

(1974) 03 OHC CK 0012

In the Orissa High Court

Case No : Original Jur. Case No. 357 of 1971

Indian Aluminium Company Ltd.

APPELLANT

Vs

The Orissa State Electricity Board and Another

RESPONDENT

Date of Decision : 27-03-1974

Acts Referred:

Constitution of India, 1950 — Article 226

Electricity (Supply) Act, 1948 — Section 2(6), 26, 49, 57, 57A

Evidence Act, 1872 — Section 115

Citation : AIR 1975 Ori 100

Hon'ble Judges : R.N. Misra, J;K.B. Panda, J

Bench : Division Bench

Advocate : B. Das, R. Mohanty and B.C. Das, for the Appellant; S. Roy Chowdhury, S. Ghosh, B. Chatterjee, S. Mohanty and K.N. Sinha, for the Respondent

Final Decision : Allowed

Judgement

R.N. Misra, J.—The petitioner is a public limited company with its registered office at Calcutta. It has several factories at different places all over the country and one of them is at Hirakud in the district of Sambalpur under our territorial jurisdiction where smelting operation is carried. It entered into a contract in June, 1957, with the State Government of Orissa for purchase of electric power for this factory at Hirakud. When it required additional electric power after going into production, a subsequent contract was entered between those parties on the 11th of February, 1960. Article 3 of both the agreements (Annexures 1 and 2) provides that the agreements would remain valid for 25 years from 1957 with the consumer's option for a renewal.

The Orissa State Electricity Board (hereafter referred to as the Board) was constituted under Electricity (Supply) Act, 54 of 1948 (hereafter referred to as the Act) with effect from 1st of March, 1961. The petitioner alleges that under the provisions of the Act, the Board stepped into the shoes of the State

Government and became the "Supplier" in terms of those contracts. Under these contracts, hydel power generated from the Hirakud Dam Project was to be supplied. In 1966, when the generating expenses of the Board went up, tariff was revised generally for the supply of electricity to its consumers by levying a surcharge, but power intensive industries like the petitioner were not subjected to this burden. Government had been paying subvention to the Board with a view to meeting any loss on account of supply to the power intensive industries within the State at fixed low rates. In 1968, the State Government installed the Talcher Thermal Power Station and the Thermal Project was inter-connected with the hydel system. In June, 1970, the Thermal Project was transferred to the Board by the State Government. The price of coal having gone up, the Board pressed upon the State Government to authorise levy of a coal surcharge. In January, 1971, decision was taken to levy such surcharge in addition to the then prevailing tariff and under a Press Note dated 1-2-1971, the decision of the Board was notified. The petitioner was charged at the enhanced rate in the bill for the month of February, 1971. The petitioner challenged the enhancement of the rate on the ground that the Board stood bound by the terms of the existing agreements with the petitioner and was not entitled unilaterally to alter any of its terms -- much less the rate of supply. Several other grounds were indicated. Having failed to obtain any relief from the Board on its representation, this application was filed on 16th of April, 1971. The petitioner obtained an order restraining the Board from collecting the surcharge and undertook to pay for the energy at the rate prevailing up to January, 1971.

In the writ application, the petitioner has pleaded that on the representation of the State Government that electricity at a favourably fixed rate for a long period of time would be supplied by Government, the company had agreed to put up its factory at Hirakud -- a place away from both raw materials as also the market. On that ground a plea of equitable estoppel has been raised. The petitioner has further contended that the Board has not been sustaining any loss; and at any rate, in respect of any possible loss on account of the fixity of the rate or its concessional character, so far as power intensive industries are concerned, the State Government grants subventions to the Board, because Government otherwise benefits out of these factories running within the State. If the subvention ear-marked for recoupment of loss is properly adjusted, the Board has no grievance to make so far as power intensive industries like the petitioner are concerned. According to the petitioner, under the agreements, the Supplier stipulated the provision of hydel energy. Rise of price of coal is irrelevant in the matter of production of hydel energy and the petitioner, therefore, could not be made to bear the burden on that head. The action of the Board in connecting the hydel lines with the thermal system is said to be not a scheme in accordance with law and, therefore, the Board was not entitled to act in such high handed manner. It has also been pointed out that the provisions in the agreements bound the Board and it had no authority unilaterally to alter any of the terms particularly in the absence of statutory Regulations.

