Delhi Cloth and General Mills Co. Ltd. and Another

Vs

Rajasthan State Electricity Board and Another

Civil Appeals Nos. 2675-2679 of 1980

(A.P. Sen, D. P. Madon J)

12.03.1986

JUDGMENT

A.P. SEN, J. -

1. These five consolidated appeals by special leave from the common judgment and orders of a Division Bench of the Rajasthan High Court dated September 12, 1980 raise questions of far-reaching importance. By the judgment under appeal, the Division Bench has upheld the constitutional validity of Sections 49-A and 49-B of the Electricity (Supply) Act, 1948 as introduced by the Electricity (Supply) (Rajasthan Amendment) Act, 1976, with retrospective effect, making it lawful for the Rajasthan State Electricity Board to revise from time to time the tariffs fixed for the supply of electricity in respect of any period commencing from September 16, 1966 i.e. the date of introduction of the new Section 49 by the Electricity (Supply) (Amendment) Act, 1966, and for the validation of amount realized, demand made or created by the Board according to the uniform tariffs in force from time to time before the publication in the official Gazette of the Electricity (Supply) (Rajasthan Amendment) Ordinance, 1976, i.e. prior to February 7, 1976, the date of promulgation of the Ordinance.

2. Upon that view, the Division Bench has reversed the judgment and order of Tyagi, J. dated October 17, 1969 and upheld the impugned notification dated July 26, 1966 issued by the Board for the levy of a general surcharge of 15% of the normal tariff as also the judgment and order of J.P. Jain, J. dated April 13, 1973 holding that the Board was entitled to recover from the appellants the difference between the normal rate of tariff and the special rate of tariff agreed upon between the parties in terms of a statutory agreement dated July 28, 1961 under Section 49 of the Act as it then stood, by virtue of Section 49-A and 49-B of the Act read with Clause 18 of the agreement as from January 1971 onwards for the supply of electrical energy to the appellants for the electro-chemical, electro-thermal and poly-vinyl chloride industry known as Messrs Shriram Vinyl & Chemical Industries, Kota, formerly known as Rajasthan Vinyl & Chemical Industries, and to levy the general surcharge of 15% thereon contrary to the terms and conditions of the aforesaid agreement for the supply of such electrical energy to the appellants at a concessional rate for a period of 20 years. Pursuant thereto, the Division Bench has upheld the demand raised by the Board by its letter dated February 1, 1971 for payment of Rs 11,67,959.95 for the billing month January 1971 onwards at normal tariffs together with general surcharge of 15% thereon under Schedule HS/LP/HT-1 applicable to all large industrial consumers under the Board's tariff notification dated April 26, 1969, under Clause 18 of the agreement i.e. prior to the promulgation of the Ordinance. It has also upheld the demand raised by the Board's letter dated March 12, 1976 for payment of Rs 21,35,506.72 for the billing month February 1976 at normal tariff plus the general surcharge of 15% thereon under Schedule LP/HT-1 applicable to all large industrial consumers under the Board's tariff

notification dated May 28, 1974 purporting to act under Sections 49-A and 49-B of the Act read with Clause 18 of the agreement for the period subsequent to the promulgation of the Ordinance.

3. The principal question in controversy is whether Sections 49-A and 49-B of the Act were integrally connected with each other; and if so, the retrospective conferment of a prospective power validated any amount realized, or demand made or created by the Board, according to the uniform tariffs from time to time, from or against any person claiming any special tariffs under any agreement, undertaking, commitment or concessions made, before the first day of April 1964 i.e. the date when the uniform tariffs were first framed by the Board at different rates for different classes of consumers by its notification dated March 18, 1964, notwithstanding anything contained in the Act or in any such agreement, undertaking, commitment or concessions so made. The question turns on a construction of the provisions contained in Section 49-A and 49-B of the Act, the constitutionality of which has not been challenged before us.

4. Sub-section (1) of Section 49-A of the Act by the use of non obstante clause has the effect of nullifying all such agreements undertakings or commitments made before the first day of April 1964 by the Board or the Government of Rajasthan or the Government of any covenanting State of Rajasthan or in any judgment and order of any court, and provides that it shall be lawful for the Board to revise, from time to time, the tariffs fixed for the supply of electricity to persons other than licensees and to frame uniform tariffs for the purpose of such supply in respect of any period commencing on and from September 16, 1966, the date when new Section 49 had come in force. Sub-section (2) thereof provides that in revising the tariffs or framing uniform tariffs under sub-section (1), the Board shall be guided by the principles set out in Section 59 and as respects any period commencing on and from September 16, 1966 i.e. after the introduction of the new Section 49 of the Act, by the principles laid down in sub-sections (2), (3) and (4) of Section 49. Sub-section (3) of Section 49-A provides that all such agreements, undertakings, commitments or concessions as are referred to in sub-section (1), shall insofar as they are inconsistent with the provisions of sub-sections (1) and (2) and to the extent of the tariffs fixed or provisions made therein for such fixation, be void and shall be deemed always to have been void. One of the crucial questions is whether the demand to be validated in terms of Section 49-B of the Act, has to be raised prior to February 7, 1976 and not on a date subsequent thereto and therefore the appellants were liable to pay the revised uniform tariff under Schedule LP/HT-1 of the Board's tariff notification dated May 28, 1974 w.e.f. July 1, 1974. The contention on behalf of the appellants is that Section 49-B of the Act in terms does not have the effect of validating the demand raised by the Board by its letter dated March 12, 1976 for payment of charges for the supply of electrical energy to them at uniform tariff framed by the aforesaid Board's notification dated May 28, 1974, such a demand having been made after the promulgation of the Ordinance i.e. after February 7, 1976; and if that be so, whether the Board was only entitled to recover from the appellants uniform tariff under Schedule HS/LP/HT-1 framed by the Board's tariff notification dated April 26, 1969 as from January 1971 onwards. Various subsidiary questions also arise, viz. whether the demands so raised are violative of Article 14, Article 19(1)(f) and (g) and Article 31(2) of the Constitution.

The Facts

5. Facts giving rise to these appeals are these. By an agreement dated July 28, 1961 the Rajasthan State Electricity Board, Jaipur agreed to supply the appellants with bulk electrical energy up to maximum of 25,000 kw per year for their Rajasthan Vinyl & Chemical Industries situate at Kota for electro-chemical, electro-thermal and PVC and allied industrial products at a concessional rate for a period of 20 years upon the terms and conditions contained therein. Clause 17 of the agreement

provides for a special rate of tariff as negotiated between the parties and is in these terms :

> 17. The consumer shall pay to the Board every month charges for the electrical demand made by the consumer during the preceding month at the rate of 201.04/12 = Rs 16.753 per KVA of the demand assessed which shall be calculated as defined in Clause 19.

We are informed that this works out roughly to 3 p. per unit.

6. Under Clause 18 of the agreement, the rate of supply was reviewable by the Board every five years after January 1, 1971. Proviso thereto was in the nature of a rider and it provided that the revision of rate shall be effected provided the component of cost of generation out of the total cost varied by 25% or more from the cost last fixed. The relevant part of Clause 18 may be reproduced :

> 18. ... The rate of supply as determined in Clause 17 above shall be reviewed every fifth year starting from the date of first supply provided the component of cost of generation out of total cost varies by 25% or more from the cost last fixed. Further the rate fixed by this agreement shall be reviewed only on or after January 1, 1971.

It is not necessary to set out Clause 31 which is the arbitration clause. Clause 34(b) of the agreement which has a material bearing upon these appeals reads as follows :

> 34(b) Nothing contained in this agreement or any amendment thereof shall restrict any rights, obligations and discretions which the Board or the consumer has derived under any legislation relating to supply and consumption of electricity enacted during the period of this agreement.

It is necessary to mention that Messrs Rajasthan Vinyl & Chemical Industries was set up by the appellants at Kota for electro-chemical, electro-thermal and PVC and allied industrial products with a capital investment of Rs 10 crores as a result of the Board agreeing to supply electrical energy at a concessional rate which came to be known later as Messrs Shriram Vinyl & Chemical Industries. It is a power-oriented industry and electricity is the basic raw material. The only other industry of this kind in the country was the one set up by Messrs Calico Mills Ltd. which has since been closed.

7. It is common ground that the Board commenced supplying electrical energy to the appellants with effect from March 1, 1963. The Board in pursuance of its powers under Section 49 of the Act, with the prior concurrence of the State Government, has been issuing various notifications from time to time bringing into effect the revised tariffs for the supply of electricity to its different classes of consumers at different rates. The first of these was notification dated March 18, 1964 which brought into effect the revised tariffs of the supply of electricity to its consumers and they became applicable for the consumption recorded for the billing month May 1964 onwards. Clause 3 of the said notification provided that the revised tariffs shall replace all existing tariffs and shall supersede all the existing orders of the Board and the State Government in that behalf with effect from the date of introduction of the revised tariffs, except for the following, namely :

> (i) Special contracts for Large or special loads separately negotiated or to be negotiated; and
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> (ii) Special loads for which concessional tariffs have been already given under the orders of the government/Board.

8. The second of these notifications was the one dated July 26, 1966 by which the Board purported to levy different rates of surcharge on different classes of consumers with effect from the billing month of September 1966. The general surcharge imposed on the appellants was 15% on the normal tariff. The third notification dated April 26, 1969 brought into effect the revised tariffs for supply of electricity to consumers falling under the category 'large industrial loads' viz. Schedule HS/LP/HT-1 with effect from the billing month June 1969, and the fourth dated May 28, 1974 making effective revised tariffs for the supply of electricity to its consumers from the billing month of July 1974. The third and fourth notifications contained similar exclusionary clause. According to the appellants, the uniform tariffs as revised from time to time under the aforesaid notifications were not applicable to them in view of the said exclusionary clause.

9. The appellants filed a petition in the High Court under Article 226 of the Constitution assailing the power of the Board to levy the general surcharge of 15% under the impugned notification dated July 26, 1966. The aforesaid writ petition was allowed by Tyagi, J. by his judgment dated October 17, 1969 by which the learned Judge held that the impugned notification levying general surcharge of 15% was ultra vires the powers of the Board in so far as the appellants were concerned. The decision was based on the ground that the parties having entered into a statutory agreement dated July 28, 1961 for a concessional rate of tariff for the supply of electrical energy to the appellants, there was a fetter created on the power of the Board to unilaterally increase the tariff under Section 49 of the Act and therefore the appellants could not be subjected to payment of the general surcharge of 15%. Feeling aggrieved, the Board preferred an appeal against the judgment of the learned Single Judge.

