

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

Dated : 25.05.2017

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**W.P. (MD) .Nos.9304 and 9305 of 2017 and
W.M.P. (MD) Nos.7075 to 7078 of 2017 and
W.M.P. (MD) Nos.7079 to 7082 of 2017**

Sugapriya Paper & Boards (P) Ltd.,
(HTSC No.147, Virudhunagar EDC),
107/2, N.Subbniahpuram, Sattur Taluk,
Virudhunagar District - 626 205.
Represented by Mr.V.Surya,
its Director. .. Petitioner in WP(MD)No.9304 of 2017

Sri Venkateshwara Boards,
(HTSC No.231, Virudhunagar EDC),
1/40A, NH7 Road, Pethureddipatti Village,
Odaipatti Post, Sattur TK,
Virudhunagar District - 626 205.
Represented by Mr.G.Seenivasan,
its Partner. .. Petitioner in WP(MD)No.9305 of 2017

.Vs.

1. Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO),
10th Floor, 144, Anna Salai,
Chennai 600 002
Represented by its
Chairman and Managing Director.
2. The Director - Distribution
TANGEDCO,
10th Floor, 144, Anna Salai,
Chennai - 600 002.
3. The Chief Financial Controller - Revenue
TANGEDCO,
7th Floor, 144, Anna Salai,
Chennai 600 002.



4. The Superintending Engineer,
TANGEDCO,
Virudhunagar Electricity Distribution Circle,
Virudhunagar.

5. Tamilnadu Electricity Regulatory Commission,
19-A, Rukumini Lakshmipathy Salai,
Egmore, Chennai - 600 008.

Represented by its Secretary. ... Respondents in both the WPs

COMMON PRAYER: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the 3rd Respondent relating to the (i) Circular. Memo.No.CFC/FC/REV/AS.3/D.325 / 17, dated 15.03.2017 (ii) Memo.No.CFC/REV/FC/REV/AS.3/F.CGP/ D.203/17, dated 18.03.2017; (iii) Circular Memo No.CFC/REV/FC/REV/AS.3/F.CGP/ D.329/17 dated 30/31.03.2017; (iv) Lr.No.CFC/REV/FC/REV/DFC/ AO.4/F.CGP Status /D. 259 / 2017 Dated 31.03.2017; issued by the 3rd Respondent and (v) Memo No.CFC/REV/FC/FC/REV/F.CGP Status/D.334/17 dated 07.04.2017; issued by 2nd Respondent and (vi) Memo No.CFC/REV/FC/REV/AS. 3/F.CGP/D. 338/17, dated 15.04.2017; and (vii) Memo No.CFC/REV/FC/REV/AS.3/F.CGP/ D.340/17, dated 15.04.2017 issued by the 3rd Respondent and quash all the same as not maintainable by law as well as on facts and direct the Respondents to strictly comply with the statutory provisions of Electricity Act 2003, Electricity Rules, 2005 and the binding judgments of the Hon'ble APTEL, in the matter of determination and verification of status of the Captive Generating Plants and consequently direct the Respondents to approach the Tamilnadu Electricity Regulatory Commission for determination of the status of the Captive Generating Plants by the State Commission as stipulated under the provisions of Electricity Rules, 2005 and confirmed by the binding judgments of the Hon'ble APTEL.

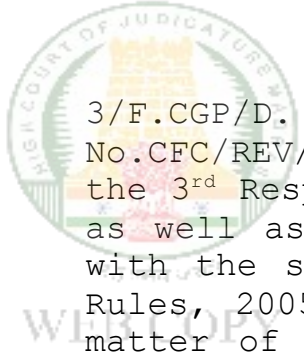
(In both the WPs)

For Petitioner : Mr.G.R.Swaminathan
for M/s.Farhathullah

For Respondents : Mr. C.Manishankhar, Addl. Advocate General,
Mr.G.Kasinatha Durai (for R1 to R5).

