

(1990) 09 KAR CK 0038

In the Karnataka High Court

Case No : Writ Petition No. 17825 of 1988 and other connected Writ Petitions.
19th and

Mysore Kirloskar Ltd., Hubli

APPELLANT

Vs

Karnataka Electricity Board, Bangalore and Another

RESPONDENT

Date of Decision : 21-09-1990

Acts Referred:

Citation : (1991) 4 KarLJ 415

Hon'ble Judges : K. A. Swami, J

Judgement

1. In these petitions under Article 226 of the Constitution the petitioners have sought for a declaration that Clause (8) of the Electric Power Tariffs, 1985 and also Clause (8) of the Electric Power Tariffs, 1987, (both the Clauses relate to H.T. consumers) are illegal and are beyond the power of the Karnataka Electricity Board (hereinafter referred to as the "KEB") conferred under Section 49 of the Electricity (Supply) Act, 1948 (hereinafter referred to as the "Supply Act"). They have also sought for a further declaration that the KEB has no authority to charge and recover fuel adjustment charges from the industrial installations. In addition to this, in each one of the petitions, the petitioners have sought for quashing the demands made. It is not necessary to refer to the demands made by the KEB from each of the petitioners because the validity of these demands ultimately depends upon granting or refusing to grant the aforesaid main prayers made in each one of these petitions. Therefore, in this order, the particulars of the demands made by the KEB from each one of the petitioners are not referred to.

2. In these petitions, the KEB has filed statement of objections on 24-2-1989. An additional statement of objections dated 4-9-1990 is also filed by the KEB. After the petitions were heard and before the Judgment was delivered some more petitions came to be filed. Therefore, those petitions were ordered to be posted along with these petitions. Hence the KEB has filed a separate statement of objections on 16-8-1990 to the petitions filed subsequent to 24-2-1989. In fact

to the statement of objections dated 16-8-1990 a copy of the statement of objections filed on 24-2-1990 is annexed and it is stated that it may be treated as part of the statement of objections filed on 16-8-1990). Along with the statement of objections dated 16-8-1990 the KEB has also produced the statement showing fuel adjustment charges recovered from H.T. consumers from October 1989 to March 1990 as Annexure I. In addition to filing the statements of objections there are two memos filed on 12-12-1989 and 18-12-1989. On the previous date of hearing, a work-sheet was also produced to show that even after collecting the fuel adjustment charges from H.T. consumers the price of the energy does not exceed from what the KEB is collecting from other consumers i.e., L.T. consumers. Along with two memos dated 12-12-1989 and 18-12-1989 the average realisation from the sale of power for the years 1985-86, 1986-87, 1987-88, 1988-89 and also the statement showing fuel adjustment charges recovered from H.T. consumers from October, 1985 to June 1989 and also the statement showing the amount of fuel adjustment charges claimed from Rajashree Cements, Malkhed, Vasavadatta Cements, Sedam, Belgundi Cements, Belgaum, Mysore Kirloskar, Hubli and Lamina Industries, Karkala and the notification dated 23-6-1987 bearing No. KEB/B10/2083/1986-87 were also produced. The memo dated 18-12-1989 only contains the statement relating to the fuel adjustment charges recovered from H.T. consumers during the period from October 1985 to March 1987 and from April 1987 to June 1989.

3. Before the points for determination are framed, it is necessary to mention one more fact. In these petitions we are concerned with the tariffs for the years 1985 and 1987. According to general condition No. 5 of the Electric Power Tariff for the year 1985, the tariffs are subject to revision or levy of surcharges, fuel adjustment charges, as may be decided from time to time. Similar is the general condition No. 5 in the Electric Power Tariff, 1987. In addition to the general conditions which are common to all the consumers irrespective of whether they are H.T. and L.T. consumers, there are special conditions which relate to H.T. consumers only. In the Electric Power Tariff, 1985, general condition No. 8 pertaining to H.T. consumers regarding "Fuel Adjustment Charges" was as follows:

"Fuel Adjustment charges: Adjustments in fuel escalation charges based on accepted formula for power from thermal stations will be made by the Board as and when required and recovered from industrial installations."

This clause was continued in Electric Power Tariff, 1987 as Clause No. 8 only. However, the Notification dated 23-6-1987 bearing No. KEB/B10/2083/1986-87 amended this general condition No. 8 pertaining to H.T. consumers. The amended condition No. 8 was as follows:

"Fuel Adjustment charges, etc.: -Adjustments in fuel escalation charges and other increases due to operation expenses etc., will be made by the Board as and when required and recovered from industrial installations."

3.1. At this stage itself, the difference between the old condition No. 8 and the New Condition No. 8 which came to be introduced by the aforesaid notification may be noticed. In the old condition No. 8, the fuel escalation charges were to be charged "based on accepted formula for power from thermal station" and recovered as and when required from the industrial installations only. Whereas in the amended condition No. 8, the words "based on accepted formula for power from thermal stations" are not found. Further it is required to be recovered from all the H.T. consumers. This is pointed out in the beginning because an argument has been put forth on the basis of the wordings contained in general condition No. 8 pertaining to H.T. consumers as it stood prior to 23-6-1987.

3.2. Having regard to the contentions urged on both sides, the following points arise for consideration:

1. Whether condition No. 8 of General Conditions pertaining to H.T. consumers as it stood prior to 23-6-1987 is valid in law and whether it is opposed to Section 49(4) of the Supply Act; and whether it is violative of Article 14 of the Constitution?

2. Whether general condition No. 8 as amended by Notification dated 23-6-1987 pertaining to H.T. consumers is in conformity with Section 49(4) of the Supply Act and whether it is violative of Article 14 of the Constitution?

3. Whether it is open to the KEB to collect fuel escalation charges from H.T. consumers without there being an agreement between the consumers and the KEB regarding the formula on the basis of which power escalation charges are to be charged and recovered?

3. (a) Whether it is open to the KEB to recover fuel escalation charges from the petitioners in W.P. Nos. 6947 to 6949/1989 and other connected petitions viz., W.P. Nos. 3718 to 3726/1990; 6775 to 6777/1990; 14105 to 14107/1990 and 15836 to 15838/1990 in respect of power consumed by the Pollution Controlling Unit and also the Housing Colony for the period prior to 23-6-1987?

(b) Whether 10 paise surcharge per unit imposed under the Government Order dated 27th August, 1986 included the fuel escalation charges? If so, whether it is open to the KEB to recover fuel escalation charges afresh for the period from 1st September, 1986 onwards?

(c) Whether it is permissible to recover fuel escalation charges, or whether fuel escalation charges can be recovered only from those who use or consume High Cost energy?

4. Whether the Electric Power Tariffs, 1985 and 1987 did not take into account the fuel escalation charges upto the dates on which they came into force and if so, whether it is open to the KEB to charge and recover fuel escalation charges separately from the date the Electric Power Tariff, 1987 came into force?

4. Before taking up Point No. 1, it may also be relevant to notice that power

escalation charges are being recovered as and when the NTPC recovers from the KEB. It has become necessary for the KEB to purchase power from the NTPC because the power generated in the State is not adequate to meet the demand. This aspect has also been noticed by the two tariff committees who went into the matter and submitted their reports during the year 1985 and 1987 and on the basis of which the tariffs for the year 1985 and 1987 were revised. In the Tariff Report 1985 regarding large power-intensive industries, the committee observed thus:

"11.09. The committee discussed at length the need or otherwise for creating a separate Tariff Schedule (as existed before 1981) for large power-intensive industries at rates lower than those payable by other H.T. consumers in the State. The committee noted that many of them had not availed high cost imported energy (which was available to them additionally over and above their entitlement under energy cut). In fact some of them even gave up that part of the energy entitlement as was charged at high cost imported rates. Notwithstanding the fact that large power intensive industries receiving power supply in bulk at extra high voltage which results in lower T & D losses, lower investment and lower cost of service to KEB the majority view of the committee was against a lower rate to them. The committee felt that similar size power intensive industries in other parts of the country are thriving quite well in spite of higher power rates payable by them and in fact some of them own captive power plants wherefrom they generate power at as high a rate as Rs. 1-00 to Rs. 1.25 per kwh. Therefore, the committee felt that if some of the power intensive industries in Karnataka are in distress and are seeking lower power tariff, it may be due to other reasons and not due to power rates. Hence in the majority view of the committee it was not considered proper to extend relief to them by way of preferential tariff.

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12.13. Fuel Surcharge:-Fuel surcharge may be imposed by KEB per kwh sold to all H.T. and L.T. industrial consumers (whenever purchase rates for thermal power from KPC and NTPC go up on this account) to the extent of the additional power purchase payment on this account divided by the number of units sold to H.T. and L.T. industrial consumers."

Thus from the Tariff Report, 1985 it is clear that the fuel surcharges were to be imposed by the KEB per kwh on all H.T. and L.T. industrial consumers, whenever purchase rates for thermal power from KPC and NTPC go up on this account, to the extent of the additional power purchase and payment made on this account divided by the number of units sold to H.T. and L.T. industrial consumers. However, the fuel escalation charges were recovered only from H.T. consumers and not from L.T. consumers. Whether it is justified in law or not is a matter to be considered while considering Point No. 1.

