IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.08.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

W.P.No.21993 of 2003
and W.P.M.P.Nos.27246 & 27247 of 2003

M/s Oriental Hotels Ltd.,
rep. by its Company Secretary,
Mr.C.Ravishankar,
Paramount Plaza,
No.47, Nungambakkam High Road,
Chennai 600 034 .. Petitioner

Vs.

1. The Tamil Nadu Electricity Board,
rep by its Chairman,
800, Anna Salai,
Chennai 600 002

2. The Superintending Engineer,
Chennai E.D.Circle/Central,
Chennai 600 034 .. Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorari, calling for the records of the second respondent in his proceedings in Lr.No.SE/CEDC/C/DFC/AAO/HT/AG 2002-03/0574/03 dated 18.07.2003 and to quash the same.

For Petitioner : Mr.T.Saikrishnan
for M/s.Anand Dasgupta

For Respondents: Mr.P.R.Dhilip Kumar

O R D E R

The petitioner has come up with this Writ Petition, challenging the proceedings, dated 18.07.2003 passed by the 2nd respondent herein.

2. According to the petitioner, he is one among the leading hoteliers in India and abroad. He had entered into an Agreement with the respondents/Tamil Nadu Electricity Board for installing six Wind Mills of capacity 410 KW x 2 at Pazhavur in Survey Nos.130/7G, 130/7F and 132/2 under the Agreement dated 31.03.1995 ; two wind mills of capacity of 410 KW x 2 at Perungudi/Kaval Kinaru Village in Survey Nos.1663/2 Part, 1665/1 and 1665/2 under the Agreement, dated 30.09.1995 and further two wind mills of capacity 410 KW x 2 at Perungudi/Kaval Kinaru in Survey Nos.2255 and 2258/1-part under the Agreement dated 27.09.1996, all bear common HTSC No.2092.

3. It is the case of the petitioner that he had invested a sum of Rs.1080 lakhs including the loan value in setting up the wind mills, generating 1,60,000 KWH (approx) per month and that the petitioner has been exporting 1,53,000 KWH (approx) per month as a part of its export obligation and the petitioner maintains an account with the second respondent as HTSC No.2092 at Chennai EDC/Central.

4. It is further stated by the petitioner that the wind mills bearing HTSC Nos.135, 190 & 248 situated in Pazhavur/Perungudi/Kaval Kinaru Villages at Tirunelveli District, EDC were originally purchased from Aban Lloyd Chiles Offshore Limited and thereafter, the wind mills were owned and operated by the petitioner. The respondent/Electricity Board adjusted the power generated from the above wind mills with the total power consumed by the petitioner during power generation and charged the petitioner for the excess power consumed, at commercial tariff, and the same is arrived, deducting the power supplied by the petitioner to the respondent/Tamil Nadu Electricity Board, i.e., if the production is less than the consumed power, the respondent / Electricity Board will charge the petitioner at commercial tariff rates for the excess power consumed and if the production of power is more than the consumed power, then the petitioner is entitled to have banking facility for the power generated and the same would be adjusted in the particular financial year, according to the terms of the Agreement.

5. For the sake of convenience, Clause 20 of the Agreement in question, is extracted below:

> "20. The Company agrees that the transactions between the Company and the Board will be settled on a monthly basis and the Company will be billed only for the net excess energy drawn by the Company from the grid at appropriate tariff in force from time to time. If the energy drawn by the Company is less than the power generated by the Windmill, then

the excess energy generated will be adjusted in the next month's account subject to the condition that the Company will be allowed to accumulate energy only for a maximum period of 3 months".

6. Methodology for adjustment of power was arrived after the petitioner received the communication dated 30.05.2001 stating that the respondent/Electricity Board has ordered that the adjustment of wind energy in commercial services is not permissible and it has reiterated the same in the subsequent communication dated 27.06.2001. The petitioner approached this Court by filing W.P.No.13835 of 2001 to quash the above communications, as those two communications were contrary to the Agreement entered into between the parties. Subsequently, on 27.07.2001, the second respondent issued another communication, modifying the earlier demand dated 31.05.2001 and the petitioner was informed that henceforth, the billing would be done in normal course and the petitioner would have to bear the difference in tariff rates applicable to H.T. Industrial services and H.T. Commercial services and the wind energy cost to be calculated on the prevailing H.T. Industrial tariff.

