

(1986) 08 SC CK 0002

In the Supreme Court Of India

Case No : Civil Appeal No. 1639 of 1985.

Kerala State Electricity Board

APPELLANT

Vs

S.N. Govinda Prabhu and Bros. and Others

RESPONDENT

Date of Decision : 26-08-1986

Acts Referred:

Constitution of India, 1950 — Article 12, 14

Electricity (Supply) Act, 1948 — Section 49, 49(3), 59, 67, 67A

Citation : AIR 1986 SC 1999 : (1986) 1 JT 261 : (1986) 2 SCALE 313 : (1986) 4 SCC 198 : (1986) 3 SCR 628

Hon'ble Judges : O. Chinnappa Reddy, J; M. M. Dutt, J

Bench : Division Bench

Advocate : M. M. Abdul Khader, G. Viswa Natha Iyer, M.A. Firoz, C.S. Vaidyanath and P. Chowdhary, for the Appellant; P. Subramaniam Poti, F.S. Nariman, S.B. Saharya, V.B. Saharya and Vijay Bahuguna, for the Respondent

Final Decision : Disposed Of

Judgement

Chinnappa Reddy, J.—These appeals preferred by the Kerala State Electricity Board raise the question of the extent of the authority of the Board to increase the Electricity Tariff under the Electricity Supply Act. The upward revision of tariff made by the Board in 1980, 1982 and 1984 was successfully challenged in the Kerala High Court. The first two revisions were struck down by a Full Bench of three judges by a majority of two to one and, later, all three revisions were struck down by a Full Bench of Five judges by majority of four to one. The principal ground of challenge and that which was accepted by the High Court was that the Kerala State Electricity Board acted outside its statutory authority by formulating a price structure intended to yield sufficient revenue to off set not merely the expenditure properly chargeable to the revenue account for the year as contemplated by Section 59 of the Act but also expenditure not so properly chargeable. Had Section 59 been strictly followed and had items of expenditure not chargeable to the revenue account for the year been excluded, the revised tariff would have resulted in the generation of a surplus far beyond the

contemplation of Section 59 of the Act. According to the High Court, in the absence of a specification by the Government the Board was not entitled to generate a surplus at all and it acted entirely outside its authority in generating a surplus to be adjusted against items of expenditure not authorised to be met from the revenue receipts. The notifications prescribing revised tariffs were therefore, struck down. The view of the High Court, as might be seen, was based primarily on their construction of Section 59 of the Electricity Supply Act.

2. In order to understand the questions at issue, it is necessary to set out Section 59 as it stood prior to 1978, as amended by Act No. 23 of 1978, and finally as amended by Act No. 16 of 1983:

Section 59 prior Section 59 as Section 59 as further to 1978 amended by Act amended by Act No. 23 of 1978 No. 16 of 1983 (1) (2) (3) General principles General principles General Principles for Board's finance- for Board's finance- for Board's finance- The Board shall not, (1) The Board shall (1) The Board shall as far as practicable after taking credit after taking credit and after taking for any subvention for any subvention credit for any from the State Government from the State subventions from the u/s 63, carry Government under State Government on its operations u/s 63, carry on its u/s 63, carry on this Act and adjust its operations under this its operations under tariffs so as to ensure Act and adjust its this Act at a loss. that the total revenues tariffs so as to ensure and shall adjust its in any year of account that the total revenues charges accordingly shall, after meeting in any year of account from time to time. all expenses properly shall, after meeting all Provided that chargeable to revenues, expenses properly where necessary any including operating, chargeable to amounts due for maintenance and revenues, including meeting the operating, management expenses. operating, maintenance and taxes (if any on maintenance and management expenses income and profits, management expenses, of the Board or for depreciation and taxes (if any) on the purposes of interest payable on all income and profits, Clauses (i) and (ii) debentures, bonds and depreciation and of Section 67 may, to such loans, leave such interest payable on all extent as may be surplus as the State debentures, bonds sanctioned by the State Government may, from and loans leave such Government, be paid time to time, specify. surplus as is not less out of capital. (2) In specifying the than three per cent or surplus under Sub-section such higher percentage, (1), the State as the State Government shall have Government may by due regard to the notification in the availability of amounts official Gazette, accrued by way of specify in this behalf, depreciation and the of the value of the liability for loan fixed assets of the amortization and leave- Board in service at the (a) a reasonable sum beginning of such to contribute towards years. the cost of capital Explanation:-For works; and (b) where the purposes of this in respect of the sub-section, "Value Board, a notification of the fixed assets has been issued under of the Board in Sub-section (1) of service at the Section 12A, a reasonable beginning of the sum by way of return year" means the on the capital original cost of such provided by the State fixed assets

as Government under reduced by the aggregate Sub-section (3) of that of the cumulative section and the amount depreciation in of the loans (if any) respect of such assets converted by the calculated in accordance State Government into with the provisions capital under of this Act and Sub-section (1) of consumers' contributions for Section 66A. service lines. (2) In specifying any higher percentage under Sub-section (1), the State Government shall have due regard to the availability of amounts accrued by way of depreciation and the liability for loan amortization and leave-(a) a reasonable sum to contribute towards the cost of capital works; and (b) where in respect of the Board, a notification has been issued under Sub-section (1) of Section 12A, a reasonable sum by way of return on the capital provided by the State Government under Sub-section (3) of that section and the amount of the loans (if any) converted by the State Government into capital under Sub-section (1) of Section 66A. We may mention here that we are not really concerned with Section 59 as amended by Act No. 16 of 1983 since that came into effect from April 1, 1985 only. We have, however, extracted that provision also for a better understanding of Section 59 as it stood before the 1983 amendment. We consider that for the purpose of understanding and construing Section 59, as it stood before the 1983 amendment, we are entitled to take into consideration the Parliamentary exposition contained in the 1983 amendment. (See we will come back to the question of proper construction of Section 59 later).

