Graphite India Ltd. And Another vs Durgapur Projects Ltd. And Others on 27 August, 1999

Equivalent citations: AIR 1999 SUPREME COURT 3289, 1999 AIR SCW 3275, (1999) 6 JT 317 (SC), 1999 (5) SCALE 260, 1999 (4) LRI 612, 1999 (7) ADSC 691, 1999 (7) SCC 645, 1999 (9) SRJ 283, 1999 (6) JT 317, (2001) 1 MAD LW 886, (1999) 7 SUPREME 417, (1999) 5 SCALE 260, (2000) 1 CIVLJ 675

Author: D.P. Wadhwa

Bench: M.B.Shah, D.P.Wadhwa

PETITIONER:
GRAPHITE INDIA LTD. AND ANOTHER

Vs.

RESPONDENT:
DURGAPUR PROJECTS LTD. AND OTHERS

DATE OF JUDGMENT: 27/08/1999

BENCH:
M.B.Shah, D.P.Wadhwa

JUDGMENT:

D.P. Wadhwa, J.

Leave granted.

The appellant Graphite India Ltd. ('Graphite' for short) was getting electricity supply for its project from respondent Durgapur Projects Ltd. ('DPL' for short). Graphite challenged the increase in tariff by filing three successive writ petitions in the Calcutta High Court. The learned single Judge of the High Court allowed the writ petitions holding that the enhancement of tariff and the notices of enhancement issued by DPL for fixation of electricity tariff were contrary to the provisions of Section 57 of the Electricity (Supply) Act, 1948 ('Supply Act' for short) read with the statutory requirements of Schedule VI of that Act. Against that judgment of the learned single Judge DPL filed an appeal before the Division Bench of the High Court which was allowed by the impugned judgment dated June 3, 1998. Writ petitions filed by Graphite were dismissed. Aggrieved Graphite has come to this Court.

Facts are not much in dispute. DPL was granted sanction by the State of West Bengal under Section 28(1) of the Indian Electricity Act, 1910 ('Electricity Act' for short) by order dated August 28, 1964 to engage in the business of supplying energy to the public in accordance with the conditions specified therein. Conditions 5, 6 and 9 are relevant and are as under:-

> "NOW THEREFORE, in exercise of the power concerned by sub-section (1) of section 28 of the Indian Electricity Act, 1910 (Act 9 of 1910), the Government is pleased, after consulting the West Bengal State Electricity Board, and with the consent of the local authorities concerned namely, the Faridpur Union Board, Durgapur Union Board, Gopalpur Union Board and Jomua Union Board, to give the said Durgapur Projects Limited (hereafter referred to as the sanction-holder), sanction to engage in the business of supplying energy within the said area, subject to the following conditions:-
>
> 5) that the provisions of section 11, section 17, section 18 sub-section (1) and (4) of section 21, section 24 and section 26 of the Indian Electricity Act, 1910 (Act 9 of 1910) and the provisions of the Indian Electricity Rules, 1956, shall apply as if the sanction-holders were licensees;
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> 6) that the rates per unit for supply of energy shall be fixed and adjusted from time to time in conformity with the provisions laid down to the Sixth Schedule to the Electricity (Supply) Act, 1948, and with the approval of the State Government;
>
> 9) that the sanction hereby given shall be liable to be rescinded or revoked in case the sanction-holders fail to supply energy efficiently and satisfactorily or fail to comply with any of the conditions on which this sanction is granted;"

DPL entered into agreement with Graphite for supply of energy to it which agreement was renewed from time to time, the last on record being effective from January 21, 1984. Clause 30 of the Agreement is relevant for our purpose, which is as under:-

> "30. This agreement shall be read and construed as subject in all respects to the provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 and of the Rules for the time being in force thereunder, so far as the same respectively may be applicable."

On February 9, 1991 DPL wrote to the State Government to accord the necessary approval to the revision in the rates and charges, details of which were given in the statement annexed with the letter for supply of power to certain categories of consumers w.e.f. April 8, 1991. However, to the Graphite a letter was addressed on February 7, 1991 informing it of the increase in the tariff to certain categories of consumers w.e.f. April 8, 1991. Graphite was told that all consumption of electricity commencing from the date of first meter reading taken on April 8, 1991 or thereafter shall be charged in accordance with the revised rates and charges in supersession of the existing rates and charges. Graphite fell in the category (Rate 'A' for industrial consumers) where increase in tariff was

applicable. Graphite protested and when DPL threatened to disconnect the supply of electricity Graphite filed a writ petition on October 10, 1991 in the High Court. While the writ petition was pending DPL again revised its tariff in 1993 (w.e.f. November 1, 1993) and 1995 (w.e.f. February 10, 1995). This led the Graphite to file two more writ petitions in the High Court challenging further revision in tariff. All these three writ petitions were allowed by a common order of learned Single Judge on October 3, 1997. As noted above on appeal filed by DPL the Division Bench of the High Court set aside the order of the learned single Judge and dismissed the writ petitions.

In the present appeal filed by Graphite there are four respondents, namely, (1) Durgapur Projects Ltd., (2) State of West Bengal, (3) The Secretary and Controller of Finance and Accounts, Durgapur Projects Ltd. and (4) Damodar Vally Corporation. DPL and the State of West Bengal are the contesting respondents.

