

**Before The Appellate Tribunal for Electricity
Appellate Jurisdiction, New Delhi**

Appeal No. 180 to 197 of 2006 & Appeal No. 226 of 2006

Dated this 23rd day of November, 2006

Present : **Hon'ble Mr. Justice E. Padmanabhan – Judicial Member**
 Hon'ble Mr. H. L. Bajaj – Technical member

Appeal Nos.180 to 197 of 2006:

Amol Pharmaceuticals Ltd.	... Appellant in Appeal No. 180/06
JK Industries Ltd., Dist. Rajsamand, Rajasthan	... Appellant in A.No.181 of 2006
Rajasthan Electronics & Instruments Ltd., Jaipur, Rajasthan	... Appellant in A.No.182 of 2006
JK Laxmi Cement Ltd., Dist. Sirohi, Rajasthan	... Appellant in A.No.183 of 2006
Shree Krishna Rollings Mills Ltd., Jaipur, Rajasthan	... Appellant in A.No.184 of 2006
Sharma Steel Rollings Mills Ltd., Jaipur, Rajasthan	... Appellant in A.No.185 of 2006
Ashiana Ispat Ltd., Dist. Alwar, Rajasthan	... Appellant in A.No.186 of 2006
Raghuvveer Metal Industries Ltd., Ajmer, Rajasthan	... Appellant in A.No.187 of 2006
Man Structural Pvt. Ltd., Jaipur, Rajasthan	... Appellant in A.No.188 of 2006
Shree Seco Pvt. Ltd., Jaipur, Rajasthan	... Appellant in A.No.189 of 2006
Rajasthan Industrial Gases Ltd., Jaipur, Rajasthan	... Appellant in A.No.190 of 2006
Clay Craft (India) Pvt. Ltd., Jaipur – 302012, Rajasthan	... Appellant in A.No.191 of 2006
M/s Kesri Steels, Bhiwadi, Rajasthan	... Appellant in A.No.192 of 2006
Rajasthan Textile Mills, Dist. Jhalawar, Rajasthan	... Appellant in A.No.193 of 2006
R.M.Mittal Steels Pvt. Ltd., Dholpur, Rajasthan	... Appellant in A.No.194 of 2006
Ceramic Industries, Jaipur, Rajasthan	... Appellant in A.No.195 of 2006
Shri Shakti Iron & Steel Re-Rooling Mill, Udaipur, Rajasthan	... Appellant in A.No.196 of 2006
Kamdhenu Ispat Ltd., District Alwar, Rajasthan	... Appellant in A.No.197 of 2006

Versus

Rajasthan Electricity Regulatory Commission, Jaipur	... Respondent in A.No. 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197 of 2006
Ajmer Vidhyut Vitran Nigam Ltd., Ajmer	... Respondent No.2 in A. No. 181, 187, 196 of 2006
Jaipur Vidyut Vitran Nigam Ltd., Jaipur	... Respondent No.2 in A.No.182,

Jodhpur Vidyut Vitran Nigam Ltd., Jodhpur

Appeal No. 226 of 2006:

M/s DSR Steel (P) Ltd.
322/6, Main road, Bijawasan, New Delhi – 110 061
(Through Dy. General Manager)

... Appellant

Versus

1. The State of Rajasthan
Through the Secretary,
Energy Department, Secretariat building,
Raj Path,
Jaipur, Rajasthan
2. M/s Jaipur Vidhyut Vitran Nigam Ltd.
Vidhyut Bhawan, Jyoti Nagar,
Jaipur (through its Managing Director)
3. The Chief Engineer (Commercial)
Commercial Wing, Jaipur Vidhyut Vitran Nigam Ltd.,
Vidhytu Bhawan, Jyoti Nagar,
Jaipur, Rajasthan
4. Rajasthan Electricity Regulatory Commission (RERC)
Shed No.5, Vidhyut Bhawan, Vidhyut Marg,
Jyoti Nagar,
Jaipur – 302 005.

... Respondents

Counsel in Appeal No.180 to 197/06:

For the Appellant : Dr. A. M. Singhvi, Senior Advocate,
Mr. P. N. Bhandari, Advocate
Ms. Richa Srivastava Advocate
Mr. Amit Bhandari, Advocate
Mr. Anshumala Bansal, Advocate
Mr. Aniruddha Ghosh

For the Respondents : Mr. R. K. Agarwal, Advocate,
Mr. Alok Chaturvedi, Advocate
Advocate with Mr.R.C.Sharma, Dy.Secretary
(RERC), Mr. S. D. Audani EE (Comml.)AVVNL,
and Mr.S.C.Bhandari, EE(Commercial), JVVNL

Counsel in Appeal No.226/06:

For the Appellant : Mr. P. C. Dhingra, Advocate
Mr. P. Choudhary, Advocate
Mr. Alok Sangwan, Advocate for Mr. Praveen
Balwada, Advocate

For the Respondent : Mr. R. K. Agarwal, Advocate taking notice as per
order

J U D G M E N T

- 1) Relief sought by the appellants in Appeals Nos. 180 to 197 of 2006 read thus :
 - (a) Allow the appeal with cost, filed against the impugned order of the learned Commission and set aside the said order dated 8th June, 2006
 - (b) It may further be declared that the withdrawal of the Incentive Scheme shall not be applicable against the petitioners due to the doctrine of promissory estoppel.
 - (c) The respondent Discoms may be kindly directed to release the entire pending incentive amount from the date of discontinuance within one month. Interest may kindly be allowed on the pending incentive amount from the date of discontinuance at the same rate at which the Discoms charge from the consumers for delayed payment and

