SUPREME COURT OF INDIA

Jharkhand State Elect.Board

Vs.

Laxmi Business & Cement Co.P. Ltd.

C.A.No.2909 of 2014

(K.S.Radhakrishnan and A.K.Sikri JJ.)

28.02.2014

JUDGMENT

A.K.SIKRI,J.

1. Delay condoned.

2. Leave granted.

3. The appellant in both the cases is Jharkhand State Electricity Board (JSEB), which is aggrieved by the common judgment dated 5th July 2011 passed by the High Court of Jharkhand in two appeals. These appeals were preferred by the appellant JSEB against the orders dated 17th February 2010 passed by the learned Single Judge of that court in the two Writ Petitions which were filed by M/s. Laxmi Business & Cement Co. Pvt. Ltd. and M/s. Laxmi Ispat Udyog (arrayed as respondent No.1 in each appeal and hereinafter referred to as the 'consumers'). These respondents had questioned the validity of the bills raised by the JSEB in those Writ Petitions, primarily on the ground that the bills were contrary to and in excess of the tariff fixed by the Jharkhand State Electricity Regulatory Commission (hereinafter referred to as the 'SERC"). Their contention was accepted by the learned Single Judge and the order of learned Single Judge is affirmed by the Division Bench as well.

4. To give a glimpse of the controversy involved, in the year 1994 HT Agreement was entered into between Bihar State Electricity Board (predecessor in interest of JSEB) and the consumers which, inter-alia, stipulated the tariff that was to be

charged by the JSEB from the consumers for supply of electricity to these consumers by the JSEB. In Clause 4(c) of the Agreement there was a provision of Minimum Guarantee Charges. In the year 2003, Electricity Act was enacted. Indubitably, power to frame tariff under this Act is given to SERC. SERC passed order dated framing the new tariff schedule ('2004 Tariff Schedule' for short) under Section 86 of the Electricity Act (hereinafter referred to as the Act). The JSEB, however, continued to send the bills as per the Clause 4(c) referred to in the agreement which were paid by the consumers under protest. In May 2010, Writ Petitions were filed by the consumers for quashing of the energy bills on the ground that it had wrongly been raised as per Clause 4(c) of the Agreement which had ceased to have any effect on the framing of 2004 Tariff Schedule by the SERC. The JSEB, however, contended that the HT agreement entered into with the consumers still survived as the 2004 Tariff Schedule saves this Agreement.

5. Since the Writ Petitions of the consumers were allowed and the order of the learned Single Judge is already upheld by the Division Bench, it is obvious that pleas raised by the JSEB have not found favour with the High Court. Before us as well, same very contentions were raised which were raised by the JSEB in the High Court. Additionally, it was also contended that even Section 185 (2)(a) of the Act read with Section 6(B) of the General Clauses Act categorically protects the previous operation of the earlier enactment, duly done or saved thereunder.

It is, thus, clear that questions which arise for consideration in these appeals are the following:

(i) Whether after the enactment of the Electricity Act, 2003 which came into force on 10.6.2003 and after passing of the new tariff order dated 27.12.2003 by Jharkhand State Electricity Regulatory Commission as per the Act of 2003 can the State Electricity Board still charge a tariff determined by itself?

(ii) Whether the issue of demand charge to HTS – 1 category of consumers has been left non-considered by the State Commission in the tariff order dated 27.12.2003 so that the same may be continued in the manner existed in the State or whether the same has been considered and given affect to in the tariff order dated 27.12.2003 which came into effect from 1.1.2004?

(iii) What would be the effect of Section 185 (Repeal and Saving Clause) of the Electricity Act 2003 upon the HT supply Agreement entered upon the Board and the Consumer prior to Electricity Act, 2003?

6. While dealing with these questions, we will narrate further seminal facts and the details submissions of the learned counsel for the parties of either side.

