In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No.18190 of 2022

Damodar Valley Corporation

Vs.

The Ombudsman and others

For the petitioner	:	Mr. Kishore Dutta, Mr. Deepak Agarwal, Mr. Prasun Mukherjee
For the respondent no.1	:	Mr. Pratik Dhar, Mr. Ritwik Pattanayak
For the respondent nos. 2 to 5	:	Mr. Nilanjan Bhattacharyya
Hearing concluded on	:	15.09.2022
Judgment on	:	09.11.2022

Sabyasachi Bhattacharyya, J:-

1. The Eastern Railway, being respondent no.3 herein, entered into an agreement with the petitioner DVC on February 23, 2017 for getting supply of electrical energy at 132 kV. During the lockdown period arising in the context of the Covid-19 pandemic, the Senior Divisional Electrical Engineer of Eastern Railway requested the DVC in writing on August 26, 2020, to lower the minimum contract demand fixed in the agreement from 5 mva to 1 mva. On September 2, 2020, the DVC intimated that the reduction of contract demand was technically not feasible with the existing metering Current Transformer (CT).

2. The Railways approached the Chief Grievance Redressal Officer (CGRO) on February 2, 2021 and the CGRO passed his final order on June 7, 2021, thereby directing the DVC to hand over the specification of non-standard CT and approved vendor list of DVC to Railways within seven days from the date of the order and to complete the installation of new CT within 30 days from the receipt of the same from the Railway. It was further directed that after successful installation of the CT, the DVC would reduce the contracted demand from 5 mva to 1 mva of Eastern Railways Topsi Off Track Point from the ensuing delivering cycle. It was further observed that the said reduction from 5 mva to 1 mva at 132 kV voltage level was to be treated as a special case for the Indian Railways and act as a temporary measure with due consideration of the situation arising due to the Covid-19 pandemic.

3. The respondent no.3 preferred an appeal against the said order of the CGRO to the Ombudsman on July 8, 2021, that is, the very next day.

4. A draft settlement order was passed by the Ombudsman on September 9, 2021. Subsequently, the Ombudsman passed his final order on November 23, 2021, thereby observing that from the first part of the year 2020 to October 2021 the running of all trains were disrupted and for that reason the claim of the appellant to change the maximum demand from 5 mva to 1 mva is not improper or unjustified and for the said situation, the consumer Railway is not responsible in any way and it has been caused for some unforeseen reason and the consumer is always entitled to proportionate relief. Accordingly, the Licensee/DVC was directed to regenerate the bills from December 2020 to October 2021 as per 1 mva contract demand. All the payment made during the said period shall be adjusted against the regenerated bill as stated. The licensee was further directed to withdraw the disconnection notice if it was issued for non-payment of electric bills.

5. The DVC has preferred the instant writ petition against the said appellate order of the Ombudsman.

6. Learned senior counsel appearing for the DVC contends that the Ombudsman's order suffers from various irregularities and illegalities.

7. First, the order of the CGRO is in the nature of an agreed order bordering on the lines of a consent order. Hence, no appeal lies against the same.

8. Secondly, the respondent-Railways did not raise any billing dispute before the Ombudsman and hence, the Ombudsman did not have inherent powers to pass the direction regarding regeneration of bills.

9. In the absence of any finding that the disconnection notices were illegal/contrary to law, it is argued that the Ombudsman could not have made the direction.

10. Learned Senior Counsel for the DVC places reliance on Regulation 10.4 of the West Bengal Electricity Regulatory Commission (Guidelines for Establishment of Form of Grievances of Consumers and Time and Manner of Dealing with Such Grievances by the Ombudsman) Regulations, 2013 (in short, "the 2013 Regulations"), submitting that the said provision empowers the Ombudsman to prepare a draft settlement order only in connection with the disputed part of the grievance. Since the billing dispute was not a part of the grievance and the draft settlement order did not contain any proposed direction in respect of billing, such direction in the final order is contrary to Regulations 10.4 and 10.5 of the 2013 Regulations.

11. Learned Senior Counsel next cites the judgment of the Supreme Court in *Raymond Ltd. and another Vs. M.P. Electricity Board and others*, reported at *(2001) 1 SCC 534*, for the proposition that minimum guarantee is a component to enable the licensee to fulfill its obligation to lay down lines, install equipment and gadgets and to keep it in good repairs at all times. Shortfall in supply by the licensee or inability of the consumer to consume electricity as per the contract demand does not relieve the consumer from paying the minimum guarantee charges. Any reduction in the bill would amount to re-writing the contract. It was further held that contracts such as power purchase agreements are not contracts of mutual rights and obligations.

12. Learned senior counsel submits that although the judgment was delivered in the light of the provisions of the Electricity Act, 1910, the law settled in such judgment would be applicable in respect of the Electricity Act, 2003 as well.

13. Learned senior counsel appearing for the Electricity Regulatory Commission also makes his submissions, thereby seeking to elaborate the scope and applicability of the concept of minimum guaranteed charge.

