

A.F.R.

HIGH COURT OF ORISSA: CUTTACK

W.P.(C) No. 917 of 2012

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Basudev Mahakud
Executive Engineer (Electrical),
Bhubaneswar Electrical Division,
At. Rasulgarh, P.O./P.S.-Bhubaneswar,
Dist: Khurda.

... Petitioner

-Versus-

National Seeds Corporation Ltd.
Represented by it's Area Manager,
IDCO, Plot No.150, Mancheswar
Industrial Estate, Bhubaneswar
Dist. Khurda.

... Opp. party

For Petitioner : M/s. D.R. Ray & B.K. Jena.

For Opp. Party : M/s. Bhaktahari Mohanty,
D.P. Mohanty, R.K.Nayak,
T.K.Mohanty, P.K.Swain &
M.Pal.

P R E S E N T:

THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA

Date of Judgment: 15.03.2013

B.N. MAHAPATRA, J. The present writ petition has been filed at the instance of the Executive Engineer (Electrical), Bhubaneswar Electrical Division, At-Rasulgarh, Bhubaneswar with a prayer to set aside the order dated 28.11.2011 passed by the Grievance Redressal Forum, Bhubaneswar in C.C. Case No.80 of 2011 (BED) on the ground that the impugned order is illegal, result of arbitrary exercise of power and without jurisdiction.

2. Petitioner's case in a nutshell is that opp. Party-National Seeds Corporation Ltd. represented by its Area Manager, IDCO, Plot No.150, Mancheswar Industrial Estate is a consumer under the petitioner having Consumer No.272 LI. Initially it availed contract demand of 12 KW. Subsequently, it filed application for enhancement of Contract Demand (for short, 'CD') by following the due procedure as prescribed under the Orissa Electricity Regulatory Commission Distribution (Condition of Supply) Code, 2004 (for short, "Code, 2004"). Considering such application, permission was granted for enhancement of the load from 12 KW to 107 KW/119 KVA. To this effect an agreement was executed between the parties on 10.06.2009 for supply of power on enhanced load imposing terms and conditions incorporated in the agreement. Opp. Party availed the power supply on enhanced CD on and from 18.06.2009 and also used to pay the bills as charged by the petitioner in accordance with the agreement under the General Purpose Tariff (hereinafter referred to as "GPT"). Though opp. Party is continuing to pay the electricity dues under GPT category since the date of charge regularly without any objection, but all of a sudden after gap of quite a long period opposite party filed an application on 20.04.2011 before the petitioner requesting to change the tariff category of High Tension from GPS to Allied Agro Industrial Activities. In the said petition, Opp. Party stated that production of Tissue Culture Plant is defined as Allied Agro Industries by the Department of Scientific and Industrial Research, Ministry of Science and Technology. Apart from the above, it was also

contended by opp. party before the petitioner that its laboratory comes under Allied Agro Industry Activity as per the Tariff Notification dated 18.03.2011 effective from 01.04.2011. Accordingly, opp. Party contended for change of classification from “GPS” category to the category of “Allied Agro Industrial Activities”. On consideration of agreement executed between the parties and the notification of Regulatory Commission published in the Orissa Gazette Notification dated 19.10.2009 vis-à-vis the purpose of utilization of power, the petitioner arrived at a conclusion that the laboratory of the Opp. Party does not come under the category of Allied Agro Industrial Activities. The decision of the petitioner was intimated to Opp. Party vide letter No. 4919 dated 2.5.2011 under Annexure-3. Upon receipt of the letter dated 2.5.2011 along with Gazette Notification, opp. Party filed a representation before the Chairman-cum-Chief Executive Officer of the petitioner claiming the same relief. Since no communication was made to Opp. Party from the Chairman-cum-Executive Officer, opp. Party filed a complaint petition seeking the said relief from Grievance Redressal Forum (for short, “GRF”) which has been registered as C.C. Case No. 80 of 2011 (BED). After hearing both the parties, the GRF passed the impugned order dated 28.11.2011 under Annexure-5 directing respondent no.2 (the present petitioner) to reclassify the present consumer in the category of Allied Agricultural Activities under Regulation 80 (5) (ii) of the OERC Distribution (Conditions of Supply (5th Amendment) Code, 2009 from the date of consumer’s application subject to fulfillment of other departmental

formalities by the complainant. Hence, the present writ petition.

