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High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 2200 of 1999

Punjab State Electricity Board	APPELLANT
Vs	
Joginder Singh	RESPONDENT

Date of Decision: Feb. 7, 2000

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 9
- Electricity (Supply) Act, 1948 - Section 49, 49(1), 49(3), 49(4), 59

Citation: (2001) 4 RCR(Civil) 513

Hon'ble Judges: R.L. Anand, J

Bench: Single Bench

Advocate: Sanjeev Sharma, for the Appellant; Arun Jain, for the Respondent

Final Decision: Dismissed

Judgement

R.L. Anand, J.
This is defendant''s appeal and has been directed against the judgment and decree dated 10.3.1999, passed by the Court of Addl. Distt. Judge, Patiala, who reversed the judgment and decree of the trial Court dated 10.3.1998, passed by the Civil Judge (Sr. Divn.), Patiala, who dismissed the suit of the plaintiff-respondent, for declaration as prayed for.

2. Some facts can be noticed in the following manner :-

3. Plaintiff filed a suit for declaration to the effect that the defendant cannot convert the Small Power Connection No. 185/15 into Commercial connection and the bill dated 18.5.1987 for a sum of Rs. 3,734/- has been wrongly prepared. The case set up by the plaintiff was that he had got a small power connection of electricity bearing No. 185/15 at his premises. The defendant is charging the amount for consumption of electricity at the industrial rates ever since the connection was given. The impugned bill dated 18.5.1987 for the consumption of 3000 units has been received for the sum of Rs. 3,734/-. The

impugned bill is excessive, the plaintiff challenged the bill vide representation dated 22.5.1987. In response to the said letter, the Board intimated to the plaintiff vide letter dated 25.5.1987 that the small power connection has been converted into commercial connection vide letter No. 91/86 and the bill has been prepared at commercial rates. The plaintiff was never given any notice of the said circular nor copy of the circular was sent to the plaintiff and this act of the board is illegal, without jurisdiction and arbitrary and cannot be operated.

4. The suit was contested by the defendant-Board who tried to justify the circular by stating that it has the power to change non-residential connection to commercial one. The change of category is being done prospectively and not retrospectively.

5. From the pleadings of the parties, the trial court framed the following issues :-"

1. Whether the plaintiff is entitled to declaration prayed for ? OPP

2. Whether the civil court has got no jurisdiction to entertain and try the present suit ? OPD

3. Relief."

6. The parties led oral and documentary evidence in support of their case. The plaintiff was non suited by the trial and aggrieved by the judgment and decree of the trial Court, the plaintiff filed an appeal before the first appellate Court, who for the reasons given in paras 8 to 12 of the judgment, reversed the findings of the trial Court and decreed the suit of the plaintiff as prayed for, which read as under :-

"8. The learned counsel for the plaintiff/appellant while challenging the findings of the lower Court has submitted that the lower Court wrongly came to the conclusion that the plaintiff has been unable to establish that the defendants have converted his small power connection No. 185/15 into commercial connection. This fact rather stands admitted by the defendants in their written statement. The defendants admitted the allegations made by the plaintiff in paras 2 to 4. Once the admission of the defendants to there, then there was no material with the lower Court to come to the conclusion that the plaintiff has been unable to establish that his small power connection has not been converted into commercial connection. He has further submitted that as per the terms and conditions of the agreement (Ex. D2) entered into between the plaintiff and the defendants, Ex. D-2, the defendants could not charge She commercial tariff instead of industrial tariff. No notice was ever given to the plaintiff for changing the conditions of supply of electricity or for changing the tariff from industrial to commercial one. In support of his contention he has relied upon the authorities Indian Aluminium Company Vs. Kerala State Electricity Board, , Punjab State Electricity Board, Ludhiana and another Vs. Ashwani Kumar, , and Ram Niwas Bansal v. State Bank of Patiala 1998(2) P.L.R. 768, He has also relied upon the authority Punjab State Electricity Board v. The Hoshiarpur Automobiles 1998(1) CLT 402.

