

(2000) 06 PAT CK 0042
In the Patna High Court
Case No : C.W.J.C. No. 5542 of 1999

Pulak Enterprises

APPELLANT

Vs

The Bihar State Electricity Board and Others

RESPONDENT

Date of Decision : 26-06-2000

Acts Referred:

Constitution of India, 1950 — Article 14

Electricity (Supply) Act, 1948 — Section 18, 49, 49(3), 51, 59

Citation : (2000) 3 PLJR 552

Hon'ble Judges : S.N. Jha, J;A.K. Ganguly, J

Bench : Division Bench

Advocate : Govind Das, Binod Poddar, L.K. Bajla, Biren Poddar, Brinalini Padhi, S.D. Sanjay, in C.W.J.C. Nos. 1655, 1807, 1861, 1971, 2009, 2087, of 1999R and for invervenor in C.W.J.C. 5542 of 1999, L.K. Bajla, Ramesh Kumar Agrawal, Raj Kumar Bhargav, Rajni Tekriwal, in C.W.J.C. 5993 of 1999, L.K. Bajla, S.D. Sanjay, Raj Kishore Prasad, Tej Bahadur Roy, Pravin Kumar Sinha, Gajendra Pratap Singh Purnendu Singh, Mriyank Mauli, Sushila Agrawal and Suraj Samdarshi, in C.W.J.C. 5542 of 1999 and the Rest, for the Appellant; V.R. Reddy, Mihir Kumar Jha, Naveen Prakash, Mohit Kumar Shah, Rajendra Prasad and Ganga Prasad Roy, for State of Bihar, for the Respondent

Final Decision : Allowed

Judgement

S.N. Jha, J.—In this batch of writ petitions the dispute relates to fuel surcharge. The validity of levy has been upheld by this Court as well as by the Supreme Court in Civil Appeal No. 6320 of 1994 and analogous cases, B.S.E.B v. Bihar 440 Volt Vidyut Upbhokta Sangh, (1997) 11 SCC 380 and that is not in issue in these cases. The dispute is only as to the method of calculation and, thus, the rate of fuel surcharge. The facts of the case may be noticed from the file of CWJC No. 5542 of 1999 which has been argued as the representative case.

2. Section 49 of the Electricity (Supply) Act, 1948 empowers the Electricity Board to frame tariff and lay down the terms and conditions of supply of electricity as it thinks fit. In exercise of the said power the Bihar State Electricity Board

(hereinafter called "the Board") framed tariff vide notification dated 21.6.93, published in the Bihar Gazette on 23.6.93 superseding the earlier tariff notifications dated 26.8.91 and 3.7.92. The tariff notification dated 21.6.93 is effective from 1.7.93. Under Clause 16.10.1 of the said tariff the consumers of the categories specified therein are required to pay operational surcharge at a rate to be determined every year in accordance with the formula prescribed, in addition to other charges as laid down in the tariff schedule. In terms of Clause 16.10.2 the operational surcharge consists of two elements (i) fuel surcharge and (ii) other operational surcharge. Clause 16.10.3 lays down the formula for determining fuel surcharge applicable during the financial year in terms of paise per unit. Clause 16.10.4 prescribes the formula for determination of "other operational surcharge". It may be mentioned here itself that the provision regarding "other operational surcharge" has been held to be arbitrary and struck down. Clause 16.10.5 provides that the operational surcharge for a financial year shall be calculated by the Board after the expiry of the financial year, Till actual calculation of the operational surcharge for a financial year is made, operational surcharge during the financial year may be levied at a rate provisionally calculated on monthly or quarterly or half-yearly basis as the Board may decide. In case of short or excess realisation the amount is to be adjusted in the next bill to be served on the consumers. Clause 17 lays down that the existing rate of fuel surcharge notified in letter No. A/CS/Costing-44/92- 93/397 dated 29.3.93 amounting to 32 paise per unit has been merged in the tariff. Any increase in the operational surcharge thereafter only shall be levied.

3. In order to appreciate the facts to be stated hereinafter it would be appropriate to notice the formula for computation of the fuel surcharge laid down in Clause 16.10.3 as under:

S1

$$A1 \times A3 + B1 \times B3 + C1 \times C3 + D1 \times D3 +$$

$$(A2 + B2 + C2 + D2$$

$$E1 \times E3 + F1 \times F3 + G1 \times G3 + H1 \times H3$$

$$+ E2 + F2 + G2 + H2)$$

Whereas,

S1 =

Average Fuel Surcharge per unit in paise applicable during the financial year.

A1, B1, C1 =

Unit generated from PTPS, BTPS and MTPS respectively

D1, E1, F1, G1, H1 =

Unit purchased from DVC, UPSEB, OSEB, NTPS, PGCL and any other source

respectively.

A2, B2, C2 =

Unit sold, out of sent out from PTPS, BTPS and MTPS on which fuel surcharge is leviable.

D2, E2, F2, G2, H2 =

Unit sold, out of purchased from DVC, UPSEB, OSEB, NTPC, PGCL and any other source respectively during the year on which Fuel Surcharge Is leviable.

A3, B3, C3 =

Increase in average cost of Fuel Surcharge in paise per unit computed for Board's Generation at PTPS, BTPS and MTPS

D3, E3, F3, G3, H3 =

Increase in average unit rate of purchase of energy from DVC, UPSEB, OSEB, NTPC, PGCL and any other source respectively during the year for which the surcharge is to be calculated.

The said increase to be calculated with respect to the year 1992- 93 (after amendment, read 1991-92)

(In the above, PTPS stands for Patratu Thermal Power Station, BTPS for Barauni Thermal Power Station, MTPS for Muzaffarpur Thermal Power Station. They are Board's own generating stations. Likewise, DVC stands for Damodar Valley Corporation, UPSEB for Uttar Pradesh State Electricity Board, OSEB for Orissa State Electricity Board, NTPC for National Thermal Power Station and PGCL for Power Grid Corporation of India Limited. They are external sources of supply of electricity to the Board.)

The manner of calculation of increase in average cost of fuel in Board's own generating stations i.e. A3, B3 and C3, and increase in average unit rate of purchase from outside sources i.e. D3, E3 etc. is laid down in Clause 16.10.3.1. As regards the former, the calculation is to be made in the following manner:

(a) Patratu Thermal Power Station: The rate in paise per unit shall be based on the average cost of 9270.08 paise per 10,00,000 K. Cal. of fuel delivered at the bunkers of the Board's generating station at Patratu. In the event of rise or fall in the aforesaid cost, at any time, the rate per unit will be increased or decreased as the case may be, by 0.3537 paise for each one per cent variation in the cost of fuel per 10,00,000 K. Cal. In calculating the above variation, percentage variation of 0.5 and above will be treated as next higher percentage and percentage variation below 0.5 will be ignored.

(b) Barauni Thermal Power Station: The rate in paise per unit shall be based on an average cost of 17407.97 paise per 10,00,000 K. Cal. of fuel delivered at the bunkers of the Board's generating station at Barauni. In the event of rise or fall

in the aforesaid cost, at any time, the rate per unit will be increased or decreased, as the case may be by 0.8539 paise for each one per cent variation in the cost of fuel per 10,00,000 K. Cal. In calculating the above variation, percentage variation of 0.5 and above will be treated as next higher percentage and percentage variation below 0.5 will be ignored.

(c) Muzaffarpur Thermal Power Station: The rate in paise per unit shall be based on an average cost of 18166.04 paise per 10,00,000 K. Cal. of fuel delivered at the bunkers of the Board's generating station at Muzaffarpur. In the event of rise or fall in the aforesaid cost, at any time, the rate per unit will be increased or decreased, as the case may be by 0.7368 paise for each one percent variation in the cost of fuel per 10,00,000 K. Cal. In calculating the above variation, percentage variation of 0.5 and above will be treated as next higher percentage and percentage variation below 0.5 will be ignored.

