

(1993) 03 AHC CK 0024

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petns. No's. 19967 of 1990 and 16582, 32444 of 1990, 2425, 5163 of 1991 etc. etc.

Eastern U.P. Chamber of Commerce and Industry, Allahabad
and others

APPELLANT

Vs

U.P. State Electricity Board

RESPONDENT

Date of Decision : 01-03-1993

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226
Electricity (Supply) Act, 1948 — Section 12A, 18, 49, 49(2), 49(3)
Income Tax Act, 1961 — Section 37

Citation : AIR 1993 All 309

Hon'ble Judges : V.N. Khare, J; M.P. Kenia, J

Bench : Division Bench

Advocate : Mr. S.P. Gupta and Mr. Vinod Sinha, for the Appellant; Mr. S.C. Budhwar and Mr. Sudhir Agarwal, for the Respondent

Final Decision : Partly Allowed

Judgement

Kenia, J.—Industrial consumers of electricity falling within the category of "heavy and large power consumers" and "small and medium power consumers" receiving supply of electricity from the U. P. State Electricity Board (hereinafter, for the sake of convenience, referred to as "the Board"), have approached this Court under Article 226 of the Constitution of India to challenge the new tariffs enforced by the Board with effect from the 17th of October, 1989 through notification dated the 21st of April, 1990, bearing number 1287-HC/SEB/V/1974-1204 C/90.

2. The dispute in these petitions is confined to the rate schedule for the categories LMV-6, HV-1 and MV-2.

3. The Board is a statutory body constituted u/s 5 of the Electricity (Supply) Act, 1948 (hereinafter, for the sake of brevity, referred to as "the Act". The Act has been enacted to provide for regularisation of the production and supply of

electricity and generally for taking measures conducive to electrical development. u/s 18 of the Act the Board stands charged, among other things, with the general duty of having to arrange for the supply of electricity that may be required within the State and for the transmission and distribution thereof in the most efficient and economical manner with particular reference to the areas which are not, for the time being, supplied or adequately supplied with electricity. The provisions of Section 49 empower the Board to supply electricity upon such terms and conditions as the Board thinks fit and for the purpose of such supply frame uniform tariffs. The Board came into existence in the year 1959 and since its first planned rate schedule placing various consumers in their respective categories with different rates for each category, the rate schedule has been revised upwards at regular intervals and occasionally the categories of consumers have also undergone change. For the purpose of the present petitions it is convenient to, briefly, summarise the position obtaining from 1982 up to date with regard to the fixation of tariffs.

4. By a notification dated the 29th of October, 1982, consumers were categorised into twenty categories. This categorisation was revised vide notification dated the 28th of January, 1986 with effect from 1st of February, 1986, reducing the total number of categories to twelve, which have now continued up to date. The said categories are as follows :

LMV-1

(light, fan and domestic power)

LMV-2

(Commercial light, fan and power as also mix load above 5 KWs. which was earlier classified as LMV-10)

LMV-3

(Public pumps)

LMV-4

(public lamps in Kanpur and Lucknow Nagarmahapali-k as and Cantonment Board, Kanpur as also Janta service connection scheme which was also earlier classified LMV-9)

LMV-5

(small power for private tube-wells/ pumping sets for irrigation purpose)

LMV-6

(small and medium power)

LMV-7

(Board's officers and employees)

LMV-8

(State tube-wells, pump canal and lift irrigation)

LMV-9

(temporary supply)

MV-1

(large power for arc induction furnishing, rolling/re-rolling mills and mini-steelplants)

HV-2

(heavy power) and

HV-3A

(railway traction)

The rates of energy prescribed for LM V-6 and HV-1 and HV-2 categories, which are relevant to the present petitions, as they were in force since 1986 and as modified now are as follows :

Category

Tariff under notification dt. 28-1-1986

Tariff under notification dt. 21-4-1990

LMV-6 small and medium power

1. for load up to 25BHP

1. for load up to 25BHP

a. fixed charge Rs. 15/- per BHP

a. fixed charge Rs. 20/- per BHP

b. energy charge 65 per paise unit AC

b. energy charge 90 per paise unit AC

120 per paise unit DC

2. above 25BHP up to 100BHP 90 paise per unit DC

2. above 25BHP up to 100BHP

a. fixed charges Rs. 30/-per BHP

i. fixed charges Rs.20/-per BHP

b. energy charges 98 paise per unit AC

ii. energy charges 75 paise per unit AC

128 paise per unit DC

100 paise per unit DC

HV-1 (large power Reclassified for arc/induction furnaces rolling/ re-rolling mills and mini steel plants in 1986 and onwards)

95 paise per unit

130 paise per unit

A-for non-continuous

HV-2(heavy power) (including large power also since 1986 tariff)

Demand 60/ per KVA

80/ per KVA

Energy 60/- paise per unit

80/- paise per unit

Demand 66/- per KVA

B-Continuous 95/ per KVA 95/ per KVA

Energy 70/- paise per unit

98/- paise per unit.

5. It is common ground that in respect of agricultural consumers falling in LMV-5 category electricity is being supplied at concessional rates, the same being 22.50 per BHP per month as per tariff fixed under notification dated 28th of February, 1986 (in fact this was continuing since 1982) which has now been revised upward to Rs. 30/- per BHP vide the current tariff.

6. It may be mentioned that the tariffs imposed under the notification dated the 28th of January, 1986, which came into effect from 1st of February, 1986, were challenged in a group of writ petitions, which came up for consideration before the Lucknow Bench of this Court, the leading case being the case of M/s. Modi Steels (unit of Modi Industries) Ltd. v. U. P. State Electricity Board and other, being Civil Miscellaneous Writ Petition No. 7058 of 1986, decided on the 27th of October, 1989. In the said petitions a comprehensive challenge was offered to the framing of new tariffs by the Board. The challenge included a challenge under Articles 19 and 14 of the Constitution of India and various arguments, relating to Sections 49 and 59 of the Act, as also challenge to the levy of demand charge or fixed charge, fuel surcharge etc. were considered and negatived by the Bench and all the writ petitions were dismissed with costs.

