

WP(C) No.266 of 2008

In WP(C) No.266 of 2008

-Versus-

For Opp. Parties: M/s.A.K.Mishra,
H.M.Das &
A.K.Sahoo
(For O.Ps.4 & 6)

M/s.S.K.Pattnaik,
U.C.Mohanty, P.K.Pattnaik
& N.Satapathy
(For O.P.2)

M/s.S.Mohanty,
& R.K.Sahoo
(For O.P.1)

-Versus-

For Opp. Parties: Add. Government Advocate
(For O.Ps.1 & 2)

M/s.A.K.Mishra, H.M.Das
&A.K.Sahoo
(For O.P.3)

In WP(C) No.8314 of 2003

Hotel Aditi ... Petitioner

-Versus-

State of Orissa & others ... Opp. Parties

For Petitioner : M/s.D.R.Pattanayak
& L.K.Pattnaik

For Opp. Parties: M/s.S.K.Pattnaik,
U.C.Mohanty, S.K.Mohanty,
B.P.Das, D.P.Das, N.Satapathy,
P.K.Pattnaik,D.Pattanayak,
T.K.Kamila & N.Satapathy

(For O.P.1)

M/s.A.K.Mishra,
H.M.Das &
A.K.Sahoo

(For O.Ps.3 & 4)

In WP(C) No.14033 of 2006

M/s.D.K.Lodgings ... Petitioner

-Versus-

Secretary to the Industries Department
& others ... Opp. Parties

For Petitioner : M/s.Siddhartha Ray
& S.Dey

For Opp. Parties: Mr.B.K.Nayak

(For O.Ps.4 & 5)

In WP(C) No.6143 of 2003

Jalaram Lodge ... Petitioner

-Versus-

State of Orissa & others ... Opp. Parties

For Petitioner : M/s.U.K.Samal,
B.R.Barik &
N.P.Ray

For Opp. Parties: M/s.Rajeet Ray,
S.K.Singh, N.Hota
& A.Pradhan

(For O.Ps.2 & 3)

Date of Judgment: 28.06.2013

P R E S E N T:

THE HONOURABLE KUMARI JUSTICE SANJU PANDA

S. Panda, J. Since common questions are involved in these writ petitions, they were heard together and are being disposed of by this common order. For the sake of convenience, WP(C) No.266 of 2008 is taken up for consideration..

In WP(C) No.266 of 2008

In this writ petition, the petitioner-Hotel has challenged the order dated 22.3.2005 passed by the Orissa Electricity Regulatory Commission, Bhubaneswar, opposite party no.1, rejecting the proposal of the petitioner to be classified under the industrial category and billed at general purpose tariff.

In WP(C) No.12680 of 2000

In this writ petition, the petitioner-Hotel has challenged the letter dated 25.8.2000 issued by the Executive Engineer, Electrical, reclassifying the petitioner-hotel as commercial tariff instead of industrial tariff.

In WP(C) No.8314 of 2003

The petitioner-Hotel has filed this writ petition challenging the letter dated 5.6.2003 issued by the Executive Engineer, Electrical, reclassifying the petitioner-hotel as commercial tariff

In WP(C) No.14033 of 2006

The petitioner-Lodge has filed this writ petition challenging the illegal action of opposite parties 4 and 5 in raising the energy bills by applying general purpose tariff rate instead of industrial tariff.

In WP(C) No.6143 of 2003

The petitioner has filed this writ petition challenging the arbitrary action of the opposite parties in raising the energy bills by applying commercial class instead of industrial class.

2. In these writ petitions, the petitioners have challenged the action of the opposite parties in classifying the petitioners' institution as commercial organisation

fixed the commercial tariff rate towards electricity charges instead of industrial tariff rate though the petitioners' organisation are hotels and to be treated as industry as per the different Industrial Policy Resolutions (in short, "the IPR").

3. Pursuant to the Industrial Policy Resolution, 1996 published by the State Government, the petitioner-company has started its hotel business. The petitioner-company has set up its hotel by taking financial assistances from the financial institutions. The hotel of the petitioner has also been approved by the Tourism Department, Government of Odisha which has recommended to the GRIDCO for charging the petitioner at "Industrial Tariff" rate. The petitioner-hotel has also been registered with the General Manager, DIC as a small scale industrial unit. From the very inception, the petitioner-hotel has been charged at industrial tariff rate by opposite party no.4. The Government of Odisha in its Industries Department from time to time declares IPRs for rapid industrialisation and financial growth in the State. In Industrial Policy Resolutions, 1986, 1989, 1992 and 1996, the State of Odisha declared tourism related industries like "Hotels" to be treated as "Industry" and that will be supplied power by charging industrial tariff rate. For giving effect to the policy decision of the Government declared in the aforesaid IPRs, the Chairman-cum-Managing Director, GRIDCO issued a letter to all the Executive Engineers on 14.5.1996 stating therein that all Hotels (existing and new) will be entitled to have power at industrial tariff rate and not at commercial rate. The Director of Industries in their letter dated 4.3.1997 also issued a clarification to the effect that all existing and new hotels are entitled to get power supply at industrial tariff rate under IPR-1996 from 1.3.1996 onwards.