3. We think that it is necessary at this stage itself to refer to some of the other important provisions of the Electricity Supply Act. Section 18 prescribes the general duties of the Board and, it is as follows:

18. General Duties of the Board-Subject to the provisions of this Act, the Board shall be charged with the following general duties, namely:

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

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

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

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

(e) to prepare and carry out schemes for transmission, distribution and generally

for promoting the use of electricity within the State; and

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

Section 49 was not amended either in 1978 or in 1983 and it is as follows:

49. Provision for the sale of electricity by the Board to persons other than licensees-(1) Subject to the provisions of this Act and of regulation, 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 standardization of methods and rates of charges for such supplies;

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

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

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

Section 63 enables the State Government, with the approval of the State Legislature, to make subventions to the Board for the purposes of the act. Section 64 empowers the State Government to advance loans to the Board and Section 65 empowers the Board, with the previous sanction of the State Government, to borrow any sum required for the purposes of the Act by the issue of debentures or bonds or otherwise. Section 66 empowers the government to guarantee the loans proposed to be raised by the Board Section 66A authorises the State Government to convert any loan obtained from the Government by the Board capital provided by the Board.

4. Section 67. was amended in 1978 and again 1983. It is useful to set out the

section as it stood originally and as amended by the two amendments of 1978 and 1983:

Section 67 prior Section 67 as Section 67 as further to 1978 amended by Act No. 23 amended by Act of 1978 No. 16 of 1983 (1) (2) (3) Priority of Priority of Priority of liabilities liabilities of the liabilities of Board- of the Board-the Board- The revenues (1) If in any year, Board shall distribute of the Board shall, the revenue receipts the surplus, after meeting its are not adequate referred to in operating, maintenance to enable compliance Sub-section (1) of Section 59 and management with the requirements to the extent available expenses and of Section 59, the Board in a particular year after provision shall, after meeting in the following has been made for its operating, order, namely: the payment of maintenance and management (i) repayment of taxes on its expenses and principal of any loan income and profits after provision has raised (including be distributed as been made for the redemption of debentures far as they are payment of taxes (if or bonds issued) available in the any) on income and u/s 65 which following order, profits, distribute becomes due for namely: the revenue receipts, payment in the year (i) interest on as far as they are or which became due bonds not guaranteed available, in the for payment in any u/s 66; following order, previous year and (ii) interest on namely: has remained unpaid; stock not so (i) payment of (ii) repayment of guaranteed; interest on loans principal of any (iii) credits to not guaranteed under loan advanced to the depreciation Section 66; Board by the State reserve u/s 68. (ii) repayment of Government under (iv) interest on bonds principal of any Section 64 which becomes guaranteed under loan raised (including due for payment in the Section 66; redemption of year or which became (v) interest on stock debentures or bonds due for payment in any so guaranteed; issued) u/s 65 previous year and (vi) interest on sums which become due for remained unpaid; paid by the State payment in the years; (iii) payment for Government under (iii) payment of purposes specified guarantees under interest on loans in Sub-section (2) Section 66; guaranteed under of Section 59 in such manner (vii) the write-down of Section 66; as the Board may amounts paid from (iv) payment of decide." capital under the interest on sums paid by proviso to Section 59; the State Government (viiia) the write-down in pursuance of of amounts in guarantees under respect of intangible Section 66; assets to the extent (v) payment of to which they are interest on loans actually appropriated advanced to the ted in any year for the Board by the State for the purpose in Government under the books of the Section 64 or deemed to be Board; advanced under (viii) contribution to Sub-section (2) of general reserve of an Section 60; amount not exceeding (vi) repayment of one half of one per principal of any loan centum per annum of guaranteed by the the original cost of State Government fixed assets employed u/s 66 which by the Board so become due for payment however that the total in the year or which be standing to the credit came due for payment of such reserve shall in any previous year not exceed fifteen per and has remained centum of the unpaid; original cost of (vii) repayment of such fixed assets; principal of any loan (ix) interest on loans

advanced to the Board advanced or deemed u/s 64 which to be advanced to the becomes due for payment Board u/s 64, in the year or which including arrears of became due for payment such interest; in any previous year (x) the balance to be and has remained appropriated to a unpaid; and if any fund to be called the balance amount is left Development Fund thereafter, the same to be utilised for- shall be utilised for (a) purposes the other purposes beneficial, in the specified in Section 59 opinion of the Board, in such manner as the to electrical Board may decide. development in the State; (2) If for any reason (b) repayment of beyond the control of loans advanced to the Board, the revenue the Board u/s 64 receipts in any year and required to be are not adequate to repaid; meet its operating, Provided that maintenance and where no such loan management expenses, is outstanding, taxes (if any) on incomes one-half of the and profits and balance aforesaid the liabilities referred shall be credited to in Clauses (i) and to the Consolidated (ii) of Sub-section (1), Fund of the State. the shortfall Shall, with the previous sanction of the State Government, be paid out of its capital receipts. 5. Section 67B which was introduced by Act 16 of 1983 defers payment of interest on loans advanced by the State Government until after all other expenses are met. It is in the following terms:

67A Interest on loans advanced by State Govt. to be paid only after other Expenses. Any interest which is payable on loans advanced u/s 64 or deemed to have been advanced u/s 60 to the Board by the State Government and which is charged to revenues in any year may be paid only out of the balance of the revenues, if any, of that year which is left after meeting all the other expenses referred to in Sub-section (1) of Section 59 and so much of such interest as is not paid in any year by reason of the provisions of this section shall be deemed to be deferred liability and shall be discharged in accordance with the provisions of this section in the subsequent year or years, as the case may be.

6. Now, a State Electricity Board created under the provisions of the Electricity Supply Act is an instrumentality of the State subject to the same constitutional and public law limitations as are applicable to the government including the Principle of law which inhibits arbitrary action by the Government. (see *Rohtas Industries Ltd. and Others Vs. Chairman, Bihar State Electricity Board and Others*,). It is a public utility monopoly undertaking which may not be driven by pure profit motive not that profit is to be shunned but that service and not profit should inform its actions. It is not the function of the Board to so manage its affairs as to earn the maximum profit even as a private corporate body may be inspired to earn huge profits with a view to paying large dividends to its shareholders. But it does not follow that the Board may not and need not earn profits for the purpose of performing its duties and discharging its obligations under the statute. It stands to common sense that the Board must manage its affairs on sound economic principles. Having ventured into the field of Commerce, no public service undertaking can afford to say it will ignore business principles which are as essential to public service undertakings as to Commercial ventures. (see Lord Scarman in *Bromely v. Greater London Council* [1982] 1 ALL

ER 129. If the Board borrows sums either from the Government or from other sources or by the issue of debentures and bonds, surely the Board must of necessity make provision year after year for the payment of interest on the loans taken by it and for the repayment of the capital amounts of the loans. If the Board is unable to pay interest in any year for want of sufficient revenue receipts, the Board must make provision for payment of such arrear of interest in succeeding years. The Board is not expected to run on a bare year-to-year survival basis. It must have its feet firmly planted on the earth. It must be able to pay the interest on the loans taken by it; it must be able to discharge its debts; it must be able to give efficient and economic service; it must be able to continue the due performance of its services by providing for depreciation etc; it must provide for the expansion of its services, for no one can pretend the country is already well supplied with electricity. Sufficient surplus has to be generated for this purpose. That we take it is what the Board would necessarily do if it was an ordinary commercial undertaking properly and prudently managed on sound commercial lines. Is the position any different because the Board is a public utility undertaking or because of the provisions of the Electricity Supply Act? We do not think that either the character of Electricity Board as a Public Utility Undertaking or the provisions of the Electricity Supply Act preclude the Board from managing its affairs on sound commercial lines though not with a profit-thirst. It may be noticed here that Section 18(a) prescribes it as one of the duties of the Board to arrange for the supply of electricity that may be required within the State and for the transmission and distribution of the same, in the most efficient and economical manner and Section 49(2)(b) requires the Board to have regard, in fixing uniform tariffs, the coordinated development of the supply and distribution of electricity within the State in the most efficient and economical manner, both with particular reference to those areas which are not for the time being served or adequately supplied with electricity. The principles of efficiency and economy are, therefore, not forsaken but resolutely emphasised. Now if we turn to Section 59. what do we find? Though at one time it appears to have been thought that it was enough if the Board did not carry on its operations at a loss it was realised that the statutory admonition to the Board should be positive and not negative and that the Board should be given an affirmative and self-assuring direction. So Section 59 was amended in 1978. The Statement of Objects and Reasons says.

3. Section 59 of the Electricity (Supply) Act is proposed to be amended by Clause 8 of the Bill to give a positive direction to the Electricity Boards that after meeting all their expenses, there should be provision for a surplus for contribution towards immediate investment needs. A similar amendment is also proposed to be made in regard to the Generating Companies by inserting a new Sub-section (3A) in Section 75A by Clause 18 of the Bill.

7. It was found that the 1978 amendment did not effectively improve matters as many State Government did not specify the quantum of surplus. Parliament had, therefore, to intervene once again to fix a statutory minimum surplus. The

Statement of Objects and Reasons relating to the 1983 amendment may also be extracted and it is as follows:

Though Section 59 of the Act, as amended in 1978, casts an obligation on the State Government has so far specified the quantum of any surplus. At present there is no uniformity in the manner of classification and presentation of accounts of the Boards and this renders inter-Board comparison of financial performance difficult. It is also considered necessary to re-arrange the priorities with regard to distribution revenues of the Boards. It is, therefore, proposed to amend the Act-

- (a) to provide that each Board shall have a surplus which shall not be less than three per cent, or such higher percentage as the State Government may specify of the value of the fixed assets of the Board in service at the beginning of the year;
- (b) to re-arrange the priorities for distribution of revenues of the Boards;
- (c) to bring the financial reporting system of the Boards in line with commercial accounting practice; and
- (d) to empower with a view to securing uniformity in the manner of classification and presentation of accounts, the Central Government to prescribe the forms in which the accounts of the Board and other records in relation thereto may be maintained.

