(2009) 08 KL CK 0036

In the High Court Of Kerala

Case No : W.A. No. 1063 of 2009

Bro. Joseph Antony APPELLANT

Vs

Kerala State Electricity Board RESPONDENT

Date of Decision : 17-08-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Electricity (Supply) Act, 1948 — Section 49, 49(3)
Electricity Act, 2003 — Section 110, 111, 127, 2(64), 49(2)
Electricity Regulatory Commission Act, 1998 — Section 17
Kerala Education Act, 1958 — Section 2(7)
Kerala Education Rules, 1959 — Rule 29, 8
Kerala State Electricity Board Regulatory Commission (Conduct of Business) Regulations, 2003 — Regulation 22, 27, 27(8), 40

Citation : (2009) 3 KLT 1022

Hon'ble Judges : P.R. Raman, J;P. Bhavadasan, J

Bench : Division Bench

Advocate : Kurian George Kannanthanam, Govindh K. Bharathan, Wilson Urmese, George Poonthottam, Bechu Kurian Thomas, T.P.M. Ibrahim Khan, C.P. Kunhikannan, Cyriac Mathew, G.S. Raghunath, George Mecheril, K.S. Sajeev Kumar, K.P. Kylasanatha Pillay, Rajit, Kuriakose G. Thekkel, Lekha Suresh, T.G. Lellulal Thundathil, M.C. Antony, M.A. Firoz, P.C. Iype, M.C. Antony, P.M. Pareeth, Manoj Ramaswamy, Mohammed Shameel, N. Sukumaran, Ranjith Babu, P.R. Reena, S. Amina, S.K. Madhu, S. Shyam, Smitha Chathanarambath, T.K. Kunhabdulla, V.C. James, V.M. Krishnakumar, V.V. Asokan, N. Nagaresh, K.B. Gangesh, Tom Jose Padinjarekara, M.A. Thomaskutty, Ashok Suresh and Ashik K. Mohamed Ali, for the Appellant; K.P. Dandapani Lakshmi Narayan, Government Pleader, P. Parameswaran Nair, Asst. Solicitor General, C.K. Karunakaran, Millu Dandapani, K.B. Mohandas, Sreedevi Kylasanath and Paul K. George, for the Respondent

Judgement

P.R. Raman, J.—These appeals are directed against the common judgment rendered by the learned Single Judge in a batch of Writ Petitions filed challenging the tariff modification issued by the Kerala State Electricity Regulatory Commission in the matter of fixation of tariff for the Self-Financing Educational

Institutions under Sections 62 and 86 of the Electricity Act, 2003 (hereinafter referred to for brevity "the Act"). The appellants are Self-Financing Educational Institutions either in the school level or in the college level. Some of the schools are understate Syllabus and some others under the C.B.S.E. Besides there are Industrial Training Institutions also. As per the new tariff notification Self-Financing Educational Institutions are classified under LT VII (A) as commercial institutions and the notification is effective from 01.12.2007.

2. Under this notification aided private educational institutions and Government Schools are classified under LT VII category. The challenge was made on several grounds. The contentions raised were that the source of revenue cannot be the basis of the discrimination between the educational institutions since all the educational institutions irrespective of whether Self-Financing Institutions or aided or Government educational institutions, are engaged in imparting education, that the notification was issued without affording an effective opportunity to the petitioners to raise their objection to the introduction of the new tariff and therefore, the remedy under the Act vide Section 110 of the Electricity Act cannot be a bar, being not an effective alternate remedy, that there was total lack of materials to justify the discrimination meted out to the Self-Financing Educational Institutions by treating them as commercial tariff consumers as against the other educational institutions, that the provisions contained in Section 62 of the Electricity Act which provides the factors, based on which alone, any differentiation could be made, is totally absent and the Kerala State Electricity Regulatory Commission has traversed beyond the very provision contained in Section 62 of the Act in this regard, that the Self-Financing Educational Institutions are prohibited from profiteering by the relevant statutes and also by the decision of the superior Courts, that there is also no material available to show that there is any profiteering by the Self-Financing Educational Institutions and that the Educational Institutions cannot be characterized as commercial establishment. Reference was also made to the decision in Chairman, M.P. Electricity Board and Others Vs. Shiv Narayan and Another, . It was pointed that students coming tinder the ITI category were generally drawn from the poorer sections and therefore, the mere fact that such ITI Institutions are Self-Financing Educational Institutions does not mean that the student studying in such Institutions are better placed in life and the purpose of consumption of electricity in the Educational Institutions irrespective of whether it is aided or unaided or Self-Financing Institution, is the same. Incidentally, it was also contended that the Commission has no suo motu power for initiating any action for revising the tariff.

