

(2022) 05 OHC CK 0123

Orissa High Court

Case No: Writ Petition (C) No. 15796 Of 2008

Southern Electricity Supply
Company Of Orissa Limited,
Berhampur And Others

APPELLANT

Vs

Grievance Redressal Forum,
Berhampur And Another

RESPONDENT

Date of Decision: May 19, 2022

Acts Referred:

- Electricity Act, 2003 - Section 14, 126
- Orissa Electricity Regulatory Commission Distribution (Conditions Of Supply) Code, 2004 - Regulation 13(2), 19(2), 76, 84, 85, 91, 92, 92(ii), 93(13), 100

Hon'ble Judges: Dr. S. Muralidhar, CJ; R. K. Pattanaik, J

Bench: Division Bench

Advocate: B.C. Panda, P.K. Ray

Final Decision: Allowed

Judgement

Dr. S. Muralidhar, CJ.

1. The present writ petition by the Southern Electricity Supply Company of Orissa Limited (SOUTHCO), its Deputy General Manager and the

Executive Engineer, Electrical, Berhampur Electrical Division, against the decision dated 19th August 2008, passed by the Grievance Redressal

Forum, Berhampur (GRF) in GRF Case Nos.396 and 396(A) of 2008 allowing the complaint petition filed by M/s. Seven Hills Iron & Steel Limited

(Opposite Party No.2).

2. By the impugned order, the Petitioners were directed to re-work the energy bill of Opposite Party No.2 limiting the claims upto two months of the

disconnection i.e., upto 13th July 2006, treating deemed termination of the initial agreement while preparing the energy bills allowing off peak tariff

concession. If the actual consumption during off peak hours was not available, incentive was to be given on proportionate basis. Further the Delayed

Payment Surcharge (DPS) was to be recast in order to arrive at the actual arrears upto 13th July, 2006. The payment made by the consumer had to

be apportioned against the arrears upto 13th July, 2006 and the excess payment together with interest @1% was asked to be refunded by way of

adjustment in the subsequent energy bills under the Regulation 92 of the O.E.R.C. Distribution (Conditions of Supply) Code, 2004 (the 2004 Code).

The two Cheques presented by the Opposite Party No.2 towards the installment payments, which had not been encashed, were asked to be returned

to the Opposite Party No.2 forthwith, in order to regularize the power supply. In order to regularize the power supply, the Petitioners were to execute

a fresh agreement with the Opposite Party No.2 by treating it as a new consumer with the date of power supply as the date of commencement of

supply. It was further directed that all the above directions were implemented, the power connection of the Opposite Party No.2 would not be

disconnected.

3. On 3rd February 2009, the impugned order of the GRF was stayed by the Court. That interim order is continued since.

4. Despite opportunities, Opposite Party No.2 has not filed any counter affidavit till date.

5. The background facts are that the Petitioner No.1 is a distribution licensee having been granted license under Section 14 of the Electricity Act, 2003

(ActTM) by the Orissa Electricity Regulatory Commission (OERC) for distribution and retail supply of electricity in the southern zone of State of

Odisha. The Petitioner No.2 and 3 are the Deputy General Manager (Commerce) and the Executive Engineer (Electrical) of Petitioner No.1.

6. On 12th August 1999, an agreement was entered into between the Petitioner No.1 and the Opposite Party No.2 for supply of a contracted demand

of 1784 KVA load of electricity. Opposite Party No.2 was categorized under the Large Industrial Tariff Category. The agreement was to continue for

five years.

7. Opposite Party No.2 on 5th October 2002, applied for additional load of 2000 KVA by enhancing the contracted demand to 3784 KVA.

Accordingly, a fresh agreement was entered into between the parties for the enhanced contracted demand on 11th October, 2002. This agreement was to continue for five years and was in supersession of the earlier agreement dated 12th August, 1999.

8. A raid was then conducted in the premises of the Opposite Party No.2 on 21st February 2005 in the presence of its representative. It was detected that the consumer was availing power supply unauthorizedly bypassing the metering arrangement. Accordingly, an assessment proceeding under Section 126 of the Act was initiated against the Opposite Party No.2. After hearing the consumer, an assessment was made on 18th May 2008 to the tune of Rs.4,15,00,418/-.

9. Challenging the above assessment order, the Opposite Party No.2 filed W.P.(C) No.7111 of 2005 in this Court. By an order dated 26th October 2006, that assessment order was set aside and the Petitioner No.1 was permitted to raise an appropriate bill in accordance with Section 126 of the Act. Pursuant to the above order, the consumer was finally assessed for a sum of Rs.1,21,76,572 for the period from 21st August 2004 to 20th February 2005.

10. This was again challenged by the Opposite Party No.2 in this Court in W.P.(C) No.5493 of 2007. By an order dated 2nd May 2007, the above order of assessment was stayed by this Court. It may be mentioned here that the said writ petition W.P.(C) No.5493 of 2007 has since been disposed of by this Court on 6th March, 2018.

11. On 3rd April 2006, the consumer was furnished with an energy bill for the month of March 2006 in sum of Rs.37,27,340/-. For the above amount, the consumer submitted a Cheque on 29th April 2006, which was dishonoured by the bank for insufficient funds. For the month of April 2006, the energy bill worked out to a sum of Rs.25,46,160/-. On account of non-payment of the outstanding dues, the power supply was disconnected on 13th May, 2006. On that date, the outstanding owed by the consumer was Rs.70,61,003/-. This was separate from the amount assessed for the period of 21st August 2004 to 20th February 2005.

12. Opposite Party No.2 made an application on 12th December 2007 for restoration of power supply requesting that the Opposite Party No.2 should pay a sum of Rs.50 Lakhs as down payment and that the rest of amount will be paid in six equal installments. By a letter dated 21st December 2007, the Petitioner No.1 informed the Opposite Party No.2 that the total arrears worked upon Rs.2,08,40,093/- against the two units, i.e., Seven Hills Iron and Steel Ltd. (LI 38) and Seven Hills Re rolling Mills Ltd. (LI 1499). This was excluding the assessed amount under Section 126 of the Act which was sub judice in W.P.(C) No.5493 of 2007. The consumer was permitted to deposit a sum of Rs.50 lakhs as down payment for restoration of power supply. Out of the said amount, Rs.37,27,340/- was to be adjusted against the Consumer No.LI 38 towards the amount of dishonoured Cheque and the balance amount was to be adjusted against the Consumer No.LI 1499, i.e., Seven Hills Rolling Ltd. The balance amount of Rs.1,58,40,093 was to be paid in five equal monthly installments by post dated Cheques by 15th of the month starting from January 2008 for clearing the outstanding dues of both the units. It was made clear that this was excluding the assessed amount under Section 126 of the Act which was subjudice in this Court.

The consumer accepted the above conditions by a communication dated 1st January 2008 and sent a demand draft of Rs.50 lakhs along with five post dated cheques totaling Rs.1,58,40,093/-. The power supply was restored on 8th January 2008.

13. For the month of January 2008, an energy bill was issued on 2nd February 2008 for a sum of Rs.1,68,03,460/- i.e., current dues of Rs.17,80,657.17

+ arrear of Rs.1,50,22,802.35. For the month of February 2008, the energy bill was issued on 2nd March 2008 with current dues of Rs.29,89,690.54.

Likewise, bills were issued for the months of March, April and May.

14. Accordingly the Petitioners, although the consumer had cleared the current energy charges upto June 2008, none of the payment was made on the due dates as mentioned in the bills. Of the five post dated Cheques, one Cheque for Rs.31,68,018/- was cleared on the due date. The second Cheque on dated 31st March 2008 for the same amount towards the second installment was dishonoured due to insufficient funds, which was later deposited

as DD on 5th April 2008. The Cheque dated 15th May 2008 towards the third installment was again dishonoured due to stop payment instructions and later the same was deposited through a DD dated 26th May 2008. As of the date of filing of the petition therefore, three of the five post dated Cheques had been realized through the above method.

15. Meanwhile, energy bills were issued for the months of June, July, August and September, 2008. According to the Petitioners, the said bills remained unpaid as of the date of filing of the present petition. Therefore, the consumer was levied DPS and the total arrears by the end of September 2008 worked out to Rs.1,18,24,340/-. This again excluding the amount assessed under Section 126 of the Act.

