Supreme Court of India
Indian Aluminum Company Etc vs Kerala State Electricity Board on 23 July, 1975
Equivalent citations: 1975 AIR 1967, 1976 SCR (1) 70
Author: P Bhagwati
Bench: Bhagwati, P.N.

PETITIONER:
INDIAN ALUMINUM COMPANY ETC.

Vs.

RESPONDENT:
KERALA STATE ELECTRICITY BOARD

DATE OF JUDGMENT23/07/1975

BENCH:
BHAGWATI, P.N.
BENCH:
BHAGWATI, P.N.
ALAGIRISWAMI, A.
GOSWAMI, P.K.

CITATION:
1975 AIR 1967 1976 SCR (1) 70
1975 SCC (2) 414
CITATOR INFO :
R 1976 SC 127 (12,14,16,17)
R 1976 SC2414 (33)
R 1982 SC 149 (1095)
D 1986 SC1126 (13,24,25,26,33,34,40,41,45,47
D 1988 SC1989 (12)
R 1989 SC 268 (12, TO, 17,27,28)
RF 1992 SC1033 (15)
RF 1992 SC2169 (12)

ACT:
Electrieity Supply Act (54 of 1948) Ss. 49, 57, 59 and 79(j)-Scope of.
Power of public authority to fetter its discretion-scope of
Delegated legislation -No power to enhance charges in Act-If delegate can d by . framing regulation
Interpretation of statutes-Marginal Note use of

HEADNOTE:
Under s. 49(1) and (2) of the Electricity Supply Act, 1948, the legislature has empowered the State Electricity Board to frame uniform tariffs and has also Indicated the factors to be taken into account in fixing uniform tariffs

Under. sub-s. (3), the Board may, in the special circumstances mentioned therein, fix different tariffs for the supply of electricity, but, in doing so, sub-s. (4) directs that the Board is not to show undue preference to any person. Under s. 59 the Board shall not, as far as practicable carry on its operations at a loss and shall adjust its charges accordingly from time to time.

Certain consumers of electricity had entered into agreements for the supply of electricity for their manufacturing purposes at specified rates for specified periods . Some of the agreements were entered into with the State Governments and the others with the State Electricity Boards. In one of the agreements there was an arbitration clause. On account of the increase in the operation and maintenance cost, due to various causes which caused loss to the State Electricity Boards, the Boards wanted to increase the charges in all the cases. the consumers challenged the competency of the Boards to do so by petitions in the respective High Courts. The High Court sustained the Boards claim, in some cases, under Ss. 49 and 59, and in others, held that the Board was incompetent to do so. In the case of the consumer where there was the arbitration clause, the High Court refused to entertain the petition on account of the clause.

In appeals to this Court by the aggrieved consumers and the Boards

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HELD: (1) The agreements with the State Governments must also be treated as agreements entered into with 'the Boards. Section 60 of the Act provides that all contracts entered into by or with the State Government for any of the purposes of the Act, shall be deemed to have been entered into by or with the Board. One of the primary purposes of the Supply Act is to provide For the supply of electricity. An agreement for supply of electricity to a consumer is. therefore, an agreement for one of the purposes of the Supply Act and s. 60 has application to such an agreement. [78G-H]

2(a) Fixation of special tariffs under s 49(3) can be a unilateral Act on the part of the Board but more often it would be the result of negotiations between the Board and the consumer and hence a matter of agreement between them. Therefore, the Board can, in exercise of the power conferred under the sub-section, enter into an agreement with a consumer stipulating for special tariff for supply of electricity for a specific period of time. The agreements for supply of electricity to the consumers must therefore be regarded as having been entered into by the Boards in exercise of the statutory power conferred under s. 49(3). [81E-F. H-82B]

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(b) When a public authority is entrusted by a statute with a discretionary power to be exercised for the public

good, it cannot, when making a private contract in general terms, fetter itself in the use of that power or in the exercise of such discretion. This principle is attracted when an attempt is made to fetter in advance the future exercise of statutory powers otherwise than by 'the valid exercise of a statutory power. Where a statutory power is exercised to enter in o a stipulation with a third party which fetters the future exercise of other statutory powers, where such stipulation is made, not as part of a private contract in general terms, but in exercise of a statutory power. he exercise of the statutory power would not be held to be invalid as a fetter on the future exercise of other statutory powers. If it were so held, it would render the statutory power meaningless and futile. Therefore, where a stipulation in a contract is entered into by a public authority in exercise of a statutory power, then, even though such stipulation fetters the subsequent exercise of the same statutory power or future exercise of another statutory power it would he valid and the exercise of such statutory power, would protanto stand restricted. The public authority would not, in such a case. be free to denounce the stipulation as a nullity and claim to exercise its statutory power in disregard of it. except, where there is an overriding statutory provision which, expressly or by necessary implication, authorises the public authority to set at naught in certain circumstances, a stipulation though made in exercise of :1 statutory power. [82E-F; 83F-G; 84F-G; 85A-C, E]

Ayer Harbour Trustees Oswald, 8 A.C. 623, York Corporation v. Henry Leetham and Sons, [1924] 1 Ch. 557, Straffordshire & Warcestershire Canal Navigation v. Birmingham Canal Navigation, 1866 L.R. I H.L. 254, Southendon-Sen Corporation , v. Hodgson (Wickford) Ltd. [1961] 2 All. E.R. 46, Southport Corporation v. Birkdale District Electric Supply Co. [1925] 1 Ch. 794 Commissioners of Crown Lands v. Page [1960] 2 All. E.R. 726 and Dowty . Boulton v. Wolverhempton, Corporation, [1971] 2 All. E.R. 277, referred to.

(c) In the present ease, `the agreements were entered into with the consumers in exercise of the statutory power to fix special tariffs under s. 49(3) and therefore there could be no question of such stipulation being void as fettering or hindering the exercise of the statutory power under that provision These stipulations did not divest the Board of its statutory power or fetter or hinder its exercise. In fact, they represented 'he exercise of the statutory power Once the agreements were made containing the stipulations they were binding as having been validly made in exercise of the statutory power, and it was not competent to the Board to override them. The Board could not enhance the charges in breach of these stipulations, for that would negate the existence of the statutory power in the Board under s. 49(3 ) to fix the charges for a specific period

of time. [85E-86B]

(d) The Board was also not competent to enhance the charges under the guise of fixing uniform tariffs because, sub-s. (1) of s. 49 is subject to sub-s (3) and once special tariffs were fixed under sub-s. (3) there could be no question of fixing uniform tariffs applicable to the consumer under sub-s. (1) . Such .. power could not be exercised in derogation of the stipulation fixing special tariffs under sub-s (3). [86B-C]

(e) If the stipulations as to charges were not binding and the Board could enhance the charges unilaterally in disregard of them the consumer would also be free to repudiate the stipulations. 'the stipulations as to charges are inseverable from the rest of the agreements and if "these stipulations are disturbed and the charges are revised unilaterally by the Board the agreements could no. bind the consumer. [86C-E]

(f) Further, on the contention of the Board i would be impossible for a consumer to enter into an agreement with the Board for supply of electricity at a certain specified rate. But 'that could not have been intended by the legislature because, far from promoting the object of electric development and industrial growth in the State it would act as a regressive factor. [86E-F]

3 (a) A marginal note to a section cannot afford any legitimate aid to the construction of the section but it can be relied upon as indicating the drift

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of the section to show what the section was dealing with. The marginal note to s. 59 reads 'General Principles for Board's finance'. This shows that the section is intended to do no more than to lay down general principles for the finance of the Board. It merely enunciates certain guidelines which the Board must follow in managing its finance. [86H-87B]

(b) Under the section the Board is directed as far as practicable not to carry on its operations at a loss and to adjust its charges accordingly from time to time. The legislature has deliberately and advisedly used the word as far as practicable," because, since the Board is a statutory authority charged with the general duty of promoting coordinated development of general on supply and distribution of electricity within the State, with particular reference to such development in areas not for 'the time being served or adequately served by any licensee, it might suffer loss in carrying on its operations, as it might have to give special tariffs to consumers in undeveloped or sparsely developed areas, and sometimes to industrial consumers for accelerating the to of industrial growth, even though such special tariffs might not be sufficient to meet the cost of generation, supply and distribution of electricity. [87B-E]

(c) Where, by a stipulation validly made under s. 49(3)

the Board under a contractual obligation not to charge anything more then a specified tariff it would not be practicable for it to enhance its charges if it finds that is is incurring operational loss. To do something contrary to law in violation of a contractual obligation, can never be regarded as 'practicable'. the Board can adjust its charges under s. 59 only in so far as the law permits it to do so, that. is, where it is not fettered by a contractual stipulation from doing

(4) (a) Under s. 57 of the Act a Iciness can, notwithstanding any agreement entered into with the consumer, enhance the charges for sale of electricity in order to earn a reasonable return by way of profit. The difference in language between s. 59 and s. 57 shows that s. 59 does not confer any power on the Board to enhance the charges for supply of electric y in disregard of a contractual stipulation entered into under s. 49(3). [87G-88C]

(b) The 6th Schedule of the Act is, by a fiction enacted in s. 57, deemed to be incorporated in the licence e of every licensee and it enables the Licensee to adjust its charges for the sale of the electricity by enhancing them so that it earns a reasonable return as profit; but the definition of 'licensee' in s. 2(6) does not include the State Electricity Board. it has been expressly taken out of the category of licensee for the purpose of the Supply Act. [99C-E]

(5) (a) The cost is not the sole or only criterion for fixing tariff. [87E-F]

Maharashtra State Electricity Board v. Kalyan Borough Municipality [1968] 3 S.C.R. 137, followed.