4.1. In Tariff Report 1987 at para 7 of the report it is stated thus:

"Adjustment in fuel escalation based on accepted formula for power from thermal station will be made by the Board as and when required and recovered from the industrial consumers."

In this report, the tariff committee itself excluded the L.T. consumers. Even though in Tariff Report, 1985, as already pointed out, the committee recommended that the fuel escalation charges should be recovered from both H.T. and L.T. industrial consumers, the State Government did not accept this recommendation and directed that the KEB should make adjustments in fuel escalation charges based on accepted formula for power from thermal stations as and when required, and recover the same only from industrial installations, by the order dated 27th September, 1985 bearing No. PWD 175 KEB 85. The recommendation made by the tariff committee in the Tariff Report, 1987 relating to fuel escalation charges was not approved by the State Government in its entirety. By the order dated 2nd May, 1987 bearing No. PWD 51 KEB 87, the State Government while according approval to the revision of the electricity tariff in respect of the several categories of the consumers as indicated in Annexure-I to the order, prescribed certain conditions. The condition No. (vii) is relevant for our purpose and it is as follows:

"While announcing the revision of tariff, the additionality of fuel surcharge and other increase due to expenses etc., to all the H.T. consumers should be specifically mentioned."

Thus recommendation made by the tariff committee, 1987 relating to power escalation charges came to be modified and it was made applicable to all the H.T. consumers. Thus as per the Government direction, it was to be recovered from all H.T. consumers irrespective of whether they are industrial or non-industrial.

5. Point No. 1: It is contended on behalf of the petitioners that the general condition No. 8 is discriminatory because it provides that the fuel escalation charges have to be recovered only from industrial installations even though the energy is consumed by all H.T. and L.T. consumers. It is contended that there is nothing like a supply of power i.e., supply of power from NTPC to only industrial installations inasmuch as the power supplied by the NTPC goes along with the power generated in the State and supplied to all the consumers. Therefore the fuel escalation charges are required to be distributed among all the consumers irrespective of whether they are H.T. consumers or L.T. consumers and are to be recovered according to the units of power consumed by them by apportioning the fuel escalation charges on the number of units consumed. On the contrary it is contended on behalf of the KEB that L.T. consumers consist of several categories and their number runs into above 45 lakhs and 50% of the energy is consumed by the H.T. consumers only. Further condition No. 8 of the general condition occurs only in Part I of the tariff which relates to rates of power supplied at KVA. Therefore the said condition is not applicable to non H.T. consumers. As the petitioners have challenged the very validity of the said condition on the ground that it is discriminatory inasmuch as it makes a difference between H.T. and L.T.

consumers when both of them consume the energy supplied by the KEB, whether the said condition occurs in general conditions pertaining to H.T. consumers or in the general conditions pertaining to all the consumers shall not make any difference for considering the validity of the contention urged by the petitioners. Therefore what is necessary to be seen is whether the classification made by condition No. 8 into industrial installations and non-industrial installations can be considered to be valid in law and is not discriminatory.

6. It cannot be disputed, and it is also not disputed before me that the broad classification of consumers to whom the energy is supplied by the KEB into L.T. and H.T. consumers is based on the valid classification because they form two different groups. The L.T. consumers cannot at all be compared with H.T. consumers. The L.T. consumers belong to the category of non-commercial lights and fans, Bhagya Jyothi installations, non-commercial combined lighting and heating, commercial and non-industrial lights, fans etc., irrigation pumpsets 10 HP and below and above 10 HP, agricultural operations, water supply to village and town panchayats, water supply to others, industrial heating and motive power, public lighting-village and town panchayats, public lighting and others, temporary power supply-non-commercial lights and fans and other small appliances, temporary power supply-commercial and industrial lights and fans, motive power. The remaining three consumers viz., the industrial, non-industrial and commercial purposes H.T., IBI (1985 tariff and H.T. 2 in 1987 tariff) irrigation and agricultural farm H.T. 2 in 1985 and H.T. 3 in 1987, and Rural Electric Co-operative Societies H.T. in 1985 and H.T. 4 in 1987, are H.T. consumers. In addition to this, the L.T. consumers come under below 100 KVA and H.T. consumers fall under above 100 KVA. So both from the point of view of power supply and nature of consumption there cannot be any comparison or similarity between the H.T. consumers and L.T. consumers. Therefore, the validity of the classification of consumers into L.T. and H.T. consumers has not been rightly disputed before me.

7. However, the contention is that even among H.T. consumers there is discrimination because the fuel escalation charges are not recovered from all H.T. consumers as the same are recovered only from industrial installations. As already pointed out, apart from industrial, non-industrial and commercial purposes, the other H.T. consumers are only irrigation and agricultural farms H.T. 2 and Rural Electric Co-operative Societies H.T. 3. The rest of them are not H.T. consumers. The aforesaid other two consumers among the H.T. consumers form a group by themselves inasmuch as irrigation and agricultural farm (H.T. 2) and Rural Electric Co-operative societies, H.T. 3) are the consumers to whom the power has to be made available on lesser price because they relate to large number of consumers viz., agricultural and also rural electric co-operative societies which are many in number. They relate to a common man. They cannot also be compared with the industrial H.T. consumers. Therefore the contention of the KEB is that as the power supplied for the purpose of irrigation and agricultural farm and rural electrification cannot be judged on the same basis on

which the power supplied to industrial, non-industrial and commercial units because there is no comparison between the two groups. Thus the contention is that the industrial installations stand as a separate class and it is they who consume about 50% of the energy even though their number is about two thousand only, whereas the number of consumers belonging to other categories is more than 45 lakhs. As the other consumers and also the consumers who fall under H.T. 2 and H.T. 3 viz., irrigation and agricultural farm and rural electrification cannot be compared with the industrial H.T. consumers, the classification made for the purpose of charging and recovering the fuel escalation charges from industrial installations during the period from October 1985 to March 1987 is not discriminatory. According to the memo dated 18-12-1989 the fuel escalation charges were recovered from H.T. consumers falling under Tariff Schedule H.T. 1-A-public water supply and H.T. 1-B(1) - industrial, non-industrial and commercial purposes. The other H.T. consumers who are excluded from the liability to pay fuel adjustment charges are those who fall under Tariff Schedule H.T. 2 -irrigation and agricultural farm, Tariff Schedule, H.T. 3-rural electric co-operative societies. About these two categories, it is already pointed out that they form separate category and even though they are H.T. consumers, they cannot be included in the category falling under H.T. 1(A), H.T. 1-B(1) and H.T. 1-B(2). The classification is based on the intelligible differentia inasmuch as both the consumers falling under H.T. 2 and H.T. 3 are not comparable with the consumers falling under H.T. 1-A, H.T. 1-B1 and H.T. 1-B2. In other words, they form different category from those falling under H.T. 1-A, H.T. 1-B(1) and H.T. 1-B(2), both from point of view of the quantity of energy consumed and also from the point of view of the purpose of which the energy is consumed. In the case of H.T. 1-A, H.T. 1(B)1 and H.T. 1-B(2), the consumption of electric power is purely for industrial and commercial purposes whereas the consumption of energy by the consumers falling under H.T. 2 and H.T. 3 is for agricultural purpose and for Rural electrification. In the first category viz., H.T. 1-A, H.T. 1(B) 1 and H.T. 1(B) 2, the individual profit motive assumes main role, whereas in the second category, agricultural farm and Rural Electric Co-operative Society, the energy is consumed for the benefit of the general category of agriculturists and rural electrification which, in the ultimate analysis, serve greater and larger public interest. I shall not be understood as holding that consumption of electrical energy by the consumers falling under H.T. 1(A), H.T. 1-B(1) and H.T. 1-B(2), is opposed to public interest. But the consumption of energy by these consumers is for making profit. Therefore, I am of the view that the classification is based on the intelligible differentia. Hence it is not possible to hold that the recovery of fuel escalation charges from industrial installations is in any way discriminatory and is violative of Article 14 of the Constitution.

8. At this stage, I may also refer to a decision of the Supreme Court in *The Adone Cotton Mills Ltd. v Andhra Pradesh State Electricity Board*, AIR 1976 SC page 2414. Referring to the argument relating to discrimination while considering Section 49(4) of the Supply Act the Supreme Court observed thus:

"The contentions of the appellants are unsound. Section 49(4) of the 1948 Act states that in fixing the tariffs and terms and conditions for the supply of electricity the Board shall not show undue preference to any person. This section embodies the same principle which is enunciated in Article 14 of the Constitution. The Board is a State for the purpose of Part III of our Constitution. In the present case, we are however not concerned with the application of Article 14. All that requires to be appreciated is, that the provisions of Article 14 of our Constitution are similar in principle. It is the principle of equality or non-discrimination."