9. On the other side, learned counsel for the defendants/respondents has submitted that the Board has only changed the tariff for the purpose of bill- ing the electricity consumed by the appellant. According to the commercial circular issued by the Board, hotels and motels are to be charged for commercial supply. The dispute is thus of billing done in view of the circular issued by the Board and therefore, the court has no jurisdiction in view of the law laid down in the authority Punjab State Electricity Board v, Jeewan Kumar 1998(3) 312 (P&H) : 1999(1) C.C. C 9 (P&H). The findings of the lower Court on issue No. 1-A deserve to be set aside. He has further submitted that the findings of the lower Court on issue No. 1 are sound and those may be affirmed.

10. Before referring to the contentions of the learned counsel for the parties, I will like to refer to the admitted facts. In para 1 of the plaint the plaintiff specifically alleged that he has got small power (industrial) connection bearing No. 185/15 at the premises of his Green Hotel, Patiala. In reply to this allegation, the defendants admitted that the plaintiff was carrying on the business at Patiala. It means that this fact stands admitted that the plaintiff has got small power (industrial) connection. The agreement between the Punjab State Electricity Board and the plaintiff was entered into and the copy of the same is Ex. D2. According to this agreement, the plaintiff was required to make the payment according to the relevant tariff. It is also an admitted fact that till the time of issuing the circular on 10.11.86, the defendants have been charging the tariff according to small power (industrial) connection. The only question involved in this case is as to whether the defendants could effect the change of small power (industrial) connection of the plaintiff to that of the commercial one without observing the rules of natural justice or not. It is also an admitted fact that before issuing the circular and changing the tariff from small power (industrial) tariff to commercial tariff, no opportunity was given to the plaintiff.

After applying my mind to the contentions of the learned counsel for the parties and the above admitted facts, I am of the considered opinion that the defendants are bound by the agreement, copy of which is Ex. D2. There is no condition in Ex. D2 that the defendants could suo moto and without notice to the plaintiff change the category from small power (industrial) connection to that of the commercial connection. I have no hesitation in holding that the Board is well within its power to issue the circular dated 10.11.1986 but it could not apply to the case of the plaintiff because the Board could not change the terms and conditions of the agreement, Ex. D2, without affording an opportunity to the plaintiff. The action of the defendant in treating the small power (industrial) connection of the plaintiff as commercial one thus cannot be said to be legal. To this view I find support from the authority Punjab State Electricity Board v. The Hoshiarpur Automobiles (supra), in that case the question involved was also of the similar nature. The Board changed its previous orders in the matter of charging tariff from industrial unit to non-residential. It was held that the least which was expected to be done was to issue show cause notice giving an opportunity of hearing to the person concerned to project his point of view even if there is no such provision made in the rules or regulations. The authority Punjab State Electricity Board v. Ashwani Kumar, AIR 1993

Punjab and Haryana 197, also supports the case of the plaintiff/appellant, where our Hon"ble High Court held that failure to grant an opportunity seriously prejudiced the interest of the plaintiff. It was incumbent on the authorities to give him a notice with detailed facts and to make him aware of its proposal to raise the demand. I further find that the lower Court wrongly ignored the authority Indian Aluminium Company v. Kerala State Electricity Board (supra) wherein in the similar circumstances the Hon"ble Supreme Court held as under;-

"Neither of the two sections viz. Sections 49 and 50, confer any authority on the Board to override a contractual stipulation as to rates and unilaterally enhance the rates in derogation of such contractual stipulation even if it finds that the rates stipulated in the contract are not sufficient to meet the cost of production and supply of electricity and it is incurring operational loss. Indian Aluminum Co. Ltd. and Others Vs. Kerala State Electricity Board and Others, Reversed. Section 49(3) confers power on the Board to fix special tariff for a consumer if the geographical position of the area, the nature of the supply, the purpose for which supply is required and other relevant factors so warrant. Now, fixation of special tariffs can be a unilateral act on the part of the Board, but more often than not, it would be the result of negotiations between the Board and the consumer and hence a matter of agreement between them. It would, therefore, seem clear that the Board can in exercise of the power conferred under sub-section (3) of Section 49, enter into an agreement with a consumer stipulating for a special tariff for supply of electricity for a specific period of time. Such a stipulation would amount to fixing of special tariffs and if would closely be in exercise of the power to fix special tariff granted under Sub-section (3) of Section 49. Now when the power to fix special tariff for a consumer is given to the Board, the possibility cannot be ruled out that the Board may in exercising this power show undue preference to one consumer as against the other. Sub- section (4) of Section 49, therefore, provides a safeguard by enacting that in fixing tariff and terms and conditions for the supply of electricity, the Board shall not show any undue preference to any person. This safeguard is obviously necessary only in cases where special tariff is fixed by the Board under sub-section (3) of Section 49. When uniform tariffs are fixed by the Board under sub-sections (1) and (3) of section 49, there could be no question of the Board showing undue preference to any consumer against another because every consumer falling within the category would have to pay the same tariff for the same benefit received by him. It is, therefore, obvious that subsection (4) of Section 49 controls the action of the Board is fixing tariff under sub-section (3) of Section 49 and it has no application where uniform tariffs are fixed under sub-sections (1) and (2) of Section 49.