- (d) Pass such order which the Hon'ble Tribunal deems just and proper in the circumstances of the case.
- 2) In Appeal No. 226 of 2006 the appellant has prayed for the following reliefs:
- i) Set aside the order dated 17.12.2004 & 08.06.2006 passed by the Rajasthan Electricity Regulatory Commission, Jaipur and thereby restore the earlier incentive scheme based on increase in consumption; and / or,
 - ii) The appellant may be protected from the premature withdrawal of the incentive scheme (and consequent merger with the general tariff from the day it was discontinued; and / or,
 - iii) The appellant be given the option of opting for the old incentive scheme with retrospective effect i.e. from the date it was discontinued; and / or,
 - iv) The Discoms should be directed to pay the accrued incentive amount to the petitioner with interest; and / or,
 - v) Any other order / direction which this Tribunal may deem fit and appropriate to be passed in the facts and circumstances of the case.

As per our orders Mr. R.K.Agarwal, Advocate who is appearing in the connected eighteen appeals accepted notice in Appeal No. 226 of 2006 for the respondents and submitted arguments.

- 3) In these batch of appeals, the appellants seek to set aside the order of the Rajasthan Electricity Regulatory Commission, Jaipur in REC Petition No. 53 to 55, 59, 61 to 69 of 2005, 73 to 78, 81 to 82, 96/2006 dated 08.06.2006. As the appeals arise out of the common order, we ordered consolidation of above batch of appeals. Mr.P.N.Bhandari, learned counsel appeared in 18 appeals for the appellant. Mr.P.Choudhary appeared for the appellant in Appeal No. 226 of 2006. Dr. Singhvi, senior counsel appeared on behalf of Mr.P.N.Bhandari and made his submissions. In addition Mr. P.N.Bhandari, learned counsel made his submissions in the same set

of appeals. On behalf of the respondents, Mr.R.K.Agarwal appeared along with Mr.Alok Chaturvedi, advocate and officials of the respondent and made their submissions.

- 4) In these batch of appeals it is contended on behalf of the appellants that the respondents are estopped and they are invoking equitable doctrine of estoppel as concessions granted to the appellants has been withdrawn abruptly after the appellant acting upon the representations made by the respondents. Per contra, the learned counsel appearing for the contesting respondents contended that the doctrine of estoppel has no application to the facts of the case and sought to distinguish the precedents relied upon by Dr. Singhvi, senior counsel and Mr.P.N.Bhandari, Advocate, in support of their contentions. The learned counsel for the respondents also contended that the plea of estoppel was advanced before the Regulatory Commission when it approved the Annual Revenue requirement and determined the tariff and hence it is not open to the appellants to re-agitate the same contention by way of review petition.
- 5) The learned counsel for the contesting respondents further contended that the review deserves to be dismissed in limine as the appellants are guilty of laches since each one of them came forward with a Review Petition after a lapse of eight months from the date of the tariff order, dated 19.12.2004 in respect of which review was sought for. However, per contra, Mr.P.N.Bhandari, the learned counsel for the appellants contended that the provisions of The Limitation Act 1963 has no application and therefore Review Petitions could be filed at any time and they are not liable to be dismissed as barred by limitation while pointing out the dissenting view expressed by one of the members of the Rajasthan Regulatory Commission.
- 6) On a consideration of the respective contentions, the following points are framed :
 - A) Whether the Regulatory Commission is conferred with power to review its order?

- B) Whether Review Petitions are maintainable when the very ground raised in the Review Petition has already been agitated and decided by the Regulatory Commission on merits in its Tariff Order after consideration?
 - C) Whether the Review Petitioners are guilty of laches and on that ground the Review Petitions deserve to be rejected?
 - D) Whether doctrine of estoppel advanced by appellants is sustainable on the facts of the case and the very scheme relied upon by appellants ?
 - E) Whether the order of the Regulatory Commission is liable to be interfered in these appeals?
 - F) To what relief, if any?
- 7) Before taking up the above points for consideration, it is essential to summarise the facts leading to the present batch of appeals. The 2nd respondent, Discom, in this batch of appeals submitted separate Petition before the Regulatory Commission on 23rd August, 2004 under Section 62 & 64 of The Electricity Act, 2003 for revision of distribution tariff to be effective from 01st December, 2004. The 1st respondent, Regulatory Commission, after due publication, invited objections to the proposed tariff to be submitted on or before 04th October, 2004. Innumerable objections were received, public hearings were conducted with respect to preliminary objections as well as general objections as to increase in tariff. After due consideration of the objections and contentions advanced, the 1st respondent, Regulatory Commission revised the distribution tariff for all the three distribution companies by its Tariff Order dated 17.12.2004. The tariff so determined will remain in force with effect from 01.01.2005 till it is amended by the said Commission.
- 8) Here and now we record that there is no challenge by the appellants to the said tariff revision ordered. It is also not in dispute that no limitation has been prescribed by the 1st respondent, Regulatory Commission, in its Conduct of Business Regulations 2000 or any other Regulations with respect to filing of review petitions.