3. The Kerala State Electricity Regulatory Commission and the Kerala State Electricity Board sought to justify the tariff notification, inter alia contending that the consumers, if at all they are aggrieved by the notification, has got an effective alternate remedy by way of an appeal to the Appellate Tribunal and thereafter, an appeal to the Apex Court. They also contended that there is no violation of the principles of natural justice in this case, that the Commission had

issued Ext. R3(a) notice inviting objections/suggestions from the public consumers and other stake holders in various newspapers and that in Ext. R3(a) it was mentioned that the details were available in the web site of the Commission as also on request. Ext. R3(c) is the detailed draft, Ext. R3(d) is the press release on the publication of the draft schedule and Ext. R3(e) is yet another press release extending the time for receiving objections. The draft schedule was discussed by the State Advisory Committee and public hearing was held; but the petitioners did not appear in the public hearing. It was also pointed out that the Electricity Board forwarded the proposals on the draft schedule to be effective from 01.06.2007 requesting that the tariff schedule be notified by the Commission with appropriate modification and that was accepted and treated as a petition filed by the Electricity Board - the Supplier. The notification is based on rationalisation principles, that educational institutions, were included in the earlier notification, as part of non domestic LTVI (B) as also commercial institutions were included in this category. It is the case of the Commission that Self-Financing Educational Institutions have their own fees structure, wage structure etc. which are absent in a Government/Aided private school and that Self-Financing Educational Institutions are run on business prospects. Reference was made to Sections 61 and 86 of the Act to contend that though the Commission has started the process of revising the tariff initially suomotu, subsequently the Board has filed a petition and therefore, the Commission was within its legal limits in issuing the tariff order. Besides the Kerala State Electricity Board Regulatory Commission (Conduct of Business) Regulations, 2003 provides for service of notice and vide Regulation 27 publication in news papers or in any other manner is an accepted service form of notice. Regulation 27(8) specifically provides for service of notice and process issued by the Commission and that publication required to be done cannot be deemed to be invalid by reason of any defect in the name or description, provided the Commission is satisfied that such service is in other respect sufficient. Regulation 40 prescribes the procedure for publication of a petition. It is contended that the Commission has followed all these procedural regulations and notification issued is in full conformity with the requirements. On behalf of the Kerala State Electricity Board, the learned Counsel contended that Section 62(3) of the Act is on the same lines as Section 49 of the Electricity Supply Act, 1948, that Self-Financing Educational Institutions are by themselves a class and further, sought to justify the difference in tariff on the basis of nature and purposes of supply. It is contended that considering the higher fee structure and facilities in Self-Financing Educational Institutions, they cannot be equated with the aided or Government Institution.

4. The learned Single Judge framed five issues for consideration, i.e. (i) whether the matter should be considered under Article 226 of the Constitution of India, in the light of Section 111 and 127 of the Act, (ii) whether the impugned tariff order is vitiated on account of non observance of the principles of natural justice, (iii) Whether the tariff order is issued beyond jurisdiction and whether the

Commission has power to determine the tariff suo motu, (iv) whether the Self-Financing Educational Institutions can be treated as "commercial" and (v) whether there is violation of Section 62(3) of the Act and whether there is valid classification.

5. The learned Single Judge found that the plea of violation of principles of natural justice is not a ground in many of the Writ Petitions. Reference was made to Ext. R3(a) and found that in the extract published, there is mention regarding the demand charge and energy charge and that details will be available in the web site and that there is mention that the present tariff rates are continued for certain categories. But at the same time, the Court found that in some cases, there are pleadings and in many cases counter-affidavits are not filed. The documents produced by the Commission indicate that the draft tariff schedule is available with the Commission on the web site and also in its Office; but the extract would not give any impression about the proposal to include Self-Financing Education Institutions in the commercial tariff (emphasis given), but at the same, it cannot be overlooked that the objections were invited to the draft tariff schedule and not to the extract of the draft tariff schedule, that the draft tariff schedule was available on the web site which indicates the proposal to include Self-Financing Institutions in the "Commercial" category and in such circumstances, it was incumbent on those petitioners who allege violation of principles of natural justice to have pursued the matter before the Commission to peruse the draft tariff schedule either from the web site or from the office of the Commission in which case they would have become aware of the inclusion of Self-Financing Institutions in Schedule VIIA. Therefore, it was concluded that there was no violation of the principles of natural justice.

