Supreme Court of India
Pawan Alloys And Casting Pvt. Ltd ... vs U.P. State Electricity Board And ... on 5 August, 1997
Bench: S.B. Majmudar, K.T. Thomas

CASE NO.:
Appeal (civil) 1710 of 1991

PETITIONER:
PAWAN ALLOYS AND CASTING PVT. LTD MEERUT ETC. ETC.

RESPONDENT:
U.P. STATE ELECTRICITY BOARD AND ORS.

DATE OF JUDGMENT: 05/08/1997

BENCH:
S.B. MAJMUDAR & K.T. THOMAS

JUDGMENT:

JUDGMENT 1997 Supp(3) SCR 266 The Judgment of the Court was delivered by S.B. MAJMUDAR, J. Leave granted in S.L.P. (C) No. 5355 of 1991.

In this group of appeals identical grievance is made by the appellants who are consumers of electricity supplied by the respondent U.P. State Electricity Board ('the Board' in short). Their grievance is that though by notifications dated 29th October 1982, 13th July 1984 and 28th January 1986 the respondent-Board in exercise of its powers under Section 49 of the Electricity (Supply) Act, 1948 (hereinafter referred to as 'the Act') had held out a promise to new industrialists seeking to establish industries in different parts of the State of Uttar Pradesh, that on the charges of electricity consumed by them they will be given 10% rebate for a period of three years from the date of commencement of supply of electricity to them for the first time, the respondent-Board had arbitrarily and prematurely withdrawn concession of the said rebate by a latter notification dated 31st July 1986 which is impugned in these proceedings. Various writ petitions were filed in the High Court of Judicature at Allahabad challenging the said impugned notification. They were heard together by a Division Bench consisting of B.P. Jeevan Reddy, CJ (as he then was) and V.N. Mehrotra, J. Diverse contentions were canvassed in support of the writ petitions. In the forefront it was submitted that Board was bound on the principle of promissory estoppel to continue the development rebate to these new industries for a period of three years as indicated in the earlier notifications and consequently the Board could not have arbitrarily withdrawn the said development rebate prior to the expiry of three years' period available to the industries concerned under these earlier notifica- tions. It was also contended that in any case the impugned notification applied prospectively and could not have any retrospective effect on earlier existing new industries.

The respondent-Board on the other hand opposed these contentions and submitted that all the writ petitioners-consumers had entered into contracts by way of written agreements with the Board before taking electricity supply at their premises and as per the terms of the said agreements they had already subjected themselves to all future actions of the Board by which the electricity tariff could be revised by the Board at any time and that would include even the development rebate

which could be withdrawn at any time at the Board's discretion as agreed to by all of them. The Division Bench of the High Court in the impugned judgment speaking through B.P. Jeevan Reddy, CJ., framed three common issues covering these controversies between the parties as under :

"(a) Whether the Board is estopped from withdrawing the said rebate before the completion of the 3/5 year period, by virtue of the doctrine of promissory estoppel?

(b) Whether the agreement executed by the petitioners bars them from questioning the impugned notification?

(c) Whether the impugned notification has no application to ex-isting consumers and does it apply to only those consumers who receive the supply on or after 1.8.1986?"

After hearing the contesting parties through their advocates the High Court on the first point came to the conclusion that the respondent-Board was estopped by virtue of the doctrine of promissory estoppel from withdrawing the development rebate before the completion of the period of three years, however on the second point the Court came to the conclusion that the writ petitioners were barred from questioning the impugned notification on the express terminology found in the agreements entered into by them with the Board for supply of electricity and under those agreements the Board was given full play to revise the tariff rates which included development rebate also from time to time and consequently the impugned notification was not illegal. On the third issue it was held that the notification dated 31st July 1986 could not be said to be retrospec-tive. In the result the High Court by the impugned common judgment dismissed all the writ petitions with the result that interim reliefs granted earlier stood vacated.

While issuing notices in the Special Leave Petitions by an order dated 6th February 1991 a Bench of two learned Judges of this Court court consisting of K.N. Singh and P.B. Sawant, JJ., stayed the recovery of late payment surcharge dues but declined stay of recovery of development rebate charges. Subsequently after hearing the contesting parties special leave to appeal was granted in these matters and the stay of recovery of late payment surcharge was made absolute. We are informed that most of the appellants have already, therefore, paid up disputed development rebate charges to the respondent-Board. But the late payment surcharge demand has remained stayed. It is also brought to our notice that in some of the matters stay of recovery of development rebate charges has also enured for their benefit as this Court granted stay of disconnection of electric supply due to non- payment of these charges.

At the final hearing of this group of appeals we heard Dr. Rajiv Dhawan, learned senior counsel for the appellants and other counsel for the appellants as well as Shri Dushyant Dave, learned senior counsel for the respondent-Board in common as the question involved are identical in all these matters. Accordingly all these appeals are being disposed of by this common judgment.

Rival Contentions Dr. Dhawan, learned senior counsel appearing in Civil Appeal No. 1710 of 1991 for the appellant, learned counsel Shri Sunil Gupta appearing in Civil Appeal Nos. 10186 and 10187 of 1995, learned counsel Shri R. Santhanam appearing in Civil Appeal No. 2183 of 1991 and other

learned counsel appearing for remaining appellants who supported the contentions of the aforesaid counsel in support of the appeals before us submitted as under :

That even though the High Court rightly held that the Board was bound by principle of promissory estoppel in the light of the diverse notifications issued by it from time to time granting incentive development rebate to the new industries covered by these notifications and consequently the impugned notification was hit by the principle of promissory estoppel, High Court erred on Issue No. 2 when it took the view that the appellants could not derive any benefit from the decision on Issue No. 1 on the ground of promissory estoppel as by the contractual obligations flowing from the agreements entered into by them with the Board while getting electric supply for their industries, their challenge to the impugned notification got barred. They also contended that the High Court had also erred in taking the view that the impugned notification was only prospective in nature and was not trying to withdraw the development rebate in a retrospective manner, Shri Dave, learned senior counsel appearing for the Board on the other hand tried to support the final decision rendered by the High Court dismissing the writ petitions, on the additional ground that the High Court had erred in deciding Issue No. 1 against the Board. It was contended by Shri Dave that there was no promise held out by the Board to any of the new industrialists by issuing earlier notification under Section 49 of the Act. That the Board had exercised its statutory and quasi-legislative powers and there could not be any promissory estoppel against such an exercise of power and consequently nothing further survived in these proceedings. It was alternatively contended by Shri Dave that in any case the High Court was right when it took the view that the impugned notification could not be challenged by the appellants as they were bound by the contractual obligations flowing from the agreements entered into by them with the Board while taking electric supply for their industries and consequently these appeals were liable to be dismissed also on that score. He further submitted that whatever benefits might have accrued to the appellants prior to 1st August 1986, those benefits were prospectively withdrawn by the Board by issuing the impugned notification and to that extent decision of the High Court on Issued No. 3 could not be faulted. Shri Dave also submitted that so far as the question of surcharge on late payment of impugned development rebate is concerned it is not germane to the present controversy as the demand for late payment was raised by the Board after the decision of the High Court and, therefore, strictly speaking the said question would not arise from the judgment of the High Court and, therefore, if the appellants have no case on merits regarding development rebate, the question regarding payment of surcharge may be kept open. Alternatively he contended that on the principle of restitution once the appellants fail on merits, if his contentions on behalf of the Board on the issue of promissory estoppel and contractual obligations of the appellants are accepted, then the demand for surcharge should be permitted to be effectuated with appropriate rate of interest as the Board could not recover the same pending these appeals because of the interim relief granted by this Court. His argument on this aspect also covered the question of restitution regarding payment of development rebate the recovery of which had remained stayed in some of these appeals by an interim order of this Court.

Learned counsel for the respective parties in support of their con-tentions pressed in service a series of decisions of this Court. Learned counsel for the appellants Shri Gupta also relied upon observations found in standard text books pertaining to Law of Contracts and also on a decision of Rajasthan High Court in the case of D.C.M. Ltd. and Another v. Assistant Engineer (HMT

Sub-Division), Rajasthan State Electricity Board, Kota and Another, AIR (1988) Rajasthan 64. We shall refer to these judgments and the relevant observations found in standard text books on Law of Contracts at an appropriate stage in latter part of this judgment.

Points For Consideration In the light of the aforesaid rival contentions the following points arise for our consideration :

1. Whether the respondent-Board on the doctrine of promissory estoppel was liable to be restrained from enforcing the im-pugned notification dated 31st July 1986 against the appel-lants so far as the unexpired period of three years available to them under earlier notifications granting development rebate was concerned.

2. Whether the appellants on account of agreements entered into by them with the Board while taking supply of electricity for their industries were barred from challenging the impugned notification of 31st July 1986.

3. Whether the impugned notification was having any retrospective effect.

4. If the appellants fail on merits, whether this Court in exercise of its powers under Article 142 of the Constitution of India on the peculiar facts and circumstances of these cases would relieve the appellants of their obligation to pay the late payment surcharge dues to the Board.

We shall deal with these points seriatim. Point No. 1 It is now well settled by a series of decisions of this Court that the State authorities as well as its limbs like the Board covered by the sweep of Article 12 of the Constitution of India being treated as 'State' within the meaning of the said Article, can be made subject to the equitable doctrine of promissory estoppel in cases where because of their representation the party claiming estoppel has changed the position and if such an estoppel does not fly in the face of any statutory prohibition, absence of power and authority of the promisor, is otherwise not opposed to public interest, and also when equity in favour of the promisee does not outweigh equity in favour of the promisor entitling the latter to legally get out of the promise.

In this connection we may usefully refer to a decision of this Court rendered in the case of State of H.P. and Others v. Ganesh Wood Products and Others, [1995] 6 SCC 363. B.P. Jeevan Reddy, J. speaking for a Bench of two learned Judges of this Court made the following pertinent observa-tions in this connection in paragraphs 54 and 55 of the Report :

"The doctrine of promissory estoppel is by now well recognised in this country. Even so it should be noticed that it is an evolving doctrine, the contours of which are not yet fully and finally demar-cated. It would be instructive to bear in mind what Viscount Hailsham said in Woodhouse Ltd. v. Nigerian Produce Ltd., (1972) AC 741 : (1972) 2 All ER 271 : (1972) 2 WLR 1090 -

'I desire to add that the time may soon come when the whole sequence of cases based upon promissory estoppel since the war, beginning with Central London Property Trust Ltd. v. High Trees House Ltd. (1947) KB 130 : 62 TLR 557 : (1947) LJR 77 may need to be reviewed and reduced to a

coherent body of doctrine by the courts. I do not mean to say that they are to be regarded with suspicion. But as is common with an expanding doctrine, they do raise problems of coherent ex-position which have never been systematically explored."

