

Fertilisers and Chemicals Travancore Ltd

Vs

Kerala State Electricity Board and Another

Civil Appeal No. 880(N) of 1974

(S. Natarajan, M.N. Venkatachaliah JJ)

05.05.1988

JUDGMENT

VENKATACHALIAH, J. –

1. This appeal, by special leave, is by Messrs Fertilizers and Chemicals Travancore Limited and is directed against the judgment and order dated June 13, 1973 of the Division Bench of the Kerala High Court in Writ Appeal No. 103 of 1971 affirming the order dated November 26, 1970 of the learned Single Judge in O. P. No. 3772 of 1968.
2. The High Court dismissed the appellant's writ petition challenging the enhancement of the electricity tariff from Rs. 110 per K. W. per annum to Rs. 200 per K. W. per annum. The enhancement was made by the Kerala State Electricity Board ('Board' for short) pursuant to the power reserved to it under Regulation 11 of the Kerala State Electricity Board (General Tariffs) Regulation, 1966 ("Regulation") framed under Section 79(j) read with Section 49(1) of the Electricity (Supply) Act, 1948, ('Act'). The enhancement was to take effect from August 16, 1968. The period to which the challenge pertains is between August 16, 1968 and January 1, 1970.
3. The appellant assailed this enhancement before the High Court on grounds, inter alia, that the terms for the supply of electricity to appellant's industrial unit manufacturing fertilizers were governed by an agreement dated October 21, 1948 entered into with the erstwhile Travancore State; that the agreement, in terms of Section 60 of the Act, should be deemed to have been entered into by the Board referable to statutory powers under Section 49(3) of the Act; that during the subsistence of the agreement the rates fixed therein were immune from any unilateral upward revision even if the purported enhancement was pursuant to the statutory regulations under Section 49(2) and that, at all events, the enhancement, being selective and discriminatory, was violative of Article 14 of the Constitution.
4. We may refer, briefly, to the factual antecedents : Appellant is a company registered under the Companies Act with its Registered Office at Eloor, Udyogamandal P. O. in the erstwhile State of Travancore, now part of Kerala. On October 21, 1948 an agreement was entered into between the appellant and the erstwhile princely State of Travancore for the supply of electrical energy by the latter to the former under terms and on conditions particularised in the agreement. The price was fixed at Rs. 110 per KW per annum. Subsequently the State merged in and became part of the Kerala State and the Electricity Board was constituted for the State. On May 10, 1965 a supplementary agreement was entered into between the appellant and the Board for supply of additional power for a period of ten years at the rate of Rs. 140 per KW per year. On October 28, 1966 the Board, in exercise of the powers under Section 79(j) of the Act, framed and promulgated

what were called "Kerala State Electricity Board (Central Tariffs) Regulations, 1966", by which, inter alia, power was reserved to the Board to amend, from time to time, the terms and conditions of supply after issue of the prescribed notice to the consumer of the Board's intention so do in that behalf. Regulation 11 provided :

The Board may amend the terms and conditions of supply from time to time, provided that any amendment having the effect of enhancement of charges payable by the consumer shall come into force from such date as notified in the gazette provided that there shall be at least 30 days between the date of publication and coming into force.

5. In exercise of the power so reserved to it, the Board issued a notification dated July 16, 1968 (Ex. P-2) which provided :

In accordance with the provisions contained in Clause 11 of the Kerala State Electricity Board (General Tariffs) Regulations issued in Kerala Gazette No. 47 dated November 29, 1966, it is hereby notified that the rates for the supply of 4200 K. W. of power at 66 K. V. to Messrs FACT availed by them as per the agreement dated October 21, 1949 executed with the erstwhile Travancore Government, is hereby revised to Rs. 200 per K. V. A. per year. This revision will take effect 30 days soon after the publication of this notification in the gazette.

