

(1998) 10 OHC CK 0024

In the Orissa High Court

Case No : O.J.C. No's. 8449, 15033 and 4739 of 1996 and 994 to 997 and 4161 of 1997

Eastern Metals and

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 30-10-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 254, 254(2)
Electricity (Supply) Act, 1948 — Section 49
Electricity Act, 1910 — Section 3
Electricity Rules, 1956 — Rule 11, 12, 13, 14, 15
Orissa Electricity Reforms Act, 1995 — Section 14(4), 23, 57(3)
Orissa General Clauses Act, 1937 — Section 23

Citation : AIR 1999 Ori 140 : (1998) 86 CLT 792

Hon'ble Judges : P.K. Misra, J; D.M. Patnaik, J

Bench : Division Bench

Advocate : Ch. P.K. Mishra, P.K. Jena, K.K. Panda, S.A. Khan, P.K. Harichandan, A.K. Ray, S. Dey, A. Mohanty, S.P. Das, K.N. Jena, D.K. Mohapatra, A. Jena, K. Rath, B.K. Mohanty, K.K. Jena, K.G. Kar, S.K. Mishra, S.K. Patnaik, U.G. Mohanty, B.H. Mohanty, D.P. Mohanty, B. Das, R.K. Nayak, S.C. Mohanty, J.K. Bastia, P. Sahoo, S.K. Mohanty, S.P. Mohanty, P.K. Lenka, L. Pangari, P. Patnaik, B. Jena, P.K. Choudhary, S. Mohanty, B.K. Sahoo, B.P. Mohanty, N. Paikra, R.P. Kar, A.N. Ray, A. Das, M.K. Badu, M. Kanungo, L. Kanungo, S. Kanungo, S. Nanda, S. Das, Manoj Mishra, U.C. Patnaik, P.K. Das, S.K. Pradhan, A. Deo, B.S. Tripathy, D.K. Sahoo, J.K. Mishra, M.R. Panda, D.K. Pani, N.K. Das and M.K. Nayak, for the Appellant; N.C. Panigrahi and S.C. Das, A.S.C., G. Rath, B.R. Sarangi, S.B. Mohanty and Saroj Kr. Das, A.S.C. (Central Govt.), for the Respondent

Final Decision : Allowed

Judgement

D.M. Patnaik, J.—Petitioner No. 1, a private company through its Managing Director (petitioner No. 2), challenges the provisional licence issued by the State Government u/s 14 of the Orissa Electricity Reforms Act, 1995 thereafter called as the "Reform Act") in favour of the Grid Corporation of Orissa Limited (for short, the "Gridco") for distribution, transmission and supply of electricity power

in the State as ultra vires as well as Gridco's authority in enhancing the tariff as arbitrary and against the law. This is also the allegation of all the other petitioners in the writ petitions named above and the present judgment will govern all these cases heard analogously with this case.

2. Petitioner's case, is, it is a small scale industrial unit engaged in the business of manufacture and sale of low carbon ferro alloys. It started its commercial production from 4-1-1984. The company had earlier entered with an agreement with the Orissa State Electricity Board (for short, the "Board") for supply of electricity to its factory with a contract demand of 150 KVA. As per the contract the company used to pay to the Board various electricity charges as per its regulations. As regards the Industrial Policy Resolution (for short, the "IPR") since the contract demand was less than 500 KVA, it was exempted from payment of electricity duty.

3. The State of Orissa (opposite party No, 1) brought out the Orissa Electricity Reforms Act, 1995, the aims and objects of which was restructuring of the electricity industry and rationalisation of generation, transmission, distribution and supply of electricity energy in the State in an efficient, economic and competent manner. The Act received the assent of the President of India on 3-1-1996. It was published in the Orissa Extra Ordinary Gazette No. 40 dated 10-1-1996.

On 30-3-1996 the State of Orissa issued a notification u/s 14(4) of the Act granting the Gridco (incorporated on 20-4-1995) provisional licence for supply of electricity energy on the terms and conditions incorporated in the licence to be effective from 1-4-1996. It is claimed that Section 14(4) of the Reforms Act being ultra vires of the provisions of the Indian Electricity Act, 1910, the notification granting the licence is also invalid in the eye of law. It is further their case that without any justifiable reason and arbitrarily the Gridco enhanced the tariff by way of revision by more than 17%, only with a view to make up the deficit incurred because of its accepting the unusually enhanced value of assets of the Board at the time of taking over. Such enhancement of tariff by the Gridco was notified on 13-5-1996 to be enforced from 21-5-1996 which affected different categories of consumers including, the petitioner company. Besides payment of enhanced tariff, in some cases even more than the rate of 17%, the notification further required the consumers to pay other statutory charges imposed.

