

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No.4680 of 2022

**Mr. Sampat Mal Jhanwar and another
Vs.
West Bengal Electricity Regulatory Commission
and others**

For the petitioners	:	Mr. Yashovardhan Kochar
For the CESC Limited	:	Dr. Samir Chakraborty, Dr. Madhusudan Saha Ray
Hearing concluded on	:	23.12.2022
Judgment on	:	09.01.2023

Sabyasachi Bhattacharyya, J:-

1. The present challenge pertains to interpretation of Clause 4.14.1 in the context of 4.14.2 of the West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2011, as amended till January 22, 2020. Clause 4.14, as it appeared in the Original Tariff Regulations of 2011, promulgated on April 25, 2011, was subsequently altered by the Notification dated July 30, 2013 only in respect of the rates of surcharge. However, the methodology of levy remained the same.
2. *Vide* Notification dated January 22, 2020, Clause 4.14 was bifurcated into Clause 4.14.1, which prescribed the provisions of Delayed Payment

Surcharge (DPS) in respect of non-L & MV Agricultural Consumers and Clause 4.14.2, which deals with L & MV Agricultural Consumers.

3. The modality of levy of Delayed Payment Surcharge has remained the same all through. Only the rates have been varied from time to time and lastly distinguished in 2020 between L & MV Agricultural Consumers and other consumers except L & MV Agricultural Consumers.
4. It is contended by the writ petitioners that the levy ought to be calculated in a graded manner for different slabs according to the period of default.
5. For example, if the last due date for payment of a bill is January 31, 2022, the surcharge should be calculated at the rate of 1% per month for the period from February 01 to April 30, 2022 (first Three months) + surcharge at the rates as specified for the slabs up to the date of payment, if such date falls within the first Three months. Again, in the event such delay exceeds Three months that is, the payment is made beyond Three months but within Six months, the surcharge would be counted for the period beyond the first Three months at the increased rate for such slab, which shall in turn be calculated on the total outstanding DPS, along with the rate of interest for the first slab, for the first Three months and thereafter, at the increased rate calculated on the said total of DPS + first Three months surcharge for the next Three months.
6. However, the CESC Limited has argued that such calculation should be at the applicable rate as per the length of delay, in uniform manner fixed for the entire period of delay from the last due date of payment till actual payment.

7. The petitioners rely on a report filed by the CESC Limited on April 19, 2022 which indicates that the petitioners' method of calculation of surcharge has been admitted as the right method of calculation while calculating surcharged as per Regulation 4.14.2 in respect of L & MV Agricultural Consumers.
8. However, the CESC Limited has argued that the method of calculation should be different in case of non-L & MV Agricultural Consumers merely because in Regulation 4.14.1, the period of non-payment is expressed in months whereas in Regulation 4.14.2, such period is expressed in number of days.
9. It is argued by the writ petitioners that the use of 'months' instead of 'days' to describe the period of non-payment *ipso facto* does not warrant a different methodology for calculation of the DPS with regard to Clauses 4.14.1 and 4.14.2. The only difference between L & MV Agricultural Consumers and other consumers is in the rates of interest.
10. The petitioners placed reliance on the Judgment of *Ramdas Vithaldas Durbar Vs. S. Amerchand and Co.*, reported at *ILR (1916) 40 Bom 630*, where the Privy Council held that merely because different expressions have been used in two places in a statute, the Court would not presume the expressions to carry different interpretations.
11. In the same context, the learned Senior Advocate appearing for the petitioners also places reliance on *Kanhaiyalal Vishindas Gidwani Vs. Arun Dattaray Mehta and others*, reported at *2000 SCC OnLine SC 1608*.
12. The petitioners next contend, by placing reliance on orders passed by different Benches of this Court in several matters, that the petitioners deal

with the Jute Industry for which tariff is fixed by the competent authorities. As such, it is contended that there is no scope for the petitioners to shift the burden imposed by the DPS on its consumers. It is argued that the revenue authorities are guilty of unjust enrichment by charging excess amounts from the petitioners. In such context, the learned Senior Advocate for the petitioners cites the Judgment of *State of Rajasthan and others Vs. Hindustan Copper Ltd.*, reported at (1998) 9 SCC 708, *Commissioner of Central Excise Vs. Oswal Chemicals and Fertilizers Ltd. and others*, reported at MANU/GH/0684/2009 and *Mahabali Techno Engineers Vs. Eastern Coalfields Limited and others*, reported at 2021 SCC OnLine Cal 33 being respectively judgments of the Supreme Court, the Gauhati High Court and this Court.

