Jiyajeerao Cotton Mills Ltd. and Another

Vs

Madhya Pradesh Electricity Board and Another

Civil Appeal Nos. 3510-3511 of 1982

(A. P. Sen, L. M. Sharma JJ)

12.09.1988

JUDGMENT

SHARMA, J. –

1. The dispute in these appeals is in regard to the additional demand of electric charges made by respondent 1 on appellant 1 for energy consumed. By a writ application filed before the Madhya Pradesh High Court the appellant challenged the demand of Rs. 1,80,97,880.97 for the period November 12, 1979 to June 30, 1981. Except to granting a minor relief as indicated in paragraph 45 of its judgment, the High Court dismissed the writ application. The writ petitioner-appellants have impugned the judgment before this Court by special leave.

2. Appellant 1 Jiyajeerao Cotton Mills Ltd. (hereinafter referred to as the Company') which runs a textile mill in Gwalior, entered into an agreement dated October 27, 1971 with respondent 1 Madhya Pradesh Electricity Board (in short the Board) a licensee under the Indian Electricity Act, 1910 (hereinafter referred to as the 1910 Act) for supply of electricity in accordance with the terms and conditions mentioned therein. The quantity of electricity to be supplied varied from time to time under supplementary agreements and the Board had to supply 2500 KW on H.T. basis with effect from November 1, 1973. Since 1975 the Board is not able to generate sufficient electricity to meet the full demand of the consumers and with a view to ease the situation two Orders were issued by the State of Madhya Pradesh under Section 22-B of the 1910 Act on April 4, 1975 called as the Madhya Pradesh Electricity (Supply and Consumption Regulation) Order, 1975 and the Madhya Pradesh Electricity (Generation, Control and Consumption) Order, 1975. The learned counsel for the parties have in their agreements referred to these orders as Regulation Order and Generation Order respectively. By the Regulation Order, the consumers were asked to reduce their consumption in accordance with the provisions therein. It was further provided that without prejudice to the Board's power to disconnect the supply in the event of any violation thereof, the consumer will have to pay the charges at penal rates for the excess energy consumed. The Generation Order said that if a consumer had an alternative source of generating power from his own generating set (described as captive power by the parties) it may be required to generate electricity to the maximum extent technically feasible and the supply by the Board would be reduced to that extent. The order in clause 3 provided for assessment of the generating capacity of the captive power of the consumer. The contract demand under the agreement was directed to remain reduced accordingly. Sub-clause (iii) of proviso to clause 3 said, that if in certain contingencies, there was reduction in the generation of electricity by the consumer, the Board would try to make good the deficit against an appropriate charge for it. An arbitration clause with respect to any dispute was included in the 6th paragraph of the order as its last term.

3. Both the Orders came into force with effect from April 7, 1975. The Divisional Engineer, Gwalior informed the appellant Company by the letter dated May 17, 1975 (marked as Annexure 'B', page 121, Vol. II of the paper book) that its additional generation capacity technically feasible by its own generating sets had been assessed at 2700 KW. In view of the contract under the which the Board was to supply 2500 KW with effect from November 1, 1973, the Company was directed to generate additional electricity to that extent, thus reducing the demand on the Board to nil. After several letters passed between the parties, which will be dealt with at some length later, another letter dated October 10, 1975 (marked as Annexure 'O', page 136, Vol. II of the paper book) was sent to the Company issuing a fresh direction for generating additional electricity to the extent of 2500 KW with effect from October 31, 1975.

4. It appears that the Board did not bill the appellant Company for any additional energy supplied at the penal rate for the next several years. According to its case the Company invoked the provision of proviso (iii) to clause 3 of the Generation Order pleading emergency, arising from time to time, covered by the proviso, and was supplied additional energy accordingly. The Company was under a duty to place its difficulties before the Board and obtain permission before drawing additional energy under this provision of emergency supply. It appears that after November 11, 1979 additional power was drawn by the appellant without the Board's prior approval and a letter Annexure 'T' dated August 5, 1980 was ultimately sent to the Company explaining the situation and telling it that the supply availed by it with effect from November 12, 1979 would be billed at the penal rate. In the meantime two additional contracts were executed by the parties; the first one on July 11, 1979 (Annexure 'C') for supplying additional 800 KW, and the second one dated February 26, 1980 (Annexure 'D') for additional 190 KW. The Board by its letter Annexure 'U' dated October 13, 1980 reiterated its stand taken under Annexure 'T' intimating the appellant the maximum amount of electricity it was entitled to consume at the normal rate. The letter further added that no additional power would be allowed as emergency supply to the Company even during the period of overhauling of the generating sets as was done earlier under proviso (iii) to clause 3 of the Generation Order. The matter was debated for some time and ultimately the additional demand for the period November 12, 1979 to September 30, 1980 amounting to Rs. 94,41,745.60 was served on the appellant Company by the letter Annexure 'X' dated January 15, 1981. The further bills were also sent on the same basis.

5. On August 5, 1981 the application under Article 226 of the Constitution was filed before the Madhya Pradesh High Court challenging Annexures 'H', 'O', 'T' and 'U'. The main case of the petitioner-appellant was rejected by the High Court, but marginal reliefs with respect to the Board's demands for the period November 12, 1979 to February 25, 1980 and from February 26, 1980 to July 31, 1980 were allowed on the basis of errors in calculation. The High Court also pointed out that under the terms of the Generation Order the Board was under a duty to consider and allow the additional emergency supply when conditions arose making the proviso (iii) to clause 3 applicable and the Board could not refuse to do so as was observed in some of its letters. Subject to these minor modifications the writ application was dismissed by the judgment dated September 23, 1982. The Company thereafter filed an application for review, which was dismissed by a speaking order of October 19, 1982. The present appeals have been filed by special leave against these two judgments.

6. The appeals have been argued at considerable length by Mr. Dipankar Gupta on behalf of the appellant and Mr. S. N. Kacker representing the respondents with great ingenuity and resourcefulness. Mr. Gupta appearing in support of the appeals, however, did not press some of the points urged on behalf of the appellant in the High Court and relied upon some new grounds. We, therefore, do not consider it necessary to deal with all the points disposed of in the High Court

judgments except making reference to some of them while dealing with the points urged before us.

7. It will be necessary to examine the relevant portions of the Regulation and Generation Orders (Annexure 'E' and 'G') before considering the arguments of the learned counsel. They were both issued on April 4, 1975 by the State Government of Madhya Pradesh under Section 22-B of the 1910 Act, which reads as follows :

> 22-B. (1) If the State Government is of option 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 generally 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 supply) or an increase in the supply of energy of 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 continuance, where the requisitioning consumer was not himself the consumer of the supply at the time of its discontinuance.

Clause 3 and 4(i) of the Regulation Order (Annexure 'E') have been referred to by the learned counsel for the parties repeatedly and they are quoted below :

> 3. (1) No consumer receiving supply of electrical energy from the Board and consuming or using electrical energy for any of the categories specified in column (2) of Part A of Schedule VII shall consume or use during any month or day electrical energy in excess of that specified in respective entry in column (3) of the said Schedule;
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> (2) (a) If at any time during the month, on inspection of the meter reader or any other person authorised by the Divisional Engineer/Assistant Engineer of the Board having jurisdiction, the consumer is found to have already reached or exceeded the quantity of electricity indicated in column (3) of Part A of Schedule VII the Divisional Engineer/Assistance Engineer of the Board, having jurisdiction over the area where the consumer's premises is situated, may by an order in writing require the consumer not to utilise electrical energy for the rest of the month and such order shall be complied with by the consumer forthwith. Appeal shall, however, lie with the Deputy Chief Engineer of the Board having jurisdiction whose decisions thereon shall be final.
>
> (b) Any HT consumer who makes default in complying with the directions contained in sub-clause (1) and item (a) of this sub-clause shall be warned in the first instance

in writing by the Divisional Engineer/Assistance Engineer of the Board having jurisdiction over the area where the consumer's premises is situated and if the default continues, the said Divisional Engineer/Assistant Engineer shall after reasonably satisfying himself disconnect power supply altogether to such consumer and supply shall not be resumed without orders of the Deputy Chief Engineer of the Board having jurisdiction.

4. Without prejudice to the Board's powers to disconnect supply in the event of violation of clause 3 above, the Board shall bill the electricity consumed or used in excess of the monthly limit specified in column (3) of the Schedule VII at the penal rates as mentioned below :

(i) All HT consumers as specified in Schedules I, II, III and IV - Four times of normal tariff (both in respect of demand charges and energy charges) including fuel cost adjustment charges.

The expressions "average monthly consumption", "average demand" and "average daily consumption" have been defined in clause 2 of Annexure 'E' by taking January, February and March 1975 as the base period. The Seventh Schedule mentioned in clause 3 above has not been included in the paper books with reference to which arguments have been addressed but a copy thereof was filed during the hearing and accepted as a correct copy by both the sides.

8. This regulation Order was substituted by another Order and later by still a third Order, amending the penal rate and the schedules to the Order. However, the learned counsel for the parties stated that except for change in the penal rate and the figures in the schedules, the Order has remained the same all through, and it is not necessary, therefore, to refer to the other Orders.

9. So far as the Generation Order is concerned, it requires such consumers, who have their private generating sets, to generate electricity to the maximum extent technically feasible in the following terms :

3. Any consumer who is receiving electrical energy from the Board and also has an alternative source of generation of power by his own generating set may be required by the respective Divisional Engineer of the Board having jurisdiction to generate electricity from his set (or sets) to the maximum extent technically feasible in the opinion of the Divisional Engineer and the Board's supply of electrical energy to such consumer shall be reduced to the extent of additional generation assessed as feasible by the Divisional Engineer :

provided that -

(i) Before assessing the additional generation feasible and directing the consumer accordingly the Divisional Engineer shall consult the local Manager or Engineer in charge of the set;

(ii) The Board shall, during the period such a direction is in force, reduce the contract demand of the consumer to a corresponding extent and

(iii) If due to an emergency outage which in the opinion of the Divisional Engineer of the Board having jurisdiction is not due to any negligence or failure of those responsible for maintaining and running the set, there is reduction in additional

> generation, or if in the opinion of the Divisional Engineer, the set has to be taken out for maintenance during the period of such emergency or maintenance outage the Board shall try its best to make good the reduction to the consumer, levying an appropriate charge for it.

Its 6th clause directed any dispute between the consumer and the officer acting under clauses 3 an 4 to be referred to the Electrical Adviser and Chief Electrical Inspector to the State Government, for his decision.

10. While Regulation Order was meant for general application to all consumers, the Generation Order was confined only to such consumers who were captive power source. It is also manifest that such a consumer was under a duty to generate additional electricity only when the maximum technically feasible capacity of the generating set or sets of the consumer was assessed under proviso (i) to clause 3 and was followed by a direction to that effect. The main argument of the learned counsel for the appellant has been that none of the two assessments and directions contained in Annexure 'H' and 'O' was sustainable in law on the ground that -

> (a) in making the assessment of the technically feasible maximum capacity, relevant factors were not considered, and irrelevant and extraneous matters were taken into account;
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> (b) the requisite opinion was not arrived at and the assessment was not made by the authority empowered to do so; and
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> (c) the participation of the appellate authority in process of assessment, completely vitiated it in law.

Mr. Gupta argued that instead of examining the point on its merits, the High Court erroneously brushed it aside on the plea of waiver and acquiescence. Relying on a number of letters sent by the appellant to the respondent Board it was urged that the appellant Company was protesting against the impugned directions issued by the Board and it is not right to shut it out on the technical ground of estoppel. Mr. Kacker, on the other hand interpreted the High Court's judgment differently. According to him, none of the points raised by the Company was rejected without examining the merits. He strongly relied on some of the letters referred to in the argument of the Company itself as also a few other letters in support of his submission that they furnished unimpeachable evidence including admissions on the part of the appellant Company proving that the assessment of the maximum feasible capacity of the appellant's captive power sets was duly made in accordance with the Generation Order and in pursuance thereof the required direction was issued which was acted upon by the parties for a number of years. The Company not only took steps to generate the additional energy as was required of it, it also took advantage of the provisions of proviso (iii) to clause 3 of the Generation Order and benefited by it from time to time.

11. For appreciating the argument of the learned counsel for the appellant it is necessary to examine some of the Orders and letters issued in March and April 1975. As has been mentioned earlier, the two Government Orders were issued on April 4, 1975. It appears that the matter was being discussed by the differently authorities of the State Government and the Electricity Board since before this date and advisable to require the consumers having captive power to generate as much energy as was technically feasible was under consideration for some time. The question as to their capacity in this regard, naturally assumed importance and some steps for assessing the same were

taken a few days before the Orders actually came into effect. On March 28, 1975 a letter sent from the Board to Shri H. K. Aggarwal, the Electrical Adviser and Chief Electrical Inspector to the State Government (Annexure 'R-1') referred to a telephonic talk in connection with the assessment of the generating capacity of the captive power set. It was mentioned "that it would be necessary to make a realistic assessment in respect of each of the consumers" by keeping in mind the suggested factors. The letter further said that with that object the Board had constituted a Committee consisting of Shri Aggarwal himself, the Superintending Engineer of the concerned Circle of the Board and the Divisional Engineer (Generation), Jabalpur of the Board as Members. The appellant Company is mentioned as one of the 17 consumers in this category. Along with his letter dated May 3, 1975 Shri Aggarwal sent the report as desired. It has been contended on behalf of the appellant that the Generation Order authorised the Divisional Engineer of the Board to assess the additional feasible capacity of the captive power source and any other person or authority or Committee could not usurp this jurisdiction. The impugned letter Annexure 'H' issued by the Divisional Engineer has been characterised as illegal on the ground that it was based upon the assessment by the Committee headed by Shri H. K. Aggarwal and not by the Divisional Engineer. The learned counsel proceeded to say that immediately after receipt of the intimation by the Board, the Company protested on May 21, 1975. The Board's reply dated June 2, 1975 has been relied upon as showing that the direction was issued on the basis of the assessment of the Committee and not of the Divisional Engineer. It was also pointed out that Electrical Adviser and Chief Electrical Inspector to the State Government (the then incumbent being Shri H. K. Aggarwal) was the appellate authority under clause 6 of the Generation Order and could not, therefore, take part in the original assessment proceeding. The reply of the Board is that the Committee no doubt inspected the generating sets and discussed the matter with the consumers, and thus collected relevant date for the purpose of assessment of the capacity, but the Divisional Engineer while relying on the material collected, did not mechanically accept the conclusion of the Committee. He (the Divisional Engineer) applied his mind before issuing the Order Annexure 'H'. Mr. Kacker further said that the matter did not rest there. After taking into account the objection raised by Company the Divisional Engineer took up the matter afresh and applied his mind independently. Ultimately he came to a similar conclusion as evident by the second direction as contained in Annexure 'O' dated October 10, 1975. The argument of Mr. Kacker appears to be well founded.

12. On receipt of the letter Annexure 'H' dated May 17, 1975 whereby the Divisional Engineer directed the Company to generate 2500 KW of electricity by its own generating sets, the appellant Company protested by its letter dated May 21, 1975 (at page 195 of the paper book Vol II). Mr. Gupta strenuously relied on this letter which stated that the Company failed to understand as to how its additional generating capacity had been assessed at 2700 KW. It will be necessary to discuss this letter in some detail later in the judgment while dealing with another point as Mr. Kacker also has relied on certain statements made therein. At this stage, however, we should like to point out that the appellant did not challenge the assessment on the ground that it was not made by the authority mentioned in the Generation Order; and in the last paragraph the request made was for "review". The next document referred to by the learned counsel for the appellant is the letter dated May 30, 1975 (page 305 of the paper book Vol. II), wherein the Company stated that :

> as desired by the Board, we have started generating about 2000 KW additional power at our generating station .... our coal consumption has, therefore, increased by 70 tonnes daily for this additional generation.

Finally a request was made in the letter to the Superintending Engineer of the Board to recommend the appellant's case for allotment of additional wagons for transport of coal. Instead of advancing

the appellant's case, the letter shows that the assessment and the direction mentioned in Annexure 'H' were accepted by the Company and steps were taken to implement the same. Chronologically proceeding, the letter dated June 2, 1975 (Annexure 'I' at page 122 of the paper book Vol. II) was relied on by Mr. Gupta as proving the fact that the assessment of additional generating capacity had been done by the Committee mentioned in the letter dated March 28, 1975 (supra) and not by the Divisional Engineer as required by the Generation Order. The learned counsel for the parties next placed before us the letters dated June 3, 1975 (document 3 at page 302 of the paper book Vol. II) and dated June 4, 1975 (document 1, at page 300 of the paper book Vol. II), another letter of the same date Annexure 'J' at page 123 of the paper book Vol. II) and then dated August 8, 1975 (Annexure 'K' at page 132 of the paper book Vol. II) and October 10, 1975 (Annexure 'O' at page 136 of the paper book Vol. II).