8. A plain reading of Section 59 (as amended in 1978) plainly indicates that it is the mandate of Parliament that the Board should adjust its tariffs so that after meeting the various expenses properly required to be met a surplus is left. The original negative approach of functioning so as not to suffer a loss is replaced by the positive approach of requiring a surplus to be created. The quantum of surplus is to be specified by the State Government. What the State Government is to specify is the minimum surplus. This is made clear by the 1983 amendment which stipulates a minimum of 3 per cent surplus in the absence of specification by the State Government which has the liberty to specify a higher percentage than three. That Section 59, as it stood before 1983 contemplated a minimum surplus was also the view expressed by this Court in *Rohtas Industries v. Bihar State Electricity Board* (supra) where it was said,

Under the above provisions, the Board is under a statutory obligation to carry on its operations and adjust its tariffs in such a way to ensure that the total revenues earned in any year of account shall after meeting all expenses chargeable to revenue, leave such surplus as the State Government may, from time to time, specify. The tariff fixation has, therefore, to be so made as to raise sufficient revenue which will not merely avoid any net loss being incurred during the financial year but will ensure a profit being earned, the rate of minimum profit to be earned being such as may be specified by the State Government.

9. Shri Potti, learned Counsel for the consumers placed great reliance on the

observations of this Court in Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd., ; Bihar State Electricity Board, Patna Vs. Their Workmen, and Dr. P. Nalla Thampy Thera Vs. Union of India (UOI) and Others, to contend that the Electricity Board was barred from conducting its operations on commercial lines so as to earn a profit. In the first case, the observations relied upon were.

Furthermore, Electricity Boards are not trading corporations. They are public service corporations. They have to function without any profit motive. Their duty is to promote co-ordinated development of the generation, supply and distribution of electricity 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 any licensee (Section 18). The only injunction is that as far as practicable they shall not carry on their operations at a loss (Section 59). They get subventions from the State Governments (Section 63). In the discharge of their functions they are guided by directions on questions of policy given by the State Governments (Section 78A). There are no shareholders and there is no distribution of profits.

In the second case the court observed,

The Electricity Board is not an ordinary commercial concern. It is a public service institution. It is not expected to make any profit. It is expected to extend the supply of electricity to unserved areas without reference to considerations of loss that might be incurred as a result of such extension.

In the third case where the court was considering the position of the Indian Railways it was observed,

The Indian Railways are a socialised public utility undertaking. There is at present a general agreement among writers of repute that the price policy of such a Public Corporation should neither make a loss nor a profit after meeting all capital charges and this is expressed by covering all costs or breaking even; and secondly, the price it charges for the services should correspond to relative costs. Keeping the history of the growth of the Railways and their functioning in view, the commendable view to accept may be that the rates and fares should cover the total cost of service which would be equal to operational expenses, interest on investment, depreciation and payment of public obligations, if any. We need not, however, express any opinion about it.

We have said earlier that the Railways are a public utility service run on monopoly basis. Since it is a public utility, there is no justification to run it merely as a commercial venture with a view to making profits. We do not know-at any rate it does not fall for consideration here-if a monopoly based public utility should ever be a commercial venture geared to support the general revenue of the State but there is not an iota of hesitation in us to say that the common man's mode of transport closely connected with the free play of this fundamental right should not be. We agree that the Union Government should be

free to collect the entire operational cost which would include the interest on the capital outlay out of the national exchequer. Small marginal profits cannot be ruled out. The massive operation will require a margin of adjustment and, therefore, marginal profits should be admissible.

We do not think that any of these observations is in conflict with what we have said. Pure profit motive, unjustifiable according to us even in the case of a private trading concern, can never be the sole guiding factor in the case of a public enterprise. If profit is made not for profit's sake but for the purpose of fulfilling, better and more extensively, the obligation of the services expected of it, it cannot be said that the public enterprise acted beyond its authority. The observations in the first case which were referred to us merely emphasised the fact that the Electricity Board is not an ordinary trading Corporation and that as a public utility undertaking its emphasis should be on service and not profit. In the second case, for example, the court said that it is not expected to make any profit and proceeded to explain why it is not expected to make a profit by saying that it is expected to extend the supply of Electricity to unserved areas without reference to considerations of loss. It is of interest that in the second case, dealing with the question whether interest cannot be taken into account in working out profits, the court observed,

The facile assumption by the Tribunal that the interest should not be taken into account in working out the profits is not borne out by the provisions of the statute.

In the third case, the court appeared to take the view that the railway rates and fares should cover operational expenses, interest on investment, depreciation and payment of public obligations. It was stated more than once that the total operational cost would include the interest on the capital outlay out of the national exchequer. While the court expressed the view that there was no justification to run a public utility monopoly service undertaking merely as a commercial venture with a view to make profits, the court did not rule out but refrained from expressing any opinion on the question whether a public utility monopoly service undertaking should ever be geared to earn profits to support the general revenue of the State.