Though the above view was expressed as far back as 1972, it is no less valid today. The dissonance in the views expressed by this Court in some of its decisions on the subject emphasises such a need. The views expounded in Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., [1979] 2 SCC 409 : [1979] SCC (Tax) 144 was departed from in certain respects in Jit Ram Shiv Kumar v. State of Haryana, [1981] 1 SCC 11 which was in turn criticised in Union of India v. Godfrey Philips Indian Ltd., [1985] 4 SCC 369 : [1986] SCC (Tax) 11. The divergence in approach adopted in Shri Bakul Oil Industries v. State of Gujarat, [1987] 1 SCC 31 : [1987] SCC (Tax) 74 and Poumami Oil Mills v. State of Kerala, [1986] Supp. SCC 728 : [1987] SCC (Tax) 134 is another instance. The fact that the recent decision in Kasinka Trading v. Union of India [1995] 1 SCC 274 is being reconsidered by larger Bench is yet another affirmation of the need stressed by lord Hailsham for enunciating 'a coherent body of doctrine by the courts'. An aspect needing a clear exposition - and which is of immediate relevance herein - is what is the precise meaning of the words 'the promisee ... alters his position', in the statement of the doctrine. The doctrine has been formulated in the following words in Motilal padampat sugar mills co. ltd. [1979] 2 scc 409 :

The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution."

We may say at this stage that at the time the aforesaid decision was rendered, judgment of this Court in the case of Kasinka Trading and Another v. Union of India and Another, [1995] 1 SCC 274 was pending scrutiny before a larger Bench. Subsequently, the said decision came to be confirmed by the decision of a Bench of three learned Judges of this Court speaking through A.M. Ahmadi, CJ. in the case of Shrijee Sales Corporation and Another v. Union of India, [1997] 3 SCC 398. We will refer to these decisions in the latter part of this judgment. Suffice it to say at this stage that if a statutory authority or an executive authority of the State function-ing on behalf of the State in exercise of its legally permissible powers, has held out any promise to a party who relying on the same has changed its position not necessarily to its detriment and if this promise does not offend any provision of law or does not fetter any legislative or quasi-legislative power inhering in the promisor then on the principle of promissory estop- pel the promisor can be pinned down to the promise offered by it by way of representation containing such promise for the benefit of the promisee.

In order to decide whether the High Court in the impugned judgment had rightly decided Issue No. 1 about promissory estoppel against the Board it is necessary to keep in view the nature of the claim put forward by the learned counsel for the petitioners before the High Court in support of their writ petitions. The same is noted in the impugned common judgment. It will be profitable to extract the

summary of the contentions of the petitioners' counsel on their behalf before the High Court as found from the judgement as under :

"(1) That the three notifications dated 29.10.1982, 13.7.84 and 28.1.1986 amounted to representations by the Electricity Board to the public at large, including the intending entrepreneurs. The representation by the said notifications was meant to be acted upon. It held out a concession and an inducement. Believing and acting upon the said representation, the petitioners established new industries and obtained connections from the Electricity Board. They were availing of the concession in terms of the said notifications. The sudden withdrawal of the said concession under the impugned notification even before the completion of the three year period (or the appropriate period, as the case may be) caused grave prejudice to the petitioners. It increases the cost of production and to that extent their products become less competitive. This is a case where the doctrine of promissory estoppel is attracted and precludes the respondent Board from withdrawing the said concession."

Shri Dave, learned senior counsel for the respondent- Board was, there- fore, justified in saying that the representation alleged to have been held out by the Board to the new industries was sought to be culled out only from the three notifications of 29th October 1982, 13th July 1984 and 28th January 1986 and that it was not the case of the petitioners before the High Court that any other representations by way of correspondence or brochure or any handbills were held out by the Board to attract new industries to establish themselves in the State of U.P. and to get electric power from the Board at concessional rates earning rebates as mentioned in these notifications. It is, therefore, obvious that the appellants' case of promissory estoppel must stand or fall on the basis of these notifications.

Learned senior counsel for the appellants joined issued on this point and submitted that in the writ petitions it was clearly averred by them that the State of U.P. had taken a decision to attract new industries in the State and, therefore, the State saw to it that appropriate incentives were being offered as a package to these new industries. That consequently the State Government in exercise of its statutory powers under Section 78A of the Act had issued appropriate instructions to the Board and that is how the Board had come out with the scheme of rebates on the electricity bills pertaining to electricity consumed by the new industries. In this connection our attention was invited to a package of incentives and concessions offered by the State to new industries, a copy of which was found annexed to S.L.P. (C) No. 13827 of 1991 out of which Civil Appeal No. 3203 of 1991 arises.

Shri Dave, learned senior counsel for the Board in this connection submitted that whatever might have been alleged by the writ petitioners in their writ petitions before the High Court their clear case at the stage of arguments before the High Court was confined to the ground of promissory estoppel only against the Board and not against the State Government and that too based on the recitals in the three notifications mentioned earlier and not dehors them. Therefore it is too late for the appellants to contend as aforesaid before us in these appeals and they cannot be permitted to make out such a new case which would require fresh investigation of facts especially when the State is not a party to these proceedings in large number of appeals. Prima facie we find some force in the aforesaid objection put forward by Shri Dave, learned senior counsel for the Board. However on a

closer scrutiny this objection falls through. It is of course true that whatever might have been the wide canvass tried to be spread by the appellants before the High Court in their pleadings at the stage of arguments as noted by the High Court in the impugned judgment they confined their challenge to the impugned notification only on the solitary ground that the Board had held out promise by way of representation to the new industrialists on the basis of the clear recitals in the three notifications of 29th October 1982, 13th July 1984 and 28th January 1986. They did not think it fit to support their cases of promissory estoppel against the Board on any other material. However it cannot be forgotten that the Board is a supplier of electricity to consumers on charging appropriate sale price. It is thus a commercial entity. It is not concerned with development of industries in the State. That task is entrusted to the State concerned. If the latter with a view to giving a fillip to new industries puts forward a scheme of incentives to new industries, as a part of this package it can issue appropriate directions to the Board, its limb, under Section 78A of the Act to make this incentive available to new industries to be established in the region covered by Board's supply network of electric power. It is precisely what is done by the Board at the behest of State Government. No estoppel is required to be pleaded against the State as the latter has not issued any notification holding out such a promise. Nor has the State gone back upon it. We must, therefore, examine the challenge of the appellants on the question of promissory estoppel against the Board only from this aspect. We will now, therefore, address ourselves to this moot question.

It is true that all the three notifications dated 29th October 1982, 13th July 1984 and 28th January 1986 were issued by the Board in exercise of its statutory power under Section 49 of the Act. The said Section reads as under :

"49. Provision for the sale for electricity by the Board to persons other than licencees. - (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 distribu-tion 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 ade-quately 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 forgoing 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."

These notifications are identically worded. We will, therefore, refer to the relevant clauses thereof which have a direct bearing on this controversy. The said notifications are issued by the Board in exercise of powers under Section 49 of the Act notifying revised rate schedule appended to the notifications and they are to apply to all persons in respect of supply of electricity throughout the State of U.P. directly served by the Board. It is mentioned in the said notifications that the revised rate schedule will come into force from the respective dates mentioned in the said notifications. The rate schedules which are incorporated in these notifications, amongst others, contain an item pertaining to incentives to new industries. This item is mentioned as item No. 9 in the earlier notifications, but in the last notification dated 28th January 1986 which was issued in partial modification of earlier notifications it is mentioned as item No. 8 as part and parcel of rate schedule. The first part thereof which is relevant for our present purpose reads as under :

"8. Incentive to New Industry - A development rebate of 10 percent on the amount of the bill pertaining to the energy charges as computed under item 4 and 7, above, will be given to a new industrial unit for a period of three years from the date of com-mencement of supply. This rebate will also be admissible for the unexpired period of three years to these existing industrial units which have not completed three years on Feb. 1, 1986 from the date of commencement of supply. This development rebate, how-ever, shall not be allowed to the Central/State Govt. departments."

It is this item 8 which stood deleted by the impugned notification of 31st July 1986. The relevant part of the said impugned notification reads as under :

"In partial modification of their Notification (Amendment) No. 225-HC/SEB- V-1974-1204-C-86, dated January 28, 1986, regarding rates and tariffs for supply of electrical energy by the Board, as published in U.P. Gazette extraordinary, dated January 29, 1986 and as amended from time to time, the U.P.S.E.B. in exercise of the powers under Section 49 of the Electricity (Supply) Act, 1948 (Act No. 54 of 1948) and all other powers in this behalf hereby make the following amendment in rate schedules LMV-6, LMV-8, HV-1 and HV-2 annexed thereto, which shall be deemed to have come into force w.e.f. August 1, 1986 :

(1)... (2)... (3) Rate Schedule HV-1

(a) The first para of item 8 under the heading "Incentive to New Industry" be deleted."

A mere look at this item shows that all the aforesaid three notifications which held the field from 29th October 1982 to 28th January 1986 clearly contained a representation by the Board to the consumers, who were to establish new industrial units in the territories of the State in which the Board was to supply electricity, that on the total bill of electricity consumed by them during the period of first three years of their taking supply they will be getting a rebate of 10% on the total

amount of such bills for electricity consumption. It was also assured that this rebate would be available not only to new industrial units which may get established and which may take electric supply from the Board on and from the date on which the said last notification of 28th January 1986 came into force, but rebate would be permissible even to those new industries who had earlier established their industries and taken electricity supply from the Board and three years' period earlier granted to them for earning development rebate had remained unexpired on 1st February 1986 and for that entire unex-pired period also the said development rebate was guaranteed by the Board. This obviously can be said to have been an incentive offered by the Board in exercise of its statutory powers under Section 49 of the Act read with Section 78A of the Act under which the State was entitled to issued suitable directions for effectuating such an incentive package for new industries to enable these new and infant industries to get attracted to the area where the Board was to supply electric energy so that these prospec-tive consumers of electricity to be supplied by the respondent- Board could not only establish their industries in these areas but could withstand the competition with old industrial units as the concession in the payment of electricity charges would obviously reduce their cost structure and conse-quently the price of their manufactured articles, so that these new in-dustries during their infancy could effectively stand in the competition with old industries which may be well settled in the market. This was certainly an infancy benefit made available as an incentive by the Board to these new industries. This package of infancy benefit made available by the Board was obviously in compliance with State's directive under Section 78A of the Act as it was a part and parcel of the package of incentives made available to new industries as seen from the Annexure 'A' (Copy of extracts specifying various incentives and concessions dated 12th Novem-ber 1981) to the Special Leave Petition (C) No. 13827 of 1991 out of which Civil Appeal No. 3203 of 1991 has arisen, filed by the appellant. It is not the case of the Board that such an incentive scheme was not quoted by the State. It must, therefore, be held that the earlier three notifications issued by the Board under Section 49 read with Section 78A of the Act were a part and parcel of this incentive scheme. This scheme of rebate of 10% for new industries to be established in plains of the Slate had remained operative since 29th October 1982 for almost four years and even by the latest notification dated 28th January 1986 the Board had continued the said package of incentives and made it available also to the new industries which could come up even after 28th January 1986 in the area of the State where the Board was supplying electricity and selling it to its consumers.

