

**In The High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

**WPO No.2271 of 2022
Jaishree Steels Private Limited and another
VS.
West Bengal State Electricity Distribution
Company Limited and others**

For the petitioners : Mr. Ratnanko Banerji, Sr. Adv.,
Mr. Jishnu Chowdhury, Adv.
Mr. A. Rai, Adv.
Mr. R.K. Rai, Adv.

For the respondents : Mr. Abhratosh Majumder, Sr. Adv.,
Mr. Sudhasatva Banerjee, Adv.,
Mr. Debanjan Mandal, Adv.,
Mr. Chayan Ghupta, Adv.,
Mr. Sandip Dasgupta, Adv.,
Mr. Aviroop Mitra, Adv.

Hearing concluded on : 24.04.2023

Judgment on : 08.06.2023

The Court:

1. The writ petition has been filed, challenging the imposition of Delayed Payment Surcharge (DPS), alternatively referred to as Late Payment Surcharge (LPSC), on electricity charges due from the petitioners.
2. The relevant facts are as follows:
3. On August 13, 2015, the erstwhile Distribution Licensee Durgapur Projects Limited (DPL) raised a supplementary bill demanding a sum of Rs.19,67,99,980/- as arrears payable by the petitioners.

4. There were talks of instalments between the parties and the DPL revised the principal dues of Rs.18.61 crore and granted twelve monthly instalments. The petitioners, although not in terms of the instalments granted, ultimately cleared the entire dues of Rs.18.61 crore by June 18, 2021. However, the first default in payment of the supplementary bill took place on September 18, 2015.
5. On January 1, 2019, DPL got merged into the West Bengal State Electricity Distribution Company Limited (WBSEDCL). On March 12, 2019, the WBSEDCL served a Notice demanding Rs.8.81 crore from the petitioners, being the balance dues in terms of the said supplementary bill of 2015.
6. The petitioners again asked for instalments, on which the respondents granted twelve monthly instalments in the same manner as the DPL had previously done. In the instalment bill dated March 27, 2019, it was clearly mentioned that no LPSC was included therein.
7. Due to non-payment of the DPS amounts, the WBSEDCL disconnected the electricity supply at the petitioners' plant on June 8, 2021, upon which a writ petition, bearing WPO No.260 of 2021, was filed. On November 17, 2021, a Division Bench of this Court ultimately directed restoration of such electricity connection and referred the validity of imposition of DPS *qua* its validity and probability, to be decided by the Central Grievance Redressal Officer (CGRO).

8. The CGRO upheld the imposition of DPS by its Order dated May 12, 2022. The present writ petitioner has been filed against such imposition.
9. It is argued by learned senior counsel appearing for the petitioners that the claim of DPS by the respondents was barred under Section 56(2) of the Electricity Act, 2003 (hereinafter referred to as, “the 2003 Act”). It is argued that the supplementary bill was raised on August 13, 2015, the cut-off date with regard to which in terms of Section 56(2) ought to have been August 13, 2017. Till that date, no sum payable on account of DPS or principal was continuously shown as arrears by the DPL in its regular monthly bills. In fact, till September, 2019, no DPS was claimed from the petitioners at all on the basis of the supplementary bill dues, either by the DPL or, subsequently, by the WBSEDCL.
10. Learned senior counsel submits that the CGRO, in the impugned order, erroneously relied on *Assistant Engineer (D1), Ajmer Vidyut Vitran Nigam Limited and another Vs. Rahamatullah Khan alias Rahamjullah*, reported at (2020) 4 SCC 650. It is argued that the Supreme Court held in the said judgment that Section 56(2) did not preclude the licensee from claiming an additional or supplementary demand after expiry of the limitation period. However, in the present case, the supplementary bill was raised long back by the DPL, in the year 2015, whereas the claim has been made for DPS only in the month of September, 2019. It is argued, on the premise of *Prem Cottex Vs. Uttar Haryana Bijli Vitran Nigam Ltd. and others*, reported at

2021 SCC OnLine SC 870, that Section 56(2) of the 2003 Act not only debars disconnection but recovery of any sum, if not reflected as arrears for a period of more than two years in the regular bills after the first claim.

