

A KERALA STATE ELECTRICITY BOARD LTD. & ANR.

v.

RUBFILA INTERNATIONAL LIMITED & ORS.

(Civil Appeal No(s). 8457-8458 of 2022)

B NOVEMBER 15, 2022

[AJAY RASTOGI AND C.T. RAVIKUMAR, JJ.]

- Electricity Laws: Exemption of enhanced power tariff – Benefit of five years exemption to new industrial unit from the date of commercial production or from the date of energisation – Writ petition by the respondent no. 1-industrial unit, wherein the Single Judge of the High Court held that the benefit should be given from the date of energisation on the ground of parity as the Electricity Board has extended the benefit of concession to the other industrial unit from the date of energisation – Division Bench upheld the order of the Single Judge – Thereafter, the order in the case of the other industrial unit was withdrawn by the Board – Review petition filed on this ground but it was dismissed holding that withdrawal of order itself would not efface the finding of the judgment – On appeal, held: The High Court's holding that withdrawal of exemption in the case of the other industrial unit will not efface the finding recorded in the judgment, is not good and is not sustainable in law – Withdrawal of exemption in the case of the other industrial unit remained unchallenged and this being an error apparent on the face of record – What being prayed for is something which does not emerge/contemplate from the Government order and after the order has been withdrawn in the case of the other industrial unit with whom parity was claimed by order of the Electricity Board, no negative equality would have been claimed by the respondent taking aid of Art. 14 of the Constitution – Thus, the impugned judgment followed with order passed by the High Court in the review petition, set aside.*

G CIVIL APPELLATE JURISDICTION : Civil Appeal Nos.8457-8458 of 2022.

H From the Judgment and Order dated 22.11.2018 of the High Court of Kerala at Ernakulam in WA No.2089/2018 and Order dated 29.07.2019 in RP No. 506/2019 in WA No. 2089/2018.

Basant R., Sr. Adv., Raghenth Basant, Ms. Liz Mathew, Vishnu Pazhanganal, Ms. Roopali Lakhota, Ajay Krishna, Advs. for the Appellants. A

V. Giri, Sr. Adv., Sreegesh M. K., Amrendra Kumar Mehta, Nishe Rajen Shonker, Ms. Anu K. Joy, Alim Anvar, Advs. for the Respondents.

The Judgment of the Court was delivered by B

RASTOGI, J.

1. Leave granted.

2. The instant appeals are directed against the judgment and order dated 22nd November, 2018 followed with order dated 29th July, 2019 C passed by the High Court of Kerala at Ernakulam.

3. The seminal facts relevant for the purpose of disposal of the present appeals are that respondent no. 1 is an industrial unit which started its commercial production on 26th March, 1995 and the unit was energised on 16th September, 1995. D

4. The Government of Kerala under its GO dated 6th February, 1992 granted certain incentives in respect of electricity for new industrial units starting commercial production between 1st January, 1992 and 31st December, 1996 for a period of 5 years in regard to payment of enhanced rate of tariff which came into effect from 1st January, 1992. E

5. In the first round of litigation, the dispute that arose was as to whether the respondent (industrial unit) is entitled to claim benefit of incentive from the date of commercial production i.e. 26th March, 1995 or from the date of energisation i.e. 16th September, 1995 for a period of 5 years, but the Division Bench of the High Court under its judgment dated 18th January, 2005 held that the crucial date in terms of the GO issued by the Government of Kerala dated 6th February, 1992 is the date of commencement of commercial production and the respondent (industrial unit) started its commercial production on 26th March, 1995 and accordingly while disposing of the petition filed at the instance of the respondent herein returned a finding that the date of commercial production in respect of the respondent (industrial unit) is 26th March, 1995 and the claim for concessional tariff for a period upto 16th September, 2000 based on the date of energisation came to be rejected. The operative part of the Order dated 18th January, 2005 is referred hereunder:- F