10. As from January 1, 1971, the Board manifested its intention to the appellants to revise the concessional rate of supply and charge them the uniform rate of tariff under Schedule HS/LP/HT-1 as applicable to all large industrial consumers and the general surcharge of 15% thereon in exercise of its powers under Clause 18 of the agreement. There followed several meetings between the officers of the Board and the representatives of the appellants and they were informed that they would have to pay for the consumption of electricity at the normal rate of tariff prevalent plus the general surcharge of 15%. It is quite evident from the appellants' letter dated September 5, 1970 addressed to the Chairman of the Board that the Board had the power to review the tariff insofar as they were concerned as and from January 1, 1971. In their letter they adverted to Clause 18 of the agreement which conferred power on the Board to review the tariff on or after January 1, 1971 and referred to the discussion they had with the Chairman and other officials of the Board, making a request that the Board should furnish the necessary details with regard to the total cost and the component of cost of generation at the time of the supply under the agreement as well as the relevant time, if any review of tariff was being contemplated. In response thereto, the Board by its letter dated December 22/24, 1970 drew the attention of the appellants to Clause 18 and stated that the cost of generation had been worked out in the office of the Board and it had been found that the present cost was higher than 25% of the cost at the time of executing the agreement as detailed below :

> #Component of cost of generation at thetime of agreement .. 2.089 p/kwh.Component of cost of generation duringthe year 1969-70 .. 5.17 p/kwh.##

It went on to say :

> In view of this, the Board is entitled to review the rates of supply to you and intends to charge from January 1, 1971, at the normal tariff Schedule HS/LP/HT-1 (copy

enclosed) plus 15% general surcharge.

11. Accordingly, the Board by its letter dated February 1, 1971 enclosed a bill for the billing month January 1971 for a sum of Rs 12,18,740.60 at the normal tariff with a rebate of Rs 50,780.65 which worked out to Rs 11,67,959.95. It was stated that the rate of supply had been reviewed by the Board under Clause 18 of the agreement w.e.f. January 1, 1971 and the rate charged was under Schedule HS/LP/HT-1 applicable to all large industrial consumers. We are informed that this works out to 7.67 p. per unit exclusive of the general surcharge of 15% and to 8.73 p. inclusive thereof and this more or less represented the actual cost of generation.

12. On a petition filed by the appellants under Article 226 of the Constitution assailing the validity of the demand raised by the Board by its letter dated February 1, 1971 and the enclosed bill for Rs 11,67,959.95 on the ground that the Board was not entitled to revise the tariffs applicable to them under Clause 18 as from January 1, 1971, J.P. Jain, J. by his order dated April 13, 1973 quashed the impugned bill issued by the Board. He repelled the construction sought to be placed by the appellants on the terms of Clause 18 of the agreement and held that the Board was entitled under the first part of Clause 18 to review the rate of supply every fifth year starting from the first date of supply', but in view of the restrictive clause contained in the second part of Clause 18 it was impermissible for the Board to make any such upward revision in the rate of supply till January 1, 1971. He further rejected the contention of the appellants that the Board was not competent to review the tariff under Clause 18 prior to March 1, 1973. He also held that it was not open for them to contend that the cost of generation had not varied by 25% or more, they having by their letter dated January 18, 1971 addressed to the Board declined to go into the question of cost of generation as on the date last fixed and at the relevant time i.e. in the year 1969-70 on the pretext that they were advised that the rate revision was in no case due till March 1, 1973. The learned Judge next held that in the circumstances he would infer that the rise in the cost of generation was at least 25% and accordingly the Board was entitled to revise the rate of supply by 25% of the rate specified in Clause 17 upon the basis that the upward revision in the rate of supply under Clause 18 must be in proportion to, or correlated with, the actual rise in the cost of generation. In that view, he held that the Board could not unilaterally impose the normal tariff in disregard of the agreement, and added :

> Sub-section (3) of Section 49 of the Electricity Supply Act, 1948 clearly empowers the Board to fix different tariffs if it considers it necessary or expedient for the supply of electricity to any non-licensee having regard to the geographical position of the area, the nature of the supply required and any other relevant factor. The petitioner company is admittedly the biggest consumer in the State and the Board at one time under the agreement agreed to give it an exceptional rate. Sub-section (3) is an exception to sub-section (1) which lays down that the Board shall frame uniform tariff. Sub-section (4) again prescribes a limitation to sub-section (3) that the Board shall not give undue preference. It has not been the case of the Board that by executing the agreement any undue preference was shown to the petitioner company.

In conclusion, the learned Judge held that if the Board claimed a further rise, it would have to establish that the rise in the cost of generation was more than 25% and it had to for that purpose get the percentage in the cost of generation determined either by mutual dialogue or reference to arbitration.

Promulgation of the Electricity (Supply) (Rajasthan Amendment) Ordinance, 1976 : Introduction of Sections 49-A and 49-B into the Act

13. Both the appellants and the Board preferred appeals. While the aforesaid appeals were pending in the High Court on February 7, 1976 the Governor of Rajasthan promulgated the Electricity (Supply) (Rajasthan Amendment) Ordinance, 1976 by which new Sections 49-A and 49-B were introduced into the Act with retrospective effect to overcome the difficulty created by the judgment of the High Court in this case, and more particularly by the judgment of this Court in Indian Aluminium Co. v. Kerala State Electricity Board ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967). By the use of a non obstante clause in sub-section (1) of Section 49-A the legislature made it lawful for the Board to revise, from time to time, the tariffs fixed for the supply of electricity to persons other than licensees and to frame uniform tariffs for the purpose of such supply. Sub-section (2) thereof provided that in revising or framing tariffs under sub-section (1) the Board shall be guided by the principles set out in Section 59 and as respects any period commencing on and from September 16, 1966 i.e. the date on which the new Section 49 of the Act was brought into force, by the provisions laid down in sub-sections (2), (3) and (4) of Section 49-A notwithstanding anything contained in the Act or in any agreement, undertaking, commitment or concession made before the first day of April 1964, i.e. the date when the uniform tariffs were first framed by the Board by its tariff notification dated March 18, 1964. Sub-section (3) of Section 49-A provides that all such agreements, undertakings, commitments or concessions as are referred to in sub-section (1), shall insofar as they are inconsistent with the provisions of sub-section (1) and (2) and to the extent of the tariffs fixed or provisions made therein for such fixation, be avoid and shall be deemed always to have been void. The non obstante clause in sub-section (1) of Section 49-A had the effect of nullifying the agreement between the parties entered into by the appellants with the Board under Section 49 of the Act as it then existed for the supply of electricity at a concessional rate for their industrial undertaking. Similarly, by the use of a non obstante clause Section 49-B provided that notwithstanding anything contained in the Act or in any agreement, undertaking or concession as are referred to in sub-section (1) of Section 40-A, any amount realized or demand made or created by the Board or the government etc. according to the uniform tariffs in force from time to time from or against any person claiming any special tariffs under any such agreement, undertaking or concession made before February 7, 1976, the date of promulgation of the Ordinance, shall be deemed to have been validly realized, made or created under the Act as amended by the Ordinance. It is necessary to reproduce Section 49-A in its entirely and Section 49-B insofar as relevant, which read :

> 49-A. Power of the Board to revise certain tariffs. - (1) Notwithstanding anything contained in this Act or in any agreement, undertaking, commitment or concessions made, before the first day of April 1964 by the Rajasthan State Electricity Board or the Government of Rajasthan or by the ruler or government of any covenanting State of Rajasthan, or in any judgment or order of any court, it shall be lawful for the said Board to revise, from time to time, the tariffs fixed for the supply of electricity to persons other than licensees and to frame uniform tariffs for the purpose of such supply,
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> (2) In revising the tariffs or framing uniform tariffs under sub-section (1), the said Board shall be guided by the principles set out in Section 59 and as respects any period commencing on and from the 16th day of September 1966, by the principles laid down in sub-sections (2), (3) and (4) of Section 49.
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> (3) All such agreements, undertakings, commitments or concessions as are referred to in sub-section (1), shall, insofar as they are inconsistent with the provisions of sub-sections (1) and (2) and to the extent of the tariffs fixed or provisions made therein

for such fixation, be void and shall be deemed always to have been void.

49-B. Validation of certain tariffs etc. - Notwithstanding anything contained in this Act or in any agreement, undertaking or concession referred to in sub-section (1) of Section 49-A, or in any judgment or order of any court -

(a) any amount realised, or demand made or created, by the Rajasthan State Electricity Board, or the Government of Rajasthan or the ruler or government of any covenanting State of Rajasthan, according to the uniform tariffs in force from time to time, from or against any person claiming any special tariffs under any such agreement, undertaking or concession, before the publication in the official Gazette of the Electricity Supply (Rajasthan Amendment) Ordinance, 1976, shall be deemed to have been validly realised, made or created under this Act as amended by the said Ordinance.

14. Immediately thereafter on March 12, 1976 the Board furnished the appellants with a bill for payment of an amount of Rs 21,35,506.72 for the billing month of February 1976 at uniform rate, under Schedule LP/HT-1 framed by the Board's tariff notification date May 28, 1974 together with the general surcharge of 15%.

15. The appellants were therefore constrained to move the High Court under Article 226 of the Constitution challenging the constitutional validity of Sections 49-A and 49-B of the Act, as introduced by the aforesaid Ordinance as also the impugned bill sent by the Board for the billing month of February 1976 for Rs 21,35,506.72. On November 4, 1976 the Board issued another notification under Section 49(1) framing revised uniform tariffs at different rates for different class of consumers which became applicable from the billing month of December 1976. But unlike the earlier notifications prescribing uniform tariffs under Section 49(1) of the Act, this notification did not contain any exclusionary clause granting exemption for specially negotiated loads. While the matters were pending before the High Court, on November 3, 1977 the Board furnished another bill to the appellants claiming arrears amounting to Rs 5.57 crores on account of the difference between the normal rate of tariff and the agreed rate for the supply of electrical energy to them for the period from January 1, 1971 to January 31, 1976.

16. Again, the appellants filed another petition in the High Court under Article 226 of the Constitution questioning their liability to pay the said amounts. Both the aforesaid writ petitions, namely, the one challenging the vires of Sections 49-A and 49-B of the Act as well as the legality of the impugned bill sent by the Board claiming Rs 21,35,506.72 for the billing month of February 1976, and the other questioning the legality and propriety of the bill dated November 3, 1977 raising a demand for payment of Rs 5.57 crores on account of the difference between the uniform rates of tariffs and the agreed rate of supply for the period from January 1, 1971 to January 31, 1976 were referred to a Division Bench.

