

CASE NO.:

Appeal (civil) 8322 of 2001

Appeal (civil) 8323 of 2001

Appeal (civil) 8324 of 2001

PETITIONER:

Hitech Electrothermics & Hydropower Ltd.

RESPONDENT:

State of Kerala & Ors.

DATE OF JUDGMENT: 17/12/2002

BENCH:

CJI, K.G. BALAKRISHNAN.

JUDGMENT:

JUDGMENT

PATTANAIK, CJI.

These appeals by grant of special leave are directed against the judgment of Kerala High Court dated 6th April, 2001. The appellant approached the High Court of Kerala claiming that it would be entitled to the concessional tariff under the policy of the Government and approved by the Board even though the actual commercial production of the appellant's factory started in 1998. The High Court in the impugned judgment accepted the stand of the State Government that in order to be eligible to get the concessional tariff under the policy in question, commercial production must have started by 31st December, 1996 and since admittedly, the appellant did not have the commercial production by that date the incentive of concessional tariff would not be available. The question for consideration in these appeals, therefore, is whether an industrial unit which has set up the industry being lured by policy decision of the Government can still claim the benefit of the concessional tariff under the policy notwithstanding the fact that there has been delay in production, such delay being attributable to the inaction on the part of the Board in providing the necessary electric connection.

The Government of Kerala in the Industry department, issued GO(MS) dated 21.5.90, indicating therein that the power connection will be given on completion of any project irrespective of whether a general power cut is in force or not. It had also been stated therein that the new units commencing industrial production will be exempted from power cut for a period of 5 years from the date of commercial production. In February, 1992, the government came out with industrial policy offering concessional rate of tariff and electricity duty to new industries for a period of five years from the date of commercial production, if the production commences between 1.1.92 and 31.12.96. The Kerala State Electricity Board adopted the aforesaid policy decision for implementation and in its order dated 27th of March, 1992, reiterated that the concessional tariff as indicated in industrial policy resolution, would be available if the commercial production is made between 1.1.92 and 31.12.96. The appellant industry was issued the registration certificate by the District Industries Centre, on 27.12.1993. In April,

1994, government issued another GO(MS), confirming that the industries registered prior to 31.12.1993 will continue to enjoy the tariff concession and exemption from payment of electricity duty. The State Electricity Board issued a letter on 7.11.1995 to the appellant industry, allocating power in their favour. In its letter dated 13th March, 1996, the said Kerala State Electricity Board confirmed that the appellant will be entitled to the tariff concession, as per the policy resolution of the government. The appellant is stated to have invested a huge sum of money in setting up factory for production of ferro alloys. On 24th of April, 1996, the Secretary to the Government of Kerala confirmed that the appellant will be eligible for concessional tariff, if commercial production starts before 31.12.1996. In June, 1996, the appellant had informed the Board that it is going ahead with the implementation of the project of manufacturing ferro alloys and requested for issuance of demand note to enable the appellant to pay the charges. On 23rd of August, 1986, the State Electricity Board informed the appellant about the estimated amount on the electric connection and further stated that the demand note will be intimated to the appellant at the earliest. On 3rd of August, 1986, news item was published in Delhi's Times of India, showing the Kerala Government Policy in welcoming the investment in Kerala. Between August and October, 1996, the appellant intimated several authorities of the government as well as the Board, requesting them to provide power for manufacture of ferro alloys in appellant's factory, which was otherwise ready for commissioning. But it is only in August, 1997, the Board issued the order, intimating the supply of power to the appellant's factory to the extent of 15 MVA at 110 KV. The Board then took about one year in connecting the sub-station in the appellant's factory for supply of power. Ultimately, the Board granted power to the appellant's company on 22nd October, 1998. In the first week of November, 1998 the appellant got the Bill from the Board at the regular rate without the benefit of the concessional tariff as indicated in the Industrial Policy of the Government and also adopted by the Board. The appellant, therefore, approached the High Court and the High Court by an interim order directed that the appellant would be demanded the tariff on the basis of the prevalent rate prior to 1.1.1992. But the power connection had been cut off on account of non-payment of the electricity charges. The High Court then passed an order that on payment of Rs.50 lacs by the appellant, the electric connection would be given by its order dated 15.12.1999. The Board filed an application for modification of the aforesaid order and finally on 6.4.2000, the High Court of Kerala modified earlier order, denying the benefit of concessional tariff. The appeal was carried against the order to the division Bench, wherein the division Bench directed the Single Judge to dispose of the pending Writ Petition of the appellant and till the disposal of the Writ Petition, stayed the order and directed that the appellant would pay the electricity charges at pre 1.1.1992 rate by its order dated 23.5.2000. The Writ Petition of the appellant was dismissed by the learned Single Judge by order dated 21.12.2000 against which the appellant carried the appeal to the Division Bench and the Division Bench by the impugned order dated 6.4.2001 having dismissed the appeal, the present appeal by grant of special leave has been filed.

