

COURT-1

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)

APL No. 307 OF 2022 & IA NO. 667 OF 2025 & IA NO. 1125 OF 2022 &  
IA NO. 1012 OF 2025

**Dated: 11<sup>th</sup> August, 2025**

Present: Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson  
Hon`ble Ms. Seema Gupta, Technical Member (Electricity)

In the matter of:

Damodar Valley Power Consumers Association .... Appellant(s)

Versus

West Bengal Electricity Regulatory Commission & Anr. .... Respondent(s)

Counsel on record for the Appellant(s) : Rajiv Yadav

Counsel on record for the Respondent(s) : Mandakini Ghosh **for Res.1**

Shri Venkatesh  
Mharath Gangadharan  
Ashutosh kumar Srivastava  
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Siddharth Nigotia  
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Harsh Vardhan  
Mani Tiwari  
Anant Singh  
Abhishek Nangia

Kunal Veer Chopra  
Nehal Jain  
Vedant Choudhary  
Mohit Gupta **for Res.2**

## **ORDER**

**PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON**

IA No. 667 of 2025 (for vacation of stay  
&  
IA No. 1125 of 2022 (for interim relief)

### **I. INTRODUCTION:**

IA No. 667 of 2025 in Appeal No. 307 of 2022 is filed by the second Respondent-Applicant (Damodar Valley Corporation or “DVC” for short) requesting this Tribunal to vacate the stay granted by its earlier order in IA.No.1125 of 2022 in Appeal No. 307 of 2022 dated 29.07.2022.; and to allow the 2<sup>nd</sup> Respondent-Applicant to recover the unrealized amounts in terms of the order impugned in the Appeal dated 17.06.2022 along with late payment surcharge.

### **II. RELEVANT FACTS LEADING TO THE FILING OF THE PRESENT IA:**

Appeal No. 307 of 2022 was filed by the Damodar Valley Power Consumers Association, under Section 111 of the Electricity Act, 2003, whereby the order passed by the West Bengal Electricity Regulatory Commission (“WBERC” for short), in Case No. TP-79/18-19 dated 07.06.2022, was subjected to challenge. By the said order, the WBERC had determined the tariff applicable for distribution and retail supply of electricity for the 2<sup>nd</sup> Respondent-DVC for FY 2018-19 and FY 2019-20. In para 7.3.4 of the impugned order, the WBERC directed that any adjustment

in the energy bills, for the period 01.07.2018 onwards, shall be made by DVC in sixteen equal monthly instalments in the bills from the billing month of July, 2022 onwards.

In passing the interim order, in IA. No. 1125 of 2022 in Appeal No. 307 of 2022 dated 29.07.2022, this Tribunal had adopted the reasoning given by it in its earlier interim Order passed in IA. No. 896 of 2022 in DFR No. 229 of 2022 dated 06.06.2022; and had stayed recovery of arrears for FY 2018-19 and FY 2019-20 subject to the condition that the Appellant continued to pay its current dues.

The 2<sup>nd</sup> Respondent-Applicant claims that, in terms of the impugned order passed by the WBERC, they are yet to recover a total sum of Rs. 308.82 Crores as tariff arrears for FY 2018-19 and FY 2019-20 from its consumers on account of the interim order passed by this Tribunal on 29.07.2022, which included Rs. 217.40 Crores from the existing connected consumers and Rs. 91.42 Crores from consumers who had availed supply of power from DVC, but had subsequently disconnected themselves from the network of DVC; and this amount of Rs. 308.82 Crores excluded delayed payment surcharge.

On Appeal No. 307 of 2022, being listed for the first time before this Tribunal on 29.07.2022, an interim order was passed by this Tribunal adopting the interim order passed by it earlier in **Inox Air Products Private Limited Vs. West Bengal Electricity Regulatory Commission** (Order in IA No. IA. No. 896 of 2022 in DFR No. 229 of 2022 (later numbered as Appeal No. 286 of 2022) dated 06.06.2022) whereby all recovery of tariff arrears determined by the WBERC for FY 2017-18 was stayed. The interim order passed by this Tribunal on 29.07.2022, in terms of the earlier order passed in **Inox Air Products Private Limited**, was subject to the condition

that the Appellant Consumers Association/Consumers would continue to pay full tariff at the rate determined in the impugned order for the period commencing from the date of the impugned order.

The interim order, in **Inox Air Products Private Limited Vs WBERC** (Order in IA No. 895 of 2022 in DFR No. 229 of 2022 (later numbered as Appeal No. 286 of 2022) dated 06.06.2022), records that this Tribunal had heard the Learned Senior Counsel appearing on behalf of the appellant on the prayer for interim relief; the prime grouse of the appellant was that, in the Tariff Petition of the 2<sup>nd</sup> Respondent- DVC filed in December, 2016 for the control period 2017-18, the WBERC, by its decision rendered more than five years later on 05.05.2022, while determining higher tariff, had directed consequential arrears to be paid w.e.f. 01.04.2017 in eight installments, the total amount working out to Rs. 9.12 Crores approximately, the first installment being payable on or before 17.06.2022; and had held that, in case of non-payment, the second respondent-DVC would get the right to disrupt the supply which was likely to result in irreparable loss to the appellant (consumer).

This Tribunal thereafter noted that, in the facts and circumstances as presented, they were inclined to grant interim protection to the appellant; the direction of the respondent Commission for payment of arrears was being stayed subject to the condition that the appellant paid full tariff at the rate as determined by the impugned order for the period commencing with the date of the impugned order, and continues to do so month by month against the periodic bills that were raised in the contract between the parties; and this order would continue to operate till the matter returned to this Tribunal for further consideration. This Tribunal further observed that compliance of the above conditions shall be without prejudice to the

contentions of the appellant, and subject to the decision on the application for interim relief and the appeal.

Thereafter, in its order in IA No. 1125 of 2022 in Appeal No. 307 dated 29.07.2022, this Tribunal noted the submission, urged on behalf of the appellant herein, that the order under challenge in the appeal was similar to the subject matter of the appeal registered as DFR No. 229 of 2022, titled **Inox Air Products Private Limited Vs. West Bengal Electricity Regulatory Commission**, which had come up before the vacation bench of this Tribunal on 06.06.2022; and, on a similar application for interim relief (IA No. 895 of 2022 in DFR No. 229 of 2022), they had passed an interim order. After extracting the contents of the said interim order, this Tribunal thereafter noted the submission urged on behalf of the learned Counsel for the appellant that there was no justification for the members of the appellant association to be burdened with the responsibility to bear higher tariff in terms of the impugned decision, it being in breach of the norms set down by this Tribunal by judgment dated 11.11.2011 in Original Petition No.1 of 2011.

This Tribunal further observed that at this stage, when they were considering ex-parte relief, they felt it would be appropriate to adopt the interim dispensation granted ex-parte in the case of **Inox**. This Tribunal, however, reserved the right of the appellant to press for a modified interim relief after the respondents had been served and had the opportunity to file their respective replies; and, in this view, they were adopting the quoted order dated 06.06.2022 in the case of **Inox** for purposes of the present case as well.

I.A No. 1125 of 2022 in Appeal No. 307 of 2022 (the main I.A and the Appeal) formed part of the batch of I.As which came up for hearing before

this Tribunal on 17.10.2022. In its order dated 17.10.2022, this Tribunal noted that the WBERC had, by its order dated 05.05.2022 and 17.06.2022, determined the tariff in respect of DVC for the control period of FYs 2017-18, 2018-19 and 2019-20; one of the prime objections taken in the appeals was that such belated determination was not consistent with the statutory timelines enshrined in Part-VII of the Electricity Act read with the judgment of this Tribunal in OP No.1 of 2011 dated 11.11.2011, and was in violation of the provisions of the WBERC Tariff Regulations 2011.

