FORUM OF THE ELECTRICITY OMBUDSMAN, JHARKHAND-RANCHI

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

Present- Prem Prakash Pandey

Electricity Ombudsman

Case No. EOJ/03/2018 **Ranchi, dated, 28 th day of,2019**

M/S Gautam Ferro lloys(*A unit of Bihar Foundry & Casting Ltd.*) **Ramgarh Industrial Area,District Ramgarh,** through its director shri Gaurav Bhudhia son of shri Hari Krishna Budhia, r/o near Surendranath Centenary School, Dipatoli, P.O.Bariatu,P.S.Sadar, District Ranchi……..……Appellant.

Versus

The Jharkhand Urja Bijli Vitran Nigam Limited through its chairman, having its office at project building, HEC, Dhurwa, District Ranchi and three others

……..Respondents

For the Appellant : 1- Shri Nitin Kumar Pasari, Advocate

: 2- Shushri Vishakha Gupta, Advocate

For the Respondents : Shri. Prabhat Singh , Advocate

(Arising out of impugned Judgement and order dated 29-09-2018, passed in complaint case no. 50 of 2018, by the Learned V.U.S.N.F., Hazaribag.)

J U D G E M E N T

1- The instant appeal is directed against the impugned judgment and order, dated 29-09-2018, passed by the Learned Vidyut Upbhokta Shikayat Niwaran Forum (*here- in- after called VUSNF)*, Hazaribag, in complaint case no. 50 of 2018, whereby and where under, the learned. V.U.S.N.F. disposed off the complaint petition with the following view and direction *"As per regulation of Supply code Regulation, tariff Order framed by Jharkhand State Electricity Regulatory Commission, the petitioner is not entitled to get pro-rata reduction in maximum demand charge for non-supply hours taking aid of clause-13 of HTS/HTSS power supply agreement."*

2- The factual matrix of the case, in brief, as contained, in complaint petition of the Appellant (Petitioner), which is admitted fact between the parties, is that Appellant is an industrial unit, which is engaged in manufacturing of

Ferro Alloys. had sought electricity connection from the Respondent, which was sanctioned and accordingly, an agreement was executed between the parties on 16-11-2013 and electricity connection was energized on 17-11-2013 for contract demand of 12500 KVA with voltage supply at 33 KVA.

3- The further case of the Appellant is that at the end of the first supply month, November, 2013, first monthly energy bill was served, which transpired that the same was suffered from anomaly, which was levied for the entire month without giving pro-rata reduction in demand charge for actual supply hours i.e. 299 hours in the month, as recorded in the electricity bill. Whereupon, appellant, being a vigilant consumer, sent protest letters to the respondents, showing the defects in the energy bill with request for grant of pro-rata reduction in the maximum demand charge for non-supply hours, as provided under clause 13 of the HTSS agreement, dated 16-11-2013, but no action was taken by the respondent, thereupon ,appellant vide its letter dated 31-12 2013 informed them that payment of Rs.1,32,21,344.00 through cheque no 955282 has been made "under protest", keeping his claim intact. It is further case of the Appellant that electric bill for the subsequent months i.e. December 2013 and onwards, the respondent did not give pro-rata reduction in maximum demand charge for non supply hours in respective months. However, the appellant made payment of the concerned bill amount " under protest". It is also case of the appellant that aforesaid electric connection no.NSL2266 with contract demand of 12500 KVA was surrendered by him in the month of October 2016, after completion of initial period of agreement for 3 years of supply in terms of HTSS agreement and accordingly, the said agreement was determined. Thus, appellant has claimed for pro-rata reduction in maximum demand charges for non-supply hours from November 2013 to October 2016, for which table containing the claim has been submitted with application.

4- It is also case of the appellant that he had also taken a separate electrical connection for its adjoining premises with connection no NSL-2267 with an initial contract demand of 5500 KVA and the date of commencement of supply was 07-06-2014. However, from time to time, the contract demand of the appellant has been enhanced and at the moment the appellant was enjoying/availing contract demand of 15500 KVA. Therefore, the appellant has also claimed the pro-rata reduction in maximum demand charges

for non-supply hours from 07-06-2014 to till date and for it, also closed a table containing reduction in demand charge as annexure-6 of the application.

5- It is alleged by the appellant that its claim for pro-rata reduction in maximum demand charge for non-supply hours as per clause 13 of the HTSS agreement would find force from distribution Tariff order for F.Y.2012-13, where in the Hon'ble JSERC, after conducting public hearing, had been pleased to hold that clause 13 of the High Tension Agreement would not be deleted from the HT agreement for HTSS supply in terms, where the petitioner-consumer is entitled for pro-rata reduction in the monthly demand charge , vide paras 4.22,23&24 of the Tariff Order. Likewise, in the distribution tariff order dated 14-12-2015 for F.Y.2015-16 and also recent tariff order for F.Y. 2016-17 of JBVNL. JSERC reaffirmed that clause 13 of the H.T. agreement will not be deleted from H.T. agreement for HTSS supply vide para 7.2o(m),7. 34 &7.35. It is also stated that, apart from irrespective of the fact that AMG has been raised or not reduction/remission on account of KVA charges can always be claimed by the consumer as has already been held by Hon'ble Patna High Court(Ranchi Bench) in the matter of *Dumraon textiles limited*. Lastly, it is submitted that looking into the orders passed by the Hon'ble JSERC and APTEL, the appellant is very much entitled to grant of reduction in the KVA charges.

