

**(1982) 09 MP CK 0012**

**In the Madhya Pradesh High Court**

**Case No : Miscellaneous Petition No. 888 of 1981**

Jiyajeerao Cotton Mills Ltd. and Another

APPELLANT

Vs

The Madhya Pradesh Electricity Board and Another

RESPONDENT

**Date of Decision : 23-09-1982**

**Acts Referred:**

Constitution of India, 1950 — Article 14, 19(1), 226  
Electricity Act, 1910 — Section 22B

**Citation :** AIR 1983 MP 93 : (1983) ILR (MP) 193 : (1989) JLJ 66 : (1983) JLJ 312 : (1983) 28 MPLJ 212

**Hon'ble Judges :** M.L. Malik, J;J.S. Verma, J

**Bench :** Division Bench

**Advocate :** S.S. Ray, J.P. Gupta, A.K. Chitale, A. Bhatnagar and A. Sharma, for the Appellant; Y.S. Dharmadhikari, M.L. Jaiswal, A.M. Mathur, General and R.K. Verma, D.A.G., for the Respondent

**Final Decision :** Partly Allowed

## Judgement

J.S. Verma, J.

The petitioner No.1, Jiyajeerao Cotton Mills Ltd. is an existing company within the meaning of the Companies Act. 1956, and having its registered office at Birlanagar, Gwalior, in the State of Madhya Pradesh. Petitioner No. 2, Jai Narain Somani, is a shareholder of this company, The petitioner No. 1 (hereinafter called "the Company") has a composite textile mill at Birlanagar, Gwalior, wherein it manufactures yarn and textiles. For running its mill, the company requires electricity and had entered into a contract with respondent No. 1, M. P. Electricity Board (hereinafter called "the Board") for supply of electricity to it in accordance with the specified terms and conditions. Under the agreement dated 27-10-1971, between the company and the Board, 1500 K.W. power as an H.T. consumer, was to be supplied by the Board to the Company and the agreement was to commence from the date reckoned according to the stipulation therein. Supply of 1590 K.W. power under this agreement commenced with effect from 3-3-1972.

The agreement was later modified mentioning therein that an additional 1000 K.W. power was to be supplied with effect from 1-11-1973. The result was that under this agreement, the company was to be supplied 1500 K.W. + 1000 K.W.=2500 K.W. with effect from 1-11-1973. This contractual position between the Company and the Board came to be further modified by two agreements dated 11-7-1979 and 26-2-1980, under which an addition of 800 K.W. and 190 K.W. respectively was made to the earlier quantity of 2500 K.W. thereby increasing the total contract demand first to 3300 K.W. and ultimately to 3490 K.W. per month.

Section 22B of the Indian Electricity Act, 1910 gives power to the State Government to issue orders providing for regulating the supply, distribution, consumption or use- of electrical energy for maintaining its supply and securing its equitable distribution. An order issued by the State Government under this provision supersedes the contractual obligation of the licensee (State Electricity Board) under any contract with the consumer for supply of electrical energy. The State of Madhya Pradesh (respondent No. 2) issued two orders on 4-4-1975 u/s 22B of the Indian Electricity Act, called the "Ma-dhya Pradesh Electricity Supply and Consumption Regulation Order, 1975. (Annexure E) (hereinafter called the "Regulation Order") and the M. P. Electricity Generation. Control and Consumption Order, 1975 (Annexure G) (hereinafter called the "Generation Order"). Both these orders came into force on 7-4-1975. The Regulation Order was amended from time to time, retaining its basic characteristics. These orders were admittedly made by the State Government for meeting the acute power shortage in the State with a view to maintaining the supply of electrical energy and securing its equitable distribution amongst the consumers. In brief, the Generation Order was issued to compel any consumer who also had an alternative source of generating power of his own to generate electricity from his set to the maximum extent technically feasible and to reduce the Board's supply under the contract with him to the extent of this additional generation available to him from the alternative source. The Generation Order, therefore, applies only to the consumers who had their own alternative source of generating power. The Regulation Order enabled rationing of the available electrical energy between the consumers for ensuring equitable distribution by fixing the ceiling up to which alone a consumer was entitled to draw electricity at normal tariff and providing for the charging at penal rate any consumption in excess of the ceiling fixed, in addition to conferring power to disconnect supply for violations made by the consumer.

When the aforesaid two orders came into force on 7-4-1975, the Company was entitled to draw power up to 2500 K.W. from the Board's supply under the contract, as earlier stated. The company admittedly had an alternative source of generating power and, therefore, the Generation Order also was applicable to it. in addition to the Regulation Order. The total installed capacity of the company's generating set was 9800 K.W. but according to the company itself the actual maximum generation was between 4500 and 5000 K.W. depending upon the

availability of steam. It is clear that unless the power generated from the alternative source owned by the company fell short of the contractual demand under the Generation Order, the Company was not entitled to draw any power from the Board under the contract. The dispute in the petition is mainly with regard to the Board's demand for payment of the electrical energy consumed during certain period by the company at penal rate by virtue of the Generation Order and the Regulation Order. The Company, on the other hand, claims that it is not liable to pay any such penal charges. The various arguments advanced are in support of the rival contentions.

For the period of more than four years up to 11-11-1979, the Board has not demanded any penal charges from the company and whatever charge has been recovered by the Board for supply of power has not been disputed by the Company. The dispute between the parties is with regard to the period commencing from 12-11-1979. For the period between 12-11-1979 and 31-7-1980, the entire quantity of power drawn by the company from the Board has been charged at the penal rate on the ground that the contractual obligation was reduced to nil by virtue of the Generation Order, since the alternative source of power belonging to the company covered the entire contractual demand of 2500 K. W. The excess amount claimed by the Board from the Company on account of higher tariff, according to the penal rate, comes to Rs. 76,51,379.87. For the period between 1-8-1980 and 30-6-1981, the Board took into account the increase in contractual obligation from 2500 K.W. to 3490 K. W. i. e; additional 990.K. Ws. as well as the company's request for some extra power. On account of difficulty in generating from its own set and, therefore, gave to the company the benefit of supply of 1250 K.W. under the contract in accordance with the Generation Order. This quantity of 1250 K. Ws. reduced from the contractual demand of 3490 K. Ws. under the Generation Order, has been curtailed according to the formula given in the Regulation Order and this reduced quantity has been treated as the ceiling limit for supply of power by the Board to the Company at normal tariff, while any quantity consumed in excess thereof has been charged at the penal rate. For this period between 1-8-1980 and 30-6-1981, the unpaid balance remaining due from the company under the bills issued, amounts to Rupees 1,04,46,501.10. Thus, for these two periods from 12-11-1979 to 31-7-1980 and 1-8-1980 to 30-6-1981, the amount of Rs. 76,51,379.87 + Rs. 1,04,46,501.10 = Rs. 1,80,97,880.97 remained unpaid by the company to the Board against the bills issued for the period and the challenge in this petition is mainly to this demand.

This petition was filed on 6-8-1981 and by virtue of the stay order dated 7-8-1981, the status quo ordered thereby continues.

