

(2014) 02 AP CK 0100

In the Andhra Pradesh High Court

Case No : Writ Petition Nos. 30818, 30819, 30840, 30863, 31336, 32414, 35012, 35412, 35579, 36427, 37740, 37875, 38011, 38022, 38074, 38087, 38162, 38230, 38244, 38258, 38284, 38351, 38363, 38410, 38415, 38416, 38420, 38472, 38510, 38610, 38828, 38837, 38838, 38839

Andhra Pradesh Spinning Mills Association

APPELLANT

Vs

Andhra Pradesh Electricity Regulatory Commission

RESPONDENT

Date of Decision : 24-02-2014

Acts Referred:

Andhra Pradesh Electricity Reforms Act, 1998 — Section 11, 12, 26, 26(2), 26(7)
Constitution of India, 1950 — Article 14, 254, 265
Electricity Act, 2003 — Section 108, 178, 181, 185, 185(3)

Citation : (2014) 5 ALD 311 : (2014) 4 ALT 342

Hon'ble Judges : Kalyan Jyoti Sengupta, C.J.;K.C. Banu, J

Bench : Division Bench

Advocate : K. Gopal Choudary, K. Mamata Choudary, Challa Gunaranjan, Vedula Srinivas, Duba V. Nagarjuna Babu, M.P. Chandramouli, Dhulipalla V.A.S. Ravi Prasad, D. Jagan Mohan Reddy, S. Appadhara Reddy, G. Sudheer, M.L. Narasimham, J. Ugranarasimha, D. Dhananjai, Anjali Agarwal, N. Shoba and P.S. Raman, Sr. Counsel, Advocate for the Appellant; Ponnamm Ashok Goud, Asst. Solicitor General, B. Adinarayana Rao, Senior Counsel for Patluri Srinivasa Rao and P. Srinivaslu, Advocate General for O. Manohar Reddy, P. Vinod Kumar and G. Jyothi Eswar, Advocate for the Respondent

Judgement

Kalyan Jyoti Sengupta, C.J.—By the above batch of writ petitions, basically and broadly the challenge is the vires of Section 26(2) and (9) of the Andhra Pradesh Electricity Reforms Act, 1998 (hereinafter referred to as "Act 1998") to the extent it empowers the respondent -- Andhra Pradesh Electricity Regulatory Commission (hereinafter referred to as "the Commission") to frame fuel surcharge formula by way of Regulations, and the validity of Clause 45-B of the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (hereinafter referred to as "the Regulations") as substituted by Regulation 1 of 2003, prescribing a formula for fuel surcharge adjustment

(FSA), and the orders of the Commission dt. 2.11.2012 determining FSA for the first quarter of 2012-2013.

2. From a perusal of all the petitions and the grounds of attack in the eye of law are more or less similar and identical. On the question of validity of Section 26(9) of Act 1998, it is asserted that it is bad as there is no clear-cut definition of the term "fuel surcharge adjustment". The impugned Regulation 1 of 2003 is challenged on the ground that the same read with Regulation 9 of 2004, is valid for one year from the appointed date in view of Section 61 of the Electricity Act, 2003 (hereinafter referred to as "Act 2003"). These Regulations framed under Act 1998 which is included as Serial No. 3 in the Schedule to Act 2003 cannot survive in terms of Section 185 to the extent it is inconsistent with the latter Act by which all the earlier Acts stood repealed. The inclusion of fixed costs and other costs incurred in the procurement of power by the distributing companies cannot form part of the FSA, they being the items specifically includable in the Aggregate Revenue Requirement for the next year in terms of Regulation 4 of 2005. The impugned Regulations insofar as they seek to add other non-fuel related expenses into the FSA runs contra to sub-rule (6) of the same Regulation which seeks to restrict FSA only to cost of fuel and its transport and does not include any other cost. The conditions impugned, of the Regulations are also contrary to provision of Section 26(9) of Act 1998 which prohibits amendments to tariffs more frequently than once in a year except in respect of changes expressly permitted under the terms of any fuel surcharge formula prescribed by Regulations and did not empower the Regulatory Commission to fix formulae which go beyond the fuel surcharge in the absence of said expression being defined in the Act.

3. The grant of exemption to the un-metered agricultural consumers and not taking their quantum of consumption of power into account for the purpose of computation of FSA is ultra vires the Act 2003 inasmuch as the scheme of the said Act is to do away with cross-subsidies un-metered connections and to make concerned State Governments bear such subsidies by itself and not to pass on the same to the consumers.

4. The short background fact which led to filing of the aforesaid series of writ petitions is that the above Regulations being Regulation No. 2 of 1999 dt. 5.7.1999 was framed under Act 1998. In these Regulations initially there was no mention of terms and conditions of determination of tariffs or any fuel surcharge formula. Thereafter, this Regulation was amended by the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) First Amendment Regulations, 2000, being Regulation No. 8 of 2000, dt. 28.2.2000. By this amendment, Chapter VI-A dealing with tariffs was inserted comprising of Clauses 45-A to 45-C. Clause 45-B provided for FSA and the terms and conditions relating thereto. The formula inserted in Clause 45-B was based upon summing up the total differences in the fuel costs for the purchasing of energy in a quarter from the various sources from the base values adopted in the most recent tariff

order. The total differences in such cost was distributed over the energy sold to all categories of consumers in the quarter except agriculture; the exclusion of agriculture till the Commission is satisfied that metering of agricultural consumption is complete. After Act 2003 was brought into force with effect from 10.6.2003, the Commission again amended the above Regulations by Amendment Regulation No. 1 of 2003 dt. 23.6.2003 substituting Clause 45-B with new Clause.

5. By this substituted clause, various changes have been made. It appears that quite a good number of conditions were mentioned in the substituted Clause 45-B. Condition (4) provides for the forfeiture of the right of the licensee for quarter if the required calculations are not filed with the Commission within 30 days of the end of the respective quarter. Condition (5) requires reporting of split up fixed and variable costs of each generating station also and provides for the recovery of the total amount on aggregate basis. Condition (6) refers to the fuel cost and what may not be included in the fuel cost. Condition (10) requires the exclusion of the effect of UI charges in respect of Central Generating Stations. Condition (11) provides that the FSA will include not only fixed costs of two-part tariff but also of single part tariff wherever applicable.

6. The respondent - Commission again amended the Regulations on 22.6.2011 to substitute Condition (1) of the impugned Clause 45-B. The proposed substituted Condition (1) provided for the FSA to be distributed among all the categories of the consumers that existed in the quarter, however, taking the agricultural consumption as estimated by the distribution licensees and approved by the Commission till the Commission is satisfied that the metering of agricultural consumption is complete.

7. Counter affidavits have been filed by the State and the Electricity Regulatory Commission to contest the petitions.

8. Quite a good number of learned counsel appeared and argued in this matter to challenge the vires of the above provision of Regulation in question.

9. The arguments advanced by all the learned counsel appearing for the petitioners in these matters were almost common and basically same and in order to avoid multiplicity and repetition the substance of the arguments of all the learned counsel is noted by us as follows.

