

(2013) 02 SC CK 0096

In the Supreme Court Of India

Case No : C.A. No's. 266-284, 1848-1849 and 2528 of 2004

Coimbatore Stock Exchange Ltd. and Others

APPELLANT

Vs

Tamil Nadu Electricity Regulatory Commission and Others

RESPONDENT

Date of Decision : 21-02-2013

Acts Referred:

Andhra Pradesh Electricity Reforms Act, 1998 — Section 11, 26, 26(7), 26(9)
Constitution of India, 1950 — Article 14
Electricity (Supply) Act, 1948 — Section 46, 49, 49(4), 57, 57A
Electricity Regulatory Commi

Citation : (2013) ELR 1181 : (2013) 6 SCALE 408

Hon'ble Judges : Ranjana Prakash Desai, J;H.L. Gokhale, J;G.S. Singhvi, J

Bench : Full Bench

Final Decision : Disposed Of

Judgement

1. These appeals are directed against judgment dated 30.9.2003 of the Division Bench of the Madras High Court whereby the appeals filed by the Appellants u/s 27 of the Electricity Regulatory Commissions Act, 1998 (for short, 'the Act') against the determination of tariff by Tamil Nadu Electricity Regulatory Commission (for short, 'the Commission') were dismissed. Tamil Nadu Electricity Board (for short, 'the Board') submitted a petition under Regulation 7 of the Tamil Nadu Electricity Regulatory Commission Tariff Regulations, 2002 (for short, 'the Regulations') for revision of tariff w.e.f. 1.12.2002. The Commission issued public notice and invited objections/ suggestions from various stakeholders. The Appellants and other consumers filed objections against the proposed hike in tariff. After conducting public hearing, the Commission passed detailed order dated 15.3.2003, the relevant portions of which are extracted below:

7.4 Average Cost of Supply

The Commission has designed ARR formats such that data regarding the voltage-level cost of supply is maintained by the TNEB. With the eventual aim of linking the tariffs to the voltage-level cost of supply, if not the category-wise cost to

serve. The consumers will appreciate that the cost of supply at higher voltages will be lower than that at lower voltages, on account of the downstream distribution costs and the higher level of T & D losses at lower voltages. If the tariffs are determined in relation to the voltage level cost of supply, then the tariffs for the IT consumers will have to be increased substantially. Moreover, the level of cross-subsidy with respect to the average cost of supply is itself high. The Commission would also like to have more data and a more detailed analysis of the voltage level costs before arriving at the voltage level cost of supply.

The Commission is of the view that the tariffs should gradually approach the average cost of supply, and the Commission would attempt to eliminate the cross-subsidy in a period of five years. The Commission is of the view that considering the data availability, the average cost of supply method is the most suitable methodology for the present. The average cost of supply in FY03 and FY04 has been computed as shown in the Table below:

(Table omitted)

7.5 Cross-subsidy Reduction

The Commission is committed to gradually reduce the cross-subsidies in the State over a five-year period, by increasing the tariffs applicable to the subsidised categories, viz. Agriculture, domestic, Lift Irrigation Societies, power looms and Cottage industries, and reducing the tariffs applicable to the subsidising categories, viz. HT and IT industrial consumers, Railway Traction, HT and LT Commercial category, etc. However, the magnitude of the tariff revision required and the level of cross-subsidy is such that the Commission has been compelled to increase the tariffs for the subsidising categories also, in order to avoid tariff shock for the subsidised categories. The Commission has endeavoured to minimise the tariff increase for the subsidising categories while undertaking higher tariff increases for the subsidised categories. The category-wise sales and revenue from approved tariffs have been summarized in Annexure A. The category-wise increase in average realisation is shown in the Table below:

Table: Increase in Average Realisation

Note: i) Average realisation includes fixed charges and energy charges ii) Average realisation numbers rounded of the nearest 2 decimals

iii) *-Flat rate tariff in Rs. /Month

** - Flat rate Tariff in Rs. /HP/Month

The above table shows that the Commission has attempted to increase the tariffs for the subsidised categories to a higher extent than that for subsidising categories.

