

Maharashtra State Electricity Board

Vs

Kalyan Borough Municipality & Anr.

Civil Appeals Nos. 335 and 336 of 1967

(K. N. Wanchoo, J. M. Shelat, C. A. Vaidialingam, S. M. Sikri, V. Bhargava JJ)

08.02.1968

JUDGMENT

VAIDIALINGAM, J.

These two appeals, by certificate, are directed against the common judgment of the Bombay High Court rendered in Special Civil Applications, Nos. 1570 & 1571 of 1962.

The circumstances, under which the two writ petitions were filed, by the respondent, in each of these two appeals, may be briefly stated. Till January 14, 1959, a company called the Kalyan Electricity Company (Private) Ltd., held a licence for supplying electrical energy to the town of Kalyan and the surrounding areas. The licence of the said company was revoked by the Government of Maharashtra, and, on option being given to purchase the undertaking of the said company, the appellant purchased the same, on January 15, 1959. The appellant, hereinafter to be referred to as the Board, continued to supply electrical energy to the residents of Kalyan, according to the rates prescribed by the former Kalyan licensee, pending notification of its standard rates of supply. In March 1962, a public notice was given by the Board, to the effect that in the Western Maharashtra area (which includes Kalyan) revised tariff would be applicable from the first day of the month next following the month in which supply of Koyna power became available. As the electrical energy from the Koyna Project became available from the month of June 1962, the Board caused another public notice to be issued, informing the public that the Board's revised tariffs would come into force from July 1962, and that bills, in respect of the power consumption, during that month, would be issued at the revised tariffs, in August 1962.

The Kalyan Borough Municipality, which is the respondent, in Civil Appeal No. 335 of 1967, was being supplied by the appellant, electrical energy for street lighting, till June 1962, on the same terms on which the old Kalyan licensee was supplying. The Board submitted a draft of the new agreement to the said Municipality, in respect of the supply of electrical energy for street lighting, under which the charge which the Municipality had to pay, per unit of electricity, was slightly less than before, but the Municipality was required to pay several fixed charges, with the result that the total amount payable was greater than before. The Municipality, however, intimated its desire to enter into the new agreement, only for a period of one year, instead of seven years, as suggested by the Board. The Board was not prepared to accede to this request, of the Municipality, and, on the latter's failure to pay bills for street lighting, according to the draft agreement, an intimation was sent, by the appellant, on October 12, 1962, that the supply of electricity, for street lighting, would be cut off, from October 22, 1962. The Municipality filed a writ petition, under Art. 226, being Special Civil Application No. 1570 of 1962, in the High Court, against the Board, seeking a writ of mandamus, prohibiting the appellant from enforcing the directions, contained in its notice, dated

October 12, 1962.

One Dattatraya Pandurang Pimpale and other consumers of electricity formed an association called 'Kalyan-Dombivali-Vij Grahak Mandal', to protest against the steps taken, by the appellant, to levy increased charges, for the supply of electrical energy. As the request of the Association, for not increasing the charges, was not heeded to, by the appellant, which threatened to stop supply of electricity to consumers, if the bills were not paid, according to the revised tariffs, the said Dattatraya filed, in the High Court, a writ petition, under Art. 226, being Special Civil Application No. 1571 of 1962, seeking directions to restrain the Board from disconnecting supply of electrical energy.

In both these writ petitions, the action of the Board, in increasing the tariffs, over and above the rate which was charged by the original Kalyan licensee, and fixing a uniform tariff, was challenged. Two contentions appear to have been raised, in the writ petitions, before the High Court, viz., (a) that s. 49, of the Electricity (Supply) Act, 1948 (Act LIV of 1948) (hereinafter referred to as the Supply Act), did not permit the Board to frame uniform tariffs for consumers in compact areas as well as consumers in sparse areas, so as to require the former to pay a part of the cost involved in the supply of electricity to the latter; and (b) that, if s. 49 gave such power to the Board, it was ultra vires and void, as it offended the provisions of the Constitution.