7. Mr. S. P. Gupta, the learned counsel for the petitioners, assails the latest fixation of tariffs on three main grounds :

(1) that the supply of electricity to agriculturists and people inhabiting in hill areas at a price which is drastically lower than the cost price itself is ultra vires the Electricity (Supply) Act, 1948;

(2) that assuming that the U. P. State Electricity Board can sell electricity at a loss to any section of consumers such loss cannot be taken into account and recuperated by a higher tariff fixed for the industrialists; and

(3) that assuming it is permissible that a class be carved out consisting of agriculturists and people inhabiting hill areas for supply of electricity at a concession as compared to industrialists, the concession as provided is arbitrary and against the public interest and, therefore, violative of Article 14 of the Constitution of India.

8. Before examining the arguments advanced it would be appropriate at this stage to refer to and where necessary to quote the relevant provisions of the Electricity (Supply) Act, 1948, with reference to which these arguments will have to be considered. Section 5 provides for the constitution and composition of State Electricity Boards, Section 18 lays down the general duties of the Board and may usefully be quoted :

18. General duties of the Board :

Subject to the provisions of this Act, the Board shall be charged with the following general duties, namely,

(a) to arrange, in co-ordination with the Generating Company or Generating Companies, if any, operating in the State for the Supply of electricity that may be required within the State and for the transmission and distribution of the same in the most efficient and economical manner with particular reference to those areas which are not for the time being supplied or adequately supplied with electricity :

(b) to supply electricity as soon as practicable to a licensee or other person requiring such supply if the Board is competent under this Act so to do;

(c) to exercise such control in relation to the generation, distribution and utilisation of electricity within the State as is provided for by or under this Act :

(d) to collect data on this demand for, and the use of, electricity and to formulate perspective plans in co-ordination with the Generating Company or Generating Companies, if any, operating in the State, for the generation, transmission and supply of electricity within the State :

(e) to prepare and carry out schemes for transmission, distribution and generally for promoting the use of electricity within the State; and

(f) to operate the generating stations under its control in co-ordination with the Generating Company or Generating Companies, if any, operating in the State and with the Government or any other Board or agency having control over a power

system.

9. Section 49 contains provisions for the sale of electricity by the Board to persons other than licensees and the same runs as follows :

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

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

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

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

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

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

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

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

10. Section 59 sets out the general principles for Board's finance, which are as follows :

(1) The Board shall, after taking credit for any subvention from the State Government u/s 63, carry on its operations under this Act and adjust its tariffs so as to ensure that the total revenues in any year of account shall, after meeting all expenses properly chargeable to revenues, including operating, maintenance and management expenses, taxes (if any) on income and profits depreciation and interest payable on all debentures, bonds and loans, leave such surplus as is not less than three per cent, or such higher percentage, as the State Government may, by notification in the Official Gazette, specify in this behalf, of the value of the fixed assets of the Board in service at the beginning of such year.

Explanation.-- For the purposes of this sub-section, value of the fixed assets of the Board in service at the beginning of the year means the original cost of such fixed assets as reduced by the aggregate of the cumulative depreciation in

respect of such assets calculated in accordance with the provisions of this Act and consumers" contributions for service line;

(2) In specifying any higher percentage under sub-section (1), the State Government shall have due regard to the availability of amounts accrued by way of depreciation and the liability for loan amortisation and leave-

(a) a reasonable sum to contribute towards the cost of capital works; and

(b) where in respect of the Board, a notification has been issued under sub-section (1) of Section 12A, a reasonable sum by way of return on the capital provided by the State Government under sub-section (3) of that section and the amount of the loan (if any) converted by the State Government into capital under sub-section (1) of Section 66A.

11. Section 67 indicates the priorities of liabilities of the Board profits how the surplus referred to in Section 59 shall be distributed by the Board to the extent available in a particular year. Section 67A provides that interest on loans advanced by State Government may be paid only after certain other expenses indicated in the same section. Section 78 provides for the power of the State Government to make rules to give effect to the provisions of the Act and Section 78A provides as follows :

78A. Directions by the State Government-

(1) In the discharge of its functions, the Board shall be guided by such directions on questions of policy as may be given to it by the State Government.

(2) If any dispute arises between the Board and the State Government to whether a question is or is not a question of policy, it shall be referred to the Authority whose decision thereon shall be final.

12. Before proceeding to consider the submissions made before us it will not be out of place to take a quick look at the limits laid down by Court within which alone they will act in the matter of examination of price fixation. In *Rohtas Industries Ltd. and Others Vs. Chairman, Bihar State Electricity Board and Others*, , Justice Balakrishna Eradi, speaking for the Court, stated as follows (at page 663 of AIR) :

"As pointed out by this Court in *Prag Ice and Oil Mills and Another Vs. Union of India (UOI)*, in the ultimate analysis, the mechanics of price fixation is necessarily to be left to the judgment of the executive and unless it is patent that there is hostile discrimination against a class of persons, the processual basis of price fixation is to be accepted in the generality of cases as valid."

13. In the very next paragraph in the said judgment, namely, paragraph 18 the Court went on to observe :

"Some of the appellants have endeavoured to persuade us to go into the minute details of the mechanism of the tariff fixation effected by the Board in an

endeavour to demonstrate in relation thereto that a factor here or a factor there which ought to have been taken into account has been ignored. We have declined to go into those factors which are really in the nature of matters of price fixation policy and the court will be exceeding its jurisdiction if it is to embark upon a scrutiny of matters of this kind which are essentially in the domain of the executive to determine, subject, of course, to the constitutional limitations."