7.7 Tariff for erstwhile free supply categories

7.7.1 General

This aspect is very sensitive and has aroused a lot of opinions, both, for and against, during the public hearings and there have also been several objections in this context. In subsequent sections, the Commission has discussed the tariff for the agricultural category and the hut service connections, in detail.

7.7.2 Agricultural Tariff

The TNEB has proposed a flat rate tariff of Rs. 600 per HP per year for unmetered agricultural connections and 50 paise/kWh for metered agricultural connections. A comparison of the prevailing agricultural tariffs in selected states where SERC's have issued Tariff Orders, is given in the following table:.

(Table omitted)

XXX XXX XXX

The Commission appreciates that the small fanner will be unable to pay substantial tariffs immediately, and the tariff increase has to be gradual. It should also be borne in mind that the supply availability to agriculture is restrictive as compared to other categories. Moreover the voltage profile for agricultural supply is also said to be poor to most of the services. Water table in many of the places in Tamil Nadu has gone down considerably and more energy is required to pump water. It is pertinent to note that, of the 29 districts in the State, all districts except Chennai are declared by the Government as drought hit. Under these extreme circumstances, the Commission is constrained not to concede the request of TNEB to charge the agricultural consumers at the rate of Rs. 600/HP/Annum. Considering all the above, the Commission has decided to introduce tariff for agriculture at the rate of Rs. 250 per HP per annum, for unmetered services or 20 paise per unit for metered services. In order to incentives the consumers to opt for metered services the monthly minimum charge for metered services has been fixed at Rs. 25, The billing cycle for agricultural consumers shall be half yearly, and the first bill will be raised at the end of September 2003.

7.7.3 Hut Service Connections

As stated earlier, the ERC Act provisions effectively does not permit free supply of electricity to any consumer category, and if the State Government wishes to subsidise these consumers, then it has to compensate the TNEB for the corresponding revenue loss. Moreover, the TNEB has itself stated that there have been instances of misuse/excess use of electricity from such free hut service connections. The Commission has hence accepted the TNEB's proposed tariffs of Rs. 10 per connection per month. If the consumption of the hut service connections is found to exceed the normative levels, then meters will be installed and domestic tariffs will be applicable as per the slab rates applicable for the domestic category.

2. Paragraph 6.2.2 of the Tariff Order, which speaks of State Government subsidy is also extracted below:

6.2.2 State Government Subsidy

The Section 29(5) of the ERC Act, 1998 states, "If the State Government requires the grant of subsidy to any consumer or class of consumers in the tariff determined by the SERC under this section, the State Government shall compensate the utility in the manner directed by the SERC". In its Tariff Petition, the TNEB has stated that the Government of Tamil Nadu (GoTN) has committed a revenue subsidy of Rs. 250 crore for FY03, by creating a provision in the State Budget for FY03, and not indicated any subsidy commitment for FY04, due to its own financial situation. However, in the Petition, the TNEB has assumed GoTN subsidy of Rs. 250 crore for both years, i.e. FY03 and FY04. The TNEB has further clarified that the GoTN revenue subsidy is being given specifically to compensate the TNEB for the subsidized supply of electricity to agricultural consumers. Government of Tamil Nadu in their written submission which has been reproduced in earlier sections have stated that the present financial status does not permit them to provide any subsidy in FY04. The Commission has taken note of the submissions in this regard by TNEB and GoTN and determined the tariff accordingly.

3. The Appellants challenged the order of the Commission by filing appeals u/s 27 of the Act. They pleaded that the burden of subsidy given to some classes of consumers could not have been transferred to them and it was for the State Government to compensate the Board. They relied upon the judgment of this Court in West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd. etc. etc., and claimed that the burden of subsidy cannot be loaded on other consumers.

