Indian Aluminium Company

Vs

Kerala State Electricity Board

Civil Appeal No. 1457 of 1971

(A. Alagiriswami, P. N. Bhagwati, P. K. Goswami JJ)

23.07.1975

JUDGMENT

BHAGWATI, J. –

1. The short but important question which arises is determination in this appeal is whether a State Electricity Board has power to enhance the rates for supply of electricity notwithstanding an agreement binding it to supply at certain rates where it finds that the contractual rates are less than the cost of generation, distribution and supply of electricity and in the result, there is loss to the State Electricity Board in its operations ? In order to appreciate how the question arises it is necessary to state a few facts giving rise to the appeal.

2. The petitioner is a limited liability company which carries on business of manufacturing aluminium. The manufacturing of aluminium involves three processes, viz., mining of bauxite ore, dressing it and converting it into alumina and reduction of alumina into aluminium. The petitioner carried on bauxite at the quarries in Bihar and also set up its factory in Bihar for dressing bauxite ore and converting it into alumina. So far as the process of reducing alumina into aluminium is concerned, it involves the application of the method of electrolysis in which electrical energy is a primary raw material and, therefore, the petitioner was anxious to set up a factory for this purpose at a plan where electric power would be cheap. The Government of the then native. State of Ttravancore offered to supply electric power to the petitioner at reasonable rates for a long period of time if the petitioner established its factory for reducing alumina into aluminium within its territory. An agreement dated July 30, 1941 was accordingly entered into between the petitioner and the Government of the State of Travancore for supply of electrical energy at certain rates for a period of 34 years from July 1, 1941 with an option of renewal in favour of the petitioner for a further period of 20 years. In view of this agreement, the petitioner established a factory at Alupuram near Alwaye for reducing alumina and converting into aluminium, though, for this purpose had to be brought all the way from Bihar and the aluminium produced at the factory had to be transported outside the State of Travancore for the purpose of sale.

3. On the integration of the States of Travancore and Cochin, a new State of Travancore-Cochin was formed in 1948 and the agreement dated July 30, 1941 (hereinafter referred to as the principal agreement) was accepted by the new State as binding upon it. The terms and conditions of supply of electrical energy laid down in the principal agreement was accepted by the new State as binding upon it. The terms and conditions of supply of electrical energy laid down in the principal agreement were however, varied and modified by a supplemental agreement (hereinafter referred to as the first supplemental agreement) dated August 16, 1956 entered into between the petitioner and State of Travancore-Cochin. On November 1, 1956 a new State of Kerala was formed comprising

inter alia the territories of the existing State of Travancore-Cochin, barring a small portion transferred to the State of Madras under the States Reorganisation Act, 1956, and by reason of Section 87 of that Act, the principal agreement as modified by the first supplemental agreement was deemed to have been made in the exercise of executive power of the State of Kerala and all rights and obligations under it became the rights and obligations of the State of Kerala Government thereafter by a notification issued under Section 5, sub-section (1) of the Electricity Supply Act, 1948 (hereinafter referred to as the Supply Act), constituted the Kerala State Electricity Board (hereinafter referred to as the Board) with effect from April 1, 1957. Section 60 of the Supply Act provides, inter alia, that all the contracts entered into by or with the State Government for any of the purposes of the Act before the first constitution of the Board shall be deemed to have been entered into by or with the Board. The principal agreement as modified by the first supplemental agreement was, therefore, deemed to have been entered into with the petitioner by the Board. The terms and conditions of agreement were subsequently modified under another supplemental agreement (hereinafter referred to as the second supplemental agreement) dated April 4, 1963 entered into between the petitioner and the Board. This modification did not affect either the rates or the duration of the principal agreement.

4. It appears that the petitioner required additional electric power for expansion of the operations of its alumina reducing factory and an agreement dated March 30, 1963 (hereinafter referred to as the second agreement) was therefore, entered into between the petitioner and the Board whereby the Board agreed to supply to the petitioner from January 1, 1965 a total of 12500 kilowatts of electric power at the rates and on the terms and conditions set out in the agreement. The duration of this agreement was 25 years from January 1, 1965 with an option to the petitioner to renew it for a further period of 25 years. Another agreement (hereinafter referred to as the third agreement) was entered into between the petitioner and the Board on September 18, 1965 for supply of further 12,500 k.w. of electric power at certain rates for a period of 25 years from January 1, 1965 with an option of renewal in favor of petitioner for a further period of 25 years on the same terms and conditions.

