IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.06.2018

CORAM:

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN
AND
THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

W.A.No.1607 of 2016
and CMP No.19842 of 2016

1. The Tamil Nadu Generation & Distribution company Limited,
Rep. By its Chairman & Managing Director,
144, Anna Salai, Chennai 600 002.

2. The Superintending Engineer,
Kanchi Electricity Distribution Circle,
Anna Maaligai, Vellore Road,
Olimuhamedpet, Kanchipuram,

3. Chairman,
Tamil Nadu Electricity Board,
144, Anna Salai, Chennai 600 002.
... Appellants/Respondent

versus

Padmaadevi Sugars Limited,
(Formerly known as S V Sugar Mills Limited)
Rep. By its Manager (Accounts)
106, Palayasivaram Village, Palayasivaram Village,
Kancheepuram 631 606. ... Respondent/Petitioner

Appeal filed against the order passed by this Court dated 10.03.2016 passed in W.P.No.37376 of 2015.

W.P.No.37376 of 2015:

Writ Petition filed under Article 226 of the constitution of India, praying to issue a Writ of certiorarified Mandamus,to call for the records of the 2nd Respondent comprised in his impugned letter dated 19.10.2015 bearing Ref. Lr.No.0236/RCS/A1/ F.PPA Bill/2015 and quash the same in so far as it seeks to levy a penalty for short-supply of an amount of Rs.92 21 758 and consequently direct the respondents to forthwith and in a time bound manner release the dues under the respective Power Purchase Agreements and Open Access Agreement for sale to TANGEDCO dated 30.09.2014 entered into between the petitioner and the respondent without in any manner deducting any penalties for short supply so long as the Respondents do not make full payments within the due date against the Invoices raised for supply of electricity from time to time and pay interest on the delayed payments of the unfractual rate for the period of delay

For appellants : Mr.P.H.Aravind Pandian, AAG for Mr.Abdul Saleem

For 2nd Respondent : Mr.R.Parthasarathy

J U D G M E N T

(Judgment of the Court was delivered by R.SUBRAMANIAN, J.)

The challenge in this Intra Court Appeal is to the order of the learned Single Judge dated 10.03.2016 made in WP No.37376 of 2015, in and by which, the letter dated 19.10.2015 bearing letter No.0236/RCS/A1/F.PPA Bill/2015, was quashed resulting in the appellants becoming liable to pay a sum of Rs.69,69,000/- to the respondent.

2. The short facts that led to the filing of the Writ Petition are as follows:

The respondent which is engaged in Sugar Production at Palayasivaram Village, Kancheepuram District had entered into the power purchase agreement with the appellants on 23.10.2013, the power generation unit set up by the respondent is a coal based power station. The said unit had a generation capacity of 27.3 MW, since there was a surplus about 16 M.W., after meeting its internal requirements, the respondent agreed to supply the said surplus power to the first appellant. As per the power purchase agreement, the respondent has been supplying power to the first appellant and it had been raising periodical invoices. However, the appellants failed to pay the amounts due to the petitioner in respect of the power supply, according to the respondent, between 28.04.2013 and September 2015, the appellants owed a sum of Rs.296.42 Crores to the respondent towards the cost of the power supplied along with agreed interest. Despite such nonpayment the respondent continued the supply and made several representations to the appellants for release of payment. It is claimed that none of the representations evoked any positive response from the appellants. The continued nonpayment of the cost of the power supplied led to the respondent becoming sick and it could not make payments for purchase of coal, which resulted in coal suppliers stopping the supply of coal. As the coal stock depleted and due to the non availability of the coal, the respondent's power plant came to a grinding halt on 04.09.2015.

The respondent can resume power production only after the dues to the coal suppliers are made good. It was under such circumstances the respondent made a representation to the Chairman cum Managing Director of the first appellant on 11.09.2015, stating that payments have been made for supplies only till April 2015 and they have raised invoices for a total sum of Rs.16,05,12,312/- for the period from May 2015 to August 2015 and the same has not been settled.