11. It is argued that the said position of law was reiterated by a Division Bench of this Court in *West Bengal State Electricity Distribution Company Limited and Others Vs. Transmission & Distribution (India) Limited*, reported at 2023 SCC OnLine Cal 667. Although the CGRO proceeded on the premise that the petitioners defaulted in making regular payments of monthly bills, the same is contrary to the observation of the Division Bench of this Court in the Order dated November 17, 2021 to the effect that nowhere from the charts relied upon by both the parties, it could be shown that the current outstandings were not paid by the appellants. Moreover, the respondents, in their affidavit-in-opposition, have also admitted that the entire dispute in the writ petition pertains to the imposition of DPS aggregating to Rs.14,67,16,864/-. However, the respondents have sought to enhance their case from the one presented before the CGRO by contending that the right to levy DPS (LPSC) arises upon the delayed payment actually being made and therefore the claim is not barred as the delayed payments were made after 2019. Even going by such arguments without admitting the same, the petitioners contend, the DPS claims are barred under Section 56(2) since such delayed payments commenced and continued since September 18, 2015, despite which the DPL never imposed any DPS or LPSC on the

previous defaults, prior to the same being levied for the first time by the WBSEDCL in September, 2019, that is, much after the expiry of the limitation period.

12. In this context, the petitioners places reliance on a judgement of this Court reported at 2022 SCC OnLine Cal 174 [*Gagan Ferrotech Limited and another Vs. West Bengal Electricity Regulatory Commission and others*]. It is contended by the petitioners that the respondents, for the first time at the stage of arguments, adopted the plea of novation by contending that, after the issuance of the instalment bills and the correspondence exchanges between the parties pursuant to merger, the previous contract between the parties stood novated and superseded and therefore the claim of the DPS is justified and not barred by limitation. However, no new agreement or substitution of the old agreement is evident from any of the previous instalment bills and exchange of correspondences between the parties. Moreover, there was no consensus *ad idem* established between the parties with regard to issue of levy and claim of DPS. The petitioners never acquiesced to pay the DPS, as evident from the letters dated September 21, 2020, February 1, 2021 and February 10, 2021.

13. In the absence of any mutual agreement regarding new terms of any novated contract and without complete substitution of the terms of the previous agreement, a contract cannot be unilaterally novated or superseded. On such proposition, the petitioners rely on the judgments of *Lata Constructions and others Vs. Dr. Rameshchandra*

Ramniklal Shah and another [(2000) 1 SCC 585] as well as *Polymat India (P) Ltd. and another [(2005) 9 SCC 174]*.

14. Since the respondents have failed to plead novation either before the CGRO or in its affidavit-in-opposition against the writ petition no credence ought to be given to such arguments on this stage at the same will be highly prejudicial and detrimental to the rights and interest of the petitioners. In support of such proposition, learned senior counsel for the petitioners cites *Mukesh K. Tripathi Vs. Senior Divisional Manager, LIC and others*, reported at (2004) 8 SCC 387.

The facts of the judgments cited by the respondents are different from the present case, it is argued.

15. While controverting the arguments of the petitioners, learned senior counsel for the respondents contends that DPL was merged with WBSEDCL with effect from December 31, 2019, subsequent to which the WBSEDCL was able to ascertain that a sum of Rs.8.81 crore was payable by the petitioners. Accordingly, a disconnection notice was issued on March 12, 2019, as the entire amount under the supplementary bill was not paid by the petitioners as yet.
16. On March 26, 2019, the WBSEDCL granted twelve monthly instalments, but the petitioners failed to repay in terms of such grant.
17. On October 25, 2019, again on the petitioners' request, the WBSEDCL granted further instalments, which were re-scheduled again on December 30, 2019. Thereafter on August 7, 2020 the petitioner again prayed for grant of twelve instalments, upon which, by an

instalment bill dated August 10, 2020, the WBSEDCL agreed by granting eleven instalments commencing on September 30, 2020.