13. The argument of Mr. Kacker has been that the Divisional Engineer applied his mind independently to the question of assessment of the capacity of the appellant's generating sets, and while so doing took in consideration the factual data collected by the Committee mentioned in the letter of March 28, 1975. It was pointed out that all the three persons constituting the Committee were very highly placed officers and there could not be any legitimate objection were very highly placed officers and there could not be any legitimate objection if the Divisional Engineer referred to the data collected by them in presence of the Company's officers after personally verifying them. Even a judicial tribunal or a regular court is allowed to rely upon a evidence collected by an enquiry officer or commissioner. The learned counsel heavily relied on the letter dated June 3, 1975 from the Divisional Engineer to the Superintending Engineer (document 3). On behalf of the appellant it was said that the Company had no knowledge of this letter in 1975. We do not think that this is a correct stand. The letter mentions an inspection of the Company's power house by the Divisional Engineer and the materials supplied by the Company to him. The details with respect to the boilers of the Company and the other figures mentioned therein, correctness whereof is not challenged by the appellant, fully establish that the inspection was made in presence of, and the figures were collected with the assistance of, the officers of the appellant Company and the conclusion regarding the assessment was reached after taking into account the case of the Company. It has been argued on behalf of the Board before us that the method adopted by the Divisional Engineer as disclosed by this letter (document 3) was different from that followed by the Committee, as a result of which there was some difference in their final result. On the basis of his independent assessment the Divisional Engineer issued another instruction as contained in Annexure 'O' dated October 10, 1975 (at page 136 of the paper book Vol. II), mentioned earlier. This second direction which was effective from October 31, 1975 naturally superseded the earlier one under Annexure 'H'. The Board's impugned demand does not relate to any period before October 31, 1975 and, therefore, it is immaterial if the direction in Annexure 'H' is completed ignored on account of its supersession by Annexure 'O' or on any other ground it be assumed that in absence of a feasible assessment of the capacity, the Generation Order was not applicable to the appellant Company before October 31, 1975.

14. Mr. Gupta relied on the letter dated June 4, 1975 (document 1). referred to above, for showing that the Company emphatically protested against the assumption that it could generate additional 2500 KW. It was said that its capability in this regard was limited to 1200 KW. The learned counsel referred to the other letters also for a similar purpose. We think that in view of the revised order of the Divisional Engineer passed on October 10, 1975, vide Annexure 'O', earlier correspondence is not material for the purpose for which the appellant is trying to use them. The learned counsel for the respondent has relied on some of them for his argument on the other points and we will have to deal with them again when we take up those points. So far as the question as to whether an

assessment of the feasible capacity of the generating sets of the appellant Company was made by the Divisional Engineer as required by the Generation Order is concerned, we have no hesitation in deciding the issue in favour of the respondent.

15. On behalf of the appellant it was urged that since the Electrical Adviser-cum-Chief Electrical Inspector of the State Government who has been mentioned as the appellate authority under clause 6 of the Generation Order was associated with the assessment by acting as a member of the Committee (vide Annexure 'R-1' at page 256 of the paper book Vol II), the entire process in this regard should be held to be completely vitiated. In view of our finding in the preceding paragraph, the argument has to be rejected. Besides, it is not correct to assume that an appeal against the assessment was provided by clause 6 of the Generation Order which reads as follows :

> 6. In case of any dispute between the consumer and the Divisional Engineer acting under clauses 3 and 4, it shall be referred to the Electrical Adviser and Chief Electrical Inspector to the Government of Madhya Pradesh whose decision shall be final.

The above is obviously an arbitration clause in case of a dispute and since the maintainability of the appellant's writ application before the High Court was decided in its favour, it cannot make a grievance of this score. Besides, if the appellant Company had a grievance against the assessments which were made in 1975, it ought to have challenged the same then and not to have waited for a number of years before approaching the High Court.

16. Mr. Gupta challenged the assessment still on another ground. He contended that while making the assessment, the relevant factors were ignored, and irrelevant and extraneous considerations were taken into account. The argument which is based on certain scientific technical hypothesis proceeded thus : The Company had three generator sets described as M. V. Turbo Generator Set, B. B. Turbo Generator Set and AEG Turbo Generator Set; and five boilers. Another boiler was added in 1977. Every generator set has a rated capacity which has been described by the learned counsel as the level at which operation can continue satisfactorily for indefinite period. This rated capacity is declared by the manufacturer and can be accurately ascertained without difficulty. The terms 'overload' and 'overload capacity' have been explained by the learned counsel as "one exceeding the level at which operation can continue satisfactorily for an indefinite period" and "excess capacity of a generator over that of its rating", respectively. It was argued that overloading may lead to distortion or to overheating with risk of damage, depending on the type of circuit or device, and so in many cases only temporary overloads are permissible. The overload capacity, it has been said, is referable generally for a specified time. The criticism against the report of the Committee is that the Committee took into account the overload capacity of the sets and not the rated capacity. Mr. Gupta stressed on the point that the AEG Turbo Generator Set was maintained as a stand by to be operated only when other sets were not available for any reason. He also said that the feasible generation capacity of a set is also dependent on other factors and conditions, namely, age and condition of the set, availability of coal of requisite quality and specification, adequate and continuous supply of water etcetera. Referring to the report of the Divisional Engineer dated June 3, 1975 (document 3 at page 302 of the paper book Vol. II) it was argued that the Divisional Engineer picked out a moment of time when the plants reached the generation of 7500 KW and concluded therefrom that the appellant was capable of generating 1800 extra KW from its captive plant. It was further suggested that in any view of the matter on the basis of the aforesaid opinion of the Divisional Engineer the appellant Company ought to have been asked to generate only 1800 KW more and not 2500 KW. Finally it was argued that the Board has to be confined to the reasons in support of the assessment

orders which are mentioned therein and cannot be allowed to travel beyond the same.

17. Mr. Kacker took great pains in going into the reports and specially through the aforementioned report of the Divisional Engineer dated June 3, 1975, with a view to meet the criticism of the appellant and support the report as a correct one on merits. He also relied on a number of letters sent by the appellant showing that the assessment was accepted as binding on it and claiming from time to time benefits under proviso (iii) to clause 3 of the Generation Order which was allowed for a number of years. The learned counsel relied in this aspect as furnishing strong circumstantial evidence in support of the correctness and binding nature of the assessment impugned belatedly when the appellant approached the High Court.

18. It is significant to note that at no point of time either in 1975 or later the appellant chose to get a scientific assessment of its generating sets made by an expert, nor even after filing the present writ petition in the High Court did it file any opinion of a person having scientific expert knowledge showing the impugned assessments to be erroneous or undependable. It is also important to appreciate that the appellant has not either earlier or now made any complaint of mala fides or bias against any of the members of the Committee or the Divisional Engineer or for that matter against any officer of the respondent Board or the State. On the other hand, the officers of the Board appear to have taken a very sympathetic attitude towards the appellant for more than four years and allowed it the benefit of additional energy under proviso (iii) to clause 3 of the Generation Order every generously. It was only when the Board discovered in 1980 that the appellant had stopped even informing the Board and obtaining its prior approval as envisaged by the Generation order before consuming extra energy that the matter was closely examined by the Board's officers. Mr. Kacker is also right in relying upon the conduct of the parties for about four or five years after the assessment was made as furnishing important circumstances relevant to the issue. We may, therefore, examine a number of letters in this regard some of which have already been mentioned earlier.

19. The very first letter of the appellant Company after receiving the impugned direction in Annexure 'H' dated May 17, 1975 was sent within 4 days on May 21, 1975 and is included at page 195 of Vol. II of the paper book. It will be seen that the protest against the assessment referred to by the learned counsel for the appellant was not founded on any of the grounds pressed now. This basis was "only due to steam limitation", assuring that "once our boiler under erection starts steaming, we can enhance our generation to the full installed capacity". The prayer in the end of the letter was to "revive the whole matter". The Divisional Engineer, as mentioned earlier, personally examined the entire matter de novo. Although in its letter dated May 21, 1975 the Company had stated that it was not advisable to generate more than 12 KV from its own sets, by the next letter dated May 30, 1975 (page 305, Vol II), the appellant informed the Board that they were generating about 2000 additional KW, but were in the need of additional coal, for which the Board was requested to make a recommendation. In Annexure 'J' dated June 4, 1975 (page 123, Vol. II) the protest against the assessment was once more reiterated on account of some trouble with the boilers. The first paragraph of this letter indicates that the question was under discussion of the Divisional Engineer with the Company's representatives who were armed during the conference "with all relevant records". In this background the fresh independent assessment was made by the Divisional Engineer as per document 3 dated June 3, 1975 (page 302, Vol. II). Before the fresh independent direction by the Divisional Engineer as contained in the impugned Annexure 'O' dated October 10, 1975 was issued, a suggestion was made on behalf of the Board of the appellant Company for its satisfaction as to the correctness of the assessment by "actually taking the load on the set, after running it in parallel with the Board's Board's supply system". The learned counsel for the parties before us

