

CASE NO.:
Appeal (civil) 5343 of 2002

PETITIONER:
M/s Southern Ispat Ltd.

RESPONDENT:
State of Kerala & Ors.

DATE OF JUDGMENT: 25/03/2004

BENCH:
K.G. Balakrishnan & B. N. Srikrishna.

JUDGMENT:
J U D G M E N T

SRIKRISHNA, J.

The judgment of the Division Bench of the Kerala High Court dismissing writ appeal no.2614/2001 of the appellant is challenged before us in this appeal. The writ appeal itself was to impugn the judgment of the single Judge dismissing O.P. No.9007/1999 by the appellant.

With a view to encouraging the industrial process in the State of Kerala, and as a measure of incentive, the State Government decided as a matter of policy that new industrial units established in the State would be exempted for a period of 5 years from payment of enhanced power tariff which had come into effect on 1.1.1992. This policy was reflected in the G.O. (MS) No.4/92/ID dated 6.2.1992 which indicated that the concession would be available:

"i. to the units from the date of commercial production which start such production between 1.1.1992 and 31.12.1996.

ii. To manufacturing units only and not to service and entertainments units;

iii. To existing units for substantial expansion/modernisation / diversification. The concession in such cases will be available only for the consumption of the new machinery and equipment which add to the capital asset, by not less than 25 % of the existing fixed capital investment excluding land and building the installation of which is to be certified by the competent authority.

iv. For modernisation, to industrial units having a contract demand not exceeding 500 KVA. In such cases, new equipments alone will be eligible for the concession."

The Government order also indicated that the eligibility for the concessions would have to be certified by the Kerala State Industrial Development Corporation (KSIDC) / Kerala Financial Corporation (KFC) in respect of units funded by them, or by the Director of Industries and Commerce in other cases, and by the concerned General Manager, District Industries Centres in respect of Small Scale Industrial units. It was also declared in Government order that the industrial units which set up their captive power generating units for their own consumption would be exempted from payment of electricity duty to the extent to which they generate power for their own consumption. The said concession was made available to the units which may have started commercial production or set

up captive power generating units between 23.9.1991 and 31.12.1991.

On 26/27.6.1995 the appellant company was registered with the Registrar of Companies office at Palakkad in Kerala State. The company intended to manufacture alloy steel M.S. Sections, C.T.D. Bars, Steel Castings and allied products. The company had an authorised capital of Rs.550 lakhs out of which shares worth Rs.205 lakhs were issued to and subscribed by the Directors and their friends and rest were issued to and subscribed by the public. The appellant company also raised loans from the Kerala State Industrial Development Corporation and the Kerala Financial Corporation for setting up the unit. According to the appellant, the total project cost was Rs.820 lakhs. Land was purchased in Kottai village in Palakkad District of Kerala and construction of buildings and installation of machinery for steel melting and re-rolling was commenced.

On 17.7.1995 the appellant made an application to the Chief Engineer, Kerala State Electricity Board ('KSEB') for allocation of 2450 KVA of power. The appellant requested for registration of its application and sought a feasibility certificate for the allocation of power at the earliest to facilitate sanction of loan from KFC /KSIDC and working capital from South Indian Bank Ltd.

On or about 17.6.1996 the appellant made a representation to the Ministry of Steel, Government of India to persuade the KSEB to expedite the sanction of power. The Regional Development Commissioner for Iron and Steel, Government of India, Ministry of Steel, addressed a D.O. letter dated 3.7.1996 to the Chairman KSEB, strongly recommending the urgent sanction of the power to the appellant. By a letter dated 16.7.1996 the Chairman, KSEB, informed the Regional Development Commissioner for Iron and Steel, Madras that the State of Kerala was facing acute shortage of electrical energy and that the KSEB was resorting to all possible ways to tide over the situation. As a part of their efforts to bring down the energy consumption, they had even banned new domestic connections. Hence, the Chairman said, "in the present scenario I am not in a position to think of giving power allocation to a power intensive industry like steel producing unit" and said "if the situation improves, the application of M/s Southern Ispat Ltd., can be taken up". The said reply was forwarded to the appellant by the office of the Regional Development Commissioner for Iron and Steel.

