PETITIONER:
M/S RAYMOND LIMITED & ANR., ETC. ETC.

Vs.

RESPONDENT:
MADHYA PRADESH ELECTRICITY BOARD & ORS.,ETC.ETC.

DATE OF JUDGMENT: 16/11/2000

BENCH:
B.N.Kirpal, Doraiswamy Raju, K.G.Balakrishna

JUDGMENT:

RAJU, J.
L.....I.....T.....T.....T.....T.....T.....T..J

The above batch of appeals arise out of a common judgment rendered in a batch of Writ Petitions by a Full Bench of the Madhya Pradesh High Court, since reported in AIR 1999 Madhya Pradesh 143 and also the consequential separate orders passed subsequently by the Division Bench dismissing the Writ Petitions. The Writ Petitioner - Industries filed appeals against that portion of the opinion of the Full Bench confining the declaration of law made for prospective application only and the dismissal of the Writ Petitions, whereas, the Electricity Board had filed appeals against that portion of the opinion of the Full Bench declaring the position of law that whenever the contracted supply falls short of 40% of the contract load then the Board shall be entitled to charge only for the reduced energy actually supplied and not for 40% of the contract load as minimum charges and thereby overruling an earlier decision of a Division Bench of the said High Court reported in M/s Gwalior Steels Private Ltd. vs M.P. Electricity Board (AIR 1993 M.P. 118). For the purpose of appreciating the points raised, we would advert to the facts in one of these appeals, particularly those in M/s Raymond Ltd. in C.A. Nos. 4218-4219 of 1998.

The appellant M/s Raymond Ltd., a company registered under the Companies Act, 1956 and having its cement manufacturing division within the State of Madhya Pradesh, entered into an agreement with the Madhya Pradesh Electricity Board on 27.3.1979 renewed periodically for supply and purchase of high tension electric energy for use in the manufacture of cement. The minimum contractual demand was for 33 MW (38,822 KVA) per day and clause 19 provided for the Tariff, while clause 21 stipulated the term relating to minimum guarantee in the following terms:

21(a) The consumer shall from the date of utilisation of electrical energy, or from the date of expiry of the three months notice mentioned in clause 2 hereof guarantee such minimum consumption as when calculated at the tariff (excluding charges due to fuel adjustment clause, meter rent and miscellaneous charges) will yield an annual revenue of Rs.5,40,000/- (Rupees Five Lakhs Forty Thousand Only) or pay this sum as a minimum. The deficit, if any, between the

guaranteed minimum charges and the actual charges shall be payable by the Consumer.

(b) The minimum guarantee specified in Clause 21(a) above shall at all times be without prejudice to realisation by the Board of the minimum prescribed under the tariff referred to in Clause 19 hereof.

(c) It hereby agreed further that the Board shall be entitled to fix and charge enhanced amount of annual revenue if the Board, on completion of all works for supply to the Consumer, finds it has incurred higher expenditure than the pre- estimated cost and in that case the Consumer shall pay to the Board the enhanced annual revenue so fixed by the Board without any objection and will not raise any dispute regarding the same.

Clause 19 of the agreement read as follows:

The Consumer shall pay to the Board every month, charges for the electrical energy supplied to the Consumer during the preceding month, at the Boards tariff applicable to the class of service and in force from time to time. A copy of the current H.T. tariff No.1-A of notification No.5/GA/147-A dated 11.03.1976 as amended applicable to the Consumer is set out in the Schedule attached to this Agreement.

Under the notification issued for High Tension for 132 KV/220 KV supply, the minimum tariff prescribed for cement factories is said to be as hereunder:

The consumer will guarantee a minimum monthly consumption (KWH) equivalent to 40% load factor of the contract demand. The consumer will be required to pay the energy charges on the said minimum monthly consumption plus the demand charges on the billing demand for the month as minimum monthly payment irrespective of whether any energy is consumed or not during the month. An average power factor of 0.9 will be applied for the calculation of corresponding unit of 40% load factor on contractual demand.