- 18.** Learned senior counsel for the respondents argues that, *vide* letters dated August 7, 2020 and September 21, 2020 and representations dated February 1, 2021 and February 10, 2021, which prayer was reiterated on March 10, 2021, the petitioners clearly acknowledged their liability to pay the old outstanding amount and DPS thereon.
- 19.** It is argued that as such, in terms of Regulations 3.3.9 and 4.14 of the WBERC Regulations, pertaining to The Electricity Supply Code and Terms and Conditions of Tariff, all categories of consumers committing default in payment of billed amount in time and stipulated manner shall be liable to pay surcharge, penalty, etc., at the rates made applicable in the concerned tariff order, which has been clearly stipulated in Regulation 4.14.
- 20.** The chargeable event in the case of DPS is the payment of legacy dues. Once a payment/part payment of outstanding dues is made, only then DPS is to be charged on such payment or part payment, which is to be calculated with reference to the date when such dues were ascertained and communicated to the consumer for immediate payment. It is argued that in this case, by a supplementary bill dated August 13, 2015, a sum in excess of Rs.18 crore (ascertained subsequently at Rs.18.61 crore) was found payable by the consumer on account of the change of Multiplying Factor (MF) from 200 to 400.

- 21.** No LPSC/DPS has been charged on the sum of Rs.9.80 crore which was paid towards the outstanding dues of Rs.18.61 crore during the DPL regime by way of irregular instalments. However, once DPL stood merged with the WBSEDCL, the legacy dues were ascertained at Rs.8.81 crore, which form a parallel set of dues compared to the regular monthly bill. The first demand was raised in February, 2019 and thereafter several agreements were entered into between the parties for payment of arrear dues by way of instalments. The point of accrual of liability is on the date of the supplementary bill raised by the DPL on August 13, 2015 for the purpose of ascertaining the liability of the petitioners. Regulation 3.3.9 of the 2013 Regulations is the charging provision whereas Regulation 4.1.4 of the 2011 Regulations is the machinery and/or computation provision. For the purpose of computation, the accrual of liability to pay LPSC relates back to August 13, 2015.
- 22.** Admittedly, the petitioners did not keep their commitment for making instalments time and again. Section 56(2), under these circumstances, would have no manner of application since several agreements were entered into between the parties for making payment by way of instalments from time to time and whenever any part payment was made towards outstanding dues of Rs.8.81 crore LPSC was charged on such part payment being computed with reference to the original supplementary bill raised by DPL on August 13, 2015. Hence, LPSC/DPS became first due for the month of September, 2019 and was correspondingly included in the monthly bill of October,

2019. Hence, the bar of limitation under Section 56(2) is not applicable. This Court, in *Rahamatullah Khan (supra)* and *Prem Cottex (supra)*, held clearly that first due date would be the date of raising the bill, which was reiterated in *Prabhu Polly Pipes (supra)*, it is contended.

- 23.** The WBSEDCL raised its demand for payment of arrear dues only when part payment was made with respect to the arrear dues of Rs.8.81 crore, with reference to the date of supplementary bill raised on August 13, 2015.
- 24.** The acknowledgement by the petitioners of their liability in writing and prayer for waiver was unqualified and would not only save the limitation period, but would also give a cause of action to the respondents to base their claim, as held in *Syndicate Bank Vs. R. Veeranna and others*, reported at (2003) 2 SCC 15.
- 25.** Three instalment arrangements were made by the WBSEDCL at the instance of the petitioners for payment of arrear dues, in total four, the first of which did not provide for levy of LPSC. Hence the contract/instalment plans got novated one after the other and it is a clear case of continuing breach of contract provided in Section 22 of the Limitation Act, 1963. Hence, Section 56(2) of the 2003 act would have no manner of application, it is submitted.
- 26.** There are three primary conditions in the present case. The first germane question which arises is whether the fresh claim of Rs.8.81 crore by the WBSEDCL, after merger of DPL with it, can be taken to