By a letter dated 10.9.1996 addressed to the appellant the KSEB sanctioned power allocation to the extent of 1950 KVA at 11 KV with contract demand of 1950 KV to the appellant's factory. The allocation was made subject to the following conditions:

"1. Supply is liable to be restricted or cut off during power shortage period after giving notice.

2. Power should not be used for industrial purpose between 6 P.M. to 10 P.M. or any other restrictions necessitated by local condition or otherwise when imposed should be strictly complied with.

3. Charges payable as minimum will have to be paid even if power is not availed of within three months from the date on which the readiness of the Board to supply power to you is intimated.

4. Specific provision regarding the above condition will be incorporated in the service connection agreement.

5. You have to execute a power supply agreement in the form to be specified by the Deputy Chief Engineer, Ele. Circle, Palakkad and agree to pay the tariff and other charges specified by the Board from time to time as per rules in force in

the Board within 6 months from the date of this letter failing which the allocation sanctioned will stand cancelled.

6. You have to request remit the required amount under OYEC scheme which may be ascertained from the Assistant Executive Engineer, Electrical Major section, Parali.

7. The power allocated can be availed only after drawing separate 11 KV feeder from Parali Sub Station (Extentsion of 1.12 KM of S/C line and duplicating 2.3 KM of the Kottayi feeder) for which OYEC amount has to be remitted by the applicant.

8. The power allocated can be given only after providing separate outlet in the 110 KC Sub Station, Parali and the cost of work has to be met by the application under OYEC Scheme."

The Executive Engineer KSEB Palakkad informed the appellant by a letter dated 3.10.1996 that an estimate amounting to Rs.8,73,200 had been sanctioned for the power allocation work to the appellant under Own Your Electric Connection (OYEC) basis. The appellant was called upon to remit a sum of Rs.8,73,200/- in cash, at the earliest, to the electrical section. On 11.11.1996 the appellant wrote a letter to the Executive Engineer, Electrical Division, KSEB Palakkad informing him that it had completed all civil works at the site and erected over 50% of plant and machinery and that other machines were in transit and were expected to reach very shortly. He, therefore, requested that instructions be issued to the Executive Engineer Electrical, Parali to accept the amount of Rs.8,73,200 so that the KSEB electrical work may start to meet the requirements. On 12.11.1996 the Executive Engineer Electric Division Palakkad addressed a letter to the Deputy Chief Engineer, Electrical Circle, Palakkad on the subject. He pointed out that an estimate for Rs.8,73,200 towards construction of 1.12 Kms 11 KV overhead line and duplicating 2.3 KM of Kottayi feeder from 110 KV sub station Parali for giving high tension connection under OYEC basis had been sanctioned in favour of the appellant. He also stated that the appellant was ready to remit the amount on OYEC basis and requested further instructions in the matter.

On or about 14.11.1996 the appellant sent a letter to the Deputy Chief Engineer, Electrical Circle, Palakkad thanking him for the inspection of the work site on 12.11.1996. It also enclosed a Chartered Accountant's certificate detailing the investment of Rs.379.68 lakhs and a photocopy of KSIDC's letter dated 11.11.1996 giving full details. Finally, the letter requested permission to deposit the amount of Rs.8,73,200 at Electrical Major Section, Parali so that the construction of line may begin. A copy of the letter from KSIDC requesting expedition and commission of the project was also forwarded.

Apprehending that the KSEB was deliberately delaying the matter, so that the appellant would not be able to carry out commercial production before the cut off date of 31.12.1996, the appellant submitted a scheme to the Government of Kerala for generation of 125 KVA electrical energy by installation of a diesel power generating set in its factory. By the letter dated 6.12.1996 of the Chief Electrical Inspector to the appellant sanction for the scheme was granted subject to the following conditions:

"1. Copy of Power allocation sanction for additional loads if required should be obtained from the K.S.E.Board/ Licensee and a copy of the same

forwarded to Electrical Inspector.

2. Installation of all switch boards and distribution boards should be in conformity with Rule 51 (1) (c) of I.E. Rules, 1956.