17. By the judgment under appeal, a Division Bench speaking through Kudal, J. allowed the appeal preferred by the Board and dismissed that of the appellants as well as the writ petitions filed by them. The learned Judge disallowed the contention raised on behalf of the appellants as to the constitutional validity of Sections 49-A and 49-B of the Act as introduced by the Electricity (Supply) (Rajasthan Amendment) Act, 1976 and upheld the right of the Board to revise the rate of supply as agreed upon for the period commencing from January 1, 1971 onwards and enforced a demand for payment of the difference between the uniform tariffs as fixed from time to time and the

agreed rate. Learned counsel for the parties have placed no reliance on the judgment of the Division Bench which, according to them, does not deal with the points raised.

Extent of the Appellants liability

18. We find it convenient at this stage to indicate the extent of the appellants' liability involved in these appeals. From the abstract statement filed by the Board, the net amount due with interest as per the uniform tariffs under Schedule HS/LP/HT-1 framed by the Board's tariff notification dated April 26, 1969 for the period from January 1, 1971 to June 30, 1974 and the uniform tariff Schedule LP/HT-1 framed by the Board's tariff notification dated May 28, 1974 for the period from July 1, 1974 to February 6, 1976 together with the general surcharge of 15% on the tariff from September 16, 1966 and the interest thereon comes to Rs 14,50,99,654.47. On the other hand, if the appellants' contention regarding the inapplicability of the uniform tariffs under Schedule LP/HT-1 of 1974 were to prevail on the ground that the Board had failed to raise a demand for payment of electricity charges at that rate prior to February 7, 1976, the date of promulgation of the Ordinance, the net amount due on account of this difference for the aforesaid period applying the uniform tariff Schedule HS/LP/HT-1 of 1969 comes to Rs 12,10,51,510.46. The resultant sums have been arrived at after making adjustment of various payments made by the appellants from time to time towards the bills submitted by the Board as per the interim orders passed by the High Court from time to time together with interest, as also under the interim order of this Court dated October 6, 1980 while granting special leave and stay of the operation of the judgment of the High Court. We may state that the figures given in the abstract statement filed by the Board more or less correspond with those in the statement filed by the appellants. The difference between the two amounts with interest thereon at 9% works out to Rs 2,41,58.937. That is the magnitude of the claim in these appeals.

19. We had the benefit of hearing Shri Shanti Bhushan appearing for the appellants and Dr Y.S. Chitale, on behalf of the Board. At the very outset Shri Shanti Bhushan, learned counsel for the appellants with all fairness stated that he does not challenge the constitutional validity of Sections 49-A and 49-B of the Act.

The nature of controversy

20. The controversy in these appeals can be viewed from three aspects. First rests on the interpretation of the terms of the agreement between the parties dated July 28, 1961 and the various clauses thereof, particularly Clauses 19 and 34(b) which both have a material bearing. The second on the construction of Sections 49-A and 49-B of the Act, the scope and effect of Section 49-A which by the non obstante clause nullifies the agreement for the supply of electrical energy at a concessional rate to the appellants and makes it lawful for the Board to charge the uniform tariff with retrospective effect from September 16, 1966 i.e. the date on which the new Section 49 was introduced, and Section 49-B which validates the making of such demand with retrospective effect. As also the validity of the demands created by the Board by its letter dated February 1, 1971 for the billing month January 1971 for Rs 11,67,959.95 under Schedule HS/LP/HT-1 to the Board's tariff notification dated April 26, 1969 applicable to all large industrial consumers, and bill sent by the Board on March 12, 1976 for the billing month February 1976 for payment of Rs 21,35,506.72 under Schedule LP/HT-1 to the Board's tariff notification dated May 28, 1974. The third comprises of various subsidiary issues as to whether the Board is precluded by the doctrine of promissory estoppel from raising these demands, as also whether such demands are violative of Articles 14, 19(1)(f) and (g) and 31(2) of the Constitution. We shall deal with these contentions in seriatim.

The statutory changes

21. In order to appreciate the issues involved, it is necessary to deal with the legislative changes. Under Section 49 of the Act as it stood at the relevant time i.e. on July 28, 1961, the date of agreement, a general power was conferred on the Board to supply electricity upon such terms and conditions as it may, from time to time, fix having regard to the matters referred to in that section and the proviso thereto directed the Board not to show undue preference to any person in fixing the tariffs. The section was in the following terms :

49. Provision for the sale of electricity by the Board to persons other than licensees. - Subject to the provisions of this Act and of any regulations made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board may from time to time fix having regard to the nature and geographical position of the supply and the purposes for which it is required :

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

22. It appears that a view was taken by the Bombay High Court in a case relating to the Kalyan Borough Municipality that Section 49 of the Act as it then stood, did not permit the Board to frame uniform tariffs for consumers in compact areas as well as consumers in sparse areas, so as to require the former to pay a part of the cost involved in the supply of electricity to the latter i.e. so as to cast a higher burden on the consumer in a compact area, where the cost of supply was less. An appeal was brought by the Maharashtra Electricity Board to this Court. During the pendency of the appeal, Parliament enacted the Electricity (Supply) Amendment Act, 1966 by which the Act was amended in various particulars. It is only necessary to refer to two sections of the Amendment Act viz. Sections 11 and 24. Section 11 substituted, with retrospective effect, new Section 49 in the place of old Section 49, and Section 24 of the amending Act validated the imposition and collection of charges for the supply of electricity, preventing any person from claiming refund of any amount paid by him in excess of the amount due under the Act. The new Section 49 of the Act runs as follows :

> 49. Provision for the sale of electricity by the Board to persons other than licensees. - (1) Subject to the provisions of this Act and of regulations, if any, made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs.
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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;
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> (b) the coordinated development of the supply and distribution of electricity within the State in the most efficient and economical manner, with particular reference to such development in areas not for the time being served or adequately served by the licensee;
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> (c) the simplification and standardisation of methods and rates of charges for such supplies;

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

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

23. In Maharashtra State Electricity Board v. Kalyan Borough Municipality ((1968) 3 SCR 137 : AIR 1968 SC 991) this Court reversed the decision of the Bombay High Court and it was held that the levying of uniform tariff on the consumers irrespective of whether they were in sparse areas or in compact areas, which was not directly related to the cost of supply, did not amount to a colourable exercise of taxing power by Parliament.

24. The Electricity (Supply) (Rajasthan Amendment) Ordinance was first promulgated on February 7, 1976, later replaced by the Electricity (Supply) (Rajasthan Amendment) Act, 1976 introducing Sections 49-A and 49-B to the Act, to obviate the difficulty created by the judgment of the High Court in this case as also by the decision of this Court in the case of the Indian Aluminium Co. v. Kerala State Electricity Board ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967). In the Indian Aluminium Co. case ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967), the Court speaking through Bhagwati, J. held that agreements for supply of electricity to the consumers for a specified period at a special tariff are the result of negotiations between the Board and the consumers and hence a matter of agreement between them. Such agreements for the supply of electricity to the consumers must therefore be regarded as having been entered into by the Board in exercise of the statutory powers conferred under Section 49(3) and thus there could be no question of such stipulation being void as fettering the exercise of the statutory powers of the Board under Section 49(1). The learned Judge observed that in fact such agreements under Section 49(3) represented the exercise of the statutory powers and the Board could not unilaterally frame uniform tariffs under Section 49(1) of the Act in derogation of such agreements entered into under Section 49(3). Upon that basis, the learned judge further observed that the Board was not competent to enhance the charges under the guise of fixing uniform tariffs because, sub-section (1) of Section 49 is subject to sub-section (3); and once special tariff were fixed under sub-section (3) there could be no question of fixing uniform tariffs applicable to such consumers under sub-section (1). Such a power could not be exercised in violation of the stipulation fixing special tariffs under sub-section (3).

25. According to Section 59 of the Act, the Board is required to carry on its operations without incurring any loss. In the Indian Aluminium Co. case ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967), however, the learned Judge repelled the contention of the Board that since it was operating at a loss it was bound under Section 59 to readjust its charges to avoid the loss. It was said that Section 59 does not give a charter to the Board to enhance its charges in breach of a contractual obligation. The view taken by the court in that case would have had a disastrous effect in some of the States if new Sections 49-A and 49-B were not introduced by the Ordinance. In the State of Rajasthan, not only special agreements or concessions in tariffs were made several years ago by the covenanting States, but also by the old State of Rajasthan after its formation as a part B State : and

if they were allowed to continue, they would not cover the existing cost of generation with the result that the burden of this cost would have to be passed on to other consumers who do not, in any way, benefit from such special contracts providing concessional tariffs. It would have been manifestly unjust and discriminatory that one consumer should benefit at the cost of other consumers or general taxpayers. It was therefore thought expedient to amend the Act with retrospective effect so as to enable the Board to revise the contractual rates in order to cover the cost of generation from time to time, notwithstanding any special contract, undertaking or concession to contrary".

Purport and effect of Sections 49-A and 49-B of the Act

26. It is a well-known principle that for the validation of an invalid act done under an Act, it is essential that the subsequent validating statute must confer power for the doing of the act at the time it was done, and that the power should also be exercised. In the absence of such authorisation for the doing of the act, the validation would be futile as that would only amount to attempt to exercise a power which ex hypothesi did not exist. This has been achieved by the legislature by enacting Section 49-A of the Act. The purport and effect of Section 49-A of the Act is to nullify the judgment of the High Court and more particularly the decision of this Court in Indian Aluminium Co. case ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967) laying down that sub-section (1) of Section 49 was subject to (3) and therefore the Board could not unilaterally frame uniform tariffs under Section 49(1) with respect to the class of consumers who were entitled to the supply of electricity at a special rate by virtue of agreements entered into by the Board with them under sub-section (3) of Section 49. By the use of the non obstante clause in Section 49-A(1), the legislature has removed the hurdle placed on the Board against framing of uniform tariffs with respect to such class of consumers and by the retrospective conferment of a prospective power empowered the Board to raise a demand for payment of the difference between the uniform tariffs in force from time to time and the special rates as respects any period commencing on and from September 16, 1966 i.e. the date when the new Section 49 of the Act was brought into force. On its plain construction, Section 49-A makes it lawful for the Board to revise, from time to time, the tariffs fixed for the supply of electricity to all such consumers who were enjoying special benefits by virtue of the agreements entered into with the Board under Section 49(3) of the Act, and also to frame uniform tariffs for the purpose of such supply, notwithstanding anything contained in any agreement, undertaking, commitment or concession to the contrary made by the Board before the first day of April 1964. The non obstante clause contained in Section 49(1) has clearly the effect of overriding the agreement between the parties.