1. Re.: Power of SERC under Electricity Act 2003.

Legal position contained in Act of 2003 is hardly in dispute. Before this Act was enacted in the year 2003, we had Indian Electricity Act, 1910 and thereafter Electricity (Supply) Act, 1948 was passed. It is the Electricity Board in the respective States which were supplying electricity to the consumers and determining the operation rates at which the electricity was to be supplied. Section 49 of the Act, 1948 empowered the Board to supply electricity to any person upon such terms and conditions as the Board thinks fit and made for the purposes of such supply from time to time and were empowered to frame uniform tariffs for the purpose of such supply. This power to frame tariff under Section 49(1) of the Act 1948 included the power to fix minimum guarantee charges. In State of Bihar, such rates were fixed in the year 1993 tariff. It, inter-alia, provided for tariff for HT consumers. Three categories of HT consumers were mentioned there. HTS-I, II and III. Both the consumers in the instant appeals were put in HT-I category. HT Agreement dated 26.4.1974 was entered into between the Board and the consumers. As per Clause 4 of this Agreement, the consumers were to pay to the Board for the energy so supplied and registered or taken to have been supplied at the appropriate rates applicable to the consumers according to the tariff framed by the Board and in force from time to time. It was subject to the minimum contract demand applicable for the category of supply category in which the consumers fell. Clause 4(b) explained that the maximum demand of the consumer for each month shall be the largest total amount of kilovolt amperes (KVA) that was delivered to the consumers at the point of supply during any consecutive 30 minutes in the months. Since the JSEB has worked out the charges as per Clause 4 (c) which it is demanding, we reproduce the said clause hereinbelow:

"4(c) Maximum demand charges for supply in any month will be based on the maximum KVA demand for the month or 75 per cent of the contract demand whichever is higher, subject to provision of clause 13. For the first twelve months service the maximum demand charges for any month, will however, be based on the actual monthly maximum demand for that month."

Thus, as per the aforesaid clause, JSEB had been raising energy bills on the basis of 75% of the contract demand.

7. As mentioned above, after the Electricity Act, 2003 was enacted, power to frame tariff is given to the SERC. This power is statutorily conferred upon the SERC under the Act. However, it would be relevant to mention herein that before the passing of this Act, Electricity Regulatory Commission Act, 1998 was enacted and under Section 17 of the said Act, Jharkhand State Electricity Regulatory Commission was constituted by the Government of Jharkhand vide Notification No.1763 dated August 22, 2002. Its functions and duties were notified by the Government as per Section 22 of the Electricity Regulatory Commission Act.

8. On the passing of the Electricity Act, 2003, Electricity Act 1910, Electricity (Supply) Act 1948 and Electricity Regulatory Commission Act, 1998 have been repealed. At the same time, Act 2003 recognizes the SERCs constituted under the 1998 Act. The object clause of this Act reads as under:

> "An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."

9. It is also not in dispute that 2004 Tariff Schedule framed by the SERC is in exercise of powers conferred upon it under Section 86 (a) of the Act. In PTC India Ltd. V. Central Electricity Regulatory Commission (2010) 4 SCC 603 this Court has categorically held that Act, 2003 is an exhaustive code on all matters concerning electricity which also provides for "unbundling" of State Electricity Boards into separate utilities for generation, transmission and distribution. Further, Regulatory regime is entrusted to the State Electricity Regulatory Commissions which are given vide ranging responsibilities. This Act has distanced the Government from all forms of regulations, including tariff regulation which is now specifically assigned to SERC. Relevant observations, outlining the scheme of this Act, are reproduced below:

"The 2003 Act is enacted as an exhaustive code on all matters concerning electricity. It provides for unbundling" of SEBs into separate utilities for generation, transmission and distribution. It repeals the Electricity Act, 1910: the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. The 2003 Act, in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 (the 1998 Act), mandated the establishment of an independent and transparent regulatory mechanism, and has entrusted wide-ranging responsibilities with the Regulatory Commissions. While the 1998 Act provided for independent regulation in the area of tariff determination: the 2003 Act has distanced the Government from all forms of regulation, namely, licensing, tariff regulation, specifying Grid Code, facilitating competition through open access, etc."[Paragraph 17]

The 2003 Act contains separate provisions for the performance of dual functions by the Commission. Section61 is the enabling provision for framing of regulations by the Central Commission: the determination of terms and conditions of tariff has been left to the domain of the Regulatory Commissions under Section 61 of the Act whereas actual tariff determination by the Regulatory Commissions is covered by Section 62 of the Act. This aspect is very important for deciding the present case. Specifying the terms and conditions for determination of tariff is an exercise which is different and distinct from actual tariff determination in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee or for transmission of electricity or for wheeling of electricity or for retail sale of electricity.