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- A “We are of the view, crucial date is date of commencement of commercial production. Certificate produced by the petitioner would show the date of commencement of commercial production on 26.03.1995. In the above circumstances, the claim of the petitioner for concessional tariff for a period up to 16.09.2000 cannot be granted.”
- B 6. It reveals from the record that after dismissal of the writ petition by judgment and order dated 18th January, 2005, a review application was filed by the respondents and it was prayed that instead of the date of commencement of commercial production, date of energisation has been considered by the Kerala State Electricity Board (hereinafter referred to as “the Board”) granting concession to other industrial units. Taking note of the statement made by the respondent (industrial unit), the review petition came to be disposed of by an order dated 8th March, 2007 granting liberty to the respondent (industrial unit) to file a representation before the Board, if so advised.
- D 7. Against the aforesaid orders, the appellants filed Special Leave Petition (Civil) No.13408 of 2007 before this Court which came to be dismissed by an order dated 20th February, 2009.
- E 8. In view of the liberty granted by the Division Bench of the High Court while disposing of the review application by order dated 8th March, 2007, representation was filed by the respondent (industrial unit) and that came to be rejected by the Board by a self-contained reasoned order dated 31st August, 2007.
- F 9. That gave a fresh cause of action and a writ petition came to be preferred at the instance of the respondents. The only contention advanced and persuaded the learned Single Judge of the High Court in the second round of litigation was that a benefit of 5 years’ exemption for enhanced power tariff has been granted to another industrial unit, M/s Patspin India Ltd., from the date of energisation and accordingly it was directed that the respondent(industrial unit) is also entitled to claim the benefit of 5 years’ exemption of enhanced power tariff from the date of energisation. The writ petition was disposed of by the learned Single Judge by an order dated 19th September, 2017. The extract of the order of the learned Single Judge is reproduced herein:
- H “4. Therefore, this Court is of the view that the Board is not justified in declining the request of the petitioner. Holding that the petitioner

is also entitled for the benefit of five years' exemption of enhanced power tariff from the date of energisation, the writ petition is allowed. The excess amount shall be refunded to the petitioner within a period of four months. It is open for the respondents to adjust the excess amount received from the petitioner from the future bills by passing appropriate orders in regard to the same. No costs."

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10. The aforesaid order came to be challenged by the appellants in writ appeal before the Division Bench of the High Court and that came to be dismissed by the judgment and order dated 22nd November, 2018 on the premise that since the Board had taken a different view in the case of M/s Patspin India Ltd. where the concession has been extended from the date of energisation to the unit rather than from the date of commercial production, finally upheld order of the learned Single Judge holding that the respondent(industrial unit) is entitled for the concession as being granted to M/s Patspin India Ltd. and that makes the respondent (industrial unit) entitled to the benefit of concession for 5 years from the date of energisation.

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11. After the writ appeal came to be dismissed, a review application was filed at the instance of the present appellants and at this stage, it was brought to the notice of the High Court that claim of the respondent (industrial unit) was based on the plea that other industrial unit (M/s Patspin India Ltd.) has been granted certain benefits from the date of energisation, but the order in the case of M/s Patspin India Ltd. has been withdrawn by the Board by its order dated 22nd November, 2001 and once the very foundation on which the respondent (industrial unit) claimed concession of 5 years from the date of energisation loses its effect/stands demolished, the judgment granting benefit to the industrial unit from the date of energisation deserves to be recalled, but the review application came to be dismissed by Order dated 29th July, 2019 on the premise that the benefit once extended to M/s Patspin India Ltd. even has been reviewed by the Board, that in itself will not efface the finding of the judgment and that became the subject matter of challenge at the instance of the appellants before this Court. Extract of order dated 22nd November, 2001 pursuant to which concession to M/s. Patspin India Limited was withdrawn from the date of energisation is reproduced hereunder:-