10. The provisions of Sections 9, 26 and 54 of Act 1998, which is a State Enactment and received the assent of the President of India eclipse the provisions of Sections 61, 62 and 181 of the Electricity Act, 2003, which is a Central Enactment, since both Central and State Governments respectively made these Enactments in respect of Entry No. 38 of Concurrent List-III of 7th Schedule appended to Constitution of India inasmuch as in terms of Article 254 of the Constitution of India, if a State enactment which received assent of the President of India, the provisions of such Act will eclipse the Central Act or its provisions as a whole, as the case may be, in the case of conflict between the

same. In support of this contention, learned counsel has relied on the following decisions of the Supreme Court.

- (i) Bar Council of Uttar Pradesh v. State of Uttar Pradesh (1973) 1 SCC 261
- (ii) M. Karunanidhi v. Union of India (1979) 3 SCC 431
- (iii) State of Tamil Nadu v. Adhiyaman Educational & Research Institute (1995) 4 SCC 104
- (iv) M.P. ATT Permit Owners Association v. State of Madhya Pradesh (2004) 1 SCC 320
- (v) Pt. Rishikesh v. Salma Begum (1995) 4 SCC 718
- (vi) Deep Chand v. State of Uttar Pradesh AIR 1959 SC 648
- (vii) Ch. Tika Ramji v. State of Uttar Pradesh AIR 1956 SC 676
- (viii) State of Orissa v. M/s. M.A. Tulloch and Co. AIR 1964 SC 1284

11. It has been submitted that the impugned Regulation, namely Regulation 45-B of the Regulations, 1999, as amended by Regulation No. 1 of 2003 was not brought into Statute Book in accordance with quasi legislative power vested in the first respondent (Regulatory Commission) in terms of Section 181 of Act, 2003 or under Sections 9 and 12 of Act 1998. Therefore, the impugned Regulation is non est in the eye of law and has the effect of implied repeal. The following decisions have been relied on in support of this contention.

- (i) State of West Bengal v. Debasish Mukherjee (2011) 14 SCC 187
- (ii) Global Energy Limited v. Central Electricity Regulatory Commission (2009) 15 SCC 570
- (iii) Union of India v. Venkateshan S (2002) 5 SCC 285.

12. The impugned Regulation cannot be made in exercise of power vested in the first respondent (Regulatory Commission) in terms of Sections 61 and 62 of Act 2003 which is meant for tariff fixation and such exercise of power by the first respondent ultra vires the quasi legislative power conferred u/s 181 of the Act 2003, or Sections 9 and 54 of Act 1998. The following judgments of the Supreme Court have been relied on to support this contention.

- (i) State of Punjab v. Tehal Singh AIR 2002 SC 533
- (ii) H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur v. Union of India AIR 1971 SC 530

13. Regulation No. 9 of 2004, i.e., Andhra Pradesh Electricity. Regulatory Commission (Transitory Provisions for Determination of Tariff) Regulation, 2004, has the effect of reviving the Regulations, 1999 in toto, including the impugned Regulation, i.e., Clause 45-6 in view of the proviso to Section 61 of Act, 2003

and therefore Regulation No. 9 of 2004 being delegated piece of legislation/quasi legislative order cannot be given retrospective effect in the absence of statutory provision in the principal Statute namely, Electricity Act, 2003 authorizing the delegate to make a statutory Rule with retrospective effect. In support of this contention, the following decisions have been relied on.

(i) Swami Vivekanand College of Education v. Union of India (2012) 1 SCC 642

(ii) State of Madhya Pradesh v. Yogendra Shrivastava (2010) 12 SCC 538

(iii) Sakshi v. Union of India (2004) 5 SCC 518

14. It is also argued that assuming that the impugned Regulations have been validly made in accordance with the provisions of the Act that empower the second respondent and like licensees to collect various components such as additional power purchases made by them from various sources, yester years" expenditure etc., does not answer the reasonableness/rationale test on the touchstone of Article 14 of the Constitution of India. To support this argument, the decision of the Supreme Court reported in Municipal Corporation of Greater Bombay v. M/s. Nagpal Priniting Mills (1988) 4 SCC 466, is relied on.

15. It is contended that extraneous levies cannot be made by the State and its instrumentalities so as to answer the prescription as provided under Article 265 of the Constitution of India, which mandates that any levy whether tax or fee or charge, without any legal authority is a nullity. In support of this contention, the following decisions of the Supreme Court are relied on.

(i) Calcutta Municipal Corporation v. Shrey Mercantile (P.) Ltd. (2005) 4 SCC 245

(ii) State of Himachal Pradesh v. Shivalik Agro Poly Products (2004) 8 SCC 556

(iii) A.P. Paper Mills Ltd. v. Government of Andhra Pradesh (2000) 8 SCC 167

(iv) D.C.M. Financial Services Ltd. v. Neel Kamal Plastics Ltd. AIR 2002 SC 850

(v) Belsund Suga Co. Ltd. v. State of Bihar AIR 1999 SC 3125

(vi) Dewan Chand Builders and Contractors v. Union of India (2002) 1 SCC 101

(vii) Har Shankar v. Deputy Excise and Taxation Commissioner AIR 1975 SC 1121

(viii) M/s. Khoday Distilleries Ltd. v. State of Karnataka AIR 1996 SC 911

16. It is further argued that without admitting but assuming that the impugned Regulation has been validly made in accordance with the provisions of the Act, the orders dt. 17.1.2012 passed by the Commission permitting the second respondent to collect FSA charges for the years 2010-11 and 2011-12 defeat the very purpose of levy and collection of FSA charges which have to be made within 30 days at the end of each quarter and even beyond the 120 days time prescribed for fixing the main tariff in terms of the Act and the Regulations made thereunder.

17. The Commission has to pass orders permitting the second respondent to collect FSA charges within 30 days from the date of application of FSA claims made by the first respondent licensee in terms of Condition No. 6 of the Draft A.P.E.R.C. (Conduct of Business) Third Amendment Regulation, 2006. The State Government cannot issue any policy directions in terms of Section 108 of Act 2003, in the matter of fixation of tariff/which is a legislative function of the Commission. While passing orders impugned in the writ petitions, the Commission has followed the directions of the Government of Andhra Pradesh and therefore the same are liable to be set aside.

18. Clause 45-B of Regulation 2 of 1999, as amended by Regulation 1 of 2003 is void ab initio and ultra vires to Section 26(9) of Act 1998 and also ultra vires to Section 62(4) of Act 2003, insofar as it provides for any variations other than arising out of fuel costs alone, transgressing the scope of the FSA formula thereby permitted. Both Section 26(9) of Act 1998 and Section 62(4) of Act 2003 prohibit variation of tariff ordinarily more than once in a financial year. It is in the negative imperative. As such, it is mandatory and must be obeyed strictly. The only exception provides is for changes permitted under the terms of any specified fuel surcharge formula. The permitted exception to the express prohibition is to be strictly construed. The term "fuel" has to be given specific and natural meaning and it circumscribes and limits the nature and scope of permitted surcharge; it cannot be ignored, considered superfluous or rendered otiose. In support of the above interpretation of the relevant provision, learned counsel has relied on a Constitution Bench decision in *M. Pentaiah v. Veeramallappa Muddala* AIR 1961 SC 1107.