6- The respondent appeared through their counsel and filed counter affidavit, admitting there in that Appellant was HTS consumer of the Respondent for contract demand of 1250 KVA at 33KV power supply for which an agreement was executed on 16-11-2013 and accordingly electricity connection was energized on 17-11-2013. Thereafter, first energy bill was served on appellant on 05-12-2013. The said bill was raised for charging the consumed unit and demand charge as per applicable tariff and prevalent regulation giving the benefit of voltage rebate, power factor rebate and load factor rebate, therefore, the remission sought by the appellant in the energy bill is not applicable because there is no provision of remission in the present Tariff/ Regulation, as stated, under maximum demand under the clause " tt" as aforesaid. The said demand recorded in the energy meter meant for the whole month and there is no provision of pro-rata reduction. Moreover, the appellant /consumer was not billed any AMG/MMG charge, rather, it was monthly demand/ fixed charge.. It is also admitted that connection no 2266 has been determined. As matter of fact the energy bill had been served on actual meter

reading and maximum demand, which was type of fixed charge and to be charged for the complete month based on regulation clause "tt" mentioned above. However, there is no point of giving pro-rata reduction in maximum demand charge for non –supply hour in respective month because the demand charge is meant for the whole month on the basis of Electric Supply Code, Regulation,2015, clause "tt ". Thus, the energy bill paid by the appellant "under protest" is nothing but to litigate the matter.

7- The respondent has taken a specific plea that relief sought by the appellant under clause 13 of the HT Agreement was brought into the effect from Tariff Order 1993 under the provision of clause 15.2 i.e. The following minimum Base Charges shall be realizable from the HT/EHT and RT consumers as per the appropriate tariff :- **(a)** in respect of demand charge- subject to the minimum contract demand, mentioned in this tariff, for each category of service , the consumer shall pay the monthly maximum demand charge as the appropriate tariff based on the actual maximum demand of that month or 75% of the contract demand, whichever is higher. **(b)** in respect of energy charges :- It shall be chargeable annually in the manner as indicated below but it will be realized on monthly basis. Final adjustment will be given in the last bill of financial year.

8- The further additional plea of the respondent is that the Minimum Guarantee Charge was charged on unconsumed units, as such provision of clause 13 was made for remission in proportion to the ability of the consumers to take or the Board to supply such power . It was made clear vide Gazette Notification dated - 29-07-1994 of Bihar Electricity Board. Therefore, the relief under clause 13 of HT agreement was allowable only when AMG has been charged. The clause 13 must be read and interpreted in view of the detailed provisions, made in the aforesaid notification dated 29-07-1994, which clearly says that Remission under clause 13 will be allowable only when AMG has been charged..

9- The further case of the Respondent, that at the time of bifurcation of Jharkhand State Electricity Board from Bihar Electricity Board, all the rules , sub rules and Regulations of BSEB had been adopted by JSEB, vide notification no.02 dated 20-03-2001. It is alleged that notification dated 29-07-1994 has not been repealed or modified, as such, the same is still vogue. After

enactment of the Electricity Act, 2003, The Jharkhand Stat Electricity Regulatory commission , Ranchi was established by the Government of the Jharkhand, who has made the Electricity Supply Code, Regulation, 2015,circulated by Resolution dated 07-09-2015 and Gazette Notification No. 45 . Under clause "tt " the maximum demand has been defined the same [" Maximum demand" mans the highest load measured in average KVA or KW at the point of supply of a consumer during any consecutive period of 30 minutes or as specified by the Commission, during the billing period].

10- It is also case of the Respondent that remission in demand charges due to applicability of clause 13 of HT, despite the relief minimum 75% of demand charges provided in the tariff , will adversely impact the financial position of the DISCOM, a consumer having contract demand of 200 KVA, with actual maximum demand of 100 KVA, will be liable to pay fixed charges for 150 KVA only instead of 200 KVA , which is further proportionately reduced in accordance to the hours, for which power, has not been available during the month in case of applicability of clause 13. The proportionate reduction is applicable if at any time the consumer is prevented from receiving or using the electrical energy to be supplied under this agreement either in whole or part due to strike ,riots, fire, floods, Act of God etc. or any other case reasonable beyond the control, or if the DISCOM is prevented from supplying or unable to supply such electrical energy owing to any or all of the causes mentioned above. It is further submitted that in case, a consumer has a contract demand of 200 KVA with actual maximum demand of 180 KVA(more than 75% of contract demand),shall be liable to pay the fixed charges for 180 KVA only, which is again proportionately reduced in accordance to the hours for which power has not been available during the month which is non-justifiable as the actual maximum demand , which has been utilized by the consumer is 180 KVA only. Thus, in each of the cases, as mentioned above, JBVNL is not able to recover the actual fixed cost incurred. This would result into insufficient recovery of the fixed charges by JBVNL, which in turn would further increase the burden of the consumers in the form of higher energy charges. In case the Hon'ble Court has the opinion of retaining the clause 13 in HT agreement , the applicability of the same may be modified to strike ,riots, fire, floods and Act of God only and the portion *" any other case reasonable beyond the control or if the DISCOM is prevented from supplying or unable to supply such electrical*

energy owing to any or all of the causes mentioned above" may be removed from clause 13. This would ensure the recovery of actual fixed cost incurred by JBVNL and thus prevent the burden on the consumers in the form of higher energy charges.

