

Durgapur Projects Ltd. and anr. Vs. Graphite India Ltd. and ors.

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SooperKanoon Citation : sooperkanoon.com/875501

Court : Kolkata

Decided On : Jun-03-1998

Reported in : AIR1998Cal319

Judge : Prabha Shankar Mishra, C.J. and ;Barin Ghosh, J.

Acts : Electricity (Supply) Act, 1948 - Section 57A; ;[Constitution of India](#) - Article 226

Appeal No. : APO/T Nos. 710 and 713 of 1997 and G.A. No. 4374 of 1997

Appellant : Durgapur Projects Ltd. and anr.

Respondent : Graphite India Ltd. and ors.

Disposition : Appeal allowed

Judgement :

Barin Ghosh, J.

1. By the judgment and order under appeal a learned single Judge of this Court allowed three writ petitions and thereby set aside the revision of tariff made by the appellant No. 1, Durgapur Projects Ltd., with effect from 8th April, 1991, 1st November, 1993 and 10th February, 1994.

2. The appellant No. 1 is a Government Company within the meaning of Companies Act, 1956 and its entire shareholding is held by the Government of West Bengal. It has six Thermal Power Units for generation of electricity, all of them are situated in Durgapur. It is a generating company within the meaning of the Electricity (Supply) Act, 1948. It supplies electricity to consumers in the rural and industrial areas in and around Durgapur. The excess power generated by it, is sold to the West Bengal State Electricity Board.

3. It being a generating company and not a licensee, the appellant No. 1 required sanction of the Government of West Bengal to enable it to supply electricity to the public in terms of Section 28(1) of the Indian Electricity Act, 1910, which sanction was accorded on 28th August, 1964.

4. In that sanction the Government of West Bengal imposed, inter alia, a condition to enable the appellant No. 1 to supply electricity to the public as set out below :--

'That the rates per unit for supply of energy shall be fixed and adjusted from time to time in conformity with the provisions laid down in the Sixth Schedule to the Electricity (Supply) Act, 1948, and with the approval of the State Government.'

5. By a letter dated 29th August, 1996 the State Government directed the appellant No. 1 to charge tariff in line with that of the West Bengal State Electricity Board for the purposes of uniformity. The order says, inter alia :--

'The Department has since suggested that for the sake of uniformity DPL's tariff should be fixed in the line of WBSEB's rates.....'

6. On 9th February, 1991 the appellant No. 1 wrote a letter to the Secretary to the Government of West Bengal, Department of Power, proposing to revise the rates and charges for the supply of power to certain categories of consumers with effect from 8th April, 1991. The writ petitioner, Graphite India Ltd., fell in the category of consumer whose rates and charges were proposed to be revised. The contents of the letter dated 9th February, 1991, is as follows :--

Sub : General revision of tariff for supply of power to certain categories of consumers by the Durgapur Projects Limited.

Sir,

I am directed to inform you that with steeply rising costs and expenses in terms of coal, oil, salary, wages, spare parts and other essential inputs for the operation and maintenance of our power plant, it is proposed to revise the rates and charges for the supply of power to certain categories of consumers with effect from 8th April, 91.

In the context, we submit hereunder the following facts for your kind consideration and necessary action :--

(i) The company last revised its tariff for all categories of consumers with effect from 1st August, 1988. Thereafter, the cost of operation and maintenance of power plant of the company has increased considerably. The revenue derived by the Company from its existing tariff has been found to be quite inadequate to absorb the spiralling costs and expenses.

(ii) The Government of West Bengal vide its order No. 80-Power/II dated 31 st January 91 has approved revision in tariff by the West Bengal State Electricity Board with effect from the 4th March 91 and West Bengal State Electricity Board has published a notification in the Press announcing revision in their rates and charges (in supersession of their existing rates and charges) for supply of power to their different categories of consumers with effect from the 4th March 91.

(iii) The Government of West Bengal vide its order No. 329/II1/DPL/IE-3/81 (part II) dated 29th August, 1986 directed that D.P.L.'s power tariff should be fixed in line with those of West Bengal State Electricity Board for the purpose of uniformity. In terms of the said order it has been proposed to revise the Company's power tariff in keeping with those of West Bengal State Electricity Board with effect from 8th April '91.

(iv) A statement showing the comparative details of Company's present and proposed tariff together with the present and the revised tariff of West Bengal State Electricity Board is submitted herewith for your kind perusal.

(v) The company has circulated on the 7th February, 1991 a resolution to the Members of the Board of Directors of the company seeking their approval to the revision in its rates and charges for the supply of power to certain categories of consumers with effect from 8th April, '91. A copy of the said circular Resolution is also submitted herewith for your kind perusal.