The Senior Account Officer concerned of the Electricity Board issued a bill dated 18.10.1995 raising a demand of Rs.2,83,18.581/- for the consumption period from 15.9.1995 to 15.10.1995. While recording the actual consumption in units of the electrical energy and the charges therefor, the ultimate bill and demand came to be raised on the basis of the minimum guarantee charges equivalent to 40% load factor of contract demand. This, according to the appellant, resulted in a demand of Rs.87,45,685/- in addition to the charges really due on the actual consumption of energy during the period in question. Challenging the same, Writ Petition No. 3616 of 1995 came to be filed, claiming either for refund or adjustment of the said excess amount against future demands, the said sum being for electrical energy not really consumed by them. During the pendency of the said Writ Petition, another bill dated 18.10.96 for the consumption period from 1.12.95 to 15.12.95 was said to have been issued for Rs.10,24,867/- towards minimum guarantee charges equivalent to 40% load factor of contract demand. As against this, Writ Petition No. 4711 of 1996 came to be filed challenging the demand and seeking for either refund of the same or for adjustment

thereof against future demands. The Electricity Board contested the claim of the appellants and others contending that as per the terms of the agreement entered into governing the supply of electrical energy, the sum demanded is quite, in accordance with law, justified and cannot be avoided by any of the appellants, and the details of their defence will be adverted to hereinafter, at the appropriate stage.

The batch of Writ Petitions initially came up before a Division Bench and keeping in view the earlier decision of a Division Bench reported in AIR 1993 M.P. 118 (Supra), by an order dated 11.9.97, the matter was placed before a Full Bench with the following observations:

After reviewing all these cases on the subject we are impressed with the arguments that the matter requires consideration by the larger Bench because notwithstanding the fact that as per the terms of the agreement, an obligation has been cast on the consumer 40% load factor of the contract demand and pay for the same every month. But there is no corresponding obligation on the Electricity Board to supply 40% load factor of the contract demand. When there is no corresponding duty on the part of the Electricity Board to supply minimum 40% of the contract demand load every month still the consumer is under an obligation to 40% of the contract demand load. This prima-facie sound in equitable. Therefore, we think it proper that since this is a larger issue which involve serious interpretation of the aforesaid tariff clause of the Electricity Board as much, yet the matter may be referred to a Larger Bench so that the matter can be placed beyond the pale of any further controversy in the matter. Papers maybe placed before the Chief Justice for constituting a Larger Bench.

The Full Bench, which heard the matter, by its opinion dated 5.3.98 held as follows:@@
JJJJJJJJJJJJJJJJJJJJJ

25. After considering all aspects of the matter, we are of the opinion that the view taken by the learned Division bench of this Court in the case of M/s Gwalior Steels Private Limited v M.P.Electricity Board, AIR 1993 Madh Pra 118, does not lay down a correct law and we hold with reference to Clause 23(b) of the Agreement read with Tariff, that whenever contracted supply falls short of 40% of the contract load, then the Board shall be entitled to charge for the reduced energy (actually supplied) and will not be entitled to charge 40% of the contract load. This interpretation which appears to us to be more equitable, just and reasonable shall be applicable only prospectively that is from the date of the order and will not have any retrospective operation. This is being done keeping in view that the Division Bench judgment of this Court has held the field since 1993 and the Board has been billing the consumers in the State on that basis and now since we are taking a different view from that of the Division Bench of this Court and we are interpreting the provision contrary to the view taken by the Division Bench in the above case of M/s Gwalior Steel Private Limited it would be more just and equitable to give this interpretation a prospective effect and not retrospective. Similar course of action was adopted by the Hon. Supreme Court in the case of L.Chandra Kumar v. Union of India, AIR 1997 SC 1125. Therefore, we hold that

the present interpretation will be prospective in nature and not retrospective.

Thereupon, the Writ Petitions came to be posted before the Division Bench, and apparently on account of the prospective declaration of law, no relief as prayed for in respect of particular demands for the earlier period could be granted and the Writ Petitions came to be dismissed. Hence, the appeals by the Writ Petitioners before the High Court. So far as the Electricity Board is concerned, they filed appeals, felt aggrieved by the judgment of the Full Bench insofar as it overruled the earlier judgment reported in AIR 1993 M.P. 118 (Supra). This Court, while granting leave in the Special Leave Petitions filed, on 24.8.98 directed the appeals to be placed before a Bench of three judges in view of the decision of this Court in Orissa State Electricity Board & Another vs IPI Steel Ltd. & Others reported in 1995 (4) SCC 320.

Heard the learned counsel appearing on either side. Shri C.S. Vaidyanathan, learned senior counsel for the Electricity Board, took us at length through the various clauses in the agreements and contended that the minimum charges expressly guaranteed in favour of the Board is not subject to either actual supply by the Board or consumption by the consumer and the payment of such minimum guarantee at a rate equivalent to 40% load factor of the contract demand is in substance a partial return for various investments in the various installations and to meet recurring expenses for maintenance and the consumers, having specifically undertaken to do so with no provision for any reduction or deduction in the contract as such for such reasons or grounds, cannot go back upon the solemn commitments and undertaking under clause 19. In reinforcing the said stand it is further contended that whenever the State Government pass orders under Section 22 B imposing power cuts/reduction/staggering in supply both parties are obliged to carry out the same and it would be futile for the consumers to read into the word consumption, the element of supply too. The load factor envisaged is said to be a measure of liability for minimum guarantee and not to cast any obligation on the Board to effect supply of energy to that extent so as to make it a condition precedent for casting liability on the consumer to pay the minimum guaranteed charges. It is further contended that the minimum guarantee has been fixed for various industries such as cement, steel etc. depending upon the different minimum load factors having regard to the investments on establishments and recurring maintenance expenditure and it is never considered to be part of the tariff but really relate to the realm of mechanics of price fixation, exclusively within the discretion of the Board and consequently the High Court could not have interfered with the same.