13. Learned senior counsel for the CESC Limited, on the other hand, argues that the petitioner no.2-Company has on numerous occasions delayed making payments against bills raised by the Licensee Company for electricity consumption. Accordingly, in terms of Regulation 4.14 of the 2011 Regulations, the Licensee Company has levied and recovered from the said consumer DPS at the rates prescribed in the said Regulations on the electricity charges payable by the consumer, wherever applicable. Certain specimen bills are relied on to harp the said point.
14. By placing reliance on the language of Regulation 4.14 as on April 25, 2011 and July 30, 2013 and Regulations 4.14.1 and 4.14.2 as on January 21, 2020, learned senior counsel contends that the CESC Limited was justified in charging the DPS amounts.

15. It is next submitted that the modalities of charging DPS in respect of Low and Medium Voltage (L & MV) Agricultural Consumers and non-L & MV Consumers are different, as prescribed in the Regulations.
16. It is contended on behalf of the CESC Limited that Regulation 4.14.1 of the Tariff Regulations is not to be applied in a graduated manner as pleaded by the petitioners. The methodology of determining surcharge, it is argued, is to attribute a uniform marginal rate of surcharge applicable in each case, depending on the total period of delay.
17. Learned counsel appearing for the CESC Limited, places reliance on *Sukhlall Chandanmull Vs. A.C. Jain and another*, reported at AIR 1958 Cal 669, for the purpose of elucidating that the graduated method of interpreting a scale of rates finds substantial application under the Income Tax Act, 1961, read with the relevant Finance Acts.
18. It is submitted that the rates of income tax are determined as a percentage of the amount by which the total income exceeds the upper limit of the previous slab. As such, the graduated method is applicable in such cases.
19. However, in case of the present surcharge levied by the Distribution Licensee, the calculation is based on the provisions of Clauses 4.14.1 and 4.14.2, on the basis of the total period of delay.
20. It is argued that while determining surcharge on income tax, depending on the threshold of income earned, a uniform marginal rate of surcharge is applied across the entire value of income tax, although the income tax itself is determined on a graduated rate basis.
21. It is argued on behalf of the CESC Limited that the “month” in Regulation 4.14.1 stands for 30 days or the actual calendar period. It is submitted

that since the number of days vary between months in the same year, an average of 30 days period is taken in order to avoid unnecessary complications. If the delay is for a fraction of a month, the surcharge is required to be prorated for only that part of the month for which the delay has occurred.

22. It is submitted that Clause 4.14.1 of the Tariff Regulations provides that the rates of the Delayed Payment Surcharge arising from non-payment of electricity charges “as also other charges” by a consumer, except the L & MV Agricultural Consumers, shall be as per the chart given therein. The surcharge, it is submitted, falls within such “other charges”. It is argued that the surcharge literally means an additional charge and is compensatory in nature; as such, it is in the nature of an interest which is capable of being compounded.
23. Learned counsel for the CESC Limited cites *The Adoni Ginning Factory and others Vs. The Secretary, A.P. Electricity Board, Hyderabad and others*, reported at *AIR 1979 SC 1511*, where it was held that the very rate of levy of surcharge stipulated in the agreement, namely, 1% per mensem, that is 12% per annum, is a clear indication that the levy is not meant to be a penalty but is a provision for interest by way of compensation for delayed payment.
24. By citing a Supreme Court Judgment reported at *AIR 1976 SC 127 [M/s. Bisra Stone Lime Co. Ltd. Vs. Orissa State electricity Board and another]*, it is submitted that the word “surcharge” is not defined in the Act but etymologically, it stands for an additional or extra charge or payment. Surcharge is thus a super-added charge over and above the usual and

current dues. In substance, it is an addition to the stipulated rate of tariff. The nomenclature does not alter the position.

