

(2003) 09 MAD CK 0131

In the Madras High Court

Case No : C.M.A. No's. 921, 1165, 1496 to 1502, 1506 to 1514, 1519, 1532 to 1534, 1549 to 1555, 1579 to 1583, 1585, 1608 to 1616, 1876 to 1883, 1886 to 1890, 1906, 1911 to 1918, 2049, 2118 and 2226 of 2003

Coimbatore Stock Exchange Ltd.

APPELLANT

Vs

The Tamil Nadu Electricity Regulatory Commission and The
Government of Tamil Nadu

RESPONDENT

Date of Decision : 30-09-2003

Acts Referred:

Electricity Regulatory Commission Act, 1998 — Section 27

Citation : (2003) 4 CTC 385 : (2003) 4 LW 161 : (2003) 3 MLJ 672

Hon'ble Judges : T.V. Masilamani, J; P. Shanmugam, J

Bench : Division Bench

Advocate : V. Sriram Panchu, for N.L. Rajah, in CMA Nos. 921, 1496 to 1502, 1506 to 1514, 1519, 1532 to 1534, 1549 to 1555, 1579 to 1583, 1585, 1608 to 1616, 1876 to 1883, 1906, 1911 to 1918 of 2003, V.T. Gopalan, Additional Solicitor General assisted by V. Suresh Kumar, in C.M.A. No. 1165 of 2003 and Nalini Chidambaram, assisted by M. Kamalanathan, in C.M.A. Nos. 2226, 2049 and 2118 of 2003, for the Appellant; R. Muthukumarasamy, A.A.G. for Rajeswaran and K.S. Natarajan, for Tamil Nadu Electricity Regulatory Commission, for the Respondent

Final Decision : Dismissed

Judgement

P. Shanmugam, J.—All the above appeals are filed u/s 27 of the Electricity Regulatory Commissions Act, 1998 (Act 14 of 1998).

2. The appellants, as consumers of electricity, have preferred the appeals aggrieved by the Tariff Order of the Tamil Nadu Electricity Regulatory Commission dated 15.3.2003, fixing fresh tariff in respect of Commercial and High Tension consumers of electricity.

3. The Electricity Regulatory Commissions Act 1998 (Act 14 of 1998), hereinafter referred to as the "Act", has been enacted by the Parliament providing for the

establishment of State Electricity Regulatory Commissions to rationalize electricity tariff, framing of transparent policies regarding subsidies, promotion of efficient and environmentally benign policies and for matters connected therewith or incidental thereto. The Government of Tamil Nadu constituted the Tamil Nadu Electricity Regulatory Commission (hereinafter referred to as "TNERC") in G.O. Ms. No. 58, Energy (A.1) Department dated 17.3.1999. The Tamil Nadu Electricity Board (hereinafter referred to as "TNEB") submitted a Tariff Petition before TNERC on 25.9.2002 for revision of tariff with effect from 1.12.2002, which was registered as T.P. No. 1 of 2002. After issuing a public notice, TNERC invited response from all the stake holders. Some of the appellants herein have submitted their representations/objections during the public hearing. After considering their response as well as the written submissions made on behalf of the Government, TNERC issued the Tariff Order dated 15.3.2003 in exercise of the power vested u/s 29 of the Act. The order was given effect from 16.3.2003. The appeals are against this order fixing fresh tariff.

4. Learned senior counsel Mr. Sriram Panchu appearing on behalf of the appellants made his submissions under the following heads :

(1) The Tariff Order and its implementation is in direct disobedience of the judgment, the directives and the law laid down by the Supreme Court in West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd. etc. etc., .

(2) The Tariff Order is beyond the power and scope of Section 29 of the Act and is, therefore, illegal.

(3) TNERC has exceeded its authority in making excessive cross subsidy.

The learned senior counsel, while elaborating these submissions, submitted that the appellants have made detailed representations/objections in their representations dated 29.10.2002, 11.11.2002, 15.2.2003 and 12.3.2003, wherein they have, inter alia, drawn the specific attention of TNERC to the law laid down by the Supreme Court on "Cross Subsidy". The main grievance of the learned senior counsel is that TNERC has not only failed to follow the law so laid down, but has not even bothered to refer to the judgment of the Supreme Court and therefore, on this sole ground alone, the order is vitiated.

5. On the other grounds, it is submitted that though TNERC is alive to their functions and powers as set out under Sections 22 and 29 of the Act, viz. that the tariff for all consumer categories should approach towards the cost of supply, that the level of cross subsidization is quite high and that the subsidizing consumers are finding it difficult to bear the cross subsidy burden, has decided to fix the tariff charges at 50% more or less than the cost of supply and to achieve that goal in a period of three years. In other words, according to the learned senior counsel, TNERC has committed a grave error in choosing to charge 50% more or less than the cost and that too, in a period of three years and this, obviously, is beyond the power conferred upon TNERC. According to him, TNERC has failed to apply the mandate contained in Section 29(3) of the Act, but has

taken its role as one u/s 29(5) of the Act for the purpose of providing cross subsidy.

