

In the High Court at Calcutta
Constitutional Writ Jurisdiction

Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No.5548 of 2022

Regal Ingot Private Limited and another
Vs.
Damodar Valley Corporation
and others

For the petitioners : Mr. Sagar Bandyopadhyay,
Ms. Soma Kar Ghosh,
Mr. Arabinda Pathak

For the DVC : Mr. Kishore Datta,
Mr. Prasun Mukherjee,
Mr. Deepak Agarwal

Hearing concluded on : 31.03.2023

Judgment on : 27.04.2023

Sabyasachi Bhattacharyya, J:-

1. The writ petition has been filed primarily seeking restoration of electricity connection of the petitioners. The said connection was severed on August 1, 2011 for non-payment of electricity charges. It is relevant to mention that the writ petitioners are consumers of the Damodar Valley Corporation (DVC)-respondent no.1 in the State of Jharkhand. By operation of the Jharkhand State Electricity Regulatory Commission (JERC) Regulations, the power purchase

agreement between the parties automatically expired 180 days after such disconnection.

2. The DVC filed a money suit bearing Money Suit No.29 of 2014, claiming Rs.1,01,46,469/- as dues for May, 2010 to July, 2011.
3. Prior to the filing of the suit, the DVC had filed a winding up proceeding against the petitioner under the Companies Act, 1956 claiming the same outstanding dues. On February 7, 2014, this Court directed the petitioner to pay the amount in ten (10) installments, against which the writ petitioners preferred an appeal before the Division Bench. The Division Bench, *vide* Order dated July 2, 2014, allowed the appeal, granting DVC the liberty to file a suit, pursuant to which the money suit was filed.
4. Meanwhile, on January 13, 2022, the petitioners made an application for restoration of electricity. On January 31, 2022, the DVC claimed a sum of Rs.2,72,96,891/- as outstanding dues against the petitioners, with Delayed Payment Surcharge (DPS) at the rate of 18 per cent per annum.
5. Learned counsel for the petitioners argues that the claim of the DVC is barred by Section 56(2) of the Electricity Act, 2003 (in brief, “the 2003 Act”), since the outstanding DPS was not shown regularly in the bills during two years subsequent to the disconnection. Secondly, it is argued that after termination of the power purchase agreement by operation of the Jharkhand Regulations, there cannot subsist any “outstanding dues”.

6. It is also argued by the petitioners that the DVC acted *de hors* the law in claiming outstanding dues at their own rates, despite the Jharkhand Electricity Regulatory Commission (JERC) having fixed retail tariff in the meantime. It is contended that since the generation tariff for the relevant period has already been assessed by the Central Electricity Regulatory Commission (CERC), the retail tariff of Jharkhand is required to be calculated on such basis. It is submitted that the claim now made by the DVC did not find place in the winding up petition or the suit filed by the DVC. Moreover, the claim was never shown in the bills before disconnection.
7. Learned counsel for the petitioners reiterates that the provisional tariff previously assessed for Jharkhand has now merged into the final tariff and, as such, the latter has to be the basis of the claim for outstanding dues, if any.
8. It is further contended that after the revised CERC rates came into force on May, 2010, the DVC could not charge the petitioner for electricity supply at its own rates. In such context, learned counsel places reliance on Section 43(2), Section 45(1) and Section 79(1)(b) of the 2003 Act to contend that it was the duty of the DVC/licensee to restore the electricity connection of the petitioner in terms of the CERC Regulations. The Central Commission has, as one of its functions, the regulation of tariff of generating companies.
9. The learned Senior Advocate for the DVC controverts the submissions made by the petitioners. Placing reliance on Clause 12.7 of the JERC Regulations of 2015 pertaining to Electricity Supply Code, it is

contended by the DVC that after the lapse of 180 days from disconnection, there has been no subsisting agreement between the parties. Hence, any order of restoration of electricity connection, if passed in the writ petition, would amount to reviving a terminated contract.

10. Clause 12.13 of the JERC Regulation of 2015 mandates that for restoration of electricity connection, disconnected for non-payment of electricity charges, the consumer has to pay charges due from him along with other ancillary charges. It is argued that the Regulation of 2015 flows from a statute and has statutory enforceability. Hence, the petitioners are not entitled to get reconnection without paying the charges as indicated above.
11. The writ petitioners, it is further argued, have not disputed the bills in the writ petition but seek to challenge the same by way of its list of dates, which does not assume the character of pleadings.
12. By placing reliance on *Bharat Singh and others Vs. State of Haryana and others*, reported at (1988) 4 SCC 534, it is argued that in the absence of requisite pleading and attendant evidence annexed to the writ petition, the High Court will not look into any point of fact based on law.
13. Even if it is assumed that the additional facts and documents annexed to the list of dates could be looked into, the same pertains to a billing dispute. Such conversion from a dispute relating to reconnection of electricity into a billing dispute is not permissible, it is contended.