On behalf of the consumer industries Shri G.L.Sanghi, learned senior Advocate, made the leading arguments followed by Sarvashri A.K. Chitale, Bhimrao Naik, Ravindra Srivastava, Senior Advocates, and S.Ganesh, U.A.Rana, A.K.Sanghi and others. Adverting to clauses 1(a), 3(a), (b), 8, 11, 12, 18, 19, 21 and 23, it was strenuously contended that the contract must be construed as a whole in the context of the object underlying the same and the basic

contract being for supply continuously 33 KV electrical energy on day to day basis, it should really be meaningful and really useful and possible of consumption for the purposes of the industries concerned. It is further stated that the quality, the quantity and manner of supply has also to be taken into account in assessing the usefulness of the energy for industrial purposes and if it is shown that the supply actually made did not conform to these vital aspects of supply then the undertaking to pay the minimum guaranteed amount should itself have to go and any other construction would result in grave injustice besides being also inequitable and unconscionable. The further plea is that the Board during the period in dispute did not supply even the bare minimum quality of energy required to run the essential machineries to keep the manufacturing process going and continuous and the supply actually made was of poor quality, not really useful, erratic and non-continuous, fluctuating and accentuated with frequent trippings and in effect not only dislocating the normal working of the industries but also damaging the machineries and retarding production and therefore, no exception could be taken to the manner of construction placed on the clauses in the contract as well as the conclusions arrived at in respect of the statutory and other liabilities of the consumers, by the High Court. The learned counsel appearing also endeavoured to highlight some of the individual factual details pertaining to their cases and also invited our attention to some of the correspondence exchanged between parties regarding their grievances about the quality as well as the quantity of supply made to them. We may make it clear even at this stage that we do not propose to undertake an enquiry into or adjudication of such factual claims in these proceedings, particularly in the teeth of the manner of disposal given by the Division Bench after the opinion of the Full Bench and the desire of the learned counsel themselves to relegate to the High Court the matters, if need be, for determination of such claims.

Though there was an attempt for the consumers to contend that any shortfall in the supply of the total quantity of contract demand agreed to be made would relieve them of all liabilities from payment of the minimum guaranteed sum undertaken, we are unable to countenance any such claim, particularly in view of the very question that was actually referred to and decided by the Full Bench of the High Court and which on the face of it merely pertained to the liability or otherwise of the consumer industries to pay the minimum guaranteed charges even when the minimum 40% of the contract demand energy is not supplied during the relevant period by the Board. As a matter of fact, we find, in the light of the decision in AIR 1993 M.P. 118 (Supra) the correctness of which was taken up for consideration by the Full Bench, the question referred to the Full Bench itself is as to whether the consumer is required to pay minimum tariff of 40% of the contract load irrespective of the fact that even 40% of the contract load energy has been supplied or not to the consumer. Therefore, it is not permissible for the consumer industries in these appeals to invite a decision as to the liability or otherwise of the consumers to pay the minimum guaranteed charges undertaken, notwithstanding the factual position that the supply made was actually 40% or even more though not of the extent of total contract demand agreed to between the parties under the respective contracts. That apart, countenancing such claims to be agitated in proceedings under Article 226 of

the Constitution would amount to the extraordinary jurisdiction being permitted to be availed to rewrite the contract and read just contractual liabilities and thereby undertaking an adjudication of rights of parties flowing under a contract - a function normally assigned to the ordinary civil courts of the land.

Apart from making such submissions on the merits of their claim, on the basis of the very decision of the High Court and drawing sustenance to substantiate such claims, the consumer industries also attacked that portion of the judgment which purported to confine the declaration of law made for future application only by applying the principle of prospective overruling, contending that such principles cannot be invoked by the High Courts exercising jurisdiction under Article 226 of the Constitution of India and that the High Court, in any event, committed an error in not affording an opportunity to them to make their submissions on the applicability or otherwise of the principle of prospective overruling to the cases on hand.

