

Kerala State Electricity Board vs Hitech Electrothermics & Hydropower ... on 10 August, 2005

Equivalent citations: AIRONLINE 2005 SC 43, (2005) 6 SCJ 51, (2005) 6 SCALE 425, 2005 (6) SCC 651, (2005) 7 JT 485, (2005) 5 SUPREME 599, (2005) 2 WLC (SC) CIVIL 442, (2005) 5 KHCACJ 390 (SC), (2005) 4 JCR 97 (SC), (2005) 33 ALL IND CAS 93 (SC), (2005) 2 WLC(SC) CVL 442, (2005) 33 ALL IND CAS 93, (2005) 7 JT 485 (SC)

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Bench: K.G. Balakrishnan, B.P. Singh

CASE NO.:

Review Petition (civil) 238 of 2003

PETITIONER:

Kerala State Electricity Board

RESPONDENT:

Hitech Electrothermics & Hydropower Ltd.and others

DATE OF JUDGMENT: 10/08/2005

BENCH:

K.G. BALAKRISHNAN & B.P. SINGH

JUDGMENT:

J U D G M E N T REVIEW PETITION (CIVIL) NO. 238 OF 2003 IN CIVIL APPEAL NO.8322 OF 2001 B.P.Singh, J.

This review petition has been preferred by the Kerala State Electricity Board under Article 137 of the Constitution of India seeking review of the judgment and order of this Court dated December 17, 2002 passed in Civil Appeal No. 8322 of 2001 whereby this Court set aside the judgment and order of the Kerala High Court and partly allowed the appeal preferred by the respondent herein.

Briefly stated the facts of the case are that the respondent herein claimed benefit of the Industrial Policy announced by the Government of Kerala offering the concessional rate of tariff and electricity duty to new industries for a period of five years from the date of commercial production, if the production commenced between 1.1.1992 to 31.12.1996. Admittedly the respondent herein did not commence commercial production before the specified date, but its case was that the respondent had done all that was within its control and applied to the Kerala State Electricity Board in good time. However, the supply of electrical energy was not commenced till October 22, 1998. It was the

case of the respondent that it was entitled to the benefit of concessional rate of tariff and electricity duty under the aforesaid Industrial Policy of the Government, since it could not be blamed for delay in commercial production if that was on account of latches and inaction on the part of the Kerala State Electricity Board which did not commence supply of electrical energy till October 22, 1998. The respondent filed a writ petition before the High Court of Kerala at Ernakulam being O.P. No. 30179 of 1999. A learned Judge of the High Court by his judgment and order dated December 21, 2000 dismissed the writ petition holding that since the respondent had not started commercial production before the date specified in the Government's policy, it was not entitled to the benefit of the concessional rate of tariff and electricity duty under the said policy. It further held, on a consideration of the evidence on record, that the respondent had failed to establish that it was solely due to the fault of the Electricity Board that the respondent could not commence production before 31st December, 1996.

The respondent herein preferred an appeal before a Division Bench being W.A. No. 820 of 2001 which was disposed of by judgment and order of April 6, 2001. The appeal preferred by the respondent was dismissed. The appellate Bench took the view that if the commercial production was not commenced within the period specified in the Industrial Policy of the Government, the industrial unit could not claim the benefit of concessional tariff. Rejecting the contention of the respondent that it was on account of the fault of the Board that it could not start commercial production before 31st December, 1996, it held that the Electricity Board and the Government are only concerned with its promise under the Industrial Policy. It was not necessary for the Government or the Electricity Board to find out whether the company could have started commercial production before the cut off date or whether there was any fault on the part of the respondent for not having started the commercial production before the cut off date. It observed :-

"We are not going to find out on whose side the fault was. Even if we accept for arguments sake that there was delay on the part of the Electricity Board to supply electrical energy that does not compel the Electricity Board to apply the notification to the petitioner, when the commercial production is started only after the cut off date. There is no question of estoppel or legitimate expectation arising here. Of course, it is not unfortunate that a company which wanted to avail of the tariff concession was not able to do so due to the delay in having the electric connection. As we have already stated, supply of electrical energy depends on many factors. In the above view of the fact, it is not necessary to go into and discuss about the question of promissory estoppel or legitimate expectation or whether the writ is maintainable. According to us, to get the benefit of Ext.P7, what is necessary is to find out whether the commercial production has been started between the dates mentioned in Ext.P7. If the commercial production could be started within the cut off date, it is not necessary to go behind the reason why it could not be started."

The respondent preferred Civil Appeal No. 8322 of 2001 before this Court wherein it was contended by the respondent that the delay in commencing commercial production was solely on account of the inaction of the Electricity Board which did not supply electrical energy to the respondent till October 22, 1998, even though it was ready to receive the said electrical energy and had applied for

the same well within time.

