(1993) 10 GAU CK 0016

In the Gauhati High Court

Case No : Civil Rule No''s. 1588, 1589, 1748, 1774, 1775, 1776, 1793, (sic) , 1811, 1815, 1816, 1821, 1822, 1832, 1840, 1876, 1916, 1917, 1964 and 1965 of 1993

National Boards Ltd. and Others APPELLANT

Vs

State of Assam, Assam State Electricity Board and Secretary, Assam State Electricity Board RESPONDENT

Date of Decision : 14-10-1993

Acts Referred:

Constitution of India, 1950 — Article 226
Electricity (Supply) Act, 1948 — Section 18, 49, 49(1), 49(2), 5

Citation : (1993) 2 GLR 340

Hon'ble Judges : S.K. Homchaudhuri, J

Bench : Single Bench

Advocate : P.K. Goswami, D.N. Choudhury, A.K. Das, M. Hazarika, A.R. Banerjee, B. Choudhury, S.C. Biswas, C.L. Sethi and A.K. Sarkar, for the Appellant; S.N. Bhuyan, General, B.D. Singh, Government Advocate, A.M. Mazumdar H.C. Borthakur, N.N. Saikia, Senior Standing Counsel, ASEB, N. Saikia and J. Chutia, St. Counsel, ASEB, for the Respondent

Final Decision : Allowed

Judgement

S.K. Homchaudhuri, J.—In these 20 writ petitions, the Petitioners have impugned the notification dated 18.5.93 purporting to revise the Schedule of Tariff of electric charges with effect from 18.6.93 increasing the rate of tariff at various rates and introducing a new system, namely, two part tariff. The impugned notification dated 18.5.93 which is annexed to the petition is as follows:

ASSAM STATE ELECTRICITY BOARD REVISED ELECTRICITY TARIFF

1. Assam State Electricity Board has been functioning as principal supplier of electricity in the State of Assam. The Board is charged with the statutory obligation of promoting the coordinated development of generation, supply and distribution of electricity. The Board is required to adjust its charges from time to

time so as to enable it to carry on its operation to leave such surplus as is not less than 3% of the value of the fixed assets of the Board in the service at the beginning of such year vide Section 59 of Electricity Supply Act, 1948 and as amended by Act 16 of 1983. The cost of production of electricity has been going up continuously due to increase in cost of inputs like, (sic) oil, H.S.D., Coal, natural gas, machines, spares required for maintenance of machines and also due to increase in the emoluments of employees. The cost of power purchased from other agencies has also increased. While the cost of power has been escalating on a continuing basis, the level of cash support from the government of Assam has declined to nil in the State budget for 1993-44. Consequently, the revenues derived by application of the existing tariff are no longer sufficient to meet the steadily growing fixed, operational and maintenance expenses for generation, purchase and supply of power to fulfil the statutory requirements. In these circumstances, the Board had, therefore, to review the position and to decide that the rates for various types of supply require to be altered. It must be mentioned that the proposed tariff arrangement includes an implied subvention to the extent of interest payment on State loans which the Board in to pay to the government. During the year 1993-94 this amount is Rs. 118 Crore.

2. In exercise of the power conferred by Sections 49 and 59 of Electricity (Supply) Act, 1948 (Central Electricity Act No. 54 of 1948) with latest amendment thereto, Assam State ''Electricity Board do hereby notify the following revised tariffs in all areas to come into force with effect from the consumption of the month of June, 1993.

CATEGORY Schedule of tariff June, 1993.

1. Domestic ption falls in the following range;

(a) Upto 1 KWH/day average consumption Rs. 0.75

(b) Above 1 KWH/day and to 2 KWH/day average consumption Rs. 1.20

(c) Above 2 KWH/day and to 3 KWH/day average consumption Rs. 1.60

(d) Above 3 KWH/day and to 4 KWH/day average consumption Rs. 2.00

(e) Above 4 KWH/day average consumption Rs. 2.40

2. Commercial sumption falls in the following range:

(a) Upto 2 KWH/day average consumption Rs. 2.00

(b) Above 2 KWH/day and to 4 KWH/day average consumption. Rs. 2.45

(c) Above 4 KWH/day and to 8 KWH/day average consumption Rs. 2.95

(d) Above 8 KWH/day and to 16 KWH/day average consumption Rs. 3.25

(e) Above 16 KWH/day average consumption Rs. 3.65

3. Public lighting Rs. 3.25

4. Public Waterworks Rs. 3.25

5. Irrigation following range:

(a) Upto 20 KWH/day average consumption Rs. 1.60

(b) Above 20 KWH/day and to 100 KWH/day average consumption Rs. 2.09

(c) Above 100 KWH/day average consumption Rs. 2.45

9. Industry

(A) Small Industry (L.T.)

(i) Rural (LT) Upto 25 KVA connected load Rs. 0.90

(ii) Urban (LT) upto 25 KVA connected load Rs. 1.50

(B) Medium Industry (HT)

(i) Above 2.5 KVA and upto 100 KVA connected load Rs. 2.20

(C) Large Industry.

(I) Above 100 KVA to 500 KVA of connected load Rs. 2.80

(ii) Above 500 KVA to 2500 KVA of connected load Rs. 75/KVA/month

(a) Fixed Charge Rs. 2.25/KWH

(b) Energy charge

(D) Extra large industry (EHT)

(i) Above 2500 KVA of connected load Rs. 85/KVA/month

(a) Fixed charge Rs. 2.43/KWH

(b) Energy charge

7. Bulk Supply

(a) Educational Rs. 1.40

(b) Others Rs. 3.00

8. Tea, Coffee and Rubber

(a) Fixed charge Rs. 57/KVA/month

(b) Energy charge Rs. 2.65/KWH

9. Oil and Coal

(a) Fixed charge Rs. 85.00/KVA/month

(b) Energy charge Rs. 2.45/KWH

10. Metered supply in rural area

(a) Domestic Rs. 0 75/KWH

(b) Commercial Rs. 2.00/KWH

3. The tariffs notified are in supersession of the prevailing tariff and shall be applicable to all consumers availing supply of electricity from the Board and are subject to terms and conditions of supply of the Electricity Board. The total amount of the monthly bill shall be rounded off to the nearest rupee. The amount less than 50 paise will not be included, and 50 paise and above will be rounded off to the next higher rupee.

4. The sur-charge for delayed payment and rebates where applicable as per existing terms and conditions shall continue till further notification on the subject.

5. The Electricity Duty leviable as per the Government of Assam order under Assam Electricity Duty Act, 1964, released vide Gazette Notification No. 177 dated 24.9.84 with latest amendments and any other statutory levy, duty, sales tax, toll etc imposed by the Central State Government or any other authority as per law from time to time shall be charged over and above the tariff as shown above.

6. The foregoing tariff are liable to be increased at any time as may become necessary and as may be decided by the Board on account of increase in cost of generation, purchase and supply of Electricity due to increase in cost of inputs and increase in emoluments of employees, interest cost or increase in any other expenses.

7. Other schedule of charges like minimum charges, temporary power supply connection, meter rent, meter security deposit, meter listing fee, load security deposit, disconnection and re-connection charges, will remain unaltered.

Note No. 1 Domestic and Commercial consumers are grouped into 5 (five) classes on the basis of daily average consumption, Irrigation consumers are grouped into 3 (three) classes on the same basis.