19. It is argued that since FSA formula in Clause 45-B as substituted by Regulation 1 of 2003 being ultra vires to Section 26(9) of Act 1998 and 62(4) of Act 2003, Condition Nos. (5), (10) and (11) of Clause 45-B of the Regulations are also ab initio, illegal and bad in law being ultra vires of Section 26(9) of Act 1998 and also Section 62(4) of Act 2003 insofar as they provide for the inclusion of fixed costs in the determination of FSA. It is submitted that Section 55(1) of Act 2003 prohibits supply of electricity after expiry of 2 years from the date of the appointed date, except through installation of correct meter. It is in negative imperative terms, and therefore mandatory. No notification extending time was ever issued by the Commission in terms of provisions of Section 55(1) of Act 2003. It is therefore imperative that all electricity supply be made only through a meter after 10.6.2005. The Act 1998 did not contain a provision similar to Section 55(1) of Act 2003, but after the Electricity Act, 2003 had come into force on 10.6.2003, the mandate of compulsory metering must be considered to have taken effect from 10.6.2005 and consequently Condition No. (1) must be considered to have ceased to have effect from and after 10.6.2005.

20. It is submitted that the term "fuel surcharge adjustment" is not defined either under Act 1998 or under Act 2003. None of the words like "fuel", "surcharge", "adjustment" are defined either in the above mentioned Statutes or

under the Regulations. Unless the Statute defines what FSA means, it cannot empower the Regulatory Commission to provide for a formula to impose the same on the consumers. Without laying down any guidelines for prescribing such a Formula, the whole thing cannot be left to the Commission by the legislature, as the same would amount to excessive delegation of power that too unbridled and uncanalised.

21. It is contended with the support of the decision of the Supreme Court in *Union of India v. Cynamid India Ltd.* AIR 1987 SC 1802 that price fixation is more in the nature of legislative activity than any other and it is ultimately the consumers who are affected by the price fixation when a monopoly like A.P. Transmission Corporation and its agencies like distribution companies fixes the tariffs as per the directions of the Commission and such a tariff fixation shall necessarily be done in accordance with the provisions of Section 26(9) of the Act 1998. When the said Section itself fails to define the FSA and also fails to provide any guidelines for formulating an FSA formula by the Commission, the said Section is liable to be struck down to that extent of grounds as stated in the writ petition. It is urged with the support of the decision of the Supreme Court in *State of Rajasthan v. Basant Nahata* (2005) 12 SCC 77, that the legislature while delegating its power, is required to lay down the criteria or standard so as to enable the delegate to act within the frame work of the Statute. The principle on which the power of the legislature has to be exercised is required to be disclosed. It is further contended that the essential legislative functions cannot be delegated as it has been held by the Supreme Court in the case of *M/s. Jullundur Rubber Goods Manufacturers' Association v. Union of India* AIR 1970 SC 1589, essential legislative functions consist of the determination of the legislative policy and its formulation as a binding rule of conduct and they cannot be delegated by the legislature. What can be delegated is the task of subordinate legislation necessary for implementing the purpose and objects of the enactment. It is only where legislative policy is enunciated with sufficient clearance or a standard laid down, the Courts will not interfere.

22. It is contended, with the support of the decision of the Supreme Court in *Kishan Prakash Sharma v. Union of India* AIR 2001 SC 1493 : (2001) 5 SCC 212, that the legislature cannot delegate uncanalised and uncontrolled power. The legislature must set the limits of the power delegated by declaring the policy of the law and by laying down standards for guidance of those on whom the power to execute the law is conferred. The delegation is valid only when the legislative policy and guidelines to implement it are adequately laid down and the delegate is only empowered to carry out the policy within the guidelines laid down by the legislature.

23. Learned Advocate General appearing for the State, while meeting the challenge as to the vires of the formula of fuel surcharge adjustment under clause 45-B of the Regulations 2003 together with Condition Nos. (1), (5), (10) and (11) submits that Section 26(9) of Act 1998 empowers the State

Commission to frame Regulations in respect of fuel surcharge formula. Similarly, Section 62(4) of Act 2003 empowers the Commission to frame fuel surcharge formula. Section 54 of Act 1998 empowers the State Commission to frame Regulations. The impugned Regulations have been framed in the year 2003 by respondent - Commission in accordance with the aforesaid provisions.

24. While countering the contention that Condition No. (1) of Clause 45-B being irrational and unreasonable since it excludes agricultural sector, learned Advocate General submits that under the provisions of Section 26(7) of Act 1998, the power to differentiate the consumer has been given. It will appear that the Commission is empowered to differentiate according to the consumers load factor or power factor, the consumers total consumption of energy during any specified period, or time at which supply is required, or paying capacity or category of consumer and need for cross-subsidization.

25. The provision of Section 62(3) of Act 2003 is akin to provisions of Section 26(7) of Act 1998. In support of his contention he has referred to a decision of the Supreme Court in the case of Bihar State Electricity Board v. Pulak Enterprises (2009) 5 SCC 641 and also another decision of the Supreme Court in the case of Association of Industrial Electricity Users v. State of Andhra Pradesh 2002 SC 1361 : (2002) 3 SCC 711.

26. His next contention, to counter the challenge as regards condition Nos. (5), (10) and (11) of Clause 45-B as being ultra vires to Section 26(9) of Act 1998, insofar as they provide for inclusion of fixed costs components in determination of fuel surcharge adjustment liability, is that the issue is no longer res integra. He submits that the Supreme Court in the case of M/s. Rohtas Industries Ltd. v. Bihar State Electricity Board AIR 1984 SC 657 : (1984) Suppl. SCC 161 and Bihar State Electricity Board v. Pulak Enterprises (supra) has held that though the nomenclature given to the levy is fuel surcharge, it is really surcharge levied to meet the increased cost of generation and purchase of electricity. He argues that the contention on this issue raised by the petitioners is devoid of any merit.

27. Referring to the judgment of the Supreme Court in the case of P.T.C. India Ltd. v. Central Electricity Regulatory Commission (2010) 4 SCC 603, he submits that decision making and regulation making functions are both assigned to the Commission. These functions of the Commission are adjudicatory, advisory and legislative. The powers and functions u/s 178 of Act 2003, which deal with making of Regulations, confer wide power to the Commission to frame Regulations. In the premises, the contention that the functions of the Commission are quasi judicial and Regulations cannot be made, has no basis. He answers the contention of some of the petitioners that as per Section 55(1) of Act 2003, no licensee shall supply electricity after expiry of two years from the appointed date, i.e., 10.6.2003 except through installation of correct meter and the said supply to agricultural consumers is not in accordance with law asserting that second proviso to Section 55(1) of Act 2003 specifically confer power on the Commission to the effect that the Commission may extend such period of two

years by notification. Accordingly, in these cases, the Regulatory Commission by incorporating Condition No. (1) clearly extended the said period until satisfied by the Commission of such metering. Condition No. (1) being part of Regulations, the same has been notified in the Gazette. Therefore, there has been complete compliance of the provisions of the Act 2003 in extending two years period specified in Section 55(1) of Act 2003.