25. Learned senior counsel appearing on behalf of the CESC Limited argues that the interpretation in *The Adoni Ginning Factory* (supra) of surcharge in the context of electricity tariff continues to hold good, having been applied in *Nava Bharat Ferro Alloys Ltd. Vs. Transmission Corp of AP Ltd and another* [AIR 2011 SC 538] and *Tapan Kumer Sinha Vs. WBERC* [1997 (11) CHN 58].
26. Again, the ratio of *M/s. Bisra Stone Lime Co. Ltd.* (supra) was applied by the Apex Court in *Sai Bhaskar Iron Ltd. Vs. APERC* [AIR 2016 SC 4835] and *M/s. Consolidated Coffee Ltd. Vs. AITO, Madikeri and others* [AIR 2000 SC 3731]
27. It is argued that the consumer itself, in its letter dated January 18, 2021 (annexed at Page 92 of the writ petition), expressly described DPS as “interest”, acknowledging that it is compensatory in nature. As such, it is contended that there is no dispute between the parties as to the nature of surcharge being compensatory.
28. With regard to refundability of surcharge, it is argued that such a direction, in any event, would unjustly enrich the consumer. The Tariff Regulation, inasmuch as the interpretative position is concerned, has remained unchanged at the end of the Distribution Licensee from the inception.
29. It is submitted that Clause 2.1 of Schedule 5 of the Tariff Regulations indicates that non-tariff income/income from other sale of energy is deducted from the Gross Aggregate Revenue Requirement (ARR) to arrive at the net ARR. Such net ARR per unit of sale to consumers, it is argued,

translates to the basis of determination of tariff levied on consumers under the Tariff Regulations. Hence, the surcharge bears an inverse relation to the consumer tariff. The lower the surcharge recovery, the higher would be the consumer tariff and vice versa. Any surcharge already collected by the Licensee Company has therefore been factored into the determination of the tariffs levied on consumers during the relevant period. Consequently, whatever benefit may have been derived from the recovery of surcharge during the said period has been passed by the CESC Limited to consumers. Thus, any refund of such surcharge at this stage would only prejudice and cause hardship to other *bona fide* consumers.

- 30.** Disputing the contention of the petitioners that the petitioners have not passed on to their consumers the DPS surcharge, learned counsel places reliance on *Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of C. Ex. And Cus.*, reported at 2005 (181) E.L.T. 328 (SC). It was held therein that the doctrine of 'unjust enrichment' is based on equity. Before claiming a relief of refund, it is necessary for the petitioner to show that he had paid the amount for which relief is sought and has not passed on the burden to the consumer and, if such relief is not granted, he would suffer loss.
- 31.** From the Central Government Gazette Notification dated November 26, 2020 (Annexure P/2 at page 32 of writ petition), it is seen that 100% of food-grains production has to be packed in jute bags whereas in case of sugar the compulsion is with regard to 20% of the production. Thus, 80% of sugar can be packed by sugar manufacturers in any kind of bags, even apart from jute. There is no price control as regards sale of such quantity of, *inter alia*, jute bags and no embargo on manufacturers of jute bags to

sale their products to producers of sugar as well. Hence, it is argued by the CESC Limited that the restriction and price control is only as regards such quantities of raw jute that are compulsorily allocated by the Jute Commissioner from the stocks of JCI for production of such jute bags that is for 100% packing of food-grains and 20% packing of sugar produce. In respect of the rest there is no price control. Rather, there is the option of Government Agencies to purchase jute bags through national competitive bidding, that is, by tender/auction. Hence, in such cases, the principle of unjust enrichment would definitely apply in the light of the principles settled by the Apex Court.

- 32.** It is argued that in *Rochiram & Sons Vs. Union of India*, reported at 2008 (226) ELT 20 (SC), the Apex Court has held that the principle of unjust enrichment is equally applicable to Government authorities.
- 33.** Learned counsel for the CESC Limited submits that the Supreme Court Judgment in *Hindustan Copper Ltd.* (supra) passed by the Supreme Court and cited by the petitioner is distinguishable as no part of the duty paid on rectified spirit captively consumed in the manufacture of copper could be added to the price of copper and could not therefore be passed on to the consumer, in which context the Supreme Court held that there could not be any unjust enrichment on the part of the Company.
- 34.** Again, in *Oswal Chemicals and Fertilizers Ltd.* (supra) it was categorically noted that although the respondent therein paid duty on naphtha, yet it had to sell urea “exclusive of such duty”. In such factual situation, the Gauhati High Court held that the respondent could not have passed on the burden of duty element to the purchase of urea and hence the doctrine of

unjust enrichment was inapplicable. Such is not the case herein, it is argued.

