

PETITIONER:
THE SPECIAL OFFICER (REVENUE)KERALA STATE ELECTIRCITY BOARD

Vs.

RESPONDENT:
M.R.F. LIMITED

DATE OF JUDGMENT14/12/1995

BENCH:

ACT:

HEADNOTE:

JUDGMENT:

With
CIVIL APPEAL NO. 11833 OF 1995
[Arising out of S.L.P. (C) No. 20785/94]
Kerala State Electricity Board
v.
United Film Exhibitors

With
CIVIL APPEAL NO, 11834 OF 1995
[Arising out of S.L.P. (C) No. 20726/94]
Kerala State Electricity Board
v.
Hotel Luciya and Anr.

With
CIVIL APPEAL NO. 11835 OF 1995
[Arising out of S.L.P. (C) No. 21020/94]
Kerala State Electricity Board
v.
M/s Kokers

With
CIVIL APPEAL NO. 11738 OF 1995
[Arising out of S.L.P. (C) No. 5053/95]
Kerala State Electricity Board
v.
E.M. Jose

JUDGMENT

G.N. Ray, J.

Leave granted in all these five special leave petitions. Heard learned counsel for the parties and the appeals are disposed of by a common judgment in view of the fact that in all these matters common question of law and fact arise.

M.R.F. Limited is the respondent in appeal arising out of S.L.P. No. 16265/1991. The said M.R.F. Limited (hereinafter referred to as the Company) is engaged in manufacturing automobile tubes, tread rubber etc. and the said Company entered into an agreement with the Kerala State Electricity Board (hereinafter referred to as the Board) for supply of electricity to the factory of the said Company. The agreement contained a provision for payment of power and energy supplied to the Company by the Board within 15 days

from the date of the receipt of the invoice by the consumer, namely, the Company. It was further provided for in the agreement that in default of payment within the stipulated time, the payment was to be made with interest @ 18% per annum or at such other percentage as would be fixed by the Board from time to time.

The Board revised the tariffs for the electricity supplied by it in 1980, 1982 and 1984. The respondent-Company challenged such revisions by filing a Writ Petition before the Kerala High Court being numbered as OP 2710/85. Similar Writ petitions were filed by other consumers challenging the upward revisions by the Board. All such Writ Petition were heard along with the Writ Petition filed by the respondent-Company. The Kerala High Court by common judgment dated December 19, 1985, struck down the revisions of tariff by the Board. The respondent-Company and other consumers were, therefore, entitled to the refund of excess amount on account of the payment of revised tariffs. The High Court of Kerala directed that such amount paid in excess would be adjusted towards future bills to be issued by the Board.

The Board, thereafter, moved this Court by filing Special leave petitions inter alia challenging the correctness of the judgment of the Kerala High Court dated December 19, 1985, striking down the revisions of tariffs. Such special leave petition was entertained by this Court and an interim order was passed inter alia directing that pending disposal of the appeals before this Court, there would be stay of the refund of charges already collected. It was further directed by this Court that future charges would be collected to the extent of 50% only and the balance would be adjusted towards the past charges. The respondent Company paid 50% of the demands for the months of March to June 1986 and adjusted 50% of the balance towards the refund due to them. Similar appeals were also preferred by the State Electricity Board against other consumers whose Writ Petitions were disposed of by the said common judgment by the Kerala High Court. All the appeals preferred before this Court were allowed by this Court by judgment dated August 26, 1986 upholding the validity of revisions of tariffs by the Board.

In view of the said decision of this Court dated August 26, 1986 upholding the tariff revisions by the Board, the respondent-Company and other consumers became liable to pay the amounts due on the basis of revisions of tariff including the amounts since adjusted by them in the manner indicated hereinbefore.