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“O R D E R

- Based on the G.O., B.O & Certificate issued by the Kerala State Industrial Development Corporation referred 1, 2 & (3) above, sanction was accorded vide reference (5) by the Financial Adviser & Chief Accounts Officer, K.S.E. Board, extending the benefit of concessional tariff (Pre-92 tariff) to M/s. Patspin India Limited, Kanjikode, for a period of 5 years from 01.4.94 to 31.3.99. The Board vide order referred to (6) above has accorded sanction to extend the concessional tariff for the period where there was 50% or more power cut to the eligible consumers. As such, M/s. Patspin India Ltd., Cons. Code No. 26/2662, is also eligible for the extension of concessional tariff to compensate the period of power cut of 214 days. While going through the certificate dated 15.10.1994 issued by the Kerala State Industrial Development Corporation, it has been observed that the actual date of commencement of commercial production as per item 9 of the certificate is 18.01.94 (with using D.G. set). Period of concession to be given as per item 10, is 01.04.94 to 31.03.99. (For 1000 KVA) & from 01.08.94 to 31.07.99 (for 2500 KVA).
- As per G.O referred to (1) above, vide para 1(1), it is clearly mentioned that incentive as per the G.O is “to the units from the date of commercial production which start such production between 01.01.92 to 31.12.96”. Since the date of Commercial Production is 18.01.94. M/s Patspin India Limited, Cons. Code No. 26/2662 is eligible for 5 years concessional tariff from the date of commercial production, i.e., from 18.01.94 to 17.01.1999.
- As such the proceedings of the Financial Adviser and Chief Account Officer Dtd. 11.11.94 referred (5) above is modified and the consumer is eligible for Pre-92 tariff from 18.01.94 to 17.01.99.
- Sanction is hereby accorded to extend to benefit of concessional tariff for 214 days to compensate the period where there was 50% and more power cut from 01/96 to 12/97, from 18.01.99 to 19.08.99. The invoice for the above period will be revised and the excess collected, if any, will be adjusted.
- The order read as fifth paper above stands modified to the above extent.”
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12. It is further brought to our notice that apart from the controversy which was raised by the respondent (industrial unit) claiming parity in respect of concessional tariff granted to M/s Patspin India Ltd., a further objection was raised that the respondent(industrial unit) is also entitled for extension of the period of application of pre-1992 tariff at least for the period where there was 50% or more power cut in terms of the Board's Order but that has not been extended to the respondent (industrial unit) herein, the extension of the period of application pre-1992 tariff was from 26th March, 2000 to 26th October, 2000 so as to cover the period where there was 50% or more power cut, has been extended to the respondent (industrial unit) as per the Board's order dated 18th October, 2000 (Ann.P-5). A

13. Learned counsel for the appellants submits that once the parity which was claimed by the respondent (industrial unit) with M/s Patspin India Ltd. has been withdrawn by the appellant Board by order dated 22nd November, 2001 and it was noticed by the Division Bench of the High Court at the stage when review application was filed at the instance of the present appellants, in the given circumstances, the finding which has been returned in extending the concessional tariff to the respondent (industrial unit) for 5 years from the date of energisation is not legally sustainable. B

14. Learned counsel further submits that so far as the Government Order dated 6th February, 1992 is concerned, the new industrial unit starting production between 1st January, 1992 and 31st December, 1996 was entitled to claim exemption from enhanced power tariff for a period of 5 years from the date it started commercial production and in the instant case, the date of commercial production in reference to the respondent (industrial unit) herein admittedly was 26th March, 1995 and that was noticed by the Division Bench of the High Court in the first round of litigation and after the date of commercial production being settled, the exemption from enhanced power tariff has been extended to the respondent (industrial unit) for 5 years from the date unit started commercial production in terms of GO dated 6th February, 1992. More so, after the order came to be passed on 22nd November, 2001, benefit in favour of M/s Patspin India Ltd. being withdrawn, there remain no factual foundation on the basis of which the parity by the respondent (industrial unit) could have been claimed. In the given circumstances, the judgment passed by the Division Bench of the High Court is not legally sustainable and deserves to be set aside. C

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- A 15. Per contra, learned counsel for the respondents, on the other hand, while supporting the finding returned by the Division Bench of the High Court under the judgment impugned submits that even taking note of the order of withdrawal dated 22nd November, 2001, the respondent (industrial unit) was entitled for concessional tariff for 214 days to compensate the period when there was 50% or more power cut, in the manner as extended to M/s Patspin India Ltd., which is indicated in the order dated 22nd November, 2001 relied upon by the Board. The present respondent (industrial unit) is also entitled for the extension of concessional tariff to compensate the period of power cut for 214 days as extended to M/s Patspin India Ltd. in terms of the order dated 22nd November, 2001.
- B 16. Learned counsel further submits that if the period of commercial production in the case of the respondent (industrial unit) is taken from 26th March, 1995 which may be effective for a period of 5 years upto 25th March, 2000, the period which is subsumed within 5 years from the date of commercial production, at least the respondent (industrial unit) is entitled for extension of the period of application of pre-1992 tariff for further 214 days where there was 50% or more power cut, as per the orders of the Board from time to time and this has not been considered by the Board even while the orders passed in the case of the present respondent (industrial unit) dated 18th October, 2000. In support of his submissions, learned counsel has placed reliance on the judgment of this Court in *S.V.A. Steel Re-Rolling Mills Limited and Others vs. State of Kerala & Others*¹.
- C 17. We have heard learned counsel for the parties and with their assistance perused the material on record.
- D 18. It is not disputed that enhanced power tariff became effective from 1st January, 1992 and the Government of Kerala came with the GO dated 6th February, 1992 to provide exemption from enhanced power tariff to new industrial units starting commercial production between 1st January, 1992 and 31st December, 1996 for a period of 5 years from the date the unit started commercial production.
- E 19. In the case of the present respondent (industrial unit), admittedly the date to start commercial production was 26th March, 1995 and thus the respondent (industrial unit) was entitled for exemption from enhanced power tariff upto 25th March, 2000. Indisputedly, the exemption from
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- F 1(2014) 4 SCC 186