6. Turning to the contention regarding the power to act suo motu by the Commission, it was pointed out that though initially the Commission was proceeding suo motu, thereafter the Board had filed a petition which included the proposal to modify the proposal and the tariff order was passed on the basis of the suo motu petition and the petition filed by the Board. After referring to Sections 62, 64 and Section 86(4) it was held that the statutory regulation made under the Act empowers the Commission to initiate suo motu action. Reference was also made to Regulation 22 of the Kerala State Electricity Regulatory Commission (Conduct of Business) Regulations, 2003 in this regard. The learned Single Judge then turned to the issue as to whether Section 62(3) of the Act is breached and he did not accept the contention of the petitioners and distinguished the decision in Rohtas Industries Ltd. and Others Vs. Chairman, Bihar State Electricity Board and Others, which held that the capacity to pay cannot be the basis for differentiation. The differentiation based on the capacity to pay will be bad if the differentiation is between the consumers falling in the same category and for that matter Self-Financing Educational Institutions are to be treated, as not falling in the same category. Referring to the contention that differentiation factors are nature of supply, purpose of supply and the consumption pattern, the learned Single Judge observed that there appears to be

substantial difference in the consumption pattern of Self-Financing Institutions and Government Institutions; but it does not appear to contain the consumption pattern of Aided Educational Institutions. It was held thus:

Further, under the ''head "purpose of supply", it is to be noted that the respondent has a case that Self-Financing Educational Institutions have their own fees structure, wage , structure, student and employee welfare measures and they operate on business prospects. One way of looking at the premise relating to "purpose of supply" is to consider whether if a question is posed as to whether the purpose of supply to Government Educational Institutions/Aided Educational Institutions on the one hand and Self-Financing Educational Institutions on the other hand is the same, it could be said that the purpose is to supply connection to Educational Institutions which are providing education. However, it is also possible to consider whether, having regard to the differences between Government Educational Institutions and Aided Educational Institutions on the one hand and Self-Financing Educational Institutions on the other hand, it could be said that there is a difference in the purpose for which the supply is sought. In other words, if it could be found that there are substantially distinguishing features, they could be treated as falling in two different categories.

It was observed that it is not the source of funds, but the extent of the funds available that makes the difference and finally, repelling all the contentions raised by the writ petitioners, the Writ Petitions were dismissed.

7. We have referred to the finding of the learned Single Judge for the limited purpose of appreciating the fact that though an issue was raised as to whether the petition under Article 226 is maintainable, the Writ Petitions were not dismissed on the ground of alternate remedy. The contention on merits as to whether the tariff notification is justified u/s 62(3) of the Act was considered elaborately and negatived the contention of the petitioners. That being the position, the question of maintainability of the Writ Petition can no more be an issue before us. If the Writ Petitions are dismissed on the ground of alternate remedy, then there is no scope for considering the contentions on its merits. Once the Court considered the various contentions on their merits and negatived the contentions, thereafter the parties cannot be relegated to the appellate forum. Hence we proceed to consider the contentions which were pressed at the time of hearing the appeal before us.

8. Though a contention was raised that the tariff notification differentiating the Self-Financing Educational Institutions from the other Educational Institutions is irrational and does not stand the test of Article 14 of the Constitution of India, the said contention was not pressed before us. So also, the contention whether the Regulatory Commission has got suo motu power or not is only academic in the factual situation and based on the subsequent development. The licensee namely, the Kerala State Electricity Board themselves have made a proposal later which was treated as a petition as contemplated under the Act, though initially suo motu power was invoked by the Commission, subsequently, it was based on

the petition that further proceedings were taken. Hence this contention also is not seriously pressed.