- 9) Each one of the appellants, in these batch of appeals, moved independent Review Petitions, invoking Section 94(1)(f) of The Electricity Act, 2003 seeking review and for continuance of incentive scheme. The Review Petitions were contested by the utilities on merits as well as on the ground that review is not maintainable, apart from being barred by limitation and they also sought for dismissal of Review Petitions on ground of laches.
- 10) Petitions, replies and re-joinders have been filed before the 1st respondent, Commission, as obviously there were over enthusiasm on the side of appellants and stiff resistance on the part of the contesting respondents. The Review Petitions were heard on 23.11.2005, 13.01.2006, 10.03.2006, 24.03.2006, 06.05.2006 and 15.05.2006 the respective counsel were heard in detail by the 1st respondent, Commission, in all the Review Petitions.
- 11) The Three Member Regulatory Commission after detailed consideration of the various contentions advanced on either side, dismissed all the Review Petitions holding that the Doctrine of Promissory Estoppel has no application to the facts that the alternate prayer to extend the old scheme by Petitioners cannot be entertained, that the appellants have not altered their position acting on representations or the incentive scheme, that already the very same Doctrine of Promissory Estoppel was invoked before the Commission in its Tariff hearing which had been turned down by the Tariff commission by its Order dated 17.12.2004 and therefore, no review is maintainable on the very same grounds. On the plea of limitation a dissenting view has been expressed by one of the members of the Commission. We will refer to the very scheme in respect of which the appellants invoked the Doctrine of Promissory Estoppel.
- 12) Let us consider Point 'A' at the threshold. There is no doubt that Section 94(1)(f) of The Electricity Act, 2003 confers power on the appropriate Commission to review its decisions, directions and orders. Thus a specific power is conferred on the appropriate Commission to review its decisions or directions and orders. Hence, there is no doubt that the Regulatory Commission has the power of review.

Petition is maintainable before the 1st respondent Commission, in terms of Section 94(1)(f). The power of review of the appropriate Commission is the same as are vested in a Civil Court under The Code of Civil Procedure 1908. In other words, the provisions of order 47 CPC in so far as they are relevant are made applicable. The power of review is circumscribed by the provisions contained in the Code of Civil Procedure 1908. On point 'A' we hold that the 1st respondent, Regulatory Commission, is conferred with power to review its decisions, directions and orders if a case of review is made out in terms of Order 47 Rule 1 CPC and other connected provisions of the code.

- 13) **Point B:** Next, we shall take up Point 'B' for consideration. It is the contention of Mr. Agarwal, learned counsel appearing for contesting respondents that review is not maintainable as the Doctrine of Promissory Estoppel was raised by the industries in respect of very same incentive scheme, during tariff fixation the same was considered by the 1st respondent Regulatory Commission, and order has been passed on merits rejecting the same. In this respect, Mr. P. N. Bhandari the learned counsel for the appellants fairly represented that with respect to equitable Doctrine of Promissory Estoppel advanced by a group of industrialists, he had appeared before the Commission and urged the said plea, which did not find favour with the Commission. However, Mr. P. N. Bhandari pointed out that these appellants have not taken part in the tariff fixation proceedings before the Commission at the stage of tariff but it was by a different set of industrialists and therefore they are entitled to maintain a Review Petition invoking the Doctrine of Promissory Estoppel and that they are entitled to maintain the review petition. In other words, the very Doctrine of Promissory Estoppel advanced on behalf of a number of industrialists, claimed the benefit of very same incentive scheme but they have not chosen to challenge the tariff order despite their contentions having been negated by the Regulatory Commission. A fresh set of industrialists have moved these Review Petitions invoking the very same Doctrine of Promissory Estoppel for the continuance of the incentive scheme. The learned counsel for the contesting respondents, in our considered view, is well founded. We do not see merits in such a condition

advanced by Mr. P.N.Bhandari. Merely because different set of Industrial consumers have now come forward, when the tariff order is a representative action and binding on all consumers, it is definitely not open to the present appellants to re-agitate the same plea of estoppel.

- 14) The following passage in the Tariff Order, definitely go to show that identical contention was raised but it did not find favour with the Regulatory Commission :

“69. *Ten Industrial Associations have made identical observations on revised incentive scheme proposed by Nigams. Shri P. N. Bhandari appearing on their behalf stated that all over the world the wholesale tariff is lower than retail tariff which unfortunately is distorted in our country and in past few years industrial consumption is declining and to check this declining trend incentive scheme was introduced and was extended up to 31.3.07. To avail the same, heavy investments have been made for increasing load to enhance consumption and as such, incentive scheme should not be discontinued. He expressed that the Nigams are prevented from withdrawing the scheme on the principle of promissory estoppel also. He further objected to the provision of inapplicability of incentive scheme where contract demand is increased stating that industry making permanent increase in contract demand by additional installation will not get substantial benefit while those causing temporary increase will be benefited. M/s. Synergy Steels Limited New Delhi have requested for extending the incentive of 15% for load factor exceeding 50% to the stick industries without any bar of load factor. Shri Kamal Agrawal of all India Induction Furnaces Association, appearing on behalf of several Industrial units of Bhiwadi objected to the incentive scheme in its present form and suggested.*

70. *The incentive scheme was proposed by the nigams as a stopgap arrangement to arrest the decline in industrial consumption. The Commission while conveying its approval to extension of the incentive scheme clearly stipulated that it shall be valid till 31.3.07 or revision of*

tariff whichever was earlier. The scheme itself had a limited validity and therefore, did not attract the principle of promissory estoppel. The Commission had envisaged review of incentive scheme at the time of tariff revision, as the proceeding would have provided opportunity to public to express their views to enable appropriate changes in incentive scheme or tariff.”

Thus the Commission negated the contention and plea of Promissory Estoppel in its Tariff Order.