6. In this context, learned senior counsel has referred to the replies of TNEB and the State Government, wherein it was pointed out that the rationalization of tariff structure for such cross subsidized segments can be brought about at the average cost of supply within a period of three years. TNEB has specifically stated as follows :-

"The State Government must be directed to bear the entire subsidy and cost of free power."

Whereas, the Government of Tamil Nadu, in their written submissions, as extracted in the report, has stated that the Government of Tamil Nadu has got financial constraints and therefore, it is unable to provide from its budget, revenue support to the Electricity Board in order to meet its revenue requirements and therefore, it is for TNERC to consider alternative means of ensuring that free electricity is continued for farm pump sets and huts. This has been possible in the past through various measures and TNERC has to examine all such options in determining that free electricity shall continue to farm pump sets and huts.

7. The submission of the learned senior counsel is that TNERC has implicitly followed the directives of the Government by providing cross subsidy at the cost of the appellants and has failed to see that it is the duty of the Government u/s 29(5) of the Act if they want the grant of any subsidy. Learned senior counsel further submits that TNERC has failed to take note of the transmission and distribution (T & D) loss before burdening the consumers without even issuing specific directions to TNEB to reduce its operating cost. For all these reasons, learned senior counsel prays that the order of TNERC has to be set aside.

8. Learned senior counsel submitted that the new Act, viz. the Electricity Act 36 of 2003, is entirely new in its content and procedure and is substantially different from Act 14 of 1998 and hence, the appeals preferred against the orders passed under the old Act have to be continued. He relied upon the Proviso to Section 61 under the new Act which specifically provides for the continuance of the tariff determined by the Electricity Regulatory Commission for a period of one year or until the terms and conditions for tariff are specified under the new Act. According to him, the repeal and saving provision, Section 185, has saved the tariff provided for by the Electricity Regulatory Commission and therefore, those orders should be questioned only before the forum created under the old Act. He also referred to Sections 110 and 111 of Act 36 of 2003 wherein it is stated that appeals could be filed only against the orders passed under the new Act. Learned senior counsel referred to various decisions in support of his contention that the provision for a forum itself is a substantive right and it cannot be altered retrospectively.

9. Mr. V.T. Gopalan, learned Additional Solicitor General of India, appearing on

behalf of the Southern Railways submitted that the increase in tariff is unreasonable and without any justification in respect of a concern which is running on a "no profit" basis.

10. On the question of the maintainability of the appeals before the High Court, he submitted that in the absence of a provision for the transfer of the pending appeals, they have to be continued in the forum where the appeals were filed. The Parliament, which has enacted the new Act, did not make provision for transfer, and they knew that appeals are pending before the various High Courts against orders of the respective Electricity Regulatory Commissions. According to him, in the absence of a provision for transfer, the appeals would have to be continued. He relies upon Section 6 of the General Clauses Act for the continuation of the legal proceedings since a different intention is not shown under the new Act.

11. Mrs. Nalini Chidambaram, learned senior counsel appearing on behalf of some of the appellants submitted that TNERC has approved the extra levy of 20% on energy charges for the energy recorded during peak hours without assigning any reason whatsoever. This Court has granted interim orders of stay of collection of peak hour charges in writ petitions filed by other consumers. The submission of the learned senior counsel is that until the matter is finally decided, it has to be remanded back to TNERC for considering their objection and to pass a speaking order.

12. The learned Additional Advocate General, Mr. R. Muthukumaraswamy, appearing on behalf of the Tamil Nadu Electricity Board and the State Government submitted that though TNERC has not referred to the judgment of the Supreme Court in its Tariff Order, they have followed the law laid down on the subject and have not deviated from the principles set out in the said judgment. He justified the tariff determination, which according to him, is strictly within the competency of TNERC as provided for u/s 29 of the Act. According to him, TNERC has fixed the regulation after taking note of the factors and had determined the tariff under Sub-section (3) of Section 29 of the Act. Learned Additional Advocate General further justified the differential tariff on the factors that can be taken note of, viz. nature of supply and the purpose for which the supply is required. According to him, the Board is also entitled to apply the principles of Section 59 of the Electricity Supply Act, 1948, besides Section 49 of the said Act, which is analogous to Section 29 of the Electricity Regulatory Commissions Act.

13. The learned Additional Advocate General referred to the Objects and Reasons to Act 14 of 1998 and submitted that Section 29 of the Act, read along with the objects, would require TNERC to fix the tariff progressively reflecting the cost of supply. Further, TNERC is also entitled to take into account other matters which are appropriate for the purpose of the Act. He justified the differential tariff on the basis of the factors set out u/s 29(3) of the Act and according to him, TNERC has not made any departure from Clauses (a) to (f) of Sub-section (2) to Section

29 of the Act so as to record the reasons for such departure. Learned Additional Advocate General has also referred to the reports of the other State Electricity Regulatory Commissions and the tariff fixed there under and comparing those figures with the tariff fixed by TNERC, he justified the method of fixation of tariff in these cases. According to him, in order to avoid tariff shock for the subsidized categories, TNERC has minimized the tariff increase for subsidizing categories and TNERC has also attempted to eliminate the cross subsidy within a period of five years. He further referred to the rulings of TNERC in reference to various categories and submitted that all the factors were taken note of in order to make a differential tariff, with justifiable reasons.

