M/S BADRI KEDAR PAPER PVT. LTD. A

v.

U.P. ELECTRICITY REGULATORY COMMN. & ORS.

(Civil Appeal No. 7433 of 2008)

DECEMBER 19, 2008 B

[S.B. SINHA AND CYRIAC JOSEPH, JJ.]

Uttar Pradesh Electricity Reforms Act, 1999 – s.24 – Electricity tariff – Determination/modification of – Held: In view of provisions of the Act as also regulations framed thereunder, U.P. Electricity Regulatory Commission alone has exclusive jurisdiction to determine tariff – Even for modification and/or alteration of tariff, the Commission must be approached – Tariff in terms of s.24(6) to be modified by licensee albeit in terms of direction issued by Commission, wheretobefore all procedures laid down in that behalf in terms of the regulations are required to be complied with. C D

Doctrines – Doctrine of promissory estoppel – Applicability of – In matter of implementation of electricity tariff.

Validity of the action of withdrawal of a circular letter issued by the U.P. Power Corporation Ltd. (respondent No.2) was the subject matter of the writ petitions filed before the High Court. The writ petitions were dismissed. The writ petitioners filed appeals before this Court. E

Earlier in *LML Ltd.* case, this Court had allowed appeals against the Corporation. It is the contention of the Corporation that the decision in LML case required re-consideration. F

Allowing the appeal with directions, the Court G

HELD:1.1. In *LML Ltd.* case, this Court proceeded on the basis that it was the U.P. Electricity Regulatory Commission alone who had the exclusive jurisdiction to determine the tariff. In view of the provisions of the Uttar

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A **Pradesh Electricity Reforms Act, 1999 as also the regulations framed thereunder, as the law stands now, there cannot be any doubt or dispute that the Commission alone has the exclusive jurisdiction and even for the purpose of modification and/ or alteration of**
B **tariff, the Commission must be approached. The submission on behalf of the respondent that in that judgment, this Court had held that sub-section (6) of s.24 of the 1999 Act empowers the holders of the licence to modify the tariff, is incorrect. The tariff in terms of Sub-**
C **section (6) of s.24 has to be modified by the licensee albeit in terms of a direction issued by the Commission, wheretobefore all procedures laid down in that behalf in terms of the regulations are required to be complied with. There cannot further be any doubt or dispute that the**
D **Commission has the exclusive jurisdiction to determine the tariff. [Paras 12, 13 and 14] [1564-C-G]**

1.2. This Court in *LML Ltd.* however, proceeded to hold in favour of the consumers of electrical energy on the premise that the Corporation was bound by the doctrine
E **of promissory estoppel. The matter as regards fulfillment of the conditions of licence granted by the Commission in favour of the licensee is a matter between the parties thereto. If the Corporation fails to comply with any of the conditions laid down in the licence or violates the tariff,**
F **the licence of the licensee may be revoked. A penal action may also be taken. But the same would not mean that the licensee can be permitted to take advantage of its own wrong. It can approbate and reprobate, particularly when it is the beneficiary thereof. It is furthermore well known**
G **that even a right under a mandatory provision can be waived. If it had made a representation pursuant whereto or in furtherance whereof a consumer of electrical energy had altered its position, the doctrine of promissory estoppel shall apply. The doctrine of promissory estoppel applies also in the realm of a statute. It is not the**
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contention of respondent that in the matter of implementation of tariff the doctrine of promissory estoppel will have no application. If it applies, correctness of *LML Ltd.* cannot be questioned and therefore, *LML Ltd* does not require reconsideration. This appeal shall also be governed by the aforementioned judgment. [Paras 15, 16 and 18] [1564-G-H; 1565-A-F; 1566-B-C]

BSES Ltd. v. Tata Power Co. Ltd. and Others **[(2004) 1 SCC 195];** *West Bengal Electricity Regulatory Commission v. CESC Ltd.* **[(2002) 8 SCC 715];** *Association of Industrial Electricity Users v. State of A.P. and Others* **[(2002) 3 SCC 711];** *LML Ltd. v. State of Uttar Pradesh and Others* **(2008) 3 SCC 128;** *Nagubai Ammal v. B. Shama Rao* **(1956) SCR 451;** *C. Beepathuma v. Velasari Shankaranarayana Kadambolithaya* **(1964) 5 SCR 836;** *State of Punjab v. Nestle India Ltd. and Another* **(2004) 6 SCC 465 and** *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO and Others* **(2007) 5 SCC 447, relied on.**

Ambu Nair and Kelu Nair **(1932-33) 60 Indian Appeals 266, referred to.**

Halsbury's Laws of England, **Fourth Edition, Vol. 16, pages 1012-1013- referred to.**

Case Law Reference:

(2008) 3 SCC 128	relied on	Para 3
(2004) 1 SCC 195	relied on	Para 9
(2002) 8 SCC 715	relied on	Para 9
(2002) 3 SCC 711	relied on	Para 9
(1956) SCR 451	relied on	Para 15
(1964) 5 SCR 836	relied on	Para 15
(1932-33) 60 Indian Appeals 266	referred to	Para 15
(2008) 8 SCALE 206	relied on	Para 15
(2004) 6 SCC 465	relied on	Para 15
(2007) 5 SCC 447	relied on	Para 15

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7433 of 2008.