Again in *M/s. Rohtas Industries Ltd. v The Chairman, Bihar State Electricity Board & Others*, AIR 1984 SC 657 while considering the question as to whether the fuel escalation charges could be recovered from the H.T. consumers only, it has been observed thus:

"In our opinion, the Board was perfectly within its rights in deciding to restrict the levy of fuel surcharge to those categories of consumers who were enjoying the benefit of a concession in the general rate and in sparing smaller type of consumers such as the agricultural, irrigation and commercial consumers from being subjected to that burden, in view of the fact that they were already being subjected to a basic levy at substantially higher rates. The true consequence of the action so taken by the Board is only to effect a reduction in the quantum of concession that was being enjoyed by the consumers belonging to the industrial and railway traction categories. A classification which is legally valid and permissible for the grant of a concession in the basic rates of a subsequent scheme of distribution of the burden in the form of fuel surcharge. In this context, it is also relevant to remember that the levy of surcharge was necessitated by reason of the extra expenditure which the board had to incur in the generation of electricity in the two power stations run by the Board and the purchase of power from the two outside sources, namely, the D.V.C. and the U.P. State Electricity Board and 63% of the total quantity of energy supplied by the Board is consumed by the industrial and railway traction consumers. A classification of these bulk consumers has a rational nexus with the object and purposes of the levy of surcharge. Having regard to all these facts and circumstances, we find no substance in the contention advanced by some of the appellants that the imposition of the fuel surcharge under paragraph 16.7 of the 1979 tariff is arbitrary and violative of Article 14 of the Constitution."

9. The similar benefit is also enjoyed by the high voltage consumers under the heads power factor bonus and high voltage rebate. The benefit enjoyed by them is substantial and it has been worked out with reference to W.P. Nos. 6947 to 49/1989 of Indian Aluminium Company for the quarter ending December 1989, which is as follows:

QUARTER ENDING DECEMBER 1989

DECEMBER

DEMAND CHARGE DECEMBER

ENERGY CHARGE Total Bill for

(A) Rs. (B) Rs. October 1989 Rs. 4,76,16,665.30

SMEILTER 29,26,520 3,93,20,721.60 Total Bill for November 1989 Rs.
4,54,26,479.25

ALLMINA 2,47,000

----- 28,85,200.00

----- Total Bill for December 1989 Rs. 4,39,78,774.60

31,73,520 4,22,05,921.60 Net after allowing Power Factor Bonus and High
Voltage Rs. 13,60,21,919.15

Total (A+B) 4,22,05,921.60

31.73.520.00

----- Rebate

P.F. Bonus for Oct., Nov., Dec.-

Rs. 5,89,444

Rs. 4,53,79,441.60 (excluding Tax) High Voltage rebate for Oct., Nov., Dec. Rs.
84,85,344

REBATES: Rs. 90,74,788

(1) Power Factor Bonus-

(Vide Cl. 6)

Total (A+B) A Rs.

2 19,480.00

Rs. 2,38,014 B Rs.

18,525 FUEL ESCALATION CHARGES FOR OCT., NOV., DEC. 1989 Rs.
60,60,327.80

(2) High Voltage Rebate

(Vide Cl. 7)

Total A Rs.

25,21,665.10

Rs. 27,08,485.10 B Rs.

1,86,820.00

10. From the aforesaid calculation, it is clear that the benefit enjoyed by the high voltage industrial consumers under the heads-Power factor bonus, and high voltage rebate is of considerable magnitude as they get concession in terms of lakhs of rupees, depending upon the number of units consumed by them. Whereas in the case of the L.T. consumers and H.T. consumers falling under the category other than the industrial category, the basic tariff itself is very high. Therefore, as observed in Rohtas case AIR 1984 SC 657, any further burden on the consumers falling under the category of agricultural, irrigation and commercial consumers could be burdensome. All that happens is that by recovering power escalation charges from the industrial H.T. consumers, there will be a reduction in the quantum of benefit enjoyed by them; but they will not be made to pay higher tariff charges when compared with the other consumers. The amount of rebate they were getting by way of concession under power factor bonus, and high voltage rate would be reduced by reason of recovering the fuel escalation charges from them. It is not their case, nor any material is produced to show that by reason of recovery of fuel escalation charges from industrial H.T. installations, the amount they are paying for each unit of energy consumed by them will be more than the amount which the other consumers pay for each unit they consume. Therefore, it is not possible to hold that there is undue preference to other consumers other than the H.T. industrial installations. Accordingly, it is held that general condition No. 8 pertaining to H.T. consumers as it stood prior to 23-6-1987 is valid and it is not violative of Article 14 of the Constitution. Point No. 1 is answered accordingly.

11. Point No. 2.-The difference between condition No. 8, as it stood prior to 23-6-1987 and the one modified with effect from 23-6-1987 is that prior to 23-6-1987, fuel escalation charges were recoverable from industrial installations only whereas from 23-6-1987, fuel escalation charges are made recoverable from all the H.T. consumers. Thus condition No. 8, as amended by the Notification dated 23-6-1987, covers more number of H.T. consumers for the purpose of recovery of fuel adjustment charges than it covered prior to 23-6-1987, inasmuch as fuel escalation charges as per condition No. 8 are recoverable from all H.T. consumers. The contention of the petitioners is that the recovery of fuel escalation charges from H.T. consumers is discriminatory. In other words, this contention is similar to the one advanced under Point No. 1. It has already been pointed out while considering Point No. 1 that the classification of consumers into L.T. consumers and H.T. consumers is valid and is based upon the well accepted and intelligible differentia between the two class of consumers. That being so, it is not possible to hold that H.T. consumers are subjected to any hostile discrimination or any undue preference is given to other consumers other than the H.T. consumers by reason of recovery of fuel adjustment charges from H.T. consumers while dealing Point No. 1, it has already been pointed out that

the number of L.T. consumers is more than 45 lakhs, whereas the H.T. consumers are hardly two thousand in number. Apart from the number, the purpose for which the energy is consumed by the L.T. consumers and the H.T. consumers is quite different. The H.T. consumers according to Electric Power Tariff, 1987 are divided into Tariff Schedule H.T. I, Tariff Schedule H.T. 2 and Tariff Schedule H.T. 3 and Tariff Schedule H.T. 4 and Tariff Schedule H.T. 5. However, the last one relates to only temporary power supply and therefore, it is excluded from the fuel escalation charges. The fuel escalation charges are recovered from a pre-date of 1987 onwards from all H.T. consumers falling under H.T. 1, H.T. 2, H.T. 3, and H.T. 4. Thus, it is clear that prior to 23-6-1987, the consumers falling under the category of irrigation and agriculture farms and rural agricultural co-operative societies were excluded from fuel escalation charges, but they are also brought under fuel escalation charges by reason of amendment of condition No. 8, by the notification dated 23-6-1987. Therefore, the grievance made by the H.T. industrial consumers that all H.T. consumers are not brought under the fuel escalation charges is also removed, inasmuch as all H.T. consumers are made liable for fuel escalation charges. That being so, it is not possible to appreciate the contention of the petitioners that general condition No. 8, either subjects the H.T. consumers to hostile discrimination or gives undue preference to L.T. consumers. It is also not the case of the petitioners that by reason of recovery of fuel escalation charges the energy charges payable by them are in far excess of the energy charges payable by the L.T. consumers per unit. Even after recovering fuel escalation charges the energy charges payable by the H.T. consumers is still less than the energy charges payable by the L.T. consumers. The only effect of recovering of fuel escalation charges from all the H.T. consumers is that there is reduction in the amounts of benefit they were enjoying under the heads power factor bonus and high voltage rebate. In addition to this it may also be noticed that the charge, and recovery, of fuel escalation charges is a part of the tariff and it is a legislative act. The Supreme Court in *M/s. Shri Sitaram Sugar Co. Ltd. & Another v Union of India*, AIR 1990 SC 1277, after considering all the decisions on the point, has Supreme Court held thus:

"Price fixation is in the nature of a legislative action even when it is based on objective criteria founded on relevant material. No rule of natural Justice is applicable to any such order. It is nevertheless imperative that the action of the authority should be inspired by reason: *Saraswati Industrial Syndicate Ltd.*, (1975) 1 SCR 956, 961, 962: AIR 1975 SC 460 at pp. 463, 464. The Government cannot fix any arbitrary prices on extraneous considerations:"

It has also further held that there would be very little interference by way of judicial review. The relevant portion of the Judgment is as follows:

57. "Judicial review is not concerned with matters of economic policy. The court does not substitute its Judgment for that of the legislature or its agents as to matters within the province of either. The court does not supplant the "feel of the

expert" by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness. In all such cases, judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land. As stated by Jagannatha Shetty, J., in *Gupta Sugar Works*, AIR 1987 SC 2351 at p. 2352, (supra):

"the court does not act like a chartered accountant nor acts like an income tax officer. The court is not concerned with any individual case or any particular problem. The court only examines whether the price determined was with due regard to considerations provided by the statute. And whether extraneous matters have been excluded from determination."

58. Price fixation is not within the province of the courts. Judicial function in respect of such matters is exhausted when there is found to be a rational basis for the conclusions reached by the concerned authority. As stated by Justice Cardozo in *Mississippi Valley Barge Line Company v United States of America*, (1933) 292 US 282-290: 78 Lawed 1260, 1265:

"The structure of a rate schedule calls in peculiar measure for the use of that enlightened Judgment which the Commission by training and experience is qualified to form It is not the province of a court to absorb this function to itself... The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

Apart from this it has already been pointed out that classification of consumers into H.T. and L.T. is valid and it is based on the intelligible differentia. As such, the recovery of fuel escalation charges from H.T. consumers cannot be considered to be discriminatory, because, there will not be any differential treatment to the consumers who belong to the H.T. category as they belong to a separate class or category. The fact that fuel escalation charges are not recovered from the L.T. consumers cannot be made a ground to hold that the recovery of fuel escalation charges from H.T. consumers is unreasonable or discriminatory because L.T. consumers are a different category, even though the energy consumed by them is supplied by the KEB only.

