

**FORUM OF THE ELECTRICITY OMBUDSMAN, JHARKHAND-
R A N C H I**

(4th floor, Bhagirathi Complex, Karamtoli Road, Ranchi – 834001)

Present- Prem Prakash Pandey

Electricity Ombudsman

Case No. EOJ/02/2018

Ranchi, dated,29th day of Novembar, 2018

M/S JAMSHEDPUR ROLLER FLOUR MILLS(PVT.) LTD through its director shri Ajai Agarwal son of shri Lallu Ram Agarwal, r/o 13 CH Area, North, P.O. and P.S.Bistupur, Jamshedpur, District singhbhum East.....Appellant.

Versus

The Jharkhand Urja Vikas Nigam Limited and three others through its Law Officer- namely Mithilesh Kumar, S/o- Sri. R. B. Choudhary, R/o- Kusai Colony, P.O. & P.S.- Doranda, District- RanchiRespondents

For the Appellant : 1- Shri Nitin Kumar Pasari Advocate

: 2- Shushri Divya Kumari Advocate

For the Respondents : 1- Shri. Prabhat Singh Advocate

(Arising out of impugned Judgement and order dated 21-04-2018, passed in complaint case no. 03 of 2017, by the Learned V.U.S.N.F., Chaibasa at Jamshedpur.)

J U D G E M E N T

1- The instant appeal is directed against the impugned judgment and order dated 21-04-2018, passed by the Learned Vidyut Upbhokta Shikayat Niwaran Forum; here- in- after called VUSNF, Chaibasa at Jamshedpur, in complaint case no. 03 of 2017 , whereby and where under, the learned. V.U.S.N.F. dismissed the complaint petition with the following view *“In view of the fact that an appeal being L P A No.264 of 2014 against the final order dated 11. 07. 2014, passed in W.P. 3047 of 2009 is still pending before the Hon’ble High court of Jharkhand, this forum has no authority and power to decide the instant case filed by the petitioner. Any order being passed by this forum affecting merits of the present case would amount to ignoring the prior pendency of appeal before the Hon’ble High court with regard to the same subject matter and will be against the settled principles of judicial propriety and discipline.”*

2- The factual matrix of the case, in brief , as contained in complaint petition of the Appellant (Petitioner) is that Appellant had established an industrial Unit in

the year 1975-76 and took an electric connection on 23-04-1976 on contract demand of 250 KVA with voltage supply at 11 KVA. Later on, the contract demand was enhanced from 250 KVA to 400 KVA, which was sanctioned by the respondent vide its letter dated 09-09-2006 and accordingly, inspection was conducted on regular interval but no anomaly had ever been found. It is further case of the appellant that an inspection was carried on 22-06-2009, in which it was reported that the seal of the L.V. Box of the metering unit was tampered, locking system of glass was changed with fibre body and also the locking system was disturbed, accordingly electric connection was disconnected, seizure report was prepared and F.I.R was lodged under section 135 (1A) Electricity Act. Later on Appellant was served with a provisional assessment, against theft of energy, assessing the purported loss to the tune of Rs. 85 lakh with direction to deposit the same within a period of one week or to file objection, if any. The further case of the Appellant is that an objection was filed on his behalf on 30-06-2009 and also filed a writ petition (c) 3047 of 2009 to show the illegalities and infirmities prevalent in the electricity Board.

3- The Hon'ble High court in pursuant to such petition vide its order dated 05-08-2009 directed the appellant to deposit a sum of Rs.10 lakh and ordered the Respondent to restore the electricity connection, accordingly, appellant deposited the said amount but the appellant was again served with a copy of final assessment order, by which the earlier provisional loss amount was reduced from 85 lakh to Rs, 58 lakh, which was challenged by him by way of interlocutory application but the same was not acted upon as there was already an interim order existing in favor of the appellant

4- The further case of the Appellant is that a demand vide dated 16-02-2010 for making payment of final assessment amount was served upon the appellant. The appellant filed an affidavit on 10-07-2014 to bring the attention of the Hon'ble court towards the developments that had taken place on the issues of law and facts, during pendency of the writ petition. It is further case that instant matter was finally heard by the Hon'ble Court on 11-07-2014, where the writ petition was disposed of with a direction upon the Respondent to carry out assessment afresh and held that instant matter was of theft and the appeal, if any, as against the final assessment, can only be challenged before the special court in terms of section 154 of the Electricity Act, 2003.