As regards the latter i.e. electricity purchased from external sources the clause says that the actual increase in the average unit rate of purchase will apply, that is to say, will be the basis.

4. On 4.4.94 the Board issued circular stating that on final calculation the fuel surcharge for the period 1992-93 had been determined as 26.14 paise per Kwh. On 5.1.95 the Board issued another circular calculating the fuel surcharge for the period July 1993 (i.e. after coming into force of the new tariff) to March 1994 to be 25.98 paise per Kwh. I am not referring to the rate of other operational surcharge under Clause 16.10.4 which was also notified by the same circular because that has already been struck down. The consumers were billed accordingly. Writ petitions were filed challenging the rates in CWJC No. 2771 of 1995 (R) and analogous cases. During the pendency of the said writ petition the Board proposed certain amendments in clauses 16.10.3, 16.10.3.1 and 17, vide letter No. 135 dated 28.12.95. I shall refer to the salient features of the proposed amendment later. The implementation of the circular dated 5.1.95 was kept pending vide circular dated 8.2.95 in the meantime. On 8.3.95 and 17.4.95 circulars were issued directing payment @ 15 paise/Kwh from 1.7.93 to 31.3.95 instead of 25.98 paise per Kwh as fuel surcharge as stipulated in circular dated 5.1.95. However, by circular dated 20.9.95 the said circulars dated 8.3.95 and 17.4.95 were withdrawn and the earlier circular dated 5.1.95 by which fuel surcharge @ 25.98 paise/Kwh had been fixed was restored.

5. The writ petitions, CWJC No. 2771 of 1995 (R) and analogous, came up for hearing in October 1996. With the consent of the Board, on 17.10.96 this Court constituted a High Level Committee consisting of two nominees each of the consumers and the Board and two independent members. The Committee was directed to calculate the fuel surcharge in terms of 1993 tariff, particularly taking into account Clause 17, and submit report by 31.1.97 to the Chairman of the Board. The writ petitions were thus disposed of. This Court made it clear that after submission of such report, anybody feeling aggrieved may move the appropriate forum or court of law. From the records of the case it appears that

an interlocutory application was made by the concerned Petitioners of the case making a grievance that certain vital documents had not been made available by the Board to the Committee vide order dated 29.1.97. This Court recorded the submission of the counsel for the Board that the documents required shall be furnished within two weeks. Time for submission of the report was accordingly extended to 31.3.97 and the earlier order dated 17.10.97 was modified to this extent.

6. At this stage the Board issued circular dated 5.2.97 notifying the provisional rates of fuel surcharge as 43.89 paise/Kwh for 1994-95, 72.12 paise/Kwh for 1995-96 and 102 paise/Kwh from 1.4.96 onwards. This led to fresh writ petitions being CWJC Nos. 1632 of 1997 and analogous cases. On 12.3.97 when the cases came up for preliminary hearing dispute again arose as to circumstances in which the aforesaid Committee had not finalised the report. After hearing counsel for the parties, however, a consent order was passed to the effect that the Committee shall finalise its report on 14.3.97 when it was scheduled to meet next, on the basis of documents already on record and submit the report to this Court on 17.3.97. On 16.3.97 the Committee submitted its report. On 21.3.97 when the matter came up for further hearing this Court noted that the findings reached by the members of the committee were not unanimous. While four members of the Committee had worked out the fuel surcharge @ 12.38 paise/Kwh for the period from July 1993 to March 1994, 21.33 Paise/Kwh for the period 1994-95 and 44.00 paise/Kwh (provisional) for the period 1995-96, the other two members who were Board's nominees, had worked out the same @ 25.98 paise, 43.98 paise and 72.12 (provisional) paise per Kwh for the aforesaid periods respectively. As an interim measure this Court directed the Petitioners to pay fuel surcharge for the periods 1993 (July) to March 1994 and 1994-95 at the rates worked out by four members of the committee, which were in their favour, and for the periods 1995-96 and 1996-97 @ 46.37 paise/Kwh and 56.37 paise/Kwh offered by them. CWJC Nos. 1632 of 1997 and analogous cases were finally heard and decided by judgment dated 30.6.98.

7. At this stage it may be relevant to advert to the Board's letter dated 28.12.95, referred to above, suggesting certain amendments in clauses 16.10.3, 16.10.3.1 and 17. The substance of the proposed amendment was that instead of calculating the increase in the average unit rate of purchase of energy from DVC, UPSEB, OSEB, NTPC, PGCL and any other source with respect to the year 1992-93, as prescribed in Clause 16.10.3 (last para), the same should be calculated with respect to the year 1991-92, and similarly in Clause 16.10.3.1 the average cost of fuel in respect of energy generated at Board's own generating stations be computed on the base rate of 1991-92 and not 1992-93. In other words, the base year with respect to these two sets of components was sought to be changed from 1992-93 to 1991-92. Clause 17 was also proposed to be amended by providing that in accordance with the instructions issued by the Government of Bihar to the Board, the increase in the rate of fuel surcharge between January 1992 and June 1993 which came to 20 paise (12 paise as in

January 1992 and 32 paise as in June 1993) had been merged in the tariff and, thus, any increase in the fuel surcharge thereafter only shall be believed after accounting for the increase already merged in the tariff.

8. From the judgment dated 30.6.98 disposing of CWJC Nos. 1632 of 1997 and analogous cases, it appears that the validity of the rates of fuel surcharge was challenged mainly on two grounds-(a) the cost of generation at the Board's own generating stations, namely, Patratu, Barauni and Muzaffarpur Thermal Power Stations had been worked out treating 1991-92 as the base year but the cost of the unit purchased from DVC, NTPC etc. had been calculated on the basis of 1992-93 rates. According to the Petitioners in working out the rate the values to be taken into account must correspond to the same year least determination could become irrational and arbitrary; (b) the merger of fuel surcharge as on 1.7.93 in terms of Clause 17 of the tariff was not correct. This Court noted that the objections of the Petitioners were in consonance with the Board's own decision vide letter dated 28.12.95 (supra) by which the Board had suggested certain amendments in the relevant clauses of the tariff to the State Government. This Court, however, took the view that in terms of the order dated 17.10.96 passed in CWJC No. 2771 of 1995 (R) the Committee was required to submit its report to the Chairman of the Board and not to this Court. Observing that the report of the committee would assist the Board in coming to a fair and just decision, and if the Board was satisfied that the tariff notification requires any modification it was open to it to modify the tariff in accordance with law, this Court instead of finally deciding the issues itself directed the Board to consider the report of the committee submitted before this Court on 16.3.97, and in consultation with the State Government, take a final decision, by reasoned order, on the points:

(i) Whether any modification of Clause 16.10.3 of the tariff notification published on 23.6.93 is required so that the increase in the average unit rate of purchase of energy from DVC, NTPC etc. should be calculated with respect to the year 1991-92 instead of the year 1992-93.

(ii) Whether in terms of Clause 17 of the aforesaid tariff notification, 20 paise per Kwh the increase in fuel surcharge which has been merged in the basis tariff should be considered for adjustment, instead of 32 paise, in terms of Clause 17 of the aforesaid notification. If so, whether the impugned circular dated 5.2.97 be not withdrawn and the consumers be given the benefit of discrediting to the period July 1993 to March 1994 and thereafter, and Clause 17 of the tariff notification u/s 93 be amended appropriately.