Briefly stated, the petitioners' case on merits is that there has been no valid assessment of the generating capacity of the company's generating set so as to permit any reduction in the contractual demand by virtue of the Generation Order and that, at any rate, such assessment even, if made, was never acted

upon for the period ending on 11-11-1979; and, therefore, unless a valid assessment is now made under Clause 3 of the Generation Order, determining the capacity of the alternative source of generation, there can be no reduction in the contractual obligation under the Generation Order. The petitioner claims that the bills issued by the Board for the period commencing from 12-11-1979 on the basis of powers given under the Generation Order and the Regulation Order, charging at the penal rate, are invalid. It is also claimed that Clause 3 of the Generation Order is ultra vires Section 22B of the Indian Electricity Act and unconstitutional being violative of Articles 14 and 19(1)(g) of the Constitution. Validity of Clause 3 of the Generation Order is also attacked on the ground of impermissible delegation of essential legislative powers.

The relief claimed in the petition, as summarised by the learned counsel for the petitioners at the hearing, is for quashing the Board's orders dated 17-5-1975 (Annexure H), 10-10-1975 (Annexure O), 5-8-1980 (Annexure T), 13-10-1980 (Annexure U), the bills for the total amount of Rs. 1,80,97,880.97 for the periods between 12-11-1979 and 30-6-1981; a direction for making fresh calculation and adjustment in accordance with law, which would include the question of refund of any excess payment made by the petitioner; and quashing of the blanket prohibition against supply of power during emergency under clause 3, proviso (iii) of the Generation Order contained in the orders dated 13-10-1980 and 25-7-1981.

In reply, the case of the M. P. Electricity Board (respondent No. 1) is that the necessary assessment was made and directions issued to the company for generating 2500 K.W. of electricity from its generating set under Clause 3 of the Generation Order with the result that the contractual obligation to supply power was reduced to this extent and it was nil when the entire contractual obligation was to supply only 2500 K.W, the supply of power up to 11-11-1979; was only during emergency covered by Clause 3, proviso (iii) of the Generation Order and not because the direction given under Clause 3 of the Generation Order reducing the contractual obligation was not acted upon. The bills issued at penal rate for excess consumption are supported on the basis of the Generation Order read with the Regulation Order. The company's conduct throughout has been relied on to show that till the year 1980, no challenge was made to the assessment made and the direction issued by the Divisional Engineer under Clause 3 of the Generation Order. The petition is said to be inordinately delayed for challenging the orders made in the year 1975. The remedy available under Clause 6 of the Generation Order for determination of the dispute by the Electrical Adviser and the Chief Electrical Inspector to the Government, is pointed out as an alternative remedy for refusing any relief under Article 226 of the Constitution. The invalidity attributed to Clause 3 of the Generation Order by the petitioners is denied. The State Government (respondent No. 21) has taken interest only in oppose the challenge made to the validity of Clause 3 of the Generation Order. Even at the hearing before us, the learned Advocate General addressed us only on this point, stating that the rest was the concern of the State Electricity Board,

While raising the preliminary objection on the ground of existence of an alternative remedy, Shri Dharmadhi-kari, learned counsel for the Board did not dispute that the question of vires of Clause 3 of the Generation Order has to be decided in this petition, since that question cannot be determined by the Electrical Adviser and the Chief Electrical Inspector to the Government, Shri S. S. Ray, learned counsel for the petitioners, in addition to contending that there was in reality no such alternative remedy available to the petitioners, added that even if it be so, it is not an absolute bar to entertaining the writ petition and the facts of this case justify our deciding the case on merits instead of referring the petitioners to the remedy under Clause 6 of the Generation Order. Shri Dharmadhikari also placed all the facts before us to support his contention that even on merits the petitioners' claim is unsustainable. In short, both sides addressed us at length on merits of the case and for one reason or the other, invited us to decide the controversy on merits. Consequently, we have formed the opinion that it would be better to decide the controversy on merits in this petition instead of directing the petitioners to seek recourse to the alternative remedy under Clause 6 of the Generation Order, assuming it to be available, in order to curtail litigation and avoid any further delay in decision of the dispute. Before dealing with the merits of the case, we shall dispose of the points pertaining to vires of Clause 3 of the Generation Order raised by the petitioners. The question of delay, laches etc. shall be dealt with thereafter, while dealing with the merits. Validity of Clause 3 of the Generation Order--

The first question for consideration is whether clause 3 of the Generation Order is unconstitutional and ultra vires Section 22B of the Indian Electricity Act. 1910. The relevant provisions may now be quoted. Section 22B of the Indian Electricity Act is as under:--

"22-B. Power to control the distribution and consumption of energy:-- (1) If the State Government is of opinion that it is necessary or expedient so to do, for maintaining the supply and securing the equitable distribution of energy, it may by order provide for regulating the supply, distribution, consumption or use thereof.

(2) Without prejudice to the generality of the powers conferred by Sub-section (1) an order made thereunder may direct the licensee not to comply, except with the permission of the State Government, with--

(i) the provisions of any contract, agreement or requisition whether made before or after the commencement of the Indian Electricity (Amendment) Act, 1959, for the supply (other than the resumption of a supply) or an increase in the supply of energy to any person, or

(ii) any requisition for the resumption of supply of energy to a consumer after a period of six months, from the date of its discontinuance, or

(iii) any requisition for the resumption of supply of energy made within six months of its discontinuance, where the requisitioning consumer was not himself

the consumer of the supply at the time of its discontinuance." Clause 3 of the M. P. Electricity Generation, Control and Consumption Order. 1975. the validity of which has to be examined, is as under:--

"3. Any consumer who is receiving electrical energy from the Board and also has an alternative source of generation of power by his own generation set. may be required by the respective Divisional Engineer of the Board having jurisdiction to generate electricity from his set (or sets) to the maximum extent technically feasible in the opinion of the Divisional Engineer and the Board's supply of electrical energy to such consumer shall be reduced to the extent of additional generation assesses as feasi-ble by the Divisional Engineer:

Provided that--

(i) Before assessing the additional generation feasible and directing the consumer accordingly, the Divisional Engineer shall consult the local Manager or Engineer-in-charge of the set;

(ii) the Board shall, during the period such a direction is in force, reduce the contract demand of the consumer to 3 corresponding extent; and

(iii) if due to an emergency outage, which in the opinion of the Divisional Engineer of the Board having jurisdiction is not due to any negligence or failure of those responsible for main taining and running the set, there is reduction in additional generation, or if in the opinion of the Divisional Engineer, the set has to be taken out for maintenance during the period of such emergency or maintenance outage the Board shall try its best to make good the reduction to the consumer, levying an appropriate charge for it."

The attack to the validity of Clause 3 of the Generation Order is mainly on the ground that there arc no guidelines therein for assessment of the generating capacity of the alternative source of generation and, therefore, unfettered powers are conferred on the Divisional Engineer, who has to act thereunder. It is urged that the conferment of such arbitrary powers violates Article 14 of the Constitution and such a restriction not being reasonable is violative also of Article 19(1)(g). It is also contended that the statute does not permit the State Government, which is itself a delegate, to further delegate this auth-ority given by Section 22B, to the Divisional Engineer and this further delegation, therefore is impermissible. Shri Ray contended that there would be no vice in the provision, if the State Government had not totally effaced itself and retained power under Clause 3 to itself to confirm or modify the preparatory work of assessment done by the Divisional Engineer so that the assessment of the generating capacity of the alternative source was really of the State Government and not of the Divisional Engi-neer.

