

Fertilizers & Chemicals Travancore Ltd vs Kerala State Electricity Board & ... on 5 May, 1988

Equivalent citations: 1988 AIR 1989, 1988 SCR (3) 925, AIR 1988 SUPREME COURT 1989, 1988 2 UJ (SC) 184, (1988) 2 JT 540 (SC), (1988) 2 KER LT 117, 1988 (3) SCC 382

PETITIONER:

FERTILIZERS & CHEMICALS TRAVANCORE LTD.

Vs.

RESPONDENT:

KERALA STATE ELECTRICITY BOARD & ANOTHER

DATE OF JUDGMENT 05/05/1988

BENCH:

VENKATACHALLIAH, M.N. (J)

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VENKATACHALLIAH, M.N. (J)

NATRAJAN, S. (J)

CITATION:

1988 AIR 1989	1988 SCR (3) 925
1988 SCC (3) 382	JT 1988 (2) 540
1988 SCALE (1) 1023	

ACT:

Electricity Supply Act, 1948: Sections 49(1), 49(3), 60 and 79(j)-Electricity Tariff-Protection from unilateral increase-'Period factor' in agreement-Enhancement of tariff-When permissible.

Kerala State Electricity Board (General Tariffs) Regulations, 1965: Regulation 11-Enhancement of rate or tariff for supply of power-Validity of.

Constitution of India, 1950: Article 14-Allegations of discriminatory treatment-To be specific-Action of Governmental authorities-Presumed to be reasonable and in public interest-Person assailing-To plead and prove contrary.

HEADNOTE:

The Appellant, a company registered under the Companies Act, had its registered office at Eloor in the erstwhile State of Travancore. On October 21, 1948 the company entered into an agreement (Exhibit-P1) with the erstwhile princely

State of Travancore for the supply of electrical-energy under the terms and conditions particularised in the agreement. The price was fixed at Rs. 110 per K.W. per annum. Subsequently, the State of Travancore merged in, and became part of, the Kerala State, and the Electricity Board was constituted for the State. On May 10, 1965 a supplementary agreement was entered into between the appellant and the Electricity Board for supply of additional power for a period of 10 years at the rate of Rs.140 per K.W. per year.

On October 28, 1966 the Electricity Board in exercise of the powers under Section 79(j) of the Electricity Supply Act, 1948 framed and promulgated the Kerala State Electricity Board (General Tariff) Regulations, 1966 by which the Board empowered itself to prescribe higher tariffs for different classes of consumers. Regulation 11 thereof empowered the Board to amend the terms and conditions of supply from time to time.

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The Board issued a Notification dated July 16, 1968 (Exhibit P-2) providing that the rates for supply of power at 66 K.V. to the appellant company availed of by them as per the agreement dated October 21, 1948 be revised to Rs.200 per K.W. per year. The supplemental agreement with the appellant dated May 10, 1965 which pertained to the additional supply of power for a period of ten years at Rs.140 per K.W. per year was, however, left undisturbed.

The appellant in a writ petition before the High Court assailed the enhancement in the electricity tariff, contending that the terms for the supply of electricity to the appellant's industrial unit were governed by the agreement dated October 21, 1948 entered into by the company with the erstwhile Travancore State; that the agreement, in terms of Section 60 of the Electricity Supply Act, should be deemed to have been entered into by the Electricity Board and that during the subsistence of the said agreement the rates fixed therein were immune from any unilateral upward revision even if the purported enhancement was pursuant to the statutory regulations made under Section 49(2). It was further contended that the enhancement being selective and discriminatory, was violative of Article 14 of the Constitution.

The writ petition having been dismissed by a Single Judge of the High Court, and the Division Bench having confirmed the order of dismissal in appeal, the appellant appealed to this Court by Special Leave.

In the appeal it was contended on behalf of the appellant that the agreement, Exhibit P-I, though one entered into prior to the constitution of the 'Board' was, by virtue of Section 60 of the Act, one which should be deemed to have been entered into by or with the Board, and must also be held to be referable to Section 49(3) of the Act. Relying on the decision of this Court in Indian

Aluminium Co. v. Kerala Electricity Board, [1976] 1 SCR 701, it was contended that the agreement must be regarded as having been entered into by the Board in exercise of its statutory powers under Section 49(3) of the Act, and therefore, immune from the operation of the Kerala State Electricity Board (General Tariffs) Regulations, 1966. It was also submitted that power under Section 49(1) would be available to the statutory-authority enabling an unilateral upward revision of the tariff only if the agreement itself enabled such revision, that as long as the agreement did subsist and was not terminated a unilateral change was impermissible and that the appellant was subjected to a steep revision in the tariffs while other similarly circumstanced high tension consumers were left unaffected.