(b) There may be certain consumers who may have to be supplied electricity at special tariff less than the cost, having regard to the geographical area or the nature or purpose of the supply. That is why the adjustment of the charges would have to be left to the discretion of the Board to be made in such manner as it thinks fit, and since cost is not the sole or only criterion for fixing tariff, the Board would be free not to enhance the charges in case of some consumers even though such charges may be less than their costs. If that be so, it must follow, a fortiorari, that there is nothing in s. 59 which requires the Board 'to enhance the charges in a case where it has bound itself by a contractual stipulation not to claim anything more than certain specified charges. [88C-E]

(6) If the power to enhance the rates unilaterally in derogation of the contractual stipulation does not reside in any provision of the Supply Act it cannot be created by regulations under s. 79(j) of the Act. Either this power can be found in some provisions of the Supply Act or it is not there at all. Regulations, in the nature of subordinate legislation, cannot confer authority on the Board to interfere with contractual rights and obligations unless the

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power to make such regulations is vested in the Board by some provision of the statute expressly or by necessary implication. Therefore, it would not make any difference whether or not the Board has made any regulations under . 79(j). [92H-93B]

(7) The arbitration clause provided that "any dispute or difference arising between the consumer and the supplier o, their respective electric engineers, as to the supply of electrical energy hereunder or the pressure thereof as as to the supplier or the consumer respectively to determine the same or any question, matter thing arising hereunder shall be referred to a single arbitrator who shall be mutually agreed upon by both parties".

The claim of the Electricity Board to enhance the charges under ss. 49 and 59 and the 6th Schedule to the Supply Act, is not a question matter or thing arising under the agreement is a claim founded on the provisions of the Supply Act and such a claim falls outside the ambit of the arbitration provision. [98E-H]

(8) (a) But since the Board also claimed that it has the power to claim the additional levy under another clause of the agreement, which provided that the. tariff and conditions of supply mentioned in the agreement shall be subject to any revision that may be made by the supplier. The question whether the Board had power under that clause to enhance the charges is a question arising under the agreement. All the contentions raised by the consumer against the claim of the Board are also covered by the arbitration agreement, and therefore, there is no reason why the consumer should not pursue he remedy of arbitration and instead invoke the extraordinary jurisdiction of the High Court under t. 226. [99F-100E]

(b) When an authority takes action which is within its compence, it cannot be held to be invalid merely because it purports to be made under a. wrong provision, if it can be shown to be within its power under any other provision. The Board claimed originally power under ss. 49 and 59 and the 6 h Schedule of the Supply Act, but if it has power under a clause of the agreement, the enhancement could be justified by reference to that power.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1457 & 1642 of 1971.

From the judgment and order dated 19th August, 1971 of the Kerala High Court in O.P. Nos. 2827 & 1288 of 1970 respectively.

CIVIL APPEALS Nos. 1652-1654 of 1974.

Appeals by special leave from the judgment and order dated the 27th March, 1974 of the Orissa High Court in O.J.C. Nos. 357, 605 and 527 of 1971.

S. V. Gupte (In C.A. No. 1457/71) G. B. Pai (In C.A. No. 1642/ 71) Ajay Ray and P. Mathai, (In C.A. No 1457/71) O.C. Mathur K.J. John and J. B. DadachanJi, for the appellants (In C.As. Nos. 1457 & 1642/71).

Lal Narain Sinha, Solicitor General (In C.A. No. 1457/71) A. G. Pudissery, for the respondents (In C. As. Nos. 1457 & 1642/71).

Sumitra Chakravarty (In C.A. No. 1652/74) B. Parthasarthy, for the appellants (In C.A. Nos. 1652/74).

A. K. Sen, B. Sen, Ranjit Mehanty, Ajay Ray, O. C. Mathur, K J; John and J. B. Dadachanji, for the respondent (In C.A. Nb.

K. R. Chowdhary and K. Rajendra Chowdhry, for the intervener. Andhra Pradesh Electricity Board.

G. L. Sanghi , P. V. Kapur and U. K. Khaitau, for the applicatintervener-Ferro Alloys Corporation.

S. V. Gupte (In C.A. No. 1654174) and Vinoo Bhagal, for the appellant (In C.As. Nos. 1653-1654/74).

The Judgment of the Court was delivered by BHAGWATI, J.-The short but important question which arises for determination in this appeal is whether a State Electricity Board has power to enhance the rates for supply of electricity notwithstanding an agreement binding it to supply electricity at certain rates where it finds that the contractual rates arc less than the cost of generation, distribution and supply of electricity and in the result there is loss to the State Electricity Board in its operations? In order to appreciate how the question arises, it is necessary to state a few facts giving rise to the appeal.

The petitioner is a limited liability company which carries on business of manufacturing aluminium. The manufacture of aluminium involves three processes, viz., mining of bauxite ore, dressing it and converting it into alumina and reduction of alumina into aluminium. The petitioner carried on bauxite mining at the quarries in Bihar and also set up its factory in Bihar for dressing Bauxite ore and converting it into alumina. So far as the process of reducing alumina into aluminium is concerned, it involves the application of the method of electrolysis ill which electrical energy is a primary raw material and, therefore, the petitioner was anxious to set up a factory for this purpose at a place where electric power would, be cheap. The Government of the then native State of Travancore offered to supply electric power to the petitioner at reasonable rates for a long period of time if the petitioner established its factory for reducing alumina into aluminium within its territory. An agreement dated 30-7-41 was accordingly entered into between the petitioner and the Government of the State of Travancore for supply of electrical energy at certain rates for period of 34 years from 1-7-41 with an option of renewal in favour he petitioner for a further period of 20 years. In view of this agreement, the petitioner established a factory at Alupuram near Alwaye fol.

reducing alumina and converting it into aluminium, though alumina for this purpose had to be brought all the way from Bihar and the aluminium produced at the factory had to be transported outside the State of Travancore for the purpose of sale.

On the integration of the States of Travancore and Cochin, a new state of Travancorc-Cochin was formed in 1948 and the agreement 30-7-41 (hereinafter referred to as the Principal Agreement) was accepted by the new State as binding upon it. The terms and conditions of supply of electrical energy laid down in, the Principal Agreement were, however, varied and modified by a supplemental agreement (hereinafter referred to as the first Supplemental Agreement) dated 16-8-1955 entered into between the petitioner and the State of Travancore-Cochin on 1-1-1956 a new State of Kerala was formed comprising inter alia the territories of the existing State of Travancore Cochin, barring a small portion transferred to the State of Madras under the States Reorganisation Act 1956, and by reason of section 87 of that Act, the Principal Agreement as modified by the First Supplemental Agreement was deemed to have been made in the exercise of executive power of the State of Kerala and all rights and obligations under it became the rights and obligations of the State of Kerala. The Kerala Government thereafter by a Notification issued urbder section 5, sub- section (1) of the Electricity Supply Act, 1948 (hereinafter referred to as the Supply Act), constituted the Kerala State Electricil. Board (hereinafter referred to as the Board) with effect from 1-4-57. Section 60 of thc Supply Act provides, inter alia that all the contracts entered into by or with the State Government for any of the purposes ot the Act before the firsl constitutionl of the Board shall be deemed to have been entered into by or with the Board. The Principal Agreeement as modified by the First Supplemental Agreement was, therefore. deemed to have been entered into with the petitioner by the Board. The terms and conditions of agreement were subsequently modified under another supplemental agreement (hereinafter referred to as the Second Supplemental Agreement) dated 4-4-1963 entered into between the petitioner and the Board. This modification did not affect either the rates or the duration of the Principal Agreement.

It appears that the petitioner required additional electric power for expansion of the operations of its alumina reducing factory and an agreement dated 30-3-1963 (hereinafter referred to as the Second Agreement) was, therefore, entered into between the petitioner and the Board whereby the Board agreed to supply to the petitioner from 1965 a total of 12500 Killowatts of electric power at the rates and on the terms and conditions set out in the agreement. The duration of this agreement was 25 years from 1-1-1965 with an option to the petitioner to renew it for a further period of 25 years. Another agreement (hereinafter referred to as the Third Agreement) was entered into between the petitioner and the Board on 18-9-1965 for supply of further 12500 k.w. Of electric power at certain rates for a period of 25 years from 1-1-1966 with an option of renewal in favour of the petitioner for a further period of 25 years on the same terms and conditions.

Whilst these agreements were in force, the Board framed the Kerala State Electricity Board (General Tariffs) Regulations 1966 in exercise of the powers conferred under section 79 (j) read with sections 49 and 59 of the Supply Act. Regulation 4 empowered the Board to prescribe different terms and conditions for different classes of consumers and Regulation 6 provided that the Board may fix different tariffs for different classes of services under various heads. The Board was conferred power under Regulation 10 by Notification or otherwise to fix special terms and conditions fol. supply for