4. The Division Bench of the High Court distinguished the judgment in West Bengal Electricity Regulatory Commission v. C.E.S.C. Limited (supra) by recording the following observations:

In the case cited above, the Supreme Court was dealing with the direction of the Calcutta High Court to the licensee to maintain the tariff structure and increase in the average tariff rate pro rata amongst different consumers, which was in effect, a direction to continue the cross subsidy. One of the reasons given by the High Court was the likelihood of wide discontentment if the rates are to be increased. The Supreme Court faulted the view of the High Court since it amounted to maintaining the tariff structure which was prevailing prior to the Commission's report, In that context, their lordships held that the object of Act 14 of 1998 being to prevent discrimination in the fixation of tariff by imposing cross subsidy, if cross subsidy were to be given, it is for the Government to compensate for the revenue loss and the said loss cannot be imposed on any other class of consumers.

The ratio laid down by their lordships in the above judgment, how ever, will not apply to the facts of the case on hand. The Commission is well aware of the mandatory provisions of the Electricity Regulatory Commissions Act and also that

TNEB has to operate on commercial principles. They are conscious of the fixation of tariff which should reflect the cost of supply of electricity progressively. In our view, the Commission has taken into account the load factor, the total consumption of energy, the nature of supply and the purpose for which the supply is required while accepting the tariff for huts and agricultural service connections. We do not find any arbitrariness in the said attempt on the part of the Commission, under the circumstances of the case. However, in our view, the Commission could have avoided the expressions 'subsidy' and 'cross subsidy' while prescribing the tariff inasmuch as Sub-section (5) of Section 29 of the Act 14 of 1998 refers to the grant of subsidy only by the State Government. Therefore, there is no scope for cross subsidization. As rightly pointed out by the learned Additional Advocate General, the fixation of differential tariff may result in fixing the tariff below the average cost in respect of one set of consumers and in respect of another set of consumers, to fix the tariff above the average cost. Fixation of percentage is a norm fixed for progressively moving towards cost of supply. The differential tariff is permissible on factors set out and consequential fixation over and above the average cost for certain consumers will be unavoidable.

5. The Division Bench then referred to Section 29, relevant portions of the Tariff Order and observed:

The expression under Sub-section (2) of Section 29 that the "tariff should progressively reflect the cost of supply" and the Commission shall determine differential tariff on the nature of supply and the purpose for which supply is required without showing undue preference' enables the Commission to approach towards the cost of supply and not to abruptly eliminate the differential tariff. If the Commission is empowered to take into account the factors for the purpose of preferring a lesser tariff and to fix the tariff reflecting the cost progressively, it would definitely enable the Commission to allow a lesser tariff to certain consumers on the factors set out above. The consequence of such an exercise definitely will lead to a preference in the tariff structure. This need tariff structure. This need not always be expressed as subsidy as has been wrongly stated by the Commission. As rightly pointed out, if the State Government requires the grant of any subsidy to any consumer, it shall pay for it. The consumers cannot be asked to bear the cross-subsidy. Therefore, we are of the view, from the fixation of differential tariff, especially, the Low Tension Tariff 1B for huts and Low Tension Tariff IV for agriculture, that there is no free supply to anybody, but only a lesser tariff has been provided for them.

The Tariff Order, in paragraph 7.4, under the heading, 'Average Cost of Supply', has taken the view that the tariff should gradually approach the average cost of supply and the Commission would attempt to eliminate cross subsidy in a period of five years. The average cost of supply as has been computed in the Tariff Order is extracted below:

The attempt of the Commission to go towards the cost of supply gradually cannot

be faulted within the light of the enabling provision u/s 29(2)(c) of Act 14 of 1998. Taking into account the submissions of the Tamil Nadu Electricity Board and the Government, the Commission has found that the reduction of cross subsidy would be achieved by increasing the tariff applicable to the subsidized categories, viz. Agriculture, domestic, lift irrigation, societies, powerlooms and cottage industries and by reducing the tariff applicable to the subsidizing category, viz., H.T. And L.T. Industrial consumers, railway traction, H.T. And L.T. Commercial categories, etc. Again, the Commission is alive to the fact that the magnitude of tariff revision required and the level of cross subsidy is such that the tariff for subsidizing categories has to be increased in order to minimize the tariff increase while undertaking higher tariff increases for the subsidized categories. The category wise increase computed in the Tariff Order, extracted hereunder, gives us a clear picture.

(Table already extracted above)

In our view, the Commission is empowered to safeguard the interests of the consumers and require them to use electricity in a reasonable manner based on the average cost of supply of energy as mandated u/s 29(e) of the Act.

The Commission is alive to the fact that TNEB has to operate on commercial principles and that the tariff should progressively reflect the cost of supply. According to the Commission, unless the electricity supplied is charged for, it will be difficult to inculcate the sense of conservation of scarce resources and the consumers will not manage and control their consumption. While considering the tariff for small farmers, the Commission has found that the increase has to be gradual and has also stated, "It should also be borne in mind that the supply availability to agriculture is restrictive as compared to other categories. Moreover, the voltage profile for agricultural supply is also said to be poor to most of the services. Water table in many of the places in Tamil Nadu has gone down and more energy is required to pump water." Considering the request of the State Government as well as the Board, the Commission decided to introduce tariff for agriculture at the rate of Rs. 250/- per HP. Per annum for unmetered services or 20 paise per unit for metered services. In reference to hut service connections, the Commission has stated that the Electricity Regulatory Commissions Act does not permit free supply of electricity to any consumer category and if the State Government wishes to subsidize these, consumers, it has to compensate TNEB for the corresponding revenue loss. Taking into account these factors, the Commission has accepted the TNEB's proposed tariff of Rs. 10/- per connection per month; If the consumption of hut service connection is found to exceed the normative levels, then meters were directed to be restored and domestic tariffs were to be made applicable as per the slab rates. Thus, we find that the Commission has fixed the tariff progressively, reflecting the cost of supply and has safeguard the interests of consumers in a reasonable manner. They have taken into account the nature of supply and the purpose for which the supply is required in accepting the differential tariff.

As pointed out, it cannot be possible to place all the consumers on the uniform tariff without reference to their past utilization. The Act was intended to rationalize the electricity tariff and it is not in dispute that the H.T. Industries were enjoying the concessional tariff for an initial period of five years and other concessional tariff for establishment of new industries, etc., though as on date, all these concessions have been withdrawn. As pointed out in the A.C. Mills' case referred to earlier, in reference to Section 49 of the 1948 Act, tariff fixation does not mean mechanical equal treatment. The obligation not to discriminate involves both the right and the obligation to make reasonable classification on the basis of relevant factors. The judgment provides for imposition of higher rates if the quota is exceeded.

(Emphasis supplied)

6. While dealing with the tariff fixed for the Railways, the High Court observed:

H.T. Tariff 1A is set out in paragraph 2.0 at page 183 of the Tariff Order. In other words, the rates fixed by TNERC for High Tension Tariff 1A (industries) are applied to the Railways at the energy charges of 350 paise per unit and demand charge of Rs. 300/- per KVA, the average of which is 447 paise per unit and therefore, the Railways cannot have any grievance on this score. Even with regard to the levy of 20% peak hour charges. TNERC has exempted them from this penalty and therefore, there is no question of concession on current consumption charges for night time consumption.

7. The argument made on behalf of the Railways that it must be permitted to wheel the power for Southern Railway directly was rejected by the High Court on the premise that there is no provision in the Act for doing so.

8. Shri N.I. Rajah and Ms. Pritha Srikumar Iyer, learned Counsel appearing for the Appellants in Civil Appeal Nos. 266-284/2004 and 1848-1849/2004 reiterated the argument made before the High Court that the Appellants cannot be made to pay for the subsidized supply of electricity to hutment dwellers, agriculturists etc. And State Government should compensate the Board for subsidized supply of electricity. Learned Counsel extensively referred to the Tariff Order and argued that the Commission committed grave illegality by not requiring the State to bear the burden of subsidized supply of electricity to identified classes of consumers. Learned Counsel submitted that the ratio of the judgment of this Court in West Bengal Electricity Regulatory Commission v. C.E.S.C. Limited (supra) is squarely attracted in these matters and the High Court committed serious error by not following the law laid down in that judgment.

