Hindustan Zinc Ltd. Etc. Etc vs Andhra Pradesh State Electricity ... on 2 May, 1991

Equivalent citations: 1991 AIR 1473, 1991 SCR (2) 643, AIR 1991 SUPREME COURT 1473, 1991 (3) SCC 299, 1991 AIR SCW 1329, (1991) 2 SCR 643 (SC), (1991) 2 JT 403 (SC), 1991 (2) JT 403, 1991 (2) SCR 643

Author: Jagdish Saran Verma

Bench: Jagdish Saran Verma

PETITIONER:
HINDUSTAN ZINC LTD. ETC. ETC.

Vs.

RESPONDENT:
ANDHRA PRADESH STATE ELECTRICITY BOARDS & ORS.

DATE OF JUDGMENT02/05/1991

BENCH:
VERMA, JAGDISH SARAN (J)
BENCH:
VERMA, JAGDISH SARAN (J)
VENKATACHALLIAH, M.N. (J)
OJHA, N.D. (J)

CITATION:
1991 AIR 1473 1991 SCR (2) 643
1991 SCC (3) 299 JT 1991 (2) 403
1991 SCALE (1)869

ACT:
Electricity (Supply) Act, 1948: Ss. 4A, 16, 49, 59, 61, 63, 67, 67A, 68, 78-A-Orders No. 1014 and No. DE/COML/IV/2250/83/1
dated 13.12.1983 and Memo dated 18.11.1975.
S. 49-Tariffs-Power of fixation-No Unreasonable preference shall be shown to any person.
S. 16-Electricity Tariff-Revision-State Electricity Consultative Council-Non-consultation by State Electricity Board-Validity of.
S. 59-State Electricity Board-Finance-Tariff-Generation of surplus-Non-specification of quantum by State Government-Whether board can adjust its tariffs to generate a reasonable surplus.
Whether the surplus generated could be called

extravagant.

Whether revision of tariffs fall within the scope of judicial review.

Fuel cost adjustment-Charged only from particular category of consumers-Whether reasonable.

S. 78A-Tariffs-Directions by State Government-Whether binding on the Board.

Administrative Law: Delegated legislation-'Laying procedure'-Placing Electricity Board's annual financial statement u/s 61 of the Electricity (Supply) Act before the Legislature-Whether effectively controls exercise of Board's delegated power.

HEADNOTE:

The appellants are H.T. electricity consumers of various categories in the State of Andhra Pradesh. The respondent-State Electricity Board (the Board), by its orders B.P. Ms. No. 1014 dated 13.12.1983 revised upwards the tariffs for various categories of consumers including H.T. categories 1 (Industrial) and II (Non-Industrial); and by Memo No. DE/COML/IV/2250/83/I of the same date it revised upwards the electricity tariffs for highly power intensive industries falling under

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H.T. Category III. Tariffs consisted of three parts. The said three categories of H.T. consumers fell in Part A. H.T. consumers availing supply of electricity for irrigation and agricultural purposes were included in part B. Part C provided for miscellaneous and general charges. Tariffs were not revised for consumers availing H.T. supply for purposes of irrigation and agriculture falling in part B or L.T. supply for domestic cottage industries, public lighting and small poultry farms units.

Besides the energy charges, the H.T. consumers included in Part A were also required to pay at different rates effective from 1.9.1982 an additional charge levied as `fuel adjustment charges'; and some amount as `voltage surcharged' in accordance with the terms of the agreement entered into by the individual consumers with the Board.

The writ petitions filed by the appellants challenging the said upward revision of the Electricity Tariffs were dismissed by the High Court upholding the revision of tariffs made by the respondent-Board. Aggrieved the appellants preferred appeals by special leave to this Court.

It was contended on behalf of the appellants that: (1) the upward revision of tariffs by the State Electricity Board was invalid being made without prior consultation with the State Electricity Consultative Council as envisaged by s. 16 of the Electricity (supply) Act, 1948; (2) without specification of any surplus by the State Government the Board had no power to adjust its tariffs in a manner which

resulted in generating any surplus; (3) there is discrimination in recovery of the entire full cost adjustment from the H.T. consumers alone; (4) the upward hike of the tariffs for the H.T. consumers including power intensive consumers was arbitrary and discriminatory inasmuch as it was not related to the cost of generation and was based on irrelevant factors; and (5) and the Board had acted with profit motive losing its public utility character. Learned counsel representing the power intensive consumers also contended that in the absence of a clause relating to fuel cost adjustment in the G.Os. issued in respect of the power intensive units, they could not be governed by the clause of fuel cost adjustment made applicable to the H.T.tariffs.

Dismissing the appeals, this Court,

HELD: 1.1 The power of fixation of tariffs in the Board is provided by s. 49 of this Supply Act which requires the fixation of uniform

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tariffs ordinarily having regard particularly to the specified factors and enables fixation of such tariffs for any person having regard to the factors expressly stated and any other relevant factors providing further that no unreasonable or undue preference shall be shown to any person by the Board in exercise of its powers of fixing the tariffs. S. 59, requiring the Board to adjust the tariffs for the purpose of its finance is to be read along with s. 49. [667B-C; 668B-C]

1.2. The common premise for the purpose of the instant case that the revision of tariffs by the State Electricity Board is a question of policy may indicate that it would be open to the Consultative Council to advise the Board also on the question of revision of tariffs, and if such advice is given, then the Board must consider the same before taking the final decision. That, however, does not necessarily mean that where no such advice was taken from the Consultative Council or was rendered on account of the absence of any meeting during the relevant period, it would necessarily render invalid the revision of tariffs made by the Board. [664A-B]

Though it is advisable to seek advice of the Consultative Council before revision of the tariffs yet failure to do so does not result in invalidation of the revised tariffs. This consequence appears to be the logical and reasonable view to take of the requirement of s. 16 alongwith other provisions of the Act. [666A-B]

1.3 The consequence of non-compliance of s. 16 is not provided, and the nature of function of the Consultative Council and the force of its advice being at the best only persuasive, it cannot be said that revision of tariffs without seeking the advice of the Consultative Council renders the revisions of tariffs invalid. [664B-C]

1.4 It is also significant that the annual financial

statement containing all particulars relating to revision of tariffs is required to be submitted to the State Government in February each year and the State Government is required after receipt of such statement to cause it to be laid on the table of the House or Houses of the State Legislature and the said statement is open to discussion therein. The Board is bound to take into consideration any comments made on the said statement in the State Legislature. The 'laying procedure' before the legislature effectively controls the exercise of the delegated power of the Board. Thus there is ample provision for discussion on the revised tariffs in the State Legislature with the Board being bound to take into consideration any comments made thereon. [664C-D; 666A]

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Kerala State Electricity Board v. M/s. S.N. Govinda Prabhu & Bros. & Ors., [1986] 4 S.C.C. 198, relied on.