4. While the matter stood thus, the opposite parties took a decision that the petitioners are liable to pay electricity charges by applying commercial tariff instead of industrial tariff. Hence these writ petitions.

5. Opposite parties 4 and 6, the Distribution Companies, have filed their counter affidavit taking a stand that as per Section 39 of the Orissa Electricity Reforms Act, 1995, if any person is aggrieved by any decision or order of the Commission passed under the Act, may file an appeal before the High Court on any question of law arising out of such order within sixty days of the decision. Since the petitioner was aggrieved with the order of the Orissa Electricity Regulatory Commission (hereinafter referred to as "the O.E.R.C") dated 22.3.2005, it had to file an appeal within the statutory period. The O.E.R.C. was constituted in the year 1996 as per the Orissa Electricity Reforms

Act, 1995 (in short, “the Act”) and it regulated the electricity business in Orissa. As per the said Act, O.E.R.C. issued license to GRIDCO in the year 1997 and all the four DISTCOs including WESCO in the year 1999 for doing business in their respective license areas for distribution of power supply to different types of consumers. The petitioner-unit comes under opposite parties 4 and 6. As per the reforms process undertaken by the State Government, 51% equity shares of the company had been purchased by a private company and a separate license for supply of power had been granted in favour of the company with effect from 1.4.1999. The Commission has the power to frame regulation for its efficiency purpose. The Commission framed its regulation known as “O.E.R.C Distribution (Conditions of Supply) Code, 1998” to govern the distribution and supply of electricity and procedure thereof, such as, system of billing, modality of payment of bills, powers, functions and obligations of the suppliers and the rights and obligations of consumers and matters connected therewith and incidental thereto. The Distribution Code has its application and binding on all types of consumers and suppliers. Clause-VII of the Code deals with “Classification of Consumers”. Clause 80(b) of the Code deals with “commercial category of consumers” which reads as follows:

“80(b) Commercial-

This relates to relax to supply to premises which are used for office, business, commercial or other purposes not covered under any of the category with a contract demand upto but excluding 110 KVA and whereas the non-domestic load exceeds 10% of the total connected load.”

Since the demand of the petitioner-hotel is 63 KW, it comes under the category of “commercial tariff”. The Government of Odisha has formulated Industrial Policy Resolution to provide incentive to different industries in the State. As per the provisions of the IPR 1986, 1989 and 1992, benefits had been extended by OSEB to different industrial units including the petitioners so far as consumption of electricity was concerned. They availed the benefits of industrial tariff even though they come under the category of “commercial tariff”. The said benefit was extended by the State Government and the same was reimbursed by the State Government to OSEB. After formation of GRIDCO, the then Chairman and Managing Director of GRIDCO informed all the Executive Engineers in-charge of the Divisions under GRIDCO vide letter dated 14.5.1996 that the units relating to tourism activities, existing/new hotels are

entitled to have the power at industrial tariff rate and not at commercial tariff rate. Modifying its earlier letter, it was further intimated vide letter dated 26.11.1996 that the industrial units, hotels covered under the earlier I.P.Rs continued to have the benefit of such waiver upto the period provided in the concerned IPR. However, such facilities shall not be available to new industries coming under IPR, 1996. It was also intimated in the said letter that the financial loss incurred due to implementation of the directives of the State Government will have to be made good to GRIDCO by the State Government as provided under Section 12(3) of the OER Act, 1995. On the basis of the said communication, the benefits were extended to the petitioner-hotel and they were charged under the industrial tariff category upto 2000. After formation of different supply zones, distribution business of the zone was handed over to the private company and separate license was granted by the O.E.R.C. The Commission regulating the tariff policy notified the tariff for the entire retail supply of Orissa on 30.12.1999 with effect from 1st February, 2000. As per the Code, 1998, the commercial establishments including hotel consumers are coming under Clause 80(b) of the Regulations. The tariff for the commercial category of consumers fixed and mentioned in tariff order dated 30.12.1999 was published in the newspaper circulated in the State of Orissa for information of the general public and all consumers including the petitioners. As such, the action of the opposite parties is not arbitrary. As per the said tariff notification, the tariffs of hotels are covered under commercial category and not under industrial category. However, they have got the benefit declared by the Government, i.e., waiver of electricity duty as per applicable rates provided in IPR 1996. Since the Government has withdrawn all supports and the private companies are in charge of supplying the electricity and Government did not reimburse the financial loss, the benefit of IPR 1996 was not extended to the petitioner industries as per the orders of OERC dated 30.12.1999.

6. Section 12(1) of the Orissa Electricity Reforms Act provides that the State Government shall be entitled to issue policy directives on matters concerning electricity in the State. Section 12(3) of the Act provides that the State Government shall be entitled to issue policy directives concerning the subsidies to be allowed for supply of electricity to any class or classes of persons or in respect of any areas in addition to the subsidies permitted by the Commission while regulating and approving tariff structure provided that the State Government shall pay the amount to compensate any concerned

Bodies or Units affected by the grant of subsidy by the State Government to the extent the subsidy granted.