9. However, the learned Counsel appearing for the appellants contended that insofar as Section 62(3) of the Electricity Act, 2003 exhaustively provides the grounds on which the consumer could be differentiated for the purpose of tariff notification, the Regulatory Commission being a statutory authority cannot go beyond the same and the notification issued by the Commission has to be tested with reference to Section 62(3) of the Act alone and if there are no valid grounds as envisaged u/s 62(3) of the Act, the differentiation of Self-Financing Colleges from the rest of the Institutions for the purpose of tariff is to be held to be bad. In other words, whether Self-Financing Educational Institutions themselves form a class or not generally is not relevant insofar as the classification or differentiation for the purpose of tariff fixation must be decided within the frame work of the Statute and not beyond or de hors the provisions contained therein. In this context reference was made to Section 49 of the 1948 Act and the corresponding section, namely, Section 62(3) of the present Act and contended that while u/s 49 differentiation could also be made on any other grounds that is consciously omitted in the new Act. So much so, the intention of the legislation was clear that the condition or the grounds on which differentiation could be made for the purpose of tariff fixation must strictly be on the parameters fixed u/s 62(3) of the Act alone. In this case, it is shown that even according to the respondents, the nature and purpose are the factors justifying the Self-Financing Educational Institutions to be treated differently from other Educational Institutions. If so, it is contended that, the nature and purpose of supply of energy to an educational institution being the same, irrespective of source of fund, cannot be treated differently. It is contended that the Self-Financing Educational Institutions, as per the averments made in the counter-affidavit, is a new class emerged which is factually incorrect. The averments made in the additional counter-affidavit that Self-Financing Educational Institutions are run on business profit is totally denied and it is pointed out that it is not sought to be supported by producing the files containing any such materials. In other words, the Commission has not made any-enquiry regarding these aspects and there is total lack of application of mind and merely based on surmise and conjunctures it is held that all Self-Financing Educational Institutions are run as a business.

10. We have heard the arguments of the learned Counsel appearing on behalf of the appellants Sri. Gangesh, Sri. Kurian George Kannanthanam, Sri. Wilson Urmese, Sri Rajit, Sri. Ashik K. Mohammed Ali, Sri. Nagaresh, Sri. Tom Jose P., Sri. M.A. Thomaskutty, Sri. T.P.M. Ibrahim Khan and Sri. Paul K. George and the learned Standing Counsel Smt. Sreedevi Kailasanath, appearing on behalf of the Kerala State Electricity Regulatory Commission and Sri. C.K. Karunakaran, learned Standing Counsel for the Electricity Board.

11. The Electricity Act, 2003 is 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, rationalisation 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. Section 2(64) of the said Act defines the "State Com mission" as follows:

"State Commission" means the State Electricity Regulatory Commission constituted under Sub-section (1) of Section 82 and includes a Joint Commission constituted under Sub-section (1) of Section 83.

12. Section 82 deals with the Constitution of a State Commission. There is a proviso to Section 82(1) to the effect that the State Electricity Regulatory Commission established by a Government u/s 17 of the Electricity Regulatory Commissions Act, 1988 and the enactments specified in the Schedule, and functioning as such immediately before the appointed date shall be the State Commission for the purposes of this Act and the Chairperson, Members, Secretary and officers and other employees thereof shall continue to hold office, on the same terms and conditions on which they were appointed under those Acts. Section 86 enumerates the various functions to be discharged by the State Commission and determination of tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail within the State is one such function. It is in exercise of the said function that the State Regulatory Commission has issued the new tariff which is impugned in the Writ Petition to the extent where Self-Financing Educational Institutions are included under Tariff VIIA as commercial and treating them differently from the other Aided/ Government Educational Institutions retaining them under Tariff VI. Section 61 empowers the appropriate Commission to specify the terms and conditions for the determination of tariff and in so doing, it shall be guided by the factors mentioned under Clause (a) to (i). Section 62 empowers the appropriate Commission to determine the tariff in accordance with the provisions of the Act and Section 62(3) clearly provides that the appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate the consumers on the basis of the factors enumerated thereunder. We may extract for easy reference Section 62(3) of the Act as follows:

The appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer''s load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required." Section 49 of the Electricity (Supply) Act, 1948 corresponds to Section 62(3) of the Electricity Act, 2003. We may extract the said provision also as hereunder:

49. Provision for the sale of electricity by the Board to persons other than licensees.- (1) Subject to the provisions of this Act and of regulations, if any made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs.