Claims similar to the one sought to be now asserted, have come up for consideration before this Court, though in somewhat different background of facts and pattern of contracts between consumers and Electricity Boards, and either of the parties before us tried to lay their hands on some or the other of the observations made in those cases, to justify their respective stand. In M/s Northern India Iron and Steel Co. vs. State of Haryana & Anr. (1976 (2) SCC 877) the dispute arose between the parties as to whether in a situation where there were substantial power cuts and the Board was not able to supply the energy required by the consumer in terms of the contract entered into, the Board was entitled to get any demand charge and if so, to what extent and whether the State could demand any duty on such demand charge. This Court adverted to the existence of two well-known systems of tariff - one the flat rate system in which a flat rate on units of energy consumed and the other known as the two-part tariff system, meant for big consumers of electricity comprising of (i) what is known as 'demand charges to cover investment, installation and the standing charges to some extent and (ii) energy charges for the actual amount of energy consumed. The Court ultimately decided the question on the basis of the specific stipulation contained in clause 4(f) of the contract therein, which entitled the consumer to a proportionate reduction of demand charges/minimum charges, if the consumer was not able to consume any part of the electrical energy due to any circumstance beyond its control and for that purpose the circumstance of power cut which disabled the Board to give the full supply to the consumer because of the government order made under Section 22 B of the Electricity Act, 1910, was considered to be a circumstance which disabled the consumer from consuming electricity as per the contract.

In Bihar State Electricity Board & Anr. vs M/s Dhanawat Rice & Oil Mills (1989 (1) SCC 452), this Court while applying the decision in 1976 (2) SCC 877 (supra) construed clause 13 of the contract between parties in that case which specifically provided for the proportionate reduction of the annual minimum guarantee bills, as merely entitling the consumer to a proportionate reduction only and not completely avoid payment of annual minimum guarantee bills, even in cases where there was failure on the part of

the Board to supply electrical energy as per demand of the consumer under the contract. In Bihar State Electricity Board, Patna & Others vs M/s Green Rubber Industries & Others (1990 (1) SCC 731, this Court, while repelling a challenge to the clause in the agreement which provided for payment of minimum guaranteed charges irrespective of whether energy was consumed or not, observed that the same was reasonable and valid for the reason that the supply of electricity to a consumer involves incurring of overhead installation expenses by the Board which do not vary with the quantity of electricity consumed and also for the reason that those installations have to be continued and must be maintained until the agreement itself comes to an end. Such a stipulation was also considered to be not by way of penalty for not consuming the specified quantity of energy but more for the obligation of the Board to keep the energy available to the consumer at his end. Again in Andhra Steel Corporation Ltd. & Others vs Andhra Pradesh State Electricity Board & Others (1991 (3) SCC 263) this Court held that the purpose of prescribing minimum charges is to ensure that no undue loss is caused to the Electricity Board due to the tendency of the consumer to have connection for inflated requirement and the Boards agreement to meet such requirement and the readiness to maintain the supply up to that requirement, even if no or very little energy is consumed. The decision of the State Government under Section 78 A of the Supply Act, 1948, to fix concessional tariff was also held not sufficient to absolve the consumer from the liability undertaken to pay the minimum guaranteed charges. In coming to such a conclusion, reliance has also been placed upon the decisions reported in 1990 (1) SCC 731 (Supra) and The Amalgamated Electricity Company Ltd. vs The Jalgaon Borough Municipality (1975 (2) SCC 508) wherein this Court observed as follows:

9. Moreover it is obvious that if the plaintiff company was to give bulk supply of electricity at a concessional rate 0.5 anna per unit it had to lay down lines and to keep the power ready for being supplied as and when required. The consumers could put their switches on whenever they liked and therefore the plaintiff had to keep everything ready so that power is supplied the moment the switch was put on. In these circumstances it was absolutely essential that the plaintiff should have been ensured the payment of the minimum charges for the supply of electrical energy whether consumed or not so that it may be able to meet the bare maintenance expenses.