3. Mr. D.R. Ray, learned counsel appearing on behalf of the petitioner submitted that the impugned order passed by the GRF is without jurisdiction and therefore, the same is a nullity and void. The impugned order is a glaring instance of usurpation of jurisdiction by the GRF being not conferred upon it under the relevant provision of law and Regulation to decide such issues. The order being contrary to the statutory provision is not binding upon the petitioner. The GRF has no jurisdiction to decide the matter as the relief sought for by Opp. party is within the exclusive domain of the Orissa Electricity Regulatory Commission (for short, "Commission"). The order passed by the GRF is a result of non-application of mind. In the instant case, neither any deficiency(s) has/have been committed by the petitioner nor there is any contravention of the Act, Rule or Regulation so as to confer jurisdiction upon the forum below to sit over the matter. The power of classification/ categorization of consumer is within the exclusive domain of the Commission as provided under Section 62 of the Electricity Act, 2003. Therefore, learned forum below has usurped its jurisdiction to pass the impugned order. It is settled position of law that if an Act provides to do certain work in a particular manner, the same has to be done in that manner or not at all. The Electricity Act, 2003 confers power upon the Commission for recovery of charges in accordance with such tariff fixed from time to time, which is essentially the duty of the Commission in accordance with the provisions of the Act. Therefore, the same power

cannot be exercised by any other authority, court or forum. The finding of the G.R.F. that opposite party comes under the allied agricultural tariff is contrary to the statutory provision of law inasmuch as law provides conditions to differentiate the consumer under a particular category. Learned forum below has been swayed away by the argument advanced by opposite party without keeping in mind the maximum profit earned by Opp. party by utilizing the electric energy which has become a costly affair now-a-days. It is further submitted that the tariff notification is made in each year inviting public attention to file their grievance, but opp. party did not choose it's prudence to file any complaint before the Commission for its classification under the alleged class of consumer. He cannot raise such point after declaration of such tariff classification. The GRF has committed grave mistake to take note of the documents which are not at all relevant for the purpose of present classification. Opp. party by doing its business in plantlets unlike other businessmen in the State, cannot by any stretch of imagination be considered as a consumer under the Allied Agricultural Activities. In this context, the GRF has given a go bye to the very intention of the Commission. In support of his contention the petitioner relied upon the decision rendered in Case Nos. 140, 141, 142 and 143 of 2009 dated 20.3.2010 and the letter of the Deputy Director, Horticulture dated 20.01.2012 and judgment of the Hon'ble Supreme Court in *Maheswari Fish Seed Farm vrs. T.N. Electricity Board and another*, (2004) 4 SCC 705. Concluding his argument, Mr. Ray submitted to allow the writ petition.

4. Mr. D.P. Mohanty, learned counsel appearing for Opp. party submitted that in the year 2003, The Electricity Act, 2003 was enacted. The power of the Commission is defined in the Act. In the year 2004 as per the provision of Sec. 181 (i), (t), (v), (w) & (x) of the Act, the Orissa Electricity Regulatory Commission framed a Regulation known as “Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004” which came into force in May 28, 2004, i.e., the date of publication of the Code in the Orissa Gazette Extraordinary. In the year 2009, the OERC in exercise of power conferred on it under sub-sections (5), (6) and (7) of Section 42 read with Clauses (r) and (s) of Sub-section (2) of Section 181 of the Electricity Act, 2003 framed Regulations, namely, “OERC (Grievances Redressal Forum and Ombudsman) Regulations, 2004” which was notified on 17.5.2004 in the Orissa Gazette Extraordinary. Clause 2(d) of the above Regulations defines ‘complaint’ to mean an application filed with the Forum seeking redressal of grievances of any nature, whatsoever, including any defect or deficiency in the electricity service, subject to the provision of the Act. Clause 4(2) of the above Regulations provides that the Forum shall duly comply with the procedure as laid down by the Commission from time to time. Clause 15 of the Regulations inter alia provides that the Commission may from time to time issue orders/circulars with regard to implementation of these Regulations. Circular dated 19.10.2004 issued by the OERC prescribes procedure to be followed by GRF while deciding the complaint and also stipulates the jurisdiction of the Forum, the

nature of the complaint etc. wherein the GRF has jurisdiction and power to classify and reclassify the consumer. Section 62 of the Act does not prescribe for classification or categorization of the consumer.