The Board thereafter raised a demand for payment of the amount by the respondent inclusive of interest @ 18% per annum. The respondent-Company did not challenge the liability to pay the excess amount in view of the revisions of tariffs but it refused to pay interest as demanded by the Board and such claim of interest by the Board was challenged before the Kerala High Court by filing a Writ Petition numbered as OP 7686/86. The learned Single Bench disposed of Writ Petition by holding that the demand for interest comprised in the demand notice (Ext. P.2) was not justified and the demand for interest of a sum of Rs.6,60,615/- as contained in Ext. P.2 was quashed. The Board thereafter preferred an appeal. Such appeal was numbered as W.A. No.49/91. It was inter alia held by the Division Bench in disposing of the said appeal by its judgment dated February 27, 1991, that after the Kerala High Court had struck down the revisions of tariffs and directed adjustment of the excess amount paid towards future demands, the respondent

was justified in not making payment of amounts which became due after December 19, 1985. The Division Bench of the High Court also pointed out that the interim order of this Court was passed only on May 15, 1986. In the aforesaid circumstances, it could not be contended by the appellant-Board that the respondent-Company had not complied with the directions of this Court. It could not also be contended, therefore, that the respondent-Company had defaulted in payment of 50% of the future bills as directed to be paid by this Court. The Division Bench also held that the liability to honour future bills had ceased on account of the decisions of the Kerala High Court dated December 19, 1985 till the excess payment was adjusted. It was also indicated by the Division Bench that even before such adjustments had been fully made, this Court passed interim order and the respondent-Company had complied with such interim order. The Division Bench, therefore, held that there was no enforceable demand after the decision of the Kerala High Court and the interim order passed by this Court. The Division Bench agreed with the view of the learned Single Bench that the respondent-Company could not be held to have defaulted for non-payment of liability which did not factually exist at the relevant time. The finding of the learned Single Judge that there was no default on the part of the respondent-Company, as there was nothing to hold that the respondent-Company defaulted on account of its failure to pay was accepted. Hence, the order quashing the demand for the interest as contained in Ext. P. 2 of the learned Single Bench was held justified. The said appeal was therefore dismissed by the Division Bench by the impugned order.

The demand of the Board for interest on account of the liability arising out of revision of tariffs from other consumers were also challenged before the Kerala High Court. Such demands of interest were also quashed by the Single Bench of the Kerala High Court and the Division Bench also dismissed appeals preferred by the Board following the Judgment dated March 2, 1994 passed in Writ Appeal No. 48/91. Being aggrieved by the aforesaid decisions of the Kerala High Court quashing the demand of payment of interest on account of the liability arising due to revisions of tariffs, the Board moved this Court by filing Special leave petitions out of which the instant appeals arise. As in all these appeals, the same question requires to be decided they have been heard analogously and are being disposed of by this common judgment.

Mr. Poti, learned Senior counsel appearing for the appellants has contended that the upward revisions of tariffs by the Board were challenged by the respondent-Company and other consumers. Initially, they succeeded before the Kerala High Court where such upward revisions of tariffs had been struck down but ultimately the validity of such upward revisions of tariffs has been upheld by this Court. Hence, liability of a consumer of electricity supplied by the Board to pay dues on the basis of the revised tariffs cannot be denied and the respondent-Company has also conceded to such demand. But the respondent-Company is only objecting to its liability to pay interest on the unpaid portion of the bill which is attributable to the upward revision of tariffs. He has submitted that the Kerala High Court, unfortunately, on a total misconception of the fact and the legal position, has held that at the relevant time, when the order of the Kerala High Court striking down the upward revisions of tariffs and subsequently when interim order passed by this Court during the pendency of

the special leave petitions inter alia regulating a scheme of adjustment between the Board and the respondent-Company on the basis of the decision of the Kerala High Court was subsisting, no liability had accrued for the respondent-Company to make payment on the basis of the revised tariffs. Accordingly, question of payment of interest on such unpaid amount also does not arise.