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

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

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

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

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

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

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

13. It may be noticed that though Section 62(3) and Section 49(2) of the Act may appear to be similar, by virtue of Section 49(3) of the earlier Act, the Board, if it considered necessary or expedient, can fix different tariffs for the supply of electricity to any person not being a licensee having due regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and any other relevant factors. Therefore there could be any other relevant factors which may weigh with the Board to justify differentiation other than the factors specifically mentioned in the Section. In other words, the board has got a wider power and the Section is not exhaustive as regards the factors based on which differentiation could be made since there may be other factors which may justify differentiation for the purpose of tariff fixation. But while enacting the new law, The Electricity Act, 2003, the Legislature has consciously omitted the word "any other relevant factors" occurring in Sub-section (3) of Section 49, thereby the differentiation factors for tariff fixation must necessarily be factors specifically mentioned u/s 62(3) of the Act. In other words, the Act is exhaustive with reference to the factors based on which

differentiation could be made to fix different tariffs among the consumers. What factor weighed with the Regulatory Commission to differentiate the Self-Financing Educational Institutions from other Educational Institutions in the matter of fixation of tariff rates is a matter to be guessed since the averments in the counter-affidavit and additional counter-affidavit do not lend support to their contention that the nature and purpose are the factors of differentiation. The State Electricity Regulatory Commission, in their notification dated 07.09.2009, has published an extract of the tariff petition filed by the Kerala State Electricity Board for inviting objections. The notification says that detailed tariff proposal is available in the Commission''s web site. In the extract of the notification, under HT-EHT Category item 5 reads thus:

(5) The Seafood processing and milk chilling and processing units to be retained under the Commercial Category.

Under the head "B" L.T. categories item (5) reads thus:

Freezing plants, cold storages, Bakeries, CD recording/duplication, computer consultancy services, software development with or without SSI registration, data processing activities, desk top publishing, floriculture activities, marble cutting, colour photo printing, tissue culture, audio/video/CD recording/ duplication units to be classified as LT VII (A) Commercial.

The notification containing the schedule of tariff and terms and conditions for retail supply by Kerala State Electricity Board with effect from 01.12.2007 is produced as Ext. P4 in the Writ Petition. In the notification, Low Tension - VII (LT VII A) Commercial reads thus:

VII (A) Tariff for commercial consumers such as display lights, cinema studios, commercial premises, hotels and restaurants (having connected load exceeding 1000 W), showrooms, business houses, private hostels/lodges/guest/rest houses, freezing plants, cold storages, milk chilling plants, bakeries (without manufacturing process), Audio/video cassette recording/duplication units, CD recording units, Self-Financing educational institutions (including hostels), petrol/ diesel/LPG/CNG bunks, Automobile service stations, all construction works, installations of cellular mobile communications/cable TV networks, satellite communications, offices/ exchanges of telecom companies, Offices or institutions of AIR, Doordarshan, radio stations, insurance companies, call centers and marble cutting units.

There is nothing in the extract as rightly held by the learned Single Judge to suggest that the proposal is to include the Self-Financing Educational Institutions under LT Commerce Tariff. May be the details are available in the web site in the draft Tariff. But it cannot be said that the petitioners were on default for not raising any objection because the purpose of the publication of the extract as could be seen from the item extracted above indicates the proposal to retain the other consumers, for example - the seafood processing and milk chilling and processing units under the Commercial Category. Under the LT category -

