State of U. P. and Others

Vs

Hindustan Aluminium Corpn. and others

Civil Appeal Nos. 921/78 and 425 of 1979

(P. N. Shinghal, D. A. Desai JJ)

17.04.1979

JUDGMENT

SHINGHAL, J. -

1. These appeals by special leave arise from the judgment of the Allahabad High Court dated April 27, 1978. While Civil Appeal 921 of 1973 has been filed by the state of Uttar Pradesh, the APT. State Electricity Board and the Executive Engineer of the Rihand Power Station, hereinafter collectively referred to as the State, Civil Appeal 425 of 1979 has been filed by the Hindustan Aluminium Corporation Ltd., its Vice-President and Chief Accountant, hereinafter referred to as the Company. We have heard the two appeals together and will dispose them of by a common judgment.

2. The controversy relates to the supply of electrical energy (for short "energy") for the production of aluminium which is the most modern of the common metals. Unlike the other common industrial metals like iron, copper, since and lead, pure aluminium is not produced by the direct smelting of its ores. The metal is now produced by the modern electrolytic method under the influence of direct current. It takes about 10 kilowatt hours of electricity to produce a pound of aluminium, and the supply of cheap electric power is therefore an essential requisite or raw material for its production. The metal has many advantages and uses and has gained such importance that it is an essential commodity under the Essential Commodities Act and its production is one of the scheduled industries under the Industries (Development and Regulation) Act. While the State feels aggrieved because the High Court has interfered with the Uttar Pradesh Electricity (Regulation of Supply, Distribution, Consumption and Use) Order, 1977, dated September 19, 1977, hereinafter referred to as the Order, which it made under Section 22B of the Electricity Act, 1910, (for short the Act), the Company's grievance is that the High Court has not granted all the reliefs which it had claimed in its petition under Article 226 of the Constitution. The Court's record is much too voluminous, but it appears to us that the appeals can be adequately disposed of on the basis of the important averments in the lists of dates drawn up by Counsel for the parties about which there is no dispute before us.

3. When the question of establishing a new aluminum factory arose for consideration by the Government of India, it took into consideration the consent of the Government of Uttar Pradesh to make energy available for the factory from the Rihand Hydro-electric Scheme which was expected to go into operation by the end of 1960, and granted an industrial licence to the Company on September 26, 1959, for the manufacture of 20,000 metric tones of aluminium ingots per year at Rihand. An agreement was also entered into between the State of Uttar Pradesh and the Company on October 29, 1959 for the supply of 55 mw of power on a firm, continuous and uninterrupted basis at a rate of 1.997717 paise per unit for a period of 25 years from the date of commencement of

the supply.

4. The Company set up and commissioned its aluminium plant at Renukoot (near Rihand Dam) with an installed capacity of 20,000 metric tonnes per annum in April 1962. It was granted a further licence for the expansion of its installed capacity by 40,000 metric tonnes per annum. As the State was unable to meet the extra requirement of energy, sanction under Section 28 of the Act was granted to the Company, at its request, on November 12, 1964, to set up a generating station at Renusagar, near Renukoot, through its subsidiary the Renusagar Power Company Ltd. It had two generating units of 67.5 mw each. The first unit started generating power in 1967 and the other in 1968. The 40,000 metric tonnes expansion unit was commissioned in 1968. In the meantime the Company was granted a licence in December 1966 for effecting a further expansion of 60,000 metric tonnes per annum in its installed capacity for the production of aluminium.

5. The Company thought of setting up the plant for the production of 60,000 metric tonnes of aluminium in Gujarat State as it was informed by the Gujarat State Electricity Board that it would be able to meet the requirement of energy there at a rate of Rs. 320 per kilo watt year, which was much higher than the rate at which it was receiving energy from U.P. State Electricity Board (UPSEB). The Government of U.P. held negotiations with the Company, and it was decided that the Company would produce the additional 60,000 metric tonnes of aluminium also in Uttar Pradesh. The Chief Secretary to the Government of U.P. wrote a detailed letter to the Company on November 20, 1968 in which the position regarding the supply of energy was stated as follows:

> Regarding the power plant, I am see no difficulty in meeting the interim requirements for 2 to 3 years from the U.P. State Electricity Board, nor do I see any difficulty in arranging for parallel running of your new power station with the U.P. State Electricity Board.

The Company then addressed a letter to the State government on September 26, 1969 stating the position regarding the supply and generation of increased energy for the expansion of aluminium production as follows :

> 5. (a) The Scheme of power supply for our expansion by UPSEB is interlinked with the question of expansion of our Renusagar power plant and its parallel operation with your system. The application for the expansion of our Renusagar Power Plant has already been submitted to your office, a copy of which is enclosed herewith for your ready reference. The necessary permission for the same is requested as early as possible.
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> (b) the emergency assistance under parallel operation would be required for about 100 mw and the terms and conditions for the same would have to be decided simultaneously with the permission for expansion of your Power Plant.
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> It may be mentioned that the Company was granted sanction to expand Renusagar generation by 250 mw.

6. In 1972 the Company expanded its installed capacity for the production of aluminium by 35,000 metric tonnes per year. On its part, the UPSEB sanctioned 110 mw additional energy under a phased program to be completed by June 1, 1975. It was clearly stated in the letter of the UPSEB dated September 2, 1972, that the supply would be without prejudice to the power of the State

Government to control the distribution and consumption of energy under Section 22B of the Act. Reference in the letter was made to the acute shortage of power because of scanty rainfall in the catchment area.

7. It so happened that additional energy was not made available to the Company during 1972-75 although the rate was substantially increased (to 11 paise instead of 1.997717 paise) with retrospective effect from June 30, 1975, under the new aluminium policy of the Government of India. An agreement was however entered into between the Company and the UPSEB on November 30, 1976, for the supply of 85 mw of energy on a continuous basis, for a period of 5 years, in supersession of the agreements, and it was stipulated that it would be read and construed in all respects in conformity with the provisions of the Act, the Electricity (Supply) Act, 1984, and the rules and the regulations, and the amendments thereto. The Company received that supply and was even promised an additional supply of 35 mw over a phased period from July 1977, but did not get it. The Company was all the same able to raise its production of aluminium to 95,000 metric tonnes by April 7, 1977, because of the supply of 85 mw of energy.

8. In the meantime, the State Government took a decision by the end of December 1976 to reconnect some 70,000 pumping sets which had been disconnected for non-payment of the electricity dues. That placed an additional load of about 400 mw on the grid system of the State. The Chairman of UPSEB submitted a note on the power situation which was likely to obtain from April to July 1977. He pointed out that there was acute shortage of energy and suggested the imposition of some restrictions up to the end of July 1977 by when the demand for agriculture was expected to decrease and the Rihand and Matatila reservoirs would be filled up. That was proposed to meet the needs of agriculture and related industries and to meet the industrial demand to the extent possible. One of the proposals was for a 50 per cent cut in the demand of the Company and some other industrial units including Kanoria Chemicals and Industries Ltd. That note came up for consideration in the State Cabinet on April 1, 1977, and was partially approved. The U.P. Electricity (regulation of Distribution and Consumption) Order, 1977, was therefore issued on April 7, 1977. Under Clause 6(a)(i) of the Order, the Company could draw energy only to the extent of 42.5 mw i.e. 50 per cent of its monthly consumption; but it was allowed to draw 55 mw for the time being.