Mr. Poti has submitted that the Kerala High Court has failed to appreciate that the validity of upward revisions of tariffs was finally decided by this Court by disposing of special leave petitions after getting aside the decision of the Kerala High Court that such upward revisions of tariffs were illegal. The interim order by this Court while the special leave petitions were pending for final disposal, was made to safeguard the interest of the parties because the respondent-Company was keen to get back the alleged over payment on account of bills calculated on the basis of revised tariffs since struck down by the Kerala High Court. This Court, therefore, subject to the final decision of the question as to the validity of the upward revisions of tariff in the special leave petition pending before it, passed the said interim order infavour of the respondent-Company so that the alleged over-payment by the respondent-Company would be adjusted without causing undue hardship to the Board.

Mr. Poti has submitted that it must be held that in law such liability was always there because the revisions of tariff were held valid by this Court. He has submitted that because of the erroneous judgment of the Kerala High Court striking down the upward revisions of tariff such liability remained suspended till the correct position in law was finally determined by this Court with which the liability revived with full vigour.

Mr. Poti has submitted that as the liability of the respondent-Company to pay on the basis of the revised tariffs was always there and as such payment had not been made by the respondent-Company by taking advantage of the erroneous decision of the High Court, the respondent-Company should not be permitted to claim any immunity on its liability to pay interest on the unpaid amount of the enhanced bill after the correct legal position was finally determined by this Court. Mr. Poti has submitted that when a party to a legal proceeding has suffered on account of an erroneous adjudication by a Court of law, the court has an imperative duty to restore the party which has suffered on account of such erroneous order, to the position, as far practicable, as would have prevailed, had there been no such erroneous decision of the Court.

In support of this contention, Mr. Poti has referred to a decision of the Privy Council in *Alexander Rodger, Charles Carnie and Richard James Gilman versus The Comptoir D'Escompte De Parid and the Chartered Bank of India, Australia and China* (1871 Law Reports (Privy Council Appeals) 465). In that case, the respondents before the Privy Council brought an action against the defendants-appellants for recovery of a certain sum. An order was passed by the Court at Hongkong for payment of \$56,390.92 as principal and \$6,336.47 as interest with further sum as costs. The defendants thereafter applied for a new trial or for non suit. Such application was refused with costs. Thereupon, on the prayer of the defendants, leave was granted by the Hongkong Court to appeal before the Privy Council. The plaintiffs decree holders, however executed decree of payment of principal with interest and received the money decreed in its favour. Ultimately, the Privy

Council allowed the appeal and in terms of such decision of the Privy Council, it was ordered that the judgment of the Courts below should be reversed and an order of non suit should be entered. In the order passed on the basis of ultimate decision of the Privy Council there was however no specific direction for refund of the entire amount which also included the interest on the principal since realized by the plaintiffs by executing the decree. The defendant thereafter applied for restitution and the Supreme Court of Hongkong held that it had power to direct for payment of all sums and costs that had been paid under the judgment to the plaintiffs but it had no power to order for payment of any interest upon any part of the sum paid over by the defendants to the plaintiffs. In the aforesaid facts, the question which came up for consideration before the Privy Council was whether the Court of Hongkong had or had not the power to order for payment of interest and, if so, whether in this case it was proper to exercise this power? The Privy Council has held in the said decision in Rodger's case that one of the first and highest duty of this Court is to take care that an act of the Court does not cause any injury to any of the suitors and when the expression "the act of the Court" is used, it does not mean that the only act of the primary court or of any intermediary court of the appeal but act as a whole of the Court from the lowest Court which entertains jurisdiction over the matter upto the highest Court which finally dispenses with the case. It has been held by the Privy Council that it is the duty of all these Tribunals to take care that no act of the Court in whole of the proceedings does any injury to the suitors in the Court. The Privy Council has also negated the contention of the plaintiff-respondents that the principal sum and not the interest on it, since recovered by execution, is enforceable by way of restitution.

Mr. Poti has also referred to another decision of the Privy Council in Jai Berham and others versus Kedar Nath Marwari and others (AIR 1922 Privy Council 269). In the said decision, the earlier decision of the Privy Council in Rodger's case was referred to and relied upon and it has been held by the Privy Council that one of the first and highest duties of all the Courts is to take care that act of the Court does not cause injury to any of the suitors. It would be inequitable and contrary to justice that the judgment debtor should be restored the property without making good to the auction purchaser the money which has been applied for his benefit.