In reply, the learned Advocate General appearing for the State, relied on the return of the State Government at pages 250 and 251 of the Paper Book to contend that the expression technically feasible" used in Clause 3 of the

Generation Order has to be read as taking into account the individual characteristics of a generating set and the local conditions while making the assessment and these factors being implicit in the expression "technically feasible", there are sufficient guidelines for the exercise of the power and there is no element of arbitrariness therein. The learned Advocate General also referred to proviso (i) contained in Clause 3, which says that the Divisional Engineer shall consult the local Manager or Engineer-in-charge of the set before assessing the additional generation feasible and directing the consumer accordingly. He argued that this requirement of consultation ensures that the D. E. would be made aware of the relevant factors pertaining to the generating set for being taken into account before making the assessment. According to the learned Advocate General, this is sufficient to exclude any suggestion of arbitrariness in the exercise of the power. It was also contended that there is no delegation of any essential legislative function by the State Government to the Divisional Engineer who has only been authorised by Clause 3 to work out the details, the essential things having already been provided in clause 3, Shri Dharmadhikari, learned counsel appearing for the Board took a slightly different stand and contended that the expression "technically feasible" occurring in clause 3, is itself sufficient to furnish guidelines and no other factor suggested in the return of the State Government is necessary for this purpose. According to him, the requirement is of finding out the maximum technical feasibility of the alternative source of generation and not what is necessarily practicable under the circumstances.

In our opinion, Shri Ray's contention that Clause 3 of the Generation Order is ultra vires Section 22B of the Indian Electricity Act and/or is unconstitutional cannot be accepted. Section 22B of the Indian Electricity Act empowers the State Government to make orders providing for regulating the supply, distribution, consumption or use of energy for maintenance of supply and securing its equitable distribution if the State Government is of opinion that it is necessary or expedient so to do. The formation of the State Government's opinion of the existence of the necessary conditions and directing the exercise of This power are rightly not disputed, in view of the admittedly acute power shortage during the relevant time. The State Government's power to impose rationing of the energy when the demand is far in excess of supply, by issuing orders under this provision, is not in dispute. The real question, therefore, is whether in Clause 3 of the Generation Order any essential function entrusted to the State Government by Section 22B has been unauthorisedly further delegated by it to the Divisional Engineer. This brings us to the question whether clause 3 empowers the Divisional Engineer to discharge any essential function in this connection or he has only been entrusted with the duty of implementing the policy laid down by the State Government in this Order for maintenance of supply and securing its equitable distribution. It is in this light that the contents of Clause 3 have to be examined.

The main enacting part of Clause 3 says that any consumer receiving electrical

energy from the Board and also having an alternative source of generation of power of his own, is to be directed by the Divisional Engineer to generate electricity from his set to the maximum extent technically feasible" in his opinion, and the power supplied to the consumer shall be reduced to the extent of additional generation assessed as feasible by the Divisional Engineer. In other words, the policy laid down by the State Government is that a consumer having his own source of generating power should be required to tap it to the maximum extent technically feasible and to the extent power is available to him from the alternative source, the Board's supply of power should be reduced. There can be no doubt that requiring a consumer to reduce his intake of power from the Board's supply to the extent he can generate power from his own generating set is a very reasonable course to adopt during the period of power shortage. The State Government having itself provided for this essential thing in Clause 3, the only remaining part pertaining to its implementation after working out the details has been left to the Divisional Engineer for obvious reasons. For implementation of this decision of the State Government, taken in exercise of its power u/s 22B, the only requirement is finding out the generating capacity of the alternative source belonging to such a consumer. This matter of detail required for implementation of the State Government's decision has necessarily to be left to an expert in the field. This assessment cannot also be treated as an essential legislative function required to be discharged, by the State Government itself inasmuch as it is only a data required to be filled in the formula laid down by the State Government in Clause 3. The generating capacity of the alternative source available to different such consumers brings variable, this non-essential function had necessarily to be left for determination in each individual case to an expert and this does not amount to further delegation of an essential function by the State Government to the Divisional Engineer. Clause 3 does not leave any discretion, much less unfettered discretion on any essential feature to either the Divisional Engineer or any other officer of the Board itself as it provides for reduction of Board's supply of the power to any such consumer to the extent the consumer has his own source of generating power. Clause 3 of the Generation Order does not, therefore, suffer from the vice of impermissible delegation of an essential function by the State Government in favour of the Divisional Engineer and it is, therefore, not ultra vires Section 22B of the Indian Electricity Act.

Clause 3 is also not unconstitutional as contended by Shri Ray. The expression to the maximum extent technically feasible" provides sufficient guidelines to exclude any arbitrariness in making assessment of the generating capacity of the alternative source of generation of power. Proviso (i) also requires the Divisional Engineer to consult the local Manager or Engineer-in-charge of the set before making the assessment, it is, therefore, clear from Clause 3 itself that the assessment to be made by the Divisional Engineer is of the maximum generating capacity "technically feasible" of the generating set, after consulting the local Manager or Engineer-in-charge of the set. The requirement of consultation is obviously for the purpose of knowing the individual characteristics of the

generating set and any significant Local condition which may be relevant for assessing the generating capacity of the set. It is, therefore, clear from the provision itself that assessment has to be made of the maximum generation technically feasible from the generating set, taking into account the relevant factors pointed out by the local Manager or the Engineer-in-charge of the set who is expected to know the individual characteristics of the set. The expression, "technically feasible" coupled with the requirement of consultation with the local Manager or the Engineer-in-charge of the set in order to know the individual characteristics of the set provides sufficient guidelines for making the assessment and excludes any element of arbitrariness therein. No further details are necessary to furnish necessary guidelines for making assessment. The factors, enumerated in the return of the State Government at pages 250 and 251 of the Paper Book, to which reference was made by the learned Advocate General do not constitute any additional requirements and are merely illustrative to indicate their relevance in a given case. In our opinion, it is not necessary to read them as additional requirements, since the expression "technically feasible" used in Clause 3 with the requirement of prior consultation with the local Manager or Engineer-in-charge of the set mentioned in proviso (i) thereto, provides sufficient guidelines to regulate the assessment and exclude any element of arbitrariness therein. In this connection, Clause 6 of the Generation Order is also relevant, which provides a machinery for deciding any dispute raised by the consumer to the assessment made by the Divisional Engineer under Clauses 3 and 4. Obviously, in deciding a dispute under Clause 6, the Electrical Advisor and the Chief Electrical Inspector is required to re-examine whether the assessment made by the Divisional Engineer is technically feasible in a particular case, keeping in view the factors given out by the local Manager or the Engineer-in-charge of the set during consultation with him. The provision for resolving the dispute in such a manner contained in Clause 6 also negatives the argument of conferring arbitrary powers on the Divisional Engineer under Clause 3.

