(2007) 09 MP CK 0054

In the Madhya Pradesh High Court

Nahar Spinning Mills Limited APPELLANT

Vs

M.P. Electricity Board and State of M.P. RESPONDENT

Date of Decision : 05-09-2007

Acts Referred:

Arbitration Act, 1940 — Section 34
Constitution of India, 1950 — Article 14, 226
Electricity (Supply) Act, 1948 — Section 3, 34, 35, 36, 44

Citation : (2007) 09 MP CK 0054

Hon'ble Judges : Shantanu Kemkar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Shantanu Kemkar, J.—Both these petitions involve common questions of law and facts and as such are being decided by this common order.

2. Through Writ Petition No. 3670/2000 the petitioner has challenged the order dated 24.5.1999 (Annexure P-14) passed by the respondents No. 1 and 2 Madhya Pradesh Electricity Board (for short Board) by which the Board has rejected it''s application seeking permission to install and run Captive Power Plant of 4.1 MW (4100 KVA) capacity in its unit No. 1 and the order dated 17.1.2000 (Annexure P-26) passed by the Board by which the Board has rejected the petitioner''s request for reduction in contract demand from 5000 KVA to 1000 KVA in respect of the same unit No. 1. The petitioner is also seeking direction to the Board to grant it the permission with retrospective effect, i.e., w.e.f. 1.7.1999 to set up Captive Power Plant of 4.1 MW and to permit it to reduce its contract demand from 5000 KVA to 1000 KVA retrospectively w.e.f. 1.7.1999 and re-determine the minimum charges accordingly and issue corrected electricity bills w.e.f. 1.7.1999.

3. Through Writ Petition No. 3838/2000 the petitioner has challenged the order dated 22.3.1999 (Annexure P-12) by which the Board has rejected it''s application seeking permission for installation of Captive Power Plant of 4.1 MW

(4100 KVA) in its industrial unit No. 2 and to direct the board to accept the surrender of total power connection and re-determine the minimum charges retrospectively from 31.7.1999 on the basis of surrendering of the total connection and to cancel all the bills raised after 1.8.1999, treating the surrender of connection w.e.f.31.7.1999.

4. Briefly stated, the petitioner Company is having its two units of Yarn Manufacturing at village Simrai district Raisen. According to the petitioner the substantial part of the Yarn produced by its units is exported to foreign countries. It is averred that in order to compete with the export market strict quality adherence and quality production is required to be maintained by it. The desired high quality production of Yarn can only be achieved by continuous uninterrupted supply of electricity. It is further averred that in order to ensure quality production of high level it is also necessary to run the humidification plant of the units continuously, without any interruption. Thus, the petitioner''s case is that for producing the quality yarn it needs quality electricity supply which includes supply on fixed voltage without fluctuations.

5. Initially, the petitioner started its unit No. 1 with 1000 KVA of electricity supplied by the Board, thereafter on its application dated 7.8.1995 for installation of its own 2 Diesel Generator sets of capacity 1525 KVA the petitioner was accorded conditional permission by the Board vide letter dated 16.8.1995 (Annexure P-8) and letter dated 19.9.1995 (Annexure P-9) to use the Generator sets as standby Generator sets which shall not be used in parallel with the Board''s supply and shall be used only during the period of failure of the Board''s supply. Thereafter the petitioner was also permitted to install its own standby Generator set of 1000 KVA with similar condition. After the installations of its own standby Generator sets the petitioner applied for 5000 KVA power connection from the Board. The said application was allowed by the Board and an agreement dated 25.6.1998 (Annexure P-3) to that effect was executed between the petitioner and the Board.

6. In the meantime realizing the shortage of electricity and the Board''s inability to supply the electricity as per the demand, the Board circulated the guidelines of the captive power policy of the State Govt. vide its circular dated 27.12.1996 (Annexure P-11) and motivated its consumers to install their own captive power plant. The State Govt. also realizing the shortage of the electricity, in order to overcome it and for encouraging the installation of own captive power plant by the consumers amended it''s captive power policy vide notification dated 16.10.1998 (Annexure P-12) requiring the Board to accord permission to the consumers for installing the captive power plant within 45 days from the date of application from the consumer for the same.

7. It is stated by the petitioner that acting upon the said circular and the captive power policy of State Govt., an application dated 22.1.1999 (Annexure P-13) was submitted by it for granting permission to it for installing in its unit No. 1 heavy fuel operated generating set of 5W.P. Nos. 3670/2000 & 3838/2000 capacity 4.1

MW for captive power plant. Since the said application was not considered within 45 days as per the time limit fixed in the amended captive power policy (Annexure P/12), the petitioner vide letter dated 1.6.1999 (Annexure P-15) informed the Board that it has installed 4.1 M.W heavy fuel operated generator set. The petitioner also informed that on installation of 4.1 MW Diesel Set its requirement of electricity from the Board has reduced drastically and requested the Board to reduce its existing contract demand of 5000 KVA to 1000 KVA w.e.f. 1.7.1999. Thereafter since the petitioner was not informed about its prayer for reduction of the contract demand the petitioner vide letter dated 30.6.1999 (Annexure P-16) informed the Board that it shall be reducing the contract demand from 5000 KVA to 1000 KVA w.e.f.1.7.1999 pursuant to its letter dated 1.6.1999.

8. The petitioner''s application dated22.1.1999(Annexure P/13) was rejected by the Board vide order dated 24.5.1999 (Annexure P-14). The Board also issued bills of the electricity to the petitioner on the basis of contract demand. On 17.1.2000 (Annexure P/26) the Board rejected the petitioner''s request for reduction in contract demand from 5000 KVA to 1000 KVA for its unit No. 1. Feeling aggrieved by the order dated 24.5.1999 and the order dated 17.1.2000 and also the demand notices issued by the Board for non-payment of the dues and the penal demand for illegal and unauthorized installation of the captive generators of 4.1 M.W capacity, the petitioner has filed W.P. 3670/2000.