O R D E R

The petitioner seeks for a Writ of Certiorarified Mandamus, calling for the records of the 3rd Respondent relating to the (i) Circular. Memo.No.CFC/FC/REV/AS.3/D.325 / 17, dated 15.03.2017 (ii) Memo.No.CFC/REV/FC/REV/AS.3/F.CGP/ D.203/17, dated 18.03.2017; (iii) Circular Memo No.CFC/REV/FC/REV/AS.3/F.CGP/ D.329/17 dated 30/31.03.2017; (iv) Lr.No.CFC/REV/FC/REV/DFC/ AO.4/F.CGP Status /D. 259 / 2017 Dated 31.03.2017; issued by the 3rd Respondent and (v) Memo No.CFC/REV/FC/FC/REV/F.CGP Status/D.334/17 dated 07.04.2017; issued by 2nd Respondent and (vi) Memo No.CFC/REV/FC/REV/AS.



3/F.CGP/D. 338/17, dated 15.04.2017; and (vii) Memo No.CFC/REV/FC/REV/AS.3/F.CGP/ D.340/17, dated 15.04.2017 issued by the 3rd Respondent and quash all the same as not maintainable by law as well as on facts and direct the Respondents to strictly comply with the statutory provisions of Electricity Act 2003, Electricity Rules, 2005 and the binding judgments of the Hon'ble APTEL, in the matter of determination and verification of status of the Captive Generating Plants and consequently direct the Respondents to approach the Tamilnadu Electricity Regulatory Commission for determination of the status of the Captive Generating Plants by the State Commission as stipulated under the provisions of Electricity Rules, 2005 and confirmed by the binding judgments of the Hon'ble APTEL.

2.The learned counsel appearing for the petitioner has brought to the information of this Court, the relevant provisions of the Electricity Rules 2005 which regulate the captive arrangement and the captive ownership of captive generating plants and captive users involved in it. Prima facie, the Rules state that all the captive users of a captive generating plant must have collectively 26% ownership by way of equity shares with voting rights and all the captive users should collectively consume a minimum of 51% of the aggregate electricity so generated from the captive generating plant on an annual basis.

3.The learned counsel appearing for the petitioner has also brought to the information of this Court that the Appellate Tribunal for Electricity has passed various orders continuously confirming that the power and jurisdiction to verify the status of captive users and captive generating plants are available only to the State Regulatory Commissions in various orders as follows:

"As to the point that who can make a determination of status of a Captive Generating Plant, the issue has been well settled by law by virtue of binding judgments of the Hon'ble APTEL and one among them is dated as early as on 18.05.2010 in Appeal No.116 of 2009 in the Hira Ferro Alloys Ltd. case as extracted below:

"27.A generating Company which fulfils the special conditions prescribed in Section 2(8) read with Rule 3 above is categorized as captive power plant. Therefore, the captive generating plant will also be subject to the regulatory control of the State Commission inasmuch as a generating company. The proviso of Section 42(2) exempts a captive consumer from payment of cross subsidy surcharge. It is the State Commission which has the jurisdiction to determine whether the exemption provided under Section 42(2) can be accorded or not in the same manner as it is entrusted with the responsibility of determination



of tariff and charges payable by the consumers in the State.

28. In view of the aforementioned discussions we have no manner of doubt that the State Commission has the jurisdiction to determine the captive generating plant status of the first Respondent which in turn will determine whether or not surcharge is payable."

4. Besides to the above quoted judgments of the Hon'ble APTEL holding that the Respondents have no jurisdiction to verify the CGP status, the following judgments are also clearly demonstrate the same stand. The Appellate Tribunal for Electricity in the case of M/s. JSW Steel Limited, Vijaynagar Works v. Karnataka Electricity Regulatory Commission & Ors. (Appeal No.136 of 2011, dated 21.12.2012) has held as under:

"Secondly, the question as to whether a certain generating plant can be termed as captive generating plant or not, does not fall for determination by the Govt. It is the Appropriate Commission that has the exclusive jurisdiction to decide the issue. The learned Commission has aptly referred to a decision of this Tribunal in "Chattisgarh State Power Distribution Company Limited v. Hira Ferro Alloys (Appeal No.116/2009)" which we also quote as follows:-