9. Uttar Pradesh came under the President's rule on April 30, 1977, and the Company was allowed to draw 55 mw until further orders. It is the case of the State that the shortage of energy became more acute in the third week of May. The Company, in the meantime, filed its first writ petition [No. 1790(c) of 1977] on receipt of a letter of the Executive Engineer (O&M), Rihand, that the power supply to the Company should be cut off completely with immediate effect. The writ petition was dismissed on May 20, 1977, because of a subsequent letter by the Government requiring the UPSEB to continue the supply of 42.5 new energy instead of 55 may in accordance with the aforesaid Order of April 7, 1977.

10. The Secretary of the Power Department of the State Government sent a note to the Governor on May 24, 1977, proposing some additional cuts in the supply of energy. Decision thereon was deferred until information was obtained from other States in regard to availability of energy to aluminium plants. A fresh note was thereafter prepared for orders. In that note dated May 31, 1977, it was stated that there was a large gap between demand and availability of energy and that was creating a serious imbalance requiring loadshedding on a large scale, and that had given rise to discontent in all sectors of the economy and, in particular, in the rural sector. It was also pointed out that overriding public interest, particularly the need to maintain food supply and the industrial production, required that units which were heavy consumers of energy should be subject to further

cut in the consumption of energy. It was particularly pointed out that as the Company was itself generating energy at Renusagar, it will have more than 50 per cent of energy even if the Board's supply of 42.5 mw was completely withdrawn, and that will service some 8500 pumping sets. It was, all the same, stated that the Company would continue to have 60 mw from the UPSEB as stand-by supply as in the past. The Governor approved that proposal on June 1, 1977. A proviso was, inter alia, inserted in Clause 6(a)(i) of the U.P. Electricity (Regulation of Distribution and Consumption) Order, 1977, on June 2, 1977, according to which the industrial consumer which had its own source of generation of energy from which it obtained 50 per cent or more of its total consumption would suffer a cut of 100 per cent in the energy supplied by the UPSEB. The Company was accordingly given time to bring about the total cut.

11. In the meantime, the Company filed its second writ petition [No. 2160(c) of 1977] along with an application for stay. The High Court admitted the writ petition, but rejected the application for stay. The Company then moved this Court for special leave. The Hon'ble Vacation Judge made an observation that the matter may be discussed by the parties concerned, and the State agreed to give 20 mw of energy to the Company for the time being.

12. Fresh election were held to the State Legislative Assembly, and the new Cabinet was sworn in on June 23, 1977. It decided to reduce the supply of energy to the Company to zero, in pursuance of the amendment date June 2, 1977, and called for a fresh note on the position regarding the generation and distribution of energy. The Executive Engineer, Rihand, accordingly asked the Company to reduce the consumption to zero.

13. A detailed note was prepared by the Secretary concerned on June 28, 1977, and it came up for consideration in the Cabinet on June 30, 1977, but no decision was taken and the note was kept pending. It appears that the Chairman of the UPSEB prepared a note on August 26, 1977, in which he pointed out the shortage of energy, including a substantial fall in the generation of thermal energy and in the "import" of energy. It appears that the Minister concerned made some statements in regard to the generation of energy in the State and the position of the Company, but we shall refer to them later when we deal with the allegation regarding malice in law. It will be sufficient to say that the State Government made the Order on September 19, 1977, called the Uttar Pradesh Electricity (Regulation of Supply, Distribution, Consumption and Use). Order, 1977. It has undergone some amendments, but learned Counsel are in agreement that they have no bearing on the controversy before us.

14. The Company filed its third writ petition (No. 3732 of 1977), against the Order, on September 26, 1977. It was admitted the same day and the earlier writ petition (No. 2160 of 1977) was dismissed as withdrawn. The High Court directed the Company to make an application under clause 10 of the Order, for exemption, but it was rejected on December 9, 1977 when made. The High Court ultimately heard and decided the writ petition by its impugned judgment dated April 27, 1978 against which these appeals by special leave have been directed as aforesaid. This Court made an order on May 4, 1978 for the supply of 20 mw of energy to the Company as a purely interim arrangement. That was raised to 35 mw by an order dated August 29, 1978, and the State is now supplying 42.5 mw to the Company as an interim arrangement.

15. These basic facts are not in dispute before us. We shall examine the arguments of the learned Counsel for the parties with reference to them, after taking into consideration the other well settled facts on which reliance has been placed by learned Counsel, and with due regard to the relevant averments of the parties.

16. The High Court has recorded a number of findings. We shall have occasion to refer to those of the findings which have been challenged before us. It may be sufficient to say here that the High Court has worded the operative part of its judgment as follows :

> In view of the aforesaid discussion the provisions of the first proviso to Clause 6(a)(i) of the Uttar Pradesh Electricity (Regulation of Supply, Distribution, Consumption and Use) Order, 1977, dated September 19, 1977 are declared ultra vires and are quashed. The U.P. State Electricity Board is directed to supply electrical energy to the petitioner in accordance with law without taking into consideration the provisions of the said proviso.

17. In order to examine the findings of the High Court about the invalidity of the proviso to Clause 6(a)(i) of the Order, it will be convenient to examine the relevant findings of the High Court on the various points of law.

18. The High Court has taken the view that it is the statutory obligation of the UPSEB because of the obligation of a licensee under Sections 18 and 26 of the Electricity (Supply) Act, 1948 to supply electrical energy to a consumer. Reference in this connection has also been made to Clause VI of the Schedule to the Act.

19. Clause (h) of Section 2 of the Act defines a "Licensee" to mean any person licensed under Part II to supply energy. Section 26 of the Act of 1948 provides, inter alia, that, subject to the provisions of that Act, the Electricity Board shall in respect of the whole State, have all the powers and obligations of a licensee under the Indian Electricity Act, 1910, and the Act of 1948 "shall be deemed to be the licence of the Board" for purposes of the Act (of 1910). The first proviso to the section excludes the application of some sections, including Section 22 of the Act, and the second proviso state that the provisions of Clause VI of the Schedule to the Act shall apply to the Board in respect of that area only where distribution mains have been laid by the Board and the supply of energy through any of them has commenced.

20. While, therefore, the UPSEB is a licensee under the Act, it will be sufficient, for purpose of the controversy before us, to say that Section 22 of the Act is not applicable to it, and Clause VI of the Schedule is applicable to it subject to the restriction contained in the second proviso to Section 26 of the Act of 1948. So even though the Board is a licensee, the obligation under Section 22 of the Act to supply energy to every person within the area of its supply is not fastened on it.

