

IN THE HIGH COURT OF ORISSA AT CUTTACK**W.P. (C) No.30354 of 2011**

Executive Engineer, CESU, City *Petitioner*
Distribution Division-II,
Badambadi, Cuttack-2

Mr. B.K.Sharma, Advocate

-versus-

M/s. Mahanadi Casting Pvt. Ltd., *Opp. Party*
Cuttack

Mr. B.Jena, Advocate for Opp.Party

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K.PATTANAİK

ORDER
30.03.2022

Order No.

Dr. S. Muralidhar, CJ.

07. 1. The Executive Engineer, Central Electricity Supply Utility (CESU), City Distribution Division-II, Badambadi, Cuttack has filed this petition questioning an order dated 29th September, 2011 passed by the Grievance Redressal Forum (GRF), CESU, Cuttack. Accepting the plea of the Opposite Party- complainant and ordering CESU to supply power to the Opposite Party at a reduce load of 50 KVA from July, 2011 onwards and during the period of such reduce supply to raise electricity charges bills in terms of Regulation 110 of the OERC Distribution (Conditions of Supply) (Code 2004) (hereafter 'Code'). It was further directed that the bills already issued for the months of July & August, 2011 should be revised within 15 days of the receipt of

the order. Finally, it has been ordered that such bills were served on the complainant i.e. opposite party herein power supply to the premises of the complainant shall not be disconnected.

2. While directing issuing a notice in the present petition on 2nd December, 2011, this Court stayed the operation of the impugned order of the GRF.

3. This Court is heard the submissions of the learned counsel for the parties. Today, learned counsel appearing for the Opposite Party has handed over a counter affidavit.

4. The principal contention of Mr. B. K. Sharma, learned counsel for the Petitioner was that the GRF misconstrued the scope an ambit of Regulation 107 and read with Regulation 110 of the Code which read as under:

“107. The licensee or the consumer shall not be liable for any claim for loss, damage or compensation whatsoever arising out of failure of supply when such failure is due either directly or indirectly or indirectly to war, mutiny, civil commotion, riot, strike, lockout, fire, flood, tempest, lightning, earthquake or other force, accident or cause beyond his control.”

110. At any time during the continuance of the agreement between the licensee and the consumer, the plant or premises of the consumer is destroyed or damaged due to force majeure conditions referred to in Regulations 107 and 108 resulting in break-down or rendering the plant or the premises wholly or

substantially unfit for occupation or use, the consumer may on giving seven days notice in writing to the engineer of such break-down or unfitness take a reduced supply of power as may be necessary and feasible. In such a contingency, he shall not be liable to pay the charges in accordance with the agreement, but he shall pay minimum monthly charges, demand charges where such charges are payable on the basis of the maximum demand recorded in the demand meter and energy charges on the basis of actual energy consumed. The aforesaid period of reduced supply shall no count towards the initial period as stated in the agreement and the period of the agreement shall be extended for a further period equal to the period of reduced supply.”

5. Mr. Sharma submitted that since the consumer came fourth with a case of break-down of machinery on account of accident or cause ‘beyond his control’, then for the purpose of Regulation 110 of the Code, the burden was on the consumer to show that the breakdown was for such reason. The failure of the consumer to discharge that burden would disable the consumer and claiming the benefit under Regulation 110. In other words, his contention was that in the present case apart from simply stating that there was a breakdown of machinery in the consumer’s factory premises, no attempt was made by the consumer to actually demonstrate that the said break-down was on account of any of the causes mentioned in Regulation 107 of the Code. He submitted that the GRF erred in not even

discussing the scope and ambit of the above provisions and issuing the impugned directions.

6. Mr. B. Jena, learned counsel for the Opposite Party consumer on the other hand referred to the counter affidavit which states that there was a major breakdown of the main Induction Furnace which rendered the plant completely unfit for any production activities. According to him, this by itself was sufficient to attract Regulation 110 of the Code and the electricity utility was obliged in law to accept such a statement of the consumer and reduce the power load factor, apart from revising the bills for the period of breakdown. Reliance is placed on the decisions in *Dhanrajmal Gobindram v. Shamji Kalidas & Co. AIR 1961 SC 1285* and *Executive Engineer (CESCO/CESU), Kendraprara Electrical Division-1 v. Grievances Redressal Forum, Cuttack 2008 (Supp 2) OLR 913*.

7. At the outset must be said that, although the last-mentioned judgment was cited by Mr. Jena, learned counsel for the Opposite Party consumer to question the maintainability of the present petition, during the course of the argument he did not press that point.

8. However, Mr. Jena drew attention to the following passage in *Dhanrajmal Gobindram (supra)*:

“19. Mc Cardie J. in *Lebeaupin v. Crispin* (1920) 2 K.B. 714, has given an account of what is meant by “force Majeure” with reference to its history. The expression “force majeure” is not a mere French version of the Latin expression “vis major”. It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in “force majeure”. Judges have agreed that strikes, breakdown of machinery, which, though normally not included in “vis major” are included in “force majeure”. An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to “force majeure”, the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to “force majeure”, and even if this be the meaning, it is obvious that the condition about “force majeure” in the agreement was not vague. The use of the word “usual” makes all the difference, and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties.”

9. Mr. Jena accordingly, submitted that in the present case the requirement of Regulation 110 read with 107 of the Code stood satisfied with the consumer having stated that there was a major breakdown of the main Induction furnace rendering the plant completely unfit for any production activities.

10. The Court is unable to agree with the above submissions made on behalf of the Consumer/Opposite Party. A careful reading of Regulation 110 read with 107 would show that requirement for attracting the ‘Force Majeure Clause’ is that the

breakdown of the plant and machinery rendering it 'wholly or substantially unfit for occupation or use' must be a result of any of the factors enumerated in Regulation 107. In other words, it should be shown that such failure is 'due either directly or indirectly or indirectly to war, mutiny, civil commotion, riot, strike, lockout, fire, flood, tempest, lightning, earthquake or other force, accident or cause beyond his control.'

11. The breakdown itself cannot be turned as an 'accident'. In other words the breakdown must be as a result of the accident or as a result of some other cause which is beyond the control of the person in whose control the plant operates. The breakdown is the result whereas Regulation 107 talks of the 'cause' for such breakdown. In the present case, while the consumer has asserted that there has been a breakdown of the plant and machinery, the consumer has failed to demonstrate (i) what caused such breakdown of the plant and machinery; (ii) further that the said cause was relatable to any of contingencies mentioned in Regulation 107 of the Code and (iii) that such cause was beyond the control of the consumer. Without the consumer discharging that burden of proof, it is not possible to agree with the Consumer that Regulation 110 read with 107 of the Code is attracted by the mere statement by the Consumer that there has been a breakdown of its plant and machinery.

12. In that view of the matter, the impugned order of the GRF which fails to examine the actual requirement of Regulation 107 read with Regulation 110 of the Code cannot be sustained in law. The order of the GRF is accordingly set aside.

13. The Court has been informed that from 2013 onwards, pursuant to an application made by the Consumer, its load factor has in fact been reduced to 68 KVA and therefore, dispute if any, is only confined to the period between 2011 and 2013. In any event, in view of the reasons discussed hereinbefore, the Court is unable to sustain the impugned order of the GRF.

14. The writ petition is allowed in the above terms but with no order as to costs.

15. An urgent certified copy of this order be issued as per rules.

(Dr. S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge