

Cochin State Power And Light ... vs State Of Kerala on 25 February, 1965

Equivalent citations: 1965 AIR 1688, 1965 SCR (3) 187, AIR 1965 SUPREME COURT 1688

Author: R.S. Bachawat

Bench: R.S. Bachawat, J.C. Shah

PETITIONER:

COCHIN STATE POWER AND LIGHT CORPORATION LTD.

Vs.

RESPONDENT:

STATE OF KERALA

DATE OF JUDGMENT:

25/02/1965

BENCH:

BACHAWAT, R.S.

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BACHAWAT, R.S.

SUBBARAO, K.

SHAH, J.C.

CITATION:

1965 AIR 1688

1965 SCR (3) 187

ACT:

India Electricity Act, 1910, s. 6(1)(2) and (4)--Scope of.

HEADNOTE:

The appellant held a licence for the supply of electrical energy in Kerala which was granted for a period of 25 years, and was subject to continuation for ten-year terms in the absence of a notice by the local authority or State Government of an election to purchase the undertaking. The first 25-year term of the licence expired on December 2, 1960, and prior to that, on October 24 and again on October 29, 1959, the State Electricity Board gave notice to the appellant under s.6(1) of the Indian Electricity Act, 1910, to purchase the under taking on the expiry of the licence. On November 20, 1959, the State Government also served notice

on the appellant of its election to purchase the undertaking on December 2, 1960.

In November 1960, the appellant filed a writ petition in the High Court seeking orders restraining the State Electricity Board and the respondent State Government from taking any action pursuant to the notices given by them. In the course of the hearing the petition the State Electricity Board waived and abandoned all its rights of purchase of the Undertaking. The writ petition thereafter dismissed and it was held that the State Government was entitled to take further steps under its notice dated November 20, 1959. An appeal against this decision to a Division Bench of the High Court was dismissed.

In the appeal to the Supreme Court, the appellant contended, inter alia, that the State Electricity Board having duly elected under 6(1) to purchase the undertaking on the expiry of the licence, the State Government acquired no option of purchase under s. 6(2) the 1910 Act.

HELD: Any option of purchasing the undertaking on the expiry of the period of 25 years specified in the licence under s. 6(1) vested in the State Electricity Board, and as the Board duly elected to purchase the undertaking by the notice served on the appellants, the State Government acquired no right or option of purchasing the undertaking under s. 6. [193 G-H]

As s. 6 came into force less than eighteen months before December 2, 1960, it was impossible for the Board to have given notice to the State Government as required by s. 6(4) of its intention to exercise the option. On the principle of *lex non cogit ad impossibil* must therefore be construed as not being applicable in the circumstances of the case, so elected not to purchase the undertaking under s. 6(4). [193 E-F]

JUDGMENT:

CIVIL, APPELLATE JURISDICTION: Civil Appeal No. 897 of 1963.

Appeal from the judgment and order dated October 4, 1962 of the Kerala High Court, Ernakulam, in Writ Appeal No. 17 of 1962.

A.V. Viswanatha Sastri, Arun B. Saharaya and Sardar Bahadur, for the appellant.

V.P. Gopalan Nambiar, Advocate-General for the State Kerala and V.A. Seyid Muhammad, for the respondent. The Judgment of the Court was delivered by Bachswat, J. The short question in this appeal is whether the proposed acquisition of the electrical supply undertaking of the appellant by the State of Kerala in pursuance of the notice Ex. G, dated November 20, 1959 is authorised by s. 6 of the Indian Electricity Act, 1910. The appellant is the holder of a license for the supply of electrical

energy in Ernakulam and other places in Cochin. The license was originally granted to the managing agents of the appellant under the Cochin Electricity Regulation III of 1902 then in force in Cochin and subsequently assigned to the appellant with the permission of the Cochin Government. On the merger of Travancore-Cochin with the Union of India, the Indian Electricity Act, 1910 was made applicable by the Part-B States Laws Act, 1951 (Act III of 1951) to the Travancore-Cochin area, and the Cochin Electricity Regulation stood repealed. The Electricity (Supply) Act, 1948 (Act 54 of 1948) was also made applicable to the Travancore-Cochin area by the Part-B States Laws Act, 1951. On March 31, 1957 the Kerala Electricity Board was constituted, and by s.71 of Act 54 of 1948, any right and option to purchase the undertaking of the licensee under the Indian Electricity Act, 1910 was transferred to and vested in the Board. Now, the right or option to purchase the undertaking of a licensee under s.7(1) of the Indian Electricity Act, 1910 then in force was exercisable "on the expiration of such period, not exceeding fifty years, and of every such subsequent period, not exceeding twenty years as shall be specified in this behalf in the license." Sub-section (4) of s.7 provided:

"Not less than two years' notice in writing of any election to purchase under this section shall be served upon the licensee by the local authority or the State Government, as the case may be."

Clause 15(a) of the license held by the appellant provides:

"The option of purchase given by Section 7, sub-section (i) of the Regulation shall first be exercisable on the expiration of 25 years from the commencement of this license and on the expiration of every subsequent period of ten years during the continuance of this license."

Section 7(1) of the Indian Electricity Act, 1910 corresponds to s. 7(i) of the Regulation, that is to say, of the Cochin Electricity. Regulation. The date of the commencement of the license is December 3, 1935. The period of 25 years mentioned in el. 15(a) of the license expired on December 2, 1960. The last date for giving the two years notice of the election to purchase on, the try of December 2, 1960 required under s. 7(4) of the Indian e electricity Act, 1910 expired on December 2. 1958. On February 11, 1959, the State Electricity Board served on the appellant a notice, Ex. B, of its election to purchase the undertaking of, the appellant on the expiry of December 2, 1960, but this notice was not being in accordance with s. 7,(4) was of no legal effect.

By the Indian Electricity (Amendment) Act, 1959 (Act 32 1959), s.6 now in force was substituted for the old s.7 of the Indian Electricity Act, 1910, with effect from September 5, 1959. Section 6 of the Indian Electricity Act; 1910 now in force reads:

"6. (1) Where a license has been granted to any person not being a local authority, the State Electricity Board shall,--

(a) in 'the case of a license granted' before the commencement of the Indian Electricity (Amendment) Act, 1959, on the expiration of each such period as is

specified in the license; and

(b) in the case of a. license granted on or after the commencement of the said Act, on the expiration of such period not exceeding twenty years and of every such subsequent period, not exceeding ten years, as shall be specified in this behalf in the license;

have the option of purchasing the undertaking and such option shall be exercised by the State Electricity Board serving upon the licensee a notice in writing of not less than one year requiring the licensee to sell the undertaking to it at the expiry of the relevant period referred to in this sub-section.

(2) Where a State Electricity Board has not been constituted, or if constituted, does not elect to purchase the undertaking, the State Government shall have the like option to be exercised in the like manner of purchasing the undertaking.

(3) Where neither the State Electricity Board nor the Government elects to purchase the undertaking, any authority constituted for an area within which the area of supply is included shall have the like option to be exercised in the like manner of purchasing the undertaking. (4) If the State Electricity Board intends to exercise the option of purchasing the undertaking under this it shall send an intimation in writing of such intention to the State Government at least eighteen months before the expiry of the relevant period referred to in subsection (1) and if no such intimation as aforesaid is received by the State Government the State Electricity Board shall be deemed to have elected not to purchase the undertaking. (5) If the State Government intends to exercise the option of purchasing the undertaking under this section. shall send an intimation in writing of such intention to the local authority, if any, referred to in sub-section (3) at least fifteen months before the expiry of the relevant period referred to in sub-section (1) and if no such intimation as aforesaid is received by the local authority. the State Government shall be deemed to have elected not to purchase the undertaking.

(6) Where a notice exercising the option of purchasing the undertaking has been served upon the licensee under this section, the licensee shall deliver the undertaking to the State Electricity Board, the State Government or the local authority, as the case may be, on the expiration of the relevant period referred to in sub-section (1) pending the determination and payment of the purchase price.

(7) Where an undertaking is purchased under this section, the purchaser shall pay to the licensee the purchase price determined in accordance with the provisions of sub-section (4) of section 7A."