The Board, by reference to the scheme and the provisions of Supply Act, contended that the levy of a uniform tariff was valid and within its power and that s. 49 did not offend any provisions of the Constitution. At this stage, it may be mentioned that the High Court considered the contentions of the parties, on the basis of s. 49, as it was, prior to the amendment of the Supply Act in 1966. Before the High Court, it appears to have been common ground that distribution costs involved in the supply of electricity, per unit of consumption, to sparse areas, was higher than the distribution costs, involved in the supply of electricity, per unit of consumption, to compact areas. The High court has taken the view that one of the factors which the Board has to take into account, under s. 49, in framing its tariffs, is the location, where the consumer wants electrical energy to be supplied to him, and that this implies that if, on a consideration of this factor, the Board finds that the cost of supply of electricity to different areas, are widely divergent, different tariffs could be framed, in respect of such areas. On this line of reasoning, the learned Judges of the High Court, came to the conclusion that, in framing the impugned tariffs, the Board did not have due regard to the provisions, contained in s. 49, and therefore, the Board was not entitled to enforce the demand, made by it. The learned Judges also seem to have been impressed with the objections, raised by the respondents, that the Board had assumed that s. 49 permitted it to frame its tariffs, in such a way that a part of the higher cost, involved in the supply of electrical energy, to undeveloped areas, may be borne, by consumers, in compact areas. As the High Court accepted the contention of the respondents, that the Board had no power to fix uniform tariffs, so as to cast a higher burden, on the consumers, in a compact area, where the cost of supply was less, it did not express any opinion, regarding the constitutional validity of s. 49, though, there again, the High Court appears to have been inclined to hold that unguided and unfettered power had been given, to the Board, to fix its charges as high as it liked. Ultimately, the High Court allowed the writ petitions and prohibited the appellant, from enforcing its claim to recover the revised tariff, and disconnecting electric supply. Civil Appeal No. 335 of 1967 is against the order in Special Civil Application No. 1570 of 1962, in which the respondent is the Kalyan Borough Municipality; and Civil Appeal No. 336 of 1967 is against the order in Special Civil Application No. 1571 of 1962, in which the respondent is Dattatraya Pandurang Pimpale.

During the pendency of the above appeals, Parliament enacted the Electricity (Supply) Amendment Act, 1966 (Act XXX of 1966) (hereinafter called the Amendment Act), by which the Supply Act was amended, in various particulars. It is only necessary to refer to two sections of the Amendment Act, viz., Ss. 11 and 24. Section 11, substituted, with retrospective effect new s. 49, in the place of old s. 49, the new s. 49, runs as follows :

"49. Provision for the sale of electricity by the Board to persons other than licensees.

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(1) Subject to the provisions of this Act and of regulations, if any, made in this behalf the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs.

(2) In fixing the uniform tariffs, the Board shall have regard to all or any of the following factors, namely :-

(a) the nature of the supply and the purposes for which it is required;

(b) the coordinated development of the supply and distribution of electricity within the State in the most efficient and economical manner, with particular reference to such development in areas not for the time being served or adequately served by the licensee;

(c) the simplification and standardisation of methods and rates of charges for such supplies;

(d) the extension and cheapening of supplies of electricity to sparsely developed areas.

(3) Nothing in the foregoing provisions of this section shall derogate from the power of the Board, if it considers it necessary or expedient to fix different tariffs for the supply of electricity to any person not being a licensee, having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and any other relevant factors.

(4) In fixing the tariff and terms and conditions for the supply of electricity, the Board shall not show undue preference to any person."

Section 24, of the Amendment Act, validating the imposition and collection of charges for the supply of electricity, under s. 49, is as follows :

"(1) Notwithstanding any judgment, decree or order of any Court, all rates fixed under section 49 of the Electricity (Supply) Act, 1948, for the sale of electricity to any person, other than a licensee before the commencement of this Act shall be deemed to have been validly fixed as if the provisions of the said section, as amended by this Act, had been in force at all material times when such rates were fixed and accordingly, -

(a) no suit or other proceeding shall be maintained or continued in any Court for the

refund of any amount collected from any person on the basis of such rates;

(b) no Court shall enforce a decree or order directing the refund of any amount collected from such person on the basis of such rates;

(c) any amount due from any person on the basis of such rates before the commencement of this Act but not recovered before such commencement may be recovered in the manner provided under the Electricity (Supply) Act, 1948.

(2) For the removal of doubts, it is hereby declared that nothing contained in sub-section (1) shall be construed as preventing any person from claiming refund of any amount paid by him in excess of the amount due from him under the said Act, as amended by this Act and the rules or regulations made thereunder."