9. In W.P. No. 3838/2000 the petitioner''s grievance is about refusal of the permission by the Board to install and run 4.1 MW (4100 KVA) captive power plant against contract demand of 2500 KVA for its unit No. 2. Initially the petitioner entered into an agreement on 13.6.1997 (Annexure P-3) with the Board for supply of contract demand of 3500 KVA for its unit No. 2. Thereafter on petitioner''s application the Board permitted the petitioner vide letter dated 7.3.1998 (Annexure P-5) to install and run its own two D.G. sets of total capacity 5900 KVA with the stipulations that it shall not be worked in parallel with the Board''s supply system and shall be used as standby sets only during the period of failure of the Board''s supply. Thereafter, on petitioner''s request for reduction in contract demand it was reduced to 2500 KVA w.e.f. 1.4.1998. The petitioner''s application based upon the aforesaid circular of the Board and the captive power policy of the State Govt. seeking permission to install its own 4.1 MW (4100 KVA) DG Sets was rejected by the Board vide order dated 22.3.1999 (Annexure P-12) on the ground that the petitioner has already been allowed to install generator sets of capacity of 5900 KVA. Feeling aggrieved, by the order dated 22.3.1999 the writ petition No. 3838/2000 has been filed for quashment of the order dated 22.3.1999 and for direction to accord the permission of 4.1 MW captive power plant and also to accept the surrender of total contract demand retrospectively w.e.f. 31.7.1999 and for quashment of the bills raising demand from 1.8.1999.

10. The Board in its return and additional return filed in both the petitions has

stated that the installation of its own generating set of 4.1 MW in both the units was done by the petitioner without obtaining prior permission of the Board. The petitioner on the basis of unauthorized installation of its own 4.1 MW capacity Generator sets arbitrarily assumed reduction in contract demand without consent from the Board and in order to escape the liabilities and consequences of the aforesaid unauthorized act of installation and running of its captive power plant on its part, has filed these petitions. It is stated that the petitioner''s applications for installation and running of its own generator sets have been duly considered and have been rightly rejected by the Board. It is further stated that having regard to the application filed by the petitioner with regard to unit No. 1 seeking permission to install the captive power plant in which the petitioner had disclosed that its maximum achieved contract demand is 4500 KVA as against already existing 5000 KVA contract demand it was not found feasible to allow the petitioner''s prayer, more particularly, for the reason that the petitioner had already been permitted to install 2 generator sets of 1525 KVA and one generator set of 1000 KVA. So far as the request for reduction in the contract demand as prayed by the petitioner it is stated that the said request was not based on any compelling circumstances but was made due to installation of the unauthorized DG set of 4.1 MW, in the circumstance the request to reduce the contract demand was rightly declined in view of the agreement. As regards unit No. 2 it is stated that the petitioner''s application seeking permission to install and run 4.1 M.W Captive Power Plant for its unit No. 2, was duly considered by the Board and on finding that the petitioner has already been permitted to install D.G. Sets of capacity 5900 KVA as against its contract demand of 2500 KVA it was not deemed proper to permit the petitioner to install additional D.G. set of 4.1 M.W. and to permit it to reduce the contract demand to nil. It is further stated that the petitioner''s case would be governed by the agreements entered into between the parties and in view of the terms of the agreements, the captive power policy of the State. Govt. is not binding upon them. The Board also raised a preliminary objection by filing a separate application that the petitioner is having an alternative remedy and instead of availing alternative remedy available u/s 44(3) of Electricity Supply Act, 1948 (for short `Act'') requiring the dispute to be referred to the arbitration before the authority constituted under the Act it has directly approached this Court by filing these petitions, therefore, the petitions be dismissed on the ground of availability of alternative remedy.

11. Shri Ajay Mishra, learned senior Counsel for the petitioner referring to the various clauses of the agreements entered into between the petitioner and the Board as also the clauses of the circular issued by the Board, the guidelines and the captive power policy of the State Govt. contended that the action of the Board is wholly illegal, unjustified and arbitrary. He contended that as per the captive Power policy notified by the State Govt. the petitioner was eligible for grant of permission to set up captive power plant for the capacity of twice of the contract demand of the industrial units. He submitted that the rejection of the petitioner''s applications by adding capacity of its existing standby short duration

support generators is illegal and contrary to the condition imposed by the Board while permitting the petitioner to install the D.G. sets as standby sets. He argued that in the year 1994, the petitioner started facing shortage in the power supply of the Board as the Board imposed peak load period restriction, thereby obstructing uninterrupted continuous supply of power necessary for the petitioner''s units. During the said period the Board imposed restriction to the industrial consumers not to use more than 10% of their connected load between 4.00 p.m. hours to midnight. In the circumstances, the permitted load was too low and it was not possible for the petitioner to run its units during the aforesaid period and it became impossible to the petitioner to perform the manufacturing process. In order to meet the requirement of electricity in the aforesaid peak load restriction the petitioner applied for installation of standby diesel generating sets. The permissions were granted to the petitioner with a stipulation that the petitioner shall use the D.G. sets as standby sets only during the period of failure of the power supply by the Board and shall not use the said standby generators in parallel with the Board''s power supply system. He submitted that the Generator sets installed by the petitioner pursuant to the permission granted to the petitioner are by its type and make are only short duration support generators and cannot be used as parallel mode of supply of electricity. In this background and having regard to the conditions imposed by the Board while permitting the installation of standby D.G. sets, the rejection of the petitioners prayer for the set up of captive power plant of 4.1. M.W. in both the units, taking into consideration and adding the capacity of its standby D.G. sets is wholly erroneous. He further submitted that the rejection of applications in respect of both the units is against the circular of the Board and the captive power policy of the State Govt. So far as the refusal of the permission to reduce the contract demand he submitted that the agreement as well as the captive power policy of the State Govt. permits reduction of the contract demand. The petitioner having installed its own Diesel Generator sets as per the circular of the Board and the captive power policy of the State Govt. cannot be compelled to use the Board''s supply. He further submitted that in view of the amended captive power policy in which the concept of the compelling circumstances which was the requirement of the agreement for allowing reduction in the contract demand has been given complete go by and the amended captive power policy permitted the reduction of the contract demand even up to zero.

