

ALLAHABAD HIGH COURT

State of U.P

Vs.

Benaras Electric Light and Power Co. Ltd

Special Appeals Nos. 301 and 300 of 1972. against judgment of C.S.P. Singh, J.
in C.M.W. No.2273 of 1971

(Satish Chandra and N.D. Ojha, JJ.)

18.05.1972. 08.08.1972

JUDGMENT

Satish Chandra, J.

1. These two appeals have been filed by the State of Uttar Pradesh. They raise same question, and can be conveniently decided by a common order. They are directed against the judgment of a learned Single Judge allowing two writ petitions and directing the appellant not to take action under Section 3 of the U. P. Electricity (Temporary Powers of Control) Act, 1947. The learned Judge found that this section was void on the ground of repugnancy with Sections 57 and 57-A of the Electricity Supply Act No. 54 of 1948, as amended by the amending Act, No. 101 of 1956, and with Section 22-B of the Indian Electricity Act, 1910, as amended by the Central Act No. 32 of 1959.

2. The relevant and material facts in relation to the Benares Electric Light and Power Co. Ltd., the respondent in Special Appeal No. 301 of 1972 are as follows:

3. The respondent company carries on the business of generating, supply and distribution of electrical energy in the city of Benares, under a license granted to it under the Electricity Act, 1910.

4. Under the Defense of India Act, 1939, the State Government had been conferred powers of control over production, supply and distribution of electricity. With the cessation of hostility, that Act lapsed. The Provincial Legislature felt that there was need to continue the powers of control.

Accordingly, the U. P. Electricity (Temporary Powers of Control) Act No. 6 of 1947 was enacted. Section 3 of this Act provided:-

"3. Powers to control production supply and distribution –

(1) The State Government so far as it appears to it to be necessary or expedient for maintaining or increasing supply of electricity or for securing its equitable distribution and availability at fair prices, may by notified order provide for regulating or, prohibiting the production, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by subsection (1), an order made there under may provide :

(a)

(aa) for regulating the rates which may be charged by any undertaking for supplying electrical energy and for relaxing any maximum or minimum limits otherwise imposed on such rates."

Shortly thereafter, the Central Legislature enacted the Electricity Supply Act No. 54 of 1948. This Act was passed for the rationalization of production and supply of electricity and for electrical development. The Supply Act was amended by Parliament by the Electricity Supply (Amendment) Act No. 101 of 1956, which came into force on 31-12-1956. This amending Act introduced Sections 57 and 57-A and 6th and 7th Schedules to the Supply Act. Section 57 provided that the provisions of the 6th and 7th Schedules shall be deemed to be incorporated in the license of every licensee (not being a local authority). It further provided that the provisions of the Indian Electricity Act, 1910 and of any other law, agreement or instrument applicable to the licensee shall be void and of no effect in so far as they are inconsistent with Section 57-A and the said schedules.

5. Section 57-A provided that the State Electricity Board or, where there is no such Board in any State, the State Government may constitute a rating committee, in case a licensee fails to comply with any provisions of the said schedules or in case it makes a request for it.

6. The 6th schedule contemplated that a licensee should ensure for itself a

reasonable return. The licensee was authorized to enhance the rates, which it may charge from its consumers, keeping in view the various provisions of the schedule. The rating committee contemplated by Section 57-A was to examine the charges which a licensee had imposed upon its consumers and to report to the State Government, after hearing the parties. The State Government had to publish the report of the rating committee in the Official Gazette. The State Government could then pass an order in accordance with the report, fixing the charges for the supply of electricity by the licensee with effect from a date not earlier than two months or later than three months from the date of the publication of the report. Thereupon, the licensee was obliged to give effect to the order. The rates fixed under such an order were to remain in operation for a period not exceeding three years.

7. Clause 1 of the 6th Schedule provided that the licensee was to adjust its charges in such manner as not to exceed the reasonable return for itself. The third proviso to this clause prohibited the licensee from enhancing the charges for the supply of electricity until after the expiry of a notice in writing of not less than two months to the State Government of its intention to enhance the rates.

8. The scheme of the Supply Act, as amended in 1956, was to authorize the licensee to fix its rates, so that the licensee gets a reasonable return as defined in the 6th Schedule. It was not to enhance the rates in the manner so as to get more than 20 per cent over and above the reasonable return. If the State Government or the State Electricity Board felt that the fixation or the enhancement of the rates by a licensee was in violation of the provisions of the 6th Schedule, it could constitute a rating committee to examine the question and then pass an order in accordance with the report of the rating committee. Thereupon, the licensee was obliged to adjust the rates accordingly.

9. As has been seen, the State Government had the power under clause (aa) of Section 3 of the Temporary Act of 1947 to regulate the rates which may be charged and to relax the maximum or minimum limits imposed on such rates.