16. The consumer by communication dated 9th May 2008 requested the CEO of Petitioner No.1 to waive off the demand charges i.e., the fixed charges i.e., of Rs.86,77,973/- for a period of fourteen months and ten days stating that the agreement had been executed on 12th August 1999 for a period of five years which had already expired whereas the supply was disconnected on 13th May 2006. The agreement had come to an end on 13th July 2006, after which the consumer was not liable to pay the demand charges. This was not accepted and a communication to that effect was sent by the Petitioners to the Opposite Party No.2 on 9th May 2008.

17. In the above background, Opposite Party No.2 filed a complaint before the GRF alleging that excess amount was being collected by the Petitioners and that a revised bill had to be issued by them for the earlier period. An interim order was passed by the GRF on 11th June 2008 stating that the power supply to the consumer would not be disconnected. The interim order directed the present Petitioners:

1. Not to disconnect the power supply till pending disposal of the Case No.396/08 and 396(A)/08 2. Not to present the Cheque Nos. 881699 dated 30.6.2008 for Rs.31,68,018,00 and 881700 dated 15.8.2002 for Rs.31,68,021.00 before the Andhra Bank SME Branch, Jagannathpur for encashing.

The complainant is hereby directed that-

1. He shall go on paying monthly energy charges on actual consumption.

18. Petitioner No.1 was stated to have appeared before the GRF and submitted an application for a direction to the Opposite Party No.2 to honour the

post-dated Cheques. No order appears to have been passed in the said application. Petitioner No.1 was stated to have filed a detailed reply bringing on

record all of the above facts. As far as the delayed payment surcharge (DPS) was concerned, it was pointed out that the consumer was liable as per

Clause 93(13) of the 2004 Code and that the DPS had been charged only on the unpaid amount. As regards extension of benefit of the off-peak tariff

concession i.e., TOD on actual consumption during off peak hours i.e., 10 PM to 6AM, it was pointed out by the Petitioners that the energy meter

installed in the industry was not technically built up or programmed as per the tariff notification of 2005-06 and that the consumer had also not come

forward to install such type of programmed meter having the TOD facility to avail the benefit.

19. The GRF then framed nine issues for determination and in the impugned order came to the following conclusions (it must be mentioned here that

the expression "Opposite Parties" issued hereafter in the extracted portion of the impugned order of the GRF refers to the Petitioners):

1. The Opp. Parties have raised a claim of demand charges for a period of 14 months and 10 days against the Complainant when the consumer has come forward for power supply, whereas on the contrary the bills have been stopped after two months of disconnection i.e. 13.7.2006 due to deemed termination of the agreement

dated 12.8.1999. Further no monthly bills have been served during this period which is in blatant violation of Regulations.

2. Delayed Payment Surcharge have been levied after deemed termination of the agreement dated 12.8.1999 for a period of 16 months and 21 days. The claim is in violation of Regulation 93(13) as D.P.S. can be levied on the arrears in case payment is not made within due date. In this case neither any monthly bills are served nor due dates are given.

3. Instead of sending the claims through bills to individual consumers as per Regulation 89, the Opp. Parties have raised a claim for both the consumer combinedly

through a statement which is irregular.

4. The Opp. Parties being a Licensee has allowed the consumer for availing power supply without entering into a formal agreement in breach of Regulations (After

deemed termination of the agreement dated 12.8.1999) in order to take undue advantage of the situation.

5. The Opp. Parties have tried to absolve their responsibility in non providing an appropriate meter with TOD facilities and citing the same as the reason for not giving tariff incentive during off-peak hour consumption, whereas the same facility has been extended to other consumers which tantamount to discrimination.

6. It was incumbent on the part of the Opp. Parties to ensure that before deemed termination (after two months of disconnection) the claims made against the consumer should have been settled as per Regulations and Tariff., had the incentive been given as per the tariff the amount outstanding including DPS would have been different at the time of termination.â€

20. Based on the above findings, directions were issued by the GRF by the impugned order referred to hereinbefore. This Court has heard the

submissions of Mr. B.C. Panda, learned counsel appearing for the Petitioners and Mr. P.K. Ray, learned counsel appearing for the Opposite Party

No.2.