7. In the light of the facts and circumstances enumerated above, we would request you to kindly accord the necessary approval of the Government of West Bengal to the revision in the rates and charges as per the details given in the attached statement for supply of power to certain categories of consumers with effect from 8th April, 1991 in the exercise of power conferred by Section 57 of the Electricity (Supply) Act, 1948 at an early date

Encl : As above.

8. This notice, admittedly, was a 58 days notice.

9. The appellant No. 1 effected the revision as it had proposed in the letter dated 9th February, 1991 with effect from 8th April, 1991 admittedly without any previous sanction of the Government of West Bengal. The writ petitioner did not accept the said revision and sought to pay the bills raised by the appellant No. 1 at the rate, prevailing before the revision was made effective. The appellant. No. 1, therefore, in August, 1991 threatened to disconnect the supply to the writ petitioner and in the circumstances the first writpetition was filed.

10. In the first writ petition it was contended by the writ petitioner that the State Government had offered to it to supply power at a concessional rate through the appellant No. 1 if it sets up an industry at Durgapur and as such the petitioner No. 1 had set up its factory for manufacture of graphite, for manufacturing of which cost of power constitutes roughly 37 percent of the total cost, at Durgapur. It was then contended that the appellant No. 1 initially granted concessions and incentives to the writ petitioner but later on discontinued the same. It was stated that Damodar Valley Corporation also supplies electricity in and around Durgapur and that the appellant No. 1 used to revise its tariff only when D.V.C. revised its tariff and also to the same extent for the sake of parity of tariff structures of the two

power supplying agencies operating in the same area. It was then stated that the appellant No. 1 in an agreement made with one Sankey Wheels Ltd., an industrial consumer as that of the writ petitioner, had stipulated that in case the tariff Schedule of D.V.C., be revised, the tariff for supply to the consumer under that agreement shall be automatically revised. The writ petitioner then contended that the appellant No. 1 wrongfully and illegally began to increase its tariff and as a result the rates charged by the appellant No. 1 became much higher than the rates charged by the D.V.C. It was stated that such revision to increase is arbitrary and unreasonable. It was contended that such revision is also discriminatory since the consumers of D.V.C. are being charged at rates much lower than that charged by the appellant No. 1.

11. On 23rd December, 1991 the appellant No. 1 wrote a letter to the Secretary, Department of Power, Government of West Bengal, seeking an approval for the proposal for general revisions in the power tariff of the appellant No. 1 to all its consumers. That letter is as follows :--

Sub: General Revision in Power Tariff by the Durgapur Projects Limited.

Ref: Our Letter No. OOM/Tariff/1-289 dated 9-2-1991.

Sir,

I am directed to inform you that the Board of Directors of the Durgapur Projects Limited at its 405th Meeting held on 13th December, 1991 approved the proposal for general revision in power Tariff of the Durgapur Projects Limited to all its consumers. A copy of the Board/Agenda Note in this connection placed before the aforesaid Board Meeting is enclosed herewith. A certified True Copy of the decision of the Board is also enclosed herewith wherein it has been mentioned that the proposal be referred to the Power Department for an approval in the matter so as to enable the Company to give effect to of the general revision with effect from 3rd March, 1992 after compliance with all the formalities. It has also been felt by the Board of Directors that the Company should have the benefit of revision in rates of supply to W.B.S.E.B. as a whole for which the Government should be moved.

I would, therefore, request your goodself to accord necessary approval in the matter as per the rates charge furnished in the enclosed Agenda Notes as early as possible, by 1st January, '92 at the latest for enabling us to give effect to of the said general revision on and from 3rd March '92, for which at least 2 months' notice has to be served on the consumers. If you feel that certain clarifications are required by your Deptt. we will send the concerned officials immediately.

Encl. As above

On 10th January, 1992 an affidavit was filed in the first writ petition on behalf of the State of West Bengal where it was contended that the appellant No. 1 before enhancing the tariff with effect from 8th April, 1991 did not comply with the necessary formalities as are required under the Electricity Supply Act read with Government Order No. 4520-power dated 28-8-64 and the Government was not informed of the said hike which came into force with effect from 8th April, 1991.

On 27th April, 1992 the State of West Bengal wrote a letter to the appellant No. 1. The relevant portion of the said letter is as follows :--

'Sir,

I am directed to refer to your Secretary's letter No. 2128/DPL/MD/2M/1-6/9t dated 23-12-91 on the subject noted above and to state that the State Government has considered the proposal for revision of tariff for the different categories of consumers and to advise as follows :

13. Rate A--As revised w.e.f. 8-4-91'

12. Thereafter by a letter dated 16th August, 1993, the appellant No. 1 once again sought permission of the State Government to revise its tariff upwardly with effect from 1st November, 1993. In that letter it was stated that despite upwardly revision of tariff made effective from 8th April, 1991, the appellant No. 1 would suffer a loss of Rs. 752 lacs for the financial year 1993-1994 if the tariff is charged in the same rate and the upwardly revised tariff proposed in the said letter would reduce such loss to Rs. 25 lacs for the financial year 1993-94. This notice was a notice for more than 60 days. By an on dated 23rd August, 1993 the State Government accorded

approval to the upwardly revision of tariff as was sought by the appellant No. 1 by its letter dated 16th August, 1993. There is no dispute that by a letter dated 26/28th August, 1993 the appellant No. 1 was notified in regard to the said revision of tariff.