6. The supplement agreement dated May 10, 1965 which pertained to the additional supply of power for a period of ten years at Rs. 140 per K. W. per year was, however, left undisturbed. The case of the Board is that while the agreement, Ex. P-1, was not an agreement which enjoyed the status of and protection as one under Section 49(3) of the Act, supplemental agreement dated May 10, 1965, however, was entered into by the Board in exercise of the statutory powers under Section 49(3) and was, therefore, immune from any alternation during its tenure.

7. The principal controversy in this appeal is whether the agreement dated October 21, 1948 could be said to be one within the contemplation of Section 49(3) of the Act; and whether the enhancement of the tariff under Ex. P-2 was impermissible.

8. Another contention which was not urged before the learned Single Judge of the High Court, but which was permitted to be raised in appeal before the Division Bench was whether by the said enhancement appellant was subjected to a hostile and invidious discrimination.

9. Both contentions have been repelled by the High Court. Appellant has come up by special leave.

10. We have heard Shri G. L. Sanghi, learned Senior Advocate for the appellant and Shri P. S. Poti, learned Senior Advocate for the Board. The submissions of counsel spread over a much wider field than was covered before the High Court. On the contentions urged at the hearing, the points that fall for consideration in the appeal are :

(a)(i) Whether the agreement dated October 21, 1948 (Ex. P-1) should be held to be one which was deemed to have been entered into by the Board under Section 60 of the Act.

(ii) If so, whether the said agreement requires to be considered as one entered into by the Board in exercise of its power under Section 49(3) of the Act with the attendant

consequence that during its subsistence, the tariff does not admit of being raised even pursuant to the Regulations made under Section 49(1) of the Act.

(b) Whether, at all events, the enhancement under Ex. P-2 brings about a hostile discrimination against the appellant, in that, while in the case of other similarly situated and circumstanced High Tension Consumers there was no such revision of the tariff.

Re contentions (a)(i) and (ii) :

11. Shri Sanghi submitted that the agreement Ex. P-1 though one entered into prior to the constitution of the 'Board' was yet, by virtue of Section 60 of the Act one which should be deemed to have been entered into by or with the Board, and must also be held to be referable to Section 49(3) of the Act. Shri Sanghi, placing reliance on the pronouncement of this Court in *Indian Aluminium Co. v. Kerala State Electricity Board* [(1975) 2 SCC 414 : (1976) 1 SCR 70 : AIR 1975 SC 1967] contended that the agreement must be regarded as having been entered into by Board in exercise of its statutory powers conferred under Section 49(3) of the Act, and therefore, immune from the operation of the Regulations. The contract under Section 49(3), it was submitted, substitutes for the power under Section 49(1) and that where, as here, even there is in subsistence an agreement under Section 49(3) the power under Section 49(1) would be available to the statutory authority enabling an unilateral upward revision of the tariff, only if the agreement itself enables such a revision.

12. Shri Poti for the Board urged that Ex. P-1 could not be held to fall under, and be protected by, Section 49(3) of the Act. Shri Poti urged a number of considerations, which according to him, militate against Ex. P-1 being accorded such a status.

13. It is appropriate, at this stage, that some of the statutory provisions which have a bearing on the matter are noticed.

14. Sections 49, 59 and 79 of the Act (as they then stood) read :

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) * * *##

(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 persons 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) * * *##

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

79. The Board may make regulations not inconsistent with this Act and the rules made thereunder to provide for all or any of the following matters, namely :

(a)

to

(i) Omitted as irrelevant

(j) principles governing the supply of electricity by the Board to persons other than licensees under Section 49.

#(k) * * *##

15. We may also notice Section 60 :

60(1) All debts and obligations incurred, all contracts entered into and all matters and things engaged to be done by, with or for the State Government for any of the purposes of this Act before the first constitution of the Board shall be deemed to have been incurred, entered into a engaged to be done by, with or for the Board; and all suits or other legal proceedings instituted or which might but for the issue of the notification under sub-section (4) of Section 1 have been instituted by or against the State Government may be continued or instituted by or against the Board.