14. Learned counsel for the respondent nos. 2 to 5 (Railways) argues that none of the grounds of challenge taken by the DVC are tenable in the eye of law.

15. It is disputed that the order of the CGRO was in the nature of an agreed order, as the Railways never agreed to the direction of the CGRO to purchase the necessary equipment of downgrading the power supply. Hence, there was no bar in preferring the appeal before the Ombudsman.

16. It is further argued by the Railways that in terms of Clause 21 (2) of the Power Purchase Agreement dated February 23, 2017, if the consumer desires reduction of contract demand mentioned in the schedule, such reduction will be effected within the next billing cycle from the date of receipt of the application from the consumer and the effect of it on tariff will be from the next billing cycle.

17. As such, it is argued that the DVC acted without jurisdiction in refusing to reduce the contract demand, which would have a direct effect on the minimum guaranteed price. Hence, the Ombudsman was justified in directing regeneration of the bill for the relevant period, during which the Railways could not operate at full strength due to the pandemic.

18. It was specifically communicated to the DVC, it is argued, that the Railway was ready to bear the cost of the new CT, if procured and installed by the DVC at Topsi. Also, the Railways never accepted the proposal of the DVC for supply at 33 kV, which was without any reasonable basis. It is argued that conversion of 132 kV/ 25 kV would require replacement of power transformation, all switch gears and allied equipment in the sub-station which translates to construction of a new Green Field Traction Sub-Station in terms of cost and time involved and is against the Railway guidelines.

19. Learned counsel for the Railways further argues that it was categorically mentioned in its application that contract demand reduction would be for a temporary period and would be restored to 5 mva since the Railway traffic normalized after the pandemic lockdowns. The DVC's proposal of such huge conversion work for such temporary reduction was uncalled for.

20. It is reiterated that one of the components of challenge before the Ombudsman was in respect of raising energy bills as per reduced contract demand of 1 mva instead of 5 mva and against the notice of disconnection of the Topsi TSS. After the draft order, the Railway submitted its written submission, clearly asserting its request of complete withdrawal of disconnection notice. It was assured in the last hearing dated August 24, 2021 that the issue of submission of fresh corrected bill for the period from December 2020 based on 1 mva contract demand had not be addressed in the draft settlement order.

21. It is further submitted that, in terms of the Section 42 of the Electricity Act, 2003, it was well within the power and authority of the Ombudsman to pass award on the issues raised by the Railways.

22. Thus, the Ombudsman, in its capacity as an alternate dispute settlement forum created under the 2013 Regulations, need not have followed strict rules of procedure.

23. Hence, it is contended that the Ombudsman was justified in passing the impugned order on the challenge of the Railways.

24. For the adjudication of the present dispute, the provisions of the power purchase agreement entered into between the parties on February 23, 2017 acquires relevance.

25. It is clear from the said agreement and the communications between the parties, as annexed to the writ petition and the affidavits-in-opposition and reply, that the "billing period" was monthly.

26. Clause 4 of the said agreement contemplated a Force Majeure clause. The sudden lockdowns due to the pandemic was not a man-made disaster but the consequence of a natural calamity in the form of the Covid-19 disease which acquired multi-national proportions.

27. Again, Clause 21(2) of the Power Purchase Agreement clearly provides that in the event the consumer desires reduction of contract demand mentioned in the schedule, such reduction will be effected *within the next billing cycle from the date of receipt of the application* from the consumer and the *effect of it on tariff will be from the next billing cycle.*

28. The only additional rider stipulated in the proviso is to the effect that further reduction of the contract demand shall be effected on the basis of an application not before one year from the date of commencement of supply to the consumer. Any subsequent request for reduction of contract demand shall be made effective not before one year from the date of the previous reduction.

29. In the present case, the power purchase agreement was entered between the parties on February 23, 2013 whereas the request for reduction of contract demand from 5 mva to 1 mva was made by the Railways on August 26, 2020, that is, much after expiry of one year subsequent to the commencement of the contract. Nothing has been pleaded to indicate that there was any previous reduction within a year. Hence, as specifically provided in sub-clause (2) of Clause 21 of the Agreement, the reduction had to be effected "within the next billing cycle from the date of receipt of the application" from the consumer and the effect of it on tariff would be from the "next billing cycle".

30. It is evident from the agreement and other communications between the parties that the billing period was monthly, as indicated above. Hence, it was the bounden duty of the DVC to reduce the contract demand from 5 mva to 1 mva from the next billing cycle after the request of the Railways on August 26, 2020. The power purchase agreement does not contemplate any deviation from such time-frame on the score of technical feasibility as such, which is sought to be set up as an excuse by the DVC. Thus, the ground of lack of "technical feasibility", as sought to be set up by the DVC for not downgrading the contract demand, is not tenable in the eye of law or in terms of the agreement itself.