After extracting details of the ARR and APR/ True-UP orders passed for different Financial Years/ period, this Tribunal noted that the order dated 05.05.2022 was passed by the WBERC to determine tariff not only for FY 2017-18 but also for FY 2018-19, FY 2019-20 and FY 2020-21, it having been made effective retrospectively from 01.04.2017; the subsequent order dated 17.06.2022 was issued to determine tariff for FY 2018-19 and FY 2019-20 made effective from 01.04.2018; in rendering these decisions, for a substantial period after close of the FYs, the State Commission had ignored the audited accounts which were available for FY 2017-18, *prima facie*, on the specious plea that an order on ARR must mandatorily be based on projections only; and, with actual data available for such past period, the delay being not attributable to the appellants, they found *prima facie* merit in the arguments that, overlooking the audited accounts, rendered it a case of failure to undertake proper prudence check.

This Tribunal further observed that, even as on date, the ARR/ APR orders awaited truing-up for nearly nine years, the last such order having been issued for FY 2013-14; a parallel exercise undertaken by the Jharkhand Electricity Regulatory Commission had resulted in Energy Charge Rate being determined @Rs.2.21/ unit, in contrast to the rate of Rs.2.60/ unit fixed by the State Commission in the case at hand, each order

being based on the same data of the same entity; on the previous hearing date, it was noticed that there was some possibility of amicable resolution and parties were called upon to formulate an interim arrangement such that, given the prima facie weighty contentions which had been urged against the propriety of the impugned order, they might call upon the State Commission to re-visit in a time bound manner so that all objections, claims and counter claims were properly addressed at the earliest; the parties had not been able to reach a consensus; in these circumstances, the applications for interim relief were posted for detailed hearing on 15.12.2022; and, meanwhile, the impugned orders shall remain stayed till a final decision was taken on the interim applications. In effect, while the earlier interim order passed on 29.07.2022, required the Appellant to pay the current dues, since what was stayed was only payment of arrears, the order dated 17.10.2022, whereby the impugned order was directed to remain stayed, entitled the Appellant not even to pay the current dues in terms of the true up/APR orders passed by the WBERC for FYs 2018-19 and 2019-20.

Aggrieved by the order passed by this Tribunal on 17.10.2022, the 2<sup>nd</sup> Respondent-DVC filed Civil Appeal Nos. 8091-8098 of 2022. Among the Civil Appeals included the appeal preferred by DVC against the interim order passed by this Tribunal on 17.10.2022 in I.A No. 1125 of 2022 in Appeal No. 307 of 2022 (ie. the present appeal and the main I.A therein). In its order in Civil Appeal Nos. 8091-8098 of 2022 dated 23.11.2022, the Supreme Court, after noting that this Tribunal was not in a position to take up the appeal for consideration for valid reasons, observed that they found it appropriate to make an interim arrangement, so that the interest of all the parties were protected in the meantime pending consideration of the appeal and, in this regard, they noted that this Tribunal, in its earlier order dated

06.06.2022, had stayed only payment of arrears subject to the condition that the Appellants before the Tribunal paid full tariff at the rate determined by the impugned orders dated 05.05.2022 and 17.06.2022 which were pending consideration before this Tribunal; since disposal of the appeals would take some time, they felt it appropriate to restore the earlier interim arrangement clarifying and directing that the Respondents in the Civil Appeals (who were Appellants before APTEL) to pay full tariff at the rate as determined by the WBERC, starting from the date on which the WBERC passed the impugned order i.e. from 05.05.2022 and 17.06.2022, during the pendency of the appeals before this Tribunal. The order dated 06.06.2022 of APTEL was restored to that extent. While requesting this Tribunal to consider and dispose of the appeal as expeditiously as possible, the Supreme Court clarified that pendency of the appeal before this Tribunal shall not be an impediment for the WBERC to consider the issue relating to truing up charges which was pending before it and pass appropriate orders in this regard in accordance with law. While leaving all contentions open to be urged in appropriate proceedings, the appeals were disposed of.

Several IAs in several appeals relating to this issue, including IA No. 436 of 2023 in I.A No. 1125 of 2022 in Appeal No. 307 of 2022, came up for hearing before this Tribunal on 31.03.2023. These IAs were filed by the 2<sup>nd</sup> Respondent-DVC seeking vacation of the earlier interim orders of stay, including those passed on 06.06.2022 and 29.07.2022. After noting the observations made by the Supreme Court, in its order in Civil Appeal Nos. 8091-8098 of 2022 dated 23.11.2022, this Tribunal observed that, in the said order, the Supreme Court had observed, more than once, that the interim arrangement made by it was to protect the interests of all the parties pending consideration of the Appeals; and, therefore, the Appellants were



directed to pay full tariff from the date of the order of the Commission i.e. 05.05.2022 and 17.06.2022 during the pendency of the Appeal before this Tribunal. This Tribunal, while holding that the submission urged on behalf of DVC that, since the earlier order passed by it on 06.06.2022 was interim in character, it was open to them to file a petition to have the said order vacated could not be readily brushed-aside, however observed that the order of the Supreme Court dated 23.11.2022, a final order which is binding on this Tribunal, disabled it from hearing the petition to vacate stay, since the directions of the Supreme Court was for the interim arrangement made by it to continue till the Appeals were finally heard and decided. All the IAs were, accordingly, dismissed.

Aggrieved thereby, DVC carried the matter again in appeal to the Supreme Court against the orders passed by this Tribunal on 31.03.2023. By its order in Civil Appeal Nos. 3164-3171 of 2023 dated 15.05.2023 (which included the appeal wherein the order passed by this Tribunal in I.A Nos. 436 of 2023 in I.A No. 1125 of 2022 in Appeal No. 307 of 2022 dated 31.03.2023 was under challenge), the Supreme Court, by its order dated 15.05.2023, disposed of the Appeals directing WBERC to consider the issue relating to truing up charges pending before it without being influenced by any of the proceedings pending before this Tribunal or any other forum or orders passed by APTEL or any other forum.

Pursuant to the aforesaid directions of the Supreme Court, the WBERC passed an order in Case No. APR-106/22-23 in the Petition filed by the 2<sup>nd</sup> Respondent-DVC seeking approval of the APR for FY 2017-18 based on the audited annual accounts.

Thereafter, several IAs were filed by Damodar Valley Corporation in several appeals, including an IA in the Appeal filed by Inox Air Products

Private Limited, seeking vacation of the interim orders passed by this Tribunal on 06.06.2022, 21.06.2022 and 01.07.2022. It is relevant to note that these IAs, seeking vacation of interim stay, did not include an IA seeking vacation of the interim order passed by this Tribunal in the Appellant's case on 29.07.2022.

By its order dated 05.04.2024, this Tribunal, after taking note of the events which had transpired till then, observed that, except to direct WBERC to consider the issue relating to truing up charges pending before it, the Supreme Court, even in its order dated 15.05.2023, had neither interfered with the order passed by this Tribunal on 31.03.2023 nor did it vacate the said order or modify or vary it; the interim arrangement put in place, as a result of the order passed by the Supreme Court on 23.11.2022 in terms of the earlier order of this Tribunal dated 06.06.2022, continued to remain in force even as on date; the second application now filed by DVC, seeking vacation of the order, was contended to be maintainable in view of Order 39 Rule 4 CPC; the basis for filing a second application, seeking vacation of the interim order dated 06.06.2022 was that, on a truing up order having been passed by the WBERC on 18.09.2022, there was a change in circumstance justifying the second vacation petition being filed by them; and, in view of the interim order dated 06.06.2022, hardship was being caused to the DVC which was detailed in the IA.

After extracting the relevant contents of the I.A wherein details of the unpaid dues were furnished, this Tribunal observed that, for an interim order to be vacated, the second proviso to Order 39 Rule 4 CPC required either one of the twin conditions stipulated therein to be satisfied i.e. (1) the application had been necessitated by a change in circumstances or (2) that the Court was satisfied that the order had caused undue hardship. On the question of undue hardship, this Tribunal observed that the interim order

now in force was passed by the Supreme Court in Civil Appeal Nos. 8091-8098 of 2022 dated 23.11.2022; consequently, any claim of hardship, for vacation of the said interim order, could only be made before the Supreme Court and not before this Tribunal, more so as the said interim order was directed to remain in force during the pendency of the present appeals.