5. Whilst these agreements were in force, the Board framed the Kerala State Electricity Board (General Tariffs) Regulations, 1966, in exercise of the Powers conferred under Section 79(j), read with Section 49 and 59 of the Supply Act. Regulation 4 empowered the Board to prescribe different terms and conditions for different classes of consumers and Regulation 6 provided that the Board may fix different tariffs for different classes of services under various heads. The Board was conferred power under Regulation 10 by notification or otherwise to fix special terms and conditions for supply for special purposes and under Regulation 11, the Board could amend the terms and conditions of supply from time to time. These regulations were amended by the Board by making the Kerala Electricity Board (General Tariffs) (Amendment) Regulations, 1964. By the amendment Regulations 6 and 8 were substituted by a new Regulation 6 which empowered the Board to fix different tariffs for different classes of services under the broad heads, low tension supply, high tension supply and extra high tension supply. Now it appears that since September, 1965, when the last revision of tariffs was made by the Board there was a steep rise in "prices of all commodities including plant and equipment, construction materials, etc., salary and wages of employees thereby increasing the operation and maintenance cost of the Board will the result that the Board found itself in a position where it was working at a loss. Section 59 of the Supply Act enjoins the Board that "it shall not, as far as possible, carry on its operation under this Act at a loss and shall adjust its rates accordingly from time to time". The board therefore, in exercise of the power conferred under Section 49 of the Supply Act and the regulations, "and other enabling provisions in the statute", issued an order dated November 28, 1969 called "Kerala State Electricity

Board Extra High Tension Tariff Order, 1969", fixing the rates or tariffs for supply of electric power to all extra high tension consumers a category which included the petitioner. Clause (6) of this Order provided that the rates or tariffs fixed by it shall apply to all extra high tension consumers notwithstanding anything to the contrary contained in any agreement entered into with extra high tension consumer either by the Government or by the Board or anything in the tariff regulation or Rules previously issued.

The result was that despite the principal agreement, the second agreement and the third agreement, which were in force, the Board claimed to the entitled to recover from the petitioner the rates or tariffs fixed by this order, though they were manifestly higher than the rates or tariffs stipulated in these respective agreements. The petitioner thereupon filed a writ petition in the High Court of Kerala challenging the validity of this order but the challenge failed. The High Court sustained the order on the ground that it was within the competence of the Board under Sections 49 and 59 of the supply Act. This view is assailed in the present appeal brought with certificate obtained from the High Court.

6. Before we proceed to consider the question which arises for determination in this appeal, it will be convenient at this stage to refer to a few relevant provisions of the Supply Act for this is the statute with which we are concerned in this appeal. The Supply Act, as its preamble and long title show, is enacted "to provide for the rationalisation of the production and supply of electricity and generally for taking measures conducive to electrical development". That is the object and purpose of the statute and this object and purpose is sought to be achieved by the establishment of the Central Electricity Authority and State Electricity boards charged with certain functions, powers and duties. Section 5(1) provides that the State Government shall, as soon as may be after the issue of the notification under Section 1(4) bringing into force the various provisions of the Act, "constitute by notification in the Official Gazette a State Electricity Board under such name as shall be specified in the notification." Chapter IV sets out the powers and duties of the State Electricity Board. Section 18, which is the first section in that chapter, enumerates duties, which also represent the functions, of the State Electricity Board. It says, to quote the words of the section :

> Subject to the provision of this Act the Board shall be charged 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 license, and without prejudice to the generality of the foregoing provisions it shall be the Board - (a) to prepare and carry out schemes sanctioned under Chapter V; (b) to supply electricity to owners of controlled stations and to licensees whose stations are closed down under this Act; (c) to supply electricity as soon as practicable to any other licensees or persons requiring such supply and whom the Board may be competent under this Act so to supply.

Then follow other sections in that chapter which deal with the powers of the State Electricity Board. They are not material and we need not refer to them. Chapter V is headed "The Board's Works and Trading Procedure". It contains the fascicluls of section dealing with making of a scheme for an area "with a view to rationalising the production and supply of electricity" in that area. Then there are other sections, not relevant for our purpose, which speak of controlled stations and generating stations provide for supply of electricity by the State Electricity Board to a licensee and lay down the mode of fixation of grid tariff. Section 49 enacts a provision for sale of electricity by the State Electricity Board to a person other than a licensee. It reads :

> (1) Subject to the provision of this Act and of regulations, if any, made in this behalf, the Board thinks fit and may for the purposes of such supply frame uniform tariffs.
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> (2) In fixing the uniform tariffs, the Board shall have regard to all or any of the following factors, namely -
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> (a) the nature of the supply and the purposes for which it is required;
>
> (b) the co-ordinated 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 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 the 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.