14. In Kerala State Electricity Board Vs. S.N. Govinda Prabhu and Bros. and Others, Justice O. Chinriappa Reddy, speaking for the Court, pointed out that the Electricity Board is a public utility monopoly undertaking which may not be driven by pure profit motive not that profit is to be shunned but that service and not profit should inform its actions. In paragraph 10 of its judgment the Court observed :

"The Board may not allow its character as a public utility undertaking to be changed into that of a profit motivated private trading or manufacturing house. Neither the tariffs nor the resulting surplus may reach such heights as to lead to the inevitable conclusion that the Board has shed its public utility character. When that happens the Court may strike down the revision of tariffs as plainly arbitrary. But not until then. Not, merely because a surplus has been generated, a surplus which can by no means be said to be extravagant. The Court will then refrain from touching the tariffs. After all, as has been said by this Court often enough "price fixation" is neither the forte nor the function of the Court."

14A. In paragraph 16 of its judgment the Court went on to hold :

We are not delving into more details as we are satisfied that it is not within our province to examine the price structure in minute detail if we are satisfied that the revision of tariff is not arbitrary and is not the result of the application of any wrong principle.

The same principles and approach are applicable while examining a revision in the tariffs.

15. It may also be mentioned that most if not all, of the points, that have been argued before us are covered, indeed concluded, by judgments as we shall have occasion to point out as we go along. To cite only two examples, In the case of M/s. Hindustan Zinc Ltd. etc. Vs. Andhra Pradesh State Electricity Board and others, after taking note of the fact that the Court had in Govind Prabhu's case held that prescribing different classes of consumers, such as industrial, commercial, agricultural and domestic, appear to be reasonable and far from arbitrary and is based on intelligent and intelligible differentia and in the said case the judgment of the Kerala High Court upholding the challenge to the validity of the upward revision of tariffs was set aside; the Court went on to hold that the HT consumers, including the power intensive consumers are known power guzzlers and in power intensive industries, electricity is really a raw material. This category of consumers, therefore, forms a distinct class separate from other consumers like LT consumers who are much smaller consumers. There is also a

rational nexus of this classification with the object sought to be achieved. In Govind Prabhu's case it was specifically argued by counsel that it was not open to the Board to give favourable treatment to low tension domestic and agricultural consumers at the cost of the rest of the consumers and the Supreme Court rejected the argument pointing out that Section 49(3) expressly reserves the power if it considers it necessary or appropriate to fix different tariffs to supply electricity to any person having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and other relevant factors.

16. The first argument advanced on behalf of the petitioners that the supply of electricity to agriculturists and people inhabiting hill and sparsely developed areas at a price which is lower than the cost price itself is ultra vires the Electricity (Supply) Act, 1948, is developed in three parts. Firstly, Mr. Gupta submitted that a reference to the Preamble indicates that this is an Act to provide... for taking measures conducive to electrical development. Mr. Gupta argued that the use of the word "development" indicates that selling of electricity at a loss to any section of consumers is not permissible in so far as selling at a loss is directly opposed to "development". It seems to us that this argument proceeds on an interpretation of the word development which is not in keeping with the interpretation, which appears to us proper and relevant in the context of the provisions of this Act. In the argument the word development is sought to be used and interpreted as it is generally done when speaking of development of a business where it may be used to mean to expand the business so as to increase the profits accruing from a business. Here the central idea is the profits which may accrue from a business. It seems to us that this is not the sense in which the word electrical development has been used, be it in the Preamble or in various other provisions of this Act. The word "electrical development" is here used in the sense illustrated by subsections (a) and (e) of Section 18 which sets out that the Board shall be charged with the duties, inter alia, to arrange for the supply of electricity that may be required within the State and for the transmission and distribution of the same in the most efficient and economical manner with particular reference to those areas which are not for the time being supplied or adequately supplied with electricity and to prepare and carry out scheme for transmission, distribution and generally for promoting the use of electricity within the State, Similarly, Section 49 sub-section (2) clause (b) refers to the coordinated development of the supply and distribution of electricity within the State in the most efficient and economical manner, with particular reference to such development in areas not for the time being served or adequately served by the licensee, as one of the criteria to be taken into consideration by the Board in fixing uniform tariffs. It seems to us that the electrical development envisaged under the Act has reference to promoting the use of electricity within the State and ensuring that it reaches each and every nook and corner of the State including areas which are not supplied adequately with electricity or not at all with electricity and this development has to be so co-ordinated that the supply

and distribution of electricity within the State is carried out in the most efficient and economical manner. None of the provisions of the Act whether specifically or even by reasonable implication prohibits the supply of electricity at rates lower than the cost of production thereof. We, therefore, have no hesitation in rejecting this argument.

17. The second part of the argument proceeds on the wording of Section 49 of the Act. Mr. Gupta pointed out that Section 49 begins with the words "subject to the provisions of this Act" and is, therefore, subject to Section 59 of the Act. Section 59, which sets out the general principles of the Board's finance provides, inter alia, that the Board shall after taking credit for any subvention from the State Government u/s 63 carry on its operation under this Act "and adjust its operation so as to ensure that the total revenues in any year of account shall, after meeting all expenses properly chargeable to revenues, including operating, maintenance and management expenses, taxes (if any) income and profits depreciation and interest payable on all debentures, bonds and loans leave such surplus as is not less than three per cent, or such higher percentage, as the State Government may, by notification in the Official Gazette, specify in this behalf, of the value of the fixed assets of the Board in service at the beginning of such year. Mr. Gupta argued that since under the provisions of Section 59 the State has to ensure a surplus which is not less than three per cent., it is not permissible while fixing the tariff u/s 49 for any class of user or consumer of electricity to fix tariff in any manner other than that which results in a surplus which is not less than three per cent. A look at the provisions of Section 59 makes it quite clear that the recommended adjustment of tariff is to be in such a way as to ensure that "the total revenues" in any year of account leaves such surplus as is not less than three per cent. etc.