2.1 Mere generation of surplus by the Board as a result of adjusting its tariffs when the quantum of surplus has not been specified by the State Government after the 1978 amendment of s. 59 of the Act, cannot invite any criticism unless it is further shown that the surplus generated as a result of the adjustment of tariffs by the Board has resulted in the Board acting as a private trader shedding off its public utility character. If the profit is made not merely for the sake of profit, but for the purpose of better discharge of its obligations by the Board, it cannot be said that the public enterprise has acted beyond its authority. [669C-E]

2.2 The general principle for the Boards finance indicated by s. 59 is that prior to the 1978 amendment, tariffs could be adjusted to avoid any loss, but as a result of the shift made by the 1978 amendment the power could be exercised to generate a surplus and when the State Government specified the amount of surplus then the Board was bound to adjust the tariffs to ensure generation of the specified surplus. However, generation of a reasonable surplus in any year of account without specification of the surplus amount by the State Government was not contra-indicated in the provision inasmuch as the duty to generate a surplus was implicit with the added obligation to ensure generating surplus to the extent specified by the State Government when it was so specified by it. It cannot be accepted as a reasonable view that in the absence of specification of the surplus by the State Government, the Board could not adjust its tariffs to generate even a reasonable surplus in any year of account. [668E-G]

2.3 In the instant case the Board showed that the surplus resulting from upward revision of tariffs applicable to the H.T. consumers was for the purpose of better discharge of its other obligations under the Supply Act and in effect the same has merely resulted in a gradual withdrawal of the concessional tariffs provided earlier to the power intensive consumers which did not in its opinion

require continuance of the concessional tariffs any longer. It was not proved that this assertion of the Board was incorrect or there was any reasonable basis to hold that the upward revision of tariffs applicable to H.T. consumers was merely with a desire to earn more profits like a private trader and not to generate surplus for utiliasation of the funds to discharge other obligations of the Board towards more needy consumers, such as agriculturists, or to meet the needs of expansion of the supply to deserving areas. [669E-G]

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3.1 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 L.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 some time, 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 tariffs, for quite some time and have also a better capacity to pay, cannot, therefore, be faulted since the consumption in the power intensive industries accounts for a large quantity. [670B-C]

3.2 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 notionally be allocated to the consumption by H.T. and power intensive consumers and, therefore, the fuel cost adjustment is made applicable to them alone. [671E-F]

4.1 The Court would not strike down the revision of tariffs as arbitrary unless the resulting surplus reaches such a height as to lead to the inevitable decision that the Board has shed its public utility character and is obsessed by the profit motive of private entrepreneur in order to generate a surplus which is extravagant. [672A-B]

4.2 The surplus generated by the Board as a result of revision of tariffs during the relevant period cannot be called extravagant by any standard to render it arbitrary permitting the striking down of the revision of tariffs on the ground of arbitrariness nor is it discriminatory. It was pointed out on behalf of the Board that its action was based on the opinion of Rajadhyaksha Committee's report submitted in 1980 and the formula of fuel cost adjustment was on a scientific basis linked to the increase in the fuel cost. This is a possible view to take and, therefore, the revision of tariffs by the Board does not fall within the available scope of judicial review. [672C-D]

Kerala State Electricity Board v. M/s. S.N. Govinda Prabhu and Bros. & Ors., [1986] 4 S.C.C. 198, relied on.

Shri Sitaram Sugar Company Limited & Anr. v. Union of India & Ors., [1990] 3 S.C.C. 223, followed.

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5. It cannot be said that the term relating to fuel cost adjustment had no application to the power intensive consumers during the relevant period. The Memo dated 18.11.1975 did not merely extend the non-specified 'terms and conditions of supply' applicable to normal H.T. consumers to the power intensive consumers but also "other charges" which were merely illustrated by the words, "such as Misc. charges, terms and conditions of supply not mention herein". This express provision in the said Memo clearly provided that except for the provision specifically made for power intensive consumers, in respect of all other provisions the power intensive consumers were to be governed by the provisions, by whatever name called, applicable to the normal H.T. consumers. However in the bills issued to the power intensive consumers the terms relating to fuel cost adjustment was specifically indicated. [673D-H; 674A]

Nav Bharat Ferro Alloys Ltd. v. A.P.S.E. Board Hyderabad, AIR 1985 A.P. 299, approved.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 2567-70 of 1985.

From the Judgment and Order dated 3.4.1985 of the Hyderabad High Court in Writ Petition No. 9403 of 1984.

Kapil Sibal, Additional Solicitor General, G.L. Sanghi, Anil B. Diwan, G. Ramaswamy, P.A. Choudhary, Kailash Vasudev, Naunit Lal, M.J. Paul, C.S. Vaidyanathan, U.K. Khaitan, Praveen Kumar, S. Murlidhar, Vineet Kumar, Vinod Bhagat and Mukul Mudgal for the Appellants.

Shanti Bhushan, V.R. Reddy, Rajendra Choudhary, S. Thananjayan, K. Ram Kumar for the Respondents.

V.B. Sharya for the Intervenor.

The Judgement of the Court was delivered by VERMA, J. These appeals by special leave are by several industrial concerns against the Andhra Pradesh State Electricity Board (hereinafter called 'the Board') challenging the common judgment of the Andhra Pradesh High Court in writ petitions filed by these concerns challenging the revision of the electricity tariffs by the Board by its proceedings contained in B.P. Ms. No. 1014 (Commercial) dated 13.12.1983 which came in to force on 15.1.1984. Prior to this revision, the tariffs were governed by B.P. Ms. No. 418 (Commercial) dated 12.1.1981. On 13.12.1983, two separate orders were issued by the Board revising the various tariffs. By one of them, namely, B.P. Ms. No. 1014, the tariffs for various categories of consumers

including H.T. categories I and II were revised. By the other order of the same date, namely, Memo No. DE/COML/IV/2250/83/I, the tariffs for highly power intensive industries were also revised upwards. Out of the appellants it was applicable to five units, namely, (1) Nav Bharat Ferro Alloys Ltd., (2) Andhra Sugars Ltd., (3) Ferro Alloys Corporation Ltd., (4) Grindwell Norton Ltd., and (5) A.P. Carbides Ltd. This upward revision of tariffs made by the Board by its two orders dated 13.12.1983 which were made effective from 15.1.1984, was challenged by the appellants in writ petitions filed in the Andhra Pradesh High Court on various grounds. The High court rejected all the grounds and dismissed the writ petitions by its common judgment now reported in A.I.R. 1985 A.P. 299. These appeals by special leave are against the High Court Judgment.

The appellants are all H.T. power consumers of one category or other. The tariffs consist of three parts:

> Part-A, Part-B and Part-C. Part-A provides for H.T. tariffs; Part-B for L.T. supply; and Part-C provides, inter alia, for miscellaneous and general charges. H.T. consumers in Part-A are broadly classified into three categories: H. T. Category-I (Industrial); H.T. Category-II (Non- Industrial); and H.T. Category-III comprising of power intensive consumers and some others. The Board retained the power to decide in accordance with the guidelines as to which industries were power intensive and which were not. This was the position in the tariffs of 1975. Subsequently, the Board began to deal with the power intensive industries by notifying tariffs for them separately from time to time. In effect, there were four classes of consumers availing H.T. supply; (1) H.T. consumers falling under H.T. Category- I (Industrial); (2) H.T. consumers falling under H.T. Category-II (Non-Industrial); (3) H.T. consumers falling under the category 'power intensive industries'; and (4) H.T. consumers availing supply of electricity for irrigation and agricultural purposes included in Part-B. The tariffs for these different categories of H.T. consumers were enhanced from time to time. For H.T. Category-I (Industrial), it was 21 paise in 1975, increased to 30 paise in 1979, 33 paise in 1980, 40 paise in 1981 and 48 paise in 1984. Likewise, there was corresponding increase in the energy rates for H.T. Category-II (Non-Industrial), being 28 paise, 37 paise, 40 paise, 47 paise and 56 paise. The tariffs for power intensive industries were, however, increased by separate notifications issued by the Board from time to time. It was 11 paise prior to 1975, raised to 12.2 paise in 1977, 16 paise in 1978, 18.5 paise in September 1979, 21 paise in November 1979, 25 paise in 1980, 32 paise in 1981 and 45 paise in 1984. The H.T. consumers grouped in Part-B were required to pay 15 paise under the 1975 tariffs and 16 paise thereafter. Besides the energy charges as stated above, the H.T. consumers were also required to pay at different rates effective from 1.9.1982 an additional charge levied as 'fuel cost adjustment charges'. The H.T. consumers were also required to pay some amount as 'voltage surcharge' in accordance with the terms of the agreement entered into by the individual consumers with the Board.
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> The comparison of the aforesaid tariffs shows that the tariffs for power intensive industries to begin with were much less than the tariffs for H.T. Category-I