special purposes and` under Regulation 11 the Board could amend the terms and conditions of supply from time to time. These Regulations were amended by the Board by making the Kerala Electricity Board (General Tariffs) (Amendment) Regulations, 1969. By the amendment Regulations 6 and 8 were substituted by a new Regulation 6 which empowered the Board to fix different tariffs for different classes of services under the broad heads, low tension supply, high tension supply and extra high tension supply. Now it appears that since September 1965, when the last revision of tariffs was made by the Board, there was a steep rise in "prices of all commodities including plant and equipment, construction materials, etc. salary and wages of employees" thereby increasing the operation and maintenance cost of the Board with the result that the Board found itself in a position where it was working at a loss. Section 59 of the Supply Act enjoins the Board that "it shall not, as far as possible, carry on its operations under this Act at a loss and shall adjust its rates accordingly from time to time". The Board, therefore, in exercise of the power conferred under section 49 of the Supply Act and the Regulations, "and other enabling provisions in the Statute", issued an order dated 28-11-1969 called "Kerala State Electricity Board Extra High Tension Tariff order 1969" fixing the rates Or tariffs for supply of electric power to all extra high tension consumers-a category which included the petitioner. Clause (6) of this order provided that the rates or tariffs fixed by it shall apply "to all extra high tension consumers" notwithstanding anything to the contrary contained in any agreement entered into with any extra high tension consumer either by the Government or by the Board or anything the tariff Regulations or Rules previously issued". The result was that despite the Principal Agreement, the Second Agreement and the Third Agreement, which were in force, the Board claimed to be entitled to recover from the petitioner the rates or tariffs fixed by this order. though they were manifestly higher than the rates or tariff stipulated in these respective agreements. The petitioner thereupon filed a writ petition in the High Court of Kerala challenging the validity of this order but the challenge failed. The High Court sustained the order on the ground that it was within the competence of the Board under sections 49 and 59 of the Supply Act. This view is assailed in the present appeal brought with certificate obtained from the High Court. F Before we proceed to consider the question which arises for determination in this appeal, it will be convenient at this stage to refer to a few relevant provisions of the Supply Act for this is the statute with which we are concerned in this appeal. The Supply Act, as its preamble and long title show, is enacted "to provide for the rationalisation of the production and supply of electricity and generally for taking measures conducive to electrical development". That is the object and purpose of the Statute and this object and purpose is sought to be achieved by the establishment of the Central Electricity Authority and State Electricity Boards charted with certain functions, powers and duties. Section 5 (1) provides that the State Government shall, as soon as may he after the issue of the notification under section 1(4) bringing into force the various provisions of the Act, "constitute by notification in, the official Gazette a State Electricity Board under such name as shall ba specified in the notification". Chapter TV sets out the powers and duties of the State Electricity Board. Section 18, which is the first section in that chapter enumerates duties, which also) represent the function, of the State Electricity Board. It Says, to quote the words of the section: "Subject to the provisions of this Act the Board shall be charged with the general duty of promote the coordinated development of the generation, supply and distribution of electricity within the State in the most efficient and economical manner, with particular reference to such development in areas not for the time being served or adequately served by any licensee, and without prejudice to the generality of the foregoing provisions it shall be the duty of the Board-(a) to prepare and carry out schemes sanctioned under Chapter V; (b) to supply

electricity to owners of controlled stations and to licensees whose stations are closed down under this Act; (c) to supply electricity as soon as practicable to any other licensees or persons requiring such supply and whom the Board may be competent under this Act so to supply." Then follow other sections in that Chapter which deal with the powers of the State Electricity Board. They are not material and we need not refer to them. Chapter V is headed "The Board's Works and Trading Procedure". It contains the fasciculus of sections dealing with making of a scheme for all area "with a view to rationalising the production and supply of electricity`' in that area. Then there are other sections, not relevant for our purpose, which speak of controlled stations and generating stations, provide for supply of electricity by the State Electricity Board to a licensee and lay down the mode of fixation of grid tariff. Section 49 enacts a provision for sale of electricity by the State Electricity Board to a person other than a licensee. It reads:

> "(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.
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> (2) In fixing the uniform tariffs, the Board shall have regard to all or any of the following factors, namely-
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> (a) the nature of the supply and the purposes for which it is required;
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> (b) the co-ordinated development of the supply and distribution of electricity within the State in the most efficient and economical manner, with particular reference to such development in areas not for the time being served or adequately served by the licensee:
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> (c) the simplification and standardisation of methods and rates of charges for such supplies;
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> (d) the extension and cheapening of supplies of electricity to sparsely developed areas. (3) Nothing in the foregoing provisions of this section shall derogate from the power of the Board, if it considers it necessary or expedient to fix difference tariffs for the supply of electricity to any person not being a licensee, having regard to the geographical position of any area, the nature or 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 under preference to any person."

Chapter VI deals with "The Board's Finance Accounts and Audit'. the first section in this Chapter, which is material, is section 59 which is in the following terms:

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

Then comes section 63 which provides inter alia that "all contracts" contracts into by, with the State Government for any of the purposes of this Act before the first constitution of the Board shall be deemed to have been entered into by, with the Board". Lastly, section 63 empowers the State Government with the approval of the State Legislature, from time to time to 'make subventions to the Board for the purposes of this Act on such terms and conditions as the State Government may determine".

Now, in the present case, as we have already seen, there are three main agreements entered into by the appellant for purchase of electricity. True, the Principal Agreement, as modified by the First Supplemental Agreement, was not entered into with the Board, but as pointed out above, by reason of section 60 of the Supply Act, it must be deemed to have been entered into by the appellant with the Board and in view of the legal fiction, all the consequences and incident must follow as if it were an agreement made with the Board. The learned Solicitor General, appearing on behalf of the Board. contested the applicability of section 60 on the ground that the Principal Agreement, as modified by the First Supplemental Agreement, was not an agreement entered into by the State Government "for any of the purposes of this Act". but we do not think this contention is sound. One of the primary purposes of the Supply Act is to provide inter alia for the supply of electricity: in fact, the Supply Act empowers the Board to supply electricity to any person other than a licensee. An agreement for supply of electricity to a consumer is. therefore. plainly and indubitably an agreement for one of the Purposes of the Supply Act and section 60 has clearly application to such an agreement. The Principal Agreement, as modified by the First Supplemental Agreement. must, there fore, for all the purposes of the Supply Act be treated as an agreement entered into with the Board. So far as the second and the third agreements are concerned, there is no question of invoking section 60, as they have been entered into by the appellant with the Board from the very beginning. The question is whether the Board is entire to override the supulation as to charges contained in these agreements and enhance the charges by unilateral action as it has purported to do.

The Board relied principally on two provisions of the Supply Act, namely, section 49 and 59, in support of its claim to increase the charges unnaterally despite the stipulation as to charges contained in the three agreements. Taking firstly its stand on section 49, the Board contended that under this section the Legislature has entrusted to it the power to fix charges-described in the section as tariffs-for supply of electricity to any person other than a licensee. Now this power is exercisable not once and for all, but from Lime to time as action requires or circumstances justify. It was urged that the exercise of this power is conditioned by the statutory obligation of "promoting the coordinated development of the generation, supply and distribution of electricity within the State in the most efficient and economical manner" and in order to run its undertaking economically, that is without Joss the Board is entitled to refix the charges in exercise of this power indeed, it is statutorily bound to do so. In any event, contended the Board, the powers and duties duties by the Supply Act, the power to fix charges under section 49 being one of them, are for public good and they are intended to further the object of promoting the production and supply of

electricity which is a matter of public utility and hence in public interest. It is, therefore, not competent to the Board to enter into a stipulation with the consumer binding it not to charge anything more than a specific rate and thereby divest itself of the power to fix and refix charges entrusted to it under section 49, or fetter or hinder its future exercise. Such a stipulation is void and it does not, ran the argument, stand in the way of the Board enhancing unilaterally the charges for supply of electricity. This argument was sought to be supported by the Board by relying on two decisions of English courts, namely, Ayer Harbour Trustees v. Oswald(1) and York Corporation) v. Henry Leetham & Sons(2) Simulataneously section 59 was also invoked in aid by the Board. It was pointed out that the opening words of section 49(1) made the power to fix charges conferred on the Board subject to section 59, and therefore, the mandate of the Legislature contained in section 59 must prevail over anything that is done by the Board in exercise of this power. Section 59 enjoins that the Board shall not, as far as practicable, carry on its operations at a S loss and shall adjust its charges accordingly from time to time. Notwithstanding the fixation of charges under section 49, therefore, the Board is entitled to enhance the charges if it finds that it is necessary to do so in order to avoid operating at a loss. In any event, the Board cannot by stipulation in a contract bind itself to refrain from exercising the statutory power which it possesses under section 59 to enhance the charges in case of operational loss. The statutory power cannot be bartered away by a contractual stimulation. If it were held permissible to the Board to bind itself by a contractual stipulation not to enhance the charges even though such charges result in operational loss, public interest would suffer since the production, distribution and supply of electricity would be prejudicially affected and electrical development in the State would receive a serious set back. On these two grounds the Board urged that, since it was incurring loss in its operations, it was entitled unilaterally to revise the charges so as to avoid such loss, notwithstanding that under the stipulation contained in the K three agreements it was bound to supply electricity to the appellant at certain fixed charges. Let us examine whether either of these two grounds is well-founded.

Turning first to section 49, we may point out that prior to its amendment by the Electricity (Supply) Amendment Act, 1966, this section was in a different form. On an interpretation of the unamended section the High Court of Bombay took the view, in a case relating to the Kalyan Municipality, that it did not give power to the Board to fix uniform tariffs as to cast a higher burden on the consumer in a compact area where the cost of supply was less than on the consumers in a sparse area where the cost of supply was more owing to higher distribution cost. This case was taken in appeal by the Maharashtra State Electricity Board, but before the appeal could be decided by this 1 Court, the Parliament enacted the Amending Act substituting the present section 49 for the old one with retrospective effect. The appeal had, therefore, to be decided by reference to the amended section 49 and having regard to that section, as amended, this Court held that the Board had power to fix uniform tariffs both for consumers in compact areas as well as consumers in sparse areas. This Court, interpreting the amended section 49, pointed out:-

> "In s. 49 as it now stands, the Legislature has empowered the Board to frame uniform tariffs and it has also indicated the factors to be taken into account in fixing uniform tariffs. These two aspects are contained in sub-ss. (1) and (2). The Legislature has also made it clear in sub-s. (3) that the Board, in the special circumstances mentioned therein, has got power to fix different tariffs for the supply of electricity. Sub-s. (4)

> directs the Board not to show undue preference to any person for fixing the tariffs and the term and conditions for the supply of electricity. Though prima facie it would appear that sub-s. (4) will govern sub- ss. (1) to (3) in s. 49. the proper way to interpret sub-s. (4) will be to read it along with sub-s. (3). The question of the Board showing undue preference to any Person in fixing the tariffs and terms and conditions for supply of electricity will not arise when the Board frames uniform tariffs under sub-ss. (1) and (2). When the entire tariff is uniform for every consumer, there is no question of any undue preference as every customer will pay the same amount for the same benefit received by him. Sub-s (3) of s. 49 recognises the power of the Board to fix different tariffs for the supply of electricity and it is really here, if at all, that an occasion for any undue preference being shown, may arise. Therefore, in our opinion, sub-s. (4) will control the action of the Board under sub-s. (3) of s. 49."