In view of the Amendment Act, this Court permitted the parties to file affidavits, stating their case, with respect to the amended section 49, and gave an opportunity to them, to raise their respective contentions. The respondent have raised the contention that s. 24, of the Amendment Act, on a proper interpretation, does not validate the impugned rates of electricity supply, imposed on them, by the appellant. According to them, on a proper interpretation of s. 49, as amended, the Board is not empowered to fix uniform tariffs, in such a way that a great part of the higher costs involved in the supply of electricity to sparse areas, is to be borne by consumers in developed or compact areas. It is their further contention that, under the amended section, uniform tariffs can, if at all, be levied by the Board, with particular reference to the development in areas which are not, for the time being served at all, or adequately served, and it does not authorise the appellant to secure development of electricity in the sparse areas, at the cost of the consumers in areas which are already developed and adequately served, and hence the levy of the tariffs at the amended rate, is unauthorised and illegal. The respondents further contend that levy of uniform tariffs, as contemplated by s. 49(2), as amended, can be done only when the Board fixes uniform tariffs, for the whole State of Maharashtra. In this connection, they point out, that the appellant has not fixed uniform tariffs for the entire State of Maharashtra, but, on the other hand, has fixed different tariffs, for different areas, for supply of electricity. As an instance of the Board itself levying different rates in different areas, the respondents have referred to the case of Poona City, which was formerly served by the Poona Electricity Supply Company Ltd. In Poona City, the respondents point out, the Board has fixed a lower rate of tariff, viz., 13 paise per unit of electricity, whereas it has fixed 31 paise per unit in other areas, including the Kalyan Municipality area. It is the claim of the respondents that the appellant should have fixed tariffs for the Kalyan Municipality area also, in the same manner as it has done for the Poona City area. The Board according to them, is not entitled to charge higher rate from consumers in the Kalyan Municipality area, in order to give cheaper supplies to other areas, in the western region. It is their further contention, that, under s. 49(2), as amended, the appellant may charge lesser rate than the cost of supply for the sparsely developed areas, but, in no case is it entitled to charge the compact areas, rates higher than warranted by the cost of supply to such areas. They point out that by charging consumers in compact areas more than the cost of supply, the Board has shown undue preference. The consumers, in the compact areas, are being made to pay, more than what is due by them, i.e. more than the cost of supply, in order to charge less from consumers in undeveloped areas, i.e., less than what is due by them, and this offends sub-s. (4) of s. 49.

The respondents also contend that if s. 49, as amended, empowers the Board to levy and collect, at the rate of the revised tariff, s. 49 is unconstitutional and void. They point out that by the Board charging consumers in compact areas more than what is due by them, i.e., more than the cost of

supply it was, in effect, taxing a class of consumers, which it had no power or authority to do, under the Supply Act, as amended. No maximum limit has been fixed, under the Supply Act, beyond which the Board cannot charge, for electricity supplied by it. They also point out that the consumers, to whom electricity is supplied by the Board, are treated differentially from the consumers who are supplied electricity, by licensees. In respect of the latter class, they point out, that the supply Act has placed several restrictions, regarding the manner in which the rate has to be fixed, whereas there is no such restriction, placed on the powers of the Board. This amounts to discrimination, resulting in Art, 14, of the Constitution, being violated. On these grounds both the respondents urge that the levy of uniform tariff, by the Board, is illegal and void.

The appellant Board has controverted the stand, taken by the respondents. According to it, the levy and collection at the revised uniform tariff, is perfectly legal and valid and s. 24, of the Amendment Act, in any event, has validated such levy. The appellant points out that the fixing of uniform tariff is authorised by s. 49, as amended; and such uniform rates are fixed, not with the intention of making the developed areas bear the incidence of higher costs of supply to undeveloped areas, but really with a view to achieve the co-ordinated development of generation, distribution and supply of electrical energy, in the most efficient and economical manner, as required by the Supply Act. According to the Board, it is not necessary to fix one single uniform tariff for the whole State of Maharashtra, and that, on the other hand, it is empowered to fix region-wise uniform tariffs, having due regard to the provisions, contained in s. 49(2). In this connection, the Board also points out that both respondents are consumers of electricity, at low tension, and that they are concerned only with tariffs for supply of electricity at low tension. The Board further avers that since April 1962, it has prescribed and applied, uniform tariffs for supply of electricity at low tension, in all the areas in the State of Maharashtra, which are served by it, except Poona area. With reference to Poona area, the Board has referred to the circumstances, under which a lower rate of tariff is levied. Even in respect of Poona area, it is stated by the Board that it has introduced uniform tariffs for low tension electricity, with effect from January 1, 1966 except in regard to consumers of electricity for lights and fans and small power in residential buildings.

Regarding the attack, on the constitutional validity of s. 49 as amended, the Board points out that there is no question of any taxing power being entrusted to it, under the said section. The Board says that in view of the special circumstances under which a licensee is operating, certain provisions have been made in the Supply Act; but the special position occupied by the Board, which has been entrusted with various duties and functions has been recognised by the Supply Act. But no discrimination as alleged by the respondents has been made by the statute between consumers who are supplied by the licensee and the consumers who are supplied by the Board. The Board further states that the Supply Act does not cast any duty on the Board to fix the tariff, in accordance with the cost of supply; and it points out that what is necessary, under s. 49, is the taking into account of the over-all economy of the Board's system of generation and supply of electricity. The Board seeks to sustain the levy of uniform tariff, on the basis of the various provisions of the Supply Act, with particular reference to s. 49, as amended.

In view of the Amendment Act, it has become really unnecessary to consider the correctness or otherwise of the views, expressed by the High Court, regarding s. 49, as it stood prior to its amendment; and these appeals will have to be disposed of, on a consideration of the Supply Act, as amended in 1966, with special reference to s. 49, as it now stands.