(Industrial) and H.T. Category-II (Non-Industrial). In course of time, the concession in tariffs for the power intensive industries was progressively withdrawn. The concessions were, however, continued in respect of consumers availing H.T. or L.T. supply for purposes of irrigation and agriculture or L.T. supply for domestic, cottage industries, public lighting and small poultry farming units. It is the admitted position that the power generation in the State of Andhra Pradesh is both hydro and thermal, each source contributing almost equally to the total power generation in the State. The H.T. categories have been consuming more than one-half of the total power generated in the State against the much larger number of individual L.T. consumers availing the remaining power.

The main attacks to the upward revision of the tariffs for H.T. consumers in the writ petitions before the High Court were: (1) The Board, as a public utility undertaking, is expected to function in the most efficient and economical manner; (2) It cannot plan its activities with a view to drive any sizeable profits on its undertaking except in accordance with Section 59 of the Electricity (Supply) Act, 1948 (hereinafter referred to as 'the Supply Act'); (3) The Board Could not generate a surplus in excess of that specified under Section 59 of the Supply Act which it had been doing; (4) The Board was preparing its financial statement incorrectly in a manner contray to section 59 of the Supply Act by improperly taking into account expenses chargeable to capital by showing such expenses as charged to revenues; (5) The steep upward revision to tariffs from 1980 made by the Board is invalid, being arbitrary and in contravention of Section 49 and 59 of the Supply Act; and (6) There was no justification for the Board to have revised the tariffs either in 1981 or in 1984 or to have levied any fuel surcharge in terms of Section 49 and 59 of the Supply Act. It was also contended that the tariffs revision was made without prior consultation with the State Electricity Consultative Council as required by Section 16(5) of the Supply Act which also rendered it invalid.

Prior to 30.7.1982, it was usual for the Board to take into account various escalation charges such as pay revisions and increases in the cost of fuel and revise its tariffs from time to time. This was done in 1975 and 1981. Thereafter, the Board took the view that to avoid making frequent tariff revisions necessitated by frequent escalations in the cost of fuels like coal and diesel oil, the formula known as "fuel cost adjustment" be evolved. Accordingly, the Board in its proceedings contained in B.P. Ms. No. 589 dated 30.7.1982, set out the formula known as "fuel cost adjustment". This formula was introduced as condition No. 11 in H.T. tariffs Part-A. Ever since September 1982, all categories of H.T. consumers in Part-A including the power intensive consumers are subject to this condition. Immediately after 30.7.1982, the fuel cost adjustment was fixed as 2.74 paise per unit, which was increased gradually to 2.95 paise, 3.79 paise and 11.68 paise. Thereafter, 3.79 paise was absorbed as part of the tariffs applicable to these H.T. consumers and the remaining increase of 7.89 paise alone was indicated as the fuel cost adjustment charges. The grievance made by all H.T. consumers before the High Court was that: (1) the fuel cost adjustment could not be recovered as part of the tariffs; (2) there is discrimination in recovering the entire fuel cost adjustment from H.T. consumers alone; (3) fairness demands that a reasonable proportion of the burden should be shared also by Part-B

consumers; and (4) that fuel cost adjustment charge is excessively computed.

The High Court rejected all these contentions. It held that this was a matter of policy which could be changed from time to time and it was permissible to gradually withdraw the pre-existing concessional tariffs given to the power intensive industries for which the tariffs earlier were much lower as compared to the other consumers and even after the increase , they were not excessive. It was held that electricity was a raw material for power intensive industries and no grievance could be made against the increase of its cost just as such a grievance was untenable against increase in the cost of any other raw material. The challenge on the ground of discrimination was rejected on the ground that H.T. consumers including power intensive industries formed a separate class and the reason which justified grant of concession to them earlier also justified the gradual withdrawal of that concession. It held that prior consultation with the State Electricity Consultative Council according to Section 16(5) of the Supply Act was not obligatory before revising the tariffs. The High Court held that the Board was justified in adjusting its tariffs to ensure progressive minimizing of losses and the failure of the State Government to specify the surplus it could generate in accordance with Section 59 of the Supply Act, did not detract from the Board's power to adjust its tariffs and generate a surplus on principles of commercial expediency applicable to a public utility undertaking. Fixation of tariffs was held to be a matter of major policy in respect of which the Government can effectively issue directions under Section 78-A of the Act. It was held that the H.T. consumers including power intensive industries were bound to pay according to the revised higher tariffs fixed from time to time under the agreement as contemplated by Section 49 of the Supply Act. The condition of fuel cost adjustment, introduced as condition No. 11 in H.T. tariffs Part-A, was held applicable to power intensive consumers also. An additional argument that this added burden became unbearable for the power intensive consumers was rejected on the ground that such inability of the industry to survive is not a compelling consideration for deciding the Board's power in adjusting it tariffs. Accordingly, the High Court dismissed the writ petitions and upheld the revision of tariffs made by the Board by the impugned B.P. Ms. No. 1014 (Commercial) dated 13.12.1983 w.e.f. 15.1.1984. The High Court having refused to grant a certificate of fitness to appeal to this Court, the appellants have preferred these appeals by special leave.

It may be mentioned at this stage that the controversy raised in these appeals was also the controversy in another bunch of civil appeals arising out of a judgment of the Kerala High Court wherein a similar challenge had been upheld and the Kerala State Electricity Board had come in an appeal to this Court. In those matters, the contention of the Kerala State Electricity Board which would be the same as that of the Andhra Pradesh State Electricity Board before us, was accepted and the judgment of the Kerala High Court taking the view contrary to that of the Andhra Pradesh High Court was reversed (Kerala State Electricity Board v. M/s. S.N. Govinda Prabhu and Bros. and Others., [1986] 4 S.C.C.

198.) All the hearing before us, it was contended by Shri Shanti Bhushan, learned counsel for the Andhra Pradesh State Electricity Board that the Kerala decision concludes these points against the present appellants. On the other hand, Shri G. Ramaswamy and other learned counsel, appearing for the appellants, made an attempt to distinguish the decision in the Kerala case. The question, therefore, is: Whether any ground has been made out by the present appellants to persuade us to

take a view different from the one taken by this Court in the Kerala case? Before considering the arguments in these appeals, we would refer to the controversies in the Kerala case and the view taken therein.