16. In the Indian Aluminium Company case [(1975) 2 SCC 414 : (1976) 1 SCR 70 : AIR 1975 SC 1967] this Court was examining the effect of an agreement entered into between the then native State of Travancore on the one hand and the Indian Aluminium Company Limited on the other for the supply of electrical energy for an industrial enterprise of the company for reduction of alumina into aluminium by a process of electrolysis in which electrical energy was itself a primary raw material. Certain rates were agreed upon for a period of 34 years from July 1, 1941 with a franchise to the company for renewal of the agreement for a further period of 20 years. The terms of this principal agreement were varied and modified by two supplemental agreements, the first dated August 16, 1955 and the second dated April 4, 1963. Two other agreements were also entered into between the parties on March 30, 1963 and September 18, 1965 respectively for supply of additional electricity. In 1966 the Kerala State Electricity Board promulgated regulations by which the Board empowered itself to prescribe higher tariffs for different classes of consumers. These regulations were amended in 1969. In exercise of powers thus assumed, the Board purported to fix higher rates of tariffs to all extra high tension consumers, including the said company. The relevant tariff was declared applicable to all extra high tension consumers notwithstanding anything contained in the agreement entered into with the consumers either by the government or by the Board. This purported unilateral enhancement was challenged by the company. This Court, in substance, held that the agreement dated July 1, 1941 must be deemed, by virtue of Section 60 of the Act, to have been made by the Board itself; that Section 49(3) enabled such specially negotiated loads as part of the statutorily permitted scheme; that since the special stipulations in the agreement were made in exertion of the statutory power under Section 49(3), they could not, during the subsistence of the agreement, be varied unilaterally by exertion of another statutory power under the same statute. It was observed : (SCC pp. 423 and 426, paras 9 and 15)

Now, fixation of special tariffs can be unilateral act on the part of the Board, but more often than not, it would be the result of negotiations between the Board and the

consumer and hence a matter of agreement between them. It would, therefore, seem clear that the Board can, in exercise of the power conferred under sub-section (3) of Section 49, enter into an agreement with a consumer stipulating for a special tariff for supply of electricity for a specific period of time. Such a stipulation would amount to fixing of special tariff and it would clearly be in exercise of the power to fix special tariff granted under sub-section (3) of Section 49.

If the statutory power is to have any meaning and content, the stipulation made in exercise of the statutory power must be valid and binding and it would, as pointed out by Pennycuik V. C., in *Dowty Boulton v. Wolverhampton Corporation* [(1971) 2 All ER 277], "exclude the exercise of other statutory powers in respect of the same subject matter". To put it differently, where a stipulation in a contract is entered into by a public authority in exercise of a statutory power, then, even though such stipulation fetters subsequent exercise of the same statutory power or future exercise of another statutory power, it would be valid and the exercise of such statutory power would pro tanto stand retracted. That would follow on the principle of harmonious construction.

17. Shri Sanghi relies upon the analogy of this case to support the appellant's claim that here also the agreement Ex. P-1 has a similar status.

18. Section 49(1) and (2) of the Act delegates the State Electricity Board the powers of subordinate legislation to frame uniform tariffs, setting out the factors and criteria to be taken into account in fixing such uniform tariffs. Section 79(j) enables the Board to frame and promulgate regulations touching the matters envisaged by Section 49(1) and (2). Sub-section (3) of Section 49 enables the Board to fix different rates of tariffs having regard to the special circumstances and particularities of individual cases. Section 49(4), however, mandates that the Board, in exercising its discretion under sub-section (3), shall not show undue preference to any person. Section 59 says that the Board shall so carry on its operations as not to incur a loss.