explained the scientific implications of the test by "parallel running", but we do not consider it necessary to go into its technical details. The Board requested the Company's consent for such a test, to be communicated positively within a week. By its reply dated August 25, 1975 Annexure 'L' (page 133, Vol II) the Company rejected the suggestion on two grounds, namely, that it was "not having protection system like power relay etc. "and "in case of tripping of Board's supply we would be doing the paralleling of the sets", which was not safe. In reply thereto the Board satisfactorily met the objections by its next letter Annexure 'M' dated October 25, 1975 (page 34, Vol. II). It was pointed out that the parallel running test will be undertaken only for a short period after which the captive sets would be separated from the Board's system; and a disturbance free period could be chosen for the same. Besides, the objections to the suggested test have to be rejected as frivolous in view of the stand of the Company itself as indicated in the letter Annexure 'N' (page 135, Vol II) dated November 6, 1975, stating that it had no objection to the suggested trial, which the appellant claims to have sent to the Board which fact is however denied. In the meantime the second assessment order under Annexure 'O' had already been communicated. It was, therefore, open to the appellant either to accept and act upon this fresh assessment or to go in for a further check as mentioned by the Board. The appellant did not pursue the matter at all and observed silence on the suggestion for the parallel running test. Mr. Gupta, however, contended that the offer in the letter dated October 25, 1975 was accepted by the appellant in its letter dated November 6, 1975, Annexure 'N' mentioned above. Mr. Kacker asked the court to disbelieve the Company's assertion of having sent this letter and pointed out that a perusal of all the letters sent from the Company to the Board would show that none of them was ever sent to the Joint Secretary (V) except Annexure 'N'. The Production Manager of the appellant Company under whose signature the letter is claimed to have been sent also does not appear to have been taking any interest either earlier or later than this letter. Mr. Kacker alternatively contended that assuming that such a letter was actually sent by the Company to the appropriate authority of the Board, it does not stand to reason as to why the Company did not sent any reminder, and remained satisfied for more than four years, asking for benefits from the Board on the basis of the assessment in Annexure 'O' having been appropriately made. The argument of Mr. Kacker appears to be well founded. It is significant to note that the appellant had not accepted the offer as wrongly claimed by it, on the basis of the letter Annexure 'N', but at the same time the said letters does indicate that the suggested parallel running test was feasible and there was no justification to reject it on the flimsy grounds mentioned by the appellant on August 25, 1975 (Annexure 'L'). The conclusion is irresistible that the appellant Company backed out without adequate reason from the realistic test proposed by the Board to check the correctness of the assessment.

20. Before proceeding to examine the other letters, strongly relied upon on behalf of the respondent Board, it may be useful to recall that the Company had mentioned the inadequate capacity of the boilers in steam generation as the ground for not being able to generate additional electricity as required by the impugned directions. It was also mentioned that after a sixth boiler became available, the difficult would stand resolved. In this background Mr. Kacker placed before us several letters starting with the letter of the Company dated February 14, 1977 (at pages 4 to 8 of additional paper book prepared and filed by the respondent Board, which was referred to by the learned counsel as Vol. IV of the paper book). The Company, by this letter requested the Board to charge at the normal tariff for the additional electricity consumed by the Company as emergency supply as per proviso (iii) to clause 3 of the Generation Order. The statements made in the letter appear to be extremely important for the purpose of the Board's case and it may be useful to consider them in some detail.

21. In the first paragraph the Company stated that it was again placing for the Board's consideration,

the reasons why it could not generate the additional power according to the direction issued. In the second paragraph the main difficulty has been mentioned as steam limitation and reason therefor has been stated in the third paragraph as the inferior quality of coal. Later it was stated thus :

> These problems would not have arisen in case out sixth boiler recently erected was commissioned and running without trouble.

It was said that although the sixth boiler was taken in August, it did not work properly for some time. Proceeding further the letter stated :

> It is only since the beginning of January the sixth boiler has been in continuous service, as a result of which we were in a position to repair out other boilers also.

Since the last week of January, we are generating our full requirement and not even availing the 600 KW allowed by the Board.

In the penultimate paragraph of the letter, the case for normal tariff on the additional electricity already supplied by the Board was argued in the following manners :

> Considering all the above, facts, we sincerely hope, that as due to no fault of our own we had to take power from MPEB, more than allotted to us, it is requested that the charges made to us may be on the usual terms as previously granted by the Board for which we will be ever grateful.

The letter is not only conspicuous by the absence of the objections which are taken later in 1980 before filing of this writ case, but it positively indicates that the Company accepted the assessment as correct, and as expected, it was actually able to generate the required additional electricity after the addition of the Sixth boiler and was pleading for normal tariff for the additional electricity already consumed earlier. This position is reinforced by several further letters of the Company, but before we go to them we would like to point out another very important fact emerging out of this very letter. At page 7 of vol. II of the paper book the letter dealt with another aspect highly relevant to the present dispute. Another Limited Company known by the name of the "Gwalior Rayons" is having a factory near the appellant Company's factory and the appellant was supplying electric energy to the other factory illegally and without the permission of the Board. On an objection by the Board this matter was dealt with in the following words :

> It is not out of place to mention in this appeal that we had given now and then some power in the past to the Gwalior Rayons, in emergency for their Beam dyeing Plant whenever MPEB power failed. This was due to the fact as the Beam Dyeing Plant is a pressure dyeing plant, with a continuous process, there used to be heavy damages to very costly Beams. Since this issue was raised by your Divisional Engineer, we have completely stopped this type of supply to them, though the same was given to them after reducing our humidity or waste plant load.

It is again our request here that the same may be allowed in emergency under whatever arrangement the Board may so decide to avoid costly damage to the cloth.

A fervent appeal in the interest of the other factory belonging to a different Limited Company altogether was made in the above terms. It has to be remembered that in view of the provisions of Section 28(1) of the 1990 Act, the Company was prohibited from supplying any energy to the other

factory. This aspect was stressed in term 2(b) of the agreement between the appellant and the Board as per Annexure 'A' (page 62 of Vol. II). It was not the appellant's case then or before us now that it had obtained the previous sanction of the state Government for so doing. Under Clause 4 of the Generation Order, which read as follows, Jurisdiction was vested in the Divisional Engineer of the Board to direct a consumer having captive source of power to supply electricity to the Board or to any other consumer only if the consumer was having surplus generation :

> 4. If the consumer having own generating set(s) can have, as a result of additional generation reasonable in the opinion of the Divisional Engineer of the Board having jurisdiction, energy, surplus to his requirement, the Divisional Engineer may direct him to supply the surplus to the Board or to another consumer nearby who has been taking supply from the Board and who is willing to take the supply from the consumer having generating sets :
>
> Provided that -
>
> (i) the contract demand of and the supply to the other consumer from the Board shall be reduced correspondingly, whether or not the other consumer avails of the supply from the consumer having the set,
>
> (ii) the other consumer shall pay to the consumer having generating set(s) for such supply as if it is supplied from the Board,
>
> (iii) if the payment receivable by the consumer having the set under the last preceding clause is less than his incremental cost of additional generation, the Board shall make good the difference to the consumer having the set(s) and
>
> (iv) the consumer having the set(s) will not be required to incur any additional expenditure for laying lines for transmitting energy to the other consumer; such lines if required being laid by and at the cost of the Board.

How could, in these circumstances, the appellant pass on to a third party some of the electricity meant for it, there is no explanation on the records. Mr. Gupta the learned counsel for the appellant argued that since the other factory was in the neighbourhood it was in the interest of the appellant Company for the sake of security to see that other factory was not plunged in darkness when the supply was interrupted on account of tripping. Mr. Kacker rightly pointed out that no such suggestion was never made on behalf of the appellant in any of its letters. On the other hand, the reason pleaded in the letter quoted above was to save the other Company from incurring loss due to costly damage to the cloth. In his final reply Mr. Gupta said that the appellant was passing waste on some electricity to the Gwalior Rayons only after reducing its humidity or waste plant load as stated in the letter. The explanation is too vague and it cannot be assumed that the appellant was making the contribution to its sister concern by creating artificial shortage of supply of its mills. The appellant's conduct cannot be explained except of the premise that it was able to generate adequate additional electricity for its purpose and was taking for granted the sympathetic attitude of the officers of the Board in liberally allowing it additional emergency supply at normal tariff.