Two questions arise for consideration, in these appeals, viz., (i) the proper interpretation to be placed, on s. 49, as amended, and the power of the Board to levy a uniform tariff, as in this case; and (ii) the

validity of s. 49, as amended.

It is necessary to state at this stage that both the respondents are consumers of electricity at low tension and that the Board has fixed uniform tariff for the whole of the State of Maharashtra for supply of electricity at low tension, except in Poona city in respect of certain types of consumers. Even in respect of such consumers, the Board has stated that it is taking steps to levy a uniform tariff. It is on this basis that the contentions of the parties are being considered and dealt with in these appeals.

It is necessary now to refer to some of the relevant provisions of the Supply Act as that will indicate the scheme underlying the Act. The Supply Act, as the preamble shows, is an Act to provide for the rationalisation of the production and supply of electricity, for taking measures conducive to electrical development. Chapter II deals with the Central Electricity Authority. Section 3(1) provides for the constitution by the Central Government of a body called the Central Electricity Authority to exercise such functions and perform such duties under the Supply Act and in such manner as the Central Government may prescribe and direct. Chapter III deals with the constitution and composition of the State Electricity Board and certain other incidental matters. Section 5 provides for the State Government constitution a State Electricity Board, hereinafter referred to as the Board. Section 16 deals with the constitution by the State Government of a State Electricity Consultative Council for the State. Sub-sec. (2) deals with the composition of the State Electricity Consultative Council. It provides for inclusion, in the said Council of representatives of consumers of electricity also. Sub-section (6) casts a duty on the State Electricity Board to place before the State Electricity Consultative Council the annual financial statement and supplementary statement if any. A duty is also cast upon the Board to take into consideration any comments made on such statement by the said Council before it is submitted to the State Government under s. 16(1).

Chapter IV deals with the powers and duties of State Electricity Boards. Section 18 charges the Board with the general duty of promoting the co-ordinated development of the generation supply and distribution of electricity within the State in the most efficient and economical manner, with particular reference to such development in areas not for the time being served or adequately served by any licensee. Section 49 as incorporated by the Amendment Act of 1966 retrospectively, makes provision for the sale of electricity by the Board to persons other than licensees. As, in these appeals, the proper interpretation to be placed on that section arises for consideration, that section will be dealt with by us more exhaustively, in the latter part of the judgment. It is enough to note at this stage that the said section deals with the framing of uniform tariffs and also of fixing different tariffs as the case may be, in accordance with the principles laid down therein.

Chapter VI deals with the Board's finance accounts and audit. Section 59, leaving out the proviso, states that the Board shall not, as far as practicable, and after taking credit for any subventions from the State Government under s. 63, carry on its operations under the Supply Act at a loss and that it shall adjust its charges accordingly from time to time. Section 61 directs the Board to submit in February of each year to the state Government a statement in the prescribed form of the estimated capital and revenue receipts and expenditure for the ensuing year. Sub-section (3) thereof makes it obligatory on the State Government to place the said statement before the House or Houses, as the case may be, of the State Legislature and it also provides that the said statement shall be open to discussion by the Legislature, but it is not subject to vote. Sub-section (4) casts a duty on the Board to take into consideration any comments that may be made on the said statement in the State Legislature. It may be noted that s. 61 really deals with the Board's preparing its budget for the succeeding year and making it available for discussion by the State Legislature. Section 63 gives

power to the State Government, with the approval of the State Legislature, to make subventions from time to time to the Board for the purposes of the Act on such terms and conditions as the State Government may determine. Section 67 deals with the priority and discharge of liabilities by the Board and how the balance amount, if any, is to be utilised. Section 70(2) provides that save as otherwise provided, the provisions of the Supply Act shall be in addition to, and not in derogation of, the Indian Electricity Act, 1910 (Central Act X of 1910). Section 75(1) deals with the preparation and submission to the State Government by the Board soon after the end of each financial year a report giving an account of its activities during the previous financial year. The report should also given an account of the activities, if any, which are likely to be undertaken by the Board in the next financial year. It also makes it obligatory on the State Government to place the said report before the State Legislature. Here again, it may be noted, that the Board has to give a report of its activities for the past year. Section 78 gives power to the State Government to make rules to give effect to the provisions of the Act. One of the items in respect of which rules could be framed is that referred to in cl. (g) of s. 78(2) namely the form in which, and the date by which, the annual report of the Board shall be submitted under s. 75 The State Government in this case has framed the Maharashtra Electricity (Supply) Rules, 1963. Rule 57 thereof relates to the submission of annual reports under s. 75(1) by the Board. Sub-s. (2) indicates the various matters that are to be included in the annual report that is sent by the Board. Item (q) of sub-r. (2) relates to details of the tariffs of the Board during the year. Therefore, it will be seen, that in the annual report that is sent under s. 75(1) by the Board to the State Government and which report, as already referred, is placed before the State Legislature, the Board, among various other matters, will have also to give details of the tariffs imposed by it during the year. Under s. 78A(1), the Board is to be guided in the discharge of its function by such directions on questions of policy, as may be given to it by the State Government. Section 79 enables the Board to make regulations not inconsistent with the Act and the Rules made thereunder. One of the matters which may be covered by regulations made by the Board and to which reference is necessary to be made, is dealt with under cl. (j) to the effect, 'principles governing the supply of electricity by the Board to persons other than licensees under section 49'.