28. He further submits, on the question of excessive delegation of power in relation to Section 26(9) of Act 1998, that Section 62(4) of Act 2003 also empowers the Commission to frame fuel surcharge formula. The said provision is not challenged in the writ petitions. Thus, even in the absence of Section 26(9) of Act 1998, fuel surcharge can be framed by way of regulation u/s 62(4) of Act 2003. What is sought to be achieved u/s 26(9) of Act 1998 is in consonance with the aim and object of the Act. The delegated legislation can be challenged when any provision of the Constitution is violated and it is violative of the enabling Act, i.e., when it makes any provision inconsistent with the Act that includes without delegation. Section 86 of Act 2003 specifies the functions of the State Commission. Section 11 of Act 1998 is akin to the provision of Section 86 of Act 2003. He submits further that Section 181 of Act 2003 deals with the power of State Commission to make Regulations. Similarly, Section 54 of Act 1998 is meant for the same effect. Thus, it is clear that all the aforesaid provisions give wide-ranging power to the Commission to frame Regulations in consonance with the aims and object of the Act. While referring to the judgment of the Supreme Court in the case of *P.T.C. India Ltd. v. Central Electricity Regulatory Commission* (supra), he contended that the Commission has wide power to frame Regulations. Therefore, the provisions of Section 26(9) of Act 1998 enables the Commission to frame Regulations in respect of fuel surcharge formula and the same is within the spirit of the Act and it does not amount to excessive delegation of power.

29. While referring to the judgment of the Supreme Court in the case of *Bangalore Development Authority v. Aircraft Employees Cooperative Society Ltd.* (2012) 3 SCC 442, he submits that it is not possible for the legislature to enact laws with minute details to deal with increasing complexities of government, and legislature can lay down broad policy principles and guidelines and leave the details to be worked out by the agencies and that the delegation of power upon such authorities to implement the legislative policy cannot be castigated as excessive delegation of legislative power. He submits that in all these cases the Regulations empower the Commission to frame fuel surcharge formula strictly in conformity with the Act, Rules, objects and Preamble of the Act and thus it does not suffer from vice of excessive delegation.

He has also referred to the following decisions of the Supreme Court, which deal with the issue of excessive delegation of power.

1. *Gulabchand Bapalal Modi v. Municipal Corporation of Ahmedabad* AIR 1971 SC 2100

2. State of Madhya Pradesh v. Bhaskara Prasad (2012) 3 SCC 1

3. Bangalore Development Authority v. Aircraft Employees Cooperative Society Ltd.(supra)

4. Dr. Haniraj L. Chulani v. Bar Council of Maharashtra and Goa AIR 1996 SC 1708

30. Learned counsel appearing for Andhra Pradesh Electricity Regulatory Commission contends that the State of Andhra Pradesh enacted Act 30 of 1998, namely Andhra Pradesh Electricity Reforms Act, 1998 with specified objectives. The Act 1998 came into force on 1.2.1999. Pursuant thereto, Andhra Pradesh Electricity Regulatory Commission was constituted u/s 3 of Act 1998. In exercise of power conferred by Section 54 of Act 1998, the Commission has framed Business Regulations. Subsequently, the Electricity Act, 2003 was enacted by the Union Legislature, which came into force with effect from 10.6.2003. u/s 185(3) of Act 2003 the Andhra Pradesh Electricity Reforms Act, 1998 is saved and it was mentioned in the schedule at Serial No. 3 that the provisions of Andhra Pradesh Electricity Reforms Act, 1998, which are not inconsistent with the provisions of the Electricity Act, 2003, shall continue to apply to the State of Andhra Pradesh.

31. He further submits that as per Section 54 of Act 1998, the Commission has framed Business Regulations vide Regulation No. 2 of 1999 for conduct of its proceedings and discharge of its functions. These Regulations were amended from time to time. Regulation No. 1 of 2003 has been framed by the Commission for recovery of FSA for the price and mix variations in the quantity of energy to be purchased as per the Tariff Order during a quarter and the same shall be determined by a formula specified thereunder.

32. He further submits that Sections 61 and 62 of Act 2003 deal with powers and procedure for determination of Tariff and framing of Regulations for tariff. Section 86 of Act 2003 stipulates functions of the Commission. The Regulations framed under the Act 1998 were continued by issuing Transitory Regulation No. 9 of 2004, till such time the Regulations framed under Act 2003. Thus the Regulations continue to apply.

33. He submits further that as per Section 26(7) of Act 1998, the Commission has power to classify the consumers and fix different tariffs, having regard to the nature of supply, the purpose of supply, voltage and geographical locations. Similarly, Section 62(3) of Act 2003 has empowered the Commission to classify the consumers and fix different tariffs and both the provisions were in pari materia.

34. Referring to the decision of this Court in S. Bharat Kumar and others v. Government of Andhra Pradesh 2000 (6) ALD 217, he submits that free supply of power to agricultural consumer has been accepted and approved by this Court and said decision has also been affirmed by the Supreme Court in the case of Association of Industrial Electricity Users v. State of Andhra Pradesh (supra). Since the levy of FSA is part of tariff, exclusion of agricultural consumers from

the levy of FSA cannot be faulted.

35. He further contends that u/s 62(4) of Act 2003, the Commission is empowered to frame fuel surcharge adjustment formula. The Commission has accordingly framed Regulation No. 1 of 2003 u/s 54 of the Act 1998, which is saved and consistent with Act 2003. Even otherwise, the Commission has issued Regulation No. 9 of 2004, which is a Transitory Regulation. The Commission thus has been exercising the substantive power under the Act 2003 apart from the Regulations framed under Act 1998.

36. He submits that FSA is really a surcharge levied to meet the increased cost of generation and purchase of power, which is supplied to the consumers. While adopting the argument of the learned Advocate General he contends that this issue has been settled by the Hon'ble Apex Court in the case of Bissa Stone Lime Co. v. Orissa State Electricity Board (1976) 2 SCC 167. He further contends that condition Nos. (5), (10) and (11) of Clause 45B of Regulation No. 1 of 2003 cannot be said to be ultra vires of the Act as it has been held by the Supreme Court in the case of M/s. Rohtas Industries Ltd. v. Chairman, Bihar State Electricity Board (supra) that the fuel surcharge not only include fuel cost but it will also include the other charges also.

37. His next contention is that by virtue of proviso to Section 61 of Act 2003, since Act 1998 is saved and there is no inconsistency of Regulation 1 of 2003 with the provisions of Act 2003 and the same is continued to be operative by Transitory Regulation No. 9 of 2004, which has given retrospective operation.

38. He cited the following decision of this Court in the case of the Andhra Pradesh State Electricity Board, Vidyuth Soudha v. The Gowthami Solvent Oils AIR 1991 AP 141 and also the decision of the Supreme Court in the case of M/s. Real Food Products Ltd. v. A.P. State Electricity Board (1995) 3 SCC 295, which has approved the decision of this Court in the case of Andhra Pradesh State Electricity Board, Vidyuth Soudha v. The Gowthami Solvent Oils (supra).

39. Therefore, both the aforesaid learned counsel appearing for the respondents pray for dismissal of these writ petitions.

