M/S. Indian Metals and Ferro Alloys Ltd. and Another

Vs

State of Orissa and Others

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Orissa State Electricity Board and Another

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State of Orissa and Others

Writ Petition No. 1753 and SLPs (C) Nos. 13848-49, 14173-74 and 14923-24 of 1986

(G. L. Oza, V. B. Eradi JJ)

06.05.1987

JUDGMENT

BALAKRISHNA ERADI. J. -

1. M/s. Indian Metals and Ferro Alloys Ltd. - the petitioner in Write Petition No. 1753 of 1986 and SLP (C) Nos. 14923-14924 of 1986 is public limited company incorporated under the Indian Companies Act which is engaged, inter alia, in the manufacture of ferro silicon and silicon metal which are said to be a valuable raw material used by the Defence establishments in India and also exported out of the country. The second petitioner in the aforesaid writ petition and special leave petitions is the Managing Director of the Company. The company has installed three units namely, 11 KV, 33 KV and 132 KV furnaces in which it is manufacturing ferro alloys and silicon metal in a composite industrial complex in a place called Therubali in the State of Orissa. The company has also a subsidiary by name M/s. India Metal and Carbide Ltd. engaged in the manufacture of silicon carbide and it a factory is also situated in the same industrial complex. All the four units utilise electricity as raw material and they are, therefore classified as 'power intensive industrial units' - the four units shall hereinafter be referred to as "11 KV IMFAL", "33 KV IMCL", 11 KV IMFAL", and "132 KV IMFAL". The company has entered into separate agreements with the Orissa State Electricity Board (hereinafter called the 'Board') for supply of electric energy to these four different units and the rates of tariff to be charged for such supply. The agreement in respect of 11 KV IMFAL was entered into initially on April 3, 1967 and subsequently renewed on August 1. 1983 that

in respect of 33 KV IMFAL on January 2, 1974 and the agreement for supply of 11 KV IMCL was entered into on January 28, 1975. The agreement in respect of supply of energy to 132 KV IMFAL was entered into on December 4, 1982. These agreements show that the Board had agreed to supply 78. 8 MU for 11 KV IMFAL unit for the manufacture of silicon metal/charge chrome by the company, 197.1 MU for the 33KV IMFAL unit for the manufacture of ferro silicon/silicon metal, 15.8 MU for the 11 KV IMCL for the manufacture of silicon carbide and 262.8 MU for the 132 KV IMFAL unit for the manufacture of charge chrome/ferro silicon/silicon metal. As already indicated, all the above furnaces of the company are located in the same complex and are adjacent to one another. The tariff fixed for supply of the energy to the first there units is the same and that for the 132 KV IMFAL is 0.5 paise less per unit.

2. Supply of energy was made to the company regularly as per the agreements in respect of the first three units till the year 1979-80. The unit of time of supply of electricity adopted by the Board is the 'water year' which commences on July 1 of a year and ends with June 30 of the succeeding year. In the year 1979-80, the State of Orissa resorted to power cuts on account of non-availability of sufficient power in the State to meet in full the requirements of the various categories of consumers. It accordingly passed orders allocating restricted quotas of power to the four units of the company for the water year 1979-80. This order however, permitted the clubbing of the electricity supplied to the 11 KV IMFAL, 33 KV IMFAL, 11 KV IMCL furnaces of the company. The 132 KV IMFAL furnace of the company had not been commissioned at that time. The aforesaid position continued for the water years 1981-82 and 1982-83.