26. The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the appropriate Commission shall determine the actual tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the appropriate Commission under Section 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same under the Act is made applicable vide Section 111. These provisions, namely, Sections 61, 62 and 64 indicate the dual nature of functions performed by the Regulatory Commissions viz.

decision-making and specifying terms and conditions for tariff determination."[Paragraph 25,26] [Emphasis supplied]

10. It is, thus, beyond the pale of doubt that the State Electricity Boards have no power whatsoever to frame tariff which is under the exclusive domain of the Commission. This legal position has been judicially recognized. [See Gujarat Urja Vikas Nigam Ltd. V. Essar Power Ltd., (2008) 4 SCC 755 and A.P. TRANSCO v. Sai Renewable Power (P) Ltd. (2011) 11 SCC 34.

11. Notwithstanding the aforesaid legal position, JSEB contends that agreement entered into with the consumers in the year 1994 is saved and the JSEB has right to charge the tariff as per Clause 4 (c) thereof. According to the JSEB this is the position because of the reason that Clause 1.4 of the 2004 Tariff Schedule framed by the SERC provides for such a position and further that even Section 186 of the Act 2003 saves this agreement. On these twin aspects, we have already framed question Nos. 2 and 3 above and would now proceed to deal with them.

2. Re: Whether the Agreement dated 26.4.1994 is saved by the 2004 Tariff Schedule?

Mr. Sinha, learned senior counsel for the JSEB submitted that in the 2004 Tariff Schedule there was no such provision which is contained in the agreement dated 26.4.19994 particularly in Clause 4(c) and in the absence thereof in the tariff schedule energy bills raised on the basis of 75 % contract demand was saved. It was submitted that the Agreement dated 26.4.1994 is a statutory agreement as it was under the Act of 1948. The learned senior counsel further submitted that it had never been the case of consumers that the aforesaid provision was repealed, repudiated or destroyed. It has not happened either. For this purpose, Mr. Sinha sought to rely upon averments made in the Writ Petitions filed by the consumers and on the basis it was contended that even the consumers admitted that the provision of 75% of contract demand is absent and not provided in the 2004 Tariff Schedule. He also placed strong reliance on Clause 1.4 of 2004 Tariff Schedule of SERC which reads as under:

"All other Terms and Conditions in respect of Meter Rent, Supply at Lower Voltage, Capacitor Charge, Electricity Duty, Rebate, Security Deposit, Surcharge for exceeding contract demand etc., shall remain the same as existing in the State."

Further, the tariff order 2003-04, in Clause 5 under the heading Design of Tariff Structure and Analysis of Tariff, particularly at Clause 5.4 has dealt with the two part tariff structure and Minimum Guarantee Charges wherein it was stated that "Ideally, the fixed/demand charge should be levied in proportion to the demand placed by an individual consumer on the system. This is so because it facilitates the utility in designing an appropriate system to cater to the supply needs of a consumer and is therefore a just and fair mechanism for recovering fixed costs of the system."

Mr. Sinha further argued that Clause 4 (c) of the High Tension Agreement dated 26.8.2004 which the Respondent Consumer has signed with the Board much after 1.1.2004, when the Tariff Order 2003-04 came into effect, clearly specified that after commencement of power supply, the respondent shall be liable to pay KVA/Maximum Demand Charges on actual consumption basis in the first 12 months and after that on the basis of 75% of the contract demand or recorded demand, whichever is higher. This is uniformly applied to similarly situated all the HTS-1 consumers.

12. In order to appreciate this argument, we will have to construe relevant provision of 2004 Tariff Schedule as framed by the SERC. It would be pertinent to observe that the SERC fixed the tariff on the request of the JSEB itself when it approached the SERC for this purpose. We find that in the Tariff Petition filed by the JSEB before the SERC, the JSEB did not propose to continue the manner of 75% of contract demand and the SERC allowed the demand charge 140-KV-Month. On perusal of the Tariff Order, it becomes apparent that this is divided in different sections viz., section 1 is the chapter containing 'introduction', section 2 is the chapter containing 'ARR' i.e. the Annual Revenue Requirement and tariff proposal submitted by the Board, section 3 is the chapter containing 'objections' received from the stake holders, section 4 is the chapter containing 'Commission's analysis on ARR', Section 5 is the chapter containing 'design of tariff structure and analysis of tariff', section 6 is the chapter containing 'Directions to the JSEB' and finally there is Annexure 5.1 containing the 'Tariff Schedule'. This Tariff Schedule which is the final outcome of the tariff process is binding on the State as well. The relevant portion of the Annexure 5.1 of the tariff order wherein the State Commission has dealt with the tariff applicability upon the High Tension Service (HTS) consumers i.e. category applicable to Respondent No.1 is reproduced below:

"Category: High Tension Service (HTS)

1. Applicability

For consumers having contract demand above 100 kVA

2. Character of service

50 cycles, 3 Phase at 6.6. KV/11 Kv/33 kV or 132 kV.

3. Tariff

Tariff for HTS

|DESCRIPTION |TARIFF* | |RS./kVA/month |DEMAND CHARGE | |HTS |140 | | | | |ENERGY CHARGE | |KWh/month |Rs/KWh | |All consumption |4.00 | | | | |Monthly minimum | | |charge | |For Supply at 11 and 33 kV |Rs.250/kVA | |For Supply at 132 KV |Rs.400/kVA |

13. However, as stated above, the JSEB itself in its application/reference to the SERC did not ask for fixing any minimum guarantee charges. It would be relevant to mention that the JSEB in its proposal for fixation of tariff for 2003-04, submitted before the Regulatory Commission, indicated both the existing tariff and the tariff proposed by it in respect of all consumers, including all categories of HTS (High Tension Service) consumers. The SERC after undertaking the necessary exercise, fixed the tariff of all categories. The tariff proposed by the Board for HTS-I consumers along with existing tariff is reproduced in Tables 5.28 and 5.29 of the 2004 Tariff Schedule which will clearly reflect that the aspect of minimum guarantee charges was duly considered by the SERC. To demonstrate it, we reproduce the said two tables hereunder:

5.28 Tariff for HTS-II Consumers (Existing/Proposed)

| DESCRIPTION | TARIFF |

DEMAND CHARGE

| | Existing | Proposed | |Rs./KVA/Month | 115 | 200 |

ENERGY CHARGE

|Rs./KWH | Existing | Proposed | |All Consumption | 1.72 | 4.30 |

FUEL SURCHARGE CHARGE

|Rs./KWH | 2.44 | - |

Annual Minimum Guarantee (AMG) Charge

| |Subject to minimum |The following AMG charge| | |contract demand for this|shall be realized from | | |category, monthly |the consumer as per | | |minimum demand charge as|appropriate tariff. | | |per appropriate tariff | | | |based on actual maximum |AMG Charge based on load| | |demand of that month or |factor of 30% and power | | |75% of the contract |factor 0.9 on contract | | |demand whichever is |demand payable at the | | |higher. |rate of energy charge | | |Energy charges based on |applicable to HTS-II | | |load factor of 30% and |category. | | |power factor 0.85 on | | | |contracted demand | | | |payable at the rate of | | | |Rs.1.72/KWH | |

5.29 Tariff for EHTS Consumers (Existing/Proposed)

| DESCRIPTION | TARIFF |

DEMAND CHARGE

| | Existing | Proposed | |Rs./KVA/Month | 110 | 200 |

ENERGY CHARGE

|Rs./KWH | Existing | Proposed | |All Consumption | 4.13 | 4.15 |

FUEL SURCHARGE

|Rs./KWH | 2.44 | - |

Annual Minimum Guarantee (AMG) Charge

| |Subject to minimum |The following AMG charge| | |contract demand for this|shall be realized from | | |category, monthly |the consumer as per | |

|minimum demand charge as|appropriate tariff. | | |per appropriate tariff | | | |based on actual maximum | | | |demand of that month or |AMG Charge based on load| | |75% of the contract |factor of 50% and power | | |demand whichever is |factor 0.9 on contract | | |higher |demand payable at the | | | |rate of energy charge | | |Energy charges based on |applicable to EHTS | | |load factor of 50% and |category. | | |power factor 0.85 on | | | |contracted demand | | | |payable at the rate of | | | |Rs.1.69/KWH | |

14. The tariff order further reveals that the SERC had even compared the proposal of JSEB with the tariff prevailing in other States in India and after detailed analysis thereof, it approved the tariff for HTS consumers which is mentioned in table 5.31 of the 2004 Tariff Schedule. Therefore, it cannot be said that the SERC was oblivious of the clause relating to minimum guarantee charges which JSEB was charging from its consumers as per the earlier agreements entered into with them. The position would become crystal clear from the following discussion in the 2004 Tariff Schedule wherein the SCRC gave specific reasons for revising and approving the tariff for HTS consumers.