On the other hand learned Additional Solicitor General appearing for the State of Kerala and the Kerala State Electricity Board vehemently contended before this Court that the language of the policy was unequivocal and such policy clearly stipulated that only those units which started commercial production between 1.1.1992 and 31.12.1996 were entitled to the concessional tariff indicated in the policy. The respondent having failed to do so could not claim such benefit under the Industrial Policy. It was also contended that even if there have been some laches on the part of the Electricity Board in its failure to provide power connection in time, the same was not one sided and the respondent itself was not in a position to start commercial production within the stipulated date. Having urged these contentions, learned Additional Solicitor General appearing for the State and the Electricity Board responded to the suggestion from the Court that the appeal may be disposed of on equitable consideration by reducing the period for which concessional tariff could be given to the respondent.

This Court after examining the Industrial Policy came to the conclusion that in terms of the said Policy the concessional tariff could be availed of only by industrial units which started commercial production between 1.1.1992 to 31.12.1996. To this extent it accepted the submission urged on behalf of the State and the Electricity Board. However, the Court further considered the question whether the respondent could not commence commercial production on account of delay and laches on the part of the Electricity Board. It noticed the fact that power allocation had been made in favour of the respondent as early as in the year 1995, yet electrical energy could not be supplied on account of which commercial production could not commence in the factory of the respondent by 31st December, 1996. This Court further considered whether it would be equitable to deny relief to the respondent by giving a literal interpretation to the incentive scheme of the Government, as adopted by the Electricity Board. In this context this Court considered documents on record which were produced before the Court and reached the conclusion that the respondent had been communicating with the Board seeking power connection at an early date so that it could start commercial production by December 31, 1996. It had also brought to the notice of the Board that it had made all other arrangements to commence commercial production but there was inaction on the part of the Electricity Board in providing electrical energy to the respondent. This Court also noticed the contents of a letter of the respondent on which considerable reliance was placed by the Electricity Board which contended that having regard to the contents of the aforesaid letter, it was apparent that the respondent could not possibly commence commercial production by December 31, 1996. This contention was rejected by this Court. In the given circumstances this Court held that the respondent was atleast entitled to concessional tariff for a period of 3 years instead of 5 years as indicated in the Industrial Policy as that would meet the ends of justice.

Mr. T.L. Viswanatha Iyer, learned senior counsel appearing on behalf of the Kerala State Electricity Board has taken us through several letters which were on record and argued before us that having regard to the correspondence exchanged between the parties it is apparent that there was no material before this Court to hold that the respondent was ready in all respects to receive electrical energy before the specified date. This Court was, therefore, not right in granting relief on equitable consideration since the respondent did not fulfil the condition precedent for claiming benefit under

the Industrial Policy. On the other hand Dr. A.M. Singhvi, learned senior counsel appearing on behalf of the respondent submitted that there is correspondence on record which would establish that the respondent was ready for commissioning of its plant and going into commercial production, but on account of delay and latches as well as inaction on the part of the Electricity Board it could not do so. This Court was, therefore, justified in granting limited relief on equitable consideration.

It was also urged on behalf of the Electricity Board that learned counsel appearing on behalf of the Board made a concession which he had no authority to make. The respondent on the other hand contended that the learned counsel appearing on behalf of the Board did not make any concession and vehemently contested the matter before this Court. The submission made by him regarding grant of relief on equitable consideration was only in the alternative i.e. in case his contention on merit did not find favour with this Court. He also relied upon several decisions of this Court holding that a review petition cannot be treated as an appeal in disguise.

Having heard them at length, we are of the considered view that this review petition must be rejected. While it is true that a forceful argument has been advanced by the Electricity Board on the basis of the correspondence exchanged between the parties, at the same time learned counsel for the respondent has also brought to our notice some other letters which formed part of the correspondence between the parties, which tend to support his plea that the respondent was ready and prepared to accept the supply of electrical energy but the same was not given promptly by the Electricity Board.

This Court has referred to several documents on record and also considered the documentary evidence brought on record. This Court on a consideration of the evidence on record concluded that the respondent had been denied power supply by the Board in appropriate time which prevented the respondent from starting the commercial production by December 31, 1996. This is a finding of fact recorded by this Court on the basis of the appreciation of evidence produced before the Court. In a review petition it is not open to this Court to re-appreciate the evidence and reach a different conclusion, even if that is possible. Learned counsel for the Board at best sought to impress us that the correspondence exchanged between the parties did not support the conclusion reached by this Court. We are afraid such a submission cannot be permitted to be advanced in a review petition. The appreciation of evidence on record is fully within the domain of the appellate court. If on appreciation of the evidence produced, the Court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. It has not been contended before us that there is any error apparent on the face of the record. To permit the review petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise.

We are also of the view that learned counsel appearing for the Board made no concession before this Court. A mere perusal of the judgment of this Court discloses that he urged all submissions on behalf of the Board with great vehemence. There is an observation in the judgment which is as follows :-

"Mr. Rohtagi, however to the suggestion from the Court finally agreed that the appeal can be disposed of on equitable consideration by this Court by reducing the period for which concessional tariff could be given to the appellant".

This observation cannot be read in isolation because we find that thereafter this Court proceeded to examine the Industrial Policy of the Government and came to its conclusions on the basis of its analysis of the policy and the evidence on record. We do not find that the judgment of this Court proceeds on any concession made by learned counsel appearing on behalf of the Electricity Board.

We, therefore, find that the review petition lacks merit and the same is accordingly dismissed.