5- The further case of the appellant that being aggrieved and dissatisfied with this order, approached the Hon'ble High Court for further reliefs vide an appeal being LPA No.264 of 2014. This appeal was heard and vide order dated 14-11-2014, the amount claimed by the Respondent has been stayed, which is operative till date and the said matter is already pending before the Hon'ble Court. It is further submitted by the appellant that he is not a defaulter and is paying the electricity bills regularly, however, since July 2016 such payments are being erroneously adjusted against Delayed Payment Surcharge (DPS) levied upon the amount already stayed and is pending consideration before the Hon'ble High Court. It is further alleged that against such actions of the Respondent, the Appellant had submitted a letter to the authorities of the Respondent that the adjustment against DPS levied upon the amount already stayed, is absolutely against the Tariff Schedule read with Supply Code Regulation 2015. Further, a letter dated- 27-02-2017 was served upon the appellant u/s 56 of the Electricity Act 2003 by the Electric Executive Engineer (C&R),Jamshedpur , for a claim of Rs.94,40270 as dues/arrears. In response to this notice, the appellant submitted his reply dated 06-03-2017, mentioning the fact that the payment has already been stayed by the Hon'ble High Court and therefore, any such adjustment against the DPS with monthly energy bill amount is absolutely against the Tariff Schedule read with Supply Code Regulations 2015. Hence the instant complaint case has been instituted.

6- The respondent appeared and filed counter affidavit, admitting there in that Appellant is his HTS consumer for contract demand of 250 KVA. It is also admitted that load of 250 KVA was enhanced to 400 KVA since 06-11-2006 and inspection was carried out on 22-06-2009 and accordingly an FIR was lodged showing loss of Rs. 85 lakh, at Sunder Nagar P.S. for theft of energy and electric line was disconnected & relevant materials were seized. It is further case of the respondent that Appellant was informed with regard assessment of Rs. 85 lakh with direction to deposit the same within a week or if any objection may submitted to the Electric Superintending Engineer. Thereafter a detailed reply was submitted by the Appellant. Thereupon, a proper hearing was made and a final assessment order for Rs.58,10,352.00 only was passed u/s 126 of the Electricity Act ,2003/2007 and accordingly appellant was duly informed but finally assessed amount has not been paid by the appellant, till date.

7- The further Case of the Respondent, that ,in meanwhile an interim order dated 05-08-2009 passed by the Hon'ble High Court, was received and accordingly electric connection was restored on 14-08-2009, after deposition of Rs, 10 lakh with RC/DC charges by the appellant .It is further submitted that W.P.(c) No.3047 of 2009 has already been disposed of vide order dated 11-07-2014, in which Hon'ble High Court has directed to make re-assessment as per provision contained u/s 15.8 read with Annexure 1 of the Electricity Supply Code 2005 as amended in the year 2010 within two weeks from the date of order and further appellant was directed to pay the re-assessed amount after adjusting Rs, 10 lakh. It has further been observed that if appellant would not pay the said amount within one month from the date of receipt of assessment order then it would be open for the electric company to disconnect the electric connection and realize the assessed amount in accordance with law . It is further submitted that in compliance of the order, re-assessment was made as per provision of Regulation as amended in the year 2010 and accordingly re-assessment order for Rs. 74,25,232.00, after deducting the amount of Rs. 10 lakh, which was already paid , issued to the appellant vide letter no. 2072 dated 24-07-2014, which has not been paid by the appellant till date and appellant has filed L.P.A.no.264 of 2014, which is still pending before the Hon'ble High Court of Jharkhand.

8- It is further submitted by the Respondent that so for as grievances of the appellant regarding imposition of DPS on arrear bill and adjustment of amount of DPS at first out of the amount deposited against current monthly bill is concerned , that the monthly energy bill since July 2016 are being prepared as per provision contained under clause 10.12.1 of the JSERC(Electricity supply Code) Regulation 2015 and all payment made by the consumer is being adjusted in the following order of priority:- (i) Delayed Payment Surcharge, (ii) Arrears of electricity and corresponding arrears of electricity duty/tax, (iii) Current electricity charged and corresponding current electricity duty/tax,(iv) Miscellaneous charges.