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On behalf of the respondent-Board it was urged that Exhibit P-1 could not be held to fall under, and be protected by, Section 49(3) of the Act; that the agreement having been anterior to the commencement of the 'Act' itself could not be held to have been entered into for "purposes of the Act" within the meaning of Section 60; that the agreement could not be deemed to be one entered into by the Board under Section 60(1), because it did not satisfy the essential requirement of having been entered into by the State Government; that the Board had not done anything with reference to the agreement which could attract Section 60 to it and though the obligations of the State Government became the obligations of the Board, the agreement itself did not qualify for recognition under Section 60 of the Act; that there was not fixity of tenure with reference to and in the context of which alone any immunity from unilateral alteration under Section 49(1) and (2) could be conceived and measured. It was further contended that the additional agreement dated May 10, 1965 was for an independent purpose and that the action of the Board in entering into this agreement did not constitute any such Act in relation to the original agreement as would constitute a conscious adoption by the Board of the original agreement, so as to attract Section 60(1); that the essential quality of the agreement which qualified for recognition and protection as one made in exercise of the Board's power under Section 49(3) was its distinctiveness as to the period of operation and that the protection and immunity from unilateral increase of tariff could only be with reference to the period of the agreement.

Two questions arose for consideration: (1) Whether the agreement dated October 21, 1948 (Exhibit P-1) should be held to be one which was deemed to have been entered into by the Board under Section 60 of the Act and whether it is required to be considered as one entered into by the Board in exercise of its powers under Section 49(3) of the Act, and (2) Whether the enhancement under the Notification dated July 16, 1968 (Exhibit P-2) brings about a hostile discrimination against the appellant, because for similarly

situated and circumstanced High Tension Consumers there was no such revision of the tariff.

Dismissing the Appeal,

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HELD:1(i) The Board's power to enter into an agreement fixing a special tariff for a 'specified period' is relatable to Section 49(3). [938H]

(ii) One of the tests whether an agreement is entered into in exercise of the power under Section 49(3) is that such agreement has the effect of excluding the other statutory power under Section 49(1). [939A]

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(iii) The main consideration for protection from unilateral increase under Section 49(1) is the 'period-factor' in an agreement. [939A-B]

(iv) A contract which does not provide for, an obligation to supply electricity at a specific-rate for a specific-period and does not, therefore, have the effect of excluding Section 49(1) cannot be said to fall under Section 49(3). [939G]

(v) If by an unilateral, volitional act on the part of the Board the assurance of a fixed-rate to the consumer could be denuded that circumstances, in itself, would be such as to detract from the agreement being considered as one entered into in exercise of power under Section 49(3). [939G-H]

In the instant case, the agreement was precarious in regard to the period of its operation and was susceptible to termination at the volition of the Board. It cannot, therefore, be construed as one which was intended to give a statutory protection for the tariff by means of a special agreement by the exercise of the statutory power of the Board under Section 49(3). [940D]

Indian Aluminium Co. v. Kerala Electricity Board, [1976] 1 SCR 70 and Delhi Cloth & General Mills Co. Ltd. v. Rajasthan State Electricity Board, [1986] AIR SC 1126, referred to.

(vi) In a long term contract of indefinite duration it is not unusual to find provisions for cancellation with reasonable notice and for payment of compensation in the event of termination. It is also not unusual to infer, under certain circumstances, terminability by notice even in the absence of an express provision in that behalf, upon a construction of the contract. A contract which contains no express provision for its termination may well be terminated by reasonable notice by one or the other party depending upon the implication of a term or upon a true construction of the agreement. This principle has no application in the instant case. [941C-D]

Staffordshire Area Health Authority v. South Staffordshire Water Works Co., [1978] 3 All E.R. p. 769, referred to.

(vii) The agreement dated October 21, 1948 Exhibit P-I,

therefore, does not qualify to be recognised and protected under Section 49(3) of the Act. [941E]

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2(i) The Board while denying that there was any hostile discrimination, averred that no similarly situate consumer had been left out of the tariff revision and only cases that had been left-out were those where the Board, owing to the subsistence of the agreements protected under Section 49(3), was under the legal inhibition from making an unilateral enhancement. [943E-F]

2(ii) The charge of discrimination against the respondent Board could not be said to have been established. Indeed the appellant had not laid a proper foundation for examination of a case of discrimination under Article 14. [944C]

(iii) The allegations of discrimination ought to be specific. Action of Governmental authorities must be presumed to be reasonable and in public interest. It is for the person assailing that presumption to plead and prove the contrary. But in the instant case the allegations are in general terms. [944D]

State of Maharashtra and Anr. v. Basantilal Mohanlal Khetan and Ors., AIR 1986 SC 1466 para 12 and Kasturi Lal Lakshmi Reddy v. State of J & K, [1980] 3 SCR 1338 at 1357, referred to.