In Orissa State Electricity Board & Another vs IPI Steel Ltd. & Others (1995 (4) SCC 320) this Court had an occasion once again to deal with these issues in the light of the earlier case law on the subject. This Court explained therein the meaning of the expressions maximum demand charges, consumption charges and dealt with the role as well as purpose of installing two meters - the normal meter meant for recording the total quantity of energy consumed over a given period, in variably a month and trivector meter meant for recording the highest level/ load at which the energy is drawn over any thirty minute period in a month. While explaining the two part tariff system meant for big/bulk consumers of electricity, this Court has emphasised and reiterated the justification and reasonableness of the same, observing the following:

Normally speaking, a factory utilises energy at a

broadly constant level. May be, on certain occasions, whether on account of breakdowns, strikes or shutdowns or for other reasons, the factory may not utilise energy at the requisite level over certain periods, but these are exceptions. Every factory expects to work normally. So does the Electricity Board expect - and accordingly produces energy required by the factory and keeps it in readiness for that factory - keeping it ready on tap, so to speak. As already emphasised, electricity once generated cannot be stored for future use. This is the reason and the justification for the demand charges and the manner of charging for it. There is yet another justification for this type of levy and it is this: demand charges and consumption charges are intended to defray different items. Broadly speaking, while demand charges are meant to defray the capital costs, consumption charges are supposed to meet the running charges. Every Electricity Board requires machinery, plant, equipment, sub-stations, transmission lines and so on, all of which require a huge capital outlay. The Board like any other corporation has to raise funds for the purpose which means it has to obtain loans. The loans have to be repaid, and with interest. Provision has to be made for depreciation of machinery, equipment and buildings. Plants, machines, stations and transmission lines have to be maintained, all of which require a huge staff. It is to meet the capital outlay that demand charges are levied and collected whereas the consumption charges are levied and collected to meet the running charges.

Adverting to the actual grievance of the consumer in that case that where the cut in supply, be it even for the reason of an order passed by the Government under Section 22 B of the 1910 Act, is only to the extent of half of the contract demand, it was held that during such periods of restricted supply the consumer had to pay the energy charges for the actual consumption plus maximum demand charges for the maximum demand availed of by him at the rate prescribed in the agreement. As in the cases before us, it seems to have been projected there also that even during the periods of restricted supply there were frequent cuts and break downs as well as irregular supply and the Board cannot levy full demand charges merely because in any thirty minute period in a given month, the power is availed at the maximum demand level, and that except the actual consumption charges nothing further, particularly the full demand charges could be collected. After referring to the decisions reported in 1990 (1) SCC 731 (Supra), and the other decisions which were quoted with approval therein such as AIR 1936 Cal.265 (Saila Bala Roy vs Chairman, Darjeeling Municipality and 1969 (1) Madras Law Journal 69 (M.G.Natesa Chettiar vs Mad. SEB) which were quoted with approval earlier by this Court, the challenge by the consumer came to be rejected. It was also observed that breakdowns and trippings etc. which are not confined to periods of restricted supply alone but may occur during normal times also does not affect the liability of the consumer and only if there is no supply at all for considerable periods, the situation would be different, whether it happens during the period of normal supply or restricted supply, though on facts the case considered by the Court was not found to be one such.

We have carefully considered the submissions of the learned counsel appearing on either side, in the light of the provisions of the 1910 Act and 1948 Act, the contract entered into between the parties, the general conditions for

supply and the tariff rates prescribed as well as the governing principles as laid down by this Court. The terms and conditions of supply, as envisaged in the contract and the statutory provisions and general conditions have been standardised for uniform application among consumers with variations merely necessitated by the different class 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. The further attempt made to contend that the failure on the part of the Board to effect supply up to the contract demand level relieved the consumers from the obligation undertaken to pay a minimum guaranteed sum per month, as though the contract demand is the minimum guaranteed for supply, not only lack any basis in law or on the terms of the contract governing the supply but also directly runs counter to the terms in the contract which makes different stipulations relating to contract demand and the minimum guarantee in the form of a portion or percentage of the contract demand, only. The question of exonerating the consumer from the liability undertaken to pay minimum guaranteed charges for a month and billing only for the actual consumption of energy or allowing a consumer to pay the rates on the actual consumption of electricity measured in units will and can arise and has also been considered for determination only in case the supply by the Board itself fell short of the minimum of energy, the consumption of which go to make up the minimum guaranteed sum. It is well settled and there could be no controversy over the position that if only the supply was available for consumption but the consumer did not consume so much of energy up to the extent of the obligation cast upon him to pay the minimum charge, there is no escape from the payment of the minimum guaranteed charges, except in very exceptional cases envisaged under clause 23 of the contract, and that too subject to the stipulations and restrictions contained therein.

