

L.M.L. LTD.
v.
STATE OF U.P. & ORS.

DECEMBER 13, 2007

[S.B. SINHA AND HARJIT SINGH BEDI, JJ.]

*Uttar Pradesh Electricity Reforms Act, 1999—ss. 24(2) and (6)—Electricity tariff—Fixed by Electricity Regulatory Commission—Imposing surcharge on consumers using 500 hrs. continuous supply and consumption during peak hours—Modification in—By one of the licencees/ suppliers (independent feeder)—After making representation to its consumers—Subsequent withdrawal of the modification pursuant to order of High Court opining that the modification was without jurisdiction—Raising of bills as per the rates fixed by the Commission, with retrospective effect—Challenged—Held: The licencee, estopped from raising bill with retrospective effect—No impropriety was caused by the licencee in modifying the tariff—On violation of tariff approved by the Commission, appropriate legal action can be taken against the licencee, but the consumers cannot be made to suffer therefor—Ordinarily the doctrine of promissory estoppel would not be applied against statute—But in the instant case it would be applicable, since the provisions of the Act empower the licencee, to modify the tariff—Conduct of the Commission in not responding to communication of licencee regarding the modification may invite the doctrine of acceptance **sub silentio**—However, the principle of doctrine of promissory estoppel would not be applicable in case of other licencees, where no such promise was made—Administrative Law—Doctrine of Promissory Estoppel—Applicability of—Doctrine of acceptance **sub silentio**.*

The licencees/suppliers of electrical energies, filed applications before U.P. Electricity Regulatory Commission for determination of tariff. Tariff was framed by the Commission, by a Notification dated

A 7.8.2000. The same was to come into force from 9.8.2000. According to the Notification consumers connected to independent feeders were to be charged 15% surcharge against 500 hours of assured electric supply in a month from sub-stations of 400 KV, 220 KV and 132 KV in HV-2 rate list and that the consumers who opted for power supply during peak hours, an additional surcharge of 15% was to be levied on the amount billed at the 'Rate of Charge'. Licencee/ Uttar Pradesh Power Corporation Ltd. (UPPCL) wanted some alterations in the tariff. Commission did not take any decision despite repeated communications by UPPCL. UPPCL keeping in view its capacity to provide uninterrupted electric supply, by a Circular dated 8.9.2000, called for options from its consumers, who did not intend to have continuous power supply for 500 hours. By a further notice dated 14.9.2000, it informed that both the categories of continuous and non-continuous were amalgamated and it required the consumers to pay 15% surcharge, if they consumed the electricity during peak hours. Appellant-consumers opted for not having supply of power for continuous 500 hours and during peak hours. UPPCL by Circular dated 15.12.2000 altered the tariff to the effect that 15% surcharge would not be levied on the consumers who did not opt for 500 hours guaranteed supply.

E Appellant (LML Limited) who was consumer of another licensee i.e. Kanpur Electricity Supply Company (KESCO) filed a writ petition. The High Court opined that UPPCL had no jurisdiction to make any modification in the tariff and thus the Circular dated 8.9.2000 was invalid in law. On the basis of the judgment of the High Court, UPPCL by a Circular dated 31.8.2001, cancelled its earlier Circulars. It issued bills to its consumers with retrospective effect. Appellants/consumers of UPPCL filed writ petitions questioning the legality and validity of the Circular dated 31.8.2001 and jurisdiction of UPPCL to issue bills with retrospective effect. Various Division Benches of High Court dismissed the petitions following the decision in the case of appellant (LML Ltd.). On similar questions, High Court of Uttaranchal allowed the writ petitions. Hence the present appeals.

H Allowing the appeal filed by Uttaranchal Power Corporation,

partly allowing the appeals filed by consumers of UPPCL, and dismissing that of the consumers of KESCO, this Court A

HELD: 1. The suppliers/licencees, who, keeping in view their capacity to supply uninterrupted electrical energy, had made a representation and pursuant thereto the consumers had altered their position, cannot be permitted to take a different stand as the doctrine of promissory estoppel would apply against them. The said doctrine is premised on the conduct of the party making a representation to the other so as to enable it to arrange its affairs in such a manner as if the said representation would be acted upon. It provides for a cause of action. It need not necessarily be a defence. B

[Para 38] [698-B-C] C

Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector and Etio and Ors., [2007] 5 SCC 447; *State of Punjab v. Nestle India Ltd. and Anr.*, [2004] 6 SCC 465 and *Express Newspapers Pvt. Ltd. and Ors. v. Union of India and Ors.*, [1986] 1 SCC 133, referred to. D

2. The appellants-consumers did not intend to have supply of electrical energy during peak hours. Their need in relation thereto, therefore, was not such which would have required continuous supply of electrical energy. If keeping in view such a contingency, the suppliers intended to have an assessment of their own capacity to supply uninterrupted electrical energy by asking for option of the consumers concerned, they cannot be said to have deviated from the tariff determined by the Commission. If one of the objects of the Commission was to ensure uninterrupted supply of electrical energy, it was for the supplier itself to assess its own capacity therefor. Surcharge may or may not be a part of tariff. Even if it is a part of tariff in respect thereof, the levy was conditional. If the supplier was not itself in a position to fulfill the condition, the question of insisting on implementation of the said provision would not arise. E

[Para 36] [697-E-G] F

3. Ordinarily the doctrine of promissory estoppel would not be applied against statute. Sub-section 6 of Section 24 of Uttar Pradesh Electricity Reforms Act, 1999 *inter alia* empowers the holder of a G H

A licence, to modify the tariff. If the implementation of tariff was dependent upon fulfillment of certain conditions precedent which in turn would be dependent upon the capacity of the producer of electrical energy to fulfil the same, no impropriety was caused by the Power Corporation to ask for the said option. The fact that such an option had indeed been called for and pursuant thereto the consumers had altered their position, is not in dispute. While dealing with a question as to whether an action on the part of the State to make a representation is contrary to a statute or not, distinction should be borne in mind between an act which goes clearly contrary to the mandatory provisions thereof and a case where irregularities have been committed. A circular would be binding on the State in appropriate cases. [Paras 42 and 45] [699-F-H; 700A; H]

Collector of Central Excise Vadodra v. Dhiren Chemical Industries, [2002] 2 SCC 127, relied on.