13. The writ petitioner then filed the second writ petition challenging the revision which was to be effective from 1 st November, 1993. In that writ petition, in addition to the grounds taken in the first writ petition, it was, inter alia, contended that the immediately previous revision was unauthorised as is the stand of the State Government contained in the affidavit of Nihar Ranjan Banerjee filed on its behalf and as such the subject revision is also bad; the purported justification given by the appellant No. 1 for the subject revision to the effect that it sought to achieve parity with the increase made by the West Bengal State Electricity Board is not permissible under the Sixth Schedule to the Electricity (Supply) Act, 1948; and that the purpose of increasing charges to the consumers is to supply electricity at lower rates to West Bengal State Electricity Board. .

14. Again by a letter dated 13th August, 1994 the appellant No. 1 made a request to the State Government to permit it to revise its tariff with effect from 1st November, 1994. In that letter it was indicated that if the proposed increase is effected with effect from 1st November, 1994, the additional revenue will just cover up the anticipated loss for the year 1994-95. This notice too was a notice for more than 60 days. The State Government, by its letter dated 5th December, 1994 accorded sanction to the revision as was proposed in the letter dated 13th August, 1992, but, however, directed the appellant No. 1 to give effect to the revised tariff after giving due notice to the consumers. Thereupon by a letter dated 10th December, 1994 the writ petitioner was informed about the proposed increase to be effective from 10th February, 1995.

15. The writ petitioner filed the 3rd writ petition challenging the revision which was to be effected from 10th February, 1995/In that writ petition, in addition to the grounds taken in the earlier two writ petitions, it was contended that by the letter dated 23rd December, 1991, extracted above, the appellant No. 1 proposed to make the first revision under challenge with effect from 3rd March, 1992 and not

from 8th April, 1991 and therefore, the sanction accorded by the letter dated 27th April, 1992, as extracted above, could not be given effect to with effect from 8th April, 1991 and in any event such sanction is wrongful. In that writ petition it was also contended that the State Government should be directed to constitute a Rating Committee under the provisions of Section 57(a) of the Electricity (Supply) Act, 1948 for the purpose of ascertaining whether the revised tariff with effect from 10th February, 1995 has been fixed in conformity with the Sixth Schedule of the Act.

16. It appears from the judgment impugned herein that before the Trial Court submissions were principally made with regard to the legality and validity of the first revision which was made effective on and from 8th April, 1991 and it was contended that the said revision was invalid since the said revision was not done in accordance with the provisions contained in Sections 57 and 57A of the Electricity (Supply) Act, 1948 and that no prior approval of the State Government was obtained to give effect to the said revision. Before the learned Trial Judge it was submitted on behalf of the State Government that the statement made by its officer to the effect that prior to the revision in 1991 the provision of Section 57 had not been complied with by the appellant No. 1 was a mistaken statement and the same would be evidenced from the correspondence which were brought on record by filing a supplementary affidavit. It was also stated on behalf of the State that a distinction has to be made between 'permission' and 'approval' and in view of the fact that the appellant No. 1 had sent notices to the State Government and the State Government having not disapproved the same, it must be held to have granted approval by necessary implication. It was submitted on behalf of the State that doctrine of acquiescence is applicable, it was also contended on behalf of the State that price fixation, being a legislative act, this Court in exercise of its jurisdiction under Article 226 of the [Constitution of India](#) cannot interfere therewith. On facts it was pointed out that DVC supplies powers to consumers at a pressure of not less than 33KV but supply made by the appellant No. 1 to the writ petitioner is at 11 KV.