5. It is not at all correct to say that the classification/ categorization of consumer is within the exclusive domain of OERC. The present dispute does not relate to fixation of tariff. On the other hand, it relates to change of category from “General Purpose” to “Allied Agricultural Activities”. It is not necessary on the part of Opp. Party to approach the Commission by way of filing any objection for reclassification of the category.

6. Mr.Mohanty further submitted that opp. party-National Seeds Corporation Ltd., a Government of India Undertaking is engaged in production of banana plantlets (seedling) under controlled environmental conditions for supply to farmers of the State at subsidized rates. Opp. party has been producing high grade banana plantlets (seedlings) by adopting modern technology of plant tissue culture for supply under “National Horticulture Mission Programme”. Opp. Party-Laboratory comes under the category of Allied Agricultural Activities as per the amended Regulation 80(5)(ii) of the Code, 2004. In the instant case, the petitioner committed deficiency in service by not considering the grievance of Opp. Party to change its category from “General Purpose” to “Allied Agricultural Activities”.

7. On the rival contentions of the learned counsel for both parties, the following questions fall for consideration by this Court:

- (i) Whether the Grievance Redressal Forum (CESU), Orissa , Bhubaneswar has the jurisdiction in terms of Circular No.19 dated 19.10.2004 issued by the OERC to classify/reclassify the consumer so as to bring the consumer from the category “General Purpose” to the category of “Allied Agricultural Activities”?
- (ii) Whether Circular No.19, dated 19.10.2004 relied upon by the GRF is contrary to the statutory provision of law as contended by the petitioner-licensee?
- (iii) Whether the term “Horticulture” as appearing in Clause 80(5)(ii) of the OERC Distribution (Conditions of Supply) (5th Amendment) Code, 2009 includes Tissue Culture?
- (iv) What order?

8. Question Nos. (i) and (ii) being inter-linked, they are dealt with together

Facts which are not in dispute are that Opp. Party-National Seeds Corporation Ltd., Bhubaneswar is producing Tissue culture banana plantlets under the control of environmental conditions being utilized in the farmers’ field of the State at subsidized rates under the National Horticulture Mission Programme. For the aforesaid purpose, Opp. Party–Seed National Corporation set up a Tissue Culture Laboratory over Plot No.150, Mancheswar Industrial Estate, Bhubaneswar and the said Tissue Culture Laboratory is a consumer of Central Electricity Supply Utility of Orissa. On 26.10.2009, the OERC amended Regulation 80 of the Code by way of inserting the Regulation 80(5)(ii), wherein one new category was created as “Allied Agricultural

Activity” for the purpose of Horticulture. Pursuant to such amendment, Opp. Party made a request to the Executive Engineer (Electrical), BED, CESU to change its category from “General Purpose” to “Allied Agricultural Activity”. Since the Executive Engineer turned down the request of the opposite party it filed a representation before the Commission. As the Commission did not consider the representation, finding no way out, the opp. Party Company filed an application before the GRF, Bhubaneswar, who passed the impugned order.

9. The petitioner-licensee’s case is that the impugned order passed by the GRF is not sustainable in law basically on two grounds i.e. (i) it has no jurisdiction to reclassify opposite party so as to bring it from category of General Purpose to the category of Allied Agricultural Activities; (ii) Tissue culture does not come within the purview of Horticulture appearing under Clause 80(5) (ii) of OERC Code, 2009.

10. Undoubtedly creation of classification/re-classification of consumer is within the exclusive domain of the Regulatory Commission as provided under Section 62 of the Electricity Act, 2003. Section 62 of the Electricity Act, 2003 empowers the appropriate Commission to determine the tariff in accordance with the provisions of the Act for supply of electricity by a generating company to a distributing company. The tariff or any part thereof shall not be amended ordinarily more frequently than once in any financial year. However, if the generating company or any licensee recovers excess amount from the consumer, the same shall be recoverable by the person who has paid such excess

amount along with interest equivalent to bank rate. Therefore, under the provision of Section 62 of the Electricity Act power is vested with the appropriate Commission to determine the tariff for different categories of consumers. But once the classification or reclassification of consumer is made and tariff is fixed for each category, the GRF has the power to decide which consumer is coming under which particular category. This emanates from the following provisions of the Regulations, 2004.