3. Fuses should be graded properly and selected based on the rating of cables. Low watt loss fuses shall be selected.

4. Earthing of the installation should conform to provisions in I.S.3043/87.

5. Isolation facility should be provided for all equipments within a distance of 3 meters from equipments conforming to Rule 50(1)(d) of I.E. Rules, 1956.

6. M.V. installation should conform to I.S. 732.

7. Installation of all cables should be as per standards.

8. An energy meter should be provided in the generator circuit which should be got tested and sealed by Kerala State Electricity Board/ Standards Laboratory attached to this Department and a copy of the test report should be forwarded to Electrical Inspector.

9. Sanction from K.S.E.B. under Section 44 of Supply Act 1948 should be obtained and copy forwarded to the Electrical Inspector.

10. Only materials with I.S. certification as required under QCO should be used. The Electrical Inspector should ensure this.

11. Only energy efficient equipments shall be used in the installation.

12. Completion report should be submitted to this office for arranging inspection.

13. The voltmeter and frequency meter may be provided before the breaker in the generator control panel."

On 6.12.1996 the appellant also applied to the Secretary of Kottayi Gram Panchayat for permission to install and utilise a diesel generator set of 125 KVA for its factory with the help of which it was proposed to use a 10 HP motor.

On 11.12.1996 the appellant forwarded a cheque for Rs.8,73,200 to the Assistant Executive Engineer, Electrical Major Section, Parli and requested him to accept it towards the estimate for the construction work to be carried out. He was also requested to draw up an agreement so that it can be executed and the security amount be deposited.

According to the appellant, it purchased stamp papers for executing the agreement with KSEB for supply of electricity on 9.12.1996. On 11.12.1996 the Assistant Executive Engineer, Parali accepted the cheque of Rs.8,73,200 towards the cost of construction of electric line. By an order made by the Chief Engineer Transmission (North) Kozhikode, on 12.12.1996 sanction was accorded for an estimate amounting to Rs.13,10,000 for modification of sub-station for

providing 11 KV Outlet at 110 KV sub-station, Parali and registered as 21/96-97. It was directed by the order that the cost on account of this had to be met from the deposit to be made by the beneficiary under OYEC Scheme.

On 13.12.1996 the appellant gave a declaration to the KSEB that the private generator set installed at the premises of its factory would not be synchronised with KSEB board mains and that a meter would be installed. On the same day the agreement on stamp paper of Rs.60 was forwarded to the Assistant Executive Engineer, Electrical Major Section, Parli, Palakkad for being processed. He was also requested to intimate the amount to be deposited towards security. On 16.12.1996 the appellant deposited a sum of Rs.13,10,000/- with the KSEB as directed in the order of the Chief Engineer.

The appellant moved the High Court of Kerala by O.P. No.6456/1997 seeking a writ of Mandamus directing the KSEB and its officers to take urgent and immediate steps to give sanctioned power connection to the appellant's factory at Kottayi and also sought an interim order for grant of power connection temporarily from the feeder line to the neighbouring industrial unit, M/s Elgi Tyre & Treads Ltd. Kottayi, so as to enable the petitioner to maintain nominal production and marketing of its products and reduce the overheads and other losses. This petition was disposed of by a learned single Judge of the Kerala High Court by an order dated 11.4.1997 with the direction to the Deputy Chief Engineer, Electrical Circle, Vidyuthi Bhavan, Palakkad, to consider and take a decision on Exhibit P-15 (the appellant's representation dated 23.12.1996) addressed to him highlighting the grievances of the appellant, with notice to the petitioner, within a period of three weeks.

Pursuant to the directions made by the High Court, the KSEB considered the grievances made by the appellant and the appellant was informed as under by letter dated 23.5.1997 :

"I have been directed by the Secretary/ K.S.E.B. Trivandrum-4 to intimate you the decision regarding your representation vide Ex. P-15 in the above OP. Accordingly I may inform that:

1) Power allocation to the extent of 1950 KVA was granted to you by the Chief Engineer (Distt. North), Kozhikode on 12.9.1996 on the specific conditions that

a) The power can be availed only after drawing separate 11 KV feeder from Parli Sub-Station under OYEC; and

b) The power can be given only after providing separate outlet in the 110 KV Sub-Station / Parli under OYEC.