Meter readinges, will be taken normally once in a month and daily average consumption would be worked out by dividing the units consumed between two successive meter readings by number of days covered in the period. Thereafter, the units consumed during the period would be billed at the rate applicable to the average consumption arrived at. Where such average consumption figures could not be worked out for non recording in the meter or any other valid reason, the average daily consumption would be estimated on the basis of connected load, load factor and demand factor as prescribed in the terms and conditions of supply and the class of tariff would be fixed accordingly on provisional basis.

Note No 2: In case of following consumers two part tariff on the basis of fixed charge and energy charge would be applicable:

(a) Industrial consumer with connected load 500 KVA and above.

(b) Tea, Coffee and Rubber.

(c) Oil and Coal Industries.

Maximum demand during a period would be recorded from the maximum demand meter installed for the purpose. However, fixed charges shall be on the basis of maximum demand recorded or 80% of the contract demand as per agreement, whichever is higher.

Note No. 3: In case of unmetered supply in the villages, meters will be installed in a phased manner and the tariff prescribed would be applicable. Until conversion to the meter system, the present point system of billing would continue.

May 18, 1993.

Secretary Assam State Electricity Board, Bijulee Bhawan, Guwahati-781001.

2. The Schedule of Tariff of 1981 of the Assam State Electricity Board (hereinafter referred to as the ASEB) was revised in 1986. Thereafter in 1992 the Schedule of Tariff, 1986 was further revised and the rate of electricity charges was enhanced with effect from 1.1.1992 by Notification No. ACE (COM)/ T-7(5)/91/2 dated 9.12.91 as follows:

ASSAM STATE ELECTRICITY BOARD

NOTICE

With heavy increase in the cost of all inputs like fuel (Furnace Oil, LHSH, Coal, Natural gas etc), cost of Spares required for maintenance of machineries and equipments and also due to increase in wages of employees, the ASEB, u/s 49 and 59 of the Electricity (Supply) Act, 1948 with latest amendments thereto, and as approved by the Government of Assam vide letter No. PEL. 192/90/ 186 dated 5th December, 1991, revises its schedule of tariff with effect from 1.1.92 i.e. for energy consumption with effect from 1.1.92 as per rates shown below:

CATEGORY SCHEDULE OF TARIFF

1. DOMESTIC (Connected load) Rs. PER KILLOWAT HOUR

(a) 0-1 KVA 0.60

(b) above 1 KVA-5 KVA 0.80

(c) above 5 KVA 1.00

2. COMMERCIAL (Connected load)

(a) 0.5 KVA 1.50

(b) above 5 KVA-25 KVA 1.75

(c) above 25 KWA 2.00

3. PUBLIC LIGHTING 1.50

4. PUBLIC WATER WORKS 1.50

5. IRRIGATION (Connected load)

(a) 0.5 KVA 0.50

(b) above 5 KVA-25 KVA 0.80

(c) above 25 KVA 1.00

6. INDUSTRIES (Connected load) (0-25 KVA)

(i) Rural 0.45

(ii) Urban 1.00

(a) above 25 upto 100 KVA 1.25

(b) above 100 KVA Upto 2500 KVA 1.50

(c) above 2500 KVA 1.75

7. BULK SUPPLY (Connected load)

(a) Educational Institutions 0.80

(b) Others 1.25

8. OUTSIDE STATE 1.10

9. TEA, COFFEE, RUBBER 1.75

10. OIL & COAL INDUSTRY 1.75

11. UNMETERED SUPPLY

(a) Domestic 1.00/Point

(b) Commercial 10.00/Point

Surcharges for delayed payment and rebates where applicable as per existing terms and conditions shall continue till further notification on this subject.

The Electricity Duty leviable as per the Government of Assam order under Assam Electricity Duty Act, 1964, released vide Gazette Notification No. 177 dated 21.9.84 with latest amendments and any other statutory levy, duty, sales tax, toll etc imposed by the Central/ State Government or any other authority as per law from time to time shall be charged over and above the tariff as shown above.

Consequent upon this revision of tariff, changes in other Schedule of charges like minimum charges etc. and appropriate changes in the existing terms and conditions of Supply with latest amendments applicable to different categories are being worked out and will be notified shortly. Till then, bills against consumption with effect from 1.1.92 shall be provisional.

Sd/- Shantikam Hazarika Secretary, Assam State Electricity Board.

3. According to the Petitioners the impact of abnormal enhancement of Tariff by the impugned notification on various categories of consumers are as follows:

Domestic Consumers: Ranging from 25% to 300%

Commercial Consumers: Running from 133% to 204%

Industrial Consumers: Ranging from 85% to 209%

Tea Garden: Ranging from 72% to 210%

4. The Petitioners have assailed the impugned notification mainly on the following grounds:

(i) The Schedule of tariff has been revised by the impugned notification arbitrarily and without application of mind, inasmuch as, the reasons and grounds for highly excessive and irrational increase in the tariff is non-existent and extraneous inasmuch as the overall impact of the increase of cost of inputs, furnace oil, HSD, Coal, natural gas, machines, spares etc. after 1.1.92 is around 12% and the report of the Planning Commission also reveals that the increase in the cost of production of supply of electricity is only 11%;

(ii) Abnormally high enhancement of the rate of tariff has been made by the impugned notification, in violation of the mandatory provisions of Section 49 of the Electricity Supply Act, 1948;

(iii) As per the mandate of Sections 18 and 49 the Electricity Supply Act, 1948, the ASEB is to function most efficiently and economically. But in violation of the mandatory provisions of the Act the ASEB is running most inefficiently and uneconomically and burden of inefficiency and mismanagement has been passed on the consumers. The Petitioner has stated a few instances of inefficient and uneconomic functioning of the ASEB as stated below:

(a) The ASEB generates only 30% of the power which is being supplied by it and the rest 70% of the power being supplied by it, is purchased from North Eastern Electric Power Corporation (NEEPCO), Meghalaya State Electricity Board (MSEB), North Eastern Hydel Power Corporation (NEHPCO) and the Eastern Grid at the average price of 0.66 paise per KWH. There has been no increase in the cost of purchase of power by ASEB since 1.1.92.

(b) The total installed capacity of the various power generating stations of the ASEB is 514 MW but the actual power generated by ASEB is 150/160 MW.

(c) The number of employees employed per 1000 consumers by ASEB is highest in India, for example, during 1990-91 ASEB employed 42.2 persons per 1000 consumers as against the All India average of 15.7 per 1000 consumers.

(d) There is extremely high cost in preparation of the bill of its consumers ranging from Rs. 11.23 per bill at Narengi to Rs. 32.58 per bill at Kalapaharwhich is another glaring example of mismanagement and inefficiency of ASEB.

(e) The ASEB''s transmission and distribution loss during the last 5 years in the average has been 23% which as per the norms should nor exceed 7% to 8%. In addition, there has been considerable loss to the extent of 8% due to pilferage and unmetered consumption.

(f) The establishment expenses of ASEB per unit sale of energy is 21.65 Paise per KWH as against the All India Average of 10.27 Paise per KWH

(g) In the case of employment per MW of installed capacity the ratio of ASEB for the year 1983-84 is 70.7 against the All India figure 27.0 per MW.

