

SUPREME COURT OF INDIA

Paschimanchal Vidyut Vitran Nigam Ltd.

Vs.

M/S Adarsh Textiles

C.A.No.10707 of 2014

(Jagdish Singh Khehar and Arun Mishra JJ.)

03.12.2014

JUDGMENT

ARUN MISHRA, J.

1. Leave granted in all the special leave petitions.
2. The question involved in the appeals is whether policy decision dated 14.6.2006 issued by the Government of Uttar Pradesh regarding supply of the electricity to power loom bunkers on the flat rate could have been applied by the U.P. Electricity Regulatory Commission (hereinafter referred to as "the Commission") to the industries availing HV-2 category connection.
3. To dispose of the appeals, we notice facts from civil appeal arising out of SLP (Civil) No.9869 of 2008. The backdrop facts indicate that the Commission fixed tariff for the year 2004-2005, whereby rebate of Rs.5,000/- per consumer was granted to power loom bunkers availing LMV-2 and LMV-6 connections in accordance with policy of the U.P. Government.
4. LMV-2 is a non domestic light, power and electricity connection, LMV- 6 electricity connection is of small and medium power having connected load up to 100 HP for industrial/processing or agro-industrial purposes, power loom, etc. HV-2 connection is provided for utilising large and heavy power for industrial and other

purposes having contracted load of above 100 HP. Industries which are having load more than 100 HP are covered by tariff HV-2.

5. The State Government had issued order dated 14.6.2006 to Managing Director, U.P. Power Corporation Ltd. (hereinafter referred to as 'Corporation'). The Commission opined that it has the effect of altering the rate schedule approved by it. The Commission, in turn, issued order dated 3.7.2006 restraining all electricity supply undertakings in the State of U.P. from implementing the provisions of State Government order dated 14.6.2006.

6. The Commission took up the matter to work out modalities as per the Government order. Chairman of the U.P. Power Corporation Limited filed an affidavit before the Commission providing a new scheme compatible with legal framework along with a directive from the State Government issued under Section 108 of the Electricity Act, 2008. The scheme as proposed in the affidavit states that despite the aforesaid order, the normal billing as per applicable tariff shall be made but payment shall be collected as per the directions of the Government at normal billing cycle and that the advance subsidy shall be collected from the Government in one instalment or maximum two half yearly instalments. Pursuant thereto the Commission on 11.7.2006 passed order in which it had prescribed the rate for LMV-2 and LMV-6 consumers only. However, Commission also opined that the State Government has permitted realization on flat rate depending upon reed space, number of looms, etc. It appeared to be the case of altering the rate schedule of the tariff order fixed by it which is not permissible within the legal framework to be attempted by the State Government. The State Government also did not spell out compliance of the advance subsidy payment as envisaged under Section 65 of the Electricity Act, 2003. While dealing with the matter, the Commission observed that billing of the power loom be done strictly in accordance with prevalent schedule.

7. It is pertinent to mention that tariff order 2004-2005 was issued by the Commission for providing benefit to LMV-2 and LMV-6 consumers, it admittedly did not cover HV-2 consumers. The Commission ultimately directed that billing of the power loom consumers shall be done strictly in accordance with prevalent rate schedule of tariff order 2004-2005 on monthly basis. It issued further directions with respect to the collection of the subsidy. It also directed that payment from the power loom consumers shall be collected as per the policy direction of the Government on monthly

basis. It also directed that Government should earmark capital subsidy for providing free of cost meters to power loom consumers in case of new connections.

8. Later on, industries enjoying HV-2 connection approached the Electricity Regulatory Commission to clarify that whether the order of the Commission dated 11.7.2006 in the matter of subsidized electricity rates for power loom consumers shall be applicable to them also, as the benefit of the said order was not extended to them by the concerned authorities.

9. The Commission passed an order on 14-15/9/2006 that the order dated 11.7.2006 shall apply mutatis mutandis for even HV-2 power loom consumers irrespective of their load. It also directed that subsidy provision shall accordingly apply to them also.

10. The Secretary, Government of U.P. wrote to the Chairman, U.P. State Electricity Regulatory Commission on 6.10.2006 drawing their attention to the Commission's letter dated 14th/15th September, 2006 clarifying that only those consumers to whom the State Government was giving subsidy under Section 65 of Electricity Act, 2003 were entitled for benefit of Government order dated 14.6.2006. The scheme to supply electricity on flat rate to the power loom bunkars has been made for LMV-2 and LMV-6 consumers for whom earlier also provisions of subsidy had been made. The U.P. Government has not made provisions of any subsidy for industries availing HV-2 category connection. Therefore, distributing companies of U.P. could not give facility of flat rate tariff to HV-2 consumers.