The above conditions were stipulated taking into consideration all technical aspects such as loading on 11 KV feeder, Voltage regulation, flexibility of 11 KV lines, existing Power system/ line capacity etc. As you have already remitted the OYEC for all the above works (a) & (b) above, action has been taken by the Executive Engineer/ Elec. Division/ Palakkad to finalise the tenders for the construction of 11 KV new feeder.

Taking into account the existing consumers in the 11 KV Elgi Feeder and all technical aspects, I regret to inform that it is not technically feasible to connect your factory load from the existing Elgi feeder.

Further, I may inform that due to acute Power shortage, the Board has ordered a total ban on new connections to the Power Intensive units \026 during the period of Power cut, w.e.f. 30.7.1996.

Yours faithfully
Sd/-
EXECUTIVE ENGINEER IN/C."

For a period of almost two years the appellant made no grievance, nor took any other steps. The appellant moved a writ petition No.OP 9007/1999 before the High Court of Kerala challenging the bill for charges for electrical energy supplied to the appellant's industrial unit at rates in excess of the pre-1992 tariff rates. This writ petition was moved on 31.3.1999 and challenged the invoice no.23602 dated 23.3.1999 by which the appellant was called upon to pay a sum of Rs.2,28,578/- towards consumption of electricity during the month of February, 1999. By a judgment dated 3.7.2001 the learned single Judge who heard the writ petition dismissed the writ petition holding generally that appellant had not complied with the conditions subject to which power supply at concessional tariff rates have to be made. Being aggrieved thereby, the appellant filed writ appeal no.2614/2001 which was dismissed by the Division Bench by the judgment impugned before this Court.

It is contended by the appellant that the delay in sanction and supply of electric supply was only on account of the tardy manner in which the KSEB functioned. It is also urged that, despite the lethargy shown by the KSEB, to meet the deadline the appellant had installed its own diesel generator set and commenced "commercial production" on 14.12.1996. The appellant relied on certain invoices for sales made to customers in the month of December, 1996, a certificate dated 11.9.1998 issued by the KSFC, the copies of the nil return made to the commercial taxes department, declaration made to the superintendent of Central Excise and Register of daily stock in support of its contention that it had commenced 'commercial production' in the month of December, 1996. Reference was also made to the assessment order issued by the Sales Tax Department and the Balance Sheet of the company as on 31.3.1997 for this purpose.

The respondents strongly refute the contentions urged and support the judgment of the Division Bench of the High Court as being correctly decided on the facts of the case.

As the Division Bench rightly pointed out, the question to be decided in this case is essentially a question of fact, namely, whether the appellant had started 'commercial production' between 1.1.1992 and 31.12.1996 so as to be entitled to power supply at concessional tariff rates. As a rule, it is not the practice of this Court to interfere with factual findings which have been concurrently recorded by two courts below. Both the learned single Judge and Division Bench have concurrently answered all factual findings against the appellant. On that ground itself the appellant must fail. Nonetheless, as the appeal was argued with some seriousness, we propose to deal with the facts and examine the factual findings only from the point of view of interference under our special jurisdiction under Article 136.

The Division Bench of the High Court rightly pointed out that though the policy of granting concessional tariff was announced by the State Government on 6.2.1992, followed by the KSEB order dated 27.3.1992, the appellant did nothing till or about June 1995. It is only in June 1995 that the appellant company was incorporated and an application for power allocation was made on 17.7.1995. The appellant's factory had yet to be constructed and machinery to be transported and installed after the construction of the factory building. Undoubtedly, the application was moved on 17.7.1995 in anticipation. The material on record suggests that there was acute shortage of electricity as a result of which even

domestic power connections were being refused. The high tension power supply required by the appellant had to be specially arranged by drawing the electrical lines on the OYEC basis by construction of PSC polls along the line at the Appellant's cost. This amount was deposited on 11.12.1996, only a few days before the concession was about to lapse. Having examined the correspondence on record, we are not in a position to accept the contention of the appellant that the respondents had acted with undue tardiness or lethargy. Further, the remittances of Rs.8,54,700/- and Rs.3,45,200/- made by way of security deposit for executing the power supply agreement were actually made on 1.2.1997 and 4.2.1997, after the expiry of the period of concession.