12. As regards the preliminary objection about the availability of the alternative remedy of arbitration before the authority constituted under the Act learned senior Counsel for the petitioner submitted that the Central Electricity Authority constituted under the Act to act as an arbitrator itself had issued guidelines (Annexure P/29) for giving sanctions by the State Govt. for installation of captive power plants and the said guidelines having been flouted by the Board it was not necessary for the petitioner to have approached to the said authority. He also submitted that the preliminary objection has been pressed by the Board only at the time of final hearing of the cases, thus at this belated stage the objection be

rejected and the petitions may be decided on merits, instead of directing to the petitioners at this point of time to approach the authority by way of an arbitration.

13. Shri Ajay Mishra, learned senior Counsel for the petitioner further submitted that the Board having permitted number of industries/consumers as shown in the chart Annexure R/3, to install and run additional captive power plant on the basis of the aforesaid guidelines and the captive power policy of the State Govt. and also permitted them to reduce the contract demand cannot be allowed to refuse the permission to the petitioner on the ground that the captive power policy of the State Govt. is not binding upon them and also cannot be permitted to raise the ground that the petitioner is bound by the agreement. In support of his contentions reliance has been placed on the judgments in the case of Superpack Vs. M.P. State Electricity Board and Others, , Associated Cement Companies Ltd. v. M.P. Electricity Board and Ors. 2001 (1) MPLJ 641, Maihar Cement Vs. M.P. State Electricity Board and Others, , Bangalore Medical Trust Vs. B.S. Muddappa and others, , Suman Gupta and Others Vs. State of Jammu & Kashmir and Others, , Krishi Utpadan Mandi Samiti Sahaswan District Badaun through its Secretary Vs. Bipin Kumar and Another, , Beg Raj Singh Vs. State of U.P. and Others, , Carew and Co. Ltd. v. Union of India AIR 1975 SC 11 W.P. Nos. 3670/2000 & 3838/2000 2260, and Maharashtra State Judicial Service Association and Others Vs. High Court of Judicature at Bombay and Others, .

14. Shri M.L. Jaiswal, learned senior Counsel for the Board contended that the Board examined the petitioner''s applications seeking permission for installing 4.1 MW Generator sets in correct perspective. On examination about unit No. 1 it was revealed that the petitioner''s contract demand was 5000 KVA and in addition to it the petitioner had already been permitted to install DG sets of capacity 4160 KVA in its unit No. 1 in the circumstances the permission to install additional 4.1 MW (4100 KVA) set was not allowed as the petitioner''s maximum demand was only 4500 KVA as per its application (Annexure P-13). He argued that the policy of the State Govt. allowing installation of captive power plant is not binding on the Board. The petitioner who unauthorizedly installed and started operation of the DG set of the capacity 4100 KVA is not entitled for grant of discretionary relief under Article 226 of the Constitution of India. He further argued that the standby sets are also part of the captive power plant and as such merely on the basis of conditional permission to install the standby sets it cannot be presumed that the petitioner used the same only on failure of the powers supply and has not used it as a parallel mode of supply of electricity. The petitioner having already availing contract supply of 5000 KVA and 4160 KVA through standby DG sets in its unit No. 1 it was rightly not allowed to install captive generation sets. Similarly he supported the rejection of the petitioner''s application for unit No. 2. He further submitted that the petitioner having failed to satisfy compelling reasons as required under Clause 13(d) of the agreement for reduction in contract demand the Board has committed no error in exercising its discretion in rejecting the petitioner''s prayer for reduction of the contract

demand. In support he placed reliance on the judgments passed in the case of National Highway Authority of India Vs. Ganga Enterprises and Another, , World Tel Inc. and Another Vs. Union of India (UOI) and Others, , M.P. Electricity Board and Anr. v. Manju Singh Chauhan (Mrs.), (2000)10SCC290, Bisra Stone Lime Co. Ltd. and Another Vs. Orissa State Electricity Board and Another, and Poddar Projects Ltd. (Multi Steels) Vs. The A.P.S.E. Board and Others, .

15. In order to appreciate the contentions raised by learned senior Counsel for the parties and to decide the controversy involved in this petition it would be appropriate to quote relevant clauses of the agreement entered into between the parties, provisions of Electricity (Supply) Act, 1948, the circulars issued by the Board and the relevant clauses of the Captive Power Policy of the State Govt.

Clause 13 of the Agreement reads thus:

13 (a) The Consumer will be permitted such additional supply in excess of the contract demand as may be agreed upon by the Board and the Consumer after the latter has given due notice in writing of his desire to have the contract demand altered.

(b) In the event of the Board agreeing to make such additional supply available, the Consumer shall pay such contribution towards the cost of making such additional supply available as may be determined by the Board.

(c) If such additional supply is made available by the Board the contract demand specified in Clause 1(a) hereof shall be increased to the same extent.

(d) On being satisfied that for certain compelling reasons the Consumer is not or will not be in a position to consume electricity sufficient to have maximum demand equal to his contract demand, the Board may in its discretion allow the Consumer when request in writing is received in this regard, to reduce his contract demand to such extent and from such date as the Board may decide. Such reduction in the contract demand will be allowed not more than once during the period, of the Agreement remains in force but it shall not effect the consumer''s liability to pay the amount of the minimum guarantee, mentioned in Clause 21(a) hereof.