Before we consider the rival contentions of the parties it may be appropriate to set out the relevant provisions of the Acts which bear upon the controversy in the appeal :-

> The Indian Electricity Act, 1910 Part I "2. Definitions - In this Act, expressions defined in the Indian Telegraph Act, 1885 (13 of 1885) or in the Electricity (Supply) Act, 1948 (54 of 1948), have the meanings assigned to them in either of those Acts, and unless there is anything repugnant in the subject or context, -

(h) "licensee" means any person licensed under Part II to supply energy;"

> Part II "3. Grant of licenses - (1) The State Government may, on application made in the prescribed form and on payment of the prescribed fee (if any) grant after consulting the State Electricity Board, a license to any person to supply energy in any specified area, and also to lay down or place electric supply-lines for the conveyance and transmission of energy, -
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> (a) where the energy to be supplied is to be generated outside such area, from a generating station situated outside such area to the boundary of such area, or
>
> (b) where energy is to be conveyed or transmitted from any place in such area to any other place therein, across an intervening area not included therein, across such area.
>
> (2) In respect of every such license and the grant thereof the following provisions shall have effect, namely:-
>
> (a) ..... (b) ..... (c) ..... (d) .....
>
> (e) the grant of a license under this Part for any purpose shall not in any way hinder or restrict the grant of license to another person within the same area of supply for a like purpose;

(f) the provisions contained in the Schedule shall be deemed to be incorporated with and to form part of, every license granted under this Part, save in so far as they are expressly added to, varied or excepted by the license, and shall, subject to any such additions, variations or exceptions which the State Government is hereby empowered to make, apply to the undertaking authorised by the license:

Provided that where a license is granted in accordance with the provisions of clause IX of the Schedule for the supply of energy to other licensees for distribution by them, then, in so far as such license relates to such supply, the provisions of clauses IV, V, VI, VII, VIII and XII of the Schedule shall not be deemed to be incorporated with the license."

Part III "28. Sanction required by non-licensees in certain cases - (1) No person, other than a licensee, shall engage in the business of supplying energy to the public except with the previous sanction of the State Government and in accordance with such conditions as the State Government may fix in this behalf, and any agreement to the contrary shall be void.

(1A) The State Government shall not give any sanction under sub-section (1)-

(a) except after consulting the State Electricity Board; and

(b) except with the consent -

(i) in any case where energy is to be supplied in any area for which a local authority is constituted, of that local authority;

(ii) in any case where energy is to be supplied in any area forming part of any cantonment, aerodrome, fortress, arsenal, dockyard or camp or of any building or place in the occupation of the Government for defence purposes, of the Central Government;

(iii) in any area falling within the area of supply of a licensee, of that licensee:

Provided that except in a case falling under sub-clause (ii), no such consent shall be necessary if the State Government is satisfied that such consent has been unreasonably withheld.

(2) ....."

The Electricity (Supply) Act, 1948 "2. Interpretation In this Act, unless there is anything repugnant in the subject or context, (6) "licensee" means a person licensed under Part II of the Indian Electricity Act, 1910, (9 of 1910) to supply energy or a person who has obtained sanction under section 28 of that Act to engage in the business of supplying energy but the provisions of section 26 or 26A of this Act notwithstanding, does not include the Board or a generating company;"

"57. Licensee's charges to consumers The provisions of the Sixth Schedule shall be deemed to be incorporated in the license of every licensee, not being a local authority -

(a) in the case of a license granted before the commencement of this Act, from the date of the commencement of the licensee's next succeeding year of account; and

(b) in the case of a license granted after the commencement of this Act, from the date of the commencement of supply, and as from said date, the licensee shall comply with the provisions of the said schedule accordingly, and any provisions of the Indian Electricity Act, 1910 (9 of 1910) and the license granted to him thereunder and of any other law, agreement or instrument applicable to the licensee shall, in relation to the licensee, be void and of no effect in so far as they are inconsistent with the provisions of section 57A and the said Schedule.

57A. Rating Committees (1) Where the provisions of the Sixth Schedule are under section 57 deemed to be incorporated in the license of any licensee, the following provisions shall have effect in relation to the said licensee, namely -

(a) the Board or where no Board is constituted under this Act, the State Government, -

(i) may, if satisfied, that the licensee has failed to comply with any of the provisions of the Sixth schedule; and

(ii) shall, when so requested by the licensee in writing, constitute a rating committee to examine the licensee's charges for the supply or electricity and to make recommendations in that behalf to the State Government:"

SCHEDULE VI FINANCIAL PRINCIPLES AND THEIR APPLICATION "1. Notwithstanding anything contained in the Indian Electricity Act, 1910 (9 of 1910), except sub-section (2) of section 22A, and the provisions in the license of a licensee, the licensee shall so adjust his charges for the sale of electricity whether by enhancing or reducing them that his clear profit in any year of account shall not, as far as possible, exceed the amount of reasonable return:

PROVIDED that such charges shall not be enhanced more than once in any year of account:

PROVIDED FURTHER that the licensee shall not be deemed to have failed so to adjust his charges if the clear profit in any year of account has not exceeded the amount of reasonable return by twenty per centum of the amount of reasonable return:

PROVIDED FURTHER that the licensee shall not enhance the charges for the supply of electricity until after the expiry of a notice in writing of not less than sixty clear days of his intention to so enhance the charges, given by him to the State Government and to the Board:

PROVIDED ALSO that if the charges of supply fixed in pursuance of the recommendations of a rating committee constituted under section 57A are lower than those notified by the licensee under and in accordance with the preceding proviso, the licensee shall refund to the consumers the excess amount recovered by him from them:

PROVIDED ALSO that nothing in this schedule shall be deemed to prevent a licensee from levying, with the previous approval of the State Government, minimum charges for supply of electricity for any purpose.