It is further the case that since the bills were raised by the Gridco in utter violation of the incentive under the 1995 IPR which the petitioner company is entitled to, being a continuing industry having a contract demand below 500 KVA such bills should be quashed.

4. The Gridco (opposite party No. 2) and the Board (opposite party No. 4) have filed a joint counter.

Both the opposite parties denied the case that the tariff notification dated 13-5-1996 was arbitrary, whimsical and therefore bad in law. It is further their

case that u/s 14(4) of the Reforms Act, Government was competent to issue a provisional licence to any one and not to speak of the Gridco alone and with regard to the competency of the Gridco they stated that it was well within later's competency to raise the tariff. It is further claimed as follows. That the Gridco was incorporated under the Companies Act on 20-4-1995. The work for supply of electricity energy in the State was entrusted to it by the Statute with effect from 1 -4-1996 by virtue of the provisions of the Reforms Act, 1995. Prior to the taking over of the functions by the Gridco, OSEB u/s 49 of the Electricity Supply had fixed the tariff by notification dated 28-10-1995 for different categories of consumers which remained in force till 31-3-1996. Government took a decision that the said tariff should be deemed to be an interim tariff imposed by the State Government and the licensee may fix the tariff subject to limitation provided in Clause 9.1 of the provisional licence. Thus, according to these opposite parties the power of revising the tariff vested with the Gridco was subject to the limitation provided under Clause 9.1 of the licence which the Gridco did not exceed.

5. The State of Orissa (opposite party No. 1) filed a separate counter through its Additional Secretary in the Department of Energy stating that the State was competent to issue the provisional licence to the Gridco the latter being a duly incorporated company under the Companies Act. The Government of Orissa with a view to restructure the electricity industries and to rationalise the act of generation, transmission, distribution and supply of electricity energy enacted the Reforms Act, 1995. The said Act got the assent of the President of India on 3rd January, 1996. By virtue of Section 14 of the said Act, the State Government issued a licence in favour of the Gridco for a period of six months to perform the above functions. It is further their case that on coming into force of the Reforms Act, 1995 from 1 -4-1996, Section 26 of the Electricity (Supply) Act, became inoperative because of the provisions contained u/s 57(3) of the Reforms Act and the Orissa State Electricity Board ceased to have its power and functions. A bare reading of the provisions of Sections 23(3) and 29(9) in particular and with other provisions of the Reforms Act, it is clear that the Board ceased to perform any function in regard to transmission and supply of electricity energy in the State either under the two Central Acts mentioned above or under the new Reforms Act. Therefore, granting provisional licence in favour of the Gridco and the latter's power enhancing the tariff was justified in the eye of law.

6. Mr. P.K. Mishra, learned counsel for the petitioner, advanced extensive arguments in support of his contention that the action of the State by granting the provisional licence and that of the Gridco in enhancing the tariff was in violation of the prescribed law and the rules thereunder. He drew the attention of this Court to the constitutional provisions, the Electricity Acts and the Rules thereunder and the provisions of the Reforms Act. The other counsel on record also advanced arguments supplementing as to what was argued by Mr. Mishra.

Mr. M.G. Panigrahi, learned counsel for the Gridco, Mr. Patnaik learned counsel

for the Regulatory Commission and Mr. A.K. Mohapatra learned counsel for the State also advanced extensive arguments by referring to different Acts and Rules thereby countering the argument of Mr. Mishra that the action of the State as well as that of the Gridco was legal and justified under law. All the counsel for the parties also submitted their notes of argument.

Their respective contentions are disposed of in the following manner.

7. Mr. Mishra submitted that the provisions of Section 14(4) of the Reforms Act for granting a temporary licence to the Gridco by the State is ultra vires the provisions of the Indian Electricity Act, 1910 and the Indian Electricity (Supply) Act, 1948.

In the alternative it was submitted that under the Constitution, the subject "Electricity" finds place in the concurrent list so that both the Parliament and the State are competent to legislate laws. Section 3 of the Reforms Act prescribes constitution of the Regulatory Commission within a period of three months from the date of enactment. u/s 15 of the said Act, the Commission is alone competent to issue licence under the Act. Therefore, on the face of such statutory mandate it was not competent on the part of the State to grant the Gridco a licence for a period of six months from the date of enactment for a duration not exceeding twelve months.