Clause 38(a) of the Agreement reads thus:

38(a) The Consumer shall conform to conditions of supply prescribed by the Board from time to time in its booklet "General conditions for supply of Electrical Energy" and also the provisions of the Indian Electricity Act, 1910, and of Electricity (Supply) Act, 1948 and any modification or re-enactment thereof, for the time being in force, and to the rules and regulations thereunder for time being in force in so far as the same respectively may be applicable. A copy of the booklet "General Conditions for Supply of Electrical Energy" has been supplied by the Board to the Consumer and the Consumer hereby acknowledges the receipt thereof.

Section 44 of the Electricity (Supply) Act, 1948 reads thus:

44. Restriction on establishment of new generating stations or major additions or replacement of plant in generating stations. - (1) Notwithstanding anything contained in any other law for the time being in force or in any license, but subject to the provisions of this Act, it shall not be lawful for a licensee, or any other person not being the Central Government or any Corporation created by (a Central Act] [or any Generating Company], except with the previous consent in writing of the Board, to establish or acquire a new generating station or to extend or replace any major unit of plant or works pertaining to the generation of electricity in a generating station:

Provided that such consent shall not, except in relation to a controlled station be withheld unless within three months from the date of receipt of an application.

(a) for consent to the establishment or acquisition of a new generating station the Board-

(i) gives to the applicant being a licensee an undertaking that it is competent to, and will, within twenty-four months from the said date, afford to him a supply of electricity sufficient for his requirements pursuant to his application; or

(ii) shows to the applicant that the electricity required by him pursuant to his application could be more economically obtained within a reasonable time from another appropriate source;

(b) for consent to the extension of any major unit of plant for works as aforesaid, the Board-

(i) gives to the applicant being a licensee an undertaking that within twenty-four months from the said date either the station to which the application pertains will become a controlled station in terms of Section 34, or the Board will make a declaration to the applicant in terms of Section 35 offering him a supply of electricity sufficient for his requirements pursuant to his application, or the Board will make a declaration to him in terms of Section 36; or

(ii) Shows to the applicant that the electricity required by him pursuant to his application could be more economically obtained within a reasonable time from another appropriate source or by other appropriate means;

(c) for consent to the replacement of any major unit of plant or works, the Board-

(i) gives to the applicant being a licensee an undertaking that within eighteen months from the said date either the station to which the application pertains will become a controlled station in terms of Section 34 or the Board will make a declaration to him in terms of Section 36; or

(ii) shows to the applicant that the electricity required by him pursuant to his application could be more economically obtained within a reasonable time from another appropriate source or by other appropriate means.

(2) There shall be stated in every application under this section such particulars as the Board may reasonably require of the station plant or works, as the case may be, in respect of which it is made, and where consent is given thereto, in acting in pursuance of such consent, the applicant shall not, without the further consent of the Board, make any material variation in the particulars so stated.

[(2A) The Board shall, before giving consent under Sub-section (1), to the establishment or acquisition of a new generating station or to the extension or replacement of any major unit of plant or works, consult the Authority, in cases where the capacity of the new generating station or, as the case may be, the additional capacity proposed to be created by the extension or replacement exceeds twenty-five thousand watts.]

(3) Any difference or dispute arising out of the provisions of this section shall be referred to the arbitration of the Authority.

Section 78A of the Act reads thus:

78A. Directions by the State Government. - (1) In the discharge of its functions, the Board shall be guided by such directions on questions of policy as may be given to it by the State Government.

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

The guidelines under the Captive Power Policy of Govt. of M.P. circulated by the Board vide letter dated 27.12.1996 reads thus:

To,

The Pihikhedi Indsutries Association, E-7/638, Shahpura Extn. Arera Colony, Bhopal-462016 (M.P.)

Sub : Guidelines under the Captive Power Policy of the Government of Madhya Pradesh

Dear Sirs,

The Government of Madhya Pradesh declared Captive Power Policy, for installation of the captive power plants in the State, vide letter No. 368/F/142/13/95, Bhopal dated 11.6.1996. Certain modifications are made in the policy by the State Government vide letter No. 9681/F-3/142/13/95 dated 5.11.96. Based on above guidelines for the entrepreneurs for installation of captive power plants in the State are framed. A copy of which is enclosed herewith for giving wide publicity among the members of your association.

With regards,

Yours faithfully Encl : As above (B. Krishnamoorthy) Chief Engineer (Commercial) MPEB : Jabalur

The relevant guidelines of Captive Power Policy are extracted below:

2- dSfIVo ikoj miHkksDrkvksa dks tks dSfIVo ikoj IykaV LFkkfir djuk pkgrs gSa fuEufyf[kr Jsf.k;ksa esa j[kk tk ldrk gS 1@411@2 %&os u;h vFkok ekStwnk vkS|ksfxd bdkb;ksa tks mRikfnr dSfIVo ikoj dk mi;ksx iw.kZr% vius vkS|ksfxd mRiknu ds fy;s djuk pkgsaxh]] vFkok e/; izns''k fo|qr e.My dh ikoj fxzM ls Hkh vkaf''kd :I esa ikoj izkIr djsaxh A

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The amended captive power policy of the State Govt. published in M.P. Gazetted dated 16.10.1998 is extracted below:

No. 9359-F. 3-13-98-13.- State Government declare the following amended captive power policy for installation of captive power plants by HT consumers of M.P.E.B. in the State-

(1) Permission shall be accorded by M.P.E.G. for installation of the captive power plant within 45 days, and by Chief Electrical Inspector within 15 days on receipt of the application from consumer. If the capacity of the captive power plant is above 25 M.W. or the Project cost is more than Rs. 100 crores, then the consumer is required to take necessary permission from Central Electricity Authority as per prevailing act/rule.