- 14.** In the event the writ petitioners were to dispute the electricity bills, its remedy lay before the concerned Grievance Redressal Officer (GRO) under Clause 2(e) read with Clauses 8 and 12 of the JERC (Guidelines for Establishment of Forum for Redressal of Grievances of the Consumers, Electricity Ombudsman and Consumer Advocacy) Regulations, 2020. Although statutory alternative remedy is not an absolute bar in entertaining a writ petition, a billing dispute does not come within the exceptions carved out in various judgments for entertaining a writ petition.
- 15.** The learned Senior Advocate for the DVC next contends that the DVC charged for each of the relevant periods in the interregnum as per the prevailing law, orders of the Appellate Tribunal (APTEL) and/or the prevalent court orders, which held the field at the respective periods.
- 16.** The details of such applicable rates and the corresponding law/orders have been specifically argued on the basis of the written notes of arguments of the DVC. Hence, there was no illegality on the part of the DVC in charging at the rates as it did.
- 17.** It is next argued that DPS is chargeable as per law for the entire period of default. The limitation as stipulated in Section 56(2) of the 2003 Act commences from the date when the payment becomes 'first due' and continues for the purpose of calculating the payables at the time of restoring electricity connection to the consumer.
- 18.** The Supreme Court order affirming the APTEL decision applying the DVC tariff rates, passed on December 3, 2018, entailed that the DVC could not have claimed the due charges before disconnection in 2011.

19. As the respective rates reached finality by virtue of the Supreme Court order, there was no scope of raising bills at the revised rates prior to disconnection of electricity supply to the petitioners.
20. It is stressed by the learned Senior Advocate for the DVC that only the generation and transmission tariff has been finalized by the CERC, but no final retail tariff has been fixed as yet for distribution of electricity in Jharkhand by the JERC.
21. To reiterate the principle that no relief can be granted in a writ petition unless specifically prayed for, in the context of the refund of money claimed by the writ petitioners, it is submitted that the said dispute is pending before the JERC at the instance of the consumers as well as the DVC. Learned counsel cites the judgments reported at *(2010) 11 SCC 557 [Manohar Lal (dead) by LRS. Vs. Ugrasen (dead) by LRS. and others]* and *(2010) 1 SCC 234 [Bharat Amratlal Kothari and another Vs. Dosukhan Samadkhan Sindhi and others]*, in support of the said proposition.
22. It is seen from the orders, copies of which have been produced by the parties, that the DVC has charged outstanding dues during the entire relevant period as per the rates prevalent at each juncture. Bills up to the month of April, 2010 were raised as per the DVC tariff, even after coming into force of the 2003 Act, in terms of the APTEL order dated September 16, 2009. Since the petitioners are consumers based in Jharkhand, where the provisional tariff was upheld by the High Court at Jharkhand (Ranchi), they were bound to pay as per the provisional tariff prevalent in the State of Jharkhand till retail tariff is determined.

- 23.** Moreover, the writ petitioners have not challenged the outstanding dues claimed by the DVC in the writ petition itself and, as rightly contended by the DVC, cannot seek such relief *post facto* by way of filling a list of dates, which is not a part of the pleadings. In such context, the judgments of *Bharat Amratlal Kothari (supra)* and *Manohar Lal (dead) (supra)*, cited by the DVC, hold the field.
- 24.** It is further seen that the petitioners have placed reliance on *Gagan Ferrotech Limited and another Vs. West Bengal Electricity Regulatory Commission and others*, an unreported judgment of this Court rendered on January 24, 2022 in *W.P.A. No.15428 of 2021* and other connected writ petitions. By relying on such judgment, it is argued by the petitioners that DPS cannot be charged prior to the final fixation of retail tariff. The petitioners argue that if the DVC is of the view that no retail tariff has yet been determined for Jharkhand, the proposition laid down in *Gagan Ferrotech (supra)* would apply.
- 25.** In the said judgment, it was one of the issues as to whether DPS could be charged by the DVC from its consumers on the basis of the Central Electricity Regulatory Commission (CERC) input tariff and/or otherwise, before the final retail tariff is settled by the WBERC for the particular periods 2006-09 and 2009-13. However, it has to be kept in mind that such proposition was negated by holding that the DVC could not do so, in the specific context of the said periods and in respect of the state of West Bengal.
- 26.** It is noteworthy that in the said cases, the final retail tariff had already been fixed by the WBERC when the DPS was charged. As

such, it was held that once the retail tariff is fixed by the State Commission, there cannot be any instance of charging DPS on the basis of the previously prevalent rates.