18. Section 59 nowhere requires that the Board must so fix its tariffs with regard to various classifications that the revenue qua every different classification in any year of account leaves a surplus. Indeed, there are two factors which the Board is required to have regard to while fixing uniform tariffs and they are : (i) Co-ordinated development of supply and distribution of electricity within the State in the most efficient and economical manner, with particular reference to such development in area not for the time being served or adequately served by licensees; (ii) the extension and cheapening of supply of electricity to sparsely developed area. As pointed out by the Andhra Pradesh High Court in *Andhra Pradesh State Electricity Board Vidyut Soudha and others Vs. The Gowthami Solvent Oils and another*, .

"Tariffs must bear a reasonable relation to the costs of supply. But it would be incorrect to state that tariffs prescribed for each and every category of consumers should be tested on the said basis. Once it is agreed that the Board has the power to classify consumers into various categories having regard to the factors mentioned in sub-section (2) of S. 49, it follows therefrom that in some cases the tariffs may be lower than the cost of supply. Section 18 casts a duty

upon the Board to provide supply to "areas which are not for the time being supplied or adequately supplied with electricity". Similarly, Section 49(2) empowers the Board to take into consideration the development of areas not for the time being served, or adequately served. Now, it is indisputable that the costs of the supply to undeveloped or sparsely developed areas is substantially higher than the costs of supply to developed areas and the Board has to incur a substantial cost in laying lines, establishing power stations and transformers, whereas the costs of supply to industrially developed areas or to industries situated around major cities may be far less. Indeed Section 49(2) empowers the Board to take into consideration the "extension and cheapening of supplies of electricity to sparsely developed areas". This cannot be done if it is insisted that the tariffs should never go below the cost of supply. What is to be noted is that the Board is not a mere commercial, or business concern, it is a statutory public corporation with a social commitment, and under an obligation to promote public good and nation's welfare. All this may call for supply of electricity to some at a rate lower than the cost of supply, and to others at a rate higher than the cost of supply. Since the Board is under an obligation to so conduct its affairs as to yield a minimum statutory surplus of 3% it is obvious in the above situation that some categories of consumers have to pay more than the others. It would not be correct to say, in such a situation, that the categories paying higher tariffs are subsidizing the other categories."

19. Finally, Mr. Gupta argued that Section 49(2) permits classification only for uniformity and not for giving any concession. Further illustrating his arguments by reference to sub-section (4) of Section 49, which provides that in fixing the tariffs and terms and conditions for the supply of electricity the Board shall not show undue preference to any person, Mr. Gupta argued that sub-section (4) of Section 49 controls sub-sections (1) and (2) as well. Mr. Gupta cited the decision of the Supreme Court in *Delhi Cloth and General Mills Co. Ltd. and Another Vs. Rajasthan State Electricity Board and Another*, and with particular reference to the observations of the Court in paragraph 25 of the judgment that it would have been manifestly unjust and discriminatory that one consumer should benefit at the cost of other consumers or general tax-payers. Mr. Gupta also placed reliance on the case of the *Indian Aluminium Company Vs. Kerala State Electricity Board*, . This case, if anything, contains observations which are contrary to the main argument put forward by Mr. Gupta that the supply of electricity to agriculturists and hill area at price which is lower than the cost price is ultra vires the provisions of the Act. In paragraph 19 of its judgment the Court, inter alia, observed :

"If u/s 59 charges have to be adjusted for the purpose of avoiding operational loss, what is the basis on which such adjustment could be made? Obviously, it cannot be on the basis of cost of production, distribution and supply of electricity to each consumer or class of consumers, for there may be certain consumers or class of consumers who may have to be supplied electricity on special tariff less than the cost having regard to the geographical area or the nature or purpose of

the supply. That means the adjustment of charges would have to be left to the discretion of the Board to be made in such manner as it thinks fit and proper in the light, of relevant circumstances and since cost.... is not the sole or only criterion for fixing tariff. The Board would be free not to enhance the charges in case of some consumers or classes. of consumers even though such charges may be less than the cost and in case of others enhance them even beyond the costs, provided, of course, the relevant factors are taken into account and there is no undue preference of one consumer as against another."

20. As one reviews the provisions of Section 49 one notices that the section begins by using the word the "tariffs" in plural when it provides that the Board may for the purpose of such supply frame uniform tariffs. It seems to us that Section 49 provides for framing classification of consumers for the purpose of fixing uniform tariffs. Thus, there can be different classification depending upon the nature of supply (high tension, low tension about 100 KVs and so on) or the purpose of supply (small power for private tube wells/ pumping sets, for irrigation purpose, large power for arc/ induction furnaces, rolling/re-rolling mills and mini steel plants, and so on) et cetera. Classifications may be many and uniformity is envisaged in each classification. Section 49(2) enumerates the factors which the Board shall have regard to while fixing the uniform tariffs. Section 49(3) is an exception to the uniformity envisaged by Section 49(1) and (2) and reserves with the Board the power, when thought necessary or expedient, to fix different tariffs for the supply of electricity having regard to the geographical position of any area, the nature of the supply and the purpose for which supply is required and any other relevant factors. Section 49(2) constitutes an injunction against the undue preference (while fixing different tariffs). Section 49(4) thus governs only 49(3) and not Section 49(1) and (2). In fact, this view has found favour with the Supreme Court as early as in the year 1968 when in paragraphs 26 and 27 of its judgments in Kalyan Borough Municipalities Case, AIR 1968 SC 991 the Court observed as follows at page 999 :

"In Section 49 as it now stands, the Legislature has empowered the Board to frame uniform tariffs and it has also indicated the factors to be taken into account in fixing uniform tariffs. These two aspects are contained in sub-sections (1) and (2). The Legislature has also made it clear in sub-section (3) that the Board, in the special circumstances mentioned therein, has got power to fix different tariffs for the supply of electricity. Subsection (4) directs the Board not to show undue preference to any person by fixing the tariffs and the terms and conditions for the supply of electricity. Though prima facie it would appear that sub-section (4) will govern sub-sections (1) to (3) in Section 49, the proper way to interpret sub-section (4) will be to read it along with sub-section (3).