(2) If any one or more than one High Tension consumers want to install captive power plant jointly for their own use or sale of surplus power to other parties (HT consumers) they can do so by forming a Generating Company under the Company Act. But such High Tension consumers should have equity participation in the capital of company to have Control on the Management of the Generating company, in accordance of company act. In case such condition does not prevail then the Generating Company, will lose its recognition for Captive generation.

(3) It is essential for such entrepreneur who want to sell surplus power to other consumers or to M.P. Electricity Board, that should be HT consumer of M.P. Electricity Board. Similar policy shall also be applicable for co-operative Societies.

(4) Capacity of captive power plant. The capacity of captive power plant shall not be more than twice the requirement of the consumer. In case of installation of plant by consortium or captive power company this capacity shall not be more than twice of total requirement of all the consumers included in the consortium or company.

(5)-(A) Entrepreneur installing captive power plant (Captive power consumer), who shall be HT consumer of the Board, can supply electricity from its captive power Plants in the following manner:

(i) Captive power consumer can fulfill his own requirement fully or partially from captive power plant.

(ii) Captive power consumer can wheel surplus power through M.P.E.B.''s grid lines to his own HT connection (anywhere in the State) or any other HT consumers (anywhere in the State) after meeting his own requirement.

(iii) Wheeled power consumer (W.P.C.) can reduce its contract demand, but he has to keep it a minimum contract demand as specified for that voltage class, and would be required to pay minimum charge for it.

(iv) Captive power consumer can supply surplus power form captive power plant after meeting his own requirement to any nearby HT consumer for their full demand by extending his own line. In such condition the third party shall not be eligible to get power supply from Madhya Pradesh Electricity Board.

(v) Such captive power consumer who has reduced his contract demand, or made it zero, prior to or after declaration of captive power policy is also eligible to sell surplus power.

5(B) Supply of surplus power as mentioned in 5A above by Captive power consumer, or its utilization by wheeled power consumer, can be done on the following terms and conditions:

(i) Captive power consumers can reduce his contract demand. But will have to keep a minimum demand as specified for that voltage class or can also reduce it to zero.

16. Before dealing the preliminary objection and the merits of the petitions it would be profitable to refer the relevant decisions cited at bar.

In case of Bala Prasad Rajoriya (supra) this Court has held as under

25. Section 78A of the Electricity (Supply) Act, 1948, which governs the respondent Board, provides:

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

It is clear that the policy decision taken by the State Government is binding on the Board and the Board has no option but to abide by it.

In Associated Cement Co. Ltd. v. M.P. Electricity Board and Ors. (supra) after dealing with Section 44 of the Electricity (Supply) Act, 1948 this Court has held as under:

17. From a plain reading of Section 44(1) of the Act it is apparent that the Legislature while conferring the power to grant consent has fixed norms for exercise of the power and has provided that consent cannot be withheld unless the Board informs to the applicant that it is competent to and will within 24 months afford to the applicant supply of electricity sufficient for its requirements or shows to the applicant that the electricity required by the applicant pursuant to its application could be more economically obtained within a reasonable time from another appropriate source. Thus, under the scheme of the Act, consent can be withheld only on satisfaction of either of the aforesaid conditions. Conditions laid down for grant of consent u/s 44 of the Act, nowhere states that the Board can put a condition for continuance of the contract-demand for grant of consent. In my opinion, putting the condition for continuance of the contract demand cannot be reasonably inferred as incidental or consequential to the power of grant of consent itself. I am of the opinion that for execution of the power to consent the authority to put condition for continuance of the contract-demand is neither directly or immediately require to carry out the purpose for which the power of grant of consent has been confirmed on the Board. I am further of the opinion that the power to direct for continuance of existing contract demand or for that matter, compelling a person seeking consent u/s 44 of the Act for availing electricity of which quantity cannot be said to be falling in natural consequences from the power to grant consent.

In case of Maihar Cement, Satna v. M.P. State Electricity Board, Jabalpur (supra) this Court again considered the provisions of Section 44 of the Electricity (Supply) Act, 1948 and also Sections 12 & 21 and M.P. Vidyut Sudhar Adhiniyam, 2000 and held as under:

14. It has been argued on behalf of the Board that it has to supply electricity to a certain section of the society at subsidised rates and therefore it has to charge higher rate from industrial consumers and if they start setting up their own

captive power plants it would shatter the economy of the board and the Power Policy of the State. This argument is not acceptable. The law incorporated in the act and the Adhiniyam must prevail. The consent can be withheld on specified grounds only and on no other grounds. One of the grounds for refusal of consent is "public interest". The Commission has not refused consent on that ground. Public interest means those interest which concern the public at large. The expression "public interest" is not capable of precise definition and has not a rigid meaning and is elastic and takes its colours from the statue in which it offers, the concept varying with the time and State for society and its needs. The State of Bihar Vs. Sir Kameshwar Singh, . There is scarcity of power. That is undeniable. Therefore, the Board or the Commission must have a pragmatic approach while dealing with the application for consent for establishing the generating station by private person. It must follow the law engrafted in Section 44 of the Act and in Section 21 of the Adhiniyam in letter and spirit. The attempt should be to improve the power position. The increase in the generation and supply of electricity is the real solution and that has the sanction of law. The increase introduction of electricity would be in over all public interest. That would solve the problem of scarcity and shortage of power. The slogan is "increase production and bring happiness" ^^mRiknu c<+ko [kq''kgkyh ykvks**. This is the edifice of the power policy as projected in the statutory provisions mentioned above. No artificial barrier should be created in the laudable objective of increasing the power supply either by the public sector or by the private sector. There was a time when nationalization was considered to be the panacea of all evils. That has not proved through. Now there is shift and change in the policy. There is a trend towards privatization to bring efficiency. Now the liberalization and transparency are the buzzwards. There is openness in the field of economy. The economy scenario is changing and the tools of law are being tuned in that direction. Therefore, the power policy also must change. The State monopoly has not yielded the desire result. If a private individual comes forward with a genuine proposal to set up a generating stations consistent with the law to meet its own requirement then it should not be turned down. Rather he should be encouraged to do so. This is the way to augment and improve the power supply and that is in conformity with the law. As already stated the increase in the production of electricity would serve the real public interest and it would not in any way be adverse to public interest. The energy saved by the Board can be diverted to other priority sectors, e.g. for agricultural purposes. The grant of consent to set up captive power plant by the petitioner company would not affect public interest. The refusal of consent by the Commission in this case is contrary to law.

