

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**APPEAL NO.170 OF 2020 &
IA NO. 1295 OF 2020**

Dated: 28th January, 2021

**Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member**

In the matter of:

Damodar Valley Corporation

DVC Towers, VIP Road,
Kolkata – 700 054

..... Appellant(s)

Versus

- 1. Jharkhand State Electricity Regulatory Commission**
Through its Secretary,
2nd Floor, Rajendra Jawan Bhawan,
Sainik Bazar, Main Road, Ranchi-834001
Jharkhand
- 2. Department of Energy,
Government of Jharkhand**
Through its Secretary,
3rd Floor, SLDC Building,
Kusai, Ranchi-834002
- 3. Jharkhand Bijli Vitran Nigam Ltd.**
Through Managing Director
Engineering Building,
HEC Dhurwa, Ranchi-834004,
- 4. Tata Steel Limited (TSL)**
Through its Director

Sakchi Boulevard Road, Northern Road, Bistupur
Jamshedpur - 831 001, Jharkhand

5. **Tata Steel Utilities & Infrastructures Services Limited (TSUISL)**
(Earlier known as Jamshedpur Utilities and Services Company Ltd)
Through EIC (Power Services)
Sakchi Boulevard Road, Northern Town, Bistupur,
Jamshedpur - 831 001, Jharkhand
6. **Steel Authority of India Limited (SAIL)**
Through CEO, Bokaro Steel Plant
Bokaro Steel City, Bokaro-827001,
7. **M/s Sujata Picture Palace**
Through Director
Mahatma Gandhi Main Road,
Sujata Chowk, Ranchi-834001
8. **Secretary General, FJCCI**
Federation of Jharkhand Chamber of Commerce & Industries
Chamber Bhawan, Chamber Path,
Main Road, Ranchi – 834001
9. **Secretary, Jharkhand Small Industries Association**
Udyog Bhavan, Industrial Area,
Kokar, Ranchi, Jharkhand – 834001
10. **Vice President-Industry,
Singhbhum Chamber of Commerce and Industry**
Chamber Bhawan, Bistupur, Jamshedpur,
Jharkhand 831001
11. **Sri Ajay Bhandari**
E-71, Ashok Vihar,
Opp. Ashok Nagar PS- Argora
Ranchi, Jharkhand – 834002
12. **Association of DVC HT Consumers of Jharkhand**
Through its Secretary,
Kalyani Apartment, 1st floor
Gandhi Chowk, Giridih,

Jharkhand, 815301

..... Respondent (s)

Counsel for the Appellant (s): **Mr. M.G. Ramachandran, Sr. Adv.**
Ms. Anushree Bardhan

Counsel for the Respondent (s): **Mr. Farrukh Rasheed for R-1**

Mr. Arijit Maitra for R-2

Mr. Sachin Datta, Sr. Adv.
Mr. Rupesh Kumar
Mr. Pravesh Bahuguna for R-6

Mr. Amit Kapur
Mr. Rajiv Yadav
Mr. Akshat Jain for R-12

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. This matter has been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. The challenge in this appeal is by distribution licensee to an Order issued *suo-motu* by the Jharkhand State Electricity Regulatory Commission (hereinafter referred to as “*the State Commission*” or “*the Commission*”) essentially to provide some relief to the consumers *vis-à-vis* compliance with the Tariff Order in the matter of payment to the distribution

licensees on account of difficulties faced due to the pandemic conditions prevailing as a result of spread of 'COVID-19'. Though, there are several distribution licensees operating in the State of Jharkhand, one of them i.e. Damodar Valley Corporation (hereinafter referred to as "DVC" or "Appellant" or "Distribution Licensee") has come up to assail the relief package introduced by the impugned Order dated 21.09.2020 passed in Case No. 15 of 2020 arguing primarily that it is illegal on account of non-adherence to the pre-requisite under Section 65 of the Electricity Act, 2003 and also on the ground that it is arbitrary, unjust, unfair and inequitable. The beneficiaries of the order who have put in a contest include mainly the twelfth respondent – Association of DVC consumers of Jharkhand and sixth respondent Steel Authority of India Ltd (SAIL).

3. COVID-19 (Coronavirus) started spreading its tentacles from some time in December, 2019 beginning from a region in Peoples' Republic of China. It seems to have spread initially to Western Europe and then all over the globe entering Indian territory sometime in the beginning of 2020. It acquired pandemic status soon thereafter resulting in measures required to be taken by all civil societies and Governments of different countries including in India eventually forcing a lockdown (imposed nationally) sometime in the end of March, 2020. Though, of late, its spread seems to have been checked to an extent, the situation has not returned to normalcy

even till date, news of a more severe mutant surfacing in certain West European countries doing the rounds.

4. The national lockdown resulted in closure of almost all activity – social, economic, industrial, etc. – for several months. There is no doubt that this had the enormous adverse consequences, causing havoc to the industrial and commercial enterprises in all States and Union Territories of India including the State of Jharkhand. Several industries (excluding those which were declared to be essential) had to be shutdown, bringing the production work to a halt. There is no dispute that this had a very blighting impact on the economic wellbeing of such enterprises damaging the economy. Relief packages were announced and floated by various Governments (Central and State) from time to time and over the period to alleviate the people at large from the miseries consequentially suffered. In ongoing pandemic state, the audit of damage suffered and of the palliatives injected by the State agencies, however, will have to wait.

5. In the above scenario, the industrial activity and commercial transactions having either come to a stop or suffering slowdown, the demand and consumption of electricity also saw a nosedive. The generating units were asked to back down because there was not much demand for electricity even though they were expected to remain in

readiness and available. The food chain in the electricity sector includes the distribution licensees as one of the key links, they being the facilities through which the consumer receives the supply. The impact of the slowing economy also resulted in the distribution licensees suffering losses and being rendered unable to pay back to the generators (source of supply) because of the difficulties suffered in recoveries from the consumers at large. Having regard to these conditions, relief packages were announced by Central Government and several State Governments as indeed various Electricity Regulatory Commissions controlling the tariff of such supplies in the respective States or Union Territories.