- 15) It may be that these appellants / Review Petitioners have not chosen to appear before the Regulatory Commission nor they have filed their objections to the revision of tariff nor taken part in the proceedings but that would not mean that the Commission is called upon to decide the very same plea once again. The proceedings, before the Commission is in respect of all the three Discoms with respect to all consumers – both domestic and industrial and it was a public hearing. On very many dates the tariff proposals were heard including the revised incentive for industries through out the State of Rajasthan. It is a representative action and proceeding on behalf of the consumer public. During the public hearing nothing prevented the appellants / petitioners herein from going before the Regulatory Commission and raised the plea of estoppel yet they have not chosen to raise objections nor taken part in the proceedings nor advanced the plea of Estoppel. The entire proceedings before the Regulatory Commission being representative and binding on all consumers at large. It is a representative action resorted for determination of tariff. If the appellants have failed to appear and raise objections, they have to suffer for the same. The appellants have not preferred appeal against tariff order nor did they raise objections against modified incentive scheme introduced in the tariff for nearly ten months. When the Doctrine of Promissory Estoppel has been invoked and negated by the Commission, only a remedy of appeal is maintainable at the instance of consumers who failed before the Appellate Forum and not by way of review as has been resorted to by these appellants / petitioners.

- 16) Mr. Agarwal contended that Review Petition is not and should not be an attempt for re-hearing the matter on merits. The learned counsel placed reliance on the pronouncement of the Hon'ble Supreme Court in *Tamil Nadu Electricity Board & Anr. V. N. Raju Reddiar & Anr.* As reported in *JT 1997 (1) S.C. 486*. Mr. Agarwal also rightly placed reliance on the pronouncement in *Smt. Meera Bhanja, v. Smt. Nirmala Kumari Choudhury*, reported in *AIR 1995 Supreme Court 455* and relied upon the following passage : “8. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1, C.P.C. In connection with the limitation of powers of the Court under Order 47, Rule 1, while dealing with similar jurisdiction available to the high Court while seeking to review the orders under Article 226 of the Constitution of India, this Court, in the case of *Aribam Trueshwar Sharma v. Aribam Pishak Sharm*, *AIR 1979 SC 1047*, speaking through Chinnappa Reddy, J., has made the following pertinent observations (para 3): “ It is true there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it.”
- 17) Mr. Agarwal also relied upon the recent pronouncement in *Haridas Das v. Smt Usha Rani Banik & Ors.* as reported in *JT 2006(3) SC 526*.
- 18) The learned counsel rightly referred to the pronouncement of Hon'ble Arijit Pasayat J where His Lordship summarised the entire case law with respect to powers of review under Order 47 Rule 1 of Civil Procedure. In *Parsion Devi v. Sumitri Devi*, (1997) 8 SCC 715, the Hon'ble Supreme Court held thus : “ Under Order 47, Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47, Rule 1 CPC. In exercise of the jurisdiction under Order

47, Rule 1 CPC it is not permissible for an erroneous decision to be “reheard and corrected”. There is a clear distinction between an erroneous decision and an error apparent on the face of the record while the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction. A review petition has a limited purpose and cannot be allowed to be “an appeal in disguise.”

- 19) The above pronouncement relied upon by Mr. R. K. Agarwal applies on all fours to the case on hand. The distinction sought to be advanced by Mr. P. N. Bhandari, in our considered view, is a misconception and cannot be sustained as the appellants could have preferred an appeal as aggrieved industrial consumers against the very same tariff order. The invocation of powers of review by these appellants after a passage of eight months cannot be entertained as these appellants / review Petitioners are guilty of laches. Had the appellants been vigilant they would have raised the very same objections which were raised by other industrialists and taken up the same on appeal. Hence there is no escape for these appellants and the justification sought to be made out Mr. P.N.Bhandari, Advocate deserves to be rejected.
- 20) As already pointed out review is not for re-arguing nor it is a re-hearing of the very tariff proceedings and therefore Review Petition, in our view deserves to be dismissed in limine. The appellants cannot be permitted to re-argue the very same contention by filing a Review Petition after eight months on the pretext of their being not parties earlier. Point ‘B’ is answered against the appellant and in favour of contesting respondents.
- 21) Taking up Point ‘C’, in this case the Regulatory Commission invited the tariff revision proposal on 30.08.2004 and on the following dates. Rajasthan Chamber of Commerce & Industry and some other industries filed their objections. Public hearings were conducted by the Commission on 08.12.2004 and on various dates. A tariff order was passed on 17.12.2004 and notified. Before the Regulatory Commission at the stage of tariff fixation Mr.P.N.Bhandari, the counsel who

represented a different set of industrialists raised same objections against the proposed revision including the plea of Promissory Estoppel in respect of the very scheme. Those objectors have not chosen to prefer an appeal.

- 22) However, the present appellants / review petitioners moved a batch of Review Petitions only 22.08.2005, after a lapse of eight long months. It is not in dispute that with respect to tariff order no challenge has been made by anyone, including these appellants, by invoking the remedy of appeal nor the appellants could come forward with grievance after eight long months and that too after tariff being given effect for eight months.
- 23) Neither The Electricity Act 2003 nor the Regulations framed by the 1st respondent, Regulatory Commission prescribes the limitation to seek review of the orders. A contention was advanced by Mr.P.N.Bhandari, that the provisions of The Limitation Act has no application and therefore at any time the Review Petitioners could invoke review jurisdiction, maintain and seek a review. In this respect, Mr.P.N.Bhandari relied upon the pronouncement of the Hon'ble Supreme Court in (1) *Sakuru v. Tanaji in (1985) 3 Supreme Court Cases 590* (2) *Smt. Sushila Devi v. Ramanandan Prasad and Others, 1968 Pat LJR 91, AIR 1976 Supreme Court 177* (3) *Town Municipal Council v. Presiding Officer, Labour Court, Hubli and others, AIR 1969 Supreme Court 1335* (4) *Nityanand M. Joshi and Another, v. The Life Insurance Corporation of India and others in AIR 1970 Supreme Court 209* and contended that the provisions of The Limitation Act will have no application to the Regulatory Commission, as it is not a Court. Mr. R.K.Agarwal, learned counsel appearing for the appellant, disputed the proposition and sought to contend that it may not be necessary to examine this proposition as already merits of the appellant's contention has been examined by the Regulatory Commission and arguments have been allowed to be advanced in this appeal as well. The propositions of law laid down by Hon'ble Supreme Court, in the above case are not in dispute.