In case of Bisra Stone Lime Co. Ltd. v. O.S.E. Board (supra) the Supreme Court in paragraphs 22, 23 & 24 has observed:

22. We can appreciate the handicap of counsel in advancing his arguments under the head of discrimination having lost the protective amulet of Article 14 of the Constitution under the Presidential embargo during the emergency. A plea of discrimination which is available when Article 14 is in free play is not at par with

the interdict of ''undue favour'' u/s 49 of the Act. Apart from this, when law makes it obligatory for certain special agreements to continue in full force during their currency stultifying the power of the Board to revise the rates during the period, no ground of discrimination can be made out on the score of exempting such industries as are governed by special agreements.

23. Although the Press Note in the instant case did not recite any provisions of the Act under which the same was issued, mere omission to do so does not disentitle the Board to rely upon Clause 13 of the agreement for a claim to revision of the rates, although in the form of a surcharge in this case. We, therefore, do not give any significance to the omission in the Press Note to refer to Clause 13 or to any other provision of the Act. The matter is, therefore, covered by the arbitration Clause 23 of the agreement. It is not for this Court to speculate what answers the Arbitrator will enter with regard to the disputed questions that may be raised before him. We are not to be understood as expressing any opinion on the merits of the dispute or difference between the parties with regard to the surcharge.

24. It is then submitted that this Court should not use its discretion in favour of arbitration in a matter where it is a pure question of law as to the power of the Board to levy a surcharge. This submission would have great force if the sole question involved were the scope and ambit of the power of the Board under Sections 49 and 59 of the Act to levy a surcharge, as it was sought to be initially argued. The question in that event may not have been within the content of Clause 23 of the agreement. But all questions of law, one of which may be interpretation of the agreement, need not necessarily be withdrawn from the domestic forum because the court has discretion u/s 34 of the Arbitration Act or under Article 226 of the Constitution and that the court is better posted to decide such questions. The arbitration Clause 23 is a clause of wide amplitude taking in its sweep even interpretation of the agreement and necessarily, therefore, of Clause 13 therein. We are therefore, unable to accede to the submission that we should exercise our discretion to withhold the matter from arbitration and deal with it ourselves.

In Poddar Projects Ltd. v. The A.P.S. E. Board and Ors. the Andhra Pradesh High Court in paragraph 30 held as under:

13. Assuming that this is a direction u/s 78A, the direction is of the State Government to the Electricity Board and if the Board has failed to comply with the said direction, no third party acquires any right thereunder. This is a dispute between the Board and the State Government which could be only referred to the Authority constituted u/s 3. Such a matter cannot be enforced or implemented at the instance of the consumer which is not given any right as such under the said G.O., and who is not released from the obligations which he has incurred under his contract with the Electricity Board. The fact that the Government has not referred in the G.Os as to what is to happen to the rights and obligations of the Electricity Board and the consumers who are the

contracting parties, is very significant. The direction given u/s 78A does not alter these obligations which arose out of a contract as made u/s 49 read with the rules and regulations framed under the Act. Neither Section 49 nor the regulations framed under the Act in this behalf are expressly made subject to Section 78A.

In case of M/s. Hyderabad Vanaspathi Limited Vs. Andhra Pradesh State Electricity Board and Others, it has been held that Section 49 of the Supply Act empowers the Board to prescribe such terms and conditions as it thinks fit for supplying electricity to any person other than a licensee. The section empowers the Board also to frame uniform tariffs for such supply. u/s 9(j) the Board could have made regulation there for but admittedly no regulation has so far been made by the Board. The terms and conditions of supply were notified in B.P.Ms. No. 69 0 dated 17-9-1975 in exercise of the powers conferred by Section 49 of the Supply Act. They came into effect from 20.10.1975. They were made applicable to all consumers availing supply of Electricity from the Board. The section in the Act does not require the Board to enter into a contract with individual consumer. Even in the absence of an individual contract, the terms and conditions of supply notified by the Board will be applicable to the consumer and he will be bound by them. Probably in order to avoid any possible plea by the consumer that he had no knowledge of the terms and conditions of supply, agreement in writing are entered with each consumer. That will not make the terms purely contractual. The Board in performance of a statutory duty supplied energy on certain specific terms and conditions framed in exercise of a statutory power. Undoubtedly the terms and conditions are statutory in character and they cannot be said to be purely contractual.

In case of Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others, in para 175 it has been observed thus:

175. In my considered opinion the Express Newspapers Pvt. Ltd. having acted upon the grant of permission by Sikandar Bakht, the then Minister for Works and Housing and constructed the new Express Building with an increased FAR of 360 and a double basement in conformity with the permission granted by the lessor i.e. the Union of India, Ministry of Works & Housing with the concurrence of the Vice -Chairman, Delhi Devlopment Authority on the amalgamation of plots Nos. 9 and 10, as ordered by the Vice Chairman by his order dt. Oct. 21, 1978 as on ''special appeal'' as envisaged in the Master Plan having been directed, the lessor is clearly precluded from contending that the order of Minister was illegal, improper or invalid by application of the doctrine of promissory estoppel.

