

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE**

RESERVED ON: 28.07.2023
DELIVERED ON: 16.08.2023

CORAM:

**THE HON'BLE MR. CHIEF JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

**A.P.O. NO. 82 OF 2023
(I.A. NO. G.A./01/2023)**

**JAISHREE STEELS PRIVATE LIMITED AND ANOTHER
VERSUS
WEST BENGAL STATE ELECTRICITY DISTRIBUTION COMPANY
LIMITED AND OTHERS**

Appearance:-

**Mr. Parathi Sarathi Sengupta, Sr. Adv.
Mr. Ratnanko Banerji, Sr. Adv.
Mr. Ratnesh Kumar Rai, Adv.
Mr. Ankan Rai, Adv.**

....for the Appellant.

**Mr. Abhratosh Majumder, Sr. Adv.
Mr. Suddhasatva Banerjee, Adv.
Mr. Sandip Dasgupta, Adv.
Mr. Aviroop Mitra, Adv.**

.....for the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S. Sivagnanam, CJ.)

1. This intra court appeal at the instance of the writ petitioner is directed against the judgment and order dated 08.06.2023 in WPO No. 2271 of 2022. The appellant filed the said writ petition challenging the order dated 12.05.2022 passed by the (CGRO) by which the demand made by the respondent, West Bengal State Electricity Distribution Company Limited (herein after referred to as the Distribution Company) by supplementary bill dated 13.08.2015 was affirmed. By the said demand, the distribution company demanded delayed payment surcharge (DPS) on the electricity charges due and payable by the appellant.
2. On 14.06.2016 the appellant entered into an agreement with Durgapur Projects Limited (DPL) for supply of electricity to its mini steel plant. On 16.07.2014, the revised contract demand was entered into between the first appellant and DPL. As per the respondent the load having been enhanced from 7 MVA to 12 MVA, bills are required to be raised with MF 400 instead of MF 200. On 13.08.2015, DPL informed the appellant that upon enhancement of load to 12 MVA the bills would be raised with the 400 MVA as opposed to 200 MVA. On 14.08.2015, the first appellant requested permission to pay 50% of the said bill and allow 60 installments for payment of the balance 50%. A letter was addressed by DPL to the first appellant on 17.08.2015 to which the appellant responded on 24.08.2015. DPL vide letter dated 27.08.2015 directed the appellant to pay the entire outstanding amount in the supplementary bill in 12 equal installments. According to the appellant, such payment was without any DPS. By letter dated 02.09.2015,

DPL had called upon the appellant to pay the first installment and stated that the appellant would be liable to pay 12 installments of Rs. 19,67, 99, 980/-. Subsequently on 04.09.2015 and on 07.09.2015 the appellant requested to revise the bill on the ground that there was a computation error while calculating the electricity due at the concessional rate. On 09.09.2015, DPL sent a reply to the appellant informing that the issue was pending for approval. As the appellant failed to adhere to the installments schedule, DPL sent demand letters on five occasions. On 28.05.2016, the appellant requested for revision of bills raised by DPL mentioning certain reasons. On 03.03.2017, the first appellant and DPL entered into an agreement. The appellant would contend that on 13.08.2017 the period of limitation of two years started from the raising of the supplementary bill on 13.08.2015 came to an end. On 31.12.2018, DPL merged with the respondent distribution company on 12.03.2019. The respondent distribution company issued notice under Section 56(1) of the Electricity Act, 2003 (the Act) threatening disconnection of electricity on account of Rs. 8.81 crores remaining due and payable by the appellant. The appellant by letter dated 26.03.2019 requested for payment in installment. The distribution company granted 12 installments to the appellant for clearing the dues pertaining to the supplementary bill dated 26.03.2019, 27.03.2019 and 10.04.2019. On 04.10.2019, DPS was charged in the billing cycle of the month of September 2019 and the respondent kept on levying DPS till June, 2021 as and when the appellant defaulted in making the payment of the dues arising out of the supplementary bill in accordance with the installments. The appellant had submitted representations on various dates