Now taking up the first question arising for consideration, namely, the power of the Board to levy uniform tariffs under s. 49 of the Supply Act as amended, Mr. Poras A. Mehta, learned counsel for the respondents, whose contentions have been also reiterated by Mr. A. K. Sen, learned counsel for the interveners, urges that in fixing the rate of tariff, one of the essential matters to be taken into account by the Board is the cost of supply to particular areas concerned. That is in other words, according to the respondents, the tariff must be based upon the cost of supply. It is their further contention that in fixing the tariffs, the cost incurred by the Board for supply of electricity to different areas must be given due consideration and importance. Extension of electricity to sparse areas or to areas which are not adequately supplied, should not be made at the cost of, and to the detriment of, consumers of electricity in already developed or compact areas. It is also their contention that the Board may have, if at all, power to levy a lesser uniform rate of tariff in underdeveloped or sparse areas, and any loss that may be incurred by the Board in that regard will have to be compensated by the subventions that may be received by the Board from the State Government under s. 63 of the Supply Act. In no case, the counsel points out, can that burden be shifted to the consumers in the already well-developed areas. By levying uniform tariffs in this case on consumers whose area is already well-developed, they are being to pay for the development schemes that are being carried out in sparse areas. That, according to them, is violative of sub-s. of s. 49 by the Board, in as much as, the consumers of sparse areas to whom the cost of supply is more, are enabled to pay at the same rate as those in compact areas. In effect, they point out that there has been undue preference to the consumers in the sparse areas in as much as they pay much less than

the cost of supply.

The further stand taken on behalf of the respondents is that in this case, the question of imposing different tariffs should have been considered by the Board under sub-s. (3) of s. 49 in view of the fact that the compact area is geographically different from sparse area. According to them, the rates should have been fixed more favourably in favour of the consumers in the compact area. They also urge that Sub-s. (4) of s. 49 which directs the Board not to show undue preference to any person in fixing the tariffs and terms and conditions for the supply of electricity, governs sub-ss. (1) to (3) of s. 49 and the Board, by fixing the same tariff in the sparse areas as in the compact areas, has shown undue preference to the former which is not permissible in law.

On the other hand, Dr. L. M. Singhvi, learned counsel appearing for the Board pointed out that there is absolutely no indication in the supply Act that the Board should fix its tariff, having regard to the cost of supply. Counsel points out that the Board is charged, under s. 18 of the Act, with the duty of promoting the co-ordinated development of generation, supply and distribution of electricity within the State in a most efficient and economical manner. Normally, the Board which is deemed to be a company, under s. 80 of the Act, would be entitled to fix its own tariff for electricity supplied by it. Under the old s. 49 of the Act, a general power was conferred on the Board to supply electricity upon such terms and conditions as it may, from time to time, fix, having regard to the matters referred to in that section. The proviso to the said section directed the Board not to show undue preference to any person in fixing the tariffs. Except this limitation in the exercise of its power, the Board was not placed under any further restriction. Section 49, as it now stands, has been incorporated with retrospective effect. Under that section, the Board has been directed to frame uniform tariffs. The factors which are to be taken into account by the Board for fixing uniform tariffs have also been indicated therein. In particular circumstances indicated therein, the Board has been given the power to fix different tariffs. What was originally the subject-matter of the proviso in the old s. 49 has now been incorporated in sub-s. (4) of s. 49. Counsel points out that the question of showing undue preference cannot arise when the Board fixes uniform tariffs. Therefore, sub-s. (4) can govern only sub-s. (3) in the matter of fixing different tariffs. Sub-s. (4) cannot cut down the power given to the Board in the matter of fixing uniform tariffs.

Counsel also points out that going by the phraseology of sub-ss. (1) and (2) of s. 49, it is open to the Board to frame uniform tariffs having regard to the matters mentioned in sub-s. (2) of s. 49. Counsel also points out that there is no question of any development in sparse area being made at the expense of the compact area. Under cl. (d) of s. 49(2), one of the factors to be taken into account for fixing uniform tariffs relates to the extension and cheapening of supplies of electricity to sparsely developed areas. If the Board supplies electricity at cheaper rates to sparsely developed areas, the compact areas also will stand to benefit, because the cheap rates applicable to the former area will be a uniform tariff governing the compact area consumers also. There is no question of any undue preference being shown by the Board.

