

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 05.12.2017

Delivered on : 24.04.2018

CORAM:

THE HON'BLE MR.JUSTICE K.K.SASIDHARAN

AND

THE HON'BLE MR.JUSTICE P.VELMURUGAN

W.A No.3259 of 2004,

WPMP No.6144 of 2004,

CMA No.1034 of 2003 and CMP No.7288 of 2003

W.A.No.3259 of 2004

The Superintending Engineer I,
Electricity Department,
Pondicherry.

...Appellant

Vs

1.The Government of Tamil Nadu
Rep. by its Secretary,
Energy Department, Chennai.

2.The Tamil Nadu Electricity Board
Rep.by its Chairman,
Tamil Nadu State Electricity Board,
800, Anna Salai, Chennai.

...Respondents

Prayer:- Writ Appeal filed under clause 15 of the Letter Patent against order dated 26.07.2004 in W.P.No.27667 of 2003.

Prayer in WP.No.27667 of 2003:To issue a writ of Certiorarified mandamus to call for the records from the file of 1st respondent relating to G.O(Ms) No.95 dated 28.11.2001 fixing 300 paise per Kwlt for HT consumer V for supply to Pondicherry and to quash the same and restore the status as per G.O.Ms.No.29 (Energy.A2) dated 31.1.95 including payment of cost.

CMA No.1034 of 2003

The State of Pondicherry

Rep. by its Chief Secretary to Government,
Pondicherry.

...Appellant/Respondent

Vs.

1.The Secretary
Tamil Nadu Electricity Regulatory Commission,
Alwarpet, Chennai.

2.The Chairman,
Tamil Nadu Electricity Board,
800 Anna Salai, Chennai.

...Respondents/Appellants

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Civil Miscellaneous Appeal filed under Section 27 of the Electricity Commission Act, 1998 against the order of Tamil Nadu

Electricity Regulatory Commission, Tamil Nadu in T.P.No.1 of 2002 dated 15.03.2003.

For Appellants : Mr.ARL.Sundaresan
Senior Counsel
for Ms.V.Usha,
Addl.Govt.Pleader (Pondy)
(in both appeals)

For Respondents : Mr.V.Viswanathan
Standing Counsel
in W.A.No.3259 of 2004 and
for R2 in CMA No.1034 of 2003
Mr.T.Saikrishnan
for R1 in CMA No.1034 of 2003

C O M M O N J U D G M E N T

K.K. SASIDHARAN, J.

Introductory

The Government of India issued directives to the Neyveli Lignite Corporation Limited (hereinafter referred to as "NLC") to divert energy to the Union Territory of Puducherry to the extent indicated in the Government Order. The agreement executed between the NLC and Tamil Nadu Electricity Board (hereinafter referred to as "TNEB") on 9 March 2001 contained a mandatory provision that supply should be made to the Union Territory of Puducherry treating the transaction as an inter-state sale. The TNEB initially supplied electricity to Puducherry treating it as an industrial consumer and collected only the cost payable to NLC together with wheeling charges at 10 paise per KWH. However, in the subsequent Order issued by the Government of Tamil Nadu in G.O.(Ms).No.95 Energy Department, dated 28 November 2001, making amendment to the Schedule to the Tamil Nadu Revision of Tariff Rates on supply of Electrical Energy Act, 1978, the Union Territory of Puducherry was considered as a HT consumer like other HT consumers in the State of Tamil Nadu.

2. The TNEB raised bills at the rate of Rs.3 per KWH treating the sale in favour of the Union Territory of Puducherry as an intra-state sale. When TNEB approached the Tamil Nadu Electricity Regulatory Commission (hereinafter referred to as "Regulatory Commission") for fixing the tariff with effect from 16 March 2003, taking into account the objection raised by the Union Territory of Puducherry, the Commission held that Union Territory of Puducherry cannot be considered as a HT Consumer of the TNEB for fixation of tariff. However, after saying so, the Commission directed the parties to maintain status quo as regards the existing tariff of Rs.3/- per KWH, meaning thereby, to continue to treat the Union Territory of Puducherry as a HT Consumer. The writ petition filed against the order passed by the Regulatory Commission was dismissed by the Writ Court giving

rise to the intra court appeal.

3. The TNEB has now raised a bill for a sum of Rs.1663.75 crores as on 18 August 2016 payable by the Union Territory of Puducherry.