Chapter VI deals with "The Board's Finance, Accounts and Audit". The first section in this Chapter, which is material, is Section 59 which is in the following terms :

> The Board shall not, as far as practicable and after taking credit for any subvention from the State Government under Section 63, carry on its operations under this Act a loss, and shall adjust its charges accordingly from time to time.

Then comes Section 60 which provides inter alia that

> all contracts entered into by, with . . . the State Government for any of the purposes of this Act before the first constitution of the Board shall be deemed to have been ... entered into ... by, with . . . the Board.

Lastly, Section 63 empowers the State Government, with the approval of the State Legislature, from time to time to "make subventions to the Board for the purpose of this Act on such terms and conditions as the State Government may determine".

7. Now, in the present case, as we have already seen, there are three main agreements entered into by the appellant for purchase of electricity. True, the principal agreement, as modified by the first supplemental agreement, was not entered into with the Board, but as pointed out above, by reason of Section 60 of the Supply Act, it must be deemed to have been entered into by the appellant with the Board and in view of legal fiction, all the consequences and incidents must follow as if it were an

agreement made with the Board. The learned Solicitor General, appearing on behalf of the Board, contested the applicability of Section 60 on the ground that the principal agreement, as modified by the first supplemental agreement, was not an agreement entered into by the State Government "for any of the purposes of this Act, " but we do not think this contention is sound. One of the Primary purposes of the Supply Act is to provide inter alia for the supply of electricity : in fact the Supply Act empowers the Board to supply electricity to any person other than a licensee. An agreement for supply of electricity to a consumer is therefore, plainly and indubitably an agreement for one of the purposes of the Supply Act and Section 60 has clearly application to such an agreement. The principal agreement, as modified by the first supplemental agreement, must, therefore, for all the purposes of the Supply Act, be treated as an agreement entered into with the Board. So far as the second and the third agreements are concerned, there is no question of invoking Section 60, as they have been entered into by the appellant with the Board from the very beginning. The question is whether the Board is entitled to override the stipulation as to charges contained in these agreements and enhance the charges by unilateral action as it has purported to do.

8. The Board relied principally on two provisions of the Supply Act, namely, Section 49 and 59, in support of its claim to increase the charges unilaterally despite the stipulation as to charges contained in the three agreements. Taking firstly its stand on Section 49, the Board contended that under this section the Legislature has entrusted to it the power to fix charges - described in the section as tariffs - for supply of electricity to any person other than a licensee. Now this power is exercisable not once and for all, but from time to time as action requires or circumstances justify. It was urged that the exercise of this power is conditioned by the statutory obligation of "promoting the co-ordinated development of the generation, supply and distribution of electricity within the State in the most efficient and economical manner" and in order to run its undertaking economically, that is without loss, the Board is entitled to refix the charges in exercise of this power - indeed, it is statutorily bound to do so. In any event, contended the Board, the power and duties created by the Supply Act, the power to fix charges under Section 49 being one of them, are for public good and they are intended to further the object of promoting the production and supply of electricity which is a matter of public utility and hence in public interest. It is, therefore, is a matter of public utility and hence in public interest. It is, therefore, not competent to the Board to enter into a stipulation with the consumer binding it not to charge anything more than a specific rate and thereby divest itself of the power to fix and refix charges entrusted to it under Section 49, or fetter or fetter or hinder its future exercise. Such a stipulation is void and it does not, ran the argument, stand in the way of the Board enhancing unilaterally the charges for supply of electricity. This argument was sought to be supported by the Board by relying on two decisions of English Courts, namely, Ayr Harbour Trustees v. Oswald (8 AC 623) and York Corporation v. Henry Leetham & Sons ((1924) 1 Ch 557 : 131 LT 127; 40 TLR 371). Simultaneously, Section 59 was also invoked in aid by the Board. It was pointed out that the opening words of Section 49(1) made the power to fix charges conferred on the Board subject to Section 59, and therefore, the mandate of the Legislature contained in Section 59 must prevail over anything that is done by the Board in exercise of this power. Section 59 must prevail over anything that the Board shall not, as far as practicable, carry on its operations at a loss and shall fixation of charges under Section 49, therefore, the Board is entitled to enhance the charges if it finds that it is necessary to do so in order to avoid operating at a loss. In any event, the Board cannot, by stipulation in a contract, bind itself to refrain from exercising the statutory power which it possesses under Section 59 to enhance the charges in case of operational loss. The statutory power cannot be bartered away by a contractual stipulation. If it were held permissible to the Board to bind itself by a contractual stipulation not to enhance the charges even though such charges result in operational loss, public interest would suffer since the production, distribution and supply of