19. Enumerating the considerations which, according to him, detract from the acceptability of the claim that the agreement in this case qualifies for recognition as one referable to the statutory power under Section 49(3) of the Act, Shri Poti said that first, the agreement cannot be deemed to be one entered into by the Board under Section 60(1) because it does not satisfy the essential requirement of having been entered into by the State Government; that secondly, the Board had not done anything with reference to the agreement which could attract Section 60 to it; and, accordingly, though the obligations of the State Government became the obligations of the Board, the agreement itself did not qualify for recognition under Section 60 of the Act; that, thirdly, there was no fixity of tenure with reference to and in the context of which alone any immunity from unilateral alteration under Section 49(1) and (2) could be conceived and measured, and that, fourthly the agreement having been anterior to the commencement of the 'Act' itself, it could not be held to have been entered in to for "purposes of the Act" within the meaning of Section 60.

20. The point that Shri Poti particularly emphasised was that the element of recognition of the agreement under and for purposes of Section 60(1) - which in the case of the Indian Aluminium Company consisted in the Board, after the commencement of the Act, having treated and adopted the agreement by conscious overt acts which comprised of the subsequent modifications of its terms, - were lacking in the present case. The additional agreement dated May 10, 1965 in the present case was for an independent purpose and that the action of the Board in entering into this agreement did not constitute any such act, in relation to the original agreement, as would constitute a conscious adoption by the Board of the original agreement, so as to attract Section 60(1).

21. On a consideration of the matter, we are of the view that it is unnecessary to examine the merits of these contentions as we think that the point could be decided with reference to an aspect which goes to the root of the matter. That is, whether the agreement, even if attracts Section 60(1), qualifies itself to be recognised as one under Section 49(3). We may here notice some provisions of the agreement (Ex. P-1) :

Clause 1 stipulates :

(1) The government shall furnish to the consumer and the consumer shall take from the government all the energy required by the consumer for operating and lighting the Consumer Fertilizer Factory located at Eloor, Alwaye up to a total amount of 4000 K. W.

Clause 12 provides :

12. The consumer shall not be at liberty, save with the consent of the Electrical Engineer to government to determine this agreement before the expiration of twelve calendar months from the date of commencement of supply. The consumer may determine this agreement after (sic at) any time after the said period on giving the Electrical Engineer one clear month's notice in writing. If within twelve months from the date of commencement of supply the consumer should without giving previous intimation in writing to the Electrical Engineer to government cease to consume energy under the agreement continuously for three months, his agreement shall be determined.

22. There is, in the agreement, no specific stipulation as to the duration, or term, of the agreement. The appellant is enabled after expiration of 12 calendar months from the date of commencement, to terminate it by notice in writing. Shri Poti's contention is that the essential quality of the agreement which qualifies for recognition and protection as one made in exercise of the Board's power under Section 49(3) is its distinctiveness as to the period of operation : that the protection and immunity from unilateral increase of tariff can only be with reference to the period of the agreement and that without reference to any period the idea of such protection would be unmeaning and inconceivable; as the benefit of Section 49(3) is to enure during the period respecting which there is a commitment on the part of the Board to supply electrical energy at a fixed rate.

23. Shri Sanghi, however, submitted, that it was not the specificity of the period of operation of the agreement, but its very existence that brings it within the protective umbrella of Section 49(3). Learned counsel said that what keeps an agreement outside Section 49(3) was the existence of specific stipulation in it enabling such unilateral increases of the rates. Shri Sanghi submitted that the period factor was not the decisive criterion, but the very existence of a special agreement, however precarious its tenure, that excludes the power under Section 49(1) of the Act. According to Shri Sanghi even an agreement which is not in terms bound for a fixed period and which is terminable by either side by notice, is eligible for recognition as one under Section 49(3) and that till the Board puts an end to the agreement in a manner provided by the agreement, the agreement qualifies itself for such protection under Section 49(3).