6. The Ministry of Power (MoP), in the Government of India (GoI), seems to have initiated the relief measures by communication dated 15.05.2020 addressed to Central Public Sector Generations Companies (CPSGCs) to suggest that they may consider to offer certain rebates to the distribution licensees for passing to the end consumers reliefs in the nature of deferment of capacity charges and rebates against the power supply billed or inter-state transmission charges, such advisory having been partially modified on 16.05.2020.

7. Against the above backdrop, and definitely with similar concerns in mind, the Government of State of Jharkhand issued a communication to the State Commission on 16.07.2020 as under:

*“Letter no. 1384/ACS
Department of Energy
Govt. of Jharkhand*

Dated 16.07.2020

*From,
L. Khiangte, IAS
Additional Chief Secretary
Department of Energy
Government of Jharkhand*

*To,
Chairperson,
Jharkhand State Electricity Regulatory Commission
Kanke Road, Ranchi*

Sub: Providing relief of Waiver of Fixed Charges for the months of April, May & June, 2020 and moratorium on electricity bill payments for 03 months to industrial/commercial consumers affected due to lockdown to control spread of (COVID-19) – regarding.

Ref.: Letter No. GRD/AC2020-21 dated 07/07/2020 of Shri Sudivya Kumar, Hon’ble Member of Legislative Assembly, Giridih, Jharkhand.

Sir,

Imposition of lockdown post outbreak of COVID-19 has thrown many challenges before the Consumers and Discoms. Due to slowdown of economic activities, there has been constant pressure on the financial position of Discoms as well as consumers. Several representations have been received from various industrial/commercial consumers for providing relief in fixed charges and DPS leviable. Association of DVC HT Consumers of

Jharkhand, through a representation to Shri Sudivya Kumar, Hon'ble Member of Legislative Assembly, Giridih (Jharkhand) has also requested that in view of the closure of business activities due to the lockdown, waiver of Fixed Charges for the months of March' 2020 to June' 2020 should be provided in addition, it has been further requested to provide moratorium of 3 months for payment of electricity bills due between 01/04/2020 and 30/06/2020 to avoid hardship due to slowdown in economic activities.

2. Therefore, in view of public interest, the Jharkhand State Electricity Regulatory Commission is requested to provide the following reliefs to the consumers of Jharkhand.

2.1 Moratorium of three months for payment of electricity bills which are due between 01/04/2020 and 30/06/2020, without levying any Delayed Payment Surcharge (DPS) for all consumers of all the Distribution Licensee I the State.

2.2 Waiver of Demand/Fixed Charges for the month of April, May and June 2020 for industrial & commercial consumers of all Distribution License of Jharkhand.

2.3 The generating units within the State for which Tariff is determined through JSERC may also be directed to provide similar relief of moratorium on bills and waiver of Demand/Fixed charges to all the Distribution Licensee buying power from such generators. Further, the generating units may also be directed to ensure that no power is regulated for want of payments pertaining to power purchase for the period March'20 to June'20.

2.4 The waiver provided on DPS would entail additional working capital requirement which in turn would lead to extra interest on working capital as per the regulatory norms. Further, the waiver of Demand/Fixed Charges to

Industrial/Commercial consumers would lead to reduction in revenue /collection which may not be recognized by Jharkhand State Electricity Regulatory Commission.

3. *It is therefore requested that above mentioned waivers may be considered while determining the Interest on Working Capital and the Tariff for FY 2020-21.*

*Yours faithfully,
L Khangte”*

8. It appears various industrial/commercial consumers, including in particular the twelfth respondent herein, approached the Government of Jharkhand by some representations, upon consideration of which another communication was issued by the Principal Secretary to Chief Minister of the Government of Jharkhand to the Chairperson of the State Commission now taking the shape of a direction under Section 108 of the Electricity, Act, 2003. It is necessary to quote the said communication, it reading thus:

*“Rajiv Arun Ekka, IAS
Government of Jharkhand
Principal Secretary to Chief Minister
Chief Minister Secretariat*

Letter no. 3600566

Dated 23.07.2020

*To,
Chairperson,
Jharkhand State Electricity Regulatory Commission
Kanke Road, Ranchi*

Sub: Providing relief under Section 108 of the Electricity Act, 2003.

Dear Sir,

We are in receipt of representation from various industrial/commercial consumers including from the “Association of DVC HT Consumers of Jharkhand” requesting therein to get relief of waiver of fixed charge for the month of March, April, May and June 2020 and moratorium electricity bill payments for 03 months in view of the closure of business activities and disrupted cash flows due to severe restrictions placed on movement of public and opening of offices and establishments etc. by the Orders of State Government and Government of India, w.e.f. 22.03.2020.

The matter has been examined by the Government of Jharkhand and in order to mitigate the problem, some reliefs are required to be granted to the consumers affected by the closure under the government orders.

In view of above, I am directed to state that under section-108 of the Electricity Act, 2003, following relief may be given to consumers of DVC in Jharkhand:-

- a. Moratorium of 03 months for payment of electricity bills which are due to the month of March, April, May and June 2020 without late payment surcharges.*
- b. Waiver of Demand/Fixed Charges for the month of March, April, May and June 2020 on the Industrial/Commercial units getting power supply from all licensee i.e. DVC, JBVNL, JUSCO, SAIL & TISCO.*
- c. This will not be considered as “Deemed Revenue” by the Commission in the True-up petitions of all licensee in the State of Jharkhand. The lost collection of revenue under the order shall be considered by the Commission to be billed in next year tariff (2020-2021).*

*Yours faithfully,
(Rajeev Arun Ekka)
Principal Secretary to CM”*

9. The State Commission proceeded to issue a public notice referring to the directions of the State Government under Section 108 of the Electricity Act, 2003 intimating the stakeholders at large that *suo-motu* Case (No. 15 of 2020) had been registered and comments on the proposed relief measures (as quoted from the Government direction) were invited. There is no dispute as to the fact that the stakeholders which participated in the deliberative exercise pursuant to the public notice included the appellant, a distribution licensee operating in the State of Jharkhand and also in the State of West Bengal. On the basis of deliberations, the Commission proceeded to pass the impugned Order dated 21.09.2020, the relevant part whereof reads thus:

“Commission’s observation and findings

1. We have considered the submission made by the Respondents/Representatives and perused the materials available on record.