"27. The question of the Board of showing undue preference to any person in fixing tariffs and terms and conditions for supply of electricity will not arise when the Board frames uniform tariffs under sub-sections (1) and (2). When the entire tariff is uniform for every consumer there is no question of any undue preference

as every customer will pay the same amount for the same benefit received by him. Sub-section (3) of Section 49 recognises the power of the Board to fix different tariffs for the supply of electricity and it is really here, if at all, that an occasion for any undue preference being shown, may arise. Therefore, in our opinion, sub-section (4) will control the action of the Board under subsection (3) of Section 49."

21. In paragraph 9 of the judgment of the Supreme Court in *Indian Aluminium Company v. Kerala State Electricity Board* (supra), Bhagwati, J. as he then was, speaking for the court, quoted with approval the aforesaid quoted passages from *Kalyan Borough Municipalities* case and in paragraph 18 further quoted, with approval, a passage from the same judgment indicating that cost is not the sole or only criterion for fixing the tariff. It is reasonably clear that cost is only one of the several factors for fixing tariff, other factors being indicated in Section 49(2) and (3). It may be mentioned that the *Delhi Cloth and General/Mills Company Ltd.* case, referred earlier, was a case of preference being given to only one consumer and not a class of consumers and has no application to the facts of the present case. We hold that there need not be uniformity among various classifications and there is nothing in the provisions of Section 49(2) or indeed in the provisions of the entire Section which prohibits the grant of concession. (Indeed clause (d) of sub-section (2) speaks of "the extension and cheapening of supply of electricity to sparsely developed areas). We hold that the supply of electricity to agriculturists and people living in the hill areas or in sparsely developed areas at a price which is lower than the cost price is not ultra vires the provisions of the Act.

22. The next argument of Mr. Gupta is that assuming that the Board can sell electricity at a price lower than the cost to any section of consumers, the loss cannot be taken into account and recuperated by the tariffs fixed for the industrialists. Dealing with this argument it will be appropriate at the outset to point out that the factual basis for this argument has not been made out and the mere fact that the Board sells electricity to one section of consumers at a lower rate than that which is levied from another section of the consumers does not necessarily justify the argument that the loss incurred in the earlier instance is sought to be recuperated by the tariff fixed in the latter instance, Indeed, Mr. Budhwar appearing on behalf of the Electricity Board has pointed out that apart from the fact that there is no evidence to show that any burden is actually being transferred to any other section of consumers, the losses incurred in supplying electricity at a lower price to certain class of consumers are losses which the Board continues to suffer and bear. In *Indian Aluminium Company's* case (supra) in a passage already quoted earlier the Supreme Court accepted the position that there may be certain consumers or class of consumers who may have to be supplied electricity by special tariff less than the cost having regard to the geographical position of the area or the nature or the purpose of the supply. The adjustment of charges has to be levied to the discretion of the Board to be made in such manner as the Board thinks fit and proper taking into consideration the

relevant circumstances and since cost is not the sole or only criterion for fixing the tariff the Board would be free to charge less than the cost in case of a certain class of consumers and enhance them in the case of other even beyond the cost provided the relevant factors are taken into account and there is no undue preference of one class of consumers as against the other. So far as the factors to be taken into consideration for fixing different tariffs are concerned, they are indicated in sub-section (3) of Section 49 apart from the factors indicated in sub-section (2) with regard to the fixing of uniform tariffs. In Govind Prabhu's case (supra) the Supreme Court has specifically indicated that it is perfectly permissible for the Board if it considers it necessary or expedient to fix different tariffs for the supply of electricity to another person having regard to the geographical position of any area, the nature of supply and purpose for which the supply is required and other relevant factors. In Kalyan Borough Municipalities case (supra) the Supreme Court observed :--

"We are not impressed with the contention of the respondent that by uniform tariff being levied by the board it is making more profits in compact areas than in sparse areas, not with the further contention that development of sparse areas is being done at the expense of compact areas."

23. In *M/s. Hindustan Zinc Limited v. Andhra Pradesh State Electricity Board* (supra) the Supreme Court went one step further and noted that :--

"The HT consumers including the power intensive consumers are known power guzzlers and in power intensive industries, electricity is really a raw-material. This category of consumers therefore, forms a distinct class separate from other consumers like LT consumers who are much smaller consumers. There is also a nexus of classification with the object sought to be achieved."

24. The extension and cheapening of supply of electricity of sparsely developed areas is specifically mentioned in sub-section (2) of Section 49.