electricity would be prejudicially affected and electrical development in the State would receive a serious setback. On these two grounds the Board urged that, since it was incurring loss in its operations, it was entitled unilaterally to revise the charges so as to avoid such loss, notwithstanding that under the stipulation contained in the three agreements it was bound to supply electricity to the appellant at certain fixed charges. Let us examine whether either of these two grounds is well founded.

9. Turning first to Section 49, we may point out that prior to its amendment by the Electricity (Supply) Amendment Act, 1966 that section was in a different form. On an interpretation of the unamended section, the High Court of Bombay took the view, in a case relating to the Kalyan municipality, that it did not give power to the Board to fix uniformly tariffs so as to cast a higher burden on the consumer in compact area where the cost of supply was less then on the consumer in a compact area where the cost of supply was less than on the consumers in a sparse area where the cost of supply was more owing to higher distribution cost. This case was taken in appeal by the Maharashtra State Electricity Board, but before the appeal could be decided by this Court the Parliament enacted the amending Act substituting the present Section 49 for the old one with retrospective effect. The appeal had, therefore, to be decided by reference to the amended Section 49 and having regard to that section, as amended, this Court held that the Board had power to fix uniform tariffs both for consumers in compact areas as well as consumers in sparse areas. This Court, interpreting the amended Section 49 pointed out (Maharashtra State Electricity Board v. Kalyan Borough Municipality, AIR 1968 SC 991, 999-1000 : (1968) 3 SCR 137,153) :

> In Section 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-section (1) and (2). The Legislature has also made it clear in Sub-section (3) that the Board in the special circumstances mentioned therein, has got power to fix different tariffs for the supply of electricity. Sub-section (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. Through prima facie it would appear that sub-section 49 will govern sub-section (1) to (3) in Section 49, the proper way to interprete sub-section (4) will be to read it along with sub-section (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-section (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-section (3) of Section 49 recognizes 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 it our opinion, sub-section (4) will control the action of the Board under sub-section (3) of Section 49.

It would be seen that sub-section (1) of Section 49 empowers the Board to fix uniform tariffs. The fixation of uniform tariffs need not necessarily be region wise or areawise, nor need it be only in respect of particular classes of consumers. There is no limitation on the exercise of the power of fixing uniform tariffs save that certain factors are laid down in sub-section (2) of Section 49 which have to be taken into account by the Board in fixing uniform tariffs. These factors guide and control the exercise of the power of the Board. But, even where uniform tariffs are fixed for a particular category of consumers, the application of uniform tariffs to all consumers falling within the

category, irrespective of their distinctive features, may sometimes defeat the object of promotion of electrical development and industrial growth and progress. There may arise be found necessary to make departure from the uniform tariffs and to fix special tariffs for them. Sub-section (3) of Section 49, therefore, provides that the Board shall have the power,

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 as required and any other relevant factors.