31. Hence, the DVC acted patently *de hors* its own contract in refusing to reduce the contract demand from the 5 mva to 1 mva at least during the pandemic period.

32. Clause 21 of the agreement does not distinguish between a temporary and permanent reduction of contract demand and the time-frame of next billing cycle applies equally to both.

33. Inasmuch as the objection taken by the DVC with regard to the variation between the draft settlement order and the final order of the Ombudsman, it is palpably clear from the records that the final order was not beyond the purview of the draft settlement order. Rather, the direction to regenerate bills taking the contract demand to be 1 mva, as reduced from 5 mva, was merely consequential to the findings made otherwise by the Ombudsman both in the draft settlement order and the final order. There is no substantial variance between the two.

34. Although the first request of reduction was made by the Railways as long back as in the month of August, 2020, the Ombudsman has directed regeneration of bills only from the month of December 2020 till October 2021 in terms of the 1 mva contract demand. As a corollary, the disconnection notice was set aside as a whole. In fact, the direction to regenerate bills does not pertain to a 'billing dispute' simpliciter but relates to the more fundamental question as to whether the DVC was justified on principle in refusing to reduce contract demand from 5 mva to 1 mva during the relevant period. Such question having been decided in favour of the Railways, it was a merely consequential direction on the DVC to regenerate the bills from December 2020 to October 2021, that is, during the pandemic lockdown period.

35. The same was well within the ambit of the challenge preferred by the Railways and as such, it is not correct to contend that it was beyond the scope of the dispute adjudicable by the Ombudsman.

36. Inasmuch as *Raymond Ltd.* (supra) is concerned, the same merely elaborated the concept of minimum guaranteed charges. It was held by the Supreme Court that if either in the General Conditions and terms of supply or the contract or the tariff rates, as the case may be, there is any stipulation, in clear and unmistakable terms, that liability relating to the payment of guaranteed minimum charge could or will be in force irrespective of the actual consumption rate of the consumer or even *de hors* 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. It was observed further that 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 for allowing the consumer to pay the rates on the actual consumption of electricity measure in units will and can arise only in case the supply of the power itself fell short of the minimum of energy, the consumption of which goes to make up the minimum guaranteed sum. 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 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.

37. There cannot be any quarrel with such proposition of law. In the present case, the Railways have not disputed such proposition at all. The power contract agreement between the parties itself stipulated, in sub-clause (2) of Clause 21 thereof, that in the event the consumer desires a reduction of contract demand mentioned in schedule 1, which was 5 mva (initial) and 7.5 mva (final), such reduction will be effected within the next billing cycle from the date of receipt of the application from the consumer and the effect of it on tariff will be from the next billing cycle. None of the exceptions stipulated in the proviso to the said sub-clause are applicable to the present case, as this was the first request for reduction of contract demand, which was made after about three years, that is, beyond one year from the commencement of supply to the consumer. Hence, it was the incumbent duty of the DVC, being the licensee, to honour the agreement between the parties and to reduce the contract demand from the next billing period after the receipt of the request of the Railways to do so. Even if benefit of doubt with regard to the time when the communication was received by the DVC is given to the latter, the Ombudsman has merely taken into consideration the lockdown period, starting from about four months after the request being made, that is, from December 2020 till October 2021.

38. As the request was made for reduction on a temporary basis only, the elaborate paraphernalia and equipment proposed by the DVC was entirely unnecessary on the face of the records.

39. As the DVC failed to honour its commitment in terms of the Clause 21 of the Agreement, the Ombudsman was well within his authority within the contemplation of Section 42 of the Electricity Act, 2003 to decide upon the issue and to direct regeneration of bills for the said period, which is well within the conspectus of the dispute raise before it and the CGRO.

40. The argument that the CGRO order bordered on an agreed order is entirely baseless. The CGRO directed the Railways to procure the equipment and machinery suggested by the DVC, which was not contemplated in the contract or agreed to by the Railways at any point of time. In fact, the Railway was gracious enough to show its bona fides by agreeing to pay for the necessary equipment and machinery even for the unnecessary and cumbersome changes required by the DVC. However, the CGRO, contrary to the concession given by the Railways, directed the Railway itself to procure such equipment. Hence, the challenge against the CGRO was entirely maintainable in law, since there was no ingredient of consent in the order of the CGRO.

41. In view of the above discussions, the Ombudsman acted well within his jurisdiction and in law in directing the regeneration of bills for the period of December 2020 to October 2021 and to set aside the disconnection notices outright. As such, there is no scope of interference with such decision. Accordingly, WPA No.18190 of 2022 is dismissed on contest without, however, any order as to costs.

42. Urgent certified copies, if applied for, be issued by the department on compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)

Later

When the above Judgment is passed, learned counsel for the petitioner prays for a stay of operation of the said Judgment. Since certain questions of law are involved herein, stay of operation of the Judgment and Order passed today is granted till November 30, 2022.

(Sabyasachi Bhattacharyya, J.)