21. The provisions of the Schedule to the Act are deemed to be incorporated in, and to form part of, every licence granted under Part II. Clause VI of that Schedule states that where after distributing mains have been laid down and the supply of energy through them has commenced, a requisition is made by the owner or occupier of any premises situate within the area of supply requiring the licensee to supply energy for such premises, the licensee shall make the supply and shall continue to do so in accordance with the requisition. But, as has been pointed out, the second proviso to Section 26 of the Act of 1948 places a restriction on that obligation for it says that the provisions of Clause VI shall apply to the Board in respect of that area only "where distribution mains have been laid by the Board and the supply of energy through any of them has commenced".

22. Clause (i) of Section 2 of the Act defines a "main" to mean any electric supply-line through which energy is, or is intended to be, supplied to the public. A "distribution main" has been defined by clause (e) of the same section to mean the portion of any main with which a service-line is, or is

intended to be, immediately connected. We have also gone through the definitions of "electric supply-line" and "service-line". They leave no doubt that a "distributing main" is different from an electric supply-line, for to it a service-line is immediately connected.

23. The High Court has stated that the Company gets its supply from the Pipri Bus Bar, which is composed of a set of conductors which are made up of thick aluminium core steel reinforced cables, and has taken the view that the Pipri Bus Bar is a "distributing main" under Section 2(e) of the Act and is an electric supply-line as defined in Section 2(f) so that Clause VI of the Schedule to the Act would be fully applicable to the Board insofar as its obligation to the Company is concerned.

24. But as has been stated in the second proviso of Section 26 of the Act of 1948, the provisions of Clause VI of the Schedule to the Act could apply to the UPSEB in respect of that area only where distribution mains had been "laid by the Board". It was therefore a question of fact whether that was so, and had to be examined on the basis of the averments of the parties to that effect. It is however not disputed before us that the Company did not plead that distributing mains had been laid by the Board for supply of energy to the Company, or to any one else, from the Pipri sub-station. The State had therefore no occasion to controvert any such allegation. This has in fact been admitted to be so by Mr. Ray in his arguments, and the High Court went wrong in recording a finding of fact against the State without any basis for it in the pleadings. We have also gone through Section 18 of the Act of 1948 to which reference has been made in the judgment of the High Court, but it is also of no avail to the Company. The section makes a mention of the general duties of the Board, but it does not make it obligatory for it to supply energy to every person irrespective of its practical difficulties.

25. The High Court has in fact quoted extensively from its earlier judgment in civil miscellaneous writ petition No. 618 of 1972 to which one of the two judges was a party. It is not disputed, however, that when an appeal was taken against that judgment, the writ petition was itself withdrawn and was dismissed, so that the judgment of the High Court may not be said to have subsisted thereafter, and need not have formed the basis of the finding of the High Court against the Board in regard to its duty to supply the energy asked for by the Company - the more so when the decision on the point should have turned on the facts pleaded and established on the record.

26. Mr. Ray for the Company has however invited our attention to a decision of the Rajasthan High Court in firm Sadul Shahr Cotton Ginning and Pressing Factory v. Rajasthan State Electricity Board (AIR 1972 Raj 40 1972 Raj LW 1). But that was a different case where it was not pleaded by the Electricity Board that Clause VI of the Schedule to the Act was not applicable to it as the distributing mains had not been laid by it. The High Court therefore erred in taking the view in the present case that the Board was bound by the terms of Clause VI of the Schedule to the Act to supply energy to the Company within one month of the making of the requisition or within such longer period as the Electrical Inspector may allow. But even if it were assumed that the Board was under an obligation to supply energy to every person, the fact nonetheless remains that the State Government had the overriding power to provide, by order made under Section 22B of the Act, for regulating the supply, distribution, consumption or use thereof. In fact sub-section (2) of that section categorically states that, without prejudice to the generality of the power under sub-section (1), the order may direct the Board not to comply with any contract, agreement or requisition for the supply of energy, etc. The High Court erred in taking a contrary view.

27. It has next been argued that only the energy which was generated by the Board could be the subject-matter of an order under Section 22B of the Act and it was not permissible for the State to take into account the energy generated by the Company for its own use.

28. It may be recalled that the Company applied for the grant of sanction under Section 28(1) of the Act to generate 120 mw of energy for the additional production of aluminium. That was allowed and a notification was issued on November 12, 1964, granting sanction to the Renusagar Power Company Limited (a wholly owned subsidiary of the Company) to engage in the business of supplying energy to the Company. It has two generating units and 135 mw power is being generated by the Renusagar Station for the exclusive use of the Company, and it is this energy for which it has been argued that it cannot be the subject-matter of an order under Section 22B.

29. But sub-section (1) of Section 28 of the Act in terms refers to, and deals with, engaging by a non-licensee, in the business of supplying energy to the "public". It is therefore futile to contend that what was generated by the Renusagar Power Company was not meant for supply to the public, but was the Company's own energy. It is true that that generation became, in the circumstances, the "captive" generation for the use of the Company, but supply to the public or that it was not amenable to control under Section 22B. It must therefore be held that it was also liable to equitable distribution by an order under Section 22B of the Act.

30. The expression "energy" has been defined by clause (g) of Section 2 of the Act as follows :

> (g) "energy" means electrical energy -
>
> (i) generated, transmitted or supplied for any purpose, or
>
> (ii) used for any purpose except the transmission of a message.
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> It is therefore a pervading definition, and there is no reasons why energy generated and supplied under Section 28 of the Act should not fall within its sweep.

31. We are mindful of the fact that while Section 22B of the Act occurs in Part II, the aforesaid Section 28 is in Part III, but that will not really take the supply of energy under Section 28 out of the control of Section 22B. Part II deals with "supply of energy" by licensees, while Part III deals with "supply, transmission and use of energy by non-licensees". But when it was thought necessary to vest the State Government with the power to give directions to licensees (under Section 22A), and to control the distribution and consumption of energy (under Section 22B), it became necessary to insert Section 22A and 22B by Act 32 of 1959. The Legislature therefore inserted both the section in Part II which occurred earlier than Part III, and under the broad rubric "Supply of Energy". As is obvious, insertion of Section 22A and 22B would not have been appropriate in Part III, and the Legislature cannot be blamed if it preferred the inclusion of the two sections together in Part II rather than in the residuary Part IV. Moreover it is by now well-settled that the true meaning of a provision of law should be determined on the basis of what it provides by its clear language, and with due regard to the scheme of the law as a whole, and not merely by the place it finds in the formation of its Parts or Chapters.

32. An ancillary argument has been advanced that if sub-section (1) of Section 22B of the Act is read with due regard to sub-section (2), it will appear that, like sub-section (2), sub-section (1) is also confined to a licensee and will not be applicable to the energy supplied by a sanction-holder under Section 28. Our attention in this connection has been invited to the use of the article "the" in sub-section (2) while stating that the order made under sub-section (1) may direct "the licensee" not to comply with the matters stated in clauses (i) to (iii). The argument is untenable for two reasons. Firstly, sub-section (1) of Section 22B refers to the State Government's power to control the

distribution of energy as a whole and not merely the energy generated by a licensee, and there is not rule of construction by which the restricted scope of sub-section (2), which seals only with the licensees, should govern the scope of sub-section (1) and confine it to licensees. Secondly, the purpose of sub-section (2) is to provide exceptions of the nature which are peculiar to licensees and are necessary to save them from the statutory obligations mentioned in the three clauses of the sub-section. It appears that the use of the article "the" in sub-section (2) is not quite appropriate, but we have no doubt that there is no justification for the argument that Section 22B is applicable only to licensees and not to a sanction-holder under Section 28.

33. What Section 22B of the Act authorises the State Government to do, is to make an order providing for "regulating" the supply, distribution, consumption or use energy, and it has been held by the High Court that the section does not confer the power to prohibit the supply of energy to any consumer. The High Court has gone on to hold that Parliament did not confer on the State Governments the power to cut off supply to existing consumers. Mr. Ray has supported the view of the High Court and has invited our attention to the decisions in Municipal Corporation of the City of Toronto v. Virgo (1896 AC 88), Attorney-General for Ontario v. Attorney-General for the Dominion and the Distillers and Brewers' Association of Ontario (1896 AC 348), Birmingham and Midland Motor Omnibus Co. Ltd. v. Worcestershire County Council ((1967) 1 WLR 409), Tarr v. Tarr ((1972) 2 WLR 1068), Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan ((1963) 1 SCR 491 : AIR 1962 SC 1406) and State of Mysore v. H. Sanjeeviah ((1967) 2 SCR 361 : AIR 1967 SC 1189 : (1967) 2 SCJ 313). As against that the learned Solicitor-General has placed reliance on the view taken in Fatehchand Himmatlal v. State of Maharashtra ((1977) 2 SCC 670, 630 : (1977) 2 SCR 828, 851) that 'regulation', if the situation is necessitous, may reach the limit of prohibition.

34. It appears that a distinction between 'regulation' and 'restriction' or 'prohibition' has always been drawn, ever since Municipal Corporation of the City of Toronto v. Virgo. 'Regulation' promotes the freedom or the facility which is required to be regulated in the interest of all concerned, whereas 'prohibition' obstructs or shuts off, or denies it to those to whom it is applied. The Oxford English Dictionary does not define "regulate" to include prohibition so that if it had been the intention to prohibit the supply, distribution, consumption or use of energy, the Legislature would not have contended itself with the use of the word "regulating" without using the word "prohibiting" or some such word to bring out that effect.

35. But where the High Court went wrong was in thinking that the Order had the effect of prohibiting the supply of energy to the Company, which was an "existing consumer". The proviso to Clause 6(a)(i) of the Order to which exception has been taken, states as follows :

> Provided that where any such industrial consumer has his own source of generation of energy which alone enables him to obtain 50 per cent or more of his total consumption, then a cut of 100 per cent in the energy supplied by the Uttar Pradesh State Electricity Board shall be exercised.

What has therefore been ordered is no more than a cut of 50 per cent in the monthly consumption of electricity and not a total prohibition of consumption of energy. That is a step in the direction of regulating the consumption of energy as far as it goes, and it is overridden with the further regulation contained in the proviso in the case of an industrial consumer having its own source of generation of energy "which alone" enabled him to obtain 50 per cent or more of his total consumption so as to ensure even to him a consumption of 50 per cent of energy and not a total prohibition. The proviso therefore operates in a special or particular field and for a particular

purpose where it is considered necessary for regulating the supply etc. of the energy in the interest of the other consumers, for Section 22B is meant to maintain the supply and secure the equitable distribution of energy to all concerned. We are constrained to say that the High Court did not properly appreciate this aspect of the matter.

36. The High Court has gone on to hold that no power was vested in the state Government under Section 22B of the Act to issue an order that certain preferences will be followed in supplying energy. The High Court has found it established that after power supply was totally "disconnected" by the Board to the Company, "power supply connections were given to the agricultural sector and agro-based industries". This appears to be the High Court's finding in regard to the argument that the Order was bad as it was not permissible to adjust the priorities by an order under Section 22B. Learned Counsel for the Company have argued that the only permissible preference was that under Section 22A in favour of an establishment mentioned in it and that the preference shown to individual consumers was illegal.

37. Now so far as Clause 6(a)(i) of the Order is concerned, it does not, by itself, provide for any preferences or priorities, beyond excluding "fertilizers" from the cut of 50 per cent on all large and heavy industrial power consumers receiving power at 33 kv and more. Clause 7 of the Order deals with "exemptions", and "fertilizers manufacturing establishments" have been included there amongst the consumers to whom the cut referred to in Clause 6 of the Order shall not be applicable. It has not been argued before us that it was not permissible for the State Government to provide for exemptions in an order under Section 22B, and we have not been referred to any such data or material on the basis of which it may be possible to examine whether the exemptions in question were in derogation of the concept of "maintaining and securing the equitable distribution of energy" under Section 22B.

38. It may be that the State Government was of the opinion that supply of energy to the agricultural sector and agro-based industries was more necessary and would benefit the State more substantially than the supply made to heavy industrial consumers, but merely because any such preference has been entertained by the State Government, it cannot be said that it necessarily runs counter to the concept of equitable distribution of energy stated in Section 22B. In fact Counsel for the Company have repeatedly urged before us that the cut of 50 per cent referred to in Clause 6(a)(i) was meant to deprive only a few consumers of energy, and that the cut of 100 per cent under the proviso operated exclusively against the Company. And it has to be appreciated that Clause 6(a)(i) deals only with large and heavy industrial power consumers receiving power at 33 kv and above, and it is hardly permissible for such a heavy consumer as the Company to complain of any preference that may have been shown to small consumers in the field of agriculture or agro-based or other small industries. The fact remains that large and heavy industrial consumers of the category mentioned in Clause 6(a)(i) are a class by themselves and it is hardly permissible for them to complain that the small preference shown to agriculturists in supplying energy for their water pumps or tube-well; or in energising State tube-wells supplying water to them, or the supply of energy to small scale industries has really created a privileged class of consumers or brought into existence any such concept of priorities as to run counter to or defeat the objective of bringing about the equitable distribution of energy by an order under Section 22B. No glaring instance of any preference has been brought to our notice so as to raise in us a desire to examine the question whether it was necessary or proper for the State Government to provide guidelines for the small preferences shown by it to the aforesaid consumers. In fact it has been admitted in the written arguments which have been filed and received in Court that, in the present case, the Company is "not sure as to what exactly has happened". In such a situation, we are not persuaded that the High Court had any real