11- Lastly, it is submitted that Hon'ble DERC in the Tariff Order dated 31-08-2017 of Tata Power Distribution Ltd for FY 17-18 quoted that "*Fixed charges are levied to cover the fixed expenses of the Utilities. The infrastructure and network involves continuous running and maintenance to ensure uninterrupted power supply irrespective of the fact whether such load demand is actually used or not . The energy charges indicate the variable charges which are directly linked to the consumption of electricity. Both fixed and energy charges form part of the electricity billing ; decrease in one shall lead to increase in the other."*

12- Appellant filed a rejoinder against the counter affidavit of the Respondent, in which it is alleged that respondent is not aware about internal communication dated:-05-12-2005 JSEB to JSERC, 19-12-2005 JSERC to JSEB, 15-07-2008 JSEB to JSERC and on 21-03-2009 JSERC to JSEB .The JSEB had sought for a clarification from JSERC with regard to the applicability of the tariff, issued prior to enactment 2004 Tariff, where in, JSERC had been clarify that none of the provisions of any Tariff issued prior to 01-01-2004 has any applicability after the new Tariff has been introduced. In fact the aforesaid issue had come up for consideration, in the matter of *M/S Laxmi Business & Cement Co. Ltd.*, wherein the Hon'ble Apex Court has been pleased to hold that after enactment of Electricity Act ,2003, any past notification of the erstwhile State of Bihar and for that matter any notification prior to the enactment of Electricity Act, 2003 unless dully adopted by the Regulatory Commission, will have no application. Apart irrespective of the fact that AMG has been raised or not, reduction / remission on account of KVA charges can always be claimed by the consumer as has been held by the Hon'ble Patna High Court (Ranchi Bench) in the matter of *Dumraon Textile Limited,* where in, it was held that even if no bill on account of AMG charges has been raised, the petitioner may still be entitled for remission under clause 13 of the agreement.

13- It is further submitted by the appellant against the counter affidavit of the respondent that notification no 810 dated 29-07-1994 has no bearing on

the present Tariff order inasmuch as the same having never been and not been adopted by the Hon'ble commission either expressly or impliedly ,the petitioner can't be deprived of claim of reduction/remission on account of KVA charges inasmuch as admittedly the Board has not supplied power to the petitioner in terms of the agreement and otherwise also in view of the fact that clause 13 exists even after introduction of 2004 Tariff Order and is still continued in terms of Tariff Order 2012-13, the petitioner's entitlement cannot be denied in the light of the judgement of KUMARDUBHI STEELS Ltd. It is further submitted that it is wrong for the respondent to say that they cannot go beyond tariff Order passed by JSERC as the Tariff does not provide of remission/proportionate reduction of monthly maximum demand charges for load shedding /interruption hours as such they cannot allow remission/proportionate reduction in monthly maximum demand charge, As matter of fact the Tariff Order passed by JSERC only provides for Tariff rates to be made applicable to various categories of consumer for round the clock supply of power whereas the force majeure clause 13 of the agreement which is not in conflict with the tariff Order passed by the JSERC, provides *inter-alia*, remission/proportion reduction in monthly maximum demand charges for load shedding /interruption hours during the month. By allowing for proportionate reduction, in monthly maximum demand charges, as aforesaid, the Board is not going beyond the Tariff Order passed by JSERC, as alleged. It is further stated that the clauses of the agreement cannot be contrary to the Tariff Order, after enactment of Electricity Act, 2003. Actually clause 13 of the agreement has to be read independently because the Tariff Order only provides schedule of charges /rates livable to various categories of consumers and forms a schedule, in the agreement and as such the charges realized from the consumers are subject to clause 13 of the agreement approved by the JSERC also has force majeure clause 13 in the new format of agreement. Therefore, Licensee cannot be given an upper hand without any check to supply electricity as per its whims and fancies, which is not the scheme of the Electricity Act, 2003 and National Electricity Policy, Rather the Electricity Act, 2003, Supply Code Regulation and the governing laws , only recognizes continuous power supply and if any Licensee fails to perform or supply continuous power supply to the consumers, the fixed charges in the Tariff Order including monthly demand charges and guaranteed energy charges, if any, have to be proportionately reduced for the periods of load shedding/interruption of power supply

14- It is also alleged by the appellant in his reply that the defence taken by the respondent is *dehors the tariff* order and with regard non raising of AMG bills and application of notification no 810 dated 29-07-1994, has no legs to stand upon much less any statutory authority because the same is beyond the Tariff Order of 2012-13 and as such the application made by the petitioner is liable to be allowed with direction to grant interest also in terms of clause 11.10.3 of the Supply Code Regulation, since he has made payment of disputed bills under protest , since November 2013 onwards, till date.

15- On the basis of the pleadings of the parties , no issue has been framed by the learned VUSNF rather learned VUSNF has decide the entire matter under the heading of **Observation of the forum,** which is bad in law. However on the basis of the pleadings and in the light of submissions advanced on behalf of both sides, the following issues have been framed for proper adjudication before this forum:-

(i)-Whether the appellant is entitled for benefits under clause 13 of the HT Agreement irrespective of the fact that AMG was not charged from the appellant ?

(ii)- Whether, once the JSERC has hold that the clause 13 of the HT agreement protect the interest of consumers, then in that circumstances, taking the benefit of repealed Act of Electricity and un-adopted circular of BSEB to deny the benefit?