- 27.** In this context, certain paragraphs of the *Gagan Ferrotech (supra)* judgment are required to be considered.
- 28.** In paragraph 13 of the Judgment, it was specifically observed that prior to the final fixation of retail tariff, the DVC had not claimed DPS at any point of time. As opposed to the said case, in the instant case, the retail tariff has not been shown to have been determined by the JERC for Jharkhand till date.
- 29.** Again, in paragraph 76 of the *Gagan Ferrotech (supra)* judgment, it was held that DPS could not be charged at the first instance, without there being any default regarding bills raised on the final tariff at any previous point of time. In paragraph 77, this Court concluded that even if any DPS was to be retrospectively claimed on the basis of previous bills during the period 2009-2013, the same would be barred by the two-year limitation as stipulated in Section 56(2) of the 2003 Act. In the said case, however, such question was held not to arise since the DPS was claimed for the first time in 2021.
- 30.** Insofar as the instant case is concerned, however, no retail tariff has yet been fixed and, as such, the outstanding dues have to be charged on the prevailing rates for each of the relevant periods, as per the corresponding orders of the APTEL or the court or by operation of the statute.

- 31.** In the *Gagan Ferrotech (supra) judgment*, DPS was charged after final fixation of retail tariff by the State Commission for the first time, which was held to be barred under Section 56(2) of the 2003 Act. As opposed to the said case, here the retail tariff for Jharkhand has not yet been fixed. Keeping in mind that the commencement of limitation under Section 56(2) of the 2003 Act is from the first due date, that is, the date on which the part payment is made for the first time, the context of *Gagan Ferrotech (supra)* is not applicable at all. In the said case, since the DPS was charged after final fixation of retail tariff, such retail tariff had to be the yardstick of final determination.
- 32.** Hence, the principle laid down in *Gagan Ferrotech (supra) judgment* was in the context of the facts as narrated above and do not apply to the present case. In the present case, the DPS was claimed at the relevant juncture when part payment was made and the cause of action for DPS first arose. Hence, before the part payment was tendered by the petitioners, there could not have arisen any occasion to levy DPS, let alone the same being reflected continuously in bills raised in the interregnum.
- 33.** That apart, even after termination of the agreement, the claim of outstanding dues still subsisted for the purpose of Section 56(1) of the 2003 Act, read with Clause 12.13 of the JERC Regulations of 2015. The applicant is required to pay outstanding dues whenever a restoration application is made. If the proposition of the petitioners on the effect of the termination of the agreement by operation of law, 180 days post-disconnection, was to be accepted, then an absurdity

would arise. In such case, any defaulting consumer, in order to avoid payment of outstanding dues and DPS, was merely required to wait for expiry of the statutory 180 days in terms of Clause 12.13 and apply for reconnection thereafter. As per the logic of the petitioners, in such cases, merely because the agreement was terminated, DPS could not be levied and/or outstanding dues charged by the licensee for disconnection could not be claimed for reconnection. Such handy device to avoid payment of dues, bypassing Clause 12.13 and Section 56(1), could not have been the intention of the legislature. Hence, to avoid such absurdity, the only conclusion which can be arrived at is that the applicant for reconnection is required to pay outstanding dues whenever a restoration application is made.

- 34.** As per the Regulations, the liability to pay such amount continues, at least for the purpose of reconnection, although the quantum of outstanding charges gets frozen on the termination of the agreement after 180 days of disconnection.
- 35.** Thus, in the present case, the DVC acted well within its jurisdiction in charging the DPS and outstanding dues from the petitioners in terms of its claim.
- 36.** For the purpose of reconnection, such claim can be made by the licensee within the contemplation of Clause 12.13 of the 2015 Regulations of the JERC, read with Section 56(1) of the 2003 Act.
- 37.** However, inasmuch as the objection of the present dispute being merely a billing dispute, since the writ petition primarily challenges the underlying principles of such charges being levied, it cannot be

said that the dispute is merely confined to a billing dispute, to be decided by the GRO. Since no challenge on the quantum of outstanding dues itself was made at any point of time before the GRO, the same cannot be reopened at this juncture. However, insofar as the DPS is concerned, the DVC was justified in levying the sum in the light of the above observations.

- 38.** Hence, WPA No.5548 of 2022 is dismissed on contest, without any order as to costs.
- 39.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)