From the final Judgment and Order dated 19.10.2006 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Writ Petition No. 7279 (M/B) of 2002.

B Ankur Saigal, Bina Gupta and Gaurav Singh for the Appellant.

Pradeep Misra and Suresh Chandra Tripathy for the Respondents.

C The Judgment of the Court was delivered by

S.B. SINHA, J.1. Leave granted.

2. Validity of an action of withdrawal of a circular letter dated 8.09.2000 issued by the U.P. Power Corporation Ltd. (Respondent No. 2 herein) was the subject matter of ten writ D applications filed before the High Court. The said writ petitions were dismissed.

3. The writ petitioners preferred appeals before us upon obtaining special leave. This Court in *LML Ltd. v. State of Uttar Pradesh and Others* [(2008) 3 SCC 128] allowed the appeals E against the Corporation. The appellant before us is against the said common judgment of the High Court. In *LML Ltd.* (supra), this Court, inter alia, held:

> "50. The proximity of issuance of the circular *vis-à-vis* notification must also be noticed. The tariff was framed F on 7-8-2000 which came into force from 9-8-2000 whereas the Circular was issued on 8-9-2000. The consumers exercised their option on 31-10-2000. The judgment in LML1 was delivered on 25-4-2001. The Circular dated 31-8-2001 undoubtedly was issued in view G of the said judgment. The said judgment did not deal with the questions raised before us. In any event if the licensee violates the tariff approved by the Commission appropriate legal action can be taken against it. But it would be too much to contend that for a mistake on the part of the

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Corporation, the consumers would suffer. In this view of the matter, we are of the considered view that the doctrine of estoppel shall apply in the cases where the promise was made. However, the principle of said doctrine would, however, not be applicable where no such promise was made."

4. Mr. Pradeep Misra, learned counsel appearing on behalf of the respondent No. 1 – corporation, however, would submit that the said decision should not be followed by us as a review petition had been filed. It was urged that in any event the said decision requires reconsideration.

The said review petition, we may place on record, has been dismissed by a Bench of this Court by an order dated 20.02.2008.

5. We, therefore, proceed to deal with the submission of Mr. Misra before us that the said decision requires reconsideration.

For the purpose of appreciating the said contention, we may notice at the outset the basic fact of the matter.

Legislature of the State of Uttar Pradesh enacted the Uttar Pradesh Electricity Reforms Act, 1999 (for short "the 1999 Act") in terms whereof the U.P. Electricity Regulatory Commission (for short "the Commission") was constituted. For determination of tariff in terms of the 1999 Act, the Commission was approached by the respondent No. 2. Tariff was determined, relevant portion whereof reads as under:

"RATE SCHEDULE HV-2

LARGE AND HEAVY POWER

1. Applicability

This rate schedule shall apply to all consumers who have contracted load of more than 75 kW (100 BHP) for industrial and/or processing purposes as well as to Arc/ induction, furnaces rolling/re-rolling mills, mini steel plants and to any other power consumers not covered under any

A other rate schedule.

This rate schedule shall also apply to commercial light, fan and power consumers (LMV-2) and power consumers of Rate Schedule LMV-6, subject to the condition that they opt for this rate schedule.

B The contracted demand shall be expressed in whole number only.

2.-3. * * *

4. Rate of charge

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Description	Demand charge	Energy charge
A. Basic rate (applicable to urban consumers)	Rs 130 per kVA/month	PLUS 390 paise/ kWh

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Notes.-(a) In respect of consumers who opt for power supply during restricted/peak hours an additional surcharge of 15% on the amount billed at the "Rate of Charge" under Item 4-A above i.e. demand charge and energy charge shall be levied.

E However, in respect of consumers getting power supply on independent feeders emanating from 400/220/ 132 kV substations an additional surcharge of 15% on demand and energy charges shall be charged further

F subject to the condition that these consumers will get an assured supply of minimum 500 hours in a month. In case of shortfall in above guaranteed hours of supply a rebate @ 1% for each 10 hours' shortfall will be admissible on the bill amount computed under "Rate of Charge".