In case of M/s. Real Food Products Ltd. and others, etc. etc., Vs. Andhra Pradesh State Electricity Board and others, it has been held by the Supreme Court that the view expressed by the State government on a question of policy is in the nature of a direction to be followed by the Board in the area of the policy to which it relates. In the context of the function of the Board of fixing the tarrifs in accordance with Section 49 read with Section 59 and other provisions of the Act, the Board is to be guided by any such direction of the State Government. Where the direction of the State Government, as in the present case, was to fix a concessional tariff for agricultural pump-sets at a flat rate per H.P., it does not relate to a question of policy which the Board must follow. However, in indicating the specific rate in a given case, the action of the State Government may be in excess of the power of giving a direction on the question of policy, which the Board, if its conclusion be different, may not be obliged to be bound by. But where the board considers even the rate suggested by the State government and finds it to be acceptable in the discharge of its function of fixing the tariffs, the ultimate decision of the Board would not be vitiated merely because it has accepted the opinion of the State government even about the specific rate. In such a case the Board accepts the suggested rate because that appears to be appropriate on its own view. If the view expressed by the State Government in its direction exceeds the area of policy, the Board may not be bound by it unless it takes the same view on merits itself.

In case of Ester Industries Ltd. Vs. U.P. State Electricity Board and Others, the Supreme Court has held that the State electricity Board has a statutory function to discharge in determination of the rates of tariff and terms and conditions subject to which the electrical energy be supplied to the consumers and enforcement thereof. This being a legislative policy, while exercising the power u/s 78A policy directions issued by the Government may also be taken into consideration by the Electricity Board which has a statutory duty to perform. But so long as the policy direction issued by the Government is consistent with the provisions of the Act and the tariff policy laid down by the Board, it may be open to the Board to either accept it or not to accept the directions as such. It is for the State Government to consider whether the Board has laid down the policy or whether the direction issued by the State Government has not been properly implemented. The Court cannot give a direction to implement the directions issued by the State Government exercising the power under Article 226 of the Constitution to direct the Board to exercise its powers u/s 78A(1) of the Act. Section 78A(2) has no application in the instant case.

17. As regards the preliminary objection raised by the Board that the petitioner has an alternative remedy u/s 44(3) of the Act to approach the authority constituted under the Act in my considered view the authority had itself issued guidelines (Annexure P/29) in July 1999 providing that if the captive plant is based on coal or liquid, fuel or gas and if the State is deficit in power supply, the installation of such captive power plant shall normally be allowed and the capacity of the plant shall be permitted up to 200% of the requirement of the industry for its own use and also providing that only in case the State is surplus in power the installation of such captive plant shall normally be not permitted. The guidelines Annexure P/29 further provides that however in such case also it can be considered if the Industries require uninterrupted power supply due to the nature of the industry and if the State is not able to guarantee the supply of such requirement and if the Industry requires quality power supply and if the state is

not in a position to guarantee the supply of such stringent requirement, the proposal can be considered. In view of the guidelines Annexure P/29 issued by the said Authority itself in my view, no useful purpose would be served to send the petitioner before the said Authority more particularly after such a long lapse of seven years. In this view of matter, it would be inappropriate to direct the petitioner to avail the alternative remedy more particularly when there are no serious disputed questions of facts and the petitions are required to be decided on the basis of the terms of the agreements, the circulars of the Board and the captive power policy of the State Govt. It is also to be seen that against the bills and demands raised by the Board against the petitioner for it''s alleged unauthorized installation of the captive power plants of 4.1 MW and its assumed reduction of contract demand in both the units and the bills issued on the basis of the contract demand and also the penalty imposed, the alternative remedy of approaching the authority for arbitration may not be available to the petitioner. In this view of the matter, I deem it proper to proceed for deciding the petitions on merits.

18. On going through the aforesaid clauses of the agreement, Act, circular of the Board, the captive power policy and the decisions cited by learned senior Counsel for the parties, I am of the opinion that having regard to the acute shortage of electricity prevailing at the relevant time the captive power policy was framed by the State Govt. The said policy was never challenged by the Board, on the other hand the Board implemented the same and on its basis issued circulars to its consumers to avail its benefits. Having motivated its consumer to avail the facility of installation of captive power plant the Board cannot be permitted to say that the said policy is not binding upon it. The decisions cited by the learned senior Counsel for the Board are, therefore, not applicable to the facts of the present petitions. After a careful scrutiny of the captive power policy it is revealed that the policy framed by the State Govt. to grant permission for installation of captive power plant permits such installation not only the new industrial units but also to the existing industrial units. Thus, the petitioner cannot be said to be excluded from its ambit on the ground that the petitioner is bound by the agreement.

The policy provides for using of the entire electricity by the consumers from their captive power plant and also provides for partial use from the Board. The policy also provides that the permission to install captive power plant to be granted normally within 45 days. The amended captive power policy further provides that such permission shall be accorded by the Board within 45 days, however, the capacity of captive power plant shall not be more than twice the requirement of the consumer. The amended policy further provides that the captive power consumer can reduce his contract demand upto the zero. Even Section 44 of the Act also provides for grant of consent to the licensee or any other person to establish or acquire a new generating station except in relation to a controlled station and such consent shall not be withheld by the Board unless within three months from the date of receipt of an application for consent to the establishment or acquisition of a new generating station the Board gives to the applicant being a licensee an undertaking that it is competent to, and will, within 24 months from the said date, afford him a supply of electricity sufficient for his requirement pursuant to his application or shows to the applicant that the electricity required by him could be more economically obtained within a reasonable time from another appropriate source. Section 78A of the Act provides that in the discharge of its function, the Board shall be guided by such directions on questions of policy as may be given to it by the State Govt. Clause 38(a) of the agreement provides that the consumer shall confirm to its supply prescribed by the Board from time to time in its booklet "General Conditions for Supply of Electrical Energy" and also the provisions of the Indian Electricity Act, 1910 and of Electricity (Supply) Act, 1948 and any modification or re-enactment thereof, for the time being in force, and to the rules and regulations thereunder for time being in force in so far as the same respectively may be applicable.

