruptly. Many a times, restarting of the machines or boilers take lot of time and energy, which results into loss to the manufacturer. The said fact ought to have been considered by the State while taking the aforestated decision. The decision with regard to giving extension of time to such a limited extent is not reasonable and in our opinion, that would have surely affected the new units adversely.

30. It is true that Section 22B of the Act enables the State Government to regulate the supply, distribution and consumption of electricity for the purpose of maintenance and supply of equitable distribution of energy but in our opinion,

provisions of the said section are not much relevant for the reason that in the instant case, the respondent State had given an assurance with regard to uninterrupted supply of electricity and therefore, the respondents ought to have made provision for uninterrupted supply of electricity to the appellants and other similarly situated persons by regulating electricity supply in a proper manner.

31. Framing such policies and doing the needful for its implementation are administrative functions of the respondent-State and therefore, normally this Court would not like to interfere with its policies but looking at the peculiar facts of the case, where an assurance had been given for uninterrupted supply of electricity, one would presume that the respondent-State must have made necessary arrangements to provide 100% uninterrupted supply of electricity for 5 years to the new units. If for any reason it was not possible to supply electricity as assured, the respondent-State ought to have extended the period of 5 years by the period during which assured electricity was not supplied. By doing so, the respondent-State could have made an effort to fulfill its promise and satisfied the persons who had acted on an assurance given by the State and set up their manufacturing units in the State of Kerala.

32. Before laying down any policy which would give benefits to its subjects, the State must think about pros and cons of the policy and its capacity to give the benefits. Without proper appreciation of all the relevant factors, the State should not give any assurance, not only because that would be in violation of the principles of promissory estoppel but it would be unfair and immoral on the part of the State not to act as per its promise.

33. In the instant case, the respondent-State was conscious about the fact that there was a problem with regard to supply of electricity in the State of Kerala and possibly for that reason industries which depended much upon electricity as a source of power were not inclined to establish new industries in the State of Kerala. Before setting up an industry, the entrepreneur or the industrialist considers several factors and thereupon takes several decisions like place of business, capacity at which production should be made, type of raw-material, etc. After considering all these factors, a final decision is taken with regard to setting up of an industry. For a new entrepreneur, such a decision is of vital importance because if he fails in his estimates or in consideration of all the relevant factors, there are all chances that he would fail not only in his business but he would completely ruin himself. Thus, one can very well appreciate that the appellants must have thought about all relevant factors, including the incentives offered by the respondent- State

and might have decided to set up their industries in the respondent-State. While deciding this case, this Court would invariably keep in mind the circumstances in which the appellants had set up their industries in the State of Kerala.

34. In view of the incentives and assurances given to the appellants along with others, who were desirous of setting up new industries, the appellants set up their new units which were much dependant upon continuous supply of electricity. One of the appellants is a Steel Re-rolling Mill. In Steel industry, when the industry is concerned with making of steel or re-rolling of steel, it requires lot of power and energy, and electricity being one of the important sources of power, the appellant was much dependent on continuous supply of electricity, which had been assured to it by the respondent-State.

35. If an assurance was given to the appellants and similarly situated persons that they would be given 100% electricity supply for five years, the respondents can not riggle out of their liability by making a policy to the effect that the benefit by way of incentive would be extended only if the electricity supply was reduced to less than 50% on a particular day. A steel industry, for example, which cannot function without electricity or power in any other form, would be put to enormous inconvenience and loss if the power supply is not continuous. So as to reactivate or to restart the machines or to start the process afresh, the industry has to spend something more then what it would have spent if the supply or power namely, electricity was uninterrupted. Stoppage of manufacturing process would mean losses under several heads. The labour employed has to be paid even when the employer does not get work from the labour force. Very often, so as to bring a required temperature for the purpose of carrying on certain processes, more fuel is to be injected so as to attain the condition which was prevailing prior to electricity supply being disconnected. Moreover, there would be several overhead expenses which one has to incur even if there is no production or stoppage of manufacturing process.

36. The judgments cited by the counsel appearing for the respondents would not help them for the reason that in the cases referred to, the Government had to change the policy in public interest. In the instant case, by compensating the aggrieved appellants, no harm would be caused to the State of Kerala except that it will have to compensate the appellants by supplying assured electricity for some extended period at a specified tariff.

37. For the aforestated reasons, in our opinion, the respondent-State was not wholly fair when it extended benefit to the appellants only for the period during which electricity supply was reduced to less than 50% on certain days.

38. We, therefore, hold that the benefit extended by the respondent State is not sufficient. The respondent-State ought to have extended the period even for the days when supply of electricity was more than 50% but not 100% as assured under G.O. dated 21.5.1990 and 6.2.1992. We, therefore, direct the respondents to give the said benefit by extending the period of incentive.

39. We, therefore, allow the appeals by quashing and setting aside the impugned order passed by the High Court and direct the respondents to calculate the period during which 100% electricity supply was not given to the appellants and extend the period of incentive accordingly. The calculation shall be made and consequential orders shall be passed within two months from today. The appeals are allowed with no order as to costs.

(Anil R.Dave and A.K. Sikri JJ.)
06.02.2014