14. Learned Additional Advocate General further submitted that the judgment of the Supreme Court in the West Bengal Case is distinguishable on facts and that the ratio of the said judgment applies to the facts of that case only. According to him, the order of the West Bengal State Electricity Regulatory Commission related to the fixed tariff structure for the Calcutta Tramways and not the differential tariff applicable to the whole of the State. According to him, while the West Bengal State Electricity Regulatory Commission increased the tariff, the High Court directed the company to maintain its tariff structure as it was prevailing before the Commission fixed the new tariff. The High Court also directed the increase in the average rate of tariff by permitting to be distributed on pro rata by the company amongst different consumers so that the percentage of increase in each category is the same. This direction of the High Court was held to be unsustainable by the Supreme Court in that case and according to the learned Additional Advocate General, the ratio laid down by the Supreme Court in that judgment will not apply to the case on hand. According to him, TNERC has not deviated from the law laid down by the Supreme Court and hence, the order of TNERC does not call for any interference.

15. According to the learned Additional Advocate General, though the right of appeal is a substantive right, the right to a forum is only a procedural right and the new Act 36 of 2003 has clearly stated that Act 9 of 1910, Act 15 of 1948 and Act 14 of 1998 are repealed by Act 36 of 2003. Sub-section (2) to Section 185 of Act 36 of 2003 has saved such of those action taken which are not inconsistent with the provisions of the new Act. He further submits that Section 6 of the General Clauses Act, 1897 will enable the continuance of the legal proceedings unless different intention appears in the repealed Act. Sub-section (5) to Section 185 of the new Act says that the application of Section 6 of the General Clauses Act shall be subject to the provision of Sub-section (2) to Section 185 of the new Act. Ultimately, learned Additional Advocate General fairly submits that in the absence of a notification for the constitution of an appellate tribunal, there is no forum for an appeal and therefore, the right of appeal itself is not available to the appellants. According to him, in these peculiar circumstances, though the forum created under Act 14 of 1998 is not available, the appeal can be pursued. However, he tried to make a distinction between such of those appeals filed prior to 10.6.2003 and those filed thereafter. According to him, the appeals filed after

the coming into force of Act 36 of 2003 are incompetent.

16. We are disappointed at the failure on the part of the counsel for the Tamil Nadu Electricity Regulatory Commission to be present and clarify the position then and there instead of simply adopting the argument of the learned Additional Advocate General through a junior counsel. It is unfortunate that the Commission has failed to advert to the law laid down by the Supreme Court in West Bengal's case and we are unable to appreciate their omission to refer to the same in the Tariff Order.

17. We have heard the counsel for either side and considered the matter carefully.

18. The following points are raised for our consideration :

i) Whether the appeals survive for consideration in the light of the Electricity Act, 2003 (Act 36 of 2003) which has come into force from 10.6.2003 ?

ii) Whether the judgment of the Supreme Court in West Bengal's case applies to the facts of the case on hand ?

iii) Whether the rulings given by TNERC in reference to different categories are in accordance with Section 29(2) and Section 29(3) of the Act ?

iv) Whether TNERC is entitled to fix a particular percentage of the cost of supply, viz. 50% more or less ?

v) Whether the consumers can be directed to pay more than the average cost ?

vi) Whether the tariff is fixed within the parameters of Section 29(3) of the Act ?

19. When substantial arguments on the matter had been completed, it was brought to the notice of the Court by the counsel that the Indian Electricity Act, 1910 (Act 19/1910), the Electricity Supply Act, 1948 (Act 15/1948) and the Electricity Regulatory Commissions Act, 1998 (Act 14/1998) have been repealed by the Electricity Act 36 of 2003. The new Act provides for an appellate tribunal against the orders of the Electricity Regulatory Commissions. The submission is that the provision for an appeal to the High Court u/s 27 of Act 14 of 1998 is no longer available and it is replaced by an appellate tribunal with a further appeal only to the Supreme Court u/s 125 of Act 36 of 2003.

20. In the light of the submissions, we will now proceed to look into the various decisions and the law on this point before considering the matter on merits.

21. In Colonial Sugar Refining Company Limited v. Irving 1905 App C 369 the Privy Council held that there is no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case, there is an interference with the existing rights contrary to the well known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested. Prior to August 25, 1903, the right of appeal was available to the Privy Council from decisions of the Supreme Courts

of the States of Australia. By the Judiciary Act 1903, the High Court of Australia was conferred with the Federal jurisdiction from the Supreme Courts of the States in all those matters except specified and subject to certain conditions and restrictions. Their lordships held that as regards the general principle applicable to the case, there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, the appellant would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. In the above circumstances, where the appeal is preferred to the Privy Council, a right is vested with the appellant at the date of the passing of the Act is not a matter of mere procedure. It was deprivation of a right itself and in that context, it was held that there is no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. Ultimately, the Privy Council dismissed the application filed by the respondent that the appeal to the Privy Council does not lie as of right. In the above judgment, their lordships held that the right of appeal which was taken away was a substantive right. The change of forum in the form of the High Court of Australia as against the various Supreme Courts of the States is available subject to certain conditions. Therefore, it was held that there was an interference with the existing right contrary to the well known general principle and the statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

22. In *Dajisaheb Mane and Others Vs. Shankar Rao Vithal Rao Mane and Another*, , the question that arose before the Supreme Court was whether the appeal before them was maintainable. Though their lordships held that the question, whether in all matters where there was a right of appeal u/s 110 C.P.C. it continues in respect of all suits filed prior to the Constitution, does not arise for the decision, they have held that the vested right to an appeal perishes if the court to which an appeal lies is altogether abolished without any forum substituted in its place for the disposal of pending matters or for the lodgment of appeals.