In the light of the serious controversies raised as to the duration, quantity, manner and quality of supply of electrical energy expected to be made by the Board, it becomes inevitably necessary to decide first the question relating to the unit or standard of measurement, which invariably must have relevance, in our view, only to the billing cycle envisaged in the contract and the tariff which is only a month. The payment by the consumer is to be on the electrical energy supplied during the preceding month. The parties have also agreed that the maximum demand of the supply is to be measured with reference to the month at the point of supply of the consumer and will be determined on the basis of the supply during any consecutive thirty minutes in that month as recorded by the trivector meter. The power factor, according to the statutory conditions of supply which form part and parcel of the supply of energy to a consumer, is also to be determined with reference to the supply of energy to a consumer, and that factor is also to be determined with reference to the supply of electrical energy made during a month. The minimum consumption of energy guaranteed, as per the tariff notification, is also in terms of a monthly minimum. While that be the position, it is futile for the consumers to contend that they will not be liable to abide by the minimum guaranteed charges undertaken, unless on every day of the month/year and during

the twenty four hours or round the clock the load factor and power supply agreed to be made, at one and is the same level without any shortfall, tripping or low voltage. The provisions of Section 56 of the Contract Act, 1872 sought to be relied upon have no relevance or application to the cases on hand. Countenancing of such claims would not only defeat the very purpose, object and aim of providing for a minimum charges guarantee clause but would ultimately result in mutilation of the very fabric of tariff structure rendering thereby the schemes of generation and supply of power at the agreed concessional rates uneconomical and non-viable for the Board. This would also result in the re-writing of many of the clauses in the contract and rendering nugatory the tariff pattern and system itself throwing into disarray and disharmony the efficient execution of the power supply schemes.

The further claim asserted on behalf of the consumers that since what was agreed to between the parties was to make the supply available continuously except during situations envisaged in clause 11 of the contract, the failure to effect such supply by the Board renders the very contract relating to the payment of minimum guaranteed charges unenforceable against them, does not merit acceptance in our hands. It cannot legitimately be contended that the word continuously has one definite meaning only to convey uninterruptedness in time sequence or essence and on the other hand the very word would also mean 'recurring at repeated intervals so as to be of repeated occurrence'. That apart, used as an adjective it draws colour from the context too, and in the light of the texture of clause 11 as well as clause 12 and clause 23 (b) and also Section 22 B of the 1948 Act and orders passed therein which are binding with equal force upon both the consumer and the Board, the word is incapable of being construed in such absolute terms as endeavoured by the learned counsel for the consumers.

The High Court was of the view that it would be more just, equitable and reasonable to hold whenever the contracted supply fell short of 40% of the contract load which alone accounts for the minimum guaranteed sum, then the Board shall be entitled to charge for the reduced energy actually supplied and not the minimum of 40% of the contract demand. As noticed supra, on behalf of the consumers, not only inspiration is drawn to support their claim in this regard but an extreme stand is also sought to be taken by contending that in such cases as also in cases where the supply is not of the contracted load and to the extent of the agreed load factor without interruptions so as to cause any disturbance or dislocation of the smooth functioning of their industry concerned, the obligation under the clause in the agreement providing for the payment of the minimum guaranteed charges to the tune of 40% of the contract load also would automatically stand snapped and not only that the consumers will be relieved of their liability but they can be made answerable only to the extent of energy actually supplied and which has been consumed. There is no justification for countenancing this extreme stand either under any of the provisions of the Act or the regulations made thereunder or under the provisions of the contract entered into between the parties and tariff schedule notified and made binding upon the consumers. This would, if accepted, give credence to the plea vaguely and indirectly projected as though the contract demand is the

minimum supply undertaken to be made by the Board, whereas in contrast clause 23 of the general conditions for supply of electrical energy by the Board applicable to all consumers in unmistakable terms stipulate that the maximum demand agreed to be supplied and taken under the agreement shall be the consumers contract demand and that if as a matter of fact in any given case the consumption exceeds this level, then only the contract provides for additional charges to be paid by the consumers.