40. After hearing the learned counsel for the parties and after considering the petitions filed in the above batch of matters, it appears that most of the petitioners are challenging the vires of condition Nos. (1), (5), (10) and (11) Clause 45-B of Regulations, 1999, as substituted by Regulation 1 of 2003, insofar as it provides for any variations other than the variations arising out of fuel cost alone, and insofar it does not distribute all or any of the variations in cost on all the energy sold to all categories of the consumers in the quarter by exclusion of consumption by agriculture sector as in condition No. (1).

41. Some of the petitioners have gone on challenging vires of Section 26(9) of Act 1998 to the extent it permits or empower the Commission to frame its own fuel surcharge formula on the ground it suffers from excessive delegation of

power. We think that if this challenge succeeds, obviously the Regulations framed under the aforesaid Act in relation to fuel surcharge formula will automatically go. Accordingly, before we proceed to deal with other contention raised by most of the petitioners, this contention requires consideration at first. We reproduce Section 26(9) of Act 1998 hereunder:

26. Licensee's revenues and tariffs:-....

(9) No tariff or part of any tariff required by sub-section (6) may be amended more frequently than once in any financial year ordinarily except in respect of any changes expressly permitted under the terms of any fuel surcharge formula prescribed by regulations. At least three months before the proposed date for implementation of any tariff or an amendment to a tariff the licensee shall provide details of the proposed tariff or amendment to a tariff or amendment to a tariff to the Commission, together with such further information as the Commission may require to determine whether the tariff or amended tariff would satisfy the provisions of sub-section (6). If the Commission considers that the proposed tariff or amended tariff of a licensee does not satisfy any of the provisions of sub-section (6), it shall, within 60 days of receipt of all the information which it required, and after consultation with the Commission Advisory Committee and the licensee, notify the licensee that the proposed tariff or amended tariff is unacceptable to the Commission and it shall provide to the licensee an alternative tariff or amended tariff which shall be implemented by the licensee. The licensee shall not amend any tariff unless the amendment has been approved by the Commission.

42. The invalidity on the ground of excessive delegation more often was raised before High Courts and the Supreme Court in relation to various enactments. It appears historically whenever a new enactment comes providing for delegated legislative power these challenges are made. It appears this Section was never challenged on the ground as above and at least we have not been supplied with any authority wherein this issue has been decided. When the Court will declare a particular portion of the enactment providing for delegation of power in the field of legislation being invalid on the ground of excessive delegation has been well settled by the Supreme Court by this time. As it has been pointed in our view correctly so, by the learned Advocate General this has been firmly settled by the Supreme Court in its very recent decision in the case of Bangalore Development Authority v. Aircraft Employees Cooperative Society Ltd. (supra). The Supreme Court speaking through Justice G.S. Singhvi (as His Lordship then was), after considering following number of decisions of the Supreme Court on the above question of excessive delegation, almost settled the law, which will be discussed a little later.

(i) Jyoti Pershad v. Union Territory of Delhi AIR 1961 SC 1602;

(ii) Ajoy Kumar Banerjee v. Union of India (1984) 3 SCC 127;

(iii) Maharashtra State Board of Secondary and Higher Education v. Paritosh

Bhupeshkumar Sheth (1984) 4 SCC 27

(iv) Kishan Prakash Sharma v. Union of India (supra)

(v) Union of India v. Azadi Bachao Andolan (2004) 10 SCC 1

43. The Apex Court uniformly laid down that it is not possible for the legislature to enact laws with minute details to deal with the increasing complexities of governance in a political democracy, and held that the legislature can lay down broad policy, principles and guidelines and leave the details to be worked out by the executive and the agencies/instrumentalities of the State and that the delegation of the powers upon such authorities to implement the legislative policy cannot be castigated as excessive delegation of the legislative power.

44. In the case of Jyoti Pershad (supra), the Supreme Court laid down as follows:

So long, therefore, as the legislature indicates, in the operative provisions of the statute with certainty, the policy and purpose of the enactment, the mere fact that the legislation is skeletal, or the fact that a discretion is left to those entrusted with administering the law, affords no basis either for the contention that there has been an excessive delegation of legislative power as to amount to an abdication of its functions, or that the discretion vested is uncanalised and unguided as to amount to a carte blanche to discriminate. The second is that if the power or discretion has been conferred in a manner which is legal and constitutional, the fact that Parliament could possibly have made more detailed provisions, could obviously not be a ground for invalidating the law.

45. In the case of Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupesh kumar Sheth (supra), the Apex Court, on this subject, has laid down in paragraph -- 14 of the report as follows:

...So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations. It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provisions of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the statute.

46. In the case of Ajoy Kumar Banerjee v. Union of India (supra), the three-Judge Bench of the Supreme Court, in paragraphs 28 and 29 of the report laid down in almost in the same lines but in a different language.

28. The growth of legislative power of the executive is a significant development of the twentieth century. The theory of laissez faire has been given a go-by and large and comprehensive powers are being assumed by the State with a view to improve social and economic well-being of the people. Most of the modern socio-economic legislations passed by the Legislature lay down the guiding principles of the legislative policy. The legislatures, because of limitation imposed upon them and the time factor, hardly can go into the matters in detail. The practice of empowering the executive to make subordinate legislation within the prescribed sphere has evolved out of practical necessity and pragmatic needs of the modern welfare State.

29. Regarding delegated legislation, the principle which has been well established is that legislature must lay down the guidelines, the principles of policy for the authority to whom power to make subordinate legislation is entrusted. The legitimacy of delegated legislation depends upon its being used as ancillary which the legislature considers to be necessary for the purpose of exercising its legislative power effectively and completely. The legislature must retain in its own hand the essential legislative function which consists in declaring the legislative policy and lay down the standard which is to be enacted into a rule of law, and what can be delegated is the task of subordinate legislation which by very nature is ancillary to the statute which delegates the power to make it effective provided the legislative policy is enunciated with sufficient clearness or a standard laid down. The courts cannot and do not interfere on the discretion that undoubtedly rests with the legislature itself in determining the extent of the delegated power in a particular case.

47. In *Kishan Prakash Sharma v. Union of India* (supra), the Constitution Bench of the Supreme Court in paragraph 18 of the (SSC) report summed up the principle of delegated legislation in the following words:

18. The legislatures in India have been held to possess wide power of legislation subject, however, to certain limitations such as the legislature cannot delegate essential legislative functions which consist in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. The legislature cannot delegate uncanalised and uncontrolled power. The legislature must set the limits of the power delegated by declaring the policy of the law and by laying down standards for guidance of those on whom the power to execute the law is conferred. Thus the delegation is valid only when the legislative policy and guidelines to implement it are adequately laid down and the delegate is only empowered to carry out the policy within the guidelines laid down by the legislature. The legislature may, after laying down the legislative policy, confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of the policy. When the Constitution entrusts the duty of law-making to Parliament and the legislatures of States, it impliedly prohibits them to throw away that responsibility on the shoulders of some other authority. An area of compromise is

struck that Parliament cannot work in detail the various requirements of giving effect to the enactment and, therefore, that area will be left to be filled in by the delegatee. Thus, the question is whether any particular legislation suffers from excessive delegation and in ascertaining the same, the scheme, the provisions of the statute including its preamble, and the facts and circumstances in the background of which the statute is enacted, the history of the legislation, the complexity of the problems which a modern State has to face, will have to be taken note of and if, on a liberal construction given to a statute, a legislative policy and guidelines for its execution are brought out, the statute, even if skeletal, will be upheld to be valid but this rule of liberal construction should not be carried by the court to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on the executive.