1A. The notice referred to in the third proviso to paragraph I shall be accompanied by such financial and technical date in support of the proposed enhancement of charges the as State Government may, by general or special order, specify."

There are various clauses in this Schedule defining capital base, clear profit, debenture capital, intangible assets, ordinary capital, original cost, preference capital, reasonable return, standard rate, etc. all for adjusting the charges for sale of electricity to match with reasonable return.

There is an earlier letter dated August 29, 1986 from State Government to DPL whereby approval for enhancement of tariff in 1986 was granted and it was suggested that DPL tariff should be fixed in the lines of West Bengal State Electricity Board (WBSEB) rates. This letter we reproduce as under:-

"Sir I am directed to refer to your letter No. COM/Tafiff/1-2025 dated 24.4.86 on the above subject and to say that the matter was taken up with the Power Deptt. of this Govt. for concurrence to the enhancement of DPL's tariff from 1.7.86. The Deptt. has since suggested that for the sake of uniformity DPL's tariff should be fixed in the lines of WBSEB's rates which have been revised from July, 1986. Power Deptt.'s original letter No. 404-Power/III dated 22.5.86 to the Secretary, WBSEB containing the revised tariff rates of WBSEB has been made over to you which may be returned along with the reply. An extract of the Power Deptt's note in this regard is enclosed. I am now to request you kindly to let this Deptt. have your views as to whether the proposed revision will meet the requirement of DPL."

Mr. Dipankar Gupta, learned counsel for the Graphite made the following submissions:-

1. DPL is a sanction-holder under Section 28 of the Electricity Act. DPL is thus permitted to engage in the business of supplying energy to the public "in accordance with such conditions as the State Government may fix in this behalf". Reference may be made to condition No. 6 imposed by the State Government granting sanction to

DPL by order dated August 28, 1964. Rates of electricity have thus to be fixed in conformity with the provisions of the Sixth Schedule to the Supply Act and with the approval of the State Government. DPL in revising the tariff has contravened condition No. 6.

2. Language of Sixth Schedule to Supply Act casts an obligation upon the "licensee" to adjust his charges in a particular manner but shall not "exceed the amount of reasonable return". "Licensee" would include sanction-holder in view of the definition given in Section 2(6) of the Supply Act. Alternatively, even otherwise the Sixth Schedule of the Supply Act is incorporated in the "license of every licensee" by virtue of Section 57 of that Act and since the definition "licensee" includes a sanction-holder the phrase "license of every licensee" would make the terms and conditions of the Sixth Schedule applicable to sanction as well. Compliance with the Sixth Schedule is thus by force of law an obligation of the sanction-holder. Sixth Schedule has been devised to be a financial discipline of the supplier of energy and a protective provision for the consumer. A consumer whether falling within the area of a "licensee" or of a sanction-holder should not be exposed to different considerations so far as tariff fixation is concerned. It is the obligation of the sanction-holder before revising the tariff to comply with the provisions of the Sixth Schedule and to obtain approval of the State Government.

3. 60 days clear notice to the State Government before tariff revision is effected, is mandatory. This provision, which is conceived for the benefit of the consumer and in the public interest, has to be held as mandatory and cannot be waived. This provision is not for the "benefit" of the State Government. It is to enable the State Government to examine the issue of tariff revision.

State Government can complete its examination in a shorter period than 60 days and grant approval but it cannot waive that notice can be for a period less than 60 days. Admittedly while effecting first revision in tariff 60 days notice was not given to the State Government. A question also arises whether there was any approval of the State Government to the proposed increase sought by the notice dated February 9, 1991.

4. Communication of the State Government dated April 27, 1992 though it grants approval to the increase with effect from April 8, 1991 is of no effect. Approval could not be given retrospectively more than a year after the increase. This letter dated April 27, 1992 of the State Government merely states that rate 'A' (for industrial consumer) had already been increased with effect from April 8, 1991 and the approval was with regard to other categories which had been left out during April 8, 1991 revision of tariff. There is nothing to indicate that the State Government ever applied its mind to the revision effective from April 8, 1991 and granted its approval. Letter dated April 27, 1992 is not an approval of the increase in tariff with effect from April 8, 1991. In any case DPL could not have effected tariff revision without prior approval which came only on April 27, 1992.

5. When DPL wrote letter dated February 9, 1991 seeking approval of the State Government the only reason for the revision indicated was that there was a direction of the State Government that DPL's power tariff should be fixed in the line with WBSEB for the purpose of uniformity. This is an extraneous consideration and contrary to requirements of Sixth Schedule of the Supply Act. Sixth Schedule provides certain accounting procedure, which, on the face of it, must relate to the individual supply company whose tariffs are under consideration. The accounting inputs can never be the same for two suppliers. Since the relevant conditions have been ignored and extraneous considerations have been relied upon the tariff revision with effect from April 8, 1991 is vitiated.