7. Since the State Government refused to extend for such subsidy to the company, the O.E.R.C is not in a position to provide any subsidy to the petitioners' establishment and the tariff rate was fixed as per the commercial tariff rate instead of industrial tariff rate.

8. While the matter stood thus, considering the power sector reforms and private participation in the distribution sectors, the Government of Orissa abridged/modified the incentive criteria in subsequent IPR 2001. For better appreciation, IPR-2001 is quoted below:

"IPR-2001

ELIGIBILITY

13.2. Industrial Units, hotels, cinema halls etc. covered under earlier industrial policy resolutions shall continue to enjoy the incentives admissible under the said policy except to the extent abridged or modified or enlarged in this policy.

POWER

18.11 Information Technology, Bio-technology and Tourism related activities (existing or new) which are treated as industrial activity will be entitled to have power at industrial and not commercial rate of tariff subject to OERC approval."

9. The Government of Orissa further abridged/modified the incentive criteria in subsequent IPR 2007 which reads as follows:

"IPR-2007

ELEGIBILITY

14.2 Industrial units covered under earlier Industrial Policy Resolutions shall continue to enjoy the incentives if admissible under the said policy as per eligibility.

20. POWER

20.1 New Industrial unit other than Thrust sector industries shall be exempted from the payment of electricity duty upto a contract demand of 110 KVA for a period of 5 years from the date of availing power supply for commercial production. New industrial unit in the thrust sector shall be entitled to 100% exemption of electricity duty upto a contract demand or Five Megawatt for a period of 5 years from the date of availing power supply for commercial production.

20.2. New industrial unit setting up captive power plant shall be exempted from the payment of 50% of electricity duty for captive power plant for a period of 5 years for self-consumption only from the date of its commissioning.

20.3 Industries of seasonal nature like sugar, salt industries etc. will be provided the facility of temporary surrender of a part of their connected/sanctioned load subject to approval of OERC."

Definitions and Interpretation

17. "Priority Sectors" means-New Industrial units where fixed capital investment commences on or after the affective date and fall within the following categories.

- 1) Information technology and IT enabled service
- 2) Tourism related (hotels shall not be eligible for any fiscal incentive other than land at concessional industrial rate. No such concession was extended to the tourism sector as per the said IPR.)

10. In view of the above since the hotels shall not be eligible for any fiscal incentive other than land at concessional industrial rate, no such concession was extended to the tourism sectors as per the said IPR. Therefore, the petitioners are not entitled to get any relief.

11. Opposite parties 2 and 3-the State Government have filed their counter affidavit taking similar stand to that of opposite parties 4 to 6. They have further stated that for similar prayer, the petitioner has filed OJC No.12680 of 2000 which is still pending. Therefore, the present writ petition is a repetition. The Government did not provide any subsidy to the hotels declared as an industry and there is no policy to pay any subsidy to the licensee and the distributing companies. The State Government also do not propose to provide energy to the hotels set up under IPR-1996 at the commercial rate by paying any subsidy to the licensing companies either. The Government has cleared the said position while issuing IPR-2001 and 2007. Since O.E.R.C is not ready to supply power tariff to hotels at industrial rate, the petitioners are not entitled to claim any benefit as per IPR 1996 which was for a specific period. The decision of the O.E.R.C dated 22.3.2005 having their own justification in the right direction achieved the desired objectives by launching reforms in power sector which has also not been challenged by any one and the same has become final and binding.

12. This Court has considered the aforesaid facts and the fact that after introduction of IPR-2001 and IPR-2007, the State Government has already abridged/modified the incentive criteria given to the hotels treating them as industries.

13. Sections 108(1) and 65 of the Electricity Act, 2003 being vital; they are extracted below for better appreciation:

"108. Directions by State Government.-(1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

xxx

xxx

xxx"

“65. Provision of subsidy by State Government.- If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under section 62, the State Government shall, notwithstanding any direction which may be given under section 108, pay, in advance and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licence or any other person concerned to implement the subsidy provided for by the State Government:

Provided that no such direction of the State Government shall be operative if the payment is not made in accordance with the provisions contained in this section and the tariff fixed by the State Commission shall be applicable from the date of issue of orders by the Commission in this regard.”

14. The benefits the petitioners are getting under the said IPR-1996 having not been extended to them, it is open to the petitioners to challenge the order of the O.E.R.C as per the provision of Section 39 of the Act within a period of four weeks from today. In case such an appeal is filed explaining the delay in filing the appeal, the same shall be considered on its own merits. The petitioners may also make representation(s) to the State Government to provide them incentives taking into consideration the development of tourism sectors of the State and in such event the representation(s) of the petitioners may be considered by the State Government sympathetically.

With the above directions, the writ petitions are disposed of.

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Sanju Panda, J.

High Court of Orissa, Cuttack
Dated 28th June, 2013/ Pradeep