9- The further case of the Respondent that as per energy bill of June 2016 total dues of Rs.54,36,864/ only was showing in arrear and Rs.24,32,214/ was showing against DPS, Total Rs.78,69,078/arrear was out standing. Also, the bill is being prepared since July 2016 as per the clause 10.12.1 of the Electric Supply Code Regulation 2015 and accordingly the amount is being adjusted;- 1st- Against DPS, 2nd- against arrear ,3rd- against current electricity bill and 4th- against misce.

charges. lastly it is submitted that this case is devoid of merits and it is fit to be dismissed.

10- Appellant again filed rejoinder against the counter affidavit of the Respondent, in which it is alleged that whatever payment is being made by the appellant after July 2016, the same is being adjusted at the first instance towards DPS and thereafter against current monthly charges, though realization of the so called arrear has already been stayed by the Hon'ble High Court. It is further submitted that the interpretation which is sought to be given to clause 10.12.1 of the electric Supply Code Regulation 2015 is per se illegal and contrary to the order passed by the Hon'ble High court dated 14-11-2014.

11- On the basis of the pleadings of the parties , the learned VUSNF has framed single issue :-“ whether in view of prior pendency of L.P.A.No. 254 of 2014 before the Hon'ble High Court of Jharkhand in relation to the same subject matter, the reliefs sought for by the complainant/ petitioner should be granted?”

12- The learned VUSNF, having careful perusal of the order dated 14-11-2014, passed in LPA No.264 of 2014 by the Hon'ble Jharkhand High Court, arrived on conclusion that no direction as to stay of realization of arrears of electricity bill or to the effect that delayed Payment surcharge (DPS) should not be charged on the amount deposited by the Petitioner-company was passed therein by the Hon'ble High Court. Neither the word “ stay ” has been used expressly by the Hon'ble High Court in relation to realization of arrears of electricity bill and charging the DPS nor the same can be deemed to have been used by the Hon'ble High Court by any stretch of interpretation.....,Therefore , in view of the foregoing observation, the claim of the petitioner as also present petition is devoid of any merit, accordingly, the present case being devoid of merit is hereby dismissed.

13- Assailing the impugned judgment and order, it has been contended by the learned counsel for the Appellant that the learned VUSNF erred in law and in fact and passed the impugned order, which is apparent on the face of the record and in disregard of principle of natural justice. However the learned VUSNF failed to take into consideration that the order which comes to the rescue of the appellant is the opening line of the order dated 09-09-2014 ,which thus reads as follows “ *Counsel for the appellant has argued out of his case on the interlocutory application for getting stay against the judgment & order delivered by the learned*

single judge in W.P. (s) No.3047/2009 dated 11.07.2014” not the order dated 14-11-2014. Apart from that the learned VUSNF erred in not even taking into consideration the arguments recorded of the Licensee in paragraph 2 of the order dated 09-09-2014, which thus reads as follows:- “ *counsel for the respondents submitted that this appellant has to pay Rs. 75.00 lakhs and .therefore, let this amount be paid because since long the F.I.R. was lodged in the year 2009 for theft of electricity and thereafter the appellant is enjoying the stay*” .Therefore, it may be submitted that the learned VUSNF erred in observing that the word “ Stay “ has not been used in the order and thus there is no deeming fiction that there is stay as against the realization of the dues. As matter of fact, in the entire counter affidavit filed by the Licensee, there is not a single whisper as to whether vide order dated 09-09-2014 the deemed stay was granted or not.

14- It has further been contended by the learned counsel for the appellant that the learned VUSNF further erred in holding and observing that any order being passed by this forum would amount to ignoring the prior pendency of appeal, which is misnomer in as much as the issue before the Hon’ble High Court is with regard to the claim made by the licensee under section 126/135 of the Electricity Act , where as the case before the learned VUSNF was with regard to billing dispute and mis-utilization of powers of the Licensee by misreading the provisions of the Supply Code Regulation in as much as the Supply Code Regulation does not fathom the situation, where the Hon’ble High Court has granted ad-interim protection from disconnection, since if the principal amount can not be recovered , the question of realization of any interest accruing over the said principal also can not be realized. Moreover ,the provisions of the Supply Code Regulation does not come in the way of the orders passed by the Hon’ble High court dated 09-09-2014, inasmuch as when the Hon’ble High court has categorically suggested and observed to make payment of Rs. 20.00 lakhs only as on 09-09-2014, the realization of the balance for the principal disputed amount is the subject matter before the Hon’ble High court and not the energy bills raised post May ,2016, which is not even the subject matter before the Hon’ble High court. Therefore the learned VUSNF has failed to take into consideration that the case in hand is a case, where the doctrine of acceptance Sub-Silentio must apply inasmuch as till May, 2016 the payments were being accepted towards current monthly charges and not being adjusted towards Delayed Payment Charges. Lastly, the learned counsel has placed reliance upon the verdict of the Hon’ble Apex Court that the conduct of the

