HIGH COURT OF GUJARAT

PETRONET LNG LIMITED AND ORS
Versus
DAKSHIN GUJARAT VIJ CO LTD AND ORS

Date of Decision: 01 July 2014

Citation: 2014 LawSuit(Guj) 2069

Hon'ble Judges: C L Soni

Eq. Citations: 2015 1 GLR 145

Case Type: Special Civil Application

Case No: 20670 of 2005

Subject: Constitution

Acts Referred:
Constitution Of India Art 226

Final Decision: Petition allowed

Advocates: Nanavati Associates, P P Banaji, R V Acharya

C. L. Soni, J.

[1] In this petition filed under Article 226 of the Constitution of India, the petitioner has made following prayers in para No.20.

> "A. Your Lordships be pleased to issue a writ of or in the nature of mandamus quashing and setting aside the impugned notices dated 13.4.2005 and 18.6.2005 and supplementary bill dated 27.9.2005 and impugned order dated 13.12.2004 at AnnexureA classifying the petitioner company under residuary item no.7 of Schedule I & II of the said Act;
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> B. Your Lordships be pleased to direct the respondent Board to refund the amount of Rs.1,35,00,000/paid pursuant to the impugned order dated 13.12.2004 and be further pleased to refund the excess amount charged on the basis of the purported classification;

C. Pending admission, hearing and final disposal of this petition, your Lordships be pleased to restrain the respondents from recovering the amount of supplementary bill dated 27.9.2005 and issuing bills/supplementary bills on the basis of the impugned notices and / or taking coercive steps including that of disconnecting the power supply, against the petitioner company on such terms and conditions as deemed just and proper in the facts and circumstances of the case;

D. Exparte ad interim relief in terms of prayer B above be granted."

[2] It is the case of the petitioner company that it was incorporated in the year 1998 as joint venture company for setting up LNG Regasification Terminal. It completed the commissioning of its plant in April 2004. For industrial activity undertaken by the company at its LNG terminal, it executed agreement with the respondent for HT power supply of 2500 KVA under HTP1 tariff treating it as an industrial undertaking. As per the said agreement, the respondent Company started applying HTP1 tariff, treating it as an Industrial undertaking and started levying 20% electricity duty as per the Schedule1, item No.5 of the Bombay Electricity Act, 1958 ('the Act' for short) effective from November2003. The petitioner company was also liable to pay electricity duty in so far as electricity generated through its three generating sets are concerned as per ScheduleII. It is further case of the petitioner that though the activities of the petitioner company are industrial activities falling under Item5 of ScheduleI, the respondent company issued a letter in June 2004, interalia, demanding energy bill for supply of 2500 KVA of power on the basis of HTPII(A) Tariff with retrospective effect from November, 2003. However, subsequently the said demand was kept in abeyance on petitioner representing that its activities could not be termed as falling under tariff HTPII(A). However, so far as CPP consumption was concerned, the petitioner company received notice/order dated 13.12.2004, interalia, demanding 70 paisa per unit effective from November 2003 on the ground that the activities undertaken by the petitioner company would fall under the residuary Item No.7 of ScheduleII. The respondents thus retrospectively charged the petitioner company at the rate of 40% for the energy supplied by it and at the rate of 70 paisa per unit for the energy generated through CPP purportedly on the ground that the activity undertaken by the petitioner company is of only storage and not falling under the definition of 'industrial undertaking'. It is stated in the petition that the petitioner has paid an adhoc amount of Rs.1,35,00,000/towards the supplementary bill issued by the Board for the energy generated through CPP from November 2003 and December 2004 and thereafter the petitioner has been paying electricity duty of Rs.O.7 paisa per unit for electricity generated through CPP. However, since the classification is made without affording an opportunity of hearing and without any rational basis, the petitioner has challenged the demand notices and supplementary bill.

[3] The petition is opposed by filing affidavit in reply on behalf of respondent No.2 as also on behalf of the respondent No.1 stating that the activities of the petitioner do not fall under any of the items No.1 to 6 of ScheduleI. It is stated in the affidavit of the respondent No.2 that on scrutiny of the report, since it was observed that electricity duty should be levied at 45% from the date of connection to 31.05.2005 and at 35% with effect from 01.04.2005 onwards as per the item No.7 of PartI of ScheduleI, show cause notice dated 13.04.2005 was issued asking the petitioner company to clarify necessary facts within 15 days from the date of notice. However, no response was received from the petitioner and therefore instructions were issued to the electricity company to recover the differential amount of electricity duty between 20% to 45% from the date of connection to 31.05.2005 and at 35% from 01.04.2005. It is further stated that the activities explained by the petitioner in the petition are akin to the activities defined under the service undertaking and therefore, the petitioner is at the most entitled to rate applicable to service undertaking.

