IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order Reserved : on 29.04.2019

Order Delivered : on 30.08.2019

Coram:-

The Honourable Mr. Justice T.Raja

Writ Petition Nos.5196, 11725, 8459 & 8463 of 2019
and 6694 & 1275 of 2018

W.P.No.5196 of 2019

M/s.Vivid Wind Energy Private Limited,
Rep. By its Authorized Signatory
A.Maria Selvakumar,
S.F.No.708/2, Thatchan Thotam,
G.H.Backside, Tirupur - 641 608. ... Petitioner

vs.

1.The Director / Generation,
Tamil Nadu Generation and Distribution
Corporation Limited,
144, Anna Salai, Chennai - 2.

2.Chief Engineer / NCES
Tamil Nadu Generation and Distribution
Corporation Limited,
144, Anna Salai, Chennai - 2.

3.The Superintending Engineer,
Udumalpet Electricity Distribution Circle,
TANGEDCO,
15, 15A, Kumaralingam Road,
Udumalpet - 624 154. ... Respondents

Prayer in W.P.No.5196/19:- Writ Petition filed under Article 226 of the Constitution of India for issuance of a writ of mandamus to direct the respondents for the termination of the PPA dated 17.03.2017 and to order switch over to captive consumption.

W.P.No.11725 of 2019:

M/s.Hindustan Hardwares,
No.356 Patel Road, Coimbatore 641 009
Rep by its Authorized Signatory
S.Prabhu ...Petitioner

Vs

1 Tamilnadu Generation and Distribution
Corporation Ltd. (TANGEDCO)
10th Floor 144 Anna salai,
Chennai 2 Rep by
its Chairman cum Managing Director

2 The Chief Engineer NCES,
TANGEDCO 2nd Floor 144 Anna Salai
Chennai 2

3 The Superintending Engineer
TANGEDCO,
Tuticorin Electricity Distribution Circle,
Tuticorin.

4 Tamilnadu Electricity Regulatory Commission,
19-A Rukumini Lakshmipathy Salai,
Egmore, Chennai 8.
Rep by its Secretary ... Respondents

Prayer in W.P.No.11725 of 2019:

Petition filed under article 226 of the Constitution of India it is prayed that this Hon'ble Court may be pleased to issue a Writ Mandamus directing the 1st 2nd and 3rd respondents to allow the Utility Change by converting the existing Energy Purchase Agreement dated 25.3.2017 to Energy Wheeling Agreement in petitioners Wind Mills bearing WF HTSC No. 297 for captive consumption of the windmill generated units in the petitioners own Spinning Mills Coimbatore North EDC and consequently make payment of Rs. 2,74,51,898/- towards the wind energy sold from the petitioners WEG No. 297 for the period from 08/2017 to 12/2018 as per their respectively invoices till date and pass such further or other orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and thus render Justice.

W.P.No.8459 of 2019:

Royal Classic Mills P. Ltd.
No. 31 Puliyamar Thottam,
Mangalam Road,
Tiruppur Rep. by its Assistant Manager Accounts
Mr.R. Velumani ... Petitioner

Vs

1 Tamil Nadu Generation and Distribution,
Corporation Ltd. (TANGEDCO),
10th Floor 144 Anna Salai,
Chennai - 600002
Rep. by its Chairman
Cum Managing Director

2 The Chief Engineer,
NCES, TANGEDCO, 2nd Floor,
144, Anna Salai,
Chennai - 600002.

3 The Superintending Engineer,
TANGEDCO,
Udumalpet Electricity Distribution Circle,
Udumalpet.

4 Tamil Nadu Electricity Regulatory Commission,
19-A Rukumini Lakshmipathy Salai,
Egmore, Chennai - 600008
Rep. by its Secretary ... Respondents

Prayer in W.P.No.8459 of 2019: Petition filed under article 226 of the Constitution of India it is prayed that this Hon'ble Court may be pleased to issue a Writ Mandamus directing the 1st 2nd and 3rd respondents to allow the Utility Change by converting the existing Energy Purchase Agreement dated 25.03.2017 to Energy Wheeling Agreement in Petitioners wind mills bearing WF HTSC No. 221 and 2212 for captive consumption of the windmill generated units in the petitioners own spinning mill at HTSC No. 265 at Dindigul EDC processing unit at HTSC No. 51 at Tirupur EDC and garment unit at HTSC No. 517 of Palladam EDC and consequently make payment of Rs. 4,57,44,703/- towards the wind energy sold from the petitioners WEG Nos. 2211 and 2212 for the period from 09/ 2017 to 01/2019 as per their respectively invoices till date and pass such further or other orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and thus render Justice.