2. The Board filed its first counter-affidavit on 6th of September, 1971. Attempt was made to justify the surcharge and the various contentions of the petitioner were refuted. The petitioner brought in new allegations by way of amendment. A further counter was received from the Board. Thereafter several affidavits have been filed on either side. By that process, the record of the case has now become fat enough,

3. The hearing of this case began on 13th August, 1973, and was adjourned from time to time to accommodate parties. Judgment was ultimately reserved on 4th of March, 1974.

4. Learned Counsel for the petitioner at the hearing raised the following contentions:--

(1) The State Government, and after it the Board, is bound by the principles of promissory estoppel and the enhancement of duty is vitiated in law being a levy in breach of such estoppel;

(2) The agreement having provided for supply of hydel power, coal surcharge was not applicable so far as supply of hydel energy to the petitioner was concerned;

(3) The Board not being a licensee was not entitled to rely upon Sections 57 57A and Schedule VI of the Act;

(4) The Board is not entitled to unilaterally reverse the tariff fixed under binding contracts by relying upon Sections 49 and 59 of the Act, together or independently; and

(5) In the absence of Regulations, the Board cannot unilaterally abrogate the agreements.

On behalf of the Board, the maintainability of this application has been disputed on the ground that the plea raised by the petitioner at the most shows that the Board has acted in breach of contract, A civil action is more appropriate than the writ proceeding to resolve such a dispute. Simultaneously it is contended that the agreement in question provide for arbitration in the event of dispute and the impugned actions admittedly come within the ambit of the arbitration clause.

5. Each of the contentions raised on behalf of the petitioner and the question of maintainability raised on behalf of the opposite party -- Board has now to be examined.

Contention No. 1:

The plea of promissory estoppel has been raised on the basis that the State Government soon after the construction of the Hirakud Dam and making of provision for production of Hydel Power was looking for heavy consumers of such power. With a view to encouraging location of power intensive industries near about, the State Government held out assurances to the petitioner of supply of Hydel Power at low and fixed rates over a long term of years. Acting on such

representations and assurances, the petitioner-company agreed to locate its factory at Hirakud notwithstanding the fact that it was a place away from raw materials as also the market for the produce. The Board in terms of Section 60 of the Act has to assume obligations of the State Government and, therefore, is bound by the estoppel which the petitioner was entitled to raise against the State Government.

We find the petitioner in respect of its factory located at Alupuram near Alwaye in the State of Kerala raised a similar plea when the Kerala State Electricity Board unilaterally raised the tariff. A Bench of the Kerala High Court in the case of *Indian Aluminum Co. Ltd. and Others Vs. Kerala State Electricity Board and Others*, , at page 211, examined this contention. Upon hearing learned Counsel for the parties on the question of estoppel, we are not satisfied that the petitioner is entitled to any relief on that ground. We are impressed with what has been observed by the learned Judges in that case and feel inclined to extract the conclusions reached therein on this point. The plea of estoppel was rejected by saving--

"The plea of equitable estoppel need not occupy us long. We are pressed with the decision of the Supreme Court in *Anglo Afghan Agencies case*, AIR 1968 SC 718 and in *Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another*, . The arguments based on these decisions covered familiar ground. On the pleadings, we are not satisfied, that the picture sought to be presented of the Board (or its predecessor) being a supplicant before the petitioner for the establishment of its industry in this State, of representations made, hopes raised, vast expenditure incurred, sacrifices made, and expectations blasted, has been either complete or correct. As pointed out by Counsel for the Board, there is enough in the agreements themselves to show that the petitioner was equally desirous of obtaining electric power and had negotiated for the supply of the same. See for instance the preamble to Ext. P-1, Ext. R-2, Ext. R-3, etc., (here Annexures 1 & 2). Again, it is well settled that there can be no estoppel against the provisions of a statute or the exercise of statutory power. With reference to the principle laid down in the *Anglo Afghan Agencies case*, the matter was fully considered in this Court in *Sankaranarayanan v. State of Kerala*, ILR (1968) 2 Ker 664. See the discussion in paragraphs 3 to 16 of the judgment. The decision was affirmed by the Supreme Court See 1971 Ker LT 422 = (AIR 1971 SC 1997). There estoppel was pleaded against the exercise of the constitutional power under Article 309 of the Constitution and the plea was repelled. The matter was further discussed by a Full Bench of this Court in *Achuthan Pillai and Others Vs. State of Kerala and Others*, and it was ruled that the decision of the Supreme Court in the *Anglo Afgan Agencies case* AIR 1968 SC 718 and *Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another*, referred to earlier) did not consider whether a representation can operate as estoppel against the exercise of constitutional or discretionary power vested for public good, or for the good of a third party. We do not wish to cover the same ground again, or to refer

to the still later decisions of this Court. On the principle of these decisions, we have no hesitation in rejecting the plea of equitable estoppel."

Mr. Das for the petitioner has tried to distinguish this decision by saying that in repelling the contention support had been sought from the statutory exercise of power and as in the present case, the petitioner contends that the opposite party -- Board is not entitled to fall back upon the statute, the plea of estoppel cannot be repelled.

In *Low v. Bouverie* (1891) 3 Ch 82. Bowen L. J., pointed out--

"Estoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one special knowledge in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he had said."

As has been pointed out by the Supreme Court in *Turner Morrison and Co. Ltd. Vs. Hungerford Investment Trust Ltd.*, . estoppel is a rule of equity. That rule has gained new dimensions in recent years. A new class of estoppel, that is, promissory estoppel, has come to be recognised by the courts in this country as well as in England. The full application of promissory estoppel is yet to be spelt out.

A pithy statement of Lord Cotenham was cited with approval by Lord Campbell in *Maunsell v. Hedges* (1845) 12 C&F 45 which runs as follows:

"A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will, in general, be sufficient to entitle him to the assistance of this Court for the purpose of realising such representation."

The material placed before us to support the plea, in our view, is not sufficient to bring relief to the petitioner on the ground of estoppel. The agreement for supply of energy was the outcome of negotiation. In fact, the preamble to the agreement in Annexure-1 clearly shows that the petitioner was as much desirous for being supplied electric power as the Supplier was anxious and willing to supply the same. What is claimed by the petitioner to have preceded the agreement is not borne out by the agreement nor is there any written evidence for it. The petitioner's plea on that score has also been disputed in the counter-affidavit. The State of Orissa is not a party to the proceeding and obviously the Board has not been in a very convenient position to dispute effectively the plea of estoppel raised on the facts alleged in the petition. We are, therefore, not satisfied that even otherwise the petitioner is entitled to relief on the ground of equitable estoppel.

Contention No. 2:

6. The petitioner has alleged that in or about 1956, the Government of Orissa was putting up a Hydro-electric power station at Hirakud Dam site with a view to

producing electric power for industrial purposes and as per the two agreements, under Annexures 1 and 2, the petitioner was to be supplied Hirakud Hydel power. Clauses 12 and 13 of the first agreement under Annexure-1 provides for a single point delivery and the form of supply was indicated to be:--

"The electric power made available by the Supplier to the company (petitioner) shall be alternating current, three (3) phase, at a nominal frequency of fifty (50) cycles per second and at a nominal delivered voltage of 135,000 volts between phases at the company's high tension receiving bus."

It is not disputed that the supply of energy under Annexures 1 and 2 was intended to be from the Hirakud Hydel Project, nor is it disputed that for the production of hydel energy coal is not a raw material. The Board in its Press Note (Annexure-3) had categorically excluded consumers from the Machkund Power System from the impugned levy by saying--

"As the Machkund Power System is not integrated with the Hirakud-Talcher Grid, consumers receiving power from Machkund Power System are exempted from the above levy for the present."

Reliance is placed for support of the petitioner's contention from this action of the Board. According to Mr. Das for the petitioner, as coal is not a raw material for production of hydel power, the consumers of Machkund Hydel Power have been exempted from sharing the additional burden. According to him, the petitioner should have also been so exempted as admittedly for Hirakud Hydel power, coal has no role to play and in producing such hydel power, coal is not a factor and the rise in the price of coal is, therefore, an irrelevant feature.

In the Press Note, the reason for the surcharge has been stated thus:--

"The Talcher Thermal Power Station was commissioned and constructed in Grid with the Hirakud Hydro Power Station of Orissa State Electricity Board. Owing to steep rise in the price of coal which is necessary for generation of thermal power at Talcher, the cost of generation has gone up considerably and the Board felt that the additional cost could be met only by the levy of a coal surcharge on consumers receiving power supply from Talcher-Hirakud Grid, as is levied by other Electricity Boards who have Thermal Generations. As per the provisions of Sections 49 and 59 and the Sixth Schedule of the Indian Electricity (Supply) Act, 1948, the levy of coal surcharge is permissible under the aforesaid circumstances.