10. One of the submissions which found favour with the High Court and which was seriously pressed before us was that in the absence of specification by the State Government the position would be as it was before the 1978 amendment, that is, the Board was carry on its affairs and adjust the tariffs in such a manner as not to incur a loss and no more. We do not agree with the submission for the reasons already mentioned.

11. We may also refer here to the decision of the Privy Council in *S. M. Railway Co., Ltd. v. Bezwada Municipality* which affirmed the Judgment of the Madras High Court in *Madras and Southern Maharashtra Railway Company Limited v. The Municipal Council Bezwada* ILR 1941 Mad 897. One of the questions there raised

was whether in the absence of rules made by the State Government, the Municipal Council was entitled to determine the capital value of property in the face of a provision which stated,

Provided that such percentage or rates shall not exceed the maxima, if any, fixed by the Local Government and that the capital value of such lands shall be determined in such manner as may be prescribed.

The High Court, in that case had observed, and we agree with what had been said,

We cannot accept the contention of the appellant that, merely because the Local Government has not prescribed the manner in which the capital value should be determined, the municipal council is deprived of the power of levying the tax u/s 81(3)...the omission of the rule-making authority to frame rules cannot take away the right of the municipal council to levy tax at the rate mentioned in the notification issued under Clause 3. If, for instance, the Local Government refrained from prescribing the manner in which the value of such lands should be determined, it cannot, we think, be said that the municipal council has no power at all to levy the tax at a percentage of the capital value merely because the method of determining the capital value has not been prescribed by the Local Government. If the Local Government does not prescribe it, then the municipal authority is free in our opinion to fix it in any manner it chooses.

We are of the view that the failure of the Government to specify the surplus which may be generated by the Board cannot prevent the Board from generating a surplus after meeting the expenses required to be met. Perhaps, the quantum of surplus may not exceed what a prudent public service undertaking may be expected to generate without sacrificing the interests it is expected to serve and without being obsessed by the pure profit motive of the private entrepreneur. The Board may not allow its character as a public utility undertaking to be changed into that of a profit motivated private trading or manufacturing house. Neither the tariffs nor the resulting surplus may reach such heights as to lead to the inevitable conclusion that the Board has shed its public utility character. When that happens the Court may strike down the revision of tariffs as plainly arbitrary. But not until then. Not, merely because a surplus has been generated, a surplus which can by no means be said to be extravagant. The court will then refrain from touching the tariffs. After all, as has been said by this Court often enough 'price fixation' is neither the forte nor the function of the court.

12. The occasional excursions that have been made into that field were at the request and by the agreement of the parties. This was made clear by a Constitution Bench of seven judges of this Court in *Prag Ice and Oil Mills and Another Vs. Union of India (UOI)*, where it was said,

It is customary in price fixation cases to cite the oft quoted decision in *Premier Automobiles Ltd. and Anr. etc. v. Union of India* which concerned the fixation of price of motor cars. It is time that it was realized that the decision constitutes no

precedent in matters of price fixation and was rendered for reasons peculiar to the particular case. At page 535 of the Report Grover, J., who spoke for the Court, stated at the outset of the judgment. "Counsel for all the parties and the learned Attorney General are agreed that irrespective of the technical or legal points that may be involved, we should base our judgment on examination of correct and rational principles and should direct deviation from the report of the Commission which was an expert body presided over by a former judge of a High Court only when it is shown that there has been a departure from established principles or the conclusions of the Commission are shown to be demonstrably wrong or erroneous." By an agreement of parties the court was thus converted into a Tribunal for considering every minute detail relating to price fixation of motor cars. Secondly, as regards the escalation clause the Court recorded at page 543 that it was not disputed on behalf of the Government and the Attorney General accepted the position, that a proper method should be devised for escalation or de-escalation. Thirdly, it is clear from page 544 of the Report that the Learned Attorney-General also agreed that a reasonable return must be allowed to the manufacturers on their investment. The decision thus proceeded partly on an agreement between the parties and partly on concessions made at the Bar. That is the person why the judgment in Premier Automobiles (supra) cannot be treated as a precedent and cannot afford any appreciable assistance in the decision of price fixation cases.

The position was again clarified in Rohtas Industries v. Bihar State Electricity Board (supra):

As pointed out by this Court in Prag Ice & Oil Mills and Anr. v. Union of India, in the ultimate analysis, the mechanics of price fixation is necessarily to be left to the judgment of the executive and unless it is patent that there is hostile discrimination against a class of person, the processual basis of price fixation is to be accepted in the generality of cases as valid.

13. On the question of appropriate pricing policy we may conveniently refer, at this juncture to what the Planning Commission had to say in the Seventh Five Year Plan. At page 128 of Vol. II in para 6.31 it was said,

6.31 The Sixth Plan had emphasised the need to give high priority to the evolution of a structure of energy prices which reflect true costs, curb excessive energy use and promote conservation of scarce fuels. Except in the case of oil, timely adjustments have not been made in the prices of coal and electricity to reflect the real costs. Energy pricing has not promoted, to the desired extent, inter-fuel substitution. Energy users have generally not adopted conservation measures already identified. While action is being taken to promote technologically energy-efficient equipment and processes, on the one hand, appropriate energy pricing policy would have to be followed, on the other hand, in order to induce economics in the use of energy in all sectors and encourage desired forms of inter-fuel substitution, including renewable energy wherever viable. The pricing of energy should not only reflect the true costs to the

economy but also help to ensure the financial viability of the energy industries. This is particularly relevant in respect of coal and power industry. As we have said in the past, it is wrong to think that an adjustment in the prices of a basic input like energy would aggravate the inflationary situation; the costs to the economy are not reduced by not reflecting them in proper pricing. Indeed the continuance of wrong pricing policy has a far more deleterious effect on the health of the economy than is often realised. The formulation of an integrated energy pricing structure on the above lines should receive the highest priority in the beginning of the Plan period.