justification for recording an adverse finding against the State on the question of the so-called preferences or priorities. Learned Counsel for the Company were not able to refer us to any plea in the writ petition about illegal priorities or preferences. Nor could they refer to a plea that any preference or priority shown by the State was the very antithesis of the concept of equitable distribution which, for the purpose of maintaining the supply of energy, was the very object of the Order. If any such plea had been taken, it would have been permissible for the State to take any defence that may have been open to them. But merely because the word preference or priority has been used by the State for the purpose of comparing the grantees of energy in preference to the Company, or as a matter of priority over the consumption of energy by a giant consumer like the Company, it will not be fair and reasonable for us to hold that the State has established a class of privileged consumers, and to set aside the grant of energy to them in their absence and without examining the facts and circumstances of their respective cases. The purpose of the Order is to maintain the supply of energy and to secure its equitable distribution. One such method was to conserve energy by virtue of the provisions of Clause 6(a)(i). If that has been done according unlawful preferences resultant saving of energy is frittered away by showing unlawful preferences or creating unlawful priorities by other orders of an administrative nature, there is nothing to prevent the aggrieved party, including the Company, from challenging it according to the law, in an appropriate proceeding, if so advised. But any such grievance cannot be examined in these proceedings for the Order has the avowed object of bringing about equitable distribution of the conserved energy in an honest and forthright manner and there is nothing on the record for us to hold otherwise.

39. It has next been argued that the validity of the Order, which is by way of a piece of subordinate legislation, is open to judicial scrutiny and that the subjective satisfaction of the State Government in making it is open to challenge in a court of law.

40. It will be enough for us to say that subordinate legislation is by now a well-recognised form of legislation for practical reasons. The modern administrative machinery is quite complex and it is often found difficult to administrative machinery is quite complex and it is often found difficult to pass complicated legislative measures through the full parliamentary procedure and on a permanent or durable basis. Even a carefully drafted Act may not work well in actual practice. It may also be that the exact means of achieving the object of an Act may not be adequately comprehended all at once, and it may be useful to provide for some elasticity in the actual working of a law. That can best be done by leaving some of the details to subordinate legislation. That is why some legislative powers are delegated to executive authorities, subject of course to the purpose and the scheme of the parent Act, the constant vigil of the Parliament or the State Legislature, and the judicial control. These are reliable safeguards and with their easy availability, it is no surprise that subordinate legislation is now so voluminous that it may well be said to have dwarfed the parent.

41. The grounds of challenging the validity of subordinate legislation are well known. The challenge may be on the ground that the power to make the law could not have been exercised in the circumstances which were prevailing at the time when it was made, or that a condition precedent to the making of the legislation did not exist, or that the authority which made the order was not competent to do so, or that the order was not made according to the procedure prescribed by law, or that its provisions were outside the scope of the enabling power in the parent Act or were otherwise violative of its provisions or of any other existing statute. As it happens, none of these grounds or circumstances has been shown to exist in the present case. The High Court has taken the view that the Company was unable to establish as a fact that there was no shortage in the generation of energy at the time when the Order was made under Section 22B. It is nobody's case that the State

Government was not competent to make the Order, or that it did not comply with any procedural requirement of the Act in making the Order, or that its provisions (or any of them) are outside the scope of the enabling power or are violative of the provisions of any other law. We have examined some of the points of law on which the High Court has found some, provisions of the Order to be invalid, and we have given our reasons for taking a different view. We have no doubt that the State Government formed its opinion about the necessity and expediency of making the Order for the purpose of maintaining the supply and securing the equitable distribution of energy at a time when that was called for, and this Court cannot sit as a court of appeal to examine any and every argument in an attempt to show that the opinion of the State Government was vitiated for one fanciful reason or the other. It has to be appreciated that the question whether the reasons which led to the making of the Order were sufficient, was essentially for the State Government to consider.

42. The validity of the Order has been challenged on the ground that it suffers from the vice of malice in law. But that is a point by itself and we shall examine it separately.

43. It will thus appear that the above arguments which have been advanced against the validity of Clause 6(a)(i) of the Order are not justified. The whole of the clause reads as follows :

> In respect of electrical energy consumed by all large and heavy power industrial consumers receiving power at 33 kv and above, excepting fertilizers, from the U.P. State Electricity Board a cut of 50 per cent in their monthly consumption of electricity both in respect of energy and demand shall be exercised :
>
> Provided that where any such industrial consumer has his own source of generation of energy which alone enables him to obtain 50 per cent or more of his total consumption, then a cut of 100 per cent in the energy supplied by the Uttar Pradesh Electricity Board shall be exercised.

It thus deals with the consumption of energy by all (excepting fertilizers) large and heavy industrial power consumers receiving power from the UPSEB at 33 kv and above. It imposes a cut of 50 per cent in their monthly consumption of energy. Then it adds the provision that where such an industrial consumer has his own source for the generation of energy which by itself gives him 50 per cent or more of his total consumption of energy (provided for in the main clause), then it will not receive any energy from the UPSEB as the cut in its supply will then be 100 per cent. The clause therefore subserves the purpose of Section 22B for, in a period of scarcity or insufficiency of the supply, it will have the effect of regulating the same and thereby securing the equitable distribution thereof.

44. It is true that although the Order has been made on the ground that the State Government is of opinion that it is necessary and expedient for maintaining the supply and securing the equitable distribution and use thereof, and has been called the Uttar Pradesh Electricity (Regulation of Supply, Distribution, Consumption and Use) Order, 1977, it does not deal with all those matters in detail. In fact it may well be said to be an order relating essentially to compulsory cut in the consumption of energy. But that cannot detract from the basic fact that the Order has the sanction of Section 22B of the Act and subserves the main purpose thereof, even though there may be justification for the criticism that it does not go far enough in its regulative enterprise in the expansive filed set out for it in the preamble. At any rate, it cannot be said to be beyond the scope and the ambit of that section, and its validity is not really open to challenge as a piece of subordinate legislation.

45. It has however been strenuously argued on behalf of the Company that the Order should be struck down on the ground of malice in law on the part of the State Government. That no doubt is another aspect of the doctrine of ultra vires, for an offending Act can be condemned simply for the reason that it is unauthorised. Bad faith has often been treated as interchangeable with unreasonableness and taking a decision on extraneous considerations. In that sense, it is not really a distinct ground of invalidity. It is well settled that if a discretionary power has been exercised for an "unauthorised purpose", that is enough to invite the Court's review, for as has been said quite widely but properly by Rand, J. in Roncarelli v. Duplessis ((1959) SCR 121, 141 (Canada Law Reports), malice is "acting for a reason and purpose knowingly foreign to the administration". But the question is whether this has been proved to be so in the present case.

46. Mr. Ray has argued on behalf of the Company that the Order is mala fide, and has been made in the colourable exercise of the power under Section 22B of the Act simply to compel the Company to agree to the payment of a higher rate for the supply of energy to it. He has tried to establish his argument on the basis of the statement of the Chief Secretary of the State Government dated July 8, 1977 and some statements of the Minister concerned. We shall examine them separately.

