

**BEFORE THE HON'BLE JHARKHAND STATE ELECTRICITY REGULATORY
COMMISSION**

SUO MOTO CASE NO. 15 OF 2020

The Commission on its own motion

V E R S U S

All distribution Licensees of Jharkhand

... Respondent

AND

M/s. Sujata Picture Palace and Another

... Intervenors/ Respondents

WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENTS

1. The present *suo moto* proceedings arises out of two letters, namely, letter no. 1384 / ACS dated 16.07.2020 and letter no. 3600566 dated 23.07.2020, by which directions have been given under Section 108 of the Electricity Act, 2003, by the Government of Jharkhand. Pursuant to such letters, a public notice was issued by this Hon'ble Commission ("JSERC") in the following terms:

PUBLIC NOTICE

Jharkhand State Electricity Regulatory Commission

In the matter of directions given under Section 108 of the Electricity Act, 2003 by the Government of Jharkhand vide its letter no. 1384/ACS dated 16.07.2020 and letter no. 3600566 dated 23.07.2020 to provide relief/moratorium in the energy bills for the period from 01.04.2020 to 30.06.2020. The brief points of relief for consideration of the Commission are mentioned below:-

1. Moratorium of 3 months for payment of electricity bills due between 01.04.2020 to 30.06.2020 without levying any DPS for all consumers of the Licensees;
2. Waiver of Demand/Fixed Charges of Industrial and Commercial consumers of all the Licensees for the period 01.03.2020 to 30.06.2020;
3. Considering the impact of moratorium and wavier while determining the interest on working capital for licensees and tariff.

The Commission has registered the Suo Moto case no. 15 of 2020, in regard to the above said subject and public comments are hereby invited on the above suo moto case personally or by post or through email (secretary@jserc.org) latest by **13.08.2020**.

Any Stakeholder willing to be impleaded as party responded in this Suo moto case, may file/apply on or before **05.08.2020**.

2. Accordingly, the Respondents, being consumers of electricity supplied by the Jharkhand Bijli Vitran Nigam Limited (“**JBVNL**”), sought to be impleaded in the above *suo moto* proceedings as a “stakeholder”. It cannot be gainsaid that any order passed by the JSERC will have a severe economic impact on the Respondents and thus the Respondents are ‘necessary parties’ for the adjudication of the present proceedings¹. *Vide* order dated 5 August 2020, the Respondents were impleaded as parties to the present proceedings.

COVID – 19 : A force majeure event

3. In the wake of the World Health Organisation declaring the novel corona virus (COVID – 19) as a global pandemic, the Ministry of Home Affairs, Union of India (“**MHA**”) vide order dated 24th March 2020 [No. 40-3/2020-DM-I(A)] (**Annexure – 3, Page 17**) set out certain measures for containment of COVID – 19 including shutting down of commercial and private establishments. These orders were subsequently extended on 15.04.2020, 1.05.2020 and 17.05.2020 [**Annexure – 4 (series), Page 23**]. Pertinently, all the orders referred to hereinabove, specifically restrained opening of cinema halls and theatres.
4. Subsequently, *vide* orders dated 30.05.2020, 29.06.2020 and 29.07.2020 [**Annexure – 5 (series), Page 59**] MHA published orders relating to “unlock” guidelines. Cinema halls were still restricted from running their business. Further, even the orders of the Government of Jharkhand, Home, Prison & Disaster Management Department (Disaster Management Division) dated 1.06.2020, 26.06.2020 and 30.07.2020, restricted cinema halls from functioning [**Annexure – 5 (series), Page 59**].
5. At this juncture, it must be noted that situation of nationwide lockdown had never been imposed in the country before and could never have been predicted by the Respondents. The imposition of the lockdown was by way of a sudden and emergent measure, of which no advance knowledge could be credited to

¹ The statutory recognition of the principle of ‘necessary party’ is found in Order 1 Rule 10 (2) of the Code of Civil Procedure, 1908 as per which parties “*whose presence before the [Court] may be necessary in order to enable the [Court] effectually and completely to adjudicate upon and settle all the questions involved in the [suit]*” are necessary parties to a proceeding.

the Respondents. It had thus become impossible for the Respondents to continue running its cinema hall / theatres during the period of lockdown.