In the instant case, the respondent-Board while denying that there was any hostile discrimination, averred that no similarly situate consumer had been left out of the tariff revision, and only cases where the consumer had the protection of an agreement under Section 49(3) which prevented the unilateral increase, had been left out. [944D-E]

Bisra Stone Lime Co, v. Orissa State Electricity Board, [1976] 2 SCR 307, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 880 (N) of 1974.

From the Judgment and Order dated 13.6.1973 of the Kerala High Court in Writ Appeal No. 103 of 1971.

G.L. Sanghi, V.C. Mathur and A.M. Dittia for the Appellant.

P.S. Potti, K.M.K. Nair and Ms. Malini Poduval for the Respondents.

The Judgment of the Court was delivered by VENKATACHALIAH, J. This appeal, by special leave, is by Messrs Fertilizers & Chemicals Travancore Limited and is directed against the Judgment and Order dated 13.6.1973 of the Division Bench of the Kerala High Court in Writ Appeal No. 103 of 1971

affirming the order dated 26.11.1970 of the learned Single Judge in O.P. No. 3772 of 1968.

The High Court dismissed the appellant's writ-petition challenging the enhancement, of the electricity tariff from Rs.110 per K.W. per annum to Rs.200 per K.W. per annum. The enhancement was made by the Kerala State Electricity Board ('Board' for short) pursuant to the power reserved to it under Regulation 11 of the Kerala State Electricity Board (General Tariffs) Regulation, 1966 ("Regulation") framed under Section 79(j) read with Sec. 49(1) of the Electricity (Supply) Act, 1948, ('Act'). The enhancement was to take effect from 16.8.1968. The period to which the challenge pertains is between 16.8.1968 and 1.1.1970.

The appellant assailed this enhancement before the High Court on grounds, inter alia, that the terms for the supply of electricity to appellant's industrial unit manufacturing fertilizers were governed by an agreement dated 21.10.48 entered into with the erstwhile Travancore State; that the agreement, in terms of Section 60 of the Act, should be deemed to have been entered into by the Board referable to statutory powers under Section 49(3) of the Act; that during the subsistence of the agreement the rates fixed therein were immune from any unilateral upward revision even if the purported enhancement was pursuant to the statutory regulations under Section 49(2) and that, at all events, the enhancement, being selective and discriminatory, was violative of Article 14 of the Constitution.

2. We may refer, briefly, to the factual antecedents:

Appellant is a company registered under the Companies Act with its Registered Office at Eloor, Udyogamandal P.O. in the erstwhile State of Travancore, now part of Kerala. On 21.10.1948 an agreement was entered into between the appellant and the erstwhile princely State of Travancore for the supply of electrical energy by the latter to the former under terms and on conditions particularised in the agreement. The price was fixed at Rs.110 per K.W. per annum.

Subsequently the State merged in and became part of the Kerala State and the Electricity Board was constituted for the State. On 10.5.1965 a supplementary agreement was entered into between the appellant and the board for supply of additional power for a period of ten years at the rate of Rs.140 per K.W. per year. On 28.10.1966 the Board, in exercise of the powers under Section 79(j) of the Act, framed and promulgated what were called "Kerala State Electricity Board (General Tariffs) Regulations, 1966", by which, inter alia, power was reserved to the Board to amend, from time to time, the terms and conditions of supply after issue of the prescribed notice to the consumer of the Board's intention so to do in that behalf. Regulation 11 provided:

"The Board may amend the terms and conditions of supply from time to time, provided that any amendment having the effect of enhancement of charges payable by the consumer shall come into force from such date as notified in the Gazette provided that there shall be at least 30 days between the date of publication and coming into force."

In exercise of the power so reserved to it, the Board issued a notification dated 16.7.1968 (Exhibit P/2) which provided:

"In accordance with the provisions contained in clause 11 of the Kerala State Electricity Board (General Tariffs) Regulations issued in Kerala Gazette No. 47 dated 29.11.1966, it is hereby notified that the rates for the supply of 4200 K.W. of power at 66 K.V. to messrs F.A.C.T. availed by them as per the agreement dated 21.10.1948 executed with the erstwhile Travancore Government, is hereby revised to Rs. 200 per K.V.A. per year. This revision will take effect 30 days soon after the publication of this notification in the Gazette."

The supplemental agreement dated 10.5.1965 which pertained to the additional supply of power for a period of ten years at Rs.140 per K.W. per year was however, left undisturbed. The case of the Board is that while the agreement, Exhibit P-1, as, one under Section 49(3) of the Act, the supplemental agreement dated 10.5.1965, however, was entered into by the Board in exercise of the Statutory powers under Section 49(3) and was, therefore, immune from any alteration during its tenure.