The Paper Products Ltd. v. Commissioner of Central Excise, [1999] 7 SCC 84, referred to.

4. The Commission did not take any decision despite repeated communications by the Power Corporation. a situation of this nature where the licensee wanted some alteration in the tariff, it was expected of the Commission to take a decision forthwith. It should not have whiled away the time and allowed the Power Corporation to proceed with its proposal. Such a conduct on the part of the Commission may invite the doctrine of acceptance *sub silentio*. The statute provides for a consultation and not a concurrence. It does not provide for the consequence of any alteration of tariff applicable to a particular category of consumer. It merely, brings about the situation where a licensee found itself unable to supply electrical energy uninterruptedly to the consumer. [Para 41] [699-D-E]

5. The proximity of issuance of the Circular *vis-a-vis* Notification must also be noticed. The tariff was framed on 7th August, 2000 which came into force from 9th August, 2000 whereas the Circular was issued on 8th September, 2000. The consumers exercised their option on 31st October, 2000. The judgment of High Court in the case of

LML Ltd. was delivered on 25th April, 2001. The Circular dated 31st August, 2001 undoubtedly was issued in view of the said judgment. The said judgment did not deal with the questions raised before this Court. In any event if the licensee violates the tariff approved by the Commission appropriate legal action can be taken against it. But it would be too much to contend that for a mistake on the part of the Corporation, the consumers would suffer. In this view of the matter, the doctrine of estoppel shall apply in the cases where the promise was made. [Para 48] [702-D-F]

Association of Industrial Electricity Users v. Respondent: State of Andhra Pradesh and Ors., [2002] 3 SCC 711; *West Bengal Electricity Regulatory Commission v. C.E.S.C. Ltd. etc. etc.*, [2002] 8 SCC 715 and *BSES Ltd. v. Tata Power Co., Ltd. and Ors.*, [2004] 1 SCC 195, distinguished.

6. However, the principle of doctrine of promissory estoppel would, not be applicable where no such promise was made. Respondent-Kanpur Electricity Supply Company (KESCO) would not be bound thereby. Tariff is fixed for providing a service. Supply of electrical energy is a public utility service. While carrying out a function of this nature, the court of law must keep in mind the equitable principles also. Equity does not postulate that although the supplier did not fulfil its obligation, still it would be entitled to the benefits envisaged under the law. Similarly Uttaranchal Power Corporation also does not appear to have made such a promise. The doctrine of promissory estoppel in those cases also will have no application. [Paras 48, 49 and 50] [702-F-H; 703-A]

7. If any appeal is pending before the Commission on the question of independent feeder, it would decide the same irrespective of the result of this decision. The Court, therefore, permits the appellants to agitate the same point before the Commission.

[Para 51] [703-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5789 of 2002.

A From the final Judgment and Order dated 25.4.2001 of the High Court of Judicature at Allahabad in Civil Miscellaneous Writ Petition No. 40692 of 2000.

WITH

B C.A. Nos. 1106, 1622-1628, 1716 of 2007 & SLP (C) No. 6721 of 2007.

C Rachana Srivastava, Genl., M.L. Lahoti, Ravindra Shrivastava, C.S. Vaidyanathan, T.S. Doabia, and Rakesh Dwivedi, E.C. Agrawala, Mahesh Agarwal, Rishi Agrawala, Gaurav Goel, Amit Sharma, Neha Aggarwal, Ananaya Kumar, Kunal Verma, Rajul Shrivastva, Vibha Datta Makhija, Arvind Kumar Shukla, Sunil Kr. Shukla, Vishal Dixit, Alok Shukla, Irshad Ahmad, Niraj Sharma, Manpreet Singh, Doabia Vikrant Singh Bais, Assem Chandra, Anurag Singh, C. Murlikrishna, C. Balakrishna, Ramesh Singh, Shela Goel, R. Santhanam, R.C. Gupta, Manjula Gupta, Hari Shankar K.E.C. Vidya Sagar, Pradeep Misra, Manoj Swarup (for Manoj Swarup & Co.), Amit Bhandari, Vikas Mehta and Rajiv Mehta for the appearing parties.

The Judgment of the Court was delivered by

E **S.B. SINHA, J.** 1. Effect of two Circular letters issued by the U.P. Power Corporation Limited is involved in these appeals, which arise out of a judgment and order dated 25th April, 2001 of the High Court of Judicature at Allahabad in CMWP No.40692 of 2000 ; judgment and order dated 17th January, 2007 passed by the High Court of Uttaranchal at Nainital in WP No. 936 of 2001 and judgment & order dated 19th October, 2006 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow, in Appeal No.82 of 2002 etc. etc.

G 2. State of Uttar Pradesh constituted Uttar Pradesh Electricity Board in terms of the provisions of the Electricity (Supply) Act, 1948. In the year 1999 Uttar Pradesh Electricity Reforms Act, 1999 (for short, 'the 1999 Act') was enacted, in terms whereof the U.P. Electricity Regulatory Commission (for short, 'the Commission') was constituted. Indisputably, three licensees, namely, (i) U.P. Power Corporation Ltd. (for short, 'UPPCL'), (ii) Kanpur Electricity Supply Company (for short, 'KESCO');

H

and (iii) NOIDA Power Company Ltd. (for short 'NPCL') filed applications before the Commission for determination of 'tariff'. A

3. By reason of a notification dated 07.08.2000, tariff was framed which was to come into force from 09.08.2000, *inter alia*, providing for:

"RATE SCHEDULE HV-2
LARGE AND HEAVY POWER

1. Applicability :

This rate schedule shall apply to all consumers who have contracted load of more than 75 KW (100 BHP) for industrial and/or processing purposes as well as to Acr/Induction, Furnaces Rolling/ Re-Rolling Mills, Mini Steel Plants and to any other power consumers not covered under any other rate schedule. C

This rate schedule shall also apply to commercial light, fan & power consumers (LMV-2) and power consumers of Rate Schedule LMV-6, subject to the condition that they opt for this Rate Schedule. D

The contracted demand shall be expressed in whole number only. E

2.