3. The company's 132 KV IMFAL furnace was commissioned on February 20, 1983 but the agreement of supply of energy to this unit had been executed on December 4, 1983 itself. On July 16, 1983, the company addressed a letter to the Board requesting the facility of clubbing of the power allocated to its four furnaces for the water year 1983-84. By a teleprinter message dated August 4, 1983 sent by the Chief Engineer of the Board to the Superintending Engineer, Talcher, it was intimated the IMFAL and IMCL may be permitted to draw the power allotted to the four units taken together as requested by the company in its letter dated July 17, 1983, subject to the condition that the company's drawal of power at its 132 KV IMFAL furnace in excess of the allotment of the said unit shall be made at the tariff applicable of the supply at 132 KV IMFAL. It was also made clear that the said order will be effective from July 16, 1983, that being the date of the company's letter of request. Pursuant to the above permission the company clubbed the supply of power to all its units for the water year 1983-84. On July 23, 1984, the Chief Engineer addressed a letter to the company informing the latter that with effect from July 1, 1984 the drawal of power by the company against the different units will be regulated separately and as such the company was requested to limit its drawal for the different units as per the allotment indicated in that letter with effect from July 1, 1984; in other words, the facility of clubbing was withdrawn by the said letter with effect from July 1, 1984. On July 2, 1984, the company wrote to the Broad pointing out the hardship involved in the denial of the facility of clubbing and requesting for permission to club the energy for all the four units for the water year 1984-85. In reply thereto the Chief Engineer of the Board sent a communication dated July 12, 1984 informing the company as follows :

> # Orissa State Electricity Board BhubaneswarNo. Com-V- /4238 Dated July 12, 1984From Sri N. K. Das, Chief Engineer and Member (TDC)To M/s. Indian Metals and Ferro Alloys Ltd., Bomikhlal, P.O. Rasulgarh, Bhubaneswar-751 010 Sub : Restriction in power supply Ref : Your letter No. 82/12/01-Exp. 130 dated July 2, 1984Dear Sirs,As requested in your letter cited above, you are permittedto draw 22.64 MW average and 27.75 MW peak from July 1, 1984 toJuly 31, 1984 for

> IMFAL (11 KV, 33 KV and 132 KV) and IMCL,Theruvalli taken together subject to the condition that drawal at10.80 MW average and 13.501 MW peak shall be billed at the tariffapplicable to power supply at 11KV/33 KV. This will be revisedin October 1984.In case your drawal exceeds the energy and / or the demandas indicated above, you will be liable to pay at double thenormal tariff rate. Yours faithfully, Sd/- Chief Engineer and Member (TDS)##

4. One of the points raised before this Court relates to the correct construction to be placed upon this letter. We shall avert to that aspect later on. For the present, it is sufficient to mention that on the basis of the said letter the company was permitted to club the power supply made to its four units from July 1984 onwards and the bills for the period from July 1984 to December 1984 were drawn up by the Board and served on the company on the basis that the company was entitled to the benefit of clubbing in respect of the power allotted to the four units. Though the letter stated that the position would be subject to revision in October 1984, no revision was effected till December 1984 and the company continued to enjoy the benefit of clubbing till the end of the calendar year.

5. However, on December 11, 1984, the Chief Engineer to the Board wrote to the company stating into alia that the combined drawal of power for purposes of flexibility of operation had been permitted to the company at its request only for the month of July 1984 by the Board's letter dated July 12, 1984 and the clubbing could no longer be permitted since power supply to 132 KV IMFAL which was a 100 per cent 'export-oriented industry' was to be regulated separately for purposes of energy allocation. It may be mentioned at this stage that in the agreement entered into regarding supply of power to the 132 KV IMFAL unit, there was no mention whatever of the fact that the said unit was a 100 per cent export-oriented industry. It was treated only as a 'power intensive industry' just like the other three units of the company. The aforesaid letter was followed by another communication addressed by the Chairman of the Board to the company stating inter alia as follows :

> Since it has been decided by the government to treat allotment of power to 100 per cent export-oriented industries separately, allotment of power to your 100 per cent export-oriented unit at 132 KV cannot be permitted to be utilised for other purposes unless specific government permission is necessary for the same. As you are aware, the allocation of power for IMFAL 11 KV, IMFAL 33 KV and IMCL had been combined together for the purpose of flexibility in operation and hence you should have no difficulty regarding the same.

6. It will thus be seen that the sole reason given for refusing the facility of clubbing to the company was that the State Government had taken a decision that 100 per cent export-oriented industries should be treated separately for the purposes of power allocation. Significantly, no statutory order of the State Government incorporating such a policy decision has been placed on record either before the High Court or before this Court.