On the other test of change in circumstance, this Tribunal observed that the true up order passed by the WBERC on 18.09.2023, recorded that the entire recoverable amount of around Rs.782.23 Crores shall be adjusted with the Aggregate Revenue Requirement for the year 2020-21 or any subsequent year as may be decided by the Commission; the subsequent event of the truing up order being passed, more so when recovery in terms of the said order was effective from the ARR of 2020-21, did not have any bearing on the interim order passed in an appeal preferred against the ARR order passed by the WBERC for FY 2017-18; and this would not constitute a change in circumstance justifying the second vacation petition being filed. Holding that the second application for vacation of the interim order did not satisfy the requirements of Order 39 Rule 4 CPC, this Tribunal observed that the said application was not maintainable, more so as the interim order passed by the Supreme Court on 23.11.2022 was directed to remain in force during the pendency of the present appeals.

Aggrieved thereby, the 2<sup>nd</sup> Respondent-DVC filed Civil Appeal Nos.5890-5893 of 2024 before the Supreme Court. Since the interim order granted by this Tribunal on 29.07.2022 was not under challenge, Civil Appeal Nos. 5890-5893 of 2024 also did not relate to the said order, but was confined only to the interim order passed by this Tribunal earlier on 06.06.2022, 21.06.2022, 01.07.2022 and 15.07.2022. In its order in Civil Appeal Nos.5890-5893 of 2024 dated 17.05.2024, the Supreme Court,

after extracting its earlier order dated 23.11.2022, observed that the WBERC had concluded the truing up proceedings and had passed an order on 18.09.2023; the Appellate Tribunal, by the impugned order dated 05.04.2024, had opined that, as the Supreme Court had already interfered with the interim order on 23.11.2022 and had restored the earlier order dated 06.06.2022, it would not be proper to vacate or vary the interim order and had, therefore, directed parties to approach the Supreme Court for appropriate orders; and it had also held that a change in circumstance pursuant to the WBERC's order dated 18.09.2023 and undue hardship being suffered by DVC warranting vacation could only be raised before the Supreme Court.

Thereafter the Supreme Court, in its order dated 17.05.2024, observed that the order passed by it on 23.11.2022 was an interim arrangement pending disposal of the appeals before the Tribunal; considering the subsequent development of the WBERC's order dated 18.09.2023, there was definitely an occasion to either reconsider the interim order or to dispose of the appeals pending before the Tribunal; and they respected the decision of the Tribunal that the present appeal could not be taken up out of turn. The Supreme Court clarified that the earlier order dated 23.11.2022 shall not stand in the way of this Tribunal reconsidering the interim order dated 06.06.2022 in the light of the WBERC's order dated 18.09.2023 or to hear the appeals on merits; and left it to this Tribunal to adopt such course as it considered appropriate.

Thereafter the 2<sup>nd</sup> Respondent-DVC filed IAs in Appeal No. 244 of 2022, 286 of 2023 and 288 of 2023 seeking vacation of the interim orders passed therein on 06.06.2022, 21.06.2022 and 01.07.2022. By a common order passed in these three IAs on 17.01.2025, this Tribunal, after extracting the order of the Supreme Court in Civil Appeal No. 5890-5893 of

2024 dated 17.05.2024, observed that the said order made it clear that there was an occasion for this Tribunal to reconsider its interim order in view of the subsequent development i.e. the WBERC's order dated 18.09.2023; in the light of the order of the Supreme Court, this Tribunal was required to proceed on the basis that the order of the WBERC dated 18.09.2023 was a change in circumstance justifying review of the earlier interim orders of this Tribunal dated 06.06.2022, 21.06.2022 and 01.07.2022; the main issue before this Tribunal, while granting interim stay of the impugned order, was that it was based on projections, it could not be an exaggerated tariff, and in case such a determination had been done based on actuals, this would have been lower; accordingly interim protection was granted by this Tribunal; in fact, from the APR order of FY 2017-18, the tariff determined based on actual audited figures was higher at Rs.5.63/ Kwh as compared to that determined as Rs.5.01/ Kwh based on projections in the impugned order, and which addressed the main concern of the Appellant; till the impugned order was passed by the WBERC on 05.05.2022, which determined the ARR of FY 2017-18, the tariff applicable for FY 2016-17, which was lower than the tariff determined in the impugned order, was extended for subsequent years; the adjusted tariff since 01.04.2017, till the passing of the impugned order, was allowed to be recovered in eight installments without carrying cost for this period; thus, the consumers not only had to pay lower tariff till passing of the impugned order, but adjustment was also without carrying cost from 01.04.2017 till passing of impugned order dated 05.05.2022; and, timely completion of the exercise of determination of tariff, could have obviated this problem.

With respect to the contention of the Appellant that, in the APR order dated 18.09.2023 passed by the WBERC, the revenue gap of Rs.782

Crores was to be adjusted with the ARR for the year 2020-21 or any subsequent year as may be decided by the State Commission and therefore, even if the stayed amount was considered in the APR order for FY 2017-18, leading to a higher revenue gap, it would also have been adjusted in the future, thus, resulting in no change in circumstances, this Tribunal observed that the State Commission, while determining the ARR for FY 2017-18 had allowed recovery of the adjusted amount (revenue gap) in eight installments; while determining the ARR for FY 2017-18, it had directed adjustment of the revenue gap from the ARR order in future years; and, therefore, these matters needed detailed deliberation and should be considered during the hearing of the Appeals.

This Tribunal further observed that the interim stay granted by this Tribunal earlier had disabled the applicant-DVC from recovering the arrears in eight instalments starting from the month of June, 2022 which could have been completed much before the date of the ARR order dated 18.09.2023 which had a different methodology than that of the ARR order as far as adjustment of revenue gap was concerned; this would constitute undue hardship in terms of the 2<sup>nd</sup> proviso to Order 39 Rule 4 of the CPC necessitating review of the earlier interim order; and the contention of Inox Air Products Pvt. Ltd, . that retrospective application of tariff, as allowed in the impugned order, had not been addressed in the APR order dated 18.09.2023 necessitated detailed deliberations, and would be taken when the main appeal was finally heard.

This Tribunal concluded holding that, instead of complete vacation of stay and with a view of to protect the interests of the appellants, the ex parte interim orders passed by this Tribunal dated 06.06.2022, 21.06.2022 and 01.07.2022 should be modified to the extent that 50% of the arrears based on the tariff, as determined in the impugned orders, should be paid within

thirty days of the order, and the balance 50% would remain stayed. After noting that a few consumers in the past had left the distribution system of the DVC subsequent to the interim orders of this Tribunal, and with a view to ensure that the respondent-DVC was not left high and dry in case the main appeals were to be dismissed later, this Tribunal directed that, for the balance 50% of the arrears, which were directed to be stayed, the appellants should give an unconditional bank guarantee of an equivalent amount from a scheduled bank within 30 days of the order; and the appellant shall comply with the directions for payment of full tariff as per the interim orders dated 06.06.2022, 21.06.2022 and 01.07.2022. This Tribunal further clarified that the said interim arrangement was subject to the result of the main appeal. All the IAs were accordingly disposed of.

Aggrieved thereby, the Appellants herein filed Civil Appeal No. 1976 - 2281 of 2025 before the Supreme Court and, by order dated 14.02.2025, the Supreme Court, while expressing its disinclination to interfere with the order passed by this Tribunal dated 17.01.2025, however extended the thirty days' time granted by this Tribunal till 30.04.2025 making it clear that no further extension of time in this respect would be granted. The Civil Appeals were accordingly disposed of.