23. In *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, , a Constitution Bench of the Supreme Court held that the right of appeal is not a mere matter of procedure, but is a substantive right. The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit. This vested right of appeal can be taken away only by subsequent enactment, if it so provides, expressly or by necessary intendment and not otherwise. Their lordships have observed in paragraph 23 of their judgment as to the law on the subject as follows :-

"From the decisions cited above, the following principle clearly emerge :

(i) That the legal pursuit of a remedy, suit appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to

be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the time of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

Their lordships in that case held that the petitioner was entitled under Article 135 to come up on appeal to the Supreme Court as of right. Since the suit, out of which the application arose, having been instituted before the date of the Constitution, the parties thereto had, from the date of the institution of the suit, a vested right of appeal upon terms and conditions then in force.

24. In *Ittavira Mathai Vs. Varkey Varkey and Another*, , another Constitution Bench of the Supreme Court refused to accept the argument that the rights of parties to a suit in a matter of preferring the appeal are governed by the law as it obtained when the suit was instituted. Their lordships held that a litigant has no right to contend that a tribunal, before whom he should have taken the appeal when he instituted the suit, should not be abolished. The legislature has full power to enact a law of that kind and therefore, whatever rights may have vested in the party in the matter of filing an appeal were abrogated by competent legislature and new rights were conferred in place of those which were taken away and it is only the new rights which could be availed of.

25. In *Jose Da Costa and Another Vs. Bascora Sadasiva Sinai Narcornim and Others*, , the Supreme Court held that there are two exceptions to the general principle, the general principle being that a provision of a statute dealing with the matters of procedure having a retrospective effect, the right of appeal is a substantive right. The institution of a suit carries with it the implication that all successive appeals available under the law then in force are preserved to the parties to the suit throughout the rest of the career of the suit. The two exceptions are as follows :-

(1) When by competent enactment such right of appeal is taken away expressly or impliedly with retrospective effect ; and

(2) When the Court to which appeal lay at the commencement of the suit stands abolished.

26. A Division Bench of this Court, in *Managing Director, Repatriate Co-operative Finance Limited v. Deputy Commissioner of Labour & Another* 1993 W.L.R. 419 has held that the appeal before the appellate authority under the Tamil Nadu Shops Act was not competent and he had no jurisdiction to hear and dispose of the appeal after 12.4.1978, the date on which the exemption from the purview of the Shops Act has been granted. While so holding, the Division Bench followed the judgments of the Supreme Court that the right of appeal is a substantive right and hence vested in a litigant no sooner the lis is commenced in a suit in the court of first instance. Such right will not be affected by any repeal of the enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such a right of remedy in respect thereof. However, the forum where such an appeal can be lodged is a procedural matter and therefore, if the repealing Act provides a new forum where the remedy by way of appeal or legal proceedings in respect of such vested right can be pursued after the appeal, the forum must be specified to the litigant.

27. A Constitution Bench of the Supreme Court, in *Dajisaheb Mane and Others Vs. Shankar Rao Vithal Rao Mane and Another*, , held that merely because the Supreme Court came into existence in place of the Federal Court, a vested right of appeal to the Federal Court is not taken away. An interpretation or construction of the provisions of the Constitution which will lead to such results should be avoided unless inevitable. In *Rajendra Kumar Vs. Kalyan (D)* by Lrs., , the Supreme Court held that the law seems to be well settled that no person has, in fact, a vested right in procedural aspect.

28. Justice G.P. Singh, in the "Principles of Statutory interpretation" - VII Edition, under the Chapter "Statutes Regulating Appeals" has stated as follows :-

"An Appeal is the "right of entering a Superior Court and invoking its aid and interposition to redress an error of the Court below" and "though procedure does surround an appeal the central idea is a right". The right of appeal has been recognised by judicial decisions as a right which vests in a suitor at the time of institution of original proceedings. Any change in the law relating to appeals, after institution of original proceedings, which adversely touches this vested right is presumed not to be retrospective."

.....

"It must, also, be noticed that the right of appeal that vests at the commencement of original proceeding is limited to the various stages of the same proceeding, e.g., suit, appeal or second appeal; but is not available in respect of a later original proceeding even if the same is somewhat connected with the earlier one, e.g., an application for amendment of a decree u/s 152, Code of Civil Procedure.