4. The Union Territory of Puducherry is before this Court challenging the order passed by the Regulatory Commission, dated 15 March 2003 and the related order passed by the Writ Court dated 26 July 2004 in W.P.No.27667 of 2003.

Brief Facts

5. The Union Territory of Puducherry has been receiving power for its Puducherry and Karaikal region from the NLC through the TNEB. Initially, the Electricity Department of Puducherry purchased power for its Puducherry Region from the TNEB through 22 KV Villanur and Manalmedu points of supply. Similarly, power to the Karaikal regional was purchased from TNEB through 11 KV Velangudi and Vanjiur points of supply.

6. The Union Territory of Puducherry commissioned 230/11 KV Auto sub-station at Villianur, Puducherry during 1987. The sub-station started availing power from Neyveli Thermal Station II through the radically connected 230 KV Neyveli - Villanur feeder. The Union Territory of Puducherry started drawing its share allocated from the Central Generating Stations in the southern region. The power from TNEB grid was continued to be utilised at Bahour point of supply in the Puducherry region and Sorakudi point of supply in Karaikal Region.

7. The Government of India directed the NLC to supply energy to the Union Territory of Puducherry. The Government of India made it clear that the diversion of energy to Puducherry shall be on the basis of their normal requirements and not merely based on times of power shortage or emergency. The Puducherry had an allocation of 65 MWs out of 630 MWs in the NLC TS - II Stage I and 15 MW out of 840 MW in TS II Stage II.

8. The NLC and TNEB entered into an agreement for purchase and supply of electricity. The agreement was renewed from time to time. The agreement contained a specific provision that based on the direction issued by the Government of India, power should be diverted to the Union Territory of Puducherry. Clause 1.3 of the agreement dated 9 March 2001 stipulates that out of the energy generated and sold by the NLC to TNEB, the TNEB shall divert energy to Puducherry to the extent indicated from time to time by the Government of India. The NLC and TNEB have agreed to supply the allocated power to the Union Territory of Puducherry.

9. The State of Tamil Nadu in exercise of the powers conferred under Section 4 of the Tamil Nadu Revision of Tariff Rates on Supply of Electrical Energy Act, 1978 has made certain amendments to the said Act. It was published in the Tamil Nadu Government Gazette on 31 January 1995 . As per the related

Government Order in G.O.Ms.No.3 Energy dated 7 January 2000, which came into force from 7 January 2000, the Tamil Nadu Government made it clear that the " H.T. Tariff V supplied to Pondicherry State shall be at the Thermal Station I rate charged by NLC to the TNEB + wheeling charge at 10 paise per KWh + 4% on the energy wheeled towards transmission loss. The TNEB has been billing at this rate.

10. The Government of Tamilnadu had revised the power tariff for the power supplied to Puducherry. The Government of Tamilnadu in the order in G.O.Ms.No.95 Energy Department, dated 28 November 2001, prescribed that like any other HT Consumer, Puducherry shall also pay electricity charges at Rs.3/- per KWh. The demand was per se in violation of the agreement executed between NLC and TNEB.

11. The Government of Puducherry appears to have taken up the issue with the Government of Tamil Nadu. However, there was no response.

12. The Tamil Nadu Electricity Board filed a petition before the Tamil Nadu Electricity Regulatory Commission, Chennai in T.P.No.1 of 2002 for passing appropriate orders with regard to the tariff and various other issues in exercise of the power vested in it under Section 29 of the Electricity Regulatory Commissions Act, 1998. The Government of Union Territory of Puducherry was a party to the Tariff Petition No.1 of 2002.

13. Before the Regulatory Commission, the Union Territory of Puducherry filed objection against the collection of tariff at the rate indicated in the Government Order in G.O.Ms.No.95 dated 28 November 2001.

14. The Regulatory Commission considered the case pleaded by TNEB and the Union Territory of Puducherry in the light of the direction given by the Government of India and the agreement executed by TNEB with NLC and issued its ruling on the supply to Puducherry.

15. The Regulatory Commission in its ruling on the supply to Puducherry held that the State of Puducherry cannot be considered as a HT Consumer of the TNEB for the fixation of tariffs. The transaction must be considered purely as an inter-State sale of energy. The Regulatory Commission was of the view that the issue requires conciliation between the Government of Tamilnadu and the Government of Puducherry. The Regulatory Commission even after giving such a finding with regard to the nature of transaction involving the Government of Tamilnadu and Puducherry, still permitted the TNEB to collect tariff at Rs.3/- per KWH, which was the rate applicable to the HT Consumers of Tamil Nadu.