11. The aforesaid communication was not dealt with by the Commission but Secretary of the Commission vide letter dated 18.10.2006 advised the Principal Secretary, Energy, Government of U.P. to amend the Government order dated 14.6.2006 so as to confine subsidy to LMV-2 and LMV-6 consumers only.

12. On 24.2.2007 Chief Engineer (Commercial), U.P. Power Corporation Ltd., Commercial Cell wrote to Chief Engineer (Distribution) Purvanchal Vidyut Vitran Nigam Ltd., Varanasi Region, Varanasi that present tariff is applicable to LMV-2 and LMV-6 consumers and subsidy is not admissible to HV- 2 consumers.

13. On 1.5.2007 the Secretary of the Government of U.P. wrote to the Managing Director of U.P. Power Corporation Ltd. that only the weaver- consumers falling under

rate schedule LMV-2 and LMV-6 would be covered by the flat rate for the supply of electricity to bunkars.

14. One of the industry, namely M/s Hiltrex Industrial Fabrics Pvt. Ltd., Sahjani, Magarwara, District Unnao, availing HV-2 connection, filed W.P. No.2204 (M/B) of 2007 before the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow. The writ petition was dismissed. It was held by the Division Bench that subsidy paid by the Government was to help person or class of persons by keeping the prices down. The earlier decision dated 14.6.2006 was intended to give benefit to weavers, who were members of the weaker section of the society, not to consumers like the petitioners.

15. Thereafter, the U.P. Electricity Regulatory Commission issued a letter dated 10.10.2007 in the matter of extension of rebate/subsidized power loom flat rate tariff to HV-2 category consumers, duly noticing the decision of the Lucknow Bench in order dated 16.8.2007 rendered in the aforesaid writ petition, it clarified that the provision of tariff for 2006- 2007 shall not be attracted in case of HV-2 power loom consumers in consonance with the findings of the High Court.

16. Thereafter, in the instant matters the writ petitions were filed by the industries seeking extension of benefit for HV-2 power loom consumers questioning the aforesaid adverse decisions. A Division Bench of the High Court of Allahabad in CMWP No.32401 of 2007 M/s. Maa Vind Vasini Industries Gorakhpur and Another v. Purvanchal Vidyut Vitran Nigam Ltd. and others, allowed the writ petition vide order dated 12.12.2007. The said order has been followed in CMWP No. 8765 of 2008 M/s. Adarsh Textiles v. Paschimanchal Vidyut Vitran Nigam Ltd. & Ors., and CMWP No. 8763 of 2008 M/s Amit Textiles v. Paschimanchal Vidyut Vitran Nigam Ltd.

17. In CMWP No.63293 of 2007, M/s. Vikas Textile Company and another v. State of U.P. and others, though following the decision in M/s Maa Vind Vasini Industries and another v. Purvanchal Vidyut Vitran Nigam Limited Varanasi and others, it has been ordered by the High Court on 13.8.2009 that the Corporation shall charge petitioners in accordance with the Government order dated 11.7.2007. The petitioner shall not be entitled to the relief provided by the Government orders dated 14.6.2006 and 31.3.2007.

18. Aggrieved by the order dated 13.8.2009, Vikas Textile has filed SLP (Civil) No.30528 of 2009 and prayed for enforcement of the Government Order dated 14.6.2006 and question of demand raised by respondent No.6 (Executive Engineer (Distribution), Electricity Distribution Division - I, Hathras, of Rs.4,43,904/- for the period from April 2007 to December 2007. The said amount had been deposited 'under protest' on 23.9.2009 and a direction is sought to refund the aforesaid amount with interest.