Further, though a right of appeal to a particular Court is a vested right, no party has a vested right to have his appeal heard by a specified number of judges of that Court and a change in law in that matter will be regarded merely as a change in procedure; and therefore retrospective. Again, when existing civil courts are abolished and new civil courts are created by the new law, an appeal against a decision in a pending suit decided by the new civil court, to which it is transferred, will lie to the court which has power to hear appeals under the new law. This is on the principle that when the repealing Act abolishes the existing courts and provides for new courts, the forum for pursuing the vested right of appeal must be as provided in the repealing Act."

29. In *V.C.K. Bus Service (P) Ltd., Coimbatore and Another Vs. H.B. Sethna and Others*, , a learned Judge of this Court, as he then was, has held that no litigant has or can have a vested right in a particular forum. Forum belongs to the realm of procedure and does not constitute the substantive right of a party or litigant. It is a well settled principle of construction that exclusion of civil court's jurisdiction will not be taken for granted in the absence of express words or necessary intendment of the statutory provision to that effect. There must be a special forum prescribed under the statute for exclusion of the civil court jurisdiction. A statute which may affect vested rights will not be read or understood as having retrospective effect unless the statute contained the words capable of necessary intendment that retrospective effect is meant.

30. In *M/s. P.V. Mohammad Barmay Sons Vs. Director of Enforcement*, , while construing Section 6 of the General Clauses Act, the Supreme Court held that the rights acquired or accrued or the liabilities incurred or any penalty, forfeiture or punishment incurred during the period when the Act was in force are kept alive and preserved. If they did not evince any contrary intention, Section 6(d) gets attracted to the acts done or penalties incurred or forfeiture or punishment which had already been undergone before the repealed enactment. Where penalty was incurred by a person under the repealed Act for contravention of the same, it would continue to subsist under the new Act. The authorities under the new Act would be entitled to initiate the proceedings, conduct investigation and impose such penalty as is warranted.

31. It is not in dispute that Act 36 of 2003 is substantially different from Act 14 of 1998. It is also not in dispute that no notification for the constitution of the appellate forum has so far been issued. If a right of appeal is not made available and if we were to hold that there is a change of forum for the appeal, the appellants would be deprived of the very right of a substantive relief in the appeal. Therefore, as on date, it is no longer a procedural right, but a substantial right. No provision has so far been made for the transfer of the pending appeals to a different forum. In the above circumstances, the proceedings that had already been taken have to be continued and the proceedings shall include those which were initiated at the time when the present appeal was available and there is no other forum available as on date and therefore, the appeals are

maintainable. The new Act does not expressly or impliedly take away the right of appeal with retrospective effect and the Act has not dealt with the pending appeals. The Parliament is fully aware of the appeals pending in the various High Courts as appellate authorities. Therefore, in the absence of any specific provision, the appeals that have been filed and are pending even after the coming into force of the new Act have to be continued until a different forum is constituted for that purpose.

On Merits

32. Section 29 of Act 14 of 1998 is akin to Section 49 of the Electricity Supply Act, 1948. Section 29 enables the State Commission, by regulation, to determine the terms and conditions for fixation of tariff. By virtue of this power read with Section 58, the Tamil Nadu Electricity Regulatory Commission Tariff Regulations, 2002 have been notified. Regulation 6 of the Tariff Regulations, 2002 provides for tariff fixation guidelines. The State Commission is empowered to take into account the principles set out u/s 59 of the Electricity Supply Act that the tariff should progressively reflect the cost of supply at an adequate and improving level of efficiency and the factors which would encourage efficient, economic use of the resources, etc. and other matters which the State Commission considers appropriate for the purpose. The Commission is entitled to take into account that the interests of the consumers are safeguarded and that they pay for the use of electricity in a reasonable manner based on the average cost of supply of energy. Sub-section (3) of Section 29 empowers the Commission to take into account the approved differential tariff, without showing undue preference on the basis of load factor, power factor, total consumption of energy during any specified period or the time at which supply is required or the geographical position of any area, nature of supply and the purpose for which supply is required. Regulation 6 of the Tariff Regulations, 2002 also sets out the above principles and states that the Commission may keep in view the unbundling costs so as to maintain rational allocation of costs and rationalize the tariff on the basis of the actual cost of general, transmission, distribution and supply of electricity. A reading of the above provisions entitles a Commission to accept a differential tariff. However, it shall be subject to not showing undue preference and should be based on the norms set out under Sub-section (2) and Sub-section (3) of Section 29.

33. In *M/s. Hindustan Zinc Ltd. etc. Vs. Andhra Pradesh State Electricity Board and others*, , repelling the contention that imposing different tariffs unrelated to the production cost on a particular section of consumer would be a case of misplaced philanthropy and it is for the Government to subsidize the cost, the Supreme Court accepted the argument of the Electricity Board that the power intensive consumer units have been enjoying the benefit of a concessional tariff for quite some time, which too is a relevant factor to justify the classification. Placing the burden of fuel cost adjustment on these power guzzlers for the benefit of a concessional tariff for quite some time, who have also a better capacity to pay cannot, therefore, be followed since consumption in the power

intensive units have been found for a large quantity. The Supreme Court ultimately held as follows :-

"It is not unreasonable to take the view that thermal power has become costly on account of the increase in fuel cost and could notionally be allocated for consumption by H.T. and power intensive consumers and therefore, the fuel cost is made applicable to them alone. In our opinion, the argument on behalf of the Court in this behalf is not unreasonable."