3. It is also stated in the said letter that in view of the fact that the TANGEDCO had not made payments for the power supplied to it, the respondent could not buy coal and as a consequence the power plant was shut down from 04.09.2015. Despite several representations, the appellants did not bother to make payments, but however chose to levy a penalty of Rs.92,21,758/- towards short supply of power as per the agreement. It is this levy that was challenged by the respondent before the Writ Court.

4. The Writ petition was resisted by the appellants raising several untenable contentions all of which are rejected by the learned Single Judge, hence the present appeal.

5. We have heard Mr.P.H.Aravind Pandian, learned Additional Advocate General appearing for Mr.Abdul Saleem, for the appellants and Mr.R.Parthasarathy, learned counsel appearing for the respondent.

6. Though the learned Additional Advocate General would make a serious attempt to dislodge the findings of fact recorded by the learned Single Judge, we must point out that he could not succeed in his attempt as facts are loaded against the appellants. From the correspondence that was placed before the learned Single Judge, the learned Single Judge had found that from July 2015 onwards the respondents has been continuously representing to the appellants that the payment for the power procured is delayed and because of the delay they are unable to procure coal to maintain the power generation. The appellants had not even bothered to reply to any one of those representations. It is not in dispute that the appellants had not paid the dues to the respondent for the power purchased, in time. The agreement also provides for payment of interest if there is a delay in payment of the power bills.

7. In the counter affidavit filed by the second respondent, the delay in payment of the power bills is admitted, but an attempt is made to attribute the same the financial constraints that the first appellant is going through as it had been continuously incurring losses for many years. However, no justification is sought to be made for the action of the appellants in attempting to penalise the respondent for short supply of power. When the respondent had made it very clear that it is due to the action of the appellant, in not paying the power bills, the respondent had to shut down the power generation unit due to non availability of coal. In the back drop of such factual findings on the basis of material available, Mr.P.H.Aravind Pandian, learned Additional Advocate General could not succeed in making out a case for interference in this intra Court Appeal. However, the learned Additional Advocate General would vehemently contend that in view of the provisions of Section 86 of the Electricity Act 2003, which provides for resolution of disputes by the Tamil Nadu Electricity Regulatory Commission (TNERC), the respondent could not have approached this Court under Article 226 of the Constitution of India.

8. Mr.R.Parthasarathy, learned counsel appearing for the respondent would submit that the Writ Petition was filed in the year 2015 at that point of time a dispute regarding the appointment of the Chairman of Tamil Nadu Electricity Regulatory Commission was pending and there was in fact an injunction restraining the Commission from taking up issues for adjudication. The said challenge was decided by the Hon’ble Supreme Court only on 12.04.2018 while deciding Civil Appeal No.14697 of 2015 in the State of Gujarat & Ors. V. Utility Users’ Welfare Association & Ors. Therefore, in the said circumstances Mr.R.Parthasarathy, would contend that at the relevant point of time and the respondent invoked the Extra Ordinary Original Jurisdiction of this Court under Article 226 of the Constitution of India the alternative remedy was not really available to the respondent. This factual position is not disputed. We are therefore, unable to countenance the submission of the learned Additional Advocate General on the ground of availability of alternative remedy also.

9. We hasten to add that we are not deciding on the question of law, viz. the availability or adequacy of the alternative remedy provided under Section 86 of the Electricity Act 2003. We reject the contention regarding availability of alternative remedy only because of the fact that the Tamil Nadu Electricity Regulatory Commission was injuncted from

entertaining and deciding disputes during the relevant period because of the pendency of the challenge to the appointment of the Chairman of Tamil Nadu Electricity Regulating Commission in this court.

10. For the foregoing reasons, the intra Court Appeal is dismissed. However in the circumstances of the case, we make no order as to costs. Consequently, the connected miscellaneous petition is closed.

-s/d-
Assistant Registrar(CS-IX)

True Copy

Sub-Assistant Registrar

jv

To

1. The Tamil Nadu Generation & Distribution company Limited,
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2. The Superintending Engineer,
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3. Chairman,
Tamil Nadu Electricity Board,
144, Anna Salai, Chennai 600 002.

+1 CC to Mr. Abdul Saleem, Advocate sr 37545.

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and CMP No.19842 of 2016

SKS(CO)
SP(04/07/2018)