The principal controversy in this appeal is whether the agreement dated 21.10.1948 could be said to be one within the contemplation of Section 49(3) of the Act; and whether the enhancement of the tariff under Exhibit P-2 was impermissible.

Another contention which was not urged before the learned Single Judge of the High Court, but which was permitted to be raised in appeal before the Division Bench was whether by the said enhancement appellant was subjected to a hostile and invidious discrimination.

Both contentions have been repelled by the High Court. Appellant has come up by special leave.

3. We have heard Shri G.L. Sanghi, learned Senior Advocate for the appellant and Shri P.S. Potti, learned Senior Advocate for the Board. The submissions of counsel spread over a much wider field than was covered before the High Court. On the contentions urged at the hearing, the points that fall for consideration in the appeal are:

(a)(i): Whether the agreement dated 21.10.1948 (Exhibit P-1) should be held to be one which was deemed to have been entered into by the Board under Section 60 of the Act.

(ii) If so, whether the said agreement requires to be considered as one entered into by the Board in exercise of its power under Section 49(3) of the Act with the attendant consequence that during its subsistence, the tariff does not admit of being raised even pursuant to the Regulations made under Section 49(1) of the Act.

(b) Whether, at all events, the enhancement under Exhibit P-2 brings about a hostile discrimination against the appellant, in that, while in the case of other similarly situated and circumstanced High Tension Consumers there was no such revision of the tariff.

Re;contentions a (i) and (ii):

Shri Sanghi submitted that the agreement Exhibit P-1 though one entered into prior to the constitution of the 'Board' was yet, by virtue of Section 60 of the Act one which should be deemed to have been entered into by or with the Board, and must also be held to be referable to Section 49(3) of the Act. Shri Sanghi, placing reliance on the pronouncement of this Court in *Indian Aluminium Co. v. Kerala Electricity Board*, [1976] 1 SCR 70 contended that the agreement must be regarded as having been entered into by the Board in Exercise of its Statutory powers conferred under Section 49(3) of the Act, and therefore, immune from the operation of the Regulations. The contract under Section 49(3), it was submitted, substitutes for the power under Section 49(1) and that where, as here, even there is in subsistence an agreement under Section 49(3) the power under Section 49(1) would be available to the statutory-authority enabling an unilateral upward revision of the tariff, only if the agreement itself enables such a revision.

Shri Potti for the Board urged that Exhibit P-1 could not be held to fall under, and be protected by, Section 49(3) of the Act. Shri Potti urged a number of considerations, which according to him, militate Exhibit P-1 being accorded such a status.

5. It is appropriate, at this stage, that some of the statutory provisions which have a bearing on the matter are noticed.

Sections 49, 59 and 79 of the Act (as they then stood) read:

"Section 49(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 purpose of such supply frame uniform tariffs.

(2) (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).....

"Section 59: The Board shall not, as far as practicable and after taking credit for and subventions from the State Government under Section 63, carry on its operation under this Act at a loss, and shall adjust its charges accordingly from time to time."

"Section 79: The Board may make regulations not inconsistent with this Act and the rules made thereunder to provide for all or any of the following matters, namely:

(a)] to]

(i)] Omitted as irrelevant

(j) principles governing the supply of electricity by the Board to persons other than licensees under Section 49.

(k).....

We may also notice Section 60:

"60(1): All debts and obligations incurred, all contracts entered into and all matters and things engaged to be done by, with or for the State Government for any of the purposes of this Act before the first constitution of the Board shall be deemed to have been incurred, entered into or engaged to be done by, with or for the Board; and all suits or other legal proceedings instituted or which might but for the issue of the notification under sub-section (4) of Section have been instituted by or against the Board."

In the Indian Aluminium Company's case this Court was examining the effect of an agreement entered into between the then native State of Trivancore on the one hand and the Indian Aluminium Company Limited on the other for the supply of electrical energy for an industrial enterprise of the company for reduction of alumina into aluminium by a process of electrolysis in which electrical-energy was itself a primary raw material. Certain rates were agreed upon for a period of 24 years from 1.7.1941 with a franchise to the company for renewal of the agreement for a further period of 20 years. The terms of this principal agreement were varied and modified by two supplemental agreements, the first dated 16.8.1955 and the second dated 4.4.1963. Two other agreements were also entered into between the parties on 30.3.1963 and 18.9.1965 respectively for supply of additional electricity. In 1966 the Kerala State Electricity Board promulgated regulations by which the Board empowered itself to prescribe higher tariffs for different classes of consumers. These regulations were amended in 1969. In exercise of powers thus assumed, the Board purported to fix higher rates of tariffs to all extra high tension consumers, including the said company. The relevant tariff was declared applicable to all extra high tension consumers notwithstanding anything contained in the agreement entered into with the consumers either by the Government or by the Board. This purported unilateral enhancement was challenged by the company. This Court, in substance, held that the agreement dated 1.7.1941 must be deemed, by virtue of Section 60 of the Act, to have been made by the Board itself; that Section 49(3) enabled such specially negotiated loads as part of the statutorily permitted scheme; that since the special stipulations in the agreement were made in exertion of the statutory power under Section 49(3), they could not, during the subsistence of the agreement, be varied unilaterally by exertion of another statutory power under the same Statute. It was observed:

"Now, fixation of special tariffs can be unilateral act on the part of the Board, but more often than not, it would be the result of negotiation between the Board and the

consumer and hence a matter of agreement between them. It would, therefore, seem clear that the Board can, in exercise of the power conferred under sub-section (3) of Section 49, enter into an agreement with a consumer stipulating for a special tariff for supply of electricity for a specific period of time. Such a stipulation would amount to fixing of special tariff and it would clearly be in exercise of the power to fix special tariff granted under sub-section (3) of Section 49."

"To put it differently, where a stipulation in a contract is entered into by a public authority in exercise of a statutory power, then, even though such stipulation fetters subsequent exercise of the same statutory power or future exercise of another statutory power, it would be valid and the exercise of such statutory power would protanto stand restricted. That would follow on the principle of harmonious construction."

"If the statutory power is to have any meaning and content, the stipulation made in exercise of the statutory power must be valid and binding and it would, as pointed out by Pennycuik V.C., in *Dowsty Boulton v. Wolverhampton Corporation*, 'exclude the exercise of other statutory powers in respect of the same subject matter'."

Shri Sanghi relies upon the analogy of this case to support the appellant's claim that here also the agreement Ext. P-1 has a similar status.

Section 49(1) and (2) of the Act delegates to the State Electricity Board the powers of subordinate legislation to frame uniform tariffs, setting out the factors and criteria to be taken into account in fixing such uniform tariffs. Section 79(j) enables the Board to frame and promulgate regulations touching the matters envisaged by Section 49(1) and (2). Sub-section (3) of Section 49 enables the Board to fix different rates of tariffs having regard to the special circumstances and particularities of individual cases. Section 49(4), however mandates that the Board, in exercising its discretion under Sub-section (3), shall not show undue preference to any person. Section 59 says that the Board shall so carry on its operations as not to incur a loss.

6. Enumerating the considerations which according to him, detract from the acceptability of the claim that the agreement in this case qualifies for recognition as one referable to the statutory power under Section 49(3) of the Act, Shri Potti said that first, the agreement cannot be deemed to be one entered into by the Board under Section 60(1) because it does not satisfy the essential requirement of having been entered into by the State Government; that secondly, the Board had not done anything with reference to the agreement which could attract Section 60 to it; and, accordingly, though the obligations of the State Government became the obligations of the Board, the agreement itself did not qualify for recognition under Section 60 of the Act; that, thirdly there was no fixity of tenure with reference to and in the context of which alone any immunity from unilateral-alteration under Section 49(1) and (2) could be conceived and measured, and that, fourthly the agreement having been anterior to the commencement of the 'Act' itself, it could not be held to have been entered into for "purposes of the Act" within the meaning of Section 60.

The point that Shri Potti particularly emphasised was that the element of recognition of the agreement under and for purposes of Section 60(1)-which in the case of the Indian Aluminium Company consisted in the Board, after the commencement of the Act, having treated and adopted the agreement by conscious overt acts which comprised of the subsequent modifications of its terms,- were lacking in the present case. The additional agreement dated 10.5.1965 in the present case was for an independent purpose and that the action of the Board in entering into this agreement did not constitute any such act, in relation to the original agreement, as would constitute a conscious adoption by the Board of the original agreement, so as to attract Section 60(1).

7. On a consideration of the matter, we are of the view that it is unnecessary to examine the merits of these contentions as we think that the point could be decided with reference to an aspect which goes to the root of the matter. That is, whether the agreement, even if attracts Section 60(1), qualifies itself to be recognised as one under Section 49(3). We may here notice some provisions of the agreement (Exhibit P-1):

Clause 1 stipulates:

(1) The Government shall furnish to the Consumer and the Consumer shall take from the Government all the energy required by the Consumer for operating and lighting the Consumer Fertilizer Factory located at Eloor, Alwaye upto a total amount of 4000 K.W. Clause 12 provides:

12. The consumer shall not be at liberty, save with the consent of the Electrical Engineer to Government to determine this agreement before the expiration of twelve calendar months from the date of commencement of supply. The consumer may determine this agreement after any time after the said period on giving the Electrical Engineer one clear month's notice in writing. If within twelve months from the date of commencement of supply the consumer should without giving previous intimation in writing to the Electrical Engineer to Government cease to consume energy under the agreement continuously for three months, his agreement shall be determined.