be a fresh instance of cause of action. However, it is well-settled that upon merger, the WBSIEDCL stepped into the shoes of the DPL and, as such, its position vis-à-vis the petitioners remained the same as with the DPL. Hence, we have to proceed on the legal position which would apply to the DPL, if no merger had taken place at all, in respect of the impugned claim of DPS.

27. The second aspect of the matter which has to be dealt with is whether the respondents' argument, of limitation being extended and fresh cause of action having arisen upon the several acknowledgments of due by the petitioners, is tenable in the eye of law.
28. Even if we consider Section 18 of the Limitation Act, we find that the premise of imposition of the said Section is that the acknowledgment has to come prior to the expiry of the limitation period.
29. In the event the petitioners' argument regarding the cause of action for DPS having arisen in the year 2015 is accepted, it cannot be said in such case that the acknowledgment prolonged the limitation period or create a fresh cause of action.
30. A cause of action, if dead, cannot be revived several years after its expiry merely by a subsequent acknowledgment, more so, since there cannot be any *estoppel* against statute.
31. Hence, if the limitation period is accepted to have arisen for the purpose of charging DPS from August, 2015, the same could not have been extended merely by taking advantage of subsequent "admissions" by the petitioners much thereafter.

32. Hence, such argument of the respondents cannot be accepted as well.
33. The most important ingredient of this matter is the commencement of the limitation period for charging DPS which has been impugned herein.
34. A look at Section 56 of the 2003 Act as a whole is required to ascertain the same.
35. The said Section is quoted herein below:

“56. Disconnection of supply in default of payment

(1) Where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a licensee or the generating company in respect of supply, transmission or distribution or wheeling of electricity to him, the licensee or the generating company may, after giving not less than fifteen clear days' notice in writing, to such person and without prejudice to his rights to recover such charge or other sum by suit, cut off the supply of electricity and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no longer:

Provided that the supply of electricity shall not be cut off if such person deposits, under protest,--

(a) an amount equal to the sum claimed from him, or

(b) the electricity charges due from him for each month calculated on the basis of average charge for electricity paid by him during the preceding six month,

whichever is less, pending disposal of any dispute between him and the licensee.

(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall 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 arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity.”

- 36.** As per Section 56(1), the Section is applicable where any person neglects to pay “charge for electricity or any sum other than a charge for electricity due from him to a licensee”. Sub-section (2) of Section 56 refers to the same definition of electricity charges and has a *non-obstante* clause in it. The relevant phrase in the said sub-section is “after the period of two years from the date when such sum became first due”. The expression “first due” has been explained by the Supreme Court in *Rahamatullah Khan (supra)* and *Prem Cottex (supra)* to be the date when the amount became first due. In the said cases, such date was held to be the date when the bill was first raised. As opposed to the date when the liability to pay first accrued, the “first due date” as contemplated in Section 56(2) was reiterated by the Supreme Court and by other judgments of this Court to be the date when the bill was raised.
- 37.** However, the date of the bill being raised cannot be a static straitjacket formula. The due date depends on two factors:
- i) when the first instance of the accrual of liability to pay occurs and
 - ii) the nature of the cause of action (e.g. whether fixed or continuing).
- 38.** Appreciating from such perspective, Clause 4.14 of Regulation 48 dated April 25, 2011 of the WBERC clearly stipulates the rates of the applicable “delayed payment surcharge arising from non-payment of electricity charges as also other charges” for different time-slabs.