(h) The employees of ASEB are paid remuneration considerably higher than their counter-parts in the Board of other States. In addition thereto the employees of ASEB enjoys a number of prerequisites which includes power at home at concessional rate,

(iv) Although as per Section 5 of the Act the Board shall consist of a person having experience of accounting and financial matters in a public utility undertaking, the Board has been functioning without any such expert for a long time and that the impugned notification revising the tariff is issued without guidance of such on important member in the Board.

(v) There is no effective cost control system, monitoring of technical performance, accurate measurement of transmission and distribution loss and gathering of information regarding performance.

According to the Petitioner if a proper effective cost control system, monitoring of technical performance, accurate measurement of transmission and distribution loss and gathering of information regarding performance is done, there will be no any necessity to revise its tariff.

(vi) The ASEB has not followed the accepted and required principles of accounting that the interest on borrowing of acquisition of fixed assets has to be capitalised. Though ASEB holds a large value of assets as capital work in progress, no portion of the interest is capitalised and if the correct principle is followed the cost of generation and losses will come down substantially. ASEB on toe same analogy has been capitalising expenses but not capitalising interest thereby charging capital expenditure to revenue and inflating the cost of generation.

(vii) The impugned notification introduced for two parts tariff in case of certain categories of consumers, and by this system the consumers shall have to pay a fixed charge over and above the energy charge. The fixed charge so introduced in addition to the energy charge and minimum charge is arbitrary and irrational.

5. The Petitioner''s further case is that a duty and responsibility has been cast on the State Govt. by the Electricity Supply Act, 1948 to ensure that the ASEB runs efficiently and economically. The State Govt. cannot abruptly fold its hands and

allow the ASEB to run without direction and force the consumers to pay abnormally high rate of tariff which has a serious effect on the consumers and the economy of the State. State Govt. cannot stop grant of subvention to the ASEB arbitrarily at its whims.

6. The Respondent ASEB has filed counter. In the affidavit-in-opposition the Respondent has contended that in the year 1993 financial crisis faced by the Board was aggravated because of the fact that non-plan loan assistance by the State Govt. was lowered down to Rs. 125.40 Crores for the year 1991-92 and the Board found it impossible to manage its statutory duties of generations, transmission and distribution of electricity to the minimum extent. Cost of all inputs of generation, transmission and distribution of electricity increased further. The Board therefore considered it expedient for further revision of tariff and in its meeting hold on 20.4.93 decided to adapt its tariff structure on the basis of different level of cash support from the Govt. by way of loan assistance/ subvention for the year 1993-94. Accordingly 4 sets of tariff structures were worked out and submitted to the State Govt. for consideration which are:

(i) A schedule with no Government subvention at all at the average rate of Rs. 2.95 per unit;

(ii) A Schedule with Rs. 100 Crores subvention from the State Government at the average rate of Rs. 2.40 per unit;

(iii) A Schedule with Rs. 150 crores subvention at average rate of Rs. 2.12 per unit;

(iv) A Schedule with Rs. 200 crores subvention at the average rate of Rs. 1.85 per unit.

The State Govt. after receipt of the said suggestion informed that it had decided that ''non-plan'' support would not be provided to Public Sector Undertakings including the Assam State Electricity Board and the Assam State Transport Corporation and that these organisations might suitably amend their tariff/fare structure for meeting their maintenance and other establishment cost. Under the circumstances, the Board had no alternative but to adopt the tariff Schedule mentioned at item No. 2 above which included the cost of all components as per mandate of Section 59 of the Act, except payment of interest on the State Government loan which would be Rs. 113 Crores during the year 1993-94. Incorporation of this interest would have made the tariff higher at the average rate of Rs. 2.95 per unit.

7. According to Respondents ASEB, it is legally bound u/s 59 to determine the tariff which must cover the cost plus three percent return on investment. The legal requirement of the Board is that it should provide for tariff covering the full cost and return of three percent over assets. However, in the case of Assam, such a tariff would have been very high, therefore, tariff has been notified at the average Rs. 2.40 per unit which is below the cost i.e. Rs. 2.95 per unit. This

decision of the Board having taken as per statutory guidelines u/s 49 and 59 of the Act if not open to question, in a petition under Article 226 of the Constitution.

8. In paragraph 17 of the affidavit-in-opposition the Respondent ASEB contended that the State Govt. never gave a subvention to the Board. What was given in the past was only loan assistance which is not subvention. The loan assistance has burdened the Board with payment of interest thereof. The Govt. also heavily defaulted last year and during this year in releasing plan funds earmarked for the ASEB for which the ASEB has not been able to meet certain basic requirements both for normal development and to improve the system.

9. In paragraph 19 of the affidavit-in-opposition it is contended that the ASEB has taken various measures to improve the position of generation, transmission and distribution of electricity with improvement of financial conditions.

10. In paragraph 20 of the affidavit-in-opposition the ASEB has stated that there has been enormous increase in respect of various inputs of generation, transmission and purchase of power from other agencies and distribution of electricity from the year 1986 to 1993 and in support thereof made a statement showing relative increase. As regards the introduction of two parts tariff in the impugned notification, the ASEB has contended that such tariff are in vogue throughout in respect of most of the Electricity Boards in India. The system had also been in vogue in the ASEB upto 1981, which was temporarily suspended by the ASEB and the ASEB has again adopted it on the following considerations:

(i) This type of tariff will encourage the consumers to maintain better power factor to keep the maximum load in KVA low and thereby make more energy available to the Board at the same level energy generated and purchased.

(ii) If the power factor of the consumer is improved, his KVA demand will be reduced and he will have to pay less amount of fixed charges which will encourage him to improve his power factor by installing static capacitor.

(iii) The two part tariff is universally an energy management practice and therefore such two part tariff is made applicable for consumers having connected load of more than 500 KVA.

11. In paragraph 30 of the affidavit-in-opposition the ASEB has disputed the contention of the Petitioner that the Board generates only 30% of the power at the peak hours and the rest 70% is purchased from other agencies. According to ASEB in 1991-92 the Board made available 47.01% of total supply and in 1992-93 generation was met upto 47.84% peak demand from its own generation.

12. In paragraph 33 of the affidavit-in-opposition the ASEB has denied the contention of the Petitioner that cost of purchase of power from other outside agencies in the year 1993-94 is Rs. 0.66 Per KWH. In para 36 of the affidavit-in-opposition the ASEB has shown the distribution cost during last four years, such as, in 1989-90 Rs. 0.92 per KWH and in 1992-93 Rs. 0.91 per KWH. It is contended that in the year 1991-92 cost per unit came down because of

conversion of Rs. 800 crores of debts into equity by the State Government resulting in reduction of burden to pay interest.

13. In para 37 of the affidavit-in-opposition the ASEB has contended that out of 18 Electricity Boards and 9 Electricity Departments in India, transmission and distribution loss in 16 Boards/Electricity Departments are higher than Assam. In para 23 of the rejoinder filed on 15.7.93, the ASEB has stated that the State Govt. was to pay subsidy for the loss incurred by the Board due to Rural Electrification by the ASEB but the subsidies are not being paid to it since 1971-72 and subsidy payable to it for the period 1971-72 to 1988-89 has been accumulated to Rs. 292.2 Crores.