12. For the reasons stated above, Point No. 2 is answered in favour of the KEB. Hence on Point No. 2 it is held that the amended condition No. 8 is not violative of Article 14 of the Constitution and Section 49(4) of the Supply Act. It is in conformity with Section 49(4) of the Supply Act.

13. Point No. 3.-As already pointed out general condition No. 8 pertaining to H.T. consumers, as it stood prior to 23-6-1987, provided that the adjustment of fuel escalation charges should be based on accepted formula for power from thermal stations. It is the contention of the petitioners that the formula on the basis of which the fuel escalation charges are to be recovered has to be accepted by the consumers because, it is the consumers who are required to pay the escalation

charges. In the alternative, it is contended that as the power is supplied under the agreement entered into between the H.T. consumers and the KEB, the fuel adjustment charges can be charged and recovered only by way of further agreement and not by way of unilateral action by the KEB. On the contrary, it is contended on behalf of the KEB that the expression "accepted formula" used in condition No. 8 of the general conditions relating to H.T. consumers is referable to the formula on the basis of which the fuel escalation charges are claimed by the NTPC, which supplies the power to the KEB and it is accepted by the KEB. It is also further submitted that there is no option left to the KEB but to accept the formula which the NTPC prescribes for collecting the fuel escalation charges. The KEB has also produced the agreement entered into between the KEB and the NTPC. The relevant clauses of the agreement having a bearing on the fuel escalation charges are contained in paragraphs B. 4.0, B.4.1, & B.4.2, of the agreement. It is on the basis of these clauses, the NTPC has worked out the formula for recovery of the fuel escalation charges which is as follows:

B.4.0. ADJUSTMENT OF GENERATION TARIFF

B.4.1. NTPC proposed that based on the trend of relevant Reserve Bank of India indices for the last 5 years (1978 to 1983), the Generation tariff shall be increased annually by 0.5 P/KWH commencing from 1st April, 1986 towards future escalation in operation and maintenance costs. It was however, agreed that this matter may be referred to Member (E & C), CEA. Whose decision shall be final and binding on the parties concerned.

B.4.2. The energy charges per KWH specified in the para B.3.9 shall be deemed to be based on:

- a) Average cost of coal at pit head loading point for Ramagundam Station. Rs. 179.17 tonnes
- b) Average gross Calorific value of coal 4,200k Cal/Kg.
- c) Average cost of oil delivered to the fuel oil header on the boiler front at Ramagundam Station Rs. 2905.09/kl.
- d) Average gross calorific value of oil 10500k Cal/Ltr.

From the aforesaid conditions of the agreement between the NTPC and the KEB, there is no option left to the KEB for disputing the correctness of the fuel escalation charges claimed by the NTPC on the basis of the formula worked out by them. Therefore, the words "accepted formula" occurring in condition No. 8, as contended by the petitioners, cannot be interpreted to mean the formula as may be accepted by the consumers and the KEB. In the very nature of things, it is not possible to hold that the fuel escalation charges can be collected on the basis of the formula accepted by the consumers. Fuel escalation charges are recovered long after the supply of energy and consumption of the same. If, after the energy is supplied and it is consumed by the consumers, the agreement has to be arrived at between the consumers and the KEB regarding fuel escalation

charges and recovery of the same, it would amount to first sale of the goods and then determination of the price. Whereas, it should be other way; sale takes place after the price is agreed upon. Therefore, keeping this in view, general condition No. 5 pertaining to all consumers and general condition No. 8 pertaining to H.T. consumers specifically provide that tariffs are subject to revision or levy of fuel adjustment charges as may be decided from time to time and the same are recoverable based on the accepted formula for power from thermal stations will be made by the Board as and when required and recovered from the industrial installations. A close reading of Clause 8 of the General conditions pertaining to H.T. consumers as it stood prior to 23-6-1987, makes it clear that the KEB is entitled to recover fuel escalation charges from industrial installations as and when the same is recovered by the NTPC based on the formula accepted by the KEB and the NTPC. In addition to this as has been already pointed out the fuel escalation charges also form part of the power tariff. Therefore, the question of agreement between the consumer and the KEB does not arise. It is open to the KEB to determine the power tariff and the consumer has no option, but to accept it. In *Rohtas Industries Ltd. v The Chairman, Bihar State Electricity Board and M/s. Shriram Bearings Ltd. v Bihar State Electricity Board*, AIR 1984 SC 657, the Supreme Court has held that the fuel surcharge is really a surcharge to meet the increased charges of generation and purchase of electricity. The relevant portion of the Judgment is as follows:

"10. The formula for determining the fuel surcharge set out in para 16.7.2 reads:

This is followed by detailed explanation as to what the different alphabets used in the numerator and denominator signify. The explanation given in respect of C1 is "Increase in the average unit rate of purchase of energy from DVC during the year for which the surcharge is to be calculated. The said increase to be calculated with respect to the base year 1977-78." C3 stands for "units purchased from DVC during the year". Likewise, E1 and E3 have been explained as "Increase in the average unit rate of purchase of energy from Uttar Pradesh State Electricity Board during the year for which surcharge is to be calculated, the said increase to be calculated with respect to the base year 1977-78" and "units purchased from Uttar Pradesh State Electricity Board" respectively.

11. We see no force in the contention put forward on behalf of some of the appellants that the words "increase in average unit rate of purchase of energy" used in C1 below paragraph 16.7.2 should be interpreted as taking their colour from the contents of paragraph 16.7.3. From a reading of these provisions it is abundantly clear that the entire increase in cost incurred in the purchase of energy from the DVC and the UP State Electricity Board has to go into the computation of the surcharge leviable under paragraph 16.7. The contention to the contrary advanced by the appellants is, therefore, only to be rejected. There is no ambiguity whatever in the words used in C1 so as to require us to take light from paragraph 16.7.3. for the purpose of understanding their scope and meaning."

Therefore, it is not possible to interpret Clause 8 of general conditions pertaining to H.T. consumers as contained in Electric Power Tariff, 1985, that the fuel adjustment charges are recoverable only if there is an agreement between the consumer and the KEB regarding the formula on the basis of which the fuel adjustment charges are to be recovered. As the conditions of power supply form part of the tariff and also form part of the agreement entered into between the consumer and the KEB without further agreement between the consumer and the KEB, it would be open to the KEB to recover the fuel adjustment charges in exercising the power under Clause 8 of general conditions pertaining to H.T. consumers and Clause 5 of general conditions pertaining to all consumers. Therefore, Point No. 3 is answered as follows:

For the purpose of charging and recovering the fuel escalation charges from the H.T. consumers from industrial installations during the period from April 1985 to March 1987, it was not necessary for the KEB to enter into agreement with the consumers regarding the formula nor the formula of the NTPC on the basis of which fuel escalation charges were charged and recovered from the consumers, was required to be accepted by the consumers.

14. Point No. 3(a): The contention of the petitioners is that neither the pollution controlling unit nor the housing colony can be considered to be industrial installation, therefore, the fuel escalation charges claimed on the units consumed by the pollution controlling unit and the housing colony is contrary to general condition No. 8 pertaining to H.T. consumers. General condition No. 8 as it stood prior to 23-6-1987, whether it was of 1985 tariff or 1987 tariff, provided that the adjustments in fuel escalation charges based on accepted formula for power from thermal stations to be made by the Board as and when required and recovered from industrial installations. Therefore, the question that has to be determined is as to whether the pollution controlling unit and the housing colony of the petitioners to which power is supplied by the KEB are industrial installations.

15. It is not disputed that the pollution controlling unit is situated in the factory premises of the petitioners and it is a necessary adjunct to the industry as without that the industry in question cannot at all be run. Power supply to the pollution controlling unit is also drawn through the H.T. installation from which the energy is fed into the factory in question. When the pollution controlling unit is a necessary adjunct to the industry in question and the industry cannot be run without the pollution controlling unit, it is not possible to accept the contention of the petitioner that the power supply to the pollution controlling Unit is not a supply to an industrial installation. In addition to this, there is no separate supply point for the pollution controlling unit. It is fed from the main meter of the industry only. Hence the contention of the petitioners that power supply to the pollution controlling unit does not fall under the industrial installation cannot be accepted. In addition to this, it is also relevant to notice the Electric Power Tariffs of 1983, 1985 and 1987.

16. Tariff Schedule H.T. 1 of Electric Power Tariffs, 1983 relates to power supply

to industrial, non-industrial and commercial purposes. It reads thus:

"Tariff Schedule-H.T. 1 (Industrial, non-industrial and commercial purposes):

Applicable to bulk power at voltages of 11 KV and above at standard high voltages or extra high voltages available in the locality at the discretion of the Chief Engineer, Electricity (General) of the Board or his authorized representative to all category of consumers. The minimum contract demand shall be 100 KVA.