G (b)-(c) * * *

(d) In respect of supply during peak hours/restricted hours, the consumers shall have to take the permission from UPPCL."

6. A confusion arose as regards interpretation of the

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purported levy. The U.P. Power Corporation issued a circular calling for options from the consumers of electrical energy as to whether they intended to have a continuous power supply of 500 hours in a month. Pursuant to or in furtherance of the said circular, appellant along with others exercised an option stating that they did not intend to have 500 hours of continuous supply.

Another circular letter was issued by the U.P. Power Corporation Ltd. on 15.12.2000, the relevant portion whereof reads, thus:

> "U.P. Electricity Regulatory Commission in its revised tariff for the year 2000-2001 applicable to HV-2 rate schedule consumers who are getting supply from independent feeders for levy of 15% surcharge on the guarantee of 500 hours of power supply per month.
>
> In this regard, detailed guidelines have been issued by this office vide Letter No. 1423 dated 9-8-2000.
>
> In this regard, it is directed that those consumers who will exercise option, of not availing 500 hours' guaranteed supply, through a registered letter to Executive Engineer (Distribution) by 31-12-2000, they will not be charged 15% surcharge from the very date of its applicability i.e. 7-8-2000. For consumers, who will submit their option after 31-12-2000, this facility will be applicable from the date of receipt of the application."

The said policy decision, however, was not adopted by other suppliers of electricity.

7. Indisputably, LML Ltd. filed a writ application before the High Court. A Division Bench of the Allahabad High Court in a judgment (since reported in AIR 2001 All 321) inter alia held that the said circular letters were illegal and, thus, void opining that it was the Commission alone who could fix the tariff and, thus, the same could not have been modified or altered by any licensee.

The impugned circular was, thereafter, issued withdrawing

A the aforementioned circulars.

8. At the outset, Mr. Pradeep Misra, learned counsel appearing on behalf of the respondents, would submit that in the writ petition an order of stay was granted which was later on vacated. However, the appellant herein prayed for payment B of dues in instalments which was allowed by an office memo 16.03.2004, the relevant portion whereof reads as under:

> "6. According to the own request of the consumer, he will submit an affidavit to the concerned Executive Engineer (Distribution) that if he gets any order from C Hon'ble Court in this case for stay of this amount then also he will continue to pay the installments regularly till the entire payable amount is not paid."

A Director of the appellant – company is said to have affirmed an affidavit pursuant thereto, stating: D

> "3. That on my application Managing Director, Pashchimanchal Vidyut Vitran Nigam Ltd., Meerut vide letter No. 1670 dated 16.03.2004 has issued order to deposit the aforesaid outstanding amount in six monthly E installments.
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> 4. That besides the conditions mentioned in the aforesaid letter, I further assure that even if we get any stay order regarding the said amount by Hon'ble High Court in the said case, we will continue to pay six monthly F installments regularly."

Indisputably, the entire amount of Rs. 21,13,031/- together with interest amounting to Rs. 10,16,815/- had been deposited in terms of the said undertaking.

9. Mr. Misra would submit that in that view of the matter, G this special leave petition is not maintainable.

The learned counsel would further contend that even otherwise the judgment of this Court requires reconsideration as it had wrongly been held in paragraph 43 thereof that the Commission did not take any decision despite repeated H

communications by the Power Corporation praying for modification of the tariff in terms of the provisions of the 1999 Act and the regulations framed thereunder and in that view of the matter, it was only the Commission which could not only frame tariff but also make amendments thereto. It was urged that finding of this Court that Sub-section (6) of Section 24 of the 1999 Act inter alia empowers the holders of the licence to modify the tariff is patently incorrect. In support of the said contention reliance has been placed on *BSES Ltd. v. Tata Power Co. Ltd. and Others* [(2004) 1 SCC 195], *West Bengal Electricity Regulatory Commission v. CESC Ltd.* [(2002) 8 SCC 715] and *Association of Industrial Electricity Users v. State of A.P. and Others* [(2002) 3 SCC 711]

10. It was contended that in *LML Ltd.* (supra), the regulations framed by the State had inadvertently not been placed; from a perusal whereof it would appear that it was the Commission only who could amend the tariff.

11. We are unable to agree with Mr. Misra on any of the aforementioned contentions.

When questioned, Mr. Misra conceded that the affidavit affirmed in support of the representation filed by the appellant as regards payment of the amount had not been brought to the notice of the High Court. Concededly again it had also not been contended before the High Court that in view of the aforementioned event subsequent to the filing of the writ application by the appellant, the writ petition became infructuous. Had such contention been raised before the High Court, it might not have exercised its discretionary jurisdiction. Such a contention had not only been raised before the High Court, the respondent No. 1 allowed the High Court to determine the issues arising therein on their own merit, without any demur whatsoever.