9. Shri S.P. Singh, learned senior counsel appearing for the Appellants in Civil Appeal No. 2528/2004 argued that the Railway Tariff determined under Para 7.15 was highly excessive and the High Court committed serious error by declining to interfere with the same.

10. Shri Gurukrishna Kumar, learned Additional Advocate General for the Tamil Nadu appearing for the Respondents argued that the Tariff Order is in consonance with Section 29 of the Act and the Appellants cannot complain against the tariff fixed for High Tension Industrial and Commercial Consumers and the Railways.

11. We have considered the respective submissions. Section 29 of the Act which provides for determination of tariff by the Commission reads as under:

29. Determination of tariff by State Commission.-(1) Notwithstanding anything contained in any other law, the tariff for intra-State transmission of electricity and the tariff for supply of electricity, grid, wholesale, bulk or retail, as the case may be, in a State (hereinafter referred to as the "tariff"), shall be subject to the provisions of this Act and the tariff shall be determined by the State Commission of that State in accordance with the provisions of this Act.

PROVIDED THAT in States or Union territories where Joint Electricity Regulatory Commission has been constituted, such Joint Electricity Regulatory Commission shall determine different tariff for each of the participating States or Union territories.

(2) The State Commission shall determine by Regulations the terms and conditions for the fixation of tariff, and in doing so, shall be guided by the following, namely:

(a) the principles and their applications provided in Sections 46, 57 and 57A of the Electricity (Supply) Act, 1948 (54 of 1948) and the Sixth Schedule thereto;

(b) in the case of the Board or its successor entities, the principles u/s 59 of the Electricity (Supply) Act, 1948 (54 of 1948);

(c) that the tariff progressively reflects the cost of supply of electricity at an adequate and improving level of efficiency;

(d) the factors which would encourage efficiency, economical use of the resources, good performance, optimum investments, and other matters which the State Commission considers appropriate for the purposes of this Act;

(e) the interests of the consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner based on the average cost of supply of energy;

(f) the electricity generation, transmission, distribution and supply are conducted on commercial principles;

(g) national power plans formulated by the Central Government.

(3) The State Commission, while determining the tariff under this Act, shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor, power factor, total consumption of energy 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.

(4) The holder of each licence and other persons including the Board or its successor body authorised to transmit, sell, distribute or supply electricity wholesale, bulk or retail, in the State shall observe the methodologies and procedures specified by the State Commission from time to time in calculating the expected revenue from charges which he is permitted to recover and in determining tariffs to collect those revenues.

(5) If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under this section, the State Government shall pay the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct. As a condition for the license or any other person concerned to implement the subsidy provided for by the State Government.

(6) Notwithstanding anything contained in Sections 57A and 57B of the Electricity (Supply) Act, 1948 (54 of 1948) no rating committee shall be constituted after the date of commencement of this Act and the Commission shall secure that the licensees comply with the provisions of their licence regarding the charges for the sale of electricity both wholesale and retail and for connections and use of their assets or systems in accordance with the provisions of this Act.

12. An analysis of the above reproduced provision shows that by virtue of the non-obstante clause contained in Section 29(1), the tariff for intra-State transmission of electricity and the tariff for supply of electricity, grid, wholesale, bulk or retail in the State is subject to the provisions of the Act and while determining the tariff, the State Commission is required to keep in view those provisions. Section 29(2) lays down that while fixing the tariff, the State Commission must keep in mind the principles and their applications provided in Sections 46, 57, 57A and 59 of the Electricity (Supply) Act, 1948 (for short, 'the 1948 Act'). The tariff determined by the State Commission should progressively reflect the cost of supply of electricity at an adequate and improving level of efficiency. It is also the duty of the State Commission to safeguard the interest of the consumers. At the same time, the consumers are duly bound to pay for the use of electricity in a reasonable manner keeping in view the average cost of supply of energy.