48. In the case of *Union of India v. Azadi Bachao Andolan* (supra), the Supreme Court in paragraph 56 of the report has again reiterated as follows:

The question whether a particular delegated legislation is in excess of the power of the supporting legislation conferred on the delegate, has to be determined with regard not only to specific provisions contained in the relevant statute conferring the power to make rules or regulations, but also the object and purpose of the Act as can be gathered from the various provisions of the enactment. It would be wholly wrong for the court to substitute its own opinion as to what principle or policy would best serve the objects and purposes of the Act; nor is it open to the court to sit in judgment over the wisdom, the effectiveness or otherwise of the policy, so as to declare a regulation ultra vires merely on the ground that, in the view of the court, the impugned provision will not help to carry through the object and purposes of the Act.

49. After considering all these judgments, the Supreme Court in the case of *Bangalore Development Authority v. Aircraft Employees' Cooperative Society Limited* (supra) in paragraph 65 of the report culled out on this principle as follows:

65. The principle which can be deduced from the above noted precedents is that while examining challenge to the constitutionality of a statutory provision on the ground of excessive delegation, the Court must look into the policy underlying the particular legislation and this can be done by making a reference to the Preamble, the objects sought to be achieved by the particular legislation and the scheme thereof and that the Court would not sit over the wisdom of the legislature and nullify the provisions under which the power to implement the particular provision is conferred upon the executive authorities.

50. After taking note of all these authoritative pronouncements of the Apex Court, we think that while examining any statutory provision on the premise of excessive delegation, the Court is to examine at first the specific provisions contained in the relevant statute conferring power to make Rules and Regulations and thereafter if this provision is not clearly helpful to adjudge the issue, then

the Court will look into the policy underlying particular legislation and it can be done on reading Preamble and the objects sought to be achieved by the particular enactment and the scheme thereof. While applying the aforesaid guidance we hereafter examine Section 26(9) of Act 1998.

51. It will appear from Section 26 of Act 1998 it enables the Commission to fix tariff of electricity. Sub-section (2) thereof and its proviso specifically empowers to determine and fix tariff of electricity. Clause (b) of the proviso to sub-section (2) of Section 26 gives clear guidelines how it has to be done. Sub-section (1) and Clauses (b) and (c) of the proviso to sub-section (2) of Section 26, reads as follows:

26. Licensee's revenues and tariffs: - (1) The holder of each licence granted under this Act shall observe the methodologies and procedures specified by the Commission from time to time in calculating the expected revenue from charges which it is permitted to recover pursuant to the terms of its licence and in designing tariffs to collect those revenues.

(2). The Commission shall subject to the provisions of sub-section (3) be entitled to prescribe the terms and conditions for the determination of the licensee's revenue and tariffs by regulations duly published in the Official Gazette and in such other manner as the Commission considers appropriate,

Provided that in doing so the Commission shall be bound by the following parameters:-

(a)... ..

(b) the factors which would encourage efficiency, economic use of the resources, good performance, optimum investments performance of licence conditions and other matters which the Commission considers appropriate keeping in view the salient objects and purposes of the provisions of this Act; and

(c) the interest of the consumers.

52. The object of sub-section (9) of Section 26 of Act 1998 is basically incidental to that of sub-sections (1) and (2). Thus, it appears from a reading of sub-section (2) clauses (b) and (c) the Commission has been empowered to encourage efficiency, economic use of the resources, good performance, optimum investments, performance of licence conditions and also the interest of the consumers. Thus, the object of the aforesaid provision is to strike fine balance of efficiency and economic use of the resources. Meaning thereby, the generating company or distributing company can be encouraged to generate optimum power with appropriate investment in power sector on one hand and the consumer should get electricity at a reasonable market rate on the other hand. Therefore, the object is clearly laid down. In addition thereto, objects of the enactment of 1998 may be referred to. It appears that the object of Act 1998 is to provide for the constitution of an Electricity Regulatory Commission, restructuring of the Electricity Industry, Rationalization of the Generation,

Transmission, Distribution and supply of Electricity avenues for participation of private sector in the Electricity Industry and generally for taking measures conducive to the development and management of the Electricity industry in an efficient, economic and competitive manner and for matters connected therewith or incidental thereto.

53. In our view, in order to achieve the object as mentioned in the Preamble of Act 1998 as well as Section 26(2) thereof, the fixation of tariff for sale and distribution of electrical energy is one of the important factor. The word "tariff" has been explained in clause (b) of sub-section (10) of Section 26, which reads as follows:

"tariff" means a schedule of standard prices or charges for specified services which are applicable to all such specified services provided to the type or types of customers specified in the tariff notification.

The tariff is to be fixed in order to generate revenue at a competitive price for the survival of both the electricity generating and distributing agency, and the consumer. We, therefore, feel tariff, in this case FSA, has been mentioned and according to us the FSA is one of the factor for determination of the tariff and logically it follows the power of determination of FSA is part and parcel of the determination of tariff and to achieve the object of efficiency and economic use of the resources and good performance and to achieve above salient objects and purpose of this Act (1998) as well as interest of the consumers.

54. When we find that this power has given clear guidelines how the tariff is to be determined and what factors have to be taken into consideration in the object of the Act as well as the above Section, we do not think that the provision of Section 26(9) is a piece of excessive delegation of power. As it has been rightly contended by the learned Advocate General and the learned counsel for the respondent -- Commission, when guidelines in clear terms are there and the method for determination of tariff does not exceed the power given to Commission, only the manner and method of collection of FSA not being mentioned in the Act itself cannot be said that the formula devised for arriving at FSA is ultra vires the said Act nor it can be termed to be the result of excessive delegation. We accordingly do not find any substance in the submission of the learned counsel for some of the petitioners who argued on this point.

55. The concept of fuel surcharge adjustment has been clearly laid down in a decision in Andhra Pradesh State Electricity Board, Vidyut Soudha & others v. The Gowthami Solvent Oils and another (supra), wherein it was held thus: (para. 5).

This concept of Fuel Cost Adjustment was introduced with a view to offset the constant rise in the price of coal and oil. Instead of revising the tariff every time the price of coal and oil goes up, they introduced this concept, according to which an additional amount, called "Fuel Cost Adjustment" is levied upon H.T. Consumers every time there is a rise in the price of coal and oil beyond the prescribed limit. The H.T. Consumers have to pay the prescribed tariff and the

amount representing Fuel Cost Adjustment in addition thereto. FCA was not made applicable to other categories of consumers. The FCA charge is notified from time to time.