This Court directed that till the Board takes a final decision in the matter, the interim order passed by the Court on 21.3.97, referred to above, shall operate. Thereafter, the Petitioners shall be liable to pay fuel surcharge in accordance with the decision that may be taken by the Board. Any person aggrieved by the decision of the Board will be at liberty to challenge the same in accordance with law.

9. In the meantime, on account of pendency of CWJC No. 1632 of 1997 and analogous cases, on 3.6.97 the Board had decided to levy the fuel surcharge for the year 1997-98 provisionally at the existing rate of 102 paise/Kwh. This also led to writ petitions both at Patna and Ranchi Bench of the Court. While the Bench at Patna directed the concerned Petitioner to pay fuel surcharge @ 80 paise/Kwh in CWJC No. 5326 of 1997 and analogous cases, the Ranchi Bench permitted the concerned Petitioner to pay the same @ 56.33 paise/Kwh. It is not necessary to refer to the details of the cases, some of which, it appears, curiously, are still pending. Be that as it may, after the decision in CWJC No. 1632 of 1997, upon due consideration of the matter the Board resolved to amend Clause 16.10.3 (last para) and Clause 17 and revise the rates of fuel surcharge for the years 1993-94 (July 1993 to March 1994), 1994-95, 1995-96, 1996-97 and 1997-98 (provisional) in the light of the decision of this Court vide resolutions dated 14.12.98 and 12.1.99. Thereafter, vide letter dated 2.2.99 the Board sought the mandatory approval of the State Government which was accorded by the Government on 20.5.99. The amendments in Clause 16.10.3 (last para) and Clause 17 were finally notified vide notification dated 27.5.99 published in the Bihar Gazette on 29.5.99. (A corrigendum was later issued on 26.6.99). The revised rates of fuel surcharge were notified vide circular No. AC-Costing-44/98-99-1239 dated 31.5.99. The validity of these two notification/circular has been assailed in this batch of writ petitions. Though by the circular the rates have been fixed for the years 1993-94 (July 1993 to March 1994) to 1997-98, the correctness of the rates for the years 1993-94 (July 93 to March 94), 1994-95 and 1995-96 is not disputed, the challenge is only as to rates for the years 1996-97 and 1997-98. By filing amendment petition, the rate notified for the year 1998-99 was also challenged in course of hearing.

10. We heard Shri Gobind Das followed by Shri L.K. Bajla and Shri Binod Poddar on behalf of the Petitioners, and Shri V.R. Reddy ably assisted by Shri Mihir Kumar Jha on behalf of the Board at great length. On behalf of the Petitioners it was submitted as follows. The subject matter of dispute being technical in nature the dispute may be referred to a Committee of experts as was done by this Court in C.W.J.C. No. 2771 of 1995 (R) and has been done by the Supreme Court in many cases. The correctness of the calculation of the rates of fuel surcharge depends on the correctness of the accounts but as the accounts of the Board have been found to be far from satisfactory by no less than the Comptroller and Auditor General of India (CAG) the determination cannot be said to be conclusive. This Court in Bihar 440 Volts Vidyut Upbhokta Sangh's case, 1994 (2) PLJR 103, has taken judicial notice of the inefficiency etc. of the Board. The consumers should not be made to pay for the inefficiency and shortcomings of the Board. In the facts and circumstances, the Board should have given opportunity of hearing before determining the rates to ensure transparency. The tariff contemplates fixing of the fuel surcharge at the end of each year (clause 16.10.3.1); in practice, however, the Board takes years to finalise the rates resulting in not only a state of uncertainty but also, sometimes, impairing the

financial condition of the industry. In any view, fuel surcharge partakes the nature of tax and just as a tax cannot be levied without a rate, the fuel surcharge also cannot be levied without fixing rate. The rate of fuel surcharge is valid only for a particular year and thereafter unless fresh rate is fixed and notified, fuel surcharge cannot be levied in the next year. It is, therefore, imperative that the rate is fixed in the same year, at least provisionally if it is not possible to fix the rate finally. In C.W.J.C. 1632/97 this Court had directed the Board to pass a reasoned order but no such reasoned order has been passed and without complying with the said direction the rates of fuel surcharge have been revised.

Apart from these submissions, which are of general nature, some specific issues were also raised, which I shall notice and deal with later.

11. The submission that the Board has not passed a "reasoned order" or otherwise failed to implement the direction of this Court is completely misconceived. This Court had directed the Board to decide whether any modification in Clause 16.10.3 of the tariff notification was required so as to make the base year with respect to average unit rate of purchase of energy from DVC, NTPC etc, at par with the increase in cost of generation at Board's own generating stations, and to adjust the merger of the existing fuel surcharge of 20 paise/Kwh, by a reasoned order. A favourable decision having been taken and the aforesaid clauses suitably amended, I wonder if there is any scope for further argument in this regard. As far as the requirement of passing a "reasoned order" is concerned, the facts and figures contained in the agenda notes dated 26.11.98 and 6.1.99 (Annexure E series) which were the basis of the proposed amendments and revision in the rates, can be treated as reasons for the same. The direction of this Court to pass a reasoned order cannot be interpreted as a direction to set out reasons for fixing the particular rates of fuel surcharge which is merely an arithmetical exercise to be worked out in accordance with the prescribed formula. The Board is a body corporate and it takes its decision on the basis of the facts and figures furnished to it in the agenda notes supported by materials. It is apparent that after the decision of this Court the matter was examined at different levels and finally the said agenda notes dated 26.11.98 and 6.1.99 were put up for consideration which were approved respectively on 14.12.98 and 21.1.99. I, therefore, do not find any substance whatsoever in the contention that the Board failed to implement the direction of this Court by not passing a reasoned order or otherwise.

12. The submission that the dispute should be referred to a Committee of experts, at first blush, looks attractive because of the nature of the dispute. However, such a course should be taken only when the Court cannot decide the dispute. There may be justification to constitute committee and refer the dispute to it when the relevant data have to be gathered or facts have to be ascertained without which the dispute cannot be resolved. This normally is done in public interest litigation. In adversary litigation it is for the parties to produce materials in support of their respective claim. The Court is not supposed to make a roving

inquiry for allowing or disallowing the claim of one or the other party. It is true that on the previous occasion in CWJC No. 2771 of 1995 (R), this Court did constitute a committee but that was with the consent of the Board. Counsel for the Board pointed out in course of his submission that the Board wanted to re-assure itself that the stand taken by it in letter dated 28.12.95 to the State Government suggesting amendments in clauses 16.10.3 (last para) and 17 was correct. May be, in an appropriate case even in an adversary litigation the Court may refer the dispute to a Committee. The present case, in my opinion, is not one of that type. As would appear from the discussions to follow, the issues are not such as cannot be resolved by this Court.

13. A number of decisions on the point of reference of the dispute to a committee of experts were cited on behalf of the Petitioners. Except one, namely, the case of Gulam Abbas and Others Vs. State of U.P. and Others, , all other cases related to public interest litigation. In the case of Ghulam Abbas, the dispute between two sects of Muslims related to holding of religious ceremonies on the same land. In order to find out a permanent solution to the "perennial" conflict between two communities and to restore the smooth and peaceful performance of religious ceremonies in future in an atmosphere of cordiality between them, the Supreme Court constituted a committee to ascertain the feasibility of the proposal regarding shifting of the graves from their original place. The cases of Rural Litigation and Entitlement Kendra, Dehradun and Others Vs. State of U.P. and Others, , M.C. Mehta and Another Vs. Union of India (UOI) and Others, , and A.P. Pollution Control Board Vs. Prof. M.V. Nayadu (Retd.) and Others, were cases relating to environment, while the cases of Vishal Jeet Vs. Union of India and others, , and Paramjit Kaur Vs. State of Punjab and Others, were cases of human rights violation.

