

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.12.2018

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.32955 of 2018

and

W.M.P.Nos.38211 to 38213 of 2018

M/s.GBR METAL(P) Ltd.,
H.T.Sc.No.1817,
No.4, Ramanan Road,
Sowcarpet, Chennai - 600 079,
Rep.by its Director,
Mr.Venkatesh Rathi.

..Petitioner

vs

1.The Chairman and Managing Director,
Tamil Nadu Generation and Distribution
Corporation Limited(TANGEDCO),
144, Anna Salai, Chennai - 600 002.

2.Chief Financial Controller/Revenue
TANGEDCO, (Accounts Branch)
144, Anna Salai,
Chennai - 600 002.

3.The Tamil Nadu Electricity Regulatory Commission,
Rep.by its Secretary,
No.19A, Rukmani Lakshmipathy Salai,
Egmore, Chennai - 600 008.

4.The Superintendent Engineer,
Chennai Electricity Distribution Circle/North,
TANGEDCO,
No.144, Anna Salai, Chennai - 600 002.

.. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records of the 2nd respondent contained in impugned letter No.CFC/FC/DFC/AAO.HT/AS.3/REV/D.N.No.115/13 dated 29.07.2013 and quash the same as arbitrary, illegal and violative of the provisions of the Electricity Act 2003 and the order of the TNERC.

For Petitioner : Mr.K.Seshadri

For Respondents : Mr.P.R.Dhilipkumar, standing counsel
for EB for R1, R2 & R4

O R D E R

The order of cancellation of the benefit of Deemed Demand Charges issued by the second respondent in proceedings dated 29.07.2013 is sought to be quashed in the present writ petition.

2. The writ petitioners are the High Tension Electricity Consumers and they are purchasing the electricity power from the third parties for generating power and adjusting the same for the benefit of petitioners establishments.

3. In this regard, certain terms and agreements were agreed upon between the parties by way of adjudicative process before the Tamil Nadu Electricity Regulatory Commission.

4. The learned counsel appearing on behalf of the writ petitioner contented that the unilateral withdrawal of concession granted to the writ petitioners are arbitrary and unsustainable in view of the order dated 15.05.2006 in petition No.TP 1/05 by the Tamil Nadu Electricity Regulatory Commission. It is contended that the adjudicative process had been conducted statements, objections and suggestions were received from all stakeholders and thereafter a decision was taken by the Tamil Nadu Electricity Regulatory Commission, Chennai in petition No.T.P.1/2005 and an order was passed in order No.2 dated 15.05.2006. The preamble of the order stipulates as follows:

Sub section (2) of Section 42 of the Electricity Act, 2003, stipulates that the State Commission shall introduce open access in such phases and subject to such conditions as may be specified, within one year of the appointed date. Accordingly, the Commission has notified the Tamil Nadu Electricity Regulatory Commission ? Intra State Open Access Regulations 2005 in the Tamil Nadu Government Gazette dated the 3rd August, 2005 so as to introduce open access in Tamil Nadu. As per Regulation 9 of the aforesaid Regulations, various charges payable to State Transmission Utility / Transmission Licensee and Distribution Licensee by an open access customer have to be determined by the Commission. As directed by the Commission, the TNEB filed a petition for determination of the above charges on 26.09.2005 and the Petition was registered and numbered as T.P. 1 of 2005.

In exercise of the powers conferred by section 42 of the Electricity Act, 2003 (Act 36 of 2003) and all other powers enabling it in this behalf, the Tamil Nadu Electricity Regulatory Commission (TNERC) after having considered the written objections, consulted the members of the State Advisory Committee, heard the issues raised by the stakeholders in a public hearing, the reply of the Tamil Nadu Electricity Board, the

applicant herein, and having considered the relevant documents available on record, passes this order, fixing the transmission charges, wheeling charges and other charges specified under the aforesaid Open Access Regulations and payable by an open access customer.

Sd.....

B.Jeyaraman
Member

Sd.....

S.Thangarathnam
Member

Sd.....