14. Turning back to Section 59 and reading it along with Sections 49, 67, 67A etc. we notice that the Electricity Supply Act requires the Electricity Board to follow a particular method of accounting and it is on the basis of that method of accounting that the Board is required to generate a surplus. Broadly, Section 59 requires that a surplus should be left from the total revenues, in any year of account, after meeting all expenses properly chargeable to revenues. It has to be remembered that apart from subventions which may be received from the State Government, which depend entirely on the bounty of the Government, the only revenues available to the Board are the charges leviable by it from consumers. Bearing this in mind, we may now consider what expenses are properly chargeable to revenues under the Electricity Supply Act. For this purpose, we may not be justified in having recourse to the principles of corporate accounting or the rules which determine what is revenue expenditure under the Indian income tax Act. It appears to us that the Electricity Supply Act prescribes its own special principles of accounting to be followed by the Board. To begin with Section 59(1) specifies 'operating maintenance and management expenses' 'taxes (if any) on income and profits', 'depreciation and interest payable on all debentures, bonds and loans', as included in 'expenses properly chargeable to revenues'. Section 59(2) further stipulates that in specifying the surplus, the Government shall have due regard to the availability of amounts accrued by way of depreciation and the liability for loan amortization. It also stipulates that a reasonable sum to contribute towards the cost of capital works and a reasonable sum by way of return on the capital provided by the State Government should be left in the surplus. This sub-section, therefore makes it clear that the Board is to provide for (1) loan amortization (2) contribution towards the cost of capital works; (3) return on the capital. We may now turn to Section 67 which prescribes the priority to be observed by the Board in the matter of discharging the liabilities enumerated therein out of its revenues. First the operating maintenance and management expenses have to be met, next provision has to be made for payment of taxes on Income and Profits and thereafter various items of expenditure are mentioned in order of priority. If any amount is left after the discharge of the liabilities enumerated in Section 67 it is further provided that the balance shall be utilised for the other purposes specified in Section 59 in such manner as the Board may decide. Payment of interest is expressly mentioned among the liabilities to be discharged, as also repayment of principal of loans

becoming due for payment in the year. Clause (vi) of Sub-section (1) of Section 67 makes it clear that repayment of principal of any loan guaranteed by the State Government will include loans which became due for payment in the year as well as loans which became due for payment in any previous year and had remained unpaid. The submission strenuously urged on behalf of the consumers before the High Court and before us was that while interest which accrued during the year might be properly considered to be revenue expenditure, arrears of interest which accrued during the previous years and had not been paid could not be so considered. We fail to see why that should be so. Under the scheme of the Act principal amount falling due in any year has to be met from the revenue receipts of the year. It is difficult to understand how any payment towards principal could be made or accepted. If interest of previous years continued to be outstanding. The very provision for repayment of capital necessarily implies payment of all interest accrued upto the date of repayment of the capital. If as argued on behalf of the consumers arrears of interest cannot be paid from revenue receipts, how then may such arrears be paid? Not from the capital receipts. What may be paid out of capital receipts and the circumstances under which the payment may be made are expressly provided in Section 67(2) which says that if for any reason beyond the control of the Board the revenue receipts in any year are not adequate to meet the operating, maintenance and management expenses, taxes on income and profits, and the liabilities referred to in Clauses (i) and (ii) of Section 67(1), then the shortfall shall be paid out of its capital receipts with the sanction of the State Government. We do not therefore, have any doubt that arrears of interest are, under the scheme of accounting contemplated by the Act, required to be paid out of revenue receipts of the Board and are expense properly chargeable to revenues within the meaning of that expression in Section 59 of the Act. The Legislature has presently clarified the position by the amending Act 16 of 1983 which came into force from April 1, 1985. By this Act a separate section, Section 67A has been introduced along with a consequential amendment of Section 67 providing that interest on loans advanced u/s 64 or deemed to have been advanced u/s 60, which is charged to revenues in any year may be paid out of revenue receipts of a year only after all other expenses referred to in Section 59(1) are met and further providing that so much of interest as is not paid in any year by reason of the priority mentioned in Section 67A shall be deemed to be a deferred liability to be discharged in accordance with provision of Section 67A in the subsequent year or years. In our view these provisions show beyond doubt that payment of arrears of interest is an expense properly chargeable to the revenues under the scheme of the Act.