17. The learned single Judge in the impugned judgment held, inter alia :--

'The third proviso appended to paragraph 1 (of the Sixth Schedule to the Electricity (Supply) Act, 1948) is in tune with the other provisions which having been couched in negative language prohibiting the first respondent from enhancing the charges of supply of electricity only after the expiry of a notice in writing of 60 clear days of his intention to do so, and, thus, the notice required to be given by it to the State Government and to the Board must be held to be mandatory. Clause I -A clearly states that the notice referred to in the third proviso to paragraph I shall be accompanied by such financial, technical data in support of the proposed enhancement of the charges as the State Government may by general or special order specify. The first respondent being bound by the aforementioned agreement could not have acted contrary thereto. It was bound to obtain approval from the State Government before it could enhance its charges.' '.....Apart from the fact that the said letter was not addressed to the Board, it was not a notice of 60 days as contemplated under the provisions of Sixth Schedule of the Electricity (Supply) Act and in any event the documents required to be annexed in terms thereof were not annexed. Even the extent of reasonable return of 20% had not been mentioned and the only ground taken therein was that the West Bengal State Electricity Board had increased its tariff. The first respondent does not say as to how and in what manner it had not earned a clear profit. It is pertinent to mention that 'reasonable' return' must relate to the business of supply of electrical energy and not any other business. The first respondent merely has stated that it has incurred huge loss but it does not say that such losses have occurred only from the business of supply of electrical energy. The Government of West Bengal according to the affidavit, is said to have approved the rate by a letter dated 27-4-1992. It appears that in the said letter the State had referred to a letter dated 23-12-1991 and not to a letter dated 9-2 1991 i.e. subsequent to the date of filing of the writ application (which for reasons best known to the respondent had not been disclosed) stating there that rate A shall be applicable with effect from 8-4-91, The first respondent and the State, therefore failed to comply with a mandatory requirement of Section 57 of the Act and the Sixth Schedule appended thereto.'

'.....There is nothing to show that the State Government was satisfied that conditions of Sixth Schedule were fulfilled and in that view of the matter it was obligatory on the part of the State to constitute a Rating Committee. The State

Government was also bound to consider that the sanction holder is permitted to adjust its charges provided its clear profit does not exceed the amount of reasonable return in any particular year by 20 per cent and further a sanction holder had not enhanced the charges for supply of electricity only after expiry of a notice in writing of not less than 60 clear days.....' 'It is not a case where the timespecified in the provision is to be construed as directory inasmuch as by reason of such are vision, the consumers are affected.....' 'It is a tritelaw that a directory provision coupled with duty is construed as 'must'.....' In the instant caseno legal approval had been given by the State. Such an approval could be granted provided all the conditions precedent therefor under the Act were satisfied. The first respondent apart from the fact that it failed to serve a proper notice has not been able to show that the requirement of sixth schedule and in particular Clause 1A thereof had been complied with. Grant of approval implies application of mind on the relevant materials. The first respondent did not furnish the materials as is required under law and thus, question of application of mind on the part of the State does not arise at all.....approval must be given beforethe new rate comes into force'. 'Assuming that keeping in view the fact that word 'approval' has beep used, the same could have been granted by the State subsequent to the coming into force of the revision but there cannot be any doubt whatsoever that grant of such approval was a must in view of the agreement of sanction ascontained in Annexure, 'A' to the writ application.....' 'the principles of acqueiscencecannot be said to have any application whatsoever as the action on the part of the State adversely affects a third party. Principles of acqueiscence is applicable only in case of bilateral transactions. Furthermore, grant of approval is a condition under the agreement and the first respondent was bound to comply therewith.'.....'clear noticeof 60 days is a must so as to enable the authorities to consider as to whether it is necessary to grant such approval or not.'

18. In the judgment and order impugned herein, the learned Judge, however, held that the notice dated 16th August, 1993 as well as the notice dated 13th August, 1994 as well as the respective approvals granted by the State Government do not show that the same had complied with the mandatory requirements of Clause 1-A of the Sixth Schedule, without, however, indicating to what extent.

19. The learned single Judge rejected the contentions of the writ petitioner that the impugned revisions were barred by the doctrine of promissory estoppel. The learned single Judge also rejected the contentions of the writ petitioner that sale of electrical energy by the appellant No. 1 to the West Bengal State Electricity Board at a different rate is discriminatory.

20. The learned single Judge also observed that there cannot be any doubt whatsoever that in terms of Clause 13, (of the agreement), the writ petitioner is entitled to proportionate reduction, but did not indicate to what extent and for which period.

21. There is no cross appeal in any of these matters nor the writ petitioner has filed any independent appeal against the judgment impugned in these appeals.

22. Before us it was urged that the notices dated 16th August, 1993 and 13th August, 1994 did not comply with the requirements of Sixth Schedule of the Electricity (Supply) Act, 1948, although they were not short notices, since they did not comply with Clause 1A of the said Schedule, but more stress was given to the contention that if the revision made effective from 8th April, 1991 is invalid then a revision of that revision made subsequent thereto, would automatically become invalid. It was urged that the 1991 revision was bad inasmuch as the same was effected (i) without obtaining approval of the State Government; (ii) without giving 60 days notice; and (iii) without furnishing statement and other materials to show that such revision would not entail the appellant No. 1 to make excess clear profit over reasonable return and as a result the approval accorded thereto by the State Government was mechanical which resulted in deprivation of the consumers including the writ petitioner in getting proportionate distribution of the difference between clear profit and reasonable return.

23. The relevant provisions of the law governing the subject are as follows :--

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

agreement to the contrary shall be void.'