- 24) In this context, this Appellate Tribunal pointed out to Mr.P.N.Bhandari, learned counsel for the appellants, that even if The Limitation Act has no application, the appellant should have approached the Regulatory Commission within a reasonable time and for laches on the part of the appellants / review petitioners and the Review Petition could be rejected on that score. Mr.P.N.Bhandari could not dispute this legal position. The hon'ble Supreme Court has taken identical view and if within a reasonable time remedy of review is not invoked, the Petition for review could be rejected on ground of laches, when the Review Petitioners approach the Forum after a lapse of several months. It cannot be stated that the period of eight months is a reasonable time in any view matter.
- 25) In our view, the appellants who were aware of tariff determination and who had the benefit of the substituted scheme of incentives also availed the same for nearly eight months and thereafter sought for review. Such a conduct of blowing hot and cold is not permissible. We have already held that seeking a review on the very same ground which did not find favour with the Regulatory Commission at the stage of tariff determination remedy of review is not available. In this case, we further hold that the delay of eight months and during that period the appellants enjoyed the incentive scheme as modified by Regulatory Commission are guilty of laches and there being no explanation much less, acceptable explanation or an application, we hold that on grounds of laches the review petition deserves to be rejected. In fact, the tariff period of two years has nearly rolled and the appellants have been paying the consumption charges as per the revised tariff order and the revised incentive scheme. In the Circumstances, on the ground of laches the Review Petitions are liable to be rejected.
- 26) Taking up Point 'D', much arguments were advanced by Dr. Singhvi the learned senior counsel and Mr.P.N.Bhandari who invoked the equitable Doctrine of Estoppel at the instance of appellants. Such a contention has been rightly negated on merits by the Regulatory Commission. The learned counsel for the appellants placed reliance on the following pronouncements in support of their contentions: **(1)** *Assistant Commissioner of Commercial Taxes (Asst), Dharwar and others v.*

Dharmendra Trading Co. etc. etc. in AIR 1988 Supreme Court 1247 (2) Bhim Singh And Others v. State of Haryana and Others in (1981) 2 Supreme Court Cases 673 (3) State of Punjab v. Nestle India Ltd. and Another in (2004) 6 Supreme Court Cases 465 (4) Pournami Oil Mills And Others v. State of Kerala And Another in 1986(Supp) Supreme Court Cases 728 (5) Pine Chemicals Ltd. And Others v. Assessing Authority And Others, (1992) 2 Supreme Court Cases 683 (6) State of Madhya Pradesh And Others v. Orient Paper Mills Ltd., (1990) 1 Supreme Court Cases 176 (7) State of Bihar And Others v. Suprabhat Steel Ltd. And Others, (1999) 1 Supreme Court Cases 31 (8) State of Bihar And Another v. Usha Martin Industries Ltd., 1987 (Supp) Supreme Court Cases 710 (9) Union of India And Others v. Godfrey Phillips India Ltd., (1985) 4 Supreme Court Cases 369 (10) Gujarat Ambuja Cement v. Assessing Authority (2000) 118 S.T.C 315..

- 27) Per contra, Mr. R.K. Agarwal sought to distinguish those pronouncements on the ground that the contract for supply of electrical energy is different from any other contract of mutual rights and obligations and contended that the Doctrine has no application much less to the facts of the present case. Mr. R.K.Agarwal relied upon the pronouncement of Hon'ble Supreme Court in (1) *Raymond Ltd. and Another v. M.P.Electricity Board And Others*, (2001) 1 Supreme Court 534 (2) *Nipha Steels Ltd. And Another v. W.B. State Electricity Board*, (2003) 5 Supreme Court Cases 593 (3) *Bannari Amman Sugars Ltd. v. Commercial Tax Officer And Others*, (2005) 1 Supreme Court Cases 625 (4) *Kasinka Trading And Another v. union of India And Another*, (1995) 1 Supreme Court Cases 274.
- 28) The pronouncement in *Pawan Alloys & Casting Pvt. Ltd. v. U.P.State Electricity Boad and Others*, as also reported in (1997) 7 Supreme Court Cases 251, was relied upon by Mr. R.K.Agarwal. In *Andhra Steel Corpn. Ltd. v. A.P.State Electricity Board*, (1991) 3 SCC 263: AIR 1991 SC 1456, where the Hon'ble Supreme Court held that concession can be withdrawn at any time except where the authority is bound by the principles of Promissory Estoppel. In this case, we have already held

the invocation of doctrine is without merits and we add that there is no withdrawal but it is a lapse of the very incentive scheme.