27. Section 49-B of the Act by the non obstante clause provides that notwithstanding anything contained in the Act, or in any agreement, undertaking or concession referred to in sub-section (1) of Section 49-A, or in any judgment or order of any court, any amount realized, or demand made or created by the Board, according to the uniform tariffs in force from time to time, from or against any person claiming any special tariffs under any such agreement, undertaking or concessions, before the publication in the official Gazette of the Ordinance i.e. before February 7, 1976, shall be deemed to have been validly realized, made or created under the Act. as amended by the Ordinance. A combined reading of Sections 49-A and 49-B seeks to achieve a twofold object. Section 49-B in terms validates the demands raised by the Board by virtue of its powers under Section 49-A against the appellants prior to the promulgation of the Ordinance on February 7, 1976 for payment of the difference between the uniform tariffs in force from time to time and the special rates as from January 1, 1971. The other legal consequence is that the appellants who were entitled to supply of electricity at a concessional rate under the agreement between the parties, became subject to payment of uniform tariffs in force from time to time and it became lawful for the Board to raise a

demand upon that basis subsequent to the promulgation of the Ordinance and also to revise the tariffs fixed for the supply of electricity to them. The appellants do not dispute their liability to pay for the supply of electricity according to the uniform tariffs fixed for all large industrial consumers as from February 7, 1976 and the dispute only relates to the power of the Board to raise a demand for payment of the difference for the past period.

Contentions of the parties

28. It is in this setting and the factual background that we are required to consider the submissions addressed to us. As already stated, the controversy in these appeals can be viewed from three aspects, namely,

> (i) Interpretation of the terms of the agreement between the parties dated July 28, 1961, particularly Clauses 18 and 34(b) thereof;
>
> (ii) Interpretation of Sections 49-A and 49-B of the Act; and
>
> (iii) Whether the demands raised by the Board for payment of the difference by the impugned bills dated February 1, 1971 and March 2, 1976 which involved the imposition of a liability on the appellants by the retrospective conferment of a prospective power under Section 49-A and the validation of such power under Section 49-B was wholly arbitrary and irrational, confiscatory in nature and amounted to deprivation of property without payment of compensation and was thus violative of Articles 14, 19(1)(f) and (g) and 31(2) of the Constitution.

It would be convenient to deal with the first and third aspects together.

Interpretation of the agreement between the parties : Clause 18 of the agreement

29. As to the construction of the terms of the agreement between the parties we may first deal with Clause 18. The appellants' submission is that on a true construction of the agreement, Clause 18 is nothing but an escalation clause and therefore the Board was not entitled to unilaterally frame uniform tariffs as due and payable by the appellants but the rate of increase must be in proportion to, or correlated with, the actual rise in the cost of generation. It is said that in every case, the function of the court is to find the contractual intention by placing a construction of what is just and reasonable. The agreement was for the sale and purchase of electricity and the prices had been specifically stipulated by the parties in Clause 17. A perusal of Clause 17 of the agreement which fixes the rate of supply at the rate of 201.04/12 = Rs 16.753 per KVA of the demand assessed shows that the rate had been worked out by the parties jointly on the basis of some calculation with reference to the cost of generation. The only reasonable construction should be that a clear correlation between the cost of generation and increase in the rate of supply had been stipulated, as was the view expressed by Jain, J. On re-determination the rate of supply could be increased only to the extent that the cost of generation had gone up and not to any arbitrary extent. Clause 18 is not susceptible of a construction which could make the price of the goods totally uncertain and dependent on the arbitrary volition of one party to the contract. In this connection, the appellants placed reliance on the following passage from Anson's Law of Contract, 25th edn., p. 61 :

> On the other hand, a transaction which at first sight seems to leave some essential term of the bargain undetermined may, by implication, if not expressly, provide some method of determination other than a future agreement between the parties. In that

> event, since it is a maxim of the law that id certum est quod certum reddi potest, there will be a good contract. In every case the function of the court is to put a fair construction on what the parties have said and done, though the task is often a difficult one when an instrument has attempted to record some complicated business bargain. The parties making such a bargain naturally assume that it will be carried out and therefore do not always express it with the exactness of terminology that lawyers, whose profession leads them to contemplate the possibility of future disputes, might have employed.

It is accordingly urged that Clause 18 was an escalation clause and therefore the power of the Board to revise the rate of supply arises as and when the cost of generation goes up, and therefore the rate must be in proportion to, or correlated with, the actual rise in the cost of generation. Learned counsel for the appellants tried to draw sustenance from the following extracts from the Statement of Objects and Reasons of the Rajasthan Electricity (Supply) Amendment Bill, 1976 :

> Such special agreement or concessions in tariff were made several years ago by covenanting States and if they were allowed to continue, they would not cover the existing cost of generation, with the result that the burden of this cost would have to be passed over to other consumers.....

It was, therefore, expedient to amend the Act... so as to enable the Board to revise the contractual rates in order to cover the rising cost of generation from time to time, notwithstanding any special contract, undertaking or concession to the contrary.

30. We find it difficult to subscribe to the contention advanced by learned counsel for the appellants that Clause 18 is an escalation clause and therefore the Board's power to revise the rate of supply must be restricted to the actual rise in the component of cost of generation. As rightly pointed out by learned counsel appearing on behalf of the Board, an 'escalation clause' according to its accepted legal connotation means a clause which takes care of the rise and fall of prices in the market, whereas the right to review confers the power to revise the rate of supply. It is submitted that Clause 18 in terms provides that the rate of supply as determined in Clause 17 shall be 'reviewed every fifth year starting from the date of first supply'. The word 'review' in Clause 18 necessarily implies the power of the Board to have a second look and to so adjust from time to time its charges as to carry on its operations under the Act without sustaining a loss. The parties clearly contemplated by Clause 18 for a fresh revision of the rate once in a block of five years. The only fetter on the power of review is that contained in the proviso to Clause 18. The limitations placed on such power are twofold in nature. The first of these is that such power of review shall be exercisable if the component of cost of generation out of the total cost varies by 25% or more. The second is that such power shall not be exercisable by the Board till January 1, 1971. If the parties intended Clause 18 to be in the nature of an escalation clause, the language would have been different. In that event, the rate of supply being linked with the component of cost of generation would keep on progressively increasing. In support of his submissions, learned counsel for the Board referred to us Butterworths' Encyclopaedia of Forms and Precedents, 4th edn. vol. 3, p. 148, Hudson's Building & Engineering Contracts, 10th edn., Keating's Building Contracts, 4th edn., p. 498 and Black's Law Dictionary, 4th edn., p. 639 giving different forms of 'rise and fall' or escalator clause in building or commercial contracts and the accepted meaning thereof. The expression 'escalation clause' has a well defined meaning. This is brought out succinctly in American Jurisprudence, 2nd edn., vol. 17, p. 786 in these terms :

> In some contracts, there is what is known as an escalator or fluctuation clause, which is defined as one in which the contract fixes a base price but contains a provision that in the event of specified cost increases, the seller or contractor may raise the price up to a fixed percentage of the base, and such escalator clauses are generally held to be sufficiently definite for enforcement.

In Corpus Juris Secundum, vol. 17, p. 806, the law on the subject is stated thus :

> (A) contract giving one of the parties the right to vary the price is not unenforceable for lack of mutuality where the right is not an unlimited one, as where its exercise is subject to express or implied limitation, such as that the variation must be in proportion to some objectively determined base, or must be reasonable; and this rule has been applied to contracts containing so called "escalator" clauses.

These considerations however do not apply as on its true construction, Clause 18 cannot be regarded to be an escalation clause. There is therefore no basis for the submission that there could only be proportionate increase keeping in view the increase in the component of cost of generation.

The effect of Clause 34(b) of the Agreement

31. Turning next to Clause 34(b), the rival contentions may be set out. The appellants' contention is that firstly, the stipulation in Clause 34(b) cannot be regarded as a contractual stipulation at all and secondly, that in no case Clause 34(b) can possibly be made applicable to any purported alteration of contracting parties' rights for a past period by means of retrospective legislation. It was said that Clause 34(b) cannot be construed in a manner favourable to the Board; all that the parties contemplated was that the mutual rights and obligations would be subject to future legislations on supply and consumption of electricity but such legislations necessarily had to be valid legislations and if Clause 34(b) was to be treated as a contractual stipulation providing that the rights stipulated in the agreement were subject to any modification by any legislation, valid or invalid, Clause 34(b) will have to be struck down as a totally uncertain clause which cannot find place in any contract and such clauses have been described as meaningless terms in Anson's Law of Contract, 25th edn., p. 63 :

> Finally, we should note that if the contract contains an indefinite, but subsidiary provision, the courts have felt at liberty to strike it out as being without significance, and to give effect to the rest of the contract without the meaningless term.

32. The contention to the contrary on behalf of the Board is that a plain reading of Clause 34(b) makes the contract subject to any legislation. The right which the parties derived under the agreement for supply of electricity at a concessional rate under Section 49 of the Act was therefore defeasible. That being so, it would be as if Sections 49-A and 49-B of the Act had to be read into the contract and therefore became a contractual term. The submission is that the appellants derived a right to get electricity at a concessional rate only for a limited period till January 1, 1971 and thereafter the Board derived the power to revise the rate of supply under Clause 18. It was competent for the legislature to enact a law providing for application of uniform tariffs notwithstanding any such commitment, undertaking or concession to the contrary made during any period prior to April 1, 1964. There is, in our opinion, considerable force in the submissions advanced on behalf of the Board.

33. It is not uncommon for statutory contracts to contain a term like Clause 34(b) which makes the contract subject to future legislations. Such a clause can usually be found in forest or excise contracts relating to the grant of a privilege which subjects the mutual rights and obligations flowing from such a contract to be liable to be altered or modified by subsequent legislations. Although there was no such term in the Indian Aluminium Co. case ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967), even so, the court speaking through Bhagwati, J. observed : (SCC p. 427, para 16)

> (A) case may conceivably arise where there may be an overriding statutory provision which expressly or by necessary implication authorizes 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.....

34. On a plain construction of the terms of the agreement, the appellants were no doubt guaranteed the supply of electricity for a period of 20 years but the right to get the supply at the concessional rate was subject to the power of the Board to effect a revision of the rate of supply every fifth year starting from the date of first supply subject to the only restriction that such revision could not be effected before January 1, 1971. The Board's contention that the right of the appellants to the supply of electricity at a concessional rate under the agreement entered into by the Board with them under Section 49 of the Act was defeasible, is clearly well-founded and must be given effect to. It follows that the rights derived by the appellants under the contract were subject to the stipulation contained in Clause 34(b) which made the mutual rights and obligations of the parties subject to any legislation relating to supply and consumption of electricity enacted during the period of the agreement.