24. If an agreement, entered into by the Board does not contain any stipulation as to the specific period for which a particular rate should apply or, after so providing, also contains a specific stipulation that the rates agreed upon under it could unilaterally, be altered at the instance of the

Board, then it becomes merely academic whether such an agreement does not qualify itself to be considered as one entered into by the Board in exercise of its statutory power under Section 49(3) or even if so qualified, yet, it does not have the effect of excluding the exertion of the other statutory powers under Section 49(1). The real question is whether a unilateral increase could be effected or not. In such a case, from the point of view of practical consequences, it is immaterial whether the importance of the absence of the period factor lies in taking the agreement out of Section 49(3) or whether, being within Section 49(3), yet it does not exclude the exercise of the statutory power under Section 49(1). It has been held that the Board's power to enter into an agreement fixing a special tariff for a 'specified period' is relatable to Section 49(3), or conversely, one of the tests whether an agreement is entered into in exercise of the power under Section 49(3) is that such agreement has the effect of excluding the other statutory power under Section 49(1). The main consideration for protection from unilateral increase under Section 49(1) is the 'period factor' in an agreement. In an Indian Aluminium Company case [(1975) 2 SCC 414 : (1976) 1 SCR 70 : AIR 1975 SC 1967], it observed : (SCC pp. 423 and 427, paras 9 and 17)

It would, therefore, seem clear that the Board can, in exercise of the power conferred under sub-section (3) of Section 49, enter into an agreement with a consumer stipulating for a special tariff for supply of electricity for a specific period of time. Such a stipulation would amount to fixing of special tariff and it would clearly be in exercise of the power to fix special tariff granted under sub-section (3) of Section 49.... The power to enter into an agreement fixing a special tariff for supply of electricity for a specified period of time is, therefore, relatable to sub-section (3) of Section 49 and such an agreement entered into by the Board would be in exercise of the power under that sub-section....

To hold that the Board could unilaterally revise the charges notwithstanding these stipulations, would mean that the stipulations had no binding effect, or in other words, the Board had no power to enter into such stipulations. That would negate the existence of statutory power in the Board under sub-section (3) of Section 49 to fix the charges for a specific period of time, which would be contrary to the plain meaning and intendment of the section.

25. The above excerpts would suggest that a contract which does not have, and provide for, an obligation to supply electricity at a specific rate for a specific period and does not, therefore, have the effect of excluding Section 49(1) cannot be said to fall under Section 49(3). If by an unilateral, volitional act on the part of the Board the assurance of a fixed rate to the consumer could be denuded, that circumstance, in itself, would be such as to detract from the agreement being considered as one entered into in exercise of power under Section 49(3). The importance of the period factor was again referred to in Delhi Cloth & General Mills Co. Ltd. v. Rajasthan State Electricity Board [(1986) 2 SCC 431 : AIR 1986 SC 1126]. It was observed : (SCC pp. 450-51, para 24)

In the Indian Aluminium Company case [(1975) 2 SCC 414 : (1976) 1 SCR 70 : 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 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).

26. The agreement in this case was precarious in regard to the period of its operation and was susceptible to termination at the volition of the Board. It cannot, therefore, be construed as one which was intended to give a statutory protection for the tariff by means of special agreement by the exercise of the statutory power of the Board under Section 49(3).

27. Shri Sanghi, however, contended that as long as the agreement did subsist and was not terminated, a unilateral change was impermissible. To this, two answers could be posited. First is, as already held, that if there is no statutory protection and immunity from unilateral change in view of the precariousness of the tenure and its susceptibility to defeasance at the mere volition of the Board, the Act did not furnish it with the status of one under Section 49(3). The second, is that at all events, even if the agreement was one under Section 49(3), the giving of 30 days notice - though issued in compliance with the requirement of the regulation - puts an end to the agreement. Looked at from either angle the enhancement is not rendered infirm.