7. It is worthy of note that the scheme of according special priority and preferential treatment to 100 per cent export-oriented industries in the matter of supply of electric energy was evolved the Government of India for the first time only in June 1983 and it was implemented only in 1984-85. All that the said scheme envisaged was to provide for supply of additional power to such export-oriented industries in the event of their satisfying certain conditions relating to their export performance.

8. On January 22, 1985, the State of Orissa issued an order under Section 22-B of the India Electricity Act (hereinafter called the 'Act') directing the Board to reduce supply of energy so as to allow the consumers to avail of the supply only to the extent specified in the Annexure to the said order. All the four units of the company were shown in the Annexure under the classification "power intensive industries". The 11 KV IMFAL, 33 KV IMFAL and 11 KV IMCL were together allotted 57.60 million Kwh and the 132 KV IMFAL was separately allotted 52056 million Kwh. There was a note to the order which was in the following terms :

> Every hundred per cent export-oriented unit will, however, be provided additional supply of energy if :
>
> (i) It exported not less than 95 per cent of its entire production during the preceding year or made no internal sale during the same period.
>
> (ii) It has export commitment from foreign buyers for at least 95 per cent of the production during the current year.
>
> (iii) It obtains specific recommendations of the Union Commerce Ministry regarding its export performance during the previous year and export commitment during the current year.

9. The aforesaid order was to be effective from the commencement of the water year 1984-85, i.e. from July 1, 1984. As already stated, the petitioner-company had been permitted to enjoy the benefit of clubbing from July 1984 till the end of December 1984 on the basis of the permission granted as Board's letter dated July 12, 1984 and the bills issued to the company for the said period were all on the basis that it was entitled to club the supply allotted to it in respect of the four different units. After the promulgation of the order dated January 22, 1985, grouping together only the three units of the company other than 132 KV IMFAL unit, the Board served revised bills on the company on July 8, 1985 demanding payment at the higher tariff rate for the period from October 1984 to June 1985 on the basis that there had been alleged excess drawal by the company due to clubbing.

10. Aggrieved by the said action taken by the Board the company filed Writ Petition No. OJC 1549 of 1985 in the High Court of Orissa challenging the order dated January 22, 1985 passed by the State Government in purported exercise of its powers under Section 22-B of the Act, as also the letter dated January 24, 1985 of the Board refusing clubbing for the entire water year 1984-85. Besides seeking the quashing of the aforesaid letter as well as the revised bills of the higher tariff issued to the company on July 8, 1985, the company also sought a writ of mandamus directing the Board and the State Government to permit clubbing for the water year 1984-85 as well as the future years. In the counter-affidavit filed by the State of Orissa the stand taken by the State was that clubbing had been allowed to the company by the Board temporarily for the month of July 1984 only during the water year 1984-85. It was further contended that the power allotted to the 132 KV IMFAL furnace could not be allowed to be clubbed with that allotted to the other three units since the 132 KV IMFAL furnace was a 100 per cent export-oriented unit and, therefore, it had to be treated separately for the allocation of power.

11. While the aforesaid writ petition was pending, the State Government passed another order dated August 31, 1985, effecting allocation of power under Section 22-B of the Act for the water year 1985-86. On October 11, 1985, the company was served with a notice of disconnection by the Board for non-payment of the bills prepared at the higher tariff rate for the month of August 1985. It may

be mentioned at this juncture that the High Court of Orissa by an interim order passed in the Writ Petition No. OJC 1549 of 1985 had stayed the demand made by the Board as per the revised bills for the months of October 1984 to June 1985 and had directed the Board not to take any action to disconnect power supply to the petitioner-company. The notice dated October 11, 1985 was apparently issued by the Board on the basis that it was in respect of the subsequent water year covered by the government order dated August 31, 1985.

12. Aggrieved by the said notice dated October 11, 1985, the company filed another Writ Petition - OJC No. 2496 of 1985 in the High Court of Orissa challenging the government's order dated August 31, 1985 passed for the water year 1985-86 and praying for identical reliefs in the previous writ petition regarding directions to allow clubbing for all the four furnaces. In the counter-affidavit filed by the State of Orissa in this writ petition also the only reason given for refusal to allow the benefit of clubbing to the company's 132 KV IMFAL furnace was that the said unit being a 100 per cent export-oriented unit had to be treated separately for the purpose of power allocation.

13. On December 12, 1985, the High Court passed an interim order in the aforesaid writ petition directing the State Government to dispose of the company's application dated November 9, 1985 wherein the company had requested for being allowed the benefit of clubbing of the power allotted for all the four furnaces for the water year 1985-86. On December 18, 1985, the State Government through its Deputy Secretary wrote a letter to the company stating as follows :

Sir,

In inviting a reference to your letter No. Proj. - 4103/1920 dated November 9, 1985 on the subject noted above I am directed to say that after due consideration, government have been pleased to reject your request for clubbing of power allocation during the water year 1985-86.

2. You are allowed to draw only 57.60 Million K.W.H. of energy of 11 KV and 33 KV and 52.66 Million KW of energy on 132 KV as allotted in this department order No. 37477 dated August 31, 1985 for the period from July 1, 1985 to June 30, 1986.

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Yours faithfully,

Sd/- Deputy Secretary to Govt

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It will be noticed that no reason whatever was given by the government in this order for rejecting the company's request for clubbing of power allocation. After receipt of the said communication, the company moved the High Court by a miscellaneous petition for amending the Writ Petition OJC No. 2496 of 1985 by incorporating a challenge against the said letter of the State Government refusing clubbing for the water year 1985-86. That prayer for amendment was allowed by the High Court.

14. Ultimately the two Writ Petitions OJC No. 1549 of 1985 and OJC No. 2496 of 1985 were disposed of by the High Court by a common judgment dated August 7, 1986. The High Court held that under Section 22-B of the Act the State Government had the power to grant or refuse the request of a consumer for being allowed the facility of clubbing. The High Court negatived the

contention of the company that it was beyond the power of the State Government to impose special tariff in the case the allotted quota of energy is acceded. It however upheld the contention of the company that the State Government and the Board had no power under the Act to impose restrictions on the use of the electric energy with retrospective effect. The demands made under the revised bills impugned in the first writ petition were, therefore, quashed by the High Court. The High Court further held that the orders passed by the State Government under Section 22-B of the Act did not show that there was any application of mind by the government on the question as to whether clubbing should be allowed or not with reference to relevant considerations. In the opinion of the High Court the plea raised in the counter-affidavits filed by the State Government and the Board that the 132 KV IMFAL should be treated separately from the other three units since the former was an export-oriented unit was without any substance. The High Court held that the only classification which appeared from the record was of "power intensive industries" and others. Since all the units of the company had been classified under the heading "power intensive units" and the only privilege available to an export-oriented unit as indicated in the note to the government's order passed under Section 22-B of the Act was that such unit would be entitled to additional power, if it satisfied the conditions laid down therein, there was no justification at all for refusing the benefit of clubbing in respect of the 132 KV IMFAL unit on the mere ground that it was an export-oriented unit. Accordingly, the writ petitions were allowed to the extent of quashing the demands for additional tariff made in the revised bills produced as Annexure II series in OJC No. 1549 of 1985 and it was declared that the company will be liable to pay tariff only at the contractual rate for the supply made during the water year 1984-85. In respect of the water year 1985-86, which formed the subject matter of OJC No. 2496 of 1985, the High Court directed that the company shall enjoy the benefit of clubbing till the State Government in exercise of its power under Section 22-B of the Act passed as appropriate statutory order rejecting its request. The writ petitions were disposed of by granting the aforesaid reliefs to the company.

15. Subsequent to the judgment of the High Court, the State Government passed an order dated October 31, 1986 in purported exercise of its power under Section 22-B of the Act effecting an allocation of power supply for the water year 1986-87. The allocation followed the same pattern as was adopted for the previous year by making a joint allotment in respect of the three units of the company other than the 132 KV IMFAL unit and a separate allotment in respect of the 132 KV IMFAL unit. The order also contained a note in terms identical with the note that was contained in the order relating to the water year 1985-86, the text of which has been already reproduced supra.