6. The word "shall" in the third proviso to Sixth Schedule is mandatory and it is wrong to contend that it is not mandatory and the mere use of the word "shall" is not decisive factor in deciding whether a provision is mandatory or directory. The provisions contained in the Sixth Schedule are for the benefit of the consumers and the Government is to act as a watch dog for their benefit in order to ensure that the enhancement of tariff is made within the parameters as laid down in the Sixth Schedule and that it is not framed in a manner which is arbitrary and unreasonable. Provisions contained in Sixth Schedule are made for public good and cannot be waived by the person proceeded against. It has been held that in case of failure to observe procedural provision which is of mandatory character it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. In these circumstances the third proviso to Sixth Schedule is a provision of mandatory nature and the State Government cannot waive the requirement of the notice. It has been rightly observed by the learned single Judge that the notice dated April 9, 1991 by DPL to the State Government is also not in conformity with para (1A) of the Sixth Schedule. Reliance has been placed to two decisions of this Court in State Bank of Patiala and others vs. S.K. Sharma (1996 (3) SCC 364) and Rajendra Singh vs. State of M.P. (1996 (5) SCC 460).

7. Object of Section 57 of the Sixth Schedule is to protect the consumer from arbitrary enhancement of rate for supply of electricity. Reliance has been placed on a decision of this Court in Poona Electric Supply Co. Ltd., Bombay vs. Commissioner of Income-tax, Bombay City I, Bombay (AIR 1966 SC 30). Any objection to the legality of the price and rate fixation is not beyond challenge as court is always entitled to go into the question and ascertain whether the price or rate fixation is valid or not. Reference has been made to a decision of this Court in Shri Malaprabha Coop. Sugar Factory Ltd. vs. Union of India and another (1994 (1) SCC 648), which was a case of price fixation under the Essential Commodity Act.

All these objections have been to the revision in tariff in 1991. In respect of tariff revisions in 1993 and 1995 Mr. Gupta submitted that though for both these enhancement and revision notices were given by DPL to the State Government and approval obtained, the enhancement was ex-facie illegal and without jurisdiction and arbitrary inasmuch as revision was not in accordance with the provisions contained in the Sixth Schedule to the Supply Act. He said there has been no consideration of relevant material and reliance was placed upon extraneous considerations as in the case of first revision in 1991. He said second and third revisions in 1993 and 1995 are consequently also vitiated.

Mr. A.K. Mitra, learned counsel appearing for DPL in reply referred to a decision of this Court in U.P. Avas Evam Vikas Parishad and another vs. Friends Coop. Housing Society Ltd. and another (1995 Supp. (3) SCC 456). This he said was an authority for the proposition that approval subsequently given can date back to the date of the request. He also said that in the first writ petition there was no challenge to the tariff revision on the ground of non-application of mind and it was only when the counter affidavit of the State Government dated January 10, 1992 mentioned that the approval had not been given that this ground of non- application of mind was advanced in two subsequent writ petitions.

Mr. V.R. Reddy, appearing for the State of West Bengal supported the impugned judgment of the Division Bench of the High Court. His submissions are summarised as under

:-

1. DPL is a wholly owned Government company of the State of West Bengal. It has been granted sanction under Section 28 of the Electricity Act. DPL is not a license holder under clause (h) of Section 2 of Electricity Act. It has no licence under Part II of that Act. Section 28 under which sanction has been accorded to DPL falls under Part III of the Act which applies to non-licensees. Although under Section 2(6) of the Supply Act DPL becomes a licensee for the purpose of said Act but that Act does not define the term "license" nor does it prescribe that sanction under Section 28 of the Electricity Act shall be treated as license. Definition of the "license" as given in Section 2(6) of the Supply Act has to be read as such unless there is anything repugnant in the subject or context. By virtue of Section 57 of the Supply Act Sixth Schedule is incorporated in the license of a licensee. Since DPL is not a holder of license the question of incorporation into the license of Sixth Schedule does not arise. Provisions of Section 57 and the Sixth Schedule do not apply to a sanction-holder under Section 28 of the Electricity Act.

These will not, therefore, apply to DPL.

2. Clause (5) of the sanction order dated August 28, 1964 incorporates certain sections of the Electricity Act and Indian Electricity Rules, 1956 to the sanction-holders as if they were licensees. Section 57 of the Supply Act and the Sixth Schedule thereto are not even made applicable to DPL. However, clause (6) of the sanction order directs that DPL shall fix the tariff on the principles enumerated in the Sixth Schedule. Applicability of Sixth Schedule is not by virtue of any statute but is contractual. Sanction order itself provides for consequences of breach of the provisions contained in the Sixth Schedule. Notice which was given to the State Government for tariff revision in 1991 was short by two days. Notices are to be given by the licensee to the State Government and to the Board under Sixth Schedule. Revision of tariff becomes automatically effective on expiry of 60 days. There is no provision for subsequent refund of excess if the Rating Committee reduces the tariff as proposed by licensee. Fourth proviso of the Sixth Schedule giving 60 days notice is procedural and not mandatory. State Government accepted the short notice without objection and waived the shortness of two days. It gave its approval to the first revision though retrospectively. Consumer has