It was further contended that Sub-Section (4) of Section 14 of the Electricity Act starts with non-obstante "clause and, therefore, the Clause only overrides the requirement of establishment of the Commission and other sections dealing with the functions and duties of the commission including Sections 13(3), 13(4) and 15 of the Reforms Act which deal with the power of the Commission to grant licence. But the words "consistent with the provisions of the Act" in that section, according to, the learned counsel, indicate that any such licence granted should comply with the rest of the provisions of the Act. In other words, the contention is until the constitution of the Regulatory Commission which came into existence on 12-6-1996, the Board still existed and therefore it was incumbent on the part of the State as well as the Gridco to comply with the provisions of Section 3 of the Electricity Act and the rules which deal with the powers of the State to grant licence to a licensee after consulting the Board and Rules 11 to 20 of the Electricity Rules which make it obligatory on the part of the licensee to apply for licence during the period of consideration of the same by the State and the stipulated period of notice to the public etc. It was strenuously urged that non-compliance of these provisions rendered the licenses so granted invalid.

This argument of Mr. Mishra was countered by Mr. Panigrahi by submitting that in view of Section 23(9) of the Reforms Act the Board ceased to perform any function and duties from the effective date and the Board was not in existence for the purpose of the Reform Act. Therefore the State, consulting the Board before issuing the licence in favour of the Gridco did not arise. In regard to non-compliance of the provisions of Section 3 of the Electricity Act and the Rules 11

to 20 by the Gridco in applying for the above licence, Mr. Panigrahi submitted that the provisions were no more required for compliance by the Gridco since the provisions of the Reform Act have an overriding effect over the provisions of the Central Act and the Rules as provided under Article 254(2) of the Constitution of India.

8. A lot of argument was advanced by counsel for both sides both for and against the issue touching the point of "occupied field" and "repugnancy". Initially though Mr. Mishra laid lot of stress by submitting that the provisions of Section 14(4) of the Reforms Act were repugnant to the provisions of the Electricity Act, 1948 and the Supply Act and thus invalid to the extent of such repugnancy, yet it seems the said argument was advanced in a modified form and it was submitted that the provisions of both the Acts could stand together and are supplementary to each other and not contradictory and therefore the relevant provisions are reconcilable.

Thus it was very much stressed by the leaned counsel that non-compliance of these provisions i.e. Section 3 of the Electricity Act and Rules 11 to 20 of the Electricity Rules which were very much in force rendered the licence invalid.

The contentions so advanced need examination.

9. So far as the question of ultra vires of Section 14(4) of the Reforms Act is concerned, we are unable to accept the contention. The legislative power of the State to frame laws relating to "electricity" has been provided under entry No. 38, Seventh Schedule (List III) of the Constitution of India in respect of which both the Parliament and the State Legislatures are competent to enact laws. Secondly, Section 3 of the Electricity Act also vests power with the State Government to issue licence to any one. Further Section 3 of the Electricity Act vests plenary power with the State Government to grant licence to another person even if there is an existing licensee without any limitation/reservation.

Therefore, the question of declaring the provisions ultra vires does not arise because, there is no violation of the constitutional provisions nor there is any absence of any authority on the part of the State to legislate laws on this point. That apart, constitutionality of a statute passed by a competent Legislature cannot be challenged on the ground that the law made is not reasonable or just (see *The State of Bihar Vs. Sir Kameshwar Singh*,), This point of Mr. Mishra therefore fails.

10. We do not feel it necessary to discuss in detail the issue touching "occupied field" and "repugnancy" since this part of the argument as indicated above has been abandoned by Mr. Mishra, But we feel it appropriate to deal to avoid any confusion as to this settled proposition, since the point was raised during the course of argument at one stage.

Question of "occupied field" and "repugnancy" arises only when the subject matter as in the present case is covered under the concurrent list. It has been

held in the case of Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others, that when these two wings of legislature deal with a separate and distinct subject though of a cogent and allied character, question of repugnancy does not arise. Also reference may be made to the cases of M. Karunanidhi Vs. Union of India and Another, and Vijay Kumar Sharma and others Vs. State of Karnataka and others, .

Thus following the above proposition in the above two cases, we are of the view that there is no repugnancy between the provisions of the two Acts since the authority to grant licence in both Sections of the Electricity Act and Section 14(4) of the Reforms Act lay with the State. That apart, assuming this is a case of repugnancy, yet by virtue of Article 254(2) of the Constitution the provisions of the State Act would override the provisions of the Central Act if the State Act received the assent of the President of India as provided under that Article. Admittedly, the Reform Act was published in the Orissa Extra ordinary Gazette dated 10-1-1996, but prior to that on 3-1-1996 it received the assent of the president of India as provided under that Article.

This point is disposed of accordingly.

Next we may advert to the point raised by Mr. Mishra that non-compliance of the provisions of Section 3 of the Electricity Act and Rules 11 to 20 of the Electricity Rules rendered the provisional licence invalid.

11. The provisional licence was granted by the State in exercise of its plenary power. That the State has got such power was also held by the apex Court in the case of Western M.P. Electric Power and Supply Company Ltd. Vs. State of U.P. and Another, where the Court held that the statute expressly reserved the right of the State to authorise another licensee to supply electrical energy in the same area to a consumer directly through the State Electricity Board.

In the case of The Mysore State Electricity Board Vs. Bangalore Woollen, Cotton and Silk Mills Ltd. and Others, dealing with the provisions of Section 3 and Section 28 of the Electricity Act and the provisions of the Supply Act, 1948 the Court held that under the above Act there are two classes of persons who could supply electric energy, one was a licensee and the other a sanction holder u/s 28 of the Electricity Act. According to the apex Court the 1948 Supply Act made some radical changes in the scheme and this was that the expression "licence" was given an extended meaning to take within it not merely a licensee defined in the Electricity Act but also a person who had obtained sanction u/s 28 of the Electricity Act and that the expression did not however include the State Electricity Board which was constituted for the first time under the 1948 Supply Act. In para 37 of the judgment the majority view expressed was that, though the Board carried on the work of a licensee for the purpose of Electricity Act, it was not a licensee in the true sense of the word and duties and obligation of a licensee in the matter of charges fixing of electrical energy are not applicable to the Board. That apart, Section 26, Sub-Section (6) of the Supply Act has been

amended by Amending Act 115 of 1976 dated 8-10-1 976 here the Board has been specifically excluded from the definition of the licensee.

12. If the same analogy is applied because of the reasoning given by the Apex Court, the Gridco stands on the same footing as that of the Board and it could not be considered to be a licensee in the true sense of the term as discussed in the foregoing paragraphs and, therefore, it was not obligatory on the part of the Gridco to comply with the provisions of Rules 11 to 20 for obtaining a licence. That apart, I may point out that these provisions are certainly meant for persons who intended to apply for licence to the State. But these provisions are not meant to be applicable to one to whom the State in exercise of its plenary power appoints as a licensee and issues a licence to carry on work of supply of electricity. We therefore hold, non compliance of the Rules 11 to 20 of the Electricity Rules did not invalidate the licence.

13. Next, Mr. Mishra, put great stress on the absence of power with the State Government for granting licence u/s 14(4) of the Reforms Act stating that when under on Annexure 1 the Reform Act was to be effective from 1 -4-1996, the State Government was not competent to issue notification dated 30-6-1996 thereby granting licence to the Gridco.

Mr. Panigrahi, learned counsel for the Gridco as well as Mr. Mohapatra, learned counsel for the State both have drawn the attention of this Court to Section 23 of the Orissa General Clauses Act and submitted that power of the State Government to appoint Gridco as claimed was saved by the provisions of Section 23 of the said Act. To this, Mr. Mishra submitted that the provisions of Section 23 would not be applicable since the language employed therein brings within their fold only orders and not any action for granting the Gridco the provisional licence. I am unable to accept this contention of Mr. Mishra, the reason being as follows :

Language of Section 23 of the General Clauses Act is in pan materia with the provisions of Section 22 of the Central General Clauses Act. In this regard we may appropriately refer two decisions, one in the case of Amarendra Nath Roy Chowdhury Vs. Bikash Chandra Ghose and Another, and the other in the case of Jiyajirao Cotton Mills Ltd. Vs. Employees State Insurance Corporation, since the provisions of the respective sections of the General Clauses Act of the States are found to be same in terms of the language employed in Section 23 of the Orissa General Clauses Act and both these cases deal with the action taken by the State Government which were saved because of the provisions of the Act. The same is the situation with us in the case at hand.