On October 24, 1959, the State Electricity Board served upon the appellant a notice Ex. D, of its election to purchase the undertaking on the expiry of December 2, 1960. On October 29, 1959, the State Electricity Board served upon the appellant another notice, Ex. E, of its election. On November 20, 1959, the State Government served upon the appellant a notice, Ex. G, of its election to purchase the undertaking on the expiry of December 2, 1960. On November 14, 1960, the appellant filed a writ petition in the High Court of Kerala impleading the State of Kerala and the Kerala State

Electricity Board and asking for the issue of appropriate writs and orders restraining them from taking any action pursuant to the notices. Exs. B,D,E and G. On December 20. 1961, a learned single Judge of the High Court passed the following order :

"In view of the representation made before me by both the learned Advocate-General appearing for the State, the 1st respondent, and Mr. Krishnaswami Iyengar, learned counsel appearing for the Kerala State Electricity Board. the second respondent. that for the purpose of this writ petition. the notices issued by the Kerala State Electricity Board, Exs. B. D and E can be ignored, it follows that neither the 1st respondent nor the 2nd respondent has any jurisdiction or power to take any action on the basis Exs. B. D or E. In view of the fact that I am uphold-

ing the action of the State Government, who had issued the notice Ex. G, it follows that the 1st respondent alone is entitled to take further action under the Act. in pursuance of the notice, Ex. G, issued and sent along with the covering letter, Ex. F on 20-11-1959. It follows, subject to what is stated about Exs. B, D and E, that the writ petition has to be dismissed. There will be no order as to costs."

The effect of this order was that the State Electricity Board waived and abandoned all its rights of purchase of the undertaking under the notices, Exs. B, D and E, and neither the Kerala State Electricity Board nor the State of Kerala had any jurisdiction or power to take any action on the basis of those notices, and save as aforesaid, the writ petition was dismissed, and it was held that State Government was entitled to take further action under its notice, Ex. G. Aggrieved by this order, the appellant filed an appeal in the Kerala High Court impleading the State Government only as the party respondent. The State Electricity Board did not file any appeal from the order of the learned single Judge. By its judgment dated October 4, 1962, a Division Bench of the High Court dismissed the appeal. In paragraph 15 of its judgment, Bench observed:

"In its petition the appellant asked for reliefs both against the State Government and the State Electricity Board. However, in the course of the hearing of the petition, the Board gave up its claims under Exts. B. D and E, and only the claim of the State Government under Ext. G was canvassed. The petition was, in effect, allowed: against the Board. The Board has not appealed and is not a party to the present appeal; and its notices may therefore be ignored except to the extent that they may affect the rights of the State Government."

The appellant now appeals to this Court under a certificate granted by the High Court under Arts. 133(1)(a) and 133(1)(c) of the Constitution.

On behalf of the appellant, Mr. Vishwanath Sastry contended that (1) as the two years' notice in writing of. the election to purchase the undertaking on the expiry of December, 2, 1960 was not served on the appellant as required by the old s. 7(4) of the Indian Electricity Act. 1910. the appellant acquired a vested right to hold the license until the expiry of a further period of ten years.that is to say, until December, 2, 1970. and this vested right was not taken away either expressly or by necessary