A generating Company which fulfils the special conditions prescribed in Section 2(8) read with Rule 3 above is categorized as captive power plant. Therefore, the captive generating plant will also be subject to the regulatory control of the State Commission inasmuch as a generating company. The proviso of Section 42(2) exempts a captive consumer from payment of cross subsidy surcharge. It is the State Commission which has the jurisdiction to determine whether the exemption provided under Section 42(2) can be accorded or not in the same manner as it is entrusted with the responsibility of determination of tariff and charges payable by the consumers in the State.

Therefore, when the question has arisen as to whether the JSW Steel has or has not lost the status of a captive generating plant, it is the State Commission that has the only jurisdiction to decide the same."

5. Subsequently, the Hon'ble Appellate Tribunal in the case of Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra



Electricity Regulatory Commission & Anr. (Appeal No.252 of 2014, dated 03.06.2016) has again recognized the jurisdiction of the State Commission to determine the captive status of a generating plant in the following manner:

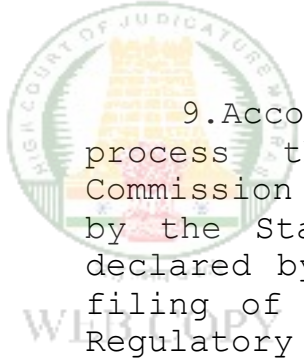
"17.10) After considering rival contentions and going through the relevant provisions of law and the relevant part of the Impugned Order, we do not find any merit in the contentions of the appellant because the learned State Commission has, after analyzing the facts and circumstances and the provisions meticulously cited cogent, solid and legal reasons for reaching the said conclusion in the Impugned Order. We approve of the approach taken by the State Commission in the Impugned Order while deciding the captive status of the CGP of respondent No.2. In the instant matter, the appellant has not pointed out any mistake in the said calculation for arriving at the CGP status but has challenged the Impugned Order simply arguing that the entire shareholding of the captive users has to be taken and cannot be reduced to fulfil the minimum criteria of 26%."

6.Further recently, the Hon'ble Appellate Tribunal in the case of Salasar Steel and Power Ltd. v. Chattisgarh State Electricity Regulatory Commission (Appeal No.252 of 2015, dated 08.11.2016) has held as under:

"a) The present case pertains to decision of the State Commission while granting "Captive Status" to the power plant of the Appellant. The Captive Status is granted by the State Commission based on the report submitted by the Chief Electrical Inspector after getting inputs from the Appellant."

7.The learned Additional Advocate General, who appeared for the respondents informed this Court that the respondents are willing to take up the matter before the 5th respondent State Electricity Regulatory Commission to undertake the process of verification of captive generating plants and captive users' status by the State Electricity Regulatory Commission as per the process of law already declared by the binding judgments of the APTEL.

8.In view of the consent provided by the learned Additional Advocate General, to take up the matter before the State Electricity Regulatory Commission, all the impugned Circulars and Memos issued by the respondents 2 and 3 in the matter of verification of the status of the captive generating plants and captive users' are ordered to be kept in abeyance.



9. Accordingly, the respondents 1, 2 and 3 are directed to process the matter before the State Electricity Regulatory Commission to get the status of the CGPs and captive users approved by the State Commission by following the due process of law as declared by the binding judgments of the APTEL and accordingly, on filing of the petition by the respondents, the State Electricity Regulatory Commission is directed to dispose of the matter by verifying the captive status of the CGPs and captive users within twelve weeks of filing of such petition by the respondents, by providing suitable opportunities to the stakeholders.

10. With the above observations, both the writ petitions are disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Vacation Officer

/True Copy/

Sub Assistant Registrar

To

+1cc to M/S. G.KASINATHA DURAI, Advocate, SR.No.57830.

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W.M.P. (MD) Nos.7075 to 7078 of 2017 and
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SDS/SV:MMS/SAR 1/08.06.2017/6P/2C