In the case of Amarendra Nath Roy Chowdhury Vs. Bikash Chandra Ghose and Another, the West Bengal State Government's City Civil Courts Act was notified to come into force with effect from 23-2-1957 whereas the then Additional Chief Resident Magistrate, Calcutta was appointed on 20-2-1957 as the Chief Judge, City Civil Court u/s 4 of the Act. The Court held that such an appointment was

competent in view of Section 23 of the Bengal General Clauses Act. Same situation arose in the case of Jiyajirao (supra). In that case certain sections of the Employees State Insurance Act enacted were notified on 22-1-1995 but were to come into force from 23-1-1955. By another notification published in the same issue of the Gazette the State Government in exercise of its power u/s 74 of the Act appointed the Labour Judges as the Employees Insurance Courts. The said appointments were done prior to the date on which the Act came into force. The Court held that such an appointment was saved by virtue of Section 22 of the Madhya Pradesh General Clauses Act, and therefore, was deemed to be valid but the appointment made in exercise of power would take effect only from 23-1-1995 when the Act came into force. The same being the position we are unable to accept the contention of Mr. Mishra in this regard.

14, Once we have held that the notification under Annexure 1 is a valid one, the Gridco functioning like that of a licensee as per the terms and conditions attached to the licence, cannot be challenged. There is no doubt that under the provisions of the Electricity Act as well as the Supply Act the State appointed the Orissa State Electricity Board as a licensee though as I have earlier held that it was not a licensee in the true sense of the term. However, since the Board at the relevant time was the competent agency under the State to look to the supply, distribution and transaction electric power, the provision of the two Central Acts are clear that the Board had to comply with the policy decision of the State Government whenever such question arose. The same way Section 12 of the Reform Act authorises the State Government to issue in general "policy directives" which is also to be followed by the Gridco to implement such policy u/s 13 of the Act. Therefore,, there can be no doubt that the Gridco under the terms of the policy was competent to fix the tariff but the same should be subject to the direction of the State Government in that regard. Therefore, we cannot agree with the contention of Mr. Mishra that the clauses 9(1) and 10(1) of the terms and conditions of the licence under Annexure 1/A should be struck down because of absence of authority.

15. The same way we also cannot accept the contention of Mr. Mishra that as on the date of the notification dated 1-4-1996 the Orissa State Electricity Board was still in existence and that the State had no power to delegate the power of enhancing tariff which could be done only u/s 49 and 49(2)(a) of the Supply Act.

Mr. Mishra put a lot of stress on the point that until 12-6-1996 i.e. the Constitution of the Regulatory Commission the Board existed for all purposes under the two Central Acts read with Section 23, Sub-Section (9) as well as Section 57(3)(v) of the Reform Act and therefore granting of licence to the Gridco and the latter's authority to revise tariff on the higher side was incompetent.

Mr. Panigrahi, learned counsel for the Gridco in meeting the above submission of Mr. Mishra submitted that provisions of Section 57(3)(v) of the Reform Act clearly prescribe that the provisions of All India Statute shall be deemed to have been

repealed and cannot be brought into force for challenging the notification under Annexure 1 series.

Mr. Mishra contended that such a submission is "factually incorrect" as well as "legally untenable" the argument being that such non-obstante Clause in Section 14(4) of the Reforms Act does not "cover" or "preclude" the inflexibility of Section 57(3) and according to Mr. Mishra, provisions mentioned in the said Sub-Clause shall be deemed to have been excluded only on establishment of the Regulatory Commission and not before that and certainly not on coming into force of the Reforms Act.

16. We may point out that so far as the provisional licence under the Reform Act is concerned, Sections 49 and 49(2)(a) of the Supply Act could not have been made applicable because I have already held that the provisions of the Reform Act to the extent of such inconsistency override the provisions of the Central Act and secondly, though u/s 49(2)(a) as inserted by the Orissa Amendment the power to revise the tariff vested with the Board, the Board did not | exist after the effective date.

We may further point out that Sub-Section (3) of Section 23 of the Reform Act prescribes that such of the right and the power exercised by the Board under the Electricity Supply Act as well as the right or power which the State Government may by notification specify shall be exercisable by the Gridco for the purpose of discharging the functions and duties with which it is charged. Sub-Section (9) of that Section prescribes that the Board shall cease to be charged, and shall not perform the functions and duties specified in Sub-Section (3), with regard to the "transfers made on or after the effective date". Needless to point out that the effective date in the present context is the date i.e. on which the transfer scheme was notified by the State Government. This is all the more clear from the opening words employed in Section 23 that the effective date is to be the date on which the transfer scheme is published. The transfer scheme was notified on the 1st April, 1996. Therefore, I am unable to accept the contention of Mr. Mishra that the Board existed as on 1-4-1996 and therefore the State had no authority to grant provisional licence to the Gridco. .