7. In view of the subsequent communication dated 27.07.2001, the Writ Petition in W.P.No.13835 of 2001 was withdrawn on 03.09.2001 with liberty to challenge the subsequent order of the Electricity Board. Thereafter, the petitioner filed W.P.No.764 of 2002 challenging all the three communications dated 30.05.2001, 27.06.2001 and 27.07.2001 of the second respondent and in that writ petition, the petitioner obtained an interim order for restraining the respondents from disconnecting the services. While that being so, on 18.07.2003, on review of the above service, the Audit Party has observed that incorrect adjustment of wind energy units resulted in shortfall of Rs.8,91,239/- and that the shortfall would be included in the monthly current consumption bill of July 2003 and the petitioner has been requested to pay the said amount.

8. In the counter filed by the respondent/ Electricity Board, it is stated that the petitioner was paying the current consumption charges regularly with appropriate tariff, after making wind energy adjustment till April 2002. The petitioner has challenged G.O.Ms.No.95, Energy Department, dated 28.11.2001 and obtained an interim order of stay of the applicability of the tariff revision with effect from 1.12.2001 for H.T. A/c No.2092, from May 2002 onwards. The petitioner was paying the current consumption bills at the revised rates as per G.O.Ms.No.95 Energy Department, dated 28.11.2001 for their another company under H.T. A/c No.2228 M/s Connemara Hotel. The Civil Miscellaneous Appeal challenging the said Government Order

regarding tariff revision was dismissed. According to the respondent/Electricity Board, they have got every right to collect the revised Tariff rates ordered in G.O.Ms.No.95 Energy Department, with effect from 1.12.2001. Thus, according to the respondent, short fall of a sum of Rs.22,46,897/- from May 2002 till November 2002 was called from the petitioner asking him to pay the same in 10 monthly instalments, commencing December 2002. The shortfall amount was paid by the petitioner till August 2003. Out of 10 instalments, 9 instalments have been paid. Further, the Audit party has observed that the adjustment between commercial and industrial rates for wind energy units was shortly made at the old rate of Rs.0.40 instead of the new rate of Rs.1.00 per unit for the revision period from June 2002 to November 2002.

9. It is further stated in the counter affidavit filed by the respondent/Electricity Board, that there was a tariff revision on 1.12.2001, revising the tariff from Rs.4.30 to Rs.3.90, in view of the facts stated in G.O.Ms.No.95 Energy Department. According to the respondent/Electricity Board, the method of billing is same for all hotels and the revision made by the audit party is as per the rules and the shortfall levied is only due to the wrong application of tariff. The petitioner was informed about the revision and on 18.01.2003, a demand was raised for a sum of Rs.22,46,897/- in terms of G.O.Ms.No.95 Energy Department, as mentioned supra, as the petitioner is falling under Tariff III Commercial and not under Tariff I (A). According to the respondent/Electricity Board, the petitioner, as an industry, is liable to pay the tariff rates applicable as per the demand which has been made in the agreement with the respondent/ Tamil Nadu Electricity Board for H.T. supply of wind energy agreement.

10. Learned counsel for the petitioner contended that when the subject matter relating to the Electricity consumption with reference to Wind Mill power generation by the petitioner is already pending before this Court in W.P.No.764 of 2002, the respondent/Electricity Board ought not to have challenged the impugned communication dated 18.07.2003 on the pretext of audit objections and revised the Electricity consumption charges and demanded a huge sum as arrears. It is further contended by the learned counsel for the petitioner that the decision of the 2nd respondent to include the short fall in the consumption bill for July 2003 and to direct to make payment is without notice to the petitioner and therefore, there is gross violation of the principles of natural justice. As such, any other adjustment or calculation as referred to in the impugned order is contrary to the Agreement and therefore, it is arbitrary and illegal.

11. Per contra, learned Standing Counsel appearing for the respondents submitted that the Writ Petition itself is not maintainable, as there is a contract between the two parties and the remedy lies only before the civil forum. Even assuming for the sake of argument, without admitting the petition, whether it is maintainable, the petitioner has entered into an agreement with the respondent/ Electricity Board and a communication dated 30.05.2001 was sent to the petitioner informing that the adjustment of wind energy in commercial services were not permissible and that they are allowed only to operate under H.T. Industrial services. The petitioner was to inform within 15 days regarding the willingness to adjust the wind energy to H.T. Industrial services or otherwise, a decision to sell the energy to the respondent/Electricity Board.