14. As regards the allegation about maintenance of accounts the ASEB has contended that the compilation of Accounts of the ASEB was delayed mainly due to introduction of Commercial Accounting System w.e.f. 1.4.85. A time bouud programme was drawn up for compilation of arrear accounts and the accounts upto 1990-91 has been finalized.

15. In para 48 of the counter the ASEB has contended amongst other that "the Board has not been in a position to function as an efficient commercial organisation, because it has to function very often as per the directives and guidelines of the State Government and for example the case of rural electrification may be cited.

16. On behalf of the State Govt. an affidavit-in-opposition has been filed. The affidavit is sworn by the Deputy Secretary to the Govt. of Assam, Power Department. Contentions made on behalf of the State Government in paragraphs 3, 4, 5, 6 and 7 of the affidavit-in-opposition are as follows:

That the statements made in the paragraphs of the above Civil Rule relating to subvention, guarantee of the State Govt. and loan etc. are only concerned with the State Govt., other matters relates to the Assam State Electricity Board, those statements are not required to be controverted by the State.

4. That the State Govt. sanctioned subvention as loan to ASEB and amounts sanctioned during the last three years upto 1992 to 1993 are shown below-

Non Plan

1990-91 .. Rs. 14,822.00 Lakhs

1991-92 .. Rs. 21,724.00 "

1992-93 .. Rs. 64,063.00 "

Subvention is given to ASEB to meet their non-plan gap between revenue and expenditures. During 1993-94 the Stale Govt. is not in a position to release any revenue assistance to ASEB to meet its revenue gap.

That ASEB''s market borrowing limit has been raised from Rs. 600 Crores to Rs. 1100 Crores from June/July, 1991. ASEB has already borrowed Rs. 600 Crores from the market.

The Govt. of Assam is a guarantor in most of the market borrowing already availed by ASEB. ASEB cannot go on borrowing without having the capacity to reply the loan along with interest. ASEB''s balance sheet is a negative one. In such circumstances no financial institution with give further loan to ASEB.

6. That so far aa the State Govt. loan and ASEB is concerned the deponent states that Govt. has given loan upto 1990-91 about totalling Rs. 1076.99 Crores of which Rs. 800 Crores has already been converted as equity. In 1991-92 itself the interest on State Govt. loan was Rs. 118 Crores. The interest of Rs. 729.23 Crores accumulated so far over the outstanding loan is also considered to be waived out. ASEB has not so far repaid any amount of State Govt. loan not even interest.

7. That in view of the above circumstances State Govt. did not grant subvention to ASEB during the year 1993-94, so that ASEB should run administration efficiently and economically.

17. I have heard Mr. S.C. Bordoloi, Mr. P.K. Goswami, Mr. A.R. Banerjee, Mr. A.K. Das, Mrs. A. Hazarika and Mr. M. Hazarika, learned Counsels appearing on behalf of the Petitioners. Mr. S.N. Bhuyan, learned Advocate General, Assam for the State of Assam and Mr. A.M. Mazumdar, learned Counsel for the Respondents ASEB.

18. Mr. P.K. Goswami who spearheaded attack against the Impugned notification, has submitted that the records of the case was called for and the records submitted by the ASEB as regards revision of tariff by the impugned notification reveals a very sorry state of affairs. It is apparent that some loose sheets from here and there are tagged in the file and submitted before the Court. The records submitted squarely supports the contention of the Petitioner that the impugned notification enhancing the tariff has been issued arbitrarily without application of mind in violation of provision of Section 49 of the Act. Records submitted does not at all reveal that there was agenda or deliberation or decision of the Board in the meeting stated to have been held on 20.4.93. As per mandates of Section 49 of the Act, while fixing uniform tariff, the Board shall have to consider the important factor, namely, co-ordinated development of the supply and distribution of the electricity within the State in a most efficient and economic manner. When admittedly the Board was not running efficiently and economically, it was imperative on the part of the Board to consider first, what measures should be taken to run the affairs of the ASEB in an efficient and economic manner so as to raise production and to reduce unnecessary expenditure before enhancing the tariff at an abnormal high rule-doubling the existing average rate of Rs. 1.20 per unit to Rs. 2.40 per unit. It appears from the contentions of the ASEB that the enhancement of the tariff by the impugned decision was made of the basis of the cost worked out and submitted by the Chief engineer (Commercial), who is admittedly an engineering Graduate and not

an Accounts expert. The records also reveal that cost, per unit has been worked out in a most perfunctory manner. The costing ought to have been done by an expert Accountant for consideration by the Board. Besides, according to the Respondent. ASEB, the Board in the meeting dated 20.3.93, endorsed 4 alternative rates of tariff depending on the different rate of cash support from the State Govt. as suggested by the Chief Engineer (Commercial). Undisputedly, after receipt of the letter dated 28.4.93 from the Govt. of Assam, Power Department intimating that the Govt''s decision that non-plan grant would not be provided to Public Sector Undertakings including the ASEB, no meeting of the Board was held to take final decision in the matter, and that the impugned notification revising the tariff has been issued on the basis of the approval of the Chairman accorded on the proposal made in the office note. Mr. Goswami has drawn my attention to the provisions of Assam Electricity Board (Chairman''s Power) Rules, 1962, and has submitted that the Chairman has no power to take decision us regards the revision of tariff and us such the impugned notification is apparently without jurisdiction and cannot be sustained.

19. Mr. Goswami has submitted that undisputedly utilisation of the generation capacity of the ASEB is far below in comparison with all India average, inasmuch as, while total installation capacity at various power generation stations of the ASEB is 514 MWT, actual power generated by the ASEB is only 150 MWT to 160 MWT. The Board in its so-called meeting stated to have been held on 20.4.93, apparently failed to exercise jurisdiction in not taking into consideration to the vital factor that power generation capacity should be increased to the level of all India average so as to reduce the cost of production to a great extent. The Board in its meeting ought to have also considered the ways and means to reduce-(i) the transmission and distribution loss of 23% to 8 to 9%; (ii) the high establishment cost from 21.65% to all India average of 10.2%; (iii) employment ratio per 1000 MWT to the all India average and, (iv) extremely high expenditure on preparation of bill of its consumers which in certain places is as high as Rs. 32.58 per bill. Consideration of the above factors to explore the possibility to bring down unnecessary expenditure plugging the loopholes, and increase of production to all India level is the mandates of the provision of Section 49 of the Act. Admittedly, the Board in its meeting stated to have been held on 20.4.93 did not consider the important factors and only endorsed the proposal of different rates of tariff as prepared by the Chief Engineer (Commercial) for consideration of the Govt. As such, the impugned notification has been issued in complete disregard to the mandates of the provision of Section 49 of the Act.