16- Assailing the impugned judgment and order, passed by the learned VUSNF, it has been contended by the learned council for the Appellant that the learned VUSNF erred in law & in fact and passed the impugned order complained of in erroneous exercise of discretion, vested in him, and without consideration of the principles of binding effect, which is apparent on the face of the record and in disregard of principle of natural justice. However the learned VUSNF could not have observed that for interruption, the appellant may resort to "Distribution Licensee Standards of Performance Regulation 2015, as if the Learned VUSNF sitting in appeal over the order of the Regulatory Commission, when the JSERC has held clause 13 of the HT agreement to be in existence and it is for protecting the interest of the consumers. In fact, the learned JSERC has also taken care of the situation and has kept scheduled Outage in the different category and the load shedding/interruption in a different category. As matter of

fact, the learned VUSNF exceeded its jurisdiction by holding & declaring that the petitioner (appellant) is not entitled to get pro-rata reduction in Maximum Demand Charges for non-supply hours taking aid of clause 13of HT agreement. Although, in terms of Tariff Order 2012-13, determined by the Learned JSERC, taking in to consideration of the objections raised by the licensee, had been pleased to decide to continue with the said clause and has been pleased to hold that clause 13 of the agreement protects the interest of the consumers.

17- The learned counsel for the appellant has further contended that the learned VUSNF has failed to take into consideration the law by the Hon'ble Jurisdictional High Court as also having been up held by the Hon'ble Apex Court, as also that the tariff determined by the JSERC for the F.Y.2018-19, which decided to continue with clause 13 of the HT agreement and the learned JSERC categorically taking the note of the previous orders ,rejecting claim of the licensee to delete the said clause, has been pleased to hold that the benefit /facility extended in terms of clause 13 should be available to other categories of consumers as well as and in that view of the matter the learned VUSNF has exceeded the jurisdiction. It has further been submitted towards the **effect of Notification No. 810,dated 29-07-1994 (BSEB)** and contended that assuming for a moment, although not admitting, that the said notification is still in existence and continues to be operative , in such an eventually also taking the earlier clause 13, pre Electricity Act 2003 and clause 13 post Electricity Act 2003 as has been outlined in the Tariff Order of JSERC to be same /similar/identical, it becomes all the more obligatory to the licensee to have granted the benefit of clause 13 which has been categorically interpreted by the Hon'ble Courts, since its introduction and till a very recent past 2016 and the same holds good as on date. More so, the *ratio decidendi* of the earlier Judgements clarifies/interprets notification no. 810, dated 29-07-1994, which ought to have been applied in the facts of the instant case.

18- The learned counsel for the appellant has further contended that the observation made in para 6 of the impugned judgement under the heading Observation is totally bad in law in as much as the Learned VUSNF could not have referred to above notification, issued by BSEB and could not have held that there is no guideline or notification in order to give effect to clause 13,which is misplaced, inasmuch as clause 13 of the agreement itself speaks about the situation under which the claim can be made and so for the formula for claiming

remission on account of demand charges is concerned , the Hon'ble Patna High Court as also the Hon'ble Jharkhand High Court has been pleased to carve out the formula for grant of remission for non supply hours under the demand charges and the same has not been upset by any Hon'ble Superior Court. The learned counsel has placed reliance upon the case -*Bihar Gases Ltd. Vs BSEB, reported in 1999(2) PLJR 105 vide para 8 to 12(page107-108), Balaji Wire Products Vs BSEB, 1995(2) PLJR 810, para 7& 11, in which ,it is held that the remission in the demand charges should be calculated in the following manner:-* ***Formula:- Total KVA charged x Total hours of non supply /Total hours of power to be supplied*** .The learned counsel has further contended towards NON-RAISING OF AMG/MMC BILL and submitted the learned VUSNF has also exceeded its jurisdiction by not referring to the principle of law laid down by the Hon'ble Division Bench of the Hon'ble Patna High Court in the matter of *Dumrao Textiles case*, in which it is held that irrespective of the fact that if there has been any bill on account of Minimum Guarantee Charges or not , the consumers are still entitled to get pro-rata reduction/remission on account of KVA Charges(Demand Charges).

19- It has further been contended that the learned VUSNF could have not interpreted clause 13 of the HT agreement in a manner ,which is pre-judicial to the consumers, irrespective of KVA recorded above 75% of the contract demand ,as the Hon'ble Jurisdictional High Court in umpteen number of cases have been pleased to hold that clause 13 of the agreement nowhere restrict the claim on account of pro-rata reduction for non supply hours , only if any bill has been raised separately ,rather it provides for pro-rata reduction for non supply hours irrespective of KVA recording. Apart from that the learned VUSNF has gone beyond pleadings of the parties and has dealt with clause 1, section 14 of the Tariff Order , which deals with penalty for exceeding billing/contract demand, which has no relevance at all with present case. It is also submitted that the learned VUSNF could not have observed as against appellant that the claim has been raised arbitrarily, that too when the claim of the appellant had initially been placed before the learned JSERC/APTEL/ Hon'ble Ape Court and none of the superior Court have used any such derogatory words, but in terms of the Act/ Supply code/ HT agreement, a right having accrued to the appellant and as such has been claimed in the most legal manner and the same could not have been termed to be as per suitability of own will, when the notification itself

referred too by the Forum is in favour of the appellant. Therefore, the impugned judgement and order is liable to be set aside and grant reliefs claimed by the appellant.