A.Balraj
Chairman

5. The learned counsel for the petitioner relied on the preamble of the said order, which states that the Regulatory Commission considered the written objections, consulted the members of the State Advisory Committee, heard the issues raised by the stakeholders by way of public hearing and the reply from the Tamil Nadu Electricity Board and considered all the issues. Pursuant to the said order dated 15.05.2006 the applicability of Deemed Demand Charges has been stipulated and in respect of Deemed Demand Charges it is stated that the transmission losses in each voltage play a vital role in deciding the deemed demand. The loss levels at each voltage are given above. The loss factor depends on the voltage at which the power is injected and the voltage at which the open access user draws. Since various combinations are possible, a simple methodology is adopted to approximate the loss factor under various scenarios. Even though the power, in an interconnected grid, flows by displacement and does not actually traverse the whole distance from point of injection to the point of travel, the accepted principle, in general is, that the loss estimation shall be based on the theoretical route of flow. For example, even though the generated power is injected by a generator at 11 K V and is also drawn at the same voltage of 11 KV at a distant place, the power is supposed to have been transformed through the higher voltages of 33, 110,230 KV etc., again transformed into the lower levels and reach the point of drawal. To emulate such scenarios it is assumed that the said power, flows in an upward and downward direction as indicated below, through various transformation levels and undergoes 50% of the loss, in each direction, in that level. The percentage of deemed demand supplied by the licensee for typical cases of injection and drawal and based on the loss factors and also considered by the Regulatory Commission. Considering the technical aspects the Regulatory Commission passed an order in respect of billing of monthly consumption which is segregated into two parts as under:

(i) Quantum of energy supplied by the generator at open access user end and;

(ii) Quantum of energy supplied by Distribution licensee to open access user.

The demand charges in a billing month are to be arrived at as detailed below;

(a) The maximum demand recorded in a month shall be

segregated into demand supplied by the generator and the demand supplied by the licensee taking into account the actual energy consumed in units, the actual energy in units supplied by the generator and average power factor maintained at the consumption point in the billing month.

(b) The demand charges payable by the open access customer will be calculated as below:

Case 1:

Injection Voltage	110 kV
Drawal Voltage	33 kV
Percentage of deemed demand as per the table	= 41.28
Sanction Demand	1000 Kva
Recorded Demand	855 Kva
Units consumed	650000 units
Power factor	0.95
Units supplied by generator (at consumption point)	: 500000 units
Demand supplied by generator	= $500000/720 \times 0.95$ =659.72 Kva
Demand supplied by the licensee	= $855-659.72$ =195.28 Kva
Billable demand supplied by licensee	= $900-126; 659.72$ =240.28
(at 90% of the sanctioned demand)	
Demand charges payable	= $(659.72 \times 0.4128 \times 300) + (240.28 \times 300)$ =81699.72+72084=153783.72

Case 2:

Injection Voltage	230kV
Drawal Voltage	22/11 kV
Percentage of deemed demand as per the table above	= 40.04
Sanction Demand	1000 Kva
Recorded Demand	950 Kva
Units consumed	700000 units
Power factor	0.92
Units supplied by generator (at consumption point)	: 700000 units
Demand supplied by generator	= $700000/720 \times 0.92$ =894.44 Kva
Demand supplied by the licensee	= $950-126; 894.44$ =55.56 Kva
Billable demand supplied by licensee	= $950-126; 894.44$ =55.56 Kva
Demand charges payable	= $(894.44 \times 0.4004 \times 300) + (55.56 \times 300)$ = 107440.13+16668=124108.13

6. Importantly in paragraph No.5.24.2 the order passed by the Regulatory Commission itself categorically states that all the orders will take effect from the date of this order and till such time the charges are revised. Further revision shall normally be along with the regular tariff petition by the licensee. The licensee may also approach the Commission for revision of these charges by filing a distinct revision petition without linkage to the regular tariff revision. Further the commission reserves the right to initiate suo-motu procedure for revision of the charges. Thus it is made clear that the licensee

has got right to approach the Commission for revision of these charges by filing a distinct revision petition. The commission also shall initiate suo-motu procedure for revision of the charges. Thus both the licensee as well as the Commission are empowered to reopen the concession granted in respect of Deemed Demand charges. It is further made clear that reopening of the concession of Deemed Demand Charges is payable either by way of revision petition by the licensee or by way of suo-motu revision by the Regulatory Commission. Thus the authorities of the board has no authority to cancel the concession granted unilaterally without reference to the order passed by the Regulatory Commission by invoking clause 5.24.2 of the order dated 15.05.2006 in petition No.T.P.1 of 2005.

7. The learned counsel is of the opinion that the Regulatory Commission has not passed any such order withdrawing the concession granted in respect of Deemed Demand Charges to the open access consumers/fossil fuel based generators. In the absence of any such order by the Regulatory Commission, it is not open to the authorities of the electricity board to cancel the concession unilaterally by passing the impugned order.