Mr. Poti has also referred to another decision of the Privy Council in L. Guran Ditta versus T.R. Ditta (A.I.R. 1935 Privy Council 12). In that case also, the decision in Rodger's case was referred to and it has been held by the Privy Council that the duty of the Court when awarding restitution under Section 144 of the Code of Civil Procedure is imperative. The Court shall place the applicant in the position in which he would have been if the order had not been made and for this purpose the Court is armed with powers. The Privy Council has also indicated that the expression "may" should not be understood as discretionary but it only points out that the Court is empowered to grant mense profits, interest and so forth. The Privy Council has also held that the restitution ordinarily involves interest also and the Court can grant the same.

Mr. Poti has also referred to a Full Bench decision of the Madras High Court in Pappu Reddiar versus P.S.V. Rm Ramanatha Iyer (AIR 1963 Madras 45). The Madras High Court has held that the restitution conceived in the light of

diong justice between the parties will necessarily have to depend on the circumstances of each case and cannot be reduced to the form of inflexible rule that the Courts should have regard only to the detriments suffered by one party and not to the position of the other. The granting of restitution under Section 144 of the Civil Procedure Code should be consistent with justice to both the parties. Where a sum of money is deposited in Court to answer a decree but a restriction is placed to the unconditional withdrawal of the same in terms of the decree by reason of which decree holder is either unable or unwilling to obtain the use of the money, it cannot be taken as invariable rule in such a case that the decree holder should pay interest on the amount lying in Court on the reversal of the trial court's decree in appeal.

Mr. Poti has submitted that in the instant case, the Company had enjoyed the fruits of erroneous decision in its favour inasmuch as the Company not only did not pay on the basis of the revised tariffs but whatever amount had been paid on the basis of the revised tariffs for the earlier period was allowed to be adjusted by the Company against its future liability only on the basis of unrevised tariffs.

Mr. Poti has submitted that such advantage was enjoyed by the Company because the Company had obtained an erroneous decision from the Kerala High Court but when the correct position in law was settled by this Court by holding that the upward revisions of tariffs were fully justified, it was the bounden duty of the respondent-Company to not only pay the unpaid amount of the bill due on account of revisions of tariff but also the agreed rate of interest @ 18% on such unpaid amount. Mr. Poti has submitted that it was highly improper on the part of the Company to deny its liability to pay interest on the unpaid amount of the bill. Mr. Poti has submitted that the respondent-Company being the manufacturing Company and an on going business concern, has gainfully utilised the amount which it did not pay because of the subsistence of erroneous decision passed by the Kerala High Court. But when the question of liability was clearly determined by this Court, the Company had obligation, both moral and legal, to repay the unpaid portion of the bill with interest. Mr. Poti has submitted that the Board is entitled to demand for payment of electricity charges consumed by the Company on the basis of revised tariffs and the Board is also legally entitled to claim payment of interest on such amount by way of restitution. Mr. Poti has submitted that when the respondent-Company moved the Kerala High Court by making an application under Article 226 of the Constitution contending inter alia it had no liability to pay interest on the unpaid portion of the bill due on account of the revisions of tariffs, the High Court failed in its duty in not rejecting the said petition by clearly indicating that such contention was untenable both in law and also in equity and in any event, such claim of the Company being unfair and inequitable, the exercise of writ jurisdiction of the High Court which is not only discretionary but also equitable, was not at all warranted. Mr. Poti has, therefore, submitted that the impugned judgment of the High Court in quashing the bill realised by the Board against the Company to the extent of the interest claimed @ 18%, must be set aside by indicating that the Board is justified in making such claim and the respondent-Company has liability to pay interest @ 18% on the unpaid portion of the bill for the entire period when the amount became due till such date when the principal amount on account of revised tariff has been paid.