22. Another letter which calls for a detailed consideration was sent by the appellant on May 30, 1979 and is included at pages 16 to 20 of Vol. IV. A fresh request for emergency supply under proviso (iii) to clause 3 of the Generation Order was made in this letter on the ground that the sixth

boiler was out for annual overhaul. It was stated in the opening sentence that this boiler was giving some trouble earlier but later 'stabilised'. The Company was, therefore, self-sufficient "without drawing any power from the Board so far". The letter proceeded to state that the sixth boiler would be going for annual overhaul and after that the annual overhauling of the other boilers would be carried out; and therefore, 1875 KW should be allowed to be drawn for the period mentioned therein. Assurance about the future was held in the following terms :

> Now when our sixth boiler has been stabilised we would normally, not draw any power from the Board after September 15, 1977 when overhauling of all the boilers is complete except in case of emergency due to outage of any of the boilers.

It was further requested that during the period of breakdown emergency power as detailed should be supplied and, We would request you that for the power availed by us from the Board for above purpose, say up to a total 7 days in a month, we may be charged at the same tariff.

Insisting again that it should be allowed to supply electricity to Gwalior Rayons, described as its sister concern, the letter read as follows :

> Here we may also mention that we have been supplying power to our sister concern M/s. Gwalior Rayons, in accordance with the provisions of sanction granted to us under Section 28 of the I.E. Act vide Government Order No. 1313/6061/XIII/74 dated April 8, 1975. However, it had not been possible for us to obtain prior permission from S. E. Gwalior before switching over power to Gwalior Rayons. It may be mentioned here that power has to be supplied to M/s. Gwalior Rayons during the period the Board's supply remained off, and it is not practically possible to obtain prior permission for supply in such cases. We would, therefore, request you that prior permission should be given once for all for supplying power to the Gwalior Rayons during the period supply from the Board to M/s. Gwalior Rayons remained off.

This letter dated May 30, 1977 confirms the conclusions derived from the earlier letter dated February 14, 1977 and clarifies that the first letter was not sent by some mistake on the part of the appellant Company. Request for emergency supply was, however, made from time to time in 1978 and for some time in 1979, which was allowed by the Board. The other letters including those dated May 30, 1978, June 29, 1978, July 7, 1978 and September 9, 1978 are all consistent with a correctly made binding assessment of the feasible additional capacity from the generating sets belonging to the Company.

23. Mr. Gupta contended that throughout the period 1975 to 1979 there was never a demand made by the Board for any energy consumed by the appellant at the penal rate and it was only in 1980 that the Board suddenly decided to press for the additional demand on the basis of the Generation order. The learned counsel emphasised that before the provisions of the Generation Order can be relied upon by the Board it is essential for it to make an assessment of the consumer's capacity to generate electricity from its captive power plant. The fact that no demand was made for many years leads to the conclusion that such an assessment as required by the provisions of the Generation Order to be made, had not in fact been made, and alternatively assuming that factually the capacity had been assessed, the same must be ignored on account of the conduct of the parties for several years. The stand of Mr. Kacker, as has been stated earlier, is that the parties acted on the basis that an assessment had been made in accordance with the Generation order and on that on that basis the appellant demanded the benefit under proviso (iii) to clause (3) of the Order. The documents relied

on by him and discussed in the preceding paragraphs support the respondent's stand. The also explain as to why demand on the penal rate was not made earlier, but it would be helpful to consider a few more facts relevant to this aspect.

24. The system of supply of power of the consumers is such that they can go on drawing electricity beyond their entitlement without any further positive step by the officers of the Board. The Board is, however, in a position to, by keeping a certain switch known as Air Break Switch open, put a restriction on the consumer from drawing excess energy. A letter dated June 4, 1975 (document 1, at page 300 of Vol. II) sent by the appellant has been strongly relied on by Mr. Kacker for showing that Air Break Switch was permitted to remain closed with a view to assure uninterrupted supply to the appellant as its request. The result was that the appellant was in a position to draw excess electricity without reference to the officers of the Board. That letter indicates that the Board was contemplating to keep the switch open and the Company by this letter made a request not to do so. The appellant Company was fully conscious of the fact that it was consuming electricity beyond its entitlement under the two Orders, by claiming the benefit of the provisions dealing with emergency supply, and was also alive to the fact that this had to be done only with the prior approval of the Board. The relevant portion of the letter is in the following terms :

> Further at no time it may kindly be noted that power has been availed from MPEB without prior intimation by phone either to Divisional Engineer or Superintendent Engineer. By keeping the A.B. Switch open at your end, the delay in supply to J.C. Mills will be considerable which will cause they heavy losses to the J.C. Mills for no fault of their own. This may kindly be reviewed and .....

The learned counsel for the Board was right in saying that on account of this request by the appellant the line was kept open for it unhindered. This did not mean that the Company was entitled to misuses the privilege, draw extra energy without prior permission and thereafter refuse to pay higher charges when demanded. It has been conclusively established by a large number of letters on the records of the case that for several years the Company was particular in obtaining the permission of the Board for drawing electricity in excess of what it was entitled to, by the agreement as modifying by the Regulation Order and Generation Order, but later, it not only stopped seeking the advance sanction in this regard, it did not even care to inform the Board of the excess drawal. The branch of the respondent Board at Gwalior sent the bills on the basis of the normal tariff, as the question of grant of additional emergency supply was being dealt with by the Head Office at Jabalpur. The Gwalior office was not at all dealing with the matter relating to the excess emergency supply which aspect was being exclusively dealt with at Jabalpur, and as soon as the relevant facts came to the knowledge of the Head Office of the Board it took up the matter with the appellant Company. The entire conduct of the parties furnishes strong circumstantial evidence in support of the Board's case.

25. Another argument addressed by Mr. Gupta is based on the letters Annexure 'P' series sent by the Board to the appellant Company from time to time. They have been included at pages 137 to 156 of Vol. II of the paper book, and according to Mr. Gupta they are inconsistent with the Board's case regarding the appellant's entitlement to receive the amount of energy from the Board. He has pointed out that these letters do not suggest that the contract demand had been reduced to nil in accordance with Annexure 'H' and 'O'. By way of illustration he relied on the letter dated October 31, 1975 (at page 138 of Vol. II) stating that the Company's maximum demand should not exceed 1875 KW". We do not find any merit in the submission. The letters marked as 'P' series did not deal with the entitlement of the appellant Company as a result of both the Orders - Regulation and

Generation. The Regulation Order was of universal application to all the consumers while the Generation Order applied to only such of them who had their own generating sets. Under the Regulation Order the contract demand was reduced by a certain percentage and provided for payment of charges at penal rate in case of excess consumption. The rate of cut and the penal rate for additional consumption did not remain constant, and were revised from time to time. It appears that as and when the revision in the rates took place the consumers were informed as to the effect of the Regulation Order as it stood after modification. Mr. Kacker was right in saying that since the Regulation Order was application to all the consumers and letters similar to those marked as Annexure 'P' series were being addressed to all of them, there could not be any objection in the Board sending similar letters to the appellant and others having their private generating sets dealing with the effect of the Regulation Order alone, without taking into account the Generation Order. A perusal of these letters fully supports the respondent's stand that they were being issued with reference to the Regulation Order alone. Further, a close examination of the Generation Order would show that the Maximum permissible limit available under the Regulation order had not ceased to be relevant even after the application of the Generation Order. The entitlement of the appellant due to emergency outage under proviso (iii) to clause 3 of the Generation Order was limited to the original contract demand as reduced by the Regulation Order. It was, therefore, important for the appellant to keep in mind that at no point of time it could be entitled to ask for beyond this limit as emergency supply on any ground whatsoever. As this limit fluctuated from time to time on the change in the percentage of reduction in the Regulation order, the appellant was rightly reminded of the latest position in this regard. The learned counsel for the respondents was also right in saying that these letters could not have misled the appellant in any manner. The numerous letters discussed earlier clearly indicate that the appellant correctly appreciated its position and repeatedly made requests for emergency supply under the Generation Order on the assumption that its entitlement had been rendered to zero. The appellant's letter dated May 30, 1977 (at page 16 of Vol IV) referred to earlier, fully demonstrates that the plea raised by the appellant is devoid of any merit. A portion of the said letter (not dealt with earlier) is in the following terms :

> During the period of breakdown we would request you to agree to the following arrangement :
>
> (i) Before availing Board's power during the emergency we will intimate the E.E., MPEB, Gwalior as well as SE, MPEB, Gwalior and send a copy of our letter to the Director (Com), MPEB, Jabalpur.
>
> (ii) (a) In case sixth boiler is out and other boilers are working satisfactorily we may be allowed to draw power up to 1200 KW.
>
> (b) In case sixth boiler is on range and one of our M V boilers is out we may be allowed to draw power up to 1200 KW.
>
> (c) In case sixth boiler is out and one of our M V boilers is also out, we may be allowed to draw power up to 1875 KW.