We have already referred to the material provisions of the Act which will show the nature of the duties cast upon the Board. Section 59 lays down that the Board, after taking subventions from the State Government shall not, as far as practicable, carry on its operations under the Act at a loss, and that the Board is to adjust its charges accordingly from time to time. That means that cost has to be taken into account, though that is not the sole or only criterion for fixing the tariff. There is also no indication in the Act that uniform tariffs can be fixed only in respect of particular regions or areas. We are not impressed with the contention of that respondent that by uniform tariffs being levied by the Board, it is making more profits in compact areas than in sparse areas, nor with the further

contention that development of sparse areas is being done at the expense of compact areas.

On behalf of the respondents, certain English decisions have been brought to our notice wherein the expression 'undue preference' or 'discrimination' found in the corresponding Electricity Act have come up for consideration. One of the decision is that of the House of Lords reported as *South of Scotland Electricity Board and others v. British Oxygen Co. Ltd.* [[1959] 2 All E.R. 225.]. Section 37(8) of the Electricity Act, 1947 which the House of Lords had to construe provided :

"An area board, in fixing tariffs and making agreements under this section, shall not show undue preference to any person or class of persons and shall not exercise any undue discrimination against any person or class of person."

The House of Lords held that in determining whether there has been discrimination as between high voltage consumers and low voltage consumers, the lesser cost of supplying high voltage power should be taken into consideration, and that, therefore, there might be discrimination against high voltage consumers notwithstanding that the price charged to them was a little lower than that charged to low voltage consumers. But the English statute did not contain any provision similar to s. 49(1) and (2) of our Act, regarding the fixation of uniform tariffs. It is also seen that in that case, the question of costs appears to have been relied on by the Electricity Board. In this connection, it is pertinent to note the observations of Lord Reid in his dissenting judgment at p. 244 to the effect :

"What then is the standard by which preference or discrimination is to be judged ? The appellants say price charged to the consumer and the respondents say cost of supply. The Act uses these words in connexion with the fixing of tariffs which deal with prices and not with cost of supply, and one would expect these words in this context to refer to price. Moreover, prices are easily ascertained by inspection of the tariff but costs of supply are not; their ascertainment probably involves highly contentious questions of costing and the like. So if preference is a matter of cost, it would be impossible to tell whether there is any preference or discrimination until an elaborate investigation had been made.'

The above observations in the dissenting judgment clearly bring out the difficulty that will be felt by having to judge the question of undue preference or discrimination with reference to the cost of production. But as we have stated earlier the provisions in the English Act were entirely different.

We may also refer to another decision of the Privy Council reported in *Attorney-General for Victoria v. Mayor, Aldermen, Councilors and Citizens of Melbourne* [[1907] A.C. 469.] in which the construction of s. 39 of the Victorian Electric Light and Power Act, 1896 came up for consideration. Section 39 of the said Act was as follows :

"The undertakers shall not in making any agreements for a supply of electricity show any preference to any council company or person and the charge for such supply shall be uniform throughout such area so that each council company or person shall be supplied at the same price and not less than any other council company or person, but such price shall not exceed the limits of price imposed by or in pursuance of the order authorising them to supply electricity."

The Privy Council, in construing that section, held that the preference prohibited therein is not as between customers dealing under two different systems but only as between customers dealing

under the same system. Based upon this decision, counsel for the respondent argued that uniform tariffs under s. 49 of our Act can only be levied as against the same type of customers situated in the same area and that uniform tariff cannot be levied in respect of same type of customers situated in a different area. Counsel further urged that consumers regarding whom supply cost is more as in sparsely areas, cannot be considered to be on par with consumers in compact areas in respect of whom supply cost is less. It is further pointed out that if both these types of consumers are treated as same, that will amount to showing undue preference, which is prohibited under sub-s. (4) of s. 49. In view of the wording of s. 39 of the Australian Act, the reasoning of the Privy Council in construing the said section regarding the rule of uniformity cannot be applied when construing s. 49 of our Act. But it is significant to note that as early as 1907, a system of levying uniform rates as indicated in s. 39 has been in vogue in Australia.

After having charged the Board under s. 18 to supply and distribute electricity in the most efficient and economical manner, as already pointed out, s. 59 states that the Board shall not, as far as practicable, carry on its operations under the Act at a loss. Section 63 empowers the State Government to make subventions to the Board. It is entirely within the discretion of the State Government under s. 63 to make subventions to the Board. We are referring to this aspect, because it has been stressed on behalf of the respondents that any development schemes in respect of sparsely areas should be done by the Board only with the subventions which the State Government pays and not by charging the consumers in the compact areas and sparse areas at uniform tariff.