Mr. Dholakia, learned senior counsel for the respondent, has, however, disputed the contentions of Mr. Poti. He has contended that the Company had challenged the validity of upward revisions of tariff before the High Court by filing writ petition and on contest, such writ petition was allowed by striking down the upward revisions of tariff. The Board's appeal against such decision was also dismissed by the Division Bench of the High Court. The Board thereafter filed special leave petition before this Court. Although such special leave petition was entertained by this Court, this Court was also not inclined to stay the operation of the impugned judgment of the High Court. On the contrary, proceeding on the footing that in view of the impugned judgment of the High Court, the appellant Board was under obligation to refund the entire excess amount since paid by the Company, this Court passed an interim order in favour of the Board, and to the detriment of the interest of the Company, that claim of refund of excess amount of the Company would be slowly adjusted against future bills drawn against the Company. The Company had not taken any illegal and undue advantage and only on the basis of the decision of the High Court in its favour and in terms of interim order passed by this Court, it paid then recoverable dues on account of the electricity bill and got the claim of refund of the Company slowly adjusted against future bills. If on such facts and circumstances, the High Court has struck down the claim of interest by the Board on the ground that the amount on which interest was claimed was not due and recoverable at the relevant period and the Company cannot be held to have defaulted in payment of any sum on which the interest may be claimed, no exception can be taken to such decision. Mr. Dholakia has submitted that it is not an inflexible rule that in all cases, in order to give effect to restitution, mense profits and damages including interest are to be given.

In this connection, Mr. Dholakia has referred to a decision of Calcutta High Court in Surendra Nath Choudhury Vs. Sultan Ahmed (AIR 1935 Cal. 1206). In the said decision, the High Court has held that where the wrong doers have not been shown to have cultivated the lands but settled the lands with tenants, mense profits can only be calculated on the basis of rental value of the land. In assessing what a party has lost on account of dispossession, the law takes into account not what he could have made but what his opponent did in fact make or could with reasonable diligence have made.

Mr. Dholakia has also referred to a decision of this Court in Income Tax Officer, Kolar and another Vs. Seghu Buchiah Setty (1964 (7) SCR 148). It has been held as per majority decision in this case that on the income tax officer's order being revised in appeal, the default based on it and other consequential proceedings must be taken to have been superseded and fresh proceedings have to be started to realise the dues as formed by revised order. As demand notice was issued on the basis of assessment made by the Income Tax Officer and no fresh notice of demand was issued on the basis of revised assessment made in appeal, the assessee could not have been treated as defaulter and the proceedings of the collector based on the certificate issued by the I.T.O. would be held as illegal. Mr. Dholakia has submitted that even if the Company has a liability to pay on the basis of revised tariffs, since upheld by this Court, it will not be correct to contend that such liability was enforceable from the dates of revisions of tariff and on such premises, the Company may be held defaulter in payment

of excess amount flowing from revisions of tariff and consequently incurring a liability to pay interest on such excess amount. After the High Court struck down the upward revisions of tariff, no claim on such revisions could be made and a consumer had also no liability to pay on the basis of revised tariffs. It was only when this Court had finally decided the question of validity of revisions of tariff in favour of the Board, the liability to pay revived only prospectively from the date of the decision of this Court and not from any earlier period. Mr. Dholakia has submitted that as already indicated, this Court did not pass any interim order of stay of operation of the impugned judgment of High Court so that there was any occasion to proceed on the footing that liability to pay at the revised rates had remained in force. The liability to pay on the basis of revised rates ceased to be operative after the pronouncement by the High Court but became operative after the final decision by this Court. The Company accepting such liability after the decision of this Court has paid the demand on account of enhancement due to revisions of tariff but as the liability for payment of excess amount was enforceable from the date of decision of this Court, it has rightly refused to pay interest on such excess amount claimed on the footing that demand for excess amount was also enforceable from the dates of revision of tariffs.

He has submitted that the High Court is, therefore, fully justified in quashing the memo claiming interest on the excess dues by indication cogent reasons and no interference by this Court is called for. The appeals, therefore, should be dismissed. In other appeals, no new contention has been raised by the parties.