It is also obvious that when new industries are attracted in the region, the Board would be able to find more and more customers for the electricity sought to be sold by it to these consumers of electricity who would be taking high voltage electric power and, therefore, would be paying higher tariff by way of HVI and HV2. Thus such an incentive scheme would benefit not only the entire State but also the Board itself.

It is, therefore, not possible to agree with the contention of learned senior counsel for the Board that these three notifications did not hold out any promise or any representation to the general public enabling the new industries to get established acting on the said representation. It is obvious that after the expiry of this three years' period the Board would be able to charge full rate for electricity supplied to these new customers who would then become sufficiently old and mature and would not need any more rebate. It cannot, therefore, be said that the Board had no interest in these new industries, their prospective customers, and was not interested in attracting them to the territory

catered to by it by the supply of electricity. It may be that the Board exercised its statutory powers under Section 49 of the Act for that purpose but all the same it in its wisdom and acting on the direction under Section 78A of the Act pursuant to the package of incentives offered by the State of U.P. to these new industries, had issued the said notifications holding out these promises. But even assuming that the State had no role to pay in this connection as submitted by Shri Dave for the respondents, these three notifications on their own wordings leave no room for doubt that they did contain offers of incentives to new industries who would be the prospective new consumers of electricity and, therefore, the Board's future customers.

In this connection we may usefully refer to two decisions of this Court. In the case of State of Madhya Pradesh & Ors. v. Orient Paper Mills Ltd., [1990] 1 SCC 176 a Bench of two learned Judges of this Court consisting of S. Ranganathan and M.M. Punchhi, JJ., upheld the electricity duty package made available to industrialists who were themselves generaling power through their own generating sets on the doctrine of promissory estoppel. It is of course true that in that case State of Madhya Pradesh had offered this package but it was obviously through its own limb, M.P. State Electricity Board. Any exemption from electricity duty could be granted only by the Board exercising powers under Section 49 of the Act and that could be at the behest of the State.

In the present case even leaving aside the promissory estoppel against the State of U.P. it can clearly be visualised that by the mere wordings of the aforesaid three notifications the Board acting as a limb of the State of U.P. had offered these concessions by way of rebate in electricity duty to the new industries so as to attract them to the State to enable the Board to take them in its fold as prospective consumers of electricity to be sold by it to them.

It the case of Amrit Banaspati Co. Ltd. and Another v. State of Punjab and Another, [1992] 2 SCC 411 another Bench of this Court consisting of two learned Judges speaking through R.M. Sahai, J., considered the ques-tion whether any promissory estoppel was available against the State of Punjab when it promised new industries refund of sales tax collected by it earlier from its consumers.

In connection with the doctrine of promissory estoppel the follow-ing pertinent observations, relying on a number of decisions of this Court, are found in paragraph 4 of the Report :

"The law of promissory estoppel furnishes a cause of action to a citizen, enforceable in a court of law, against govt. if it or its officials in course of their authority extend any promise which creates or is capable of creating legal relationship, and it is acted upon, by the promisee irrespective of any prejudice. What, there-fore, requires to be examined, is if any promise was made by the Government or its officials to the appellants that sales tax shall be refunded to it and if the appellant acting on it altered its position?

In this case a promise or representation promise was made on behalf of the Government by its officials in pursuance of and in line with the declaration of policy by the Government that a new unit shall be entitled to concession. Acting on the assurance, both express and implied, the appellant invested substantial amount in setting up the unit requesting, in the meanwhile, for grant of written sanction from the Government which, too, came. The equity arose in favour of appellant by having

altered its position on the as-surance given by the authorities. Thus basic ingredients of promise by the Government, belief of the appellant that it was true and if acted upon shall entitle it to refund of sales tax, and finally altering its position by investing substantial amount were established to invoke promissory estoppel against the government."

However on facts it was found that no promissory estoppel was available to the appellant in that case which enabled it to require the State of Punjab to refund the sales tax already collected by it from its consumers by way of incentive. In this connection relevant observations are found in paragraph 11 of the Report as under :

"Exemption from tax to encourage industrialisation should not be confused with refund of tax. They are two different legal and distinct concepts. An exemption is a concession allowed to a class or individual from general burden for valid and justifiable reason. For instance tax holiday or concession to new or expanding in-dustries is well known to be one of the methods to grant incentive to encourage industrialisation. Avowed objective is to enable the industry to stand up and compete in the market. Sales tax is an indirect tax which is ultimately passed on to the consumer. If an industry is exempt from tax the ultimate beneficiary is the con-sumer. The industry is allowed to overcome its teething period by selling its products at comparatively cheaper rate as compared to others. Therefore, both the manufacturer and consumer gain, one by concession of non-levy and other by non-payment. Such provisions in an Act or Notification or orders issued by Govern-ment are neither illegal nor against public policy."

It was, therefore, held that incentive to new industries by way of tax holiday or tax exemption could validly form the subject-matter of promissory estoppel as it would not be against public policy but in so far as any representation seeks to enable the promisee to get refund of the collected sales tax it would remain unconstitutional being violative of the taxation scheme of the Constitution and, therefore, would be contrary to public policy and would get voided under Section 23 of the Contact Act. Consequently it cannot be held On the clear recitals found in the aforesaid three notifications issued by the Board that no representation whatsoever guaranteeing 10% rebate on electricity consumption bills could be culled out from these notifications. We, therefore, agree with the finding of the High Court on Issue No. 1 that by these notifications the Board had clearly held out a promise to these new industries and as these new industries had admittedly got established in the region where the Board was operating, acting on such promise, the same in equity would bind the Board. Such a promise was not contrary to any statutory provision but on the contrary was in compliance with the directions issued under Section 78A of the Act. These new industries which got attracted to this region relying upon the promise had altered their position irretrievably. They had spent large amounts of money for establishing the infrastructure, had entered into agreements with the Board for supply of electricity and, therefore, had necessarily altered their position relying on these representations thinking that they would be assured of at least three years' period guaranteeing rebate of 10% on the total bill of electricity to be consumed by them as infancy benefit so that they could effectively compete with the old industries operating in the field and their products could effectively compete with their products. On these well established facts the Board can certainly be pinned down to its promise on the doctrine of promissory estoppel.

However Shri Dave, learned senior counsel appearing for the Board vehemently pressed in service a decision of a three Judge Bench of this Court in the case of M/s. Ashok Soap Factory and Another v. Municipal Corporation of Delhi and Others, [1993] 2 SCC 37. In that case the Court was concerned with the power exercised by Delhi Municipal Corporation under Section 283 of the Delhi Municipal Corporation Act, 1957 to levy charges for the supply of electricity at such rates as may be fixed from time to time by Delhi Municipal Corporation in accordance with law. The dispute centered round the question of levying minimum consumption guarantee charges for large industrial power consumers and tariff revision is connection therewith. The Court upheld the revision of minimum demand charges but while doing so in paragraph 29 of the Report observed that apart from that, the fixation of tariff was a legislative function and the only challenge to the fixation of such levy could be on the ground of unreasonableness or arbitrariness and not on demonstrative grounds in the sense that the reasons for the levy of charge must be disclosed in the order imposing the levy or disclosed to the court, so long as it was based on objective criteria.

We fail to appreciate how those observations made in connection with entirely a different challenge based on different statutory scheme can be straightaway pressed in service for contending that even grant of rebate of electricity charges as a part of permissible incentive scheme would also be a legislative function. It has to be kept in view that the Board exercises its statutory powers under Section 49(1) of the Act by fixing uniform rates of tariff for electricity charges. When it fixes general tariffs, it may be said to be exercising delegated legislative power. But while doing so, it also in exercise of its statutory power can grant rebate to a given class of con-sumers under Section 49 sub-Sections (2) and (3) read with Section 78A of the Act. Once the uniform tariffs are fixed the statutory function of quasi-legislative nature gets fructified. Dehors such rates if some concession by way of rebates is to be given the same would still remain in the field of statutory exercise of power. On this aspect we may usefully refer to a decision of this Court in the case of Bihar State Electricity Board and Another v. Usha Martin Industries and Another, [1997] 5 SCC 289 rendered by a Bench of two learned Judges wherein one of us (K.T. Thomas, J.) was a member. Dealing with the very same Section 49(1) the following pertinent observations were made by Sen, J. speaking for the Bench :

"Moreover, the tariff is fixed by exercise of statutory power. It is not fixed as a result of any bargaining by and between the Board and the consumers. It is a uniform tariff which every consumer will have to pay for the electricity consumed by him. In fact, the consumer has no option but to pay the tariff fixed by the Board in exercise of power conferred by Section

49."

For the purpose of the present discussion we may proceed on the basis that while fixing general tariffs and making them subject to schemes of rebate, the Board exercises delegated legislative function flowing from the Statute. However once incentive rebate is granted in the general rate of tariffs on directions by State under Section 78A, the said incentive rebate offered by the Board would remain in the realm of exercise of statutory power-cum-duty. In the exercise of the same power the Board in its discretion can grant rebate in appropriate cases within the forecorners of Sections 49 and 78A of the Act. Of course this exercise will be subject to legally permissible limits

and subject to the said concessional rates being found reasonable on the touchstone of Article 14 of the Constitution of India. It is, therefore, not possible to countenance the submission of Shri Dave that there cannot be any promissory estoppel against the Board when it exercises its powers under Section 49(1) of the Act whatever may be the settings for exercise of this power and even if it is exercised as a part of a scheme of incentive package required to be offered to new industries as enjoined on the Board as per statutorily binding directions issued by the State to the Board under Section 78A of the Act.

Shri Dave, learned senior counsel for the Board next contended that the Board in exercise of its statutory powers had earlier decided to grant rebate of 10% on the bills of electricity consumed by new industries. In the exercise of the same statutory power it was open to the Board to withdraw the said concession or rebate on the ground of public policy and doctrine of promissory estoppel cannot be pressed in service for thwarting such an exercise by the Board. For supporting this contention he vehemently pressed in service two decisions of this Court in the case of Kasinka Trading and Another v. Union of India and Another, [1995] 1 SCC 274 and in the case of Shrijee Sales Corporation and Another v. Union of India, [1997] 3 SCC 398. In fact these two decisions were the sheet anchor of the challenge mounted by Shri Dave for the Board against the finding of the High Court on Issue No. 1. We, therefore, now proceed to deal with these decisions.