17. In this connection we may point out that in the present writ petitions we are only concerned with the transitory power of the State Government to issue a provisional licence to the Gridco till the establishment of the Regulatory Commission and the Gridco's authority in revising the tariff. Section 57 deals with the effect of the Reforms Act on the Indian Electricity Act and the Supply Act. This Section is clear that subject to the exceptions prescribed u/s 58, the provisions of the Reforms Act notwithstanding the fact that the same are inconsistent or contrary to the provisions of both the Central Acts, shall prevail in the manner and to the extent provided in Sub-Section (3). Sub-Section (3) prescribes that the provisions of the Electricity Act and the Supply Act shall be applicable to the State after establishment of the Commission with modifications and reservation mentioned in those sub-sections. Therefore, I am unable to

accept the contention of Mr. Mishra that from the provisions of Section 57(3) of the Reform Act it is clear that the State Electricity Board still existed as on 1-4-1996 i.e. on the date of the notification of the scheme.

18. Next we may deal with Mr. Mishra's contention that the Gridco had no power to enhance the tariff under Annexures 3 and 4. For this, attention of the Court is drawn to Clauses 9.1 and 10.1 of Annexure J/A, 1/B and 1/C.

Annexure I/A as the heading shows is the "Provisional Orissa Transmission Licence, 1996". The licence consists of four parts, part I dealing with the terms of the licence, part II general conditions, part HI with technical condition and part IV relates to tariffs. Clause 3 of Part I deals with terms of the licence and Clause 3.1 of Part I for better appreciation is quoted as follows:--

"The State Government, in exercise of the powers conferred by Section 14(4) of the Act, hereby grants to the licensee a licence to transmit electricity in the area of transmission during the period specified in paragraph 3.2, subject to the conditions set out in parts II and III of this licence (hereinafter together referred to as the "Conditions")." Clause 3.2 lays down that the licence shall come into force on the 1 st day of April, 1996 and shall cease to be valid and effective on completion of either twelve months from the said date of enforcement, or on the date on which the decision of the Commission referred to in condition I is communicated to the licensee, whichever is earlier. There is no gainsaying of the fact that the licensee has to act in compliance with the conditions enumerated under part II of the licence. Under Clause 7.4 of the part II, the State Government retains its power to publish an Order authorising the licensee to exercise any power or authority which could be given to the licensee under the Indian Electricity Act, 1910 (Act 9 of 1910) and the Electricity (Supply) Act, 1948 (Act 54 of 1948), Part III of the licence is not relevant for our present discussion. Part IV deals with tariffs and Clause 10.1 is found to be in the following language :--

"10.1. The charges made by the licensee shall not exceed on average 117% of those limited under the interim tariffs issued by the State Government. 10.2. The authority granted in 10.1 expires with the expiration of this licence."

19. Mr. Mishra as well as learned counsel for other petitioners in the connected cases have made a scathing attack in submitting that the enhancement of the tariff though temporary is incompetent under the law and even assuming it is competent the Gridco increasing the tariff by 117% amounts to absolute non application of mind and arbitrary which has considerably affected the financial back-bone and economy of various industrial units in the Slate. In Order to show the gross disparity in the enhanced percentage of tariff, the petitioners have furnished a comparative chart. It is claimed under Item No. 5 "Medium Industries" and Item No. 6 "Small Scale Industries" that tariff increased by 37.1 % and 27.6% respectively and charges with regard to the commercial establishment is claimed to have been increased by 61.1 %.

20. The petitioner in para 16(C) of the writ petition (in OJC 8449/96) took the stand that even assuming the Gridco was competent to raise the tariff by 17% yet in applying the said rate to various categories of industries, the enhancement in some cases become 37%, 27%, 61 % and 100% and therefore the same is the result of non application of mind and arbitrary action.

21. In reply to this averment of grossly disproportionate enhancement of tariff, opposite party, Nos. 2 and 4 in their counter affidavit in para 19 explained the position by stating that the tariff was enhanced in respect of categories of consumers liable for two part tariffs such as demand charges and energy charges. It further clarified by stating that the demand charges is one which is meant for recovery of fixed cost like depreciation cost, O & M cost and elements in the cost of power purchased. Further, it is stated that in the tariff fixed earlier by OSEB notification dated 28-10-1995 the demand charges had covered only a part of fixed cost whereas, in the impugned tariff notification dated 13-5-1996 the demand charges have been fixed by the Gridco taking into consideration the increase in the fixed cost as well as the ratio of realisation of the fixed cost.