The decision in Kerala State Electricity Board v. M/s. Govinda Prabhu and Bros. and Others, [1986] 4 S.C.C. 198 arose out of the decision of the Kerala High Court in a similar situation. The Kerala High Court struck down the upward revision of tariffs made by the Kerala State Electricity Board unlike the Andhra Pradesh High Court which has upheld the upward revision of tariffs in the present appeals. The main question in the Kerala case also related to the extent of authority of the Kerala Board to increase the electricity tariffs under the Electricity (Supply) Act 1948. The principal ground of challenge which was accepted by the Kerala High Court was that the Kerala State Electricity Board acted outside its statutory authority by formulating a price structure intended to yield substantial revenue to offset not merely the expenditure properly chargeable to the revenue account for the year as contemplated by Section 59 of the Supply Act but also expenditure not so properly chargeable. The Kerala High Court had held that in the absence of a specification by the Government, the Board was not entitled to generate a surplus at all and it acted entirely outside its authority in generating a surplus to be adjusted against items of expenditure not authorised to be met from revenue receipts. this view of the Kerala High Court was based primarily on the construction made of section 59 of the Electricity (Supply) Act, 1948. Accordingly, the Kerala High Court struck down the upward revision of tariffs made by the Kerala State Electricity (Supply) Act, 1948. Accordingly, the Kerala High Court struck down the upward revision of tariffs made by the Kerala State Electricity Board in the years 1980, 1982 and 1984. It may here be mentioned that Section 59 of the Supply Act, as it stood prior to 1978, was amended by Act No. 23 of 1978 and thereafter, by Act No. 16 of 1983, which came into effect from April 1, 1985 only. The Kerala case also was decided on the basis of Section 59 as it stood amended by the 1978 (Amendment) Act, prior to its amendment w.e.f. April 1, 1985 by Act No. 16 of 1983. For our purposes also, Section 59 as it stood amended by the 1978 Act, prior to the 1983 amendment, is relevant.

This Court expressly rejected the submission which had found favour with the Kerala High Court that in the absence of a specification by the State Government, the position would be as it was before the 1978 amendment, that is, the Board was to carry on its affairs and adjust the tariffs in such a manner as not to incur a loss and no more. While rejecting the submission, this Court held as under:

> "We are of the view that the failure of the government to specify the surplus which may be generated by the Board cannot prevent the Board from generating a surplus after meeting the expenses required to be met. Perhaps, the quantum of surplus may not exceed that a prudent public service undertaking may be expected to generate without sacrificing the interests it is expected to serve and without being obsessed by the pure profit motive of the private entrepreneur. The Board may not allow its character as a public utility undertaking to be changed into that of a profit motivated private trading or manufacturing house. Neither the tariffs nor the resulting surplus may reach such heights as to lead to the inevitable conclusion that the Board has shed its public utility character. When that happens the court may strike down the revision of tariffs as plainly arbitrary. But not until then. Not, merely because a surplus has

> been generated, a surplus which can by no means be said to be extravagant. The court will then refrain from touching the tariffs. After all, as has been said by this Court often enough 'price fixation' is neither the forte nor the function of the court."

Further, it said:

> "Turning back to Section 59 and reading it along with Section 49, 67, 67-A etc. We notice that the Electricity Supply Act requires the Electricity Board to follow a particular method of accounting and it is on the basis of that method of accounting that the Board is required to generate a surplus. Broadly, Section 59 requires that a surplus should be left from the total revenues, in any year of account, after meeting all expenses properly chargeable to revenues. It has to be remembered that apart from subventions which may be received from the State Government, which depend entirely on the bounty of the government, the only revenues available to the Board are the charges leviable by it from consumers. Bearing this in mind, we may now consider what expenses are properly chargeable to revenues under the Electricity Supply Act. For this purpose, we may not be justified in having recourse to the principles of corporate accounting or the rules which determine what is revenue expenditure under the Income Tax Act. It appears to us that the Electricity Supply Act prescribes its own special principles of accounting to be followed by the Board...."

This Court also held that the prescribing of different tariffs for high and low tension consumers and for different classes of consumers, such as industrial, commercial, agricultural and domestic, appears to be reasonable and far from arbitrary and is based on an intelligent and intelligible differentia. Accordingly, the judgment of the Kerala High Court upholding challenge to the validity of the upward revision of tariffs was set aside.

Broadly speaking, the substance of the main arguments advanced before us in these matters was repelled by this Court in the Kerala case. However, learned counsel for the appellants attempted to distinguish the Kerala decision and also tried to advance some additional arguments. We shall refer to those arguments presently.

It would be appropriate at this stage to quote the relevant provisions of the Electricity (Supply) Act, 1948, with reference to which the arguments advanced have to be considered. Section 2 of the act relates to interpretation and give the meaning of the expressions defined therein. Section 3 deals with the constitution of the Central Electricity Authority. Section 4-B contains the rule-making power of the Central Government. Section 5 provides for the constitution and composition of State Electricity Boards. Section 12 provides for the incorporation of the Board. Section 12-A relates to the capital structure of the Board. Section 78 contains the rule-making power of the State Government. Section 79 contains the power of the Board to make regulations. Some of the provisions of the Act which may be quoted in extenso are as under:

> "4A. Directions by Central Government to the Authority. (1) In the discharge of its functions, the Authority shall be guided by such directions in matter of policy

involving public interest as the Central Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the Central Government thereon shall be final."

xxx xxx xxx "16. State Electricity Consultative Council. (1) The State Government shall constitute a State Electricity Consultative Council for the State, and in cases to which Section 6 and 7 apply, the State Government concerned shall constitute such one or more State Electricity Cousultative Council or Councils and for such areas as they may by agreement determine.

(2) The State Electricity Consultative Council shall consist of the members of the Board and, if there are any Generating Company or Generating Companies operating in the State, one representative of the Generating Company or each of the Generating Companies, to be nominated by the Generating Company concerned, and such other persons being not less than eight and not more than fifteen as the State Government or the State Governments concerned may appoint after consultation with such representatives or bodies of representative of the following interests as the State Government or the State Governments concerned thinks or think fit, that is to say, local self-

government, electricity supply industry, commerce, industry, transport, agriculture, labour employed in the electricity supply industry and consumers of electricity, but so that there shall be at least one member representing each such interest in the Council.

(3) The Chairman of the Board shall be ex officio Chairman of the State Electricity Consultative Council.

(4) The State Electricity Consultative Council shall meet at least once in every three months.

(5) The functions of the State Electricity Consultative Council shall be as follows:-

(i) To advise the Board and the Generating Company or Generating Companies, if any, operating in the State on major questions of policy and major schemes;

(ii) to review the progress and the work of the Board and the Generating Company or Generating Companies, if any, operating in the State from time to time;

(iii) To consider such other matters as the Board or the Generating Company or Generating Companies, if any, operating in the State may place before it; and

(iv) To consider such matters as the State Government may by rules prescribe.

(6) The Board shall place before the State Electricity Consultative Council the annual financial statement and supplementary statement, if any, and shall take into consideration any comments made on such statement in the said Council before submitting the same to the State Government under Section 61."

xxx xxx xxx "49. Provision for the sale of electricity by the Board to persons other than licensees. (1) Subject to the provisions of this Act and of regulations, if any, made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs.

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

(a) The nature of the supply and the purposes for which it is required;

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

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

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

(3) Nothing in the foregoing provisions of this section shall derogate from the power of the Board, if it considers it necessary or expedient to fix different tariffs for the supply of electricity to any person not being a licensee, having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and any other relevant factors.