If present stand of the appellant be assumed to be correct, there was no occasion for it to claim verying quantities of power in changing circumstances as mentioned above.

26. It was also urged on behalf of the appellant that the Board's letter dated October 13, 1980, Annexure 'U', (at page 182, Vol. II) impugned by the appellant is also inconsistent with the Board's

stand in the present case. By this letter the appellant was informed that the contract demand of 3490 KW as per the agreements between the parties was going to be reduced to 1250 KW under the provisions of the Generation Order, and on further reduction under the Regulation Order it would come down to 875 KW only. The appellant was accordingly directed to draw power up to 875 KW with effect from August 1, 1980. The Board further informed the appellant that no additional power will be supplied during the period of overhauling of the private generating sets. This part of Annexure 'U' has been set aside by the High Court on the ground that under Proviso (iii) to clause 3 of the Generation Order the Board was under a duty to permit the appellant to draw additional electricity on satisfaction of the relevant conditions for emergency supply, which it could not deny. The Board has not challenged this part of the High Court's decision, and the same is not relevant for purposes of the present appeal. Reliance on behalf of the appellant has been placed on the earlier part of the letter directing it to limit its drawal to 875 KW. Mr. Gupta explained the situation thus : The contract demand as per the original agreement and the subsequent agreements by the date on which the letter was issued admittedly was 3490 KW. If the Board's case that the appellant's capacity to generate electricity from its own sets was assessed at 2500 KW be accepted as correct, then the appellant would have been held entitled to draw 990 KW only and not 1250 KW as mentioned in the letter. Mr. Gupta invited us to consider this aspect along with the Board's earlier letter Annexure 'R' dated December 28, 1979 (page 158 of Vol. II), informing the appellant that additional power to the extent of 190 KW had been sanctioned. The admitted position in regard to different agreements between the parties is that initially the parties entered into a contract with respect to 1500 KW only which was later raised to 2500 KW. The Regulation and Generation Orders came into existence at that stage. In July 1979, a supplementary agreement was executed between the parties for supply of additional 800 KW and in December 1979 the Board further sanctioned 190 KW. The relevant part of the letter relied on by Mr. Gupta is quoted below :

> The Board has sanctioned 190 KW additional power (over and above 3300 KW) at 33 KV subject to the following conditions :
>
> (I) The contract demand shall be reduced in terms of Government control Order No. 1254/2048/XIII/75 dated April 4, 1975 after the decision of the Committee headed by the Electrical Adviser & Chief Electrical Inspector to Government of M.P. regarding reassessment of the capacity of the consumer's generating set is known.

The argument is that the Board could mention about a Committee proceeding to assess the capacity of the consumer's captive plant only if there had not been earlier any assessment. The reduction in the contract demand under the Generation Order should have been made after the assessment work was completed, but as a matter of fact, no such assessment was made and ultimately the letter Annexure 'U' dated October 13, 1980 was issued arbitrarily without any basis. In absence of an assessment of the capacity under the Generation Order, no reduction was permissible.

27. Mr. Kacker's reply is that since the appellant for the period of more than 4 years was pleading for emergency supply from time to time on one ground or the other, an internal Committee of Superintending Engineers which had visited the Company's plant on September 25, 1980 suggested that the appellant Company be granted additional power to the extent of 260 KW on regular basis instead of examining the grounds relied upon by the appellant every now and then. The latter part of the letter informing the appellant that it would not in the future be supplied additional power on the ground of emergency has been referred to in support of this argument. Mr. Kacker further said that unfortunately the Board was held liable for the emergency supply if the necessary conditions were satisfied and thus the appellant has got double advantage and this cannot be the basis for accepting

the appellant's case. The learned counsel proceeded to say that the letter Annexure 'R' was issued in connection with the sanction of 190 KW additional power, subject to the Government Orders, and the reduction thereunder was only a matter or arithmetical calculation which should have been done without reference to a committee. The letter was not sent in connection with any controversy about the assessment of the generating capacity under the Generation Order, and it cannot be interpreted in the manner as suggested on behalf of the appellant. It was further pointed out that admittedly there was no question of a committee headed by the Electrical Adviser and Chief Electrical Inspector to the Government of Madhya Pradesh to make a fresh assessment under the Generation Order or to undertake the realistic assessment of the additional capacity over again. The assessment had to be made by the Divisional Engineer of the Board. It was lastly said that this argument addressed by Mr. Gupta before this Court was not advanced before the High Court nor was the point taken in the writ petition or any affidavit there. On a consideration of the documents and the relevant circumstances we agree with Mr. Kacker. The use of the word "reassessment" in the letter quoted above instead of "assessment" also supports the respondent's case. The term "reassessment" implies that there had already been an assessment earlier. Even interpreting the letter as suggested by Mr. Gupta. The existence of the earlier assessment by the Divisional Engineer cannot be ignored. If the appellant was not satisfied with it, it should have taken appropriate steps for getting the same quashed in 1975 itself and should not have waited for four or five years before approaching the High Court, and in the meantime taking the benefit of the provisions regarding emergency supply on its basis.

28. Now in this background let us come back to the argument of Mr. Gupta as mentioned earlier in paragraph 16 above. In reply Mr. Kacker asserted that it is not correct to assume that a machine can function on a regular basis only according to the rated capacity as declared by the manufacturer. By way of illustration he relied upon the specifications relating to a machine issued by the Bharat Heavy Electricals Ltd., indicating that the "peaking capacity" of the machine with "No time limit" was higher than the "rated output" mentioned. The learned counsel also analysed the report of the Divisional Engineer along with the data mentioned by the Committee which in his opinion indicated that the maximum capacity of the appellant's sets technically feasible was much more than that actually assessed and could not be less by any calculation even before the sixth boiler was erected. After the sixth boiler became available the capacity rose to at least 9700 KW but the Board taking a generous view did not call upon the appellant to generate further additional electricity than that directed earlier.

29. We have heard the learned counsel at considerable length on this aspect and we think that the question as to what should be considered the correct feasible capacity of the appellant's sets is one involving complex technical knowledge and the High Court (or for that matter this Court) was well advised not to have attempted to determine it. We must reiterate the circumstances which appear to be highly relevant, namely, (i) that the Divisional Engineer who has been rightly considered by the Generation Order to have sufficient expert knowledge in this regard reached the conclusion which is under challenge in the present case after personally considering the matter thoroughly along with the officers of the Company as is apparent by many of the letters; (ii) the figures collected by the members of the Committee are not challenged as incorrect or inaccurate; (ii) it is not suggested that any of the members of the Committee or the Divisional Engineer or for that matter any officer of the respondent Board or of the State Government had any prejudice or bias against the appellant Company; (iv) the appellant did not get an independent assessment of its generating sets made by any person having expert knowledge; (v) the appellant avoided to get the correctness of the assessment verified by the parallel running test as suggested by the Board; and (vi) the conduct of both the appellant and the respondent Board as emerging from the documents placed by the parties on the records of the case furnish valuable circumstantial evidence in support of the respondent's

case. The argument of the appellant challenging the assessment as illegal must, therefore, be rejected.