6. It would be imperative to first establish the fact that the Respondents not being able to run its cinema halls / theatres constitutes a *force majeure* event or an event beyond reasonable control of the Respondents.
7. In ***Dhanrajamal Gobindram v. Shamji Kalidas & Co.*, AIR 1961 SC 1285, 1291**, the Hon'ble Supreme Court of India has held that:

The expression "force majeure" is not a mere French version of the Latin expression "vis major". It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in "force majeure". Judges have agreed that strikes, breakdown of machinery, which, though normally not included in "vis major" are included in "force majeure". An analysis of rulings on the subject shows that where reference is made to "force majeure", the intention is to save the performing party from the consequences of anything over which he has no control.

(emphasis supplied)

8. It would be apposite to refer to the meaning of the term "*force majeure*" in some of the legal dictionaries:

Black's Law Dictionary:

force majeure. [Law French "a superior force"] An event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g. Floods and hurricanes) and acts of people (e.g. Riots, strikes, and wars) - Also termed force majesture; vis major; superior force. Cf. ACT OF GOD; VIS MAJOR.

Webster's s 3rd New International Dictionary:

force majeure: (1) Superior or irresistible force. (2) an event or effect that cannot reasonably be anticipated or controlled - Compare ACT OF GOD, INEVITABLE ACCIDENT, VIS MAJOR

9. It can hardly be doubted that the novel coronavirus and the measures of lockdown emanating as a consequence thereof, was beyond the reasonable control of the Respondents. Thus the Respondents, due to no fault of their own and due to the *force majeure* event resulting from the novel coronavirus, were compelled to suddenly discontinue their activity from 24th March 2020

onwards, and were prevented from using the electrical energy to be supplied by JBVNL.

10. Pertinently, as per the orders of the Central and State Governments, had the Respondents attempted to re-open and / or continue running their business, it would have been met with serious penal consequences under Sections 51 to 60 of the Disaster Management Act, 2005, besides legal action under Section 188 of the Indian Penal Code, 1860.
11. The factum of COVID-19 being a *force majeure* event has also been thoroughly established, both by circulars issued by the government and by judicial orders.
 - (i) The Ministry of Finance, Department of Expenditure *vide* its office memorandum no. F 18/4/2020-PPD dated 19.02.2020 has clarified that spread of coronavirus will be considered as a force majeure event.
 - (ii) The Ministry of Power, Government of India, *vide* its letter no. 23/22/2019-R&R Part-4 dated 28.3.2020 addressed to the Central Electricity Regulatory Commission, has itself recognised COVID-19 as “*an event of force majeure*”.
 - (iii) The JSERC by its own order dated 24.04.2020 in Suo-moto Case No. 6 of 2020 has noted that:

*The Commission has considered the above directions of the Government of Jharkhand issued under Section 108 of the Electricity Act, 2003 as the Ministry of Home Affairs (MHA), Government of India owing to the dangers posed by spread of COVID-19 vide directives dated 24th March 2020 has placed restriction on movement of public and opening of establishment and offices. The Ministry of Home Affairs (MHA), Government of India *vide* its order dated 15.04.2020 has also extended the restrictions period till 3rd May, 2020 to contain the spread of COVID-19 in the country with certain conditions. As such the consumers of various Electricity Distribution Licensees of Jharkhand State are facing difficulty in payment of their Electricity bills.*

Legal Framework

12. It is fundamental to refer to certain provisions of the Electricity Act, 2003 and the JSERC (Supply Code) Regulations, 2015 at this stage.
13. Sections 61 and 62 of the Electricity Act, 2003 empower this Hon'ble Commission for determining the tariff and the terms and conditions thereof.
14. Section 45 (1) of the Electricity Act assumes importance and is hence reproduced hereinbelow:

*Section 45. (Power to recover charges): --- (1) Subject to the provisions of this section, the prices to be charged by a distribution licensee for the supply of electricity by him in pursuance of section 43 **shall be in accordance with such tariffs fixed from time to time and conditions of his licence.***

15. It is thus evident that the prices to be charged by JBVNL (i.e. the distribution licensee) have to be in accordance with the tariff issued by the JSERC under Sections 61 and 62 of the said Act. The use of the word 'shall' makes Section 45 mandatory in nature. Further, it has been consistently held by the Supreme Court that a tariff has a statutory character and is akin to subordinate legislation (**See Hyderabad Vanaspathi Ltd. v. A.P. SEB, (1998) 4 SCC 470 – Paras 20 and 25; Bihar SEB v. Parmeshwar Kumar Agarwala, (1996) 4 SCC 686 – Para 16 and Punjab SEB v. Bassi Cold Storage, 1994 Supp (2) SCC 124 – Para 7**)
16. Section 50 of the Electricity Act, 2003 directs this Hon'ble Commission to specify an electricity supply code to provide for recovery of electricity charges, intervals for billing of electricity charges, disconnection of supply of electricity for non-payment thereof, restoration of supply of electricity etc. In **Uttar Pradesh Avas Evam Vikas Parishad v. Uttar Pradesh Power Corporation Limited, (2011) 10 SCC 223**, it has been held that the supply code has "statutory trappings".