> The SERC has filed its response to these appeals, wherein the provision in this behalf is explained in the manner noted below: "It is evident from the above table that there is no common approach towards minimum charge. However, if we compare neighbouring States like Orissa, West Bengal and Madhya Pradesh (supply at less than 132 KVA), there is no minimum charge. As mentioned earlier, the Commission would ideally like to scrap this charge, but for current year it has retained this charge due to lack of information and data to ascertain the true impact of this charge. The Commission has already directed the Board to provide details in this regard in the next petition.
>
> For the current year, the Commission would not like to increase the burden on the industries on account of minimum charge and has therefore attempted to keep it at the existing level. The Commission has assumed a minimum level of supply and a minimum level of consumption. For this, the Commission has considered 10% load factor for HTS-I and HTS-II categories considering an average consumption of two (2) hours in a day. For EHTS and HT Special load factor of 20% and 30% respectively has been taken by considering an average consumption of four (4) hours and seven (7) hours in a day respectively. The Commission observes that if these categories of industries are not able to maintain this minimum load factor,

than they should reduce their contracted load. The Commission would like to explicitly mention that if the consumption exceeds the mentioned load factor, no minimum charge would be applicable.

For encouraging consumption, the Commission has also introduced a load factor rebate for all industries consumers. For the entire consumption in excess of this defined load factor, a rebate is provided on the energy charges for such excess consumption. The Commission would have liked to align the tariff structure towards cost of supply during the current year itself, but it was constrained due to the huge tariff shock that it would translate into for other consumes and consequent increase that would have been required in tariff for other categories. Thus as a principle the Commission has taken the first step towards reducing this distortion in the tariff structure. The Commission is conscious of the fact that HT industry in Jharkhand has borne the brunt of cross subsidy in the past and the tariff applicable to them is above the cost of supply. The significance of this step should not, however, be judged by the quantitative decline but the signal and intent whereby the Commission intends to further rationalize the tariff in the future."

15. We would like to reproduce the following discussion in the impugned judgment of the High Court, as we are in agreement therewith the observations made in those paragraphs:

"……10.We are concerned with the Demand Charge only, rather to say not concerned with the Demand Charge itself but the manner in which the Demand Charge can be calculated for the purpose of raising demand against the consumer charging of the Demand Charge "has been allowed in Tariff Order 2003-04 @ Rs.140/- as mentioned at page 141 of the Tariff Order. As we have already noticed that a formula was given in Clause 15.2 in the tariff of 1993 as well as in the contract on the basis of which the Board was charging the Demand Charge on the basis of the actual consumed units but was charging the said amount irrespective of the consumption of the units of electricity. Now the contention of the respondent- writ petitioners is that they are liable only according to the units consumed by them and not according to the formula. We found from Board's proposal contained in Table 5.27 that the Electricity Board consciously (or may inadvertently) submitted its proposal only to the effect that existing annual Demand Charge is Rs.125/- per KVA per month. This proposal of the Board was considered and ultimately the Demand Charge was allowed by the Tariff Order of 2003-

04 which is mentioned at page 141by which only it has been approved that the Electricity Board shall be entitled to charge Rs.140/- per KVA per month as proposed by the Board, the Tariff Order of 2003-04 increased it to Rs.140/- only.

11. In view of the above reasons, we cannot hold that the Electricity Regulatory Commission has not considered the proposal of the Electricity Board with respect to their claim for Demand Charge and the manner in which it will be charged……"

12. In view of the above facts, we are of the considered opinion that the appellant-Board cannot take help of Clause 5.1. wherein Electricity Regulatory Commission wherein it has been observed that some of the matters have not been dealt with and they shall continue to be the same as they were in existence in the State because of the reason that there is a specific proposal made by the Electricity Board for the Demand Charge as well as the manner in which it will be charged and this proposal was considered by the Electricity Regulatory Commission and thereafter Tariff Order has been issued…"

16. To put the matter beyond the pale of controversy, we would like to highlight another fact, namely the JSEB had even filed clarification applications before the SERC contending that having regard to the Clause 4(c) of the Agreement with the HT-I consumers, the maximum demand charges would be those prescribed under Clause 4(c) of the Agreement. These applications were specifically rejected by the Commission. No appeal was preferred by the JSEB challenging those orders. It is, therefore, too late in the day for the JSEB to now argue that this aspect of minimum guarantee charge has not been dealt with by the SERC in the 2004 Tariff Schedule.

3. Re.: Effect of Section 185 of the Electricity Act 2003.

Submission of Mr. Sinha, learned senior counsel, predicated on Section 185 (2)(a) of the Electricity Act and Section 6 (B) of the General Clauses Act, was that by virtue of the aforesaid provision the earlier Agreement of 1994, including Clause 4(c) thereof entered into between the Electricity Board and the consumers was saved. Section 185(2)(a) of the Act reads as under:

> "anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any license, permission, authorization or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act."
>
> We also reproduce Section 6(B) of the General Clauses Act hereinbelow:
>
> "affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or"

17. It was the submission that since all the actions deemed to have been done or taken under the corresponding provision of the earlier Act are saved, the Agreement in question which was entered into by the Electricity Board in exercise of statutory power and was having legal force, had been saved under the aforesaid provisions. To prop this submission, Mr. Sinha also referred to the judgment of this Court in the case of Himachal Pradesh State Electricity Regulatory Commission & Anr. v. Himachal Pradesh State Electricity Board (2013) 12 SCALE 397 with the plea that this very aspect had been specifically dealt with in the aforesaid judgment and therefore the issue was no longer res-integra. Mr. Sinha pointed out that in that case the courts specifically dealt with the effect of repealed provision contained in Section 185 of the Act, 2003 read with Section 6(B) of the General Clauses Act and held that the previous agreements were saved unless it could be pointed out that there was a manifest intention to destroy them. He referred to the following passage from the earlier judgment in the case of State of Punjab vs. Mohar Singh 1955 (1) SCR 893 which is quoted in the aforesaid judgment and reads as under:

> "Whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that section 6 of the General

Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material. It is in the light of these principles that we now proceed to examine the facts of the present case."

(underlining is ours)

He also banked upon the following discussion in the said judgment:

"We have referred to the aforesaid paragraphs as Mr.Gupta has contended that when there is repeal of an enactment and substitution of new law, ordinarily the vested right of a forum has to perish. On reading of Section 185 of the 2003 Act in entirety, it is difficult to accept the submission that even if Section 6 of the General Clauses Act would apply, then also the same does not save the forum of appeal. We do not perceive any contrary intention that 6 of the General Clauses Act would not be applicable. It is also to be kept in mind that the distinction between what is and what is not a right by the provisions of the Section 6 of the General Clauses Act is often one of great fitness. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere hope, or expectation of, or liberty to apply for, acquiring right (See M.S.Shivanand v.Karnataka State Road Transport Corporation and Ors. MANU/SC/0371/1979: (1980) 1 SCC 149)."

18. In order to appreciate this argument, we will have to traverse through some salient provision of the agreement of 1994 entered into with the consumers. These are paras 4(c) and 11 of the HT agreement:

"4..(c) Maximum demand charge for supply in any month will be based on the maximum KVA demand for the month of 75% of the contract demand whichever is higher, subject to provision of clause 13……..

11. This agreement shall be read and construed as subject to the provisions of the Indian Electricity Act, 1910, rules framed thereunder, the Electricity (Supply) Act 1948 together with rules, regulations (if any) tariffs and terms and conditions for supply of electricity framed and issued thereunder and for

the time being in force as far as the same may respectively be applicable and all such provisions shall prevail in case of any conflict or inconsistency between them and the terms and conditions of this agreement."

19. It is also to be borne in mind that the tariff in force during the period was Tariff Order dated 27.12.2003 for the period 2003-04 which was having force of law under the Electricity Act 2003. Thus, what follows from the above is that even if we proceed on the basis that the statutory agreements entered into earlier were saved, the agreement in question stands replaced by 2004 Tariff Schedule. At this juncture, we would like to refer to the judgment of this Court in the case of BSES v. Tata Power Co.Ltd. (2004) 1 SCC 195 wherein following pertinent observations were made.