W.P.No.8463 of 2019:

Atlas Processing Mills,
No. 1/ 168 Siva Sakthi Nagar,
Periyandankoil Post, Karur - 639002.
Rep. by its Partner,
Mr. M. Nachimuthu ... Petitioner

Vs

1 Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO), 10th Floor, 144, Anna Salai, Chennai - 600002 Rep. by its Chairman Cum Managing Director

2 The Chief Engineer, NCES, TANGEDCO, 2nd Floor, 144, Anna Salai, Chennai - 600002.

3 The Superintending Engineer, TANGEDCO, Tirunelveli Electricity Distribution Circle, Tirunelveli.

4 Tamil Nadu Electricity Regulatory Commission, 19-A Rukumini Lakshmipathy Salai, Egmore, Chennai - 600008 Rep. by its Secretary ... Respondents

Prayer in W.P.No.8463 of 2019:Petition filed under article 226 of the Constitution of India it is prayed that this Hon'ble Court may be pleased to issue a Writ Mandamus directing the 1st 2nd respondents to allow the Utility Change by converting the existing Energy Purchase Agreement dated 26.07.2017 to Energy Wheeling Agreement in Petitioners wind mills bearing WF HTSC No. 1201 for captive consumption of the windmill generated units in the petitioners own dying unit at HTSC No. 111 and consequently make payment of Rs. 42,35,590/- towards the wind energy sold from the petitioners WEG Nos. 1201 for the period from 07/ 2017 to 01/2019 as per their respectively invoices till date and pass such further or other orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and thus render Justice.

W.P.No.6694 of 2018:

M/s. Sri Krishna Packs, WF.HT.SC.No.3011, S.F.No.248/1B Karukkan Thottam, Eatti Veerampalayam post, Perumanallur-641 666, Tirupur. Represented by its Aurhorized Signatory A.Gopal Krishnan ... Petitioner

Vs

1 Tamilnadu Generation and Distribution, Corporation Ltd. (TANGEDCO), 10th floor, 144, Anna Salai, Chennai-002. rep by its Chairman cum managing director.

2 The Chief Engineer, NCES, TANGEDCO, 2nd floor, 144, Anna Salai, Chennai-002.

3 The Superintending Engineer, TANGEDCO, Tirunelveli Electricity Distribution Circle, Tirunelveli.

4 Tamilnadu Electricity Regulatory Commission, 19-A, Rukumini Lakshmipathy Salai, Egmore Chennai-008 rep by its Secretary. ... Respondents

Prayer in W.P.No.6694 of 2018:Petition filed under article 226 of the Constitution of India it is prayed that this Hon'ble Court may be pleased to issue a Writ Mandamus Calling for the records relating to the issuance of the impugned proceedings in (CMD) No.266 on 20.05.2017 of the 2nd respondent and quash the same as not maintainable by law as well as on facts and direct the 1st 2nd and 3rd respondents to strictly comply with the provisions of the Constitution of India as enshrined under Article 300A and confine the respondents within the statutory provisions of Electricity act 2003 in the matter of allowing the Utility Changes from converting the existing Energy Purchase Agreement to Energy Wheeling Agreement and consequently direct the respondents to allow the captive consumption of the windmill generated units from the petitioner windmill bearing WEG HTSC No.3011 of Tirunelveli EDC for adjustment against consumption at the petitioner spinning mill at HTSC No.501 at Tirupur EDC and pass such further or other orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and thus render Justice.

W.P.No.1275 of 2018:

M/s.SEP Energy Pvt. Ltd.
Rep. by its Director G-409 CAPSTONE Opp. Chirag Motors Sheth Mangaldas Road Ellisbridge Ahmedabad-380 006. ...Petitioner

Vs

1 The Chairman,
Tamil Nadu Generation and Distribution,
Corporation Ltd., 144, Anna Salai,
Chennai- 600 002.

2 Chief Engineer/ NCES
Tamil Nadu Generation and Distribution,
Corporation Ltd., 2nd Floor, Eastern Wing,
144, Anna Salai, Chennai-600 002.

3 Tamil Nadu Electricity
Regulatory Commission Rep. by its Secretary
No.19A Rukmini lakshmipathy Salai Egmore
Chennai-600 008.

4 The Superintending Engineer,
Tirunelveli Electricity Distribution Circle,
TANGEDCO, Maharaja Nagar,
Tirunelveli-627 001.

5 M/s.Art Rubber Industries Ltd.,
302, Century Towers, 45, Shakespeare Sarani,
Kolkota-700 017. ... Respondents

Prayer in W.P.No.1275 of 2018:Petition filed under article 226 of the Constitution of India it is prayed that this Hon'ble Court may be pleased to issue a Writ Mandamus Calling for the records of the impugned proceedings bearing (Per) TANGEDCO Proceedings (CMD) No.266 dated 20.05.2017 issued by the 1st respondent and quash the same as being arbitrary and illegal and consequently direct the respondents to permit the application for name transfer and migration filed by the petitioner dated 31.08.2017.