3.

4. Rate of charge

Description	Demand Charge		Energy Charge
A. Basic Rate (Applicable to Urban Consumers)	Rs. 130/- per KVA/Month	P L U S	390 paise/KWH

Notes :

(a) In respect of consumers who opt for power supply during restricted/peak hours an additional surcharge of 15% on the amount H

A billed at the “Rate of Charge” under item 4-A above, i.e. Demand Charge and Energy Charge shall be levied.

B However, in respect of consumers getting power supply on independent feeders emanating from 400/220/132 KV sub-stations an additional surcharge of 15% on demand and energy charges shall be charged further subject to the condition that these consumers will get an assured supply of minimum 500 hours in a month. In case of short fall in above guaranteed hours of supply a rebate @ 1% for each 10 hours short fall will be admissible on the bill amount computed under “Rate of Charge”.

C (b)
 (c)

D (d) In respect of supply during peak hours/restricted hours, the consumers shall have to take the permission from UPPCL.”

E 4. Appellant LML Ltd. prior to framing of the said tariff and bifurcation of U.P. State Electricity Board had been taking supply of electrical energy in the form of a three phase alternatives current at declared pressure of 132 K.V. and a power not exceeding 8000 K.V. in their respective factories. Whereas in the case of L.M.L. Limited, their factory being situated at Kanpur, electrical energy was supplied by KESCO, but so far as other consumers are concerned, electrical energy was supplied to them by UPPCL

F 5. Appellants-consumers herein claimed that although they had been running a non-continuous process industry but was not to observe peak hours restriction and in terms thereof they did not consume power from 6.00 p.m. to 11.00 p.m. (being the peak hours).

G 6. A confusion arose in regard to interpretation of the said purported levy of 15% surcharge on demand and energy charge on independent feeders from 400/220/132 KV sub-stations having assured supply of minimum 500 hours in a month. In the event, the consumers were to get power supply from independent feeders, were to get supply of minimum 500 hours in a month, indisputably, they were to pay 15% surcharge on
 H demand.

7. UPPCL, however, on construction of the said provisions of the statute issued a circular letter dated 08.09.2000 calling for options from the consumers of electrical energy, who did not intend to have a continuous power supply of 500 hours in a month. A copy of the said circular letter admittedly was sent to the Secretary of the Commission, the relevant paragraphs whereof read thus :

“Some other important guidelines/directions are being issued with the request that please make aware to all your concerned subordinate officers and ensure its strict compliance.

1. 15% surcharge will be payable for Electricity use in prohibited period in new rate list of L.M.V. – 6 and HV-2. Consumers who were notified by U.P. Government under continuous category before new tariff should be necessarily imposed 15% surcharge in their bills. The facility of Electricity supply in prohibited should be continued as before to consumers falling under this category and option letter should not be asked from them.

In addition, consumers of non-continuous category will not be provided the facility to use Electricity in prohibited period. But, if the consumer of this category wants to use electricity in prohibited period, he will intimate to concerned Executive Engineer through registered letter.

Executive Engineer within three days of receiving this letter will issue office circular which will indicate the date from which this facility can be provided . 15% surcharge will be payable by the consumer from the said date mentioned in above letter. This option once given will not be revoked.

- 2(a) Consumers connected to independent feeders will be charged 15% surcharge against guarantee of 500 hours electricity supply from sub-stations of 400 KV, 220 KV and 132 KV in HV-2 rate list. 500 hours electricity supply will be ensured to the consumers of this category. 1% rebate will be given on Electricity Bill of 10 hours or its part, if they receive electricity supply less than 500 hours. If the consumers connected to

A these independent feeders who do not want guaranteed supply
of 500 hours electricity supply then 15% surcharge will not
be charged on their electricity bills. These type of consumers
will intimate to Executive Engineer (Distribution) if they do not
want 500 hours guarantee of electricity supply. Executive
B Engineer will issue office memo in this regard. If any consumer
of this category does not exercise this option, then he will be
guaranteed 500 hours electricity supply and will be charged
15% surcharge. It will be the responsibility of SSO/Assistant
C Engineer to ensure that consumers of this category should not
use electricity in the restricted period. In case consumers of
this category use electricity in the restricted period then they
will be charged (15+15) 30 % surcharge.

D 2(b) Normally the availability of electricity supply to the consumers
from these feeders will depend upon data of electronic meters
installed in their establishments and no officer will be authorized
for issuing any certificate and nor such certificate will be
acceptable.

E 2(c) In case electric meter is not available at consumers'
establishment or is defective, then during this period only no
employee below the level of Asstt. Engineer will issue any
certificate under his signatures under any circumstances
regarding period of electricity supply/hours etc. and in case
this is issued the same will no be accepted, and the concerned
F officer/employee will be deemed guilty of indiscipline and
appropriate action will be taken against them. As per
requirement, this type of certificate can be issued by Asstt.
Engineer or above level officer and they may get the signature
of subordinate officer/employee if they wish. This certificate
G will be made available to concerned Executive Engineer
(Distribution) for each month.