In the case of Kasinka Trading (supra) a Bench of two learned Judges of this Court consisting of M.N. Venkatachaliah, CJ. and Dr. A.S. Anand, J., had to consider the question whether a notification issued under Section 25 of the Customs Act, 1962 granting complete exemption from payment of customs duty to PVC resin imported into India by manufacturers of certain products requiring the said resin as one of the raw materials, which was issued in public interest and which had stated that it would remain in force upto and inclusive of 31st March 1981 could be withdrawn before the expiry of the said period by fresh notification issued by the Government in exercise of the very same power under Section 25 of the Customs Act. This Court speaking through Dr. Anand, J., took the view that as the said notification was issued in public interest it could be withdrawn even before the time fixed therein for its operation also in public interest and while issuing such a notification no promise can be said to have been held out or any representation made to the importers in general on the basis of which they could insist on the doctrine of promissory estoppel that the customs duty exemption granted earlier by the first notification could not be reduced by the second one. The following pertinent observations are found in paragraphs 11 and 12 of the Report :

"The doctrine of promissory estoppel or equitable estoppel is well established in the administrative law of the country. To put it simply, the doctrine represents a principle evolved by equity to avoid injustice. The basis of the doctrine is that where any party has by his word or conduct made to the other party an unequivocal promise or representation by word or conduct, which is intended to create legal relations or effect a legal relationship to arise in the future, knowing as well as intending that the representation, assurance or the promise would be acted upon by the other party to whom it has been made and has in fact been so acted upon by the other party, the promise, assurance or representation should be binding on the party making it and that party should not be permitted to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings, which have taken place or are intended to take place between the parties.

It has been settled by this Court that the doctrine of promissory estoppel is applicable against the Government also particularly where it is necessary to prevent fraud or manifest injustice. The doctrine, however, cannot be pressed into aid to compel the Government or the public authority 'to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the government or of the public authority to make'. There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expressions, without any sup-porting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. In our opinion, the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present to the mind of the court, while considering the applicability of the doctrine. The doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation.

It may, however, be mentioned that in paragraph 21 of the Report the Court has observed that the notification which was impugned before it was not designed or issued to induce the appellants to import PVC resin. Admittedly, the said notification was not even intended as an incentive for import. The notification on the plain language of it was conceived and issued by the Central Government 'being satisfied that it was necessary in the public interest so to do'. Strictly speaking, therefore, the notification could not be said to have extended any 'representation' much less a 'promise' to a party getting the benefit of it to enable it to invoke the doctrine of promissory estoppel against the State. It must, therefore, be held that the aforesaid decision had clearly proceeded on the basis that by issuing the earlier notification under Section 25 of the Customs Act no promise was held out to any of the importers that the notification's life will not be curtailed earlier. Nor was the issuance of the notification based on any claim of incentives to be offered to anyone. It was issued in exercise of statutory powers vested in the Government which could be exercised from time to time in public interest. Earlier the public interest might have required issuance of such a notification granting cent per cent exemption from customs duty on import of PVC resin. Under changed circumstances public interest itself required reduction of such an exemption and as no promise was held out that this could not be done at any time the Court on the facts of that case justifiably rejected the plea of promissory estoppel. It is also to be observed that the said notification was issued in exercise of sovereign taxing power and had created no legal relationship between the authority issuing the notification on the one hand and the prospective importers of PVC resin on the other. The said decision is not an authority for the proposition that even if a claim of exemption from import duty was resorted to in public interest by way of an incentive for a class of importers and even though such public interest continued to subsist during the currency of such an exemption notification and that promisees for whose benefit such exemption was granted had changed their position relying on the said exemption notification, it could still be withdrawn before the time mentioned therein even though public interest did not require the said exercise to be undertaken and even though there were subsisting equities in favour of the promisee-importers. As such a

situation had not arisen in that case it was not adjudicated upon.

The said decision, therefore, cannot be of any real assistance to learned senior counsel Shri Dave for the respondent-Board on the facts of the present group of matters. In the present cases, as we have seen earlier a clear-cut scheme of incentives for new industries was put forward by the Board presumably at the behest of the U.P. Government so that more and more industries could be attracted to State of U.P. The Board also in its wisdom adopted the said scheme of incentives while fixing schedule of tariff rates as that Was also in the interest of the Board for the obvious reason that thereby more and more new industries as consumers of high power electricity would be attracted to the region and would be paying higher electricity rates/charges to the Board.

Shri Dave next invited our attention to a three Judge Bench judgment of this Court in the case of Shrijee Sales Corporation (supra) wherein A.M. Ahmadi, CJ., speaking for the Bench considered the correctness of the aforesaid decision in Kasinka Trading (supra). As the decision in Shrijee Sales Corporation (supra) has laid down the parameters of the field in which the doctrine of promissory estoppel can apply it is necessary to closely refer to the relevant observations found in the said judgment. It may be mentioned that the very same customs exemption notification which was considered by the Bench of two learned Judges in Kasinka Trading (supra) was considered by a three Judge Bench in Shrijee Sales Corporation (supra). While upholding the said notification Ahmadi, CJ., in paragraphs 3 and 4 of the Report observed as under :

"It is not necessary for us to go into a historical analysis of the case- law relating to promissory estoppel against the Government. Suffice it to say that the principle of promissory estoppel is applicable against the Government but in case there is a supervening public equity, the Government would be allowed to change its stand; it would then be able to withdraw from representation made by it which induced persons to take certain steps which may have gone adverse to the interest of such persons on account of such withdrawal. However, the Court must satisfy itself that such a public interest exists. The law on this aspect has been emphatically laid down in the case of Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., [1979] 2 SCC 409. The portion relevant for our purpose is extracted below :

"It is only if the Court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the Court would refuse to enforce the promise against the Government. The Court would not act on the mere ipse dixit of the Government, for it is the Court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden. But even where there is no such overriding public interest, it may still be comptent to the Government to resile from the promise 'on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position' provided of course it is possible for the promisee to restore status quo ante. If, however, the promisee cannot resume his position, the

promise would become final and irrevocable. Vide Emmanuel Ayodeji Ajayi v. Briscoe, (1964) 3 All ER 556."

Two propositions follow from the above analysis :

(1) The determination of applicability of promissory estoppel against public authority/Government hinges upon balance of equity or 'public interest'.

(2) It is the Court which has to determine whether the Government should be held exempt from the liability of the 'promise' or 'representation'. "In the present case, the first notification exempting the customs duty on PVC itself recites '.....Central Government being satisfied that it is necessary in public interest to do so.....'. In the notification issued later which gave rise to the present cause of action, the same recitation is present."

It is, therefore, obvious that even though it may be found that the Govern- ment or any other competent authority had held out any promise on the basis of which the promisee might have acted, if public interest required recall of such a promise and such a public interest outweighed the interest of the promisee then the doctrine of promissory estoppel against the Government would lose its rigour and cannot be of any avail to such promisee. In the aforesaid decision the further contention canvassed on behalf of the appellant-promisee was also examined. That centered round the question whether the notification having fixed a time limit for its operation could be rescinded prior to the expiry of the said period. Rejecting the said contention and upholding the right of the authorities to recall such a notification even earlier it was observed in paragraph 7 of the Report that once public interest is accepted as the superior equity which can override individual equity, the principle should be applicable even in cases where a period has been indicated. It was further observed that the Government is competent to resile from a promise even if there is no manifest public interest involved, provided, of course, no one is put in any adverse situation which cannot be rectified. To adopt the line of reasoning in Emmanuel Ayodeji Ajayi v. Briscoe quoted in M.P. Sugar Mills even where there is no such overriding public interest, it may still be within the competence of the Government to resile from the promise on giving reasonable notice which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, provided, of course, it is possible for the promisee to restore the status quo ante. If, however, the promisee cannot resume his position, the promise would become final and irrevocable.

In the light of this settled legal position we, therefore, hold that even though the appellants have succeeded in convincing us that the earlier three notifications dated 29th October 1982, 13th July 1984 and 28th January 1986, did contain a clear promise and representation by the Board to the prospective new industrialists that once they established their industries in the region within the territorial limits of the operation of the Board, they would be assured 10% rebate on the total bills regarding consumption of electricity by their industries for a period of three years from the initial supply of electric power to their concerns, the appellants will not be able to enforce the equity by way of promissory estoppel against the Board if it is shown by the Board that public interest required it to withdraw this rebate even prior to the expiry of three years as available to the appellants concerned. It has also to be held that even if such withdrawal of development rebate prior

to three years is not based on any overriding public interest, if it is shown that by such premature withdrawal the appellant-promisees would be restored to status quo ante and would be placed in the same position in which they were prior to the grant of such rebate by earlier notifications the appellants would not be entitled to succeed. We, therefore, now proceed to examine these twin aspects of the controversy.

So far as the question of public interest is concerned it must at once be stated that it is not the case of the respondent-Board that it sought to withdraw the incentive development rebate made available earlier by it to the new industries on the ground of any public interest. In this connection by way of illustration we my refer to one of the identical counters filed by the respondent-Board in this group of matters. In Civil Appeal No. 1710 of 1991 the counter affidavit of the Board is found at page 154. Though the counter is sought to be filed in Civil Appeal No. 5318 of 1997 (Arising out of S.L.P.(C) No. 5355 of 1991) it is sought to be treated as a counter affidavit in this Civil Appeal. One B.S. Sharma, Executive Engineer (Com- mercial) of the respondent- Board has staked the claim of the Board for supporting the impugned notification for withdrawal of development rebate only on the twin grounds. Firstly it was contended that the grant of rebate could be withdrawn by the Board at any time it thought fit and for that purpose Section 49 of the Act was pressed in service. And the second ground is that the appellants themselves have executed agreements with the Board which empowered the Board to withdraw the development rebate earlier granted to them. Nowhere it is even whispered that the Board had to withdraw this development rebate incentive midstream on account of some overriding public interest.