30. Mr. Gupta by way of an alternative plea pressed an argument for granting a limited relief. He urged that even assuming that the assessment of maximum feasible capacity of the appellant's sets was correctly made in 1975 so as to be binding on the appellant, it is fully established even by the letters of the Board that the position stood materially altered by November 1979 which called for a reassessment. The Board's letters dated November 27, 1979 (page 157, Vol. II), and December 28, 1979 (page 158, Vol. II), according to the learned counsel, indicate that irrespective of whether the initial assessment was good or not, the Board accepted the position that steps for reassessment had to be taken and after taking into account the circumstances, decided to grant an ad hoc benefit of 260 KW by its letter Annexure 'U' dated October 13, 1980 (page 182, Vol. II), discussed earlier. Although the appellant does not agree that the grievance of the appellant was properly met by the grant of additional 260 KW but since this was allowed by the Board itself, the relief should have been granted with effect from November 1979 and not from August 1, 1980 as mentioned in Annexure 'U'. The plea of the respondent that this additional power was allowed on account of the recurring demand by the Company for emergency supply under proviso (iii) to clause 3 of the Generation Order has been challenged as incorrect. It is urged that the letter Annexure 'U' granting additional 260 KW over and above 875 KW the appellant was held entitled to draw, must be read in the background of Annexure 'Q' dated November 27, 1979 (page 157, Vol II) and Annexure 'R' dated December 28, 1979) (page 158, Vol. II). These letters have been discussed earlier while dealing with another argument. The argument of the appellant is that the Board had recognised the need of reassessment of the capacity and had decided to entrust the work to a committee and it must be presumed that the team must have submitted some report. However, no such report has been placed by the Board on the records of this case and the suggestion is that it is a case of suppression by the respondent and the Board cannot be heard to say that the team did not go into the question of re-assessment. Since the matter was raised by the appellant in November 1979 which ultimately resulted in the partial relief up to 260 KW about 11 months later, the benefit ought to have been allowed with effect from November 1977 if not earlier. The stand of the Board with respect to this additional 260 KW has already been mentioned earlier. It is argued by the Board that the Generation Order contemplates only a single assessment leading to a single direction and the appellant was not entitled to reassessment. The word 'reassessment" in Annexure 'R' was, according to the respondents, mentioned due to inadvertence or under a misconception of the exact legal position. In any event the additional energy was allowed as the result of the repeated demand by the appellant for emergency grant. With a view to meet the situation which was arising every now and then a generous attitude was taken to allow additional 260 KW. It is contended that no further claim can be legitimately founded on this act of generosity. As a result of the High Court's decision the appellant's claim for emergency supply was being considered on merits. The appellant is thus having the advantage of the double benefit with effect from August 1, 1980, because the Board has neither appealed against that part of the High Court judgment, nor has it withdrawn the special benefit of 260 KW, but a further claim cannot be allowed on account of this sympathetic attitude. In view of our finding that a proper and binding assessment of the capacity of the appellant's generating sets was made in 1975 by the Divisional Engineer in pursuance of which the direction in Annexure 'O' was issued and in view of the further fact that on that basis the appellant from time to time asked for and was allowed emergency relief under proviso (iii) to clause 3 of the Generation Order, the argument of Mr. Kacker appears to be correct. The appellant has, in our view, failed to establish any right of additional relief from an earlier date.

31. The next point taken on behalf of the appellant is that there is no sanction in law for charging at

the penal rate for the electricity consumed beyond what is permissible on application of the Generation Order. Section 22-B of the 1910 Act confers powers of framing subordinate legislation on the State Government for the purposes and to the extent mentioned therein and consequence of contravention of any such order is provided in Section 42(e) mentioned below :

42. Whoever -

> #* * *##
>
> (e) makes default in complying with any order issued to him under Section 22-B or sub-section (2) of Section 34;
>
> shall be punishable with fine which may extend to one thousand rupees, and, in the case of a continuing offence or default, with a daily fine which may extend to one hundred rupees.

The argument is that Section 22-B cannot be so construed as to include a delegated power to impose penalty of the delegate's choice for the contravention of an order issued under the section. Since the legislature itself exercised its legislative power in that field by including Section 42 in the statute, the State had or has no authority to take any further step for the enforcement of its Order, except by resorting to Section 42. Dealing with Section 78-A of the 1948 Act which says that in the discharge of its functions, the Board shall be guided by such directions on questions of policy as may be given to it by the State Government, Mr. Gupta contended that it cannot be interpreted to effectively clothe the State to direct the Board to do a thing which it is itself not empowered to do. The Board, therefore, should have either prosecuted the appellant under Section 42(e) or disconnected the electric supply altogether, but it was not entitled to demand penal charges. Mr. Kacker countered by saying that Section 42 of the 1910 Act belongs to the group of Sections 39 to 50 dealing with "Criminal Offences and Procedure" as is apparent by the heading just above Section 39, and deals with the criminal liability only. The same set of events may give rise at the same time to civil rights as well as to a criminal offence, and it is not correct to suggest that merely because provisions are specifically included in the Act dealing with criminal liability, the civil liability is deemed to have disappeared. By way of illustration, a simple case of theft of movable article may be considered : the owner of the property can set the criminal law in motion and at the same time may claim the property or compensation for it under the civil law. Mr. Kacker appears to be right in his stand that merely because the appellant became liable to the penalty as mentioned in Section 42(e) it cannot on that ground defend an additional demand on account of supply of the extra energy, if otherwise maintainable under the law. Besides, Section 48 puts the matter beyond controversy by expressly stating that the penalty imposed by the aforesaid section shall be in addition to, and not in derogation of, any liability in respect of the payment of compensation which the offender may have incurred.

32. While commencing his argument, Mr. Gupta had indicated that one of the points on which the appellant relied upon, related to the validity of clause 3 of the Generation Order mandatorily requiring a consumer to generate maximum feasible electricity from its own generating set. It was suggested that the provisions in the said clause being in excess of the power under Section 22-B, were ultra vires. After completing his argument on the other points he said that he was not pressing this point. Mr. Kacker, therefore, did not address us on this aspect. We may not in these circumstances detain ourselves on this question except mentioning the decisions in Adoni Cotton Mills Ltd. v. APSEB ((1976) 4 SCC 68); State of U. P. v. Hindustan Aluminium Corporation

((1979) 3 SCC 229) and New Central Jute Mills v. UPSEB ((1986) Supp SCC 581), showing in unambiguous terms that the power is there. Section 22-B permits the State Government to issue an appropriate order for regulating the supply, distribution and consumption of electricity. The expression "regulate" occurs in other statutes also, as for example, the Essential Commodities Act, 1955, and it has been found difficult to give the word a precise definition. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the relevant provisions, and as has been repeatedly observed, the court while interpreting the expression must necessarily keep in view the object to be achieved and the mischief sought to be remedied. The necessity for issuing the two Orders arose out of the scarcity of electricity available to the Board for supplying to its customers. The situation did not leave any option to be Board but to make limited supply of electricity to its consumers, and it must be held to have, in the circumstances the right to stagger or curtail the supply. The Orders were issued in this background and to make the direction mentioned therein effective it was considered essential to impose sanctions which could take any reasonable form; either disconnection in case of gross violation or the lesser sanction of enhanced tariff. By the Order issued under Section 22-B and quoted in paragraph 7 of the judgment in Adoni Cotton Mills case ((1976) 4 SCC 68) the State Government directed a reduction in supply of electricity to the extent of 75 per cent of the previous average monthly demand and provided for payment of the charges for excess consumption at double the tariff rates. The Electricity Board thereafter proceeded to impose further restrictions. Aggrieved by these measures the Adoni Cotton Mills, an aggrieved consumer approached the court, but its challenge was repelled. On behalf of the appellant Mr. Gupta attempted to distinguish the decision on the ground that the fixing of a higher tariff for the excess consumption was against public policy and that this aspect was not considered by this Court in Adoni Cotton Mills case ((1976) 4 SCC 68). We do not find any merit in this argument. The demand of higher charges/tariff for electricity consumed beyond legally fixed limit is a reasonable deterrent measure providing an appropriate sanction - not as harsh as disconnection of supply of energy altogether - and cannot be opposed on the ground of public policy. We, therefore, hold that none of the two Orders is illegal or unreasonable.

33. Mr. Gupta alternatively contended that the provisions fixing the electric charges at four times the normal tariff for the excess consumption are to be found only in the Regulation Order and since there is no corresponding provision in the Generation Order, there is no sanction for demanding the penal rate for the electricity consumed in contravention of the Generation Order. He proceeded to say that there is no language in either of the two Orders to link them with each other. The different measure taken under the two Orders operate under different conditions and circumstances, and they cannot, therefore, be lumped together. In reply to the argument of Mr. Kacker that since the Schedule to the Regulation Order refers to the 'contract demand' which expression denotes the original contract demand as reduced by the provision of both the Regulation Order and the Generation Order, leading to the conclusion that the provisions regarding the payment of penal charges take into account both the Orders together, Mr. Gupta contended that although it is true that by reason of the Generation Order the contract demand is reduced but it cannot be said that a new contract comes into existence for the reduced amount to justify the argument of Mr. Kacker, because the reduction is as a result of operation of law. In other words, the reduced amount cannot be termed as 'contract' demand as it is in supersession of the contract demand. The contract demand, therefore, remains the same as before although there is introduced a statutory bar from drawing it in full measure. Applying this logic, it was argued by the learned counsel that the Generation Order has to be kept apart while working out the effect of the Regulation Order. He also referred to the subsequent Regulation Order of 1978 in which the relevant Schedule prescribes 50 KW as the

minimum entitlement which is inconsistent with the Board's case. It is urged that the argument on behalf of the Board that the two Orders have to be read together must, therefore, by rejected.