The quantum of a coal surcharge is, however, dependent on the rise or fall in the cost of coal delivered at the Talchr Thermal Power Station and on the basis of the present cost of coal supplied to the Power station, the Board propose to levy coal surcharge at Rs. 0.62 paise per unit provisionally. This coal surcharge will be in addition to the present tariff at which the power is being supplied to the consumers fed from the Talcher-Hirakud Grid and is also exclusive of the Electricity Duty and other charges, if any, levied by Government from time to time. The coal surcharge will, however, not apply to the consumers getting

supply of power from Diesel Power Stations run by the Board.

The coal surcharge at the above mentioned rate of Rs. 0.62 paise per unit will be levied on all supplies of energy from the Talcher-Hirakud Grid with effect from 1-2-1971."

The petitioner's contention receives further support from the exemption granted by the Board in respect of supply of energy from diesel power stations. The justification to raise a coal surcharge is attributed in the Press Note to the steep rise in the price of coal for producing thermal power.

7. The petitioner's challenge that it cannot be subjected to the surcharge as the Board had undertaken to supply hydel power to it is answered by saying that the hydel transmission lines have now been connected with the thermal supply from Talcher and, as such, the energy produced both from the hydel station as also the thermal station have been integrated and the petitioner's supply is from the integrated system.

The petitioner's factory is located within a distance of about three to four miles from the hydel power station at Hirakud. The Talcher Thermal station is at a distance of almost 100 miles from the said hydel station in the same direction. The supply line for the petitioner from the hydel station is a direct one. In fact, under the agreements, the Supplier had engaged to supply energy to the petitioner's factory from such a direct line. It is true that there has now been an integration of the transmission lines of hydel power and thermal power. But one cannot lose sight of the fact that the petitioner receives its supplies from the hydel station. There is no acceptable material on the record that the hydel power generated at Hirakud is not sufficient to meet the requirement of the petitioner and the Supplier has become obliged, for the performance of its obligation under the agreements in the matter of supply of energy to the petitioner to draw energy from the thermal source.

8. The Board had tried to justify its action by relying on several provisions of the Act. The Preamble of the Act indicates the purpose of the statute to be provision for "rationalisation of the production and supply of electricity and generally for taking measures conducive to electrical development." Section 28 of the Act provides for preparation of schemes and where a scheme comes into force, the Board is entitled to impose grid tariff in terms of Section 46 of the Act.

Mr. Das for the petitioner has taken the stand that the Board has gone wrong in taking the stand that the Talcher Thermal Power Station has been constructed in grid with the Hirakud Dam Power Station. It has been emphatically contended that there has been no hydel thermal grid. According to the petitioner, the Thermal Project was not a scheme of the Board and the State Government without any authority under the Act had set up such a scheme and had ultimately transferred it to the Board as late as 1970 -- 9 years after the Board came into existence. It is conceded by the Board that the detailed procedure in Chapter V of the Act for framing a scheme had not been followed in the case of

the Thermal Project In justification, however, it has been pleaded that it was not a scheme of the Board and Chapter V did not apply to it.

Section 60 of the Act provides--

"(1) All debts and obligations incurred, all contracts entered into, all matters and things engaged to be done by, with or for the State before the first constitution of the Board shall be deemed to have been incurred, entered into or engaged to be done by, with or for the Board; and all suits or other legal proceedings instituted or which might be instituted by or against the State Government may be continued or instituted by or against the Board.

(1-A) All schemes sanctioned by the State Government and transferred to the Board shall, for the purposes of this Act, be deemed to have been sanctioned by the Board.

(2) All expenditure which the State Government may, not later than two months after the first constitution of the Board, declare to have been incurred before the issue of the notification under Sub-section (4) of Section 1 on capital account in connection with the purposes of this Act shall be deemed to be a loan advanced to the Board u/s 64 on the date of the said declaration; and all the assets acquired by such expenditure shall thereupon vest in the Board."