parties as well, in order to make applicable the doctrine of acceptance Sub-silentio, taking in to consideration the facts and circumstances of each case. It is further submitted that the Hon'ble Apex court while considering the issue with regard equitable estoppels has been pleased to hold that the doctrine of election is based on the Rule of estoppels, the principle that one cannot approbate or reprobate inheres in it the doctrine of estoppels by election is one of the species in pais , which is Rule equity. By that law a person may be precluded by his action or conduct or silence when it is duty to speak, from asserting a right, which he otherwise would have it, taking in assistance plea by a party makes it conduct far from satisfactory. It has further been held that where one knowingly accepts benefit of contract or conveyance or an order, is estopped to deny the validity or binding even on him or such contract or conveyance or order, this Rule is comply to do equity. However, it must not be complied in a manner, so as to violate the principle of rights and good conscience.

15- Refuting the contention advanced on behalf of appellant, it has been submitted by the learned standing counsel for the respondent that undoubtedly, it is case of billing dispute because the appellant has prayed before the learned VUSNF for rectification of monthly energy bill of the consumer since July 2016 and in no manner or has no bearing on the letters Patent appeal pending before the Hon'ble High Court. He has clearly submitted that in energy bill of June, 2016, amounting to Rs. 78,69,078/- an amount of Rs 54,36,864/ was towards arrears and Rs. 24,32,214/ was towards DPS .It has further been submitted by the learned standing counsel for the Respondent that as per clause 10.12.1 of the Supply code Regulation, amount deposited by the appellant was first utilized towards DPS then towards arrears and then towards current electricity charges In view thereof , no illegality has been committed by the respondent in raising the electric bills under challenge .The learned counsel for the Respondent has further contended that none of the ground taken by the appellant are tenable in the eyes of law and the learned VUSNF has not decided the case on its merit, therefore this appeal deserves to be dismissed.

16- It will admit of no doubt that appellant is a company and engaged in a business of Roller Flour Mill at sunder Nagar, District Singhbhum East. Appellant, for the said business, took electric connection, having sanctioned load of 250 KVA, which was enhanced later on. It is also admitted fact that on 22-06-2009 an inspection was conducted in the factory premises of the appellant and accordingly

an F.I.R. was lodged and disconnected the electric supply of the appellant .Thereafter Assessing Officer made an assessment and asked to the appellant to pay Rs. 85.00 lakhs towards electric energy consumed during theft period, against which the appellant filed W.P.(c) 3047 of 2009, in which the Hon'ble court vide order dated 05-08-2009 directed to the respondent to restore the electric supply on the condition that appellant shall deposit Rs. 10 lakhs out of provisional assessment demand of Rs. 85 lakhs. It is also admitted fact that appellant has deposited the said amount and accordingly his electric supply was restored. Thereafter the said case has been disposed of on 11-07-2014 with direction to the respondent to make re-assessment as per provision contained under Electric Supply code 2005 as amended in the year 2010. Appellant was directed to pay re-assessed amount after adjusting Rs. 10 lakhs , which was already paid ,within one month from the date of receipt of assessment order, failing which it is open to the respondent to disconnect the electric connection of the appellant and realized the assessed amount in accordance with law. Admittedly, appellant being aggrieved and dissatisfied from the said order preferred an appeal before the Hon'ble Division Bench as L.P.A.No.264/2014 and also filed I.A.No. 3999.2014, which is still pending for final adjudication tagged with other cases of the same nature. It is admitted fact that case pending before the Hon'ble High Court is directly related assessment amount of loss caused during theft period. Appellant has challenged the assessment process before the Hon'ble High Court, whereas the case before the learned VUSNF is rectification of energy bill. So, it is apparent on the record that both case are on different footing. Therefore, the opinion formed by the learned VUSNF is totally wrong.