H 2(d) Every months intimation/certificates of electricity supply hours
alongwith the reason of less supply hours will be provided by
Sub-division Officer of sub station of 400, 220 and 132 KV
to Executive Engineer (Distribution) for the purpose of issuing

bill to consumer. A

The supply hours should tally with the hours written in the log book of sub station. Along with this, the sub-division officer will provide the certificate confirming whether electricity was supplied in peak hours or not? In case the power supply to large and heavy power consumers is less than prescribed hours for two consecutive months, then, concerned Dy. General Manager of the sub-station will review the situation at his level and resolve the same. B

Review of power supply to small and medium consumers shall be done by Executive Engineer of concerned sub-station.” C

8. On or about the 14.09.2000, the Executive Engineer of UPPCL issued notices to the parties, *inter alia*, stating :

“As per the Extra-ordinary Gazette dated 27.07.2000 of Government of U.P., the U.P.P.C. Ltd. has revised the tariff of consumers of all the categories from 9.8.2000. Accordingly, both the categories i.e. Continuous and non-continuous have been amalgamated. The restriction is that they will have to submit their separate option for use of electricity consumption in peak hours and restricted use of electricity that if they want to consume the electricity in peak hours and restricted period, they will be required to pay 15% extra surcharge on the amount worked out as per category 4 of the tariff rate. Without permission of U.P.P.C. Ltd., the consumption of electricity in this period is prohibited otherwise action as per rules will be taken. D E F

You are, therefore, hereby requested that you intimate in writing to this office within 15 days of receipt of this letter that whether you want to consume the electricity during the peak hours and restricted use of electricity period or not so that you tariff rate could be fixed accordingly in H.V. 2 category. The consumption of electricity during the said period will be prohibited without permission of U.P.P.C. Ltd. In case of violation, you will be liable to financial and other losses. Option given by you shall be effective from 9.8.2000.” G H

A 9. Pursuant thereto and in furtherance thereof, by reason of a letter dated 16.09.2000, the consumer opted for not having a continuous power supply of 500 hours, a sample copy whereof is as under :

B “As you already know that we are electricity consumer in the category of Non-continuous process of 132 KVA. We have to inform you that we shall not be consuming the same during the peak hour restrictions. Further we are not opting for such guaranteed supply of electricity for 500 hours per month and in default thereof a rebate of 1% for every 10 hours of electricity non-supply. This does not, however, mean that you shall subject us to any
C unscheduled and arbitrary cuts in the supply in future

D We are sure that you shall continue to supply electricity as in the past from the same feeder line. This letter is in compliance of the requirement of the above notification dated 8.9.2000, and hence the additional surcharge of Rs.6,33,898.45 shall be withdrawn from our bill dated 5.9.2000. The payment of Rs.53,01,727/- having been made by cheque No.207076 dated 11.9.2000 (handed over in the Court of Chief Justice, Allahabad on 13.9.2000). Thus the aforesaid bill stands finally paid.

E We are sure that in future our bills shall not be loaded with additional surcharge of 15%.”

F 10. It appears that meetings were also held by and between the consumers and Secretary and Chairman of UPPCL at PHD Chambers of Commerce at Delhi, wherein it was decided that only thermal industries would not be charged 15% additional surcharge who did not want to go for assured supply of 500 hours.

G 11. It further appears that UPPCL issued another circular letter dated 15.12.2000, the relevant portion whereof reads thus :

H “U.P Electricity Regulatory Commission in its revised tariff for the year 2000-01 applicable to HV-2 rate schedule consumers who are getting supply from independent feeders for levy of 15% surcharge on the guarantee of 500 hours of power supply per month.

In this regard, detailed guidelines have been issued by this office vide letter No. 1423 dated 9.8.2000. A

In this regard, it is directed that those consumers who will exercise option, of not availing 500 hours guaranteed supply, through a registered letter to Executive Engineer (Distribution) by 31.12.2000, they will not be charged 15% surcharge from the very date of its applicability i.e. 7.8.2000. For consumers, who will submit their option after 31.12.2000, this facility will be applicable from the date of receipt of the application." B

12. Although no such circular letter was issued by KESCO, relying on or on the basis of circular letter issued by UPPCL, L.M.L. Limited filed a writ petition in the Allahabad High Court. C

13. Upon taking into consideration the jurisdiction of the UPPCL to implement the tariff fixed by the Commission *vis-à-vis* the procedure required to be adopted therefor, the High Court by reason of the impugned judgment and order dated 25.04.2001 opined that it had absolutely no jurisdiction to make any modification in the tariff and in that view of the matter the purported circular letter issued on 08.09.2000 was invalid in law, *inter alia*, stating : D

"The contention raised on the basis of circular dated 8.9.2000 issued from the office of Chief General Manager (Commercial), UPPCL, is equally untenable. The provision in later part of paragraph 2 Ka thereof which lays down that 15 per cent surcharge would not be levied in case a consumer getting supply from an independent feeder emanating from 400/220/132 KV sub-station gave an option that he did not want a guarantee of 500 hours of supply in a month, is contrary to the tariff approved by the Commission. The Commission in its order approving the tariff had merely provided that in case of shortfall in 500 hours of assured supply in a month, a rebate of 1 per cent for each 10 hours shortfall will be admissible on the total amount computed under "Rate of Charge". The Circular while retaining this provision has made an additional provision to the effect that if such type of consumer gave an option that he did not want an assured supply of minimum 500 E
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H

A hours in a month, the 15 per cent surcharge shall be not levied. This is a clear alteration of the approved tariff which is not permissible in law.

B 14. Relying on or on the basis of the said judgment of the Division Bench of the Allahabad High Court delivered in the case of L.M.L. Limited, UPPCL issued another circular dated 31.08.2001 cancelling the earlier circulars, stating :

C “Since some confusion has arisen amongst the Field/Regional Officers on this provision, Commercial Division vide its letter Nos. 1423-HC/UPPCL/Five-1974-1204 dated 8.09.2000 and No. 3046/HC /Tariff/SAMA/Nirdesh dated 15.12.2000 had issued clarifications after discussions with U.P. Electricity Regulatory Commission.