34. A Constitution Bench of the Supreme Court, in *The Adoni Cotton Mills Ltd. and Others Vs. The Andhra Pradesh State Electricity Board and Others*, , has held that the power of the Board u/s 49 of the Electricity Act is available to regulate the supply and to fix higher rates for consumption on excess quota. According to the Supreme Court, Section 49(4) of the 1948 Act embodies the same principle which is enunciated in Article 14 of the Constitution of India. It is the principle of equality or non-discrimination. Section 49(4) does not mean a mechanical equal treatment. The obligation not to discriminate involves both the right and obligation to make a reasonable classification on the basis of relevant factors. The guiding principle is clearly embodied in Section 49(4). The language of Section 49 shows that the power of the Board to enforce rationing can be exercised without making any regulation. The expression "any other relevant factor" in Section 49(3) is not to be construed ejusdem generis, because there is no genus as to the relevant factors. A combined effect of Section 49 of the 1949 Act and the terms and conditions of supply is that having regard to the nature of supply and other relevant factors, particularly that there is a shortage of electricity, the Board has power to enhance the rates. If there is a shortage of electricity, there has to be restriction on supply. The Board can disconnect supply if the quota has exceeded. The Board can also impose higher rates if the quota has exceeded. The imposition of higher rate is only to sanction the rigour of rationing by making the person, who exceeds the quota, liable to pay higher rates. There is no question of excessive obligation because the power is conferred by the statute.

35. The Supreme Court, in *Association of Industrial Electricity Users Vs. State of Andhra Pradesh and Others*, , has held that it is not possible to accept the submission that the Act, viz. the Andhra Pradesh Electricity Reforms Act, 1998 does not envisage the classification of consumers according to the purpose for which the electricity is used. Sub-section (9) of Section 26 of the said Act does not 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, the consumer's total consumption of energy during the specified period, the time at which supply is required or the paying capacity or the category of consumer and the need for cross-subsidization or such tariff as is just and reasonable and is 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. While considering the judicial review, it was held that the High Court has only to be satisfied that the proper procedure has been followed and would not interfere unless the decision in question, on the face of it, is shown to be arbitrary, illegal or contrary to the Act. Of course, the said judgment was distinguished by the counsel for the appellants in these cases to the effect that the Andhra Pradesh Act has made a provision for cross-subsidization and that the matter before the High Court was under Article 226 of the Constitution. However, we find that the Supreme Court has taken into account other factors so as to promote economic efficiency in the supply and consumption of electricity in order to impose a differential tariff.

36. In *West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd. etc. etc.*, the Supreme Court considered the scope of the orders of the Electricity Regulatory Commission in Paragraph 52 and their lordships have held that Section 29 firstly requires the Commission to determine the tariff in accordance with the provisions of that Act. It then requires the Commission to frame Regulations, providing for the terms and conditions for fixation of tariff. In exercise of this latter power of framing the Regulations, the Commission is mandated to be guided by the factors framed in Clauses (a) to (g) of Sub Section (2) to Section 29 and thereafter, Sub Section (3) to Section 29 mandates the Commission not to show any undue preference while determining the tariff to any consumer of electricity subject, of course, to the exceptions found in the said Sub Section, and it is the Commission alone which is authorised to determine the tariff. Their Lordships agreed that it is the duty of the licensee to bring down the loss under the head "Transmission & Distribution". But, at the same time, the Court was of the view that it cannot be done in its entirety forthwith.

37. For the first time, the Supreme Court has considered Act 14 of 1998 and has laid down important principles of law on the subject. Their lordships have held that the power of the High Court u/s 27 of the Act is unrestricted, but it should be careful in interfering with the findings of fact rendered by the Commission, which is an expert body and that it should interfere only on being satisfied that the order of the Commission is perverse, not based on evidence or on a misreading of the evidence. Their lordships have further held that the Commission cannot totally ignore the provisions of Schedule VI to Act 14 of 1948 and therefore, the Commission is bound to take into consideration the principles found in Sections 57 and 57(a) and Schedule VI of Act 14 of 1948 to the extent they have become applicable and while so applying, the Commission has to weigh these principles with other requirements as incorporated in the form of regulations and suitably apply the same.

38. 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 discontent 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.

39. The ratio laid down by their lordships in the above judgment, however, 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 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.

40. In *Padmasundara Rao and Others Vs. State of Tamil Nadu and Others*, , a Constitution Bench of the Supreme Court held that the Court should not place reliance on decisions without discussing as to how the factual situation fits in with the factual situation in the decision on which reliance is placed. According to their lordships,

"Circumstantial flexibility, one additional or different fact, may make a world of difference between the conclusions in two cases."