Since the stipulations contained in the agreements were made in exercise of the statutory power to fix special tariffs conferred under Sub-section (3) of Section 49, there could be no question of such stipulation, being void as fettering or hindering the exercise of the statutory power under that provision. These stipulations did not divest the Board of this statutory power or fetter or hinder its exercise of this statutory power. Once the

agreements were made containing these stipulations, it was not competent to the Board to override these stipulations which were binding as having been validly made in exercise of statutory power. The Board could not enhance the charges in breach of these stipulations. To hold that the Board could unilaterally revise the charges notwithstanding these stipulations, would mean that the stipulations had no bind effect, or in other words, the Board had no power to enter into such stipulations. That would negate the existence of statutory power in the Board under sub-section (3) of Section 49 to fix the charges for a specific period of time, which would be contrary to the plain meaning and intendment of the section. The Board was also not competent to enhance the charges under the guise of fixing uniform tariffs under Sub- section (1) of Section 49, because subsection (1) is, on its plain language, subject to Sub-section (3) of Section 49, there could be no question of fixing unfirm tariff under sub- section (1) of Section 49. The power to fix uniform tariffs under Sub-section (1) of Section 49, could to be exercised in derogation of the stipulations fixing special tariffs made under Sub-section (3) of Section 49.

It is true that the marginal note cannot afford any legitimate aid to a construction of a section, but it can certainly be relied upon as indicating the drift of the Section, or to show what the section was dealing with. It is apparent from the marginal note that section 59 is intended to do no more than lay down general principles for the finance of the Board. It merely enunciates certain guide-lines which the Board must follow in managing its finance. The Board is directed as far as practicable, not to carry on its operations at a loss and to adjust its charges accordingly from time to time. The Legislature has deliberately and advisedly used the words "as far as practicable as the Legislature was well aware that since the Board is a statutory authority charged with the general duty of promoting the coordinated development of generation, supply and distribution of electricity within the State, with particular reference to such development in areas not for the time being served or adequately served by any licensee, it might run into loss in carrying on its operations and it might not always be possible for it is avoid carrying on its operations at a loss. Sometimes, the Board might have to give special tariffs to consumers in undeveloped or sparsely developed areas and sometimes special tariffs might have to be given to industrial consumers with a view to accelerating the rate of industrial growth and development in the State, even though such special tariffs might not be sufficient to meet the cost of generation, supply and distribution of electricity. Thus it cannot be held that Section 59 confers any power on the Board to enhance the charges for supply for electricity in disregard of a contractual stipulation entered into by it under sub-section (3) of Section 49.

It was not correct to say that by making regulations u/s 79(i) the Board could confer upon itself power to unilaterally revise the rates for supply of (sic) 79(i) empowers the Board to make regulations not inconsistent with the Act to provide for principles governing the supply of electricity by the Board to persons other that the licensee u/s 49." This power to make regulations obviously be exercised consistently with the provisions of the Act and the regulations made in exercise of this power cannot be beyond the Act. If the power to

enhance the rates unilaterally in derogation of the contractual stipulation does not reside in any provision of the Act it cannot be created by regulations made under the Supply Act. Either this power can be found in some provision of the Act or it is not there at all. Regulations in the nature of Subordinate legislation cannot confer authority on the Board to interfere with the contractual rights and obligations, unless specified power to make such regulations is vested in the Board by some provisions in the Statute, expressly or by necessary implication. No such power is to be found in Section 79(1) or in any other provision of the Act. It does not. therefore, make any difference whether regulations u/s 79(1) were made or not at the date when a surcharge was levied. Even if they were made, they could not have conferred authority on the Board to unilaterally exonerate itself from the stipulation contained in the contracts and enhance the rates, notwithstanding such contractual stipulation."