2. The Department of energy, Government of Jharkhand vide its letter no.1384/ACS dated 16.07.2020 has given direction under section 108 of the Electricity Act, 2003. Several Respondents/stakeholders through written communication to this Commission have highlighted the acute financial crisis faced by them due to the Lock down and in general also prayed for other grievances, as far as this case is concerned, it is to be decided in narrow compass of the directions given under Section 108 of the Electricity Act, 2003, vide the above said letter dated 16.07.2020.

3. The Commission acknowledges the gravity and unprecedented nature of the situation prevailing in the Country affecting on one hand to ensure uninterrupted power supply by the DISCOMs, to maintain the distribution infrastructure and on the other hand the ability of the consumers to pay the dues in time and to pay the fixed charges of the electricity by the industrial and commercial consumers who are staring at a situation of low production/ demand on service.

4. *The Industrial and Commercial consumers were actually caught between the Devil and deep sea. On the one hand the Government asked them to shut down their establishment and on the other hand, Licensees were levying the demand / fixed charges from the consumers.*

5. *The Commission opines that in the present situation, while some relief have been made available to the DISCOMs under the directions of the State Government, by order dated 24.04.2020, passed in Suo-Moto case no. 06 of 2020, some respite also needs to be given to the electricity consumers who are adversely impacted by the Lock down situation. In order to mitigate to some extent, the difficulties being faced by the electricity consumers, the Commission after careful consideration of the situation at hand, decided to provide following relaxation:*

1. Moratorium of three months for payment of electricity bills which were due between 01.04.2020 and 30.06.2020, without levying any Delayed Payment Surcharge (DPS) for all consumers of all the Distribution Licensee in the State of Jharkhand, till current month i.e. September, 2020.

II. Waiver of Demand/Fixed Charges (Provisionally) for the month of April, May and June, 2020 for all Industrial & Commercial consumers of all Distribution Licensee of Jharkhand.

III. The implementation of the above sub-clauses should not have any adverse affect on the applicable Tariff/rebate and other Terms & Conditions of Supply.

6. If the Licensees have received any amount from the consumers either against DPS or fixed/demand charge (Industrial & Commercial consumers only) for the period from 01.04.2020 to 30.06.2020, the said amount should be allowed as adjustment by way of reduction of said amount in the bills of subsequent month after the issuance of this order.

7. The Commission further feels that the Distribution Licensees will be required to borrow/avail additional working capital over and above those specified in the Regulations. The Distribution Licensees shall separately account for the financial impact in respective category of consumers, arising out of this order in their annual account and submit to the Commission at the time of submission of APR of FY 2020-21 and subsequent Tariff Order. The Commission will consider the additional expenses that are likely to be incurred by the Distribution Licensees on all these accounts after prudence check while evaluating the APR of FY 2020-21 for further processing. It is clarified that all costs incurred due to any waiver, remission, and moratorium shall necessarily be passed on to beneficiary consumer category, equivalent to the cost incurred by the Licensee

(emphasis supplied)

10. The appeal at hand was preferred by DVC submitting that the decision of the State Commission is arbitrary and contrary to law because the interest of the distribution licensee (DVC) and its operations have not been balanced, the Commission having not appreciated that DVC as an electricity utility incurs substantial costs of ongoing basis for maintaining the distribution and retail supply of electricity and, therefore, is subjected to substantial cash outflow on continuous basis for procurement of fuel for its generation capacity at its generation stations, operation of such power stations requiring expenses such as employee cost, repairing and maintenance, administration and general expenses, interest on working capital, etc. which are also required to be met besides taking care of cost for procurement of power from other generating stations, cost of availing transmission from inter-state transmission system, etc. It is the contention of the appellant DVC that the State Government cannot call for deferment/moratorium/waiver in the tariff which is required to be implemented in terms of the direction of the State Commission (the tariff order applicable for the period in question having been issued on 28.05.2019), the State Government not having committed itself to provide any cash support to the distribution companies for implementation of such decision, the policy directions issued under Section 108 of Electricity Act, 2003 having the effect of reducing the retail supply tariff of the distribution licensee which

cannot be done unless the State Government makes provision for meeting the amount of impact in terms of Section 65 of the Electricity Act, 2003.

11. The appellant contends further that the moratorium given by the State Commission for three months for payment of invoices which became due during the period of April to June, 2020 without delayed payment surcharge is for the period much longer than the one considered and provided by its counterpart in the State of West Bengal which is also a territory in which the appellant DVC operates. The appellant is particularly aggrieved with the direction of the State Commission for refund of money already duly collected by DVC from its consumers for the abovementioned period by way of demand charges or delayed payment surcharge (DPC), it being now obliged by the impugned order to give adjustments against the bills for the periods starting with October, 2020.

12. The appellant argues that the impugned order was passed in September, 2020 *vis-à-vis* a period (April to June, 2020) which was already over, DVC having already arranged its affairs and substantially recovered the amounts incurred in accordance with the applicable regulations. It is submitted that the waiver of demand/fixed charges for all industrial and commercial consumers for the abovementioned three months period (April to June, 2020) would result in losses, the arrangement in the impugned

order being that such financial impact would be considered at the time of annual performance revenue (APR) or truing-up for the next Financial Year 2020-2021, it ignoring the adverse impact of negative cash flow for the current financial year.