41. The expression under Sub-section (2) that the "tariff should reflect progressively the cost of supply" and the principles set out under Sections 46, 57, 57(a) and 59 of Act 14 of 1948 should be taken as guiding factors. Taking into account all the above, the tariff should reflect the cost of supply and there should not be a differential tariff subject to the nature of supply and the purpose for which the supply is required and other such exceptions. The Tamil Nadu Electricity Board, in their response to the objection of providing subsidized power to huts and agriculture, has stated that in case the tariff is corrected from the

present situation to reflect the cost of supply at different voltage levels, it would require a major increase in the tariff for L.T. Consumers and requested tariff rationalization to be gradual in order to avoid burdening some consumer categories. It is further requested a timeframe for progressive rationalization. The Government, in their response, requested the Commission to go in detail the location of the consumer, the nature of supply and the use to which the electricity supply is put to by the consumer. Admittedly, the Commission has considered these aspects before ruling that the level of cross-subsidization has reached quite high levels and therefore, the cost of supply has to be recovered in a period of three years.

42. The expression under Sub-section (2) of Section 29 that the "tariff should progressively reflect the cost of supply" and that 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 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.

43. 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 :

Particulars	FY _____	TNEB 03 _____	TNERC FY _____	TNEB 04 _____
TNERC Projected Sales (MU)	37524	36726	41633	39458
Total Revenue Requirement (Rs. Crore)	12318.31	11696.8	13264.49	12133.12
Average Cost of Supply	3.28	3.18	3.31	3.07

The attempt of the Commission to go towards the cost of supply gradually cannot be faulted with in the light of the enabling provision u/s 29(2)(c) of Act 14 of 1948. 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 category, 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. The attempt of the Commission to increase the tariff for subsidized categories to higher extent than that for the subsidizing categories.

CONSUMER CATEGORY AVERAGE Rs/ _____ EXISTING REALISATION kWh
 _____ TNEB PROPOSED IN _____ TNERC % OF INCREASE IN AVERAGE
 REALISA- -TION HT Industry 4.19 4.59 4.47 6.69 Railway Traction 4.62 4.62
 4.47 -3.31 Educational Institutions 4.12 4.53 4.31 4.40 Public Worship 3.30 3.30
 3.30 - HT Commercial 5.43 6.23 6.21 16.37 Lift Irrigation 0.25 0.50 0.50 -
 Supply to Pondicherry 3.00 3.00 3.00 - TOTAL HT CATEGORY 4.31 4.73 4.61 7.14
 Domestic 1.79 2.29 2.18 22.13 Huts (Unmetered) * 0.00 10.00 10.00 - Public
 Lighting & PWW 3.41 3.41 3.41 - LT Educational Institutions 3.89 4.59 4.53
 16.61 LT Public Worship 3.07 3.07 3.05 -0.51 Cottage Industries 2.39 2.62 2.56
 7.13 Powerloom 2.17 2.17 2.17 - LT Industries 4.07 4.70 4.48 10.20 IT Parks, IT
 Industry 3.80 4.36 4.25 11.85 Agriculture (Unmetered) ** 50.00 20.83 -
 Commercial 4.83 5.83 5.80 19.96 Temporary Supply 10.00 10.00 7.00 - TOTAL
 HT CATEGORY 1.94 2.47 2.31 19.30 TOTAL HT & LT 2.62 3.12 2.98 13.52 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.

44. 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 H.P. 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 safeguarded 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.

45. 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.

46. Insofar as the Railway Traction is concerned, as per the Table of increase in average realization found at page 165 of the Tariff Order, we find that there is a decrease in the tariff to the extent of (-)3.31%. From the existing tariff of Rs. 4.62 per unit, the TNERC has fixed it at Rs. 4.47 per unit.

47. The Railway Tariff as set out in paragraph 7.15 is as follows :-

"The Commissioner has restored the original category (prior to the change made in G.O. Ms. No. 95) for the H.T. Supply for traction by merging the H.T. Tariff 1B with H.T. Tariff 1A. Their grievance on the domestic consumption rates is almost solved by notifying them to come under the newly introduced L.T. Tariff 1C for such bulk consumption for domestic purposes."

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.

48. The submission made on behalf of the Railways that they must be permitted to wheel the power for Southern Railway directly cannot be sustained. No provision or rule has been pointed out to enable them to mandate the Commission to do so. The further submission that the projection of unit rate at 447 paise is not correct cannot be accepted. According to the Railways, the average unit rate for railway traction has been projected as paise 477 per unit based on the pattern of consumption for the earlier period. Unless the same had

been pointed out before the Commission, it will not be possible for the appellate court to go into this factual aspect of the rate projected and accept their case. Hence, we do not find any merit in their submission.

49. Insofar as the appeals challenging the peak hour charges are concerned, it is seen that the levy of 20% extra on energy charges for the energy recorded during peak hours, viz. from 6 am to 9 am and from 6 pm to 9 pm, has been charged ever since the year 1997. There was no written objection on the part of the appellants in C.M.A. No. 2226 of 2003 nor were there any oral representations. The submission by the consumer is set out in paragraph 7.8 and not disputed is that :-

"The representation was made only for seeking a rebate for consumption during off peak hours. It is submitted and not seriously disputed that the requirement of power during day time average is 5000 Megawatts and it increases to 7000 Megawatts during peak hours. With the existing capacity of 4500 Megawatts, the Electricity Board has to increase the supply to meet the peak hour demand at an extra cost and that is why the extra 20% levy."