Section 49(1), as it now stands, provides that the Board is to frame uniform tariffs in the matter of supply of electricity to any person, not being a licensee; and sub-s. (2) lays down the factors which are to be taken into account by the Board in fixing uniform tariffs. In this connection, it is necessary to refer to the provisions of s. 49 of the Act as it originally stood. It was as follows :

"Subject to the provisions of this Act and of any regulations made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board may from time to time fix having regard to the nature and geographical position of the supply and the purpose for which it is required :

Provided that in fixing any such terms and conditions the Board shall not show undue preference to any person."

In the old s. 49 extracted above, there is no such policy or direction indicated by the Legislature that the Board is to frame uniform tariffs. Under that section, the Board had the power to supply electricity on such terms and conditions as it may from time to time fix, having regard to the matters referred to in the said section. The only restriction upon the Board's power was that it shall not show undue preference to any person in fixing any such terms and conditions. In s. 49 as it now stands, the Legislature has empowered the Board to frame uniform tariffs and it has also indicated the factors to be taken into account in fixing uniform tariffs. These two aspects are contained in sub-ss. (1) and (2). The Legislature has also made it clear in sub-s. (3) that the Board, in the special circumstances mentioned therein, has got the power to fix different tariffs for the supply of electricity. Sub-s. (4) directs the Board not to show undue preference to any person for fixing the tariffs and the terms and conditions for the supply of electricity. Though prima facie it would appear that sub-s. (4) will govern sub-ss. (1) to (3) in s. 49, the proper way to interpret sub-s. (4) will be to read it along with sub-s. (3).

The question of the Board showing undue preference to any person in fixing the tariffs and terms

and conditions for supply of electricity will not arise when the Board frames uniform tariffs under sub-ss. (1) and (2). When the entire tariff is uniform for every consumer, there is no question of any undue preference as every customer will pay the same amount for the same benefit received by him. Sub-s. (3) if s. 49 recognises the power of the Board to fix different tariffs for the supply of electricity and it is really here, if at all, that an occasion for any undue preference being shown, may arise. Therefore, in our opinion, sub-s. (4) will control the action of the Board under sub-s. (3) of s. 49. We are not inclined to accept the contention of the respondents that the consumers in a compact area cannot be treated as on par with the consumers in sparse area and that uniform tariffs cannot be levied on both. In this case, we have already referred to the fact that both the respondents are consumers of low tension electricity and that uniform tariffs have been levied for the entire State of Maharashtra excepting certain types of consumers in Poona area. To conclude we are of the opinion, that the Board had ample powers to frame uniform tariffs as it has done in the case before us and the levy is valid.

The second question that arises for consideration, as indicated earlier, relates to the validity of s. 49, as amended. The attack on the validity of this section is made under different heads, as indicated below.

The first ground of attack is that levying of a uniform tariff on the consumers in sparse areas and the consumers in compact areas, which is not directly related to the cost of supply, amounts to a colourable exercise of taxing power by Parliament. In this connection it is stated that the power to levy tax on the consumption or sale of electricity is conferred under entry 53 List II of the 7th schedule on the State Legislature. This attack is made on the basis that the tariff levied by the Board must be related to the cost of supply. We have already rejected the contention of the respondents in this regard; and we have held that the cost of supply is only one of the factors to be taken into account in fixing the tariff. If that is so, it follows, that in this case, there is no question of any levy of tax by Parliament through the medium of the Board. By reference to the proviso to sub-cl. (b) of cl. (10) of s. 67, it is further urged by the respondents that the Board may fix tariffs in such a way that large surplus may be found by them from which one-half will be credited to the consolidated fund of the State. This action, according to the respondents, amounts to levy of tax for which there is no power in law. We are not inclined to accept this contention either. Section 67 of the Supply Act which occurs in Chapter VI relating to the Board's finance, accounts and audit, deals with priority of liabilities of the Board. After meeting its operations, maintenance and management expenses and providing for the payment of tax on its income and profits, s. 67 provides for the revenues of the Board, in so far as they are available, to be distributed in the order mentioned in cls. 1 to 10. After adjustments have been made in respect of cls. 1 to 9, cl. 10 provides for the balance to be appropriated to a fund to be called the 'development fund'. Clause 10 further provides that the development fund is to be utilised for two purposes, (a) purposes beneficial, in the opinion of the Board, to electricity development in the State; (2) repayment of loans advanced to the Board under s. 64 and required to be paid. It is after this that the proviso, on which reliance is placed by the respondents, states that where no such loan is outstanding, one-half of the balance shall be credited to the consolidated fund of the State. In the counter-affidavit filed on behalf of the Board, it has been stated that ever since its constitution it has been carrying on its operations at a loss and there has been no occasion when any part of its revenues has been passed to the consolidated fund of the State. We have no hesitation to accept this statement made on behalf of the Board. Even otherwise, before the proviso can come into operation, there are several other items in respect of which adjustments will have to be made, and there will be no occasion at all for the proviso to come into effect. We are also not inclined to accept the contention of the respondents that with a view to give effect to the proviso, the Board will so fix the tariffs as to enable them to have huge surplus, after

meeting the various adjustments. In case such a thing happens in future the proviso which is clearly severable, may have to be struck down. Therefore, this ground of attack, that there is a colourable exercise of taxing power, cannot be accepted.