D LML Kanpur had filed a Writ Petition No.40692/2000 before the Hon’ble Allahabad High Court on this subject. Hon’ble Allahabad High Court in its order has directed that tariff as approved by Electricity Regulatory Commission only will be applicable and the licensee cannot amend the tariff. Therefore, in the light of Hon’ble Allahabad High Court’s judgment Circular No. E 1423 dated 8.9.2001 (Point No. 2) and letter No. 3046 dated 15.12.2000 stand rescinded from the date of their issue.”

Bills were issued in October 2001 with retrospective effect from November 2000.

F 15. Appellants other than L.M.L. Limited filed several writ petitions questioning the legality and/or validity of the said circular dated 31.08.2001.

G Several contentions were raised in the writ petitions including the jurisdiction of UPPCL to issue bills with retrospective effect.

H It was furthermore contended that the appellants having altered their position pursuant to or in furtherance of the promise made by UPPCL in terms of its circular letter dated 08.09.2000, they were estopped and precluded from raising any bill, with retrospective effect or otherwise.

Attention of the High Court in the subsequent writ petitions were also drawn to the fact that UPPCL had carried out extensive consultation with the Commission on several dates. A

16. It was pointed out that UPPCL itself in its counter affidavit filed in the case of Modi Pon Fibre Company, Ghaziabad before the High Court had stated as under : B

“4. That there was some confusion in the category of consumers who were covered by both category (i) and (ii) above, and who on plain reading of the tariff were liable to pay surcharge of 15% plus 15%. To clarify the above UP Power Corporation Limited, hereinafter referred to in brief as UPPCL, held discussions both with the Commission and the Government of Uttar Pradesh through Principal Secretary, Power. The above discussions culminated in the passing of Circular No.1423-HC/UPPCL/5-1974-1204-C/2000 dated 8.9.2000 by UPPCL. The above circular as per its Para 2(Ka) gives an option to the consumers under category (ii) that in case they do not want to receive supply of assured 500 hours in a month no surcharge of 15% shall be charged from them. It was provided in the above circular that the concerned consumer may give their option of waiver of assured supply by registered post to the concerned Executive Engineer (Distribution). It was further provided in the above circular that in case the consumer fails to exercise the above option, he will be assured supply of 500 hours and he shall be liable to pay surcharge of 15%. A copy of the above circular is endorsed to the Secretary of the Commission for information and necessary action. A copy of the above circular dated 8.9.2000 is appended to this Short Counter Affidavit as its Annexure CA-1. C D E F

5. By another Circular No.3046-HC/Tariff/general instruments, dated 15.12.2000, it was provided that the consumers of category (ii) above may exercise their option of not availing 500 hours guaranteed supply through a registered letter to Executive Engineer (Distribution) by 31.12.2000. A copy of G H

A the above circular was endorsed to the Secretary of the Commission for information and necessary action. A copy of the above circular dated 8.9.2000 is appended to this Short Counter Affidavit as its Annexure CA-2.

B It was further stated therein :

C 7. Since the circular dated 8.9.2000 now stands rescinded pursuant to the orders of the Hon'ble Allahabad High Court and since UPPCL has failed to elicit any response from the Commission to its letters (Annexure Nos. CA-3, 3A and 3B), UPPCL has initiated action for charging 15% surcharge from consumers of category (ii) above which as per the tariff order dated 27.7.2000 passed by the Commission. A circular No. 925 HC/LML/LS-15 dated 31.8.2001 has been issued by the respondent to the above effect. A copy of the above circular dated 31.8.2001 is appended to this Short Counter Affidavit as its Annexure No. cA-4”

D 17. Before the High Court, several other documents were brought on record, including a letter dated 11.06.2001 which had been filed before the Commission, which was in the following terms :

E “In accordance with the rates specified by U.P.E.R.C. in its Tariff Orders dated 27.7.2000, it was provided in the Notification for rate Schedule for HV-2 category issued by U.P.P.C.L. that 15% surcharge will be levied on consumers who opt for power supply during restricted/peak hours. It was also provided that additional surcharge of 15% on demand and energy charges will be payable by the consumers getting supply on independent feeders subject to the condition that they will get assured supply of 500 hours in a month. Subsequently, as per discussions in the Hon'ble Commission it was clarified by UPPCL vide letter No. 1423-HC/UPPCL/V-1974-1204-C/2000 dated 8.9.2000 that the levy of 15% surcharge on consumers on independent feeder will be optional subject to their giving the option.

H A writ was filed by M/s LML, Kanpur who is a consumer of KESCO claiming that 15% additional surcharge for independent

feeder should not be levied on them as provided in circular no. 1423-HC/UPPCL dated 8.9.2000 referred to above. The Hon. High Court, Allahabad have held that the provision of para-2(Ka) of above referred circular dated 8.9.2000 giving option to the consumers on independent feeders is a clear alteration of the approved tariff. They have further held that the circular of UPPCL insofar as it is inconsistent with the tariff approved by the Commission is void and wholly inoperative in law. The petitioner, therefore, cannot get any advantage by exercising an option in terms of circular by way of informing through the registered post that he did not want an assured supply of 500 hours in a month.

It may kindly be recalled that the clarification issued vide above referred letter no. 1423 dated 8.9.2000 was subsequent to the detailed discussions held in the Commission as well the then Pramukh Sachiv Oorja.

It is, therefore, requested that the above facts may kindly be brought to the notice of the Hon'ble Commission and further directions may kindly be issued so that the same may be implemented as ordered by the Hon. High Court, Allahabad."

18. The Chief General Manager, UPPCL by reason of a letter dated 23.06.2001 drawing the attention of the Commission to the said letter dated 11.06.2001 had requested it to issue necessary guidelines in the light of the order dated 25.04.2001 passed by the Allahabad High Court in W.P. No.40692 of 2000.