As a matter of general principle, any stipulation for payment of minimum guarantee charges is unexceptionable, in a contract of this nature wherein, the Board which undertakes generation, transmission and supply of electrical energy has to, in order to fulfil its obligation lay down lines and install the required equipment and gadgets and constantly keep them in a state of good repair and condition to render it possible for the consumer to draw the supply required at any and all times. These commitments are irrespective of the capacity of the Board to generate at a given point of time or during a relevant period the total quantum required for the consumption of all consumers of various categories or even during the days of breakdown envisaged or staggering necessitated on account of orders of Government regulating the distribution and consumption of energy as well as during periods when for reasons personal or peculiar to the consumers or even beyond their control the consumption is not and could not be of the mutually agreed extent. The Board undertakes to generate and supply energy, in public interest also at concessional rates of varying nature and it cannot be stated that the rates so fixed invariably are to meet the expenditure incurred by the Board for generation and supply of energy, to the last pie. Consequently, if either in the general conditions and terms of supply or the contract or the tariff rates as the case may there be any stipulation, in clear and unmistakable terms that the liability relating to the payment of guaranteed minimum charge could or will be enforced irrespective of the actual consumption rate of the consumer or even dehors the capacity or otherwise of the Board to supply even the minimum of the contract demanded energy, there could be no valid objection in law for any such stipulation being made and the consumer will be bound to honour such commitment. The contract for the supply of electrical energy cannot be treated on par with any other contacts of mutual rights and obligations, having regard to the peculiar problems involved in the generation, transmission and supply which invariably depend upon the vagaries of monsoon as well short supply to them of the required coal and oil in time and similar other problems over which the Board cannot have any absolute control. The recurring commitments relating to constant and periodical maintenance of supply lines and other installations cannot be anytheless even during such times and such onerous liabilities cannot be left to fall exclusively upon the Board and it is only keeping in view all these aspects, payment of minimum guaranteed charges is necessarily in built in the tariff system of the Board and the reasonableness or legality of the same cannot be considered either in the abstract or in isolation of all these aspects. It is for this reason that all over and the consumer is also made to share the constraints on Boards economy even during such periods. In fact the tariff inclusive of such a provision for payment of a minimum guaranteed sum irrespective of the supply/consumption factor appears to be

the consideration for the commitments undertaken by the Board as a package deal and it is not possible or permissible to allow the consumer to wriggle out of such commitments merely on the ground that the Board is not able to supply at any point of time or period the required or agreed quantum of supply or even supply up to the level of the minimum guaranteed rate of charges. Tinkering with portions of contracts for any such reasons, merely on considerations of equity or reasonableness pleaded for and vis-a-vis one party alone will amount to mutilation of the whole scheme underlying the contract and render thereby the very generation and supply of electrical energy economically unviable for the Board. Consumers, who enter into such commitments openly and knowing fully well all these hazards involved in the generation, transmission and supply, will be estopped from going behind the solemn commitment and undertaking on their/its part under the contract. The High Court does not seem to have properly appreciated the ratio of the several decisions noticed except merely referring to them in extenso, and yet ultimately just, arrived at a conclusion merely for the reason that the court considered it to be 'more equitable, just and reasonable to do so.

So far as the cases under consideration and the liability of the consumers relating to minimum guarantee are concerned, the relevant clause relating to minimum guarantee charges as well as the tariff notification relied upon, would go to show that what was guaranteed was not the payment of a flat sum or amount of money to be calculated with reference to a particular number or percentage of units, dehors the quantum of electrical energy distributed and supplied by the Board. In other words, the guarantee was of such minimum consumption as when calculated at the tariff.. will yield a particular monthly/annual sum to the Board. Even going by the tariff notification which prescribes also a minimum entitling the Board to collect it [vide clause 21 (b)] it merely casts liability on the consumer to guarantee a minimum monthly consumption equivalent to 40% load factor of the contract demand. Consequently, for the consumer to honour his/its commitment so undertaken to give a minimum consumption there should essentially be corresponding supply by the Board at least to that extent, without which the consumption of the agreed minimum is rendered impossible by the very lapse of the Board. The minimum guarantee, thus, appears to be not in terms of any fixed or stipulated amount but in terms of merely the energy to be consumed. The right, therefore, of the Board to demand the minimum guaranteed charges, by the very terms of the language in the contract as well as the one used in the tariff notification is made enforceable depending upon a corresponding duty, impliedly undertaken to supply electrical energy at least to that extent, and not otherwise. It is for this and only reason we find that the ultimate conclusion arrived at by the Full Bench of the High Court does not call for any interference in these appeals.

Shri C. S. Vaidyanathan, learned senior counsel for the Board, further contended that the High Court committed an error in overlooking the facts placed on record in the form of statements showing the units which were made available to the consumers during the periods in question and the units determined on which the minimum charges became payable and that those statements sufficiently substantiated the position that the units made available were more than sufficient to cover the payment of minimum charges and the