Shri Dave, learned senior counsel for the Board, however, submitted in this connection that there was a felt necessity for the Board to recall this development rebate as a high power Tariff Realisation Committee advised the Board for maintaining its profits, to withdraw this rebate and the Board had acted in the light of the said Report submitted to it in the year 1986. In short genesis of this impugned notification is the advice given to the Board by the Tariff Realisation Committee which was a high power committee. It, therefore, becomes clear that not on the ground of general public interest but solely on the ground of commercial interest of the Board which had earlier held out the promise that the aforesaid withdrawal was effected. Consequently it must be held on the facts of these cases that the impugned withdrawal notification was not backed up by any demands of public interest which would outweigh the individual interests of the appellant- promisees who acted upon the same. It is also pertinent to note in this connection that it is no longer in dispute between the parties that relying upon the earlier notifications holding out promise by the Board to give development rebate by way of incentive to new industries for three years from the date of initial supply of electricity to them, all the appellants as new industrialists had walked in the territory catered to by the Board and had established their industries in State of Uttar Pradesh by spending huge amounts of moneys for constructing the factories wherein their industrial activities could commence. On this aspect we may usefully refer by way of a specimen the averments contained in S.L.P.(C) No. 4561 of 1991 out of which Civil Appeal No. 10187 of 1991 arises. At page 51 of the Paper Book is found relevant factual data mentioned in the said Special Leave Petition. In para 3(i) and 3(ii) the following averments were made :

"(i) That on 29.10.1982/13.7.1984 the U.P. State Electricity Board (an instrumentality of the State subject to the mandate of fairness and reasonableness under Article 14 of the Constitu-tion) made representations and promises to the effect that an incentive in the form of 10% development rebate on the amount of electricity bills shall be given to all new industrial units in the State for a period of three years from the date of commencement of supply of electricity to them.

(ii) That the petitioner established a new industrial unit (relying on the aforesaid representations and promises of the Board)."

The counter affidavit filed on behalf of the Board in reply to the said averments makes an interesting reading. At page 70 is the counter affidavit filed by the same deponent Shri Sharma, Executive Engineer (Commercial) whose counter in other case is referred to earlier. In the said counter he had stated that he relies upon the counter affidavit in Civil Appeal No. 1713 of 1991 for the purpose of the aforesaid Civil Appeal also. The said counter is annexed by way of Annexure '1' at page 72 of the Paper Book. So far as the recitals in the S.L.P. at paragraphs 3(i) and 3(ii) are con- cerned the reply thereto in the said counter is found at page 80 by way of parawise reply. In paragraphs 3(i) to 3(iii) it is mentioned that the contents in these paragraphs need no comments. Identical is the stand taken by the respondent-Board in this group of matters trying to deal with the identical averments made by all these appellants that relying upon the representation of the Board as found in the earlier notifications they had spent large amounts and established their factories.

Consequently it must be held that relying upon the representations held out by the Board in these earlier notifications assuring grant of incentive rebate of 10% on the total bill of electricity consumption charges these new industries being assured that for three years this concession will be available had burnt their boats and spent large amounts and had established their industries in the area falling in the operative jurisdiction of the Board in State of U.P.

Under these circumstances when no public interest was sought to be pressed in service by the Board for withdrawal of this incentive rebate, as seen earlier, the equity which had arisen in favour of the appellants remained untouched and undisturbed by any overwhelming and superior equity in favour of the Board entitling it to withdraw this development rebate in a premature manner leaving these promisees high and dry before the requisite period of three years earlier guaranteed to them by way of development rebate had got exhausted. This takes us to the consideration of the second aspect of the matter.

As observed by this Court in Shrijee Sales Corporation (supra) even where there is no such overriding public interest it might still be open to the promisor-State or its delegate to resile from the promise on giving reasonable notice which need not be a formal notice giving the promisee a reasonable opportunity of resuming his position, provided it is possible for the promisee to restore the status quo ante. Even on this aspect the respondent-Board has no case. It has not given any reasonable opportunity to the appellants to resume their earlier position. Nor is it shown by the Board that it is possible for the appellant-promisees to restores the status quo ante. The reason is obvious. Once the new industries were lured into establishing their factories in the region catered to by the Board on being assured three years guaranteed incentive of development rebate of 10% on

their total bills of electricity charges and acting on the same once they had established their industries and spent large amounts for constructing the infrastructure and for employing necessary labour and for purchasing raw materials etc., it would be almost impossible for them to restore the status quo ante and to walk out midstream if the development rebate incentive was withdrawn for the unexpired period out of the three years' guaranteed period of currency of development rebate incentive. In fairness even it was not suggested by learned senior counsel for the respondents that on such withdrawal of development rebate the appellants would be able to restore the status quo ante and walk out. He simply relied upon the ratio of the decision of this Court in the case of Shrijee Sales Corporation (supra) for contending that it is the power of the Board to grant the rebate and it is equally the power of the Board to withdraw the same in its own discretion.

Consequently it must be held that the twin aspects highlighted by this Court in Shrijee Sales Corporation (supra) on the basis of which the authority promising a particular course of conduct on its part to the prospective promisee can resile from the promise even prematurely are not found established on the facts of these cases. Consequently the ratio of the said decision cannot be of any avail to the respondent-Board.

Shri Dave, learned senior counsel for the Board next pinned his faith on another decision of this Court in the case of Ester Industries Ltd. v. U.P. State Electricity Board and Others, [1996] 11 SCC 199. In that case this Court was concerned with a converse situation wherein the Government of U.P. had decided to grant 10% development rebate to new industries which could be attracted to the State. However, the respondent-Board had not acted upon the said suggestion of the Government of U.P. and had not changed its tariff rates by adopting the same scheme of incentive benefits for its consumers. Question was whether the Court could compel the Board to grant such an incentive rebate to its consumers in exercise of statutory power of the Board under Section 49 of the Act when the Board itself had not thought it fit to do so. The High Court had rejected such a request of the writ petitioners for enforcing the aforesaid scheme on the Board. Said decision was upheld by a Bench of this Court consisting of K. Ramaswamy and G.B. Pattanaik, JJ., by the aforesaid judgment. The Court observed that the State Electricity Board had a statutory function to discharge in determination of the rates of tariff and this being a legislative policy while exercising the power under Section 78A of the Act policy directions issued by the Government may also be taken into consideration by the Board which had a statutory duty to perform and that it was for the State Government to consider whether the Board had laid down the policy or whether the direction issued by the State Government had not been properly implemented. The Court could not give a direction to the Board to implement the directions issued by the State Government. Thus it was held that no mandamus could be issued to the Board to grant such incentive rebate to the new industries. The Court also noted that in the agreements entered into by the consumers with the Board full tariff rates without any rebate were agreed to be paid. Consequently it was observed that promissory estoppel would apply only in a case where there was no contract executed between the parties and in that case there existed a contract duly executed under law between the petitioner and the Board which bound them and unless the same was revised question of promissory estoppel did not arise.

We fail to appreciate how the aforesaid decision can advance the case of respondent-Board in the peculiar facts of this group of matters. As we have noted earlier here is a converse poisition where

the Board presumably appears to have accepted the guidelines and the directions given by the State of U.P. under Section 78A of the Act and its adopted the scheme of incentive rebates for new industries by promulgating it own tariffs in exercise of its powers under Section 49 read with Section 78A of the Act and it was the Board itself which had given such a promise and held out such representations to the newcomer industries by the first three notifications as seen above. Once that was so the question of compelling the Board to promulgate such policy would not survive for consideration in the present cases. It is obvious that if the Board had not promulgated such a policy the Court could not have compelled the Board to give such concession. Here the question is having itself promulgated such a policy whether the Board can go back upon it prematurely. The aforesaid decision of this Court had no occasion to consider this aspect of the matter.

However Shri Dave was very sanguine about the observation in this judgment that promissory estoppel would not apply where there existed a contract executed between the consumer and the Board. As we have noted earlier the aforesaid observations in the said Report were made in the light of the fact situation before the Court. There the consumer had entered into an agreement to be bound by the tariff rates notifications by the Board from time to time. Those tariff rates were devoid of any scheme of incentive development rebate. In other words they were full-fledged tariff rates without any development rebate component. Under these circumstances the Court justifiably observed that the consumer was bound by the contract and when the Board itself had not promulgated any policy of development rebate for new industries Board could not be compelled on the doctrine of promissory estoppel to do something which it had never promised to do. Consequently the decision in Ester Industries Ltd. (supra) also is of no avail to the respondent-Board.

Before parting with this discussion it must be stated that in the light of I he observations made in Ester Industries Ltd. (supra) by this Court to the effect that the fixation of tariff including incentive rebate is a legislative function, the observations of the High Court that it is not a legislative or delegated legislative function, cannot be sustained. It must be held that such a function is quasi-legislative in character reflecting an exercise of delegated legislative power.

As a result of the aforesaid discussion it must be held that the finding reached on the question of promissory estoppel by the High Court on Issue No. 1 is well sustained. The respondent-Board must be treated to be estopped from prematurely withdrawing the incentive development rebate made available to these appellant-industries by issuing the impugned notification. Point No. 1 is accordingly answered in the affirmative in favour of the appellants and against the Board. This takes us to the consideration of the main question on which the High Court held against the appellants.

In the view of the High Court despite the equity by way of promissory estoppel being available to the appellants against the Board, as the appellants themselves had agreed by entering into written agreements and contracts with the Board when they took electric connections for their industries, that the Board had power to change the rate schedules from time to time and to revise them, the appellants were barred from challenging the impugned notification. Now it must be kept in view that as per the incentives offered to the new industries the Board had promised these new industrialists that for three years from the date on which they took electric supply for the first time

for their industries they would be given 10% rebate on the total bill of electricity consumption charges for their industries. It is not in dispute that before electric supply could be made available to these new industries who would be new consumers to be enrolled by the Board these consumers had to enter into standard agreements. Such agreements had to be signed and entered into by all the prospective consumers whether they were covered by any incentive scheme or not. It is also an admitted position that all the appellants while taking electric connections for the first time for their new industries established by them in the region relying upon the incentives offered by the Board, entered into such written agreements in standard forms. The relevant clauses of these agreements on which strong reliance was placed by the High Court of non-suiting the appellants, deserve to be extracted in extenso at this stage :

"7. (a). The consumer shall pay for the supply of electric energy at the rates enforced by the supplier from time to time as may be applicable to the consumer.

(b) The Rate Schedule applicable to the consumer at the time of execution of this agreement is annexed hereto as Annexure-2.

(c) The Rate Schedule above mentioned, may, at the discretion of the supplier, be revised by the supplier from time to time and in the case of revision, the Rate Schedule so revised shall be applicable to the consumer."

According to the High Court once the consumers agreed to the authority of the Board to revise earlier rate schedule which was existing at the time of the agreement and as item 8 was a part and parcel of the said rate schedule implicit in Clause 7(c) was the agreement by the appellant-consumers that the Board will be able to tinker with or even wholly withdraw the development rebate earlier made available as per the said item 8 of the rate schedule.

