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HIGH COURT OF ORISSA: CUTTACK

W.P.(C) No.11646 of 2022

(In the matter of an application under
Article 226 of the Constitution of India, 1950)

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Vedanta Limited	...	***Petitioner***

Mr. Sujit Ghosh, Senior Advocate
being assisted by Mr. P. K. Nayak, Advocate

-versus-

State of Odisha and others	...	***Opposite Parties***

Mr. Swayambhu Mishra,
Additional Standing Counsel

Date of Hearing: 25.08.2022 : Date of Judgment: 11.11.2022

CORAM:
JUSTICE KRUSHNA RAM MOHAPATRA

JUDGMENT

KRUSHNA RAM MOHAPATRA, J.

1. This matter is taken up by virtual/physical mode.

2. Petitioner being a Private Limited Company calls in question the inaction of the authorities under the Electricity Act, 2003 (hereinafter referred to as 'Electricity Act') and Odisha Electricity (Duty) Act, 1961 (herein after referred to 'Electricity Duty Act') in considering its representation dated 5th August, 2021.

3. Before delving into the issue involved in this writ petition, it would be profitable to deal with certain relevant provisions of the Electricity Duty Act (pre and post-amended) for adjudication of the writ petition.

3.1 Section 8 of the Electricity Duty Act, 1961 reads as follows:-

> *"**Disputes between the licensee and the consumer-***
>
> *(1) The Chief Electrical Officer or such other officer not below the rank of an Assistant Engineer or an Assistant Electrical Inspector as may be authorized by the State Government in that behalf shall have the power to decide all disputes relating to the liability for payment of the electricity duty or exemption therefrom.*
>
> *(2) Subject to the decision in appeal before such authority as may be constituted by the State Government in that behalf by a notified order, preferred within three months from the date of the order under sub-section (1), such order shall be final"*

Subsequently, the Electricity Duty Act was amended and published in Gazette Notification dated 5th November, 2016, which received the assent of the Governor of Odisha on 3rd November, 2016. Amended provisions of the Odisha Electricity (Duty) Amendment Act, 2016 reads as under:-

> *"(1) The Chief Electrical Inspector, Electrical Inspector or Deputy Electrical Inspector as may be authorized by the State Government within the local limit as may be specified in that behalf shall have the powers to decide all disputes relating to the liability for payment of the electricity duty or exemption therefrom:*
>
> *Provided that in case of any dispute relating to exemption of electricity duty as an incentive under different Policy Resolutions of the State Government, such dispute shall be referred to the Secretary to Government, Energy Department, whose decision shall be final.*
>
> *(1-a) Any person, aggrieved by the order passed by the authority referred to in sub-section (1), may prefer an appeal accompanied with such fee as may be prescribed, before,—*
>
> *(a) the Principal Chief Electrical Inspector, where the order is passed by the Chief Electrical Inspector;*

> *(b) the Chief Electrical Inspector, where the order is passed by the Electrical Inspector; and*
>
> *(c) the Electrical Inspector, where the order is passed by the Deputy Electrical Inspector,*
>
> *within one month from the date of the order passed under sub-section (1) and the decision in appeal under this subsection shall be final subject to appeal, if any, preferred under sub-section (2):*
>
> *Provided that no appeal shall be admitted unless the appellant makes a deposit of fifty percentum of the amount disputed.*
>
> *(c) in sub-section (2), for the words, figure and bracket "under sub-section(1)", the words, figure and bracket "under sub-section (1-a)" shall be substituted."*

4. As reveals from the writ petition, the Petitioner-Company is engaged in the business of production and export of Aluminum. It has set up its processing unit, '*Aluminum Smelter*' within the Special Economic Zone (SEZ) area under the provisions of Special Economic Zone Act, 2005 (hereinafter called 'SEZ Act'). Claiming exemption from levy of electricity duty upon auxiliary consumption of 3 x 600 MW Captive Generating Plant (CGP), i.e., Units- I, III and IV and refund of money already deposited towards electricity duty along with applicable interest, the Petitioner-Company made a representation to the Chief Electrical Inspector, Sambalpur-Opposite Party No.2 stating *inter alia* that electricity generated by the Captive Generating Plant (CGP) within Domestic Tariff Area is being consumed by its *Aluminum Smelter* situated within SEZ area. Hence, the auxiliary energy consumption should be exempted from levy of electricity duty by virtue of Section 50 of the SEZ Act and Clause-9 of the Special Economic Zone Policy, 2015 (hereinafter referred to as 'SEZ

Policy'). Such representation although filed on 5th August, 2021 and the Petitioner has already submitted documents in support of its claim pursuant to letter dated 7th August, 2021 of the Opposite Party No.2 (Annexure-6 series), but no action on its representation was taken till filing of the writ petition. Hence, this writ petition has been filed.