There is, in the agreement, no specific stipulation as to the duration, or term, of the agreement. The appellant is enabled after expira-

tion of 12 calendar months from the date of commencement, to terminate it by notice in writing. Shri Potti's contention is that the essential quality of the agreement which qualifies for recognition and protection as one made in exercise of the Board's power under Section 49(3) is its distinctiveness as to the period of operation; that the protection and immunity from unilateral increase of tariff can only be with reference to the period of the agreement and that without reference to any period the idea of such protection would be unmeaning and inconceivable; as the benefit of Section 49(3) is to enure during the period respecting which there is a commitment on the part of the Board to supply electrical energy at a fixed rate.

8. Shri Sanghi, however, submitted, that it was not the specificity of the period of operation of the agreement, but its very existence that brings it within the protective umbrella of Section 49(3). Learned counsel said that what keeps an agreement outside Sec. 49(3) was the existence in of specific stipulation in it enabling such unilateral increases of the rates. Shri Sanghi submitted that the period factor was not the decisive criterion, but the very existence of a special agreement, however precarious its tenure, that excludes the power under Section 49(1) of the Act. According to Shri Sanghi even an agreement which is not in terms bound for a fixed period and which is terminable by either side by notice, is eligible for recognition as one under Section 49(3) and that till the Board puts an end to the agreement in a manner provided by the agreement, the agreement qualifies itself for such protection under Section 49(3).

9. If an agreement, entered into by the Board does not contain any stipulation as to the specific period for which a particular rate should apply or, after so providing, also contains a specific stipulation that the rates agreed upon under it could unilaterally, be altered at the instance of the Board, then it becomes merely academic whether such an agreement does not qualify itself to be considered as one entered into by the Board in exercise of its statutory power under Sec. 49(3) or even if so qualified, yet, it does not have the effect of excluding the exertion of the other statutory powers under Sec. 49(1). The real question is whether a unilateral increase could be effected or not. In such a case, from the point of view of practical consequences, it is immaterial whether the importance of the absence of the period-factor lies in taking the agreement out of Sec. 49(3) or whether, being within 49(3), yet it does not exclude the exercise of the statutory power under Sec. 49(1). It has been held that the Board's power to enter into an agreement fixing a special tariff for a 'specified period' is relatable to Sec. 49(3), or conversely, one of the tests whether an agreement is entered into in exercise of the power under Sec. 49(3) is that such agreement has the effect of excluding the other statutory power under Sec. 49(1). The main consideration for protection from unilateral increase under Sec. 49(1) is the 'period-factor' in an agreement. In the Indian Aluminium Company's case, it was observed:

".....It would, therefore, seem clear that the Board can, in exercise of the power conferred under sub-section (3) of Sec. 49, enter into an agreement with a consumer stipulating for a special tariff for supply of electricity for a specific period of time. Such a stipulation would amount to fixing of special tariff and it would clearly be in exercise of the power to fix special tariff granted under sub-section (3) of sec. 49

"..... The power to enter into an agreement fixing a special tariff for supply of electricity for a specified period of time is, therefore, relatable to sub-section (3) of sec. 49 and such an agreement entered into by the Board would be in exercise of the power under that sub-section"

(emphasis supplied) "..... To hold that the Board could unilaterally revise the charges notwithstanding these stipulations, would negate the existence of statutory power in the Board under words, the Board had no power to enter into such stipulations. That would negate the existence of statutory power in the Board under sub-section (3) of Section 49 to fix the charges for a specified period of time which would be contrary to the plain meaning and intendment of the

section."

(emphasis supplied) The above excerpts would suggest that a contract which does not have, and provide for an obligation to supply electricity at a specific rate for a specific period and does not, therefore, have the effect of excluding Section 49(1) cannot be said to fall under Section 49(3). If by an unilateral, volitional act on the part of the Board the assurance of a fixed-rate to the consumer could be denuded, that circumstance, in itself, would be such as to detract from the agreement being considered as one entered into in exercise of power under Section 49(3). The importance of the period-factor was again referred to in *Delhi Cloth & General Mills Co. Ltd. v. Rajasthan State Electricity Board*, [1986] AIR SC 1126. It was observed:

"..... In the Indian Aluminium Company's case, the Court speaking through Bhagwati, J. held that agreements for supply of electricity to the consumers for a specified period at a special tariff are the result of negotiations between the Board and the consumers and hence a matter of agreement between them. Such agreements for the supply of electricity to the consumers must therefore be regarded as having been entered into by the Board in exercise of the statutory powers conferred under Sec. 49(3) and thus there could be no question of such stipulation being void as fettering the exercise of the statutory powers of the Board under sec. 49(1)....."