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

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

(b) in the case of a licence granted after the commencement of this Act, from the date of commencement of supply.

and as from the said date, the licensee shall comply with the provisions of the said Schedule accordingly, and any provisions of the Indian Electricity Act, 1910 (9 of 1910), and the licence granted to him thereunder and of any other law agreement or instrument applicable to the licensee shall, in relation to the licensee, be void and of no effect in so far as they are inconsistent with the provisions of Section 57A and the said Schedule.

'57-A. Rating committees.-- (1) Where the provisions of the Sixth Schedule are under Section 57 deemed to be incorporated in the licence of any licensee, the following provisions shall have effect in relation to the said licensee, namely :--

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

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

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

Provided that where it is proposed to constitute a rating committee under this section on account of the failure of the licensee to comply with any provisions of the Sixth Schedule, such committee shall not be constituted unless the licensee has been given a notice in writing of thirty clear days (which period, if the

circumstances so warrant may be extended from time to time) to show cause against the action proposed to be taken : (c) a rating committee shall, after giving the licensee a reasonable opportunity of being heard and after taking into consideration the efficiency of operation and management and the potentialities of his undertaking, report to the State Government within three months from the date of its constitution, making recommendations with reasons therefore, regarding the charges for electricity which the licensee may make to any class or classes of consumers so, however, that the recommendations are not likely to prevent the licensee from earning clear profit sufficient when taken with the sums available in the Tariffs and Dividends Control Reserve to afford him a reasonable return as defined in the Sixth Schedule during his next succeeding three years of account:

Provided that the State Government may, if it so deems necessary, extend the said period of three months by a further period not exceeding three months within which the report of the rating committee may be submitted to it: (d) within one month after the receipt of the report under clause (c), the State Government shall cause the report to be published in the Official Gazette, and may at the same time make an order in accordance therewith fixing the licensee's charges for the supply of electricity with effect from such date, not earlier than two months or later than three months, after the date of publication of the report as may be specified in the order and the licensee shall forthwith give effect to such order :

(e) the charges for the supply of electricity fixed under clause (d) shall be in operation for such period not exceeding three years as the State Government may specify in the order :

Provided that nothing in this clause shall be deemed to prevent a licensee from reducing at any time any charges so fixed.' 'Sixth schedule.

'1. Notwithstanding anything contained in the Indian Electricity Act, 1910 (9 of 1910), (except Sub-section (2) of Section 22A), the provisions in the licence of a licensee, the licensee shall so adjust his charges for the sale of electricity whether by enhancing or reducing them that his clear profit in any year of account shall not as far as possible, exceed the amount of reasonable return :

Provided that such charges shall not be enhanced more than once in any year of account;

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

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

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

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

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

II(1) If the clear profit of a licensee in any year of account is in excess of the amount of reasonable return, one-third of such excess, not exceeding five, per cent of the amount of reasonable return, shall be at the disposal of the undertaking. Of the balance of the excess, one half shall be appropriated to a reserve which shall be called the Tariffs and Dividends Control Reserve and the remaining half shall either be distributed in the form of a proportional rebate on the amounts collected from the sale of electricity and meter rentals or carried forward in the accounts of the licensee for distribution to the consumers in future, in such manner as the State Government may direct.

(2) The Tariffs and Dividends Control Reserve shall be available for disposal by the licensee only to the extent by which the clear profit is less than the reasonable return in any year of account.'

Sections 57 and 57A of the 1948 Act it seemed do not apply to the appellant No. 1, it being a generating company and not a licensee as such, but by reason of Section 2(6) of the said Act it is a licensee. However, in terms of Section 28 of the 1910 Act, the appellant No. 1 except with the previous sanction of the State Government and in accordance with the conditions as fixed by the State Government in that behalf could not effect supply of electrical energy to the public including the writ petitioner. There is no dispute that such sanction has been accorded by the State Government and there is also no dispute that while according such sanction the State Government, inter alia, stipulated a condition that the rates for supply of energy to be effected by the appellant No. 1 shall be fixed and adjusted from time to time in conformity with the provisions laid down in the Sixth Schedule to the 1948 Act and with the approval of the State Government. Therefore, there cannot be any dispute that to revise tariff for supply of energy, it is obligatory on the part of the appellant No. 1(i) to comply with the provisions laid down in the Sixth Schedule to the 1948 Act; and (ii) to obtain approval thereto of the State Government. Thus, in the matter of revision of tariff by the appellant No. 1 Sections 57 and 57A of the 1948 Act and the Sixth Schedule thereto do apply.