17. The Respondents thus refer to the following provisions of the Jharkhand State Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2015:

2.3 In these regulations, unless the context otherwise requires:

...

*(aa) “**demand charge**” for a billing period refers to a charge levied on the consumer based on the contracted/sanctioned load or maximum demand (reference to relevant subsection of these Regulations), whichever is higher, and **shall** be calculated as per the procedure laid down in the Tariff Order approved by the Commission;*

...

*(ll) “**fixed charges**” shall be as per the provisions of the prevailing Tariff Order issued for the Distribution Licensee by the Commission;*

...

3.1 The Distribution Licensee shall be authorized to recover charges for the supply of electricity from any person requiring such supply in accordance with the provisions of the Act and these Regulations and such charges shall include:

(a) Recovery of such expenses as may be reasonably incurred by the Distribution Licensee in providing electric line or electrical plant used for giving such supply in accordance with these Regulations;

(b) Charges for electricity supplied by licensee in accordance with the tariff order issued by the Commission;

...

3.3 Charges for Electricity Supplied

*3.3.1 The Distribution Licensee **shall** recover electricity charges for the electricity supplied to the consumer as per the tariff determined by the Commission from time to time in accordance with the provisions of Electricity Act 2003.*

18. It is therefore apparent that :

- (i) Prices to be charged by the JBVNL have to be in accordance with the tariff as per Section 45 of the Electricity Act, 2003.
- (ii) The tariff is determined under Sections 61 and 62 of the Electricity Act, 2003 and has a statutory character.
- (iii) The Supply Code framed by the JSERC under Section 50 of the Electricity Act, 2003 has statutory trappings.

- (iv) The Supply Code itself provides that demand / fixed charges shall be charged in accordance with the tariff.
- (v) The use of the word 'shall' in the above sections make it evident that the said provisions are 'mandatory' in character (See **B.K.S. Marulasiddaiah & Co. v. Madras Pakku Mandy, (2015) 15 SCC 740 – Para 8**).

Clause IX of the Tariff for JBVNL approved by JSERC.

19. In line with the above statutory provisions, this Hon'ble Commission has approved the tariff for JBVNL for FY 2019-20, being applicable from 1.04.2019. In the said tariff, under the heading "A-14 TERMS AND CONDITIONS OF SUPPLY", particularly Clause IX (titled "Other terms and conditions") which deals with "Reduction in Fixed Charges" reiterates and reemphasizes that if a consumer is unable to use electricity to be supplied by the Respondents, then the fixed charges/ Demand charges set out in the Tariff shall be reduced. The material portion of Clause IX of A-14 is reproduced below:

If at any time any consumer is prevented from receiving or using the electric energy to be supplied by JBVNL either in whole or in part due to strike, riots, fire, floods, explosion, act of God or any other case reasonable beyond control or if JBVNL is prevented from supplying or unable to supply such electric energy owing to any or all of the causes mentioned above, then the fixed charges/ demand charges set out in the Tariff Schedule for that particular category of consumer shall be reduced in the manner prescribed below.

(emphasis supplied)

19. This clause can be broken-down into parts for a better understanding thereof:
- (i) If at any time, consumer is prevented from receiving or using the electric energy to be supplied by JBVNL due to reasons beyond control of the consumer; OR