In reply to the claim that in some cases it has increased by 31.1 % and 61.1% the opposite party in para 11 stated that the same was not correct though admitted in that para that for medium industries the tariff was revised and increased by 29.73% only and for commercial consumption with 100 units per month the increase is by 22.22% only. It further explained that tariff has been revised to mitigate the cost and expenditure for purchase of power and supply to consumer and therefore there is no arbitrary action in increasing the tariff. It is claimed that the rate of tariff in other States like Karnataka, Haryana and Maharashtra is much more than the tariff rate in Orissa.

22. The relationship between the Gridco and the consumer flows from a contract. The Gridco undertakes to supply energy against the price to be paid. There is a contractual obligation. Therefore, the Gridco as a supplier is free to enhance the tariff but it is always subject to the policy decision of the State Government. But we are concerned with only the interim tariff so increased which remained effective only from the period 21 -5-1996 i.e. the date when revised tariff came into force till one year i.e. up to 21-5-1997 which period is already over and the matter as per the provisions of the Reform Act is to be dealt with by the Regulatory Commission,

So ,far as enhancement of this tariff is concerned, it is admitted by the opposite parties that though the tariff has been increased by 17% in terms of licence issued by the State Government, yet as we have seen above the enhancement is not uniformly applied in respect of all categories of industries. As for example we may take the case of revision of pay of government servants which is taken up at intervals. Whenever there is increase of either pay or daily allowance or additional daily allowance by any percentage, the increase is uniform in respect of all categories of government servants. Therefore, if under the licence the State Government permitted the Gridco to enhance interim tariff by 17%, it is

apparent that it did not specifically permitted enhancement of the tariff by that percentage should at any time exceed the percentage in respect of any particular category of industries. In the absence of a specific direction that enhancement of the tariff was permissible beyond 17% in respect of any particular category of consumer, it was not competent for the Gridco to enhance the tariff in any case beyond the percentage of 17% in case of any particular category of industries. Secondly, while delegating the power to enhance the tariff under the licence the State Government did not prescribe any guideline for raising the tariff particularly when it is the case of both the Gridco and the State Government that provisions of the Electricity (Supply) Act could not have been made applicable after coming into force of the Reform Act. Therefore, the power to enhance the tariff amounts to excessive delegation and the action is liable to be struck down.

We are of the view that the explanation offered by the opposite parties that in some cases it has to be more than 17% does not appeal to us particularly when the language of the clauses authorising such power of enhancement of the tariff does not spell out the same.

23. Mr. Misra has drawn our attention to the Bills issued and the various terms and conditions of the IPRs for availing the benefit of exemption of the electricity duty. Various decisions have been rendered by the apex Court as well as by this Court as to the applicability of the benefit under the IPRs. Therefore, I have felt it idle to deal with that matter here. The matter is left open for decision if occasion arises.

24. In the result, the notification dated 13-5-1996 (Annexure-2) relating to the tariff cannot be sustained and consequently, the demand under the respective Bills of various petitioners are quashed. The Regulatory Commission is hereby directed to redetermine the tariff as per law. Any excess amount be adjusted towards future demand. No costs.

P.K. Misra, J.

25. :-- I agree with the ultimate conclusion that the notification increasing the charges cannot be sustained, as the charges made by the Gridco have exceeded on average 117 per cent of those permitted under the interim tariffs issued by the State Government and as such, the notification is in contravention of Clause 10.1 of the Provisional Licence. However, I would like to make some observations relating to the authority of the Gridco to enhance the tariff on the basis of the Provisional Licence.

26. It has been contended on behalf of the petitioners that the Gridco had no authority to enhance the tariff without following the relevant provisions contained in the Electricity (Supply) Act, 1948, or in Chapter-VIII of the Orissa Electricity Reform Act, 1995. The learned counsel for the Gridco has submitted that the authority to enhance the tariff on the basis of the Provisional Licence flows from the Provisional Licence itself and there was no necessity to follow the procedure contemplated in Sections 57, 57A of the Electricity (Supply) Act, 1948 and

Schedule-VI of the said Act. It was further contended that since Regulatory Commission, as contemplated in Section 3 of the Orissa Electricity Reforms Act had not been constituted, the provisions contained in Chapter-VIII of the said Act were inapplicable at that stage. Section 14 (4) of the Orissa Electricity Reforms Act reads as follows :--

"14. Licensing.