The 2<sup>nd</sup> Respondent-Applicant's contention, in the present IA, is that the APR/true-up order subsequently passed by the WBERC constituted a change in circumstance; in addition, undue financial hardship was being caused to them in view of the order of this Tribunal dated 29.07.2022, since they were unable to recover the legitimate arrears which had been trued-up as a result of the revised tariff order approved by the WBERC in the APR orders; this also went against the principles of the Electricity Act by jeopardizing the interests of the consumers at large; some of the consumers of the 2<sup>nd</sup> Respondent-Applicant had started defaulting payment

of current bills, and therefore the Applicant had disconnected power supply of these consumers in accordance with law; the current monthly dues of such consumers would be adjusted against the security deposit held with the Applicant; further as the stay imposed by this Tribunal, by order dated 29.07.2022, was still in force, the arrear amounts could not be recovered from such consumers; the order of this Tribunal dated 29.07.2022 had resulted in delayed recovery (due to legal recourse that the DVC would have to initiate to recover the dues); they would now have to recover additional arrears amounting to around Rs. 91.42 Crores over and above the sum of Rs. 217.40 Crores as determined by the WBERC; after truing up, the WBERC had determined an additional revenue gap of Rs. 1015.98 Crores over and above the said amounts; even if the stay order dated 29.07.2022 gets vacated, then also recovery of arrears on account of certain consumers is uncertain; DVC cannot take any action against such consumers to recover its dues; such unrecovered arrear amounts from a back date would ultimately increase the loss to DVC; some of the consumers of DVC, in order to avoid payment of the tariff arrears, had chosen to disconnect from the network of DVC; these consumers were liable to pay Rs. 8.78 Crores on account of tariff arrears for FY 2018-19 and FY 2019-20; and the only remedy available to DVC is to initiate appropriate proceedings against the said consumers for recovery of the pending tariff arrears.

### **III. RIVAL CONTENTIONS:**

Elaborate submissions, both oral and written, were made by Sri Rajiv Yadav, Learned Counsel for the Appellant and Mr. Sri Venkatesh, Learned Counsel for the 2<sup>nd</sup> Respondent-DVC (the applicant in this IA seeking vacation of the earlier interim order passed by this Tribunal dated



29.07.2025). It is convenient to examine the rival contentions, urged by Learned Counsel on either side, under different heads.

#### **IV. SECOND PROVISO TO ORDER 39 RULE 4 CPC:**

Order 39 Rule 4 CPC stipulates that an order for injunction may be discharged, varied or set aside and, there-under, any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order. The second proviso thereto stipulates that, where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party.

Since the subject application itself seeks vacation of the earlier interim order dated 29.07.2022, in terms of the second proviso to Order 39 Rule 4 CPC, we shall proceed on the basis that the said provision is applicable to the facts of the present case. In terms of the second proviso to Order 39 Rule 4 CPC, the earlier interim order dated 29.07.2022 can only be set aside or varied if one of the two tests stipulated therein is satisfied, i.e. (a) there should be a change in circumstance, or (b) the Court/Tribunal must be satisfied that the interim order passed by it earlier on 29.07.2022 has caused undue hardship to the 2<sup>nd</sup> Respondent-DVC.

##### **(a) CHANGE IN CIRCUMSTANCE:**

If a party, against whom the injunction has been granted, satisfies that there is a change in the circumstance the Court may, in exercise of powers under Order 39 Rule 4 of the Code of Civil Procedure, vary or set aside or

discharge the injunction granted earlier. If, due to change in circumstance and in view of subsequent developments, in a given case a prima facie case and/or balance of convenience and/or irreparable loss has undergone a change, the same can be said to be change in circumstances warranting exercise of powers under Order 39 Rule 4 of the Code of Civil Procedure to discharge or vary or set aside the injunction granted earlier. While exercising such powers the Court is required to take great care and unless a strong case is made out of change in the circumstance, by which the relevant consideration for grant of injunction are likely to be changed, the Court may not exercise such powers, when the earlier injunction has been passed after giving an opportunity to both the parties. **(Padmavati Paradise v. Kirtiben Dhaneshkumar Shah, 2012 SCC OnLine Guj 471).**

The expression “change in circumstances” is referable to alteration in conditions or events which are pertinent to the issue of injunction. Thus when, after a temporary injunction is granted, there is a change in the relevant circumstances, it might become necessary to discharge, vary or modify order of temporary injunction. The Court may take into account subsequent events. **(Dover Park Builders Pvt. Ltd. v. Madhuri Jalan, 2002 SCC OnLine Cal 413 : AIR 2003 Cal 55).** The expression ‘change in circumstances’ is referable to the change/alteration in conditions or events which revolve around the subject in respect of which an injunction is granted. It would thus contemplate change in the relevant circumstances in form of subsequent events when the exercise of the power would be justified and such circumstance which were not in existence or contemplation when an order of injunction was passed.

**(b) UNDUE HARDSHIP:**

“Undue hardship” is the inconvenience being caused to a party on account of operation of an order of temporary injunction, which may justify the discharge/variance or setting aside an order of temporary injunction on an oppressive treatment or injunction being brought to the notice of the Court. **(Jairaj Devidas v. Hirabhai Shinwar Jadhav, 2021 SCC OnLine Bom 13790).**

The expression ‘*undue hardship*’ is normally related to economic hardship. ‘*Undue*’ means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances. **(Monotosh Saha v. Special Director, Enforcement Directorate & Anr, (2008) 12 SCC 359; S. Vasudeva v. State of Karnataka: (1993) 3 SCC 467 : AIR 1994 SC 923; Renew Naveen Urja (P) Ltd. v. CERC, 2024 SCC OnLine APTEL 86).** A mere assertion of “*undue hardship*” is not sufficient. For a hardship to be ‘undue’ it must be shown that the particular burden to observe or perform the requirement is out of proportion to the nature of the requirement itself. The word ‘*undue*’ adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant. **(Monotosh Saha v. Special Director, Enforcement Directorate & Anr, 2008 (12) SCC 359; S. Vasudeva v. State of Karnataka [(1993) 3 SCC 467 : AIR 1994 SC 923).**

“Undue” means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances. For a hardship to be “undue” it must be shown that the particular burden to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it. The word “undue” adds something more than just hardship. It means

an excessive hardship or a hardship greater than the circumstances warrant. (**Benara Valves Ltd. v. CCE, (2006) 13 SCC 347; Sterling General Insurance Co. Ltd. v. Planters Airways (P) Ltd., (1975) 1 SCC 603**).

As it would suffice for the earlier interim order to be varied or vacated if one of the afore-said two tests are satisfied, let us examine, bearing in mind the scope of these two expressions as detailed hereinabove, whether either one of these two tests is satisfied in the present case.

## **V. IS THERE ANY CHANGE IN CIRCUMSTANCE?**

### **A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:**

Sri Rajiv Yadav, Learned Counsel for the Appellant, would submit that the impugned tariff order dated 17.6.2022 for FY 2018-20 provided for retrospective revision of tariff with effect from 1.4.2018; Para 7.2.4 of the impugned order directed that *"All the rates and conditions of tariff mentioned above are effective from 1" April 2018."*; the stay order dated 6.6.2022 was passed in *Inox* appeal which had placed reliance on Regulation 2.10.2 at page 9 of the appeal and specifically contended in Ground-A: *"BECAUSE tariff order cannot be given for retrospective period unless there are compelling reasons"*; Regulation 2.10.2: *"The tariff shall normally be revised from the prospective date unless there is a compelling reason to revise the same from the retrospective date in which case detailed justification will be given in writing by the Commission"*; the relevant circumstance which weighed with this Hon'ble Tribunal while passing the 6.6.2022 order in *Inox* appeal was the retrospective revision of tariff with effect from April 2017 and. the submission in this regard has been recorded in the said order as follows: "The prime grouse of the appellant is that on a

Tariff Petition of second respondent/ Damodar Valley Corporation (DVC), filed in December, 2016 for the control period 2017-18, the respondent State Commission (WBERC) by its decision rendered *more than five years later on 05.05.2022 while determining higher tariff has directed consequential arrears to be paid w.e.f. 01.04.2017 in eight instalments....*". (emphasis supplied); the order dated 6.6.2022 was "*adopted*" in the subject order dated 29.7.2022, reserving liberty to DVPCA to seek a "*modified interim relief after the respondents have been served and have had the opportunity to file their respective replies*"; no change in circumstance has occasioned due to the APR orders for FY 2018-20 and/or this Tribunal's order of 17.1.2025 in Appeal No. 244/ 2022; the said orders cannot cure the 'retrospectivity defect' in the impugned order, which was the sole "*relevant consideration*" for grant of stay on recovery of arrears; and in **Padmawati Paradise v. Kirtiben (2012) SCC OnLine Guj 471**, it was observed: "*However, while exercising such powers the Court is required to take great care and unless a strong case is made out of change in the circumstance, by which the relevant consideration for grant of injunction are likely to be changed, the Court may not exercise such powers, as earlier injunction has been passed after giving an opportunity to both the parties*".