It would be seen that sub-s. (1) of s. 49 empowers the Board to fix uniform tariffs. the fixation of uniform tariffs need not necessarily be regionwise or areawise, nor need it be only in respect of particular classes of consumers. There is no limitation on the exercise of the power of fixing uniforms tariffs save that certain factors are laid down in sub-s. (2) of s. 49 which have to be taken into account by the Board in fixing uniform tariffs. These factors guide and control the exercise of the power of the Board. But, even where uniform tariffs are fixed for a particular category of consumers, the application of uniform tariffs to all consumers falling within the category irrespective of their distinctive features, may sometime defeat the object of promotion of electrical development and industrial growth and progress. There may arise individual cases there, there regarded to special circumstances, it may be found necessary to take departure from the uniform tariffs and to fix special tariffs for them. Sub-s. (3) of s. 49, therefore, provides that the Board shall have the power,. if it considers it necessary or expedient to fix different tariffs for the supply of electricity to any. person not being", ; 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". This sub- section confers power on the Board to fix special tariff for a consumer if the geographical position of the area, the nature of the supply, the purpose for which supply is required and other relevant factors so warrant. Now, fixation of special tariffs can be a unilateral act on the part of the Board, but more often than not it would be the result of negotiation between the Board and the consumer and hence a matter of agreement between them. It would, therefore, seem clear that the Board can, in exercise of the power conferred under sub-s. (3) of s. 49, enter into an agreement with a consumer stipulating for a special tariff for supply of electricity for a specific period of time. Such a stipulation would amount to fixing of special tariff and it would clearly be in exercise of the power to fix special tariff granted under subs. (3) of s. 49. Indeed, if the power to fix special tariff through the modality of an agreement with the consumer were not there in sub-s. (3) of s. 49. it cannot be found in any other provision of the Supply Act and in such a case it would be impossible for the Board to enter into any agreement with the consumer binding itself to supply electricity at a special rate for a certain period of time. Such an agreement would be wholly ultra the power of the Board and the would cause considerable mischief and inconvenience as no industry would be able to enter into an agreement ensuring supply of electricity which would be binding on the Board. Tariff is the most important element in such agreement and if no binding stipulation can

be made in regard to tariff, the agreement itself would be meaningless and would b no more than a mere rope of sand.. The power to enter into an agreement fixing. a special tariff for supply of electricity for a specified period of time is, therefore, relatable to sub-s. (3) of s. 49 and such an agreement entered into by the Board would b. in exercise of the power under that sub-section. The three agreements for supply of electricity to the appellant must, in the circumstances be regarded as having been entered into by the Board in exercise of the statutory power conferred under sub-s. (3) of s. 49. Now, when the power to fix special tariff for a consumer is given to the Board, the possibility cannot be ruled out that the Board may in exercising this power show undue preference to one consumer as against the other. Sub-section (4) of s. 49 therefore, provides a safeguard by enacting that in fixing tariff and terms and conditions for the supply of electricity, the Board shall not show any undue preference to any person. This safeguard is obviously necessary only in cases where special tariff is filed by the Board under sub-s. (3) of s.

49. When uniform tariffs are filed by the Board under sub- ss. (1) and (2) of s. 49, there could be no question of the Board showing undue preference to any one consumer against another because every consumer falling within the category would have to pay the same tariff for the same benefit received by him. It is, therefore, obvious that sub-s. (4) of s. 49 controls the action of the Board in fixing tariff under sub-s. (3) of s. 49 and it has, no application where uniform tariffs are fixed under sub-ss. (1) and (2) of s.

49. Having analysed the provisions of s. 49, we may now turn to consider the argument advanced on behalf of the Board that a stipulation binding the Board not to charge anything more than a specific rate would be void as it would have the effect of divesting the Board of the power to fix and refix charges entrusted to it under s. 49, or hindering or fettering is future exercise. Now, if there is one principle more well settled than any other, it is that when a public authority is entrusted by statute with a discretionary power to be exercised for the public good, it cannot, when making a private contract in general terms, fetter itself in the use of that power or in the exercise of such discretion. There are a number of decisions which would establish this principle beyond doubt. We may refer to a few of them in order to appreciate the true scope and ambit of this principle-what is its area of operation and what are its limitation.

The first case where this principle was enunciated is Ayr Harbour Trustees v. Oswald (supra). In this case the Harbour Trustees, whose statutory power and duty were to acquire land, to be used as need might arise for the construction of works on the coast line of the Harbour, sought to save money in respect of severence on the compulsory acquisition of a particular owner's land by offering him a perpetual covenant not to construct their works on the land acquired, so as to cut off from access to the waters of the Harbour, or otherwise to affect him injuriously in respect of the land not taken but from which the acquired land was severed. It was held that such a covenant was ultra vires Lord Blackburn stated the principle in these terms:

> "I think that where the legislature confer powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees

> acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently that a contract purporting to bind them and their successors not to use those powers is void."

This case was followed by Russell, J., in York Corporation v. Henry Leetham & Sons Ltd. (supra). There, the plaintiff-Corporation was entrusted by statute with the control of navigation in part of the rivers ouse and Foss with power to charge such tolls within limits, as the Corporation deemed necessary to carry on the two navigations in which the public had an interest. The Corporation made two contracts with the defendants under which they agreed to accept, in consideration of the right to nevigate the ouse a regular annual payment of Rs.600/- per annum in place of the authorised tolls. The contract in regard to navigation of the Foss was on similar lines. It was held by Russell, J., that the contracts were ultra vires and void because under them the Corporation had disabled itself, whatever emergency might arise, from exercising its statutory powers to increase tolls as from time to time might be necessary. The learned Judge, after citing Ayr Harbour's case (supra) and another case(1) observed: "the same principle underlies many other cases which show the incapacity of a body charged with statutory powers for public purposes to divest itself of such powers or to fetter itself in the use of such powers".

Finally Lord Parker, C. J., said in Southendon Sea Corporation v. Hodgson (Wickford) Ltd.(2): "There is a long line of cases to which we have not been specifically referred which lay down that a public authority cannot by contract fetter the exercise of its discretion."

The principle laid down in these cases is unexceptionable and can not be doubted. But the question is: does it apply in the present case We do not think so. The principle is attracted when an attempt is made to fetter in advance the future exercise of statutory powers otherwise than by the valid exercise of a statutory power. The covenant in Ayr Harbour's case (supra) tied the hands of the Harbour Trustees and prevented them from constructing works on the land acquired, however necessary they might become for the proper management of the undertaking and thus fettered the Harbour Trustees in the exercise of the statutory power entrusted to them by the Legislature for the purpose of the undertaking. But this covenant was entered into by the Harbour Trustees as a 'private contract' with the owner of the land acquired in order to save money in respect of severence and not in exercise of a statutory power and hence the principle was invoked to invalidate the covenant. So far as York Corporation case (supra) is concerned, it came to be severely criticised by Sargant, L.J., in Southport Corporation v. Birkdale District Electric Supply Co. (1) and the learned Lord Justice pointed out that the decision in York Corporation's case (supra) could hardly stand with the judgment of the Court in Southport Corporation's case (supra). This criticism of the decision in York Corporation's case (supra) was adopted by Earl of Berkenhead when the Southport Corporation case (supra) was taken in appeal to the House of Lords. Lord Sumner also observed in that case that he did not think that there was a true analogy between Ayr Harbour's case (supra) and York Corporation's case (supra). The House of Lords as well as the Court of Appeal in the Southport Corporation's case (supra) seemed to be of the view that the York Corporation's case (supra) was

wrongly decided. Of course, they did not doubt the validity of the principle enunciated by Russell, J., but questioned its applicability to the facts of the York Corporation's case (supra). They appeared to think that the discharge of their statutory duties by the Harbour Trustees would be facilitated rather than fettered by a reasonable latitude of discretion in fixing tolls and both ouse and Foss agreements must, therefore, be regarded as having been entered into by the Harbour Trustees in exercise of the statutory power of fixing tolls and hence they would be valid. But they pointed out that there were certain peculiar features in the York Corporation's case (supra) on which the actual decision of Russell, J., holding ouse and Foss agreements to be void, could be sustained. The discussion of these two cases shows that the principle that a public authority cannot by contract fetter the exercise of the statutory power, which is conferred upon it for the public good, is limited in its application to those cases where the attempt to do so is otherwise than by the valid exercise of a statutory power.

The position is different where a statutory power, is exercised to enter into a stipulation with a third party which fetters the future l. exercise of other statutory powers-where such stipulation is made not us part of 'private contract in general terms as Devlin L.J. calls it in Commissioner of Crown Lands v. Page(2), but in exercise of a statutory power. In such a case it is difficult to see how the exercise of the statutory power could be held to be invalid as a fetter on the future exercise of other strututory powers. If it were so held it would render the statutory power meaningless and futile. It would nullify the existence of the statutory power and that would be contrary to all canons of construction. If the statutory power is to have any meaning. and content. the stipulation made in exercise of the statutory power must be valid and binding and it would, as pointed out by Pennycuick, VC. in Dowty Boulton v. Wolverhampton Corporation(3), "exclude the exercise of other statutory powers in respect of the same subject-matter". To put it differently, where a stipulation in a contract is entered into by a public authority in exercise of a statutory power, then, even though such stipulation fetters subsequent exercise of the same statutory power or future exercise of another statutory power, it would be valid and the exercise of such statutory power would protanto stand restricted. That would follow on the principle of harmonious construction. The public authority would not, in such a case, be free to denounce the stipulation as a nullity and claim to exercise its statutory power in disregard of it. If that were permissible, it would mean that the stipulation has no binding force and the public authority has no statutory power to enter into such stipulation. But that would be plainly contradictory of the premise on which the argument is based.