20- 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 grant of pro-rata reduction in the maximum demand charge for non supply hours as per provision mentioned in clause 13 of the HT agreement from November 2013 onwards with interest on the amount paid under protest.

21- The learned counsel has clearly submitted that the dispute raised to the bill of Nov.2013 against consumer no.2266, which has been determined as well as there is no such provision of pro-rata reduction. The energy bill was served on actual meter reading and the maximum demand, which is a type of fixed charged and to be charged for the complete month based on in Electricity supply Code Regulation 2015, circulated by resolution dated 07-09-2015 and Gazette notification no 45 u/c " tt" the maximum demand has been define. Thus, there is no point of giving pro-rata reduction in maximum demand charge for non supply hours in respective month, because the demand charge is meant for the whole month. Hence the energy bill paid by the appellant under protest, as stated, is nothing but litigate the matter.

22- It has further been submitted that As matter of fact the bill has been prepared and served on the basis of actual consumed unit, which was recorded in the meter on the basis of supply code regulation 2015 and applicable tariff and in vague regulation. At present no energy bill has been raised against AMG hence remission under clause 13 of the HT agreement is not applicable as mentioned in the notification no 810 dated 29-07-1994 issued by BS EB. It is further submitted that instant matter has been preferred by the appellant before the learned VUSNF after series of litigation and in the light of order passed by the Hon'ble Apex Court.

23- The learned counsel for the respondent has further submitted that the notification no.810 dated 29-07-1994 (Annex-A) has not been repealed or modified as such the same is still in vogue. The very purpose of allowing relief under clause 13 was based on the fact that minimum Guarantee charge on unconsumed nits was levied to such consumers, whose energy bill was less than

that of the minimum guarantee charge. As such provision of clause 13 was made under HT agreement for remission to such consumers in proportion to the ability of the consumers to take or the appellant to supply such power.

24- The learned counsel has further contended that after enactment of Electricity Act, 2003, the JSERC, Ranchi was established by the Govt. of Jharkhand. It has further been contended that the remission in demand charges due to applicability of clause 13 of HT agreement, despite the relief of minimum 75% of demanded charges provided in the tariff order will adversely impact the financial position of the DISCOM. For instance, in case of applicability of clause 13, a consumer having contract demand of 200KVA, with actual maximum demand of 100KVA will be liable to pay fix charges for 150 KVA only instead of 200 KVA, which is further proportionately reduced in accordance to the hours for which power has not been available during the month. The proportionate reduction is applicable , if at any time the consumer is prevented from receiving or using the electrical energy to be supplied under the agreement either in whole or part due to strike, riots, fire , floods, Act of God etc. or any other case reasonable beyond the control , or if the DISCOM is prevented from supplying or unable to supply such electrical energy owing to any or all of the causes mentioned above.. Further, in case, a consumer has a contract demand of 200 KVA, with maximum demand of 180 KVA (more than 75% of contract demand), shall be liable to pay the fixed charges for 180 KVA only which is again proportionately reduced in accordance to the hours for which power has not been available during the month, which is non-justifiable as the actual maximum demand, which has been utilized by the consumer is 180 KVA only. Therefore in each of cases, as stated above, Respondent is not able to recover the actual fixed cost incurred. This would result into insufficient recovery of the fixed charges by the Respondent, which in turn may further increase the burden of the consumers in the form of higher energy charges. The learned counsel has given an example of DERC in tariff order dated 31-08-2017 of Tata Power Delhi Distribution.

25- The learned counsel appearing on behalf of Respondent has lastly submitted that the decisions relied upon by the appellant of this case is not at all applicable in the instant case because the said case laws are based / related to the old law, rules and regulations. Now the circumstances have been changed and new Electricity Act 2003 has come in to force and accordingly JSERC

came in to in existence and framed the Rules and Regulations & Guidelines, which has been rightly be dealt by the learned VUSNF in the impugned judgement and order. Apart from that, the learned VUSNF has also been fully considered the facts and law relating points, as submitted during course of hearing of this case and made clear cut observation and rightly come to conclusion as per the Supply Code Regulation and Tariff Order issued by the learned JSERC, Ranchi. Thus, under the facts and circumstances of the case and also Supply code & Tariff Order, appellant is not entitled to get pro-rata reduction in maximum demand charges for non- supply hours taking aid of clause 13 of the HT agreement. In support of his submission, reliance has been placed upon the case law **Rishi Cement Co. Ltd., reported in AIR 2002 Jhar 1.** Thus, the present appeal is devoid of any merits and it deserves to be dismissed with heavy cost.

26- It is relevant to mention at very outset that both sides also submitted written notes, which is on records. I have perused the same and found that the submissions, advanced during course of the argument, are repeating therein.

27- It will admit of no doubt that appellant is a company and engaged in manufacturing of Ferro alloys and had sought electricity connection from the respondent for carrying out its operational activities, which was sanctioned and accordingly, an agreement was executed into between the parties on 16-11-2013 and electric connection was energized on 17-11-2013. The first energy bill was raised by the respondent in the name of the appellant on 05-12-2013, where in monthly demand charges have been levied for the whole month without considering pro-rata reduction for actual supply hours i.e. 299 hours in the said-month, as recorded in the bill.

28- According to the Appellant, the said bill was in violation of the agreed terms and condition as provided in clause 13 of the HT agreement, finding anomaly and irregularities in the energy bill sent protest letter to the respondent, referring therein about the defects and requesting therein for pro-rata reduction, though the such payment was made by the appellant under protest, keeping his claim intact.