- 29) It will not be necessary in our view to catalogue the above pronouncements relied upon by either side in the present appeal as on facts, the appellants have not made out a case to invoke the Doctrine of Promissory Estoppel as has been held by Regulatory Commission. The Doctrine of Promissory Estoppel is a well founded one but it depends upon the facts of each case, the terms of statutory notification / scheme, and the authority of the person who makes the representation and the objective of such representation.
- 30) To give a finding it is essential to extract material portion of the scheme, which is heavily relied upon by Mr.P.N.Bhandari and Dr. Singhvi, senior counsel. Initially on 28.08.2002 the three Discoms resolved and proposed an incentive scheme for the HT large industrial consumers having excess consumption of 2.5% over average monthly consumption of FY 2002. The three Discoms requested the 1st respondent, Regulatory Commission to approve the incentive scheme from the billing month of October 2002.

“Incentives for consumption excess of 2.5% over base year:

<u><i>Load Fact %</i></u>	<u><i>Incentive to the consumer</i></u>
<i>i) Upto 50% Load Factor</i>	<i>10% rebate on energy charges for excess units consumed above base year.</i>
<i>ii) Above 50% Load factor</i>	<i>15% rebate on energy charges for excess units consumed above base year.</i>

The proposed scheme has following salient features:

- 1. All HT industries will have incentive to increase their consumption*

to avail discounted tariff for all additional consumption above base year consumption.

2. *The industries having higher load factor would have an additional incentive of 5% as indicated above.*
3. *The incentive proposal would not adversely affect the revenue requirement of the Discoms, as the incentive would be provided only if the consumption is excess of base year consumption by 2.5% and would be only on the additional units and the base year sales would be at full tariff.*
4. *Higher consumption by HT industries to avail discounted tariff would result in additional revenue to Discoms, as all sales would be still higher than marginal cost of supply.*

Considering the above advantages the Hon'ble Commission is, therefore, requested on behalf of all the three Discoms to approve the aforesaid incentive scheme to be effective from billing month of October, 2002."

- 31) The Regulatory Commission by its order dated 30.04.2003 accorded in principle permission to allow incentive by way of tariff rebate to industrial consumers who increase by 2.5% as compared to previous year's consumption. The Commission approved the proposal in the following terms :

"The proposal has been approved with the following:

1. *Base year for assessing the consumption shall be FY 2002-03.*
2. *Incentive by way of rebate shall be applicable on consumption of electricity from 1st April '03 to 31st March '04*
3. *Incentive by way of rebate shall be allowed quarterly, subject to adjustment at the end of each quarter and final adjustment at the end of the year based on cumulative consumption.*
4. *Incentive shall also not be admissible in case a consumer who recupes his contract demand during the year 2003-04."*

32) There after a tariff petition has been filed on 23.08.2004 by the Discoms. The Regulatory Commission in its order dated 04th September, 2004 while referring to the tariff petition filed by Discoms on 23.08.2004 directed thus : ***“Commission has approved incentive scheme linked to enhanced consumption and load factor for industrial consumers with validity up to FY06-07 of date of applicability of revised tariff, whichever is earlier. With the decision on this tariff petition said scheme will expire. Nigam need incorporate such comprehensive scheme in its proposal.”***

33) It is the case of the appellants that the incentive scheme should be continued for the full period of three years and the denial of the scheme as per notification and approval by Regulatory Commission by its tariff order and the substitution by new scheme is not permissible as industrialists have acted upon the representation. Much reliance is placed by Mr.P.N.Bhandari & Dr. Singhvi learned senior counsel on the following portion of the incentive scheme, published by the utility and also to the introduction of the third slab:

“The Rajasthan Electricity Regulatory Commission has accorded approval of the aforesaid proposals thereby modifying existing scheme and also for extension of the modified scheme for a further period of three years subject to the following conditions:

1. *Incentive shall be allowed to new/reconnected consumers only after completion of initial twelve months operation. The incentive will be allowed for the remaining period of the Financial year in which the new / reconnected consumers completes twelve months operation in case the consumer exceeds the average consumption of twelve months operation by 2.5% in the remaining period of the financial year. The incentive for subsequent years shall be applicable financial year wise with 2.5% annual increase in consumption.*
2. *The incentive is allowed to the consumer who have reduced his contract demand during current year, provided energy consumption during current year has increased by more than 2.5% of that of base year. The incentive @ 15% is achieved with the higher contract demand of the base year; otherwise the incentive shall be admissible @ 10% only.*

3. *The existing scheme is extended for the consumer raising his consumption by more than 2.5% each year for a further period of three years i.e. up to 31.3.2007. To elaborate it is stated that :-*

- (a) For FY 2004-05, the consumption has to be 5.0% more than the consumption of the base year F.Y. 2002-03 to avail the incentive,*
- (b) For FY 2005-06, the consumption has to be 7.5% more than the consumption of the base year FY 2002-03 to avail the incentives,*
- (c) For FY 2006-07, the consumption has to be 10% more than the consumption of the base year 2002-03 to avail the incentives.*

However, in case of new/reconnected consumers, the base year shall be initial twelve months period operation and the consumer will become eligible for incentive on causing 2.5% more consumption than in the F.Y in which he completes 12 months operation than the consumption of initial twelve months. For subsequent financial years, increase of 5%, 7.5% & 10% in consumption shall be needed to avail the benefit as per following illustration:-

New connection to a large industry was released on 1.8.2002. First twelve months operation was completed on 31.7.2003. The base year of consumer shall be consumption for the period 1.8.2002 to 3.7.2003.

To avail incentive for F.Y. 2003-04 the consumption has to be 2.5% more than the consumption of the base year.

To avail incentive for FY 2004-05, the consumption has to be 5% more than the consumption of the base year.

To avail incentive for FY 2005-06, the consumption has to be 7.5% more than the consumption of the base year.