47. What the Chief Secretary said in his press statement dated July 8, 1977, was that the State Government had reduced the supply of power to the Company from 85 mw to 10 mw and that it had been decided to almost double the rate for the supply of the power which was being given to the Company. It will be remembered that by virtue of the amendment which was made to the U.P. Electricity (Regulation of Distribution and Consumption) Order on June 2, 1977, the Company was required to reduce its consumption of the Board's energy to zero, but it was, nonetheless, allowed to draw 30 mw for some time. That led to further directions for the reduction of consumption, and ultimately an order was made on June 29, 1977 for disconnecting the supply. A representative of the Company met the Minister concerned and explained the Company's difficulties. He asked for permission to draw at least 10 mw to keep the pots warm. The Minister agreed to that request, but only against the stand-by agreement for the demand of 60 mw. A letter to that effect was sent to the Company on June 30, 1977. As under the stand-by agreement, energy was to be supplied at the rate of 24 paise per unit, instead of 11 paise, the Chief Secretary merely stated the factual position on July 8, 1977. At any rate there is nothing to show that the plea of scarcity of energy was merely a ruse to charge a higher rate from the Company.

48. Mr. Ray has invited our attention to the statements of the Minister concerned date July 18, 1977, July 28, 1977, September 14, 1977, August 29, 1978 and his reply to the Company dated October 18, 1978, to show that the State Government was not satisfied with the contractual rate for the supply of energy as it was below the cost of generation and wanted to review and rescind the agreement altogether. We have gone through the record of the proceedings of the Legislative Assembly and we find that what the Minister said there was essentially correct, that 10 mw energy was being supplied to the Company under the stand-by agreement. It was in that context that the Minister informed the Assembly that the charges for the said stand-by supply came to 26-28 paise per unit. The learned Solicitor - General has taken us through the relevant record to show that the Minister did not really want to harm the Company unnecessarily, and if he stated further that he was never approached personally by the Company, or in a proper manner, or that the relief to the Company would be considered depending on how it contacted him for that purpose, the Minister simply wanted to state the facts and to convey his resentment against the attempt to influence him politically, or through any Minister of the Central Government.

49. The State has in fact filed a chart with its supplementary counter affidavit about the supply of

energy to the Company from February 1973 to April 7, 1977. It shows that during the period February 1973 to August 7, 1975 the Company received energy from 27.50 mw to 1.25 mw. It was only after the declaration of emergency on June 26, 1975 that the Company received some 55 mw of energy, and then a fresh agreement was made soon after on November 30, 1976 to supply 85 mw of energy. But even before that date, for a sufficiently long period, the Company got far more energy than what it was entitled to. We are therefore not satisfied that the Company has been able to establish malice in law merely because of what the Chief Secretary or the Minister stated here and there. It may well be that the new State Government was dissatisfied with the new agreement which had been entered into at the instance of the political party which was then in power, but it cannot be said that the new Minister's desire to examine the validity or propriety of that agreement arose out of any extraneous or improper consideration so as to amount to malice in law.

50. Our attention has also been invited in this connection to certain statements on behalf of the State Government and the Board that energy was available in abundance, and it has been urged that even so the Company was denied its supply in spite of the agreements and the assurances of the State Government to the contrary. That is a point relating to the contractual rights of the Company and we shall come to it in a while.

51. Then it has been argued that even though the State Government professed in its affidavit that the cut in the consumption of energy by the Company could not be restored because of the desire to provide more energy for agricultural purposes, that was not really so and that any such attempt was in the nature of an extraneous consideration which vitiated the implementation of the Order. Reference in this connection has been made to the Company's averments in the supplementary affidavit that the load on account of agriculture and irrigation had declined, and there was in fact no diversion of energy to agriculture. In order to examine the point, we directed the State to prepare a statement for the entire period from January 1977 to December 1978. The Order was made on September 19, 1977, and the statement shows that consumption of energy for agricultural and irrigation purposes increased appreciably thereafter, and there is no justification for the argument to the contrary.

52. Another "extraneous" factor which is said to have been taken into consideration by the State Government in making the Order is said to be its view that the major portion of the aluminium produced by the Company was being consumed outside the State. A similar objection was raised before the High Court on the basis of an averment in the counter-affidavit of the State. The High Court has, however, recorded the finding that it would be "unsafe" to uphold that contention, and we see no reason to take a different view.

53. The other factors to which reference has been made as extraneous factors which vitiated the Order are said to be consideration of the facts that the Company had failed to expand its generating capacity, the financial loss suffered by the UPSEB and the non-payment of the coal surcharge by the Company. But there is nothing on the record to show that these factors were taken into consideration at the time of making the Order. It may be that those or somewhat similar facts were mentioned at one time or the other in answer to the complaint of the Company, or in justification of what the State Government had done, by way of defence, but that cannot justify the argument that they formed the basis for the making of the Order.

54. It has also been argued that while making the Order the State Government failed to take into consideration the facts that the production of aluminium was of considerable importance to the national economy and that the Board was capable of generating more energy but was not doing so.

Reference has also been made to the new aluminium policy which the Central Government announced on July 15, 1975, and to the benefits which the UPSEB was deriving from the aluminium products manufactured by the company. But the argument is untenable because there is nothing to show that these factors were not taken into consideration while making the Order, and an inference that they were ignored cannot be drawn against the State merely because the Company was not permitted to consume all the energy it wanted and there was a fall in the production of aluminium because of the restriction imposed by the Order. It may be that the UPSEB was capable of generating more energy, or that it was not running efficiently and had not succeeded in reaching its target of ideal generation. But here again it will be enough to say that although the High Court arrived at the conclusion that the company deserved the writ which it granted, it did not find it possible to hold that the UPSEB had deliberately under-utilised its generation capacity. That is a finding of fact which does not call for interference by us.

55. There is thus no justification for the argument that there was malice in law on the part of the State Government in making the Order. It may be that the State gave an impression, after the Order had been made, that it had some spectacular effect on the fortune of the Company, or that it had brought about such efficiency as to ensure supply of energy to new entrepreneurs. It may also be that in doing so the State over-stated its resources of energy in order to open up a State which had not been able to develop its industrial resources satisfactorily, but what has to be examined in such cases is the true and the dominant purpose behind the Order. And as long as the dominant motive is proper and reasonable, and is not sullied by a mere pretext, the Order based on it will be valid when it is well within the true scope and policy of the Act and is an honest attempt to deal with the situation for which the power to make the Order had been granted by the Act.

56. It has however been further argued by Mr. Ray that the Order is invalid as it does not subserve the purpose of Section 22B of the Act inasmuch as it does not secure the "equitable distribution" of energy. Reference has been made to Jowitt's Dictionary of English Law, where "equitable" has been stated to mean "that which is fair", and to Corpus Juris Secundum to show that equitable is that which is done "fairly, justly and impartially". Our attention has been invited to the facts and circumstances which led to the establishment of the Company in the State of Uttar Pradesh and the agreement with and the assurances which were given to the Company. Our attention has also been invited to the new connections which were given by the UPSEB to the other consumers while denying the contractual supply of energy to the Company.

