

EXECUTIVE ENGINEER, UTTARANCHAL POWER CORPORATION

v.

M/S. KASHI VISHWANATH STEEL LTD. & ORS.

(Civil Appeal No. 1106 of 2007)

MAY 12, 2010

[Harjit Singh Bedi and T.S. Thakur, JJ.]

[2010] 6 SCR 1086

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal by special leave arises out of an order dated 17th January, 2007 passed by the High Court of Uttarakhand at Nainital whereby Writ Petition No.936 of 2001 filed by respondent M/s Kashi Vishwanath Steels Ltd. has been allowed and order dated 7th December, 2001 passed by the Executive Engineer (Electricity) Distribution Division, District Udham Singh Nagar, quashed.

2. Uttar Pradesh State Electricity Board was established by the State of Uttar Pradesh in terms of the provisions of the Electricity (Supply) Act, 1948. With the enactment of Uttar Pradesh Electricity Reforms Act, 1999 the Government constituted Uttar Pradesh Electricity Regulatory Commission. In terms of a Notification dated 7th August, 2000 the Commission stipulated the tariff for the supply of electricity effective from 9th August, 2000. The rate schedule for large and heavy power, inter alia, provided that consumers who opt for power supply during the restricted/peak hours shall pay an additional surcharge of 15% on the amount billed at the "Rate of Charge" under item-4A of the Schedule. It further provided that consumers getting power supply from independent feeders emanating from 400/220/132 KV sub-stations shall pay an additional surcharge of 15% on demand and energy charges subject to the condition that these consumers will get assured electricity supply of minimum 500 hours in a month. In case of shortfall in the guaranteed hours of electricity supply, the consumers were entitled to a rebate @ 1% for each 10 hours shortfall on the bill amount computed under "Rate of Charge". Relevant

portion of the Tariff Rate Schedule HV-2 forming part of Notification dated 7th August, 2000, reads as under:

“

Notes:

(a) In respect of consumers who opt for power supply during restricted/peak hours an additional surcharge of 15% on the amount billed at the “Rate of Charge” under item 4-A above, i.e. Demand Charge and Energy Charge shall be levied.

However, in respect of consumers getting power supply on independent feeders emanating from 400/220/132 KV sub-stations an additional surcharge of 15% on demand and energy charges shall be charged further subject to the condition that these consumers will get an assured supply of minimum 500 hours in a month. In case of short fall in above guaranteed hours of supply a rebate @ 1% for each 10 hours short fall will be admissible on the bill amount computed under “Rate of Charge”.

.....”

3. Respondent- Kashi Vishwanath Steels Ltd. (hereinafter referred to as the ‘KVSL’ for short) is a public limited company registered under the Companies Act. On 9th November, 1995 it had entered into an agreement with Uttar Pradesh Power Corporation Ltd., Lucknow (respondent no.4 in this appeal) for the supply of electrical energy for the production of Furnace and Steel Rolling Manufacturing (Process) unit at Narayan Nagar Kashipur in the form of three phase Alternating Current at a declared pressure of 33000 Volts and a power of not exceeding 4800 K.V. amperes. The said agreement was followed by a fresh agreement executed on 28th March, 2000 between the company and the Uttar Pradesh Power Corporation Ltd., inter alia, providing that the company shall pay for the supply of energy at the rates stipulated by the supplier from time to time and that the rate schedule applicable at the

time of execution of the agreement could be revised at the discretion of the supplier. With the tariff prescribed by the U.P. Electricity Regulatory Commission becoming effective for the supply received by the consumer-company the latter became liable to pay in terms of the said tariff. Some confusion, however, appears to have arisen in regard to the interpretation of the tariff prescribed by the Commission particularly in relation to the levy of 15% surcharge upon consumers who drew power from independent feeders. The Corporation purported to clear the mist by issuing a circular dated 8th September, 2000 whereunder it purported to give certain guidelines to the concerned subordinate officers and demanded strict compliance thereof. The circular, inter alia, provided that if consumers connected to independent feeders did not want electricity supply for the guaranteed period of 500 hours, no such surcharge of 15% could be levied provided they intimate to the Executive Engineer that they do not want the guaranteed supply for 500 hours. The relevant portion of the circular reads as under:

“2.(a) In the rate schedule HV-2, as a result of the guarantee of 500 hours electricity supply of independent feeder from 400, 220 and 132 KV sub stations, 15% surcharge shall be levied. Consumers of this category shall be ensured 500 hours electricity supply per month. Due to lesser electricity supply than 500 hours, they shall be given 1% deduction for every ten hours in their electricity bill. If consumers connected with these independent feeders do not want guarantee of 500 hours electricity supply then, in that event, they shall not be imposed 15% surcharge in their bills. Such consumers shall intimate the Executive Engineer distribution by registered post that they do not want guarantee of 500 hours electricity supply. The Executive Engineer shall issue office memo in this regard. If any consumer of this category does not give any option then he shall be ensured 500 hours electricity supply and 15% surcharge shall be taken. S.S.O./Junior Engineer shall be responsible to ensure that the consumer in question does not use electricity during the restricted

period. If consumers of this category use electricity in the restricted period also then they shall be charged $15+15 = 30\%$ surcharge.”

4. It was pursuant to the above circular that the KVSL addressed two letters one dated 6th October, 2000 and the other dated 16th October, 2000 to the Executive Engineer of the Corporation to the effect that the former did not require the assured supply of electrical energy for 500 hours and that they may not be required to pay surcharge at the stipulated rate of 15%. On receipt of the said letters the Executive Engineer issued an office memo dated 24th October, 2000 granting exemption to the KVSL from payment of 15% surcharge subject to the unit complying with the other conditions stipulated in the memo.

5. In the meantime M/s L.M.L. Limited who had also entered into an agreement with U.P. State Electricity Board for supply of electrical energy for its factory at Kanpur filed Writ Petition No.40692 of 2000 in the High Court of Judicature at Allahabad challenging levy of surcharge on the total energy bill payable by it. The petitioner's case in that petition was that it was not only observing the peak hour restrictions but was not consuming power during the restricted hours hence was not liable to pay the surcharge of 15% being demanded from it. In the reply filed on behalf of the electricity supply company it was on the other hand stated that power was being supplied to the petitioner from an independent feeder emanating from 400/220/132 KVS and consequently the petitioner was liable to pay 15% surcharge under the tariff determined by the U.P. Electricity Regulatory Commission. It was also stated that payment of 15% surcharge by consumers drawing energy from an independent feeder was not subject to the observance of peak hours restrictions because those who consume power between 6 p.m. to 1 p.m. had to pay an additional amount of 1% surcharge on the energy charge.

6. A Division Bench of the High Court of Allahabad dismissed the writ petition mentioned above holding that there was absolutely no confusion of

any kind in the tariff approved by the Regulatory Commission to call for any clarification in the form of the circular referred to earlier. It was also declared that for consumers drawing power from independent feeders emanating from 400/220/132 KVS sub- stations there existed no provision in the tariff prescribed by the Commission requiring them to exercise any option in the matter. The only benefit that the consumers who drew power from such independent feeders but who do not get supply for the minimum 500 hours in a month were granted a rebate @ 1% for every 10 hours or part thereof if the continuous supply had failed. The High Court observed:

“There is absolutely no ambiguity or confusion of any kind in the tariff as approved by the Commission. It clearly contemplates two categories of consumers. One category is of consumers who get power supply on independent feeders emanating from 400/220/132 KV sub stations. The two categories are wholly independent and distinct and they are not inter linked with each other. The third condition mentioned at the bottom of the box clearly shows that a consumer cannot get power supply in restricted hours as a matter of right and he shall have to take permission from UPPCL with intimation to the Commission. It follows that if a consumer does not apply for permission from UPPCL and such a permission is not granted he shall not get power supply in restricted hours and he will not be required to pay 15 per cent surcharge. However, so far as consumers getting power supply on independent feeders emanating from 400/220/132 KV sub stations are concerned, they have to pay 15 per cent surcharge on demand and energy charges. This levy of 15 per cent surcharge is dependent only upon the fact that the consumer is getting power supply on an independent feeder emanating from 400/220/132 KV sub stations and it is not dependent upon getting power supply in restricted hours. It is also noteworthy that for such category of consumers there is no provision for taking any option to the effect that he does not want an assured supply of 500 hours in a month. The only benefit

provided to him in the tariff is that he is assured of supply of minimum 500 hours in a month and in case of shortfall in the guaranteed hours of the supply, a rebate @ 1 per cent 10 hours or part thereof shall be admissible on the total amount computed under "Rate of Charge".

7. Relying upon the view taken by the High Court in the above writ petition the Uttarakhand Power Corporation established upon bifurcation of the U.P. Power Corporation in terms of Section 63 of the U.P. Reorganisation Act issued an order dated 7th December, 2001 withdrawing the exemption granted to KVSL by the erstwhile U.P. State Power Corporation Ltd. The withdrawal order is in the following terms:

"In the aforesaid context, in the light of judgment of the Hon'ble High Court, Allahabad the Uttar Pradesh Power Corporation Ltd. vide order No.1423/HC/UPCL/Five- 1974+204 C/2000 dated 8.9.2000 has been cancelled from the date of its issuance itself. Accordingly, Memo No.3184/Vi.Vi.kha/dated 24.10.2000 is cancelled from the date of issuance 24.10.2000. The bills of M/s Kashiviswanath are ordered to be amended in accordance with the concerned billing tariff since 8.9.2000."

8. Aggrieved by the above order KVSL filed writ petition No.936 of 2001 before the High Court of Uttaranchal challenging Note (a) of Clause IV, Rate-Schedule in Category HV-2 List II of the tariff to be unconstitutional and for quashing the revised bill issued to KVSL. A mandamus directing Uttaranchal Corporation not to levy any surcharge on the supply energy to the consumer was also prayed for.

9. The above petition was allowed by the High Court of Uttaranchal by its order dated 17th January, 2007. The High Court took the view that since the petitioner KVSL did not require assured supply of 500 hours electricity in a month it was not liable to pay 15% surcharge and that the exemption granted by the U.P. Power Corporation Ltd. was valid and in accordance with the provisions of the Notification dated 8th September, 2000. The demand raised

by the Corporation was accordingly struck down. Aggrieved by the said order the Uttaranchal Power Corporation filed Civil Appeal No.1106 of 2007 in this Court which was heard alongwith Civil Appeal No.5789 of 2002 filed by LML Ltd. against the order passed by the High Court of Allahabad dismissing Writ Petition No.40692 of 2000 filed by the said company. Similar other appeals filed by other units against identical orders passed by the High Court of Allahabad were also heard and disposed of by this Court by a common order dated 13th December, 2007. This Court held that in so far as the U.P. Power Corporation had made a promise to anyone of the consumers the same was enforceable. In the case of Uttarakhand Power Corporation, however, this Court found no such promise to have been made to the consumer. Civil Appeal No.1106/2007 filed by the Uttarakhand Power Corporation against the judgment of the High Court of Uttarakhand was accordingly allowed on that basis. In so far as appeals arising out of the judgment of the Allahabad High Court and touching the question of surcharge on consumers drawing power from independent feeders were concerned the same were allowed to be withdrawn in view of the fact that several matters involving the said question were pending before the Regulatory Commission. The appellants were permitted to agitate the said point before the Commission. The relevant portion of the order passed by this Court may at this stage be extracted:

“50. Similarly Uttaranchal Power Corporation also does not appear to have made such a promise. The doctrine of promissory estoppel in those cases also will have no application.