The provisions of this section have been heavily relied upon by Mr. Das to support his contention that Government have no right to frame schemes and transfer the same to the Board after the constitution of the Board. The power to frame schemes under the Act has been given to the Board. u/s 60 of the Act provision has been made that all schemes sanctioned by the State Government and transferred to the Board are to be deemed to have been sanctioned by the Board. According to Mr. Das, the sanction of the schemes must have been before the constitution of the Board and the transfer must have been effected within the time limit indicated in Sub-section (2) of Section 60. Counsel for the Board, on the other hand, has contended that if a scheme has been sanctioned prior to the constitution of the Board and transfer has been done subsequently, it would yet be covered by Sub-section (1-A) of Section 60, Reading the scheme of Chapters V and VI of the Act together and keeping in view particularly the provisions of Sections 28 and 60 thereof, we do not agree with the contention advanced on behalf of the Board. Such schemes as are sanctioned by the State Government and transferred before the constitution of the Board can only be deemed to have been sanctioned by the Board. The provisions in Sub-sections (1) and (2) of Section 60 of the Act support such a conclusion. Support is also available for such a conclusion from the general principle in law that when the Legislature confers a specific power on a particular statutory authority in unambiguous terms, unless there be anything to the contrary in the Act, it must be assumed that exclusive power is vested in that declared authority to do that particular thing. The position is equally settled in law that for a particular purpose when a specific process has been indicated, it must also be assumed that law does not

also contemplate of a substitute process for the same matter. It must, therefore, follow that the Thermal scheme which was undertaken by the State Government and transferred to the Board some time in 1970 was not a scheme in terms of Chapter V of the Act and would not be a scheme as referred to in Section 48 thereof.

We have already indicated that the agreements stipulated supply of hydel power. There is no material to show that the Supplier with a view to keeping up its obligation under the agreements in the matter of supply of energy had actually to draw thermal power: the scheme upon which the Board relies is not a scheme under the statute and keeping in view the respective locations of the hydel station, the factory of the petitioner and the thermal station, we see no justification in the stand of the Board that as the power generated from the two projects had been intergrated, the petitioner became obliged to meet the coal surcharge.

Contention No. 3:

9. "Board" has been defined to mean "the State Electricity Board constituted u/s 5 of the Act." "Licensee" has been defined u/s 2(6) of the Act to mean "a person licensed under Part II of the Indian Electricity Act, 1910 (IX of 1910) to supply energy, or a person who has obtained sanction u/s 28 of that Act to engage in the business of supplying energy but, the provisions of Section 26 of this Act notwithstanding, does not include the Board". A bare reference to Section 3 of Act IX of 1910 assists in clarifying the position that the licensee is an entity other than the State Electricity Board. Section 26 of the Act (Act 54 of 1948) also leads to the same conclusion. It, therefore, follows that the Board is not a licensee for the purpose of the Act. Sections 57 57A and the Sixth Schedule of the Act relate to a licensee and not to a Board constituted u/s 5 of the Act. It is conceded before us on behalf of the Board that reference to the Sixth Schedule in the Press Note (Annexure-3) was a mistake and that Schedule has no application to the Board. The action, under the Press Note is, however, attempted to be justified by referring to Sections 49 and 59 of the Act -- a proposition with which we shall deal a little later. Contention No. 4:

10. Under the agreements supply had been undertaken to be made at fixed rates. In Article 5 of the First Agreement, the contract price was fixed. In the second agreement (Annexure-2), Article 5 provided thus:--

"(i) The company shall pay the Supplier for the additional electric power supplied hereunder at an annual rate of rupees one hundred and sixtyfive (Rs. 165) per kilowatt -- year determined monthly in accordance with Article 7 provided that if at any tune after the expiration of 10 years from the date of commencement of supply the cost of power generated by the Supplier at its proposed Bhimkund Power Project or elsewhere in the State of Orissa together with additional transmission cost of such power to Hirakud is lower than the price of power payable by the Company under this agreement and provided also that the

economics affecting the aluminium industry justify a reduction in the price of power payable by the Company hereunder, the Supplier shall, if requested by the company in writing, consider a suitable reduction in such price.

(ii)

Article 6 provided--

"If at any time during the terms of this agreement, the Supplier should enter into any agreement to supply electricity to any other works for reduction of alumina to aluminium in the State of Orissa using electricity for purposes similar to that of the company at any rate schedule lower than that set out in Article 5 of this Agreement, then the lowest such rate shall, from the date of its application to such works be made available to the company under this Agreement so long as the contract shall remain in force, so that the rate at which electricity is supplied hereunder shall never be higher than the rate at which electricity is supplied by the Supplier to any such works using electricity for purposes similar to those of the company."

Unlike many other contracts entered into between the supplier and the consumer in this State, Annexures 1 and 2 did not concede unilateral power in favour of the Board to revise the tariffs. Annexures 1 and 2 also do not contain stipulations clearly prohibiting the Board from making unilateral revision as was provided for in the contracts referred to in the Kerala case where the petitioner had entered into agreements with the predecessor of the Kerala State Electricity Board.

We, therefore, proceed on the footing that the agreements with the Supplier did not postulate unilateral revision of the rates. According to the Board, however, Sections 49 and 59 of the Act conferred the power to act unilaterally in the matter.

Section 49 of the Act provides:--

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

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

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

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

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

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

(3) Nothing in forgoing 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."

Section 49 of the parent Act was amended by Central Act 30 of 1966 and the amended provision has been quoted above. As the marginal note of the section shows, the section purports to provide for the sale of electricity by the Board to persons other than licensees. Sub-section (1) authorises the board to supply electricity by framing uniform tariffs. Sub-section (2) provides the guideline in the matter of fixing the uniform tariffs. Sub-section (3) empowers the Board to fix different tariffs with reference to specified circumstances. Sub-section (4) prohibits the Board from showing undue preference to any person in the matter of supply of electricity. Section 49, as Mr. Das for the petitioner rightly contends, makes no clear provision for any unilateral action. It is true, it provides a mandate for the Board not to discriminate between consumer and consumer and requires the Board to frame uniform tariffs with that end in view. Sub-section (3), however, authorises different tariffs having regard to the geographical position of any area, the nature of supply and purpose for which supply is required and any other relevant factors. According to Mr. Das, the purpose for which supply is required would justify the petitioner being treated differently. It is conceded that the petitioner's factory is a power intensive industry. In fact, electricity itself is considered as one of the most important raw materials. The binding contract into which the parties had entered is next contended as a relevant factor to justify a different tariff in the case of the petitioner. Mr. Das has asked us not to lose sight of the fact that the Board itself laid down no uniform tariffs while raising the coal surcharge. It exempted the consumers drawing energy from the Machkund Hydro-Electric Project. Similarly, consumers drawing energy from diesel stations were also exempted. The coal surcharge was almost in the nature of a fee. Higher expenditure having been incurred in the manufacturing process, that incidence was sought to be transferred to the consumer. On the aforesaid analysis, in our view, no support is available from Section 49 to subject the petitioner to the coal surcharge. Later in this judgment we shall refer to exercise of power u/s 49 by framing of Regulations u/s 79 of the Act.

The next provision upon which reliance has been placed by the Board is Section 59 of the Act. That section provides:--

"The Board shall not, as far as practicable and after taking credit for any

subventions from the State Government u/s 63, carry on its operations under this Act at a loss, and shall adjust its charges accordingly from time to time: Provided that where necessary any amounts due for meeting the operating maintenance and management expenses of the Board or for the purposes of Clauses (i) and (ii) of Section 67 may, to such extent as may be sanctioned by the State Government, be paid out of capital."

According to the petitioner, the Board has not been constituted as a commercial adventure for earning profits. The preamble categorically provides the objects to be (i) rationalisation of production and supply of electricity, (ii) taking measures conducive to electrical development: and (iii) matters incidental thereto. Ordinarily, the business of producing and distributing electricity could have been undertaken by any person or a factory could have produced its own energy. The production and distribution of electric energy has, however, been monopolised and has been regulated by law. In realisation of the fact that supply of electricity is a social service, the Board has not been required to carry on its venture with a profit earning motive. Section 59 of the Act has, therefore, been worded in the negative manner, that is, the Board has to carry on its operations under this Act in such a manner that it would not incur loss and is authorised to adjust its charges from time to time to achieve that end. For that purpose, the Act requires the Board to take credit for subventions from the State Government. The petitioner from the very beginning alleged that the State Government had been giving subventions to meet any possible losses in the matter of supply of electricity at fixed or low rates to power intensive industries. The petitioner and a few others were grouped into such a category and to cover the supplies at a comparatively low rate to them, subvention was being given by the State Government. Initially, the Board seriously disputed the fact that any subvention was being paid by Government earmarked for the purpose. But later on, it has been forced to accept the position that such subventions were being received. Relying on the accounts of the Board, the petitioner has contended that there is really no loss and as the Board has not followed the provisions of Section 67 of the Act, the trading result as disclosed is not appropriate and there has indeed been no loss at any point of time which would require the Board to take action u/s 59 of the Act to adjust its charges by raising a coal surcharge. The trading result disclosed by the Board was not being maintained in accordance with Section 67 of the Act. Defect was pointed out by Central Water and Power Commission whereafter, it is said, that the result has been recast, Counsel for the parties have not been able to agree on the position as to whether the Board runs at a loss or not. We find it embarrassingly difficult in the present proceeding to get into an objective determination of such a dispute, because the materials placed before us are not adequate and we do not find it convenient to dispose of such a factual dispute in a writ petition. In our view, a final disposal of this writ application does not require a conclusive determination, on the said question. It is sufficient for our purpose to indicate that the Board has not been able to place any positive material on the basis of which, we can hold that there was