- (ii) If JBVNL is prevented from supplying or is unable to supply such electric energy owing to any such reasons;
 - (iii) Then the fixed charges/ demand charges set out in the Tariff Schedule shall be reduced.
20. It is thus evident that in case of occurrence of events that are reasonably beyond control, if the consumer is prevented from receiving / using electrical energy, then its fixed charges shall be reduced. It was pointed out during the course of hearing of the present proceedings that the said clause would only apply when JBVNL is unable to supply electricity. However, such a construction is not borne out from a plain reading of the provision. The reduction is not limited to situations to only when JBVNL is prevented from supplying electricity. Such a construction would render the first part of Clause IX otiose and redundant.
21. A reference to the judgment of the Patna High Court in ***Suprabhat Steels Ltd. v. Bihar State Electricity Board and Ors. 1994 BBCJ 369*** would be *apropos*. While interpreting Clause 13 of the HT Agreement (akin to the current Clause IX in the tariff), the division bench held that:
- 55. Clause 13 is not only attracted when the Board is unable to supply electrical energy but also to a case where the consumer is prevented from receiving or using the electrical energy to be supplied under the agreement either in whole or in part.*
22. On the same lines is another judgment of the Patna High Court in ***Tata Yadogawa Limited v. Bihar State Electricity Board, 1996 SCC OnLine Pat 223 : (1997) 2 PLJR 522 – Paras 18 and 19.***
23. Thus, it is not only when JBVNL is prevented from supplying electricity, but also when the consumer is prevented from receiving/ using electrical energy, that clause IX would be applicable. Any other construction of clause IX would do violence to the clear wordings thereof. It is trite law that statutes have to be interpreted in the literal sense when there is no ambiguity (***See Kuldip***

Nayar v. Union of India, (2006) 7 SCC 1 – Para 201). As stated hereinabove, the tariff has a statutory character and thus must be interpreted literally.

24. Further, it has been clearly established above that COVID-19 constitutes a *force majeure* event which was reasonably beyond control of the Respondents. In fact there could not have been a better factual scenario which would entail application of Clause IX of the tariff. The Respondents have already submitted a note which shows that during the period of lockdown, since the Respondents were not able to run their business for even a single day, the fixed / demand charges shall be reduced to 'nil' in terms of the formula provided by the Tariff. The same is reproduced below for ready reference:

$$\mathbf{FCr = FC \times (20-Y)/20}$$

FC = Total Fixed Charges for the consumer for the Billing Period. **(215 KVA x Rs. 35 = Rs. 75,250)**

FCr = Fixed Charges recoverable by the Petitioner for the Billing Period.

Y = Average duration of no supply of power beyond 4 hours per day as recorded for the previous quarter. **(24 hours – 4 hours = 20 hours)**

The Petitioner is directed to adjust from the monthly fixed charges as per the above specified mechanism based on the SAIDI recorded in the previous quarter.

Calculations

Charges for the Billing period = 215 x 350 = Rs. 75,250/-

$$\mathbf{FCr = FC \times (20- Y)/20}$$

$$\mathbf{75,250 (FC) \times [20-20(Y)]/20}$$

$$\mathbf{75,250 \times 0/20}$$

$$\mathbf{75,250 \times 0 = 0}$$

25. Thus evidently, as per the tariff approved by this Hon'ble Commission itself, the Respondents are not liable to pay any fixed charges during the period in which it was unable to use / receive electricity due to the restrictions imposed by the government in light of COVID-19. Thus irrespective of any policy decision of the government or the JBVNL, the fixed charges ought to be 'waived' / reduced by following the tariff and the supply code, both of which have statutory recognition under the Electricity Act, 2003.
26. At this stage, it important to reiterate the principal of law that '*law does not compel a man to do that which he cannot possibly perform*'. This principle has

been recognised by the Hon'ble Supreme Court in **Binani Zinc Ltd. v. Kerala SEB, (2009) 11 SCC 244 – Para 35**. The following paragraph from **Special Reference No. 1 of 2002, In re (Gujarat Assembly Election matter), (2002) 8 SCC 237 – Para 151**, is illustrative:

... The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him." Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance with the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See Broom's Legal Maxims, 10th Edn., at pp. 1962-63 and Craies on Statute Law, 6th Edn., p. 268.)

27. Further, it is also relevant to note the observations of the Supreme Court in **State of M.P. v. Narmada Bachao Andolan, (2011) 7 SCC 639**

Doctrine of impossibility

*39. The court has to consider and understand the scope of application of the doctrines of *lex non cogit ad impossibilia* (the law does not compel a man to do what he cannot possibly perform); *impossibilium nulla obligatio est* (the law does not expect a party to do the impossible); and *impotentia excusat legem* in the qualified sense that there is a necessary or invincible disability to perform the mandatory part of the law or to forbear the prohibitory. These maxims are akin to the maxim of Roman law *nemo tenetur ad impossibilia* (no one is bound to do an impossibility) which is derived from common sense and natural equity and has been adopted and applied in law from time immemorial. Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God, the circumstances will be taken as a valid excuse. (Vide *Chandra Kishore Jha v. Mahavir Prasad* [(1999) 8 SCC 266 : AIR 1999 SC 3558], *Hira Tikoo v. UT, Chandigarh* [(2004) 6 SCC 765 : AIR 2004 SC 3649] and *HUDA v. Dr. Babeswar Kanhar* [(2005) 1 SCC 191 : AIR 2005 SC 1491] .)*