15. We may now assess the factual situation, Shri Abdul Khader, learned Counsel for the Kerala State Electricity Board has placed before us statements containing details of interest payable in each year of accounting, the arrears of interest due and payable, the total revenue receipts and some other relevant particulars. The statements have been prepared, taking the figures from the published annual

accounts of the Kerala State Electricity Board. In the year of account 1978-79, the total revenue receipts were Rs. 8421.75 lakhs out of which the revenue earned by sale of energy to neighbouring States was Rs. 2926.73 lakhs. After meeting operation and maintenance expenses and depreciation the balance of revenue receipts was Rs. 4161.60 lakhs. The amount of interest payable in the year of account was Rs. 1946.37 lakhs. The revenue surplus left after payment of interest in the year of account was therefore, Rs. 2215.23 lakhs. The arrears of interest accrued in previous years and not paid was Rs. 4270.58 lakhs, since the revenue surplus available after meeting the current interest was Rs. 2215.23 lakhs only there was a deficit of Rs. 2055.35 lakhs. In the year of account 1979-80 the total revenue receipts were Rs. 9124.90 lakhs which included revenue of Rs. 3856.15 lakhs from sale of energy to neighbouring States. After meeting operation and maintenance expenses and depreciation the revenue surplus left was Rs. 3253.94 lakhs. The interest which became payable in the year of account was Rs. 2107.85 lakhs and after meeting it, the revenue surplus left was Rs. 1146.09 lakhs. The old arrears of interest which could not be met fully in the previous year was Rs. 2055.35 lakhs. Thus in the year of account year 1979-80, there was a deficit of Rs. 909.27 lakhs. In the year of account 1980-81 the total revenue receipts were Rs. 10,686.54 lakhs and this included a sum of Rs. 4326.92 lakhs earned by sale of energy to neighbouring States. After meeting the operation and maintenance expenses and depreciation the revenue surplus left was Rs. 3615.90 lakhs and after meeting interest of Rs. 2369.42 lakhs which had become payable in the year of account a revenue surplus of Rs. 1246.48 lakhs was left. The unpaid interest of previous years was Rs. 909.27 lakhs and after meeting it we find for the first time a net surplus of Rs. 337.21 lakhs. In the year of account 1981-82 the total revenue receipts were Rs. 12,144.02 lakhs which included revenue of Rs. 4532.42 lakhs from sale of energy to neighbouring States. After meeting operation and maintenance expenses and depreciation; there was a revenue surplus of Rs. 3183.77 lakhs. The total interest payable in the year of account was Rs. 3105.15 lakhs, this left a revenue surplus of Rs. 78.62 lakhs and since there was no arrears of interest what was payable the net revenue surplus was 78.62 lakhs. In the year of account 1982-83 the total revenue receipts were Rs. 11,228.40 lakhs which included revenue of Rs. 1948.63 lakhs from sale of energy to neighbouring States. After meeting operation and maintenance expenses and depreciation the revenue surplus left was Rs. 2810.60 lakhs. The interest which was payable in the year of account was Rs. 3187.62 lakhs and thus left a net revenue deficit of Rs. 376.76 lakhs. In the year of account 1983-84, the total revenue receipts were Rs. 10,518.35 lakhs including revenue of Rs. 175.76 lakhs from sale of energy to neighbouring States. The revenue surplus after meeting operation maintenance expenses and depreciation was Rs. 2246.30 lakhs. The amount of interest which had become payable was Rs. 3426.53 lakhs, the arrears of interest was Rs. 376.76 lakhs leaving a total deficit of Rs. 1556.99 lakhs. We may mention here that the annual account for the year 1978-79 to 1983-84 have been certified by the Accountant General and the annual accounts for the year

1984-85 are awaiting certification. The accounts awaiting certification show that in the year of account 1984-85, the revenue receipts after meeting operation and maintenance expenses and depreciation were 4692.92 lakhs, while the interest which had become payable during the year was Rs. 3719 and the interest of the previous year Rs. 1556.99 lakhs this left a deficit of Rs. 584.00 lakhs. The revised estimates for the year 1985-86 show a revenue surplus of Rs. 5567.00 lakhs after meeting operation and maintenance expenses and depreciation. The interest payable during the year was Rs. 4574.80 lakhs and the interest of previous year was Rs. 584 lakhs. The left a surplus of Rs. 409.00 lakhs. These figures show that 1978-79, 1979-80, 1980-81 & 1981-82 were extraordinary years when there was a boom in the sale of energy to neighbouring States consequent on the conditions prevailing there. In those years also it would be seen from the accounts that but for the boom in the sale of energy to neighbouring States there would have been a serious deficit in every one of those years. It is clear that the Electricity Board has not been earning huge profits and generating large surpluses, as suggested by the consumers. Once we arrive at this position that there is hardly any revenue surplus left after meeting the expenses required to be met by Section 59, the complaint of the consumers that there was no justification for the tariff increase because of large surpluses earned by the Board loses all force.