Shri Dave, learned senior counsel for the respondent-Board also vehemently supported the said line of reasoning adopted by the High Court for non- suiting the appellants. Learned counsel for the appellants on the other hand submitted that any such standard- form contracts between the Board, a monopolist supplier of electricity and the consumers were one sided and the latter had no option but to sign such standard agreements. Hence the terminology employed in such agreement has to be strictly construed and nothing should be implied so as to foist upon the consumer a disability which would not have been even remotely intended by him. We may refer to some of the passages from standard books on contracts.

In Chitty on Contracts 27th Edition Vol. I 1994 the following passage in connection with the standard form contracts being paragraph No. 12.007 is required to be noted :

"Contacts in standard form. - A different problem may arise in proving the terms of the agreement where it is sought to show that they are contained in a contract in standard form, i.e., in some ticket, receipt, or standard form document. The other party may have signed the document, in which case he is bound by its terms. More often, however, it is simply handed to him at the time of making the contract, and the question will then arise whether the printed conditions which it contains have

become terms of the contract. The party receiving the document will probably not trouble to read it, and may even be ignorant that it contains any conditions at all. Yet standard form contracts very frequently embody clauses which purport to impose obligations on him or to exclude or restrict the liability of the person supplying the document. Thus it becomes important to determine whether these clauses should be given contractual effect."

In paragraph 12.013 at page 566 of the book the learned author has made following observations regarding the onerous or unusual terms :

"Onerous or unusual terms. - Although the party receiving the document knows it contains conditions, if the particular condition relied on is one which is a particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention. 'Some clauses which I have seen', said Denning L.J., 'would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient'."

Dealing with the topic of Construction of Terms in a Written Contract the learned author at paragraph 12.040 has observed as under :

"Intention of the parties. - The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say, the meaning of the document or of a particular part of it is to be sought in the document itself : 'One must consider the meaning of the words used, not what one may guess to be the intention of the parties.' However, no contract is made in a vacuum. In construing the document, the court may resolve an ambiguity by looking at its commercial purpose and the factual background against which it was made.

Further, the law docs not approach the task of construction with too nice a concentration on individual words."

The learned author has also dealt with the topic of Absurdity and Incon- sistency resulting from the Construction of plain words in the contract which should be avoided. Dealing with the topic in paragraph 12.046 it is observed as under :

"Absurdity, inconsistency, etc. - The rule that words must be con-strued in their ordinary sense is liable to be departed from where that meaning would involve an absurdity or would create some inconsistency with the rest of the instrument, or where, if they were so construed, they would lead to a very unreasonable result or impose upon the contractor a responsibility which it could not reasonably be supposed he meant to assume. Thus a covenant to pay money at such time as should be appointed by the creditor 'by notice in writing sent by post, or delivered to or left at the house or last known place of abode' of the debtor, has been held to impose on the creditor the necessity of allowing a reasonable time to elapse between the giving of a notice and the time of payment. And where a person covenants to pay money to do any other act 'immediately' or 'on demand', he has a reasonable time to do the act, according to the nature of the thing to be done."

Dealing with Mercantile Contracts the learned author at paragraph 12.048 states as under :

"Mercantile contracts. - Although it has been stated that there is not in law any difference of construction between mercantile contracts and other instruments, commercial documents 'must be construed in a business fashion', and 'there must be ascribed to the words a meaning that would make good commercial sense'. Indeed, in The Antaios Lord Diplock said that 'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must yield to business commonsense'. Moreover, in mercantile con-tracts, the words employed may have acquired a special meaning, and this may be a different meaning from their natural one. Hence it is that mercantile contracts are to be construed according to the usage and custom of merchants, provided that the custom is not inconsistent with the agreement. When such contracts contain peculiar expressions which have in particular places or trades a known meaning attached to them, the meaning of these expressions is a question of fact, although the meaning of the contract still remains a question of law....."

In Cheshire's Law of Contract, 12th Edition 'Use of standard form contracts' is dealt with at page 21 in following terms :

"The use of standard form contracts.

The process or mass production and distribution, which has largely supplemented if it has not supplanted individual effort, has introduced the mass contract - uniform documents which must be accepted by all who deal with large-scale organisations. Such documents are not in themselves novelties; the classical lawyer of the mid-Victorian years found himself struggling to adjust his simple conceptions of contract to the demands of such powerful bodies as the railway companies. But in the present century many corporations, pubic and private, have found it useful to adopt, as the basis of their transactions, a series of standard forms with which their customers can do little but comply.

Lord Diplock has recently pointed out that Standard forms of contracts are of two kinds. The first of very ancient origin, are those which set out the terms on which mercantile transactions of common occurrence are to be carried out. Examples are bills of lading, charterparties, policies of insurance, contracts of sale in the commodity markets. The standard clauses in these contracts have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade. Contracts of these kinds affect not only the actual parties to them but also others who may have a commercial interest in the transactions to which they relate, as buyers or sellers, charterers or shipowners, insurers or bankers. If fair-ness or reasonableness were relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable.

The same presumption, however, does not apply to the other kind of standard form of contract. This is of comparatively modern origin. It is the result of the concentration of par-ticular kinds of business in relatively few hands. The ticket cases in the 19th century provide what are probably the

first examples. The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organisation representing the inter-ests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say; 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it'.

It is fair to add that even in Lord Diplock's second class there are good as well as bad reasons for the adoption of standard form contracts. In many cases the actual conclusion of the contract is in the hands of relatively junior persons who are not trained in contract negotiation and drafting and there are enormous economies to be effected if the company only employs one (or at most a few) standard forms of agreement. As regards the first class, we should note that whole areas of English commercial practice are governed by the prevalent standard forms which exist in a symbiotic relationship with the courts, so that an historical analysis of the development of a particular form would show that the clause represented a response to a decision in the past.

In the complex structure of modern society the device of the standard form contract has become prevalent and pervasive. The French, though nor the English, lawyers have a name for it.

The term contract d'adhesion is employed to denote the type of contract of which the conditions are fixed by one of the parties in advance and are open to acceptance by anyone. The contract, which frequently contains many conditions is presented for acceptance en bloc and is not open to discus-sion."

Similar observations are found in Anson's Law of Contract, 26th Edn. at page 136 the learned author has dealt with the question pertaining to construction of terms in a written contract as under :

"3. 'An agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.' The proper mode of construction is to take the instrument as a whole, to collect the meaning of words and phrases from their general context, and to try and give effect to every part of it. However, if the words of the particular clause are clear and unambiguous, they cannot be modified by reference to the other clauses in the agreement."

Dealing with the Construction of Exemption Clause found in standard form contracts the learned author at page 144 has made the following pertinent observations:

"Assuming that reasonably sufficient notice of a standard form contract has been given to the person who receives the printed document, we must now consider the way in which the terms of the document are to be construed. Such is the disparity between the bargaining power of large enterprises (both private and public) and the consumer that terms have often been imposed upon him which are onerous or unfair in their application and which exempt the party putting forward the document, either wholly or in part, from his just liability under the contract. This may be one of

the reasons why, at common law, the Courts evolved certain canons of construction which normally work in favour of the party seeking to establish liability and against the party seeking to claim the benefit of the exemption. The impression should not be given, however, that application of these canons of construction render exemption clauses generally ineffective. If the clause is ap-propriately drafted so as to exclude or limit the liability in question, then the Courts, must (subject to the powers now conferred on them by the Unfair Contract Terms Act 1977) give effect to the clause. Moreover, as between businessmen, exemption clauses can perform a useful function in that they may, for example, anticipate future contingencies which hinder or prevent performance, estab-lish procedures for the making of claims and provide for the allocation of risks as between the parties to the contract. In a business transaction, the effect of an exemption clause may simply be to determine which of the parties is to insure against a particular risk. Exemption clauses in business transactions are not necessarily unfair or inequitable. But even in business transactions the Courts must be satisfied that the clause, on its wording, does have the effect contended for by the person relying on it, that is, the party seeking to exclude or restrict his liability.

(a) Strict interpretation of the clause.

'If a person is under a legal liability and wishes to get rid of it,. he can only do so by using clear words.' The words of the exemp-tion clause must, therefore, exactly cover the liability which it is sought to exclude. So an exemption clause in a contract excluding liability for 'latent' defects' will not exclude the condition as to fitness for purpose implied by the Sale of Goods Act;..."

Our attention was also invited to a decision of a Division Bench of the Rajasthan High Court in the case of D.C. M. Ltd. and Another v. Assistant Engineer (HMT Sub-Division), Rajasthan State Electricity Board, Kota and Another, AIR (1988) Rajasthan 64. In that case a Division Bench speaking through J.S. Verma, CJ. (as His Lordship then was) had to consider the question whether the Rajasthan State Electricity Board functioning under the Electricity Act of 1910 and the Electricity (Supply) Act, 1948 could in exercise of its powers under Section 49 of the Supply Act require the consumer- appellant before them to pay by way of minimum charges at nearly three times the normal rate charged from other consumers being heavy industries consuming heavy demand of 25 MW. Even though the appellant before them, D.C.M. Ltd., had entered into such an agreement with the Board it was held that the said term in the agreement was unreasonable and consequently the demand of such excessive minimum consumption charges was not justified and could not be countenanced on the touchstone of Article 14 of the Constitution of India as the Electricity Board was an instrumentality of the State. The Court in this connection had to consider the nature of the written agreements entered into by the consumers of the electricity with the Board which was a monopolist and the further question whether an apparently inconceivable and unjust term in the written 'contract could be enforced by the Board against the con-sumer. Frowning upon impugned clause 16(c) in the written agreement got executed by the Board from the consumer the following pertinent obser-vations were made by J.S. Verma CJ. in paragraph 24 of the Report :

"... We may further add that for the reasons already given it is obvious that the giving of such an undertaking by execution of the agreement was no doubt a conscious act of the petitioner, but in the circumstances it cannot be held to indicate the petitioner's willingness to be bound by such an

onerous condition, if it had the option. It is obvious that there was no option to the petitioner and therefore, it cannot be said that the petitioner voluntarily and willingly chose and accepted the more onerous condition of a higher rate instead of the normal rate for payment of minimum charges. The willingness to accept such an onerous term with free consent can be assumed only where a consumer has an option or in other words he can get the supply of electricity he wants even without agreeing to any such term specified by the Board for being incorporated in the written contract without execution of which the consumer cannot insist on supply of electricity to him. It is not the Board's case that it was willing to honour the petitioner's requisition and make the supply even without the petitioner un-dertaking in writing to pay minimum charges according to Cl. 16(c). How can it then be said that the petitioner willingly accepted this term when the fact is that it had no option in the matter....."

