

Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 159 of 2006

Dated the September 19, 2006.

Present – Hon'ble Mr. Justice E. Padmanabhan, Judicial Member
Hon'ble Mr. H.L. Bajaj – Technical Member

Tata Steel Ltd.
Jamshedpur, Jharkhand

... Appellant

Versus

1. Jharkhand State Electricity Regulatory Commission
Sainik Bazar, Main Road, Ranchi,

2. Damodar Valley Corporation
Through its Chairman
DVC Tower, VIP Road, Kolkata

3. Damodar Valley Corporation
Through its Chief Engineer (Commercial)
DVC Tower, VIP Road, Kolkata

4. Chief Engineer, Damodar Valley Corporation
DVC Tower, VIP Road , Kolkata

... Respondents

Counsel for the Appellant : Mr. Ajit Kumar Sinha, Advocate
Mr. Ratan Pandey, Advocate

Counsel for the Respondent : Mr. Sudarshan Shrivastava, Advocate for
Respondent No. 1
Mr. Janaranjan Das and Mr. Swetaketu Mishra,
Advocates for Resp. No. 2 to 4 Mr. A.K. Mehta,
Advocate

Judgment

The appellant M/s Tata Steel Ltd. has preferred the present appeal under Section 111 of The Electricity Act, 2003 seeking for the following reliefs:

(i) To call for the records and direct the respondents not to insist upon the delayed payment surcharge on fuel surcharge. To call for records and set aside the order dated February 28, 2006 passed in case No. 6/2005-06 by the Jharkhand State Electricity Regulatory Commission and direct the respondents not to insist upon delayed payment surcharge on fuel surcharge and /or

(ii) Issue further directions to the respondents 2 to 4 not to withdraw in adjustment of installment payments of all the consequential Delayed Payment Surcharge bills (sic appeal memorandum).

2) Heard Mr. Ajit Kumar Sinha, learned counsel for the appellant and Mr. Sudarshan Srivastava, respondent No.1, Mr. Janarjan Das and Mr. Swetaketu Mishra, Advocates for respondents No.2 to 4.

3) The present appeal has been preferred against the order dated February 28, 2006 made in case No. 6 of 2005-06 on the file of the Jharkhand State Electricity Regulatory Commission, where the Chairman of the Commission dissented from the conclusion of the member of the commission and by virtue for casting vote conferred under Sub Section (3) of Section 92, on the petition filed by the appellant herein, held thus:

“ Keeping the above in view the following issues emerges for consideration :

- (a) Whether the DPS was payable for the fuel surcharge bill issued by DVC?
- (b) Whether it attracted DPS as it was not mentioned anywhere ?
- (c) Whether DPS was payable on the Bill for AMG charges when acceptance of payment in installments without DPS was communicated?
- (d) Whether the DPS was payable on the bill for AMG after the non-acceptance of waiver of DPS was communicated ? If yes, from what date ?

From the arguments and the documents produced before the Commission, the issue raised above were looked into and concluded as follows:

(1) While accepting the request for the payment of fuel surcharge in installments no mention was made of DPS. But DPS was payable if the bill was not paid within 30 days. Since there was no mention of DPS being waived , it was payable if the bill was not paid within 30 days. In other words DPS was attracted when the payments were made in installments.

(2) In Case of bill on account of AMG charges , there was a specific communication regarding payment of the amount of the bill in six installments WITHOUT DPS. Accepting the communication in the good faith the installments of the bill were paid. And according to the communication no DPS was payable on the installments.

(3) Once the revised communication was issued informing about the non-waiver of DPS on installments, it has to be effective from that the date of issue of such communication and accordingly DPS will become payable if the amount of the bill was not paid within 30 days from the date of issue of such communication.

Accordingly, the Commission orders that :

1. The DPS on bill of fuel surcharge will be payable by TISCO on the installments as well if the amount of the bill was not paid within 30 days from date of its issue.

2. In case of bill on account of AMG charges no DPS will be payable on the installments as per the communication by the respondent to the petitioner accepting the request for payment in installments without DPS till the date of another communication was issued informing about non-waiver of DPS.

3. The DPS will, however, be payable on the remaining installments if the payment was not made within 30 days of date of issue of the communication conveying the nonwaiver of DPS on installments."

Sd/- S.K.F. Kujur
Chairman

4) The Member of the Commission concluded that the petition filed by M/s Tata Steel Ltd. is not maintainable, while holding thus :-

" In sum and substance this is dispute between the petitioner Tata Steel Ltd. (formerly TISCO) which is purchasing electricity from DVC and respondents DVC which is selling electricity to the petitioner regarding raising of bills for Delay Payment Surcharge/Interest by the respondent (DVC) upon the petitioner (Tata Steel Ltd.) for certain bills for electricity supply said to be not paid in full (in one shot) by the due date and instead paid in installments and/or part payment and realization of the aforesaid bills of the Delay Payment Surcharge /interest by the respondents (DVC) on said non-payment by the petitioner (Tata Steel Ltd.) from the advance payment by the petitioner of current bills of power supply (by way of adjustment) said to be in accordance with the agreements entered into between the two parties (the petitioners and respondent) and regarding interpretation and implementation of the agreements between the parties in this regard. In my opinion since no matter in the instant petition is related to and/or falls under the purview of the enactments and/or provisions of The Electricity Act, 2003 therefore I hold that this is not maintainable and as such may be rejected."

5) Being aggrieved the present appeal has been preferred by the appellant, while the respondent has presented cross-objections, the maintainability of such cross objections is also raised in this appeal.

6) In our considered view it is unnecessary either to set out case and counter case or findings recorded by the Member or the Chairman of the Commission, much less in detail. However, we have set out the very orders of the Member and Chairman of the State Regulatory Commission for immediate reference.

7) Conceding, the second respondent is a generator, while the appellant M/s Tata Steel Ltd. is a consumer and licensee under The Electricity Act, 2003. Long before the commencement of the Electricity Regulatory Commission's Act , 1998 and The Electricity Act, 2003 during 1991-1992, an agreement was entered between DVC and Tata Steel Ltd. to which Bihar State Electricity Board (BSEB) was a confirming party for the period April 1, 1991 to March 31, 2001. DVC agreed to supply power to Tata Steel Ltd. to which shall be deemed as a supply to BSEB at the rates approved and BSEB was collecting the difference in rates. We are not concerned with the details of the said tripartite agreement except to point out that the entire sale and purchase of power is governed by the stipulations in the agreement including an arbitration clause agreed to.

8) Certain disputes arose between the parties with respect to payment of fuel surcharge demanded by BSEB which were the subject matter of challenge in a batch of writ petitioners before the High Court at the first instance and presently pending before the Hon'ble Supreme Court. It is also fairly stated that the present controversy between the contesting parties is not the subject matter of the appeal pending before the Apex Court.

9) The tripartite agreement came to an end on March 31, 2001. A bilateral agreement was entered between DVC and the appellant on July 21, 2002 but with retrospective effect from April 1, 2001, which provides for supply and purchase of electricity by DVC and the appellant in terms of stipulations agreed to and incorporated in the agreement. With respect to payment of outstanding bills by Tata Steel Ltd. to DVC a dispute arose and a meeting was convened on March 28, 2001. DVC raised two supplementary bills for Rs. 77.60 crores and Rs. 51.56 Crores on March 28, 2001. A payment schedule was agreed to between the parties. The appellant made the payments. On May 04, 2001 DVC considered the request of the appellant and fixed the equated monthly installments at Rs. 9,05,70,179 per month commencing from May, 2001 to October, 2001. In fact, the first installment was paid on May 3, 2001 immediately before the acceptance by DVC.

10) On February 02, 2003 of delayed payment of the amounts DVC imposed Delayed Payment Surcharge (DPS) amounting to Rs. 9.87 crores referable to the period 2000-01 onwards. DVC raised a demand for Rs. 42.58 crores towards DPS Charges levied on installment payment of supplementary bills referable to the period 2000-01. DVC raised a revised demand of Rs. 10.65 crores upon the appellant and followed it by demand towards DPS. The appellant contended that it is not liable to pay DPS while DVC by letter dated 07.07.2004 conveyed to the appellant that for the failure of the appellant to pay the outstandings, Delayed Payment Surcharge has to be paid in terms of the agreement, while adding that it has adjusted Rs. 8.21 crores being the advance payment made by the appellant, Request to withdraw the DPS did not find favour with the DVC. Again DVC demanded Rs. 7.80 crores towards DPS. Thus in respect of DPS which has been demanded by DVC in terms of the agreement, the appellant approached the Regulatory Commission challenging the demand of Rs. 10.65 crores.

11) The amount of DPS claimed by the DVC is referable to the period prior to the commencement of The Electricity Act, 2003 and only in terms of the bilateral agreement entered between the appellant Tata Steel Ltd. and DVC. It is the bilateral agreement which provides for payment of Delayed Payment Surcharge for the amounts due accrued, if the same is not paid before the expiry of 30 days from raising of the bill. Infact such Delayed Payment Surcharge has become payable and demanded by DVC from Tata Steel Ltd. long before the commencement of 2003 Act. The delay in payments of charges relate to the 20 (e) of the Agreement.

12) In this respect it will be relevant to extract few of the clauses/stipulations agreed to between the parties and as contained in the bilateral in the bilateral agreement.

Clause - 2(c)

" The consumer shall commence to take electrical energy from the Corporation under the terms and conditions of this Agreement only on receipt of intimation in writing from the Corporation that the supply of electrical energy to the full extent of the Contract Demand is available under this Agreement."

Clause 15

" For each English calendar month during the terms of the agreement the consumer shall be liable to pay and shall physically pay/deposit to the Corporation the charges set out in the Schedule - II annexed hereto provided, however, that the Corporation reserves exclusive right to alter the said Schedule-II in the manner as stated below.

a) The said Schedule- II pertaining to the guaranteed energy charge may be replace as and when required due to the change in Contract Demand mentioned in Schedule-I agreed to by and between the parties hereto. In the event of difference, if any, the decision of the Corporation shall be final and binding on both the parties.

b) The said Schedule- II including the demand charge, energy charge, fuel cost surcharge, guaranteed energy charge and power factor surcharge/rebate set out therein may be raised at the discretion of the Corporation at any time after having given three months' prior notice in writing of its intention to the consumer and the consumer hereby agrees to accept and pay such amended charges immediately after the expiry of the period of notice herein- before mentioned."

Clause 20 (e)

" Notwithstanding whatsoever has been stated in Clause – 20 along with sub-clauses, (i) if the consumer fails to pay the amount of the advance bill in the form of letter of intimation/normal advance bill arising out of the commitment covered by this agreement and presented to the consumer and/or to the bank where Letter of Credit has been opened within 4th of each month, the consumer shall pay a surcharge of 2% (two percent) per month on the amount of the bill from the due date of payment to the date of receipt of the amount of such bill in Corporation's office at Calcutta/ in Corporation's account which shall be treated as the date of payment, (ii) if the consumer fails to pay the amount of any bill other than the advance bill as stated above, arising out of the commitment covered by this Agreement and presented to the consumer and/or to the Bank where Letter of Credit has been opened by the consumer, with an intimation to the consumer within 30 (thirty) days from the date of its issue, the consumer shall pay a surcharge of 2% (two percent) per month on the amount on the bill from the date of issue of the bill to the date of receipt of the amount of such bill in Corporation's office at Calcutta/in Corporation's account which shall be treated as the date of payment.

This rate of delay payment surcharge is however, liable to upward/downward revision from such date as the Corporation may deem fit with prior notice of one month in writing to the consumer".

Clause 24.

"If at any time question, dispute or difference between the Corporation and the Board in regard to any matter relating to or in connection with this Agreement, barring any such which may arise in the Corporation' exercising power or doing acts under the provision of Damodar Vallery Corporation Act, 1948 (Act XIV of 1948) or under any other Act for the time being in force or under the terms of this Agreement, either party may forthwith give to the other in writing to the existence of such question, dispute or differences and the same shall be referred to the three Arbitrators, one to be appointed by each party hereto and the third Arbitrator to be appointed by the Arbitrators appointed by each party as presiding Arbitrator for adjudication of dispute in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification so agreed to by and between the parties, shall equally be borne by both the parties.

Provided that in case of any such reference it will be obligatory on the consumer to make full payment of all arrear dues along with surcharge, if any and current dues and any other dues to he Corporation before head and continue paying such dues which may accrue from time to time within the period as mentioned in

the foregoing clauses so long the Arbitration is pending. Should the consumer be held entitled to any return it will be credited by the Corporation afterwards on receiving the Award of the Arbitration and after having accepted by the Corporation such award and will be through subsequent bills in the form of adjudication in a manner to be decided by the Corporation.”

13. It is clear from the above stipulations agreed to between the parties the appellant has agreed to pay Delayed Payment Surcharge at the rate specified in the agreement and also various other stipulations including rate at which the charges are to be remitted. The bilateral agreement is a comprehensive one containing various stipulations. The dispute between the parties, with respect to Delayed Payment Surcharge, in terms of Clause 24 has to be decided or resolved only by way of arbitration. Having agreed to such stipulations, the appellant has chosen to approach the Regulatory Commission and the contesting respondent DVC raised the jurisdictional objections as to maintainability in the light of arbitration clause agreed to between the parties.

14. The arrears payable and sought to be enforced by demand as well as the demand for Delayed Payment Surcharge is for the period anterior to the commencement of The Electricity Act, 2003. The Electricity Act, 2003 is prospective in its application and this shall not be lost sight of. What is sought to be enforced are the stipulations in the bilateral agreement and in case of dispute the same has to be referred for arbitration in terms of Clause 24 of the agreement. The learned counsel for respondent DVC also contended that the petition is not maintainable and only remedy, if at all, is by way of arbitration.

15. Per contra Mr. Ajit Kumar Sinha learned counsel for the appellant contended that there was a deemed waiver of DPS and therefore the demand is illegal. Mr. Ajit Kumar Sinha further contended that having waived DPS, the respondent DVC stopped from demanding DPS. It is contended that there is no waiver by the respondent and the letter which is relied upon by the appellant is not binding on DVC as even the Board of Directors of the DVC has no authority to waive DPS. Thus it is clear that very many factual disputes require to be adjudicated including the authority of engineer who had written the letter by recording oral and documentary evidence. The appellant also contended that it is not liable to pay DPS on one or more of disputed facts raised by it. When the facts are disputed the parties should have referred the dispute for arbitration in terms of the agreement and more so when the cause of action for the disputes arose is long prior to the commencement of The Electricity Act, 2003.

16) Learned counsel for the appellant placed reliance on Section 86 (1)(f) of The Electricity Act, 2003 and contended that the Regular has the authority to adjudicate the dispute between the licensee and generating company or to refer any dispute for arbitration. In our considered view the entire dispute between the parties namely generator and licensees-cum-consumer arose long prior to the commencement of The Electricity Act, 2003. The parties have agreed to various stipulations including stipulations to pay Delayed Payment Surcharge by the bilateral agreement entered between them. Such disputes which involve disputed questions of facts have to be referred to the arbitration in terms of Clause 24 of the Agreement and not by way of petition before the Regulatory Commission. The interpretation placed on Section 86 (1) of The Electricity Act, 2003 by the learned counsel for the appellant, in our view, cannot be sustained.

16 A) The contract between the appellant and the contesting respondents governs the entire transaction between them and the contract of supply and purchase of power is in terms of bilateral agreement which provides for levy and collection of Delayed Payment Surcharge. Section 86(1)(f) will have no application at all as dispute that arose between the parties relates to the stipulations agreed and it is not a dispute arising in terms of the The Electricity Act, 2003. In fact the Delayed Payment Surcharge is a special stipulation in the agreement which the appellant has agreed to pay at specified rates and it is not in terms of provisions of The Electricity Act, 2003 of the regulations, if any, framed thereunder as well as the rate of DPS.

17) The adjudication of disputes under Section 86(1) should be in respect of disputes falling under one or more of the provisions of The Electricity Act, 2003 and not any dispute which falls outside or arise outside the provisions of the said Act. As already pointed out the entire dispute arose between the parties, long prior to the commencement of The Electricity Act, 2003 and the Act not being retrospective, the parties have to seek resolution of the disputes by arbitration in terms of the agreement entered between the parties. The arbitration Clause agreed to by the parties in the bilateral agreement is for compulsory arbitration in case of dispute arising under the agreement.

18) In our considered view the very dispute between the appellant and the contesting respondent will not fall under Section 86(1)(f) of The Electricity Act, 2003 as the entire transaction between the parties is governed by the stipulations in the bilateral agreement and the dispute that has arisen between them has to be resolved only in terms of the arbitration clause in the agreement. There is no provision in The Electricity Act 2003 to oust the arbitration clause agreed to between the parties. In the circumstances we hold that it is not for us to decide the dispute on merits and the petition filed by the appellant before the Regulatory Commission ought to have been rejected at threshold.

19) In the light of the above discussions we decline to examine the case of the appellant as well as respondent on merits and it is for them to invoke the arbitration clause 24 in the agreement and work out remedies. The findings as well as orders of the Regulatory Commission do stand vacated and the petition filed by the appellant before the Regulatory Commission as well as appeal before us shall stand dismissed. It is well open to the appellant to work out remedies for resolution of dispute in terms of clause 24 of the bilateral agreement. The parties shall bear their respective costs throughout.

Pronounced in open court on September 19, 2006.

(Mr. H.L.Bajaj)
Technical Member

(Mr. Justice E. Padmanabhan)
Judicial Member