This sub-section confers power on the Board to fix special tariff for a consumer if the geographical position of the area, the nature of the supply, the purpose for which supply is required and other relevant factors to warrant. Now, fixation of special tariffs can be a unilateral act on the part of the Board, but more often than not, it would be the result of negotiations between the Board and the consumer and hence a matter of agreement between them. It would, therefore, seem clear that the Board can, in exercise of the power conferred under sub-section (3) of Section 49, enter into an agreement with a consumer stipulating for a special tariff for supply of electricity for a specific period of time. Such a stipulation would amount to fixing of special tariff and it would clearly be in exercise of the power to fix special tariff granted under sub-section (3) of Section 49. Indeed, if the power to fix special tariff through the modality of an agreement with the consumer were not there in sub-section (3) of Section 49, it cannot be found in any other provision of the Supply Act and in such case it would be impossible for the Board to enter into any agreement with a consumer binding itself to supply electricity at a special rate for a certain period of time. To supply electricity at a special rate for a certain period of time. Such an agreement would be wholly ultra vires the power of the Board and that would cause considerable mischief and inconvenience as no industry would be able to enter into an agreement ensuring supply of electricity which would be binding on the Board. Tariff is the most important element in such an agreement and if no binding stipulation can be made in regard to tariff the agreement itself would be meaning less and would be no more than a mere rope of sand. The power to enter into an agreement fixing a special tariff for supply of electricity for a specified period of time is, therefore., relatable to sub-section (3) of Section 49 and such an agreement entered into by the Board would be in exercise of the power under that the sub-section. The three agreements for supply of electricity to the appellant must, in the circumstances, be regarded as having been entered into by the Board in exercise of the statutory power conferred under sub-section (3) of Section 49. Now when the power to fix special tariff for a consumer is given to the Board the possibility cannot be ruled out that the Board may in exercising the power show undue preference to one consumer as against the other Sub-section (4) of Section 49 therefore, provides a safeguard by enacting that in fixing tariff and terms and conditions for the supply of electricity, the Board shall not show any undue preference to any person. This safeguard is obviously necessary only in cases where special tariff is fixed by the Board under sub-section (3) of Section 49. When uniform tariffs are fixed by the Board under sub-section (1) and (3) [sic(2)] of Section 49 there could be no question of the Board showing undue preference to any one consumer against another because every consumer falling within the category would have to pay the same tariff for the same benefit received by him. It is, therefore, obvious that sub-section (4) of Section 49 controls the action of the Board in fixing tariff under sub-section (3) of Section 49 and it has no application where uniform tariffs are fixed under sub-sections (1) and (2) of Section 49.

10. Having analysed the provisions of Section 49, We may now turn to consider the argument advanced on behalf of the Board that a stipulation binding the Board most to charge anything more than a specific rate would be void as it would have the effect of divesting the Board of the power to fix and refix charges entrusted to it under Section 49 or hindering or fettering its future exercise.

Now, if there is one principle more well settled than any other, it is that when a public authority is entrusted by statute with a discretionary power to be exercised for the public good, it cannot, when making a private contract in general terms fetter itself in the use of that power or in the exercise of such discretion. There are a number of decisions which would establish this principle beyond doubt. We may refer to a few of them in order to appreciate the true scope and ambit of this principle - what is its area of operation and what are its limitations.

11. The first case where this principle was enunciated is Ayr Harbour Trustee v. Oswald (supra). In this case the Harbour Trustees, whose statutory power and duty were to acquire land, to be used as need might arise for the construction of works on the coastline of the harbour, sought to save money in respect of severance on the compulsory acquisition of a particular owner's land by offering him a perpetual covenant not to construct their works on the land acquire, so as to cut off from access to the waters of the harbour, or otherwise to affect him injuriously a respect of the land not taken but from which the acquired land was severed. It was held that such a covenant was ultra vires. Lord black burn stated the principle in these terms :

> I think that where the Legislature confers powers on anybody to take lands compulsorily for a particular purpose will be for the public good. Where that body be one which is seeking to make a profit for shareholders, or, as in the present case a body of trustee acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily an entrusted to them, and their successors, to be used for the furtherance of that object which the Legislature has through sufficiently for the public good to justify it in entrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void.

12. This case was followed by Russell, J. in York Corporation v. Henry Leetham & Sons Ltd. (supra). There, the plaintiff-corporation was entrusted by statute with the control of navigation in part of the river and Fose with power to charge such tolls within limits, as the corporation deemed necessary to carry on the two navigations in which the public had an interest. The corporation made two contracts with the defendants under which they agreed to accept, in consideration of the right to navigate the Ouse, a regular annual payment of $ 600 per annum a place of authorised tolls. The contract in regard to navigation of the Fose was on similar lines. It was held by Russell, J. that the contracts were ultra vires and void because under them the corporation had disabied itself, whatever emergency might arise, from exercising its statutory power to increase tolls as from time to time might be necessary. The learned Judge after citing Ayr Harbour's case (supra) and another case (Staffordshire & Worcestershire Canal Nawigation v. Birmingham Canal Nawigation, 1866 LR 1 HL 254) observed :

> The same principle underlies many other cases which show the incapacity of a body charged with statutory powers for public purposes to divest itself of such power or to fetter in the use of such powers.