(4) In fixing the tariff and terms and conditions for the supply of electricity, the Board shall not show undue preference to any person."

xxx xxx xxx

Section 59 prior to 1978

"General principles for Board's finance. The Board shall not, as far as practicable and after taking credit for any subventions from the State Government under Section 63, carry on its operations under this Act at a loss, and shall adjust its charges accordingly from time to time:

Provided that where necessary any amounts due for meeting the operating, maintenance and management expenses of the Board or for the purposes of clauses

(i) and (ii) of Section 67 may, to such extent as may be sanctioned by the State Government, be paid out of capital." Section 59 as amended by Act No. 23 of 1978 "General principles for Board's finance. (1) The Board shall, after taking credit for any subvention from the State Government under Section 63, carry on its operations under this Act and adjust its tariffs so as to ensure that the total revenues in any year of account shall, after meeting all expenses properly chargeable to revenues, including operating, maintenance and management expenses, taxes (if any) on income and profits, depreciation and interest payable on all debentures, bonds and loans, leave such surplus, as the State Government may, from time to time, specify.

(2) In specifying the surplus under sub-

section (1), the State Government shall have due regard to the availability of amounts accrued by way of depreciation and the liability for loan amortization and leave.

(a) a reasonable sum to contribute towards the cost of capital works; and

(b) where in respect of the Board, a notification has been issued under sub-section (1) of Section 12-A, a reasonable sum by way of return on the capital provided by the State Government under sub-section (3) of that section and the amount of the loans (if any) converted by the State Government into capital under sub-section (1) of Section 66A."

Section 59 as further amended by Act No. 16 of 1983 "General principles for Board's finance. (1) The Board shall, after taking credit for any subvention from the State Government under Section 63, carry on its operations under this Act and adjust its tariffs so as to ensure that the total revenues in any year of account shall, after meeting all expenses properly chargeable to revenues, including operating, maintenance and management expenses, taxes (if any) on income and profits, depreciation and interest payable on all debentures, bonds and loans, leave such surplus as is not less than three per cent, or such higher percentage, as the State Government may, by notification in the Official Gazette, specify in this behalf, of the value of the fixed assets of the Board in service at the beginning of such year.

Explanation. - For the purposes of this sub- section, "value of the fixed assets of the Board in service at the beginning of the year" means the original cost of such fixed assets as reduced by the aggregate of the cumulative depreciation in respect of such assets calculated in accordance with the provisions of this Act and consumers' contribution for service lines.

(2) In specifying any higher percentage under sub-section (1), the State Government shall have due regard to the availability of amounts accrued by way of depreciation and the liability for loan amortization and leave-

(a) a reasonable sum to contribute towards the cost of capital works; and

(b) where in respect of the Board, a notification has been issued under sub-section (1) of Section 12-A, a reasonable sum by way of return on the capital provided by the State Government under sub-section (3) of that section and the amount of the loans (if any) converted by the State Government into capital under sub-section (1) of Section 66-A."

xxx xxx xxx "61. Annual financial statement. -(1) In February of each year the Board shall submit to the State Government a statement in the prescribed form of the estimated capital and revenue receipts and expenditure for the ensuing year.

(2) The said statement shall include a statement of the salaries of members and officers and other employees of the Board and of such other particulars as may be prescribed.

(3) The State Government shall as soon as may be after the receipt of the said statement cause it to be laid on the table of the House, or as the case may be, Houses of the State Legislature; and the said statement shall be open to discussion therein, but shall not be subject to vote.

(4) The Board shall take into consideration any comments made on the said statement in the State Legislature.

(5) The Board may at any time during the year in respect of which a statement under sub-section (1) has been submitted, submit, to the State Government a supplementary statement, and all the provisions of this section shall apply to such statement as they apply to the statement under the said sub-section."

xxx xxx xxx "63. Subventions to the Board.-The State Government may, with the approval of the State Legislature, from time to time make subventions to the Board for the purposes of this Act on such terms and conditions as the State Government may determine."

XXX XXX XXX "65. Power of Board to borrow.-(1) The Board may, from time to time, with the previous sanction of the State Government and subject to the provisions of this Act and to such conditions, as may be prescribed in this behalf, borrow any sum required for the purposes of this Act.

(2) Rules made by the State Government for the purposes of this section may empower the Board to borrow by the issue of debentures or bonds or otherwise and to make arrangements with bankers, and may apply to the Board with such modifications as may be necessary to be consistent with this Act, the provisions of the Local Authorities Loans Act, 1914 (9 of 1914), and the rules made thereunder as if the Board were a local authority.

(3) The maximum amount which the Board may at any time have on loan under sub-section (1) shall be ten crores of rupees, unless the State Government, with the approval of the State Legislative Assembly, fixes a higher, maximum amount. (4) Debentures or bonds issued by the Board under this section shall be issued, transferred, dealt with and redeemed in such manner as may be prescribed."

XXX XX XXX "67. Priority of liabilities of the Board.-The Board shall distribute the surplus referred to in sub-section (1) of section 59 to the extent available in a particular year in the following order, namely:-

(i) repayment of principal of any loan raised (including redemption of debentures or bonds issued) under Section 65 which becomes due for payment in the year or which became due for payment in any previous year and has remained unpaid;

(ii) repayment of principal of any loan advanced to the Board by the State Government under Section 64 which becomes due for payment in the year or which became due for payment in any previous year and has remained unpaid;

(iii) payment for purposes specified in sub-

section (2) of Section 59 in such manner as the Board may decide.

67-A. Interest on loans advanced by State Government to be paid only after other expenses.- Any interest which is payable on loans advanced under Section 64 or deemed to have been advanced under Section 60 to the Board by the State Government and which is charged to revenues in any year may be paid only out of the balance of the revenues, if any, of that year which is left after meeting all the other expenses referred to in sub-

section (1) of Section 59 and so much of such interest as is not paid in any year by reason of the provisions of this section shall be deemed to be deferred liability and shall be discharged it, accordance with the provisions of this section in the subsequent year or year, as the case may be.

68. Charging of depreciation by Board-(1) The Board shall provide each year for depreciation such sum calculated in accordance with such principles as the Central Government may, after consultation with the Authority, by notification in the Official Gazette, lay down from time to time. (2) Omitted (3) The provisions of this section shall apply to the charging of depreciation for the year in which the Electricity (Supply) Amendment Act, 1978, comes into force."

XXX XXX XXX "68-A. Directions by the State Government.- (1) In the discharge of its functions, the Board shall be guided by such directions on questions of policy as may be given to it by the State Government.

(2) If any dispute arises between the Board and the State Government as to whether a question is or is not a question of policy, it shall be referred to the Authority whose decision thereon shall be final." We shall first consider the common arguments advanced by the learned counsel for the appellants in all these matters before taking up some additional arguments advanced in some of these matters.

The first argument is that the requirement of consultation with the State Electricity Consultative Council before the revision of tariffs in accordance with Section 16 of the Electricity (Supply) Act, 1948, not having been made, the upward revision of tariffs is invalid on account of non-compliance

of Section 16 of the Supply Act. It was urged that revision of tariffs being a major question of policy as envisaged by clause (i) of Sub-section (5) of Section 16, it is one of the functions of the Consultative Council to advise the Board on this question and without such advice of the Consultative Council, the revision in tariffs could not be made. It was argued that the consumers' interest is also represented on the Consultative Council as indicated by Sub-section (2) of Section 16 providing for its constitution, and therefore, it was necessary to know the viewpoint of the consumers through their representative in the Consultative Council before deciding upon an upward revision of the tariffs for H.T. consumers. Though the Board may not be bound by the advice of the Consultative Council, yet it was urged, such consultation with the Council was a condition precedent. It was suggested that Section 16 must be read with Section 61 of the Supply Act which requires the Board to submit to the State Government the annual financial statement in February each year.