## **B. SUBMISSIONS URGED ON BEHALF OF THE 2<sup>ND</sup> RESPONDENT:**

On the other hand, Mr. Sri Venkatesh, Learned Counsel for the 2<sup>nd</sup> Respondent DVC, would contend that the change in circumstances, justifying vacation of the earlier interim order, had arisen (a) consequent on truing up of ARR of FY 2018-19 and FY 2019-20; and (b) modification of the earlier **Inox** interim order by this Tribunal which order has been affirmed by the Supreme Court.

On truing up of ARR of FY 2018-19 and FY 2019-20, Mr. Sri Venkatesh, Learned Counsel for the 2<sup>nd</sup> Respondent DVC, would submit that the Appellant sought interim stay claiming the Impugned Order was issued without prior true-up for FY 2014-15 to 2017-18 and based on projections instead of actuals, which allegedly inflated the cost of supply, making the tariff arbitrary and unjustified; subsequently, the WBERC carried out the truing-up for FY 2018-19 and 2019-20 in its Orders dated 11.12.2023 (Case No. APR 107/22-23) and 11.01.2024 (Case No. APR 108/22- 23) respectively, based on the actual audited figures; once the truing up exercise was carried out, the tariff for FY 2018-19 went from Rs. 5.01/kWh to Rs. 5.4/kWh and, for FY 2019-20, the tariff increased from Rs. 5.08/kWh to Rs. 6.114/kWh; and, on this ground alone, the interim stay granted earlier on 29.07.2022 ought to be vacated.

On the other change in circumstance, relating to the modification of the earlier **INOX** interim order, Mr. Sri Venkatesh, Learned Counsel for the 2<sup>nd</sup> Respondent DVC, would submit that the earlier **Inox** interim order, which formed the basis of the conditional stay in the present Appeal, has itself been modified by this Tribunal by Order dated 17.01.2025, wherein it has been directed that 50% of the arrears shall be paid upfront by the consumers and the remaining 50% shall be secured through Bank Guarantees; accordingly, the very foundation for continuation of the stay granted in the present Appeal no longer survives, thereby necessitating vacation of the interim Order; and the Appellant's challenge to the Order dated 17.01.2025 was dismissed by the Supreme Court, by its order in C.A. No. 1976 of 2025 dated 14.02.2025, affirming this Tribunal's Order.

### **C. ANALYSIS:**

The applicant-2<sup>nd</sup> Respondent-DVC contends that the change in circumstance had arisen (a) as a consequence of the truing up of the ARR for FY 2018-19 and FY 2019-20, and (b) modification, of the earlier interim orders passed by this Tribunal on 06.06.2022, 21.06.2022 and 01.07.2022, by its order dated 17.01.2025, the appeal against which was dismissed by the Supreme Court.

In the said order dated 17.01.2025, this Tribunal had noted that the Supreme Court, by its earlier order in Civil Appeal Nos. 3164-3171 of 2023 dated 15.05.2023, had directed the WBERC to consider the issue relating to truing up charges pending before it without being influenced by any proceedings pending before APTEL or any other forum or any order passed by APTEL or any other forum. This Tribunal, in its order dated 17.01.2026, further noted that the WBERC had, in compliance with the directions of the Supreme Court, passed the order in Case No. APR-106/2022-23 on 08.10.2022 approving the APR sought by the 2<sup>nd</sup> Respondent-DVC for FY 2017-18 based on the audited annual accounts for the concerned year.

It is relevant to note that, among the Appeals preferred by the 2<sup>nd</sup> Respondent-DVC before the Supreme Court in Civil Appeal No.3164-3172 of 2023, included the Appeal preferred by the 2<sup>nd</sup> Respondent-DVC against the interim order passed by this Tribunal in the present appeal on 29.07.2022 and, as a consequence of the order of the Supreme Court dated 15.05.2023, the WBERC had carried out truing up for FY 2018-19 and FY 2019-20 by its order in Case No.APR-107/22-23 and Case No.APR-108/22-23 dated 11.12.2023 respectively based on actual audited figures; and, like in the truing up exercise carried out for FY 2017-18, the tariff for FY 2018-19 went up from Rs.5.01/ Kwh to Rs.5.4/ Kwh and for FY 2019-20, the tariff increased from Rs.5.08/ Kwh to Rs.6.114/ Kwh.

While it is true that the Appeals preferred before this Tribunal, which resulted in the interim order dated 17.01.2025 being passed, did not include the present appeal wherein the interim order dated 29.07.2025 was passed, it is necessary to note that the very basis for passing the interim order dated 29.07.2022 is the earlier interim order dated 06.06.2022 which formed part of the batch of IAs which were heard and decided by this Tribunal by its order dated 17.01.2025. Further, in its order dated 17.01.2025, this Tribunal, after noting the observations of the Supreme Court, in its order in Civil Appeal No.5890-93 of 2024 dated 17.05.2024, that the subsequent order passed by the WBERC was a subsequent development, opined that, in the light of the said order of the Supreme Court, this Tribunal was required to proceed on the basis that the subsequent order of the WBERC was a change in circumstances justifying review of the earlier interim orders of this Tribunal dated 06.06.2022, 21.06.2022 and 01.07.2022.

Likewise, the true up orders passed by the WBERC on 11.12.2023, in compliance with the directions of the Supreme Court in its order in Civil Appeal No. 3164-3171 of 2023 dated 15.05.2023, would also constitute a change in circumstance, attracting the second proviso to Order 39 Rule 4 CPC, warranting vacation/variation of the earlier interim order passed on 29.07.2022, more so as the result of the true-up exercise carried out by WBERC for FY 2018-19 and FY 2019-20, by its order dated 11.12.2023 based on actual audited figures, has resulted in the tariff for FY 2018-19 going up from Rs.5.01/ Kwh to Rs.5.4/ Kwh, and for FY 2019-20, the tariff increased from Rs.5.08/ Kwh to Rs.6.114/ Kwh, which would belie the appellant's claim that a true-up exercise would result in reduction of tariff.

As noted hereinabove, the order passed by this Tribunal on 29.07.2022 was among the interim orders which were subjected to challenge in Civil Appeal Nos.8091-8098 of 2022 which culminated in an



order being passed by the Supreme Court on 23.11.2022 clarifying that the pendency of the appeal before this Tribunal shall not be an impediment to the WBERC to consider the issue relating to true up charges which was pending before it, and to pass appropriate orders. As the Appellant herein was also a party to the said Civil Appeals, the order of the Supreme Court dated 23.11.2022 is binding on it and its members also.

While it is true that the interim order passed in the present appeal on 29.07.2022 was not among the batch of I.As which were heard and decided by this Tribunal by its order dated 31.03.2023, or in Civil Appeal Nos. 3164-3171 of 2023 which culminated in the order dated 15.05.2023 being passed by the Supreme Court, the fact remains that the true up orders passed by the WBERC, albeit for FY 2017-18, was held by the Supreme Court, in its order dated 17.05.2024, to be a subsequent development because of which there was definitely an occasion to reconsider the interim order. This observation of the Supreme Court, in its order dated 17.05.2024, has been understood by this Tribunal, in its order dated 17.01.2025, to be a change in circumstance attracting the second proviso to Order 39 Rule 4 CPC. Further, the order of this Tribunal dated 17.01.2025, which was under challenge in Civil Appeal No. 1976 of 2025 filed by the Appellant herein (albeit in relation to another appeal), was disposed of by the Supreme Court expressing its disinclination to interfere with the order passed by this Tribunal on 17.01.2025, except for the 30 days time period granted by this Tribunal which was extended till 30.04.2025.