We are of the view that the aforesaid observations of the Rajasthan High Court are in accordance with the correct legal position. In the light of the above legal position, we have to appreciate the express terms found in the written agreements of identical nature entered into by the appellant new industrialists when they were supplied electric connections for the first time at their factory premises by the Board. When we turn to the express terminology of these written agreements as found in Clause 7(a) extracted earlier, it becomes at once clear that the consumer had agreed to pay for the supply of electric energy at the rates enforced by the supplier from time to time as may be applicable to the consumer. So for as this clause is concerned it runs parallel to Section 49(1) which entitles the Board to fix the tariff for sale of electricity to the consumers. Therefore, in absence of such a clause the requirement of Section 49(1) would have called upon the consumer to pay for the supplied electricity at the rates fixed from time to time by the Board. It would, however be a uniform tariff fixed by the Board for such class of consumers. So far as Clause 7(b) is concerned it deals with the existing rate schedule annexed to the agreement. Moment we turn to the rate schedule annexed to the agreement we find diverse items dealing with the computation of electricity bill as found in Items 1 to 7. The Board would be entitled to bill the consumer in the light of the rates mentioned and the procedure prescribed for billing them as laid down in these items 1 to 7. The 5th item at page 94 as found in the rate schedule annexed to the agreement is worth nothing. It deals with 'Extra charge of rebate'. It contemplates a type of general rebate. It reads as under :

"5. Extra charge of rebate.

(a) In case of supply given at 400 volts the consumer shall be required to pay an extra charge of 7.5 per cent on the amount calculated at the rate of charge.

(b) A rebate of 5 percent on the amount calculated at the rate of charge will be admissible if supply is taken at voltage above 11 KV and upto 66 KV."

The said clause in the rate schedule leaves no room for doubt that while computing the bill of electricity consumed by the consumer the Board will be entitled to require the consumer to pay extra charge as contemplated by Item 5(a). Converse is the situation found in Item 5(b) which deals with giving a rebate of 5% under circumstances contemplated therein. This rebate clause has nothing to do with incentives. It is not an incentive rebate but it is a rebate available to all consumers of

electricity if circumstances mentioned in Item 5 are satisfied. Then follows Item 6 which deals with 'Minimum consumption guarantee'. Next is Item 7 dealing with 'Deter- mination of demand'. It refers to the procedure for preparation of bill. And then follows Item 8 dealing with 'Incentive to new industries', first para-graph whereof stood deleted as noted earlier by the impugned notification with effect from 1st August 1986. When these relevant items and the rate schedule which is an annexure to the agreement are read in a comprehen-sive manner it becomes obvious that what the signatory to the agreement was trying to agree as per Clause 7(b) was that the rates of electricity charges as computed in the light of diverse items 1 to 7 in the rate schedule would be paid by the consumer. Item 8, though part and parcel of the rate schedule, does not deal with the computation of bill for consumption of electricity in the light of the general tariff rates as fixed by the Board. It deals with entirely a different topic of an incentive rebate. A close look at Item 8 of the rate schedule clearly indicates that this development rebate of 10% was to be paid on the amount of the bill pertaining to the energy charge as computed under Items 4 and 7 which were mentioned earlier in the rate schedule. Once the stage of Item 7 was reached the total bill regarding consumption of electricity would be ready for being delivered to the consumer and on that total amount of bill incentive development rebate of 10% would be available as per Item 8.

Therefore, it cannot be said that when Clause 7(b) referred to rate schedule applicable to the consumer it contemplated even the scheme of development rebate. The rate schedule fixing the general rates of charges of electricity would, as mentioned in Items 4 and 7, result in preparation of the bill. At that stage fixed schedule rates for charge of electricity would complete their task and would get exhausted as the bill would be prepared in that light after following the procedure laid down by these items. Ad hoc lumpsum 10% development rebate on the total bill which was treated as an incentive to new industries in Item 8, therefore, would obviously go beyond the scope of computation of electricity consumption bills as per the rate schedule.

It must, therefore, be held that Clause 7(b) of the agreement was not even remotely connected with the question of development rebate which stood on its own and had no part to play in the computation and prepara-tion of the bill for electricity consumption charges. Item 8 operated at a stage posterior to the computation of electricity charges bill in the light of the rate schedule. Therefore, when the term 'rate schedule' is employed in Clause 7(b) of the agreement it only deals with the general rates for the charge of electricity as fixed by the Board from time to time under Section 49(1). On the same line of reasoning the words 'rate schedule' as employed by Clause 7(c) have to be understood. Consequently what the consumer as a contracting party agreed under Clause 7(b) was to the effect that the general rate schedule as mentioned in Annexure 2 at the time of the execution of the agreement could be revised and that the general rates of electricity charges could be either increased or decreased by the supplier from time to time and to that exercise undertaken by the Board, that is the supplier of the electricity, the consumer would have no objection as a contracting party. The term 'revision of rate schedule' as employed by Clause 7(c) itself indicates that the rates of charges of electricity being general tariff could be either increased or decreased. That has nothing to do with the scheme of incentive development rebate which is entirely a different concept and withdrawal of development rebate cannot be said to be an upward revision of the general rate schedule for charging the consumer while being supplied the electricity. These types of standard contracts have to be examined in the light of the express language found therein and by

implication nothing can be read which obviously would be miles away from the real intention of the persons signing such contracts in standard forms.

It is difficult to appreciate how the High Court could persuade itself to hold in the light of Clause 7(c) that the appellants while signing such agreements for taking electricity supply for the first time for their new industries as if by sidewind agreed of give up their right to claim development rebate by handing over on a platter an absolute right to the Board to totally withdraw such development rebate at any time it liked before the three years' period, for which incentive was meant to be guaranteed, would have expired. On the express language of Clause 7(a), (b) and (c) such a conclusion is impossible to be arrived at.

It is also necessary to visualize that under the incentive to new industries scheme as offered by the Board as per Item 8 found in the rate schedule annexed as Annexure 2 to the agreement, the Board had agreed that the new industrial units will be given for a period of three years from the date of commencement of supply, 10% development rebate on the amount of the bill pertaining to the energy charges incurred by the concerned consumers. It is also obvious that before any new industrial unit can get commencement of supply of electricity it has to enter into such standard form agreement which included Clause 7(a), (b) and (c). For the very purpose of the incentive to new industries the starting point would be entering into such a written agreement on the basis of which the electric energy supply would commence at these new industrial units.

It would be totally absurd and incongruous to suggest on behalf of the Board that on the one hand it guaranteed to the new industrial units for a period of three years from the date of commencement of supply 10% development rebate of the total amount of the bill and on the other hand moment such supply started pursuant to the written agreement the very incentive could be withdrawn by it from its inception as new industrial unit had to sign a written agreement containing Clause 7 (a), (b) and (c). If that submission on behalf of the Board which appealed to the High Court is accepted a most incongruous, unreasonable and absurd result would follow. It can then be said that the Board on the one hand had given incentive to new industries by guaranteeing development rebate of 10% on the total bill of consumption of electricity for a period of three years from the date of commencement of supply but from the very inception of that period the Board on the other hand as per the very agreement with the promisee was enabled to immediately withdraw the very same development rebate in exercise of its contractual powers as per clause 7(c) of that very agreement. If that happens the Board would be giving on the one hand incentive to new industries by way of development rebate of 10% and by another hand would immediately and almost simultaneously be withdrawing the said incentive by pinning down the consumer to the terms of the agreement as found at clause 7(a), (b) and (c). This would result in a total exercise in futility. The incentive development rebate scheme would in such an eventuality be still-born. It is also easy to visualize that a new industrial unit which spends large amounts for establishing its infrastructure and gets lured in the light of the representation held out by the Board and establishes its plant and machinery in the new unit, would not simultaneously and voluntarily agree by signing such an agreement with the Board to give up the very same benefit of incentive by permitting the latter to withdraw it at any time it likes. That would be doing violence to common sense and business approach of an ordinarily prudent businessman. No businessman in his senses would ever voluntarily to such an absurd, incongruous

and inconsistent predicament.

It is, therefore, too much to imply any written consent on the part of a prudent consumer who established new industrial units to at once give up the incentive of development rebate guaranteed in his favour by the Board. Consequently it is not possible for us to endorse the reasoning which appealed to the High Court which decided Issue No. 2 against the appellants.

We, therefore, hold that the new industrial units while signing the written agreements and agreeing to Clause 7(a), (b) and (c) found in the standard contract forms had only undergone a formality of signing such agreements before the electric supply could commence at their new units and such clauses only re-affirm the statutory power of the Board under Section 49(1) of the Act and had nothing to do with the scheme of incentive development rebate. They had not voluntarily or by even remotest chance agreed to give up the benefit given to them by clear representation held out by the Board as per Item 8 of the rate schedule in the light of the earlier three notifications promulgated by the Bard in exercise of its powers under Section 49 read with Section 78A of the Act.

It must also be held that they have neither expressly nor impliedly agreed that the Board will have absolute power and discretion to withdraw this incentive of development rebate at any time prior to the expiry of three years for which it was guaranteed to them by the earlier representation held out by the Board and which representation resulted into promissory estoppel against the Board and in favour of the appellants.

In this connection we may note one aspect of the matter. As per Clause 7(c) the Board could revise upwards the general rates of electricity charges at any time it liked. This had nothing to do with the scheme of incentive rebate. Learned advocates for the appellants conceded this authority of the Board. This authority was clearly available to the Board as per Clause 7(c) of the agreement read with Section 49 of the Act. But this increase of general tariff rate would not adversely affect incentive available to new and infant industries.

Let us take an example to clarify this aspect. If a general rate of electricity tariff for a given class of industries is Rs. 100 per KW and if 10% rebate by way of development incentive is given to new industries, the latter will pay Rs. 90 per KW while other well established industries will pay Rs. 100 per KW. Thus the goods manufactured by new industries would be cheaper costwise as compared to goods manufactured by well established industries in the region. That will enable the newly established industries to compete more effectively with their senior counterparts. Now if the general rate is increased by the Board even within the three years of the currency of the incentive scheme, to Rs. 200 per KW all the well established industries will have to pay Rs. 200 per KW for the electricity consumed while the new industries which were earlier getting infancy benefit will pay Rs. 180 per KW as 10% rebate will still be available to them by way of development rebate. Thus benefit of infancy protection will remain avail-able to the new industries for competing with the old ones even if general tariff rate gets revised upwards for a given class of consumers comprising of new as well as old industries in the field. New industries will, therefore, despite such increase in general tariff rate will be able to sell their products in the same manner as compared to the old established industries as they were doing earlier. Thus the cloak of protection available to them against old competitors in

the field will still be available despite any upward revision of the general tariff by the Board in exercise of its powers under Clause 7(c) of the agreement read with Section 49 of the Act. Consequently the provision of revision of general rates under Clause 7(c) of the agreement cannot be treated to be conferring any further power on the Board to tinker with the development rebate provision within the guaranteed period of three years as wrongly assumed by the High Court. Point No. 2 is decided accordingly in the negative in favour of the appellants and against the Board.