13. Finally Lord Parker, C.J. said in Southend-on-Sea Corporation Hodgson (Wickford) Ltd. ((1961) 2 All ER 46) :

> There is a long line of cases to which we have not been specifically referred which lay down that a public authority cannot by cannot by contract fetter the exercise of its discretion.

14. The principle laid down in these cases is unexceptionable and cannot be doubted. But the question is : does it apply in the present case. We do not think so. The principle is attracted when an attempt when an attempt is made to fetter in advance the future exercise of statutory powers otherwise than by valid exercise of a statutory power. The covenant in Ayr Harbour's case (supra) tied the hands of the Harbour Trustees and prevented them from constructing works on the land acquired, however necessary they might become for the proper management of the undertaking and thus fettered the Harbour Trustees in the exercise of the statutory power entrusted to them by the Legislature for the purpose of the undertaking. But this covenant was entered into by the Harbour Trustees as a 'private contract' with the owner of the land acquired in order to save money in respect of severance and not in exercise of a statutory power and hence the principle was invoked to invalidate the covenant. So far as York Corporation case (supra) is concerned, it came to be severely criticised by Sargant. L.J. in Southport Corporation v. Birkdale District Electric Supply Co. ((1925) 1 Ch 794) and the learned Lord Justice pointed out that the decision in York Corporation's case (supra). This criticism of the decision in York Corporation's case was adopted by Earl of Berkenhead when the Southport Corporation case was taken in appeal to the House of Lords. Lord Sumner also observed in that case that he did not think that there was a true analogy between Ayr Harbour's case and York Corporation case. The House of Lords as well as the Court of appeal in the Southport Corporation's case seemed to be of the view that the York Corporation's case was wrongly decided. Of course, they did not doubt the validity of the principle enunciated by Rusell, J., but questioned its applicability to the facts of the York Corporation's case. They appeared to think that the discharge of their statutory duties by the Harbour Trustees would be facilitated rather than fettered by a reasonable latitude of discretion in fixing tolls and both Ouse and Fose agreements must, therefore be regarded as having been entered into by the Harbour Trustees in exercise of the statutory power of fixing tolls and hence they would be valid. But they pointed out that there were certain peculiar features in the Yoke Corporation's case on which the actual decision of Russell, J., holding Ouse and Fose agreements to be void, could be sustained. The discussion of these two cases shows that the principle that a public authority cannot by contract fetter the exercise of the statutory power, which conferred upon it for the public good, is limited in its application to those cases where the attempt to do so is otherwise than by the valid exercise of a statutory power.

15. The position is different where a statutory power is exercise to enter into a stipulation with a third party which fetters the future exercise of other statutory powersi - where such stipulation is made not as part of 'private contract in general term' as Devlin, L.J. calls it in Commissioners of Crown Lands v. page ((1960) 2 All ER 726) but in exercise of a statutory power. In such a case, it is difficult to see how the exercise of the statutory power could be held to be invalid as a fetter on the future exercise of other statutory powers. If it were so held, it would render the statutory power meaningless and futile. It would nullify the existence of the statutory power and that would be contrary to all canons of construction. If the statutory power is to have any meaning and content, the stipulation made in exercise of the statutory power must be valid and binding and it would as pointed out by Pennycuick, V. C. in Dowty Boulton v. Wolverhampton Corporation ((1971) 2 All ER 277), "exclude the exercise of other statutory powers in respect of the same subject-matter". To put it differently, where a stipulation in a contract is entered into by a public authority in exercise of a statutory power, then, even though such stipulation fetters subsequent exercise of the same statutory power of future exercise of another statutory power it would pro tanto restricted. That would follow on the principle of harmonious construction. The public authority would not, in such a case, be free to denounce the stipulation as a nullity and claim to exercise its statutory power in disregard of it. If that were permissible, it would mean that the stipulation has no binding force and the public authority has no statutory power to enter into such stipulation. But that would be plainly

contradictory of the premise on which the argument is based.

16. The distinction must always, therefore, be borne in mind whether the stipulation by which the public authority is alleged to have fettered in advance the future exercise of the statutory power, is one which is entered into as part of 'private contract in general terms', or in exercise of a statutory power. If it is the former, the stipulation would be bad in the principle that a public authority cannot by contract fetter the exercise of a statutory power would be valid and it would not be open to the public authority to disregard the stipulation and exercise the statutory power inhibited or fettered by it. This last statement, must, however, be qualified by making it clear that a case may conceivably arise where may be an overriding statutory provision which expressly or by necessary implication authorised the public authority to set at naught, in certain given circumstances, a stipulation though made in exercise of a statutory power. Where there is such a statutory provision, the stipulation would certainly be binding is such a statutory provision, the stipulation would certainly be would have the power to override the stipulation and act in derogation of it. But that again would be a matter of construction.