Commercial, there are indication to show in the extract as to which are the establishments likely to be retained under LT VII (A). Dairy farms/milk chilling plants with or without chilling/freezing/cold storage activity is included under industrial category provided the chilling/freezing/cold storage load is limited to 20% of the total connected load and if it exceeds 20%, LT VII (A) tariff is applicable. Again, in the case of freezing plants, cold storages, bakeries, CD recording/duplication, computer consultancy services, software, development with or without SSI registration etc. there are indication to bring them under LT VII(A). In the wake of this notification and in the absence of any indication that Self-Financing Educational Institutions are also to be included, how can it be said that there is a failure on the Self-Financing Institutions to file their objection? On the other hand, the non mentioning of the Self-Financing Educational Institutions, while various establishments are made mention of, may indicate otherwise. At any rate, when the extract itself contains the details of various types of consumers to be included or retained under LT VII(A), the specific omission to mention Self-Financing Educational Institutions certainly is an indication that the Electricity Board has not made any suggestion in their proposal to include Self-Financing Educational Institutions under Commercial category and it is this proposal that has been converted as a petition as contemplated under the Act. True that the manner in which notice could be issued being prescribed under the Regulation adherence to that provision by publishing in the web site or in the notice board may be sufficient. But all that we wish to say is that there is no justification for the respondents to say that the petitioners did not make any objection and they can be non suited on that ground. It must be noticed that it is for the first time that the Self-Financing Educational Institutions are treated differently from other educational institutions for the purpose of electricity tariff. Hitherto till the impugned notification all the educational institutions were treated alike. If so, a proposal to delink them from the existing tariff item and to treat them differently and to bring them under a different tariff rate is a matter on which indication should have been made in the extract of the Tariff notification before the petitioners could be alleged as defaulters in raising objections and if only the petitioners did not raise any objection the matter would have been different. In so far as that is not done, it cannot be said that there is any effective opportunity for the petitioners to raise their objection before appropriate authority before publishing the notification in question.

14. Coming to the issue regarding justifiability or otherwise of treating the Self-Financing Educational Institutions under commercial category and to treat them differently from the Aided/Governmental Educational Institutions, the only reason advanced by the Regulatory Commission'' in their counter is extracted in para 21 of the judgment under appeal, the crux of which is that the Self-Financing Institutions are treated as operating on business prospects, running on non-objective of social uplift, that they accommodate only students belonging to the upper class, having paying capacity, that Government has no control over the

fixation of fees by those Institutions, which are fixing up their own fees and establishment charges and that the motive of such Institutions is only business under the guise of service. In the additional counter-affidavit, it is stated that since the revision of tariff in 2002 there are new generation of consumers emerged such as call centers, software development units, palliative care centers, HIV rehabilitation centers, Self-Financing institutions etc. which are to be classified properly and the Commission has initiated tariff rationalization process in the tariff order effective from 01.12.2007. In para. 7 of the additional counter-affidavit extracted at page 45 of the judgment under appeal, it is seen that the further contention is that it is only for the purpose of determining tariff, Self-Financing Educational institutions are classified as LT VII (A) category considering the high usage of the electricity and the Commission has not branded them as "Commercial''.

15. Though in the judgment under appeal, in page 57, a reference is made to the argument note wherein it is stated that electricity is being consumed by the Self-Financing Educational Institutions not only for the purpose of education, but also for providing luxurious amenities, like high powered lights, lifts, air conditioned class rooms, hostels, canteens etc. whereas the Government Institutions have only few lights and fans in the class rooms and that is why the huge variation in the consumption of Government or Private Aided Institutions were compared to Self-Financing Educational Institutions and the same is well revealed by the table which provides for per student consumption. We are afraid that the statement of facts contained in the argument note cannot be treated as part of the pleading and we refuse to refer to such statements and there is also no supporting materials placed on record. The learned Single Judge rightly found that there cannot be any quarrel with the proposition that the capacity to pay cannot be a differentiating factor u/s 62(3) of the Act. In this connection, we may refer to the decision of the Apex Court in Rohtas Industries Ltd. and Others Vs. Chairman, Bihar State Electricity Board and Others, . The Apex Court, after referring to Section 49(3) of the Electricity Supply Act, 1948, held in para 14 as follows:

Yet another point urged on behalf of the appellants was that u/s 49 of the Act, while exercising the power of framing uniform tariffs, the Board was under a duty to apply its mind to all relevant factors but there had been an omission to discharge the said mandatory duty inasmuch as the capacity of the concerned industry to pay for the energy at the rate proposed to be fixed, which is a highly relevant factor, had not been taken into account at all. Clauses (a) to (d) of Sub-section (2) of Section 49 enumerated the various matters which the Board shall have regard to in fixing the uniform tariffs and the capacity of any particular industry to bear the energy charge at the proposed rate of levy is not included in the said enumeration (Emphasis given). Under the scheme of the tariff fixation incorporated in the section, the tariff is to be uniform subject to the classification of consumers into different categories. Under Sub-section (3) of the said section, the classification of the consumers into such different categories is to be made only with reference to the nature of the supply, the purpose for which supply is required the geographical position of any area and other like relevant factors. It is not contemplated by the said section or any of the other provisions of the Act that as amongst consumers falling within a specified category different rates are to be charged depending upon the financial capacity of the particular consumer to pay (Emphasis given). On the other hand, the very core of the scheme of Section 49 is that the tariff should be uniform in respect of each class or category. Hence the attack levelled against the tariff fixation on the aforesaid ground, that a relevant factor, namely; that the financial capacity of individual industrial consumers had not been taken in to account, is devoid of force.