As the true up order passed by the WBERC has been held by the Supreme Court to be a subsequent development which gave rise for an occasion for reconsidering the earlier interim order, and this Tribunal had opined, in its order dated 17.01.2025, that this observation of the Supreme Court amounted to a change in circumstance, it would necessarily follow

that the true up order passed by the WBERC for FY 2018-19 and FY 2019-20 on 11.12.2023 would also result in a change in circumstance attracting the second proviso to Order 39 Rule 4 CPC.

The other ground which forms the basis of the 2<sup>nd</sup> Respondent-DVC's claim of a change in circumstances is the order passed by this Tribunal on 17.01.2025, the appeal against which was rejected by the Supreme Court. As noted hereinabove, the very basis for grant of interim relief by this Tribunal in its order dated 29.07.2022 is the order dated 06.06.2022 which order was modified by this Tribunal in its order dated 17.01.2025. In the said order, this Tribunal modified the earlier interim orders passed by it, and directed the Appellants to pay 50% of the arrears and furnish a bank guarantee for the remaining 50% within 30 days. In its order in Civil Appeal No.1976 of 2025 and 2281 of 2025 dated 14.02.2025, the Supreme Court, while expressing its disinclination to interfere with the order passed by this Tribunal on 17.01.2025, merely extended the 30 days' period, stipulated by this Tribunal for compliance, till 30.04.2025 making it clear that no further extension of time in this regard would be granted.

In the light of the afore-said order of this Tribunal dated 17.01.2025, and the order of the Supreme Court dated 14.02.2025, the interim order passed in this Appeal on 29.07.2022 also necessitates modification in the light of the afore-said change in circumstance, and the Appellant and its Members should be and are hereby directed to pay 50% of the arrears and furnish a bank guarantee for the remaining 50% within three months from today.

## **VI. IS THE “UNDUE HARDSHIP” TEST SATISFIED?**

### **A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:**

Sri Rajiv Yadav, Learned Counsel for the Appellant, would submit that, in para 3 of the present stay vacate application, the 2<sup>nd</sup> Respondent-DVC has stated that it is *"yet to recover a total of Rs. 308.82 crores as tariff arrears for FY 2018-19 and FY 2019-20 from its consumers on account of the stay granted by this Hon'ble Tribunal..."*; the subject stay order dated 29.7.2022 does not restrain the 2<sup>nd</sup> Respondent- DVC from recovering the entire tariff arrears of Rs. 308 crores; and the above quoted averment of the 2<sup>nd</sup> Respondent DVC is, therefore, factually inaccurate.

Relying on the tabular statement handed over in the hearing held on 7.7.2025, Sri Rajiv Yadav, Learned Counsel for the Appellant, would submit that, from out of the Rs. 308 crore tariff arrears, only about Rs. 70.30 crores is due from members of the Appellant who have paid their current bills and have sought impleadment in the present appeal (excluding M/s Metsil Exports and Surya Alloys, as they have also filed writ petition against the impugned order); such amounts represents merely 0.96% of the 2<sup>nd</sup> Respondent DVC's total ARR of Rs. 7275 crores, as per the impugned order; furthermore, the said tabular statement also reveals that out of Rs. 7275 crores, representing the total ARR for FY 2018-20, the Appellant has, admittedly, recovered Rs. 6967 crores (through the tariff charged in FY 2018-20); and, therefore, 95.77% of the Appellant's ARR as per the impugned order stood recovered in FY 2018-20 itself; given the facts of the present case, there is no 'undue hardship' to the 2<sup>nd</sup> Respondent DVC; and, in **Monotosh Saha v. ED: (2008) 12 SCC 359**, Para 13, it was observed that the word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant"; and, similarly, in **Jairaj Devidas**, it was observed that *"Undue hardship" contemplated under the said provision is the inconvenience being caused to a party on account of operation of an order of temporary injunction, which*

*may justify the discharge/variance or setting aside an order of temporary injunction on an oppressive treatment or injunction being brought to the notice of the Court."*

**B. SUBMISSIONS URGED ON BEHALF OF THE 2<sup>ND</sup> RESPONDENT:**

On the other hand, Mr. Sri Venkatesh, Learned Counsel for the 2<sup>nd</sup> Respondent DVC, would submit that continued operation of the Stay Order has caused significant financial hardship to DVC, as it is unable to recover the arrears already tried-up and approved by the WBERC through the APR Orders; the 2<sup>nd</sup> Respondent DVC has to recover a total of Rs. 308.82 Crores as tariff arrears for FY 2018-19 and FY 2019-20; and the interim order of stay has emboldened several consumers to default on their current dues and disconnect from the 2<sup>nd</sup> Respondent DVC's network, resulting in Rs.91.42 crores (excluding Delay Payment Surcharge) remaining outstanding from consumers who had availed power supply from the 2<sup>nd</sup> Respondent DVC, but had subsequently disconnected from the 2<sup>nd</sup> Respondent DVC's network.

Mr. Sri Venkatesh, Learned Counsel for the 2<sup>nd</sup> Respondent DVC, would further submit that the claim of the Appellant-Association that the stayed amount, attributable to its members seeking impleadment, constitutes a mere 0.96% of the combined ARR of Rs.7275 crores for FY 2018-19 and FY 2019-20 is misleading and factually deceptive; this figure deliberately conceals the real impact of the stay on the 2<sup>nd</sup> Respondent DVC's ability to recover its legitimate dues; in reality, the stayed amount of Rs.70.30 crores represents a significant portion of the remaining unrecovered dues under the impugned Order; the 2<sup>nd</sup> Respondent-DVC was restrained from recovering Rs.308.82 crores of legitimate tariff arrears, of which Rs. 91.42

crores pertains to disconnected consumers; the stayed amount, attributable to the Appellant's to be impleaded members is not an isolated or marginal figure; it forms part of the unrecovered dues that the 2<sup>nd</sup> Respondent DVC is unable to realize due to continued operation of the stay order; therefore, the 0.96% figure is illusory and ought to be rejected by this Tribunal; further the 2<sup>nd</sup> Respondent-DVC, being a statutory authority under the DVC Act, 1948, is obligated to fulfil its vital social responsibilities such as ensuring affordable electricity, maintaining flood control infrastructure, and supporting agricultural irrigation; prolonged denial of the legitimate dues undermines its ability to carry out these essential public welfare functions that directly impact socio-economic development in its command area; and, in view of the above, the interim stay granted by this Tribunal ought to be vacated.

### **C. ANALYSIS:**

As noted earlier, it is not every hardship, but only a hardship that is undue which would justify vacation or variation, of the earlier interim order dated 29.07.2022, in terms of the 2<sup>nd</sup> proviso to Order 39 Rule 4 CPC. While the Appellant contends that what is due from its members, towards arrears (payment of which was stayed by the interim order of this Tribunal dated 29.07.2022) is not Rs.308.82 Crores but only Rs.70.30 Crores excluding those Members who had approached the Calcutta High Court or those who had disconnected themselves from the area of supply of the 2<sup>nd</sup> Respondent-DVC, and that the amount due from the other Members of the Appellant is less than one percent of the 2<sup>nd</sup> Respondent-DVC's total ARR of Rs.7275 Crores, the submission urged on behalf of the 2<sup>nd</sup> Respondent-DVC is that the basis for the interim order dated 29.07.2022 was the earlier interim order dated 06.06.2022 passed in **INOX**, which order was passed mainly on the contention that, since the audited accounts were available,

the WBERC ought to have passed a true up order and not an order based on projections.