57. It cannot be doubted that only that distribution can be said to be "equitable" which is "just and right under all the circumstances of the particular case" (The Century Dictionary). It will be remembered that the High Court has recorded a finding that there was shortage in the generation of energy when the Order was made. A great deal of statistical data has been laid before us and Mr. Gupta has tried to make full use of it on behalf of the Company. But the fact remains that the demand for energy was far in excess of the supply from all the sources available to the UPSEB. It has also been well established that a situation had arisen when it became necessary to obtain an order from the State Government about the course of action to be adopted by the Board. Self-contained notes were therefore drawn up in March 1977, and on May 24, 1977, June 28, 1977 and August 26, 1977. We have gone through the notes and they are quite detailed and objective. We have made a mention of the developments which took place because of those notes, including the making of the Order. We have no doubt that it was made because a situation had arisen when regulation of the supply, distribution, consumption and use of energy had become necessary, and the Order was a genuine attempt to secure equitable distribution of energy. It is true that the Company was the worst sufferer under Clause 6(a)(i) of the Order, but then it was also the greatest consumer.

58. The basis for the making of the Order was the necessity or expediency for maintaining the supply and securing the equitable distribution of energy by means of an order providing for the regulation of the supply, distribution, consumption and use of energy. It has been argued by Mr. Ray that as power was supplied indiscriminately to new consumers after imposing a cut on the Company's consumption of energy, the issue of the Order was really a colourable exercise of the State Government's power under Section 22B of the Act. Our attention in this connection has been invited to the averments in the affidavits which have been filed on behalf of the Company and to a list of new connections filed as Annexure D to the supplementary rejoinder affidavit of Suresh Chandra, Special Officer of the Company. Reference has also been made to a list of new connections filed in the High Court on March 6, 1978. Learned Solicitor-General has however pointed out that even if all the new connections were to become effective within a period of two years, their incidence would be no more than 4 per cent of the total connected load as the real impact on the system would merely be an additional load of only 18 mw. It has also been pointed out that while there was an increase of 9 per cent in the installed capacity of the UPSEB for the generation of energy, the increase in the connected load was not more than 2 per cent. We have been informed that the percentage increase in the connected load had declined from 10 in 1974-75 to 2 in 1977-78, which showed that great care was being taken in incurring extra liability. The State has also filed a list of those applicants to whom new connections were sanctioned, but were not actually released, making a total of some 23 mw.

59. It has been urged on behalf of the Company that the Board had deliberately reduced its thermal generation. It has been pointed out that while there was a substantial increase in hydro-electrical generation, the performance in the thermal field was highly unsatisfactory. The State has supplied the necessary information which shows that the fall in thermal generation was due to the initial troubles of new plants, the poor performance of the plants, and the breakdown at Harduaganj. We have been informed that the performance of the UPSEB was better than the Boards in the other States. We have also been told that the proposition that there was deliberate under-capacity operation of thermal machines is technically unsound because of the operating constraints in running the large thermal machines at loads lower than the rated capacity. We have made a reference to the finding of the High Court against the Company in this respect.

60. Another aspect of the controversy before us relates to the contractual liability of the State to supply the energy which it had assured to the Company. It has been pointed out that under the agreement dated October 29, 1959, the State was bound to supply 55 mw of energy up to 1987 and then an agreement was entered into on November 30, 1976, to supply additional 30 mw, making a total of 85 mw for a period of 5 years. It has therefore been argued that instead of fulfilling its obligation under the agreements and the other assurances which were given by the State from time to time, the State took resort to the provisions of Section 22B to get out of its obligation and the making of the impugned Order was really a colourable exercise of that statutory power.

61. We find from the counter-affidavit of the State (October, 1977) that, as would appear from the Chief Secretary's letter dated November 20, 1968, what the State Government had assured the Company was to meet the interim requirement of the Company for 2 or 3 years from the UPSEB and to facilitate the parallel running of the Company's new power station, in addition to the station which had been set up at Renusagar. It is also not without significance that the State was not a party to the agreement dated November 30, 1976, for the supply of additional 30 mw, because that agreement was made between the Company and the UPSEB. It was in fact expressly stated in that agreement that it would be subject to the provisions of the Electricity Act, of 1910 and 1948 and the rules and regulations, including the amendments thereto. Care was also taken to provide that the

UPSEB shall not be responsible for damages or diminutions in the supply of energy according to the orders issued by the State Government. A similar provision was made in the earlier agreement of 1959. Reference was in fact specifically made in the Board's letter to the Company dated September 2, 1972, to the State Government's power to "control the distribution and consumption of energy under Section 22B of the Indian Electricity Act, 1910".

62. We have made a reference to the manner and the stages in which the State Government took decisions for the restrictions to be imposed on the consumption of energy with due regard to the detailed factual notes which were submitted for its orders on account of the acute shortage of energy in the State. Decisions in the matter were taken by the different State Governments, including the Governors' Advisors, and it cannot be said that the cuts were imposed suddenly, or without due regard to the Company's difficulties in reducing its consumption of energy in the manner directed by the Order. We are therefore unable to take the view that the State wantonly disregarded its contractual obligations to the Company. But even if the Company had some cause of grievance on that account, that may well be said to be unavoidable, in the situation which had risen when the Order was made on September 19, 1977. It has to be appreciated that sub-section (2) of Section 22B of the Act specifically provided that it was permissible for the State Government to direct by the Order that the UPSEB shall not comply with the provisions, inter alia, of any contract made by it. A direction to that effect was expressly made in Clause 11 of the Order, and it is not permissible for the company to complain on that account.

63. It is not disputed that the consumers which were hit by the provisions of Clause 6(a)(i) of the Order were the Company, the Kanoria Chemicals and Industries Ltd., the Indian Railways, the Indian Explosives Ltd., and the Fertiliser Corporation of India. The last three of these have been exempted from the rigour of the Order. As regards the Kanoria Chemicals and Industries Ltd., the State has stated in its reply that it was manufacturing Benzena Chloride and BHC which are used for agricultural purposes and for purifying drinking water. They were entitled to 50 per cent of their consumption, and the State allowed them exemption to the extent of 3 mw making it permissible for them to consume 12.5 mw. It cannot therefore be said that the continued supply of energy to Kanoria Chemicals was proof of any hostility on the part of the State insofar as the Company was concerned. It may also be that, as has been argued on behalf of the Company, some other restrictions which were initially imposed on some other consumers under the Order were withdrawn, so that it is the Company which is the main sufferer under the Order. Even so, it is not reasonable to take the view that the Order was not justified when it was made, and it cannot be held to be invalid merely because the Company is the main sufferer under it. It is not its case that the Order was discriminatory and should be struck down under Article 14 of the Constitution. As has been stated, the High Court has in fact found that the Company was "unable to establish as a fact that there was no shortage in the generation of electricity when the impugned Order was made under Section 22B of the Act of 1910".

64. The Order was therefore justified and was a valid order when it was made on September 19, 1977. The question is whether there is force in the argument that it has ceased to be in force and stood impliedly repealed because of the change in the circumstances which brought it into existence. The High Court has recorded a finding in this connection in favour of the Company.