The next ground of attack against s. 49 is that it gives an unguided and arbitrary power to the Board to fix the tariff as it likes, and no maximum limit for the tariffs that may be fixed by the Board, has been stated. On first blush, it may appear that this connection has considerable force; but we are satisfied that no such unguided or arbitrary power has been conferred on the Board either in the matter of framing uniform tariffs or in the matter of fixing different tariffs for the supply of electricity to any person, not being a licensee. No doubt, the maximum as such, has not been fixed in the statute. But, in our opinion, there are sufficient restrictions placed upon the power of the Board. In this connection, reference may be made to some of the sections of the Supply Act. Section 16, as we have already indicated, provides for the State Government constituting a State Electricity Consultative Council for the State. That Council consists of the representatives of the various interests including representatives of consumers of electricity. The Board is bound to place before the State Electricity Consultative Council under sub-s. (6) the annual financial statement and supplementary statement and a duty is cast upon the Board to take into consideration any comments made on such statement. This annual financial statement will have then to be submitted to the State Government under s. 61. Under that section, in February of each year, the Board has to submit to the State Government an annual financial statement in the prescribed form, of the estimated capital and revenue receipts and expenditure for the ensuing year. That statement, under sub-s. (3) has to be placed before the State Legislature and it is open to discussion. Again, sub-s. (4) of s. 61 casts a duty on the Board to take into consideration any comments made on the said statement in the State Legislature. Section 75 again provides for the Board submitting to the state Government a report giving an account of its activities during the previous financial year as also an account of its activities which are likely to be undertaken by it in the next financial year. The State Government is to place the said report before the State Legislature. We have already indicated, by reference to r. 57 cl. (q) of the rules framed by the State of Maharashtra that details of tariff will have to be furnished by the Board in its annual report. Under cl. (j) of s. 79, the Board has also to make regulations laying down the principles governing the supply of electricity by it to persons other than licensees under s. 49. In our opinion, all these provisions have the effect of properly guiding the activities of the Board in its dealings with the consumers including the levy of tariffs. Section 49 itself is hedged in by various restrictions and directions which the Board will have to comply in the matter of framing uniform tariffs or in the matter of fixing different tariffs, and that section, also in our opinion, provides a proper guide-line for framing uniform tariffs and different tariffs. Therefore, in particular, it may be noted that the extension and cheapening of supplies of electricity to sparsely developed areas under cl. (d) of s. 49(2) of the Act can only be complied with by keeping the uniform rates at a minimum, consistently with the requirement, under s. 59, of not running at a loss. Therefore, we are satisfied, that s. 49 is not in any way, bad on the ground that it gives, an unguided and arbitrary power to the Board to fix its tariffs as it likes.

The next ground of attack is that consumers who are supplied electricity by the licensees are differently treated from similar consumers under the Board. In this connection, the reference is made to s. 57 of the Supply Act which provides for the 6th and 7th schedule to be deemed to be incorporated in the licence of every licensee. Clause I of the sixth scheduled provides that the licensee shall so adjust his charges for the sale of electricity, whether by enhancing or reducing them that his clear profit in any year of account shall not, as far as possible, exceed the amount of reasonable return. It is argued that while restrictions have been placed on the licensees, no such restrictions have been placed on the Board. The distinction sought to be pointed out, in our opinion

has no substance. The licensees are persons who must have invested considerable capital in the matter of their business, and obviously, the Legislature thought that some directions will have to be given so as to enable them to have a reasonable return. But we have already indicated that sufficient guidance has been laid down in the matter of fixing of tariffs by the Board. Therefore this ground of attack also cannot be sustained.

Therefore, both the grounds of attack, levelled by the respondents, will have to be rejected.

On behalf of the respondents, a feeble attempt was made to show that s. 24 of the Amendment Act has not validated the levy and collection in these cases. According to the respondents, in this case, there is nothing to show that the provisions of s. 49, as amended, which is deemed to have been in force at all material times, have been complied with by Board before the levy was made, and therefore, the levy in this case cannot be sustained. We are not inclined to accept this contention of the respondents. Section 24 of the Amendment Act, in our opinion, deals with all rates as a matter of fact fixed under s. 49 of the Act. In this case, the Board has fixed tariffs under s. 49 of the Act. Therefore, s. 24 of the Amendment Act has full effect and force.

The result is that all the contentions of the respondents fail. The order of the High Court, under attack is set aside and these two appeals are allowed. As the appellant succeeds in both these appeals on the basis of the Amendment Act, parties will bear their own costs throughout.

# Appeals allowed.##

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