with the request for grant of installment and waiver of the DPS demand. The appellant sent a letter dated 09.06.2021 stating that the entire payment of Rs. 8,81,64,222/- was made by them. The appellant filed the writ petition before this Court in WPO No. 260 of 2021 on 06.07.2021. The distribution company intimated the appellant on 08.07.2021 and the entire DPS claimed would have to be paid by the appellant to avoid disconnection and since the amount was not paid by the appellant, the electricity supplied was disconnected. The writ petition being WPO No. 260 of 2021 was dismissed by order dated 09.08.2021 holding that the critical question would arise in calculating and arriving at any conclusion as to whether there has been any payment of any monthly bill between December 2020 and June 2021 within the time stipulated. Further it was held that it has to be decided as to whether late payment charges (DPS) have been included in the claim of the distribution company either for the period from January 2021 till June 2021 or for the earlier period during which electricity was being supplied by the erstwhile DPL.

3. The learned writ court opined that the CGRO under the Act is fully and completely equipped and qualified to undertake the exercise. Being aggrieved by the said order, the appellant filed an appeal in APOT No. 117 of 2021 and by judgment dated 17.11.2021 the appeal was allowed with a direction to restore the electricity supply coupled with a direction to the CGRO to decide the dispute connected to the imposition of DPS qua the validity and proportionality. The appellant approached the CGRO and made their submissions both oral and written and after hearing the parties on several dates, the CGRO by order dated 12.05.2021 held that the DPS

claimed by the distribution company is justified and granted liberty to take necessary action in accordance with the Rules and Regulations framed by the West Bengal State Electricity Regulatory Commission. Being aggrieved by such order, the appellant filed WPO No. 2271 of 2022 which was dismissed by judgment dated 08.06.2023 holding that the appellants are liable to pay Rs. 14,67,16,864/- on account of DPS and in the event if they do not pay the sum by 31.07.2023, the distribution company would be at liberty to disconnect the electricity connection of the appellant's factory premises. Aggrieved by such order, the appellants have preferred this appeal.

4. We have heard Mr. Partha Sarathi Sengupta, learned Senior Advocate along with Mr. Ratnanko Banerji, learned Senior Advocate, assisted by Mr. Ratnesh Kr. Rai, Mr. Ankan Rai, learned advocates for the appellant and Mr. Abhratosh Majumder learned Senior Advocate assisted by Mr. Suddhasatva Banerjee, Mr. Chayan Gupta, Mr. Sandip Dasgupta and Mr. Aviroop Mitra, learned advocates for the respondent.
5. The sheet anchor of the argument of the learned Senior Advocate for the appellant is by referring to Section 56(2) of the Act. It is contended that in terms of the Sub Section (2) of Section 56 which commences with a non obstante clause, the sum due from any consumer under the said section shall not be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrears of charges for electricity supplied and the licensee shall not cut off the supply of the electricity. It is submitted that the period of limitation commenced from raising of the supplementary bill on

13.08.2015 and ended on 13.08.2017 and during such period, DPS was neither levied nor charged and for the first time DPS was levied after the expiry of four years from the date of issuance of the supplementary bill dated 13.08.2015. Therefore, it is submitted that the demand is not sustainable and the respondents are not entitled to invoke Sub Section (2) of Section 5 by which there is a threat to disconnect electricity supply.

6. It is submitted that crucial words in Sub Section (2) of Section 56 are “when such sum became due”. The date on which it is first due should have been mentioned in the Bill and in terms of the said Sub Section, bills should be shown as outstanding. In absence of such compliance, the respondents are not entitled to invoke Section 56(2) of the Act and if permissible under law, remedy is available under Sub Section (1) of Section 56. However, the threat of disconnection is meted out by the respondent by invoking power under Section 56(2) is wholly without jurisdiction. In support of his contention, learned Senior Advocate referred to the decision of the Hon’ble Supreme Court in ***Assistant Engineer (D1), Ajmer Vidyut Vitran Nigam Limited and Another Versus Rahamatullah Khan***¹, ***Prem Cottex Versus Uttar Haryana Bijli Vitran Nigam Limited and Others***² and ***K.C. Ninan Versus Kerala State Electricity Board and Others***³.