25. Finally, Mr. Gupta argued that assuming that it is permissible that a class be carved out of agriculturists and people living in the hill areas for supply of electricity at a concessional rate as compared to industrialists, the concession that is provided is arbitrary, against the public interest and, therefore, violates Article 14 of the Constitution of India. This argument, if analysed, has three aspects. One, that the concession given to agriculturists and people inhabiting the hill areas is arbitrary, two, that it is against the public interest and three, that it violates Article 14 of the Constitution of India. An argument that a concession is given arbitrarily raises a vision of the same having been given depending on mere whim or fancy or caprice of the person giving concession without following any reasonable guidelines. However, when one examines the provisions of the Electricity Act and views the concession given against the background of the provisions one finds that this is not the case. Thus, one of the general duties with which the Board stand charged u/s 18 of the Act is, inter alia, the transmission and distribution of electricity in the most efficient and economical manner with

particular reference to those areas which are not for the time being supplied or adequately supplied with electricity. What is more, one of the factors that the Board is required u/s 49(2) to have regard to, while fixing uniform tariff is specifically the extension and cheapening of supply of electricity to sparsely developed areas. As stated earlier ensuring that the supply of electricity is made available also in areas where it is not for the time being supplied by reason of their remoteness of difficult terrain or by reason of the fact that the areas are sparsely developed, is definitely going to mean incurring of higher costs. At the same time people living in these areas are not likely to be able to afford the high rates which may be in keeping even with the cost incurred by ensuring that the supply of electricity reaches such areas which will be no reason for denying them the supply (and indeed to fix the rate at a higher level than what they can afford would in fact mean denying them electricity) and the Board which is not driven by pure profit motive and whose actions are informed by service will not hesitate to grant a concession to a class of people like people living in sparsely developed areas or for that matter even agriculturists (who are certainly not men of means) cannot fairly be stated to have been given such concession in an arbitrary manner. Not only is such concession not capable of being labelled as one given depending upon the whim and fancy of the Board but must be acknowledged to have been given in keeping with the object indicated with the guidelines specifically provided in Section 49 of the Act. To say that all sections of the public inhabiting the State, including the poor and including the people inhabiting sparsely developed areas get the benefits of electricity at rates which they can afford is saying that this is done in the public interest. We have no hesitation in rejecting the suggestion that the concessions given are either arbitrary or against the public interest.

26. That leaves us with the argument that the said concessions are violative of Article 14 of the Constitution of India. Mr. Budhwar, appearing on behalf of the Board, posed a query, the rightly to our mind, as to how does Article 14 come into play on the facts of this case. The discrimination, which is envisaged in the Article 14 is between persons or class of persons similarly situated. Again, if it can be shown that there exists a rational nexus with the policy of law or the object sought to be achieved and the classification made, such classification/discrimination cannot be said to be violative of Article 14 of the Constitution. In the instant case the discrimination, that is urged is discrimination between one class of persons consisting of people occupying sparsely developed areas or hill area and agriculturists on the one hand and industrialists on the other. By no stretch of imagination can these two different class of persons be stated to be on par with each other; whether one looks at it from the point of view of power consumed or of capacity to pay or the intrinsic difference between the situation of the two. What is more, as pointed out earlier, the concession given to the former class is given in the act of giving effect to the provisions of the Electricity Act and while discharging the duties cast on the Board and following the norms indicated in Section 49 of the Act. The approach while fixing the tariff for

agriculture and for industry is indicated in the following passage taken from paragraph 23 of the judgment of Andhra Pradesh High Court reported in Andhra Pradesh State Electricity Board Vidyut Soudha and others Vs. The Gowthami Solvent Oils and another, (at page 154 of AIR)

"Having regard to the large population of the country, the overriding obligation is to be self-sufficient in food. The population has been growing at an alarming rate. Over the last three decades the population has practically doubled. All this emphasizes the importance and significance of the food production. This is not to say that industry is any the less important. The country cannot afford to be a backward agriculture country. It has to advance on the industrial front as well. But among the two, agriculture is bound to be given a preferential place. Anything can be dispensed with, but not food and a nation cannot always depend on others for such a basic necessity, required in such huge quantities. The above considerations are relevant within the meaning of sub-section (2) as well as sub-section (3) of Section 49. The nature of supply, the purposes for which supply is required, simplification and standardisation of methods and rates of charges, as also extension and cheapening of electricity to sparsely developed areas, empower the Board to classify the consumers into different categories and to fix different tariffs for them. Classification is inherent in sub-section (2) itself, though this power has to be exercised reasonably. It must, therefore, be said that treating the agricultural pump-sets as a separate category for the purpose of supply of electricity and fixing a separate tariff rate for them, is permissible u/s 49. Indeed, the power to charge a concessional rate to such category having regard to its basic importance to the national economy is beyond question."

27. We have examined the existing tariffs of 1986 and the revised tariffs. In fact, we have also glanced at the tariffs prevalent since 1982 (prior to their revision in 1986). We are satisfied that the revision of tariff (to borrow from the language used by the Supreme Court) is not arbitrary or violative of Article 14 of the Constitution of India and is not the result of the application of any wrong principle and having come to that conclusion we are of the view that it is not within our province to examine the price structure in minute detail. On the whole it cannot be said that the rates have been so fixed by the Board as to cast an unreasonably heavy burden on any section of the consumers without regard to their ability to pay, without regard to the nature of supply and the purpose for which the supply is required, nor have we found that the principle of uniformity of tariffs has, in any way, been sacrificed.

28. Mr. Gupta while referring to the provisions of Section 59 of the Act took up the question as to what kind of expenses are to be met before fixing a rate so as to make a surplus and submitted that the words "... After meeting all expenses properly chargeable to revenue..." (used in Section 59 of the Act) only mean and include expenditure incurred with regard to the operation of the system to generate and distribute electricity. He referred to Section 37 of the Income Tax Act and a passage of Sampath Iyenger's Income Tax Act indicating the true test

for arriving at expenses properly chargeable to revenue. We have not gone into greater details of this argument. In Govind Prabhu's case (supra) the Supreme Court in paragraph 13 of its judgment observed.