Mr. Salve, the learned senior counsel appearing for the appellants contended that the Government of Kerala unequivocally in its policy dated 6th February, 1992 had

indicated that new industrial units will be exempted for five years from the payment of enhanced power tariff which came into effect on 1.1.92 and this should be available to the units from the date of commercial production which start production between 1.1.92 and 31.12.1996. This policy was adopted by the Kerala State Electricity Board which issued the letter dated 27th of March, 1992, stating therein that the concessional power tariff and electricity duty to industries would be supplied as a measure of incentive to all the units who start their commercial production between 1.1.92 to 31.12.1996, irrespective of the day of permanent electric connection. On 7.11.1995, the Kerala State Electricity Board intimated to the appellant that in principle sanction of power had been accorded to the extent of 15 MVA at 110 KV to the appellant's factory premises at Pudussery Village and the power can be availed and will be operational with peak load restrictions only after commissioning of 220 KV substation at Kanjikode. But notwithstanding the same, the Board having not taken any steps to see that the power supply is given to the appellant's premises and it is for such non-supply of power, the commercial production being delayed, it will be un-equitable to deny the concessional tariff flowing from the policy resolution of the government. Mr. Salve contended that under Section 22 of the Indian Electricity Act, 1910, the Board is responsible to supply power on the terms and conditions of the licence and the said Board having allocated the power in favour of the appellant on 7.11.95 and thereafter their being no power connection until 1998, it cannot deny the benefit flowing from the policy resolution of the government which was adopted by the Board in its letter dated 27th of March, 1992. According to Mr. Salve, the Board cannot be permitted to prevent the benefit of an incentive policy by its own failure to provide power, which prevented the appellant from starting commercial production by 31.12.1996. Mr. Salve relying upon the judgment of this court in Pawan Alloys and Casting Pvt. Ltd., Meerut vs. U.P. State Electricity Board and Ors., (1997) 7 SCC 251, contended that when the appellant was persuaded to set up the industry being lured by incentive of getting the concessional power tariff for a period of five years, ought not to be denied that relief on construing the power policy and literally no such concessional tariff could be granted unless commercial production starts before 31.12.96.

Mr. Rohtagi, the learned Additional Solicitor General, appearing for the State of Kerala as well as on behalf of the Board, vehemently argued that the language of the policy issued by the Government and adopted by the State Electricity Board was unequivocal and such policy clearly stipulated that only those units which would start commercial production between 1.1.92 and 31.12.96 would be entitled to the concessional tariff indicated in the policy. Since admittedly the appellant's manufacturing unit did not start commercial production within the stipulated period, the benefit of the concessional tariff under the policy has rightly been denied and the impugned judgment does not suffer from any infirmity. According to Mr. Rohtagi, even if for certain latches on the part of the Board, the appellant may be entitled to an equitable consideration, but in the matter of incentive granted under the policy decision by the government, no manufacturing unit can claim the benefit, so long as the conditions precedent of the applicability of policy resolution have not been satisfied. Mr. Rohtagi also contended that there might have been some latches on the part of the Board in its failure to provide power connection in time, but the

same is not one-sided and even the appellant himself was not in a position to start commercial production within the stipulated date. Mr. Rohtagi also urged that since there has been no finding of the Division Bench of the High Court, as to who was at fault and if so, to what extent on which equities could be worked out, the matter could be remanded back to the High Court for re-adjudication. Mr. Rohtagi, however to the suggestion from the Court finally agreed that the appeal can be disposed of on equitable consideration by this Court by reducing the period for which concessional tariff could be given to the appellant.

On perusal of the industrial policy of the government, unequivocally indicting that concessional tariff rate would be given as well as the order of the Electricity Board adopting the same, it can be safely held that such concession could be availed of by the industrial units for a period of five years from the date, commercial production which start such production in between 1.1.92 and 31.12.1996. In this context the stand of the Board as well as the State Government cannot be held to be devoid of any substance when admittedly the commercial production of the appellant's unit did not start till 31.12.96. But the question for consideration is when the government has itself come forward alluring industrial units to set up their industries and when under the provisions of the Electricity Act, every consumer has the right to get the supply of power and in the case in hand, when power allocation has been made in favour of the appellant as early as in 1995, and yet the same power could not be supplied for such non-supply of power, the commercial production could not start by 31.12.96, would it at all be equitable to deny the relief to the appellant by giving a literal interpretation to the incentive scheme of the government as adopted by the Board? Our answer to this question must be in the negative. There are several documents on record, which were produced before us to indicate that the appellant has been communicating with the Board, seeking power connection at an early date so that it would be able to start commercial production by 31.12.96. In making such communication, the appellant has been bringing it to the notice of the Board but for supply, the appellant has made all other arrangements to set the production, but yet there has been inaction on the part of the Board in providing power to the appellant. Mr. Rohtagi, appearing for the Board no doubt brought to our notice a letter from the appellant to the Board and contended that it could not have been possible for the appellant to start production by 31.12.96 but we are unable to accept this submission nor are we making deeper probe into the matter. Suffice it to say that the appellant has been denied power supply by the Board in appropriate time, which has prevented the appellant from starting the commercial production by 31.12.96. This being the position, and having regard to the gamut of the circumstances, starting from the government policy resolution and culminating in setting up of the factory by the appellant in Kerala and commensurate the production of ferro alloys, though not by 31.12.96, we are of the considered opinion that granting the concessional tariff for a period of three years instead of five years, as indicated in the policy resolution would meet the ends of justice and we, accordingly, so direct. Be it be stated that the appellant has been enjoying the concessional tariff on the basis of interim orders of the court and, therefore, that should be taken into account and due adjustment would be made in computing the period of three years, for which we are directing for grant of concessional tariff. The impugned

judgment of the Kerala High Court is set aside and these appeals are allowed to the extent indicated above.

JUDIS