19. We have heard learned counsel for the parties. It was submitted on behalf of the appellants that policy decision reflected in the order of the State Government dated 14.6.2006 was not applicable to HV-2 consumers. The State Government intended to grant benefit to the weavers alike to farmers. It has extended the benefit in the previous years to LMV-2 and LMV-6 consumers and not to HV-2 category industries and no provision for subsidy had been made by the State Government for HV-2 consumers. Thus, it was not open to the Commission to fix the tariff for HV-2 industries and compel the State Government to release the subsidy. The Government had clarified its stand on 6.10.2006. It was also apparent from the communication dated 24.2.2007 of Chief Engineer (Commercial) of the Corporation to one of the distributors. The Commission has acted beyond the powers while fixing the tariff for HV-2 category consumers and based thereupon in directing the State Government to release subsidy. The decision of the Lucknow Bench could not have been ignored and was binding on the Coordinate Bench of the same High Court. The decision of the Lucknow Bench could not be said to be per incuriam. It was not open to Commission to pass ex parte clarification on 14/15th September, 2006 without hearing the interested parties and also State Government.

20. It was contended on behalf of the industries availing HV-2 connection that benefit of the order dated 14.6.2006 had rightly been extended by the Commission to such industries. The view taken by the High Court of Allahabad in the subsequent impugned decisions is in accordance with law.

21. Prior to 14.1.2000 electricity was being generated, distributed and transmitted in the State of U.P. by the erstwhile Uttar Pradesh State Electricity Board constituted under Section 5 of the Electricity (Supply) Act, 1948.

22. The Uttar Pradesh Electricity Reforms Act, 1999 (hereinafter referred to as "the

Reforms Act, 1999") came to be enacted which authorised/empowered the State Government, time to time issue directions on a policy matter in regard to the electricity and subsidy as per the provisions contained in Section 12 of the Reforms Act, 1999. Same is reproduced hereunder :

"12 Power of the State Government. (1) The State Government may, from time to time, issue directions not inconsistent with this Act, on a policy matter in regard to electricity and if any dispute arises between the Commission and the State Government as to whether a question is or is not a policy matter it shall, be referred to the Central Electricity Regulatory Commission whose decision thereon shall be final and binding. (2)(a) The State Government shall be entitled to issue policy directions with respect to the subsidies to be granted for supply of electricity to any class or classes of persons or in respect of any area in addition to the subsidies adjusted by the Commission while regulating and approving the tariff structure:

Provided that the State Government shall contribute the amount to compensate the licensee or person affected by the grant of the subsidies to the extent of the subsidies granted.

(b) the amount of the subsidy to be paid under clause (a) and the method and manner of payment and the time within which such amount is to be paid by the state Government shall be determined by the Commission and the Commission will calculate such amount in accordance with the procedure provide in the regulations."

23. The Electricity Act, 2003 was enacted by the Parliament. Section 62 whereof confers the power upon Commission to determine the tariff. Section 65 of the Electricity Act, 2003 enables the State Government to grant subsidy to any consumer or class of consumers in the tariff determined by the State Commission under Section 62.

24. Section 108 of the Act of 2003 deals with the power to issue directions by the State Government. The Commission shall be guided by such directions in the matter of policy involving public interest as the State Government may give to it in writing.

Sections 62, 65 and 108 of the Electricity Act, 2003 are reproduced hereunder :

"Section 62. (1) The Appropriate Commission shall determine the tariff in accordance with provisions of this Act for -

Supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

transmission of electricity;

wheeling of electricity;

retail sale of electricity.

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff. (3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended more frequently than once in any financial year, except in respect of any changes expressly

permitted under the terms of any fuel surcharge formula as may be specified.

(5) The commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee."

"Section 65. If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under section 62, the State Government shall, notwithstanding any direction which may be given under section 108, pay, within in advance in the manner as may be specified, by the State Commission the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licence or any other person concerned to implement the subsidy provided for by the State Government:

Provided that no such direction of the State Government shall be operative if the payment is not made in accordance with the provisions contained in this section and the tariff fixed by State Commission shall be applicable from the date of issue of orders by the Commission in this regard." "Section 108 (1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing. (2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final."

25. It is apparent from a bare reading of the aforesaid provisions of Electricity Act, 2003 and Reforms Act 1999 that in discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing. Such decision/direction of the State Government in the matter of policy, subsidy and public interest shall be final. Under

Section 65 it is a prerogative of the State Government to grant any subsidy to any consumer or class of consumers in the tariff determined by the Commission under Section 62. It is apparent from the provisions contained in Sections 65 and 108 of Act of 2003 that to grant subsidy to any consumer or class of consumers is the prerogative of the State Government and such other direction issued in the public interest shall be binding upon the Commission.