28. Shri Sanghi referred to certain observations of Lord Denning, M. R. in *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.* [(1978) 3 All ER 769]. In that case a water company and the authorities of a hospital entered into agreement in the year 1929 whereby the hospital was to receive 5000 gallons of water every day free and all the additional water required at 7d. for 1000 gallons 'at all times hereafter'. In 1975, the water company gave a six months notice to the hospital intending to terminate the 1929 agreement. The hospital contested the right of the company to terminate the agreement, relying upon the 'at all times hereafter' clause. The trial court upheld the hospital's claim and held that the company could not resile from the contract. But the Court of Appeal held that having regard to the fall in the value of money since the agreement was made, circumstances had arisen which the parties had not foreseen and that the agreement was not intended to hold good in the altered state of circumstances. The agreement was held terminate with reasonable notice. This case holds out its own features of interest for the school men. In a long term contract of indefinite duration it is not unusual to find provisions for cancellation with reasonable notice and for payment of compensation in the event of termination. It is also not unusual to inter, under certain circumstances, terminability by notice even in the absence of an express provision in that behalf, on a construction of the contract. In the case cited by Shri Sanghi, Lord Denning invoked the doctrine of frustration. Learned authors in *Cheshire and Fifoot's Law of Contract*, 10th edn., call that case 'a difficult case' and that the learned Judge Master of Rolls 'reached an interesting and controversial decision'. A contract which contains no express provision for its termination may well be terminated by reasonable notice by one or the other party depending upon the implication of a term or upon a true construction of the agreement. That principal has no application to the present case.

29. Accordingly, on contentions (a)(i) and (ii) we hold that Ex. P-1 did not qualify to be recognised and protected under Section 49(3) of the Act.

Re Contention (b)

30. Appellant raised the contention of a hostile discrimination before the Division Bench in appeal. In the course of the additional grounds raised on May 31, 1971 the appellant averred :

I respectfully submit that respondent 1 being committed to supply Indian Aluminium Company Limited quantities of electrical energy of 16,000 KWH at the rate of Rs.

100-105 per KWH for a period up to 1995 and having further agreed to supply electrical energy to the said company at the rate of Rs. 130 KWH for a period up to 50 years as from April 1, 1965, has in enhancing the tariff rate for supply of electrical energy to the appellant as per Ex. P-2 to Rs. 200 per KVA per year clearly violated Section 49 of the Act. Respondent 1 as far as I am aware, had not increased tariff rates in the case of other extra high tension consumers similarly placed as the appellant who are referred to in paragraph 11 of the counter-affidavit of respondent 1 in July 1968, by virtue of its powers under Ex. P-3 by notification like Ex. P-2.... The effect of Ex. P-2 order is that extra high tension consumers who are similarly placed as the appellant, have been given undue preference as compared to the appellant in that, while the tariff applicable to the appellant was increased as per Ex. P-2, there was no similar upward revision in the case of the other extra high tension consumers who are referred to in paragraph 11 of the counter-affidavit of respondent 1.

31. Again, in the reply affidavit dated March 16, 1973 the appellant said :

6. With respect to the averment in paragraph 3, I submit that the petitioner has been discriminated. Not only Indian Aluminium Company Ltd., but also companies like Travancore Cochin Chemicals Ltd., Premier Tyres Ltd., Cominco Binani Zinc Limited, Travancore Rayons Limited etc., have been given the benefit of the contractual rates and the existing contracts with those companies have not been superseded till January 1, 1970 when uniform rate is prescribed for all. The averment that the appellant company and the Indian Aluminium Company Limited are not similarly situated is made without any basis, for at any rate, for the purpose of Article 14, it cannot be denied that they are comparable concerns.