In the case of Suresh Chandra Sharma Vs. Chairman, Upseb and Others, , on which particular reliance was placed, the Supreme Court in a public interest petition alleging large scale theft of electricity and irregularities in the functioning of the U.P. State Electricity Board constituted a High Power Committee to inquire into the allegations and submit a report. Foundational facts of the case are not mentioned in the order and, therefore, it is not possible to find out any similarity between that case and the cases in hand. So far as the present cases are concerned, the dispute in sum and substance involves the question as to whether the rates of fuel surcharge have been correctly computed in accordance with the formula about which there is no dispute, and that being the scope of the present writ petitions, I am not able to appreciate as to how the said order can be of any assistance to the Petitioners.

14. In the facts and circumstances, the plea of the Petitioners to refer the dispute to a committee is rejected.

15. It would not be out of place to mention that though the dispute was referred to the committee by this Court in October 1996 and the committee submitted its report in March 1997 the controversy has remained unresolved and the decision

of the Board has so far not been implemented, and the consumers are paying fuel surcharge at interim rates fixed by this Court. I am inclined to think that reference of dispute to the committee of expert may only result in lingering the matter which would not be in public interest.

16. The submission that the Board has not been performing its duties, as it should, resulting in losses, if I may say so, is vague and general in nature. It is true that this Court in Bihar 440 Volt Vidyut Upbhokta Sangh Vs. The Chairman, Bihar State Electricity Board and Others , had observed that the Board has failed to perform its duties on all fronts from generation of power to recovery of bills. But that cannot be the ground to find fault with the increase in the rate of fuel surcharge. Increase is a natural phenomenon. There is no gainsaying that the cost of fuel viz. oil and coal has increased resulting in increase in the cost of generation at Board's own power generating stations. What is more significant is that from the materials brought on record it appears that the Board's own share of supply of electricity from its generating stations has been decreasing and the Board is depending more on external sources, such as DVC, NTPC etc. If the average unit rate of purchase of energy from DVC or NTPC increases, this is bound to raise the fuel surcharge because the purchase of energy from other sources is an essential component of fuel surcharge.

17. Pointed argument, however, was made with respect to transmission and distribution (T and D) losses mentioned in para 3.7 of Chapter III of the CAG report for the year 1996-97. It was pointed out that the report mentions that though the Central Electricity authority has recommended permissible annual T and D loss of 15.5%, the CAG found that the Board has suffered T and D loss between 41 to 48% during the last five years ending 1995-96. The loss in units has been found to be 8655.78 Million Units (MU) and the loss of revenue has been assessed at Rs. 1190.53 crores.

18. As the aforesaid plea was taken for the first time in course of argument, the Board was allowed opportunity to file written submission. In its written submission the Board has taken the stand that T and D losses do not form part of calculation of fuel surcharge and the reason for the difference of 8655.78 MU is the existence of large number of defective meters and meterless supply of electricity to consumer belonging to different categories, particularly, agriculture and domestic categories. The statement in paragraph 3.7 of Chapter III of the CAG report actually represents the T and D losses based on units actually metered and does not include power sold to the consumers having unmetered supply or the consumers having defective or burnt meters. That is why in the accounts, the units sold were worked out by dividing the assessed revenue by the tariff rates including fuel surcharge. It has been stated that in the case of defective meters and meterless consumers, though bills are raised, the corresponding quantum of power sold cannot be determined. Hence the assessed revenue (in accordance with the Board's tariff) is treated as the basis for computation of power sold. The CAG, it has been stated, has approved this

Procedure and granted its statutory certificate to the effect that the accounts of Board give a "true and fair view of the state of affairs of the Board", vide Annexure-Q.

19. The Board has further taken the stand that if the rates of fuel surcharge were to be determined only on the basis of metered sales the rates would be considerably higher than already determined by the Board. This would be evident from the following chart:

SI. No.

Particulars

July '93 March '94

1994-95

1995-96

1996-97

1.

Amount recoverable as fuel surcharge (Rs. in lakhs)

9536.09

16328.20

28431.10

53385.22

2.

Units on which fuel surcharge is leviable (In M Kwh)

2645.76

3437.95

3822.96

3834.04

3.

Rate of Fuel Surcharge (In P/Kwh)

36.04

47.49

74.37

139.24

4.

Less (20 P/Kwh) As per the Hon"ble High Court's order dated 30.6.98 passed in CWJC No. 1632 of 99

20.00

20.00

20.00

20.00

5.

Net rate (P/Kwh) if T and D losses as per serial No. 6 of table at paragraph 3.7 of CAG report at page 80 is taken into account (3-4)

16.04

27.49

54.37

119.24

6.

Present rates of fuel surcharge as per the impugned notification dated 31.5.1999

23.38

21.33

48.54

99.34

The above calculation has been explained by pointing out that while A1, B1, C1 etc. and A3, B3, C3 etc. components of the formula indicating the power pumped into the Board's system for transmission or distribution to different points in the State and the incremental rise in the average cost of fuel at the Board's Thermal Power Station or power purchased from NTPC, DVC etc. are not affected by the T and D losses, A2, B2, C2 etc. component of the Formula representing the quantum of power sold to categories from whom fuel surcharge is leviable would be reduced if power supplied to the consumers having defective meters etc. is excluded from the total quantum of power sold. Thus, while the numerators would remain unchanged, the denominators would get reduced resulting in higher rates of fuel surcharge. In the above view of the matter, it has been stated that keeping in view the meterless and defective meter supply of the electricity the Board has made its own realistic calculation of T and D losses as reflected in the table in para 3.7 of the CAG report which has been accepted by the CAG. The Board has accordingly asserted that the table shown in para 3.7 of

the report regarding "percentage of actual loss of energy available for sale" has no nexus with the computation of rates of fuel surcharge under the formula in Clause 16.10.3.

20. In Bihar 440 Volt Vidyut Upbhokta Sangh's case (supra) though this Court made critical observations against the functioning of the Board in paragraph 116 of the judgment, the Court declined to strike down the tariff on the ground of inefficiency of the Board alone. Observing that the Board is under statutory obligation to manage its affairs in the manner laid down in Sections 18(a) and 59(2)(b) of the Electricity (Supply) Act, the Court directed the Board "to improve its efficiency by raising its generation capacity to a substantive level expeditiously and preferably within three years". The Court expressed hope that the State would issue necessary guidelines from time to time in this regard which it had failed to do in the past.

21. It would thus appear that neither the decision of this Court in Bihar 440 Volt Vidyut Upbhokta Sangh's case nor the report of the CAG provides any ground to find fault with the fixation of fuel surcharge. I must observe, as I have already said above, that in these writ petitions, the issue relates only to the correctness or otherwise of the rates of fuel surcharge. The functioning of the Board at large is not in issue.

22. Now I shall consider the submission as to giving opportunity of hearing to the consumers in the matter of fixation of rate of fuel surcharge. According to the Board, framing of tariff is a legislative function, which does not warrant giving any opportunity of hearing. According to the Petitioners, fixing rate of fuel surcharge is an administrative function of the Board delegated to it under Clause 16.10 of the tariff, and in order to ensure transparency, the Board should make available its accounts and give consumers opportunity of hearing because the rates depend on the correctness of the accounts and if the accounts are not correct, the determination of fuel surcharge would also not be correct.

23. The significance of the question as to whether fixing the rate of fuel surcharge is a legislative function or a non-legislative function is that if the function is held to be legislative, in the absence of any provision in that regard the principles of natural justice would not be applicable and the scope of judicial review would also be limited to plea of discrimination i.e. violation of Article 14 of the Constitution. As a general proposition, the law on the point is settled. In *Prag Ice and Oil Mills and Another Vs. Union of India (UOI)*, , a Seven-Judge Bench of the Apex Court by majority observed,

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

The legal position was reiterated in *Rohtas Industries Ltd. and Others Vs. Chairman, Bihar State Electricity Board and Others*, and *Kerala State Electricity*

Board Vs. S.N. Govinda Prabhu and Bros. and Others, , wherein it was observed, "Price fixation is neither the forte nor the function of the Court".