20. Mr. Goswami has further submitted that for revision of tariff after the previous revision with effect from 1.1.1992, increase of cost of production due to cost of inputs like, furnace oil, HSD, Coal, natural gas, machine, spares, increase in emoluments of employees, increase of price of power purchased from other agencies etc. are to be taken into consideration by taking 1992 as the base year and not 1986 as sought to be contended by the Respondent ASEB in para 20 of their affidavit-in-opposition, inasmuch as, by previous notification dated 9.12.91

the tariff was enchanced with effect from 1.1.92 taking into consideration of enhancement of the increase of cost of the aforesaid items upto date. As such, factors relevant for consideration for revision of tariff was the increase of price of the inputs etc. which occasioned on and from 1.1.92. From the statements made in para 20 of the affidavit-in-opposition of the Respondent ASEB, It is evident that except the rise in price of coal, railway freight, natural gas and power purchase rate in respect price of power to be supplied by the ASBB (from 3.20 to Rs. 1.30 per unit), prices of other items remained stationary after 1.1.92 and the impact of overall increase of prices of those items after 1.1.92 on the overall rise of the cost of production/distribution etc is about 12%. The report of the Planning Commission, also reveals that the overall rise of costs of production/ distribution etc in the year 1992-93 was 11%. As such, enhancement of tariff, from average of Rs. 1.20 per unit to Rs. 2.40 per unit as is done by the impugned notification is ex-facie arbitrary, irrational and unreasonable.

21. Learned Counsel has also submitted that duties and responsibilities cast upon the State Govt. by the various provisions of the Act is to ensure that the State Electricity Board is run efficiently, economically and that power is made available to consumers regularly without interruption at a reasonable rate. State Govt. is responsible to take effective steps so that consumers are not made to pay heavily for the mismanagement of the ASEB. The ASEB is an instrumentality of the State and the power to appoint the Chairman and Members of the Board, the supreme body of the ASEB vests in the State Govt. In view of the duties and responsibilities cast upon the State Govt. under various provisions of the Act, granting or non-granting of subvention cannot take place at the whims or political decision of the State Govt. and the State Govt. cannot shirk its legal responsibility in the guise of exercise of discretion and leave the entire population to face a devastating consequence arising out of unchecked and uncontrolled mismanagement of the ASEB. When the arbitrary and abnormal enhancement of tariff invariably entails closing down of small industries run by power and consequent mass unemployment, breaking of backbone of the State economy, crippling the individual consumers and rise of price of essential commodities, State Govt. cannot remain a silent spectator.

22. As regards the scope of judicial review, Mr. Goswami has submitted that the power of judicial review by a Court in the exercise of jurisdiction under Article 226 of the Constitution is no doubt limited, however, such power ought to have exercised in appropriate cases where the concerned authority has acted illegally without jurisdiction and/or unreasonably without application of mind and where the State Govt. has failed to exercise its discretion coupled with its duties. Mr. Goswami has further submitted that in the case like we present one, where the enhancement of tariff is extremely high and irrational and that too is based on non-existent facts and on extraneous consideration, and where the Board has failed to function as per the mandates of the Act, the Court cannot remain a silent spectator and refuse to exercise jurisdiction in striking down the impugned notification.

23. In support of his contention Mr. Goswami, has placed reliance amongst others the following decisions:

(1) Ranjit Thakur Vs. Union of India (UOI) and Others, (Para 25 page 620);

(2) Indian Express News Paper v. Union of India 1985 (1) SCC 641 (para 73, 75, 76, 77, 78, 79, 80 and 92);

(3) Shriram Sugar Co. Ltd. v. Union of India 1990(3) SCC 123 (para 45, 47, 48, 50, 51,52, 57);

(4) Jay and Co. and Others Vs. The Regional Transport Authority, Madurai and Others,

(5) Commissioner of Police, Bombay Vs. Gordhandas Bhanji, (para 10, 28); and

(6) Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, (para 8)

Mr. Goswami has also refined to various observations of eminent Judges in England, reported in All England Report.

24. Mr. S.C. Bordoloi, learned Senior Counsel has adopted the argument of Mr. Goswami and has submitted that the revision of tariff by the impugned notification is ex-facie arbitrary, illegal and without jurisdiction and cannot be sustained.

25. Mr. S.N. Bhuyan, learned Advocate General, Assam has submitted that grant or non-grant of subvention as contemplated u/s 63 of the Act is discretionary and the ASEB has no legal right to get subvention from the Govt. Learned Advocate General has submitted that ASEB is an Autonomous Body and for the ills of the ASEB, the State Govt. cannot be made responsible. Revision and enhancement of tariff is a matter which falls completely within the ambit of power of the ASEB. The State Govt. sanctioned subvention to the ASEB by way of loan from time to time. The State Govt. is not in a position to release any assistance to ASEB to meet its revenue gap in 1993-94. The ASEB has already borrowed Rs. 1100 crores and that upto 1990-91 the State Govt. advanced loan to ASEB totalling Rs. 1076.89 crores, out of which Rs. 800 crores has already been converted to equity. In 1991-92 itself the interest due on lean advanced by the Govt. amounted to Rs. 118 crores. The ASEB has not paid any amount either on account of principal or interest of the loan advanced by the Govt. The State Govt. is considering to waive the total amount of interest accrued so far on the loan advanced to the ASBB. The State Govt. has taken the policy decision that during 1993-94 non-plan grant would not be made available to Public Sector Undertakings including the ASEB so that these undertakings run their administration efficiently and economically. In support of the submission learned Advocate General has placed reliance on the decisions in the cases of:

(i) Ramkrishna Agarwal v. State of Bihar AIR 1977 SC 1495;

(ii) Nava Bharat Ferro Alloys Limited Vs. Andhra Pradesh State Electricity Board, Hyderabad,

(iii) The Mysore State Electricity Board Vs. Bangalore Woollen, Cotton and Silk Mills Ltd. and Others,

(iv) Maharashtra State Electricity Board Vs. Kalyan Borough Municipality and Another, and

(v) Bisra Stone Lime Co. Ltd. and Another Vs. Orissa State Electricity Board and Another,

26. Mr. A.M. Mazumdar, learned Counsel for the Respondent ASEB, on the other hand, submitted that Board may supply electricity to consumers upon such terms and conditions as the Board may think fit and adjust its tariff as per mandates of provisions of Section 59 of the Act, so as to ensure that the total revenues in any year of account shall after meeting all its expenses properly chargeable to revenues, including operating, maintenance and management express, taxes (if any) on income and profits, depreciation and interest payable on all debentures, bonds and loans, leave such surplus as the State Govt. may from time to time specify. Section 49 of the Act empowers the Board to fit the tariff from time to time in giving effect to the mandates of Section 59 of the Act and the fixation of tariff is a matter of agreement between the consumer and the supplier and the matter fall within the parameter of contract/agreement Mr. Mazumdar has submitted that the Petitioners have not made out any case that revision of the tariff by the impugned notification has been made in violation of the provision of the Act or the impugned notification is illegal and without jurisdiction. Case of the Petitioners is based on the assumption that the tariff is highly executive and the escalation of the cost of production and distribution being attributable to mismanagement and inefficiency the enhancement of tariff is arbitrary and unreasonable. But mismanagement and/or mal-administration in the affairs of the body Corporate cannot be ground for challenging the tariff in an application under Article 226 of the Constitution.