10. By Act No. 32 of 1959, the Central Legislature amended the Indian Electricity Act, 1910. It inter alia introduced Section 22-B to the 1910 Act. We

shall notice this provision in detail if necessary later on.

11. The respondent company had been agitating for an increase in the rates since 1961. On 31st July, 1961 it gave the statutory notice required by the third proviso to clause 1 of the 6th Schedule to the Supply Act of 1948 for raising the rates for supply of electrical energy to the consumers. By a notification dated 23rd September, 1961, under clause (aa) of sub-section (2) of Section 3 of the Temporary Act of 1947, the Government rejected the application and directed that the company shall not enhance the rates. This notification was published in the Gazette. The respondent company on 1st September, 1965, again applied to the State Government for enhancement of the rates. This application was rejected by a letter dated 4th November, 1965. The letter stated that the Government did not find any justification for the enhancement. They were satisfied that the existing short falls could be easily made up by effecting economy in the coal handling charges and other working arrangements of the company. On 15th July, 1968, the respondent company served upon the State Government a formal notice under the third proviso to clause 1 of the 6th Schedule to the Supply Act of its intention to enhance the rates. This application was rejected by an order dated 29th January, 1969. In this order, the Government, however, permitted some increase in the rates. The respondent company by a letter dated 27th August, 1969, gave the requisite notice under the third proviso aforesaid of its intention to raise the rates. By its order dated 30th October, 1969, the State Government acting under sub-section (2) (aa) of Section 3 of the Temporary Act of 1947, prohibited the respondent company from enhancing the rates. It was stated in the order that the matter of revision of rates was under the consideration of the Government. On 3rd March, 1970, the State Government passed an order agreeing to a partial revision of the rates. On 26th March, 1970, the respondent company addressed a letter to the State Government stating that the permitted increase in the rates fell far short of their requirements. It requested the Government to advise the company of the reasons which impelled the Government to refuse the required enhancement, and to give the company an opportunity to substantiate its case. To this, the Government replied on 18th September, 1960, stating that the Government was of the opinion that there was no provision in law to furnish figures on the basis of which the revision of rates was permitted. It appears that in pursuance of further representations of the company for increase in rates, the Government by its

order dated 19th April, 1972, permitted further enhancement of rates with effect from January, 1972. But it is the common case of the parties that this enhancement also did not fully comply with what the company had proposed. The company thereupon instituted a writ petition in this Court, inter alia, praying for the quashing of the orders passed by the State Government under Section 3 (2) (aa) of the Temporary Act of 1947. The prayer was supported by a number of grounds, which are mentioned in the judgment of the learned Single Judge.

12. The learned Single Judge held that Section 3 of the Temporary Act of 1947 stood impliedly repealed by the Electricity Supply Act, 1948, after its amendment by the Act 101 of 1956; and that Section 3 before said was also impliedly repealed by Section 22-E of the Electricity Act, 1910, as amended by Act 32 of 1959. It was also held that Section 3 of the Temporary Act of 1947 authorized the State Government to make notified orders only, that is to say, the orders passed under that provision were to be published in the Official Gazette. The various orders impugned by the respondent company were not notified orders. On that ground, they were unenforceable. The learned Judge further held that the State Government took into consideration the report of the Electrical Inspector; and since that report was not made available to the respondent company so as to enable it to meet it, the principles of natural justice were violated, and the impugned orders were void for that reason as well. On these findings, the writ petition was allowed and the State was directed not to take any action on the basis of Section 3 of the Temporary Act of 1947. Aggrieved, the State has appealed.

13. Article 254 of the Constitution provides for inconsistency between laws made by Parliament and laws made by the Legislatures of the States. Sub-Article (2) is relevant for our purpose. It reads :-

"(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent list contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of the State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State.

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the laws so made by the Legislature of the State."

Entry 38 of the List 3 of the 7th Schedule to the Constitution provides for 'electricity'. Electricity thus is a subject enumerated in the concurrent list. The Temporary Powers Act of 1947 was a law made by the Legislature of a State with respect to such a matter. This Act had been reserved for the consideration of the President and had received his assent. So, it will prevail in the State of U. P. over an earlier law made by Parliament or an existing law, notwithstanding anything repugnant between its provisions and those of the latter. The Central competing Acts are amending Acts Nos. 101 of 1956 and 32 of 1959. Ex facie, they are not earlier laws to the Temporary Act of 1947. The learned Advocate General, appearing for the appellant State, sought to get over this difficulty by submitting that the operation of the Temporary Act of 1947 having been continued by several Acts of the State Legislature, each of which had received the assent of the President, as also by an act passed by the President (President Act No. 26 of 1968), the effect in Law, was as if the Temporary Act of 1947 had been reenacted by each of the continuing Acts. It is common ground that under Section 1 (4) the Temporary Act of 1947 was to remain in force till 30-9-48. Thereafter the expiry date was extended by several Acts till 1956. The U. P. Act No. 29 of 1956 continued the operation of the Act till 1958. The U. P. Act No. 30 of 1958 continued it till 1963. The U.P. Act No. 26 of 1963 extended the life of the Act till 1968. On 25th February, 1968, the President issued a proclamation Under Article 356 of the Constitution, declaring that there had been a constitutional breakdown in this State. Parliament passed Act No. 7 of 1968 under Article 357 (1) (a) of the Constitution, conferring on the President power to make laws for this State. Accordingly, the President Act No. 26 of 1968 extended the life of the Temporary Act of 1947 till 1973. After the constitutional machinery of this State was restored, the Legislature of this State passed the U. P. Act No. 12 of 1970, likewise, extending the life of the 1947 Act till 1973.