It is unnecessary in the present case to decide whether the revision of tariffs falls within the ambit of `major questions of policy' occurring in Section 16(5)(i) of the Supply Act since the arguments from both sides proceeded on the basis that revision of tariffs for the purpose of this case may be treated as a `question of policy' which expression finds place also in Section 78-A of the Supply Act. The question, therefore, reduces itself to this:

> Whether the failure of the Board to place the matter before and seek the advice of the Consultative Council on this question renders the revision of tariffs made by it invalid? The common premise for the purpose of this case that revision of tariffs by the Board is a question of policy may indicate that it would be open to the Consultative Council to advise the Board also on the question of revision of tariffs, and if such advice is given, then the Board must consider the same before taking the final decision. That, however, does not necessarily mean that where no such advice was taken from the Consultative Council or was rendered on account of the absence of any meeting of the Consultative Council during the relevant period, it would necessarily render invalid the revision of tariffs made by the Board. The consequence of non-compliance of Section 16 is not provided and the nature of function of the Consultative Council and the force of its advice being at the best only persuasive. it cannot be said that revision of tariffs without seeking the advice of the Consultative Council renders the revision of tariffs invalid. It is also significant that the annual financial statement containing all particulars relating to revision of tariffs is required to be submitted to the State Government in February each year and the State Government is required after receipt of such statement to cause it to be laid on the table of the House or Houses of the State Legislature and the said statement is open to discussion therein. The Board is bound to take into consideration any comments made on the said statement in the State Legislature. Thus, there is ample provision for discussion on the revised tariffs in the State Legislature with the Board being bound to take into consideration any comments made thereon. Shri Shanti Bhushan sought to make a distinction between the provisions of sub-section (5) of section 16 pertaining to the functions of the `Consultative Council' empowering or enabling the Council to advice the Board on `major questions of policy' and the provision in

sub-section (6) as to the obligation of the Board to place certain matters before the `Council' to emphasise his point that sub-section (6) does not envisage any obligation on the part of the `Board' to place before the Council the proposal for revision of tariffs. He sought to distinguish between the functions of the `Council' to tender advice and the obligation of the Board to specifically seek and invite such advice. Shri Shanti Bhushan said that the very concept of consultation does imply mandatory obligation or duty attaching the pain of nullity to the transaction.

Provisions of the Electricity Act 1947 in England contain certain express statutory stipulations as to the scope of the Consultative Council's functions which do not, in terms, obtain in the Indian statute. For instance, Section 7 of the English Act which contemplates the establishment of `Consultative Council' specifically provides in Section 7(4) :

``(4) Each of the said Councils shall be charged with the duties-

(a) of considering any matter affecting the distribution of electricity in the area, including the variation of tariffs and the provision of new or improved services and facilities within the area, ...

(b) xxx xxx xxx

(c) of considering any matter affecting the variation of any tariff regulating the charges for the provision of bulk supplies of electricity by the Generating Board for distribution in the area, being a matter which is either the subject of a representation made to them by consumers or other persons requiring supplies of electricity in the area, or which appears to them to be a matter to which consideration ought to be given apart from any such representation, and, where after consultation with the Area Board action appears to them to be requisite as to any such matter, of notifying their conclusions to the Generating Board;

(d) xxx xxx xxx (rest of the Section omitted as unnecessary) Section 37(1) of the English statute again provides: ``37 Fixing and variation tariffs (1) The prices to be charged by the Generating Board for the supply of electricity by them to Area Boards shall be in accordance with such tariffs as may be fixed from time to time by the Generating Board after consultation with the Electricity Council; the different tariffs may be fixed for different Area Boards." (rest of the Section omitted as unnecessary) The pattern of the provisions in the Indian statute is quite different.

The `laying procedure' before the legislature effectively controls the exercise of the delegated power of the Board. We are of the opinion that though advisable yet failure to seek advice of the Consultative Council before revision of the tariffs does not result in invalidation of the revised tariffs. This consequence appears to us to be the logical and reasonable view to take of the requirement of Section 16 along with other provisions of the Supply Act. One of the arguments

addressed at length before us relates to Section 78-A of the Supply Act. It was urged on behalf of the appellant that any direction of the State Government relating to tariffs was on a question of policy within the meaning of Sub-section (1), and, therefore, the Board is bound by such direction subject only to the adjudication, if any, in accordance with Sub-section (2), if any dispute is raised by the Board in that behalf. It was urged that in the present case the Board was, therefore, bound by the directions of the State Government granting the concession to the power intensive consumers since no dispute was raised by the Board in accordance with Sub- section (2), of Section 78-A. Learned counsel for the Board did not for the purpose of this case, dispute this position, but contended that all directions of the State Government were obeyed by the Board and, therefore, the question does not really arise. The Board's contention is that it has acted according to the directions of the State Government and, therefore, the question of non-compliance with any such directions giving rise to the argument based on Section 78-A does not arise.

For consideration of the main controversy, it is advisable at this stage to deal with Sections 49 and 59 of the Supply Act. Section 49 makes provision for the sale of electricity by the Board to persons other than licensees. Sub-section (1) starts with the words `Subject to the provisions of this Act and of regulations, if any, made in this behalf'. This means that the provision made therein is subject to other provisions of the Supply Act and the regulations. It then proceeds to say that the Board may supply electricity to any person not being a licensee upon `such terms and conditions as the Board thinks fit' and may for the purposes of such supply supply frame `uniform tariffs'. Sub-section (2) then enumerates several factors which the Board is required to `have regard to' in fixing the uniform tariffs. The meaning of the expression `have regard to' is well-settled. It means that the factors specifically enumerated shall be taken into account while performing the exercise which in this case is the fixation of uniform tariffs. Ordinarily, therefore, uniform tariffs are required to be framed by the Board for making such supply. Sub-section (3) then proceeds to say that nothing in the earlier enacted provisions shall derogate from the power of the Board, `if it considers it necessary or expedient to fix different tariffs for the supply of electricity to any person', having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and `any other relevant factors'. Sub-section (4) then says that in fixing the tariffs and terms and conditions for the supply of electricity, `the Board shall not show undue preference to any person'. In other words, Sub-section (4) provides against any unreasonable discrimination in fixing the tariffs and terms and conditions for supply of electricity. The power of fixation of tariffs in the Board is provided in this manner by Section 49 of the Supply Act which requires the fixation of uniform tariffs ordinarily having regard particularly to the specified factors and enables fixation of such tariffs for any person having regard to the factors expressly stated and any other relevant factors, providing further that no unreasonable or undue preference shall be shown to any person by the Board in exercise of its powers of fixing the tariffs.

The next important provision is Section 59 of the Supply Act. For appreciating the argument based on Section 59, it is necessary to bear in mind the distinction in Section 59 as it stood prior to 1978, as amended by Act No. 23 of 1978 and finally as amended by Act No. 16 of 1983, quoted earlier.