51. In view of the fact that several matters are pending before the Commission on question of independent feeder we need not express any opinion thereupon. If any appeal is pending before the Commission on the said question it would decide the same independent of the same irrespective of the result of this decision. We, therefore, without expressing any opinion on the said question, permit the appellants to agitate the same point before the Commission.

52. We, therefore, allow these appeals only to the extent mentioned hereinbefore in terms of the promise made by U.P. Power Corporation and allow the appeals on question of independent feeder to be withdrawn subject to the observations made by us hereinabove. 53. Civil Appeal No. 5789 of 2002 which relates to Kanpur Electricity Supply Company is dismissed.

54. Civil Appeal No. 1106 of 2007 filed on behalf of Uttaranchal Power Corporation is allowed.

55. There shall, however, be no order as to costs.

SLP (C) No. 6721 of 2007

The only issue involved in this petition is the question of independent feeder and the appeal being pending before the Commission, this special leave petition is permitted to be withdrawn.

Sd/-

(S.B. SINHA)

Sd/-

(HARJIT SINGH BEDI)"

10. I.A.No.2 of 2008 in Civil Appeal No.1106 of 2007 was filed in this Court for seeking clarification/modification of the above order primarily on the ground that the observations made in para 50 are erroneous since Uttarakhand Power Corporation was non-existent during the relevant period. There was according to the applicants no question of any such promise having been made to respondent-KSVL by a non-existent entity. The promise was according to the applicant made by U.P. Power Corporation which was binding upon the Corporation as also its successor in-interest, namely, Uttarakhand Power Corporation after the same came into existence w.e.f. 9th November, 2001. It is further stated that the dispute in the instant case was with regard to the period between September 2000 when the exemption of

surcharge was granted to the consumer and 1st September, 2001 when the same was discontinued.

11. In substance the case of the applicant was that a representation/promise had been made to it by the U.P. Power Corporation which promise having been held enforceable qua other units similarly situated as the applicant, could not be ignored in so far as the applicant was concerned. The promise was according to the applicant binding even upon the successor-Corporation, namely, Uttarakhand Power Corporation and the very fact that no promise was made by Uttarakhand Power Corporation did not make any difference so long as the liability arising out of the promise made by the U.P. State Corporation was clear and legally enforceable.

12. The above application was heard and finally disposed of by a Bench of Hon'ble Harjit Singh Bedi and Hon'ble Aftab Alam, JJ. with the following direction:

“Learned counsel for the parties agree that the judgment dated 13.12.2007 of this Court be recalled in C.A. No.1106 of 2007. We order accordingly. C.A. No.1106 of 2007 will be heard on its own merit.”

13. It is in the light of the above order that this appeal has been heard for disposal afresh.

14. The order of discontinuing the surcharge w.e.f. 1st September, 2001 reads:

“The U.P.E.R.C. in terms has recorded that discontinuation of 15% surcharge is due to (i) inability/incapability on the part of UPPCL for technical and operational reasons to ensure the guaranteed supply of 500 hours, (ii) it was difficult for UPPCL even to distinguish between the two consumers on independent feeder who asked for assured supply and who do not, (iii) most of the consumers having opted against this agreement and (iv) the financial implication was also negligible if the scheme was discontinued.”

15. Appearing for the appellant Mr. Shanti Bhushan, learned senior counsel strenuously argued that the circular issued by the U.P. State Corporation modifying the tariff prescribed by the Regulatory Commission was wholly without any jurisdiction and could be recalled by the Uttarakhand Power Corporation w.e.f. the date the same was issued. Inasmuch as such a withdrawal was ordered by the Corporation it committed no illegality especially when the withdrawal was supported by clear and authoritative pronouncement of the High Court of Allahabad stating that the grant of exemption tantamounted to modifying the tariff which modification the corporation was not legally competent to make. It was further argued by Mr. Shanti Bhushan that there was no question of any promise having been made either by U.P. State Corporation or the Uttarakhand Power Corporation. In the absence of any such promise and in the absence of any material to show that the petitioner had acted upon any such promise and changed its position, there was no question of interfering with the order withdrawing the exemption on the basis of the principles of equitable estoppel.