27. In support of his contention Mr. Majumdar has placed reliance on the following decisions:

(1) Samrathmal Keshrimal Agarwal, Bus Operator Vs. Regional Transport Authority, Indore and Another,

(2) The Adoni Cotton Mills Ltd. and Others Vs. The Andhra Pradesh State Electricity Board and Others,

(3) Rohtas Industries Ltd. and Others Vs. Chairman, Bihar State Electricity Board and Others,

(4) Northern India Iron and Steel Co. and Others Vs. State of Haryana and Another,

(5) Kerala State Electricity Board Vs. S.N. Govinda Prabhu and Bros. and Others,

(6)Bajrang Tea Manufacturing Co. and Ors. v. ASEB reported in 1989 (2) GLJ 411; and

(7) Jiyajeerao Cotton Mills Ltd. and Another Vs. Madhya Pradesh Electricity Board and Another,

28. Placing reliance on the aforesaid decisions Mr. Majumdar has submitted that consistent view of the Hon''ble Supreme Court is that with regard to revision of tariff made in exercise of power u/s 49 and 59 of the Act by the ASEB there is no scope of judicial review. In the instant case, the Govt. having intimated its decision that non-plan grant would no longer be made available to the ASEB, to meet its budgetary deficit, the ASEB had no alternative but to revise the tariff to ensure to meet at least the operational, maintenance and management expenses. Mr. Majumdar has further submitted that the ratio decidendi in the case of S. Narayan Ayyer (supra) squarely applies on the facts of the present case. In the case of S. Narayan Ayyer (supra), a Constitution Bench of the Apex Court held that court bus no jurisdiction under Article 226 to go into the reasonableness of telephone tariff rates as these rates were decided in policy matter in the fiscal planning. Mr. Majumdar has submitted that in the instant case also the Board as n policy matter of fiscal planning has revised the tariff rates by the impugned notification as per the mandates of Section 59 of the Act and as such, there is absolutely no scope to interfere with the impugned notification by this Court in this application under Article 226 of the Constitution.

29. Mr. Majumdar has further submitted that in the case of Bajrang Tea Manufacturing Co. (Supra) and others, revision of tariff in the year 1986 was challenged on the ground that escalation of the cost of production/distribution etc. and the consequential Budgetary deficit of the ASEB was directly attributable to mal-administration. A Division Bench of this Court dismissed the petition holding that this Court under Article 226 of the Constitution was not in a position to modulate the relief en the ground of mal-administration of the Board. That decision of this Court was challenged in the Hon''ble Supreme Court in SLP No. 498/90, but the Hon''ble Supreme Court rejected the SLP holding that increase in the tariff was neither arbitrary nor without jurisdiction.

30. I have considered the submissions made on behalf of the parties. The Petitioners have submitted various statements and also submitted statements of accounts prepared by recognised expert in support of their contention that there is a total inefficiency and mismanagement in the affairs of the ASEB and if the ASEB cares to manage its affairs efficiently and economically, there would not be any necessity to enhance the tariff to adjust the expenses. The Respondent ASEB, on the other hand, has submitted various statements and facts disclosing its helplessness and the compelling reasons for revision of tariff by the impugned notification. In my opinion, this Court in a petition under Article 226 cannot play the role of a manager or an expert accountant and go deep into the complicated facts. No doubt, the scope of judicial review in respect of revision of tariff is limited, however, the question as to whether the revision by the impugned

notification has been made by the competent authority and/or whether the revision is made in consistent with the provisions of the Act or not, and/or whether the revision is reasonable and is not unreasonable, arbitrary or irrational, certainly fall within the ambit of judicial review. On the question of ambit and scope of judicial review, the Honble Supreme Court in paras 57 and 58 of the decision in the case of Shri Sitaram Sugar Co. (Supra) held as follows:

57. Judicial review is not concerned with matter 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 enquiry 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 Jagannath Sheity, J. in Gupta Sugar Works 1987 SCC (Suppl) 479. para 4)

...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 Candozo in Mississippi Valley Barge Line Co. v. United States of America.

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.

31. In the case of S. Narayan Ayyer (supra) the Hon''ble Supreme Court held that the Telephone tariff rates are decided as policy matter in the fiscal planning and there was legislative prescription of the rates. Rates were matter for legislative judgments and not for judicial determination and the Court have no jurisdiction under Article 226 to go into reasonableness of the telephone tariff rates.

In the case of Bajrang Tea Manufacturing Co. (Supra) a Division Bench of this Court held that whether the Tea Gardens be clubbed with industry or disassociated from industry and on what rate the tea Gardens be charged, it was for the Board or the State Govt to decide and that the tariff payable by in Tea Estates was considered by the high power committee, the State Govt. and finally by the Board. On the facts and circumstances of the case, this Court found that the rate of Rs. 1.15 per unit payable by the Tea Estates was not unreasonable. This Court also held that, Courts including this Court, under Article 226 cannot modulate the relief on the ground of mal-administration of the Board. Mr. Goswami is right in submitting that the ratio dicidendi im the cases of S. Narayan Ayyer (Supra) and Bajrang Tea Manufacturing Co. (Supra) have no application in the facts of these petition. In my opinion, on the facts involved in the petitions in hand, following questions fall within the ambit of judicial review, namely:

(1) Whether the revision of tariff as per the impugned notification is made in compliance with the provisions of the Act?

(ii) Whether the revision of tariff by the impugned notification is illegal and without jurisdiction?

(iii) Whether the enhancement of tariff by the impugned notification is arbitrary, unreasonable and irrational having no nexus with the reasons stated in the notification and/or whether the enhancement of the rate of tariff is disproportionate to the increase in cost of production and distribution as stated in the impugned notification?

(iv) Whether the State of Assam has failed to discharge its statutory duties in the matter?

32. Electricity is no longer a luxury but essential to the life of the community Electricity plays vital role in economic development namely, in agricultural and industrial production. It is also essential for development and regeneration of the society. Considering the vital role played by the electricity, the Parliament for rationalisation in production and supply of Electricity and for taking measure condusive and for all matters incidental thereto enacted the Electricity Supply Act, 1948 (Act 54 of 1948), hereinafter referred to as the Act, Almost all the State Electricity Boards enjoy monopoly right in respect of generation and distribution of electricity throughout the State.

33. Some of the provisions of the Act, having bearing in the instant case are quoted as follows:

Section 5. Constitution and composition of Electricity Board:

(1) The State Government shall, as soon as may be, after the issue of the notification under Sub-section (4) of Section, constitute by notification in the official Gazette a State Electricity Board under such name as shall be specified in the notification.

(2) The Board shall consist of not less than three and not more than seven members appointed by the State Government.

(4) Of the members--

(a) one shall be a person who has experience of and has shown capacity in commercial matters and administration ;

(b) one shall be an electrical engineer with wide experience, and

(c) one shell be a person who has experience of accounting and financial matters in a public utility undertaking, preferably an electricity supply undertaking.

(5) One of the members possessing any of the qualifications specified in Sub-section (4) shall be appointed by the State Government to be the Chairman of the Board.

(6) A person shall be disqualified from being appointed or being a member of the Board if be is, a member of (Parliament) of any State Legislature or any local authority.

(7) No act done by the Board shall be called in question on the ground only of the existence of any vacancy in, or any defect in the constitution of the Board.

Section 18 of the Act provides General duties of State Electricity Board, hereinafter mentioned as the Board. Sub-section (a) of Section 18 is as follows:

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

Section 49 of the Act is the provision for sale of Electricity by the Board to persons other than licensees. Sub-sections (1) and (2) of Section 49, which are relevant for the purpose of the case is as follows:

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

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

(a) the nature of the supply and the purpose for which it is required?