As earlier stated, the function of the Divisional Engineer under Clause 3 is merely to quantify the variable data, namely, the maximum generating capacity technically feasible of the consumer's alternative source of power; and to direct the consumer to generate power to that extent leading automatically to the result that the Board's supply to the consumer is reduced to the corresponding extent during the operation of such a direction. There is no effacement of the State Government in the matter of regulating the supply or securing equitable distribution while making such a provision as the essential function having been performed under Clause 3 by the State Government itself, the quantification of a variable data and implementation of the decision of the State Government is alone left to the Divisional Engineer and the Board. Shri Ray's suggestion that the final authority for confirming or modifying the assessment made by the Divisional Engineer should have been retained by the State Government in each case is difficult to accept, inasmuch as, having laid down the policy or principle

necessary for the purpose of Section 22B, its implementation had to be left to the Board and its officers. Clause 3 of the Generation Order is, therefore, neither arbitrary nor unreasonable to be unconstitutional nor is it ultra vires Section 22B of the Indian Electricity Act, 1910. The challenge to its validity is rejected.

#### ALTERNATIVE REMEDY

The Board contended that Clause 6 of the Generation Order provides for decision by the Electrical Supervisor and the Chief Electrical Inspector to the Government, of the dispute raised by a consumer to the assessment made and direction issued by the Divisional Engineer under Clause 3 thereof. Without exhausting this remedy available to the petitioner, this petition has been filed and the Board's preliminary objection to the maintainability of this petition is on this ground. The objection is also supported on the basis of Section 34 of the Arbitration Act, contending that Clause 6 of the Generation Order contains the necessary arbitration clause to attract Section 34 of the Arbitration Act. On behalf of the petitioners, it was contended that the assessment of the generating capacity of the alternative source belonging to all such consumers including the petitioner, having been made by a committee headed by the Electrical Advisor and the Chief Electrical Inspector, which was adopted by the Divisional Engineer, there was a reasonable apprehension of bias in the Electrical Advisor and the Chief Electrical Inspector and, therefore, such a remedy was futile. Applicability of Section 34 of the Arbitration Act was denied and it was contended that there being no effective alternative remedy available to the petitioner for the reason given, it was not a fit case for refusing to entertain the writ petition on this ground.

No authority was cited before us to support the contention that Section 34 of the Arbitration Act, in terms, applies even to a writ petition. In our opinion, it is extremely doubtful that Section 34 would, in terms, be applicable to such a proceeding. All the same, the existence of an arbitration agreement is relevant for deciding whether the discretionary power under Article 226 of the Constitution should be exercised in favour of a person to whom the alternative remedy of arbitration is available. Such a provision cannot be treated as an absolute bar to the maintenance of a writ petition. The remedy provided in clause 6 of the Generation Order can be taken into account only to determine whether the remedy provided therein is sufficient in the present case to refuse to entertain the writ petition.

Shri-Ray, learned counsel for the petitioners, took us through the entire correspondence between the parties which is the basic material for deciding the case on merits, and invited us to give a decision on merits instead of directing the petitioners to the remedy under clause 6 of the Generation Order, after a lapse of several years, even if we reach the conclusion that this alternative remedy would not be futile in the present case. In reply, Shri Y. S. Dharmadhikari, learned counsel for the Board, in spite of raising this preliminary objection, addressed us also on the merits and contended that a perusal of the entire correspondence between the parties clearly shows that the petitioners

have no case even on merits. In other words, Shri Dharmadhikari also invited our decision on merits, saying that the entire material in the shape of documents being present on record and both sides having addressed us at length on merits, it would be proper to give a decision on merits instead of further delaying the decision of the controversy for some more years. The ultimate stand taken by both sides, therefore, is of seeking decision on merits on the ground that the material present on the record is sufficient for the purpose. In view of this position emerging at the hearing, the question of existence of alternative remedy under Clause 6 of the Generation Order ceases to be of any practical consequence in the present case and we propose to decide the controversy on merits instead of leaving the same for decision under Clause 6 of the Generation Order, unless any part of the controversy requires any further investigation for which the alternative remedy is more suitable. Failure to resort to the available alternative remedy before invoking the High Court's jurisdiction under Article 226 of the Constitution, is not an absolute bar to exercise of the power under Article 226 of the Constitution and is merely a circumstance enabling the High Court to refuse exercise of this extraordinary and discretionary power, if the facts of the case so require. This is the settled position in law and it is unnecessary, to refer to the several decisions cited at the hearing on this point. In view of the conclusion reached by us on this point, it is also unnecessary to deal with the reasons given by Shri Ray for not directing the petitioners to resort to the alternative remedy, in the facts of the present case.

#### INORDINATE DELAY/LACHES/ ACQUIESCENCE

Another objection taken by the Board is based on the petitioners' conduct, disclosing the petitioners' laches or acquiescence or at any rate inordinate delay in making the challenge. Shri Dharmadhikari, learned counsel for the Board, contended that the petitioners' grievance is basically against the order dated 17-5-1975 and the petition was filed more than six years thereafter on 6-3-1981. He argues that the impugned order dated 17-5-1975 was acted upon throughout and the petitioners raised the first challenge to it only by letter dated 15-9-1980 and at no time prior to it. Accordingly, it is urged that the petitioners' challenge is clearly an afterthought and the petitioners are not entitled to the relief claimed on this ground as well. Shri Ray's reply on behalf of the petitioners is that the petitioners ventilated their grievance from the very outset and challenged the validity of the impugned orders on account of which the Board itself did not implement the impugned orders in issuing their letter dated 5-8-1980; and immediately thereafter the petitioners took steps to challenge the impugned orders. Shri Ray relied on the documents collectively marked An-nexure P and appearing at pages 137 to 156 of the paper Book, to show that the ceiling limit for drawing power from the Board's supply was fixed under the Regulation Order for the period between 17-5-1975 and 1-5-1980 indicating that the basic order dated 17-5-1975 was not acted upon till issuance of the order dated 5-8-1980. The foundation of the rival contentions on this point is based on the conduct of the parties emerging from the correspondence between them and the facts

beyond controversy. As we shall show hereafter, the petitioner-company's conduct clearly shows that the challenge made in this petition is a clear afterthought to avoid a liability which was accepted and never disputed at least till the year 1980. Petitioners' acquiescence is too obvious to admit of any doubt. Its effect shall be stated later.

VALIDITY OF THE ORDER DATED 17-5-1975 (ANNEXURE H) AND ORDER DATED 10-10-1975 (ANNEXURE O).

It is under this heading that the entire correspondence which is material for the demand up to 31-7-1980, would be considered. The conduct of the parties also would be covered herein. It may be mentioned that for the period ending on 11-11-1979, there is no dispute and the dispute is only for the period commencing on 12-11-1979. The period between 12-11-1979 and 31-7-1980 is covered by the aforesaid orders. The period beginning on 1-8-1980 is covered by the subsequent order dated 13-10-1980 (Annexure U), which will be dealt with separately.