As regards the nature of the function, in *Saraswati Industrial Syndicate Limited v. Union of India* AIR 1975 SC 460, the Court had observed that the price fixation is more in the nature of a legislative measure even though it may be based upon objective criteria found in a report or other material. It should not therefore give rise to a complaint that rule of natural justice has not been followed in fixing the price. In *Prag Ice and Oil Mills v. Union of India* (supra) the Court observed,

We think that unless by the terms of particular statute or order, price fixation is made a quasi judicial function for specified purposes or cases it is really legislative in character ... the legislative measure does not concern itself to the facts of an individual case. It is meant to lay down a general rule applicable to all persons or objects or transactions of a particular kind or class.

In *Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc.*, , the Court held that except in cases where it becomes necessary to fix the price separately in relation to individuals, price fixation is generally a legislative act, the performance of which does not require giving opportunity of hearing. Following passage from the judgment may usefully be noticed:

Legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of Parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing-there are several instances of the legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal rate-in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation... but where the legislature was chosen not to provide for any notice or hearing, no one can insist on it and it will not be permissible to read natural justice into such legislative activity.

Reference may also be made to a Constitution Bench decision in *M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others*, .

24. The decision referred to above were rendered in the context of fixation of price of sugar or drug under the concerned statutes. The same principle, however, applies to fixation of electricity tariff u/s 49 of the Electricity (Supply) Act. The case of *Ashok Soap Factory and Another Vs. Municipal Corporation of Delhi and Others*, , is a direct authority on the point. The enhancement of tariff had been challenged on the ground of nondisclosure of reasons, the plea was rejected on the ground that "fixation of tariff is a legislative function and the only challenge to the fixation of the levy would be on the ground of unreasonableness or arbitrariness and not on any demonstrative ground in the sense that reasons for the levy of tariff must be disclosed in the order imposing the levy or disclosed to the Court, so long it is based on objective criteria".

25. In a sense, fixing rate of fuel surcharge under Clause 16.10 of the Tariff notification is different from fixing the tariff u/s 49 of the Electricity (Supply) Act. Fuel surcharge is undoubtedly a part of tariff. But fixing rates of consumption charges or the guaranteed charges or the fixed charges or the delayed payment surcharge etc. and fixing rates of fuel surcharge do not stand on par. Though rates of consumption charges etc. are based on objective materials, there is enough scope for flexibility in fixing the rates. It also involves policy to fix different rates for different categories of consumers. Such is not the position with the fuel surcharge. Clause 16.10.1 specifies the categories coming in the net of the levy and Clause 16.10.3 provides the formula. In simple words, the formula envisages addition of units generated or purchased and increased average cost of fuel and average unit rate of purchase rates and division of the total by the units sold on which fuel surcharge is leviable. The quotient is the average fuel surcharge per unit (expressed in terms of paise) described by denominator S1 in the formula. The whole exercise, it would appear, involves arithmetical accounting. There is no scope for exercise of any discretion or flexibility. This distinction, however, does not help the Petitioners. It rather goes against them because if fixing rate of fuel surcharge is just an arithmetical exercise, giving opportunity of hearing would hardly serve any useful purpose. How mathematical in nature is the process of computation is clearly illustrated in a chart which is part of Annexure-E series at page 290 of the Paper Book as under:

Calculation of Fuel Surcharge Rate for the year 1996-97

Fuel surcharge

$$(A1 \times A3) + (B1 \times B3) + (C1 \times C3) + (D1 \times D3) + \\ = (A2 + B2 + C2 + D2) (E1 \times E3) + (F1 \times F3) + (G1 \times G3) + E2 + F2 + G2$$

1. A1 = Generation of PTPS (MKWH) = 1116.54

A3 = Increase in Average Cost of PTPS (Paise/Kwh) = 17.33

A1 x A3 (Rs. in lakhs) = 1934.96

2. B1 = Generation of BTPS (MKWH) = 387.37

B3 = Increase in Average Cost of BTPS (Paise/Kwh) = 69.17

B1 x B3 (Rs. in lakhs) = 2679.44

3. C1 = Generation of MTPS (MKWH) = 213.52

C3 = Increase in Average Cost of MTPS (Paise/Kwh) = 53.05

C1 x C3 (Rs. in lakhs) = 1132.72

4. D1 = Power purchase from DVC (MKWH) = 2153.00

D3 = Increase in Average Rate of DVC (Paise/Kwh) = 57.87

$D1 \times D3$ (Rs. in lakhs) = 12459.41

5. $E1$ = Power purchase from NTPC (MKWH) = 4047.70

$E3$ = Increase in Average Rate of NTPC (Paise / Kwh) = 69.50
 $E1 \times E3$ (Rs. in lakhs) = 28131.52

6. $F1$ = Power purchase from PGCIL (MKWH) = 507.22

$F3$ = Increase in Average Rate of PGCIL (Paise Kwh) = 18.12
 $F1 \times F3$ (Rs. in lakhs) = 919.08

7. $G1$ = Power purchase from others (MKWH) = 737.82

$G3$ = Increase in Average Rate of others (Paise/Kwh) = 60.57

$G1 \times G3$ (Rs. in lakhs) = 4468.98

Excluding prior period expenditure

8. Admissible prior period expenditure (Rs. in lakhs) = 1659.11

(This is on the basis of recommendation made by the committee constituted by the Hon"ble High Court)

(I) Incremental Cost of the year and Sigma; $(A1 \times A3) + (B1 \times B3) + \dots (G1 \times G3)$ (Rs. in lakhs) = 53385.22

9. Mer,

and Sigma; $A2 + B2 + \dots G2$ (MKWH) = 4473.47

Hence,

Rate of fuel surcharge for

the year (Paise/KWH) = 119.34

Less 20.00

Net Rate of Fuel Surcharge for the year (Paise/KWH) 99.34

26. Where the fixation of rate or determination of the amount is made individually, depending on the context in which this is to be done, there may be justification or necessity to give opportunity of hearing to the person or persons concerned. But where the rate is fixed for persons at large the only way by which such opportunity can be given is to notify the rates and then invite objections. There is no such provision. In the absence of any mechanism provided in the Tariff notification, it would not be feasible at all. Whenever the statute contemplates giving such an opportunity a mechanism is provided, such as, for fixing rates of municipal taxes, while it is not so in the case of Income tax or other taxes. Counsel for the Board was not far off the point in urging that in fixing the tariff of fares and freights of telephone rates, the concerned Department of the Government do not give such opportunity.

27. Counsel for the Petitioners placed reliance on Delhi Cloth and General Mills Co. Ltd., Kota Vs. Rajasthan State Electricity Board and Others, . In para 26 of the judgment the Court observed, "It is the duty of the Board to at least give out the figures for calculating each component of the formula". But it would appear that such observation was made in the fact of the case. The tariff had been made applicable retrospectively for a number of years and the resultant liability had gone into several lacs of rupees. As a matter of fact the contention regarding giving opportunity of hearing was rejected observing in para 25 that "neither it is feasible nor in the public interest nor it is a legal right of the consumers to see the complete record with regard to the various figures submitted by the Board in working out each component of the formula, the only right available to the consumers in this regard is no object to inclusion of any extraneous matter in the working out of the formula". I am in respectful agreement with the proposition.