Prior to 1978, Section 59 required the Board, as far as practicable and after taking credit for any subventions from the State Government under Section 63, not to carry on its operations under this

ACt at a loss and for this purpose, it was empowered to adjust its charges accordingly from time to time. Under the provision as it then existed, the main thrust was to avoid the Board incurring any loss and for that purpose, it could adjust its charges accordingly from time to time. Section 59 as amended by Act No. 23 of 1978 required the Board, after taking credit for any subventions from the State Government under Section 63, to carry on its operations under this Act and to adjust its tariffs so as to ensure that the total revenues in any year meeting all expenses properly chargeable to revenue including those specified, left such surplus as the State Government specified from time to time. The shift was, therefore, towards having a surplus as the State Government specified from time to time. Sub-section (2) then provided guidelines for the State Government in specifying the surplus under Sub-section (1) and mentioned the factors to which regard was to be had for this purpose. The effect of the amendment made in Section 59 by Act No. 16 of 1983, which came into effect from 1.4.1985, was to provide for a minimum surplus of three per cent or such higher percentage as the State Government is to specify in this behalf. In other words, prior to 1978 amendment, the requirement from the Board was to avoid incurring any loss, after the 1978 amendment the shift was towards ensuring a surplus as specified by the State Government, and after the 1983 amendment the Board is required to ensure a surplus of at least three per cent unless the State Government specifies a higher surplus. This is the scheme of Section 59 and it is Section 59 as amended by 1978 Act but prior to its amendment by the 1983 Act, with which we are concerned in the present case.

It cannot be doubted that Section 59 requiring the Board to adjust its tariffs for the purpose of Board's finance is to be read along with Section 49 which provides specifically for fixation of tariffs and the manner in which that exercise has to be performed while dealing with any question relating to the revision of tariffs.

It was argued on behalf of the appellants that Section 59 as amended by the 1978 Act did not empower the Board to adjust its tariffs to generate any surplus unless the surplus had been specified by the State Government and when specified, the surplus generated could not exceed the specified surplus. In other words, it was argued that when the State Government did not specify any surplus, the Board had no power to adjust its tariffs in a manner which resulted in generating any surplus. We are unable to construe Section 59 in this manner. The general principle for the Board's finance indicated by Section 59 is that prior to the 1978 amendment, tariffs could be adjusted to avoid any loss, but as a result of the shift made by the 1978 amendment, the power could be exercised to generate a surplus and when the State Government specified the amount of surplus then the Board was bound to adjust the tariffs to ensure generation of the specified surplus. However, generation of a reasonable surplus in any year of account without specification of the surplus amount by the State Government was not contra-indicated in the provision inasmuch as the duty to generate a surplus was implicit with the added obligation to ensure generating surplus to the extent specified by the State Government when it was so specified by the State Government. It cannot be accepted as a reasonable view that in the absence of specification of the surplus by the State Government, the Board could not adjust its tariffs to generate even a reasonable surplus in any year of account. The effect of 1983 amendment, which came into force from 1.4.1985, is that the Board is entitled to adjust its tariffs to ensure generating a surplus of not less than three per cent even without such specification by the State Government and when the State Government specifies a higher surplus,

then the Board must ensure generating the higher specified surplus. This is, of course, subject to the accepted norm of the Board acting in consonance with its public utility character and not entirely with a profit motive like that of a private trader. The pre-1978 concept of the Board's functioning to merely avoid any loss is replaced by the shift after 1978 amendment towards the positive approach of requiring a surplus to be generated, the quantum of surplus being specified by the State Government, with a minimum of three per cent surplus in the absence of the specification by the Government of a higher surplus, after the 1983 amendment. This construction made of Section 59, as it stood at different times in Govinda Prabhu's case (supra) indicated earlier, cannot be faulted in any manner. In Govinda Prabhu's case (supra) the same argument which is advanced before us was expressly rejected. We are of the same view.

It is , therefore, obvious that mere generation of surplus by the Board as a result of adjusting its tariffs when the quantum of surplus has not been specified by the State Government after the 1978 amendment of Section 59 of the Supply Act, cannot invite any criticism unless it is further shown that the surplus generated as a result of the adjustment of tariffs by the Board has resulted in the Board acting as a private trader shedding off its public utility character. In other words, if the profit is made not merely for the sake of profit, but for the purpose of better discharge of its obligations by the Board, it cannot be said that the public enterprise has acted beyond it authority. The Board in the present case has shown that the surplus resulting from upward revision of tariffs applicable to the H.T. consumers made in the present case, was for the purpose of better discharge of its other obligations under the Supply Act and in effect, it has merely resulted in a gradual withdrawal of the concessional tariffs provided earlier to the power intensive consumers which do not in its opinion require continuance of the concessional tariffs any longer. In fact, no material has been placed before us to indicate that this assertion of the Board is incorrect or there is any reasonable basis to hold that the upward revision of tariffs applicable to H.T. consumers is merely with a desire to earn more profits like a private trader and not to generate surplus for utilisation of the funds to discharge other obligations of the Board towards more needy consumers, such as agriculturists or to meet the need of expansion of the supply to deserving areas. The argument with reference to statistics that the upward revision of tariffs for the H.T. consumers results in earning amounts in excess of the cost of generation does not, therefore, merit a more detailed consideration.

It was also contended on behalf of the appellants that the generation of electricity by the Andhra Pradesh Electricity Board is both thermal as well as hydro, the quantity from each source being nearly equal and the entire electricity generated is fed into a common grid, from which is supplied to all categories of consumers. On this basis, 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 L.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 some time, 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 some time and have also a better capacity to pay, cannot, therefore, be faulted since the consumption in the power intensive industries accounts for a large quantity.

Shri Sibal submitted that the prescription and imposition of disparate tariffs, unrelated to the production cost, on a particular section of consumers would be a case of misplaced philanthrophy on the part of the statutory authority. The Board, Shri Sibal says, cannot use its powers in order to confer "social or economic benefits on particular sections of the community" at the cost of the other sections. Shri Sibal contended that while it may be permissible for the Board to supply electricity to the weaker and under-privileged sections of the society at prices which may even be lower than the costs of generation and distribution, however subsidies for such social objectives must come from subventions from Government and should not be made good by unjustifiable higher charges on other sections of electricity consumers. Shri Sibal read to us the following passage in Wade's Administrative Law (6th Edn.):

> "Statutory authorities have sometimes made use of their wide general powers in order to confer social or economic benefits on particular sections of the community. In several such cases they have gone beyond the true limits of their powers. The policy of the courts is in general hostile to the use of public funds, such as rates, for new social experiments. Local authorities are subject to a fiduciary duty to use their revenues with due restraint."
>
> (at p. 424) After referring to decided cases on the point, the learned author says:
>
> "... The idea that runs through these cases is that public money must be administered with responsibility and without extravagance. This appears to mean it is not available for charity. The generosity of local authorities, in particular, is restrained by the doctrine that they owe a fiduciary duty to their ratepayers analogous to that of trustees. This means that, in deciding upon their expenditure, they must hold a balance fairly between the recipients of the benefit and the ratepayers who have to bear the cost."

(at p.426) Shri Sibal contends that in the case of class of consumers respecting which the tariff is enhanced, the enhancement is not justified on the ground of making good the loss on supply to others at cheaper rates. The increase is attributable to higher costs of generation of thermal power. 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 nationally 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.