This schedule is also applicable to bulk supply availed by private industrial estates with a provision to distribute to all industries located within the estate and bulk supply to multi-storied buildings and tenements subject to the condition that all distribution of power will be done at the cost of the consumer and charges/rates charged to individual units/tenements shall be just adequate to cover power charges plus actual cost of distribution. The bulk consumer shall satisfy the Board that rates charged by them are reasonable."

Similar is the provision contained in Tariff Schedule H.T. 1 B2 of Electric Power Tariffs, 1985. So also Tariff Schedule H.T. 2 of Electric Power Tariff, 1987 which covers industrial, non-industrial and commercial purposes is also similar.

17. Regarding housing colony of the petitioner, it is stated that the power is supplied at a voltage of 11 KV and it is not 220 KV and the housing colony is not an industry nor any industry is run there; it is only a residential colony of the workers of the petitioner-industry. In this regard Sri Karanth, learned counsel for the petitioner has placed reliance on certain correspondence that had gone on between the KEB and the petitioner. By Annexure-B, dated 25-7-1969, KEB informed the petitioner as follows:

"Dear Sri Ganapathi,

Sub: 11 KV Power Supply to Colony

I invite reference to your letter dated 7th July, 1989 on the above subject and wish to state as follows:

Power supply for residents, other industrial activities and construction are covered under Clauses 22-A and 22-D of the agreement entered into by you with the Government of Mysore and the Electricity Board. As such, it would not be necessary to execute a separate agreement for colony supply.

"As regards the tariff for the colony supply, it has to be stated that the H.T. 3 tariff could be applied only when the supply for the colony is tapped from the main installation wherein the demand of the power supply to the colony is also recorded in the demand of the main installation. It has been agreed that the power supply to the colony will be arranged at 11 KV from the existing 110 KV sub-station of Belgaum. Since the power drawn by the colony would not be integrated by the maximum demand meter of the main installation, it is now proposed to install a separate H.T. metering cubicle for the colony supply. For purposes of assessing the demand charges, it has not been proposed to add the

demand obtained for the metering equipment installed for the colony supply to the demand of your 33 KV loads. It will therefore be seen that the energy recorded in the metering equipment installed in the colony will be charged at the H.T. 3 rates, All Electric Home rates or the standard rates as the case may be. The maximum demand recorded in the above metering equipment will be added on to the demand of the 33 KV loads and charged at the H.T. 1-A rate. It would be necessary to execute a supplemental agreement for charging as above.

The draft is enclosed herewith for which concurrence may be given to enable me to obtain the approval of the Board for the same."

On the basis of the aforesaid letter, it is tried to be contended that the rates on which energy is supplied to the housing colony are different from the rates which are charged in respect of the power consumed by the industry. The learned counsel for the petitioner has not placed any material before the court to show as to what was the power tariff during the year 1969 in respect of H.T. 3. In Annexure-P it is stated that the energy recorded in the metering equipment installed in the colony will be charged at the H.T. 3 rates, All Electric Home rates or the standard rates as the case may be. The maximum demand recorded in the above metering equipment will be added on to the demand of the 33 KV loads and charged at the H.T. 1A rate.

18. As far as tariff from 1985 onwards with which we are concerned, it is clear that power supply to housing colony also comes under H.T. 1B2 of Electric Power Tariffs, 1985 H.T. 2 of Electric Power Tariffs, 1987. Therefore, merely because the power is supplied to the housing colony of the petitioner which is at 11 KV and the power supply to the industry is from 220 KV line, it is not possible to hold on that basis that the power supply to the housing colony is not an industrial installation. The letter Annexure-P also further makes it clear that the power consumed in the housing colony will be added on to the demand of 33 KV loads and charged at the H.T. 1A rate. Hence on Point No. 3(a) it is held that the power supply to the pollution controlling unit and the Housing Colony prior to 23-6-1987 was to an industrial installation only. Hence KEB was entitled to collect fuel escalation charges on the units of power consumed by the pollution controlling unit and the housing colony.

19. Point No. 3(b): The Government Order dated 27-8-1986 relating to levy of surcharge on power tariff reads thus:

"Taking into account the increase in the cost of purchase of power from the neighbouring states and also the suggestions of the industries, Government have decided that a surcharge should be levied on power consumption. I am, accordingly, directed to convey the Government direction under Section 78(A) of the Electricity Supply Act, 1948 with effect from 1st September, 1986, a surcharge of 10 paise on all the entire quantum of energy supplied to all H.T. and L.T. category of industries, shall be levied temporarily until further orders.

I am to request you to take immediate necessary action in the matter."

Pursuant to the aforesaid Government Order dated 27-8-1986, the KEB has issued a Notification bearing No. KEB/B10/2070/1986-87, dated 4th September, 1986 which reads thus:

"In view of increase in the quantum and cost of purchase of power from neighbouring systems, it has become necessary to levy a surcharge of 10 paise per unit on certain class of consumers.

"Accordingly, in exercise of powers conferred by Section 49 and 79(j) of the Electricity (Supply) Act, 1948, Karnataka Electricity Board hereby levies a surcharge of 10 paise per unit on the consumption of the following category of consumers.

This shall come into effect from the first meter reading date on or after 1-9-1986 i.e., this will be applicable for the consumption recorded thereafter.

1. Installations covered under Tariff Schedule L.T. 5(a) & (b).
2. All H.T. consumers under power cut."

Thus with effect from the first meter reading dated on or after 1-9-1986, a surcharge of 10 paise per unit on the consumption of the energy by the installations covered under Tariff Schedule L.T. 5(a) and (b) and all H.T. consumers under power cut was recovered by the Board.

20. The averments made by the petitioners in this regard are as follows:

"7. The first respondent-Board has been levying from 27-9-1985 charges for electrical energy supplied at the rate of 45 paise per unit in accordance with the Electric Power Tariffs Notification issued by the Board on 27-9-1985, hereinafter referred to as the 1985 tariff. In the general conditions published along with the power tariff notification, the Board has stated at para 5 thereof as follows:

"The tariffs are subject to revision or levy of surcharges, fuel adjustment charges as may be decided from time to time."

In the general conditions set out in para 1 of the said tariff notification, it has been stated by the Board under the heading "fuel adjustment charges" as follows:

"Adjustments in fuel escalation charges based on accepted formula for power from thermal stations will be made by the Board as and when required and recovered from industrial installations." (emphasis supplied)

After the enhanced rates were brought into force from 1-9-1985, the Board by a notification issued by it imposed a surcharge of 10 ps. per unit with effect from 1-9-1986. The reason for imposing the aforesaid surcharge of 10 ps. was stated as being due to the increase in the quantity and cost of imported energy from the neighbouring states (vide para 5.01 of 1987 Tariff-Report).

8. The rates for supply of power and energy were again revised with effect from 2-5-1987 and the rate per unit of energy supplied is 80 ps. per unit for the

category in which the petitioner has been classified by the Board (an increase of 80% over the 1985 rates). The said notification, hereinafter referred to as the 1987 tariff, both in the general conditions as well as general conditions under Part I has again set out as to fuel escalation charges being imposed as may be decided by the Board from time to time and on accepted formula.

9. The petitioner submits that the rates which were enhanced by the 1985 Tariff as well as; by 1987 tariff were after the question of increase was considered by the tariff committee constituted for the purpose of going into the question of revising the tariff. In the report submitted in the year 1985 the tariff committee had recommended that fuel surcharge may be imposed on High Tension and Low Tension industrial consumers whenever the price for power from the thermal stations is increased on account of the escalation in the fuel charge. In the tariff committee report for the year 1987 it is stated that the Board would make adjustments in fuel escalation charges based on accepted formula for power from thermal stations as and when required and recovered from the industrial consumers. The petitioner submits that in regard to the power obtained from the Karnataka Power Corporation (KPC) the price paid by the Board is inclusive of fuel escalation charges. The Board when it imposed a surcharge of 10 paise per unit from 1-9-1986 would have made such increase to include the escalation due to fuel surcharge. Similarly the rates for energy were increased from May 1987 by 48% over the previous rate. Thus the rate of H.T. 2 consumers was increased from 55 paise/unit (inclusive of surcharge) to 80 paise/unit, although the tariff committee had recommended a rate of only 75 paise (vide para 6.08.09 of the Tariff Report of 1987). It is only in respect of H.T. 2 and the agricultural sector (L.T. 4) that the Board has not accepted the tariff committee report. In regard to agricultural sector i.e., L.T. 4 the rate fixed is less than 50% of the tariff committee's recommendation.

10. The petitioner submits that in regard to the power purchased from the KPC as well as the National Thermal Power Corporation (NTPC) the Board has entered into agreements for the supply at rates fixed for the period ending 1989-90. There is, therefore, no question of fuel escalation charges having to be paid either to the KPC or the NTPC. Even assuming that there is any provision for payment of fuel escalation charges in the said agreements, the levy on that account cannot be imposed only on the high tension consumers as the electrical energy supplied to them is (H.T. consumers) not wholly based on thermal power. The petitioner has not been made aware as to what is the accepted formula for levying fuel escalation charges.

The KEB in its statement of objections has averred thus:

"12. Re: paras 7 and 8: The statements in these paras only give some details about the tariff fixation and do not call for any specific comments.