To avail incentive for FY 2006-07, the consumption has to be 10% more than the consumption of the base year.

4. *For availing higher rebate of 15%, a load factor of the consumer (who have not reduced contract demand) may be considered for the year for which incentive is considered instead of base year.*

5. *The incentive shall be allowed quarterly on cumulative basis of assessment subject to the final assessment at the end of the year on year to year basis.*
6. ***Incentive as per the scheme modified/extended as above, shall be admissible to the consumer from third-quarter of financial year 2004 and shall be applicable up to dt.31.3.07 or till the commission issues tariff order, whichever is earlier. While considering tariff, scheme shall be removed based on tariff proposal. “***

34) On a conspicuous reading of the above scheme we have no doubt that it has been sufficiently made clear that the incentive scheme shall be applicable upto 31.03.2007 or till the Commission issues tariff order, which ever is earlier. The scheme thus, if no tariff revision takes place it will be valid till 31.03.2007 and if the tariff is determined, with the fixation of tariff the incentive scheme will lapse. When such has been the notification, it is too puerile on the part of the appellants to contend that the scheme should be continued till 31.03.2007 and advance the Doctrine of Promissory Estoppel.

35) Before we proceed further to discuss, we are to advert to the contention of Mr.P.N.Bhandari that the scheme cannot end abruptly and there is a representation for reviewing or continuation based on tariff proposal. This point advanced just deserves to be mentioned for being rejected. According to Mr.P.N.Bhandari, the scheme shall be continued atleast till 31.03.2007. The learned counsel referred to the Dictionary meaning of expression 'Review'. In our view, it is not necessary to refer to the same. Factually, the Commission had by its tariff order has substituted and introduced a new scheme, the benefit of which the appellants have been availing since 01.01.2005. In the tariff order the Regulatory Commission has incorporated the revised incentive scheme as under while determining the revised tariff:

“71. After considering the petitioners’ proposal and the views expressed before us, the Commission is of the view that no separate scheme is called for at this stage. The need to provide incentive to promote consumption of electricity by large industrial power (LIP) consumers should be taken care of by the tariff itself. An

incentive which encourages better load factor will serve the purpose. Consequently, an incentive scheme linked to consumption per KVA of contract demand is proposed. Accordingly we direct that the incentive shall be available to all LIP consumers including railways and public water works, and eligibility for incentive shall be as follows:

- (i) The annual consumption of the consumer for the current financial year shall not be less than his annual consumption of the previous financial year.*
- (ii) In respect of new LIP consumers and existing LIP consumers who reduce their contract demand, incentive shall be admissible from the quarter following six months from the date of new connection or reduction of contract demand, as the case may be.*
- (iii) Consumer should have no arrear outstanding against him.*

72. *Incentive shall be allowed to eligible consumers provisionally on quarterly basis provided that consumption during the quarter is not less than his consumption during the corresponding quarter during the previous year. Incentive so allowed shall be subject to final assessment at the end of the year, on year-to year basis. If consumption of a consumer in any quarter is less than that of the corresponding quarter of the previous year but the annual consumption is more than that of the previous year, he shall be eligible for the incentive for the year as a whole.*

36) Assuming for the purpose of arguments that there is substance in the point raised by Mr.P.N.Bhandari, there has been a revision of incentive and the same has neither been challenged and the benefit of which is being availed for eight months by the appellants as a whole, as well as other industrial consumers. In our considered view it may not be necessary to refer to all the pronouncements referred to by learned counsel for the appellants as it may only increase the volume of our judgment.

37) In this respect, Mr. Agarwal rightly raised a plea of equity and challenged the statutory power of the Regulatory Commission. A reading of the scheme will not advance the case of the appellant and the Regulatory Commission has recorded a finding that none of the appellants have invested much less huge amounts on the representation of the respondents to invoke the Doctrine of Promissory Estoppel. In fact it is an attempt of 2nd respondent to sell more power for industries and get a better return for itself from industrial consumers. The converse pleaded by appellants is factually incorrect.

38) We are not persuaded to take a different view in this respect. In *Kasinka Trading And Another v. Union of India And Another*, (1995) 1 Supreme Court Cases 274, which is heavily relied upon by Mr. Agarwal it has been held thus :

“21 *The power to grant exemption from payment of duty, additional duty etc under the Act, as already noticed, flows from the provisions of Section 25(1) of the Act. The power to exempt includes the power to modify or withdraw the same. The liability to pay customs duty or additional duty under the Act arises when the taxable event occurs. They are then subject to the payment of duty as prevalent on the date of the goods. An exemption notification issued under Section 25 of the Act had the effect of suspending the collection of customs duty. It does not make items which are subject to levy of customs duty etc. as items not leviable to such duty. It only suspends the levy and collection of customs duty, etc., wholly or partially and subject to such conditions as may be laid down in the notification by the Government in “public interest”. Such an exemption by its very nature is susceptible of being revoked or modified or subjected to other conditions. The supersession or revocation of an exemption notification in the “public interest” is an exercise of the statutory power of the State under the law itself as is obvious from the language of Section 25 of the Act. Under the General Clauses Act an authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in a like manner. From the very nature of power of exemption granted to the Government under Section 25 of the Act, it follows that the same is with a view to enabling the Government to regulate, control and promote the industries and*

industrial production in the country. Notification No. 66 of 1979 in our opinion, was not designed or issued to induce the appellants to import PVC resin. Admittedly, the said notification was not even intended as an incentive for import. The notification on the plain language of it was conceived and issued on the Central Government "being satisfied that it is necessary in the public interest so to do". Strictly speaking, therefore, the notification cannot be said to have extended any 'representation much less a 'promise' to a party getting the benefit of it to enable it to invoke the doctrine of promissory estoppel against the State. It would bear repetition that in order to invoke the doctrine of promissory estoppel, it is necessary that the promise which is sought to be enforced must be shown to be an unequivocal promise to the other party intended to create a legal relationship and that it was acted upon as such by the party to whom the same was made. A notification issued under Section 25 of the Act cannot be said to be holding out of any such unequivocal promise by the Government which was intended to create any legal relationship between the Government and the party drawing benefit flowing from of the said notification. It is, therefore, futile to contend that even if the public interest so demanded and the Central Government was satisfied that the exemption did not require to be extended any further, it could still not withdraw the exemption."