The distinction must always, therefore, be borne in mind whether the stipulation by which the public authority is alleged to have fettered in advance the future exercise of the statutory power, is one which is entered into as part of 'private contract in general terms', or in exercise of a statutory power. If it is the former, the stipulation would he bad on the principle that a public authority cannot by contract fetter the exercise of a statutory power which is conferred upon it for the public good. But if it is the latter, the stipulation being in exercise of a statutory power would be valid and it would not be open to the public authority to disregard the stipulation and exercise the statutory power initiated or fettered by it. This last statement, must, however, be qualified by making it clear that a case may conceivably arise where there. may be an overriding statutory provision which expressly or by necessary implication authorises the public authority to set at naught, in certain given circumstances, a stipulation though made in exercise of a statutory power. Where there is such a statutory provision, the stipulation would certainly be bindings but. when the specified

circumstances rise, the public authority, would have the power to override the stipulation and act in derogation of it. But that again would be a matte of construction Now, in the present case, as we have already pointed out above, the stipulations as to charges contained in the agreements entered into with the appellant were made in exercise of the statutory power to fix special tariffs conferred under sub-s. (3) of s. 49, and, therefore there could be no question of such stipulations being void as fettering or hindering the exercise of the statutory power under that provision. These stipulations did not divest the Board of this statutory power or fetter or hinder its exercise in fact, they represented the exercise of this statutory power. Once the agreements were made containing these stipulations, it was not competent to the Board to override these stipulations which were binding as having been validly made in exercise of statutory power. The Board could not enhance the charges in breach of these stipulations. To hold that the Board could unilaterally revise the charges notwithstanding these stipulations, would negate the existence of statutory power in the Board under words, the Board had no power to enter into such stipulations. That would negate the existence of statutory power in the Board under sub-s. (3) of s. 49 to fix the charges for a specific period ox time, which would be contrary to the plain meaning and intendment of the section. The Board was also not competent to enhance the charges under the guise of fixing uniform tariffs for all high tension consumers, including the appellant, under subs (1) of s. 49, because sub-s. (1) is, on its plain language, subject to sub-s. (3) of s. 49 and once special tariffs were fixed for the appellant under sub-s. (3) of s. 49, there could be no question of fixing uniform tariffs applicable to the appellant under sub-s. (1) of s. 49. The power to fix uniform tariffs under Sub-s (1) of s. 49 could not be exercised in derogation of the stipulations fixing special tariffs made under sub-s. (3) of s. 49 Moreover, if the stipulations as to charges were not binding and the Board could enhance the charges unilaterally in disregard of them, it is difficult to see how the agreements, of which the stipulations formed a term as well as consideration, could be sustained. We can understand an argument that the whole of the agreements were void But strangely, the claim of the Board was that the appellant should be held to the agreements, though, at the same time the Board should be free to repudiate the stipulations which formed the consideration or part of the consideration. That is a claim which is highly illogical and we find it difficult to appreciate it. The stipulations as to charges are inseverable from the rest of the agreements and if these stipulations are disturbed and the charges are revised unilaterally by the Board, how could the agreements continue to bind the appellant ? on the view contended on behalf of the Board, it would be impossible for a consumer to enter into an agreement with the Board for supply of electricity at a certain specified tariff. That surely could not have been intended by the Legislature. " Far from promoting the object of electrical development and industrial growth in the State it would act as a regressive factor. It may be pointed out that the Board also did not contend that the agreements entered into with the appellant were wholly void. The attack was only against the validity of the stipulations as to charges and that attack must. for reasons which we have given, fail in so far as it is based on s. 49.

We then turn to consider the argument based on s. 59. That section provides that the Board shall not, as far as practicable and after taking credit for any subventions from the State Government under section 63, carry on its operations under the Act at a loss and shall adjust its charges accordingly from time to time. The contention of the Board was that since it was operating at a loss, it was bound under s. 59 to readjust its charges in order to avoid the loss and hence it was within its power to enhance the charges notwithstanding the stipulations contained in the agreements. This

contention, plausible though it may seem at first blush` is` on closer scrutiny not well founded. It ignores the true object and purpose of the enactment of s. 59 and fails to give due effect to the words "as far as practicable". The marginal note to s. 59 reads "General Principles for Board's Finance". It is true the marginal note cannot afford any legitimate aid to a construction of a section, but it can certainly be relied upon as indicating the drift of the section, or, to use the words of Collins M. R. in Bushell v. Hammond(1) "to show I what the section was dealing with'. It is apparent from the marginal note that s. 59 is intended to do no more than lay down general principles for the finance of the Board. It merely enunciates certain guidelines which the Board must follow in managing its finance. The Board is directed, as far as practicable, not to carry on its operations at a loss and to adjust its charges accordingly from time to time. The Legislature has deliberately and advisedly used the words "as far as practicable" as the Legislature was well aware that since the Board is a statutory authority charged with the general duty of promoting the coordinated development of generation, supply and distribution of electricity within the State with particular reference to such development in areas not for the time being served or adequately served by any licensee, it might run into loss in carrying on its operations and it might not always be possible for it to avoid carrying on its operations at a loss. Sometimes the Board might have to give special tariffs to consumers in undeveloped or sparsely developed areas and sometimes special tariffs might have to be given to industrial consumers with a view to accelerating the rate of industrial growth and development, in the State even though such special tariffs might not be sufficient to meet the cost of generation, supply and distribution of electricity. The Legislature, therefore, did not issue a rigid directive to the Board that it shall on no account carry on its operations at a loss, and if there is a loss for any reason whatsoever, it shall adjust its charges so as to wipe off such loss. But it merely administered a caution to the Board that 'as far as practicable' it shall not carry on its operations at a loss, that is, if it is 'practicable' for it to avoid operating at a loss by adjusting its charges, it should try to do so. That is why this Court pointed out in Maharashtra State Electricity Board v. Kalyan Borough Municipality (2) that cost is not the sole or only criterion for fixing the tariff". Now obviously where, by a stipulation validly made under sub-s. (3) of s. 49, the Board is under a contractual obligation not to charge any thing more than a specified tariff, it would not be 'practicable' for it to enhance its charges, even if it finds that it is incurring operational loss. To do something contrary to law-in violation of a contractual obligation an never be regarded as 'practicable'. Section 59 does not give a charter to the: Board to enhance its charges in breach of a contractual stipulation. The Board can adust its charges under the section only in so far as the law permits it to do so. If there is a contractual obligation which binds the Board not to charge anything more than a certain tariff, the Board cannot claim to override it under s. 59. It is significant to note the difference in language between s. 59 on the one hand and s. 57 read with cl. (1) of the Sixth Schedule on the other. Section 57 clearly and in so many terms provides that the provisions of "any other law. agreement or instrument applicable to the licensee" shall, in relation to the licensee"., be void and of no effect in so far as they are inconsistent with the provisions of the Sixth Schedule and cl. (1) of the Sixth Schedule provides that the licensee shall so adjust its charges for the sale of electricity, whether by enhancing or reducing them, that its clear profit in any year of account shall not so far as possible, exceed the amount of reasonable return. The licensee can, therefore, notwithstanding any agreement entered into with the consumer, enhance the charges for sale of electricity in order to earn the amount of reasonable return by way of clear profit. But no such language is to be found in s. 59 and, on the contrary, the words there used are "so far as practicable". We do not, therefore, think

that s. 59 confers any power on the Board to enhance the charges for supply of electricity in disregard of a contractual stipulation entered into by it under sub-s. (3) of s. 49.

There is also one other circumstance which supports this view. If under s. 59, charges have to be adjusted for the purpose of avoiding operational loss, what is the basis on which such adjustment would be made ? obviously it cannot be on the basis of cost of production, distribution and supply of electricity to each consumer or class of consumers, for there may be certain consumers or classes of consumers who may have to be supplied electricity at special tariff less than the cost, having regard to the geographical area or the nature or purpose of the supply. That means that the adjustment of the charges would have to he left to the discretion of the Board to be made in such a manner as it thinks fit and proper in the light of relevant circumstances and since "cost is not the sole or only criterion for fixing tariff", the Board would be free not to enhance the charges in case of some consumers or classes of consumers even though such charges may be less than the cost and in case of others, enhance them even beyond the cost, provided, of course, the relevant factors are taken into account and there is no undue preference of one consumer as against another. If that be so, it must follow a fortiorari that there is nothing in s. 59 which requires the Board to enhance the charges in a case where it has bound itself by a contractual stipulation not to claim anything more than a certain specified charges.

We are, therefore, of the view that the Board was not entitled to enhance the charges in derogation of the stipulation as to charges contained in the agreements with the appellant and the notification dated 28th November, 1969 fixing tariff s for extra high tension consumers was not enforceable against the appellant. We accordingly issue a writ quashing and setting aside the notification dated 28th November, 1969 in so far as it seeks to make the tariffs specified in it applicable to the appellant and declare that the Board is not entitled to claim from the appellant anything more than the charges specified in the agreements. We also issue a writ restraining the Board from enforcing the notification dated 28th November, 1969 against the appellant or claiming from the appellant anything more than the charges specified in the agreements. The appeal is accordingly allowed. The 1st respondent will pay the costs of the appeal to the appellant.

Civil Appeal No. 1642 of 1971 The facts and circumstances giving rise to the present appeal are in material respects identical with those in Indian Aluminum Company v. KeraIa Stat Electricity Board(1) which we have disposed of by a judgment delivered this morning The judgment in Indian Aluminum Company v. Kerala State Electricity Board (supra) will, therefore. govern the decision of the present appeal as well.