[4] I have heard learned advocates for the parties.

[5] Learned senior advocate Mr.K.S.Nanavati for Nanavati Associates, advocates for the petitioner submitted that the petitioner company has been supplied electricity under the agreement dated 07.11.2003 executed between the petitioner and the company as an industrial undertaking and the tariff applicable under said agreement to the petitioner is of HTPI. Mr.Nanavati submitted that suddenly the classification of the unit of the petitioner company was changed with retrospective effect and the petitioner was issued notice by the respondent No.2 for recovery of electricity duty at the rate of 45% from the date of connection. Mr.Nanavati submitted that since, the classification for the undertaking of the petitioner could not have been unilaterally changed without hearing the petitioner. The respondent No.2 was required to decide the dispute as regards the unit of the petitioner company as contemplated in partII of the schedule of the Act. Mr.Nanavati submitted that instead of referring and deciding such dispute after giving full opportunity to the petitioner company, the respondent No.2 passed order dated 08.06.2005, asking the respondent No.3 to recover electricity duty at 45% instead of 20% from the date of connection up to 31.03.2005 and at the rate of 35% from 01.04.2005 onwards. Mr.Nanavati submitted that even as per the affidavit in reply filed on behalf of the respondent, the respondents are not sure as regards classifying the undertaking of the petitioner company because it is stated in the affidavit that the activities of the petitioner company could be said to be akin to the activities defined under "service undertaking". Mr.Nanavati submitted that in fact as held by this Court in Letters Patent Appeal No.1076 of 2011, the activities undertaken by the petitioner company could be said to be falling within industrial undertaking. However, the respondent No.2 without any basis, has concluded that the activity of the petitioner

company would attract the electricity duty at the rate of 45%. Mr.Nanavati thus, urged to quash and set aside the order dated 08.06.2005 passed by the respondent No.2Collector of Electricity Duty, Gandhinagar and remit the matter back to respondent No.2 to take a decision afresh after hearing the petitioner. As far as supplementary bill issued to the petitioner for energy generated through CPP is concerned, no grievance is made.

[6] Learned AGP Mr.P.P.Banaji appearing for the respondent No.2 submitted that during routine inspection carried out by the office of the electricity duty inspector, when it was noticed that electricity consumption utilized was not for industrial undertaking, but just for storage of LNG, the petitioner was issued show cause notice to give clarification as to why electricity duty at the rate of 45% instead of 20% of consumption charges should not be levied. Mr.Banaji submitted that since, no clarification was provided by the petitioner, the respondent No.2 passed order dated 08.06.2005 for levy of electricity duty at the rate of 45% from the date of connection for the unit of the petitioner till 31.03.2005 and thereafter at the rate of 35% from 01.04.2005 onward and directed the respondent No.3 to effect the recovery at the aforesaid rate from petitioner. Mr.Banaji submitted that considering the activities of the petitioner company and in view of provision for levy of electricity duty made in ScheduleI, Item No.7 of the Act, the respondent No.2 has committed no illegality in passing the order dated 08.06.2005 for levy of the electricity duty at the rate of 45% and 35% respectively as stated above.

[7] Learned advocate Ms.R.V.Acharya submitted that though the petitioner was initially charged at the rate of 20% of the consumption charges, however, when it was found on routine inspection from the office of the electricity duty inspector that the petitioner company, in fact, was not industrial undertaking, but just indulging into storage of LNG at its terminal, the petitioner was called upon by the respondent No.2 to explain and to give clarification as to why the petitioner should not be levied electricity duty at the rates stated in the notice issued by the respondent No.2 dated 13.04.2005. Ms.Acharya submitted that the petitioner having not responded to such notice and considering the activities of the petitioner, since provisions made in item No.7 in partI of the Schedule1 of the Act were attracted, the petitioner was rightly charged with duty at the rate of 45% and 35% respectively for different periods as stated in the order dated 08.06.2005 passed by the respondent No.2. She thus, urged not to interfere with the said order as well as the demand notice issued by the respondent No.1 and respondent No.3 based on the above said order.

[8] Having heard learned advocates for the parties, it appears that for the HT connection of the petitioner unit, the petitioner was charged electricity duty at the rate of 20% of consumption charges by considering the undertaking of the petitioner as

industrial undertaking. However, as stated in the show cause notice dated 13.04.2005, issued by the respondent No.2 to the petitioner, that since, it was noticed that the electricity consumption was utilized by the petitioner for the purpose of cooling the liquefied natural gas for reducing the volume at the LNG terminal and the LNG is converted back into gas by hitting, the said activities were considered similar to storage of LNG for which levy of electricity duty at the rate of 20% was not found proper.