So far as Point No. 3 is concerned the appellants are on a weaker footing. It is true that by earlier notifications dated 29th October 1982, 13th July 1984 and 28th January 1986 the scheme of incentives by way of development rebate of 10% was continued to be offered to new industries to be established in the plains of State of U.P. Identically worded item 9 in the earlier notifications and item 8 in the last notification dated 28th January 1986 had continued the said incentive scheme. By virtue of the last notification of 28th January 1986 it was clearly laid down by the Board that all new industries which might be established on and after 28th January 1986 will earn this development rebate for the three years period from the date of commencement of supply of electricity. It was also provided that all the existing new industries which might have earlier been established before 28th January 1986 and which had still some part of unexpired period of three years of development rebate available with them also were given the continued benefit of the development rebate for the unexpired period from 1st February 1986. What the impugned notification of 31st July 1986 sought to do was to delete this first paragraph of item 8 of the notification of 28th January 1986. The result was that from 1st August 1986 whatever unexpired period for getting development rebate of 10% was available with the new industries covered by the sweep of the said notification, got withdrawn. It could not be said and it is also not the case of the respon-dent-Bpard that in the light of the notification of 31st July 1986 whatever development rebate was granted to these new industries earlier as per the then existing scheme would stand withdrawn or any recovery would be effected against them for the said amount. The case of the Board is that despite any unexpired period for earning the incentive rebate of 10% was available to the existing new industries on 31st July 1986, they would lose that benefit of development rebate for the rest of the unexpired period with effect from 1st August 1986 onwards. Hence it is not possible to agree with the contention of learned counsel for the appellants that the said notifica-tion had any retrospective effect It was purely prospective and had resulted into two consequences - (i) any new industry which entered into an agreement with the Board for supply of electricity lor the first time on and after 1st August 1986 could not get the benefit of incentive of 10% development rebate and (ii) all existing new industries which were armed with the guarantee of 10% development rebate under the earlier notifica-tions and had unexpired period out of the three years from the date of earlier commencement of supply of electricity to their concerns lost the benefit for that unexpired period which otherwise would have been avail-able to them from 1st August 1986 onwards till the entire three years' period which had already commenced would have been over. Both these effects of the notification of 31st July 1986 were purely prospective in character and had no retrospective effect. Consequently it cannot be said that the said notification was liable to be struck down on the score of being retrospective in nature. The third point for consideration, therefore, is answered in the negative.

In view of our answer to the aforesaid three points, Point No. 4 does not survive for consideration.

As a result of the aforesaid discussion on these points the conclusion becomes inevitable that the appellants are entitled to succeed. It must be held that the impugned notification of 31st July 1986 will have no adverse eflect on the right of the appellant-new industries to get the development rebate of 10% for the unexpired period of three years from the respective dates of commencement of electricity supply at their units from the Board with effect from 1st August 1986 onwards till the entire three years period for each of them got exhausted. This result logically follows for the appellants who have admittedly entered into supply agreements with the Board as new industries prior to 1st August 1986. However those appellants who entered into such agreement after 1st August 1986 cannot get benefit of development rebate any longer after 1st August 1986. This conclusion of ours pertains to the question which is no longer res integra. It is already so held by this Court in S.L.P. (C) No. 11906 of 1994 and others decided by a Bench of this Court consisting of A.M. Ahmadi, CJ. (as His Lordship then was) and S.P. Bharucha, J., in the case of Hotz Hotel Pvt. Ltd. Etc. Etc./Vaidya Ply Board & Anr. v. U.P.S.E.B. & Anr. Etc. Etc. on 3rd October 1994. We find that the appellant in Civil Appeal No. 1713 of 1991 executed agreement with the Board for the first time on 5th May 1987. Similarly appellant in Civil Appeal No. 3534 of 1991 executed agreement with the Board for the first time after 1.8.1986. These appellants, therefore, will not be entitled to get out of the sweep of the impugned notification. These appeals will, therefore, have to be dismissed.

It is obvious that after the expiry of the aforesaid three years' period available to them under the earlier notifications the appellants would be liable to pay full electricity charges billed to them by the Board without any development rebate as after the expiry of the said period they would not be protected under any promise by the Board. On the contrary from 31st July 1986 the Board made it very clear to all concerned that no new industry thenceforth would be entitled to any development rebate on getting new supply connections. Thus the appellants also will stand at par with all other industries and will not get benefit of any further development rebate incentive after the aforesaid three years' period in case of each of them had worked itself out. In fairness to the appellants it must be stated that even they did not claim any such extra benefit. It is also true that the present proceedings are confined only to the claim of 10% development rebate on the bills of consumption of electricity which according to the appellants is available to them for the unexpired period of three years from 1st August 1986 onwards and which development rebate according to the Board was not available to them.

However before parting with the present appeals we have to clarify two ancillary aspects pertaining to the controversy in these proceedings. At the time of issuing notice in the SLPs as noted earlier the recovery of development rebate charges was not stayed in most of the matters, though as we are informed in some of the matter even that stay came to be indirectly granted. Those appellants who were protected by the grant of stay of recovery of the impugned development rebate charges naturally will not be entitled to claim any refund from the Board even though they succeed in these appeals and the respondent-Board will be permanently restrained from recovering the disputed development rebate charges from them.

However so far as the appellants who were not granted stay by this Court and who have already paid up the disputed development rebate charges to the Board in the light of the High Court's common decision are concerned, it must be stated that they represent two types of industries -(i) those

appellants whose industries are still running and who continue to be enrolled as consumers of electricity by the Board; and (ii) those of the appellants who had established their industries but by now who might have ceased to be consumers of electricity from the respondents in any of the areas within the jurisdiction of the Board on account of closure of their industries in the State of U.P. So far as the first category of such appellants is concerned, instead of directing refund of the amount of disputed development rebate charges which they might have paid to the Board it will be in the fitness of things to direct the Board to credit this amount to the respective running accounts of such appellants concerned and the future bills of electricity which the appellants may be required to pay to the Board may be adjusted from this credited account so that the appel- lants as consumers may not have to pay all future bills of electricity consumed by their industries till the entire credit out standing in their respective accounts in this connection gets exhausted. The Board shall give written intimation to the appellants concerned regarding posting of such credit entries in their respective accounts.

So far as the second category of appellants are concerned as they are no longer consumers of electricity from the Board in any part of the State of U.P. appropriate order will be to direct the Board to return the disputed development rebate charges collected from them from 1st August 1986 onwards for the unexpired period of three years within three months of the receipt of a copy of this order at its end.

Now remains the question of interest to be payable to the appellants on the disputed amount which is either to be credited to their accounts or refunded to them as per the aforesaid directions. Shri Dave, learned senior counsel for the Board was right when he contended that all these appellants are commercial concerns and when they purchase electricity the cost of electricity would normally not be borne by these industrialists but they would see to it that the said expenditure enters their cost structure and pricing so that ultimately the burden would be passed on to the purchasers of the items manufactured by them by utilising the electric supply purchased from the Board. Even though the appellants might have paid these disputed amounts to the Board as stay was refused by this Court so far as development rebate charges are concerned, they would in all probability have spread the said burden in a phased manner by including it in the cost structure on the basis of which they would have worked out their future pricing for the goods manufactured by them and sold to consumers or outside wholesale dealers. Consequently, according to Shri Dave, on the principle of unjust enrichment even they would not be entitled to get refund of the amount, much less any interest thereon.

So far as the refund question is concerned, on the basic principle of restitution and in the absence of any clear evidence or even averment on this aspect it is not possible for us to come to any definite finding that all the disputed amounts of development rebate charges would have entered the cost structure of the appellants after the earlier three years period had run out. As we have seen earlier, the dispute centered round only the unexpired period of three years from the commencement of electric supply for these new industries as was available to them after 1st August 1986.

Even assuming about two and a half years period would have been available to some of them at the highest, that period would have been over by the beginning of year 1989 and the stay was refused by

this Court on 6th February 1991. Till that time all the appellants were protected by the interim relief earlier granted by the High Court. Consequently it would not be possible to clearly visualize with any degree of certainty that for the goods which the appellants might have manufactured after February 1991 they would have spread over in a phased manner burden of the past disputed development rebate charges for a period which already got ex-hausted at least two years before 1991.

However this aspect may have some relevance from the practical viewpoint when we have to deal with the claim for interest on disputed amounts raised by worldly businessmen like the appellant-industrialists carrying on commercial transactions. Their claim for interest, in our view, deserves to be rejected in exercise of our powers under Article 142 of the Constitution of India on the peculiar facts and circumstances of these cases as indicated earlier when at least the possibility cannot be ruled out that while pricing the manufactured goods in future the appellants, as shrewd businessmen and men of commercial world, would have seen to it that ultimately the burden borne by them by way of recovery of development rebate charges gets passed on to their consumers in long run and their profits would remain in tact. Keeping in view this possibility we deem it fit in interest of justice and in exercise of our powers under Article 142 of the Constitution of India to desist from mulcting the Board with interest on the refund of development rebate charges which the Board has to make available to them pursuant to the present order.

We, however, make it clear that the Board shall, within a period of three months, for appellants falling in category (i) above give full credit in their respective running accounts for the disputed amount of development rebate charges which the Board recovered from them after this Court denied interim relief to them on 6th February 1991 and within the same period of three months it will refund the principal amount of recovered disputed development rebate charges without any interest to the appellants fulling in category (ii) who might have ceased to be consumers of electricity from the Board in any part of the State of U.P. It is further directed that in case such credit is not given within that period or refund is not made available within that period to the appellants falling in these respective two categories then on the expiry of the period of three months such amount shall start earning interest at the rate of 12% p.a. for the benefit of the appellants concerned till actual effecting of credit entries in their respective accounts or till actual payment to the appellants concerned, as the case may be.

All appeals (except Civil Appeal Nos. 1713 of 1991 and 3534 of 1991) arc allowed accordingly. The common judgment of the High Court in these appeals is set aside. Writ petitions filed by these appellants will stand allowed in the aforesaid terms. However Civil Appeal Nos. 1713 and 3534 of 1991 will stand dismissed. In the facts and circumstances of the cases there will be no order as to costs in each of these appeals.

S.V.K.I.

Appeals allowed.