16. The order dated 15 March 2003 on the file of Tamil Nadu Regulatory Commission was challenged before the Writ Court. The learned single Judge taking into account the judgment in Voice

Consumer Care Council v. State of Tamil Nadu [2002 (3) CTC 1] negatived the plea taken by the Government of Puducherry on the ground that the Government Order in G.O.Ms.No.95 dated 28 November 2001 has already been upheld by the High Court. The order is under challenge in the intra court appeal.

17. Since there was no Appellate Authority under the Electricity Regulatory Commissions Act, the appellant filed a Civil Miscellaneous Appeal before this Court in CMA No.1034 of 2003, challenging the order passed by the Regulatory Commission.

Submissions

18. The learned Senior Counsel appearing on behalf of the Union Territory of Puducherry in the intra court appeal as well as in the civil miscellaneous appeal, contended that the supply to the Puducherry was made pursuant to the directives issued by the Government of India. The Government of India allotted energy to the Union Territory of Puducherry out of the power generated by NLC. The TNEB was obliged to supply electricity generated by NLC. For the said purpose, TNEB has been collecting the rate payable to NLC plus wheeling charges. According to the learned Senior Counsel, G.O.Ms.No.95 dated 28 November 2001, has no application to the Union Territory of Puducherry. The learned Senior Counsel contended that the Regulatory Commission having arrived at a finding that the Puducherry is not a HT Consumer and the transaction was in the form of inter-state sale, erred in directing the parties to maintain status quo. The learned Senior Counsel further contended that in view of the finding given by the Regulatory Commission with respect to the nature of transaction, it was not open to give a rider to the order by directing the Union Territory of Puducherry to continue to pay at the rate of Rs.3/- per KWH treating it as any other HT Consumer.

19. The learned Standing Counsel for the Tamil Nadu Electricity Board contended that the Government Order in G.O.Ms.No.95 Energy Department, dated 28 November 2001, was upheld by the Division Bench and as such, the appellant is liable to pay the charges treating it as a HT Consumer.

The Issue

20. The core issue is as to whether the Government of Puducherry should be considered as a HT Consumer notwithstanding the allocation of power by the Government of India to Puducherry Government through NLC and the agreement entered into between the NLC and TNEB for supply of the energy to the Union Territory of Puducherry with a provision for collecting the actual amount payable to the NLC plus wheeling charges.

Discussion

21. The Government of Tamil Nadu has been purchasing power from the NLC. The Government of India allotted energy to the Union Territory of Puducherry. The allocation was modified from time to time. The Government of India wanted the NLC to supply energy to Union Territory of Puducherry. The NLC in turn made

an agreement with TNEB for supply to the State of Tamil Nadu and Union Territory of Puducherry. The amount payable by the Government of Puducherry has already been included in the agreement executed between NLC and TNEB. The transaction between Union Territory of Puducherry and TNEB has always been considered as an inter-state sale. It was not an intra-state sale given the nature of transaction. The agreement entered into between NLC and TNEB contained the charges payable by the Government of Puducherry for purchasing energy allotted by NLC. The TNEB was obliged to collect only the actual amount payable to NLC plus wheeling charges at 10 paise per KWH + 4% on the energy wheeled towards transmission loss. There was no requirement to pay any other charges. Even when the agreement with NLC was executed by the TNEB, there were Government Orders issued by the State of Tamilnadu fixing the tariff for HT Consumers. However, in none of those Government Orders, Union Territory of Puducherry was treated as a HT Consumer.

22. The Government of Tamilnadu revised the tariff by issuing Government Order in G.O.Ms.No.95 Energy Department, dated 28 November 2001. The TNEB in order to give a statutory flavour to the Government Order in G.O.Ms.No.95 filed a petition before the Tamil Nadu Electricity Regulatory Commission, Chennai. The Petition in T.P.No.1 of 2002 dealt with the case of Union Territory of Puducherry also. The revision in tariff was opposed by the Union Territory of Puducherry by contending that the liability is to pay only as an inter-state sale.

23. The Regulatory Commission passed an order after giving reasonable opportunity to both TNEB and the Union Territory of Puducherry.