"13. Re: paras 9 to 11: As already submitted, the fuel escalation charges to be paid to NTPC by the Board, were not indicated by NTPC earlier and therefore, the

prevailing Unit Rate only was taken into consideration for purchase of power from NTPC for the purpose of evaluation of the tariff structure. The levy of surcharge of 10 paise per unit was to supplement the shortage in revenue anticipated by the Board, in view of the shortage of available energy due to poor monsoons. The fuel escalation charges are different and that was not the ground of revision in fixed tariff in 1985 or 1987. The tariff committee set up by the Board only makes recommendations to the Board regarding fixation of tariff for various categories of consumers. However, it is for the Board, in consultation with the State Government to take a final decision and fix the tariffs. The recommendations of the tariff committee are only their opinion and they are not binding on the Board.

While the rates which the Board pays to the Karnataka Power Corporation (KPC) for purchase of power from Raichur thermal station is inclusive of fuel escalation charges, the rate at which the Board purchases power from NTPC does not cover fuel escalation charges as submitted earlier. That is why the Board claims fuel escalation charges at different rates for the various periods based on the amounts paid to NTPC as regards power purchased from it.

"As submitted earlier, it is fully permissible and within the powers of the Board to categorise various consumers. H.T. consumers form a class by themselves and fuel escalation charges are levied on them. The contention that charging H.T. consumers only is arbitrary and discriminatory, is untenable. Even in the matter of the fixed tariff, there has all along been a classification of consumers. H.T. consumers form a different class and are treated as such all along in matters of tariff."

In the reply statement filed by the petitioners, the stand taken in the petition is reiterated.

21. It is already pointed out that 10 ps. surcharge per unit was not on account of escalations in fuel charges in respect of power supplied by the NTPC to the KEB but it was in respect of the power purchased from neighbouring States. Power supplied by the NTPC does not fall under the category of power supplied from the neighbouring States. Ofcourse in the notification dated 4-9-1986 issued by the KEB the expression used is "neighbouring systems". Whereas in the Government Order dated 27-8-1986, pursuant to which the Notification dated 4-9-1986 was issued, the words used were "purchase of power from the neighbouring States".

22. It is urged on behalf of the petitioners on the basis of the different expressions used in the Government Order and the notification issued by the KEB, that NTPC supplies power to the KEB from Ramagundam Power Station. Therefore, it is also another system of power generation which is situated in the neighbouring State. Hence the notification issued imposing surcharge at the rate of 10 ps. per unit must be held to have taken into consideration the escalation in the fuel charges. In the light of the clear words contained in the Government Order on the basis of which the notification in question is issued by the KEB, it is

not possible to hold that while imposing 10ps. surcharge per unit, escalation, if any, in the fuel charges in respect of the power supplied by the NTPC was one of the considerations. Hence it is not possible to hold that because of imposing 10 ps. surcharge per unit with effect from 1-9-1986 upto 2-5-1987, the KEB was not entitled to recover fuel escalation charges from all H.T. consumers. Point No. 3(b) is accordingly answered against the petitioners.

23. Point No. 3(c) relating to high cost energy: The supply of high cost energy was in vogue upto 2-5-1987. The contention of the petitioners is that those who have used the high cost energy should alone be made payable the fuel escalation charges. It is they who have used the energy more than they were entitled to as a result of power cut. It appears to me that it is not possible to accept this contention. Annexures D & E produced by the petitioners dated 29th September, 1983 and 10th September, 1984 are relevant to be noticed in this regard. In para 5 of the Notification dated 19th September, 1983, Annexure-D issued by the KEB regarding high cost energy it is stated thus:

"The high cost energy imported from the neighbouring systems will be available to those consumers who are desirous of having this energy. A request for the quantum required shall be registered with the Board within 15th October, 1983 and this quantum shall be on a monthwise basis for a minimum period of 3 months i.e., upto 31st December, 1983. On receipt of such a request, the energy will be allocated to the consumer subject to availability and once the allocation is made, the entire allocation so made will be billed on first charge basis, irrespective of the fact whether additional energy is consumed or not. The rate chargeable for the high cost energy will be determined by the Board from time to time. As an incentive as additional energy allocation equivalent to 1/3 of the high cost energy taken will be allowed to the purchasers of high cost energy."

24. In the Notification dated 10th September, 1984, nothing is stated about the high cost energy. However, what is stated in the Notification dated 29th September, 1983 is also not superseded. In the additional statement filed by the KEB on 14-9-1990, it is stated that the quantity of electric energy generated within the State at the relevant time was not sufficient; therefore, the Board through the State Government endeavoured to get a little more supply than they were getting earlier from the neighbouring Maharashtra State at 65 paise per unit during the relevant period. Taking note of the cost of purchase at the point of entry into the State, the wheeling charges, transmission losses within the State, administrative and other expenses involved, it would not have been workable to supply energy at the uniform tariff then in force. Therefore, it was proposed to make available high cost energy chargeable to those consumers who were in need of it if they were prepared to purchase such high cost energy. This high cost energy was in addition to the quantity of energy to which they were eligible under the power cut orders then in force. Those who availed the high cost energy were liable to purchase it on first charge basis.

25. In the additional reply statement filed by the petitioners on 17-9-1990, this

aspect has been denied.

26. The fact remains that energy generated in the State and also obtained from the NTPC by the KEB was not sufficient to meet the demand. It was because of this power cut was introduced in order to save the industries from the adverse effects of

power cut and to see that they some how carry on their production, the KEB and the State Government imported additional energy from the neighbouring States such as Maharashtra, Kerala and Andhra Pradesh. The additional energy imported from these States was on higher rate. Naturally the KEB could not have afforded to supply the said energy to all on the rates prescribed in the tariff. Hence, the system of high cost energy was introduced. The KEB first obtained the approval of those consumers who wanted to have additional energy on a high cost and on the basis of their demand energy was imported and supplied. Thus, it is clear that the purchase and supply of high cost energy by the KEB to the consumers has nothing to do with the supply of energy with the purchase and supply of power from NTPC. The fuel escalation charges are recovered on the ground that NTPC has been demanding fuel escalation charges from time to time. It is the contention of such of those petitioners who have not availed the high cost energy that they are not liable to pay the fuel escalation charges. It is relevant to point out that the energy imported from NTPC and generated within the State was found to be insufficient and therefore, high cost energy was imported. The contention that the energy consumed by the petitioners who have not availed the high cost energy is within the extent of the energy generated in the State and imported from the NTPC therefore, they are not liable to pay the fuel escalation charges has no rational basis. The fuel escalation charges are claimed on the basis that NTPC is demanding from time to time the fuel escalation charges in respect of the energy supplied by it to the KEB. Therefore, it does not make any difference whether one has availed the high cost energy or not for the purpose of determining the fuel escalation charges. Hence, the contention of the petitioners that those who have not availed the high cost energy are not liable to pay the fuel escalation charges is without any basis. It is accordingly rejected. Point No. 3(c) is accordingly answered against the petitioners.

27. Point No. 4: The contention of the petitioners is that electric power tariffs introduced in the year 1985 with effect from 27-9-1985 and also the power tariffs introduced in the year 1987 with effect from 2-5-1987 included the fuel escalation charges incurred by the NTPC till the date of determination and coming into force of the power tariff and as such the KEB is not entitled to claim the fuel escalation charges which was included in the power tariffs for the period prior to coming into force of the Power Tariffs 1985 and 1987. As far as the Power Tariffs 1987 is concerned it has been brought into force with effect from 2-5-1987. The fuel escalation charges are being recovered from 1st October, 1985. Therefore, the escalation that has taken place in fuel charges subsequent to coming into force of 1985 tariff could not have been taken into account when

1985 tariff was introduced. On the contrary, in the tariff report of 1985 it was specifically stated that the fuel surcharge may be imposed by KEB per kwh sold to all H.T. and L.T. industrial consumers (whenever purchase rates for thermal power from KPC and NTPC go up on this account) to the extent of the additional power purchase, payment on this account divided by the number of units sold to H.T. and L.T. industrial consumers. However the State Government while accepting the report put a condition that KEB should make an adjustment in fuel escalation charges based on accepted formula for power from thermal station imported by the Board as and when required and recovered from the industrial consumers. Pursuant to this condition imposed by the State Government in its order dated 27th September, 1985, the power tariffs introduced for the year 1985 incorporated the same as condition No. 8 of the general conditions pertaining to H.T. consumers. Thus, it is clear that from October 1985, what is being recovered is the escalation that has taken place from October 1985 because prior to October 1985, it is not the case of the petitioners that any amount was recovered by the KEB towards escalation charges. The escalation charges are being collected only with effect from October 1985. Therefore, the period from October 1985 to the date 1987 tariffs came into force i.e., upto 2-5-1987, it is not possible to hold that what was recovered was more than what was collected by the NTPC from the KEB by way of escalation charges.

28. Regarding fuel escalation charges collected for the period from 2-5-1987, it is now to be seen whether what is being collected under the heading fuel escalation charges is only the escalation that has taken place from the date 1987 tariffs came into force or the amount inclusive of the fuel escalation charges that was being collected prior to 2-5-1987. As per General Condition No. 8 in Electric Power Tariffs, 1985, and Electric Power Tariffs, 1987, there is no doubt that what the KEB is entitled to is to collect only fuel escalation charges. Ofcourse, with effect from 26-3-1987, the general condition No. 8 has been amended and the amended general condition No. 8 specifically provides thus:

"Adjustments in fuel escalation charges and other increase due to operation expenses etc., will be made by the Board as and when required and recovered from all the H.T. consumers."