implication by the new s.6 of the Indian Electricity Act, 1910 introduced by the amending Act 32 of 1958; (2) the expression "on the expiration of each such period as is specified in the license" in the new s.6(1)(a) means a period which has not expired and on the expiry of which the option may be legally exercised. and since in the absence of the two years' notice required under the old s.7(4), the option of purchase on the expiry of December 2, 1960 could not be legally exercised, the new s.6(1) did not confer any option of purchase on the expiry of December 2, 1960 and the first option exercisable under the new s.6(1) would be on the expiry of December 2, 1970; (3) sub-sections (4) and (5) of the new s.6 show that the period on the expiry of which the option under sub-s(1) of s.6 is exercisable, is a period which would expire at least 18 months after the coming into force of the new s.6, that is to say, after September 5, 1959, and since the period expiring on December 2, 1960 is not such a period, the new s.6(1) did not confer any option of purchase on the expiry of December 2, 1960; and (4) in any event, the State Electricity Board having duly elected to purchase the undertaking on the expiry of December 2, 1960, the State Government acquired no option of purchase under sub-s(2) of s.7 of the Indian Electricity Act, 1910. On behalf of the respondent. Mr. V.P. Gopalan Nambiar, the Advocate-General of Kerala, contended (1) that the absence of two years' notice under the old s.7(4) of the Indian Electricity Act, 1910 did not confer upon the appellant a vested right to hold the license until the expiry of December 2, 1970, and the immunity from compulsory purchase under the old s.7 arising from the non-service of the requisite two years' notice could be, and, in fact, was taken away by the new s.6, which required only one year's notice of intention to purchase the undertaking; (2) assuming that the appellant acquired under the old s.7 a vested right to hold the license until December 2, 1970, such vested right was taken away by the new s.6, which expressly applies to licenses granted before its commencement, and the period of 25 years is a period specified in as the license on the expiry of which the option of purchase was legally exercisable; (3) sub-sections (4) and (5) of the new s.6 did not cut down the plain meaning of sub-s(1) of the section and the option on the expiry of the period of 25 years was vested under sub-s(1) of s.6, though this period did not expire 18 months after September 5, 1959; and (4) as the State Electricity Board did not send to the State Government any intimation in 'writing' of its intention to exercise the option on the expiry of December 2, 1960 as required by sub-s(4) of s.6, the Board must be deemed to have elected not to exercise this option, and consequently by sub-S(2) of s.6. the State Government is vested with the option We think that the fourth contention of Mr. Viswanatha Sastry is sound, and should be accepted. Assuming, without deciding, that the option of purchasing the undertaking on the expiry of the period of 25 years specified in the license was available under sub-s(1) of s.6, such option vested in the State Electricity Board, and as the Board duly elected to purchase the undertaking, the State Government acquired no right or option of purchasing the undertaking under s.6. On this ground alone, the appeal should be allowed, and in this view of the matter, we do not think it necessary to express any opinion on the other contentions urged before us. As far as the State Electricity Board is concerned, it has abandoned and waived its option of purchase on the expiry of 25 years.

Sub-section (1) of s.6 expressly vests in the State Electricity Board the option of purchase on the expiry of the relevant period specified in the license. But the State Government claims that under sub-s(2) of s.6 it is now vested with the option. Now, under sub-s(2) of s.6, the State Government would be vested with the option only "where a State Electricity Board has not been constituted, or if constituted, does not elect to purchase the undertaking." It is common case that the State Electricity

Board was duly constituted. But the State Government claims that the State Electricity Board did not elect to purchase the undertaking. For this purpose, the State Government relies upon the deeming provisions of sub-s(4) of s.6, and contends that as the Board did not send to the State Government any intimation in writing of its intention to exercise the option as required by the sub-section, the Board must be deemed to have elected not to purchase the undertaking. Now, the effect of sub-s(4) read with sub-s(2) of s.6 is that on failure of the Board to give the notice prescribed by sub-s(4), the option vested in the Board under sub-s(1) of s.6 was liable to be divested. Sub-section (4) of s.6 imposed upon the Board the duty of giving after the coming into force of s.6 a notice in writing of its intention to exercise the option at least 18 months before the expiry of the relevant period. Section 6 came into force on September 5, 1959, and the relevant period expired on December 3, 1960. In the circumstances, the giving of the requisite notice of 18 months in respect of the option of purchase on the expiry of December 2, 1960, was impossible from the very commencement of s.6. The performance of this impossible duty must be excused in accordance with the maxim, *lex non cogitate ad impossible* (the law does not compel the doing of impossibilities), and sub-s(4) of s.6 must be construed as not being applicable to a case where compliance with it is impossible. We must therefore, hold that the State Electricity Board was not required to give the notice under sub-s(4) of s.6 in respect of its option of purchase on the expiry of 25 years. It must follow that the Board cannot be deemed to have elected not to purchase the undertaking under sub-s(4) of s.6. By the notice served upon the appellant, the Board duly elected to purchase the undertaking on the expiry of 25 years. Consequently, the State Government never became vested with the option of purchasing the undertaking under sub-s(2) of s.6. The State Government must, therefore, be restrained from taking further action under its notice, Ex. G, dated November 20, 1959.

In the result, the appeal is allowed, and the respondent State of Kerala is restrained from taking any action under the notice, Ex. G, dated November 20, 1959. The respondent shall pay to the appellant the costs in this Court. We direct the parties to pay and bear their own costs in the Courts below. Appeal allowed.