35. It was rightly contended on behalf of the Board that while the Board under the agreement had undertaken to supply the appellants 25 mw power for a period of 20 years, the concessional rate of supply was assured to them only till January 1, 1971 and could not be had forever. The scheme of the Act is that the Board is required to function without loss and to achieve the said purpose, the Board is vested with power to adjust its charges from time to time. There was no justification for the Board to give preferential treatment any longer to the appellants who were bulk consumers beyond January 1, 1971 as against all other large industrial consumers who were subjected to uniform tariffs under Schedule HS/LP/HT-1 under the Board's tariff notification dated April 26, 1969. Once it was found by the High Court that the component of the cost of generation out of the total cost as on the date of Board's tariff notification of April 26, 1969 had increased at least by 25%, the fetter on that power was removed and Board was entitled to demand payment according to the uniform tariff under Schedule HS/LP/HT-1 applicable to all large industrial consumers but for the agreement.

36. Under the restrictive covenant contained in Clause 18, such revision of rate could not be effected by the Board till January 1, 1971. Once the period was over, the Board was entitled to have a second look and taking an overall view when it found that it was no longer possible to supply electricity at the concessional rate which had no reasonable relation to the uniform tariff under HS/LP/HT-1 applicable to all large industrial consumers, it manifested its intention to review the rate of supply from January 1, 1971. The appellants knew that the review of the rate was due on January 1, 1971 as is clear from their letter dated December 5, 1970 by which they wanted to know the extent of increase and the basis therefor. In response thereto, the Board by its letter dated December 22/24, 1970 left them in no doubt. It was made clear to them by the Board that the uniform tariff under HS/LP/HT-1 framed by the Board's tariff notification dated April 26, 1969 would be applicable to

them as to all other large industrial consumers. This Board by its subsequent letter dated February 1, 1971 intimated its decision to charge uniform tariff at that rate from the billing month of January 1971 onwards, and the general surcharge of 15% thereon from July 1966 up to December 1970. At no stage, did the appellants contend that Clause 18 was an escalation clause and the rate should be increased in proportion to the rise in the cost of general. They only asserted that it should be 'reasonable' and the extent of increase determined.

37. On a fair construction of the terms of Clause 34(b) taken in conjunction with the conduct of the parties, the conclusion is irresistible that the parties had contemplated that the mutual rights and obligations under the contract would be subject to alteration by future legislation. That being so, Sections 49-A and 49-B of the Act have to be read into the contract and these provisions by virtue of Clause 34(b) became a contractual stipulation.

Whether the raising of demand for payment of difference between the uniform tariffs and the agreed rate was in disregard of the guiding principles contained in Section 49(3) contrary to the mandate of Section 49-A(2) of the Act.

38. Faced with the difficulty, learned counsel for the appellants contended that the Board in raising the impugned demands against the appellants for payment of charges according to the uniform tariffs framed under Section 49(1) of the Act from time to time, as per its letter of demand dated February 1, 1971 for payment of Rs 11.67.959.95 for the billing month of January 1971 onwards under Schedule HS/LP/HT-1 under the Board's tariff notification dated April 26, 1969 and its subsequent letter of demand dated March 12, 1976 for payment of Rs 21,35,506.72 for the billing month of February 1976 under Schedule LP/HT-1 under the Board's tariff notification dated May 28, 1974 purporting to act under Sections 49-A and 49-B of the Act read with Clause 18 of the agreement, had not any regard to the special circumstances on the basis of which the appellants set up its industry which required electricity at very reasonable rate in order to be able to sustain is operations. It is further urged that while Section 49-A of the Act might have enabled the Board to increase the special tariff applicable to the appellants even in disregard of the limitations imposed on such revision by Clause 18 of the agreement, the special position of the appellants' industry could not be totally disregard. In other words, while the concessions stipulated by the agreement under Section 49(1) of the Act could have been altered in proportion to the rise in the cost of generation, such concession could not have been altogether eliminated as that would amount to a total disregard of the guiding principles contained in Section 49(3) and thus contrary to the mandate of Section 49-A(2) of the Act. Sub-section (2) of Section 49-A further provides that in revising such tariffs or framing uniform tariffs as respects any period commencing on and from September 16, 1966 the Board shall be guided by the principles laid down in sub-sections (2), (3) and (4) of Section 49-A of the Act. A first blush, this argument plausible though it appears, is on closer scrutiny not well-founded. It ignores the rue object and purpose of the enactment and fails to give due effect to the provisions of Sections 49-A and 49-B of the Act with a retrospective effect which clothed the Board with power to make the uniform tariffs applicable to bulk consumers like the appellants who under agreements entered into with the Board on July 28, 1961 i.e. before April 1, 1964, the cut out date mentioned in sub-section (1) of Section 49-A had been to the great financial detriment of the Board enjoying a concessional rate of supply which had no relation to the existing cost of generation, with the result that the burden of this cost had to passed over to other consumers. As is clear from the Statement of Objects and Reasons of the Bill, the legislature thought it expedient to amend the Act so as to cover the rising cost of generation from time to time, notwithstanding any special contract, undertaking or concession to the contrary. The legislative mandate contained in Sections 49-A and 49-B of the Act as introduced by the Rajasthan Electricity (Supply) Amendment Act, 1976

subserves the public interest to ensure that the Board shall not, as far as practicable, after taking credit for any subvention from the State Government under Section 63, carry on its operations under the Act at a loss.

Power of the Board to unilaterally frame uniform tariffs under sub-section (1) of Section 49 of the Act in derogation of the agreement under Section 49(3)

39. Placing strong reliance on the decision of this Court in the Indian Aluminium Co. case ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967), learned counsel for the appellants drew our attention to various observations made by Bhagwati, J. during the course of his judgment laying down that under the scheme of the Act the Board could not unilaterally frame uniform tariffs under Section 49(1) of the Act in derogation of such agreements entered into under Section 49(3) and therefore was not competent to enhance the charges under the guise of fixing uniform tariffs because sub-section (1) of Section 49 is subject to sub-section (3) and, once special tariffs were fixed under sub-section (3), there could be no question of fixing uniform tariffs applicable to such consumers under sub-section (1) and that such a power could not be exercised in violation of the stipulation fixing special tariffs under sub-section (3). Emphasis was particularly laid on the observations of Bhagwati, J. in the Indian Aluminium Co. case ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967) where after referring to the earlier decision of this Court in Kalyan Borough Municipality case ((1968) 3 SCR 137 : AIR 1968 SC 991), the learned Judge observed that : (i) the cost was not the sole criterion in fixing tariffs under Section 49(1) and (ii) where the Board was under a contractual obligation not to charge under a stipulation validly made under Section 49(3) anything more than a specified tariff for a specified period, it would not be practicable for it to enhance its rates of charges even if it finds that it is incurring operational loss. That view expressed by the learned Judge proceeded on the hypothesis, to use his own words, that "Section 59 does not give a charter to the Board to enhance its charges in breach of its contractual stipulation". (SCC p. 429, para 18). We are afraid, the contention cannot prevail. Nor are the appellants entitled to any relief on the basis of the decision of this Court in Indian Aluminium Co. case ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967). The State legislature under Entry 38 of the Concurrent List was competent to enact the Rajasthan Electricity (Supply) Amendment Act, 1976 and introduce the impugned provisions contained in Sections 49-A and 49-B with retrospective effect to overcome the difficulty created by the decision of this Court in Indian Aluminium Co. case ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967). These provisions so enacted confer an enabling power on the Board to revise the tariffs from time to time notwithstanding any provision of the Act or any agreement, undertaking or concession to the contrary, and also to frame uniform tariffs with respect to the class of consumers enjoying special benefits under agreements entered into with the Board under Section 49 of the Act. There being a change in the law brought about by the introduction of Sections 49-A and 49-B of the Act by the Electricity (Supply) (Rajasthan Amendment) Act, 1976, the court is bound to give effect to these provisions notwithstanding anything contained in the Act or in any agreement, undertaking, commitment or concession to the contrary made by the Board before the first day of April 1964, or the decision of this Court in Indian Aluminium Co. case ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967).

Scope and effect of Sections 49-A and 49-B of the Act : Power of the Board to raise demands for payment of the difference between the uniform tariffs and the agreed rate with retrospective effect and the validation thereof

40. Turning next to the second aspect, question is whether the Board was entitled to recover from the appellants the difference between the uniform tariffs and the agreed rate for the supply of

electricity to them with retrospective effect by virtue of the powers derived under Sections 49-A and 49-B of the Act read with Clause 18 of the agreement. That depends on the construction of Sections 49-A and 49-B of the Act. The question pertains to two periods : (i) from January 1, 1971 to May 31, 1974 and (ii) from June 1, 1974 to February 6, 1976. According to its plain terms, Section 49-A has been structured in a manner to attain a twofold object. In the first place, the non obstante clause in sub-section (1) of Section 49-A has the effect of overriding the provisions of the Act and nullifying the judgment of the High Court and more particularly of this Court in Indian Aluminium Co. case ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967) which invalidated the framing of uniform tariffs by the Board under Section 49(1) with respect to consumers who were entitled to the supply of electricity at a special rate by virtue of the agreements entered into by the Board with them under sub-section (3) of Section 49 of the Act. Sub-section (1) of Section 49-A is clearly an enabling provision and makes it lawful for the Board not only to revise from time to time the tariffs applicable to such class of consumers but also to frame uniform tariffs applicable to them as respects any period commencing on and from September 16, 1966 i.e. the date when the new Section 49 was brought into force. Sub-section (2) thereof provides that in revising the tariffs or framing uniform tariffs, the Board shall be guided by the principles set out in Section 59. It further provides that as respects any period commencing on and from September 16, 1966, it shall also be guided by the principles laid down in sub-sections (2), (3) and (4) of Section 49. Such powers of revising the tariffs or framing uniform tariffs were exercisable notwithstanding anything contained in the Act or in any agreement, undertaking or concession to the contrary made by the Board before the first day of April 1964 or the judgment and order of any court. Sub-section (3) of Section 49-A provides that all such agreements, undertakings, commitments or concessions as are referred to in sub-section (1), shall, insofar as they are inconsistent with the provisions of sub-sections (1) and (2) and to the extent of the tariffs fixed or provisions made therein for such fixation be void and shall be deemed always to have been void. Secondly, sub-section (1) of Section 49-A as construed prospectively makes it lawful for the Board to revise the tariffs from time to time and to frame uniform tariffs with respect to such class of consumers on or after February 7, 1976, the date on which it was brought into force.