It may not be out of place to mention here that though the learned Judge found inclusion of "interest" in working out the formula as an extraneous consideration, liable to be struck down, in view of the latter decision of the Supreme Court in Kerala State Electricity Board Vs. S.N. Govinda Prabhu and Bros. and Others, , wherein it was held that the payment of interest is an expense properly chargeable to the revenue under the scheme of Electricity (Supply) Act, the finding does not appear to be in accordance with law.

28. Counsel for the Petitioners also placed reliance on Common Cause v. Union of India (1996) 6 SCC 560 and Dutta Associates Pvt. Ltd. Vs. Indo Merchantes Pvt. Ltd. and Others, on the point of transparency in action.

The decisions have been noticed only for the sake of reference, and there is nothing therein which could lend any help to the Petitioners' case. The former case related to allotment of petrol pumps by the Minister Incharge from the discretionary quota. On facts the Supreme Court found the Minister to be guilty of misfeasance in performing his public duties and saddled him with compensation. In this connection certain observations were made regarding transparency in discharge of public duties. The latter case was of auction. The lowest tenderer was asked to raise his offer within "feasible range". The Court held on facts that the whole process was vitiated as being opposed to the norms of transparency, fairness and openness because the tender notice nowhere visualised that after receiving the tender the Government shall first determine the "feasible range" and then call upon the lowest tenderer to make further offer. The Court also did not approve the concept of feasibility range.

The above decisions, it would appear, were rendered on their own facts and have no relevance to the case of fixation of tariff or fuel surcharge in accordance with the prescribed formula. The point involved in these cases as observed more than once above, is whether there has been any infraction of the laid down formula. That the discharge of public duties should be transparent and there should be fairness in action is a proposition which is unexceptionable but that is not the real issue involved here.

29. To sum up the discussion on the point, neither the Tariff notification provides for giving opportunity of hearing nor it is feasible to do so nor it would serve any useful purpose considering that fixation of rate is nothing else than arithmetical exercise as per a strait-jacket formula. The submission in this regard is accordingly rejected.

30. On behalf of the Petitioners endeavour was made to question the very basis of fixation of fuel surcharge. It was submitted that though it is open to the Board to levy fuel surcharge on certain specified categories of consumers alone or even supply electricity free to certain categories of consumers the unit rate should be worked out taking into account the entire units sold as is being done by the U.P. State Electricity Board, Damodar Valley Corporation or even in Delhi. Fixing the rates of fuel surcharge on the basis of units sold to only specified categories of consumers, it was submitted, is arbitrary and discriminatory. The submission is in the teeth of formula contained in Clause 16.10. The formula has been quoted above and it may be useful to quote the relevant part thereof again as under:

A2, B2, C2- Units sold, out of sent out from PTPS, BTPS and MTPS on which fuel surcharge is leviable.

D2 to H2- Units sold, out of purchased from DVC, UPSEB, OSEB, NTPC, PGCL and any other source during the year on which fuel surcharge is leviable.

On a plain reading it is clear to me that A2, B2, C2, D2 etc. component of the formula represents the extent of units generated i.e. sent out from the three generating stations or purchased from the external sources. Counsel for the Petitioners referred to "comma" occurring prior to the words "out of". Though sometimes presence or absence of comma has been taken aid of in interpreting the particular provision, the ordinary rule is that punctuation mark is minor element in the interpretation of Statute (See *Aswini Kumar Ghosh and Another Vs. Arabinda Bose and Another*,). Moreso, in the case of subordinate legislation. In my opinion, the words "out of" have to be understood in the sense of "to the extent of", and so read, the formula postulates that so much of units out of the units generated or purchased on which fuel surcharge is leviable only is to be taken into account for determining the value of A2 to C2 or D2 to H2. Omitting the part "out of ..." the formula would read as follows, "units sold ... on which fuel surcharge is leviable". In terms of Clause 16.10.1, fuel surcharge is leviable only on consumers in CS II and III. LT. Industrial Service, High Tension Service, Extra High Tension (EHT) and Railways Traction Service categories, the units sold to other categories of consumers cannot therefore be taken into account for determining the value of either A2 to C2 or D2 to H2. The validity of the formula has been upheld by this Court as well as by the Supreme Court in *Bihar 440 Volt Vidyut Upbhokta Sangh's case* (supra) and there is no scope for any challenge to it, nor the same has, in fact, been challenged in these cases. It is pertinent to point out that though by the impugned circular dated 31.5.99 the rates of fuel surcharge have been fixed for the years 1993-94 (July 1993 to March 1994) to 1997-98, the correctness of the rates fixed for the years 1993-94 (July 1993 to

March 1994) to 1995-96 has not been challenged. The correctness of the rates for the subsequent years only is under challenge. I fail to appreciate as to how without challenging the correctness of the determination of the rates for the previous years on the basis of same very formula, the correctness of the rates for the subsequent years on the same basis can be challenged.

31. In *Maharashtra State Electricity Board Vs. Kalyan Borough Municipality and Another*, , the Supreme Court upheld the Constitutional validity of Section 49(3) of the Electricity (Supply) Act. In *Rohtas Industries Ltd. and Others Vs. Chairman, Bihar State Electricity Board and Others*, , the Court held that Section 49(3) expressly authorises the Board to fix different tariffs for the supply of electricity classifying the consumers into different categories and fixing different tariffs. Thus, the Electricity Board is entitled to levy fuel surcharge on the consumers receiving high tension supply leaving out the consumers coming in other categories. While considering the validity of similar provisions of the 1979 Tariff of the Bihar State Electricity Board relating to Fuel surcharge, the Court observed,

Though the nomenclature given to the surcharge is "fuel surcharge" it is really a surcharge levied to meet the increased cost of generation and purchase of electricity... We see no force in the contention that the words "increase in the average unit rate of purchase of energy" used in C1 below paragraph 16.7.2 should be interpreted as taking their colour from the contents of paragraph 16.7.3. From a reading of these provisions it is abundantly clear that the entire increase in cost incurred in the purchase of energy from DVC and UPSEB has to go into the compensation of the surcharge leviable under paragraph 16.7

In *Kerala State Electricity Board Vs. S.N. Govinda Prabhu and Bros. and Others*, , the Court noticed the amendments in Section 59 of the Electricity (Supply) Act and held that a plain reading of Section 59, as amended, plainly indicates that it is the mandate at Parliament that the Board should adjust its tariff so that after meeting the various expenses properly required to be met, a surplus is left. It will not be out of place to mention here that in terms of Section 59, as it stood prior to 1978, the Board was supposed to adjust its tariff in such a way as not to incur loss. By amendment made in 1978, the Board was supposed to adjust its tariff so as to ensure that the total revenues in any year of account should after meeting expenses "leave such surplus as State Government may, from time to time, specify". The section was amended again in 1983 and as per the 1983 amendment the Board is supposed to adjust its tariff in a manner so as to ensure that the total revenues in any year of account after meeting all expenses shall leave such surplus as is "not less than three per cent or such higher percentage as State Government may by notification specify". After noticing the said amendments the Supreme Court observed,

The original negative approach of functioning so as not to suffer a loss is replaced by the positive approach of requiring a surplus to be created. The quantum of surplus is to be specified by the State Government. What the State

Government is to specify is the minimum surplus. This is made clear by the 1983 amendment which stipulates a minimum of 3 per cent surplus in the absence of specification by the State Government which has the liberty to specify a higher percentage than three. The failure of the Government to specify the surplus which may be generated by the Board cannot prevent the Board from generating a surplus after meeting the expenses required to be met. Perhaps, the quantum of surplus may not exceed what a prudent public service undertaking may be expected to generate without sacrificing the interests it is expected to serve and without being obsessed by the pure profit motive of the private entrepreneur. When that happens the court may strike down the revision of tariffs as plainly arbitrary. But not until then. Not merely because surplus has been generated, a supply which can by no means be said to be extravagant.