65. Craies on Statute Law, seventh edition, has mentioned six different classes of enactments at pages 357-8 which are considered as having ceased to be in force :

1. Expired - that is, enactment which having been originally limited to endure only

for a specified period by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had for their object the continuance of previous temporary enactments for period now gone by effluxion of time;

2. Spent - that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect or on the happening of some event or on the doing of some act authorised or required;

3. Repealed in general terms - that is, repealed by the operation of an enactment expressed only in general terms as distinguished from an enactment specifying the Acts on which it is to operate;

4. Virtually repealed - where an earlier enactment is inconsistent with, or is rendered nugatory by a later one;

5. Superseded - where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise;

6. Obsolete - where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put in force, regard being had to the alteration of political or social circumstances.

These six have been mentioned as the enactments which are selected for inclusion in the Statute Law Revision Acts of England as having ceased to be in force otherwise than by express repeal, or having by lapse of time of otherwise become unnecessary. It is quite an exhaustive list and the question is whether the Order could be said to have "spent" itself or become "obsolete", for the other four categories are inapplicable to the present case. But whether a piece of legislation has spent itself or exhausted in operation by the accomplishment of the purpose for which it was passed, or whether the state of things contemplated by the enactment has ceased to exist, are essentially questions of fact for the Legislature to examine, and no vested right exists in a citizen to ask for a declaration that the law has been impliedly repealed on any such ground.

66. It has to be appreciated that the power to legislate is both positive in the sense of making a law, and negative in the sense of repealing a law or making it inoperative. In either case, it is a power of the Legislature, and should lie where it belongs. Any other view will be hazardous and may well be said to be an encroachment on the legislative field. In an extreme and a clear case, no doubt, an antiquated law may be said to have become obsolete-the more so if it is a penal law and has become incapable of user by a drastic change in the circumstances. But the judge of the change should be the Legislature, and courts are not expected to undertake that duty unless that becomes unavoidable and the circumstances are so apparent as to lead to one and only one conclusion. This is equally so in regard to the delegated or subordinate legislation.

67. We have gone through the cases reported in Elwood Hamilton v. Kentucky Distilleries & Warehouse Co. (64 L Ed 194), Chastleton Corporation v. A. Leftwich Sinclair (68 L Ed 841) and Nashville, Chattanooga & St. Louis Railway v. Herbert S. Walters (79 L Ed 949) on which reliance has been placed by Mr. Ray, but they are of no real help to the Company. Thus in Elwood Hamilton

in has been held that it requires "a clear case" to justify a court in declaring that a Federal Statute adopted to increase war efficiency has ceased to be valid, on the theory that the war emergency has passed and the power of Congress no longer exists. In Chastleton Corporation it has been held that courts would pronounce on the continued operation of law upon facts which they "judicially know". We have also gone through Nashville case where the view has been taken that a statute valid when enacted may become invalid by change in the conditions to which it is applied. We have gone through Petition of the Earl of Antrim and Eleven other Irish Peers (1967 AC 691) also where a declaration was asked for by some Irish peers that the peerage of Ireland had in accordance with the provisions of the Union with Ireland Act, 1800, the right to be represented by 28 Lords temporal of Ireland for life. Their petition was rejected because the provisions of the Act of 1800 had ceased to be effective on the passing of the Irish Free State (Agreement) Act, 1922. That was therefore quite a different case. Mr. Ray has placed reliance on Pannalal Lahoti v. State of Hyderabad (AIR 1954 Hyd 129 : 55 Cri LJ 1093 : 1LR 1954 Hyd 441), but what has been held there is that a temporary legislation cannot be allowed to outlast the war emergency which "brought it forth". In Union of India v. Ram Kanwar ((1962) 3 SCR 313 : AIR 1962 SC 247 : (1962) 2 SCJ 670) it was held that as the building in question was being used for a purpose other than that for which it was originally requisitioned under the law, it was liable to be de-requisitioned. The question is whether any such situation has been found to be established in the present case ?

68. Now what the High Court has found in this respect is as follows :

> This Court finds that circumstances have materially changed since the impugned order was made. The shortage in reservoir from which water is drawn for the generation of hydro-electricity has ceased and further supplies of electrical energy are available from newly commissioned units. The respondents admit that fresh power connections have been given. In these circumstances, the continuance of the impugned order is no longer justified and consequently, the order must be held to have outlived the purpose for which it was made and, as such, it must be held to be no longer valid.

It has thus found three facts : (i) the shortage in the reservoir(s) for generation of hydel energy had ceased, (ii) further supply of energy was available from newly commissioned units, and (iii) fresh power connections had been given by the UPSEB. But what was lost sight of was the important fact that it was all along the case of the State that hydel energy was only one-third of the total generation, and that generation of thermal energy which met two-third of the total requirement had declined for reasons beyond the control of UPSEB. The High Court did not therefore undertake a careful examination of the facts, and took some new connections into consideration without attempting to examine their magnitude and effect on the overall generation and availability of energy from all the sources. The State has filed a detailed affidavit dated October 12, 1978, where it has been stated that the UPSEB was at best capable of generating electrical energy to the "tune of 10,185 mu", whereas the total requirement of the State for 1978-79 was 13,866 mu so that there was a gap of 393 mu. The High Court therefore erred in taking the view that the continuance of the Order was no longer justified.

69. Even so, the High Court abstained from striking down the whole of the Order and merely declared that the provisions of the first proviso to Clause 6(a)(i) was ultra vires, and quashed it.

70. We have given our reasons for taking the view that the whole of Clause 6(a)(i) of the Order, including the proviso, is valid, and the question remains whether we should restore the quashed

proviso. The answer to the question is simple. The learned Solicitor-General has made a statement at the Bar that at present, or in the near future, there is not difficulty in supplying 42.5 mw energy to the Company, and that the Company is getting that much energy already. He has been frank enough to say that this will be so even if the proviso is restored by this Court. He has stated that the State Government has been reviewing the position from time to time, and has given the assurance that it will continue to do so in future. He has also stated that although the application of the Company for grant of exemption under Clause 10 of the Order had been rejected on December 9, 1977, there is nothing to prevent the Company from making a fresh application if it thinks that there is a real and substantial improvement in the generation of energy in the State. The fact therefore remains that, as things stand at present, the proviso, which admittedly applies only to the Company, is of no practical use for the time being. So even though it is valid and has wrongly been quashed by the High Court, we do not think it necessary to restore it, so that it shall not be deemed to form part of Clause 6(a)(i) of the Order. But if there is deterioration in the generation of energy again, or there are other sufficient reasons within the purview of Section 22B of the Act to reinsert the proviso, in the present or modified form, it will be permissible for the State Government to do so according to the law.

71. In the result, while CA 921 of 1978 is allowed to the extent mentioned above, CA 425 of 1979 fails and is dismissed. In the circumstances of the case, the parties shall pay and bear their own costs in both the appeals.

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