13. Section 29(3) lays down that in the process of determining the tariff, the State Commission shall not show undue preference to any consumer but may differentiate according to the consumer's load factor, power factor, total consumption of energy during the particular 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 needed. Section 29(5) lays down that if the State Government wants that subsidy should be granted to any consumer or class of consumers in the tariff determined by the State Commission, then it

shall pay the amount to compensate the person affected by such grant.

14. Section 49 of the 1948 Act, which is substantially similar to Section 29 of the Act was interpreted by the three Judge Bench in the *The Adoni Cotton Mills Ltd. and Others Vs. The Andhra Pradesh State Electricity Board and Others*, . While repelling the argument that the Board has no power u/s 49 of the 1948 Act, either to impose different percentage of cuts in the supply to consumers or to impose penalty and that power u/s 49 can be exercised only if Regulations are framed u/s 79(j). This Court observed:

Section 49(4) of the 1948 Act states that in fixing the tariffs and terms and conditions for the supply of electricity the Board shall not show undue preference to any person. This section embodies the same principle which is enunciated in Article 14 of our Constitution. The Board is a State for the purpose of Part III of our Constitution. In the present case, we are, however, not concerned with the application of Article 14. All that requires to be appreciated is that the provisions of Article 14 of our Constitution and Section 49(4) of the 1948 Act are similar in principle. It is the principle of equality or non-discrimination. Section 49(4) of the 1948 Act does not mean a mechanical equal treatment. It is fairly settled that equality before the law does not mean that things which are different shall be treated as though they were the same. The obligation not to discriminate involves both the right and the obligation to make reasonable classification on the basis of relevant factors. To illustrate, cutting down 50 per cent of the needs of a hospital and the needs of industries producing consumer goods cannot be treated on the same footing. It would be justifiable to treat them with reference to their urgency, their social utility and also the impact on the conservation and economies in the available supply of electric power. The guidance is clearly furnished by the principles embodied in Section 49(4) of the 1948 Act similar to Article 14 of our Constitution.

(Emphasis supplied)

15. In *M/s. Hindustan Zinc Ltd. etc. Vs. Andhra Pradesh State Electricity Board and others*, this Court considered the question whether burden of enhanced tariff can be placed on High Tension consumers including Power Intensive Industries. While answering the question in affirmative, the Court referred to Sections 49 and 59 of the 1948 Act and observed:

It is, therefore, obvious that mere generation of surplus by the Board as a result of adjusting its tariffs when the quantum of surplus has not been specified by the State Government after the 1978 amendment of Section 59 of the Supply Act. Cannot invite any criticism unless it is further shown that the surplus generated as a result of the adjustment of tariffs by the Board has resulted in the Board acting as a private trader shedding off its public utility character. In other words, if the profit is made not merely for the sake of profit, but for the purpose of better discharge of its obligations by the Board, it cannot be said that the public enterprise has acted beyond its authority. The Board in the present case has

shown that the surplus resulting from upward revision of tariffs applicable to the HT consumers made in the present case, was for the purpose of better discharge of its other obligations under the Supply Act and in effect, it has merely resulted in a gradual withdrawal of the concessional tariffs provided earlier to the power intensive consumers which do not in its opinion require continuance of the concessional tariffs any longer. In fact, no material has been placed before us to indicate that this assertion of the Board is incorrect or there is any reasonable basis to hold that the upward revision of tariffs applicable to HT consumers is merely with a desire to earn more profits like a private trader and not to generate surplus for utilisation of the funds to discharge other obligations of the Board towards more needy consumers, such as agriculturists, or to meet the needs of expansion of the supply to deserving areas. The argument with reference to statistics that the upward revision of tariffs for the HT consumers results in earning amounts in excess of the cost of generation does not, therefore, merit a more detailed consideration.