24. The relevant portion of the Regulatory Commission's Ruling on the supply to Puducherry reads thus:

" Prior to the tariff revision effected from December 2001, the TNEB was supplying power to Pondicherry at NLC -1 rate plus 10 p/kWh wheeling charge plus 4% transmission loss, as it was bound by the GoTN's Tariff notification which specified this rate. As the GO 95 dated November 28, 2001 had changed the rate for sale of power to Pondicherry to Rs.3 per kWh, the TNEB was charging the same. The TNEB has clarified that there is no existing agreement with the State of Pondicherry for sale of power either as a HT consumer or for inter-state purchase.

Regarding tariff applicable to the State of Pondicherry, the Commission is of the opinion that the State of Pondicherry cannot be considered as a HT consumer of the TNEB for the fixation of tariffs and the transaction must be considered as an inter-State sale of energy. Therefore, the Commission is of the opinion that the rate of energy must be negotiated and agreed directly between GoTN/TNEB and the State of Pondicherry for the purposes of this tariff

determination exercise, the Commission has maintained the status quo as regards the existing tariff of Rs.3 per kWh applicable to the State of Pondicherry."

25. The Regulatory Commission recognised the transaction between Puducherry and the TNEB as an inter-state sale of energy. In view of the said finding, the Puducherry cannot be termed as a HT Consumer, liable to pay the energy charges at Rs.3/- per kWh.

26. The primary issue is as to whether the Regulatory Commission was correct in directing the parties to maintain status quo even after giving the ruling regarding the nature of transaction by directing the Union Territory of Puducherry to continue to pay the tariff at the rate of Rs.3/ per KWh like any other Inter-State Sale.

27. The Regulatory Commission by giving a categorical finding with regard to the nature of transaction between the Union Territory of Puducherry and TNEB was not expected to pass a further order to maintain status quo. In case, the Commission is of the view that the matter requires adjudication by the Central Electricity Regulatory Commission, being the appropriate authority to decide the lis between the two states, the matter should have been relegated to the said authority. The Commission has taken up the task of deciding the lis between the Union Territory of Puducherry and the TNEB. The question posed before the Regulatory Commission was answered by giving a finding that the State of Puducherry cannot be considered as HT Consumer of the TNEB for fixation of tariffs. It was not open to the Regulatory Commission thereafter to direct the Government of Puducherry to continue to pay electricity charges treating it as a HT consumer.

28. The Electricity Act, 2003 provides for constitution of Central Electricity Regulatory Commission. Section 79 of the Electricity Act, 2003 contained the statutory functions of the Central Electricity Regulatory Commission. Section 79(1)(c) indicates that it is within the jurisdiction of the Central Electricity Regulatory Commission to regulate the inter-state transmission of electricity and to determine the related tariff.

29. The writ court dismissed the writ petition filed by the appellant on the ground that the issue has already been decided by the Division Bench in VOICE Consumer Care Council v. State of Tamil Nadu [2002 (3) CTC 1].

30. In Voice Consumer Care Council, the nature of transaction involving Union Territory of Puducherry and the TNEB, was not an issue. The fact that the Division Bench was pleased to confirm the Government Order in G.O.Ms.No.95 Energy Department, dated 28 November 2001 by negating the ground taken by the petitioner therein would not operate as a res judicata insofar as the contention taken by the Government of Puducherry is concerned. The question whether Puducherry should

be treated as a HT Consumer was not at all an issue before the Division Bench in VOICE Consumer Care Council. The primary issue was with regard to the constitutionality of the revision of power tariff by the State of Tamilnadu. The arguments were confined to the question as to whether the Government of Tamilnadu has got power and jurisdiction for revising the power tariff. The Division Bench considered the legislative competence of the State of Tamil Nadu to revise the tariff and dismissed the writ petition.

31. The Union Territory of Puducherry was not a party to the litigation in VOICE Consumer Care Council.

32. The order in VOICE Consumer Care Council would not come to the rescue of the respondents for the simple reason that it was only the TNEB who approached the Regulatory Commission to fix the tariff in accordance with the Government Order in G.O.Ms.No.95 Energy Department, dated 28 November 2001. The Regulatory Commission rendered its finding based on the request given by the TNEB. The said finding is applicable to the Union Territory of Puducherry as well as to the State of Tamilnadu.

33. The learned single Judge dismissed the writ petition on the basis of a ground which was not taken by the TNEB. It was not at all the case of the TNEB that in view of G.O.Ms.No.95 Energy Department, dated 28 November 2001, and the judgment in VOICE Consumer Care Council (cited supra), the Government of Puducherry cannot be heard to say that it was not a HT Consumer.