13. The appeal is contested by the beneficiaries, some respondents having appeared and argued against the prayer made by DVC, they including the Government of State of Jharkhand and the State Commission. The submission on behalf of the Department of Energy of Government of Jharkhand (second respondent) essentially is that the prerogative of the State Government to issue such orders as has been passed in the case at hand under Section 108 of the Electricity Act, 2003 concerning "*matters of policy involving public interest*" cannot be questioned. We do not have the least doubt as the correctness of this proposition. The executive branch of the State represented in the State of Jharkhand by the State Government is vested not only with the authority but also the responsibility to take care of the "*public interest*" and the policy decisions on such account cannot be questioned in the Courts of Tribunals, not the least in the manner described by the learned counsel representing the State Government, particularly in view of the Welfare State Policy that India has adopted and maintains. We must observe here that while entertaining this appeal we are not examining the correctness or legality of

the directives of the State Government under Section 108 of the Electricity Act as communicated by the letter dated 23.07.2020, as quoted above, not the least even the request sent on similar lines by the Government to the State Commission by earlier letter dated 16.07.2020. What is under scrutiny before us is not the Governmental communications but the legality and correctness of the order (dated 21.09.2020) passed by the State Electricity Regulatory Commission in the wake of such request /direction of the State Government. We are called upon by the appellant to examine the legality of the decision of the State Government though it having arisen out the *suo-motu* proceedings initiated pursuant to the above quoted directions of the State Government.

14. We may note here itself that on our careful scrutiny we find that the State Commission seems to have gone beyond the scope of the directions of the State Government under Section 108 of Electricity Act, 2003. We would elaborate on this aspect a little later in proper context.

15. During the course of hearing, there was consensus amongst parties, even the contesting respondents agreeing, that the moratorium of three months for payment of electricity bills which were due between 01.04.2020 and 30.06.2020 without levy of delayed payment surcharge for all consumers of the distribution licensee can no longer be an issue the

correctness or legality of which needs to be decided by us, this for the simple reason that such moratorium was applied – courtsey para 5(l) of the impugned order – only “*till current month i.e. September, 2020*”. In simple words, there was a deferment of the liability to pay the electricity bills for all consumers, irrespective of the category, with regard to the bills due for payment during April to June, 2020 (which, in normal course, would ordinarily relate to consumption of electricity during March to May, 2020), such deferment being for and up to September, 2020. The non-payment of such dues for the said period, by virtue of the impugned decision, would not, thus, result in levy of any delayed payment surcharge, the liability to pay for such bills concededly slated to revive from October, 2020 onwards. It is clear from this that the liability towards delayed payment surcharge would now accrue if there is or has been any delay in payment of such bills from October, 2020 onwards.

16. The impugned decision was rendered on 21.09.2020, by which time the period of moratorium was all but over. The appeal was presented in the end of September, 2020 (filed on 28.09.2020), and before it could be taken up the moratorium had lapsed and liability to pay the electricity bills by all consumers for the aforementioned period had revived. The issues pertaining to the grant of such moratorium by the impugned direction in para 5(l) is thus rendered academic. The learned senior counsel appearing

for the appellant fairly conceded that for these reasons he does not press for any determination of the issues urged in the appeal to that extent, the distribution licensee reserving unto itself the right to claim the additional expenditure incurred on such account at the stage of APR for next financial period as “*pass through*”.

17. The issues which continue to plague the relationship of the parties, however, pertain to the relief measure provided by direction in para 5(II) which has to be read with directives in para 6 & 7. The effect of such directions *vis-à-vis* the industrial and commercial consumers essentially is that they stand relieved of payment of demand/fixed charges for the period April, May and June, 2020, the distribution licensee expected to maintain separate accounts of the consequent financial impact of such relief and to claim the benefit thereupon at the time of submission of APR for next Financial Year 2020-2021 and subsequent tariff order, the Commission having assured that it would consider additional expenses likely to be incurred by the distribution licensee on such account “*after prudence check*” at the above-mentioned stage, clarifying at the same time that all such cost would “*necessarily be passed to the beneficiary consumer category, equivalent to the cost incurred by the licensee*”.

18. The appellant refers to Sections 108 and 65 of Electricity Act, which may be quoted here:

*“65. Provision of subsidy by State Government-
If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under section 62, the State Government shall, notwithstanding any direction which may be given under section 108, pay, in advance and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licence or any other person concerned to implement the subsidy provided for by the State Government:*

Provided that no such direction of the State Government shall be operative if the payment is not made in accordance with the provisions contained in this section and the tariff fixed by State Commission shall be applicable from the date of issue of orders by the Commission in this regard

108. Directions by State Government.—(1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final.”

19. It is the submission of the appellant licensee that by such directions as noted in preceding para the State Commission has actually modified the

Tariff Order dated 28.05.2019 which was applicable for the period in question, the use of the expression “*waiver*” in this context indicating that the relief has been granted to such category of consumer at the cost of the distribution licensee which is made to forego its claim over such legitimate revenue during current financial year. It is also submitted that such dispensation amounts to grant of “*subsidy*” within the meaning of the expression used in Section 65 of the Electricity Act. It is argued that such relief in the nature of subsidy could not have been granted under the directions of the State Commission issued in exercise of power under Section 108 of Electricity Act without the State Government paying “*in advance*” the amount to compensate the distribution licensee which is affected by the grant of such subsidy, the proviso to Section 65 rendering such direction of the State Government inoperative.

20. The appellant is particularly aggrieved by the direction in para 6 of the impugned order in terms of which it is obliged to give adjustment by way of reduction in the subsequent bills for such consumers from whom it may have already recovered the fixed/demand charges for the period in question prior to issuance of the impugned order dated 21.09.2020. Its submission is that only a small fraction of the consumers falling in the relevant category (industrial and commercial) have actually availed of the impugned order, a large number having already paid even by taking the

benefit of rebate under the normal tariff rules, it being unjust and inequitable to give a retrospective effect to an order to such nature and to ask the licensee to pay back the dues which were lawfully claimed and recovered and as were voluntarily paid by the consumers in question.

21. We cannot accept the submission of the twelfth respondent that the consumers who actually paid the bills in time have been forced to do so. There is no proof of any compulsion or duress having been applied at any stage by the appellant. In fact, the very submission of the twelfth respondent that such consumers were constrained to pay the demand charges "*in order to avail discount of 15%*" demonstrates that the volition to pay was for economic gains rather than the result of any duress.