26. When we consider the policy decision of the State Government dated 14.6.2006 read with communications dated 6.10.2006, dated 24.2.2007 and lastly dated 1.5.2007, the State Government never intended to extend the benefit of the subsidy to HV-2 category consumers. It had not made any provision for extending subsidy to HV-2 consumers. The Commission in order dated 11.7.2006 itself has confined the tariff respite to LMV-2 and LMV-6 consumers. It was not open to the Commission to issue clarification dated 14-15/9/2006, as the matter of providing subsidy was clearly prerogative of the State Government under the provisions of Section 65 read with Section 108 of the Act of 2003 and Section 12 of Reforms Act, 1999 hence Commission could not have accepted on its own, or directed the State Government to release the subsidy to HV-2 consumers and that too unilaterally.

27. When we read the order dated 14.6.2006 it becomes clear that the State Government has granted approval for supply of electricity to "power loom bunkers on flat rate as extended to farmers". It has fixed the tariff for the loom having 60 inches reed space, Rs.65/- per loom and it will be presumed that load of loom is 0.5 H.P. and for looms having reed space of more than 60 inches, Rs.130/- per month will be charged and it will be presumed that load of the loom is 1 H.P. In additional machines in urban areas, Rs.130/HP/month would be charged and in rural area 75/HP/month would be charged. It also provided that the expenses for new meter will not be taken from consumers.

28. It can be culled out from order dated 14.6.2006 that the State Government intended the benefit to be extended to power loom 'weavers' alike farmers. The activity of manufacturing textile is generally understood as the weaving of such textile and man who is engaged in such power loom activity is known as weaver. Weaving means: to form a fabric by interlacing yarn on a loom. It also means the method of pattern of weaving or the structure of a woven fabric, as observed by this Court in *Ess Dee Carpet Enterprises v. Union of India (UOI) and Others (1990) 1 SCC 461*. The

State Government thus, never intended the benefit to be given to big industries like HV-2 industries. In the circumstances, it was incumbent upon the Commission to consult the State Government before passing clarification order dated 14-15/9/2006 while applying its order dated 11.7.2006 to HV-2 consumers. When the State Government has written to the Commission on 6.10.2006, thereafter there was no justification for the Commission not to recall the clarification issued on 14-15/9/2006 as it was the prerogative of the State Government to extend the benefit of subsidy to a class or particular class of consumers and subsidy being a concession could not have been enforced as a matter of right. The Commission was bound to act as per such directives of State Government.

29. The submission that the State is bound by the principle of promissory estoppel to extend the benefit of subsidy to HV-2 consumers is also devoid of merit. This Court in Gujarat State Financial Corporation vs. M/s. Lotus Hotels Pvt. Ltd. [1983 (3) SCC 379] had referred to Motilal Padampat Sugar Mills Co. Ltd. vs. State of U.P. & Ors. [1979 (2) SCC 409] and observed as under :

"The true principle of promissory estoppel, therefore, seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not."

The aforesaid principle is not attracted in the instant case as the State Government has not extended any assurance by its conduct much less unequivocal one, thus there was no question of the industries acting upon it. The State Government had not extended any assurance to extend the subsidy and, on the other hand, it had made its stand clear and objected to the Commission's clarification by writing a letter on 6.10.2006.

30. Equally futile is the reliance upon the agreements which have been entered into for

supply of electrical energy after the clarification was issued by the Commission. It was on the basis of the directive issued by the Commission that the said agreements have been entered into by the consumers with the Corporation. However, a perusal of the agreement makes it clear there is no mention as to the subsidy to be extended by the State Government. The only stipulation is that the supply would be made at the rate specified by the Commission. Thus, the agreement does not deal with the question of subsidy at all. Even otherwise the agreements can also not be said to be binding upon the State Government as the Commission/Corporation had no authority to burden the State with the subsidy when it had made no such provision for HV-2 consumers. It is a settled proposition that the assurance to form promissory estoppel must come from the person in authority having competence to extend it. The Commission and the Corporation had no jurisdiction in the matter of subsidy which is the domain of the State Government.

31. For the foregoing reasons, we find that the view taken by the High Court of Allahabad cannot be said to be sustainable while extending the benefit of order dated 14.6.2006 to the HV-2 consumers. The demand raised in Vikas Textiles' case for the period from April, 2007 to December, 2007 was also appropriate. In view of the aforesaid decision, the appeals arising from SLP (C) Nos.29322/10, 9869/2008, 29320/2010 and 29324/2010 are allowed and the appeal arising from SLP(C) No. 30528/2009 is dismissed. Parties to bear their own costs.