19. In view of the aforesaid position and going through the captive power policy, the circular of the Board, the Act and the agreement, there remains no doubt to hold that even during the subsistence of the agreement between the parties the petitioner was entitled to avail the benefit of the captive power policy framed by the State Govt. and widely circulated by the Board to its consumers for availing the benefit of it. It is not the case of the Board that the captive power policy framed and subsequently amended by the State Govt. was not made applicable by it and any dispute in that regard was ever referred to the authority constituted under the Act under provisions of Section 78A(2) of the Act. On the other hand, it is revealed from Annexure R/3 that the Board had acted upon the said policy and extended the benefit to its number of consumers. In the circumstances, in case of the petitioner the Board cannot be permitted to turn around and say that the captive power policy is not binding upon it.

20. It is also very clear that the petitioner was granted permission to install its own DG sets with specific conditions not to use the D.G. sets in parallel with the Board''s supply system. The permission was granted by the Board to use own DG sets only as standby sets and to be used during the period of failure of Board''s supply only. In the circumstances by no stretch of imagination it can be construed that the petitioner''s Unit No. 1 was having capacity of contract supply 5000 KVA + 4160 KVA by own standby DG sets totaling to 9160 KVA. The consideration of the capacity of aforesaid standby DG sets of 4160 KVA which were permitted to be used only on the failure of the Board''s supply, for the purpose of calculating the total capacity of the petitioner''s unit No. 1 and on that basis denying the permission to install 4100 KVA captive power plant is wholly unreasonable and arbitrary. The contention of the Board that the petitioner may be utilizing the standby generator sets as a parallel mode cannot be accepted for the reason that the Board could not establish a single instance by which such allegation was ever made or any case of such use was found in the petitioner''s units. There is also no specific denial of the petitioner''s contention that the stand by generator sets installed by him pursuant to the conditional permission were

by its type and make are only short duration support generators which cannot be used as a parallel mode of supply of electricity. The Board''s circular, guidelines and the Captive power policy of the State Government empowers the Board to grant the permission to install captive power plant to the extent of capacity twice the requirement of the consumer and the petitioner having applied less than twice the contract demand the petitioner was entitled for grant of permission for the applied capacity of 4.1 MW (4100 KVA) captive power plant.

21. The circular of the Board dt. 13.6.1997 (Annexure P-10), the letter of the Board dt. 27.12.1996 (Annexure P-11), the captive power policy of the State Govt. (Annexure P-12) requires the Board to accord permission for installation of the captive power plant within 45 days of the receipt of the application. The only rider as per the Clause 4 of the amended captive power policy (Annexure P-12) is that the capacity of the captive power plant for which the permission is sought shall not be more than twice the requirement of the consumer. Section 44 of the Act also provides that the consent shall not be withheld unless within 3 months the Board gives the applicant licensee an undertaking that it is competent to and will within 24 months afford him supply of electricity sufficient for his requirement or shows that the electricity required by him could be more economically obtained within a reasonable time from another appropriate source. In the present case the Board had communicated its decision after the lapse of 4 months from the date of application that too without giving any undertaking or showing any appropriate source of electricity to the petitioner in terms of Section 44 of the Act. In the circumstances the rejection of petitioner''s application for captive power plant of 4.1 MW is wholly unjustified.

22. So far as the petitioner''s prayer for reduction of the contract demand, no doubt in the agreement it is provided that the contract demand can be reduced only for compelling reasons. However, Clause 5(B)(i) of the amended captive power policy provides that the captive power consumer can reduce his contract demand keeping minimum demand as specified for that voltage clause and can also reduce it to zero. The petitioner''s prayer was to reduce the contract demand from 5000 KVA to 1000 KVA for its unit No. 1 and to reduce contract demand to zero for its unit No. 2 was on the basis of its application seeking installation of its own captive power plant of 4.1 MW. If the petitioner''s application for installation of captive power plant would have been allowed it would certainly come within the purview of compelling reasons for reduction in the contract demand as it would have been futile for the petitioner to continue the contract demand. In this view of the matter and having regard to the Clause 5(B)(i) of the amended captive power policy and also the fact that such reduction was also allowed by the Board in respect of other consumers, the order of rejection of the petitioner''s applications for reduction of contract demand cannot be sustained.

23. However, so far as the petitioner''s prayer for granting it permission with retrospective effect from 1.7.1999 when it set up the captive power plant of 4.1 MW cannot be allowed. Neither in the captive power policy nor in the Act there is

any such provision empowering the consumer to install and operate the Captive Power Plant in case the permission is not accorded within the time limit. In the absence of any deeming provision for permission after expiry of 45 days in the amended captive power policy or after three months u/s 44 of the Act, the petitioner was not entitled to install and run the captive power plant without there being any prior permission to that effect. In the circumstances the petitioner''s prayer to grant it the permission with the retrospective effect from the date of such installation cannot be accepted.

24. However, for the reasons stated above in my considered view the petitioner''s applications for installation of captive power plant of 4.1. MW and reduction of contract demand have been rejected by the Board illegally and arbitrarily. In the result, the impugned order dated 24.5.1999 (Annexure P14) and the order dated 17.1.2000 (Annexure P-26) are quashed. The Board is directed to grant permission to the petitioner for installation of captive power plant of 4.1 MW and to reduce its contract demand to 1000 KVA in respect of unit No. 1, immediately.

25. Similar would be the position in regard to the petitioner''s claim for installation of captive power plant of 4.1. MW and reduction of contract demand to zero as per the applications to that effect in W.P. No. 3838/2000. As a result the order dated 22.3.1999 (Annexure P/12) is quashed. The Board is directed to grant permission to the petitioner for installation of captive power plant of 4.1 MW and to reduce its contract demand to zero in respect of unit No. 2, immediately.

26. Accordingly, both the petitions are allowed in part to the extent indicated above. No orders as to cost.