19. Yet again, on or about 24.08.2001, the Executive Director, UPPCL, referring to its earlier letter dated 11.06.2001 as also a reminder letter dated 23.06.2001 requested the Secretary of the Commission to issue necessary guidelines in regard to the levy of 15% surcharge, *inter alia*, stating :

"...It may also be brought to the kind notice of the Commission that at present field unit of UPPCL are not charging 15% surcharge from such consumers on independent feeders who have given option for not availing 500 Hrs. of guaranteed supply during a month."

A 20. Other Division Benches of the Allahabad High Court, however, chose to follow its earlier decision in *L.M.L. Limited* (supra).

B 21. We may notice that some of the appellants herein had filed reference applications before the Commission, which were found to be not maintainable. A Review Application was also filed whereafter, the First Appeals were filed before the High Court. It may, however, be placed on record that in regard to the meaning of 'independent feeders' some matters are still pending before the Commission.

C 22. We may also note that on similar questions, the Uttaranchal High Court has allowed the writ applications filed before it.

D 23. The learned counsel appearing on behalf of the appellants, *inter alia*, would submit that the High Court committed a manifest error in passing the impugned judgment insofar as it failed to take into consideration that in terms of sub-section (6) of Section 24 of the 1999 Act, it was for the licensee to modify the tariff and in view of the fact that before doing so, they had held extensive consultation with the Commission; the impugned judgments are wholly unsustainable.

E It was also submitted that in any event, the doctrine of promissory estoppel could squarely be applicable in the instant case as the appellants herein had altered their position relying on or on the basis of the representation so made.

F 24. Mr. Rakesh Dwivedi, learned Senior Counsel appearing on behalf of the respondents, on the other hand, submitted :

- G
- (i) No promise having been made by KESCO, the principle of promissory estoppel will have no application.
 - (ii) In any event there cannot be any estoppel against the statute.
 - (iii) So far as UPPCL is concerned, having regard to the provisions of the 1999 Act in terms whereof the Commission alone possessed the power to modify the tariff, the impugned judgments are unassailable.

H 25. The 1999 Act was enacted to provide for the restructuring of the electricity industry, the rationalization of generation, transmission,

distribution and supply of electricity, regulation by an independent electricity regulatory Commission of the electricity industry including the purchase, distribution, supply and utilization of electricity, the quality of service, tariff and other charges keeping in view the interest of the consumers and utilities, creation of an environment which will attract participation of private sector entrepreneurs in the electricity industry in the State and generally for taking measures conducive to the development and management of the electricity industry in the State in an efficient, economical and competitive manner and for matters connected therewith or incidental thereto.

26. 'Commission' is defined in Section 2(f) of the 1999 Act to mean the Uttar Pradesh State Electricity Regulatory Commission referred to in Section 3 thereof. Section 10 of the 1999 Act provides for the functions of the Commission including the one to determine the tariff for electricity-wholesale, bulk, grid or retail, as the case may be.

27. Section 13 provides for formation and functions of the Uttar Pradesh Power Corporation.

28. Section 24 occurring in Chapter VII of the 1999 Act provides for licensee's revenue and tariffs. Sub-section (1) of Section 24 states that the licensee shall follow the procedure prescribed in the regulations in calculating the expected revenue from charges which he is permitted to recover and in determining tariffs. Sub-section (2) of Section 24 provides for the factors which are relevant for the purpose of determining the tariffs in the following terms :

"24. *Licensee's revenues and tariffs.* -

(1)

(2) Save as provided in sub-section (3), the Commission may specify in regulations the terms and conditions for the determination of the revenue and tariffs and, in doing so, the Commission shall be guided by the following, namely :-

(a) the financial principles and their application provided in Sections 46, 57 and 57-A of the Electricity (Supply) Act, 1948 and in the Sixth Schedule thereto;

A (b) the factors which would encourage efficiency; economical use of the resources, good performance, optimum investments, observance of the conditions of the licence and other matters which the Commission may consider appropriate for the purposes of this Act; and

B (c) the interest of the consumers.”

29. Sub-section (3) of Section 24 of the Act provides that in the event the Commission departs from the factors specified in clauses (a) to (c) of sub-section (2), reasons therefor shall be assigned. Sub-section (6) of Section 24 read as under :

D “(6) The Commission may, after notifying its decision on the licensee’s calculations as provided in sub-section (5), determine whether the tariff charged by the licensee is required to be modified, and if so, require the licensee to modify the tariff or any part thereof with immediate effect.

30. Section 27 provides for enforcement of the orders and directions of the Commission. Section 28 provides for penal provisions. Section 36 provides for appeals from the orders of the Commission to the High Court.

E 31. The Commission in this case proceeded to determine the tariff keeping in view the fact that the electricity rates for industries in the State of Uttar Pradesh were quite high and any sharp increase in the rates would be counter productive. It, however, thought to impose 15% surcharge in relation to two types of supply, *inter alia*, keeping in view : (i) supply during peak hours; and (ii) supply of independent feeders in terms whereof continuous supply of minimum 500 hours in a month shall be assured.

32. Surcharge, therefore, was levied when the supply was to be made by the licensee on fulfillment of conditions laid down therein.

G 33. We may notice that the Commission itself directed discontinuance of the said surcharge with effect from 01.09.2001 by issuing a tariff order in the following terms :

H “The U.P.E.R.C. in terms has recorded that discontinuation of 15% surcharge is due to (i) inability/incapability on the part of

UPPCL for technical and operational reasons to ensure the guaranteed supply of 500 hours, (ii) it was difficult for UPPCL even to distinguish between the two consumers on independent feeder who asked for assured supply and who do not, (iii) most of the consumers having opted against this agreement and (iv) the financial implication was also negligible if the scheme was discontinued.”

34. Appellants-Consumers at all material times had been complaining in regard to irregular supply of electrical energy by the licensee.