12. The above authority fully covers the present case. While considering the provisions of Sections 49, 59 and 79 of the Electricity Supply Act, 1948, the Hon"ble Supreme Court has categorically laid down that the stipulation contained in the agreement which are made in the exercise of statutory power to fix such tariff cannot be enhanced uni- laterally in breach of stipulation. As already observed above, the Board has the power to fix the tariff from time to time but when the individuals are affected by such exercise of power, they have to be afforded an opportunity of raising the objections and stating their views."

7. This time the defendant is aggrieved by the judgment and decree of the trial Court and, hence, the present appeal.

8. I have heard the counsel for the parties and with their assistance have gone through the record of this case.

9. The suit of the plaintiff has been decreed primarily by the first appellate Court on the ground that the principles of natural justice have not been complied with by the first appellate Court before changing the category of the connection. The second reasons is that the agreement between the parties does not confer any unilateral power to the Board to change the category of tariff at its own will.

10. The learned counsel for the appellant submits that the dispute covered by the suit is supposed to be redressed by the Disputes Redressal Committee and; secondly, the Board has the power to change the tariff and the bill issued to the plaintiff was justified. The learned counsel for the appellant also replied upon a judgment of this Court in Punjab State Electricity Board Vs. Jeewan Kumar and Another, and submitted that all the dispute between the appellant and the Board are supposed to be settled by the Disputes Settlement Committee and, therefore the civil Court has no jurisdiction to entertain the suit.

11. On the contrary, the learned counsel for the respondent submitted that the point for adjudication is whether the Board can unilaterally change the category of the tariff

detrimental to the interest of the plaintiff or not an whether this change can be applied retrospectively or prospectively. The learned counsel for the respondent also submitted that since an additional liability is going to be created with the demand notice, therefore, before issuing such notice, it was incumbent upon the Board to call upon the plaintiff to give reply to the notice.

12. It is the basic principle of law that nobody can be condemned unheard. It is the admitted case of the parties that when the connection was released to the plaintiff for the first time, it was a small power connection. A particular tariff was applied which tariff was revised into commercial one. The revised tariff is expressly and implied by fastened an additional liability on the plaintiff and, in such a situation, before any action detrimental to the interest of the ligant/consumer is taken by the Board, it was obligatory upon the Board to issue the notice. So far as the power of the Board to impose a revised tariff is concerned, it is not being disputed but before exercising this power, the rights of the consumer have to be safeguarded, which has not been done in the present case. This act on the part of the Board is without jurisdiction. The civil court will always have the jurisdiction to entertain such suit. So far as the judgment in National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co. and another, , is concerned, the same is not applicable to the facts in hand. In this case the plaintiff is giving challenge to the demand notice on the ground that the tariff applied in the notice is different one than the agreed one and, in these circumstances, such notice, without hearing him, cannot be acted upon.

13. Resultantly, this Court is of the considered opinion that the suit of the plaintiff has been rightly decreed. The judgment in Jeewan Kumar''s case (supra) relied upon by the counsel for the appellant is not applicable to the facts in hand. Moreover this judgment has been recalled vide RA No. (sic) of 1998 in RSA 3283 of 1987 on 2.1.1988 by a Division Bench of this Court.

14. Counsel for the appellant also relied upon the judgment rendered in Fertilisers and Chemicals Travancore Ltd. Vs. Kerala State Electricity Board and Another, and submitted that the Board has the power to enhance the tariff.

15. The judgment is misconceived. In the present case, it is not the question of enhancement of tariff. Rather, if is the question of change of category of tariff from small power connection to commercial one. There is nothing on the record to indicate that such a power has been granted to the Board under the agreement, Ex. D-2.

Resultantly, the appeal is dismissed with the clear observations that it will always be open to the Board to change the category of tariff prospectively by giving a show cause notice to the consumer. No costs.

16. Appeal dismissed.