- 35.** For a comprehensive adjudication on the issues involved in the present writ petition, a proper appreciation of Clauses 4.14.1 and 4.14.2 is necessary. The said Clauses, as amended till date, are set out hereinbelow.

"4.14.1 The rates of the applicable delayed payment surcharge arising from non-payment of electricity charges as also other charges by a consumer, except the L&MV agriculture consumers, shall be 1.00% per month of delay or pro-rated for part thereof upto 3 months of delay, 1.50% per month of delay or pro-rated for part thereof for any period beyond 3 months of delay but upto the next 3 months and 2.00% per month of delay or pro-rated for part thereof beyond first 6 months of delay. Delay in payment shall be counted from the due date for payment upto the date preceding the date of payment.

4.14.2 The rates of the applicable delayed payment surcharge arising from non-payment of electricity charges as also other charges for the L&MV agriculture consumers shall be as in the following table:

Sl. No.	Period of non-payment	LPSC Rate
1	Up to 3 months	Nil
2	From 91 days to 180 days	1% per month or prorated for part thereof
4	From 181 days to 365 days	1.25% per month or prorated for part thereof
5	Above 365 days	1.5% per month or prorated for part thereof

- 36.** Insofar as non-L & MV Agriculture Consumers are concerned, within which bracket the present petitioners fall, the LPSC (Late Payment Surcharge) or DPS (Delayed Payment Surcharge) rate is dependent on the period of non-payment. It is clearly stipulated that the DPS shall be 1% per month of

delay up to three months of delay, 1.5% per month of delay between three to six and 2% per month of delay beyond first six months, such delay being counted from the due date for payment up to the date preceding the date of payment. Clause 4.14.1 further stipulates that for a part of a month during which delay might have been committed, the surcharge will be prorated.

- 37.** It is, thus, evident that the plain language of Clause 4.14.1 clearly stipulates that the rates of surcharge are uniform for non-L & MV Agriculture Consumers for each slab of period of delay.
- 38.** Such percentage is uniform for the entire period of delay, for example, in cases of up to three months of delay at the stipulated rate, in cases involving the slab 3-6 months of delay at its own designated rate and those beyond six months of delay according to the rate for the said slab.
- 39.** Since the language of Clause 4.14.1 contains no ambiguity, there cannot be any conceivable reason to construe it in a graduated manner, as argued by the petitioners.
- 40.** In the event a graduated methodology was contemplated in the Tariff Regulation, the language would have been different, specifying that the respective percentages of surcharge would be applicable for each of the slabs of delay. For example, even if the delay was beyond six months, the calculation of surcharge would be demarcated in separate slabs according to percentage, of the first three months' delay at a particular rate, 3-6 months at another and above six months of delay at a third rate.
- 41.** However, the expression used in Clause 4.14.1 to suffix the rates is : "delay in payment shall be counted from the due date for payment up to the date

preceding the date of payment”. Hence, for each of the slabs of delay, a uniform rate of surcharge for the entire period of delay, that is, from the due date for payment up to the date preceding the date of payment, has been taken as the basis of calculation.

- 42.** The analogy of income tax and income tax surcharge perfectly suits the case at hand.
- 43.** In case of income tax, a graduated method is envisaged vis-à-vis the respective slabs of income, which is evident from the language adopted by the Supreme Court in *Sukhlall Chandanmull* (supra), which finds place in the First Schedule of the Finance Act, 2020 which has been used for illustrative purpose by the CESC in its arguments. A graduated scale is reflected from the provision that the percentage is of the amount “by which the total income exceeds” the ceiling of the previous slab.
- 44.** In the present case, however, no such language has been used to segregate the percentages to the corresponding periods respectively. The language is simple inasmuch as particular percentages have been fixed as the rate of surcharge for the whole period on the basis of different time-slabs of delay.
- 45.** Akin to surcharge on delayed payment of income tax, surcharge in case of electricity tariff can also be construed to be uniform vis-à-vis the slabs of delay.
- 46.** Hence, the interpretation sought to be attached to Clause 4.14.1 by the petitioners cannot be accepted; rather, the CESC’s interpretation is based on better logic and borne out by the language of the Regulations as well.
- 47.** The methodology of calculation has to be in terms of the uniform methodology suggested by the CESC Limited and not by the graduated