Mr. Shri Venkatesh, Learned Counsel for the 2<sup>nd</sup> Respondent-DVC, would point out that, on completion of the true up exercise, it is evident that there has been an increase in the revenue gap as also an enhancement in the applicable tariff; and the amounts due from the consumers towards arrears, which the 2<sup>nd</sup> Respondent-DVC has been unable to recover in view of the interim order, must be examined in the light of the statutory obligations required to be discharged by DVC in terms of the provisions of the Damodar Valley Corporation Act, 1948.

When examined as a percentage of the total ARR of DVC, the arrears due from the members of the Appellant, who are sought to be arrayed as co-appellants by way of another IA in this appeal, may not be significant. The fact, however, remains that, in absolute terms, the amount due from the members of the Appellant, even on the basis of the submissions urged on their behalf, is not an insignificant sum of Rs.71.30 Crores, and the 2<sup>nd</sup> Respondent-DVC claims that the total arrears due from all consumers is around Rs.308.12 Crores. It is un-necessary for us, however, to dwell on this aspect of undue hardship any further, as the second proviso to Order 39 Rule 4 CPC would be attracted even if one of the two tests stipulated therein is satisfied; and, as noted hereinabove, the 2<sup>nd</sup> Respondent-DVC has established that there has been a “change in circumstances” justifying modification of the earlier interim order dated 29.07.2022.

As the “change in circumstances” test is fulfilled in the present case, it is un-necessary for us to scrutinize in detail whether the test of “undue hardship” is also satisfied.

**VII. PENDENCY OF IA NO. 1125 OF 2022 FILED BY THE APPELLANT: ITS EFFECT:**

**A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:**

Mr. Rajiv Yadav, Learned Counsel for the Appellant, would contend that IA No. 1125 of 2022 filed by the Appellant, wherein an interim order was passed by this Tribunal on 29.07.2022, is still pending adjudication before this Tribunal and has not yet been disposed of; the 2<sup>nd</sup> Respondent had merely sought vacation of the interim order passed in the said I.A on 29.07.2022; since the said I.A is still pending, it is always open to the Appellant to request this Tribunal to adjudicate the said I.A on its merits including on grounds which the Appellant should now be permitted to urge, and which were not considered by this Tribunal while passing the interim order dated 29.07.2022; the entire basis of the interim order passed by this Tribunal on 29.07.2022 is the earlier interim order passed by it on 06.06.2022 in the appeal filed by Inox Air Products Private Limited; the main contention urged by Inox Air Products Private Limited, which resulted in an interim order being passed on 06.06.2022, was that the WBERC could not have passed a tariff order giving it retrospective operation; unlike in the appeal filed by Inox Air Products Private Limited, the Appellant herein did not raise any such ground in their appeal; and if the Appellant is not permitted to put-forth other grounds which were not considered by this Tribunal earlier when it passed the interim order on 29.07.2022, the Appellant would be denied its right to have its IA adjudicated in accordance with law.

**B. SUBMISSIONS URGED ON BEHALF OF THE 2<sup>ND</sup> RESPONDENT:**

Mr. Sri Venkatesh, Learned Counsel for the 2<sup>nd</sup> Respondent DVC, would submit that the Appellant's claim that IA No. 1125 of 2022 remains undecided is misconceived; the Stay Order was passed in furtherance of the Appellant's IA seeking interim relief (IA No. 1125 of 2022); and this Tribunal, after reserving liberty to seek modification, heard all parties and passed the Order dated 17.10.2022 which constitutes the modified interim relief.

### **C. ANALYSIS:**

It is true that the interim order passed by this Tribunal on 29.07.2022 is an interlocutory order, and this Tribunal made it clear that, at the stage when they were considering *ex-parte* relief, they felt it would be appropriate to adopt the interim dispensation granted *ex-parte* in the case of *Inox*; however, they reserved the right of the appellant to press for a modified interim relief after the Respondents had been served and had the opportunity to file their respective replies; and, in this view, they adopted the quoted order dated 06.06.2022 in the case of *Inox* for purposes of the present case as well.

What was reserved by this Tribunal was the right of the Appellant to press for a modified interim relief. As noted hereinabove, the interim relief granted by the order of this Tribunal dated 29.07.2022, is stay of payment of arrears. In terms of the said interim order, the members of the Appellant Association were obligated to pay the current dues. The right of the Appellant, which was reserved by this Tribunal by its order dated 29.07.2022, was to press for a modified interim relief. In other words, it would have been open to the Appellant to seek stay of payment of current dues also, in addition to the interim relief granted to them earlier staying payment of arrears. The Appellant has not sought any such modified interim relief, nor could they have in the light of the order of the Supreme



Court dated 22.11.2022 setting aside the interim order of this Tribunal dated 17.10.2022 and restoring the earlier interim order dated 06.06.2022.

What they contend is that they are entitled to re-argue the IA and claim that the interim order dated 29.07.2022 should be continued albeit on grounds other than that which weighed with this Tribunal in passing the earlier interim order dated 29.07.2022. The interim order passed by this Tribunal on 29.07.2022 itself records the submissions urged on behalf of the Appellant that the order, under challenge in Appeal No.307 of 2022, was similar to the subject matter of the appeal registered as DFR No. 229 of 2022 titled *Inox Air Products Private Limited v. West Bengal Electricity Regulatory Commission* which had come up before the Vacation Bench of this Tribunal on 06.06.2022. Having themselves contended that their appeal was similar to *Inox Air Products Private Limited*, it does not stand to reason that the Appellant herein should now contend, when the 2<sup>nd</sup> Respondent-DVC now seeks vacation of the interim order dated 29.07.2022 based on the interim order passed by this Tribunal on 17.01.2025 in *Inox's* case, that their IA is distinct from that of *Inox Air Products Private Limited*.

We must express our inability to agree with this submission urged on behalf of the Appellant for more than one reason. Firstly, the only basis on which the interim order dated on 29.07.2022 was passed are the reasons which weighed with the Tribunal in passing the interim order in *Inox* case on 06.06.2022. While Mr. Rajiv Yadav, Learned Counsel for the Appellant, would submit that the issue of retrospectivity, which was urged on behalf of *Inox* and which resulted in the interim order being passed on 06.06.2022, has not even been urged by the Appellant in the present Appeal, the fact remains that the Appellant has, on the basis of the said interim order dated 06.06.2022, obtained the interim order dated 29.07.2022 which order has

remained in force for the past three years. Having secured the benefit of an interim order passed on 29.07.2022, on the basis of the earlier interim order passed by this Tribunal on 06.06.2022, it is impermissible for the Appellant to now turn around and content that, since they have not raised such a ground in their appeal, their IA should be heard all over again, and an order should be passed to continue the earlier interim order dated 29.07.2022, albeit for reasons which the Appellant should now be permitted to urge. This contention, urged on behalf of the Appellant, is only to be noted to be rejected.

The other reason which has weighed with us in expressing our disinclination to permit the Appellant to re-agitate the IA is that the Appellant in the present appeal was also a party to the proceedings in Civil Appeal No. 3164-3171 of 2023 wherein the Supreme Court, by its order dated 15.05.2023, directed the WBERC to consider the issue relating to true up charges pending before it. It is pursuant to this order that the WBERC has passed the true up orders for FY 2017-18 and FY 2018-19 on 11.12.2023, long after the interim order in the present appeal was passed on 29.07.2022. The subsequent true up order passed by the WBERC has been held by this Tribunal, in its order dated 17.01.2025, to be a change in circumstance justifying modification of the earlier interim order. The order of this Tribunal dated 17.01.2025 was, in fact, subjected to challenge before the Supreme Court by the Appellant herein, albeit in relation to the earlier FY 2017-18, and the Supreme Court, by its order dated 14.02.2025, expressed its disinclination to interfere with the order of this Tribunal dated 17.01.2025.

For the afore-said reasons, we must express our disinclination to hear the IA filed by the Appellant all over again to consider whether the earlier interim order dated 29.07.2022 should be continued or not.