contentions to the contrary that the Board had not been able to supply even 40% of the contract demand to insist upon the payment of minimum guaranteed charges has no basis or merit of acceptance. In this connection, our attention has been drawn by the counsel on either side to those materials and particulars placed along with the counter affidavits/Return of the Board filed before the High Court, the annexures thereto and some of the correspondence between the officers of the Board and the consumers concerned. Unfortunately, even the Division Bench, before which the matters were posted for further hearing and disposal pursuant to the opinion given by the Division Bench, did not undertake to adjudicate this vital aspect of the issues involved which, in our view, became very much relevant and essential in the light of the opinion of the Full Bench. Apparently, on account of the fact that the Full Bench confined the operation of its decision for future application only, and the liability for the periods under challenge therefore stood governed by the position of law as declared by the decision in AIR 1993 MP 118 (supra) which held the field, the Division Bench might have thought such an exercise to be superfluous. But, in the light of our conclusion that, as the matter stands, on the basis of the existing clauses in the contract as well as the Tariff notification the minimum guarantee assured was of the monthly consumption equivalent to 40% load factor of the contract demand which obligated the Board also to ensure supply at least to that extent to insist upon the payment of the minimum charges, it becomes necessary to undertake an exercise, to decide in individual cases, the question of actual supply said to have been made in order to find out whether the units of energy to the extent of minimum of 40% of the contract demand has been made available for consumption. For this purpose, these cases have to be necessarily and are hereby remitted to the High Court, for being restored to their original number to find out the actual position about claim/dispute relating to the supply of energy equivalent to 40% load factor of the contract demand. Wherever the High Court finds this fact in favour of the Board, the consumer has to pay the minimum guaranteed consumption charges as claimed, without any further challenge to the said liability. Both parties shall be at liberty to substantiate their respective stand in the light of the materials already on record or that may be produced further before the High Court in the relegated proceedings.

So far as the challenge made to the judgment of the Full Bench of the High Court, in confining its operation and applicability only for future period, Shri G.L. Sanghi, learned counsel, followed by the others have strongly contended that the High Court as such cannot apply the principle of prospective over ruling. Reliance in this regard has been placed upon the decision reported in State of H.P. & Others vs Nurpur Private Bus Operators Union & Others [1999 (9) SCC 559] to which one of us (B.N.Kirpal, J.) was a party. Passing reference has been made to the decision in Golak Nath vs State of Punjab (AIR 1967 SC 1643) and the observation contained therein that the doctrine of prospective overruling can be invoked only in matters arising under the Constitution and that it can be applied by the Supreme Court of India. The decision in Golak Naths case as such was subsequently overruled by the decision reported in Kesavananda Bharati vs State of Kerala (AIR 1973 SC 1461) though not specifically on this point. Reliance has also been placed upon the decision reported in M/s

K.S.Venkataraman & Co. vs State of Madras (AIR 1966 SC 1089) even to contend that if the High Court had no such power, this Court while hearing an appeal from such judgment of the High Court, will equally cannot exercise such powers. This submission of the learned counsel overlooks the vital fact in that case that not only the High Court was found to exercise under Section 66 of the Income Tax Act, 1922, a special advisory jurisdiction the scope of which stood limited by the section conferring such jurisdiction but even the appeal to the Supreme Court having been made only under Section 66 A (2) of the said Act was noticed to hold that the jurisdiction of this Court also does not get enlarged and that the Supreme Court can also only do what the High Court could do. Apart from the fact that the writ jurisdiction conferred upon High Courts under Article 226 of the Constitution does not carry any restriction in the quality and content of such the powers, this Court could always have recourse to the said doctrine or principle or even dehors the necessity to fall back upon the said principle pass such orders under powers which are inherent in its being the highest court in the country whose dictates, declaration and mandate runs throughout the country and binds all Courts and every authority or persons therein and having regard to Articles 141 and 142 of the Constitution of India. The Appellate powers under Article 136 of the Constitution itself would also be sufficient to pass any such orders. This Court has been from time to time exercising such powers whenever found to be necessary in balancing the rights of parties and in the interests of justice. [vide: Union of India vs Mohd. Ramzan Khan 1991 (1) SCC 588; Managing Director ECIL vs B. Karunakar & Others 1993 (4) SCC 727; India Cement Ltd. vs State of Tamil Nadu AIR 1990 S.C.85.] The decision reported in 1999(9) SCC 559 (Supra) at any rate is no authority for any contra position to deny such powers to this Court.

The peculiar facts and circumstances of these cases and the interests of justice, in our view, necessitate the application of the Law declared therein only prospectively. The electricity Board is a public authority of the State engaged in the generation and supply of electrical energy at concessional rates to different class and category of consumers in the State. The construction placed by us is likely to have serious and adverse impact upon the finances and the economic viability of the scheme underlying tariff and minimum guarantee charges already determined. It is impossible for the Board, at this point of time to make up or change the pattern of tariff retrospectively to retrieve itself in this regard for the past period. The construction and execution of various developmental schemes and works are likely to suffer thereby a serious set back also. Keeping in view all these aspects we will be justified in declaring that the law declared in these cases shall be for future application only and not for the earlier period.

For all the reasons stated above, the appeals are disposed of in the light of the directions and observations contained herein and the High Court shall restore the proceedings to its original file and dispose of the same in accordance with the directions contained in this judgment. The parties will bear their respective costs.