no right to object that notice is short. It is a matter for the State Government. The period of notice is for the benefit of State Government and the Board. 60 days notice is not a condition precedent for revision of tariff becoming effective. Short term notice does not invalidate the revision. 60 days notice was given to Graphite. Tariff revision was not effected before the expiry of 60 days period. That provision for notice is directory and not mandatory and that substantial compliance would be enough and further mandatory provisions can be waived by the party concerned. Reference was made to a decision of this Court in State Bank of Patiala and others vs. S.K. Sharma (1996 (3) SCC 364).

3. Under the sanction order dated August 28, 1964 prior approval of the State Government is not required for tariff revision. The expression of the approval of the State Government as appearing in clause (6) of the sanction order does not mean that approval should be taken before hand. There is difference between the expressions "approval" and "permission" as held by this Court in U.P. Avas Evam Vikas Parishad & Anr. vs. Friends Coop. Housing Society Ltd. & Anr. [1995 Suppl. (3) SCC 456]. In that case this Court construed the expression "with the approval"

> and held that once approval is given, all the previous acts done or action taken in anticipation of the approval get validated.

4. Under the Sixth Schedule of the Supply Act no approval of the State Government is necessary at all. Approval of the first revision granted by the State Government may be at a subsequent stage but that ratified all actions taken by the DPL in contemplation of the approval.

5. Letter of the State Government dated August 29, 1986 contains guidelines of the State Government that for uniformity DPL's tariff should be fixed in the line of tariff of WBSEB. There is no allegation that DPL is exceeding tariff rate of the WBSEB or that DPL is making a clear profit in excess of 20% of the reasonable profit. DPL has been regularly suffering losses since 1989. It has been pointed out in the affidavit of DPL in the High Court filed in opposition in the second writ petition that DPL has been meeting losses and there has been no denial of the said factual statements. Relevant considerations were taken into account and this has been explained in the counter affidavit filed by DPL.

6. State Government has power to amend or add to the conditions of sanction order.

7. Consideration of WBSEB's tafiff is not an extraneous matter. WBSEB is the main supplier of the electricity in the State of West Bengal. It is the undertaking of the State Government. Tariff of WBSEB is comparable unit to decide upon responsibleness of tariff of DPL as the other similar supplier of electricity in the State of West Bengal.

8. It is wrong to allege that there was non-application of mind by the State in approving the tariff. There is no particulars alleged by the Graphite to show that there was non-application of mind by the State Government. That there was application of mind by the State Government as well as by DPL would appear from the counter affidavit of the State Government and from the letter dated April 27, 1992 approving the enhancement of the tariff by State Government and by DPL by its letter

dated February 9, 1991 and 405th meeting of the Board of Directors of DPL held on December 13, 1991. The very fact that the State Government reduced the tariff proposed by DPL to L.T. consumers showed application of mind by the State Government.

9. There is no allegation that the tariff of DPL exceeds that of WBSEB at the relevant times. In fact it was less at various times.

10. In the second and third writ petitions admittedly for tariff revision notices were duly served and approval obtained. There is no allegation in the writ petitions that on account of tariff revisions DPL was making clear profits on electricity account or more than 20% of the reasonable return. Rather fact remains that DPL was suffering losses on electricity account during the relevant times. From the year-wise losses of DPL it would appear that DPL was continuously suffering losses in the years 1992 to 1996. There is no denial of the said factual statement. From the affidavits filed by the State Government as well as by DPL it is apparent that the revision of tariff was made in accordance with law.

11. Burden of proof that the revision in tariff was not in accordance with law was on the Graphite, which it has failed to discharge [see The Amalgamated Electricity Co. Ltd. vs. N.S. Bhathena & Anr. (1964 (7) SCR 503)].

12. Scope of judicial review in tariff revision matter is very limited. It has been held that fixation of tariff is a matter of legislative policy [Hindustan Zinc Ltd. etc. etc. vs. Andhra Pradesh State Electricity Board & Ors. (1991 (3) SCC 299)].

Concluding his arguments Mr. Reddy said that the Graphite be directed to pay to DPL the amount of electricity charges which DPL could not collect due to interim order of injunction obtained by Graphite in the writ proceedings in the High Court. These charges, he said, amount to Rs.11,02,90,654.83 with delayed payment surcharge at the agreed rate as stipulated in the existing agreement of supply dated January 21, 1984.

Arguments have been in somewhat detail but the issues are not so complex. Broadly the contentions of the appellants are: Statutory requirements of Section 57 of the Supply Act read with Sixth Schedule have not been fulfilled inasmuch as relevant considerations required for the revision in tariff have not been kept in view and extraneous consideration has been taken into account. Relevant consideration is that for revision in tariff there should be reasonable profit and extraneous consideration is that the tariff fixed by WBSEB has been kept in view. For the first writ petition where revision in tariff was effected in 1991, contentions are (a) 60 days clear notice, which is mandatory, was not given, (b) there was no approval of the State Government before the increase was effected, and (c) subsequent approval at later date cannot be of any consequence.