24. Provisions contained in Section 57A of the 1948 Act and the Sixth Schedule to the said Act cannot be construed in isolation. They should be construed harmoniously. The Sixth Schedule talks about financial principles and their application. Clause 1 to the Sixth Schedule casts an obligation upon the appellant to adjust its charges for the sale of electricity so that its clear profit in any year of account does not exceed the amount of reasonable return. This adjustment should be done by enhancing or by reducing the charges. The mandate, therefore, is not to permit making of clear profit exceeding the amount of reasonable return. The First proviso to the said clause restricts any enhancement by way of adjustment more than once in any year of account. The second proviso to the said clause provides that in the event no such adjustment is made, but if the clear profit does not exceed the amount of reasonable return by 20% of the amount of reasonable

return then it shall not be deemed that the appellant No. 1 has failed to adjust its charges. The third proviso to the said clause provides that while making such adjustment the appellant No. 1 shall not 'enhance the charges until after the expiry of a written notice of not less than 60 clear days given to the State Government or to the Board of its intention to so enhance the charges. This notice to the State Government or to the Board, as the case may be, is necessary to enable the Board or the State Government to exercise its discretion to constitute a Rating Committee to examine the enhancement proposed and to make recommendations in that behalf to the State Government in terms of Section 57A of the 1948 Act. In this case the notice by the appellant No. 1 is required to be given to the State Government and not to the Board although a Board has been constituted under the 1948 Act since Section 57A of the 1948 Act per se do not apply. The 60 clear days notice period is the time requisite for enabling the State Government to exercise its discretion whether to appoint or not to appoint a Rating Committee. Failure on the part of the appellant No. 1 to comply with the provisions of the Sixth Schedule gives a discretion to the State Government to appoint or not to appoint a Rating Committee. Before such appointment the State Government is obliged to give a notice to the appellant No. 1 to show cause within 30 days against the, proposed appointment. If a Rating Committee is ultimately appointed, it is required to. Forward its recommendations to the State. Government with reasons within 3 months from the date of its constitution after hearing the appellant No. 1 and after taking into consideration various aspects of the matter. The time to show cause as well as the time to make recommendations may be extended by the State Government, There is no provision that on appointment of a Rating Committee, the appellant No. 1 shall cease to be entitled to charge the enhanced charges. That clearly goes to show that even if a Rating Committee is constituted the appellant No. 1 would be entitled to charge enhanced charges and this is further more clear from the fourth proviso to clause I of the Sixth Schedule, which casts an obligation upon the appellant No. 1 to refund the excess amount, if any, recovered by it in the event charges fixed in pursuance of the recommendations of the Rating Committee is lower than those fixed by the appellant No. 1.

In this background a decision has been called for whether '60 clear days' as mentioned in the third proviso to Clause 1 of the Sixth Schedule is so mandatory

that if it is less than '60 clear days' the enhancement would become null and void.

On strict grammatical and literal construction it appears that the words 'shall not enhance' occurring in the third proviso to Clause 1 of the Sixth Schedule to the 1948 Act qualifies the words 'until after expiry' and hence no enhancement can be effected until expiry of the notice period of 60 days.

The Sixth Schedule of the 1948 Act and Section 57A thereof is a complete code for adjustment of the charges for supply of electrical energy. The principal object is to prevent making of clear profit in excess of reasonable return. The procedure therefor has been provided in the Sixth Schedule and in Section 57A of the 1948 Act. Procedural laws should receive, it is well settled, a beneficial construction. In terms of Clause 1 of the Sixth Schedule it is mandatory on the part of the appellant No. 1 to adjust its charges in such manner so that it does not earn clear profit in excess of reasonable return. This is a mandate of law. To effect such adjustment if the appellant No. 1 is required to enhance its charges a procedure of giving notice has been provided. It says 60 clear days notice should be given to the State Government of such enhancement. If a 60 days, notice is given then the State Government may exercise its discretion in the matter of appointing a Rating Committee, provided it is satisfied that the appellant has not complied with any other provision contained in the Sixth Schedule of the 1948 Act. If no notice is given that itself will be non-compliance of the Sixth Schedule, giving rise to exercise of discretion by the State Government in the matter of appointing a Rating Committee. Therefore, giving of a mere 60 days clear notice itself will not validate the enhancement. But, however, the question is could the appellant No. 1 at all enhance the charges without giving a clear 60 days notice

25. There is no mandate in Section 57A that if the appellant No. 1 fails to comply with the provisions of the Sixth Schedule, the State Government must appoint a Rating Committee. It is entirely a discretion of the State Government. The State Government must appoint a Rating Committee when here is a request made to that effect by the appellant No. 1. But in the third proviso to Clause 1 of the Sixth Schedule there appears to be a mandate that if for adjustment of charges an enhancement is called for then such enhancement should not be given effect to

without giving a 60 days clear notice to the State Government.