32. In *M/s. Hindustan Zinc Ltd. etc. Vs. Andhra Pradesh State Electricity Board and others*, , the Apex Court observed,

It was argued that the rise in the fuel cost which led to the fuel cost adjustment applicable only to the H.T. consumers was unreasonable and discriminatory since the burden of rise in fuel cost was placed only on the H.T. consumers. In our opinion, this argument has no merit. The H.T. consumers, including the power intensive consumers, are known power guzzlers and in power intensive industries, electricity is really a raw material. This category of consumers, therefore, forms a distinct class separate from other consumers like I.T. consumers who are much smaller consumers. There is also a rational nexus of this classification with the object sought to be achieved. Moreover, the power intensive consumers have been enjoying the benefit of a concessional tariff for quite sometime, which too is a relevant factor to justify this classification. Placing the burden of fuel cost adjustment on these power guzzlers, who had the benefit of concessional tariff for quite sometime and have also a better capacity to pay cannot, therefore, be faulted since the consumption in the power intensive industry accounts for a large quantity.... It is not unreasonable to take the view that the thermal power has become costlier on account of the increase in fuel cost and could notion-ally be allocated to the consumption by H.T. and power intensive consumers, and, therefore, the fuel cost adjustment is made applicable to them alone. In our opinion, the argument on behalf of the Board in this behalf is not unreasonable.

33. The formula of computation of the rates of fuel surcharge not being under challenge, in view of the above decisions of the Supreme Court, it is not open to the Petitioners to challenge the rates on the ground that the rates have been fixed on the basis of sale of electricity (units) to only specified categories of consumers.

34. I shall now take up two specific issues relating to the computation of the fuel surcharge. It has been contended that the purchase of electricity from Tenughat Vidyut Nigam Limited (TVNL) has been treated as a component of H3 i.e. "any other source", but as the TVNL came into existence only in the year 1996-97 it

could not be treated as a relevant factor having regard to the fact that in computing the fuel surcharge, increase in the average unit rate of purchase of electricity has to be calculated treating 1991-92 as the base year. Secondly, it has been contended that the Board has treated the supply of electricity by the DVC to the Tisco as "deemed supply" by the Board to Tisco at a different rate which is not in accordance with the formula. Both the objections in my opinion are well founded.

35. It is not in dispute that TVNL came into existence in 1996-97 whereas while calculating the increase in the average unit rate of purchase of electricity 1991-92 is to be treated as the base year. As a matter of fact, as seen above, it was on that ground, namely, that a different base year i.e. 1992-93 was provided for computing the increase in the average unit rate of purchase of electricity from external sources, that this Court directed the Board to consider amending Clause 16.10.3 as to provide for the same base year i.e. 1991-92 with respect to both the increase in the average cost of generation and increase in "the rates of purchase, and accepting the verdict of this Court the Board amended the last part of Clause 16.10.3. Purchase of electricity from TVNL which admittedly came into existence in the year 1996-97, therefore, cannot be treated as component of H3 i.e. increase in the average unit rate of purchase of electricity from "any other source". As a matter of fact, the case of Petitioners is that the TVNL is nothing but a unit of the Board in disguise of a subsidiary company and, therefore, could not be treated as a component of H3. It may not be necessary to go behind the veil of the separate legal character of the TVNL. The fact that TVNL, did not exist in the year 1991-92 and came into existence only in the year 1996-97 is sufficient to justify its deletion as a component of H3. Counsel for the Board very fairly submitted the TVNL is to be treated as a source, some mechanism has to be worked out, and the Court has then to see whether it is rational. Counsel submitted that if the Court comes to the conclusion that the supply from TVNL cannot be included, the consequence will be that the units purchased from TVNL would have to be kept out, which is not the intention underlying levy of fuel surcharge. It is like "escalation" clause, and the additional cost has to be reimbursed. The submissions are attractive but considering that it will result in creating a different base year, I am unable to accept them. The relevant clause of the formula, after amendment, reads, "the said increase to be calculated with respect to the year 1991-92" (vide last para of clause 16.10.3). The amendment has been made in the light of the decision of this Court. In the rejoinder affidavit the Board has taken the stand that the incremental rise in the 1996-97 over the 1991-92 base year from other sources including TVNL was less compared to DVC or NTPC. I am unable to appreciate this logic. It is apparent from the chart, Annexure O, that the increase in the average unit rate of purchase has been worked out with reference to 1991-92. Increase in the unit rate has been similarly worked out in the case of TVNL, but the relevant base year column has been shown as blank though in the counter affidavit, para 37, it has been stated that the same base year i.e. 1991-92 has been applied, even when TVNL

admittedly did not exist prior to 1996-97. In my view, on the admitted facts, it is not possible to allow the Board to include purchase of electricity as a component of H3 without suitably amending the formula in accordance with law.

36. As regards "deemed supply" by the Board to Tisco it appears that under a tripartite agreement between the Board the DVC and the Tisco, with the consent of the State Government, the electricity is being supplied directly by the DVC to the Tisco but such supply is treated as made by the Board to the Tisco. It seems to be an admitted position that the tariff rates of the Board are higher than the tariff rates of the DVC. But since legally the Tisco cannot directly buy electricity from the DVC it has entered into agreement with the Board to buy electricity directly from DVC but pay the amount at the Board's rates. Though the amount is paid to DVC such payment is adjusted against the amount due from the Board to it i.e. DVC. As seen above, DVC is one of the external sources represented by D1. The Board buys the electricity from DVC, amongst others, and pays to it for the same. The increase in the average unit rate of purchase from it is reflected by D3. However, so far as the supply made by DVC to Tisco is concerned, it is treated as a "deemed supply" by the Board. While it may be permissible to charge the Tisco at the rates prescribed by the Board, i.e. at rates higher than the DVC rates, and it may also be permissible to treat sale of such electricity sold by DVC to Tisco as deemed supply/sale by the Board to Tisco, I am not able to appreciate how two rates of supply/sale can be permitted for the purpose of computing D3. In the ordinary course, in the absence of any tripartite agreement referred to above, the Board would have supplied/sold electricity to Tisco and charged at its rates. Such supply would have been made from the electricity either generated by it at its own generating station or purchased from external sources including DVC. Clause 16.10.3.1 provides for computation of the cost of generation at the Board's own generating station; as regards purchase of energy from other sources, the said clause lays down that the actual increase in average unit rate of purchase will apply. If the Board is purchasing electricity from different sources for the purpose of D3, E3, F3 etc. the actual increase in the average unit rate of purchase so far as the particular source is concerned, is to be taken into consideration. DVC has thus to be treated as one source. The source being one there cannot be two rates of purchase of increase in the average unit rate of purchase. It may be mentioned here that NTPC sells electricity generated at different power stations, namely, Farakka, Kahalgaon, Talchar or Anta and though the increase in the average unit rate is not the same, it charges the Board at a uniform rate. It is an admitted position that though the DVC has revised its tariff from year to year the Board so far has not recognised the revision and has been paying it at the rates applicable in the year 1991-92. In the agenda note dated 26.11.98 it has been clearly mentioned "that during the 1996-97 the DVC rates for the purchase remained unchanged but the rates applicable to deemed supply to Tisco rose upto 13P/Kwh". In these premises, I am unable to appreciate how the Board can treat the sale of electricity by the DVC to Tisco as a separate class or category for the purpose of computing D3.

The computation of D3 to this extent, therefore, does not appear to be correct.