Respondents on the other hand contend that applicability of Sixth Schedule to a sanction-holder under Section 28 of the Electricity Act is merely contractual and when approval is given it relates back to the date of increase in the tariff. All these points are basic around which arguments revolve.

That approval can date back we have been referred to a decision of this Court in U.P. Avas Evam Vikas Parishan and another vs. Friends Coop. Housing Society Ltd. and another (1995 Supp. (3) SCC 456). In this case notification under Section 28 of the U.P. Avas Evam Vikas Parishan Adhiniyam, 1965 was published on June 7, 1982. Immediately the appellant had sought for approval of the State Government through its letter dated July 27, 1982. The Government approved the scheme on August 24, 1982 (Section 28 is equivalent to Section 4(1) of the Land Acquisition Act, 1890). Thereafter declaration under Section 32 of the Adhibiyam (equivalent to Section 6 of the Land Acquisition Act) was published on February 28, 1987. Allahabad High Court in a writ petition set aside the declaration holding that since prior approval of the State Government was not obtained the notification under Section 28 and declaration under Section 32 of the Adhiniyam were invalid and inoperative. Question before this Court was whether it would be prior approval or approval given subsequent to the notification under Section 28 or declaration under Section 32 of the Adhiniyam was valid in law. This Court observed that if prior approval would have been a pre-condition for further steps, the Act would have said so and this not having been done what is material is to obtain the approval of the State Government. This Court said that the reason for this appeared to have been that when a scheme has been framed the land suitably required for effective implementation of the scheme should alone be acquired and not in excess in the guise of framing the scheme. Relying on its two earlier decisions in Life Insurance Corpn. of India vs. Escorts Ltd. (1986 (1) SCC

264) and The Lord Krishna Textile Mills Ltd. vs. Workmen (AIR 1961 SC 860) this Court held:-

> "This Court in Life Insurance Corpn. of India vs. Escorts Ltd. considering the distinction between "special permission" and "general permission", "previous approval" or "prior approval" in para 63 held that: "We are conscious that the word 'prior' or 'previous' may be implied if the contextual situation or the object and design of the legislation demands it, we find no such compelling circumstances justifying reading any such implication into Section 29(1) of the Act." Ordinarily, the difference between approval and permission is that in the first case the action holds good until it is disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently granted may validate the previous Act. As to the word 'approval' in Section 33(2)(b) of the Industrial Disputes Act, it was stated in Lord Krishna Textiles Mills Ltd. vs. Workmen that the Management need not obtain the previous consent before taking any action. The requirement that the Management must obtain approval was distinguished from the requirement that it must obtain permission, of which mention is made in Section 33(1)."

This Court then said that approval envisaged is to enable the Parishad, the appellant, to proceed further in implementation of the scheme framed. Unless approval is given by the Government the scheme may not be effectively implemented. This Court then said "nevertheless, once the approval is given, all the previous acts done or actions taken in anticipation of the approval get validated and the publications made under the Act thereby become valid".

It would thus appear that in the present case when approval was granted by the State Government by its letter dated April 27, 1992 the approval relates back and the revision would be effective from April 8, 1991. It is difficult to accept the argument of Graphite that the letter dated April 27, 1992 is not an approval of the increase in tariff effective from April 8, 1991. On December 23, 1991, DPL wrote to the State Government on the subject of general revision in power tariff by it and referred to its letter dated February 9, 1991. It said that the Board of Directors of DPL at 405th meeting held on December 13, 1991 approved the proposal for general revision of power tariff of DPL to all its consumers. DPL sought approval of the State Government to effect the tariff revision from March 3, 1992. It also pointed out that "the company (DPL) should have a benefit of revision in rate of supply to WBSEB as a whole for which Government should be moved". In its letter dated April 27, 1992 to DPL the State Government granted approval for revision of tariff for different categories of consumers and as regards rate applicable to Graphite the letter said "as existing w.e.f. 8.4.91". We do not think any argument is needed for us not to hold that ex post facto approval was granted for tariff revision as regards the supply to Graphite from April 8, 1991. It is also difficult to accept the argument of the Graphite that unless approval is granted there cannot be any revision in tariff. It is not the requirement of law even if Sixth Schedule of Supply Act is held to be applicable that approval has to be granted within 60 days of the notice given to the State Government. That revision can certainly become applicable after the expiry of the period of 60 days. If approval is not granted, the increased charges paid by the consumer are liable to be adjusted/refunded. In this connection reference may be made to the constitution of the Rating Committee under Section 57A of the Supply Act. Under fourth proviso to clause (1) of the Sixth Schedule it is provided that if charges of supply fixed in pursuance of the recommendations of a Rating Committee are lower than those notified by the licensee, the licensee shall refund to the consumers the excess amount recovered by him from them.

Under Section 28 of the Electricity Act for a person other than a licensee to engage in the business of supplying energy to the public two conditions are required: (1) sanction of the State Government and (2) in accordance with such conditions as the State Government may fix in that behalf. State Government is not free to give sanction except (A) after consulting State Electricity Board, (B) with the consent of local authority the licensee in their respective areas and (C) in case the energy is to be supplied in any area forming part of cantonment, aerodrome, etc. of the Central Government. The Central Government, however, cannot withhold its consent unreasonably. A question arises if the conditions imposed by the State Government while granting sanction are statutory or contractual.