14. Each of these Acts amended sub-section (4) of Section 1 of the Temporary Act of 1947 by substituting the figure of the year by another year. For instance,

the figure 1956 was substituted by 1958, 1958 by 1963, 1963 by 1968 and 1968 by 1973. On its case, these continuing Acts brought about an amendment in Section 1 (4) of the Original Temporary Act only. They did nothing else. The effect of these Acts was that the Temporary Act of 1947 continued to remain in force without break ever since 1947 till now.

15. The question is if these various amending Acts were a re-enactment of the provisions of the Temporary Act of 1947, so that they could be recognized as a law made on the subject of electricity subsequent in point of time to the Parliament Acts Nos. 101 of 1956 and 32 of 1959. Since the vital question relates to the point of time when the State law with respect to a concurrent subject comes into force, these continuing Acts would fail to support the submission of the learned Advocate-General, unless they could be held to be a fresh law on electricity and that the re-enactment could be said to take effect on the day when the continuing Acts were passed.

16. A similar problem arose in *United States v. Powers*,¹ There, the Connally Act of 1935 provided that it would cease to be in effect on 16th June, 1937, but it was extended prior to that date till 30th June, 1939, Douglas, J., held :-

"..... Due to the amendment, the Act has never ceased to be in effect. No new law was created; no old one was repealed. Without hiatus of any kind, the original Act was given extended life."

This observation would suggest that such extending Acts do not make any law on the subject covered by the original Act. It will be difficult to call them as re-enacting the subject-matter of the original Acts.

17. Maxwell on Interpretation of Statutes, Edition XI page 392, states:-

"If a temporary Act be continued by a subsequent one, or an expired Act be revived by a later one, all infringements of the provisions contained in it are breaches of it rather than of the renewing or reviving statute."

Thus, the extending Act does not make any new legislation. Its effect is that the old law instead of expiring continues in operation till the substituted date. Craies also notices such a situation, at page 408 of his Treatise on Statute Law

(1971) VII Edition. He says that if a temporary Act is continued from time to time by subsequent Acts, it is even so continued, regarded as an Act passed in the session when it was first passed. In the *State of Bombay v. Heman Santlal Alreja*,² Chagla C. J. accepted the aforesaid statement of the law, made by Douglas, J. and by Maxwell, as correct. The learned Chief Justice took the view that when the Provincial Legislature passed a temporary Act fixing its duration till a given date and then it passed another conditional legislation extending its duration to a further date, then the position is that the original Act contained within it the potentiality of being extended. The extended operation of the original Act is the potential operation, seeds of which were sown in the original Act. In that case, the Bombay Act No. 33 of 1948 provided for requisition of property. It was originally to remain in force till 31st March, 1950. By the amending Act No. 2 of 1950, its duration was extended upto 31st March, 1952. It was held that the Act of 1948 as extended by the Act of 1950 was an existing law, within meaning of Article 31 (5) (a), and, so, even, if they contravened the provisions of Article 31 (2) of the Constitution, these were saved by clause (5) (a) thereof. The position was that the Legislature when it passed Act No. 2 of 1950 did not make any fresh law on the subject. In the eye of law, the extending Act did not place any new legislation on the statute book. The original Act continued in operation.

18. The various continuing Acts had, in law, the effect of continuing in force the original Act of 1947 as it was. They were not fresh legislation on the subject of electricity. The Temporary Act of 1947 is still the only State Legislation on that subject; and from the point of view of Article 254 (2), the position would be that the State Legislature made a law with respect to electricity in 1947. The Central Acts of 1956 and 1959 were not an earlier law within meaning of Article 254 (2). In this view, the provisions of the 1947 Act which are repugnant to the provisions of the amending Acts of 1956 and 1959, will not prevail in the State; on the contrary, they will be deemed impliedly repealed.