justification u/s 59 of the Act to readjust the charges and the coal surcharge had been raised for the purpose of Section 59 of the Act. When the petitioner seriously disputed the stand of the Board in this regard, the burden to establish the fact that circumstances existed justifying action u/s 59 of the Act lay on the Board. Apart from anything else, that matter lay within the special knowledge of the Board.

If the coal surcharge came to meet the purposes of Section 59 of the Act, there may not have been any justification to exempt the consumers of energy from diesel stations and Machkund Hydel Project. Section 59 makes provision for a comprehensive view of the matter and not with reference to the particular undertakings of the Board,

We have already indicated that the petitioner was to draw hydel power and as the Board thought it appropriate to exempt the consumers drawing the supplies from diesel stations and the Machkund Hydel Power station from the burden of additional coal surcharge, the petitioner could not have been subjected to that demand because it was also a hydel consumer from Hirakud. Contention No. 5:

11. Section 79 of the Act authorises the Board to make Regulations not inconsistent with the Act and the Rules made thereunder. In Sub-sections (a) to (k) of this section, different matters have been categorically indicated. The subject-matter in Clause (j) is "principles governing the supply of electricity by the Board to persons other than licensees u/s 49." Admittedly, the Board had not framed any Regulations at the time when the decision to raise the coal surcharge was taken and enforced. In fact, it is only in 1974. after this writ application had been argued at length that the Board realised the importance of the Regulations and has taken to itself the power of unilaterally revising the tariffs under Regulations.

12. "Rule" in Section 3(51) of the General Clauses Act has been defined to mean:--

"..... Rule made in exercise of a power conferred by any enactment and shall include a Regulation made as a rule under any enactment."

As was indicated by Griffith, C J., in *Lloyd v. Wellach*, (1915) 20 CLR 299, the term "Regulations" in recent years has been used to denote provisions having the force of law made by subordinate authorities under delegated powers.

In the case of *The Chief Inspector of Mines and Another Vs. Lala Karam Chand Thapar etc.*, , at page 843 of the Reporter, the Supreme Court observed:

"..... One may pause here to remember that regulations framed under an Act are of the very greatest importance. Such regulations are framed for the successful operation of the Act. Without proper regulations, a statute will often be worse than useless."

The scheme of the Act is that the power u/s 49 of the Act can only be

appropriately exercised through Regulations. If for giving effect to the mandate of Section 49 of the Act unilateral power of revision is necessary to be assumed, it can be assumed only through Regulations. The petitioner lost before the Kerala High Court, because according to the learned Judges there, appropriate Regulations vesting unilateral power to revise the tariff by the Board had been framed. The Court held that Regulations took power u/s 49 and the only limitations on the Board's powers to take action u/s 49 were the provisions of the Statute, the Rules and Regulations framed thereunder. Reliance was placed on the decision of the Federal Court in AIR 1943 29 (Federal Court) and the affirming decision of the Judicial Committee in AIR 1946 127 (Privy Council) .

13. If regulations conferred unilateral power on the Board of revising the tariff, the position would be very different. Agreements between the parties would be subject to the law and since Regulations are law and such law would provide for unilateral exercise of power, agreements cannot stand in the way and deter the authority of the law enabling unilateral exercise of power from being so exercised. The position is, however, very different here. As already indicated, there was no Regulation in the field until 1974 and power had been exercised by the Board under the provisions of Sections 49 59 and Schedule VI of the Act. Schedule VI has been forsaken as it is not the source of power so far as the Board is concerned. We have already indicated our view in regard to Sections 49 and 59 of the Act

In the absence of Regulations under which the Board takes the power to act unilaterally, the agreements are certainly sacrosanct. Law is fairly settled that unless the statute holds out a mandate to act otherwise. Courts always lean to uphold existing contracts. Bose, J., speaking for the Court in *The State of Assam Vs. Keeshab Prasad Singh and Another*, stated:--

"According to all notions of contract current in civilised countries that would have constituted a binding engagement from which one of the parties to it could not resile at will, and had respondent No. 1 tried to back out we have little doubt that the State Government of Assam would, and quite justifiably, have insisted on exacting its just dues. But the State Government did not feel itself hampered by any such old fashioned notions regarding the sanctity of engagements."