It was argued on behalf of the appellants with considerable force that the upward hike of tariff for the H.T. consumers including power intensive was arbitrary and discriminatory inasmuch as it was not related to the cost of generation and was based on irrelevant factors. It was argued that the L.T. tariffs and agricultural tariffs were relieved of this burden and the liabilities of the Board even of a capital nature were taken into account for increasing the tariff applicable to power intensive units.

The contention is that these factors are irrelevant and do not permit exercise of the power to increase the tariffs. This arguments was considered at length in Govinda Prabhu's case before it was negatived. We agree with the reasons given in that decision to repel this contention. In Govinda Prabhu, it was pointed out that the Court would not strike down the revision of tariff as arbitrary unless the resulting surplus reaches such a height as to lead to the inevitable decision that the Board has shed its public utility character and is obsessed by the profit motive of private entrepreneur in order to generate a surplus which is extravagant. The limited power of judicial review in the field of price fixation was also indicated. This limited scope of judicial review in striking down revision of tariffs resulting in generation of surplus applied in Govinda Prabhu cannot be faulted in view of the long line of decisions of this Court on the point and reiteration of the same principle by a Constitution Bench in Shri Sitaram Sugar Company Limited and Another. v. Union of India and Others, [1990] 3 S.C.C. 223. The surplus generated by the Board as a result of revision of tariffs during the relevant period cannot be called extravagant by any standard to render it arbitrary permitting the striking down of the revision of tariffs on the ground of arbitrariness. We have already indicated that it is not also discriminatory as was the view taken in Govinda Prabhu. It has been pointed out on behalf of the Board that the Board's action is based on the opinion of Rajadhyaksha Committee's Report submitted in 1980 and the formula of fuel cost adjustment is on a scientific basis linked to the increase in the fuel cost. This is a possible view to take and, therefore, the revision of tariffs by the Board does not fall within the available scope of judicial review.

One of the contentions of Shri G. Ramaswamy, on behalf of the appellant was that the G.Os. issued in respect of the power intensive units amounted to a special tariff for them resulting in their exclusion from the category of H.T. consumers and, therefore, the clause relating to fuel cost adjustment inserted by amendment to the H.T. tariffs did not apply to the power intensive consumers without insertion of a similar clause in the special tariff applicable to them. It was urged that for this reason the power intensive consumers could not be governed by the clause of fuel cost adjustment made applicable to H.T. tariffs. Shri Ramaswamy advanced elaborate arguments to distinguish "terms and conditions of supply" from "terms and conditions of tariff". According to the learned counsel, B.P. Ms. No. 778 dated 18.10.1975 excluded the power intensive units from applicability of the Notification date 17.9.1975 to it. It is unnecessary to repeat the history of the H.T. tariffs by which power intensive tariffs were separated. It would be sufficient in this context to quote the relevant portion of Memo. dated 18.11.1975 which, in our opinion, negatives this argument. It was provided in this Memo., inter alia as under:

> "With regard to other charges, such as Miscellaneous charges, terms and conditions of supply, not mentioned specifically herein, those applicable to normal H.T. consumers will apply".

The expression "other charges" is wide enough to include within its ambit the fuel cost adjustment admittedly made applicable to all H. T.consumers as a result of the escalation in fuel prices. The method adopted was to prescribe a formula linking it to the increase in fuel cost so that it was not necessary to revise the tariffs each time as a result of increase in fuel prices, the same being taken care of by the relevant factors in the formula for fuel cost adjustment. It was in this context that Shri Ramaswamy contended that the `terms and conditions of supply' are different from the `terms and

conditions of tariff' and fuel cost adjustment being a term or condition of tariff and not a term or condition of supply, the above provision in the Memo dated 18.11.1975 did not have the effect of applying the term relating to fuel cost adjustment to the power intensive tariff. It is sufficient to state that the Memo dated 18.11.1975 did not merely extend the non-specified `terms and conditions of supply' applicable to normal H.T. consumers to the power intensive consumers but also "other charges" which were merely illustrated by the words following, namely, "such as Misc. charges, terms and conditions of supply not mentioned herein". In other words, this express provision in the Memo, dated 18.11.1975 clearly provided that except for the provisions specifically made for power intensive consumers, in respect of all other provisions the power intensive consumers were to be governed by the provisions, by whatever name called, applicable to the normal H.T. consumers. A further discussion of this distinction sought to be made by Shri G. Ramaswamy of the `terms and conditions of supply' and `terms and conditions of tariff' is, therefore, unnecessary. Shri Ramaswamy also urged that there was no communication to the appellant of the applicability of the term relating to fuel cost adjustment during the relevant period which also relieves the power intensive consumers of this liability. On the view we have already taken about the applicability of the term relating to fuel cost adjustment to the power intensive tariffs this point is not material. However, it has also been shown that in the bills issued to the power intensive consumers the same was specifically indicated. If any communication was needed, this indication in the bills issued to the power intensive consumers satisfied that requirement. We are, therefore, unable to accept the contention that the term relating to fuel cost adjustment made applicable to H.T. consumers had no application to the power intensive consumers during the relevant period.

Shri Kapil Sibal appearing on behalf of some of the appellants confined the challenge to the mode of exercise of power by the Board. He laid great emphasis on the effect of absence of consultation with the Consultative Committee under Section 16 of the Electricity (Supply) Act, 1948. He also claimed that the quantum of increase could at best be justified only to the extent of one-half and no more. Shri Sibal claimed that certain extraneous factors had been taken into account for the purpose of revising the tariffs. The irrelevant considerations, according to Shri Sibal, taken into account are the capital sums owed by the Board and the overall losses incurred by the Board which according to him is impermissible under Section 59 of the Electricity (Supply) Act. He also argued that the upward revision of H.T. tariffs is intended to subsidise another class of consumers which is not permissible. His arguments are already covered by our earlier discussion. Similarly, the arguments of Shri K.N. Bhat, for the appellant in C.A. No. 5379 of 1985 to the same effect, need to further discussion. The details of the several factors taken into account for the revision in tariffs, to the limited extent they can be gone into within the permissible scope of judicial review in such a matter also do not require any further consideration.

Shri Anil Divan, on behalf of the appellant in C.A No. 2569 of 1985, submitted that the increase in tariffs for the power intensive unit in his case was 47 per cent as against 15 per cent for ordinary H.T. consumers. According to him, even ignoring the FCA, the increase is 40 per cent from 32 paise to 45 paise. This is disputed on behalf of the Board. In our opinion, it is unnecessary to go into this question any further for the reasons already given by us. Shri Divan also contended that the Electricity Board's stand has been conflicting at different stages. In our opinion, any detailed decision on this aspect also is unnecessary on the view taken by us about the Board's power to revise

tariffs, no case for striking down the same as arbitrary and discriminatory having been made out. In view of the earlier decision of this Court in Govinda Prabhu, with the conclusion as well as reasoning of which we respectfully concur and reiteration of the Court's limited power of judicial review in Shri Sitaram Sugar Company Limited recently decided by a Constitution Bench, we do not find any reason to accept any of the arguments advanced on behalf of the appellants by their learned counsel. In fact, the decision in Govinda Prabhu con-

cludes the controversy against the appellants and some detailed discussion by us has become necessary only on account of an attempt on behalf of the appellants to distinguish the decision and the emphasis placed on the requirements of Sections 16, 49 and 59 of the Electricity (Supply) Act.

We find no merit in these appeals/special leave petition and the same are dismissed. All interim orders in favour of the appellants/petitioner stand vacated. No costs.

R.P. Appeals dismissed.