16. On behalf of the respondent-KVSL, it was on the other hand, submitted that since a promise was found to have been made by the U.P. Power Corporation to other consumers and since the said promise has been held to be enforceable, there was no justification for taking a different view insofar as the respondent-company is concerned. It was also submitted that once U.P. Corporation is held to be bound by the promise made by it the Uttarakhand Corporation which came into existence upon reorganization of the State had no option but to make the said promise good. It could not retrospectively withdraw the same only with a view to recover money which even the U.P. State Power Corporation would not have been entitled to recover.

17. In Writ Petition No.942 of 2001 filed by the respondent-KVSL the material facts were not disputed. It was unequivocally admitted that the respondent-company was a consumer getting supply from an independent

feeder emanating from 400/220/132 KV sub station. It was also not in dispute that with the coming into existence of State of Uttarakhand w.e.f. 9th November, 2000 a new Power Corporation for the said State was established on 1st April, 2001. The respondent-company's further case is that Uttarakhand Power Corporation did not charge 15% surcharge on monthly demand and energy charges for the period April 2001 to October, 2001 and that it is only on 7th December, 2001 that the applicant received an intimation that circular dated 8th September had been revoked and letter dated 24th October cancelled. That the U.P. Electricity Regulatory Commission had approved a new tariff by order dated 1st September, 2000 and U.P. State Power Corporation had issued a consequential Notification dated 10th July, 2001 is also not in dispute. The said notification, it is noteworthy, does not any longer provide for 15% surcharge from consumers getting supply of energy from independent feeders. Suffice it to say that while according to the applicant-KVSL circular issued by the U.P. Power Corporation dated 8th September, 2001 giving an option to the consumers was valid and in accordance with law, there is not even a murmur in the writ petition filed by the respondent-company to the effect that either the U.P. Power Corporation or its successor had at any point of time made any promise to the company that supply of energy would be without any surcharge notwithstanding the fact that the tariff prescribed by the Regulatory Commission envisaged the levy of surcharge on electricity supplied directly from an independent feeder. There is similarly no averment whatsoever in the writ petition to the effect that the respondent-KVSL had altered its position acting upon any such promise. Not only that the agreements executed between the parties, namely, KVSL on the one hand and Power Corporation on the other also did not contain any unequivocal promise for supply of energy, no matter the supply was made from an independent feeder. In the absence of even an averment to the effect that there was a promise made by the U.P. State Power Corporation regarding supply of energy without payment of surcharge and in the absence

of any material to show that the respondent-KVSL had indeed acted upon any such promise it is difficult to see how the said company can insist upon any such non-existent promise being made good. It is trite that before a party can rely upon on the doctrine of promissory estoppel it must make a specific averments and place material on record to demonstrate that a promise was indeed made to it. There is neither any averment nor any material to support the plea of promissory estoppel in the case at hand.

18. It is also noteworthy that the High Court of Uttarakhand did not find a case in favour of the respondent-KVSL on the ground which is now sought to be urged in the present appeal. It is one thing to say that the plea of promissory estoppel is available to a consumer but an entirely different thing to say that such a plea has been made good by the material on record.

19. We have, therefore, no hesitation in repelling the contention that any promise was made by the U.P. State Power Corporation to the respondent-KVSL which could justify the grant of any mandamus in its favour for making good any such promise.

20. We allow this appeal and set aside the order 17 th January, 2007 passed by the High Court of Uttaranchal in Writ Petition No.936 of 2001 filed by respondent-KVSL with costs of Rs.50,000/-.

JUDGMENT