41. According to its plain language, the non obstante clause in sub-section (1) of Section 49-B has the effect of overriding the provisions of the Act or any agreement, undertaking or concession referred to in sub-section (1) of Section 49-A. The consequence that ensues is this, sub-section (2) of Section 49-B provides that any amount realized or demand made or created by the Board, according to the uniform tariffs in force from time to time, under Section 49 from or against any person claiming any special tariffs under any such agreement, undertaking, commitment or concession made before February 7, 1976, the date of promulgation of the Ordinance, contrary to the decision of this Court in Indian Aluminium Co. case ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967) or of the High Court, shall be deemed to have been validly realized, made or created under the Act. The appellants do not dispute their liability to pay uniform tariffs fixed from time to time as from February 7, 1976. The controversy is only with regard to their liability to pay uniform tariffs fixed from time to time for the past period and the extent of their liability.

Liability of the appellants to pay uniform tariffs framed by the Board from time to time under Section 49-A read with Section 49-B for the period prior to February 7, 1976 and the corresponding right of the Board to raise such demands

42. Shri Shanti Bhushan contends that Sections 49-A and 49-B were integrally connected and were intended and meant to achieve a joint purpose which was merely to validate such of the past actions of the Board as would have been valid if Section 49-A had already been in force at the relevant

time. He contends that if the Board's uniform tariff notifications dated May 18, 1964, April 26, 1969 and May 28, 1974 had not contained an exclusionary clause (3) set out above, for the exclusion of all consumers who were governed by specially negotiated tariff, any demand raised under Section 49-A of the Act on the basis of such uniform tariffs fixed from time to time prior to February 7, 1976 would have been validated under Section 49-B notwithstanding that the said demands when made were not authorized in view of the stipulations contained in the agreement. As to claim for the period from January 1, 1971 to May 31, 1974, the learned counsel urges that the Board is seeking to recover from the appellants charges for the supply of electricity as per normal tariff prescribed under the Board's notification dated April 26, 1969. As to this he mainly relies on the exclusionary clause (3) of the said tariff notification. As to the period from June 1, 1974 to February 7, 1976 for which the Board raised a demand for payment of the charges for the supply of electricity at normal tariff framed by the Board's notification dated May 28, 1974, apart from relying on similar exclusionary clause contained therein, he submits that the Board never made a demand on the appellants that they would have to pay for the supply of electrical energy at normal tariff as framed by the Board's tariff notification dated May 28, 1974. In fact, he submits that there was no letter sent by the Board to the appellants like the one dated December 22/24, 1970 by which it made a demand for payment of charges at uniform tariffs framed by the Board's tariff notification dated April 26, 1969. The learned counsel urges that as is clear from the terms of Section 49-B of the Act, the demand to be validated had to be raised prior to February 7, 1976 and not on a date subsequent thereto. He submits that it was therefore not open to the Board to make a demand from the appellants for payment of charges for the period commencing from June 1, 1974 and ending with February 6, 1976 according to the uniform tariff of 1974. There is, in our opinion, considerable force in the argument.

43. Dr Chitale tried to impress upon us that Section 49-A of the Act must after February 7, 1976, the date of promulgation of the Ordinance, operate on its own force and therefore the Board was entitled to raise demands at uniform tariffs under Schedule LP/HT-1 under the Board's tariff notification dated May 28, 1974 from that date till November 4, 1976 and thereafter as per the revised uniform tariffs as framed by the Board's notification dated November 4, 1976. As regards the past period i.e. as from January 1, 1971 to February 6, 1976 he contends that Section 49-A could still be had recourse to by the Board without the aid of Section 49-B. The submission proceeds upon the basis that the power of the State legislature to make a law under Entry 38 of List III of the Seventh Schedule carries with it the ancillary power to make a law with retrospective effect. It could therefore enact a provision like Section 49-A prescribing a rate of uniform tariff under Section 49(1) with retrospective effect as from January 1, 1971, notwithstanding anything contained in the Act or in any agreement, undertaking, commitment or concession to the contrary entered into by the Board after the first day of April 1964. We find it rather difficult to uphold the contention. The question does not really arise because the legislature has not framed a law for the imposition of uniform tariffs on consumers with retrospective effect. Section 49-A is primarily enacted to override the provisions of the Act or of any agreement, undertaking, commitment or concession to the contrary made by the Board or the government prior to the first day of April 1964 for the supply of electricity to consumers at a concessional rate relatable to Section 49(3) of the Act. That is the clear effect of the non obstante clause which removes the legal hurdle placed in the way of the Board framing uniform tariffs under Section 49(1) of the Act for such class of consumers. Sub-section (1) of Section 49-A provides that it shall be lawful for the Board to revise the tariffs from time to time and to frame uniform tariffs for the supply of electrical energy. The words 'it shall be lawful' used in Section 49-A(1) are essentially in the nature of conferment of a prospective power. Sub-section (2) thereof however further states that in revising or framing such tariffs under sub-section (1), the

Board shall be guided by the principles set out in Section 59 of the Act. It then goes on to say that as respects any period commencing on and from September 16, 1966 the Board shall also be governed by the principles laid down in sub-sections (2), (3) and (4) of Section 49-A. Sub-section (3) makes all such agreement, undertakings, commitments or concessions as are referred to in sub-section (1), insofar as they are inconsistent with the provisions of sub-sections(1) and (2) and to the extent of the tariffs fixed or provisions made therein for such fixation, be void and shall always be deemed to have been void. A combined reading of these provisions shows that the Board is relieved of the shackles of the contractual obligations flowing from the agreements relatable to Section 49(3), and the Board is empowered in terms of Section 49-A to revise the tariffs or frame uniform tariffs with respect to consumers enjoying special benefits as from September 16, 1966.

44. As already stated, the Board could not on the strength of Section 49-A alone recover the difference between the uniform tariffs fixed from time to time and the agreed rate of supply from the appellants for the period from January 1, 1971 to February 6, 1976 without the aid of Section 49-B. Section 49-B on its terms has no application unless there was a demand raised or created prior to February 7, 1976, the date of promulgation of the Ordinance. There is therefore insuperable barrier in applying the uniform tariff under Schedule LP/HT-1 framed by the Board's tariff notification dated May 28, 1974 from the billing month of July 1974 i.e. from June 1, 1974 to February 6, 1976. Although the uniform tariff under Schedule LP/HT-1 of 1974 was brought into force from the billing month of July 1974 i.e. with effect from June 1, 1974 the Board never intimated the appellants that they would have to pay charges for the supply of electricity to them at that rate. Undoubtedly, no letter like the one dated December 22/24, 1970 demanding payment of charges for the supply of electricity was however written by the Board to the appellants intimating them that they would be governed by the Schedule LP/HT-1 framed by the Board's tariff notification dated May 28, 1974. That being so, the appellants would now be liable for the period in question to pay charges at the uniform tariff as per Schedule HS/LP/HT-1 framed by the Board's earlier tariff notification dated April 26, 1969.

Liability to pay the general surcharge

45. That takes us to the question whether the Board had no power under the Act to levy a surcharge. The word 'surcharge' is not defined in the Act. Plainly, the word 'surcharge' means an additional or extra charge or payment : Shorter Oxford English Dictionary, p. 2199. As held by this Court in Bisra Stone Lime Co. Ltd. v. Orissa State Electricity Board ((1976) 2 SCR 307 : (1976) 2 SCC 167 : AIR 1976 SC 127) a surcharge is in substance an addition to the stipulated rates of tariff and enhancement of the rates by way of surcharge is well within the power of the Board to fix or revise the rates of tariff under the provisions of the Act. In the Indian Aluminium Co. case ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967), there was no provision in the agreement with regard to the revision of tariff, such as we find in Clause 18 of the agreement. We must however refer to the decision of this Court in Titagarh Paper Mills Ltd. v. Orissa State Electricity Board ((1975) 2 SCC 436) where the Court taking into consideration Clause 13 of the agreement therein which was in terms similar to Clause 18, had to consider the scope and effect of Sections 49 and 59 of the Act and following the decision in the Indian Aluminium Co. case ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967) stated : (SCC p. 443, para 8)

(N)either Section 49 nor Section 59 confers any authority on the Board to enhance the rates of supply of electricity where they are fixed under a stipulation made in an agreement. The Board has no authority under either of these two sections to override a contractual stipulation and enhance unilaterally the rates for the supply of electricity.

The Court accordingly in Bisra Stone Lime Co. case ((1976) 2 SCR 307 : (1976) 2 SCC 167 : AIR 1976 SC 127) held that the power of revision of rates of the Board under Section 49(1) and (2) as also under Section 59 of the Act remained under suspended animation during the subsistence of a statutory agreement entered into in conformity with Section 49(3) of the Act. But this pro tempore ban on revision of rates could only last till the legislature introduced Sections 49-A and 49-B of the Act empowering the Board to revise the rates and framed uniform tariffs with retrospective effect. This was constitutionally permissible as indicated by Bhagwati, J. in the Indian Aluminium Co. case ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967) in the passage quoted above.

46. The Board was therefore well within its rights in raising a demand by its letter dated February 1, 1971 that the appellants would be subject not only to uniform tariffs under Schedule HS/LP/HT-1 applicable to all large industrial consumers as from January 1, 1971 in terms of Clause 18 of the agreement but also be subject to the general surcharge of 15% for the period commencing on and from September 16, 1966, the date mentioned in sub-section (2) of Section 49-A. The general surcharge of 15% as also the uniform tariff were part of the general burden borne by all consumers alike. Whatever may have been the position under the old Section 49, the new section as substituted by the Amendment Act 30 of 1966, make it plain that the Board can fix uniform tariffs. The power to fix uniform tariffs must necessarily include power to make uniform increase in tariffs. Section 49-A had the effect of removing the Board from the shackles of the agreement to supply electricity at a concessional rate entered into under Section 49. The effect of the non obstante clause in sub-section (1) of Section 49-A was to nullify the agreement.