17. Now, in the present case, as we have already pointed out above, the stipulations as to charges contained in the agreements entered into with the appellant were made in exercise of the statutory power to fix special tariffs conferred under sub-section (3) of Section 49, and, therefore, there could be no question of such stipulations being void as fettering or hindering the exercise of the statutory power under that provision. These stipulations did not divest the Board of this statutory power or fetter or hinder its exercise : in fact, they represented the exercise of this statutory power. Once the agreements were made containing these stipulations, it was not competent to the Board to override these stipulations which were binding as having been validly made in exercise of statutory power. The Board could not enhance the charges in breach of these stipulations. To hold that the Board could unilaterally revise the charges notwithstanding these stipulations, would mean that the stipulations had no binding effect, or in other words, the Board had no power to enter into such stipulations. That would negate the existence of statutory power in the Board under sub-section (3) of Section 49 to fix the charges for a specific period of time, which would be contrary to the plain meaning and intendment of the section. The board was also not competent to enhance the charges under the guise of fixing uniforms tariffs for all high tension consumers, including the appellant, under sub-section (1) of Section 49, because sub-section (1) is, on its plain language, subject to sub-section (3) of Section 49 and once special tariffs were fixed for the appellant under sub-section (3) of Section 49, there could be no question of fixing uniform tariffs applicable to the appellant under sub-section (1) of Section 49. The power to fix uniform tariffs under sub-section (1) of Section 49 could not be exercised in derogation of the stipulations fixing special tariffs made under sub-section (3) of Section 49. Moreover, if the stipulations as to charges unilaterally in disregard of them, it is difficult to see how the agreements, of which the stipulations formed a term as well as consideration, could be sustained. We understand an argument that the whole of the agreements were void But strangely, the claim of the Board was that the appellant should be held to the agreements, though, at the same time the Board should be free to repudiate the stipulations which formed the consideration or pan of the consideration. That is a claim which is highly illogical and we find it difficult to appreciate it. The stipulations as to charges are in severable from the rest of the agreements and if these stipulations are disturbed and the charges are revised unilaterally by the Board, how could the agreements continue to bind the appellant ? On the view contended on behalf of the Board, it would be impossible for a consumer to enter into an agreement with the Board for supply of electricity at a certain specified tariff. That surely could not have been intended by the Legislature. Far from promoting the object of electrical development and industrial growth in the State, it would act as a regressive factor. It may be pointed out that the Board also did not contend

that the agreements entered into with the appellant were wholly void. The attack was only against the validity of the stipulations as to charges and that attack must, for reasons which we have given, fail in so far as it is based on Section 49.