A reading of condition No. 8 does not leave any doubt that what the KEB is entitled to recover by way of fuel escalation charges is the increase in the fuel escalation charges that has taken place after the coming into force of the Power Tariff, 1987.

29. It is contended by Sri Sundara Swamy, learned counsel for the KEB that it is not open to the petitioners to challenge the correctness of the amount claimed by the KEB because it is no part of the jurisdiction of this court to go into the statistics and determination as to whether the amount claimed by the KEB by way of fuel escalation charges is "correct or not. The learned counsel has placed reliance on the observations made in *M/s. Rohtas Industries Ltd. & Another v Chairman, B.S.E.B. & Others*, AIR 1984 SC 657 in para 9 which are as follows:

"The next argument advanced on behalf of the appellants was that even if the Board is legally entitled to levy the fuel surcharge, that can only be for the purpose of recouping the amount actually paid by the Board by way of "fuel surcharge" to the Damodar Valley Corporation and the U.P. State Electricity Board for the quantities of energy purchased by the Board from those sources and the extra cost that the Board had actually to incur on fuel consumed in those two generating stations at Patratu and Barauni. From the counter affidavit filed on behalf of the Board, it is seen that in respect of the increase in the cost of production of electricity in the two generating stations of the Board, the fuel surcharge has taken into account only that part of the increase in cost which is relatable to the increased price of the coal and oil i.e., fuel alone. The increase in expenditure referable to the enhancement in cost of the energy generated on other accounts such as wages, maintenance, etc., has not been taken into account in the fuel surcharge. Such increase in cost of production on account of those other factors has been off-set by a revision of the basic general tariff by 16.5 per cent payable not only by the industries but by all classes except the agriculturist class. In respect of the energies purchased by the Board from outside sources, namely, the Damodar Valley Corporation and the UP State Electricity Board, the increase in cost per unit incurred by the Board has been included in the computation of the fuel surcharge. We see no substance whatsoever in the contention advanced by the appellants that only such amounts, if any, as might have been paid by the Board to the DVC and the UP State Electricity Board as and by way of fuel surcharge can go into the computation of the fuel surcharge levied by the Board under paragraph 16.7 of the 1979 tariff. Though the nomenclature given to the levy is "fuel surcharge" it is really a surcharge levied to meet the increased cost of generation and purchase of electricity and this is made absolutely clear in the formula given in para 16.7.2.

In para 11 of the Judgment after noticing the formula on the basis of which fuel surcharge was imposed and recovered the court further observed thus:

"From a reading of these provisions it is abundantly clear that the entire increase in cost incurred in the purchase of energy from the DVC and the UP State Electricity Board has to go into the computation of the surcharge leviable under paragraph 16.7. The contention to the contrary advanced by the appellants is, therefore, only to be rejected. There is no ambiguity whatever in the words used in C1 so as to require us to take light from paragraph 16.7.3 for the purpose of understanding their scope and meaning".

Therefore, it is clear that the court on the basis of the formula provided found that what was being recovered was only an increase in the cost incurred in purchasing energy from the DVC and UP State Electricity Board. Therefore, it is not possible to hold that the observations made in para 9 of the Judgment exclude the jurisdiction of the court to go into the question as to whether what is being recovered under the head "fuel escalation charges" is really the amount

equivalent to escalation that has taken place subsequent to coming into force of Power Tariffs, 1987 or it is inclusive of the escalation charges claimed prior to coming into force of the Power Tariffs 1987. I have already pointed out that in general condition No. 8, pertaining to H.T. consumers, whether prior to 1987 or subsequent thereto what the KEB is entitled to recover under the heading fuel escalation charges, is only the escalation in the fuel charges that has taken place after the coming into force of the tariffs and not those escalations which were in existence on the date the power tariff was introduced because in the determination of the power tariff, the entire increase in cost which the KEB incurred in purchasing power from NTPC, other systems and other States had gone into it. In fact, in para 12 of the Judgment in M/s. Rohtas Industries, it has been observed thus:

"It was strongly urged on behalf of the appellants that the provision in C1 for increase in the average rate of price of energy from the DVC to be calculated with respect to the base year 1977-78 is arbitrary inasmuch as in fixing the basic tariff as per the impugned notification of 1979, the difference in cost between year 1977-78 and the current year 1979-80 has already been taken into account. From the counter affidavit and the statements filed in the High Court on behalf of the respondent Board which form part of the record before us in these appeals, it is seen that only the fuel surcharge accrued during the year 1977-78 had been merged while fixing the revised rates for energy and it was specifically mentioned in paragraph 2.5 of the resolution of the Board containing the proposals for the tariff revision, 1979, which the Board forwarded to the State Government that only the fuel surcharge that had accrued during 1977-78 was being merged in the revised tariff rates and that "the subsequent increase or decrease in the cost of fuel or the cost of imported energy will, therefore, reflect in the fuel surcharge hereafter. Similar is the position with respect to the tariff revision effected in 1981. Hence there is no factual foundation for the argument that there has been a double neutralisation of the increase in the fuel surcharge in respect of the energy purchased by the Board from outside sources. (emphasis supplied)

Therefore, in addition to this, the wording in general condition No. 8 pertaining to H.T. consumers is also to the effect that what the KEB is entitled to recover under the heading fuel escalation charges is only the additional expenditure or escalation that takes place after the introduction of the Power Tariffs, 1987.

30. However, it is tried to be contended on behalf of the KEB that in determining electric Power Tariffs, 1987, the fuel escalation charges had not been taken into account even upto the date of determining the power tariff. In the Power Tariff Report 1987, at para 7, it is stated that the adjustment in fuel escalation charges based on accepted formula for power from thermal station will be made by the KEB as and when required and recovered from the industrial consumers. This observation also goes to show that escalation as and when required may be charged and recovered. It means the escalation that takes place subsequent to

the introduction of the power tariff should alone be recovered. While determining the power tariff also the tariff committee has taken into account the cost of the energy generated in the State as well as imported from the neighbouring States and also from NTPC and the power loss in the transmission and distribution of energy and all other relevant factors which go to determine the cost of energy and has also further provided certain amount of profit which the KEB is required to make statutorily. This is demonstrated from the various annexures annexed to the Power Tariff Committee Report of 1987.

31. It is the contention of Sri Sundara Swamy, learned counsel for the KEB that no doubt from the NTPC agreement, the KEB gets the energy at the rate of 43 paise per unit fixed charge. To this the escalation charges of 7 paise per unit is added by way of fuel escalation charges because of the increase in the cost of the fuel used by the NTPC for production of the energy, whereas there is a loss of 22% energy in transmission and distribution from the stage onwards at which NTPC delivers, and the power is supplied to the consumers and this has not been taken into account while determining the power tariff. The tariff report 1985 has noticed the transmission and distribution loss of 22% and similarly the tariff report 1987 has also noticed this aspect. It is clear from Annexure-A to the 1987 tariff report that the committee has noticed that the energy available to the Board at the receiving station was to the extent of 9,536 million units in the year 1985-86, 10,028 in the year 1986-87 and 10,286 in the year 1987-88. The energy available for sale after transmission and distribution loss at 22% has been shown in the respective years at 7,257, 7,805 and 9,563. Thus, the committee has noticed the transmission loss. As observed by the Supreme Court in para 12 of the Judgment in Rohtas case power tariff is determined on taking into consideration the actual cost that will be incurred by the Board for supplying the energy to the consumers and also the profit it is required to make.

32. The contention that though the committee has noticed the transmission and distribution loss of energy to the tune of 22%, it has not taken into account this loss while suggesting the power tariff. No part of the report is brought to my notice to show that the said aspect has not been taken into account by the committee in determining the power tariff. When the committee was appointed for the purpose of recommendation for determining the power tariff, transmission and distribution loss being one of the vital considerations, it is not possible to hold that the committee failed to take this vital and glaring aspect into consideration in making its recommendations. Therefore, it is not possible to hold that the power tariff recommended by the tariff committee was exclusive of the transmission and distribution loss on the date the report was made.

33. However, it is contended by Sri Sundara Swamy, learned counsel for the KEB that the fuel escalation charges are recovered by the NTPC on the basis of the number of units supplied by it; but by the time the energy purchased from the NTPC reaches the consumers, there is a loss to the tune of 22% in transmission and distribution of the power, therefore, the KEB is entitled to recover that loss

under the fuel escalation charges because it has paid the fuel escalation charges on the power that has been lost in the transmission and distribution. There is no doubt that KEB is entitled to recover the fuel escalation charges as paid by it to the NTPC. Therefore, whatever the loss that occurs in the number of units during the transmission and distribution of power to the consumers that loss also has to be taken into account while determining the fuel escalation charges payable by each of the H.T. consumers. The KEB has placed before the court a chart containing the details of fuel adjustment charges paid to NTPC from October 1985. The said chart is as follows:

Details of fuel adjustment charges paid to NTPC from October 1985

Sl. No. Month Energy purchased (KWH) Rate of Fuel adj. charge (PS/KWH)
Amount paid towards R.AC Rs.