12. It is further submitted by the learned counsel for the respondent/Electricity Board that based on the representations received from several wind mill owners, adjusting wind energy to their commercial services stating that they have no other industry to avail adjustment facility, the respondent/Electricity Board again allowed the wind mill owners to adjust to their H.T. Industrial services on 10.07.2001, subject to the condition that the consumers will have to remit the difference in the rate between the H.T. Industrial and H.T. Commercial tariff rate.

13. According to the respondent/Electricity Board, the petitioner is bound by Clause 23 of the Agreement and it cannot be given a go-by. For better appreciation, Clause 23 is extracted below:

> "23. The Company agrees that the Board shall have the right to vary from time to time, the tariffs, general and miscellaneous charges and the terms and conditions of supply under the agreement by special or general proceedings and the condition relating to generation of electricity through windmill of the Company".

14. The facts mentioned supra are not in dispute. It is also not in dispute that the petitioner is falling under Tariff III Commercial and not Tariff I (A) as stated by him. The revision of tariff under G.O.Ms.No.95 Energy Department, dated 28.11.2001 was challenged by the petitioner and he was unsuccessful. There was an agreement between the petitioner and the respondent/Electricity Board. As per the agreement, the petitioner will have to pay the charges mentioned as energy consumption after revision. As per Tariff III, there is no discrimination at all, as contended by the petitioner. The petitioner's Company is commercial in nature, falling under

tariff III. Non-payment of amount due to the respondent/Electricity Board is on the ground that tariff III will not be applicable to the petitioner and that they are bound to pay the amount as per Tariff I (A).

15. That apart, the agreement entered into between the parties is very clear, wherein, it has been agreed that the transaction between the Company and the Board will be settled on monthly basis and the Company will be billed only for the net excess energy drawn by the Company from the grid at appropriate tariff in force from time to time. Clause 20 and Clause 23 supports the contention of the respondent/Electricity Board and the petitioner cannot take advantage of the arithmetic error committed by the respondent/Electricity Board. Even assuming that the contention of the petitioner is going to be accepted, it is only the wrong tariff that has been identified earlier by the respondent/Electricity Board which has been subsequently corrected and rectified as commercial tariff from industrial tariff. Hence, the petitioner, who owns an industry falling under tariff III cannot be found fault with.

16. Though the contention of the respondent/Electricity Board that the writ petition is not maintainable, may be correct, this Court having admitted the Writ Petition in the year 2003, is not inclined to dismiss the writ petition on that score. The Writ Petition is devoid of merits. The petitioner is directed to pay the difference in the tariff amount to the respondent/Electricity Board together with interest or other penal charges, if any, as per the Rules and Regulations, within a period of 45 days from the date of receipt of a copy of this order.

17. According to the petitioner, when a person is allowed to construct, maintain, operate or generate power supply, he is entitled to use the power generated through these wind mills, and, demanding the tariff in commercial rates, more particularly when power has been generated by him based on the Agreement, is illegal. The said contention makes it clear that the petitioner is entitled to obtain power generation Plan, but, nowhere it can be stated that the method of tariff is to be considered and levied. The tariff is vested based on the nature of industry. The petitioner Company falls under commercial tariff and hence, this Court cannot accept the contention of the petitioner.

18. This Court appreciates the manner in which Mr.T.Sai Krishnan, learned counsel for the petitioner addressed this Court in presenting the case in a pleasing manner, though the decision is rendered against the petitioner. This Court also appreciates Mr.P.R.Dhilip Kumar, learned counsel appearing for the respondent/Electricity Board, in assisting this Court.

In fine, the Writ Petition is dismissed on merits. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To:
1. The Chairman,
Tamil Nadu Electricity Board,
800, Anna Salai,
Chennai 600 002

2. The Superintending Engineer,
Chennai E.D.Circle/Central,
Chennai 600 034

+ 1 cc to Mr. P. R. Dhilipkumar, Advocate Sr.60164

W.P.No.21993 of 2003

BR(CO)
EU(16/02/2018)