The HT consumers, including the power intensive consumers, are known power guzzlers and in power intensive industries, electricity is really a raw material. This category of consumers, therefore, forms a distinct class separate from other consumers like LT consumers who are much smaller consumers. There is also a rational nexus of this classification with the object sought to be achieved. Moreover, the power intensive consumers have been enjoying the benefit of a concessional tariff for quite some time, which too is a relevant factor to justify this classification. Placing the burden of fuel cost adjustment on these power guzzlers, who had the benefit of concessional tariff for quite some time and have also a better capacity to pay, cannot, therefore, be faulted since the consumption in the power intensive industries accounts for a large quantity.

It was argued on behalf of the Appellants with considerable force that the upward hike of tariff for the HT consumers including power intensive was arbitrary and discriminatory inasmuch as it was not related to the cost of generation and was based on irrelevant factors. It was argued that the LT tariffs and agricultural tariffs were relieved of this burden and the liabilities of the Board even of a capital nature were taken into account for increasing the tariff applicable to power intensive units. The contention is that these factors are irrelevant and do not permit exercise of the power to increase the tariffs. This argument was considered at length in Kerala State Electricity Board Vs. S.N. Govinda Prabhu and Bros. and Others, before it was negatived. We agree with the reasons given in that decision to repel this contention. In Govinda Prabhu's case, it was pointed out that the court would not strike down the revision of tariff as arbitrary unless the resulting surplus reaches such a height as to lead to the inevitable decision that the Board has shed its public utility character and is obsessed by the profit motive of private entrepreneur in order to generate a surplus which is extravagant. The limited power of judicial review in the field of price fixation was also indicated. This limited scope of judicial review in striking down revision of tariffs resulting in generation of surplus applied in Govinda Prabhu's case cannot

be faulted in view of the long line of decisions of this Court on the point and reiteration of the same principle by a Constitution Bench in *M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others*, The surplus generated by the Board as a result of revision of tariffs during the relevant period cannot be called extravagant by any standard to render it arbitrary permitting the striking down of the revision of tariffs on the ground of arbitrariness. We have already indicated that it is not also discriminatory as was the view taken in *Govinda Prabhu's* case. It has been pointed out on behalf of the Board that the Board's action is based on the opinion of Rajadhyaksha Committee's Report submitted in 1980 and the formula of fuel cost adjustment is on a scientific basis linked to the increase in the fuel cost. This is a possible view to take and, therefore, the revision of tariffs by the Board does not fall within the available scope of judicial review.

16. The question whether different tariff could be fixed for different consumers was again considered in *Association of Industrial Electricity Users Vs. State of Andhra Pradesh and Others*, in the context of the provisions contained in the *Andhra Pradesh Electricity Reform Act, 1998*. This Court referred to the provisions of Section 26 of the *Andhra Pradesh Electricity Reform Act, 1998* and observed:

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 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, consumer's 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 the 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), categorisation between industrial and non-industrial, agricultural or domestic consumers can certainly take place. This is precisely what has been done in the present cases. The High Court has at length considered all aspects of the cases and has examined in detail the exercise which was undertaken by the Commission in fixing the tariff and, in our opinion, the view expressed by the High Court calls for no interference.

(Emphasis supplied)

17. The ratio of the above-noted judgments is that while fixing tariff, the Commission cannot show undue preference to any consumer or class of consumers but it can fix different tariffs keeping in view the factors enumerated in Section 29(3). In our view by enacting that section, the Legislature has empowered the Commission to give effect to the concept of equality enshrined in Article 14 of the Constitution. Article 14 of the Constitution mandates that the State shall not discriminate between similarly situated persons. This, however, does not mean that all persons should be subjected to similar treatment. From a positivistic point of view, the decision/action taken by the State or its instrumentality/agency to accord favourable treatment to a particular class of persons on the ground of economic disparity and like factors cannot be said to be violative of the doctrine of equality enshrined in Article 14 of the Constitution.