16. From the above, it can be seen that the criteria in differentiating one consumer from the other must be the factors as specified in the provision, in this case, Section 62(3) of the Act. If the capacity to pay is a relevant factor, certainly, it can be justified in differentiating one consumer from the other. We have extracted Section 62(3) of the Act in extenso and we do not think "capacity to pay" is a differentiating factor among the consumers. Further, there is hardly any material placed on record as to what is the capacity in general of the various Self-Financing Educational Institutions compared to the other Educational Institutions. The contention that Self-Financing Educational Institutions are run on business prospects or that it is profiteering is only a vague statement made unsupported by any material produced. If the Regulatory Commission had collected any materials for the purpose of enquiry before the notification was issued, they would have very well placed the same on record. No such enquiry has been made undisputably and in the absence of any such materials placed on record and in the absence of any reference as to how the inference was drawn, it is not possible to accept a bald statement in the light of the specific denial of the same by the respondents. Further, even in the case of professional colleges, the Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-exploitative Fee and Other Measures to ensure Equity and Excellence in Professional Education) Act, 2006, clearly provides that the Self-Financing Professional Colleges cannot collect a fee beyond what has been fixed by the statutory committee and in fixation of the fee to be collected various factors will have to be taken into account. Thus, there is control in the matter of fees to be collected. Whether or not factually any college is collecting any amount more than what is fixed is a matter to be pleaded and proved, as an inference cannot be made as to what is prohibited by law. Therefore, this contention also fails. While the Self-Financing Institutions are treated as non domestic as in the case of other Educational Institutions, now they are treated under the head "Commercial". At the same time, it is admitted by the third respondent in the additional counter-affidavit that they could not be treated as "Commercial" which means that by bringing them as "Commercial" the counter-affidavit admits the fact that they are not "Commercial". If so, there is no justification to treat them along with other consumers who are "Commercial" in nature. In other words, even among the class under LT VII(A), if Self-Financing Educational Institutions are, as admitted in the additional counter-

affidavit, not "Commercial" in character, they cannot be associated with other Commercial establishments or consumers and treat them alike. It is already pointed out that yet another contention that Self-Financing Educational Institutions is a new class emerged after 2002 itself is factually incorrect. It is a known fact that there were Self-Financing Educational Institutions even prior to 2002. Further, the recognized schools'' fee structure can only be as prescribed under Rule 29 of Chapter XII of the Kerala Education Rules. "Private school" has also taken within its ambit both aided and recognized schools u/s 2(7) of the Kerala Education Act. It is also to be pointed out that Rule 8 of Chap. V specifically mandate fee and other income to be used for any other purpose not connected with the school. Rule 29 only sanction collection of two type of fee - (1) Tuition Fee and (2) Special Fee and no other fee is permitted to be collected. In the light of the above provisions and in the absence of any additional materials placed on record, this Court cannot accept the contention that generally all Self-Financing Educational Institutions are run on business motive or that they are indulged in profiteering. The only other factor which is pointed out in the counter-affidavit for justifying the inclusion of Self-Financing Educational Institutions differently is the nature and purpose for which the supply is required. When the supply is to an educational institution, irrespective of whether it is self-financing or aided or Governmental purpose, cannot be different, as education means to impart knowledge. Education in ancient times was not connected with earning. Free education is what was accorded in Dharma. Education ought to be the resource for tradition, loyalty to culture and ideals of service to society. We cannot, in the absence of materials and evidence, simply accept that educational institutions, though Self-Financing, are profiteering or run as business. There are also absolutely no materials placed on the question as to whether electricity is consumed by the Self-Financing Educational Institutions for any other purpose. The vague statement that building is air conditioned without specifying how many institutions are having air conditioned buildings or apparatus having high consumption of electricity etc. are not matters on which specific pleas with reference to details are made available. We may, at the risk of repetition, say that we are only examining the justifiability of treating Self-Financing Educational Institutions with reference to other institutions - aided/Governmental - from the point of view of electricity consumption as borne out by the affidavits filed before this Court and we have in that attempt considered the factors pleaded by them and found to be unsustainable.