- 39) In *Bannari Amman Sugars Ltd. v. Commercial Tax Officer And Others*, (2005), 1 Supreme Court Cases 625 Hon'ble Arijit Payayat J speaking for the Supreme Court after analyzing the entire case law held thus : "*In Shrijee Sales Corpn. V. Union of India it was observed that once public interest is accepted as the superior equity which can override individual equity the principle would be applicable even in cases where a period has been indicated for operation of the promise. If there is a supervening public equity, the Government would be allowed to change its stand and has the power to withdraw from representation made by it which induced persons to take certain steps which may have gone adverse to the interest of such persons on account of such withdrawal. Moreover, the Government is competent to rescind from the promise even if there is no manifest public interest involved, provided no one is put in any adverse situation which cannot be rectified. Similar view was expressed in Pawan Alloys and Casting (P) Ltd. v. U.P.SEB and in STO v. Shree Durga Oil*

Mills and it was further held that the Government could change its industrial policy if the situation so warranted and merely because the resolution was announced for a particular period, it did not mean that the Government could not amend and change the policy under any circumstances. If the party claiming application of the doctrine acted on the basis of a notification it should have known that such notification was liable to be amended or rescinded at any point of time, if the Government felt that it was necessary to do so in public interest.”

- 40) Following the above pronouncements, it is clear from the very scheme, which is relied upon for, it is clear that the scheme will come to an end either on a particular date or when the Regulatory Commission revises the tariff, whichever ever is earlier. That being the very contents of the scheme, it is too late for the appellants to advance the Doctrine of Promissory Estoppel.
- 41) The supply of electricity is distinct and it cannot be treated on par with other contractual rights. Further it has been held that the supply as envisaged in the contract and the statutory provisions places supply of power / energy is to be treated distinctly. In *Nipha Steels Ltd. And Another v. W.B. State Electricity Board And Others*, (2003) 5 Supreme Court Cases 593 Hon'ble Arijti Pasayat J speaking for the Bench held thus : *In Raymond Ltd. case it was observed that the contract for supply of electrical energy cannot be treated on a par with any other contracts of mutual rights and obligations. The terms and conditions of supply as envisaged in the contract and the statutory provisions and general conditions have been standardized for uniform application among consumers with variations merely necessitated by the different classes or categories of consumers and there is no scope otherwise for expecting any individual or free bargaining right in this regard by each consumer with the Board.”*
- 42) In *Raymond Ltd. And Others v. M.P.Electricity Board And Others*, (2001) 1 Supreme Court Cases 534, the full Bench of the Hon'ble Supreme Court ruled thus :

“(16) The terms and conditions of supply, as envisaged in the contract and the statutory provisions and general conditions have been standardized for uniform application among consumers with variations merely necessitated by the different classes or categories of consumers and there is no scope otherwise for expecting any scope for individual or free bargaining right in this regard by each consumer with the Board. Therefore, it is futile for a consumer to contend that the board was at the dictating end and the parties were not equally positioned in settling the terms of the contract.”

- 43) As has been held in *Pawan Alloys & Casting Pvt. Ltd., Meerut v. U.P.State Electricity Board And Others, (1997) 7 Supreme Court Cases 251.* in this case, no promise was held out to any new industries nor there was an invitation for investments of large scale fund but it only imposed a condition that existing industries could avail of the incentive subject to the stipulations in the scheme and nothing more. The tariff fixation is a statutory function in terms of The Electricity Act 2003 and tariff is to be fixed in the larger interest of consumer public at large. That being the position and when in the very tariff scheme, it has been specifically provided that the scheme will come to an end on 31.03.2007 or when the Regulatory Commission determines distribution tariff which ever is earlier. This is only meaning it is not known as to how the appellants could advance the said contention that the scheme is to be given any other meaning is impermissible. This sentence which is incorporated in the scheme is fatal to the claim of the appellants and none of the precedents pressed into service by the appellants will come to their rescue. It will be sufficient to answer this point, however, as the appellants on all the contentions pressed for a decision.
- 44) In the circumstances, we answer all points, B to D, against the appellants and in favour of respondents while holding that no interference is called for with the finding recorded by the Regulatory Commission. The said findings are not only balanced but also fair and in no way calls for interference.

- 45) On the last two points, in the light of our discussions though it is not necessary, we hold that no interference is called for with the order of the Regulatory Commission. In fact, the appellant shall be availing the benefits under the new scheme and they should not be allowed to blow hot and cold as the earlier scheme carried certain advantageous.
- 46) In the result, we hold that no interference is called for with the order of the 1st respondent made in Review Petition No. 53 to 55, 59, 61 to 69 of 2005, 73 to 78, 81 to 82, 96/2006 dated 08.06.2006 and all the appeals are dismissed with costs of Rs. 2,000/- in each appeal.

Pronounced in Open Court on this 23rd day of November, 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member

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