In our opinion, the respondent No. 1 cannot be permitted to raise such a contention before us for the first time. Even otherwise in the affidavit, the appellant merely stated that even

A if a stay order is granted by the High Court, the six-monthly instalments would be paid regularly. Appellant had not contended that the writ petition would be withdrawn or even if the writ petition is allowed, it would not ask for refund of the B amount deposited. It is neither in doubt nor in dispute that such an undertaking had to be given by the appellant only with a view to avoid disconnection of electrical energy. If by reason of the circular impugned before the High Court, the appellant was entitled to maintain a writ application; by reason of such C representation, it did not waive its right.

12. In *LML Ltd.* (supra), this Court proceeded on the basis that it was the Commission alone who had the exclusive jurisdiction to determine the tariff. In view of the provisions of the 1999 Act as also the regulations framed thereunder, as the D law stands now, there cannot be any doubt or dispute that the Commission alone has the exclusive jurisdiction and even for the purpose of modification and/ or alteration of tariff, the Commission must be approached.

13. Submission of Mr. Misra that in paragraphs 43 and 44 E of the judgment this Court had held that sub-section (6) of Section 24 of the 1999 Act empowers the holders of the licence to modify the tariff, is incorrect. The tariff in terms of Sub-section (6) of Section 24 has to be modified by the licensee albeit in terms of a direction issued by the Commission, F wheretobefore all procedures laid down in that behalf in terms of the regulations are required to be complied with. The statement made in paragraph 44 of the said decision cannot be read in isolation.

14. There cannot further be any doubt or dispute in view G of the binding precedent of this Court in *Tata Power Co. Ltd.* (supra), *CESC Ltd.* (supra) and Association of Industrial Electricity Users (supra) that the Commission has the exclusive jurisdiction to determine the tariff.

15. This Court in *LML Ltd.* (supra), however, proceeded H to hold in favour of the consumers of electrical energy on the

premise that the respondent No. 1 is bound by the doctrine of promissory estoppel.

The matter as regards fulfillment of the conditions of licence granted by the Commission in favour of the licensee is a matter between the parties thereto. If the Corporation fails to comply with any of the conditions laid down in the licence or violates the tariff, the licence of the licensee may be revoked. A penal action may also be taken. But the same would not mean that the licensee can be permitted to take advantage of its own wrong. It can approbate and reprobate, particularly when it is the beneficiary thereof. [See Halsbury's Laws of England, Fourth Edition, Vol. 16, pages 1012-1013, *Nagubai Ammal v. B. Shama Rao* (1956) SCR 451, *C. Beepathuma v. Velasari Shankaranarayana Kadambolithaya* (1964) 5 SCR 836 and *Ambu Nair and Kelu Nair* (1932-33) 60 Indian Appeals 266 at 271-272] It is furthermore well known that even a right under a mandatory provision can be waived. [See *Babulal Badriprasad Varma v. Surat Municipal Corporation & Ors.* 2008 (8) SCALE 206] If it had made a representation pursuant whereto or in furtherance whereof a consumer of electrical energy had altered its position, the doctrine of promissory estoppel shall apply. The doctrine of promissory estoppel, it is now well-settled, applies also in the realm of a statute. [See *State of Punjab v. Nestle India Ltd. and Another* (2004) 6 SCC 465 and *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO and Others* (2007) 5 SCC 447]

16. It is not the contention of Mr. Misra that in the matter of implementation of tariff the doctrine of promissory estoppel will have no application. If it applies, correctness of LML Ltd. (supra) cannot be questioned.

Furthermore, the Allahabad High Court in the first round of litigation was not required to go into the question as to whether the LML Ltd. could enforce a circular as against the Kanpur Electricity Supply Company although it did not make any representation. The question of the tariff prevailing over such circular did not arise therein as no such circular had been

A issued by the Kanpur Electricity Supply Company at all.

17. The circular impugned before the High Court was undoubtedly issued pursuant to the judgment of the Division Bench of the Allahabad High Court but then whether having regard to the doctrine of promissory estoppel the same could B have been withdrawn or not, further determination in that behalf was not warranted.

18. We, therefore, are of the opinion that *LML Ltd.* (supra) does not require reconsideration. This appeal shall also be governed by the aforementioned judgment. The appeal is C allowed with the direction to refund the entire amount within four weeks. Respondent shall bear the costs of the appellant throughout. Counsel's fee assessed at Rs. 1,00,000/-.

B.B.B. Appeal allowed.