8. The learned counsel appearing on behalf of the respondents 1, 2 & 4 opposed the contentions of the learned counsels appearing for the writ petitioner by stating that grant of Deemed Demand Charges is a concession extended by the Commission at the instance of the board. Such a concession was agreed to be granted by the board on certain terms and conditions. The concession was extended undoubtedly for many years, however on account of certain financial implications the board has decided to withdraw the concession of the Deemed Demand Charges and the competent authorities are empowered to do so. In view of the fact that in the subsequent order passed by the Regulatory Commission, the concession of Deemed Demand Charges were omitted. The omission of extending the concession of Deemed Demand Charges will provide an implied power to the authorities competent of the Electricity board to cancel the concession of the Deemed Demand Charges granted to open access consumer/fossil fuel based generators. Thus there is no irregularity or infirmity in respect of the impugned circular passed in this regard. It is further contended that the benefit extended is being a concession can never be claimed as a right by the writ petitioners. The concession is granted considering various other factors by the commission in the year 2012. On account of the changed circumstances the board by way of an order dated 30.03.2012 in order No.2/2012 the concept of grant of Deemed Demand Charges were dispensed with. However the learned counsel for the respondents admitted the fact that there is no specific clause withdrawing the concession or to dispense with the concession granted earlier. However such an order for withdrawal of concession was passed with reference to the wind

mill energy case. However in respect of the open access customers/fossil fuel based generators no such order was passed by the Tamil Nadu Electricity Regulatory Commission. This being the factum of the case there is no irregularity or illegality in respect of the cancellation of concession of Deemed Demand Charges granted earlier to this writ petitioners. The learned counsel for the respondents further contended that in respect of Wind Mill Generators and biogas power generators the said concession has been withdrawn and the Regulatory Commission had passed orders to that effect. When such being the factum of the case the mere omission shall not be construed as an extension of the concession granted in all other cases. The concession has been withdrawn and the same cannot be continued in respect of the writ petitioners alone, who are all coming under the category of open access customers/fossil fuel based generators. Thus the writ petition is liable to be rejected.

9. Considering the arguments advanced on both sides, this Court is of the opinion that admittedly the concession of Deemed Demand Charges were granted to all these writ petitioners by way of an order by the Tamil Nadu Electricity Regulatory Commission in T.P.1 of 2005 dated 15.05.2006. The preamble of the order categorically enumerates that an adjudicative process had been conducted and written objections, suggestions, consulted the members of the State Advisory Committee, heard the issues raised by the stakeholders by way of public hearing and were obtained before passing an order. This Court is of the opinion that such a process ought to have been conducted before withdrawing the concession granted to the writ petitioners. Concept of implied withdrawal can never be accepted. In view of the fact that through an agreement the concession was granted and it is contractual in nature. The petitioners are generating electricity power and keeping the same for their own usage. The service of the electricity board is also utilised by the petitioners for transmitting the electricity power. Thus the services ought to be compensated by the writ petitioners undoubtedly all these conditions were considered by providing opportunity to all the parties and a decision was taken by the Tamil Nadu Electricity Regulatory Commission. Such being the factum, while withdrawing the concession it is necessary on the part of the electricity board to approach the Electricity Regulatory Commission by filing a proper application or with a request to initiate suo-motu revision under clause 5.24.2 of the said order dated 15.05.2006 in respect of the open access customers/fossil fuel based generators. In respect of all other categories the Regulatory Commission had already passed orders withdrawing the concession of Deemed Demand Charges. Thus it is made clear that the electricity board has to approach the Tamil Nadu Electricity Regulatory Commission for the purpose of revision of all such concessions granted to this category.

10. This Court is of the considered opinion that when certain concession are granted for a clause/group of people by way of adjudicative process, the said concession can be withdrawn only by following the procedure. In the event of unilateral cancellation of such concession, certainly rights of the persons, who enjoyed the concession will be prejudiced. Even such a consultation process has been stipulated in the order passed by the Electricity Regulatory Commission dated 15.05.2006 in clause 5.24.2 which contemplates that the licensee may also approach the Commission for revision of these charges by filing a distinct revision petition without linkage to the regular tariff revision. Further the commission reserves the right to initiate suo-motu procedure for revision of the charges. When such a power has been provided under the very order, there is no impediment to the Regulatory Commission to initiate suo-motu revision to reopen the case of open access consumers/fossil fuel based generators. Electricity board is also competent to submit an application for revision of the charges before the Regulatory Commission.