Courts uphold the sanctity of engagements and unless required either expressly or by necessary implication to act otherwise, compel parties not to wriggle out of solemn engagements. (See *Randolph v. Milman*, (1868) 4 CP 107; *Western Counties Railway Co. v. Windsor and Annapolis*. (1882) 7 AC 178; and *Managers of Metropolitan Asylums District v. Hill*. H. L. (1881) 50 LJ QB 353). We find no justification in taking a different view so far as the Board here is concerned. Without the aid of Regulations, conferring unilateral power for revision of tariffs, the Board would have no authority to act in a manner contrary to the engagements and being a statutory authority must not be permitted to act in violation of law under the cloak of statutory power.

14. Now we shall refer to the question of maintainability. Ordinarily this question should have been dealt with first. But as in our view the application was maintainable and there was no merit in the preliminary objection, we have kept it to the last to be dealt with. Reliance has been placed on the petitioner's side on two decisions to meet the objection on behalf of the Board that in disputes over breach of contract a writ application is not maintainable: *The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others*, , and *The D.F.O., South Kheri and Others Vs. Ram Sanahi Singh*, . These are cases to justify exercise of extraordinary jurisdiction even in cases of breach, of contract. The Board is not an ordinary person. It is a statutory entity conferred with wide powers and corresponding duties. It has been clothed with special authority. In the circumstances, we find no merit in the objection raised on behalf of the Board that when it chooses to commit a breach of the contract under the cloak of statutory authority, the Court would keep looking as a helpless and silent spectator and refer the party, either to the Civil Court or require him to take to arbitration.

The other objection has been on the ground that there is an arbitration clause. Admittedly Clause 21 of the agreement stipulates arbitration. According to the petitioner, the present dispute is not covered by clause 21 of the agreement. Moreover, existence of an alternate remedy is no bar to exercise of the extraordinary jurisdiction. Law has by now been fairly settled on the topic. (See *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhvani and Another*, ; *New Manek Chowk Spinning and Weaving Mills Co. Ltd. and Others Vs. Municipal Corporation of The City of Ahmedabad and Others*, ; and *Nabaghan Sahu Vs. Election Officer, Mukundapur Grama Panchayat and Others*, . The restriction is usually self-imposed. The Court finds out whether there is a specific remedy contemplated by the parties; whether the dispute cannot be appropriately investigated in the extraordinary jurisdiction; whether by statute relief in a particular forum has been made available; whether by undertaking the investigation in the extraordinary jurisdiction, any of the litigating parties would be prejudiced or interests of justice would be jeopardised; whether the title of the contesting parties has to be examined and that would require detailed evidence to be received, and the like, when required to resolve a dispute of this type. This application had been admitted in this Court almost two and half years back. If arbitration proceedings had been taken they could by now have been finalised. At this belated stage, to drive the petitioner to the domestic forum agreed upon, may not at all be appropriate; more so, when the Board has failed to satisfy us as to how it is prejudiced if we decide the dispute. The preliminary objections, therefore, fail.

15. Our conclusions therefore, are:--

(1) The writ application is maintainable;

(2) The petitioner has failed to establish that the State Government or its successor Board is bound by the promissory estoppel set up by it;

(3) The agreements provide supply of hydel power to the petitioner and there was no justification to apply to it the coal surcharge;

(4) The Board not being a licensee was not entitled to rely upon Sections 57 57A and Schedule VI of the Act;

(5) The Board is not entitled to unilaterally revise the tariff fixed under binding contracts (Annexures 1 and 2) by relying upon Sections 49 and 59 of the Act; and

(6) In the absence of Regulations, the Board cannot unilaterally revise the tariff.

It would, therefore, follow that the decision contained in the Press Note (Annexure-31 and the levy of the coal surcharge so far as the petitioner is concerned are both without authority in law and without justification. The writ application accordingly succeeds. The decision of the Board conveyed, in the Press Note so far as the petitioner is concerned is quashed. The bill (Annexure-4) be revised by deleting the coal surcharge. It is declared that the petitioner shall not be subjected to coal surcharge on the basis of the Press Note. The liability of the petitioner in terms of the Regulations which are conceded to be prospective has not been decided by us in this case.

16. The writ application is allowed. We, however, direct parties to bear their own costs.

Panda, J.

17. I agree