11. Regulations 4 and 15 of the Regulation, 2004 read as follows:

*“Regulation 4 : **Functions of proceedings of the Forum***

- (1) xxx
- (2) The forum shall duly comply with the procedure as laid down by the Commission from time to time.

*Regulation 15: **Issue of Orders/Circulars*** - Subject to the provisions of the Act and these Regulations, Commission may from time to time, issue Orders and Circulars with regard to the implementations of these Regulations.”

12. The aforesaid provisions clearly indicate that the Orissa Electricity Regulatory Commission is empowered under Regulation 15 to issue Orders and Circulars with regard to implementation of the Regulations relating to the Grievances Redressal Forum. In pursuance of such authority, the Commission by its Circular No. GRF-1/2004 issued on 19th October, 2004 provided the jurisdiction of the GRF. A reference to the said Circular will make the position clear. Under Clause No.2.3 of the Circular, the Grievance Redressal Forum has been duly authorized to

classify/re-classify the consumer exercising its statutory jurisdiction.

The same may be quoted below for instant reference.

“2.3 Subject to the provisions of the Electricity Act, 2003, Rules, Regulations, Notifications made there under, the Forum shall generally dispose of the complaints relating to defects or deficiencies in Electrical services as defined in relevant Regulations.”

Few examples of the nature of the complaint are illustrated below:

Xxx

xxx

(viii) Classification/Re-classification of Consumer

13. In view of the above provisions in the Rules and Regulations, it can be safely concluded that the Grievances Redressal Forum has the jurisdiction to classify/re-classify the Consumers so as to bring a consumer from one category to another as has been done in the present case.

14. Needless to say that creation of classification/re-classification, fixation and determination of tariff is one thing and classification as to which particular consumer comes under which category is another thing and both are of two different and distinct aspects. While the former is within the exclusive domain of Commission, the latter is within the jurisdiction of GRF.

15. In view of the above, this Court is of the opinion that the GRF has jurisdiction to classify/re-classify a consumer so as to bring the consumer from one category to another.

16. Question no.(iii) is as to whether the term “Horticulture” as appearing in Clause 80(5)(ii) of the OERC Code, 2009 includes “Tissue

Culture”. Neither the Electricity Act nor any of the Rules and Regulations framed thereunder defines the term ‘Horticulture’. Consequently, it is necessary to refer to the general meaning from different academic sources and encyclopedia. Opposite party has got the literature downloaded from the website of *Wikipedia*, the free encyclopedia of the World Wide Web net work. Perusal of the said literature reveals that Tissue Culture is a modern scientific way of plant breeding within the ambit and scope of Horticulture. The Tissue Culture is basically the horticultural activities. The GRF in its order observed that the terminology “Tissue Culture” is responsible for production of plant seedling which undergoes further cultivation by the farmers receiving the same at the subsidized rate. Besides, flower-plants are also raised in opposite party’s Laboratory. Thus, the GRF held that opposite party is indulged in agricultural activities. Therefore, this Court is of the view that the term ‘Horticulture’ includes ‘Tissue Culture’ It may be relevant to refer to the certificate issued by the Scheme Officer functioning in the office of the Director of Horticulture, Odisha, Bhubaneswar, which reads as follows :

“TO WHOM IT MAY CONCERN

This is to certify that National Seeds Corporation Ltd. Bhubaneswar is producing tissue Culture Banana plantlets which are being utilized in the farmers’ field of the State under National horticulture Mission Programme.”

17. In its order, GRF observed that the certificate issued by the Government Officer is an authority on the subject and technically competent to form an opinion in the matter, which clearly suggests that

'Tissue Culture' is instrumental in the production of banana plantlets. The GRF held that there is no doubt that the Tissue Culture' has all the trappings of 'Horticulture' with identical activities and accordingly, it is held that the present dispute hardly attracts Section 181 of the Act requiring further definition of 'Horticulture' by the OERC so as to cover 'Tissue Culture' in the Regulation.

18. In view of the above, this Court is of the opinion that the 'Horticulture' includes 'Tissue Culture'. Thus, it is not a fit case where interference of this Court in exercise of extraordinary power under Article 226 of the Constitution of India is called for.

19. In the result, the writ petition is dismissed.

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B.N.Mahapatra, J.