29- It is also admitted fact that in the energy bills of the subsequent month and onwards, no pro-rata deduction was given to the appellant by the respondent even then he had made payment of the full bill amounts under

protest. It is also admitted fact that the said electrical connection no. 2266 with contract demand of 12,500 KVA was surrendered in October, 2016, after the completion of initial period of agreement for three years of supply in terms of HT agreement and accordingly, the said agreement was determined.

30- Admittedly, the appellant had also taken a separate electrical connection for adjoining premises with connection no.2267 with an initial contract demand of 5500 KVA and its commencement of supply was 07-06-2014, but time to time, the appellant has enhanced and at the moment, he was enjoying contract demand of 15,500 KVA but the same has also been surrendered, after completion of initial period, therefore, the period of first connection no2266/12500 KVA was from 16-11-2013 to October 2016 and second connection no. 2267/15500 KVA was from 17-06-2014 to January 2019. At present appellant has no connection at all from the respondent.

31- It is also admitted fact that when the electric connection was availed by the appellant, at that very time, Tariff Order 2012-13 was applicable. Since the claim of appellant was not being entertained, thereupon, he had preferred an application before the learned JSERC vide case no 01/2014, which was dismissed on account of maintainability. Being aggrieved& dissatisfied from the said order, he has filed an appeal before the Hon'ble Appellate Tribunal of Electricity, vide appeal no.34/2015, which was allowed, thereafter Respondent preferred an appeal before the Hon'ble Apex Court, where the order of the Learned JSERC was restored vide order dated 10-10-2017 and accordingly ,the appellant put forth his claim before the learned VUSNF, Hazaribag, whereby and where under, his claim has been rejected on the grounds:- that Prior to Electricity Act 2003, Tariff order 1993 was effective in the provision of clause 13 of the HT agreement the manner and the node of the claim was duly explained through Notification no.810 dated 29-07-1994, in which guideline was not available under the Tariff published by the Learned JSERC and there is no provision of AMG/MMG under the Tariff Order & the calculation carried out by the appellant is not supported any guideline.

32- It is to pertinent to mention that before taking discussion of the issue framed by this Forum, it would be desirable to first quote clause 13 of HT agreement, which is reproduced here in as:*"If at any time the consumer is prevented from receiving or using the electrical energy to be supplied under*

*this agreement either in whole or in part due to strikes , riots, fire floods, explosions, act of God or any other cause reasonably beyond control or if the Board is prevented from supplying or unable to supply such electrical energy owing to any or all of the cause mentioned above then the demand charge and guaranteed energy charge set out in the schedule shall be reduced in proportion to the ability of the consumer to take or the Board to supply such power and the decision of the Chief Engineer , Jharkhand State Electricity Board, in this respect shall be final." **Note**-The term Chief Engineer includes Additional Chief Engineer for the area concerned.*

33- While dealing with the issues framed in this case, I will narrate further seminal facts and submissions advanced by the learned counsels of the parties of the either sides- Issues- (i)-Whether the appellant is entitled for benefits under clause 13 of the HT Agreement irrespective of the fact that AMG was not charged from the appellant ? and (ii)- Whether, once the JSERC has hold that the clause 13 of the HT agreement protect the interest of consumers, then in that circumstances, taking the benefit of repealed Act of Electricity and un-adopted circular of BSEB to deny the benefit?

34- Since both issue related with each other, hence they are taken together for discussion. It is admitted fact that .after formation of Jharkhand State, after bifurcation from joint Bihar, adopted the rules and regulation of Bihar Electricity Board. Vide notification no.02 dated 20-03-2001. It is also admitted fact that after enactment of Electricity Act 2003, an independent Jharkhand State Electricity Regulatory Commission (JSERC) was constituted by Jharkhand State Government, who framed Tariff order 2003-04 and supply code 2005 and approved the format of HTS/HTSS agreement.

35- It is very relevant to mention at this juncture that at the time of approval of the agreement format, Jharkhand state electricity Board filed a petition with request to delete clause 13 from the said agreement format but the said prayer was turn down by JSERC, resulting thereof, the clause 13 remained as it was earlier in agreement format. It is not in dispute that before enactment of Electricity Act ,2003, Tariff order 1993 was effective in Joint Bihar and provision of clause 13 in HT agreement was in accordance with tariff Order , which was explained through notification no. 810 dated 29-07-1994 by BSEB .Undoubtedly, this notification was guideline to settle the grievances of

the consumers related to claim under clause 13 of the HT agreement , whereupon several cases had been filed before the Hon'ble Patna High court and Jharkhand High Court, wherein, the Hon'ble High Court has been pleased to carve out the formula for grant of remission for non- supply hours under the demand charges and the same has not been set aside by any Hon'ble superior court, such as *Bihar gases Ltd. Vs BSEB, reported in 1999(2) PLJR105, Balaji wire Products Vs BSEB 1995(2) PLJR 810. In DUMRAO textile Case,* division bench of Hon'ble Patna High Court (Ranchi bench) has been pleased to hold that irrespective of the fact that if there has been any bill on account of minimum Guarantee charges or not the consumers are still entitled to get pro-rata reduction / remission on account of KVA charges/demand charges.

