

**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

SUPPLEMENTARY AFFIDAVIT ON BEHALF OF THE INTERVENORS

I, Dushyant Jaiswal, son of Late A. K. Jaiswal, aged about 43 years resident of Lake Avenue, Kanke Road, P.S. – Gonda, Town and district – Ranchi, Jharkhand, do hereby solemnly affirm and state as follows:

1. That I amof the one of directors of the Intervenor No. 1 (M/s. Sujata Picture Palace Pvt. Ltd). Iam conversant with the facts of the present case and as such I am competent and authorized to file the present Affidavit. I am also duly authorised by Intervenor No. 2 (M/s. Popkorn Cinemas)to swear this affidavit on its behalf.
2. That the instant intervention application had been filed by the Intervenors pursuant to the public notice issued in the newspapers on 29.7.2020 whereby and whereunder it was informed that pursuant to

letters issued by the concerned authorities of the State of Jharkhand, a *suo moto* case being the present case, has been registered, *inter alia* on the issue of waiver of fixed charges / demand charges. The Intervenors hereinabove filed the present intervention application along with its comments on the said issue. Subsequently, *vide* order dated 5 August 2020, the Intervenors were impleaded as party respondents in the present *suo moto* case.

3. That the present Supplementary Affidavit is being filed to bring on record certain essential developments and documents on record, which is imperative for the just and proper adjudication of the instant writ petition.

Letter issued by JBVNL not on record

4. That the present *suo moto* case was registered in light 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.
5. That this is to bring on record that apart from the above two letters issued by the government of Jharkhand, a letter dated 17 July 2020 was also issued by the Managing Director of Jharkhand Bijli Vitran Nigam Limited (**JBVNL**) which is not on record in the present case.

The said letter is similar to the letters issued by the State Government and has been purportedly issued under section 108 of the Electricity Act, 2003, *inter alia* proposing the relief of waiver of demand / fixed charges for the month of March, April, May and June 2020 for industrial / commercial consumers. The said letter however also states that the lost collection of revenue shall be considered by the Commission to be billed in the next year tariff, which is a patently erroneous condition for the grant of 'waiver' (as has been explained in detail in our application).

A copy of the letter dated 17 July 2020 issued by the Managing Director, JBVNL is annexed hereto and marked as **Annexure-10**.

Clause IX is in two parts

6. It is relevant to note that Clause IX of section A-14 of the tariff for 2019-20 is divided into two parts, i.e., there are two cases in which the fixed charges / demand charges set out in the Tariff Schedule shall be reduced:
 - a. Consumer is prevented from receiving or using electrical energy to be supplied by JBVNL either in whole or in part; or

- b. JBVNL is prevented from supplying or is unable to supply such electrical energy.
7. It is thus evident that even if the consumer is prevented from using / receiving electrical energy supplied by JBVNL (irrespective of the fact that JBVNL was capable of supplying the same during such period) due to "act of God" or "any other case reasonable beyond control", then in such case, the fixed charges / demand charges set out in the Tariff should be reduced.
8. Further, Clause IX of Section A-14 of the tariff for 2019-20 is akin to the erstwhile Clause 13 of the Agreement executed between the JBVNL and its consumers (which has since been deleted pursuant to the 2019-20 tariff). In this regard, it is profitable to refer to a division bench judgment of the Patna High Court (Ranchi Bench) in ***Suprabhat Steels Ltd. v. Bihar State Electricity Board and Ors.*** **1994 BBCJ 369** where clause 13 came to be interpreted in the following terms:

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. It would not, therefore, be correct to contend that if the Board has supplied electrical energy or has been in a position to supply electrical energy in the area concerned for a period of more than six hours on a particular day, clause 13 will not be attracted.

56. The words 'prevented from receiving or using the electrical energy by a consumer are significant. The words receiving or

using, in our opinion, signify different contexts. Receiving of electrical energy by the consumer may have a direct nexus with the supply of electrical energy, but clause 13 is also attracted in a case where the consumer is prevented from using the electrical energy. Clause 13 is also not a vis major clause simpliciter. It embraces within its fold not only acts of God but also acts of men like strikes, riots, fire and explosions. In this context the words "any other cause reasonably beyond control have to be interpreted".

(emphasis supplied)

9. One may also refer to **Tata Yadogawa Limited v. Bihar State Electricity Board, 1996 SCC OnLine Pat 223 : (1997) 2 PLJR 522**, wherein the Hon'ble Division of the Patna High Court (Ranchi bench) has held that:

18. Clause-13 of the agreement is divided broadly in two parts and from a reading of the same it appears that the right of the consumer to seek reduction of A.M.G. charges arises—

I. Where the consumer is prevented from receiving or using the electrical energy to be supplied to him for the reasons beyond its control.