35. A supplier of electrical energy is presumed to know as to whether it would be in a position to abide by the terms of supply imposed by the Commission. It was required to gauge its capacity to make uninterrupted supply of electrical energy to a class of consumers. Manufacturers of electrical energy belong to different classes. Manufacturers of certain categories of goods having regard to the nature of their products would require continuous supply of electrical energy; be it peak hours or otherwise. The licensees in such cases are required to make special arrangements for continuous supply of electrical energy to such class of consumers.

36. We have noticed hereinbefore that the consumers of electrical energy, who are before us, did not intend to have supply of electrical energy during peak hours. Their need in relation thereto, therefore, was not such which would have required continuous supply of electrical energy. If keeping in view such a contingency, the suppliers intended to have an assessment of their own capacity to supply uninterrupted electrical energy by asking for option of the consumers concerned, we do not see as to how thereby they can be said to have deviated from the tariff determined by the Commission. If one of the objects of the Commission was to ensure uninterrupted supply of electrical energy, it was for the supplier itself to assess its own capacity therefor. Surcharge may or may not be a part of tariff. Even if it is a part of tariff in respect thereof, the levy was conditional. If the supplier was not itself in a position to fulfill the condition, the question of insisting on implementation of the said provision would not arise.

37. While we say so, we are not unmindful of the fact that imposition

A of 15% surcharge was not dependent upon the exercise of option in terms of the tariff provision, which was confined to the supply of electrical energy during peak hours.

B 38. Those suppliers, who keeping in view of their capacity to supply uninterrupted electrical energy had made a representation and pursuant thereto the consumers had altered their position, cannot be permitted to take a different stand as the doctrine of promissory estoppel would apply against them. The said doctrine is premised on the conduct of party making a representation to the other so as to enable him to arrange its affairs in such a manner as if the said representation would be acted upon. C provides for a cause of action. It need not necessarily be a defence.

D 39. Application of said doctrine has been analysed by this Court in several judgments. We would only refer to some of them. In *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & Etio and Ors.*, [2007] 5 SCC 447 this Court upon noticing a large number of precedents including *State of Punjab v. Nestle India Ltd. and Anr.*, [2004] 6 SCC 465 opined as under :-

E “The doctrine of promissory estoppel would undoubtedly be applicable where an entrepreneur alters his position pursuant to or in furtherance of the promise made by a State to grant *inter alia* exemption from payment of taxes or charges on the basis of the current tariff. Such a policy decision on the part of the State shall not only be expressed by reason of notifications issued under the statutory provisions but also under the executive instructions. F Appellants had undoubtedly been enjoying the benefit of payment of tax in respect of sale/ consumption of electrical energy in relation to the cogenerating power plants.”

G 40. In *Express Newspapers Pvt. Ltd. and Ors. v. Union of India and Ors.*, [1986] 1 SCC 133 this Court held :-

H “179. It would appear that Denning, J. evoked two doctrines : (1) that assurances intended to be acted upon and in fact acted upon were binding; and (2) that where a Government department wrongfully assumes authority to perform some legal act, the citizen is entitled to assume that it has that authority, and he dismissed the

contention that estoppels do not bind the Crown by saying that 'that doctrine has long been exploded' and that the Crown cannot fetter its future executive action. Professor Wade points out that the proposition about wrongful assumption of authority evoked by Denning, J. was immediately repudiated by the House of Lords in a later case in which Denning, L.J. had again put it forward in *Howell v. Falmouth Boat Construction Company Ltd.*, L.R. [1951] A.C. 837, it is beyond the scope of this judgment to enter into a discussion as to how far Denning J's dictum can still be regarded as part of the common law in England. But there appears to be a school of thought in India laying down that the doctrine of promissory estoppel applies to the Government except under certain circumstances.

41. We may also notice that the Commission did not take any decision despite repeated communications by the Power Corporation. If in a situation of this nature where the licensee wanted some alteration in the tariff, it was expected of it to take a decision forthwith. It should not have whiled away the time and allowed the Power Corporation to proceed with its proposal. Such a conduct on the part of the Commission may invite the doctrine of acceptance *sub silentio*. The statute provides for a consultation and not a concurrence. It does not provide for the consequence of any alteration of tariff applicable to a particular category of consumer. It merely, as indicated hereinbefore, brings about the situation where a licensee found itself unable to supply electrical energy uninterruptedly to the consumer.

42. There can, however, be no doubt that ordinarily the doctrine of promissory estoppel would not be applied against statute. Sub-section 6 of Section 24 of 1999 Act *inter alia* empower the holder of a licence, to modify the tariff. If the implementation of tariff was dependent upon fulfillment of certain conditions precedent which in turn would be dependent upon the capacity of the producer of electrical energy to fulfil the same, in our opinion, no impropriety was caused by the Power Corporation to ask for the said option. The fact, that such an option had indeed been called for and pursuant thereto the consumers had altered their position is not in dispute. While dealing with a question as to whether

A an action on the part of the State to make a representation is contrary to a statute or not, in our opinion, a distinction should be borne in mind between an act which goes clearly contrary to the mandatory provisions thereof and a case where irregularities have been committed.

B 43. We may notice that in *The Paper Products Ltd. v. Commissioner of Central Excise*, [1999] 7 SCC 84 this Court held :-

C “As stated above, it is an admitted fact that by virtue of Circular No. 4/85 dated 23-7-1986 as clarified by Circular dated 7-8-1987, all the three products of the appellant are to be treated as the products of the printing industry and not that of the packaging industry. A change in the said view of the Board occurred for the first time by virtue of the Circular No. 6/89 dated 16-1-1989. Further, the Board itself by its subsequent Circular No. 29/89 dated 5-5-1989 has made it abundantly clear that the change notified in D Circular No. 6/89 will be prospective from the date of issuance of Circular No. 6/89, that is, from 16-1-1989. Therefore, it is clear that till the issuance of Circular No. 6/89 which is dated 16-1-1989 the products of the appellant, by virtue of the two Circulars dated 23-7-1986 and 7-8-1987, have to be classified under Chapter 49 of the Act as being products of the printing industry E eligible for exemption of duty under Notification Nos. 122/75 and 234/82 as applicable at the relevant time. The impugned show cause notices and consequent demand being *ab initio* bad inasmuch as the same was contrary to the existing Circulars of the Board, the same cannot be sustained.” F

44. In *Collector of Central Excise Vadodra v. Dhiren Chemical Industries*, [2002] 2 SCC 127 this Court held :-

G “ We need to make it clear that, regardless of the interpretation that we have placed on the said phrase, if there are circulars which have been issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the Revenue.”