36- Impact of Notification no.810 dated 29-07-1994:- The learned counsel for the respondent has contended that once JSEB has adopted all the rules,, regulations, notification and circulars of the erstwhile ,BSEB, the same automatically stands adopted even after enactment of Electricity Act 2003. No power vests with JSERC to deny the adoption, as above, and since there has been an adoption dated 20-03-2001, notification no 810 dated 29-07- 1994 still exists and is in vague. On the other hand the learned counsel appearing on behalf of the appellant has submitted that there can be two alternative submissions, Firstly, that if said notification is still in existence and it is vague in that eventually the appellant rightly made the claim because the formula adopted in terms of notification under reference and approved by the Hon'ble High Court in catena of judgement had been followed by the appellant and as such the claim could not have been denied and Secondly, if the said notification is not in existence in that eventually also it is not open for the learned VUSNF to say and observe & hold that since no guidelines have been prescribed by the JSERC, hence can not be entertained, although, the learned VUSNF as also electricity Licensee does not dispute the existence of clause 13 of the HT agreement .

37- Having gone through the submissions , I do find that neither expressly nor impliedly the notification in question .has been adopted by the JSERC inasmuch as, although respondent is referring to the internal circular dated 20-03-2001 but the said notification /circular pertains to period prior to the enactment of Electricity Act ,2003 and not post thereto, therefore ,the notification/circular of the then BSEB or JSEB prior to the enactment of

Electricity Act ,2003, unless specifically adopted by the JSERC, has no bearing or relevance after enactment of Electricity Act, 2003.

38- Existence of clause 13 of the HT agreement and its effect vis-à-vis change of law inasmuch as the format of agreement is still old, in terms of the Indian Electricity Act 1910:- In this context I would like to make reference to section 185 sub clause 2 (a) of the Electricity Act, 2003, which save the same The Hon'ble Apex Court in *M/S Laxmi Business & cement Ltd.* has decided Issue no 3 and settled a principle of law that although the format of agreement is in terms of earlier enactment, which stood repealed after enactment of Electricity Act, 2003, but it is duly saved in terms of section 185 (2) (a) of the Act. I do find that the appellant has brought on record the Tariff Order, passed by the Learned JSERC (Annex-5),which clearly satisfies that clause 13 of the HT agreement still exists and in fact continued to be in existence, subsequent thereto also, (as would be evident from page 241 of memo of appeal).

39- This document has been brought by the appellant on record showing the existence of clause 13 of the HT agreement. This document is photocopy of the APR for F.Y. 17,revised ARR & Tariff determination for F.Y. 18, F.Y. 19 for JBVNL, in which, under heading of **Commission's View.** clause (o) reproduced here as follows " **Removal of clause 13 from HT agreement:** the commission has dealt with the proposal to remove clause 13 from HT agreement in detail in the order dated August 2,2012 and may 6, 2014 and June 21, 2017. The relevant extract has been reproduced below "*During course of public hearings, the petitioner made a presentation of their ARR & Tariff petition including additional terms and conditions of supply. In their presentation, they requested that clause 13 of the HT agreement to which the consumers have referred above, be deleted. The consumers vehemently objected to it and said that the HT agreement,, after consultation with all stake holders, have been approved by the Commission and there is no reason to delete the said clause now through this Tariff Order . The Commission agrees with the views of the consumers and do not see any reason to delete the said clause 13 of the HT agreement , which basically protects the interest of the consumers"* **Thus, for the same reasons, already recorded, the commission does not accept the said proposal of removing clause 13 of the HT agreement . The commission is also of the view that such facility should be extended to other category of**

consumers as well. Accordingly, the commission has now introduced this clause as an integral part of the Tariff Order, as stated in the chapter on Terms and conditions of supply. Therefore, I do find that the Learned JSERC has consciously not deleted the said clause from the HT agreement, in spite of perpetual attempt made by the Licensee, which stood decided against the licensee vide order dated-02-08-2012, 06-05-2014 and 21-06-2017. Thus, it is well proved that at the time of passing Tariff Order, the learned JSERC has always considered the importance of clause 13 of the HT agreement and keeping in mind of the said clause, accordingly, passed the tariff orders. Therefore there was no need to add further separate provision or clarification for Pro-rata reduction to the consumers.

40- Now I would like to take up one more important point i.e. **Raising of AMG Bill – claim under clause 13 of the HT agreement** :- The learned counsel for the respondent has submitted that since no AMG bill has been raised ,hence , there is no question of entertaining any claim of maximum demand under clause 13 of the HT agreement and reference has been made to notification no. 810 dated 29-07-1994, in terms of which it was notified by the licensee at that point of time that there will be two separate bills raised by the licensee for the month of March of every Financial Year:-(i.) Regular Energy Bill and (ii). Shortfall in AMG Bill and as such since there is no AMG bill raised by the respondent. In support of his contention , the learned placed reliance upon the case of *RISHI CEMENT CO. Ltd* and submitted that validity of the notification has been upheld by the Hon'ble High1 Court, hence for all practical purposes the aforesaid notification still exists and as such in the absence of any modalities being prescribed by the JSERC in entertaining claim under clause 13 , the claim *ipso facto* becomes no-maintainable

41- Be that as it may, in the facts and circumstances of the case ,as noted above, on perusal of clause 13 of the HT agreement, as mentioned above ,would transpire that it is in two parts – (i)-Demand charge and (ii)-Guaranteed Energy charges. So for the instant case is concerned, the same pertains to only Demand charges inasmuch as for the period in question for which the claim has been sought by the appellant, there was no Minimum Guarantee charges, prescribed in the Tariff Schedule. As matter of fact, non-raising of AMG bill is not *sine-qua-non* for making a claim under clause 13 of the HT agreement as has already been held in *M/S Dumrao Textile Ltd. cas*e "irrespective and immaterial of fact

that whether any AMG bill has been raised or not the remission has to be granted on maximum demand as well". I have perused the case law of *RISHI CEMENT CO.LTD.* and I do find that principle of law as settled in this case in para 7,15,20,and 29 is .in fact in favour of the appellant inasmuch as the appellant is not disputing the validity of the said notification and the said case was decided on 15-06-2001, prior to the enactment of Electricity Act ,2003.