7. The learned Senior Advocates had elaborately referred to the various documents which have been appended to the petition to demonstrate that in none of the bills which have been raised after 13.08.2015 there is any mention of any outstanding and the relevant column has been left blank

¹ (2020) 4 SCC 650

² (2021) SCC Online SC 870

³ (2023) SCC Online SC 663

and for the first time in the bill dated 07.11.2017, the amount was shown as outstanding and by then, the period of limitation of two years had expired and therefore Section 56 (2) cannot be invoked.

8. The provision of the West Bengal Electricity Regulatory Commission (Electricity Supplied Court) Regulations, 2013 was referred to and in particular Regulation Nos. 3.3.9, 3.4, 3.4.3 and 4.0, the attention of the court was drawn to the representation given by the appellant dated 27.08.2015 to DPL wherein they sought for payment of the supplementary bill in equal installments without any delayed payment surcharge. It is submitted that in terms of the said representation made by the appellant, DPL had not charged any delayed payment surcharge and only after DPL had merged with the respondent distribution company for the first time in the year 2017, power under Section 56(2) was invoked and DPS was demanded and upon failure to pay DPS there was a threat of disconnection of electricity.

9. It is submitted that the question of any acknowledgement of liability by the appellant would not arise as even assuming by certain letters, the appellant had sought for waiver of DPS, those representations having been made much after the expiry of the period of limitation of two years, the same cannot be taken to be acknowledgement of any liability. In this regard, reliance was placed on the decision of the Hon'ble Supreme Court in ***Asset Reconstruction Company (India) Limited Versus Bishal Jaiswal and Another***⁴.

⁴ (2021) 6 SCC 366

10. The learned Senior Counsel elaborately referred to the findings recorded by the CGRO and submitted that the contention which was canvassed by the appellant before the CGRO were not properly dealt with and the findings rendered by the CGRO is unsustainable in law. It is submitted that though substantial portion of the findings rendered by the learned Single Judge would enure in favour of the appellant, the ultimate conclusion while dismissing the writ petition was contrary to the findings recorded earlier more particularly in paragraph 16 of the impugned judgment and order. With the above submissions, the learned senior counsel prayed for setting aside the order passed in the writ petition and allowing the appeal.

11. Mr. Abharatosh Majumder, learned Senior Advocate appearing for the respondent submitted that in terms of 2013 Regulations, the respondent distribution company is empowered to charge DPS. As could be seen from Regulation 3.3.9, the demand for DPS is well within the jurisdiction of the respondent distribution company. It is submitted that the chargeable event for levy of DPS is the payment or part payment of the dues and therefore the appellant cannot contend that the demand made in the year 2017 was barred by limitation. It is submitted that it is incorrect to state that in the bills which were raised during 2015 there was no mention about the DPS. In this regard, learned Senior Advocate has drawn the attention of the court to the Bill dated 13.06.2015 and submitted that in the bill it is clearly mention as to what will be the rate of DPS which will be chargeable depending upon the delay or pro-rated or part thereof. It is submitted that Rs. 9.80 crores was paid by the appellant to DPL and a sum of Rs. 8.81 crores was due and

payable to the respondent distribution company upon its merger. The 12 installments given to the appellant commenced from 27.03.2019.

12. On 08.11.2019, the second agreement was entered into and the appellant had made a part-payment and accordingly DPS was calculated reckoning the part-payment paid by the appellant. It is further submitted that the appellant was fully aware of the legal position and that they are due and liable to pay the DPS and, therefore, sought for waiver of payment of the DPS by their representations dated 10th February, 2021 and 10th March, 2021. It is submitted that the contention raised by the appellant with regard to the interpretation of the period of limitation under Section 56(2) of the Act is an incorrect interpretation as calculation of DPS is a dynamic formula and is not a static formula and DPS will become liable for payment as and when the payment is made belatedly. Therefore, the respondents have accordingly calculated the period of delay and levied DPS on pro-rata basis taking into consideration the delay in remittance of each of the instalments. Therefore, it is incorrect to contend that the period of limitation would commence from the date of the raising of the first supplementary bill on 13.08.2015. Thus, it is contended that the appellant cannot take advantage of its own wrong and contend that the demand for DPS is beyond the period of limitation under Section 56(12) of the Act. With the above submission the learned Senior Advocate prayed for dismissal of the appeal.