28. Clause IX is merely the statutory recognition of the abovementioned principles of law that are well-established.

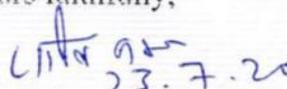
Directions under Section 108 of the Electricity Act, 2008

29. It is humbly submitted that both the letters issued by the State of Jharkhand are in line with the tariff issued by the JSERC (and thus in line with the Electricity Act, 2003) in as much as they allow for the 'waiver' of the fixed charges. As seen above, by following the formula provided in the tariff itself, the fixed charges would 'nil' for months during which the restrictions continue.
30. However, after providing for the 'waiver' of fixed charges, the letters, on an erroneous interpretation of the Electricity Act, the Supply Code and the 2019-20 Tariff, direct this Hon'ble Commission to adjust the lost revenue in the tariff for 2020-21. The relevant portions of the letters are reproduced below:

Letter no. 3600566 dated 23.07.2020

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 this 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

Letter no. 1384 / ACS dated 16.07.2020

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.

31. It is humbly submitted that such direction of the State Government makes it apparent that the alleged 'waiver' of fixed charges provided by the State Government is not actually 'waiver' but only a 'deferment' of fixed charges since the order of the State Government provides for adjustment of the amount so waived in the tariff 2020-21. It is submitted that 'waiver' of fixed charges

would not entail future adjustment thereof in subsequent tariffs. Thus, the relief provided by the State Government in the form of 'waiver' is merely an eyewash as the same will be recovered from the consumers in the subsequent tariffs.

32. To understand the purport of the term 'waiver', it would be fitting to refer to the decision of the Hon'ble Supreme Court in ***Inderpreet Singh Kahlon v. State of Pubjab, (2006) 11 SCC 356***, wherein the Supreme Court, relying on English decisions had held that:

133. In Vol. 45, Halsbury's Laws (4th Edn.), para 1269, the meaning of the word "waiver" has been described as follows:

"1269. Waiver is the abandonment of a right, and thus is a defence against its subsequent enforcement. Waiver may be express or, where there is knowledge of the right, may be implied from conduct which is inconsistent with the continuance of the right. A mere statement of an intention not to insist on a right does not suffice in the absence of consideration; but a deliberate election not to insist on full rights, although made without first obtaining full disclosure of material facts, and to come to a settlement on that basis, will be binding."

136. The doctrine of "waiver" has been explained in *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.* [(1970) 2 All ER 871 : (1970) 3 WLR 287 (HL)] The Court observed as under:

"Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel."

138. In *Central London Property Trust Ltd. v. High Trees House Ltd.* [(1947) 1 KB 130 : 175 LT 332] the Court observed as under:

"It seems that, in general, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration."

The doctrine of “waiver” has been interpreted by American cases in the same manner.

(emphasis supplied)

33. It is thus clear that once the demand charges / fixed charges are ‘waived’ (which is the bounden duty of JBVNL under clause IX of the tariff), the same cannot be adjusted or deferred as *“the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he has himself so introduced”*.
34. Thus, this direction of the State Government is contrary to basic principles of ‘waiver’. Moreover, it seeks to overcome the obligations imposed under the tariff and the supply code. It is thus humbly submitted that as per this Hon’ble Commission’s tariff, which the JBVNL is bound to follow, JBVNL cannot be allowed to collect fixed charges for the period that the Respondents’ theatres are constrained to remained close due to COVID-19. Allowing JBVNL to recover the amount so waived, would lead to a breach of the provisions of the Electricity Act, the Supply Code and the tariff for 2019-20.
35. The fact that such charges cannot be adjusted by JBVNL and must be borne by it, can be further substantiated by the resolution issued by the Government of Gujarat, Energy and Petroleum Department dated 27.03.2020 (**Annexure – 9, Page 107**). After providing for waiver of fixed / demand charges, the resolution provides that:

2. Those businesses/ industries that are shut due to lockdown, for them the minimum charge that is, **Demand / fixed charge** wont be levied in the bill for month of April 2020 and they only need to pay the charges for the consumed units. And this facility will be provided by all electricity distribution companies of the State to all the electricity consumers.
3. For this the financial burden should be borne by Electricity distribution company

From the orders of and in the name of Hon’ble Governor of Gujarat

(Ronak Modi)
Additional Secretary
Energy and Petroleum Department

Nature of directions under Section 108

36. An important question that arises for consideration is whether the directions issued by the State Government is binding upon this Commission, even if the said directions violate the tariff and / or the Electricity Act.