42- Having considered the entire facts and circumstances of the case and oral & written arguments advanced on behalf of both sides, I do find that appellant has made his claim under clause 13 of the HT agreement. Under the said agreement right and obligation has been created by and between the consumers and the respondent under clause 11 independently. It is true that no consumer can be allowed to back –out from the promises and obligations made or created in the said agreement It is therefore, manifest from clause 11 of the HT agreement that the appellant ,in an unequivocal term, agreed that Rules , regulation and tariff order that may be made under the Electricity Act ,2003 and electric supply code , shall be binding on the consumer and shall always prevail over the agreement . Thus, taking in to consideration of the whole facts, law, regulation and Tariff Order on the relevant period, as stated above, I find and hold that in the light of the Notification dated 29-07-1994 and the clarificatory Letter dated 13-07-1996 issued by the then board, Respondent cannot turn down the prayer of the appellant for pro-rata reduction, after enactment of Electricity act,2003 and creation JSERC, who has passed Tariff Order, discussing the clause 13 of the HT agreement and turn down the prayer of the respondent to delete clause 13 of the agreement.

43- Therefore, I am unable to accept the submissions advanced on behalf of respondent. Further , I would like to clear here, that when modified HT agreement was approved by the learned JSERC and in exercise of powers conferred under section 181 of the Electricity Act,2003, after conducting Public hearing and turn down the prayer of respondent to delete clause 13 of the agreement before framed the Distribution Tariff for the period 2012-2013 and notified it to be given effect from 01-08-2012, the claim of the appellant consumer for pro-rata reduction for non-supply hours as per clause13 of the HT agreement find force and Appellant is entitled for pro-rata reduction in the monthly demand charge.

44- Now the question arises that what was the occasion for respondent to make prayer before JSERC to delete the provision of clause 13 of the HT agreement? no satisfactory answer is being given. Actually, after rejection of the prayer of the Respondent to delete clause 13 of the agreement by learned JSERC, it was incumbent upon respondent to give the benefit of clause 13 of the HT agreement for pro-rata reduction in maximum demand charge for non – supply hours to the consumers. Respondent is also bound by law and regulation and implement the Tariff order but it appears that respondent and its officers have got no respect and in fact they declined the said benefit by misinterpreting of Notification no.29-07-1994 and letter dated 19-07-1996 and they are violating the law and generating litigations. The present case is best example of such litigation. Whereas, they are obliged to implement the law, Rules, Regulation, Supply Code and Tariff Orders passed time to time and act fairly. Thus, taking in to consideration of the entire facts, circumstances of the case, as stated above, Electricity Act, 2003 and Rules, Regulation and supply code & Tariff Order, notified by the Learned JSERC, I do find and hold that appellant is entitled to get proportionate reduction in monthly maximum demand charge in terms of clause 13 of the HT agreement with simple interest @ of SBI, applicable in the said period, on the amount paid, under protest. Accordingly, both issues:- (i)-Whether the appellant is entitled for benefits under clause 13 of the HT Agreement irrespective of the fact that AMG was not charged from the appellant ? and (ii)- Whether, once the JSERC has hold that the clause 13 of the HT agreement protect the interest of consumers, then in that circumstances, taking the benefit of repealed Act of Electricity and un-adopted circular of BSEB to deny the benefit?, are hereby decided in affirmative, in favour of appellant .

45- Considering all the pros and coins of the matter as well as materials available on the record and having gone through impugned judgement and order, it appears that impugned judgement suffers with manifest illegality, which requires an interference therein. Further I find and hold that the learned VUSNF did not meticulously considered the facts in issue and related Rules, Regulation, Tariff Order & Supply Code ,in proper perspective and has wrongly come to the finding. The clause 13 of the HT agreement, when read as a whole, in context of Tariff Order 2012-2013, gives a complete picture, to give the benefit of pro-rat reduction in maximum demand charge for non-supply hours. 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. Therefore, there is merit in the appeal and it succeeds. The appeal is hereby allowed. . In the result, it is therefore,

O R D E R E D

46- That the impugned judgment and order passed by the learned USNF is hereby set aside. The respondent is directed to revise energy bills from date of connection i.e. 16-11-2013 till date of disconnection, after grant of proportionate reduction in monthly maximum demand charge with simple interest @ SBI for the said period on the amount paid under protest within three months from the date of this order, failing which, the said amount will be realize by the appellant through process of law. Under the facts and circumstances of the case, both sides shall bear their respective costs.

47- Let copy of this order be given to the both sides through their e-mails and also by registered post immediately, if they or their learned Advocates do not receive the same from this office.

Sd/-
Dated-28-05-2019 (Prem Prakash Pandey)
Electricity Ombudsman