> "16. The word "tariff" has not been defined in the Act. "Tariff" is a cartel of commerce and normally it is a book of rates. It will mean a schedule of standard prices or charges provided to the category or categories of customers specified in the tariff. Sub-section (1) of Section 22 clearly lays down that the State Commission shall determine the tariff for electricity (wholesale, bulk, grid or retail) and also for use of transmission facilities. It has also the power to regulate power purchase of the distribution utilities including the price at which the power shall be procured from the generating companies for transmission, sale, distribution and supply in the State. "Utility" has been defined in Section 2(1) of the Act and it means any person or entity engaged in the generation, transmission, sale, distribution or supply, as the case may be, of energy. Section 29 lays down that the tariff for the intra-State transmission of electricity and tariff for supply of electricity — wholesale, bulk or retail — in a State shall be subject to the provisions of the Act and the tariff shall be determined by the State Commission. Sub-section (2) of Section 29 shows that the terms and conditions for fixation of tariff shall be determined by Regulations and while doing so, the Commission shall be guided by the factors enumerated in clauses (a) to (g) thereof. The Regulations referred to earlier show that generating companies and utilities have to first approach the Commission for approval of their tariff whether for generation, transmission, distribution or supply and also for terms and conditions of supply. They can charge from their customers only such tariff which has been approved by the Commission. Charging of a tariff which has not been approved by the Commission is an offence which is punishable under Section 45 of the Act. The provisions of the Act and Regulations show that the Commission has

the exclusive power to determine the tariff. The tariff approved by the Commission is final and binding and it is not permissible for the licensee, utility or anyone else to charge a different tariff."

20. In view of the above, we are of the opinion that even the argument based on Section 185 of the Electricity Act, 2003 would not bring any change to the results of this case. We, thus, do not fault with the judgment of the High Court appealed against.

21. Before we part with, it is necessary to deal with one more argument of the appellant. It was submitted that there was delay in filing the Writ Petitions inasmuch as bills raised by the JSEB on the basis of Clause 4(c) of the 1994 Agreement, even after the formulation of 2004 Tariff Schedule were being paid by the consumers and they approached the Court by filing Writ Petitions only in the year 2010. Thus, there was a delay and latches of 5 years. It is further argued that in such scenario, the High Court at least should not have directed the appellants to refund the excess amount charged under the bills raised for earlier period. Other related submission was that it would be unjust enrichment to the consumers who would have recovered the amount from the user of the electricity.

22. In so far as delay in filing the Writ Petition is concerned, it appears from the chronology of events that the same has been duly explained. It is not in doubt that the consumers had paid the amount of bills raised by JSEB under protest because of the threat of disconnection. While doing so, they had raised specific plea with the JSEB that it was now supposed to raise the bills in accordance with the 2004 Tariff Schedule. The matter remained under consideration at the level of JSEB which kept approaching the Court as well as SERC seeking clarification of 2004 Tariff Schedule. As already pointed out above, clarification applications were filed which were dismissed by the Commission. However, as the JSEB did not judge from its stand even after the dismissal of these applications, the consumers approached the Court and filed the Writ Petitions. The Writ Petitioners have thus furnished satisfactory explanation for approach the Court.

23. The plea of unjust and enrichment will not be available to the appellants. In the first place, no such plea was raised before the High Court either before the learned Single Judge or the Division Bench. In the Special Leave Petition, this submission was made for the first time at the time of hearing of the present appeals. Moreover, it is not a case of payment of tax which is a burden passed on the consumers. It is only in such cases that was held in Mafatlal Industries Ltd. vs. Union of India

(1997) 5 SCC 536 that the question of unjust enrichment would arise for consideration. As far as issue like the present is concerned, such a question was left open in para 107 of the aforesaid judgment. The Court had made it clear the concept of unjust enrichment had no application for refunds other than taxes, as is clear from the reading thereof.

> "107. A Clarification: The situation in the case of captive consumption has not been dealt with by us in this opinion. We leave that question open."

24. As a result, we find that the appeals are bereft of any merit and are accordingly dismissed. No costs.