22. During the hearing, it was fairly agreed by all sides that the use of the expression "*waiver*" vis-à-vis a demand/fixed charges by the State Commission in the impugned order is inappropriate. It seems to have borrowed this expression from missives for the State Government. But since the impugned order had the effect of modifying the statutory tariff order, the Commission should have been meticulous in employing precise phraseology. The word "*waiver*" ordinarily connotes that the creditor is to forego its lawful claim. There is no dispute or doubt as to the fact that by the impugned decision the recovery of demand/fixed charges from

industrial and commercial consumers for the three months period has been deferred till next financial year but not wholly lost to the distribution licensee. But then, there is no doubt at the same time that such deferment or moratorium effective for rest of the current financial year does impact adversely the cash flow and the economic well-being of the distribution licensee depriving it presently of such revenue and compelling it, consistent with its operations, to arrange for finances to make up for the loss to that extent and thereby incurred additional expenditure.

23. The argument of the appellant generally revolves around the submission that the relief described as “*waiver of demand/fixed charges*” is nothing but “*subsidy*” within the meaning of the expression used in Section 65 of Electricity Act, 2003, quoted earlier. The contrarian argument, however, has been that since the Government has not intended in any manner that the relief measure be subjected to grant of any subsidy, the direction under Section 108 of the Electricity Act cannot be termed as one being conditional upon provision of subsidy.

24. We may accept the submissions of the respondents for the simple reason that the Government has not arranged for the loss suffered by the distribution licensees to be made up by support at the cost of State Exchequer. But then, the other argument stemming virtually from the first

submission is that the relief in any case is in the nature of cross-subsidy. The respondents were at pains to argue that since the losses consequentially suffered as a result of compliance with the impugned decision by the distribution company would be covered, as *pass-through*, through APR for next Financial Year 2020-2021, or Truing up for the current Financial Year, the burden to be suffered in terms of the impugned decision by the “*beneficiary consumer category*” (see para 7 of the impugned order), is not a case of cross subsidy.

25. On first blush, we found the argument of the respondents to be attractive. But on close scrutiny we are of the view that though it is the same category of consumers which are envisaged to bear the burden of the loss in the next Financial year the relief measure worked out by the State Commission is essentially in the nature of cross subsidy *vis-à-vis* one small set of consumers who have chosen not to pay as against a large segment of consumers who have already paid and even availed of benefits of rebate for timely payments. We are of the considered view that the State Commission forgot its responsibility in terms of Section 61(g) of the Electricity Act, 2003 which postulates that while determining the tariff – the impugned order being in the nature of amending the tariff order - it shall be guided by the principle that “*the tariff progressively reflects the cost of supply electricity and also reduces cross subsidy*”.

26. During the course of hearing, it was fairly conceded by all the sides that the relief measures adopted by the State Commission through the impugned order could not have been claimed by any one as a matter of right. It is a welfare measure adopted in extraordinary situation. Before issuing and enforcing such dispensation, however, the State authorities and agencies are expected to bear in mind the fact that all sections of society have suffered economic losses due to the pandemic condition, the distribution companies also not having been spared such impairment. In these circumstances, it is essential that while providing succor to those who need aid, it also must be ensured that such support is not at the cost of other section(s) of the society, the objective being to minimize the impact and reduce the burden to the extent it is reasonable and fair instead of one in misery feeding at the cost of another in equal misery – putting into use the axiom “*rob Peter to pay Paul*”.

27. We gave opportunity to the parties to work-out a fair solution as an alternative to the relief package on the issue of fixed/demand charges for industrial and commercial category of consumers. On our request, Mr. Sanjay Sen, learned senior advocate, agreed to act as mediator, and engaged with the parties. Unfortunately, however, the efforts did not bear fruit. In the resumed hearing, each side has chosen to stick to its position,

the appellant insisting that order is arbitrary and, therefore, must go, the respondent on the other hand insisting that since the Financial Year is at the fag-end, other distribution licensees operating in the State having not raised any grievances, the appellant having participated at the deliberative stage before the State Commission anterior to the impugned order and having even proposed some of the clauses to which it is taking exception, the appeal should be dismissed.

28. Upon careful consideration of the issues which have been raised, we find the impugned order to the extent it granted “*waiver of demand/fixed charges*” for all industrial and commercial consumers for the months of April to June, 2020, also requiring adjustment against future bills for those who have already paid such charges for the said period leaving it for the distribution licensee to claim the corresponding losses as additional expenses at the stage of next APR for pass through against the said beneficiary consumer category to be arbitrary, unfair, inequitable and consequently bad in law. We elaborate our reasons herein after.

29. It is pointed out that the Central Electricity Regulatory Commission (CERC), pursuant to directions of the Central Government (under Section 107 of Electricity Act, 2003 also concerning *matters of policy involving public interest*) passed an Order on 03.04.2020 reducing the rate of late

payment surcharge payable by the distribution licensees to the generating companies or inter-state transmission licensees beyond the specified period, clarifying by subsequent order dated 06.04.2020 that such reduction would be available only for the period 24.03.2020 to 30.06.2020 and not for payments which were already overdue prior to the said period, the obligation to pay capacity/transmission charges to continue to be operational. Though by some subsequent communications issued in May, 2020 advisory was given to CPSSCs to consider deferment of capacity charges till the end of lockdown period, to be made available in installments, it is clear the directions *vis-à-vis* the period ending with 30.06.2020 were issued well in advance and prior to the period covered and definitely not retrospectively.

30. The appellant also cites certain similar relief packages announced by the West Bengal State Electricity Regulatory Commission by its Order dated 06.05.2020 to help the consumers facing difficulties during lockdown. The relief measures granted by the West Bengal Commission were followed by some litigation before the Calcutta High Court. It appears that, by its Order dated 07.07.2020, the High Court had directed deferment of recovery of dues of the appellant (DVC) to 31.12.2020. The larger relief granted to the consumers by the High Court were challenged by DVC before the Supreme Court and set aside as unsustainable by Order dated

14.08.2020 in Civil Appeal No. 2952 of 2020, the obligation to pay for the electricity bills with late payment surcharge for the relevant period being insisted by end of December 2020 though in four instalments beginning with September 2020.