16. By its letter dated November 22, 1986, the company made a request to the State Government to allow clubbing of the power allotted to its four units for the year 1986-87 and requested also for a personal hearing before a decision was taken in the matter. The State Government refused by its letter dated December 8, 1986, which reads as follows :

> # Government of Orissa Irrigation and Power DepartmentNo. 53250 /IP Dated December 8, 1980----------EL. III. 299/86To The Executive Vice President, M/s. Indian Metals and Ferro Alloys Ltd., Bomikhal, Bhubaneswar.Sir,##

Please refer to your letter No. OSEB/ELECT/IMFAL/BBSR/86/025 dated November 22, 1986 enclosing your letter dated November 15, 1986 to Superintending Engineer (Commercial) O.S.E.B. It is found from your letter that you have assumed that power allotted to IMFAL (11 and 33 KV) and IMCL can be availed in a clubbed manner with power allotted to IMFAL (132 KV). This is to inform you that government after careful consideration of the difficult power situation during the current water year and also in view of the fact of IMFAL (132 KV) unit being a 100 per cent export-

oriented unit, for which special provisions have been made in the power cut order No. 46885/EL. III-115/85, dated October 31, 1986, there is no merit in your request for clubbing.

2. Accordingly, it is clarified that you are eligible to receive power in terms of the order dated October 31, 1986 as aforesaid separately for IMFAL (11 KV and 33 KV) and IMCL to the extent of 57.60 MUs and separately for IMFAL (132 KV) to the extent of 57.60 MUs during the current water year.

3. Please note therefore that clubbing as assumed in your letters has not been allowed.

4. Please also note that your request for allocation of additional power for IMFAL (132 KV) can only be considered upon your fulfillment of the conditions specified in the order dated October 31, 1986.

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Yours faithfully,

Sd/- Commissioner-cum-Secretary to Government

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No personal hearing was afforded to the company before the decision incorporated in the said letter was taken by the government. It will be seen that despite the clear pronouncement by government (sic) regarding invalidity of the said reason, the sole ground stated by the State Government in the said letter for denying the benefit of clubbing to the company is that IMFAL 132 KV unit being a 100 per cent export-oriented unit for which special provisions had been made in the power cut order dated October 31, 1986, there was no merit in the company's request for clubbing. Aggrieved by the said action taken by the State Government rejecting the request for clubbing, the company has filed Writ Petition No. 1753 of 1986 in this Court seeking to quash the said order.

17. SLP(C) Nos. 13848-13849 of 1986 have been filed by the State of Orissa challenging the correctness of the above mentioned judgment of the High Court in OJC No. 1549 of 1986 and OJC No. 2496 of 1985.

18. SLP(C) Nos. 14173-14174 of 1986 have been separately filed by the Board challenging the very same judgment.

19. The company had filed SLP(C) Nos. 14923-14924 of 1986 questioning the correctness of the High Court's judgment insofar as the High Court has turned down its contentions regarding the competence of the State Government to pass orders under Section 22-B of the Act making allocation of power supply to individual consumers and to deny the benefit of clubbing and to prescribe for levy of higher tariff for excessive drawal.

20. It was submitted before us by counsel appearing for the company that the four electrical submerged are furnaces of the company producing ferro alloys cannot be run at a low capacity and they require continuous and uninterrupted supply of energy to sustain production and also to ensure that the furnaces do not sustain damage. It is electric power that is used as a raw material in the manufacture of ferro alloys. The electrical energy is converted to heat energy which generates the

requisite temperature for reduction of the ore to the metal and unless that temperature for reduction of the ore to the metal and unless that temperature is attained the necessary reaction will not take place and the desired product will not be obtained. According to the learned counsel for the company, in view of the unsatisfactory power situation in the State and the consequent drastic power cuts imposed on the industrial units, the extension of the facility of clubbing becomes very vital because that would render possible for the multiple unit industries concerned which are having more than for the multiple unit industries concerned which are having more than one unit to decide to operate a reduced number of furnaces with the available allocation of power by diverting the quota allotted to some of the units to those which are to be continuously worked. By this process alone, it is said, it will be possible for such industries to avert damage to the furnaces and to avoid large scale retrenchment of the labour force. The petitioner-company has averred both before the High Court and before this Court that on account of frequent interruptions and the undependable nature of supply of power, the company's 132 KV IMFAL furnace had suffered very serious damage causing a loss of about Rs. 16 crores to the company. But this averment has been seriously controverted by the Board and the State Government. For the purposes of this case it is not necessary for this Court to enter into the merits of this controversy and to determine which version is correct. It would suffice merely to state that the denial of clubbing to such industrial units has very serious implications and repercussions, both economic and otherwise, on the viable functioning of the industry.