After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned counsel for the parties, it appears to us that revisions of tariff for the electricity charges payable by the Company and other consumers had been struck down by the Kerala High Court. So long such decision was not revised, the same, even though erroneous, remained fully operative. The result was that no bill could be drawn by the Board on the basis of revised rates and even if such bill had in fact been drawn, such bill remained inoperative, during the entire period when the judgment of the Kerala High Court had governed the field. Pendency of appeal before this Court only ensured that the proceedings had not been finally concluded. But in the absence of any interim order of this Court granting stay of operation of the impugned judgment, the judgment of the High Court was binding between the parties to the lis despite pendency of the appeal. Viewed from this aspect, it is quite evident that the Company or for that matter, similarly placed consumers had no obligation to take notice of the revised tariffs and to make any payment on the basis of such revised tariffs. Consequently, the Company cannot be held to be a defaulter for non payment at the enhanced rate during the period when revisions, though made, remained unenforceable on account of the decision of the High Court.

But after the decision of this Court upholding upward revisions of tariffs, the Board's entitlement to draw bills on the basis of upward revisions and consequential enforceability of payment of such bills by the consumers revived with full force. Hence, it would not be correct to contend that although the Company or for that matter other consumers were required to pay on the basis of revisions of tariffs from the dates when such revisions became effective, liability for such payment would accrue only from the date

of pronouncement of the judgment by this Court upholding upward revisions and not from any date prior to that. If the upward revisions are held as valid, enforceability of such upward revisions being consequential to such revisions, though it had remained unenforceable for one period on account of the decision of the High Court, can not but revive from the dates of upward revisions.

There is no manner of doubt it is an imperative duty of the court to ensure that the party to the lis does not suffer any unmerited hardship on account of an order passed by the Court. The principle of restitution as enunciated by the Privy Council in Rodger's case (Supra) has been followed by the Privy Council in later decisions and such principle being in conformity to justice and fair play be followed. It should, however, be noted that in an action by way of restitution, no inflexible rule can be laid down. It will be the endeavour of the Court to ensure that a party who had suffered on account of decision of the Court, since finally reversed, should be put back to the position, as far as practicable, in which he would have been if the decision of the court adversely affecting him had not been passed. In giving full and complete relief in an action for restitution, the court has not only power but also a duty to order for mense profits, damages, costs, interest etc. as may deem expedient and fair conforming to justice to be done in the facts of the case. But in giving such relief, the Court should not be oblivious of any unmerited hardship to be suffered by the party against whom action by way of restitution is taken. In deciding appropriate action by way of restitution, the court should take a pragmatic view and frame relief in such a manner as may be reasonable, fair and practicable and does not bring about unmerited hardship to either of the party.

In the instant case, the company and other consumers though have liability to pay on the basis of revised tariffs, they had not paid on such basis because of erroneous decision of the High Court. Not only they did not pay on the basis of revised tariffs, but they got adjustment of payments already made prior to the decision of the High Court, against future bills to be drawn only on the basis of unrevised tariffs in a phased manner. The Company is an on going business concern and must have utilised the money, saved on account of the decision of the High Court, gainfully in its commercial activities. Similarly, other consumers have gainfully utilised the amount saved for being not required to pay on the basis of revised tariffs. The Board had to suffer financial loss because of the said erroneous decision of the High Court. In the aforesaid circumstances, it will be lawful, conforming to equity and well established principle of restitution for the Board to claim interest at 18% on the unpaid portion of the Bill drawn on the basis of revised tariffs. The Company had agreed to pay interest at 18% on the unpaid portion of the Bill drawn on the basis of revised tariffs. The Company had agreed to pay interest at 18% on the bills if not paid when it became due and payable. Even otherwise, claim of 18% interest per annum also appears to be just and proper. We, therefore, set aside the impugned decisions of the High Court by allowing these appeals. There will be, however, no order as to cost.