34. The TNEB accepted the finding given by the Regulatory Commission. There was no appeal filed by TNEB against the finding given by the Regulaotry Commission that the sale to Puducherry is an inter-state sale of energy and that Puducherry cannot be considered as a HT Consumer. The said finding has become final insofar as TNEB is concerned. The TNEB is therefore estopped from contending that inspite of the said finding, they are entitled to charge at the rate of Rs.3/- per kWh treating Union Territory of Puducherry as a HT Consumer.

35. The appellant filed a Civil Miscellaneous Appeal against the order passed by the Regulatory Commission as there was no Appellate Authority at that point of time. There is no question of relegating the parties to the Appellate Authority at this point of time. It is more so on account of the fact that the finding given by the Regulatory Commission that the Union Territory of Puducherry is not a HT Consumer and the transaction between the Union Territory of Puducherry and the TNEB should be treated as an inter-state sale of energy was accepted by the Government of Tamilnadu.

36. There was no agreement entered into between the NLC and the TNEB revising the tariff applicable to the Union Territory of Puducherry. The NLC accepted payment from TNEB to the extent of supply of energy made to the Union Territory of Puducherry. The payment was in accordance with the bilateral agreement entered into between NLC and TNEB. Therefore, the Government of

Tamilnadu was not correct in including the Union Territory of Puducherry within the definition of "HT Consumer" so as to collect energy charges from the Union Territory along with other HT consumers, purchasing energy from TNEB.

37. The Regulatory Commission exceeded its brief by directing the parties to maintain status quo even after declaring that the Puducherry is not a HT Consumer. The moment the finding is given that the Puducherry is not a HT Consumer, the matter should come to an end. The TNEB has no right to claim electricity charges at the rate of Rs.3/- per kWh treating Union Territory of Puducherry as a HT Consumer, in view of the finding given by the Regulatory Commission.

38. Since the Regulatory Commission exceeded its jurisdiction in directing the parties to maintain status quo by continuing to treat the Union Territory of Puducherry as HT Consumer, the order to that extent is liable to be set aside.

39. We confirm the finding given by the Tamilnadu Electricity Regulatory Commission that the Puducherry Government is not a HT Consumer and it is an inter-state sale of energy. The liability of the Union Territory of Puducherry is therefore only to pay the actual charges payable to the NLC taking into account the supplies made to the Union Territory of Puducherry in addition to wheeling charge at 10 paise per Kwh plus 4% on the energy wheeled towards transmission loss.

40. We set aside the order dated 15 March 2003 passed by the Tamil Nadu Electricity Regulatory Commission in part insofar as its direction to maintain status quo is concerned. The other part of the order excluding the State of Puducherry under the definition " HT Consumer" and treating the transaction as inter-State Sale of energy is confirmed.

41. We set aside the order passed by the learned single Judge dated 26 July 2004. The writ petition in W.P.No.27667 of 2003 is allowed.

42. The appropriate authority to fix the charges for inter-state sale of energy is only the Central Electricity Regulatory Commission. Section 79 of the Act gives authority to the Central Commission. We give liberty to the parties to approach the Central Electricity Regulatory Commission to decide the dispute relating to the nature of transaction. We make it clear that the observation made by us in the present judgment would not stand in the way of taking a decision on merits and as per law by the Central Electricity Regulatory Commission.

43. The Civil Miscellaneous Appeal filed by the Union Territory of Pondicherry and the intra court appeal filed by the Superintending Engineer, Electricity Department, Puducherry are allowed. No costs.

Sd/--

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

- 1.The Secretary,
The Government of Tamil Nadu
Energy Department, Chennai.
- 2.The Chairman,
The Tamil Nadu Electricity Board
Tamil Nadu State Electricity Board,
800, Anna Salai, Chennai.
- 3.The Secretary
Tamil Nadu Electricity Regulatory Commission,
Alwarpet, Chennai.
- 4.The Superintending Engineer,
Electricity Department, Pondicherry.
- 5.The Chief Secretary,
Pondicherry

+1cc to Mr.V.Viswanathan, Advocate Sr.No.30575

+1cc to Government Pleader SR.No.30494

Copy to:The Section Officer
VR Section
High Court, Madras

SSi(CO)
sm:15.5.2018

Judgment in
W.A No.3259 of 2004 and
CMA No.1034 of 2003