method sought to be advanced by the petitioners. At least, there is nothing in Regulation 4.14.1 to indicate such deviation from the policy adopted in the *pari material* case of income tax surcharge as opposed to income tax.

48. Insofar as the term “month” in Clause 4.14.1 is concerned, the ratio applied by the CESC Limited in calculating each month on an average of 30 days is perfectly rational and justified.
49. Since the Regulation itself uses the expression “months” and not delay in terms of days, a uniform meaning has to be attributed to the expression “months’. Taking a rough average of the number of days in each month in a year, it can be seen that most of the months consist of 30 days, with deviations in certain cases, where the months are of 31 days, which is again off-set in the month of February, which contains 28 days (29 days in a leap-year). As per the English calendar, the number of days in a year is about 365 whereas, taking an average of 30 days per month, the total number of days comes to $(30 \times 12) = 360$ days. The difference of 5 days between the two is negligible and can easily be ignored.
50. The question as to whether the DPS of one month, if unpaid, can be incorporated into the principal charges due in the succeeding month on which surcharge may again be calculated, becomes irrelevant in view of the uniform slab methodology discussed and accepted above. The plain and literal interpretation of Clause 4.14.1 indicates that the respective rates (percentages) of surcharge would be based on the total months of delay, vis-à-vis the time-slabs specified in the said Clause. In each case, the delay would have to be counted from the due date for payment straight up to the date preceding the date of payment, upon application of the respective

stipulated rates to the entire quantum to be paid at a uniform rate for the entire period of delay.

51. Inasmuch as the question of refund and/or unjust enrichment is concerned, the said argument does not apply to either of the parties in the present case. Since it has been held above that the CESC Limited did not over-charge surcharge from the petitioners at any point of time but applied the correct methodology in so charging, there does not arise any further question of refund of money to the petitioners. In any event, since the CESC Limited calculated surcharge properly, there cannot arise any question of the Distribution Licensee being unjustly enriched in any manner whatsoever. Hence, the judgments cited on ‘unjust enrichment’ are rendered irrelevant in the present context.
52. Insofar as the Judgment of *Ramdas Vithaldas Durbar* (supra), cited by the petitioners is concerned, the ratio laid down therein is not applicable to the present case. It was held therein that the use of different expressions to convey the same sense shows merely that the draftsman of the Act was not very careful in the use of language, cannot be imported in the present case. The expression “month” was clearly used in Clause 4.14.1, as opposed to the number of days stipulated in Clause 4.14.2 in respect of the subsequent periods of delay after the first three months.
53. In any event, nothing relevant in the present case weighs on such distinction in language between the two clauses. The interpretation of Clause 4.14.1 is what has fallen for consideration in the present case, as it affects the petitioners.

- 54.** Even in *Kanhaiyalal Vishindas Gidwani* (supra), the Supreme Court held that there is no difference between two words “sign” and “subscribed” in the context and hence the view that “subscribe” connotes something more than mere signing and enjoins conscious application of mind was not accepted.
- 55.** Even if we take into consideration the ratio laid down therein, there cannot be any substantial difference between the mention of ‘number of months’ as opposed to ‘number of days’ respectively in Clauses 4.14.1 and 4.14.2 of the Tariff Regulation. Insofar as the interpretation of the methodology of calculation of surcharge is concerned, such minor distinction in the use of words by the WBERC in its delegated legislation cannot have any bearing worth consideration.
- 56.** As such, the present challenge fails. Thus, W.P.A. No.4680 of 2022 is dismissed on contest without any order as to costs.
- 57.** Urgent certified copies, if applied for, be issued by the department on compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)