By order (Annexure H) dated 17-5-1975, the concerned D. E. of the Board informed the petitioner-company that the additional generation technically feasible from the sets installed and run by the company had been assessed at 2700 K.W. after consulting the company's representatives and the company was, therefore, directed to generate additional electricity to the extent of 2500 K.W. from its sets with effect from the date of this direction. It was further stated therein that the contract demand for supply of electricity to the petitioner-company was, accordingly, reduced to nil from the date of the direction. Apparently, this was a direction issued under Clause 3 of the Generation Order and the contract demand to which the company was entitled at that time being only 2500 K.W., it was reduced to nil as a result of the direction to generate 2500 K.W. from the company's generating set, the additional generation technically feasible from it having been assessed at 2700 K.W. in consultation with the company's representative. The reply on behalf of the company to this direction of the Divisional Engineer was given by letter dated 21-5-1975, wherein it was stated that the actual generation feasible at that time was Only 1800 K.W. but it was not advisable to generate more than 1200 K.W. in the existing conditions. It was added that this was only due to steam limitation and once the boiler under erection starts steaming, generation could be enhanced to the full installed capacity, it may be mentioned that the full installed capacity of the company's generating sets was far in excess of 2500 K.W. which was required to be generated, according to the Divisional Engineer's direction under Clause 3 of the Generation Order, The next document is the company's letter dated 30-5-1975, addressed to the concerned Superintending Engineer of the Board. It was expressly stated therein that as directed, the company had started generating 2000 K.W. from its generating set from 30-5-1975 in order to meet the power shortage in the State. It was then stated that the coal consumption of the petitioner-company had increased for this reason and accordingly a request was

made to the Board to recommend to the authorities at New Delhi for allotment of additional coal to the company to meet its demand. There was thus a clear admission of generating at least 2000 K.W. from its own generating set from 30-3-1975 in obedience to the direction given by the Divisional Engineer under Clause 3 of the Generation Order and there was absolutely no challenge made to the Divisional Engineer's authority to issue such a direction or to the validity thereof.

The Divisional Engineer then sent a letter dated 2-6-1975 to the company mentioning therein that the assessment of the additional generating capacity of the petitioner-company had been done by a committee comprising of the Electrical Advisor/Chief Electrical Inspector to the Government and the petitioner company was advised to obey the orders. It may here be mentioned that the Board wrote a letter dated 28-3-1975 to the Electrical Advisor/Chief Electrical Inspector requesting him to become member of the committee along with the concerned Superintending Engineer of the Board and the Divisional Engineer (Generation) of the Board for making a realistic assessment of the alternative generating capacity of such consumers. In view of the forthcoming Generation Order and the Regulation Order, which were issued by the State Government soon thereafter on 4-4-1975 and brought into force with effect from 7-4-1975. The committee made assessment of the generating capacity from the alternative source available to certain consumers, including the petitioner-company and submitted its report dated 3-5-1975, in which the existing generating capacity of the petitioner-company was assessed at 2700 K.W. and it was mentioned that with an additional boiler likely to be commissioned in Jan., 1976, the petitioner's generating capacity was likely to increase to 4790 K.W. This assessment by the committee was made at the spot after inspecting the premises of the consumer, the Divisional Engineer by another letter dated 3-6-1975, addressed to the Superintending Engineer gave details of the basis on which the additional generation of the company from its source had been assessed at 2700 K.W. by him; and consequently a direction to generate 2500 K.W. to meet its entire contractual demand was given to the company by the order dated 17-5-1975. The particulars given by the Divisional Engineer in his letter dated 3-6-1975, were apparently of account of the company's representation against the assessment of its generating capacity in excess of 2000 K.W. which had been clearly admitted in the company's letter dated 30-5-1975. In this letter, the Divisional Engineer wrote that the petitioners' power house was inspected by him and the report of assessment was being given. The contents of the letter also show that the Divisional Engineer's inspection was made in the presence of the company's representative who had also produced the necessary documents before the E. E. to enable a proper assessment and the ultimate conclusion reached by the Divisional Engineer that the generation capacity of company from its own generating set was in excess of its contractual demand of 2500 K.W. was based on the data collected during inspection and in consultation with the company's representative. This letter also indicates that the assessment was not merely a

mechanical or adoption of the assessment made earlier but a fresh assessment made by the Divisional Engineer based on his own inspection and the data collected in consultation with the company's representative. As a matter of fact, the Divisional Engineer also took note of a variation from the earlier report of the committee.

The company's Chief Engineer, who was obviously a person representing the petitioner-company, in the respect at all stages, including consultation and inspection, then wrote a letter dated 4-6-1975 to the Divisional Engineer. It expressly refers to the discussion between the Board's Divisional Engineer and the company's Chief Engineer on 30-5-1975 and examination of the relevant records for the purpose of assessment of the generating capacity of the company's set. Even though this letter reiterated that the assessment made earlier by the committee was wrong, it admitted the capacity to generate 1200 K.W. It may be pointed out that only a few days earlier in his letter dated 30-5-1975 the company's Chief Engineer had expressly admitted generation of 2000 K.W. from its sets from 30-3-1975 and yet thereafter in his letter dated 4-6-1975, the generating capacity was mentioned as mere 1200 K.W. without even trying to explain the earlier admission of generating 2000 K.W. from 30-3-1975. This letter of the company's Chief Engineer also raised no objection to the Divisional Engineer's authority to make the assessment and issue directions under Clause 3 of the Generation Order and the objection was merely to the capacity to generate in excess of the quantity admitted by the company, which, as earlier stated, was admitted to be 2000 K.W. in the letter dated 30-5-1975.

It appears that the company also approached the higher officers of the Board at Jabalpur for reassessment of the generating capacity of its set and this led to some correspondence between the company and the Secretary of the Board at Jabalpur. These are letters dated 8-8-1975 from the Board's Secretary to the Company, dated 25-8-1975, from the Company to the Board, and dated 25-10-1975, from the Board to the company. This correspondence related to reassessment by actually taking load on the company's set by running it in parallel with the Board's supply system, as suggested by the Board but not found feasible by the company's Chief Engineer. This correspondence between the company and the Board, apparently at the company's initiative for reassessment of the generating capacity of its set, did not proceed further and was then given up.

The concerned Divisional Engineer of the Board after asserting in his aforesaid letters dated 2-8-1975 and 3-6-1975, that his assessment of 2500 K.W. as the generating capacity of the company's set was correct and based on proper material, reiterated that direction to the company in his letter (Annexure O) dated 10-10-1975. It was stated therein that the company was directed to generate additional electricity to the extent of 2500 K.W. from its set with effect from 31-10-1975 and, accordingly, the contract demand of supply of electricity to

the company stood reduced to nil with effect from 31-10-1975. This direction under Clause 3 of the Generation Order was obviously a reiteration of the earlier direction contained in Annexure H, dated 17-5-1975, after a fresh assessment made by the Divisional Engineer in consultation with the company's representatives, including its Chief Engineer, with the only difference that the direction issued now was made effective from the date of that order. In this direction the company's Chief Engineer sent a reply by letter dated 28-10-1975. The earlier stand of inability to generate more than the quantity mentioned due to steam limitation, was reiterated and request for permission to draw only 300 K.W. power from the Board's supply was made against the total contract demand of 2500 K.W.

It may be mentioned here that no modification of the Divisional Engineer's direction issued initially by Annexure H, dated 17-5-1975, and reiterated in Annexure O, dated 10-10-1975, was made at any time thereafter by the Divisional Engineer or any one else. The further correspondence has now to be examined for the purpose of finding out whether the conduct of the parties emerging therefrom is consistent with the Board's non-implementation of this direction given by the Divisional Engineer under Clause 3 of the Generation Order, as claimed by the petitioners, or it is consistent with the petitioners' conduct of accepting and not challenging the direction, as claimed by the Board. The letters collectively marked Annexure P, which are from pages 137 to 156 of the Paper Book, are relied on by Shri Ray to show that the ceiling limit for consumption of power from the Board's supply at normal tariff was fixed under the Regulation Order and not under the Generation Order, permitting the company to draw power from the Board's supply to this extent during the period between 17-5-1975 and 1-5-1980, notwithstanding the Divisional Engineer's aforesaid direction resulting in reducing the contract demand from the Board's supply to nil under Clause 3 of the Generation Order. On this basis it is urged by Shri Ray that the Divisional Engineer's direction contained in Annexure H dated 17-5-1975 and reiterated in Annexure O, dated 10-10-1975, was never implemented or given effect to but offer to make a reassessment was made, which was never done. Shri Dharmadhikari, on the other hand, contended that the Annexure P series of letters were no doubt issued under the Regulation Order fixing a ceiling limit for consumption of power from the Board's supply during the period mentioned, which were subsequent to the Divisional Engineer's aforesaid direction to generate 2500 K.W. reducing the contract demand to nil, but this was done only for supply of power to the company during emergency in accordance with proviso (iii) to Clause 3 of the Generation Order. He also points out that this was done for the purpose of determining the appropriate charge to be levied for the supply made during the emergency inasmuch as charges were recovered at the normal tariff up to the ceiling limit and at penal rate in excess thereof. Fixing of the ceiling limit in accordance with the provisions of the Regulation Order by Annexure P series of letters during the period mentioned, is admitted by the Board but the purpose of doing so is as pointed out. Shri

Dharmadhikari also referred to certain other documents to show the admissions made by the company that the entire supply was made to it subsequent to the Divisional Engineer's aforesaid direction under Clause 3 of the Generation Order during the emergency contemplated by proviso (iii) to clause 3 of the Generation Order. Thus, the real controversy on this point between the parties relates to the purpose of issuing Annexure P series of letters fixing the ceiling limit of consumption under the Regulation Order.

The contents of the documents collectively marked Annexure P (at pages 137 to 156 of the Paper Book) read in isolation are consistent with the rival contentions and, therefore, some other material has to be found for deciding which of the two contentions is correct. The petitioners' contentions are based mainly on the contents of Annexure P series of letters. It is obvious that if there be any admission of any of the parties on this point, the same must be treated as binding on the party making the admission, unless the same has been explained away. Shri Dharmadhikari has referred to several documents in support of his contention that the petitioners' admissions support the Board's stand. We shall, therefore, now examine whether there are any such admissions made by the petitioners.

A very significant and material admission of the company is contained in the letter dated 24-10-1979, from the senior President of the company to the Secretary of the Board. It would be useful to reproduce this entire letter to show how the power drawn from the Board's supply was treated by the company up to the date of the letter. It may also be mentioned here that the contract demand had been increased to 3300 K.W. from 2500 K.W. by virtue of an agreement dated 11-7-1979 and later by another agreement dated 26-2-1980, it had become 3490 K.W. It was for this reason that this letter mentions the contract demand as 3300 K.W. This letter reads as under:--

"We have been generating our own power, requirement since the beginning of the Bill. Due to various reasons of expansion etc. we were also drawing power from the Board for which we have a contract demand of 3300 K.W. Since it was assessed that we could generate our own requirement our contract demand was considered nil as per Government order due to power crisis in the State. We are grateful to the Board for their sanction that, in emergency we can draw the sanctioned power with proportionate units up to 10 days in the month with a maximum of 3 days at a time. The position now is has due to acute coal shortage and uncertain railway movement our capacity to generate our full requirement is curtailed and it is requested that during this period of shortage, we may kindly be allowed to draw power to our sanctioned limit for which we will be grateful as otherwise lay-off will be inevitable.

Thanking you,

Yours faithfully, For Jiyajeerao Cotton Mills Ltd. Sd/- S. S. Chordia Senior President."

(Underlining by us).

In this letter, it was expressly admitted by the company "that its contract demand was reduced to nil under a Government order on account of the assessment that its own generation capacity was sufficient to meet its entire need of power; that during emergency the Board had sanctioned supply of power to the company up to 10 days in a month with the maximum of 3 days at a time; and then a request was made for permission to draw power up to the sanctioned limit during the period of coal shortage curtailing the generation from the company's set. There was thus a clear admission made by the company as late as 24-10-1979 that its contract demand had been reduced to nil on account of its capacity to generate power from its own set to meet the demand, and that supply of power to its by the Board had been made only during emergency, for which the company was grateful and requested continuance of the facility up to the sanctioned limit during a similar situation. Proviso (iii) to Clause 3 of the Generation Order, as earlier stated, provides for supply of power by the Board to such consumer during an emergency outage, where there is reduction in the additional generation available to the consumer and for such emergency supply of power, the Board is empowered to levy appropriate charge. Thus, the supply of power by the Board to such a consumer, who has an alternative source of supply of his own and to whom a direction has been given by the Divisional Engineer under Clause 3 of the Generation Order, is clearly envisaged during emergency outage and, therefore, mere supply of power by the Board during the period of operation of the direction issued under Clause 3 of the Generation Order does not indicate non-implementation of the direction given to the consumer. Levying of appropriate charges for the emergency supply contemplates determination of the same on some reasonable basis. The basis adopted by the Board in the present case was levy of normal tariff up to the ceiling limit fixed under the Regulation Order and special tariff for the consumption in excess of the ceiling limit. Such a basis for levy of the charges is undoubtedly reasonable and for that reason it was not even challenged.

Some other documents are also relevant to show such as admission of the company even though the aforesaid letter dated 24-10-1979 from the senior President of the petitioner-company is alone sufficient for the purpose. The letter dated 30-5-1977 from the Chief Engineer of the petitioner-company to the Secretary of the Board also supports the Board's contention on this point. In this letter, it was expressly mentioned that, in May 1977, no power had been drawn by the company from the Board's supply; during the earlier period, some power had to be drawn from the Board's supply, as the new boiler was giving trouble throughout a statement had been submitted showing the duration and cause of break-down of various boilers in an earlier letter dated 14-2-1977; permission was sought to draw power up to 1875 K.W. (the figure arrived at on reducing 2500 K.W. in accordance with the Regulation Order) during the period the boilers had been giving trouble, i.e. July 1976 to March 1977 and April 1977, and request for permission to draw power up to 1875 K.W. from 15th June to 15th

Sept. 1977 to enable completing overhauling of all the boilers. It was further stated therein that after the sixth boiler had been stabilised, the petitioner-company would not draw any power from the Board after 15-9-1977, when overhauling of the boilers was completed, except in case of any emergency due to outage of any of the boilers. Thereafter, an arrangement was suggested for issuing standing instructions for supply by the Board during emergencies of different kinds. The letter also contains a request for charging at normal tariff, where the emergency supply was up to the total of 7 days in a month and at the penal rate where it was in excess of 7 days in a particular month. This letter of the company's Chief Engineer written on 30-5-1977 in the middle of the period between Hay 1975 and May 1980, covered by Annexure P series of letters, is another document containing unequivocal admissions of the company to fully explain fixing of the ceiling limit under the Regulation Order by the Annexure P series of letters in relation only to emergency supply as claimed by the Board and it wholly negatives the contrary stand now taken by the petitioners that the direction given by the Divisional Engineer under Clause 3 of the Generation Order in his letters dated 17-5-1975 and 10-10-1975 was never acted upon.