- 39.** It is also stipulated that delay in payment shall be counted from the due date for payment.
- 40.** The above definition under Clause 4.14 is very relevant in the present context. Taken in conjunction with Section 56, sub-sections (1) and (2) of the 2003 Act, the above Clause clearly indicates that the accrual 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.
- 41.** A distinction may be drawn in this context with regard to principal electricity charges due and the DPS payable. Insofar as the first is concerned, the same is a fixed cause of action, which has to be taken to be the date when the amount became first due and payable. There is no scope of extension of the period of two years as envisaged in sub-section (2) of Section 56 in the event the said principal dues are not reflected continuously in the electricity bills for the next two years.
- 42.** However, in respect of DPS, the incidence is only on the instance of the delayed payment.
- 43.** Hence, in the present case, the liability to pay Delayed Payment Surcharge for each tranche of outstanding dues paid by the petitioners arises on the date on which such delayed payment was made, as only on non-payment of electricity charges the incidence of DPS arises, and “non-payment” necessarily implies that the same has to be calculated up to the date of payment.

- 44.** Hence, for each of the instalments of payments made by the petitioners with regard to the outstanding dues in respect of the supplementary bill of 2015, the liability to pay DPS would arise on and from the date of payment of such quantum, calculated on the basis of the said quantum only.
- 45.** Hence, in the present case, the cause of action for imposition of DPS for the different instalments of payment arose in a staggered manner, which is a concept somewhere in-between a static/fixed cause of action and a continuous cause of action. For the purpose of each of instalments of delayed payment of the total outstanding amount, the cause of action for charging DPS would crystallize on that date and would not operate as a continuous cause of action.
- 46.** As regards the remaining outstanding dues after each such part-payment, each of the quanta cleared thereafter would give rise to further liability to pay DPS on each of such amounts on each such occasion, which is precisely what has been done by the WBSEDCL. Hence, the modality by which DPS was charged by the WBSEDCL in the present case cannot be faulted in any manner.
- 47.** In view of the above discussions, although the petitioners would have succeeded on the first two propositions sought to be answered herein, taking into account the inter-play of Section 56(2) of the 2003 Act and Clause 4.14 of Regulation 48 of the WBERC, no fault could be found in the method of calculations of DPS by the WBSEDCL. Insofar as the date from which the amount is to be calculated in each case, the quantum would obviously relate back to the date of the first default as

a basis of calculation, although the cause of action only arises as and when the payment is made. Therefore, for each instance of payment of outstanding dues by the petitioners, the cause of action for charging DPS arises on such date of payment and the amount of DPS has to be calculated from the date when the amount became first due on the supplementary bill. Hence, the concept of limitation period under Section 56(2) can very well be reconciled and differentiated with the period for the purpose of calculation, insofar as DPS is concerned.

- 48.** Hence, the confusion sought to be raised by the petitioners between the due date for payment of the principal outstanding due and the DPS payable stands resolved, since the bill for the principal dues would be different from that for the Delayed Payment Surcharge (DPS).
- 49.** In such view of the matter, there is no scope of interference with the calculations of the WBSEDCL which have been impugned in the present writ petition, and/or the order of the CGRO in that regard.
- 50.** Accordingly, WPO No.2271 of 2022 is dismissed on contest, without any order as to costs.
- 51.** Keeping in view the pendency of the writ petition before this Court till today, the due date for payment of DPS to the tune of Rs.14,67,16,864/- by the petitioners is extended till July 31, 2023.
- 52.** In the event of non-payment of such amount within the said period, however, the WBSEDCL will be at liberty to disconnect the electricity supply of the petitioners on such score. Such payment shall be

irrespective and independent of the payment of the regular current electricity bills by the petitioners, as raised by the WBSEDCL for each billing period.

53. It is made clear that, as an arguable case was made out by the petitioners in the writ petition, the petitioners are not being saddled with any interest on the unpaid amount of recoverable DPS.
54. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)