56. In view of the above discussion, we are of the clear opinion that concept of FSA is evolved so as to minimize the cost burden on DISCOMs. Therefore, taking the other components in addition to the fuel cost variation, FSA formula was incorporated in clause 45B of the Regulations, 1999. There is necessity of inclusion of other components which are having financial inability on the Transco and DISCOMs. It cannot be said that the formula is an additional liability on the consumers. The other components" cost to go simultaneously with the tariff. Therefore, the FSA formula, in our considered opinion, cannot be said to be irrational or arbitrary.

57. Next comes the other broader and common contention that condition No. (1) of Clause 45-B of the Regulations excludes agriculture sector. Clause 45-B of the Regulations, which is under challenge, reads as follows.

Clause 45-B: Fuel Surcharge Adjustment Formula:-

Unless otherwise agreed by the Commission, the amount eligible for recovery towards the Fuel Surcharge Adjustment (FSA) for the price and mix variations in the quantity of energy to be purchased as per the tariff order during a quarter "1" shall be determined as per the following formula, aggregated for the quarter "1".

$$F_i = (P_i \times E_i + F_{Ci} + Z + A_i)/Q_i$$

Where

P_i is the difference in the Weighted Average Variable Cost in Rupees adjusted to four decimal points, of power purchase cost in quarter "1" for the power purchase quantity mentioned in the tariff order compared to the Weighted Average Variable Cost adopted in the tariff order.

E_i is the energy purchase as mentioned in the tariff order in K wh during the quarter to be submitted for each of the generating stations.

F_{Ci} is the difference in Rupees, of the actual total fixed charges of the generating stations from the base values adopted in the tariff order.

Q_i is the actual energy sold to all categories in K wh in the quarter in DISCOM or RESCO, subject to condition No. 1, mentioned hereunder.

Z is the charges in the cost in Rupees as allowed by the Commission for a period extending in the past beyond the relevant quarter.

A_i is the adjustment in Rupees to account for the financial impact of demonstrated incidents of merit order violation on account of controllable factors or any other events the financial impact of which, in the Commissions view, should be given appropriate treatment.

Condition (1): The FSA as worked out will be distributed among all categories of consumers that existed in the quarter. However the consumption by the agricultural sector will be excluded till the Commission is satisfied that metering of agricultural consumption is complete, as may be notified in the Tariff orders from time to time.

(2) The licensee shall provide the Commission with its calculation of each fuel surcharge adjustment required to be made pursuant to its tariff before it is implemented with such documentation and other information as it may require, for purpose of verifying the correctness of adjustments.

(3) FSA billed to retail categories to be made over to Bulk supplier by individual Distribution Companies and/or RESCOS as the case may be.

(4) APTRANSCO must file with the Commission all information (including sales date from the DISCOMS/RESCOs) required for calculation of the Fuel Surcharge Adjustment within 30 days of the end of the respective quarter failing which it will forfeit any future claims on this account for such quarter. DISCOMS/RESCOs should use actual consumption details of the relevant quarter when levying FSA.

(5) The licensee will report date for computing the total cost (split for fixed and variable) for each of the generation stations that has supplied power in the respective quarter for which fuel surcharge adjustment is being computed. The total amount eligible for recovery will be computed on an aggregate basis.

(6) Fuel cost data has to conform to the fuel costs to the allowed level and no other charges other than the transportation cost can be included in the fuel cost. Every statement has to be confirmed by the licensee to that effect. The costs arrived at will be compared to the fuel cost indexation which will be developed by the Commission in the future.

(7) Penalties are leviable for furnishing wrong data.

(8) The licensee shall publish the FSA approved by the Commission in one English and one Telugu daily newspaper with circulation in the area of supply, for general information of the consumers, and shall make available copies of the FSA order for the relevant quarter to the public on request, at a reasonable cost.

(9) The FSA shall be implemented after 7 days of such publication.

(10) The actual variable costs and Fixed costs computed for Central Generating Stations (CGS) should exclude the effect of UI charges.

(11) The FSA will include not only fixed costs of two part tariff but also of single part tariff wherever applicable.

58. It has been settled position of law that a delegated legislation can be challenged only when any provision of the Constitution is violated and when it is violative of the enabling Act, i.e., when it makes any provision inconsistent with the Act under which it is framed. No ground has been mentioned or stated how

the aforesaid Regulation is violative of provisions of the Constitution. No ground, except the ground that it makes a discrimination between two sets of consumers, one is agricultural consumers and another is non-agricultural consumers, is made out in support of case of the petitioners. We think that this contention of the learned counsel for the petitioners, as rightly pointed out by the learned Advocate General, has no substance as agricultural consumers can be differentially treated under Act 2003. The second proviso to Section 55(1) of Act 2003 enables the Commission to make differentiation. Section 55(1) along with the second proviso reads as follows:

55. Use, etc. of meters. - (1) No licensee shall supply electricity, after the expiry of two years from the appointed date, except through installation of a correct meter in accordance with the regulations to be made in this behalf by the Authority:

Provided that the licensee may require the consumer to give him security for the price of a meter and enter into an agreement for the hire thereof, unless the consumer elects purchase a meter:

Provided further that the State Commission may, by notification, extend the said period of two years for a class or classes of persons or for such area as may be specified in that notification.

Here, the Commission by its notification by incorporating Condition No. (1) clearly extended the said period until specified by the Commission of such metering. The Condition being part of Regulation, the same has been notified in the Gazette. Therefore, there has been sufficient compliance of the provisions of the Act 2003. It is incorrect to contend that the aforesaid condition No. (1) suffers from unconstitutionality.

59. In order to examine the validity, the next ground is whether these Regulations have been framed beyond the power given to it.

It is an admitted position that Section 26(9) of Act 1998 empowers the State Commission to frame Regulations in respect of fuel surcharge formula. Similarly, Section 62(4) of Act 2003 empowers the Commission to frame fuel surcharge formula. Section 51 of Act 1998 empowers the State Commission to frame Regulations. In any event, the petitioners are, by necessary implication, admitted the Commission has power to frame Regulations in respect of FSA. Only it has been contended that condition Nos. (1), (5), (10) and (11) of Clause 45-B are unconstitutional.

60. We have already discussed that condition No. (1) does not suffer from unconstitutionality as Act 2003 has empowered to do so. Not only Act 1998 but also Act 2003 empower to make differentiation between two sets of consumers. Apart from the aforesaid statutory provisions, the Supreme Court in the case of Bihar State Electricity Board v. Pulak Enterprises (supra), has held that it permissible to classify consumers and levy surcharge on certain category

consumers leaving other consumers.

61. In the case of *Association of Industrial Electricity Users v. State of Andhra Pradesh* (supra) in paragraph 10 of the report (AIR) observed as follows:

10. We are also unable to agree with the learned counsel for the appellants that the Act does not envisage classification of consumers according to the purpose for which the electricity is used. Sub-section (9) of Section 26 does state that the tariff which is fixed shall not show undue preference to any consumer of electricity but then the said sub-section itself permits differentiation according to the consumer's load factor or power factor, consumers total consumption of energy during the specified period, time at which the supply is required or paying capacity of category of consumers and the need for cross-subsidisation or such tariff as is just and reasonable and be such as to promote economic efficiency in the supply and consumption of electricity and the tariff may also be such as to satisfy all other relevant provisions of the Act and the conditions of the relevant licence. This section has to be read along with Section 11 which sets out the functions of the Commission and, inter alia, provides that amongst the functions is power to regulate the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be maintained unless the charges for electricity supplied are adequately levied and duly collected. Depending upon the various factors stipulated in Section 26(7), categorization between industrial and non-industrial, agricultural or domestic consumers can certainly take place...