19. The learned Advocate-General in the alternative submitted that the two competing provisions do not overlap, but they operate in different situations. Section 3 of the Temporary Act of 1947 authorized the State Government to make notified orders for inter alia the availability of electricity at fair prices. Clause (aa) of sub-section (2) thereof specifically authorized the State

Government to make an order for regulating the rates that may be charged for supplying electrical energy, and for fixing or relaxing maximum or minimum limits therefore. As mentioned earlier, Sections 57 and 57-A and 6th and 7th Schedules to the Electricity Supply Act, 1948, provided a code for, inter alia, the determination of fair prices for electricity. These provisions contemplate that if the licensee violates a provision of the said schedules, the State Government may constitute a rating committee for the purpose of examining the charges imposed by a licensee upon its consumer. The committee is to consist of a Judicial Officer not below the rank of District Judge, an accountant and an engineer. The committee is to investigate the matter after hearing the various parties including the licensee. The committee makes a detailed report to the Government. If the Government agrees, it may by an order fix the rates in accordance with the report. The licensee is obliged to comply with it. These provisions, therefore, operate on the same field of availability of electricity at fair prices specifically mentioned in clause (aa) of sub-section (2) of Section 3 of the Temporary Act of 1947. Both these provisions are competing on the same topics.

20. The learned Advocate-General submitted that the Temporary Act of 1947 operated only in an emergency, whereas the provisions of the Supply Act did not extend to such a situation. To support submission, he invited our attention to the statement of objects and reasons appended to the 1947 Act. In our view, it is not permissible to construe the otherwise plain language of Section 3 in the light of the statement of objects and reasons. Section 3 or any of its sub-clauses does not make the exercise of powers conferred by them dependent upon the existence of any kind of emergency. So long as the Temporary Act is in operation, the State Government is free to pass notified orders to regulate the prices. It cannot hence be said that the 1947 Act would operate only in an emergency.

21. In the next place, Sections 57 and 57-A of the Supply Act did not exclude a situation of emergency of the kind, mentioned in the statement of objects and reasons appended to the 1947 Act, from the ambit of its purview. These provisions are applicable in all situations and circumstances. There under, a rating committee can be constituted whenever the State Government considers that a licensee has violated the provisions of the schedules, or the licensee

requests for it, irrespective whether the situation is one of emergency or otherwise. In our opinion, repugnancy between the two competing sets of provisions cannot be avoided on such distinctive feature.

22. The two legislations are, in our view, "in respect of the same matter" within meaning of Article 254 (2) of the Constitution. The two legislations provided a different approach and a different kind of a solution to the problem of fixing fair prices. Even though they do not, strictly speaking, collide with each other in the sense that one asks for something to be done, which the other may prohibit, yet they being in respect of the same matter, both cannot remain in operation (see *State of Orissa v. M. A. Tullooh and Co.*,)³ One will have to fall under Article 254 (2) of the Constitution. Since the Parliament Act of 1956 was not an earlier law in relation to the Temporary Act of 1947, it will prevail, and the offending provisions of the 1947 Act will stand repealed. In view of the repugnancy, clause (aa) of Section 3 (2) and the overlapping part of Section 3 (1) of the Temporary Act of 1947 must be deemed repealed by implication. The various orders' passed by the State Government under that provisions were without the authority of law.

23. The learned Single Judge held that Section 3 of the Temporary Act of 1947 was repugnant to Section 22-B, as introduced in the Electricity Act, 1910, by the amending Act of 1959. We are doubtful that Section 22-B operates on the same field as clause (aa) of Section 3 (2) of the 1947 Act. But, since, the appeals fail on our finding in relation to the 1956 Act, it is unnecessary to express a final opinion on this point.

24. In these cases, this Court was invited to consider the validity of the aforesaid orders of the State Government, which were passed under clause (aa), alone; it is unnecessary to consider the wider question whether Section 3 of the Temporary Act of 1947 as a whole is void for repugnancy. We leave that question open.

25. It was agreed between the learned counsel that except for the order of State Government dated 23rd September, 1961, all the remaining orders passed between 1965 to 1972 were not notified in the Gazette. Section 3 of the

Temporary Act of 1947 authorized the State Government to pass notified orders only. These various orders, not having been notified, were in law inoperative. On this ground also, these orders were liable to be set aside.

26. Since the appeals are liable to fail on our finding on the point of repugnancy, we deem it unnecessary to discuss the various other points considered or mentioned by the learned Single Judge.

27. In the result, both the appeals fail and are dismissed with costs, subject to the reservation that the operative part of the learned Single Judge's judgment will relate to clause (aa) of Section 3 (2) of the U. P. Electricity (Temporary Powers of Control) Act, 1947, o

Cases Referred.

1. (1938) 307 US 214
2. AIR 1952 Bom 16 at p. 22
3. AIR 1964 SC 1284