Supply of electric energy is governed by two statutes, i.e., The Electricity Act and the Supply Act. A license is the requirement under the Electricity Act for a person to supply electric energy in any area. Supply Act provides for the rationalization of the production and supply of electricity and generally for taking measures conducive to electrical development. One of its main objects is to prevent such licensees from charging unreasonable rates to the detriment of the consumers. Under Section 57(1) of the Supply Act the provisions of the Sixth Schedule and the table appended to the Seventh Schedule thereto are deemed to be incorporated in the license of every licensee. The question involved depends on the provisions of the two Acts. While the Electricity Act deals with the supply and use of electrical energy and the rights and obligations of licensee and the sanction-holder under Part III of the Act, the Supply Act deals with the statutory powers and functions of the Central

Electricity Authority, State Electricity Boards and generating companies and also provides for fixing of charges to the consumers of energy by the licensee. Section 2(6) of the Supply Act thus defines licensee to mean a person licensed under Part II of the Electricity Act and also a person who has obtained sanction under Section 28 of that Act. But then the term 'license' and 'sanction' have not been defined. Section 2 also starts with the expression that "in this Act, unless there is anything repugnant in the subject or context" and, therefore, what licensee means under Section 2(6) can be different if there is anything repugnant in the subject or context. Had the term 'licensee' defined to mean a person licensed under Part II of the Electricity Act to supply energy or a person who had obtained sanction under Section 28 of that Act and the expression 'license' and 'sanction' to be construed accordingly things would have been much simpler. However, it is not that whenever the word 'licensee' has been used in the Supply Act it would also include the sanction-holder. In this connection we may refer to Section 41 of the Supply Act which provides for use by the State Electricity Board or the generating company to use for any of its purposes any transmission lines or main transmission lines of a licensee. Here 'licensee' would certainly mean a person who has been granted licensee under Part II of the Electricity Act as well who has been granted sanction under Section 28 of that Act. The question which falls for consideration is if the word 'licensee' in Section 57 of the Supply Act would include a sanction-holder. This Section provides that Sixth Schedule shall be deemed to be incorporated in the license of every licensee, not being a local authority and that would be notwithstanding anything contained in any provision of the Electricity Act or terms of the license granted to him under that Act or under any other law. Sixth Schedule of the Supply Act has thus over-riding effect. Sixth Schedule uses the expression 'license' in its various clauses. It would be difficult for us to hold that 'license' would mean 'sanction' as well. We have to see in what context the term 'license' had been used. When sanction was granted to DPL in the year 1964, much after the coming into force of the Supply Act, it was specifically mentioned that certain provisions of the Electricity Act would apply (clause 5) and clause 6 of the conditions provided that the rates for supply of energy shall be fixed and adjusted from time to time in conformity with the provisions of the Sixth Schedule to the Supply Act and with the approval of the State Government. If Sixth Schedule was applicable to a sanction-holder under Section 28 of the Electricity Act there was no occasion for the State Government to mention that rates would be fixed and adjusted in conformity with the Sixth Schedule. Moreover, when a licensee under Part II fixes and adjusts the rates in terms of the Sixth Schedule he is not required to obtain any approval by the State Government. Rather power under paragraph (1) of the Sixth Schedule would justify enhancement of the rate beyond that fixed earlier by the licensee or by any order of the State Government. Though a sanction-holder is bound to seek approval of the rates from the State Government there is no such limitation on a licensee. This term would show that conditions imposed by the State Government to a sanction-holder under Section 28 of the Electricity Act are contractual in nature and are not statutory.

In The Amalgamated Electricity Co. Ltd. vs. N.S. Bhathena and another (1964 (7) SCR 503) one of the questions raised was the effect of the Supply Act on the maximum of rates fixed by the Government under Section 3(2) of the Electricity Act which could be charged by the licensee. This Court held that under provisions of Sixth Schedule the limit imposed by the maximum rates, if any, prescribed by the State Government has no application and that licensee is free to adjust the rates in terms of Sixth Schedule. This Court further held that unless it is established that the rates charged

by the licensee resulted in a profit to it over the "reasonable return", the licensee would be held to have adjusted these rates in conformity with the requirements of the relevant provisions of the Supply Act. Court observed:-

> "There is no presumption that the rate charged by a licensee contravenes the statutory prohibition. It is for the party who alleges his right to relief to establish the facts upon which such relief could be obtained. It was, therefore, for the plaintiffs to prove by facts placed before the court that the rate charged offended the statutory provision. This they admittedly failed to do and we, therefore, hold that they were not entitled to the declaration and injunction which the learned Judge of the High Court granted."

Graphite has been unable to show that increase in tariff by DPL has contravened the provisions of the Sixth Schedule In State Bank of Patiala & Ors. vs. S.K. Sharma [(1996) 3 SCC 364] this Court observed that even a mandatory requirement can be waived by the person concerned if such requirement is in his interest and not in public interest. This is how the court said :

> "In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of the said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution bench in Managing Director, ECIL vs. B. Karunakar [(1993) 4 SCC 727]. The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called."

In Rajendra Singh vs. State of M.P. & Ors. [(1996) 5 SCC 460] this Court again affirmed that even a mandatory provision which is in the interest of the party can be waived by the party himself but if it is in public interest, it cannot be waived.

A person to whom sanction has been granted under Section 28 of the Electricity Act cannot exercise all the powers of a licensee under that Act. The powers to be exercised by holder of sanction are specifically mentioned under the Act. Reference may be made to Section 29 of the Electricity Act. Under that Act, the local authority may, by order in writing, confer and impose upon any person, who has obtained the sanction of the State Government under Section 28 to engage in the business of supplying energy, to the public, all or any of the powers and liabilities of a licensee under Sections 12 to 19, and the provisions of the said sections shall thereupon apply as if such person were a licensee under Part II of the Act. It is, thus, apparent that a sanction holder under Section 28 of the Electricity Act cannot be equated with a licensee under Part II of that Act.

Under Section 57 of the Supply Act the Sixth Schedule is applicable to a licensee. This Schedule has been made applicable to a sanction holder under the terms of the sanction. Third proviso to the Sixth Schedule provides that the licensee shall not enhance the charges for the supply of electricity until after the expiry of a notice in writing of not less than sixty clear days of his intention to so enhance the charges, given by him to the State Government and to the State Electricity Board. In the present case, when we are considering the applicability of the Sixth Schedule to the sanction holder, it is not the case that any notice was required to be given to the WBSEB. Why notice is required to be given to the State Government can be seen from the fact that the State Government or the State Electricity Board could constitute a rating committee to examine the licensee's charges for the supply of electricity and to make recommendations in that behalf to the State Government. What are the consequences of the recommendations of the rating committee find mention in Section 57A and in the Sixth Schedule. There is no question of any approval to be given by the State Government to the licensee. When notice of enhancement of charges is given in the case of sanction holder under the terms of the sanction. approval of the State Government is required. We have seen above, approval from the State Government can be retrospective. The bar in the proviso is only to the extent that enhanced charges may not be levied till after the expiry of sixty days notice to the Government. It is not that the State Government is required to grant its approval within 60 days period. As far as sanction holder is concerned, requirement of notice and approval by the State Government are not statutory conditions. These are contractual and could be varied or waived by the State Government. Conditions have been imposed by the State Government and not by virtue of any statute. It would, therefore, appear to us that the requirement of sixty days notice to the State Government is not mandatory. In its counter affidavit dated January 10, 1992 filed in the first writ petition, the State Government took the stand that the DPL before enhancing the tariff with effect from April 8, 1991 did not comply with the necessary formalities as required under the Supply Act read with the Government Order No.4520 (Power) dated August 28, 1964. Graphite was not informed of the said hike which came into force w.e.f. April 8, 1991. However, in the supplementary affidavit filed by the DPL subsequently it was stated that the Government of West Bengal by their letter dated April 27, 1992 duly approved the enhancement of tariff w.e.f. April 8, 1991. In the letter dated February 9, 1991 to the State Government, the DPL mentioned that the tariff was last revised for all categories of consumers w.e.f. August 1, 1988 and thereafter the cost of operation of maintenance of power plant has increased considerably. The revenue derived by the company from the existing tariff has been found to be quite inadequate to absorb spiraling cost and expenses. The State Government is also informed that by its order dated January 31, 1991, it had approved revision in tariff by the WBSEB w.e.f. March 1, 1991 and WBSEB has published a notification in the press announcing revision in their rates and charges. It was further pointed out that the State Government by its letter dated August 29, 1986 had directed the DPL's power tariff should be fixed in line with that of the WBSEB for the purpose of uniformity. In the letter seeking tariff revision for the year 1993-94, details were given as to how revision in tariff has been necessitated. As noted above Graphite has failed to show as to how it could be said that charges enhanced by the DPL exceed the amount of reasonable return as required under clause (1) of the Sixth Schedule. It is certainly a relevant consideration for the DPL to fix its tariff in line with the WBSEB for the purpose of uniformity and as Mr. Reddy put it for capping unless it is shown that tariff revision has contravened the provisions of the Sixth Schedule. State Government has not insisted of notice being less than 60 days. No prejudice is shown to have been caused to Graphite on the ground that notice

period fell short by two days. In the circumstances of the case requirement of 60 days notice does not appear to us to be mandatory.

We do not find merit in these appeals. These are dismissed with costs.

It has been pointed out that during the pendency of the writ petitions in the High Court, the Graphite has not been paying electricity charges on the basis of revised rates which was the subject matter of the challenge in the High Court. We have upheld the validity of the revised tariff from April 8, 1991. Graphite is, therefore, bound to pay the differential amount with such charges for delayed payment as per agreement dated January 21, 1984. Respondent Durgapur Projects Ltd. has pointed out that on that account an amount of Rs.11,02,90,654.83 with delayed payment surcharge at the agreed rate as per clause (23) of the agreement dated January 21, 1984 is due from Graphite to it. If there is any dispute regarding the amount claimed by the respondent the same shall be considered by the High Court and for that the party shall move the High Court which may pass appropriate orders. The amount which is not disputed by the Graphite shall be paid by it to the respondent within four weeks with charges for delayed payment.