**VIII. NON-COMPLIANCE OF THE CONDITIONAL STAY ORDER BY  
MEMBERS OF THE APPELLANT: ITS EFFECT:**

**A. SUBMISSIONS URGED ON BEHALF OF THE 2<sup>ND</sup>  
RESPONDENT:**

Mr. Sri Venkatesh, Learned Counsel for the 2<sup>nd</sup> Respondent DVC, would submit that, in the **Inox** Order, conditional stay was granted to the Appellant subject to the condition that the Appellant, i.e its members, would continue paying their current dues; however, admittedly out of the 59 members of the Appellant (at the time of institution of the Appeal), 16 members with principal dues of Rs. 48.61 Crores have been disconnected from the network of the 2<sup>nd</sup> Respondent-DVC on account of non-payment of current dues; the Supreme Court, in **B. Himmatlal Agrawal v. CCI & Anr.**, (2018) 17 SCC 421, has held that non-compliance with conditions of an order of stay justifies vacation of the said order of stay itself; in the present case, since 16 members of the Appellant had failed to comply with the stipulated condition, the interim order of stay is liable to be vacated as against the Appellant, i.e., DVPCA and all its members on this ground alone; the conditional stay granted by this Tribunal was not intended to operate as an unqualified shield, for members of the Appellant, without reciprocal compliance; the interim order of stay was explicitly premised on the continued payment of current dues by the members of the Appellant; in the absence of such compliance, particularly in light of 16 members defaulting and being disconnected for non-payment, continuation of the order of stay results in a manifest imbalance offering one-sided protection without accountability; in view of the above, the conditional stay, having been breached and rendered unenforceable by the Appellant, is liable to be vacated to prevent further financial prejudice to the 2<sup>nd</sup> Respondent DVC; further, two members of the Appellant, namely Metsil Exports Ltd. and Surya Alloys Ltd., have independently approached the Calcutta High Court

by filing WPA 15590/2022 and WPA 15587/2022, respectively; and, accordingly, no interim protection under the present Appeal can be claimed by or extended to them.

### **B. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:**

On the other hand, Sri Rajiv Yadav, Learned Counsel for the Appellant, would submit that a perusal of the stay order reveals that it benefits only such members of the Appellant vis-a-vis recovery of the past arrears, as have paid their current dues in terms of the impugned order; any member of the Appellant, not paying the current bills, loses the benefit of the stay order, and the 2<sup>nd</sup> Respondent-DVC can recover the arrears from such defaulter; and the 2<sup>nd</sup> Respondent DVC is under no restraint not to recover arrears from consumers who are not members of the Appellant, and such consumers who were members of the Appellant on the date of filing of the appeal, but have defaulted in payment of the current bills.

### **C. ANALYSIS:**

As noted hereinabove, the interim order passed by this Tribunal on 29.07.2022 is a conditional interim order, wherein the earlier interim order of this Tribunal dated 06.06.2022 is extracted, and it is then observed that this Tribunal, while considering grant of ex-parte relief, felt it appropriate to adopt the interim order dispensation granted *ex-parte* in the case of *Inox*. The quoted portion in *Inox's* case makes it clear that the direction of the WBERC for payment of arrears was stayed, subject to the condition that the Appellant paid full tariff at the rate as determined by the impugned order for the period commencing from the date of the impugned order, and they continue to do so month by month against the periodic bills that were raised under the contract between the parties.

Mr. Rajiv Yadav, Learned Counsel for the Appellant, would fairly state that, in so far as such of the members of the Appellant, who had not complied with the conditional order and had ceased to pay the current dues or had left the area of supply of the 2<sup>nd</sup> Respondent-DVC, are concerned, the interim order passed by this Tribunal on 29.07.2022 would cease to operate in their favour.

As rightly submitted both by Mr. Shri Venkatesh, Learned Counsel for the 2<sup>nd</sup> Respondent-DVC, and Mr. Rajiv Yadav, Learned Counsel for the Appellant, the order of this Tribunal dated 29.07.2022 is a conditional order, and the order granting stay of payment of arrears is conditional on the consumers continuing to pay their current bills month by month. The moment they cease to pay the bills for any given month, the said interim order dated 29.07.2022 ceases to operate, and it is open to the 2<sup>nd</sup> Respondent-DVC to recover all dues (including arrears and current dues) from such consumers, since the interim order dated 29.07.2022 would have ceased to operate consequent on the default by the consumer concerned.

Consequently, in so far as the 16 defaulting members of the Appellant Association are concerned, the interim order passed by this Tribunal on 29.07.2022 would cease to operate and the modified order which we have now passed shall also not apply to these 16 Members. Likewise, M/s Metsil Exports Limited and Surya Alloys Limited have admittedly filed Writ Petitions before the Calcutta High Court seeking a similar interim relief as is being sought in the present appeal. The doctrine of election would apply, and it is impermissible for any party to simultaneously seek the same relief before two different fora. Since these two companies have approached the Calcutta High Court, suffice it to hold that the interim order passed by this Tribunal on 29.07.2022 and the present modified order passed by us, shall have no application in so far as they are concerned and, subject to any

order which the Calcutta High Court may have passed, it is open to the 2<sup>nd</sup> Respondent-DVC to take action for recovery of all dues, from these two consumers, in accordance with law. Since no interim order is in force with respect to the 16 defaulting members of the Appellant Association, it is open to the 2<sup>nd</sup> Respondent-DVC to recover the entire arrears due from them. Needless to state that the question whether the Appellant association should bear the cost of restitution, in case appeals were to be dismissed later, with respect to these eighteen members (sixteen of whom have left the area of supply of the 2<sup>nd</sup> Respondent-DVC and two others who had simultaneously invoked the jurisdiction of the Calcutta High Court) shall be examined when the main appeal is taken up for hearing.

We must however, express our difficulty in agreeing with the submission urged on behalf of the 2<sup>nd</sup> Respondent-DVC that default on the part of the 18 Members (16 who have left the area of supply of the 2<sup>nd</sup> Respondent, and two others who have approached the Calcutta High Court) would necessitate the interim order dated 29.07.2022 being vacated in its entirety in so far as the other members of the Appellant Association are concerned. While it is true that, when the appeal was filed before this Tribunal in June 2022, it is only the Association which had filed the Appeal, an application has been subsequently filed seeking impleadment of the other Members and since, on their being impleaded, these members would also be Co-Appellants along with the Appellant-Association, the modified interim order would apply in their case also. Further, it would be open to the 2<sup>nd</sup> Respondent-DVC to seek restitution from each of these consumers, consequent on their being impleaded as Appellants, in case the present Appeal were to be dismissed later. It is not even the case of the 2<sup>nd</sup> Respondent-DVC that any one of the other members of the first Appellant-Association had failed to comply with the conditions stipulated in the interim

order dated 29.07.2022 or had defaulted in payment of current dues for any given month. For the fault of 18 of its members, it would be unjust to penalize the other members of the Appellant-Association for no fault of theirs.

#### **IX. CONCLUSION:**

For the afore-said reasons, the interim order passed by this Tribunal on 29.07.2022 is modified, and there shall be stay of arrears in so far as the Appellants herein are concerned on condition that they pay 50% of the arrears as determined in terms of the impugned order of the WBERC, and furnish a bank guarantee for the remaining 50%, within three months from today. They shall also continue to pay the current dues in terms of the order impugned in this appeal. Needless to state that failure to comply with the afore-said order would result in automatic vacation of the interim order now passed by us, and it would be open to the 2<sup>nd</sup> Respondent-DVC to recover the entire arrears from such defaulting Appellants.

Both IA No. 667 of 2025 and IA No.1125 of 2022 in Appeal No. 307 of 2022 are, accordingly disposed of.

APPEAL NO. 307 OF 2022 & IA NO. 1012 OF 2025

Post IA No. 1012 of 2025 for hearing on **18.08.2025.**

Pronounced in the open court on this the **11<sup>th</sup> day of August, 2025.**

(Seema Gupta)  
Technical Member

(Justice Ramesh Ranganathan)  
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

*tpd*