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

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

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

Section 59 of the Act lays down the general principles for Board''s finance. Sub-section (1) of Section 59 which is relevant for the purpose of the case is as follows:

(1) The Board shall, after taking credit for any subvention from the Stale Government u/s 63, carry on its operations under this Act and adjust its tariffs so as to ensure that the total revenues in any year of account shall, after meeting all expenses properly chargeable to revenues, including operating, maintenance and management expenses, taxes (if any) on income and profits, depreciation and interest payable on all debentures, bonds and loans, leave such surplus, as the State Government may from time to time, specify.

34. Admittedly, by the impugned notification the rate of tariff has been drastically changed and according to ASEB it has been enhanced from the existing average rate of Rs. 1.20 to Rs. 2.40 per unit, although impact on particular class or individual consumers may be more than double or in some cases may be treble. It is apparent from the provision of Section 49 of the Act that it is the Board constituted u/s 5 of the Act, has only been empowered in the matter of fixation of tariff. Section 49 provides that while fixing tariff Board shall regard to all and any of the factor enumerated in (a), (b), (c) and (d) of Sub-section (2) of Section 49. Factors enumerated in Sub-section (2) (b) is very vital. From the provisions of Sub-section (2)(b) of Section 49 of the Act it is apparent that before taking decision of enhancement of tariff, the Board is to apply its mind to see whether the coordinated development of supply and distribution of electricity within the State is done in a most efficient and economic manner. In the instant case, undisputed facts are--(i) although the total installation capacity of various power generation stations of the ASEB is 514 Mega Watt, actual power generated by the ASEB is 150 to 160 Mega Watt--which is far below the all India average, (ii) Engagement of employees per 1000 consumers is the highest in India and that as against all India average of 15.7 per 1000 consumers the ASEB engaged 42.2 per 1000 consumers, (iii) preparation of bill of its consumers is abnormally high (iv) Transmission and distribution loss of ASEB during the last 5 years is 23%, although as per norms it should not exceed 7 to 8%, (v) the establishment cost of the ASEB for per unit sale of average is Rs. 21.65 per Kwt as against the all India average of 10.27 per Kwt. (vi) In case of employment per Mega Watt of installation capacity the ratio of the ASEB is more than three time than that of the all India ratio.

As such, before taking the derision to enhance the rate of tariff by doubling the existing average of Rs. 1.20 per unit to Rs. 2.40 per unit, it was imperative on the part of the Board to consider and explore the possibility of streamlining the management/administration, to utilise its power generation capacity to reach the all India average and to bring down the cost on employment and administration to the all India average.

35. From the statements submitted by the ASEB it transpires that revenue of ASEB which was Rs. 9.66 crores in April, 1992, was increased to Rs. 16.60 crores

in August, 1992 and the average revenue collected per month thus increased from 9 crores to 14 crores during 1992. Improvement of collection of revenue was possible by improving the system of re-organisation at Head Quarters by setting up a Directorate of Revenue Intelligence and Enforcement, Apparently with, the improvement of management the annual revenue could be increased by Rs. 60 crores. This supports the case of the Petitioners that bad the ASEB run efficiently and economically, there perhaps, would not have been any necessity for revision of the tariff.

36. As to the question whether the impugned notification revising the schedule of tariff has been issued as per decision of the Board, the Respondent ASEB in their rejoinder filed on 15.7.93, have stated as follows:

The Board duly deliberated on the agenda item as to revision of tariff on the basis of four tariff Schedules prepared as stated in paragraph 27 of the affidavit-in-opposition and had discussions on the agenda notes in the matter on 8.2.93 and 20.4.93 and finally decided vide Resolution No. 3 dated 20.4.93 that the Board''s tariff should be fixed on the basis of the level of cash support from the State Government. Accordingly when no cash support became available from the State Government the Board decided to adopt the 2nd structure presuming implied cash assistance of Rs. 118.00 crores by refraining from paying interest to the State Government on its loan, which under the Act is to be paid after meeting other expenses as stated in paragraph 10 of the affidavit-in-opposition.

37. While issuing Rule, records were called for Respondent ASEB at the fag end of the hearing produced the so-called record by tagging of some loose papers. Record does not contain the deliberation or resolution of the Board if any, of the meeting stated to have been held on 20.4.93. As page 14 of the so-called records, there is the Order No. ASEB/SA/64/92/76 dated 5th April, 1993, of the Chairman ASEB which is as follows:

The attached note will come up before the Board in its meeting on the 20th of April. It will be approved and sent to the Power Department. Meanwhile, it is necessary to expedite and decide on the new rates. It is necessary that the cabinet have a look at the scenarion immediately. Four alternatives have been worked out at different level of government support. The cabinet might accept the one which they find most appropriate. The intention is to have the new tariff from 1st June, 1993.

38. At page 13 of the so-called record, there is a notice typed in 4 pages. But the contents of the notice are general statements and do not contain the proposed revision of tariff. After the notice, there are 2 sheets of proposed revised tariff under the signature of the Secretary, ASEB. The signature of the Secretary, ASEB, is dated 15.5.93. At page 6 of the so-called record, there is paper termed as ''agenda'' containing the proposed structure of the average tariff worked out on the basis of different level of subvention as follows:

(i) With zero subvention 295 paise per unit.

(ii) With subvention of Rs. 100 crores per year from Government 240 paise per unit.

(iii) With subvention of Rs. 150 crores 212 paise per unit.

(iv) With subvention of Rs. 200 crores 185 paise per unit.

39. It is apparent that the proposed enhancement of tariff signed on 15.5.93 could not be placed in the meeting of the Board stated to have been held on 20.4.93, (long before 15.5.93). It is stated by the Respondent ASEB that the Board in its meeting dated 20.4.93 accepted tariff structure worked out on the basis of different levels of Govt. subvention, on principle. But the so-called record does not contain the original resolution or resolutions signed by the Members of the Board. From the records it does not appear whether relevant material were placed in the meeting of the Board stated to have been held on 20.4.93, which were vital for taking the important decision to enhance the rate of tariff by doubling the existing average rate from Rs. 1.20 per unit to Rs. 2.40 per unit in the average.

40. For making the momentous decision of the enhancement of tariff, placing of the proper statements of account, prepared by exports (preferably having proficiency in Cost Accountancy), disclosing actual state of financial condition of the Board and the proposed measures to be taken to meet the situation, before the Board in the meeting stated to hove been held on 20.4.93, was essential. There is nothing on record disclosing the total assets and liabilities of the Board as well as the written down value of the assets namely, building, machinery and other equipments and outstanding balance of loan, to work out the depreciation and the interest liability of a year. The records produced before the Court, however, contains only 4 calculation sheets purporting to work out the cost of production and distribution per unit of electricity to be supplied to the consumers, in a perfunctory and casual manner.