"It has to be remembered that apart from subventions which may be received from the State Government, which depend entirely on the bounty of the Government, the only revenues available to the Board are the charges leviable by it from consumers. Bearing this in mind, we may now consider what expenses are properly chargeable to the revenue under the Electricity (Supply) Act. For this purpose, we may not be justified in having recourse to the principle of corporate accounting of the rules which determine what is revenue expenditure under the Indian Income Tax Act. It appears to us that the Electricity (Supply) Act prescribes its own principles of accounting to be followed by the Board."

29. In the said paragraph the Supreme Court went into a detailed review, of the provisions of the Act culling out the principles of accounting to be followed by the Board and observed, *inter alia*, that the payment, of arrears of interest is an expenditure properly chargeable to revenue under the scheme of the Act. We have not devoted greater time or attention to this aspect of the matter, because we are satisfied that there is no infraction of the provisions of Section 59 involved here. However, even if infraction of Section 59 were, purely for the purposes of argument, to be presumed to have been indicated, that by itself will not, in our view, invalidate the tariff. This aspect of Section 59 relates to a provision which does no more than lay down a principle of accounts and even if the said principle is not observed in its entirety the resultant rate will not be vitiated. In *Modi Steels v. U. P. State Electricity Board* (supra) the Lucknow Bench of this Court in paragraph 100 of its judgment, after quoting from the judgment of the Supreme Court in Govind Prabhu's case held :

"In view of this position all the expenses will have to be made by the Board out of the revenue. Accordingly all expenditure of the Board is chargeable to revenue. The expenses referred to in S. 59(1) are by way of illustration. They are not exhaustive of the expenses which the Board may make and which may be considered as expendable charges to revenue."

30. While on S. 59 of the Act, it will not be out of place to point out that whereas S. 59 contains a clearcut mandate to the Board to so govern and arrange its affairs under this Act and adjust its tariff as to ensure that the total revenues in any year of account shall after meeting all the expenses (etc.) leave such surplus as is not less than three per cent or such higher percentage as the State Government may specify of the value of the fixed assets of the Board. Thus, whereas the provisions of the Act contemplates a surplus being made, as a matter of fact it is common ground that the Board in the instant case has continued to suffer a loss making it that much more difficult for the upward revision of its tariff to be assailed.

31. It may also be mentioned that the generation capacity and the efficiency of

the State Electricity Board stated by Mr. Gupta to be producing only 34 per cent of their generating capacity and transmission losses calculated by Mr. Gupta at 26.82 per cent, were cited by Mr. Gupta as instances of inefficiency On the part of the Board. For the Board Mr. Budhwar pointed out that apart from the fact that these allegations with regard to inefficiency and the figures given with regard to the actual production vis-a-vis a generating capacity and the transmission losses are not admitted by the Board, the inefficiency on the part of the Board, if any, is a matter which has to be taken cognizance of by the State Government which has the power and authority to issue appropriate directions to the Board and the said alleged inefficiency cannot be summoned in aid for the purposes of assailing the fixation or revision of tariff. We are inclined to accept the above submission made by Mr. Budhwar.

32. Among what Mr. Gupta described as his subsidiary arguments, Mr. Gupta took up the arguments assailing the fuel surcharge as also the fixed charge (also known as demand charge.) Mr. Gupta argued that the increase of rupee one per metric ton in the price of coal results in the corresponding increase in tariff at the rate of 0.1354P. per unit. Mr. Gupta argued that the aforesaid figure of 0.1354 P has not been validly arrived at because the same is sought to be recovered from 44 per cent, of the consumers and the selection of 44 per cent, of the consumers from whom to recover fuel surcharge is arbitrary and liable to be struck down. Mr. Gupta further pointed out that thermal adjustment is 74.7 per cent, of the total electricity generated and sold. Mr. Gupta pointed out that the supply is grid supply with the result that it is now known as to what power was supplied from which source and yet, Mr. Gupta argued, instead of recovering costs qua 74.7 per cent, of the consumers what is recovered is extra costs qua 100 per cent, of them. These arguments with regard to levy of fuel surcharge being alleged to be arbitrary have been specifically dealt with and negatived by the Lucknow Bench of this Court in its earlier referred judgment in the matter of M/s. Modi Steels. Paragraph 115 of the judgment in the aforesaid case is, for the convenient reference, quoted below:

"The levy of fuel surcharge is also alleged to be arbitrary. It is also not a new charge. Fuel variation charges were payable under the old and HV-2 consumers levying of this charge has been specifically upheld by their Lordships of the Supreme Court. We need not, therefore, do anything more in respect of the charge against fuel surcharge except cite the authorities mentioned herein. These are -

(1) Rohtas Industries Ltd. and Others Vs. Chairman, Bihar State Electricity Board and Others, and

(2) Modi Industries Limited Vs. U.P. State Electricity Board, Lucknow and Others,

33. In Modi Industries" case the Bench pointed out that the Electricity Board had four sources to procure electrical energy:

i. by generation at thermal power station. ii. by generation at Hydel station,

- iii. by generation at diesel operated plants and
- iv. by importing from outside.

The entire energy procured by these sources is distributed and supplied to the consumers by integrated grid system and the charges are levied on them entire energy supplied by the Board and not on the sixty per cent, energy generated only by thermal power station. The levying of fuel charges on entire energy was held to be valid. It was also held in this case that fixation of rates of supply of electrical energy falls in the domain of the executive and the courts cannot make minute scrutiny. Disputed questions of fact were held to be beyond the pale of jurisdiction under Art. 226 of the Constitution. When energy was held at rates lower than the coal cost incurred how can it be arbitrary. It was observed that the Court should not interfere with such fixation."