Subsidiary issues : Article 31(2)

47. Finally, there still remains the third aspect. Various subsidiary issues were raised, namely, whether the demand raised by the Board against the appellants for payment of the difference between the uniform tariffs and the agreed rate for the period subsequent to January 1, 1971 was violative of Article 14, Article 19(1)(f) and (g) and Article 31(2) of the Constitution. Of these, the main contention put forth by Shri Shanti Bhushan, is that the extinguishment of the right which the appellants had to get electricity at concessional rate for a period of 20 years which was enforceable against the Board as held in the Indian Aluminium Co. case ((1976) 1 SCR 70 : (1975) 2 SCC 414 : AIR 1975 SC 1967) by Section 49-A, and the conferral of a corresponding benefit to the Board to revise the tariffs from time to time and to frame uniform tariffs for supply of electricity to them as respects any period subsequent to September 16, 1966 (here we are concerned with the period subsequent to January 1, 1971), amounted to deprivation of property without payment of compensation and in contravention of Article 31(2). He goes to the extent of contending that the matter is concluded by the seven Judges' decision of this Court in the case of Madan Mohan Pathak v. Union of India ((1978) 3 SCR 334 : (1978) 2 SCC 50 : 1978 SCC (L&S) 103 : AIR 1978 SC 803) where the majority held that the concept of property in Article 31 is not a narrow concept and a p. 359 of the Report (SCC p. 71) accepted the view expressed by Hegde, J. in the Privy Purse case (H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bhadur v. Union of India, (1971) 3 SCR 9 : (1971) 1 SCC 85 : AIR 1971 SC 530) that any right which was enforceable through courts was property. We were referred to several passages in the judgment delivered by Bhagwati, J. to drive home the point that it was not necessary for the law to provide in so many words that property was transferred to the State or to a corporation owned or controlled by the State for attracting the provisions of Article 31(2) and particular emphasis was laid on the following observations : (SCC p. 80. para 20)

Where by reason of extinguishment of a right or interest of a person, detriment is suffered by him,

and a corresponding benefit accrues to the State, there would be transfer of ownership of such right or interest to the State. The question would always be : who is the beneficiary of the extinguishment of the right or interest effectuated by the law ? If it is the State, then there would be transfer of ownership of the right or interest to the State, because what the owner of the right or interest would have lost by reason of the extinguishment would be the benefit accrued to the State.

48. The Court observed in M.M. Pathak case ((1978) 3 SCR 334 : (1978) 2 SCC 50 : 1978 SCC (L&S) 103 : AIR 1978 SC 803) that the direct effect of the impugned Act was to extinguish or put an end to the debts due from the Life Insurance Corporation to class III and class IV employees. This was not disputed on behalf of the Life Insurance Corporation and the controversy was whether the extinguishment of these debts involved any transfer of ownership of property to the Life Insurance Corporation. It was conceded by the learned Attorney-General on behalf of the Life Insurance Corporation as a proposition of law that an illegal deprivation of a pecuniary benefit to which any person is entitled under any law amounts to deprivation of property within the meaning of Article 31(2). He however sought to make a distinction between extinguishment and transfer of ownership of a debt and contended that when ownership of a debt is transferred, it continues to exist as a debt in the hands of the transferee, but when a debt is extinguished it ceases to exist as a debt and it is not possible to say that the debtor had become the owner of the debt. In dealing with contention, the court observed at p. 368 of the Report (SCC p. 80), that where by reason of extinguishment of a right or interest of a person, detriment is suffered by him, and a corresponding benefit accrues to the State, there would be transfer of ownership of such right or interest to the State. The court stated that the question would always be : who is the beneficiary of the extinguishment of the right or interest effectuated by the law ? If it is the State, then there would be transfer of ownership of the right or interest to the State, because what the owner of the right or interest would have lost by reason of the extinguishment would be benefit accrued to the State. It referred to the view expressed by Hegde, J. in State of M.P. v. Ranojirao Shinde ((1968) 3 SCR 489 : AIR 1968 SC 1053) that it was possible to view the abolition of cash grants under the Madhya Pradesh law impugned in that case as a statutory transfer of rights of the grantees to the State and extended the same principle in judging the validity of Section 3 of the impugned Act, and added : (SCC pp. 80-81, para 20)

(W)hen a debt due and owing by the State or a corporation owned or controlled by the State is extinguished by law, there is transfer of ownership of the money representing the debt from the creditor to the State or the State owned/controlled corporation... The extinguishment of the debt of the creditor with corresponding benefit to the State or State owned/controlled corporation would plainly and indubitable involve transfer of owned ship of the amount representing the debt from the former to the latter. This is the real effect of extinguishment of the debt and by garbing it in the form of extinguishment, the State or State owned/controlled corporation cannot obtain benefit at the cost of the creditor and yet avoid the applicability of Article 31 clause (2).

The court also observed that the verbal veil constructed by employing the device of extinguishment of debt cannot be permitted to conceal or hide the real nature of the transaction.

49. We fail to appreciate the relevance of the decision in M.M. Pathak case ((1978) 3 SCR 334 : (1978) 2 SCC 50 : 1978 SCC (L&S) 103 : AIR 1978 SC 803) to the instant case. The fallacy underlying the argument is that it proceeds on the assumption that there is by reason of Sections 49-A and 49-B of the Act an illegal deprivation of any pecuniary benefit to which the appellants were entitled and the extinguishment of the right they had to the supply of electricity at concessional rate for a period of 20 years in accordance with the agreement amounted to a deprivation of property

within the meaning of Article 31(2) of the Constitution. While it is true that the concept of 'property' in Article 31 is not a narrow concept and is used in a comprehensive sense, any legal right which can be enforced through a court is a right in the nature of property within the meaning of Article 31.

According to the Court in M.M. Pathak case ((1978) 3 SCR 334 : (1978) 2 SCC 50 : 1978 SCC (L&S) 103 : AIR 1978 SC 803) : Even an actionable claim is "property" in Article 31 and can be compulsorily acquired under clause (2) thereof." But it is not necessary to enter upon the controversy whether the State's power of acquisition of property under Article 31(2) extends to chooses of action for purposes of this case. All that we need notice is that the majority in M.M. Pathak case ((1978) 3 SCR 334 : (1978) 2 SCC 50 : 1978 SCC (L&S) 103 : AIR 1978 SC 803), accepted the view of Hegde, J. in the Privy Purse case (H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bhadur v. Union of India, (1971) 3 SCR 9 : (1971) 1 SCC 85 : AIR 1971 SC 530) that any right which was enforceable through courts was 'property', but it does not logically follow that the extinguishment of the right to get electricity at concessional rate by reason of Sections 49-A and 49-B of the Act for the period subsequent to January 1, 1971 necessarily attracted Article 31(2). All that the appellants had under their contract with the Board was a defeasible right by reason of Clause 34(b) of the agreement as pointed out by us above. The appellants had contracted themselves by Clause 34(b) to be subject to any subsequent legislation. All that Section 49-A of the Act does is to strike at the agreement between the parties. It is an enabling provision and empowers the Board to revise the tariffs from time to time and to frame uniform tariffs for supply of electricity to a class of consumers enjoying special benefit under agreement entered into under Section 49(3). The Board undoubtedly was competent to review the tariff in terms of Clause 18 of the agreement as from January 1, 1971. Section 49-A liberates the Board from the constraints of the agreed rate under the agreement entered into by the Board with the appellants under Section 49 of the Act and empowers the raising of demand according to the uniform tariffs. Here, there was no debt due or owing to the State or a corporation owned or controlled by the State.

50. Where a law does not, in reality, affect a transfer of ownership or possession, Article 31(2) cannot be attracted. In order to constitute acquisition within the meaning of Article 31(2), there must be transfer of ownership of property to the State or to a corporation owned or controlled by the State. Clause (2)(A) to Article 31 introduced by the Constitution (Fourth Amendment) Act, 1955 made clear what was meant by 'acquisition or requisitioning' within the meaning of clause (2). Unless the taking of property had taken place in either of the two ways, there was no obligation to pay compensation under the Constitution. It can hardly be suggested that the extinction of the right the appellants had under the contract with the Board to get electric supply at a concessional rate under Clause 18 of the agreement for the period after January 1, 1971 when revision of tariff was due under Clause 18 thereof, amounted to acquisition of property under Article 31(2). Further, there was no question of any transfer of money representing any debt owed by the Board from the appellants which stood extinguished by reason of Sections 49-A and 49-B of the Act. We are clearly of the opinion that the principles laid down in M.M. Pathak case ((1978) 3 SCR 334 : (1978) 2 SCC 50 : 1978 SCC (L&S) 103 : AIR 1978 SC 803) are in no way attracted to the present case.

Article 14

51. The contention based on Article 14 and Article 19(1)(f) and (g) need not detain us for long. Taking up the contention that the raising of demand by the Board by its letter dated February 1, 1971 for Rs 11,67,959.95 at normal tariff for the billing month January 1971 under Schedule HS/LP/HT-1 applicable to all large industrial consumers as per the Board's tariff notification dated April 26, 1969 together with general surcharge of 15% thereon, and by its letter dated March 12,

1976 for Rs 21,35,506.72 at normal tariff for the billing month February 1976 under Schedule LP/HT-1 applicable to such large industrial consumers framed by the Board's tariff notification dated May 28, 1974 together with general surcharge of 15% thereon, was violative of Article 14 and therefore constitutionally impermissible inasmuch as the public sector undertakings in the State like the Hindustan Zinc Limited and Hindustan Copper Limited which were similarly circumstanced were not subjected to any such liability and such differential treatment was without any reasonable classification. The contention must be rejected at the very threshold. There is no averment made by the appellants in any of the petitions filed before the High Court that while the Board purported to raise or create demands as against the appellants for payment of the difference between the uniform tariffs and the agreed rate as respects the period beginning from January 1, 1971 by making the uniform tariffs of 1969 and 1974 applicable to them together with the general surcharge of 15% thereon, the large public sector undertakings viz. the Hindustan Zinc Limited and the Hindustan Copper Limited were allowed the privilege of a concessional rate for the supply of electricity to them by virtue of agreements entered into under Section 49. On the contrary, the Board in its counter-affidavits specifically pleaded that all large industrial undertakings with capital investments several times more than that of the appellants were paying for the supply of electricity at the normal tariff. The Board particularly gave the instances of the two public sector undertakings Hindustan Copper Ltd. and Hindustan Zinc Ltd., which were both industries controlled by the Government of India and were taking heavy loads with huge investments, were paying at the normal tariff. For instance, Hindustan Copper Ltd. whose investments were to the tune of over Rs 100 crores were paying for the consumption at the normal tariff although the load of the industry was 31,000 KVA comparable with the load of the industry set up by the appellants which was 29,412 KVA. The same was the case with Hindustan Zinc Ltd. We may set out the relevant averment which goes thus :

> It is wrong to say that April 1, 1964 has been appointed as the date to give any benefit to any corporation owned or controlled by the Central Government. So far as the corporations controlled by the Central Government are concerned, it is submitted that Hindustan Copper, which is equally a large consumer as the petitioner company, did not get any supply of electricity at a rate different from what is fixed by the uniform tariff. As for the other concern namely Hindustan Zinc, it was commissioned in January 1968 and ever since it was charged at the uniform tariff framed in 1964 plus general surcharge of 15% imposed in 1966. No concession was given to it at the time when it started functioning. The only concession given was that in 1969 when the rates were revised, the revised rates were not applied to Hindustan Zinc and it was continued to be charged at the uniform tariff of 1964 plus 15% surcharge till April 1974. Since May 1974 the increased tariff of 1969 was applied to Hindustan Zinc also and the new tariff of 1974 ever since its coming into force is applied to it. It is, therefore, absolutely incorrect to say that April 1, 1964 is fixed in order to give any benefit to the corporations controlled by the Central Government because Hindustan Zinc started production sometime in 1968 and Hindustan Copper much later. The date April 1, 1964 is therefore more reasonable being the date on which the uniform tariffs were framed by the Board.