It is contended that during peak hours, the demand from the consumers exceeds the available supply position by a large margin, forcing the Electricity Board to purchase expensive power to meet the requirement. The Commission, in its ruling in paragraph 2.8.3, has held that in the T.N.E.B. Transmission Grid, there are peak demands during morning and evening peak hours. The peak demand determines the capacity of generation requirement. A reduction in peak demand would allow the Electricity Board to reduce power purchase, generation cost and reduce the overall cost of supply. The Commission felt that the current discounts in the tariff rates to avail supply during peak hours would continue and the incentive to continue supply during non-peak hours should be introduced. Accordingly, the Commission has introduced a rebate of 5% to H.T. power consumers for consumption between 2200 hours and 0500 hours.

50. It is pointed out that the demand in the Grid is not uniform during 24 hours of a day. Similarly, the Board's cost of power is varying depending on the source from which the power is received. Hydro power is the cheapest power and the cost of power from Independent Power Producers (IPPs) is higher due to generation of power from Naptha/LSHS. It is stated that during peak hours, i.e., from 6 am to 9 am and from 6 pm to 9 pm, the demand could not be met from the own generation/Central Sector Power. The Board has to resort to purchase of power from IPPs to meet the additional demand and to provide uninterrupted supply of power. According to the Board, the cost of power purchase from Independent Power Purchasers is around Rs. 5/03 per unit. Therefore, the additional cost and the average cost works out to nearly Rs. 2/- during peak hours. During peak hours, the extra demand is said to be in the order of 1100 MW. In terms of the cost of energy, 1100 MW, which is equivalent to 200 Million Units per month, would be Rs. 40 Crores. A major portion of this power is used by H.T. Industrial consumers who could shift their demand to non-peak hours so

that the Board can ensure continuity of supply to the domestic consumers. The Board has to recover 70 paise per unit (Rs. 3.50 x 20%) from H.T. Industrial consumers for the energy consumed during peak hours. It is submitted that the average cost of energy consumed by H.T. Industrial consumers during peak hours would be 170 Million Units in a month and that the recovery is around Rs. 12 Crores at the rate of 70 paise per unit. Hence, out of Rs. 40 Crores spent towards the purchase of additional power, the Board is able to recover only Rs. 12 Crores from the H.T. Industrial consumers as peak hour charges. This, according to the Board, will partially offset the extra cost paid during peak hours and will also regulate the additional demand in the Grid. The H.T. consumers could very well avoid to avail the demand during peak hours and avail the same during non-peak hours with a rebate of 5% for the consumption between 2200 and 0500 hours as an incentive for night consumption.

51. The argument that the order of the Commission is non-speaking and that the levy of extra 20% peak hour charges should not be imposed, cannot be sustained. The Commission has given its reasons for their approval. As on the existing available supply of electrical energy and the demand, an extra levy is imposed as a disincentive to draw electricity during those peak hours. It is rightly submitted on behalf of the T.N.E.B. that most of the industries have adjusted their break period or commencement for interval, etc. so as not to utilise energy during peak hours. Only in respect of industries like the aluminium industry, which would be running effectively for 24 hours without any stop, there could be some hardship, which is offset by the rebate of 5% given to companies drawing energy during non-peak hours and in any event, they are not before this Court. It is rightly pointed out that the appellants in C.M.A. No. 2226 of 2003 and the other appellant, which are Associations, have not set out as to how far they are prejudiced by the Tariff Order and as to why they have not submitted either oral or written objections before the Commission. The submission that the matter is pending and therefore, the Commission ought not have considered the matter as it is subjudice cannot be accepted. Act 14 of 1998 has brought about a substantial change in the determination of tariff and the major, important aspect is the constitution of an independent regulatory authority with the power of determining the tariff and an appellate power is conferred on the tariff orders and it can go into the question whether determination of the tariff is in accordance with the Act and the Regulations.

52. It is submitted by the counsel appearing on behalf of the Electricity Board that the Board is making sincere efforts to improve their efficiency which would improve the revenue resources and consequentially reduction in tariff. Similarly, they would make sincere attempt to reduce the Transmission and Distribution loss. We have no figures as to the exact revenue loss consequent on the possible inefficiency on the part of TNEB as well as the T & D loss. The Commission also was not furnished with sufficient data. It is needless to point out that for no fault of theirs, the consumers are being made liable to bear the cost on account of the inefficiency of the Board or the T & D loss. The Commission was of the view that

it is difficult to set targets for reduction in T & D loss levels over a period of time. Considering the fact that this is the first tariff process and that the assessment of unmetered agricultural consumption is very minimum and also the fact that the assessed T & D loss levels of the TNEB were lower than that existing in other States and that they would set targets for minimising the T & D losses in the subsequent years, once better quality is made, we hope and trust that while fixing the tariff in successive years, these areas would be looked into, proper adjustments made and the tariff fixed accordingly.

53. For all the above reasons, we do not find any grounds to interfere with the Tariff Order passed by the Tamil Nadu Electricity Regulatory Commission. All the appeals are dismissed. However, there will be no order as to costs. Consequently, the connected C.M.Ps. are closed.