11. On a perusal of the entire records it is made clear that no adjudicative process had been conducted before issuing the impugned order by the Tamil Nadu Regulatory Commission in respect of the category of open access consumers/fossil fuel based generators. When the concession is extended to this category withdrawal of the same must be done by providing an opportunity to the persons who are benefited from and out of the concession. Admittedly no such opportunity was provided to the writ petitioners before issuing impugned circular by the respondents. An opportunity to be provided is for the purpose of submitting the objections in respect of cancellation of such concession. Thus it is made clear that as per clause 5.24.2 the Electricity Board is at liberty to approach the Regulatory Commission if so advised.

12. The learned counsel for the respondents with reference to the counter affidavit in W.P.No.5916/2014, filed by the third respondent Tamil Nadu Electricity Regulatory Commission contended that the concept of Deemed Demand benefit was introduced in Order No.3 of 2006 by the Commission. Though there was no regulation governing the said subject, it was introduced solely with a view to extend a concession to generators as the introduction of open access was in the initial stage. The deemed demand is a fiction, which was evolved to promote open access in the formative stages and rightly Commission has reviewed its own decision in the subsequent statutory order to dispense with the same. The concept of demand charges has found statutory sanction in the Electricity Act, 2003 which provides for recovery of fixed charges but the same is not the case in respect of deemed Demand charges which does not have statutory sanction. At best, the facility so far enjoyed can be termed to be a concessional

one to promote open access in the initial stages and any move to make such concessions to the generators a permanent affair would amount to unfair enrichment at the cost of the licensee/other consumers. Further, the demand charges being a component of tariff, the Commission has the power to revisit the same and revise subsequently as circumstances warrant.

13. Further it is contended in paragraph No.11 of the counter affidavit which reads as under:

11. The respondent Commission withdrew the Deemed Demand concept in respect of Wind Energy Generators, Biomass generators, Bagasse Based Cogenerators in Orders No 6, 7 and 8 dated 31.07.2012. The following observations of the Commission in clause 8.2.5.3(b) (ii) of the Order No.8 of 2012 are reproduced for better appreciation of the facts of the case.

?"ii) Demand charges

Demand charges are governed by the provisions of Supply Code, Distribution Code and the applicable Tariff Order issued by the Commission from time to time. Sections 9 and 42 of the Electricity Act, 2003, enables consumption of electricity from the captive generating plant. Proviso to Section 42 envisages that surcharge shall not be leviable in case open access is provided to a person who has established captive generation plant for carrying the electricity to the destination of his own use. This is also reflected in the note to Regulation 9 (2) which is reproduced below:

?"Provided that such surcharge shall not be levied in case transmission access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use.?"

In the Tariff Order issued by the Commission in 2006 and 2009 the concept of deemed demand was introduced with a view to reduce the demand charges. This is opposed by the TANGEDCO as they are unable to recover the full demand charges relating to providing all the infrastructure facilities as well as typing up of the generation capacity. This matter was examined in detail. The Commission observes that

a) When the captive power plant is not generating power, the licensee is obliged to provide power supply to the consumer. During this period no wheeling charge

is recoverable as the captive generator is not injecting any power. The fixed charges payable to other generating stations or procurement of power from the market to meet such contingency will devolve on the licensee.

b) If the captive generator is generating throughout the year, he could always reduce the sanctioned demand and control his demand charges for the supply to be made only by the licensee.

c) Since the open access regulation cast a duty on the licensee to provide electricity to all open access customers, whether captive or otherwise, in case of nongeneration by such generator, the fixed charge is getting shifted to the licensee.

d) Keeping in view the above, the Commission decides to withdraw the deemed demand concept followed so far. The Commission also observes that such deemed demand concept is not prevalent in many other states in India.?"

14. With reference to the submissions made by the respective learned counsels appearing on behalf of the parties to the lis on hand, this Court is of the opinion that the power to revisit the entire concession of Deemed Demand Charges is granted to the Tamil Nadu Electricity Regulatory Commission. The Commission is empowered to revise the order even by initiating suo-motu revision. The power of suo-motu revision has been contemplated in the order dated 15.05.2006 itself. Thus there is no impediment for the commission to initiate suo-motu revision for the purpose of revisiting the entire concession and to revise the same if necessary. The grievance of the writ petitioner is that such a suo-motu power had not been exercised by the Regulatory Commission nor the Commission had undertaken the process of adjudication by providing an opportunity to the stakeholders. Without undertaking any such process the unilateral decision has been taken by the respondent Electricity Board for the withdrawal of the concession granted earlier. In the absence of a specific order by the Regulatory Commission in this regard, the power of the Commission to revise the concession of Deemed Charges cannot be usurped by the authorities of the Electricity Board. Thus the impugned order is one where the respondents are not following the procedures contemplated nor the Commission exercised the suo-motu power of revision.