The Board further averred that apart from these two corporations there are several other industries controlled by the Central Government or the State Government commissioned after April 1, 1964, and all these industries were paying at the normal tariffs fixed by the Board from time to time.

52. The argument of differential treatment is an argument of despair. The Board has averred that there is one grid which is fed from supplies from different sources whether thermal, hydel or atomic

and it was impossible to say what power came from which source. In 1971 the Atomic Power Project started to supply power and the Board was being billed at the rate of about 14 p. per unit. Later on, due to the breakdown of this source the Board had to purchase large quantum of electricity from various other sources at a cost falling between 18 to 19 p. per unit. This was done in order to maintain the supply of electricity to the consumers in the State, including the appellants. It is evident that the cost of generation in the grid was far higher than the concessional rate of 3 p. per unit at which the appellants were getting the supply. As a result the Board was incurring very heavy losses on account of this low rate for a large bulk consumption. It would have been unreasonable for the Board not to have applied the uniform tariffs to the appellants as from January 1, 1971 when the Board derived the power to revise the rate under Clause 18 of the agreement. The Board by its letter dated December 22/24, 1970 after drawing the attention of the appellants to Clause 18 of the agreement, intimated that they would be charged as from January 1, 1971 at the normal tariff Schedule HS/LP/HT-1 framed by the Board's tariff notification dated April 26, 1969 plus 15% general surcharge thereon. It was stated that the component of cost of generation had been worked out in the office of the Board and it was higher than 25% of the cost fixed at the time of the execution of the agreement, as detailed therein. The component of cost of generation during the year 1969-70 was 5.17 p./kwh. This, we are informed, works out to 7.67 p. per unit without the generation surcharge of 15% and to 8.73 p. per unit including the surcharge. The concessional rate as stipulated in Clause 17 of the agreement was more or less 3 p. per unit. The uniform tariff of 1969 works out approximately to 7.67 p. per unit, the uniform tariff of 1974 at 14.64 p. per unit, the uniform tariff of 1976 at 16.01 p. and the uniform tariff of 1978 at 18.83 p. The appellants were thus practically getting their electricity free of all charge. Even the uniform tariff under HL/LP/HT-1 was very much less than the price at which the Board was getting its supply. In the premises, there was no reason why the appellants should not be treated alike with all other large industrial undertakings which were all subjected to payment of the uniform tariffs fixed from time to time. The contention based on Article 14 must therefore fail.

Article 19(1)(f) and (g)

53. The next contention based on Article 19(1)(f) and (g) cannot obviously prevail. The present case concerns only with sale of goods i.e., electricity and the price to be paid therefor, for 'tariff' is nothing but the price. The contract itself provided for revision of the rate under Clause 18 of the agreement after January 1, 1971. The Board was within its powers in applying the uniform tariffs to the appellants after the period stipulated for had expired. There was nothing unreasonable for the Board to have enforced the uniform tariffs as against the appellants as from January 1, 1971. Reasonableness of the increase in tariff is established by the fact that the Board was not bound to supply electricity to the appellants at a concessional rate by incurring operational losses beyond that date. The appellants have not shown nor produced any material to show that they have suffered any loss on account of the increase in tariff. A grievance was made on behalf of the Board that the appellants had not despite repeated requests produced the balance-sheets to show how the increase in tariff made serious inroads on their business. At the hearing before us, learned counsel for the appellants placed the annual reports of the Delhi Cloth & General Mills Ltd. for the years 1978-79 to 1983-84, and the profit and loss account of Messrs Shriram Vinyl & Chemical Industries from the years 1965-66 to 1982-83. In these reports it is stated that the claim of the Board for payment of the difference between the uniform tariffs and the agreed rate had been upheld by the High Court and that the Company had preferred appeals before this Court. It is further stated that in compliance with this Court's interim order directing them to pay Rs 3 crores on account of the difference in five quarterly instalments commencing from December 1980, it had paid the instalments as directed which were debited to the Profit and Loss Account and treated as allowable deduction for

computing the provision for taxation in the respective earlier years. It is also stated that as at June 30, 1984 there was an unprovided liability on this account of 12 crores 16.44 lakhs which includes interest of 5.09 crores. A memorandum of hypothecation had been executed creating a charge on the whole of the movable plant, machinery and equipment of the PVC plant at Kota in favour of the Board for an amount of Rs 4.57 crores for which Rs 60.92 lakhs in fixed deposit accounts with the banks had been given as security. The Profit and Loss Account of the PVC plant at Kota, it is stated in footnote 4 : From the year 1980-81, 100% payment to RSEB has been made on the basis of uniform tariff, under orders of the Supreme Court. There is nothing to show that the appellants had not the capacity to bear the burden of uniform tariffs. It cannot be said that the impugned demands made by the Board as against the appellants were confiscatory in nature. When all the large industrial undertakings including the public sector undertakings of the Government of India and the State Government were paying for the supply of electricity at uniform tariffs fixed from time to time, the appellants had no right to claim immunity from it.

Promissory estoppel

54. Question of promissory estoppel does not really arise and, in our opinion, rightly not pressed. The appellants have laid no foundation in the pleadings for application of the doctrine of promissory estoppel. There is no question of any estoppel against the Board in as much as the appellants did not open their PVC plant on account of any assurance or promise by the Board. The opening part of the agreement itself shows that the appellants approached the Board for supply of high tension power for their industrial complex and the Board complied with the request. There was thus no question of any promise. Even otherwise, the appellants have not made out that but for the statutory contract for supply of electricity at a concessional rate under Section 49 they would not have established their industry. It is significant to note that there were number of incentives offered by the State Government to entrepreneurs to set up their industries in the State, such as, land at concessional rates, reduced development charges, facilities of railway siding free of cost and free of rent, reduced charges for industrial water, special arrangement regarding disposal of effluents, loan for subsidiary housing schemes, etc. In any event, the Board is not the government and the appellants cannot rely on promissory estoppel for the incentives offered by the government.

55. To sum up : (1) By virtue of the provisions contained in Sections 49-A and 49-B of the Electricity (Supply) Act, 1948 as introduced by the Electricity (Supply) (Rajasthan Amendment) Act, 1976, it was lawful for the Rajasthan State Electricity Board to revise the special rate of tariff agreed upon and to raise a demand against the appellants by its letter dated February 1, 1971 for payment of the difference between the uniform tariff under Schedule HS/LP/HT-1 applicable to all large industrial consumers under the Board's tariff notification dated April 26, 1969, and the concessional rate in terms of Clause 18 of the agreement between the parties dated July 28, 1961 for the period from January 1, 1971 up to February 6, 1976 i.e. the date of promulgation of the Electricity (Supply) (Rajasthan Amendment) Ordinance, 1976, as also the general surcharge of 15% thereon levied by the Board by its tariff notification dated April 26, 1969 as from September 16, 1966 onwards. (2) The Board's letter dated March 12, 1976 being subsequent to the date of promulgation of the Ordinance, the demand raised by the Board for payment of the revised uniform under Schedule LP/HT-1 applicable to all such large industrial consumers under the Board's tariff notification dated May 28, 1974 purporting to act under Sections 49-A and 49-B of the Act read with Clause 18 of the agreement, was not validated by Section 49-B and therefore the Board was only entitled to recover uniform tariff at the same rate i.e. under Schedule HS/LP/HT-1 of 1969 for the period from July 1, 1974 to February 6, 1976, that is, prior to the date or promulgation of the Ordinance. (3) The Board was entitled by the terms of Section 49-A to raise a demand for payment

of the revised uniform tariff under Schedule LP/HT-1 of 1974 w.e.f. February 7, 1976 and thereafter as per the revised uniform tariffs framed from time to time as applicable to all large industrial consumers in terms of Clause 18 of the agreement. All other contentions viz. that the impugned demands were violative of Article 14, Article 19(1)(f) and (g) and Article 31(2) of the Constitution stand rejected.

56. In that view of the matter, the bill furnished by the Rajasthan State Electricity Board dated March 12, 1976 requiring the appellants to pay an amount of Rs 21,35,506.72 for the billing month of February 1976 at the revised uniform tariff under Schedule LP/HT-1 framed by the Board's tariff notification dated May 28, 1974 together with the general surcharge of 15% must be quashed, and the Board shall instead raise a fresh demand on the appellants to pay uniform tariff under Schedule HS/LP/HT-1 framed under the Board's tariff notification dated April 26, 1969 for the period from July 1, 1974 to February 6, 1976 together with 15% general surcharge thereon. It is declared that the Board was entitled under Section 49-A of the Act to raise a demand against the appellants for payment of the revised uniform tariff under Schedule LP/HT-1 of 1974 w.e.f. February 7, 1976 and thereafter as per the revised uniform tariffs, framed from time to time, as applicable to all large industrial consumers together with the general surcharge of 15% thereon in terms of Clause 18 of the agreement.

57. The result therefore is that all the appeals, except C.A No. 2675/80, must fail and are dismissed. Civil Appeal No. 2675/80 arising out of the judgment and order of the Division Bench of the High Court dated September 12, 1980 dismissing S.B. Writ Petition No. 8579/80 filed by the appellants challenging the validity of the aforesaid bill dated March 12, 1976 sent by the Rajasthan State Electricity Board for payment of Rs 21,35,506.72 for the billing month of February 1976 is partly allowed. The said writ petition is allowed to the extent that the bill for payment of Rs 21,35,506.72 for the billing month of February 1976 at the revised uniform tariff under Schedule LP/HT-1 of 1974 is quashed for the reasons stated above. It is however, declared that the Rajasthan State Electricity Board is empowered in terms of Section 49-A of the Electricity (Supply) Act, 1948, as introduced by the Electricity (Supply) (Rajasthan Amendment) Act, 1976 to raise a fresh demand for payment under Schedule HS/LP/HT-1 of 1969 for the period from July 1, 1974 to February 6, 1976. It is further declared that the Board is entitled to recover from the appellants charges under Schedule LP/HT-1 of 1974 as from February 6, 1976 and thereafter as per the revised uniform tariffs, framed from time to time, as applicable to all large industrial consumers together with the general surcharge of 15% thereon in terms of Clause 18 of the agreement.

58. The appellants having substantially failed must pay two-thirds of the costs of these appeals to the Rajasthan State Electricity Board. The State of Rajasthan will bear its own costs.

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