5. Counter affidavit has been filed stating that the Opposite Party No.2 vide its letter No.ED/CORR/JSG/30/2462 dated 29th December, 2021, letter No. 663 dated 20th May, 2022 and letter No. 892 dated 4th July, 2022 intimated the Petitioner-Company about the decision of the Principal Chief Electrical Inspector, Odisha, Engineer in Chief (Electricity)-cum-PCEI, Odisha, wherein it was indicated that the claim of the Petitioner-Company for exemption of electricity duty in respect of auxiliary consumption has been turned down and accordingly question of refund does not arise. Rejoinder affidavit has also been filed by the Petitioner Company disputing the same.

6. Mr. Ghosh, learned Senior Advocate submits that in view of the amended provisions of the Electricity Duty Act, 2016, the Chief Electrical Inspector should not have taken a decision on the representation of the Petitioner as issue involved therein was with regard to exemption of electricity duty as an incentive under the Policy resolution of the State Government. In view of the proviso to Section 8 of the amended provision of the Electricity Duty Act, the dispute ought to have been referred to the Secretary to Energy Department, Government of Odisha to take a decision in that regard. Thus, any decision on the representation dated 5th August, 2021 is *non est* in the eye of law and the representation, as aforesaid, is deemed to be pending before the Chief Electrical Inspector. He, therefore, submitted that it should be referred to the Secretary of the Energy Department to take a decision on the same. Mr. Ghosh relied upon the case law in ***Competent Authority vs. Barangore Jute Factory and others,*** reported in (2005) 13 SCC 477 and submits that when the statue requires an act to be done in a particular manner the same has to be done in that manner. Hence, Opposite Party No.2 has no jurisdiction to take a decision in the dispute with regard to exemption of the electricity duty in terms of the policy of the Government. It should have referred the matter to the Secretary, Energy Department to take the decision as per the proviso to Section-8 of the Electricity Duty Act, 2016.

7. Mr. Mishra, learned ASC refuting such submission contended that in paras-11 and 13 of the counter affidavit, Opposite Party No.2 has taken a stand in clear terms that the Petitioner-Company is not entitled to the benefit claimed under SEZ Policy, 2015, as the auxiliary consumption of 3 x 600 MW is outside the processing area of the SEZ. The Electrical Inspector being authorised by the Principal Secretary of the Energy Department, has taken a stand in the counter affidavit dated 20th July, 2022 akin to the stand taken by Opposite PartyNo.1. In para-13, Opposite Party has taken the following stand:-

> *"13. That in reply to para-9 of the Writ petition, it is humbly submitted that the electricity generated*

> *by the captive generating plant is not exempted from electricity duty, but instead the energy consumed within the SEZ area is exempted from electricity duty as per the SEZ Act, 2005, the SEZ Policy, 2015, Notification No.2767 dtd. 11.04.2016 and Notification No.3379 dtd.12.03.2020 of Department of Energy. SEZ policy clearly states that all sales and transactions for carrying out Authorized Operations Developers, Co-Developers & Units* ***within the Processing Area*** *shall be exempted from taxes, cess, duties, fees, levies under any State law. SEZ Policy also clearly states that Auxiliary consumption cannot be said to be a part of the 'transaction' as per the definitions of auxiliary consumption. It is pertinent to mention here that the definitions of auxiliary consumption have been quoted in Para 16, 17 and 18 writ petition. Also 'transaction' refers to an occasion when someone buys or sells something, or when money is exchanged or the activity of buying or selling something as per Cambridge English dictionary. Hence the same does not apply here and the said idea is completely misconceived."*
>
> *(emphasis supplied)*

Counter Affidavit filed by the State Government on 3rd August, 2022 also indicates at para-4 that the Petitioner-Company is not entitled to the benefit either under Industrial Policy Resolution of 2017 (hereinafter referred to as 'IPR 2017') or SEZ Policy, 2015.

8. He further submitted that Section 8 (b) of the Electricity Duty Act, 2016, as laid down makes it abundantly clear that the Chief Electrical Inspector (ECI) shall be the power to decide all the disputes relating to the liability for payment of the electricity duty or exemption therefrom. The issue with regard to exemption of liabilities has already been adjudicated by a competent authority having jurisdiction. When a decision has already been taken that the Petitioner-Company is not entitled to any exemption as claimed in its representation dated 5th August, 2021, question of referring the matter to the State Government does not arise. The Petitioner-Company, if so aggrieved, may file an appeal under Section 8 (1-a) of Electricity Duty Act. It is his submission that Hon'ble Supreme Court in the case of ***Union of India Vs. Sanjay Kumar Jain***, reported in (2004) 6 SCC 708, observed as follows:-

> *"11. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in Mullins v. Treasurer of Survey [1880 (5) QBD 170, (referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha (AIR 1961 SC 1596) and Calcutta Tramways Co. Ltd. v. Corporation of Calcutta (AIR 1965 SC 1728); when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co. (1897 AC 647)(HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See A.N. Sehgal and Ors. v. Raje Ram Sheoram and Ors. (AIR 1991 SC 1406), Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and Ors. (AIR 1991 SC 1538) and Kerala State Housing Board and Ors. v. Ramapriya Hotels (P)Ltd. and Ors. (1994 (5) SCC 672).*
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> *"This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant" (Coke upon*

Littleton 18th Edition, 146) "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails....But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole" (Per Lord Wrenbury in Forbes v. Git [1922] 1 A.C. 256).