enhanced power tariff for 5 years from the date of commencement of commercial production was extended to the respondent (industrial unit). A

20. So far as the claim in the second round of litigation seeking parity with another industrial unit i.e. M/s Patspin India Ltd. is concerned, the date of energisation has been considered to be the touchstone for granting exemption from enhanced power tariff for a period of 5 years in terms of GO dated 6th February, 1992 but the very foundation on which the respondent (industrial unit) proceeded, stands nullified after passing of the order dated 22nd November, 2001 withdrawing the benefit of exemption from enhanced power tariff from the date of energisation to industrial unit (M/s Patspin India Ltd.) remained unchallenged and this being the error apparent on the face of record, the finding which has been returned by the Division Bench of the High Court holding that withdrawal of exemption in the case of M/s Patspin India Ltd. will not efface the finding recorded in the impugned judgment in exercise of its jurisdiction under Article 226 of the Constitution read with Order 47 Rule 1 CPC, in our view, does not hold good and is not sustainable in law. B

21. That apart, it was nowhere the case of the respondent (industrial unit) that the benefit seeking exemption from enhanced power tariff as being granted by the Government under its GO dated 6th February, 1992 from the date of production or other benefits extended to new industrial units started commercial production between 1st January, 1992 to 31st December, 1996 has not been extended to the respondent (industrial unit). What being prayed for is something which does not emerge/contemplate from the GO dated 6th February, 1992 and after the order has been withdrawn in the case of M/s Patspin India Ltd. with whom parity was claimed by order of the Board dated 22nd November, 2001, no negative equality would have been claimed by the respondent taking aid of Article 14 of the Constitution. C

22. So far as the submission which has been made before us in claiming the benefit of concessional tariff for 214 days for a period where there was 50% or more power cut is concerned, although this was not a subject matter of challenge before the High Court but that apart, the order has been placed on record where the benefit of 214 days was extended to the present respondent (industrial unit) as well, as it reflected from the order dated 18th October, 2000 (Ann. P-5) granting extension for the period of pre-1992 tariff to the respondent (industrial unit) from D

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- A 26th March, 2000 till 25th October, 2000 to cover the period when there was 50% or more power cut, as per Board's Order with a clear indication that it will be applicable only for the energy charge for the contract demand of 500 KV, indeed, it has not subsumed the period of 5 years in terms of GO dated 6th February, 1992.
- B 23. So far as the judgment in *S.V.A. Steel Re-Rolling Mills Limited and Others*(*supra*) on which the learned counsel for the respondent (industrial unit) has placed reliance, deal with the self- same issue for grant of certain benefits of exemption as assured by the Government of Kerala in terms of GO dated 21st May, 1990 followed with GO dated 6th February, 1992 and that being considered in the case of present respondent (industrial unit) of which reference has been made, indeed complied with by the Board by order dated 18th October, 2000.
 - 24. Consequently, the appeals deserve to be allowed and are accordingly allowed. The judgment impugned dated 22nd November, 2018 followed with order dated 29th July, 2019 passed by the High Court of Kerala at Ernakulam are hereby set aside.
 - 25. There shall be no order as to costs.
 - 26. Pending application(s), if any, shall stand disposed of.
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E Nidhi Jain

Appeals allowed.

(Assisted by : Shashwat Jain, LCRA)