37. The computation of the rates of fuel surcharge by the impugned circular for the years 1996-97 and onwards so far as it relates to the purchase of electricity from TVNL and "deemed supply" by the Board to Tisco thus does not appear to be in accordance with the formula. Fuel surcharge has to be calculated strictly within the framework of the formula. If any extraneous element has crept in, the computation to that extent must be held to be not in accordance with law and accordingly modified.

38. The computation of fuel surcharge was also assailed on the ground of non-disclosure of details to A2, B2 etc. It was submitted that as the incremental rise in the cost of generation at the Board's own generating stations and the average unit rate of purchase of electricity from external sources represented by different denominators in the formula is not the same, the Board ought to have given the details of the quantum of units sold respectively out of the units generated and purchased from the external sources. The submission has mere academic value. It is true that in the matter of calculation of fuel surcharge the units sold from out of units generated at the Board's power station and units purchased from external sources are shown by separate denominators i.e. A2, B2, C2 and D2, E2, F2 etc. respectively, but it would appear that after the electricity generated at the Board's stations or purchased from external sources are fed into transmission lines, they lose their separate identity as electricity generated at the Board's own power stations or purchased from other sources. It is difficult thereafter to find out as to how much of electricity fed in the transmission lines came from the Board's own power stations and how much of it from external sources. Counsel for the Board pointed out that this aspect of the matter was considered by the Committee constituted by this Court and the two members who had made recommendations in favour of consumers, namely, Shri B.K. Gaur and Shri V. Sinha, did not find fault with the Procedure. It may be useful to quote the relevant part of their recommendation as under:

The formula given in the Tariff provides use of individual figures of units sold out of each generating stations and each source of purchase. These individual figures have not been used and calculations are made on total units. This is technically wrong implementation of the formula, although there will be difference in result (s).

I, therefore, do not find any substance in the aforesaid objection regarding clubbing of the numerators.

39. Submission was also made that the Board pays large amounts as delayed payment surcharge (DPS) to the DVC, NTPC etc. contributing to further increase in the average unit rate of purchase of electricity resulting in higher fuel surcharge and causing, thus, additional burden on the consumers. The fact that the Board had to pay large amounts as DPS to the external agencies from which it has been purchasing electricity is more or less an admitted position. The case

of the Board, however, is that the default in payment was mainly on account of defaults committed by the consumers themselves. It is said that as much as 3,200 crores of rupees are due from the consumers as a result of which the Board is not in a position to pay to the agencies resulting in additional burden by way of DPS. I find substance in the stand of the Board. The fact that the consumers at large have not been paying the dues on time and many of them have been making only part payment on the strength of interim orders of Courts are facts which are not disputed. If the consumers do not pay the dues to the Board, they cannot be heard to make any complaint against payment of DPS by the Board to the external agencies.

40. Another submission was as to non-accounting of Rs. 100 crores paid by the Coal Companies to the Board. According to the Petitioners, if the said amount has been shown in the accounts the rate of fuel surcharge would have been different. This aspect of the matter has been dealt with by the Board in its rejoinder affidavit wherein it has been stated that as against the total claim of Rs. 356.20 crores on account of loss due to grade slippage, short supply of coal, supply of stones etc. the Coal Companies have agreed to pay Rs. 100 crores in full and final settlement of the claim but though such decision was taken on 30.8.98 actual payment has not been made till date. In any view, it is pointed out, payment of the amount would be relevant consideration while calculating the rate of fuel surcharge for the year 1998-99 and not 1997-98.

41. I may mention here that in course of hearing, to buttress their respective stand on different issues, counsel for the parties referred to various charts and tables. While endeavour of the counsel for the Petitioners was to find loopholes in the calculation of the fuel surcharge, the attempt of the counsel for the Board was to explain the discrepancies. As held by the Supreme Court in *Ashok Soap Factory and Another Vs. Municipal Corporation of Delhi and Others*, , it is not open to challenge the rates of electricity tariff on any "demonstrative ground", the tariff can be challenged only on the ground of unreasonableness or arbitrariness. In this view of the matter, I have considered it unnecessary to refer to the different charts and tables, which are parts of the affidavits of the parties. In the matter of the challenge of fixation of the rates of fuel surcharge the scope of adjudication is even narrower. The formula not being under challenge, the question of unreasonableness or arbitrariness hardly arises for consideration except what has been argued and considered in the earlier paragraphs, the only point for consideration is whether the computation is in accordance with the formula, that is to say, whether any relevant factor has been omitted from consideration or any irrelevant factor has been taken into consideration. Where the computation is found to be made in accordance with the formula, that is, taking into account the relevant factors alone, the Court is not supposed to check the accounts. In such matters, it is not the function of the Court to act as accountant. The accountants of the Board are subject to scrutiny by a Constitutional body, namely, the CAG.. It is on the basis of the audited accounts that the rate of surcharge is finally fixed. The two grounds, which this Court has

found to be extraneous, have been identified above and only to that extent the computation can be said to be erroneous. This is in accord with the well known principle that judicial review is permissible of the decision making process and not the correctness or otherwise of the decision.

42. Before I close the discussion, I must notice the submissions of the counsel for the Petitioners regarding delay in finalising the rate of fuel surcharge. It was submitted that in terms of Clause 16.10.3.1 at the end of each year the Board is supposed to ascertain the increase in the average cost of fuel in respect of energy generated from the Board's own generating stations and increase in the average unit rate of purchase from the external sources and then calculate the rate of fuel surcharge. In practice, however, the Board takes years to finalise the rates which is detrimental to the interest of the industry. It was pointed out that Section 51 of the Electricity (Supply) Act contemplates provisional payment where the price of electricity cannot be ascertained until after the end of year of account. I share the concern of the Petitioners in this regard. A proper planning is sine qua non of successful entrepreneurship. As is sometimes said, a thing well begun is half done. If the industry is kept in dark as to the amount it has to pay as fuel surcharge and after inordinate delay the rate is finally fixed with retrospective effect, it may adversely affect the industry, specially the power intensive industries where electricity is a major raw material. It is true that unless the account is finally audited by the agency i.e. CAG, the rate cannot be finally fixed. But this should not stand in the way of the Board in fixing provisionally the rates for the year immediately after the end of the accounting year, subject to adjustment as soon as may be after the liability is ascertained. This is the spirit of Section 51 of the Electricity (Supply) Act. Clause 16.10 is an exception to the general rule that the existing tariff can be replaced by the new tariff. The clause empowers the Board not only to impose but also to modify the rate of fuel surcharge without the approval of the State Government, as in the case of general tariff u/s 49. Since the Board is supposed to be generally aware of the trend of the cost of generation or purchase, I do not think it should be difficult to work out provisional rate after the end of the accounting year, notify the same to enable the bonafide consumers to make the payment saving them of abrupt increase and increased financial burden. I hope and trust the Board will consider the matter in the right perspective and do the needful in this regard.

43. On the basis of the above discussions I come to the conclusion that there is no infirmity in the fixing of the rates of fuel surcharge except on two grounds, viz, inclusion of the so called increase in the average unit rate of purchase from TVNL as a component of H3 and charging of a different unit rate of purchase with respect to supply of electricity by the DVC to Tisco as deemed supply by the Board to Tisco.

44. In the result, the Board is directed to re-work out the rates of fuel surcharge for the years 1996-97 onwards after (a) deleting the purchase of electricity from the TVNL, as a component of H3, and (b) treating the so called "deemed supply"

i.e. the supply of electricity by DVC to Tisco as supply made by DVC to the Board, as an element of D3. After re-working out the rates the Board will serve fresh bills on the concerned consumers which they shall pay within the stipulated period, failing which their electric line (s) will be disconnected in accordance with law.

45. These writ petitions are, thus, allowed in part to the extent indicated above. There will be no order as to costs.

A.K. Ganguly, J.

46. I agree.