[9] Though, the petitioner did not responded to such notice, but it could certainly be said that dispute had arisen on the issue as to the nature of undertaking and as to under which item of the schedule, the consumption of energy by the petitioner would fall. As per PartII of ScheduleI of the Act, where any such dispute arises, it is required to be referred for decision to such authority as the State Government may by notification in the official gazette specify. Such authority is to then record its decision after inquiry as it deems fit. Provision for appeal is also made against such decision. The State Government is also given powers to call for and examine the record of any proceedings of the authority for the purpose of satisfying itself as to the legality or proprietary of the decision or order passed by the authority.

[10] In view of the above provision, the dispute in connection with the consumption of energy by the petitioner was required to be referred to the authority concerned. The Court is informed that the respondent No.2 is the concerned authority.

[11] Though, the order dated 08.06.2005 is passed by the respondent No.2 who is stated to be the concerned authority to decide the dispute, however, it appears that the said order was passed not as a decision on dispute as contemplated in partII of ScheduleI of the Act nor even the petitioner was given opportunity of hearing. It appears that since the petitioner did not reply to the notice dated 13.04.2005, the respondent No.2 proceeded to pass order dated 08.06.2005, directing the respondent No.3 to recover the electricity duty at the rate of 45% and 35% respectively of the consumption charges for the period stated in the order. The copy of this order was sent to the petitioner.

[12] As per provision made in partII of ScheduleI of the Act, the respondent No.2 acting as the authority concerned was required to hold inquiry, as deemed fit. However, such inquiry should be in consonance with the principles of natural justice. Therefore, it was incumbent upon respondent No.2 to inform the petitioner that the dispute in connection with consumption of the electricity by the petitioner was taken up for decision and the petitioner was required to be given opportunity of presenting its case for decision of such dispute. Such legal procedure mandated in partII of ScheduleI of the Act was not followed by the respondent No.2. It is required to be noted that in the

affidavit in reply filed on behalf of the respondent No.2, the activities of the petitioner are stated to be akin to the activities defined under "service undertaking". In view of such stand taken in the affidavit in reply and since the order dated 08.06.2005 passed by respondent No.2 is not decision in accordance with the provision made in PartII of scheduleI of the Act, the order dated 08.06.2005 is required to be quashed and set aside, and consequently, the supplementary bill dated 27.09.2005 issued by the respondent No.3 and the demand notice issued by the respondent No.1Board for recovery of the amount of supplementary bill are also required to be quashed and set aside and the matter is required to be remitted to the respondent No.2 for taking a decision afresh on the dispute as to the nature of undertaking of the petitioner unit as also to decide as to under which item of the scheduleI of the Act, the consumption of the energy by the petitioner company would fall by treating such dispute arises under partII ScheduleI of the Act after giving full opportunity to the petitioner to represent its case in connection with such dispute and also to the respondent No.1.

[13] Since the matter is remitted to the respondent No.2 to decide the dispute afresh, the Court has not examined the contention of the petitioner on merits that the activities of the petitioner are of industrial undertaking. The Court has also not considered the judgments relied on by Ld. Senior Advocate Mr.Nanavati on the above issue. All the contentions taken in this petition as regards the nature of undertaking and the applicability of the rate of duty under PartI of ScheduleI are open to be canvassed before respondent No.2.

[14] For the reasons stated above, the petition is partly allowed. The order dated 08.06.2005 passed by the respondent No.2 as well as the supplementary bill dated 27.09.2005 issued by the respondent No.3 as also the demand notice issued by the respondent No.1Company for recovery of the amount of the supplementary bill are quashed and set aside. The matter is remitted to the respondent No.2 to treat the same as dispute arises under partII of ScheduleI and to decide as to the nature of the undertaking of the petitioner as also as to under which item of PartI of ScheduleI, the consumption of the energy by the petitioner would fall. Such dispute shall be decided by the respondent No.2 after giving full opportunity to the petitioner as well as to respondent No.1. However, if the petitioner or the respondent No.1 desires to produce any material/documents before the respondent No.2, they may do so within period of four weeks from today. The respondent No.2 shall then decide the dispute within a period of six weeks.

[15] Rule made absolute to the extent stated above.

[16] The copy of this order shall be made available to learned AGP Mr.Banaji for its onward communication to respondent No.2.