26. It is generally accepted that the words of a proviso are not to be taken absolutely in their strict literal sense. In construing a proviso one has to harmoniously construe the proviso with the main section and to see that the proviso do not cut down the obligations cast by the Section itself. Under Clause 1 a duty has been cast to adjust. The proviso directs giving of a notice only in the case of enhancement. The words in the proviso have been cast in a negative language. Whether the provisions contained in the proviso are mandatory or directory, one has to look at the intention of the law maker as expressed in the law. If the intention is clear by using imperative words, such as 'must' in stead of 'shall' that will itself be sufficient to hold that the provision is mandatory and it will not be necessary to pursue the enquiry further. Similarly if the provision is couched in prohibitive or negative language, it can rarely be directory. The use of peremptory language in a negative form is per se indicative of the intent that the provision has to be mandatory. However, the rule that negative words are usually mandatory, is like any other rule subordinate to the context and the object intended to be achieved by the particular requirement. There cannot be an universal rule for interpretation. There can also be no general rule that a particular provision should be construed as directory only or should be construed as obligatory with an implied nullification for disobedience. It is a duty of the Court to try to get at the real intention of the law maker by carefully looking at the whole scope of the enactment.

27. The object of the complete Code contained in Section 57A and the Sixth Schedule of the 1948 Act is to prevent making of clear profit in excess of reasonable return and if legislature contemplates that there are possibilities of making of clear profit in excess of reasonable return, as has been contemplated in the fourth proviso to Clause 1, and provides for statutory remedy therefor, as has been provided in the fourth proviso, then giving of notice as well as 60 days period provided for such notice although becomes mandatory in so far as the State Government is concerned, breach of which would automatically entail user of discretion by the State Government for appointment of a Rating Committee, but that itself cannot be an obligation on the part of the appellant No. 1 with an implied

nullification for disobedience, in other words, non-giving of such notice or a shorter notice could not debar the appellant No. 1 from enhancing charges for supply of electrical energy and from collecting the same from the consumers.

28. There is another angle to the matter. The notice is to be given to the State Government and not to the consumers. Shorter notice can be accepted by the notice at its option and once so accepted it should be deemed that the defect in the notice has been waived.

29. In the instant case the notice of 9th February, 1991 has been accepted by the State Government by its letter dated 27th April, 1992. Although it has been contended that in the letter dated 27th April, 1992 the State Government referred to the letter of the appellant No. 1 dated 23rd December, 1991, but the fact remains that in letter dated 23rd December, 1992 the appellant No. 1 had referred to its letter dated 9th February, 1991 and that in the letter dated 23rd December, 1991 the appellant No. 1 sought permission to increase its charges applicable to all its consumers except those consumers whose charges were proposed to be raised by the letter dated 9th February, 1991. The State Government, therefore is deemed to have waived the defect if any, in the notice dated 9th February, 1991 which was two days short in time.

30. In this connection a residuary matter on this aspect of the matter needs to be dealt with. It is true that on 10th January, 1992 in an affidavit filed in the first writ petition, it was contended on behalf of the State Government that the appellant No. 1 did not comply with the necessary formalities as were required under the Electricity (Supply) Act in respect of the enhancement, which came into force with effect from 8th April, 1991, but as on that date, i.e. as on 10th January, 1992 the State Government could say so inasmuch as there is nothing to show that the State Government had waived the two days defect in the notice dated 9th February, 1991 on or before that date, which was in fact later on waived, when it wrote the letter dated 27th April, 1992.

31. It is nobody's case, nor it has been held by the learned single Judge that the State Government has specified, in terms of clause 1 -A of the Sixth Schedule to the 1948 Act, either by general or by any special order that any particular financial

or technical data in support of the proposed enhancement of charges should accompany the notice contemplated in Clause 1 of the said Schedule. In that view of the matter it cannot be said that there has been any non-compliance of any provision of the said schedule in not supplying any financial or technical data in support of the proposed enhancement.

32. Assuming that none furnishing of any financial or technical data in support of the proposed enhancement, although no particular financial or technical data has been specified, is a non-compliance of Clause 1-A of the Sixth Schedule, even then that would only permit exercise of discretion by the State Government to appoint a Rating Committee. The object for appointing a Rating Committee is to ascertain whether the appellant No. 1 by the proposed amendment is seeking to make excess clear profit over reasonable return. There is no finding, nor there is any material on record from where it can be ascertained that by the 1991 enhancement, the appellant No. 1 proposed to or in fact made any clear profit in excess of reasonable return.

33. Appointment of a Rating Committee on failure to comply with the provisions of the Sixth Schedule is discretionary. This discretion has been exercised by the State Government by not appointing a Rating Committee, which presupposes that the State Government had no occasion to suspect that any attempt is being made by the appellant No. 1 to make clear profit in excess of reasonable return. Unless with facts and figures it can be pointed out that the appellant No. 1 in fact proposed to make or in fact made such excess clear profit by the 1991 enhancement, the Court cannot interfere with the discretion used by the State, which has been statutorily conferred upon it.