1.	10/1985	80,861,193	0.94	7,60,095.21
2.	11/1985	83,636,008	0.91	7,61,087.67
3.	12/1985	103,112,239	0.64	6,59,918.33
4.	1/1986	105,382,366	2.79	29,40,168.01
5.	2/1986	85,227,518	2.85	24,28,984.26
6.	3/1986	98,235,540	3.21	31,53,360.83
7.	4/1986	48,660,673	2.09	10,17,008.07
8.	5/1986	37,889,108	3.73	14,13,263.73
9.	6/1986	56,526,100	3.45	19,50,150.45
10.	7/1986	92,021,973	1.47	13,52,723.00
11.	8/1986	64,864,657	2.79	18,09,723.93
12.	9/1986	90,706,887	3.76	34,10,541.35
13.	10/1986	102,787,005	2.65	27,97,076.40
14.	11/1986	85,702,138	2.03	19,00,096.82
15.	12/1986	111,981,343	2.12	17,94,960.13
16.	1/1987	124,931,810	2.87	35,88,412.96
17.	2/1987	118,449,560	2.83	33,52,122.95
18.	3/1987	113,766,417	2.28	25,93,874.31
19.	4/1987	69,345,777	2.81	19,48,616.33
20.	5/1987	63,114,554	3.16	19,94,419.91
21.	6/1987	58,536,501	3.44	18,38,046.13

22. 7/1987 115,132,994 2.85 32,81,290.33
23. 8/1987 89,931,383 3.53 31,74,577.82
24. 9/1987 147,803,251 2.53 37,39,422.25
25. 10/1987 165,448,622 2.65 43,84,388.48
26. 11/1987 149,721,941 2.16 32,33,993.93
27. 12/1987 148,117,286 2.10 31,10,463.01
28. 1/1988 147,619,307 3.33 49,15,656.33
29. 2/1988 118,889,179 2.27 26,98,784.37
30. 3/1988 122,041,883 3.32 40,51,790.52
31. 4/1988 96,201,502 2.74 26,35,921.15
32. 5/1988 138,004,036 3.08 42,50,524.31
33. 6/1988 54,811,539 3.57 19,56,771.96
34. 7/1988 53,616,467 3.49 18,71,214.70
35. 8/1988 77,192,556 3.12 24,08,407.75
36. 9/1988 58,824,454 3.67 21,58,857.46
37. 10/1988 55,772,573 4.04 22,53,211.95
38. 11/1988 83,750,836 6.16 51,59,051.50
39. 12/1988 128,984,030 5.69 73,39,191.31
40. 1/1989 137,856,650 6.52 89,88,253.58
41. 2/1989 130,976.981 7.03 92,07,681.76
42. 3/1989 161,146,607 8.47 136,49,117.61
43. 4/1989 86,072,987 8.43 72,55,953.80
44. 5/1989 45,420,208 8.09 36,74,494.83
45. 6/1989 149,749,031 8.32 124,59,119.38
46. 7/1989 124,445,019 8.80 109,51,161.67
47. 8/1989 112,869,630 10.56 119,19,033.00
48. 9/1989 139,019,478 8.97 124,70,047.00
49. 10/1989 157,953,699 7.69 16,85,239.45
50. 11/1989 190,896,258 7.67 146,41,743.00
TOTAL 2,177,564,542 14,69,34,996.17

From the aforesaid chart, it is clear that the period upto May 1987 is the period which covers the Power Tariff 1985, and from 2-5-1987, Power Tariff, 1987 has come into effect. Therefore, basis for recovering the fuel escalation charges shall have to be taken as it stood in the month of November 1986, the date on which the report of the tariff committee was made. In February 1987, the fuel escalation charges were paid by the KEB to the NTPC at the rate of 2.83 paise per unit. Therefore, this has to be taken as the basis for claiming fuel escalation from 2-5-1987, the date on which the tariff 1987 came into force. To this, the KEB is entitled to add 22% of power loss during the course of transmission and distribution of power to high tension consumers of the power which is imported from the NTPC.

34. It is not in dispute that the fuel escalation charges are recovered from the petitioners not taking the basic figure of fuel escalation charges as 2.83 per unit plus transmission and distribution loss, but it has claimed the amount as and when claimed by the NTPC as per the details of fuel adjustment charges paid by the KEB upto 1985.

35. I have already pointed out that the general condition No. 8 as it stood earlier to 26-3-1987 enabled the KEB to recover only escalation in the fuel charges recovered by the NTPC from the Board. Ofcourse, from 23-6-1987 onwards, the KEB is also entitled to recover by way of additional charge not only under the heading "fuel escalation" but also under the heading "other increase due to operation expenses etc" It is not the case of the KEB that the amount claimed from the petitioners is also inclusive of other increase due to operation expenses. The various demands issued to the petitioners clearly indicate that what is demanded from the petitioners is only the fuel escalation charges and not inclusive of the expenses incurred under the heading "other increase due to operation expenses etc" Therefore, it becomes necessary for the KEB now to recalculate the fuel escalation charges payable by the petitioners from May 1987 onwards keeping the base figure of fuel escalation charges as 2.83 paise per unit. Anything over and above 2.83 paise claimed by the NTPC and paid by the KEB plus 22% of the power loss incurred during the course of transmission and distribution in the power imported from the NTPC.

36. Before closing this point, I may also refer to the two decisions referred by Sri Sundaraswamy, learned counsel for the KEB in Kerala State Electricity Board v M/s. S.N. Govinda Prabhu and Brothers and Others, AIR 1986 SC 1999 and M/s. Shri Sitaram Sugar Co. Ltd. & Another v Union of India and Others, AIR 1990 SC 1277. The reliance on both these decisions is placed in support of the contention that the court is not entitled to go into the mathematics of the tariff and the amount claimed by way of fuel escalation charges. In Govinda Prabhu's case the Supreme Court has observed thus:

"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."

In addition to this the proposition laid down in Rohtas case has also been affirmed in para-11 of the Judgment as follows:

"In the ultimate analysis, the mechanics of price fixation is necessarily to be left to the Judgment of the executive and unless it is patent that there is hostile discrimination against a class of persons, the processual basis of price fixation is to be accepted in the generality of cases as valid."

In Sri Sitaram's case all the previous decisions of the Supreme Court in which the scope of jurisdiction of the court to interfere with the determination of price made by statutory committees and also the executive have been considered and at para-58 it has been held that "the price fixation is not within the province of the courts. Judicial function in respect of such matters is exhausted when there is found to be a rational basis for the conclusions reached by the concerned authority. As stated by Justice Cardozo in *Mississippi Valley Barge Line Company v United States of America*, (1933) 292 US 282-290: 78 Lawed 1260-1265." But there is also an observation made in this decision at para-52 which reads thus:

"The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it."

37. I am of the view that these two decisions will have a bearing in the case of determination of power tariff which is made on the basis of the report of the Committee. In these cases, we are not concerned with the validity, correctness or otherwise of the Power Tariffs, 1987. In these petitions, we are concerned only with the specific demand made by the KEB in terms of General Condition No. 8 pertaining to HT consumers. As already pointed out, under General Condition No. 8 pertaining to HT Consumers, the KEB is entitled to recover from HT consumers only the charges due to fuel escalation and other increase in operational charges. It is not the case of the KEB that the demands made are due to other increase or due to increase in operational charges; but the same are made under the

heading "fuel escalation charges". Hence it is not possible to apply the aforesaid two decisions and hold that the court has no jurisdiction to go into the question under consideration.

38. Accordingly, point No. 4 is answered as follows:

The fuel escalation charges claimed from October 1985 are not covered by the Power Tariffs, 1985. Therefore, the charges claimed under the heading "fuel escalation" upto the coming into force of the Power Tariffs, 1987 with effect from 2-5-1987 are valid and are not liable to be interfered with. The fuel escalation charges claimed for the period subsequent to May 1987 are not made from 2-5-1987 on the basis that the fuel escalation of 2.83 paise per unit had gone into the determination of the Power Tariffs, 1987 as it should be made the basis for determining the fuel escalation charges from 2-5-1987 onwards and any amount paid over and above 2.83 paise per unit by way of fuel escalation to the NTPC by the KEB plus 22% of the transmission and distribution loss only is entitled to be recovered by the KEB from HT consumers. As the demands made from 2-5-1987 demanding fuel escalation charges are not made on this basis inasmuch as they include the fuel escalation charges of 2.83 paise per unit which had already gone into the determination of the Power Tariffs, 1987, the KEB is required to revise the determination of fuel escalation charges with effect from 2-5-1987 on the basis indicated above and make a fresh demand.

39. For the reasons stated above, these writ petitions are allowed in part. The fuel escalation charges demanded upto the end of March 1987 are upheld. The fuel escalation charges claimed from 1-4-1987 onwards are quashed. Liberty is reserved to issue fresh demands for recovering escalation charges for the period from 1-4-1987 onwards in terms of the finding recorded on Point No. 4. If there is any ambiguity or error in the demands so made, the petitioners, instead of straightaway approaching this court, shall approach the concerned officers who have issued the demands and bring to their notice the error, if any, in the bills/demands and in the event the error is accepted by concerned officer/s he/they shall issue the revised bill/s.

40. In the facts and circumstances of the case, there will be no order as to costs.