21. We shall first proceed to deal with the contentions raised by the State Government and the Board in their special leave petitions.

22. Section 22-B of the Act is in the following terms :

> 22-B(1) If the State Government is of opinion that it is necessary or expedient so to do, for maintaining the supply and securing the equitable distribution of energy, it may be order provide for regulating the supply, distribution, consumption or use thereof.
>
> (2) Without prejudice to the generality of the powers conferred by sub-section (1) an order made thereunder may direct the licensee not to comply, except with the permission of the State Government, with -
>
> (i) the provisions of any contract, agreement or requisition whether made before or after the commencement of the Indian Electricity (Amendment) Act, 1959, for the supply (other than the resumption of a supply) or an increase in the supply of energy to any person, or
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> (ii) any requisition for the resumption of supply of energy to a consumer after a period of six months, from the date of its discontinuance, or
>
> (iii) any requisition for the resumption of supply of energy made within six months of its discontinuance, where the requisitioning consumer was not himself the consumer of the supply at the time of its discontinuance.

23. It is also necessary to refer to Section 49 of the Electricity (Supply) Act, 1948 as amended in 1967. That section reads -

> 49(1) Subject to the provisions of this Act and of regulations, if any, made in this

behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs.

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

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

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

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

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

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

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

24. It appears to us to be clear on a reading of Section 22-B of the Act that what is contemplated by it is that the State Government should only lay down policy guidelines to be adopted by the Board for regulating supply, jurisdiction (sic distribution), consumption or use of energy. The implementation of the policy after working out the details is a matter to be carried out by the Board. It is therefore somewhat strange that the State Government has taken upon itself the task of allocating the quantum of power that may be consumed by the different industrial units mentioned in the annexures to the government orders passed in respect of the years 1984-85, 1985-86 and 1986-87 under Section 22-B of the Act. However, the High Court is in our opinion right in holding that under the aforesaid section, the government may for the purposes of securing equitable distribution of energy regulate its consumption or use and decide as a matter of policy whether the benefit of clubbing should be allowed to the consumers of energy. The immediate consequence of denial of the facility of clubbing will be to restrict the quantum of permissible consumption of energy by each of the respective units to the quota allotted to it singly or jointly and this necessarily involves serious financial implications because excessive drawals of energy by resort to clubbing would necessarily invite liability for payment at a higher tariff for the energy so drawn.

25. It was contended before us by the counsel appearing for the State and the Board that the power availability position in respect of each water year can be reasonably ascertained with some degree of precision only after the peak monsoon period and hence the High Court was not right in holding that the orders under Section 22-B of the Act cannot be passed with retrospective effect in the middle of a water year. We find there is some force in this argument and we hold that the High Court was not