On 21-7-1980, the company sent a telegram to the Chairman of the Board, mentioning the difficulties experienced in generating power from its set and requesting for full allotment of power under the contract. However, it was mentioned therein that under the conditions the company was unable to generate more than 4500-5000 K.W. It was also stated that no assessment of the company's generating capacity on a realistic basis had been done in spite of repeated requests. On 26-7-1980, the company sent another letter to the Superintending Engineer of the Board. It was mentioned therein that the company was doing its best to generate the entire power needed by it but due to poor quality of coal it was unable to generate its full requirement of power and it was not possible to generate more than 5000 K.W. Even up to this stage the company only wanted reassessment of its generating capacity on account of the difficulty expressed in generating the entire power needed by it in spite of the generating set's capacity to do so.

The Board then sent a letter (Annexure T) dated 5-8-1980 to the company, mentioning therein ex post facto sanction of emergency supply up to the ceiling limit fixed under the Regulation Order for the period up to 11-11-1979 conveyed earlier by letter dated 14-1-1980, of the concerned Superintending Engineer (the last letter in Annexure P series). It then stated that the company had continued to draw power from the Board's system even thereafter without any approval of the Board and, therefore, drawal of power from the Board's system thereafter i.e. from 12-11-1979 was wholly unauthorised, on account of which the entire supply from 12-11-1979 would be charged at the penal rate, as provided under the Regulation Order. It was only then by letter (Annexure J) dated 15-9-1981, that the company, for the first time, raised objection to the assessment made by the Divisional Engineer in the manner it has been done in the petition. It was mentioned that there was no assessment made of the generating capacity of the

company's set as contemplated by Clause 3 of the Generation Order. Then a letter dated 25-9-1980 was sent by the company to the Committee for "reassessment of the maximum technical feasibility of power generation", raising objections to the earlier assessment. Thus, the objection to the validity of the direction issued by the Divisional Engineer was raised for the first time in the company's letter dated 15-9-1980 and the inability to meet any requirement from its generating set was stated for the first time in the company's letters dated 21-7-1980 and 26-7-1980 only. Prior to that the controversy was a limited one, as pointed out earlier, and the company had acted on the basis that the Divisional Engineer's direction to generate 2500-K.W. issued under Clause 3 of the Generation Order was valid and the company was entitled only to emergency supply under proviso (iii) in Clause 3 in the manner it was given for the period up to 11-11-1979. The occasion for raising this controversy appears to have arisen as a result of the Board's letter dated 5-8-1980 (Annexure T), wherein it was stated that the entire supply from 12-11-1979 was to be charged at the rate.

Reference may also be made now to some other documents supporting the Board's contention and explaining Annexure P series letters as relating merely to emergency supply.

The Board's letter dated 15-4-1970 to the company clearly shows that the supply of power to the company by the Board was merely on emergency basis as claimed by the Board. To the same effect are the Board's letters dated 19-6-1976, 1-6-1977 and 4-7-1977. The company's letters also stating that the supply was on emergency basis, which form part of the same correspondence are letters dated 24-5-1976, 14-2-1977, 6-5-1977 and 30-5-1977. The letter dated 30-5-1977 of the company's Chief Engineer to the Board expressly admits the supply being on emergency basis. Similar letters of the company dated 1-6-1977 and 12-9-1977 also reaffirm this conclusion as they expressly mention drawing power from the Board's source by the company during emergency. The Board's letter dated 21-9-1977 then extends the sanction for emergency supply up to 30-9-1977 and the company's letter dated 7-10-1977 is a request to extend the emergency supply till 15-10-1977, making such a request again in the letter dated 11-10-1977. The Board's reply dated 15-10-1977 authorises drawing of emergency power up to the specified limits. The Board's letters dt. 8-12-1977 and 26-5-1978 are also to the same effect. The company's other letters is dated 29-5-1978, stating that drawal of power from the Board's supply had been stopped but had to be taken again during emergency, and similar are letters dated 30-5-1978 and 7-7-1978. The Board's reply dated 16-6-1978 again sanctions drawal of power during emergency by the company for the period specified therein. The Board's letter dated 20-6-1978 rectifies the ceiling limit. It also says that the ceiling limit was fixed for drawing power during emergency. The company's letter dated 9-9-1978 and those of the Board dated 26-6-1978, 29-6-1978, 26-9-1978, 11-11-1978 and 14-1-1980, all reaffirm the Board's contention that all these supplies, during the relevant period up to 11-11-1979 were made to the company by the Board under the emergency clause contained

in the Generation Order.

This entire correspondence between the Board and the company containing express admissions of the company to that effect leaves no doubt that the entire supply of electricity to the company up to 11-11-1979 was under the emergency clause contained in the proviso (iii) to clause 3 of the Generation Order. This also shows that the assessment made and direction given by the Divisional Engineer to the company under Clause 3 of the Generation Order was not challenged and sanction was taken from time to time for drawing power under the emergency provision contained in Clause 3, proviso (iii), of the Generation Order, acting upon the Divisional Engineer's assessment made and direction issued. It is also evident from this conduct of the company revealed, inter alia, by the correspondence that fixing of ceiling limit of supply was made under the Regulation Order vide letters marked collectively as Annexure P, for determining the appropriate charge to be levied on the company for emergency supply and not for any other purpose. It is obvious that emergency supply under Clause 3, proviso (iii), of the Generation Order to the company presupposes assessment of its capacity of generation from the alternative source of supply and also the direction made under Clause 3. It appears that the trouble arose when the company was not able to continue getting the emergency supply in the same manner even after 12-11-1979 and this has led to the dispute.

It has, therefore, to be held that the orders dated 17-5-1975 (Annexure H) and dated 10-10-1975 (Annexure O) made by the concerned Divisional Engineer of the Board are valid and were duly accepted and acted upon by the petitioner-company for about five years till the Board's letter dated 5-8-1980 (Annexure T) had been issued, reiterating the same. These orders are, therefore, valid and binding on the petitioner-company until superseded in accordance with law. The contention of the petitioners' counsel against their validity is rejected.