* * *

(4) Notwithstanding anything contained in the other provisions of this Act, until the establishment of the Commission in terms of Section 3, the State Government shall, for a period of six months from the date this Act comes into force, have the power to grant provisional licences under this Section having a duration not exceeding twelve months to any person or persons to engage in the State in the business of transmission or supply of electricity, on such terms and conditions as the State Government may determine consistent with the provisions of this Act, subject however to the following conditions, namely :--

(a) upon the establishment of the Commission, each of the provisional licences so granted shall be placed before the Commission and shall be deemed to constitute an application for grant of a licence by the Commission under the provisions of this Act, and

(b) each provisional licence granted under this section shall cease to be valid and effective on the date on which the decision of the Commission on the application is communicated." A perusal of the aforesaid provisions indicates that as an interim measure, the State Government has the power to grant provisional licence u/s 14, and such provisional licence can have a duration not exceeding 12 months and such licence can be issued to any person to engage in the State in the business of transmission or supply of electricity. Since this power has been conferred notwithstanding any other provisions contained in the Act, it is reasonable to hold that in granting such provisional Licence, the State may not be required to follow the provisions relating to grant of licence contained in the Orissa Electricity Reforms Act. Similarly, since such provision is in derogation of the relevant provisions contained in the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948, it is also reasonable to conclude that while granting such provisional licence, the State Government is not required to follow the procedure contemplated in those Acts. Since such Provisional Licence is to be of a limited duration, it is apparent that such power has been reserved by the State. To grant provisional licence is one thing, but to fix the terms and conditions of the licence is a different matter particularly in view of the expression contained in Section 14(4) to the following effect:--

".....on such terms and conditions as the State Government may determine consistent with the provisions of this Act.

The underlined portion clearly indicates that the intention of the Legislature that

the terms and conditions incorporated in the Provisional Licence must be consistent with the provisions of the Orissa Electricity Reforms Act. Chapter-VIII of the Orissa Electricity Reforms Act contemplates the principle relating to fixation of the tariffs. The terms and conditions of the Provisional Licence cannot be interpreted in a manner to contradict the provisions contained in the Orissa Electricity Reforms Act including Chapter-VIII thereof. Therefore, the contention of the Gridco that it had absolute authority to enhance the tariffs subject to the limits provided in Clause 10.1 of the Provisional Licence and need not follow any of the provisions contained either in the Electricity (supply) Act, 1948 or in chapter-VIII of the Orissa Electricity Reforms Act, cannot be accepted on the face of it. The intention in Clause 10.1 is only to fix the outer limit of the enhancement that can be made. Such clause nowhere lays down that the Provisional Licensee is not required to follow any other relevant provisions of the Act, nor any such provision could have been made as such term and condition would have violated the express provision in Section 14(4) of the Orissa Electricity Reforms Act.

27. It has been contended that since the question of change of tariffs has to be considered under Chapter-VIII only after the Regulatory Commission is established and since it would have taken sometime to establish the Regulatory Commission, Specific power had been conferred on the provisional Licensee under Clause 10.1 to increase the tariffs. It has been contended that since the outer limit had been prescribed, it should be taken that sufficient guidelines have been prescribed. As already observed, the outer limit had been prescribed to fix the tariffs, but by itself it cannot be said that merely because the outer limit had been prescribed, the Legislature wanted to give a go-by to the other provisions of the Act. Moreover, since the Provisional Licence was considered to be of a temporary measure, there could not have been any justification for conferring such extraordinary power on the Provisional Licensee to change the tariffs without following any procedure at all. Moreover, if Clause 10.1 is considered to be containing the terms and conditions empowering the Provisional Licensee to change the tariffs without following any procedure, such terms and conditions cannot be taken to be "consistent with the provisions of this Act". In the present case, admittedly, the Gridco had neither followed the provisions in Sections 57 and 57-A and the Sixth Schedule of the Electricity (Supply) Act, 1948 nor the provisions contained in Chapter-VIII of the Orissa Electricity Reforms Act. In such view of the matter, it may not be necessary to decide as to whether the provisions contained in the Electricity (Supply) Act and the Sixth Schedule thereof were still in force or not, as in any of the matter, the changes effected without following any procedure must be taken to be illegal and void.

28. Thus in any view of the matter, the notification relating to tariffs cannot be sustained. The excess collection made pursuant to the notification should be adjusted against the bills to be issued in future.