16. We have examined the two reports of the Tariff Committees of the years 1980 and 1982 and the revised tariffs based on those reports in the light of the legal and factual position explained by us. Before the 1980 revision, the prevailing rates were, Extra High Tension: 8.81 ps per unit, High Tension Industrial: 14.98 ps per unit, Low Tension Domestic: 38 ps per unit, Low Tension Industrial: 14.15 ps per unit, Low Tension Commercial: 38 ps per unit, Low Tension Agricultural 14.15 ps per unit, Low Tension Commercial worked out the cost per unit at 10.9, 18.6, 57.5, 43.5, 56.5 and 53.5 ps per unit respectively in that order, but recommended, in the same order, 11.55, 21.4, 38, 27.5, 74 and 18 ps per unit respectively. However, the actual tariff rates as introduced in 1980 were 10.8, 18.24, 38, 24.5, 66 and 15 ps per unit. The 1982 Tariff Committee recommended rates of 24.5, 37.3, 47.5, 48, 55-70 and 34 ps per unit. The actual tariff introduced in 1982 was 17.65, 27.24, 42.5, 24.5, 50-70 and 15 ps per unit. We notice that in the case of Low Tension Domestic and Agricultural consumers, the change is minimal. In the case of Extra High Tension and High Tension Industrial Consumers, the change effected by the 1980 revision was minimal but on the higher side in 1982. In the case of Low Tension Industrial and Commercial Consumers, the change effected in 1980 was very steep but tended to come down in 1982. On the whole, it cannot possibly be said that the rates have been so fixed by the Electricity Board as to throw a heavy burden on any section of the consumers without regard to their ability to pay without regard to the nature of the supply and purpose for which the supply is required. Now do we find that the principle of uniformity of tariffs has in any way been sacrificed. But, as we mentioned a little earlier the Low Tension Industrial and Commercial Tariff was

subjected to a very steep rise in 1980 and brought down again in 1982 apparently in recognition of the fact that the raise had been too steep in regard to them in 1980. In the case of Low Tension Industrial Consumers, the tariff was increased from 14.5 ps per unit to 24.5 ps per unit in 1980 and maintained at the rate of 24.5 ps per unit in 1982. In the case of Low Tension Commercial Consumers, the tariff was increased from 38 ps per unit to 66 ps per unit in 1980 but brought down again considerably in 1982 to 50.70 ps per unit. The very circumstance that the tariff was either brought down or maintained at the same level in 1982 when compared with the 1980 tariff appears to be an indication that the increase in 1980 was thought by the Board itself to be rather steep. We have already noticed that 1980-81 and 1981-82 were the years when the accounts of the Electricity Board recorded a net surplus after meeting all expenses including interest charges. In the circumstances, we think that it is desirable that the Board may re-consider the 1980 tariff for Low. Tension Commercial and Low Tension Industrial Consumers.

17. Shri Potti submitted that the 1980 Committee took place consideration the anticipated augmentation of the generating capacity from the proposed new power stations of Idukki, Saharigiri and Idamalyar, whereas these projects were not commissioned till 1984 and thus the cost-structure arrived at by the Committee was vitiated. We do not think so. From the figures supplied to us we find that notwithstanding the failure to commission the new projects, there was no shortfall in the production of energy. A large part of expenditure involved in the setting up of the new projects had to be met in the several years preceding the actual commissioning of the projects. Therefore, it is not correct to say that the cost structure arrived at by the Committee was in any way affected by the non-commissioning of the new projects between 1980 and 1982. Another submission made by Shri Potti was that the Committee erred in not taking into account the financial position of the Board as brought out by the year 1978-79 which showed that the Board had already turned the corner and that there was therefore no need for enhancing the rates. This submission is again without substance. As we mentioned earlier, the rise in revenue receipts in the year 1978-79 due to the unprecedented sale of energy to neighbouring states, a special situation which was the result of peculiar circumstances which prevailed that year and continued to prevail for a few years thereafter. The sale of energy to neighbouring States was not to be taken as a permanent phenomenon to every year. Yet another submission of Shri Potti was that the 1980 Committee having taken as the basis the 1982 projected cost so as to maintain price stability for a period of five years, it was not proper to revise the tariff again in 1982. But we find that the actual cost of producing energy in 1981-82 and 1982-83 had risen much above the projected 1982 cost and therefore the 1982 Committee has no option but to again consider further revision of the tariff. We are not delving into more details as we are satisfied that it is not within our province to examine the price structure in minute detail if we are satisfied that the revision of tariff is not arbitrary and is not the result of the application of any

wrong principle. Relying upon the observation, "It would have been manifestly unjust and discriminatory that one consumer should benefit at the cost of other consumers or general tax payers;" made in *Delhi Cloth and General Mills Co. Ltd. and Another Vs. Rajasthan State Electricity Board and Another*, it was argued by Shri Potti that it was not open to the Board to give favoured treatment to Low Tension Domestic and Agricultural Consumers at the cost of the rest of the consumers. We do not find any force in this submission. Section 49(3) expressly reserves the power of the Board, if it considers it necessary or expedient, to fix different tariff for the supply of electricity to any person having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and other relevant factor. Different tariffs for High and Low Tension Consumers and for different classes of consumers, such as, Industrial, Commercial, Agricultural and Domestic have been prescribed and the differentiation appears to us to be reasonable and far from arbitrary and to be based on intelligent and intelligible criteria.

18. In the result, we allow the appeals filed by the Kerala State Electricity Board, set aside the judgments of the High Court, uphold the validity of the notifications revising the tariffs and dismiss the writ petitions filed in the High Court, subject to direction that the Kerala State Electricity Board will reconsider the revised tariff introduced in 1980 in regard to Low Tension Industrial and Low Tension Commercial Consumers only, with liberty to fix separate rates, if necessary for the years 1980 and 1981. This direction will not affect the 1982 and 1984 tariff revisions. There will be no order regarding costs.