31. The appellant has quoted before us similar order passed by different State Commissions with similar intendment and flavour against identical backdrop. We need not quote the said orders in extenso but only note that none of such orders go to the extent the impugned decision does particularly by deferring the payment of fixed/demand charges for the rest of the current financial year or asking for refund (by adjustment) to be afforded even to such consumers who opted to pay or the corresponding burden to be eventually placed on the entire category as a whole. Here we must record our agreement with submission of the respondent Commission that it was not bound by the dispensation of West Bengal Electricity Regulatory Commission but at the same time also must observe that there is nothing wrong to be guided by measures introduced by other responsible agencies, if they have proved to be effective and meaningful.

32. The impugned order, as noted earlier, issued on 21.09.2020 relates to relief granted *vis-à-vis* liability to pay due in April to June, 2020. It thus clearly is an order with retrospective effect. This, in our considered view,

was not permissible. The broad framework of law governing tariff regulation and determination is provided by the statute enacted by Parliament. The Electricity Regulatory Commission is creation of the said legislation. It exercises the power and jurisdiction to frame subordinate legislation. The tariff orders are expected to be issued from time to time for control periods duly specified. For illustration, the tariff order which was applicable for the period in question was issued by the respondent Commission on 28.05.2019. Undoubtedly, there is a power vested in the regulatory authority to amend or modify the tariff order but, generally speaking, the tariff once determined may not ordinarily be amended, more frequently than once in any Financial Year, except in respect of any changes expressly permitted under the terms of fuel surcharge formula as may be specified [see Section 62(4)].

33. In *State of M.P. vs Tikamdas* 1975 (2) SCC 100, *albeit* in the context of Madhya Pradesh Excise Act, 1950 and Foreign Liquor Rules, the Hon'ble Supreme Court ruled thus:

“5. ... we have to ascertain the scope and area of the Rulemaking powers, the limitations thereon and the retroactive operation of such rules. There is no doubt that unlike legislation made by a sovereign legislature, subordinate legislation made by a delegate cannot have retrospective effect unless the Rule-making power in the concerned statute expressly or by necessary implication

confers power in this behalf. Our attention has been drawn to Sections 62(g) and (h) and 63 in this connection, by counsel for the State. The State Government may make rules for the purpose of carrying out the provisions of the Act (Section 62). Such rules may regulate the amount of fee, the terms and conditions of licences and the scale of fees and the manner of fixing the fees payable in respect of such licences [62(g) and (h)]. This provision, by itself, does not expressly grant power to make retrospective rules. But Section 63 specifically states that

“all rules made and notifications issued under this Act shall be published in the Official Gazette, and shall have effect from the date of such publication or *from such other date as may be specified in that behalf*”.

Clearly the legislature has empowered its delegate, the State Government, not merely to make the Rules but to give effect to them from such date as may be specified by the delegate. This provision regarding subordinate legislation does contemplate not merely the power to make rules but to bring them into force from any previous date. Therefore ante-dating the effect of the amendment of Rule 4 is not obnoxious to the scheme nor ultra vires Section 62.

7. In this background of the law, the short question is whether the respondent is liable to pay enhanced fee brought about by amendment of the Rules on April 25, 1964.

8. The first contention that has been raised by the respondent in support of the judgment of the High Court is that in any case subordinate legislation cannot be retrospective and the State Government cannot therefore make rules and give effect to them retroactively. We have already set out the provisions of Sections 62 and 63 bearing on the subject and have no doubt that, in the present case, the statute does authorise the State, as its

delegate, to make retroactive rules. Therefore we negative the contention that the enhanced levy of licence fee cannot operate as from April 1, 1964”

(emphasis supplied)

34. This Tribunal has had the occasion to deal with similar issues in at least two matters previously decided, they being *Reliance Industries Limited vs Petroleum & Natural Gas Regulatory Board* in Appeal no. 222 of 2012 decided on 06.01.2014 and *Tamil Nadu Spinning Mills Association vs Tamil Nadu Electricity Board* in Appeal no. 111 of 2010 decided on 11.01.2011.

35. In *Reliance Industries* (supra), it was observed as under:

“77. Since the Tariff Regulations expressly provide that the tariff fixed by the Petroleum Board can be applied only after authorisation, it is a necessary corollary that before the date of authorisation the tariff fixed by the Petroleum Board cannot apply.

78. It is a well established principle of law that in the absence of expressed provision, a statute or regulation cannot apply retrospectively. When the law is silent on this point, then that statute/regulation will only apply prospectively. These are the decisions in this regard:

...

79. The guidelines and principles with the ratio laid down in these cases with reference to retrospectivity is as follows:

(a) In order to make a provision applicable with retrospective effect, it has to be specifically expressed in the provision.

(b) *It is a well settled principle of law that the court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is the determinative factor of the legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent not found in the statute.*

(c) *If a rule/notification/circular claims to be retrospective in nature, it has to expressly specify as per the rules of interpretation of statutes.*

(d) *Every statute is prima facie prospective unless it is expressly or by necessary implications made to have retrospective operation.*

(e) *A substantive law, as it is well settled, in absence of an express provision, cannot be given a retrospective effect or retroactive operation.*

(f) *All laws that affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations unless the legislative effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is intended.*

(g) *The question whether a statutory provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous, effect will have to be given to the provision in question in accordance with its tenor. If the language is not clear then the court has to decide*

whether in the light of the surrounding circumstances, retrospective effect should be given to it or not.

(h) The general rule is that all statute other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective; and retrospective effect is not to be given to them unless by express words or necessary implication, it appears that this was the intention of the legislature.

(i) It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation.