We accordingly issue a writ quashing and setting aside the notification dated 28th November, 1969 in so far as it seeks to make the tariffs specified in it applicable to the appellant and declare that the Board is not entitled to claim from the appellant anything more than the charges specified in the agreement dated 26th October, 1964. We also issue a writ restraining the Board from enforcing the notification dated 28th November, 1969 against the appellant or claiming from the appellant anything more than the charges specified in the agreement dated 26th October, 1964. The appeal is accordingly allowed. The 1st respondent will pay the costs of the appeal to the appellant Civil Appeal No. 1652 of 1974 This appeal, by special leave, is directed against the order of the High Court of

orissa allowing a writ petition filed by the first respondent for quashing a Press note dated 1st February, 1971 levying a coal surcharge at 0.62 p. per unit of electricity supplied by the orissa State Electricity Board to the 1st respondent. The writ petition came to be filed by the 1st respondent in the following circumstances The 1st respondent is a limited liability company carrying on business of manufacturing aluminum. It has several factories at different places in the country where it carries on one or the other processes involved in the manufacture of aluminum. It was desirous of setting up another factory and for that purpose it was looking for a place where it would be able to secure at reasonable rates electrical energy which is a primary raw material in the method of electrolysis employed for the purpose of converting alumina into aluminum. The State of orissa had, about this time, commissioned hydro electric station at the site of Hirakud Dam with a view to step up the production of electricity and making it available for industrial purposes. It offered to supply electricity to the 1st respondent at reasonable rates if the respondent set up its factory at Hirakud in the District of Sambhalpur within the territories of the State. A. contract dated 3rd June, 1957 was accordingly entered into between the 1st respondent and the state of orissa for supply of electricity at certain mutually agreed rates for a period of 25 years with an option or renewal In favour of the 1st respondent for a further period of 25 years. In view of this contract, the 1st respondent established a factory at Hirakud for the manufacture of aluminum and the State of orissa supplied electricity to the 1st respondent from the Hirakud Hydro Power Station at the rates stipulated in the contract. Some time after the factory of the 1st respondent had been in production, it was found that additional electric power was necessary for expansion of its operations. Another contract dated 11th February, 1960 was, therefore, entered into between the 1st respondent and the State of orissa whereby the State agreed to supply to the 1st respondent additional electric power at the rates and on the terms and conditions set out in this contract. The duration of this contract was also coextensive with that of the earlier contract. Thus there were two contracts between the 1st respondent and the State of orissa under which the State supplied electricity to the 1st respondent.

In or about 1962, the State Government, had by a notification issued under s. 5, sub-s. (1) of the Electricity (Supply) Act, 1948 (hereinafter referred to as the Supply Act) constituted orissa State Electricity Board (for shortness called the Board). Section 60 of the Supply Act provides inter alia that "all contracts entered into by, with the State Government for any of the purposes of this Act before the first constitution of the Board shall be deemed to have been entered into by, with the Board". Therefore, as soon as the Board was constituted, the two contracts, dated 3rd June, 1957 and 11th February, 1960 were deemed to have been entered into by the 1st respondent with the Board and for all the purposes of the Supply Act, they were to be treated as contracts entered into with the Board. The Board in its turn supplied electricity to the 1st respondent from the Hirakud Hydro Power Station at the rates and in accordance with the terms and conditions set out in these contracts.

In 1968, the State Government set up a Thermal Power Station at Talcher and the transmission lines from the, Hirakud Hydro Power Station were integrated with those from the Talcher Thermal Power Station. The Thermal Project was thereafter in June 1970, transferred from the State Government to the Board. Both the Hirakud Hydel Project and the Thermal project were then operated by the Board. Now, in a thermal project, coal is an essential raw material as it constitutes the fuel necessary for generation of electricity and the cost of generation of electricity is, therefore, directly linked with

the price of coal. The Board, after it had taken over the Talcher Thermal Project found that, owing to steep rise in price of coal, the cost of generation of electricity at Talcher Thermal Power Station had gone up considerably and in order to off-set this rise in the cost of generation, it was necessary to levy a coal surcharge on consumers receiving electricity from the Talcher-Hirakud Grid. The Board accordingly after obtaining the approval of the Government decided to levy a coal surcharge at the rate of 0.62 p. per unit of the electricity supplied from the Talcher-Hirakud , Grid and notified its decision in a Press note issued on 1st February, 1971. The relevant part of Press note was in the following terms:

> Owing to steep rise in the price of coal which is necessary for generation of thermal power at Talcher, the cost of generation has gone up considerably and the Board felt that the additional cost could be set only by the levy of a coal surcharge on consumers receiving power supply from Talcher-Hirakud Grid, as is levied by other Electricity Boards who have Thermal Generation. As per the pro visions of sections 49 and 59 and the 6th schedule of the Indian Electricity (Supply) Act, 1948, the levy of coal surcharge is permissible under the aforesaid circumstances.
>
> The quantum of coal surcharge is, however, dependant on the rise or fall in the cost of coal delivered at the Talcher Thermal Power Station and on the basis of the present cost of coal supplied to the Power Station the Board proposes to levy coal surcharge at 0.62 paise per unit provisionally. This coal surcharge will be in addition to the present tariff at which the power is being supplied to the consumer fed from the Talcher-Hirakud Grid and is also exclusive of the Electricity Duty and other charges, if any levied by Government from time to time. The coal surcharge will, however, not apply to the consumers getting supply of power from Diesel Power Stations run by the Board.
>
> The coal surcharge at the above mentioned rate of 0.62 paise per unit will be levied on all supplies of energy from the Talcher-Hirakud Grid with effect from 1-2-1971. As the Machkund Power System is not integrated with the Hirakud-Talcher Grid, consumers receiving power from Machkund Power System are exempted from the above levy for the present."

It would be seen that the Press Note excluded from the coal surcharge consumers of electricity-supplied from diesel power stations as also Machkund Power Station. The only consumers subjected to the coal surcharge were those receiving electricity from the Talcher Hirakud Grid. Relying on the Press Note, the Board claimed to recover the coal surcharge from the 1st respondent, but the 1st respondent disputed this liability and filed writ petition No. 357 of 1971 in the High Court of Orissa challenging the validity of the Press Note and praying for quashing the demand for coal surcharge. The High Court allowed the writ petition and quashed the decision of the Board to levy the coal surcharge so far as the 1st respondent is concerned. The Board thereupon brought the present appeal with. special leave obtained from this Court.

There were in the main three grounds on which the High Court declared the levy of the coal surcharge invalid. Firstly, the High Court held that since electricity to be supplied to the 1st respondent under the two contracts was to be from the Hirakud Hydro Power Station, rise ill the price of coal, which is not an essential raw material in the generation of hydro electric power, was irrelevant and that the Board could not furnish any valid or legitimate reason for applying coal surcharge to the 1st respondent. Secondly, the High Court said that the levy of the coal surcharge could not be justified under s. 49, as it was imposed only on consumers of electricity from Grid and consumers of electricity from diesel power station and Machkund Hydro Power Station were not touched and it did not form part of a measure to fix uniform tariffs. Section 59 also, according to the High Court, did not help the Board. In the first place, no positive material was placed before the High Court by the Board which would show that the Board was running at a loss and the coal surcharge had been levied for the purpose of avoiding such loss and secondly, to quote the words of the High Court, if the coal surcharge were imposed to meet the purposes of section 59, there could have been no "justification to exempt the consumers of energy from diesel stations and Machkund Hydro Project" for `section 59 makes provision for a comprehensive view of the matter and not with reference to a particular undertaking of the Board" Lastly, the High Court felt that no regulations having been made under section 79(j) conferring power on the Board to unilaterally revise the charges, it was not competent to the Board to ignore the stipulation contained in the two contracts and enhance the charges in violation of such contractual stipulation. The High Court observed that if regulations made under s. 79(j). conferred "unilateral power on the Board of revising the tariffs, the position would be very different": in such a case, "since regulations are law and such law would provide for unilateral exercise of power, agreements cannot stand in the way and deter the authority of the law enabling unilateral exercise of power from being so exercised'. The High Court accordingly quashed the decision to levy the coal surcharge contained in the Press Note and declared that the 1st respondent shall not be subject to the coal surcharge on the basis of the Press Note. the question is whether the view taken by the High Court is correct.

We will take up the second and the third grounds together for consideration. We do not think that the High Court was right in saying that by making regulations under section 79(j) the Board could confer upon itself power to unilaterally revise the rate`s for supply of electricity Section 79(j) empowers the Board to make regulations not inconsistent with the Supply Act to provide for principles governing the supply of electricity by the Board to persons other than the licenses under section 49". This power to make regulations must obviously be exercised consistently with the provisions of the Supply Act and the regulations made in exercise of this power cannot go beyond the Supply Act. If the power to enhance the rates unilaterally in derogation of the contractual stipulation does not reside in any provision of the Supply Act, it cannot be created by regulations made under the Supply Act. Either this power can be found in some provision of the supply Act or it is not there at all. Regulations in the nature of subordinate legislation cannot confer authority on the Board to interfere with the contractual rights and obligations unless specific power to make such regulations is vested in the Board by some provision in the Statute expressly or by necessary implication. No such power is to be found in section 79(j) or in any other provision of the Supply Act. It does not, therefore, make any difference whether regulations under section 79(j) were made or not, at the date when the coal surcharge was levied. Even if they were made, they could not have conferred authority on the Board to unilaterally exonerate itself from the stipulation con lined in the