The agreement in this case was precarious in regard to the period of its operation and was susceptible to termination at the volition of the Board. It cannot, therefore, be construed as one which was intended to give a statutory protection for the tariff by means of a special agreement by the exercise of the statutory power of the Board under Section 49(3).

10. Shri Sanghi, however, contended that as long as the agreement did subsist and was not terminated, a unilateral change was impermissible. To this, two answers could be posited. First is, as already held, that if there is no statutory-protection and immunity from unilateral change in view of the precariousness of the tenure and its susceptibility to defeasance at the mere volition of the Board, the act did not furnish it with the status of one under Section 49(3). The second, is that at all events, even if the agreement was one under Section 49(3), the giving of 30 days notice-though issued in compliance with the requirement of the regulation-puts an end to the agreement. Looked at from either angle, the enhancement is not rendered infirm.

11. Shri Sanghi referred to certain observations of Lord Denning MR in *Staffordshire Area Health Authority v. South Staffordshire Water Works Co.*, [1978] 3 All England Reports 769. In that case a water-company and the authorities of a hospital entered into agreement in the year 1929 whereby the hospital was to receive 5,000 gallons of water every day free and all the additional water required at 7d. for 1000 gallons 'at all times hereafter'. In 1975, the water-company gave a six months notice to the hospital intending to terminate the 1929 agreement. The hospital contested the right of the company to terminate the agreement, relying upon the 'at all times hereafter' clause. The trial court upheld the hospital's claim and held that the company could not resile from the contract. But the Court of Appeal held that having regard to the fall in the value of money since the agreement was made, circumstances had arisen which the parties had not foreseen and that the

agreement was not intended to hold good in the altered state of circumstances. The agreement was held terminable with reasonable notice. This case holds out its own features of interest for the schoolmen. In a long term contract of indefinite duration it is not unusual to find provisions for cancellation with reasonable notice and for payment of compensation in the event of termination. It is also not unusual to infer, under certain circumstances, terminability by notice even in the absence of an express provision in that behalf, upon a construction of the contract. In the case cited by Shri Sanghi, Lord Denning invoked the doctrine of frustration. Learned authors in Cheshire and Fifoot's Law of Contract, 10th Edition, call that case 'a difficult case' and that the learned Judge Master of Rolls 'reached an interesting and controversial decision'. A contract which contains no express provision for its termination may well be terminated by reasonable notice by one or the other party depending upon the implication of a term or upon a true construction of the agreement. That principle has no application to the present case.

Accordingly, on contentions a (i) and (ii) we hold that Exhibit P-1 did not qualify to be recognised and protected under Section 49(3) of the Act.

12. Re: Contention (b):

Appellant raised the contention of a hostile discrimination before the Division Bench in appeal. In the course of the additional grounds raised on 31.5.1971 the appellant averred:

"I respectfully submit that the 1st respondent being committed to supply Indian Aluminium Company Limited quantities of electrical energy of 16,000 KWY at the rate of Rs.100-105 per KWY for a period upto 1995 and having further agreed to supply electrical energy to the said company at the rate of Rs.130 KWY for a period upto 50 years as from 1st April, 1965, has in enhancing the tariff rate for supply of electrical energy to the appellant as per Ext. P-2 to Rs.200 per KVA per year clearly violated section 49 of the Act. The 1st respondent, as far as I am aware, had not increased tariff rates in the case of other extra high tension consumers similarly placed as the appellants who are referred to in paragraph 11 of the counter-affidavit of the 1st respondent in July, 1968, by virtue of its powers under Ext. P-3 by notification like Ext. P-2 The effect of Ext. P-2 order is that extra high tension consumers who are similarly placed as the appellant, have been given undue preference as compared to the appellant in that, while the tariff applicable to the appellant was increased as per Ext. P-2, there was no similar upward revision in the case of the other extra high tension consumers who are referred to in paragraph 11 of the counter-affidavit of the 1st respondent."

Again, in the reply affidavit dated 16.3.1973 the appellant said:

"6. With respect to the averment in paragraph 3, I submit that the petitioner has been discriminated. Not only Indian Aluminium Company Ltd., but also companies like Travancore Cochin Chemicals Ltd., Premier Tyres Ltd., Cominco Binani Zinc

Limited, Travancore Rayons Limited etc., have been given the benefit of the contractual rates and the existing contracts with those companies have not been superseded till 1.1.1970 when uniform rate is prescribed for all. The averment that the appellant company and the Indian Aluminium Company Limited are not similarly situated is made without any basis, for at any rate, for the purpose of Article 14, it cannot be denied that they are comparable concerns."