21. It is necessary first to refer to the relevant provisions of the 2004 Code:

â€œ2 (m) â€œdate of commencement of supplyâ€ means the day immediately following the date of expiry of a period of one month from the date of intimation to an

intending consumer of the availability of power at the point of supply or the date of actual availing of supply by such consumer, whichever is earlier.

2 (w) â€œInitial period of agreementâ€ means the period of two years starting from the date of commencement of supply in respect of Domestic and General Purpose category of consumers and five years in respect of other category of consumers. The initial period of agreement shall continue till the end of the month, on which the end date of the two years period expires;

â€œAgreement

15. Every person whose application for initial supply or subsequent additional supply of power has been processed by the licensee who avails the supply at three phase, shall before taking such supply execute an agreement in the standard format as per Form No.3 of this Code and will deposit security amount as per Regulation

19(2) of this Code. In the case of non-remunerative schemes, portion of charges as indicated in Regulation 13(2) will also have to be deposited. Such agreement shall

not be required for Domestic and General Purpose consumers and their applications for power supply in the form as per in Form No.1, if accepted, shall constitute the

agreement between the licensee and the consumer. The duplicate copy of the application in Form No.1 shall be handed over to the applicant with endorsement of acceptance for his reference and record.

Termination of Agreement

16. (1) If power supply to any consumer remains disconnected for a period of two months for non-payment of charges or dues or non-compliance of any direction issued under this Code, and no effective steps are taken by the consumer for removing the cause of disconnection and for restoration of power supply, the agreement of the licensee with the consumer for power supply shall be deemed to have been terminated on expiry of the said period of two month, without notice, provided the initial period of agreement is over.

(2) On termination of the agreement, the licensee shall be entitled to remove the service line and other installation for supply of power from the premises of the consumer. After permanent disconnection, if the consumer wishes to revive the connection, then it would be treated as a fresh application for connection and would be entertained only after all outstanding dues have been cleared.

Enhancement of Contract Demand

72. Every application for enhancement of contract demand shall be made to the designated authority of the licensee and accompanied by-

- (1) such processing fee as notified by the licensee for the particular category of consumer,
- (2) test report from the licensed contractor where alteration of installation is involved, and
- (3) letter of approval of Electrical Inspector wherever applicable.

73. An application for the enhancement of the contract demand may be rejected if-

- (1) the additional power cannot be supplied at the existing voltage of supply of the license and the consumer is not willing to avail the power at higher voltage at which licensee is able to supply in accordance with Regulation 76 of this Code, or
- (2) the consumer is not agreeable to bear that part of the estimated cost of necessary additions or alterations in the system as is required to make it

remunerative

according to the norms fixed by the licensee with the approval of the Commissioner,
or

(3) the consumer is in arrears of payment of licensee's dues.

74. If as a result of the enhancement of contract demand, the classification of the consumer changes, the designated authority of the licensee before allowing the application may call upon the consumer to execute fresh agreement, subject to compliance of other conditions as laid down in this Code.

Minimum Monthly Charges

84. Every consumer, during continuance of agreement under Regulation 15, shall be liable to pay minimum monthly charges even if no electricity is consumed for any reason whatsoever or supply has been disconnected due to default of the consumer.

Demand Charges

85 (1) Monthly demand charges shall be payable by the consumer on the basis of maximum demand and contract demand as determined in the tariff notification. In case maximum demand meter is not provided or the meter has become defective, the monthly demand charges shall be payable on the basis of contract demand as determined in the tariff notification.

92. (i) If the licensee finds the bill to be erroneous, a revised bill shall be furnished to the consumer indicating a revised due date. Excess amount paid by the consumer shall be refunded by way of adjustment in the subsequent bill. Such excess amount shall be refunded together with interest at the rate of 1 (one) % per month from the date of payment of excess amount.