18. We then turn to consider the argument based on Section 59. That section provides that the Board shall not, as far as practicable and after taking credit for any subventions from the State Government under Section 63, carry on its operations under the Act at a loss, and shall adjust its charges accordingly from time to time. The contention of the Board was that since it was operating at a loss, it was bound under Section 59 to readjust its charges in order to avoid the loss and hence it was within its power to enhance the charges, notwithstanding the stipulations contained in the agreements. This contention, plausible though it may seem at first flush, is, on closer scrutiny, not well founded. It ignores the true object and purpose of the enactment of Section 59 and fails to give due effect to the words "as far as practicable". The marginal note to Section 59 reads "General Principles for Board's Finance". It is true that the marginal note cannot afford any legitimate aid to construction of the section, but it can certainly be relied upon as indicating the drift of the section, or, to use the words of Collins, M. R. in Bushell v. Hammond ((1904) 2 KB 563 : 73 LJKB 1005 : 20 TLR 413) "to show what the section was dealing with". It is apparent from the marginal note that Section 59 is intended to do no more then lay down general principles for the finance of the Board. It merely enunciate certain guidelines which the Board must follow in managing its finance The Board is directed, as far as practicable, not to carry on its operations at a loss and to adjust its charges accordingly from time to time. The Legislature has deliberately and advisedly used the words "as far as practicable" as the Legislature was well aware that since the Board is a statutory authority charged with the general duty of promoting the coordinated development of generation, supply and distribution of electricity within the State with particular reference to such development in areas not for the time being served or adequately served by any licensee it might run into loss in carrying on its operations and it might not away be possible for it to avoid carrying on its operations at a loss. Sometimes the Board might have to give special tariffs to consumers in undeveloped or sparsely developed areas and sometimes special tariffs might have to be given to industrial consumers with a view to accelerating the rate of industrial growth and development in the state, even though such special tariffs might not be sufficient to meet the cost of generation, and distribution of electricity. The Legislature, therefore, did not issue a rigid directive to the Board that it shall on no account carry on its operations at a loss, and if there is a loss for any reason whatsoever, it shall adjust its charges so as to wipe off such loss. But it merely administered a caution to the Board that 'as far as practicable' it shall not carry on its operations at a loss, that is, of if it is 'practicable' for it to avoid operating at a loss by adjusting its charges, it should try to do so. That is why this Court pointed out in Maharashtra State Electricity Board v. Kalyan Borough Municipality ((1968) 3 SCR 137 : AIR 1968 SC 991) that "cost ... is not the sole or only criterion for fixing the Tariff". Now, obviously, where, by a stipulation validly made under sub-section (3) of Section 49, the Board is under a contractual obligation not to charge anything more than a specified tariff, it would not be practicable for it to enhance its charges, even if it finds that it is incurring operational loss. To do something contrary to law in violation of a contractual obligation - can never be regarded as 'practicable.' Section 59 does not give a charter to the Board to enhance its charges in breach of a contractual stipulation. The Board can adjust its charges under the section only in so far as the law permits it to do so. If there is a contractual obligation which binds the Board not to charge anything more than a certain tariff, the Board cannot claim to override it under Section 59. It is significant to note the difference in language between Section 59 on the one hand and Section 57 read with clause (1) of the Sixth Schedule on the other. Section 57 clearly and in so many terms provides that the provisions of "any other law, agreement or instrument applicable to the licensee"

shall, in relation to the licensee, be void and of no effect in so far as they are inconsistent with the provisions of the sixth Schedule and clause (1) of the Sixth Schedule provides that the licensee shall so adjust its charges for the sale of electricity, whether by enhancing or reducing them, that its clear profit in any year of account shall not, as far as possible, exceed the amount of reasonable return. The licensee can, therefore, notwithstanding any agreement entered into with the consumer, enhance the charges for sale of electricity in order to earn the amount of reasonable return by way of clear profit. But no such language is to be found in Section 59 and, on the contrary, the words there used are "as far as practicable". We do not, therefore, think for supply of electricity in disregard of a contractual stipulation entered into by it under sub-section (3) of Section 49.

19. There is also one other circumstance which supports this view If, under Section 59, charges have to be adjusted for the purpose of avoiding operational loss, what is the basis on which such adjustment would be made ? Obviously, it cannot be on the basis of cost of production, distribution and supply of electricity to each consumer or class of consumers, for there may be certain consumers or classes of consumers who may have to be supplied electricity at special tariff less than the cost, having regard to the geographical area or the nature or purpose of the supply. That means that the adjustment of the charges would have to be left to the discretion of the Board to be made in such a manner as it thinks fit and proper in the light of relevant circumstances and since "cost ... is not the sole or only criterion for fixing tariff", the Board would be free not to enhance the charges in case of some consumers or classes of consumers even though such charges may be less then the cost and in case of others, enhance them even beyond the cost, provided of course, the relevant factors are taken into account and there is no undue preference of one consumer as against another. If that be so, it must follow a fortiori that there is nothing in Section 59 which requires the Board to enhance the charges in a case where it has bound itself by a contractual stipulation not to claim anything more than certain specified charges.

20. We are, therefore, of the view that the Board was not entitle to enhance the charges in derogation of the stipulations as to charges contained in the agreements with the appellant and the notification due November 28, 1969 fixing tariffs for extra high tension consumers was not enforceable against the appellant. We accordingly issue a writ quashing and setting aside the notification dated November 28, 1969 in so far as declare that the Board is not entitled to claim from the appellant anything more than the charges specified in the agreements. We also issue a writ restraining the Board from enforcing the notification dated November 28, 1969 against the appellant or claiming from the appellant anything more than the charges specified in the agreements. The appeal accordingly allowed. The first respondent will pay the costs of the appeal to the appellant.

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