18. In the present case, the State Commission has, keeping in view the factors like geographical location of the consumers, the quantum of energy consumed by them, the time at which the energy is supplied to them, the nature of supply etc. Fixed different tariffs for different classes of consumers. Therefore, it is not possible to find any fault with the view taken by the High Court that the Commission was entitled to fix different tariff for different consumers and that fixation of lower tariff for certain classes of consumers did not amount to violation of Article 14 of the Constitution.

19. It is also apposite to note that in the past, the Board had been supplying electricity to IIT consumers (industrial and commercial), who have been described by this Court in *Hindustan Zinc Ltd. V. Andhra Pradesh State Electricity Board* (supra) as power guzzlers and tariff was increased for them keeping in view the object of achieving the target of average cost of supply and reducing cross-subsidies in the State. In this context, reference can usefully be made to Paragraph 7.5 of the Tariff Order.

20. We also agree with the High Court that the judgment in *West Bengal Electricity Regulatory Commission v. C.E.S.C. Limited* (supra) is distinguishable on facts. The facts of that case show that the Calcutta High Court had interfered with the exercise undertaken by the Appellant for determination of tariff for 2000-2001 and 2001-2002. While setting aside the order of the High Court, this Court considered various issues including the issue relating to cross-subsidy and observed:

A perusal of Sections 29(2)(d), 29(3) and 29(5) of the 1998 Act shows that the consumers should be charged only for the electricity consumed by them on the basis of average cost of supply of energy, and the tariff should be determined by the State Commission without showing any undue preference to any consumer. The statute also obligates the State Government to bear the subsidy which if it requires to be given to any consumer or any class of consumers, should be only on such conditions that the Commission may fix and such burden should be borne by the Government. However, the High Court in its judgment has directed the Company to maintain its tariff structure in regard to different types of

supplies as it was prevailing before the Commission fixed the new tariff. It also directed the increase in the average rate of tariff which it had permitted to be distributed pro rata by the Company amongst different consumers so that the percentage of increase of each rate is the same. In effect, therefore, the High Court has directed the continuance of cross-subsidy. One of the reasons given by the High Court in this regard is that Calcutta Tramways which is otherwise running a cheap transportation system might have to increase its fare and the same cannot be permitted since Calcutta Tramways were not heard in the matter of fixation of tariff and there is therefore, a likelihood of wide discontentment if the fares are to be increased. We have noticed that the object of the 1998 Act is to prevent discrimination in fixation of tariff by imposing cross-subsidy, but at the same time u/s 29(5) of the 1998 Act, if the State Government so chooses to subsidise the supply of energy to any particular class of consumers, the same can be done provided of course the burden of loss suffered by the Company is borne by the State Government and not imposed on any other class of consumers. In this view of the matter, we are of the opinion that while the Commission was justified in its view as to the non-applicability of cross-subsidy, the High Court was in error in issuing a direction to the Commission, contrary to the object and provisions of the 1998 Act to maintain a tariff structure which WAS prevailing prior to the Commission's report. It is still open to the State Government if it so chooses to direct the Commission to fix the tariff of supply of electricity to any class of consumers at a reduced rate provided the State Government itself subsidises the same.

21. The present one is not a case of giving cross subsidy by the State u/s 29(5) after determination of the tariff. What the State Government had done was to make a commitment before the State Commission that it would provide revenue subsidy of Rs. 250 crore for financial year 2003 by making a provision in the State Budget and the Board had clarified that the subsidy was being given for the subsidized supply of electricity to agricultural consumers. The State Government had filed written statement making it clear that no subsidy is being provided for the financial year 2004. The Commission took note of the same and then determined the tariff. Thus, it is not a case in which burden of subsidy has been transferred to other consumers. That apart, the Appellants cannot be heard to make a grievance against the so called favourable treatment accorded to certain consumers because they had also availed the benefit of subsidized tariff in the past.

22. The tariff determined for the Railways is in conformity with the demand made by it and we do not find any error in the impugned judgment whereby the High Court rejected their grievance in the matter of fixation of tariff. In the result, the appeals are dismissed.