32. Shri Sanghi contended that while the appellant was subjected to a steep revision in the tariffs other similarly circumstanced high tension consumers were left unaffected. Learned counsel also contended that under Regulation 6 of Ex. P-3 one of the classifications was "high tension consumers" which included the appellant, and that any further sub-classification purported by the Board between "high tension consumers" and "extra high tension consumers" to support a further classification, not contemplated by the regulation itself was impermissible. Shri Sanghi relied upon the the case of M/s Indian Metals & Ferro Alloys Ltd. v. State of Orissa [(1987) 3 SCC 189 : AIR 1987 SC 1727] where a further purported classification in the matter of the benefit of clubbing of the allotments of electricity based on considerations which were not recognised for purposes of the statutory classification of the consumers was held impermissible. In that case amongst similarly circumstanced consumers who fell under the same classification of power intensive units, a further classification for the denial of the benefit of clubbing on the ground that the particular consumer, being an export oriented unit had failed to furnish the required export performance, was held impermissible. This Court held : (SCC p. 207, para 28)

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 fulfil 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.... 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 its export performance.

33. In the present case, the Board while denying that there was any hostile discrimination, averred that no similarly situated consumer had been left out of the tariff revision and only cases where the Board, owing to the subsistence of the agreements protected under Section 49(3) was under a legal inhibition from making an unilateral enhancement, had been left out. In addition, the Board set out two other criteria which, according to it, placed the appellant in a different class distinguishing the case of the Indian Aluminium Co. with which appellant pleaded similarity. These, as set out in the counter-affidavit dated March 5, 1973 filed before the Division Bench, are :

(i) that the appellant was not a 'power intensive' industry operating at very high load factor whereas the Indian Aluminium Company is a 'power intensive industry' operating at a very high load factor which required them to be classified differently. The two consumers were not on the same footing in the matter of consumption and the purpose for which the energy was supplied.

(ii) that considerations like the power factor were taken into account in fixing the tariff. So far as the Indian Aluminium Company is concerned the power factor was 0.9 and they were bound to maintain that rate whereas the appellant-company was required to maintain the same at 0.85 as per the agreement and it could go down to 0.80 which was advantageous to the appellant-company.

34. On a consideration of the matter, it appears to us that the charge of discrimination against the respondent-Board cannot be said to be established. Indeed in the present case, the appellant has not laid a proper foundation for examination of a case of discrimination under Article 14. The allegations of discrimination must be specific. (See *State of Maharashtra v. Basantibai Mohanlal Khetan* [(1986) 2 SCC 516, para 12 : AIR 1986 SC 1466, para 12].) It is also trite that action of governmental authorities must be presumed to be reasonable and in public interest. It is for the person assailing it to plead and prove the contrary. (See *Kasturi Lal Lakshmi Reddy v. State of J & K* [(1980) 4 SCC 1, 13 : (1980) 3 SCR 1338, 1357 : AIR 1980 SC 1992].) But here allegations are in general terms. Even so, the respondent-Board has made categorical statement that in all those cases referred to in para 6 of the appellant's reply affidavit, tariff had been increased except where the consumer had the protection of an agreement under Section 49(3) which prevented an unilateral increase.

35. That apart the circumstance that respondent-Board was rendered, by virtue of the subsistence of an agreement under Section 49(3), powerless to make an unilateral increase, can form a valid ground for differential treatment as between cases covered by Section 49(3) on the one hand and those in which the Board was competent and was at liberty to give effect to the increase, on the other. It *Bisra Stone Lime Co. v. Orissa State Electricity Board* [(1976) 2 SCC 167 : (1976) 2 SCR 307 : AIR 1976 SC 127] at 314, this Court, in similar context, held : (SCC p. 173, para 22)

A plea of discrimination which is available when Article 14 is in free play is not at par with the interdict of 'undue favour' under Section 49 of the Act. Apart from this, when law makes it obligatory for certain special agreements to continue in full force during their currency stultifying the power of the Board to revise the rates during the period, no ground of discrimination can be made out on the score of exempting such industries as are governed by special agreements.

Accordingly, contention (b) also fails.

36. In the result, for the foregoing reasons, this appeal fails and is dismissed, but without an order as to costs.

</html