13. Power to levy surcharge is traceable to the regulations framed by the West Bengal Electricity Regulation Commission. Regulation 3.3.9 of the 2013 Regulation states that all categories of consumers committing default of payment of the bill amount in time and in the stipulated manner shall be

liable to pay surcharge, penalty etc. at the rates made applicable in the concerned tariff order or in the Act or in the Regulations along with other penal actions as per the provisions of the Act and the Regulations. The 2011 Regulation also provides for collection of delayed payment surcharge and in terms of Regulation 4.1.4. the rates of applicable delay in payment surcharge arising from non-payment of electricity charges as also other charges by a consumer shall be 1.2% per month of delay or pro-rated for part thereof upto 3 months of delay, at 1.5% per month of delay or pro-rated part thereof for any period beyond 3 months of delay but upto the next 3 months and at 2% per month of delay or pro-rated for part thereof beyond first 6 months of delay. It further states the delay in payment shall be accounted from the due date for payment. Thus, delayed payment, surcharge (DPS) is without prejudice to the provisions of disconnection under the Act and the Regulations made thereunder. The appellant had entered into an agreement with DPL and in terms of Clause 12 of the said agreement and Clause 13 of the agreement would be relevant. Sub-clause (1) of clause 13 states if the consumer fails/ fail to pay the amount of any bill under the agreement within the due date of the bill referred to, shall give the consumer 15 days notice of an intimation to discontinue the supply of the electricity energy and after the expiry of such period, if payment has not been received in the meantime, may forthwith disconnect the supply until full payment for all obligation pending including charge for the work of disconnection and reconnection has been made. Sub-clause (2) of clause 13 states that for non-payment of any bill within the due date, the consumer shall pay late payment surcharge at the rate specified in the Schedule II to

the said agreement. In Schedule II under the column delayed payment surcharge, it is stated that it shall be as per the tariff order issued by the West Bengal Electricity Regulatory Commission from time to time. Therefore, the appellants are precluded and estopped from pleading that no DPC can be levied and collected from them whenever there is delay in payments of charges. The question would be as to whether the respondent could have invoked Sub-section (2) of Section 56 for the purpose of recovery of the DPS and upon failure to remit the same threatening disconnection. The contention of the learned Senior Advocate for the appellant is that the period of limitation for computing the 2 year period as stipulated under Sub-section (2) of Section 56 is the date on which the supplementary bill dated 13.08.2015 was raised. It is further contended that the bills which were raised subsequently, there was no indication of any errors payable by the appellant and for the first time in bill date 07.11.2017 alone the arrears were shown. Therefore, it is submitted that on and after the date of expiry of 2 years period, computed from 13.08.2015, DPS cannot be recovered by invoking Section 56(2) of the Act though, it will be open to the respondents to resort to the procedure under Section 56(1) of the Act in the accordance with law.

14. Late payment surcharge means the charge on all amounts not paid by the consumer by the due date prescribed. A surcharge is simply a type of cost that is applied over and above a standardized cost. Surcharge is an additional fee an added charge, or an extra tax that gets added to the total cost of a good or service. Default surcharge is in the nature of a civil penalty

and this is with a view to encourage business houses to pay the charges/taxes due on time.

15. On a perusal of the bill dated 13.08.2015 we find that there is clear mention about the rate of surcharge payable. Even assuming, it was not explicitly mentioned in the supplementary bill, yet the appellant cannot escape from the levy charges and liability in the light of the statutory regulation read with the agreement entered into between the appellant and the distribution company. Therefore, such argument which is contrary to the factual position has to be outrightly rejected and accordingly rejected. Having held thus, if we examine the order passed by the learned Single Bench, we find that the reasons to be perfectly in order. It has been rightly held that a combined reading of Regulation 4.1.4 with Section 56 clearly indicates the approval of the liability to pay DPS arises not from the date when the bill was first raised for payment of the original principal amount but from the first instance of non-payment of the concerned charges. Regulation 4.1.4 states that the licensee may disconnect or cut off supply of electricity of any defaulting consumer who fails or neglects to pay the electricity charges and/or other charges due from the consumer as per the electricity bill and/or demand unless subject to fulfilment of the conditions of Regulation 4.1.3, 4.1.1 or 4.1.2 whichever is applicable. Thus, the liability to pay other charges (DPS) would arise as and when a default is committed. It is not in dispute that the appellant did not adhere to the payment schedule which was initially granted by DPL and subsequently, granted by the respondent distribution company by virtue of an agreement on 08.11.2019. We are not concerned about the dues payable to DPL before