62. Now, we shall examine the contention of the petitioners whether condition Nos. (5), (10) and (11) of Clause 45-B of the Regulation are ultra vires to Section 26(9) of Act, 1998 insofar as they provide for inclusion of fixed costs in determination of FSA liability.

63. It is the contention of all the petitioners that in FSA only the cost of the fuel should be the factor and not any other factor. It appears to us that this contention should not be accepted at all as it has been authoritatively decided, as appropriately contended by the learned Advocate General, in the case of *M/s. Rohtas Industries Ltd. v. Bihar State Electricity Board* (supra) and *Bihar State Electricity Board v. Pulak Enterprises* (supra). In *M/s. Rohtas Industries Ltd. v. Bihar State Electricity Board* (supra) it has been held by the Supreme Court in paragraph 9 of the report that though the nomenclature given to the levy is "fuel surcharge" it is really a surcharge levied to meet the increased cost of generation and purchase of electricity. We set out the relevant portion of paragraph 9 of the report for better understanding:

The next argument advanced on behalf of the appellants was that even if the Board is legally entitled to levy the fuel surcharge, that can only be for the purpose of recouping the amounts actually paid by the Board by way of "fuel surcharge" to the Damodar Valley Corporation and the U.P. State Electricity Board for the quantities of energy purchased by the Board from those sources

and the extra cost that the Board had actually to incur on fuel consumed in those two generating stations at Patratu and Barauni.....We see no substance whatsoever in the contention advanced by the appellants that only such amounts, if any, as might have been paid by the Board to the D.V.C. and the U.P. State Electricity Board as and by way of fuel surcharge can go into the computation of the fuel surcharge levied by the Board under paragraph 16.7 of the 1979 tariff. Though the nomenclature given to the levy is "fuel surcharge" it is really a surcharge levied to meet the increased cost of generation and purchase of electricity...

(emphasis supplied)

64. Learned lawyers for some of the petitioners have argued as quoted above that the aforesaid levy of fuel surcharge is nothing but imposition of tax which is not permissible under Article 265 of the Constitution of India. It is not disputed that under the provisions of the parent Acts the licensees can realize the charges. We think that to consider this contention it has to be understood nature of impost of the fuel surcharge, namely whether it is imposed by way of tax or by way of levy. It is settled position of law, generally impost of tax does not carry quid pro quo element but in case of levy of other than tax, the element of quid pro quo is essential. The principle laid down by the Hon"ble Supreme Court in the decisions cited by the learned counsel recorded above, cannot be disputed, but it depends upon the nature of the impost. From a fair reading of the Act and the Regulations framed, this is intended to impose to meet additional burden for generation and distribution of the electric energy. Therefore, in consideration of supply of electric energy the price thereof is fixed. Under these circumstances, the aforesaid fuel surcharge adjustment is a levy and this levy is permissible to be imposed.

65. Under these circumstances, we think that the power to such levy is not hit by Article 265 of the Constitution of India. This Article prohibits that whatever may be the nomenclature whether tax, fee, or charge cannot be fixed and realized without any legal authority. Under Act 1998 the legislature has given power to impose levy and this has also been delegated to the Commission for determination and fixation of such levy. We, therefore, do not find any substance in the submission FSA is unconstitutional in any sense.

66. Learned counsel for the petitioners contends that Regulation No. 9 of 2004, i.e., Andhra Pradesh Electricity Regulatory Commission (Transitory Provisions for Determination of Tariff) Regulation 2004 has the effect of reviving the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 in toto including the impugned Clause of the Regulation, viz., 45-B in view of proviso to Section 61 of Act, 2003. Therefore, this cannot be given retrospective effect in the absence of statutory provision in the principal statute. First of all, on fact, we are unable to comprehend how this Regulation has been given retrospective effect. From apparent reading, the Regulation has not been intended to give any retrospective effect from the date of issuance of the same.

Even if for arguments sake it is taken that this has got the retrospective effect, we think that when the power has been given to frame Regulations lawfully, then such power is also given to give retrospective effect provided of course as it has been held by the Supreme Court in the case of *State of Madhya Pradesh v. Yogendra Shrivastava* (supra) that the rights and benefits which have already been accrued, earned or acquired under the existing rules cannot be taken away by amending Rules with retrospective effect (See paragraph 15 of the report). No case has been made out here that any vested right has been accrued in favour of any of the consumers - petitioners or the same is intended to be taken away by these Regulations.

67. It is further contended that the formula for FSA is unreasonable, arbitrary and unconstitutional by all the learned counsels in chorus. We are unable to accept the contention for in the body of the writ petition none of the petitioners has said how the said formula is unreasonable. It will appear from clause 45-B that the said formula has been mentioned with clarity and with high degree of transparency. Even Pi, Ei, FCi, Qi, Z and Ai have been explained unambiguously. This has been prepared by the expert bodies and nothing has been shown or argued before us that the aforesaid formula in any sense is flawed or absurd. No counter method or formula has been suggested how in a given situation fuel surcharge adjustment will be calculated differently.

68. It is settled position of law when a statutory body while functioning decides anything, the presumption of correctness is always in favour of such decision and such presumption can be rebutted with legally acceptable material. This burden is very heavy and it has to be discharged by the persons, who does not accept, and challenge on any ground. Element of arbitrariness is not judged from one side, in this case namely; from the side of the consumers' alleged sufferings, but it has to be adjudged from the angle of power generating and distribution company also. Unless a reasonable levy amongst other in the shape of fuel surcharge adjustment is made, the power generating company and distribution company cannot supply the power economically. Thus, we reject the contention that the aforesaid formula is unreasonable, arbitrary and unconstitutional.

69. In view of the discussion as aforesaid, we are unable to accept the contention that the Conditions of the Regulations challenged before us suffer from any infirmity either constitutional or otherwise. Therefore, we uphold the vires of the aforesaid Regulations challenged.

70. We have merely decided the question of constitutional validity of the above Regulations. Under these circumstances, we have not examined the legality and validity of order/orders passed by the Commission in pursuance of the aforesaid Regulations, as an alternative remedy is provided against those orders to the appellate forum. It is now well-settled that Regulatory Commission has a dual role to play; one is to act as delegated legislature and another, as adjudicator. Since the orders were passed while exercising its powers of adjudication, the same shall be subjected to scrutiny at the first instance by the alternative

mechanism by the appellate authority, for the orders passed are highly technical in nature and this technicality can be examined on the question of reasonableness and otherwise by the appellate forum.

71. Hence, we dispose of all the writ petitions granting liberty to each of the petitioners, if so advised, to prefer appeal. Since the matters are pending sub judice before this Court, if any application for condonation of delay is made, the same shall be considered taking in view the pendency of the matter before this Court, for prayer for condonation of delay. There will be no order as to costs.

72. Consequently, pending miscellaneous petitions shall stand dismissed.