17- It is relevant to mention at very out set that the appellant is not claiming and not challenging anything , which are pending consideration before the Hon'ble High court. It is also pertinent to mention at this juncture that on 09-09-2014 in L.P.A. No. 264/2014 with I.A. No. 3999/2014 ,The Hon'ble High Court passed the order as reads *"1) counsel for the appellant has argued out of his case on the interlocutory Application for getting stay against the judgment and order delivered by the single judge W.P.{s} No.3047 of 2009 dated 11th July ,2014. Argument has been continued till the time of rising court and it is apprehended by the appellant that there will be disconnection of the electricity because of nonpayment of bill raised or assessment made by the respondents. As per the Appellant, the bill raised or the assessment made by the respondent is absolutely illegal. 2) Counsel for the*

respondent submitted that this appellant has to pay Rs. 75.00 lakhs and, therefore, let this amount be paid because since long the F.I.R. was lodged in the year 2009 for theft of electricity and thereafter the appellant is enjoying stay. 3)-As this court as heard the argument till rising of the court and it has been apprehended by the appellant that the electricity connection will be disconnected, we therefore direct the appellant to deposit Rs. 20,00,000/(Rupees Twenty Lakhs) with the respondent on or before 15th September,2014. 4) - The hearing on the interlocutory application will be continued till next date of hearing. 5)- Matter is adjourned to be enlisted on 16th September,2014.”

18- Having considered the entire facts and circumstances of the case and arguments advanced on behalf of both sides, I do find that the order passed on 09-09-2014 by the Hon’ble High Court is most important point for adjudication of this instant case. In compliance of this order, appellant has deposited the same amount within stipulated period but learned VUSNF did not consider this order in the impugned judgment. The learned VUSNF has considered only order dated 14-11-2014, passed by the Hon’ble high Court. As matter of fact, assessment made by the respondent is absolutely illegal is claimed and challenged by the appellant before the Hon’ble High Court, which is still pending consideration and is running in the list of final adjudication. However, various analogous matters have been tagged with the original appeal of the Appellant. Moreover, since July, 2016 payment made by the appellant towards current monthly energy charges are being adjusted against the DPS levied upon the amount already pending for adjudication before the Hon’ble High Court. Thus, taking into consideration of the aforesaid facts I do find that the learned VUNF ought to have framed following issues:-

(i)- Whether the monthly payments made by the appellant towards current monthly Energy charges can be adjusted against the accrued Delayed Payment Surcharge upon the assessment amount already challenged and subjudice before the Hon’ble High Court?

(ii)- Whether the principal assessment having been subjudice before the Hon’ble High Court and that was the understanding since 09-09-2014 till July, 2016, what led the Respondent to start recovering DPS?

(iii)- Whether the appellant is entitled to adjustment of the amount wrongly recovered by the respondent with interest?

19- Having gone through the records of the case I find and hold that the learned VUSNF did not meticulously considered the order dated 09-09-2014, passed by the Hon'ble High Court, in proper perspective and has wrongly come to the finding. The order dated 09-09-2014, when read as a whole gives a complete picture, as to the nature of order being passed by the Hon'ble High Court and ad-interim protection granted to the appellant on payment of Rs. 20.00 lakhs. The said order is still effective. It is settled proposition of law that if the principal amount has been stayed or sub-judice, the interest accrued thereupon also can not be recovered, but can only be kept in separate head "kept in abeyance". The ad-interim protection order granted by the Hon'ble High Court having been acted upon by the Licensee in terms of the order dated 09-09-2014 has a superseding effect on clause 10.12.1 of the Supply Code Regulation, 2015. Therefore, taking into consideration of whole facts and circumstances of the case, as discussed above, I am of the view that learned VUSNF has arrived on wrong conclusion, thus, instant case is fit to be remanded back for fresh hearing and passing afresh order. In the result, it is therefore,

O R D E R E D

20- That the impugned judgment and order passed by the learned VUSNF is hereby set aside and instant case, with its original record, remand back to the learned VUSNF for giving an opportunity to the both sides for fresh hearing and thereafter passing afresh order. Under the facts and circumstances of the case, both sides shall bear their respective costs.

21- Let copy of this order be given to the both sides.

Dated-29-11-2018

Sd/-
(Prem Prakash Pandey)
Electricity Ombudsman