right in observing that the order under Section 22-B of the Act imposing restrictions on consumption of power could not legally and validly be passed by the government "with retrospective effect" in the middle of a water year. But the position regarding disallowance of clubbing stands on an entirely different footing. If a consumer had been allowed the benefit of clubbing previously, that benefit cannot be taken away with retrospective effect there by saddling him with heavy financial burden in respect of the past period where he had draw and consumed power on the faith of the orders extending to him the benefit of clubbing. The High Court was, therefore, perfectly right tin holding that the benefit of clubbing which the company had enjoyed pursuant to the order dated July 12, 1984 during the water year 1984-85 till the end of December 1984 could not not be taken away by the letter of the Board dated January 24, 1985. We find no merit at all in the stand taken by the said Electricity Board that by the letter dated July 12, 1984, the Board had permitted clubbing only for a limited period of one month i.e. the month of July 1984. It is to be remembered that right from the inception of the power cut in the State of Orissa, the benefit of clubbing had been allowed to the company in respect of the three units which were classified as "power intensive units". The same position continued in the year 1983-84 after the commissioning of the company's fourth unit namely, 132 KV IMFAL and the benefit of clubbing was allowed in respect of all the four units during that year as is clear from the teleprinter message sent by the Chief Engineer of the Board to the Superintending Engineer, Talcher granting the request for clubbing made by the company in respect of its four units by its letter dated July 16, 1983. It was thereafter that the Board issued order as per its letter dated July 12, 1984 in reply to the company's request for being given the benefit of clubbing for the year 1984-85. The text of this letter has been reproduced by us. In our opinion the correct construction to be placed on this letter is that it only makes an allocation of power to all the four units on a monthly basis commencing from July 1, 1984 with permission accorded to the company to club the drawal subject to the condition that the whole position will be reviewed in October 1984. In actual point of fact however, no such review was made in the year October 1984 and it was only on January 24, 1985 that the Board addressed a letter to the company incorporating its decision not to permit clubbing. This decision taken on January 24, 1985, even if it is assumed to be valid, could not operate retrospectively during any period prior to the date of issue of the said letter, because during the said period the company had been enjoying the benefit of clubbing under the permission validly granted to it by the order dated July 12, 1984 which had not been revised till then. We accordingly, uphold as correct the conclusion reached by the High Court that the demands for additional tariff made by the Board as per the revised bills issued to the company produced in the High Court as Annexure II series in OJC No. 1549 of 1985 were illegal and were liable to be quashed.

26. We are in complete agreement with the view expressed by the High Court that the sole reason stated by the Board in its letter dated January 24, 1985 for refusing the facility of clubbing to the company is not valid or tenable.

27. On a reference to the Orissa State Electricity Board (General Conditions of Supply) Regulations, 1981, it is seen that Regulation 28 which deals with classification of service to consumers, classifies consumers under 15 different categories namely, domestic lighting and power, commercial lighting and power, cinema, theatre etc., street lighting, railway traction, irrigation pumping and agriculture, public water works and severage pumping, general purpose tariff, small industries, medium, industries, large industries, power intensive industries, heavy industries and temporary supply. There ia no separate categorisation of 'export-oriented industries. Under the scheme of the Regulation, industries have to fall under one or other of the five categories small, medium, large, power intensive and heavy. This position is further confirmed by the fact that in the orders passed by the State Government under Section 22-B of the Act for the years 1984-85, 1985-86 and 1986-87 also

there is no separate categorisation of export-oriented industries. The only categories mentioned are heavy industries and power intensive industries and all the four units of the company had been included under the category "power intensive industries". It is admitted in the counter-affidavit and it is not disputed before us at the time of hearing the arguments that clubbing has been allowed by the Board and is being allowed even now in respect of power intensive industries other than export-oriented industries. We see no justification at all for this differential treatment meted out to export-oriented industries. The note appended to the government's orders passed under Section 22-B of the Act for the years 1985-86 and 1986-87 does not in any way support the contention of the State and the Board that an export-oriented industry is to be made a separate allocation of power and is to be denied the benefit of clubbing merely on account of which (sic) its being engaged in an export-oriented venture. It continues to be classified as a power intensive industry for purposes of allocation of power. The only effect of the note is that in case such export-oriented industry fulfills the conditions mentioned in the note, it will be entitled to additional allocation of power on the ground of its being entitled to preferential treatment as an incentive for export promotion. This is only an enabling provision which would entitle an 100 per cent export-oriented industry to claim additional allotment of power if it is able to satisfy the Board and the State Government that the conditions mentioned in the note are fulfilled by it. The only consequence of said condition not being satisfied by an export-oriented industry is that it will be treated only as an ordinary "power intensive industry" and will not be entitled to any additional allocation of energy. For the mere reason that it has not fulfilled the conditions prerequisite for claiming additional allocation of power a power intensive industry which is export-oriented cannot be subjected to treatment otherwise than at a par with other power intensive industries. If additional allocation of power has been granted to an export-oriented industry, it may well be that to the extent of such additional allocation which is specifically granted for the purpose of promotion of export, diversion of supply to the other units may not be permitted. So long as not additional power allocation has been made and no preferential treatment has been given to the particular power intensive industry on the ground that it is a 100 per cent export-oriented industry, it cannot be meted out a prejudicial treatment different from what is given to other power intensive industries which are termed as "domestic units". We have therefore, no hesitation to uphold the conclusion reached by the High Court that the reason stated by the Board in its letter to the company dated January 24, 1985 for refusing the benefit of clubbing to the company for the year 1984-85 was fallacious, illegal and untenable. We have already held that the High Court was not right in observing that orders under Section 22-B of the Act imposing restrictions on consumption of power could not legally and validly be passed by the State Government in the middle of a water year. There is no merit in the rest of the contentions raised in SLP(C) Nos. 13848-13849 of 1986 filed by the State Government of Orissa and SLP(C) Nos. 14174 of 1986 filed by the Board. Subject to our above observation regarding the competence of the State Government to pass orders under Section 22-B of the Act even after the commencement of the water year these four special leave petitions will stand dismissed.