(emphasis supplied)

36. In *Tamil Nadu Spinning Mills Association* (supra), it was observed as under:

“40. According to the Electricity Board, the 1st Respondent, Electricity Supply code was amended to provide for vesting of permanent power with regard to levy of Excess Demand Charges and Excess Energy Charges only by virtue of the order dated 15.12.2008 and it was retrospectively amended from 28.11.2008 and hence, the State Commission has power to pass orders relating to Excess Demand Charges and Excess Energy Charges by virtue of the amendment order dated 15.12.2008. On the other hand, it is contended by the learned Counsel for the Appellants that when the order had been passed on 28.11.2008 in MP No. 42 of 2008, there was no power vested with the State Commission to levy Excess Demand Charges and Excess Energy Charges for peak hours since, at that time, Electricity Supply Code had not been amended and unless the Statute itself provides

power to delegate legislation for retrospective amendment of the Supply Code, it can only have prospective application and not retrospective application.

41. While dealing with this issue, we have to bear in mind the following 3 principles:

(i) The State Commission is delegated under The Electricity Act, 2003.

(ii) A delegate does not have power to issue any order which has retrospective effect unless specifically authorized under the demand enactment.

(iii) In the present case, none of the provisions contained in The Electricity Act, 2003 dealing with the powers, duties and functions of the authorized State Commission to pass order with retrospective effect.

...

45.SUMMARY OF OUR CONCLUSIONS:

...

3.(A) According to the Appellants, even assuming that the State Commission has got powers to grant permission to the Electricity Board to collect Excess Demand Charges and Excess Energy Charges, such a power comes into effect only prospectively, i.e. from the order dated 4.5.2010 and not from the order dated 28.11.2008 retrospectively. According to the Electricity Board, the Supply code was amended as early as 15.12.2008 and the retrospective effect has been given in that amended Code from 28.11.2008 and hence the State Commission has got the power to pass orders relating to the Excess Demand Charges and Excess Energy Charges on 28.11.2008 itself.

(B) We are unable to accept this contention of the Electricity Board. There is no provision either in the Act or in the Regulations providing for retrospective application of those provisions. In the present case, by virtue of the Notification dated 15.12.2008, the State Commission has given retrospective application to the amendment in the Supply Code even from 28.11.2008 even though the said Supply Code was not amended on that date. Thus the order of the State Commission dated 28.11.2008 for excess demand and excess energy charges will take effect only from 15.12.2008.

(C) Further there is no clarity in the State Commission's order dated 28.11.2008 about Excess Demand Charges and Excess Energy Charges for evening peak hours restriction besides restriction to 5/10% during the succeeding 48 hrs. When such drastic charges for excess demand and excess energy charges are levied the scheme of things has to be clearly notified unambiguously.

(D) Only in the impugned order dated 4.5.2010 the State Commission made it clear that Excess Demand Charges and Excess Energy Charges for evening peak hour restrictions were also applicable w.e.f. 28.11.2008. This retrospective effect cannot be given by the State Commission. Therefore, the excess demand charges and excess energy charges for evening peak restriction has to be given effect to only from 4.5.2010, the date of the Impugned Order wherein the position was clearly stated.

(emphasis supplied)

37. The above rulings guide us in taking the view that the questioned dispensation could not have been rendered retrospectively after the period to which it was meant to relate had come to an end. The Commission exercise the power as delegate of the legislature. The legislation (Electricity Act, 2003) does not say such powers may be exercised retrospectively. The appellant is correct in its submission that by the time the impugned order was issued the bills particularly on account of fixed/demand charges had already been raised against HT industrial and commercial consumers for the period of April to June, 2020, even the due dates for their payment having long passed by. The element of retrospective effect is by itself sufficient to treat the impugned order bad.

38. The appellant has demonstrated on record by material duly authenticated, to which there is no contest, that all HT industrial and commercial consumers, except eleven, have elected not to avail benefit of the impugned order, eighty two of them having made the payments even prior to the due date so as to avail the rebate up to 2% the net effect of which rebate is calculated as about Rs.20.50 crores. The appellant had arranged its affairs in the normal course by the time the impugned order was promulgated to introduce a modified (provisionally) tariff discipline. If the order issued on 21.09.2020 is to be strictly implemented, the consumers of the industrial and commercial category who have paid about

Rs. 221.70 crores towards principal charges along with Rs. 26.41 lacs on account of delayed payment surcharge, of their own sweet will and volition, would be entitled to refund by adjustment against the future bills. We agree with the appellant that such arrangement creates a very awkward situation wherein consumers who had capacity and the freewill to pay for charges legitimately expected and demanded by the distribution licensee - including a large number of such consumers who even claimed and received the benefit of rebates would now have a right to refund, by adjustment, of the money duly paid by them, the licensee in turn being obliged to raise modified invoices even if the said consumers have not come forward to stake any such claim after due payment. Further rub lies in the fact that the liability of the consumers who paid in time (with or without rebate) to bear the burden of such demand/fixed charges for the past period of three months would still continue, it only being deferred to the next Financial Year wherein a share in the burden of additional expenditure incurred by the licensee would stand added, equally spread to the entire category of consumers to which they belong, irrespective of the fact as to whether the particular consumer was interested in availing the benefit or not. Besides being nightmarish for the accountants, the adjustment (actually refund for recovery later) is a compulsion for the consumers who had the capacity and actually paid, they being made to share the additional burden of default of others.

39. One of the prime defenses of the impugned order raised by the respondent is that the appellant had given its consent to the impugned arrangement, consciously opting to take the benefit of *pass through* of the additional burden in the next fiscal. The chronology of events, as explained by the appellant, however, shows that the appellant was constrained to submit agreement, it having been left with no option, because of the persistence of the Commission in introducing the measure it was proposing to press further, the agreement having been submitted without prejudice to the objections raised by the initial submission dated 05.08.2020. We only wish to add that if the order is arbitrary and, therefore, bad, there cannot be an estoppel against law.

40. In similar vein, it has been submitted by the Counsel for State Government that the other distribution licensees have accepted and abided by the order and, therefore, it would create an anomalous situation if the order is set aside at the instance of only one licensee. We are not impressed. It is our duty to examine the legality of the order even if only one person thereby aggrieved has chosen to invoke our jurisdiction under section 111 of Electricity Act. And if we find the challenge to be sound and the order vitiated it is our duty to grant the necessary relief as per law.