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13. A proviso to a section cannot be used to import into the enacting part something which is not there, but where the enacting part is susceptible to several possible meanings it may be controlled by the proviso (See Jennings v. Kelly [1940] A.C. 206)."

He, therefore, submits that as a general rule proviso added to the enactment either to qualify or to create exception to the enactment itself and ordinarily a proviso is not interpreted like a general rule. Further, the proviso does travel beyond the principal provision to its proviso. Thus, the submission of learned counsel for the Petitioner is not acceptable. Accordingly, he prayed for dismissal of the writ petition.

9. Heard learned counsel for the parties at length and perused the record as well as the case law placed before this Court. The only issue that falls for consideration is whether the Chief Electrical Inspector-Opposite Party No.2 is competent to take a decision on the representation dated 5th August, 2021 or the representation should have been referred to the Government to take a decision on the same.

10. No doubt, the claim of the Petitioner for exemption of levy of electricity duty and refund thereof is on the basis of IPR 2017 as well as SEZ Policy 2015. Under Section 8 of the Electricity Duty Act, 1961, the Electrical Inspector or such other Officer more fully described in the said provision was conferred with the power to decide all disputes relating to liability for payment of the electricity duty or exemption therefrom. Sub-section (2) of Section 8 of the Electricity Duty Act, 1961 provided for an appeal against the decision taken by the Electrical Inspector or such other Officer, as the case may be authorized by the State Government in that behalf. In 2016 along with other provisions there was an amendment to Section 8 of the principal Act. By virtue of the amended provision of Section 8(1) of the Electricity Duty Act, the Chief Electrical Inspector or the Deputy Electrical Inspector, as may be authorized by the State Government within the local limit, were conferred with power to deal with dispute relating to payment of electricity duty or exemption therefrom. A proviso has been incorporated by virtue of amendment, which lays down that any dispute relating to exemption of electricity duty '*as an incentive under different policy resolutions of the State Government*' should be referred to the Secretary to Government, whose decision shall be final. Thus, the question arises for consideration is that whether the proviso as introduced by virtue of amendment is an exception or qualification to the principal provision? A plain reading of Sub-section (1) of Section 8 of the Electricity Duty Act, 2016 makes it amply clear that the Chief Electrical Inspector, Electrical Inspector or Deputy Electrical Inspector, as the case may be authorized by the State Government within the local limits, as may be specified are conferred with the power to decide all disputes of liability of payment of electricity duty or exemption therefrom. Thus, the principal provision confers power with the aforesaid authorities to deal with all disputes relating to levy of electricity duty and claim for exemption therefrom including a claim based on different policy resolutions of the State Government. A conspectus of the principal provision, i.e., Section 8(1) of the Electricity Duty Act, 2016 as well as the proviso thereof makes it abundantly clear that the proviso does not in any manner curtail the power of the authorities more fully described in Sub-section (1) of Section 8 to decide all disputes relating to levy of Electricity Duty or claim for exemption therefrom. In other words, the Authorities under Sub-section (1) are well within their competence to decide all types of claim for exemption of electricity duty including one under any policy resolution of the State Government. The proviso, however, adds a qualification to the principal provision empowering the authorities under Sub-Section (1) to refer the matter to the State Government for its decision, if the claim of exemption of electricity duty is made as an incentive under any policy resolution of the State Government. In the instant case, the Chief Electrical Inspector has taken a decision refusing the claim of the Petitioner for exemption of levy of electricity duty and refund thereof. But, there is nothing in the said provision which would suggest that the authority can exercise *suo motu* power to refer the matter to Government. Thus, a move at the instance of the aggrieved party has to be made to refer the matter.

11. In view of the discussions made above, two options are open to the Petitioner-Company, viz., i) either to prefer an appeal under Sub-section (1-a) of Section 8 of the Electricity Duty Act, 2016; or ii) to make an application before the authority, who has taken a decision on the representation of the Petitioner, to refer the matter to the State Government for its decision by the Secretary of the Energy Department. It is made clear that the decision taken by the Chief Electrical Inspector will not in any way infringe the right of the Petitioner-Company to make an application to refer the matter to the State Government, on its claim for exemption of electricity duty in terms of an incentive under policy resolution of the State Government. The observations made herein above should not be construed as an opinion on the merit of the claim of the Petitioner's Company for exemption of electricity duty under IPR 2017 or SEZ Policy, 2015.

12. With the aforesaid observation, the writ petition is disposed of.

Issue urgent certified copy of the judgment on proper application.

(*KRUSHNA RAM MOHAPATRA)*
JUDGE

s.s.satapthy *High Court of Orissa, Cuttack*
11th Nov.', 2022