28. In Writ Petition No. 1753 of 1986, the company has challenged the action of the State Government in refusing the company's request for clubbing as per the State Government's letter dated December 8, 1986. It appears to us rather strange that in spite of the express pronouncement by the High Court to the effect that the reason stated by the Board in its communication to the company dated January 24, 1985, namely that the company's 132 KV IMFAL unit being a 100 per cent export-oriented unit it had to be treated separately for purpose of power allocation was illegal and untenable, the State Government has merely reiterated the very same reason in its impugned letter dated December 8, 1986. This clearly indicated lack of due care and proper application of the mind of the government to relevant aspects of the matter before the order was passed. We have

already indicated that we are in full agreement with the view expressed by the High Court that it is not legally permissible to refuse the facility of clubbing merely on the ground that a particular power intensive unit is an export-oriented unit so long as it had not been given any special allotment of power on the said ground on the basis of its fulfillment of the conditions specified for a 100 per cent export-oriented unit in the note appended to the government's order passed under Section 22-B of the Act. When all other power intensive units termed as "domestic units" are being allowed the benefit of clubbing, it would not be legally proper to deny the same facility to an industry classified as 'power intensive unit' merely on the ground that being an export-oriented unit, it has failed to fulfill the conditions prerequisite for allocation of additional power. Such differential treatment would amount to arbitrary discrimination, violative of Article 14 of the Constitution and it cannot be permitted. A power intensive unit which has not been extended any advantage in the nature of allocation of additional power on the ground that it is a 100 per cent export-oriented industry must be treated on the same footing as other power intensive industries called "domestic industries" and so long as the benefit of clubbing is allowed to domestic 'power intensive' units, such benefit cannot be denied to an export-oriented unit which has not been allocated any additional power on the basis of the export performance.

29. We make it clear that nothing contained in this judgment is to be construed as laying down as a general proposition that industrial consumers having more than one unit are, under all circumstances, entitled as of right to club the power allotted to their different units since we are not called upon to consider or pronounce upon the said question in this case. The observation and the conclusions recorded in our judgment are based on the special fact and circumstances of the instant case before us where admittedly all power intensive industries in the State of Orissa other than export-oriented industries had been allowed the benefit of clubbing by the Board and the limited question arising for consideration has been whether the denial of said benefit to some of the power intensive industries on the sole ground that they are export-oriented industries which had not complied with the conditions specified in the note to the government order issued under Section 22-B of the Act for the three years in question was legally valid and permissible.

30. We accordingly quash the order of the State Government dated December 8, 1986 and direct the respondent to allow the petitioner-company the facility of clubbing of the energy supply to 11 KV IMFAL unit, 33 KV IMFAL unit, 11 KV IMCL and 132 KV IMFAL unit. We see on reason to grant the prayer of the State Government under Section 22-B of the Act insofar as it fixes the energy allocation for the different units but the said order shall not be treated or construed as denying the facility of clubbing to the company.

31. The writ petition is allowed to the limited extent indicated above. The parties will bear their respective costs in all these petitions.

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