41. From what is disclosed from the records produced before the Court, I am constrained to hold that in such important matter of revision of tariff enhancing the rate of tariff by doubling the existing rate, the ASEB has followed no system or method and has not maintained any account whatsoever in support of revision of tariff to ensure that the total revenue of a year meets at least the operational and maintenance expenses of the year. It is apparent from the record produced before the Court that the Board in its meeting stated to have been held on 20.4.93 did not have materials before it to consider and apply its mind for revision of tariff and the revision has been made in a casual and perfunctory manner without at all complying with the mandates of the Act. The statements made in the re-joinder dated 15.7.93 on behalf of the ASEB that the Board in its meeting duly deliberated on the agenda items in its meeting dated 20.4.93, is not supported by the materials on record placed before this Court. The statements made in the affidavit-in-opposition and rejoinder filed on behalf of the ASEB are based on records, inasmuch as, none of the deponents was a

member of the Board, who could have personal knowledge as to what happened in the meeting stated to have been held on 20.4.93. As such, no reliance can be placed on the statements made by the ASEB in the affidavit-in opposition and in the re-joinder which are not supported by records. It is obvious that the ASEB either did not maintain any record of the meeting stated to have been held on 20.4.93 or has withheld production thereof before the Court. Section 49 of the Act empowers the Board to revise the tariff, but that power is not arbitrary. It is incumbent on the Board to apply its mind to all relevant materials placed before it at the time of making decision to revise the tariff. Meeting of the Board is not an empty formality. As already observed, from the records it appears that no material had been before the Board in its meeting stated to have been held on 20.4.93 to take the decision to revise the tariff. From what is disclosed from the records produced before me, I have no hesitation to hold that the revision of tariff as per the impugned notification has been made arbitrarily in casual and perfunctory manner without application of mind and without following the mandates of the provision of Section 49 of the Act.

42. The Respondent ASEB in their rejoinder filed on 20.7.93 along with the records have stated that the Chief Accounts Officer of the ASEB on 3.5.93, received the letter dated 28.4.93 from the Govt. intimating the decision to discontinue non plan assistance to the ASEB and that after receipt thereof, the Chief Accounts Officer forwarded it to the Additional Chief Engineer (Commercial) and the Additional Chief Engineer Commercial thereafter put up a note to the Chairman, ASEB on 13.5.93 suggesting retention of revision of tariff @ Rs. 2.40 per unit in the average with some alteration. The Chairman, ASEB, approved the suggestion and thereafter the revised schedule of tariff was prepared on 15.3.93 and the impugned notification was issued. Admittedly, after the Govt. letter dated 28.4.93 was received by the ASEB on 3.5.93, no meeting of the Board was held. So, apparently the revision of tariff by the impugned notification was made as per the order of the Chairman of the Board and not by the Board. Section 49 of the Act empowers the Board, and not the Chairman of the Board, to revise the tariff. The revision of tariff by the impugned notification is, therefore, ex-facie illegal and without jurisdiction.

43. It appears from the impugned notification that the main ground for revision of tariff is continuous increase in the cost of inputs like furnace oil, HSD, Coal, Natural Gas, machine spares required for maintenance of machine and also increase in emoluments of the employees. Admittedly, on taking into consideration to the continuous increase in cost of the inputs the tariff was revised with effect from 1.1.92 by the notification dated 9.12.91. Mr. Goswami is right in submitting that increase in the cost of inputs after 1.1.92 is relevant for further revision of the tariff. It is not disputed that over all impact of the cost of inputs etc on and from 1.1.92 is around 12% and the Planning Commission''s report has revealed that the rise of cost etc. is 11%. It is therefore apparent that the reasons and grounds for increasing the rate of tariff by doubling the existing average rate has no nexus with the rise of price of inputs and the increase in the

rate of tariff as per the impugned notification, is wholly dis-proportionate to the over all rise of cost of inputs etc. As such, I find sufficient force in the submission of the learned Counsel for the Petitioners, that enhancement of tariff by the impugned notification is based on non-existent facts, irrelevant and extraneous consideration and is arbitrary and unreasonable.

44. As regards the introduction of fixed charge in respect of certain categories of consumers Mr. Mazumdar has submitted that the system is legal and has been upheld by the Hon''ble Supreme Court in the case of Northern India Iron and Steel Co. and Others Vs. State of Haryana and Another, In my opinion, the decision of that case does not help the ASEB to support the introduction of Fixed Charge by the impugned notification on certain categories of consumers. Under the Terms and Conditions of Supply, 1988, the ASEB has already introduced realisation of ''Minimum Charges'' according to the Terms and Conditions of Supply, 1988, ''Minimum Charges means charges payable by a consumer monthly as per provisions of the tariff in force to as to cover charges incurred by the Board for affording supply such as, depreciation, general reserve, interest, establishment charges and other fixed expenses. As such, when ''Minimum Charge'' has already been introduced to cover up the charges incurred by the Board for affording supply, such as, depreciation, general reserve, interest, establishment charges and other fixed expenses to some extent, introduction of ''Fixed Charge'' in addition to ''Minimum Charge'' is unwarranted and unjustified. Besides, the reasons and grounds disclosed in the counter in support of introduction of fixed charge is not clear and convincing.

45. Undisputedly, ASEB is the instrumentality of the State. State has a vital role to play in the working and functioning of the Board. It is the State Govt. which appoints the members of the Board, the supreme body of the ASEB. Section 63 of the Electricity (Supply) Act, 1948 provides that the State Govt. may, with the approval of the State Legislature, from time to time make subvention to the Board for the purpose of this Act on such terms and conditions as the State Govt. may determine. As per Section 66 of the Act the State Govt. may guarantee in such manner as it thinks fit the payment of the principal and interest of any loan proposed to be raised by the Board or either the principal or the interest. Under Sections 78A 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 Govt. The State Govt. which so long guided and nourished the ASEB, cannot all of a sudden fold its hands and leave the ASEB to function on its own. It is true that grant or non-grant of subvention is discretionary but that discretion is coupled with duty. It is the State which has allowed to grow the ASEB as a monopoly undertaking to generate and supply power to the State. The State Govt. has a responsibility to see that the Board functions most efficiently and economically so as to distribute the electricity to the consumers at a reasonable rate and without interruption. The State Government has also found that the ASEB is not running efficiently and economically and the contention made on behalf of the State Govt. and the submissions of the learned Advocate General speaks of helplessness on the part

of the State Govt. in the affairs of the ASEB. Mr. Goswami is right in submitting that the ASEB cannot be allowed to run inefficiently and uneconomically continuously and to burden the consumers with the avoidable loss it incurrs due to mismanagement and maladministration, by enhancing the rate of tariff from time to time. It is needless to say that enhancement of the rate of tariff by the impugned notification doubling the existing average rate of tariff from Rs. 1.20 per unit to Rs. 2.40 per unit has adversely affected not only the consumers who reels under the burden, but the community as a whole. I find force in the submission of Mr. Goswami that State Govt. cannot remain indifferent to the devastating consequence of the unchecked and unmonitored inefficiency and mis-management of the ASEB and the State Government has a duty to come forward to take effective steps and give directions to the ASEB so that it can run efficiently and economically as per the mandates of the Act. As already pointed out that the ASEB has stated on oath that the Rural Electrification subsidy payable by the State Government has accumulated to Rs. 292.2 crores upto 1989-90. If it be so, the State Govt. must clear the outstanding amount of subsidy payable to the ASEB on account of Rural Electrification.

For the reasons stated above, the petitions are allowed and the impugned notification dated 18.5.93 revising and enhancing the tariff by the Respondent ASEB, is quashed. The Respondents are directed not to realise electricity charges from any consumers at the rate of tariff revised by the impugned notification dated 18.5.93. The electricity charges, if realised already from the consumers at the rate revised by the impugned notification dated 18.5.93, excess amount so realised, shall either be refunded to such consumers and/or be adjusted in future bills of electricity charges payable by the consumers.