41. The benefit of impugned order, as noted earlier, has been claimed by only 13 (thirteen) consumers of the industrial and commercial category out of total one hundred and thirty five (135) availing connectivity as such category consumers of the appellant. The impugned directives of deferral of demand/fixed charges for three months to next Financial Year creates two sub-categories within the main category of industrial and commercial consumers; one of those (13 in number) who did not pay within the time or till the date of the impugned order and, thus, are claiming their benefits and, second, those who had opted to pay without claiming any benefit of such dispensation as was issued by the impugned decision, even though it was in public knowledge that the State Commission was contemplating a relief package, with or without claiming rebate. It is this consequence which renders it in effect, a case of cross-subsidy by one sub-category for the benefit of others. If the order were to be implemented strictly, the burden of a small fraction of entire set of consumers falling under the main category of industrial and commercial consumers on account of their default in timely payment would have to be given a *pass through* in the next Financial Year, by inclusion in the APR of the distribution licensee, and evenly spread across all consumers of the said main category. The result would be those who paid in time would be bearing the financial impact of the default committed by others. There is no intelligible differentia to justify such sub-categories to be created. The benefit thus given,

labeled as waiver of demand/fixed charges, for the present and its recovery in the next Financial Year from the category of industrial and commercial consumers is clearly arbitrary and inequitable. It is also against the spirit of the principle contained in Section 61(g) wherein it is the obligation of the State Commission to reduce cross subsidy rather than perpetuate it in one form or the other.

42. An endeavor was made during the arguments to contend that the State Government has granted certain reliefs to the distribution licensees operating in the State of Jharkhand *vis-à-vis* their liability towards generating company or inter-state transmission licensees, The appellant is on record to affirm that it has not received nor is entitled to any such relief package, much less from Power Financial Corporation (PFC). It is also declared by the appellant that it has not secured any benefit from any other Central Public Sector units. No document to the contrary has been brought on record by the respondents to discredit the appellant.

43. The protection of consumer interest cannot be extended to the level of not allowing the distribution licensee the tariff to meet the legitimate cost and expenses particularly after the tariff has been designed and the revenue requirement is envisaged to be met through the tariff. There would always be the need for balancing the interest of the generators and

distribution licensees (as indeed other stakeholders) while protecting the interest of the consumers. Clearly, the State Commission in its overzealousness to abide by the direction of the State Government under section 108 glossed over the above principles and went overboard to not only blindly follow the terminology (“waiver”) but also calling for refund of revenue lawfully collected to afford benefit to a few at the ultimate cost of larger group.

44. To sum up, we record that we do accept the submission that the relaxation in the nature taken up for scrutiny provided for in the order dated 21.09.2020 would seriously affect the working of DVC which is a public utility engaged in maintenance of distribution and retail supply of electricity to the public at large. The reliance placed by Respondents on the Tariff Regulations and more so on the powers to remove difficulties and power of relaxation have no relevance to the facts of the present case. The State Commission had itself determined the demand/fixed charges to be recovered by DVC from its consumers for the relevant period of April, May, and June 2020, to meet the revenue requirements of DVC. The direction to forego the demand/fixed charges for three months midway during the financial year does impair the financial health adding to revenue requirements. There was absolutely no rationale for the State Commission to waive the demand/fixed charges for the month of April, May and June,

2020, retrospectively after the lockdown period envisaged by the Central Government for granting relief was over. The State Commission in the impugned order has provided relaxation after almost three months of the expiry of the period in question and when DVC has duly recovered substantial amount towards demand changes and DPS and has arranged its financial and commercial affairs on the basis of the money recovered. The relief being given for the retrospective period for refund by adjustment in the current payments due is harsh, unjust and arbitrary.

ORDER

45. For the foregoing reasons, we find the impugned Order dated 21.09.2020 passed by Jharkhand State Electricity Regulatory Commission in *suo-motu* Case No. 15 of 2020, to the extent thereby relief styled as waiver of demand/fixed charges for the months of April, May and June, 2020 for all industrial and commercial consumers was given with further direction for the amount if any received on such account by the licensee from consumers of the said category for the period in question to be refunded, by adjustment, by way of reduction in the bills of subsequent months and for its financial impact to be accounted for permitting the distribution licensee to claim the burden of additional expenses to be passed on to the beneficiary consumer category at the stage of APR of Financial Year 2020-2021 and subsequent tariff order, in terms of para 5(I),

6 & 7 of the impugned order, to be arbitrary, inequitable, unfair and unjust. The said order to that extent is consequently set-aside.

46. Lest there be a vacuum created by above decision, or its consequences be harsh, and in order to put in place relief that is fair, even-handed and equitable, we direct that such consumers of the industrial/commercial category in State of Jharkhand as have not or been able to pay the demand/fixed charges in time against bills due in the months of April to June 2020, owing also to the impugned order having been promulgated and operational during the interregnum, are given extended time for discharging their liability on or before 31st March 2021. No adverse consequences shall presently follow, on account of the order to above-noted extent having been set aside. We add that in the event of default to clear such dues within the extended time given by us, the Distribution licensee shall be entitled to take all such action as is permissible under the law, regulations and contracts of supply of electricity including levy of late payment surcharge, stoppage or disconnection etc.

47. We, however, clarify that this result of the appeal instituted by one of the distribution licensees need not necessarily result in the rollback of benefit if accorded by other similarly placed distribution licensees operating

in the State of Jharkhand. We leave the decisions in that regard to the discretion of the said other distribution licensees.

48. We also clarify that the impugned order except to the extent found vitiated and vacated by us will continue to inure and be available to all stake-holders including with regard to the claim of distribution licensees towards consequential additional burden to be given pass through in next fiscal.

49. The appeal and pending application, if any, are disposed of accordingly.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 28th DAY OF JANUARY, 2021.**

**(Justice R.K. Gauba)
Verma)**
Judicial Member
vt

**(Ravindra Kumar
Technical Member**