two contracts and enhance the rates notwithstanding such contractual stipulation. The only question could be whether the Board had any such authority under ss. 49 and 59, these being the only two sections relied on for the purpose of spelling out such authority in the Board. This question stands concluded against the Board by the decision given by us this morning in Indian Aluminium Company v. Kerala State Electricity Board(1). We have analysed the provisions of ss. 49 and 59 and held that on a true interpretation, neither of these two sections confers any authority on the Board to override a contractual stipulation as to rates and to enhance the rates in derogation of such contractual stipulation, even if it finds that the rates stipulated in the contract are not sufficient to meet the cost of production and supply of electricity and it is incurring operational loss. This decision clearly negatives the claim of the Board to enhance the rates by the levy of coal surcharge under s. 49 or s. 59. The Board must be held bound by the stipulation as to rates contained in the two contracts solemnly entered into by the State of orissa with the first respondent. On t his view it becomes unnecessary to consider whether the levy of the coal surcharge could not be justified under s. 49 because it was imposed only on consumers of electricity from Talcher- Hirakud Grid and not on the other consumers, and it did not form part of a measure to fix uniform tariffs, or whether there was any material before the High Court showing that the Board was running its operations at a loss so as to justify readjustment of the charges under s. 59. It is immaterial to consider these questions because whatever view be taken in regard to them. it is clear from our decision that neither under s. 49 nor under s. 59 can the Board. even if it is running at a loss, interfere with a contractual stipulation as to rates solemnly agreed upon with the consumer. It may readjust the rates in order to avoid the operational loss, where it is not fettered by a contractual stipulation from doing so. The High Court was therefore. right in taking, the view that the Board was not entitled to levy coal surcharge on the 1st respondent in enhancement of the rates for supply of electricity stipulated in the two contracts between the parties. We need not. On this view. consider the first ground on which also the High Court held the levy of coal surcharge to be invalid, namely, that electricity to be supplied to the 1st respondent under the two contracts was to be from Hirakud Hydro Power Station and, therefore, rise in the price of coal was irrelevant and it could not furnish any justification for imposing coal surcharge on the 1st respondent. We do not express any opinion on this point as it is unnecessary to do so.

There is in the circumstances, no reason to interfere with the decision of the High Court. We accordingly dismiss the appeal with costs.

Civil Appeal No. 1653 of 1974 This appeal, by special leave, is brought against an order of the High Court of orissa dismissing a writ petition filed by the appellant for quashing a Press Note dated 1st February, 1971 levying a coal surcharge at the rate of 0.62 p. per unit on electricity supplied by the orissa state Electricity Board from the Talcher-Hirakud Grid. The writ petition came to be filed by the appellant in the following circumstances.

The appellant is a limited liability company carrying on business of manufacture of board and paper. The appellant wanted to set . up its factory at a place which would be convenient from the point of view of availability of facilities such as electric power The State of orissa had, about this time commissioned Hydro Electric Station at the site of Hirakud Dam with a view to stepping up the production of electricity and making it available for industrial purposes. It offered to supply

electricity to the appellant at reasonable rates as also to make other facilities available to the appellant if the appellant set up its factory at Chouadwar in Cuttack district. An agreement dated 3rd December, 1960 was accordingly entered into between the appellant and the State of orissa for supply of electricity at certain mutually agreed rates and on the terms and conditions set out in the agreement. Clause (1) of the agreement provided that it shall be deemed to be in force , for a period of five years from the date of supply of Hydro Power, i.e. 1st February, 1958 and thereafter shall so continue unless and until the same shall be determined by either party giving to the other six calendar months' notice in writing of his intention to terminate the agreement. It was common ground between the parties that neither had given notice terminating the agreement as contemplated in cl. (1) and in the circumstances, the agreement continued to be in force. Clauses (7), (14) and (22) specified the charges payable by the appellant for the electricity supplied by the State Electricity Board under the agreement Clause (13) provided that "the tariff and conditions of supply mentioned in this agreement shall be subject to any revision that may be made by the supplier from time to time". Clause (23) laid down the machinery of arbitration. It said: "any dispute or difference arising between the consumer and the supplier or their respective Electrical Engineers IS to the supply of electrical energy hereunder or the pressure thereof or as to the Supplier or the Consumer respectively to determine the same or any question, matter or thing arising hereunder shall be referred to a single arbitrator who shall be mutually agreed upon by both parties". And lastly, Clause (24) declared that "the supply of electrical energy under this agreement shall be subject to the provisions of all Acts of the Union Parliament and the rules made thereunder and the special orders of the Government of orissa for the time being in force with reference to the supply of electrical energy from the Hirakud Hydro Electric Station and the provisions of such Acts of the Union Parliament and the rules made thereunder and Special orders of the Government of Orissa shall be deemed to be incorporated with and form part of this agreement so far as they are not inconsistent therewith". This last mentioned clause clearly posited that under the agreement electricity was to be supplied by the State from the Hirakud Hydro Electric Station a position reinforced by the use of the words "Hydro Power" in cl. (1). In view of this agreement, the appellant set up its factory for manufacture of board and paper at Choudwar, a backward area, even though it is situated far from the source of raw materials and the consumer market and the State supplied electricity to the appellant at the rates stipulated in the agreement.

In or about 1962 the State Government, by a notification issued under section 5, sub-section (1) of the Electricity (Supply) Act, 1948 (hereinafter referred to as the Supply Act) constituted the orissa State Electricity Board (for shortness caned the Board). Section 60 of the Supply Act provides inter alia that all contracts entered into by, with the State Government for any of the purposes of this Act before the first constitution of the Board shall be deemed to have been entered into by, with the Board". Therefore, as soon as the Board was constituted, the agreement dated 3rd December, 1960 was deemed to have been entered into by the appellant with the Board and for all the purposes of the Supply Act it was to be treated as an agreement entered into with the Board. The Board in its turn supplied electricity to the appellant from the Hirakud Hydro Power Station at the rates and in accordance with the terms and conditions set out in the said agreement.

In 1968, the State Government set up a Thermal Power Station at Talcher and the transmission lines from the Hirakud Hydro Power Station were integrated with those from the Talcher Thermal Power

Station. The Thermal project, thereafter in June 1970, was transferred from the State Government to the Board. With the Hirakud Hydro Hydel Project and the Talcher Thermal Project were then operated by the Board. Now, in a thermal project coal is an essential raw material as it constitutes the fuel necessary for generation of electricity and the cost of generation of electricity is, therefore, directly linked with the price of coal. The Board, after it had taken over Talcher Thermal Project, found that, owing to steep rise in the price of coal, the cost of generation of electricity at Talcher Thermal Power Station had gone up considerably and in order to off- set this rise in the cost of generation it was necessary to levy a coal surcharge on consumers receiving electricity from the Talcher-Hirakud Grid. The Board accordingly, after obtaining the approval of the Government, decided to levy a coal surcharge at the rate of 0.62 p. per unit of the electricity supplied from the Talcher-Hirakud Grid and notified its decision in a Press Note issued on 1st February, 1971. The relevant part of the Press Note was in the following terms:

> "Owing to steep rise in the price of coal which is necessary for generation of thermal power at Talcher, the cost of generation has one up considerably and the Board felt that the additional cost could be set only by the levy of a coal surcharge on consumers receiving power supply from Talcher- Hirakud Grid, as is levied by other Electricity Boards who have Thermal Generation. As per the provisions of Sections 49 and 59 and the 6th Schedule of the Indian Electricity (Supply) Act, 1948, the levy of coal surcharge is permissible under the aforesaid circumstances.
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> The quantum of coal surcharge is, however, dependent on the rise or fall in the cost of coal delivered at the Talcher Thermal Power Station and on the basis of the present cost of coal supplied to the Power Station the Board proposed to levy coal surcharge at 0.62 paise per unit provisionally. 'This coal surcharge will be in addition to the present tariff at which the power is being supplied to the consumer fed from the Talcher-Hirakud Grid and is also exclusive of the Electricity Duty and other charges, if any, levied by Government from time to time. The coal surcharge will, however. not apply to the consumers getting supply of power from Diesel Power Stations run by the Board.
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> The coal surcharge at the above mentioned rate of 0.62 paise per unit will be levied on all supplies of energy fro the Talcher-Hirakud Grid with effect from 1- 2-1971. As the Machkund Power System is not integrated with the Hirakud-Talcher Grid, consumers receiving power from Machkund Power System are exempted from the above levy for the present."

It would be seen that the Press Note excluded from the coal surcharge consumers of electricity supplied from Diesel power stations as also Machkund Power Station. The only consumers subjected to the coal surcharge were these receiving electricity from the Talcher-Hirakud Grid. Relying on the Press Note, the Board claimed to recover the coal surcharge from the appellant, but the appellant disputed its liability and filed Writ Petition No. 605 of 1971 challenging the validity of the Press note and praying for quashing the demand for coal surcharge. H There were various contentions raised on behalf of the appellant in supports of the writ petition. Since, according to the