37. This question is however no more *res integra* in light of the following decisions:

- (i) **Tamil Nadu Electricity Consumers' Association v. Tamil Nadu Electricity Regulatory Commission, 2014 SCC OnLine APTEL 15**

24. We feel that the State Commission has to be guided by the directions of the State Government u/s. 108 only in discharge of its functions assigned under the Act. Such directions have to be implemented only under the functions and powers assigned to the State Commission under the 2003 Act. ...

25. The State Commission has to consider the directions of the State Government issued under section 108 of the 2003 Act in the matter of discharge of functions of the State Commission under the Act and not in a general way outside the functional scope of the State Commission. The State Commission will be guided by such directions of the State Government if these are within the functional scope of the State Commission, as further stipulated u/s. 86 of the 2003 Act and not in all the ways and means as contended by TANGEDCO and the State Commission. Thus, the State Commission had no power to issue an SPO order as per the directions of the State Government u/s. 108 in addition and contrary to RPO obligations specified in the RPO Regulations, 2010 under Section 86(1)(e) of the Act....

31. Thus, we find that the State Commission has simply tried to implement the directions of the State Government u/s. 108 by passing the impugned order without considering its own functions and powers under the 2003 Act and its own Regulations notified under the Act.

34. The findings in the above case would squarely apply to the present Appeals as well. Thus, the State Commission in discharge of its functions under the Act has to be guided by the directions of the State Government but the same are not mandatory and the State Commission being an independent statutory authority is not bound by any policy directions which hampers with its statutory functions.

(emphasis supplied)

- (ii) In **Chittoor Zilla Vyavasayadarula Sangham v. A.P. SEB, (2001) 1 SCC 396**, the Supreme Court was concerned with Section 78-A of the

erstwhile Electricity (Supply) Act 1948, which is *pari materia* to Section 108 of the current Electricity Act, 2003. The observations of the Supreme Court were as follows:

*22. It is necessary first to examine the periphery of the statutory fields within which the Board and the State Government have to function. Admittedly both are statutory functionaries under the Central Act. They have to perform their obligations within the limits they have been entrusted with. **Section 78-A empowers the State Government to issue directions to the Board on the question of policy, on the other hand the Board has to perform its statutory obligations under the said Act and with reference to the fixation of tariff it has to act in terms of what is contained in Sections 49 and 50. But this field of policy direction is not unlimited. There cannot be any policy direction which pushes the Board to perform its obligations beyond the limits of the said two sections. Any policy direction, which in its due performance keeps the Board within its permissible statutory limitations would be binding on the Board. So, both the State and the Board have to maintain their cordiality and coordination in terms of the statutory sanctions. If any policy direction pushes the Board in its compliance beyond statutory limitations, it cannot be a direction within the meaning of Section 78-A. It is significant that the opening words of Section 78-A are, "in the discharge of its functions, the Board shall be guided by such directions". So, the direction of the State is for the guidance to the Board, in the discharge of its functions. Thus this direction has also limitation to give such direction which will subserve in performing its statutory obligation.** We would be returning later to test, if direction to charge tariff at the rate of Rs 50 per HP per annum would have been followed by the Board, whether it would have travelled beyond Section 59.*

(emphasis supplied)

38. It is thus beyond the pale of controversy that if directions by the State Government to this Hon'ble Commission under Section 108 of the Electricity Act, 2003 violate its statutory duty to conform to the Electricity Act, 2003 in the matter of determination of tariff and the supply code (which determines the price at which the fixed charges would levied), then such directions will not considered as binding on the JSERC. Thus, in so far as the directions of the State Government that require adjustment of waived amount of fixed charges being violative of the Electricity Act 2003, the Supply Code and the tariff for 2019-20 are concerned, the same is not binding on the JSERC.