its merger with the respondent distribution company as it is admitted that no DPS has been charged in respect of any of the payments which were made to DPL though belatedly, and the DPL has been calculated taking into consideration the defaults committed by the appellant from time to time only with regard to the amount of Rs. 8.81 crores which was due and payable by the appellant on the date when DPL merged with the respondent distribution company. The appellants having admitted the default it goes without saying that the respondent distribution company is entitled to take into consideration the period of delay and accordingly, levy the DPS as per the tariff schedule. By way of illustration if the 3rd instalment which was due and payable was not paid on time and there has been a delay committed by the appellant for a period of 30 days, then the DPS will become chargeable for the 30 days period of delay, and this is so because the liability for payment of DPS is only upon delay in payment. Therefore, learned Senior Advocate appearing for the respondent distribution company is right in his contention that the calculation of the DPS is a dynamic formula and is not static, as DPS is leviable when payment is made belatedly. With regard to the plea of waiver made by the appellant which was pressed into service by the respondent during the course of argument in the writ petition, the learned Writ Court has ruled in favour of the appellant, and in the absence of any appeal by the respondents distribution company we are not required to examine the said aspect though we have a slightly different opinion on the said issue. This is so because of the concept that DPS and calculation thereof is a dynamic formula then it goes without saying that on every occasion when there was a delay and DPS become leviable and the

consumer consciously seeks for waiver of such payment it goes without saying that at the relevant point of time there was acknowledgement of liability. However, we do not wish to render any finding on the said issue for the reason mentioned above. Consequently, there would not be any need to deal with the decision in ***Asset Reconstruction Company (India) Limited Versus Bishal Jaiswal***⁵.

16. Mr. Sengupta, learned Senior Advocate referred to the decision of the Hon'ble Supreme Court in ***Rahamatullah*** to support the contention that obligation of a consumer to pay electricity charges arises after the bill is issued by the licensing company. We need to take note of the facts of the said case where the issue was an additional demand for consumption of electricity for the past period and the question arose was whether the appellant thereunder could have invoked Section 56(2) of the Act. Considering the said facts and circumstances, the Hon'ble Supreme Court interpreted Section 56(1) and (2) and held that the obligation of a consumer to pay would arise when bill is issued by the licensing company quantifying the charges to be paid and electricity charges would become first due only after the bill is issued to the consumer, even though the liability to pay may arise on the consumption of electricity.

17. In our considered view, the decision is clearly distinguishable on facts. In the case on hand, the demand is with regard to DPS and not for electricity consumption charges. Admittedly, on the date of merger Rs. 8.81 crores was due and payable towards consumption charges. This was permitted to be paid in instalments making it clear that DPS will be levied.

⁵ (2021) 6 SCC 366

The appellant did not adhere to the instalment payment committed default, and admittedly there was delay in payment. Therefore, as and when the delay occurs, automatically DPS will stand attracted and the appellant cannot escape from such liability. The decision in case of **K.C. Ninan**, the Hon'ble Supreme Court had elaborately considered the implication of Section 56(2) of the Act on recovery of electricity dues by electric utilities. However, we find that in the said decision, the aspect regarding levy of DPS was not the subject matter in controversy and consequently the interpretation to the period of limitation under Section 56(2) of the Act should enure in favour of the respondent distribution company having held that the levy of demand of DPS is a dynamic exercise and not static exercise and the cause of action continues to arise as and when delay in payment arises.

18. For all the above reasons, we find no ground to interfere with the judgment and order passed by the learned Single Bench. Accordingly, the appeal fails and dismissed. The time stipulated in paragraph 51 of the impugned order is extended till 30.09.2023. In the event of non-payment, the respondents are at liberty to proceed in terms of the direction issued in paragraph 52 of the impugned judgment.

(T.S. SIVAGNANAM, CJ.)

I Agree.

(HIRANMAY BHATTACHARYYA, J.)