Shri Sanghi contended that while the appellant was subjected to a steep revision in the tariffs other similarly circumstanced high tension consumers were left unaffected. Learned counsel also contended that under Regulation 6 of Ext. P-3 one of the classifications was "High tension consumers" which included the appellant, and that any further sub-classification purported by the Board between "high tension consumers" and "extra high tension consumers"

to support a further classification, not contemplated by the Regulation itself was impermissible. Shri Sanghi relied upon the case of Messrs Indian Metal & Ferro Alloys Ltd. v. State of Orissa, AIR 1987 SC 1727 where a further purported classification in the matter of the benefit of clubbing of the allotments of electricity based on considerations which were not recognised for purposes of the statutory classification of the consumers was held impermissible. In that case amongst similarly circumstanced consumers who fell under the same classification of power intensive units, a further classification for the denial of the benefit of clubbing on the ground that the particular consumer, being an export oriented unit had failed to furnish the required export performance, was held impermissible. This Court held:

"..... When all other power intensive units termed as 'domestic units' are being allowed the benefit of clubbing, it would not be legally proper to deny the same facility to an industry classified as 'power intensive unit' merely on the ground that being an export oriented unit, it has failed to fulfil the conditions pre-requisite for allocation of additional power. Such differential treatment would amount to arbitrary discrimination, violative of Article 14 of the Constitution and it cannot be permitted So long as the benefit of clubbing is allowed to domestic power intensive units, such benefit cannot be denied to an export oriented unit which has not been allocated any additional power on the basis of its export performance.

In the present case, the Board while denying that there was any hostile discrimination, averred that no similarly situate consumer had been left out of the tariff revision and only cases where the Board, owing to the subsistence of the agreements protected under Sec. 49(3) was under a legal inhibition from making an unilateral enhancement, had been left-out. In addition, the Board set out two other criteria which, according to it, placed the appellant in a different class distinguishing the case of the Indian Aluminium Co. with which appellant pleaded similarity. These, as set out in the counter-affidavit dated 5.3.1973 filed before the Division Bench, are:

(i) that the appellant was not a 'power intensive' industry operating at very high load factor whereas the Indian Aluminium Company is a 'power intensive industry' operating at a very high load-

factor which required them to be classified differently. The two consumers were not on the same footing in the matter of consumption and the purpose for which the energy was supplied.

(ii) that considerations like the power-factor were taken into account in fixing the tariff. So far as the Indian Aluminium Company is concerned the power factor was 0.9 and they were bound to maintain that rate whereas the appellant-company was required to maintain the same at 0.85 as per the agreement and it could go down to 0.80 which was advantageous to the appellant-company.

On a consideration of the matter, it appears to us that the charge of discrimination against the respondent-Board cannot be said to be established. Indeed in the present case, the appellant has not laid a proper foundation for examination of a case of discrimination under Article 14. The allegations of discrimination must be specific. (See AIR 1986 SC 1466 para 12-State of Maharashtra and Anr. v. Basantilal Mohanlal Khetan and Ors.) It is also trite that action of Governmental authorities must be presumed to be reasonable and in public interest. It is for the person assailing it to plead and prove the contrary. (See Kasturi Lal Lakshmi Reddy v. State of J & K, [1980] 3 SCR 1338 at 1357). But here allegations are in general terms. Even so, the respondent-board has made categorical statement that in all those cases referred to in para 6 of the appellant's reply affidavit, tariff had been increased except where the consumer had the protection of an agreement under Sec. 49(3) which prevented an unilateral increase.

That apart the circumstance that respondent Board was rendered, by virtue of the subsistence of an agreement under Sec. 49(3), powerless to make an unilateral increase, can form a valid ground for differential treatment as between cases covered by Section 49(3) on the one hand and those in which the Board was competent and was at liberty to give effect to the increase, on the other. In Bisra Stone Lime Co. v. Orissa State Electricity Board, [1976] 2 SCR 307 at 314, this Court, in similar context, held:

"..... A plea of discrimination which is available when Article 14 is in free play is not at par with the interdict of 'undue favour' under section 49 of the Act. Apart from this, when law makes it obligatory for certain special agreements to continue in full force during their currency stultifying the power of the Board to revise the rates during the period, no ground of discrimination can be made out on the score of exempting such industries as are governed by special agreements."

Accordingly, contention (b) also fails.

In the result, for the foregoing reasons, this appeal fails and is dismissed, but without an order as to costs.

N.V.K.

Appeal dismissed.