Similar case before the Madras High Court

39. The Hon'ble Madras High Court in **South India Spinners Association v. Chairman, TANGEDCO & Ors.** vide its judgment dated 14.08.2020, has dealt with a similarly situated case wherein Regulation 6(b) of the TNERC Supply Code (similar to Clause IX of the tariff) was interpreted. The said clause provided for charging of minimum demand charges in cases of force majeure events.
40. Reference may be made to paragraphs 26, 27, 31, 32, 33, 34, 35, 36, 37, 40, 41 and 42. Only certain important observations are being reproduced herein for the sake of brevity:

26. This pandemic situation has been recognized by the Government of India through its Office Memorandum dt.19.02.2020 to fall within the term "force majeure". This situation obviously is something beyond human control...

36. There cannot be a better case than the facts of the present case which can be brought within the proviso to Regulation 6(b) of the Supply Code. This pandemic which resulted in complete lockdown of all establishments was a situation which was beyond the control of the consumer. ...

37. In view of the same, this Court is not in agreement with the submissions made by the Additional Advocate General to the effect that the discretion is left with the TANGEDCO for deciding the applicability of the Minimum Charges even in a case which fulfils the requirements of the proviso to Regulation 6(b) of the Supply Code. In fact, if such wide discretion is allowed in the hands of the TANGEDCO, it will only lead to arbitrariness. Therefore, once a case fits in to the first proviso to Regulation 6(b) of Supply Code, the provision becomes operational without leaving any discretion to the Licensee/ TANGEDCO.

40 In view of the above discussion, there is absolutely no doubt in the mind of this Court that the situation faced by the establishments clearly fulfilled the requirements of Regulation 6(b) of the Supply Code. Therefore, once the representation is made to the TANGEDCO, it should have applied Regulation 6(b) of the Supply Code and collected the minimum charges. This is more so since there was no discretion available to TANGEDCO once the facts of a given case fulfills the requirements of Regulation 6(b) of the Supply Code.

41 An attempt has been made by TANGEDCO to portray as if there will be a huge revenue loss for the TANGEDCO if they are made to collect the Minimum Charges. This claim made by the TANGEDCO is without any substance. The TANGEDCO is aware of the fact that the Minimum

Charges are paid as a part of fixed cost and the actual charges are paid with respect to energy charges. Therefore, TANGEDCO is not actually losing any revenue towards consumption of electricity. The TANGEDCO having accepted the regulations, cannot now turn around and complain that they will be incurring revenue losses if they collect Minimum Charges.

42 The HT 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 TANGEDCO was levying the Maximum Demand from the consumers. If this is allowed to be continued, it will virtually lead to permanent shutting down of the industries. The financial crunch that is being faced by almost all industries due to the lockdown and the huge challenge they are going to face post the pandemic is now made worse by TANGEDCO by levying the Maximum Demand Charges. TANGEDCO must understand that its attitude will kill the industries and closing down of industries will ultimately have a financial implication on TANGEDCO also. And TANGEDCO was virtually killing the goose that was laying the golden eggs.

41. It was submitted during the course of hearing that the said judgment would not be applicable in the present since the Madras High Court was concerned with the interpretation of the Supply Code, whereas in the present case, the Hon'ble Commission is concerned with the Tariff. This argument is *ex-facie* fallacious for the following reasons:
- (i) Both the Supply Code and the Tariff have statutory backing under the Electricity Act.
 - (ii) The JSERC Supply Code instead of providing for levy of the demand / fixed charges itself (as is provided under the TNERC Supply Code), incorporates by reference, the provisions of the tariff in determining the demand / fixed charges payable. In essence, this reduction of fixed charges under Clause IX of the Tariff for 2019-20 is provided under the JSERC Supply Code itself.
42. In light of the above it is submitted that this Hon'ble Commission may kindly allow reduction of fixed / demand charges as provided under clause IX of the tariff of 2019-20. It is further prayed that the same amount may not be adjusted in the tariff for 2020-21 as that would violate provisions of the Electricity Act, 2003, the Supply Code and the 2019-20 Tariff. Any such

directions by the State Government under Section 108 of the Electricity Act, 2003 would entail a dereliction of statutory duty of this Hon'ble Commission in enforcing the tariff for 2019-20.

Written Submissions drawn by:

Salona Mittal, Advocate

(Advocate for the Respondents)

Settled by:

Mr. Madhu Sudan Mittal, Senior Advocate