15. It is contended by the learned counsel for the respondents that the petitioners are attempting to take undue advantage of the omission made by the authorities in the

impugned order. However, this Court cannot consider the same in view of the fact that the powers conferred on the Regulatory Commission had not been exercised admittedly by the respondents. Procedures to be followed also had not been adhered. Thus the very submission made that the omission on the part of the respondent is taken as an advantage by the writ petitioners deserves no merit. This apart this Court cannot draw an inference from and out of such omission made by the Electricity Board or by the Regulatory Commission. There cannot be any implied withdrawal of concession, which is permissible. The concession already granted and in force for long years can be withdrawn or taken away only by following the procedures contemplated and therefore the unilateral decision of the respondent Board can never be appreciated by this Court.

16. Paragraph No. 11 of the counter affidavit filed by the respondents enumerates that the Regulatory Commission had withdrawn the Deemed Demand Charges concept in respect of the Wind Energy Generators, Biomass generators, Bagasse Based Cogenerators in Orders No.6, 7 & 8 dated 31.07.2012. However, the open category of the writ petitioners namely open access consumer/fossil fuel based generators has not been stated in the counter affidavit. Thus the reason for non-inclusion is not known to this Court. This Court cannot draw any factual inference in respect of the withdrawal of the concession granted to all other categories but it should be applied to the writ petitioners also who belongs to a different category. Such an inference is not only improbable, which cannot be made, in view of the fact that specific clause is available in the order of the Regulatory Commission dated 15.05.2006 for initiation of revision procedures even suo-motu. Thus it is made clear that the respondents in the event of passing an appropriate orders by following the procedures contemplated cannot withdraw or cancel the benefit of Deemed Demand Charges already extended to these writ petitioners. The said concession can be cancelled by invoking the power by Electricity Regulatory Commission. Accordingly the writ petition is to be considered.

17. The learned counsel appearing for the writ petitioners has stated that such an adjudicative process in compliance with the principles of natural justice has been contemplated in the Tamil Nadu Electricity Regulatory Commission conduct of business regulations 2004 clause 16 1 & 2 reads as under :

16 (1) The Commission may initiate any proceedings suo motu or on a petition filed by any affected or interested person.

(2) When the Commission initiates the proceedings, it shall be by a due notice issued by the Commission. The Commission may give such orders and directions as may be deemed necessary, for serving of notices to the affected parties; for the filing of replies and

rejoinders against or in support of the petition in such form as the Commission may direct. The Commission may, if it considers appropriate, issue orders for publication of the petition inviting comments from the public or any class of persons on the issue involved in the proceedings in such form as the Commission may direct.

18. In view of the discussions made in the afore mentioned paragraphs, this Court is of the opinion that the Regulatory Commission has to under take the process of revision either suo-motu or through an application if any filed before the commission and conduct the adjudicative process by issuing notice to all the stakeholders and after hearing the parties aggrieved, decision shall be taken on merits and in accordance with law. The compliance of principles of natural justice has been contemplated in the business regulations, as stated supra. Thus Electricity Regulatory Commission is bound by that and they have to follow the procedures and thereafter take a decision and pass orders on merits and in accordance with law in respect of the withdrawal of the concession of the Deemed Demand Charges in respect of the writ petitioners. However, it is made clear that the observations made in this judgment will not affect the independent adjudication if any undertaken by the Electricity Regulatory Commission in accordance with the procedures contemplated. The Electricity Regulatory Commission is at liberty to decide the merits and demerits independently and pass orders without causing undue delay in view of the fact that the concession has been already cancelled in respect of other categories.

19. Accordingly, the impugned order passed by the second respondent in letter No.CFC/FC/DFC/AAO.HT/AS.3/REV/D.No.115/13 dated 29.07.2013 is quashed and the writ petition stands allowed. No costs. Consequently connected miscellaneous petitions are also closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

- 1.The Chairman and Managing Director,
Tamil Nadu Generation and Distribution
Corporation Limited(TANGEDCO),
144, Anna Salai, Chennai - 600 002.
- 2.Chief Financial Controller/Revenue
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Chennai Electricity Distribution Circle/North,
TANGEDCO,
No.144, Anna Salai, Chennai - 600 002.

+1cc to Mr.K.Seshadri, Advocate sr.no.85696

W.P.No.32955 of 2018

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nr 08/01/2019