34. The reply of Mr. Kacker is threefold : (i) the point was not taken in the writ application before the High Court nor in the grounds before this Court and since it is not a pure question of law it should not be allowed to be raised in the argument; (ii) the two Orders were issued on the same date with the common object to remedy the same problem as is evident from their preamble and so they cannot be read in isolation; and (iii) in any event the Electricity Board in levying and making the impugned demand must be deemed to have exercised its power under Section 49 of the 1948 Act which it is certainly entitled to. Mr. Gupta said that it was not right to suggest that the point was not raised in the High Court. He placed before us the review petition filed in the High Court after the disposal of the writ case and relied on the statement in paragraph 3 of the judgment disposing of the review petition. He stated that the written arguments of the Company consisted of three parts under the heads 'list of dates', 'notes of argument' and a 'reply'. Mr. Gupta fairly conceded that the point was not taken in the writ petition before the High Court and he was not in a position to assert that it was actually argued on behalf of the Company in the first argument addressed before the High Court, but he claimed that the Company did press the point during the final reply. He could not deny that the point was not taken when the present appeals were filed in this Court. The judgment of the High Court does not deal with the point. In the circumstances, the question arises as to whether the question should be allowed to be urged now and if so how should it be answered.

35. Mr. Gupta contended that merely because the two Orders are issued under the same provision of law on a particular date, they cannot be dovetailed. The similarity in the preamble of the two Orders is described as not of great consequences as it merely borrows the language from Section 22-B. Many Orders are issued under Section 3 of the Essential Commodities Act, the argument proceeds, and it cannot, therefore, be suggested that the penalty imposed in one has to be applied to the other without express language to that effect in either of the two Orders. We do not think that in view of the fact that the point was not taken on behalf of the Company while instituting the writ application in the High Court and filing the present appeals in this Court, it should be allowed to be urged at the hearing. Let us assume that the argument of Mr. Gupta is correct. Immediately the next question would arise as to whether the Board is otherwise authorised in law to levy and demand charges for the excess electricity at the higher rate and if so whether the Board can be said to have exercised its power in this regard. Mr. Kacker contended that apart from the power of the State Government to limit the supply to electricity to the consumers by an order under Section 22-B and to direct payment of penal charges for excess consumption, the Board is also empowered to impose sanctions by charging enhanced tariff and the authority to do so is derive both under Section 49(3) of the 1948 Act and Section 49(1) read with the original agreement. The relevant provisions are quoted below :

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.

> #(2) * * *##
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> (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.

Reliance was placed on several decisions of this Court and of the High Courts. It was further contended that it is not essential for the Board to frame regulations for the exercise of such power. The learned counsel appears to be right. In Adoni Cotton Mills case ((1976) 4 SCC 68) the State Government had made an order under Section 22-B of the 1910 Act limiting the supply to 75 per cent of the previous consumption as was done in the present case and directed the payment of punitive rates for excess consumption. The Board made supplementary orders for placing further onerous conditions on certain groups of consumers. This was challenged before the High Court inter alia on the ground that since the State Government had already acted under Section 22-B, the Board could not further pass supplementary orders and that in any event since the Board had not made regulations laying down the principles under Section 79(j) of the 1948 Act, the orders were bad. Both the points (along with several others) raised by the appellant in that case were rejected by this Court. Referring to Section 49(1) of the 1948 Act, the court observed that the power to enhance the tariff is included in the section and the expression that "the Board may supply electricity .... upon such terms and conditions as the Board thinks fit" in Section 49(1) is related to the terms and conditions of the agreement between the parties. Sub-section (1) confers power on the Board to supply electricity upon such terms and conditions as it thinks fit and the terms and conditions include the power of the Board to enhance the rates. Section 49(3) permits the Board to fix different rates for the supply of electricity having regard to certain conditions mentioned therein and "any other relevant factors". It was held that the expression "any other relevant factors" could not be considered ejusdem generis because there is no genus of the relevant factors. In New Central Jute Mills Co. Ltd. v. UPSEB (1986 Supp SCC 581) the situation again was similar to the present case. The argument pressed before the Supreme Court inter alia was that the Board had no authority to make the demand in excess of the agreed rate under the agreement. Repelling the contention, the court observed in paragraph 4 of the judgment that the agreement itself did not envision the supply of electricity in violation of the ban imposed by the State Government in exercise of its power under Section 22-B of the 1910 Act; not did the agreement stipulate the rate at which such supply should be charged it notwithstanding the ban against the supply a consumer drew electricity in excess of the permissible quantity. In the circumstances, the Board was justify in invoking the power under Section 49(3) of the 1948 Act which authorised it to supply electricity by charging different tariff having regard to certain conditions and "any other relevant factors". Section 49(3) was interpreted to be wide enough to cover a situation where electricity in excess of the quantum is drawn in disregard of the ban imposed under Section 22-B of the 1910 Act. We do not consider it necessary to multiply the decisions as there does not appear to be any doubt that either Section 49(1) of the 1948 Act read with the agreement or under Section 49(3) or under both the provisions the respondent Board is fully authorised to levy and to make a demand at a higher rate than the usual tariff. It is also clear that it is not essential for the Board to make regulations indicating the basis for such levy before making the demand. The appellant has not been able to successfully show before us that the power by the Board has to be exercised in a particular manner and by adopting a particular mode. If it is assumed that a particular formality has to be completed before a demand can be legitimately raised, the appellant cannot be allowed to claim now that the same is lacking in the present case in the absence of a proper pleading in the original writ petition before the High Court. If the point had been raised in time, the respondent Board could have placed relevant material on the issue. If at the end of the hearing of the case in the High Court the point was mentioned in the appellant's final reply and included in the last instalment of its written argument, it cannot cure the defect in the

pleading specially when the judgment of the High Court dismissing the writ application does not deal with the point. In that view it is not necessary to test the correctness of the argument of Mr. Kacker that the appellant's entitlement to receive the quantum of electricity from the Board at the normal tariff can be determined only by a combined reading of the two Orders. We do not, therefore, consider it necessary to decide as to what would have been the precisely correct answer if the point had been properly raised before the High Court at the appropriate stage.

36. We do not find any merit in any of the points urged on behalf of the appellant. We were informed by the learned counsel for the parties that the appellant does not accept the correctness of the calculation in the letter 'P' series and the question is being examined by the High Court in a pending case. The appellant also asserts that even during the period commencing from November 1979 the Company had pleaded for emergency supply. The High Court has in the present case directed the prayer for emergency supply to be considered on merits. Since these questions are not involved in the present appeals, arguments relating to these points have not been addressed before us. We, in the circumstances, make it clear that any observation made in the present case shall not be treated to have decided those points which are the subject matter of a pending case in the High Court.

37. It was also pointed out at the bar that several interim orders were issued by this Court during the pendency of the present appeals and final direction should be given in regard to them. While granting special leave this Court by its order dated November 5, 1982 directed the appellant Company as condition for interim relief of restoration of electric connection to pay a sum of Rs. 50,00,000 within a fortnight and another sum of Rs. 1,50,00,000 within six months with interest from January 1, 1983 at the rate of 12 per cent per annum until payment. The future payment of the electricity bills was ordered to be made within four weeks from the service of the bills. The court also said that the applications made by the appellants for consideration of emergency supply of the electricity should be expeditiously disposed of by the Board on merits, and all payments by the appellants will be subject to adjustment in the light of the decision on the emergency applications. By the order dated November 24, 1982 the time for payment of Rs. 50,00,000 was extended to December 6, 1982. With respect to the payment of Rs. 1,50,00,000 the court by its order dated May 6, 1983 permitted the amount to be deposited in two instalments. The court also said that if it was ultimately found that the appellant had paid any amount in excess of the total liability, the Board shall repay such excess amount with interest at the rate of 12 per cent per annum. By a subsequent order dated April 23, 1984 the appellant was required to pay a sum of Rs. 1,28,00,000 to the Board by May 10, 1984 and to keep the bank guarantee alive till the final disposal of these appeals as condition for continuance of the interim order. During the hearing of the appeal a grievance was made on behalf of the respondent Board that the bank guarantee had not been effectively renewed and the learned counsel for the appellant undertook on behalf of the Company to correct the defect. Subsequently it was stated at the bar that proper bank guarantee had been furnished in accordance with the court's direction. In view of our present decision the respondent Board, besides being entitled to retain the amount already paid to it in pursuance of this Court's direction, is further entitled to enforce the bank guarantee. The appellant Company, therefore, must arrange to make the payment without delay, failing which the Board shall be entitled to take steps for enforcement of the bank guarantee. The dispute regarding the appellant's claim to receive emergency supply is pending before the High Court. The appellant shall be entitled to adjustment in the light of the final decision on this point.

38. In the result, the appeals fail and are dismissed with costs payable to respondent 1.

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