#### VALIDITY OF ORDER DATED 5-8-1986 (ANNEXURE T) AND ORDER DATED 13-10-1980 (ANNEXURE U)

By the order dated 5-8-1980 (Annexure T), the Board intimated the company that the power drawn from the Board's system by the company with effect from 12-11-1979 was unauthorised and, therefore, it would be billed at the penal rate. By the order dated 13-10-1980 (Annexure U) the Board intimated the company that the supply up to 31-7-1980 would be governed by the earlier decision but with effect from 1-8-1980 the company was permitted to draw power up to 875 K.W. at the normal tariff, while the supply drawn in excess thereof would be billed at the higher rate. This ceiling of 875 K.W. was fixed with effect from 1-8-1980 under the Regulation Order, treating 1250 K.W. as the available supply under the contract reduced in accordance with the Generation Order. The question has, therefore, to be examined with reference to two periods i.e. from 12-11-1979 to 31-7-1980, and thereafter commencing on 1-8-1980.

There is no dispute that the only direction given by the Divisional Engineer under

Clause 3 of the Generation Order to the company was to generate 2500 K.W. from its own source of supply and, therefore, the contract demand could be reduced only to this extent and the quantity in excess of 2500 K.W., reduced in accordance with the Regulation Order, had to be supplied by the Board to the company at the normal tariff so long as the Divisional Engineer's order to generate only 2500 K.W. from the company's own source of supply continued to operate: It is on this basis that the question arising for the period beginning from 12-11-1979 has to be determined.

For the period between ,12-11-1979 and 31-7-1.980 the company has not been given the benefit of any contract demand and the entire supply has been billed at the penal rate. It is, therefore, clear that in the event of the contract demand being in excess of 2500 K.W., the company is entitled to the benefit of the excess quantity. There is also no dispute that this excess quantity available was 800 K.W. from 12-11-1979 to 25-2-1980 and 990 K.W. from 26-2-1980 to 31-7-1980. This excess quantity under the contract determined under the Generation Order had of course to be reduced in accordance with the provisions of the Regulation Order and such reduced excess quantity of electricity had to be billed according to the normal tariff, while the power drawn in addition to that quantity alone could be billed at the penal rate. Shri Dharmadhikari, learned counsel for the Board was unable to contest this position. He rightly did not dispute that the bills issued to the company for the period between 12-11-1979 and 31-7-1980, having charged the entire supply at the penal rate, the bills for that period have to be revised on this basis.

The result is that the bills issued to the company for the period between 12-11-1979 and 31-7-1980 have to be revised by charging the supply made to the company to the extent of 800 K.W. from 12-11-1979 to 25-2-1980 and 990 K.W. from 26-2-1980 to 31-7-1980, reduced to quantity determined in accordance with the Regulation Order, at the normal tariff; and the supply made to the company in excess of this quantity alone has to be billed at the higher or penal rate. Accordingly, the demand made from the company for the period between 12-11-1979 and 31-7-1980 has to be revised to this extent and the bills issued to the company by the Board have to be corrected in this manner.

For the period commencing on 1-8-1980, the Board has given to the company the benefit of 1250 K.W. as the contract demand determined under the Generation Order, which has been reduced in accordance with the Regulation Order to 875 K.W. as mentioned in the order dated 13-10-1980 (Annexure U). To this extent the company has been charged at the normal tariff and the Board's supply in excess thereof is alone billed at the higher or penal rate. Taking into account the entire contract demand reduced by 2500 K.W. fixed by the Divisional Engineer under Clause 3 of the Generation. Order, the balance comes to 990 K.W. instead of 1250 K.W. of which the Board has given the benefit to the company. The Board's reply is that instead of 990 K.W. only to which the company was entitled, the benefit of 1250 K.W. has been given on account of the

request made by the company for giving facility of additional 300 K.W. and this is how the company has been given the larger benefit of 1250 K.w. instead of 990 K.W. to which alone the company was entitled.

Shri Ray for the petitioners contended that this disclosed arbitrariness, while Shri Dharmadhikari on behalf of the Board suggested that this act of the Board only shows that the Board has been extending greater facility to the company than that to which it has been entitled. At any rate, the petitioner company cannot claim to be aggrieved by grant of facility in excess of that to which it was entitled. Moreover, the Board has also shown that this greater facility has been given, in view of the company's request for supplying additional 300 K.W. There is, therefore, no arbitrariness in arriving at the figure of 1250 K.W. as suggested by Shri Ray. This being so, there is no infirmity in the Board's order dated 13-10-1980 in so far as it specifies the ceiling limit for supply of electricity at the normal tariff with effect from 1-8-1980. There is thus no ground for revision of the bills for the period commencing on 1-8-1980 inasmuch as the company has been given the due benefit to which it was entitled under the contract as it stood modified by the Generation Order and the Regulation Order. The petitioners' challenge to the orders dated 5-8-1930 and 13-10-1980 in respect of the demand made in accordance with the bills issued for the period commencing on 1-8-1980 must, therefore, fail.

We may add that the Board is required to consider on merits the company's request for supply of power under the emergency clause, whenever such a request is made. A general refusal to do so, contained in some of the Board's letters, is merely a casual statement which has to be overlooked. Since no refusal to consider any such specific request has been shown to us, no further discussion of the same is necessary.

## CONCLUSIONS.

As a result of the aforesaid discussion, our conclusions are as under:--

(1) Clause 3 of the Generation Order is neither unconstitutional nor ultra vires Section 22B of the Indian Electricity Act, 1910.

(2) The existence of an alternative remedy to the petitioners is not treated as a bar to this petition, in view of all relevant materials being placed on record and the Board's readiness for a decision on merits to avoid any further delay in the conclusion of the controversy.

(3) The orders dated 17-5-1975 (Annexure H), dated 10-10-1975 (Annexure O), issued by the Divisional Engineer are validly made under Clause 3 of the Generation Order and continue to operate as they have not been superseded in accordance with law. The petitioner-company duly accepted these orders and acted upon the same for about five years, clearly indicating its acquiescence.

(4) The power supply drawn by the petitioner-company from the Board's system from 12-11-1979 to 31-7-1980 is to be charged partly at the normal tariff to the

extent of 800 K.W. from 12-11-1979 to 25-2-1980 and 990 K.W. from 26-2-1980 to 31-7-1980, reduced in accordance with the Regulation Order; and the quantity of electricity drawn by the company from the Board's system in excess thereof alone has to be billed at the higher tariff or penal rate. The bills issued by the Board to the petitioner-company for the period between 12-11-1979 and 31-7-1980 are to be revised in this manner. The Board's order dated 5-8-1980 (Annexure T) is partly invalid to this extent only.

(5) The order dated 13-10-1980 (Annexure U) is valid in so far as it fixes the ceiling limit with effect from 1-8-1980 for drawing power from the Board's system at the normal tariff. The bills issued by the Board to the petitioner-company on the basis of this order for the period commencing from 1-8-1980 are valid and call for no interference.

## RESULT

The result is that except for a direction to revise the bills issued by the Board to the petitioner-company for the period between 12-11-1979 and 31-7-1980, on the basis indicated earlier, in conclusion No. (4), the remaining reliefs claimed by the petitioners are refused. Accordingly, the petition fails and is dismissed, except to the extent indicated. Parties shall bear their own costs. Security be refunded to the petitioners.