The KSEB made the power allocation on the specific condition that power would be supplied subject to drawing of 11 KVA exclusive feeder line from 110 KV Parali station under the OYEC scheme. The electric wiring was completed in the factory of the appellant and the wiring contractor submitted completion certificate on 29.8.1998. There were some deficiencies which were rectified by the appellant only on 1.12.1998. The electrical inspector is required to sanction the electrical wiring, and this was done on 14.12.1998. Power supply commenced only on 19.2.1999. Thus, upto and including 19.2.1999 the appellant had not functioned with the power supplied by the KSEB either temporarily or on permanent basis.

The contention of the appellant that commercial production had commenced in December 1996 can hardly be accepted. The appellant was setting up the factory for manufacturing of alloy steel M.S. Sections, C.T.D. bars, Steel ingots and so on with a planned production of 24000 tons of iron and steel ingots and 24000 tons of iron and steel bars, coils etc.. It hardly stands to reason that "commercial production" of such a factory could have commenced by using of a 125 KVA diesel generator set. There is also no material on record to show that the appellant had run the factory by using 125 KVA generator set during the period December 1996 to February 1999. It is pointed out by the High Court, and rightly in our view, that even the diesel unit could also not be used until permission was obtained under Rule 65 of the Indian Electricity Rules, 1956, from the Chief Electrical Inspector. Such permission was obtained from the Chief Electrical Inspector only on 14.12.1998. Thus, it is clear that even the order for energisation of the 125 KVA diesel generator set was accorded to the appellant only in 1998.

In these circumstances, we find it difficult to accept the contention of the appellant that 'commercial production' had started in December 1996 by using diesel generator set as alleged.

The appellant contends that the certificate issued by the Kerala Financial Corporation dated 11.9.1998 is conclusive evidence of the fact that the appellant had commenced "commercial production" in December 1996. Interestingly, the KFC's certificate is very guarded and states: "This is to certify that Southern Ispat Limited has commenced its commercial production of C.i. Shot and grits with the help of Generator set as Kottayi in Palakkad district on the 14th day of December, 1996 as per records submitted by the company."

(Emphasis is ours)

In the first place, we are unable to accept that the certificate issued by the KFC is conclusive in the matter. At the highest, it may be one of the facts to be considered by the KSEB in the light of all other relevant material.

The High Court has pointed out a series of difficulties in accepting this certificate as conclusive. Firstly, the certificate has been issued only on 11.9.1998. The certificate is issued "To whom so ever it may concern". There is no reference to the electrical inspector's findings on the matter of conditions of appellant's high tension installations, which was a pre-requisite for the KFC to issue a proper certificate for the purpose of entitlement to the pre-1992 tariff concessions. There is

nothing to show that the KFC had made any inquiry of their own. On the contrary, as the certificate shows, the certificate appears to have been issued merely on the basis of record produced by the company. The record produced by the company could not have shown that the appellant company had started commercial production. The High Court has also disbelieved and rejected the other documents relied upon in support of the appellant's case of commencing of commercial production prior to 31.12.1996.

The High Court points out the fact that promoters of the appellant company had a factory at Raipur in Madhya Pradesh and the possibility of the Appellant having bought manufactured goods from there and sold them within the State of Kerala to create documents to show that the production started before 1996 could not be ruled out. Even the documents produced by the appellant do not show any continuous 'commercial production' during the period December 1996 to February 1999. We agree with the conclusion of the High court that it was not sufficient for showing 'commercial production' that some small items were sold by the appellant in December 1996 and 'nil' assessment of sales tax was made and a small excise duty payment was also made. We agree with the High Court's view that these were all self-serving documents created as evidence for commercial production prior to the cut off date of 31.12.1996.

Upon an overall assessment of the facts on record, we are not satisfied that the view taken by the Division Bench of the High Court on facts is so perverse that it requires interference by this Court under Article 136 of the Constitution.

In the result, the appeal is dismissed. However, there shall be no order as to costs.