34-35. In para 42 of its judgment in the case of Nava Bharat Ferro Alloys Limited Vs. Andhra Pradesh State Electricity Board, Hyderabad, a Division Bench of the Andhra Pradesh High Court dealt with the question as follows (at page 314 of AIR) :

"We have earlier referred to the fact that about 50% of the total power generation is thermal which type of generation requires fuel. There is a steady escalation in the prices .pf either coal or diesel oil which are the fuel used for the generation of thermal power. Such escalation in the fuel costs would naturally result in raising the case of power generation a(the thermal stations. The power in Andhra Pradesh generated either by hydel or by thermal system is fed into a common grid. The explanation given on behalf of the Board is that, prior to 1982, the tariffs fixed for all categories took into account the fuel costs till then incurred and it was only after 1982 the burden of further increase in the fuel charges is loaded on the various HT power consumers excepting on such consumers availing HT supply for agricultural and irrigation purposes and that there is nothing unreasonable if these HT power consumers who are using more than 40% of the total power are required to bear the burden of further increase as a result of increase in fuel costs. We find this explanation offered by the Board as not only fair but reasonable and convincing and we accordingly reject the submission made on behalf of the petitioners that there was any unfairness or unreasonableness if the Board decided to collect the further fuel escalation charges only from these specified different categories of HT power consumers."

36. In Hindustan Zinc Limited v. Andhra Pradesh State Electricity Board (supra) the Supreme Court in the latter portion of paragraph 27 has stated :

"It has been pointed on behalf of the Board that the Board's action is based on the opinion of Rajadhyaksha Committee report submitted in 1980 and the formula of fuel costs adjustment is on a scientific basis linked to the increase of fuel costs. This is a possible view to take and. therefore, the revision of tariff by the Board does not fall within the available scope of judicial review."

In para 29 of the same judgment the Supreme Court pointed out that :

"The expression "other charges" is wide enough to include within its ambit the fuel cost generation admittedly made applicable to all HT consumers as a result of the escalation in fuel prices. The method adopted was to prescribe a formula linking it to the increase in fuel costs so that it was not necessary to revise the tariff each time as a result of increase in fuel prices, the same being taken care of by the relevant factors in the formula for fuel costs adjustment."

37. Counsel for the Board has specifically taken us through the relevant formula which is set out in the tariff and having looked at the same we find ourselves in respectful agreement with the views expressed by various courts passages from the judgments whereof have been quoted above.

38. The minutest details in which we have been invited to examine price structure is evidenced by the argument on fuel surcharge which complains about the increase in tariff to the extent of 0.1354 P per unit corresponding to the increase of rupee one per metric ton in the price of coal. This means that for the increase in the price of coal at rupee one per metric ton for the tariff is increased by 1354/10,000 paise. This fraction of a paise corresponds to about one paise for an increase of rupees eight per metric ton. In other words, for the increase of Rs. 800/- per metric ton in the price of coal the corresponding increase in tariff is rupee one. This brings to our mind the maxim "De minimis non curate lex" (the law does not take account of trifles) and the levy of a surcharge resulting in an industrialist having to pay rupee one more for corresponding increase of Rs. 800/- per metric ton in the price of coal is far too trifling a matter for an industrialist to complain about or for this Court to be invited to investigate in detail. Section 49(2)(c) speaks of "the simplification and standardisation of methods and rates of charges for such supplies" and the levy of fuel surcharge in the manner sought to be done by the Board is perfectly legitimate and permissible and is also justified by the above quoted provisions of the Act.

39. Mr. Gupta also argued that since January, 1989 there has been no increase in coal price. We have not permitted this argument because when invited Mr. Gupta was not in a position to point out that such an averment is made anywhere in the petition. Mr. Budhwar, on behalf of the Board, pointed out that apart from not admitting the factual part of the argument that since January, 1989 there has been no increase in coal price, only looking at the price of coal does not provide the complete picture because the Board is affected not only by an increase in the price of coal but also by any increase in the cost of transportation, in the cost of labour, handling charges, local taxes and even by the quality of coal supplied. Even as cost of fuel goes what is relevant is not only the cost of fuel but what has been described as "the delivered cost of fuel" so as to include both (coal as well as oil) in the relevant clause in the tariff under consideration.

40. With regard to the fixed charge (also known as demand charge) Mr. Gupta argued that the tariff determined under S. 49 includes depreciation in the capital

assets and, therefore, a fixed charge or a demand charge realised only from the consumers of the industrialists categories LMV-6, HV-1 and HV-2 is illegal. Mr. Gupta stated that the "pleading" in respect of this argument is to be found in the supplemental affidavit. This is not satisfactory. But apart from this, in para 114 of its judgment in *M/s Modi Steels v. U.P. State Electricity Board*, the Lucknow Bench of this Court has not accepted the challenge to the demand charge or the fixed charge and the minimum consumption guarantee charges pointing out that the fixed charge or the demand charge ensures return of investment and the assets of the Board like machinery, plants, etc. While minimum guarantee charge ensures all returning cost of supplying electrical energy. We have not delved into greater details with regard to the arguments relating to expenses properly chargeable to revenue, fuel surcharge and fixed charge as we are satisfied that it is not within our province to examine the price structure in minute detail if we are satisfied that the revision of tariff is not arbitrary and is not the result of the application of any wrong principle. We have already held earlier that on the whole it cannot be said that the rates have been so fixed by the Board so as to throw an unreasonably heavy burden on any section of the consumers without regard to their ability to pay, without regard to the nature of supply and the purpose for which the supply is required nor have we found that the principle of uniformity in tariffs has, in any way, been sacrificed. Indeed, we have found that in fixing the tariff the Board has borne in mind the object of the Act and the duty with which the Board stands charged and the factors which has been indicated under the Act for fixing tariffs. We find no substance in the challenge offered to the fixation of tariff, the subject-matter of these petitions.

41. In the result, these petitions fail and the same are dismissed with costs. The interim orders passed herein shall stand vacated.

42. Petitions dismissed.