H 45. The latter decision is also an authority for the proposition that a circular would be binding on the State in appropriate cases. We are not

oblivious of the decisions of this Court where the Commission has been held to be the sole tariff making authority. [See *Association of Industrial Electricity Users v. Respondent: State of Andhra Pradesh and Ors.*, [2002] 3 SCC 711] and *West Bengal Electricity Regulatory Commission v. C.E.S.C. Ltd. etc. etc.*, [2002] 8 SCC 715. In *CESC* (supra) this Court observed :-

“58. Having carefully considered the provisions of the Act as also the arguments advanced in this regard, we are of the opinion that under the 1998 Act, it is the Commission concerned and in the instant case the State Commission of West Bengal, which is the sole authority to determine the tariff, of course as per the procedure in the said Act.”

46. We may also notice that in *BSES Ltd. v. Tata Power Co., Ltd. and Ors.*, [2004] 1 SCC 195 this Court held :-

“16. The word "tariff" has not been defined in the Act. "Tariff" is a cartel of commerce and normal it is a book of rates. It will mean a schedule of standard prices or charges provided to the category or categories of customers specified in the tariff. Sub-section (1) of Section 22 clearly lays down that the State Commission shall determine the tariff for electricity (wholesale, bulk, grid or retail) and also for use of transmission facilities. It has also the power to regulate power purchase of the distribution utilities including the price at which the power shall be procured from the generating companies for transmission, sale, distribution and supply in the State. 'Utility' has been defined in Section 2(1) of the Act and it means any person or entity engaged in the generation, transmission, sale, distribution or supply, as the case may be, of energy. Section 29 lays down that the tariff for intra-State transmission of electricity and tariff for supply of electricity, wholesale, bulk or retail in a State shall be subject to the provisions of the Act and the tariff shall be determined by the State Commission. Sub-section (2) of Section 29 shows that terms and conditions for fixation of tariff shall be determined by Regulations and while doing so, the Commission shall be guided by the factors enumerated in Clauses (a) to (g) thereof. The Regulations referred to earlier show that generating

A companies and utilities have to first approach the Commission for approval of their tariff whether for generation, transmission, distribution or supply and also for terms and conditions of supply. They can charge from their customers only such tariff which has been approved by the Commission. Charging of a tariff which has not been approved by the Commission is an offence which is punishable under Section 45 of the Act. The provisions of the Act and Regulations show that the Commission has the exclusive power to determine the tariff. The tariff approved by the Commission is final and binding and it is not permissible for the licensee, utility or any one else to charge a different tariff.”

47. The abovesaid three decisions are distinguishable on facts. They were not dealing with a situation of the present kind. It was not a case where the supplier had difficulty of supplying uninterrupted electrical energy.

D 48. The proximity of issuance of the circular *vis-a-vis* Notification must also be noticed. The tariff was framed on 7th August, 2000 which came into force from 9th August, 2000 whereas the circular was issued on 8th September, 2000. The consumers exercised their option on 31st October, 2000. The judgment in the case of *LML* (supra) was delivered on 25th April, 2001. The circular dated 31st August, 2001 undoubtedly was issued in view of the said judgment. The said judgment did not deal with the questions raised before us. In any event if the licensee violates the tariff approved by the Commission appropriate legal action can be taken against it. But it would be too much to contend that for a mistake on the part of the Corporation, the consumers would suffer. In this view of the matter, we are of the considered view that the doctrine of estoppel shall apply in the cases where the promise was made. However, the principle of said doctrine would, however, not be applicable where no such promise was made.

G 49. Respondent-Kanpur Electricity Supply Company would not be bound thereby. Tariff is fixed for providing a service. Supply of electrical energy is a public utility service. While carrying out a function of this nature, the court of law must keep in mind the equitable principles also. Equity does not postulates that although the supplier did not fulfil its obligation, H still it would be entitled to the benefits envisaged under the law.

50. Similarly Uttaranchal Power Corporation also does not appear to have made such a promise. The doctrine of promissory estoppel in those cases also will have no application. A

51. In view of the fact that several matters are pending before the Commission on question of independent feeder we need not express any opinion thereupon. If any appeal is pending before the Commission on the said question it would decide the same independent of the same irrespective of the result of this decision.. We, therefore, without expressing any opinion on the said question, permit the appellants to agitate the same point before the Commission. B

52. We, therefore, allow these appeals only to the extent mentioned hereinbefore in terms of the promise made by the U.P. Power Corporation and allow the appeals on question of independent feeder to be withdrawn subject to the observations made by us hereinabove. C

53. Civil Appeal No.5789 of 2002 which relates to Kanpur Electricity Supply Company is dismissed. D

54. Civil Appeal No.1106 of 2007 filed on behalf of the Uttaranchal Power Corporation is allowed.

55. There shall, however, be no order as to costs. E

SLP (C) NO. 6721/2007

The only issue involved in this petition is the question of independent feeder and the appeal being pending before the Commission, this special leave petition is permitted to be withdrawn. F

K.K.T.

CA 5789 of 2002 dismissed,
CA No. 1106 of 2007 allowed,
CA No. 1622-1628 and C.A. No. 1716 of 2007 partly allowed.