(ii) If the licensee finds the bill to be correct, the consumer shall be intimated accordingly and notified to pay the balance, if any, within fifteen days with interest at

the rate of 1% per month from the due date. If the engineer does not resolve the dispute within two months stipulated in Regulation 91, the consumer will not be liable

to pay the interest on the balance amount. However, if the dispute is not resolved due to negligence or non-cooperation of the consumer, the consumer will be liable to pay interest.

(iii) Failure to make payment as provided under Regulation 91 or Regulation 92(ii) above, shall merit action as provided in Regulation 100.

93. Delayed Payment Surcharge

(13) Category of consumers to whom delayed payment surcharge is applicable as per tariff order shall be liable to pay such delayed payment surcharge at the rate of two per cent per month or part thereof on arrears amount for default in payment by due date. There shall be no surcharge over surcharge.â€

22. Since the Opposite Party No.2 is a large industrial consumer, it is liable to pay the energy charges, demand charges and other charges. Demand

charges have been raised up to the date of completion of the agreement period i.e., upto 10th October 2007 in terms of Clause-16(1) of the 2004

Code. Even the DPS had been raised only in terms of Clause 93(13) of the 2004 Code for a period of sixteen months and twenty-one days. In this

context Para 7.15.7 of the tariff order for 2007-08 is also relevant. It was not understood how the GRF has overlooked the above provisions and

directed the Petitioners to present energy bill limiting the claim up to two months of disconnection i.e., upto 13th July 2006 and to prepare the energy

bill extending the benefit of off-peak tariff concession on proportionate basis basing on the monthly consumption and to recast the DPS on the arrears

outstanding upto 13 th July 2006. The Opposite Party No.2 is stated to be a chronic defaulter. Despite several opportunities of acceptance of payment

by way of installments, Opposite Party No.2 has always been in arrears. The consumer never removed the cause of the disconnection and for

restoration of power supply.

23. The case of the Petitioners is that the directions of the GRF that the initial period was to be calculated from 12th August, 1999 is not sustainable in

view of Clause 1 of the agreement dated 11.10.2002. Under Clause 16(1) of the Regulations, the agreement was continued for a period of five years

from the date of power supply and was to expire on 19th December, 2007. It is pointed that the consumer had been billed with the fixed charges upto

10th October, 2007 inadvertently by calculating the period of five years from the date of execution of the agreement i.e., 11th October, 2002 whereas

it had to be calculated from the date of supply. It was this which was sought to be corrected. There was no occasion for the GRF to interfere with the

said demand.

24. There was an obligation on the consumer in terms of the Regulations 84 and 85 of 2004 Code to continue to pay the minimum monthly charges

after 19th December, 2007 i.e., the completion of initial period of agreement. The Petitioners are right in pointing out that the DPS had been claimed in

the present case only on the arrears outstanding up to end of July 2007. No DPS had been claimed on the fixed demand charges. Considering that the

Opposite Party No.2 had never requested for the waiver of DPS, there was no occasion for the GRF to grant that leave to the Opposite Party No.2.

25. As regards the off-peak hour tariff concession, reference was made to the tariff order dated 22nd March, 2005 of the O.E.R.C. It was pointed out

that:

“In the present case, the meter installed in the premises of the consumer to record the consumption is not having the TOD facility (Time of Date) to record the consumption during

the off peak hours from 10 PM to 6 AM. Unless such recording facility is available, it was not possible to extend the benefit of discount on the unit consumed during the off peak

period as per the provisions of the Tariff. It is submitted that the meter was installed in the premises of consumer prior to the said Tariff notification which was not built up or

programmed by the manufacturer to record the consumption during the off peak hours as per the tariff notification. Since the consumer is aware of the tariff order, it was open to the

consumer to install the meter having such Facility to avail the benefits. It is clear from the tariff order that the meter having the TOD facility is entitled to get the said benefit.”

26. The above explanation appears to be a plausible one to this Court. There was no occasion for the GRF to interfere and to have directed that the

benefit should be extended on proportionate basis when in fact the consumer has made no effort to install a meter which can give an appropriate

reading for the above purpose.

27. For all of the aforementioned reasons, the Court is of the view that the impugned order of the GRF is unsustainable in law and it is hereby set

aside.

28. The writ petition is allowed in the above terms, but in the circumstances, with no orders as to costs.

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