Press Note, the coal surcharge was sought to be imposed by the Board under sections 49 and 59 and the Sixth Schedule to the Supply Act, the principal contention of the appellant was directed towards showing that none of these provision authorised the Board to levy the coal surcharge and thereby enhance the rates for supply of electricity unilaterally, in derogation of the stipulation as to rates contained in the agreement. It was also urged on behalf of the appellant that in any event the coal surcharge could not be levied on the appellant, since electricity to be supplied to the appellant under the agreement was to be, from the Hirakud Hydro Power Station as clearly. indicated in cls. (1) and (2) of the agreement and rise in the price of coal was, there fore, irrelevant so far as the cost of supply of electricity to the appellant was concerned. Even if the electric, supply from the Talcher Thermal Power Station was integrated with that from the Hirakud Hydro Power Station-a position seriously disputed by the appellant it did not, according to the appellant, make any difference to the position because, in the first place, the Talcher Thermal Power Station was not established and inter connected with the Hirakud Hydro Power Station pursuant to any scheme under the Supply Act, and secondly, there was sufficient electricity generated in the Hirakud Hydro Power Station which would meet the requirements of the appellant under the agreement and it was not necessary for the Board to draw upon the electricity generated at the Talcher Thermal Power Station for the purpose of discharging its obligations under the agreement. 'though the Press Note referred only to sections 49 and 59 and the Sixth Schedule to the Supply Act as the source of the power to levy the coal surcharge, the Board also sought to justify its claim by reference to cl. (13) of the agreement and it, therefore became necessary for the appellant to repel this contention of the Board. The appellant urged that cl. (13) of the agreement could not clothe the Board with the authority to levy the coal surcharge, when it had no such authority under the provisions of the Supply Act. It was also contented on behalf of the appellant that, in any event, the power conferred under cl. (13) of the agreement could not be exercised by the Board arbitrarily or unreasonably, or on an extraneous or irrelevant ground, and since electricity to be supplied to the appellant under the agreement was to be T from the Hirakud Hydro Power Station, levy of coal surcharge on the appellant on the ground that there was steep rise in the price of coal, when coal is not at all a necessary raw material in the generation of Hydro electric power, was arbitrary and unreasonable and, to say the least, founded on a wholly irrelevant ground. The appellant also contended that there was nothing to show that the cost of generation of electricity at the Hirakud Hydro Power Station was more than the f rates for the supply of electricity. stipulated in the agreement. Even if the combined cost of generation of electricity at the Hirakud Hydro Power Station and the Talcher Thermal Power Station were taken into account, there was no material said the appellant, to show that the rates for the supply of electricity provided in the agreement were not sufficient to meet the cost of generation so as to justify revision of such rates under cl. (13) of the agreement.

Though these contentions were pressed on behalf of the appellant at the hearing of the Writ Petition, the Division Bench of the High Court of orissa, which heard the writ petition, declined to entertain the merits of these contentions and dismissed the writ petition on a short preliminary ground. That ground may be stated as follows in the words of the Division Bench Clause 23 of the agreement provides for arbitration in the event of any dispute arising out of it. We are of the view that the petitioner must avail of the specific remedy provided in the agreement, is so advised, to resolve its dispute with the Board as in our opinion, even if on an examination of the several contentions advanced before us it turns out that adequate power under the statute is wanting, the Board may yet

justify its action relying upon the contractual provision Whether the levy is justified under the agreement is a matter well within the scope of the arbitration proceeding. If the petitioner disputed the levy in a civil action, section 24 of the Arbitration Act, 1940, could have been relied upon by the Board to divert the action to the private forum chosen by the parties. The petitioner should not be permitted to invoke our extraordinary jurisdiction", and on this view the Division Bench dismissed the writ petition without examination of the merits of the several contentions". The appellant applied to the High Court for leave to appeal to this Court, but the application was refused and hence the appellant brought the present appeal with special leave obtained from this Court.

It is apparent from the Press Note that when the Board decided to levy the coal surcharge on the consumers receiving electricity from the Talcher Hirakud Grid, it claimed to do so under ss. 49 and 59 and the Sixth Schedule to the Supply Act. We must, therefore, first examine whether any of these provisions of the Supply Act empowered the Board to levy the coal surcharge. We fail to see how the machinery of arbitration contained in cl (23) of the agreement can possibly cover such a question. The arbitration agreement in that clause applies only in a dispute or difference "as to the supply of electrical energy hereunder or the pressure thereof or as to the interpretation of this Agreement or the right of the supplier or the consumer respectively to determine the same or any other question matter or thing arising hereunder`. The question as to whether the Board had the power under sections 49 and 59 and the Sixth Schedule to the Supply Act to levy the coal surcharge is not a question, matter or thing arising under the agreement It is a claim founded on the provisions of the Supply Act to impose the coal surcharge in addition to the rates payable by the appellant to the Board under the agreement. Such a claim clearly falls outside the ambit and coverage of the arbitration provision contained in cl. (23) of the agreement. The arbitration agreement cannot therefore, be regarded as a relevant factor which should legitimately influence the discretion of the Court in declining to entertain the writ petition on merits. So we proceed to consider how far sections 49 and 59 and the Sixth Schedule to the Supply Act could be regarded as providing statutory authority to the Board to levy coal surcharge on the appellant.

We have already had occasion to consider the true scope and ambit of sections 49 and 59 of the Supply Act in Indian Aluminium Company v. Kerala State Electricity Board(1) in which we have pronounced our judgment this morning. It is clear from our judgment in that case that neither section 49 nor section 59 confers any authority on the Board to enhance the rates for supply of electricity where they are fixed under stipulation made in an agreement. The Board has no authority under either of these two sections to override a contractual stipulation and enhance unilaterally the rates for the supply of electricity. Now, the effect of the levy of coal surcharge would be to enhance the rates for the supply of electricity stipulated under the agreement. It would, therefore, appear to be clear that the Board cannot claim to justify the levy of coal surcharge on the appellant by resort to sections 49 and 59. It is futile for the Board to rely on either of these two sections. Equally futile is the reliance placed by the Board on the Sixth Schedule to the Supply Act. The Sixth Schedule is, by a fiction enacted in section 57 deemed to be incorporated in the licence of every licensee and if the Board were a licensee for the Purpose of this section, the provisions of the Sixth Schedule would also apply to it and it would be entitled under cl. (1) of the Sixth Schedule to so adjust its charges for the sale of electricity by enhancing them that its clear profit in any year of account does not, as far as possible, exceed the amount of reasonable return. But the definition of 'licensee' given in section 2,

sub section (6) says that the provisions of section 26 of the Supply Act notwithstanding, 'licensee' does not include the Board. The Board is therefore, by express enactment taken out of the category of licensee for the purpose of the Supply Act. Section 57 cannot, in the circumstances, have any application to the Board and if that be so, the provision of the Sixth Schedule cannot be invoked by the Board in support of its claim to enhance the rates by the addition of the coal surcharge.

But that does not put an end to the controversy between the parties. It is true that in the Press Note the Board relied only on sections 49 and 59 and the Sixth Schedule of the Supply Act as the source of the power under which it claimed to levy the coal surcharge and these provisions have been found not to contain the power sought in them. But, if there is one principle more well settled than any other, it is that, when an authority takes action which is within its competence, it cannot be held to be invalid, merely because it purports to be made under a wrong provision, if it can be shown to be within its power under any other provision. A mere wrong description of the source of power a mere wrong label cannot invalidate the action of an authority, if it is otherwise within its power. The Board claimed that, in any event, even if sections 49 and 59 and the Sixth Schedule to the Supply Act could not be construed as authorising the Board to enhance unilaterally the rates for supply of electricity, the Board had the power under cl. (13) of the agreement to levy the coal surcharge on the appellant and the decision to levy the coal surcharge could be justified by reference to this power. Now, if this claim of the Board were well founded. it would afford a complete answer to the challenge made on behalf of the appellant. But the appellant raised various contentions in answer to this plea based on cl, (13) of the agreement. We may have referred to some of these contentions in an earlier part of the judgment. It is here that the case of the appellant founders on the rock of the preliminary objection. Clause (23) of the agreement provides that any dispute or difference relating to a question, thing or matter arising under the agreement shall be referred to the arbitration of a single arbitrator. Questions such as: whether the Board had power under cl. (13) of the agreement to levy any coal surcharge at all when no such power was conferred on it by the Act, whether the action of the Board in levying the coal surcharge on the appellant under cl. (13) of the agreement was arbitrary and unreasonable or whether it was based on extraneous and irrelevant considerations and whether, on the facts and circumstances of the case, the Board was justified under cl. (13) of the agreement to levy the coal surcharge on the appellant, are plainly questions arising under the agreement and they are covered by the arbitration provision contained in cl. (23) of the agreement. All the contentions raised by the appellant against the claim to justify the levy of the coal surcharge by reference to cl. (13) of the agreement would, therefore, seem to be covered by the arbitration agreement and there is no reason why the appellant should not pursue the remedy of arbitration which it has solemnly accepted under cl. (23) of the agreement and instead invoke the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution to determine questions which really form the subject matter of the arbitration agreement. We are, therefore, of the view that the High Court was right in exercising its discretion against entertaining the writ petition on merits, in so far as it was directed against the validity of the levy of the coat surcharge under cl. (13) of the agreement. The merits of the contentions raised by the appellant would have to be decided by arbitration as provided in cl. (23) of the agreement.

We, therefore, dismiss the appeal, but, in the peculiar circumstances of the case, make no order as to costs. Civil Appeal No, 1654 of 1954.

This appeal, by special leave, is directed against the order of the High Court of orissa dismissing Writ Petition No. 527 of 1971 filed by the appellant against the orissa State Electricity Board (hereinafter referred to as the Board) Writ Petition No. 527 of 1971 challenged the vapidity of the same Press Note dated 1st February, 1971 which also formed the subject matter of challenge in Writ Petition No. 605 of 1971 leading to Civil Appeal No. 1653 of 1974. The facts giving rise to Writ Petition No. 527 of 1971 are identical with those of Writ Petition No. 605 of 1971 barring only the difference that whereas the appellant in Writ Petition No. 605 of 1971 carried on the business of manufacture of board and paper, the appellant in Writ Petition No. 527 of 1971 carried on the business of running a textile mill and while the agreement between the appellant and the State of orissa for supply of electricity in Writ Petition No. 605 of 1971 was dated 8th December, 1960, the agreement in Writ Petition No. 527 of 1971 was dated 12th May, 1960. The material terms and conditions of both the agreements were, however, the same. The judgment given by us in Titagarh Paper Mills Co., Ltd. v. Orissa State Electricity Board and Anr. (Civil Appeal 1653 of 1974) must also, therefore, govern the decision of this appeal and whatever we have said in Titagarh Paper Mills Co. Ltd. v. Orissa State Electricity Board and Anr. (Civil Appeal 1653 of 1974) must apply equally in the present case.

We, therefore, dismiss the appeal with no order as to costs.

V.P.S. Appeals dismissed.