34. In this connection it is also to be noted that judicial review in the field of price fixation is limited. Unless it is shown that the enhancement would result in such surplus which would lead to the inevitable conclusion that a public organisation as the appellant No. 1 is, has shun its public duty and is obsessed with profit making motive like a private entrepreneur, no Court can interfere with an enhancement of tariff. As aforesaid, there is no such finding by the learned trial Judge nor there is any material on record to arrive at such conclusion.

35. It is true that when the 1991 revision was made effective, there was no approval of the State Government, but what is the meaning of the expression 'with the approval of the State Government' as occurring in the sanction order dated 28th August 1964, as extracted above? The sanction order dated 28th August, 1964 is a conscious Act of the State Government. It consciously used the word 'approval' and not the word 'permission'. A lot of difference has been made by using the word 'approval' and by not using the word 'permission'. The word 'approval' means confirmation. The word 'permission' means allow. In case where permission is required, unless permission is granted, no action can be taken, but when approval is required, it is well settled, the action holds good until disapproved. It is also well settled that once approval is given all previous acts in anticipation of approval get validated. In any event there is no statutory requirement of approval as the Sixth Schedule does not require any such approval. The State Government has in fact accorded approval in respect of all the three revisions, although in respect of the 1991 revision the approval came after the revision was effected.

36. Even if assuming the expression, 'with approval' means 'with permission', the same being not a statutory mandate, the violation there of, as provided in the sanction order, would entitle the State Government to revoke the revision of tariff and in terms of the provisions contained in the sanction order in default thereof to cancel the sanction, but until such order of revocation is issued the revision of tariff will not become bad in so far as the consumers are concerned. The State Government has not called upon the appellant No. 1 to revoke the revision. In the contrary it has in writing approved the revision. Nothing has been shown that by not issuing such order of revocation the State Government has done something which is not permissible in law i.e. making of clear profit in excess of reasonable return and therefore, question of Court exercising jurisdiction under Article 226 having any jurisdiction to give any such mandate upon the State Government does not arise at all.

37. It is true that if a manner has been provided to do a particular thing, the thing should be done in such manner or it should not be done at all, but what is the thing to be done and what is the manner is the main question. The thing to be done is

not to make clear profit in excess of reasonable return. That has not been done in the instant case. Therefore, a slight deviation in the manner of doing that thing, i.e. giving of a two days short notice and obtaining an approval subsequently would not render the thing infructuous or illegal.

38. The plea of the respondent/writ petitioner that since the 1991 revision is bad, the subsequent two revisions under challenge are also bad, to the knowledge of the writ petitioner/respondent is misplaced as it appears that subsequent to the filing of the 3rd writ petition, a further revision has been effected and no exception to that has been taken by the writ petitioner/respondent and on the contrary the same has been acted upon.

39. The last question is refund of maximum demand charge. As pointed out above, the learned Judge did not point out on what basis the same is refundable, nor has he pointed out the quantum thereof. It was urged before us on behalf of the respondent/writ petitioner that the agreement between it and the appellant No. 1 dated 1st January, 1984 provides for such refund if the supplier is prevented from supplying or is unable to supply electrical energy owing to the conditions mentioned in paragraph 24 of the said agreement. In this connection reference was made to clauses 15, 16, 18 and 24 of the said agreement. It was stated that in view of such stipulation the ratio of the decision of the Division Bench of this Court given in the case of West Bengal State Electricity Board v. Siddharta Ferro Alloys Ltd., reported in : AIR1997 Cal221 is not applicable. Clauses 15, 16 and 17 of the agreement about maximum demand charge. Clause 18 of the agreement and the Schedule referred the rein talk about minimum charges. Clause 24 talks about reduction of minimum charge. Therefore, admittedly there is no agreement for reduction of maximum demand charge. In that view of the matter the decision of the Division Bench in the case mentioned above squarely applies and as such the writ petitioner/ respondent No. 1 is not entitled to any reduction of maximum demand charge.

40. Furthermore there is no factual particulars in regard to the claim for refund or reduction of maximum demand charge. In Annexure-I to the first writ petition, upon which reliance was placed, reference has been given to a few letters dated 6th

September, 1980 to 4th September, 1991 and the amount of refund/reduction claimed in those letters. Nothing has been indicated as to on what footing those claims were made, except a statement made in para 21 of the said writ petition that refund of proportionate demand charge for the duration of pegging should be directed. There is no particulars of duration of alleged pegging. Furthermore even in a civil suit instituted in October, 1991 could a claim for refund for the amounts collected in September, 1980 to September, 1988 be made? We do not think so in the absence of acknowledgement or promise by the person from whom such refund is claimed. There is no pleading of any such acknowledgement or promise.

41. In those circumstances we allow the appeals and set aside the order under appeals impugned herein. We also dismiss the writ petitions. There shall, however, be no order as to costs.

Prabha Shankar Mishra, C.J.

42. I agree.

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