17. Nextly it was contended that there are some procedural irregularities and reference was made to Sections 62 and 64 of the Act. We may, in this connection, refer to an order passed by the Regulatory Commission on the petitions TP 23/2006 and TP 30/2007, dated 26th November, 2007. As per the said order, the State Electricity Regulatory Commission scrutinized the petition filed by the Electricity Board on ARR & ERG 2007-08 as also Tariff Petition dated 4th July, 2007 and after consulting the advisory committee and considering the written objections filed by the stakeholders and the subsequent written and oral

submissions of Kerala State Electricity Board, the views of the stakeholders/ objectors, and other documents and materials on record, passed the order which clearly shows that it was the petition filed by the Electricity Board which was considered and orders passed.

18. It may, in this connection, be noticed that even the order issued by the Kerala State Electricity Regulatory Commission shows that freezing plants, cold storage, bakeries, CD recording/duplication, computer consultancy services etc. are to be classified as LT VII (A) Commercial. On a mere glance of the various other consumers included in this category, it can be seen that it admits of no doubt that they are commercial establishments and there cannot be two opinion on that. It is along with such commercial establishment that Self-Financing Educational Institutions are also brought in. As we have already stated, when it is admitted by the respondents that they are not commercial, there is no justification for treating and including them under LT VII Tariff as commercial. The decision of the Commission at para 8.5 of the said order shows that the Commission has recognized the Self-Financing Educational Institutions, seafood processing, milk chilling plants and call centres as new consumer groups and included them under appropriate Commercial Category. Therefore, the averments in the counter-affidavit that they are not treated as commercial goes contrary to the decision of the Commission contained in the order. It only shows that at the time of inclusion of the Self-Financing Educational Institutions, they were only on the point as to whether they should be treated as commercial or not and even gone to the extent of saying that there is a new class emerged after 2002. Therefore, the basis on which the Self-Financing Educational Institutions are treated as commercial are clearly illegal and are not sustainable.

19. We may, in this connection, refer to the decision of a learned Judge of this Court in N.S.S. Hindu College v. K.S.E.B. 2007 (4) KLT 779 wherein it is held as follows:

A hostel is a place where educational institution provides food and accommodation to staying students and canteen attached to the college also provides similar facility, i.e. providing food to the students and staff, who do not stay in the campus. The only purpose in both the cases, is to provide facility to the students in the college campus. Obviously, hostels and canteens are not run by educational institutions to make profit but are run for the benefit of the students and staff. It is a well known fact that only moderate charges are levied in college canteens. Therefore, the object of running a canteen is not to make profit and prima facie it cannot be said to be commercial activity to be billed at commercial tariff....

20. Even in a case where a canteen is not to be treated as a commercial establishment because it is not running on profit basis, there is no basis for the contention that the educational institutions are commercial in nature. Probably, finding it difficult to sustain the Self-Financing Educational Institutions as commercial in nature, the additional counter-affidavit came with an admission

that the Commission has not treated them as commercial. But as already pointed out, it is only treating them as commercial that the notification is issued, treating them on par with the other commercial establishments.

21. For the various reasons stated as above, we declare that inclusion of Self-Financing Educational Institutions under LT VII(A) as a commercial consumer is bad in law insofar as such differentiation is not for any of the grounds specified u/s 62(3) of the Act. Accordingly, we allow all the Writ Appeals and the Writ Petitions. They will be treated like falling under Tariff VI until any new notification is issued in accordance with law.

22. All the Self-Financing Educational Institutions were being paid at Tariff LT VI during the pendency of the Writ Petition. In the appeal, we made a slight modification in the interim order and directed them to pay off at the current rate. Since we have allowed the appeal, the amount paid by the appellants will be adjusted as against the future dues and instead of adjusting the entire amount in one month we think it will be appropriate to direct that such excess amount be adjusted in four months'' period so that one fourth of the excess amount be adjusted in every month until the same is wiped off.