II. Where the Board is prevented from supplying or is unable to supply such electrical energy owing to any reasons beyond its control.

19. In either of these two situations for the consumer's failure to consume the minimum guaranteed units, the benefit of reduction in payment of A.M.G. charges cannot be denied to the consumer.

(emphasis supplied)

10. Thus, it abundantly clear that when the consumer is prevented from receiving / using electrical energy due to situations which are reasonably beyond its control, the fixed charges / demand charges shall be reduced. Now, it is well documented that due to COVID-19, which is undoubtedly a force majeure event and beyond control of the

consumers, the entire country was forced into a lockdown. Even as on date, cinema halls continue to remain closed under the directions / orders of the Central and the State Government. In fact, the Ministry of Power, 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*". Therefore, the consumers ought to be granted relief under the said Clause IX as they have been unable to receive/ use electrical energy due to admitted force majeure conditions.

'Waiver' and not deferment

11. A cursory glance at Clause IX of the tariff of 2019-20 will make it evident that the Intervenors / Respondents are entitled to reduction in demand charges, which in the present case will be 'nil' since the Intervenors' / Respondents' cinema halls have been shut and continue to remain closed due to COVID-19. However, in complete disregard to the tariff (which has statutory backing under the Electricity Act, 2003), the State Government has asked this Hon'ble Commission to adjust the lost collection of revenue in the tariff for the year 2020-21. The Intervenors / Respondents place reliance on their intervention application wherein it has been pointed out that such direction for adjustment would mean that the relief given by the State Government is not a 'waiver' but mere 'deferment' which is also contrary to clause IX of the tariff for 2019-20.

12. To this end, reliance is placed on the meaning of waiver as elucidated by the Supreme Court in ***Inderpreet Singh Kahlon v. State of Punjab, (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 *Kamins 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)

13. 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*".

14. It is thus clear that the Intervenors / Respondents are entitled to a waiver of the fixed charges / demand charges during the period in which their cinema halls have been forced to remain closed due to force majeure conditions. Any direction to the contrary by the State Government / JBVN / Commission would result in a breach of Clause IX of the tariff and accordingly, the Electricity Act, 2003.
15. That we have gone through the contents of the Supplementary Affidavit and have fully understood the same.
16. That this affidavit is *bona fide* and is being filed in the interest of justice.

This affidavit is verified, signed and sworn on 17th day of August 2020 at Ranchi.

Sushant Lal



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JHARKHAND BIJLI VITRAN NIGAM LIMITED

(CIN: U40108JH2013SGC001702)

Regd. Office: Engineering Building, H.E.C., Dhurwa, Ranchi-834004.

Email: -cecr2018@gmail.com, Telephone: -0651-2400826 & Fax: 0651-2400799

Letter No. 879 / C.E. (C&R)/ Ranchi

Dated 17.07.2020

File No. CE (C&R)/ Rev/ 1941/ 17

From,

Rajiv Arun Ekka, L.A.S.,
Managing Director, JBVNL

To,

Chairperson,
Jharkhand State Electricity Regulatory Commission,
Kanke Road, Ranchi.

Sub:

Regarding relief under Section 108 of the Electricity Act, 2003 for Waiver of Fixed Charges for the month of March, April, May and 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.

Dear Sir,

I am directed to inform that we have proposed for waiver of Fixed Charges for the month of March, April, May and June 2020 and moratorium on electricity bill payments for 03 months to industrial / commercial consumers of JBVNL affected due to lockdown to control spread of COVID-19, under section 108 of the Electricity Act, 2003.

Further, 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 on 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, in the public interest, using powers under section 108 of the Electricity Act, 2003, the following waiver have been proposed for the consumers of JBVNL:

- Moratorium of 03 months for payment of electricity bills which are due in the month of March, April, May and June 2020 without late payment surcharges.
- 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.

20/7/2020

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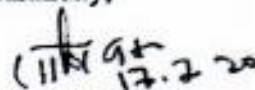
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- c. This will not be considered as "Deemed Revenue" by the Commission in the True-up petitions of all licensee in the State of Jharkhand. The lost collection of revenue under this order shall be considered by the Commission to be billed in next year tariff (2020-21) of Regulatory surcharge to be levied at defined percentage per month.

We have already proposed for deferment of Fixed Charges for the month of March, April, May and June 2020 and moratorium on electricity bill payments for 03 months to industrial / commercial consumers of JBVNL.

Similarly, DVC may be directed to provide the above deferment to the consumers in DVC Command Area under provisions of Section 108 of the Electricity Act, 2003.

Yours faithfully,


(Rajiv Arun Ekka, IAS)
Managing Director, JBVNL