For Petitioner
in W.P.No.5196/19 : Mr.T.Chezhiyan

For Petitioner
in W.P.Nos.11725 & 8459/19
& 6694/18 : Mr.R.S.Pandiyaraj

For Petitioner
in W.P.Nos.1275/18 & 8463/19 : Mr.Rahul Balaji

For R1 to R3in W.P.No.5196,
8459, 8463, 11725/19, 6694/18 and
R1, R2 & R4 in W.P.No.1275/18 :Mr.P.H.Aravindh Pandian, AAG
Assisted by Mr.S.K.Raameshuwar,
Standing Counsel

For R4 in W.P.No.8459, 8463, 11725/19, 6694/18
and R3, R5 in W.P.No.1275/18 : No Appearance

COMMON ORDER

W.P.No.5196 of 2019 has been filed by one M/s.Vivid Wind Energy Private Limited, Tirupur, seeking a direction to the respondents/ TANGEDCO for the termination of Energy Purchase Agreement (EPA) dated 17.03.2017 and to order switch over to captive consumption.

2. W.P.No.11725 of 2019 has been filed by M/s.Hindustan Hardwares, Coimbatore, seeking a direction to the respondents/TANGEDCO to allow the utility change by converting the existing Energy Purchase Agreement dated 25.03.2017 to Energy Wheeling Agreement in petitioner's wind mills bearing WF HTSC No.297 for captive consumption of the windmill generated units in the petitioner's own spinning mills, Coimbatore North EDC, and consequently make payment of Rs.2,74,51,898/- towards the wind energy sold from the petitioner's WEG No.297 for the period from 08/2017 to 12/2018 as per the respective invoices till date.

3. W.P.No.8459 of 2019 has been filed by M/s.Royal Classic Mills Private Limited, Tiruppur, seeking a direction to the respondents/TANGEDCO to allow the utility change by converting the existing Energy Purchase Agreement dated 25.03.2017 to Energy Wheeling Agreement in petitioner's wind mills bearing WF HTSC Nos.221 and 2212 for captive consumption of the windmill generated units in the petitioner's own spinning mills at HTSC No.265 at Dindigul EDC, processing unit at HTSC No.51 at Tirupur EDC and garment unit at HTSC No.517 of Palladam EDC and consequently make payment of Rs.4,57,44,703/- towards the wind energy sold from the petitioner's WEG Nos.2211 and 2212 for the period from 09/2017 to 01/2019 as per their respective invoices till date.

4. W.P.Nos.6694 and 1275 of 2018 filed by one M/s.Sri Krishna Packs, Tiruppur, and M/s.SEP Energy Private Limited, Ahmedabad, are directed against the order dated 20.05.2017

passed by the Chief Engineer, NCES, TANGEDCO, Chennai, deciding not to concede any request of Wing Energy Generators (WEGs) under Sale to Board category to migrate either to captive use or third party sale.

5. W.P.No.8463 of 2019 has been filed by one M/s.Atlas Processing Mills, Karur, seeking a direction to the respondents/TANGEDCO to allow the Utility Change by converting the existing Energy Purchase Agreement dated 26.07.2017 to Energy Wheeling Agreement in petitioner's wind mills bearing WF HTSC No.1201 for captive consumption of the windmill generated units in the petitioner's own dying unit at HTSC No.111 and consequently make payment of Rs.42,35,590/- towards the wind energy sold from the petitioner's WEG Nos.1201 for the period from 07/2017 to 01/2019 as per their respective invoices till date.

6. Since the issues involved in all these writ petitions are one and the same, they are disposed of by this common order.

7. Mr.T.Chezhiyan, learned counsel appearing for the petitioner in W.P.No.5196 of 2019, submitted that the petitioner Company has entered into an agreement on 01.01.2017 with one Mr.K.L.Shreedhan Reddy for purchase of 2 Nos. of 850 KW, WEG WF HT SC Nos.UGA 100 and UGA 101, Gamesa make Windmills, situated at EDC Udumalpet. Thereafter, the Wind Energy Generators (WEGs) were commissioned on 29.03.2012 under the Renewable Energy Certificate Scheme. As per the agreed terms, the seller has made an application dated 28.01.2017 to the third respondent requesting for name transfer and thereafter, the third respondent, vide his proceedings dated 06.03.2017, recommending the claim of the petitioner for name transfer, forwarded the same to the second respondent with no due certificate for approval. Subsequently, when the petitioner Company enquired about the further progress, they were informed that the utility change would be time consuming. Therefore, the petitioner Company entered into an agreement dated 17.03.2017 with the TANGEDCO under REC scheme.

8. Continuing further, Mr.T.Chezhiyan, learned counsel, submitted that as per Clause 6 (2) of the agreement dated 17.03.2017, the Distribution Licensee shall make payment to the Generator within 30 days of receipt of the bill and any delayed payment beyond 30 days is liable for interest at the rate of 1% per month. However, as against the very terms of their own agreement, the respondents have not come forward to settle the dues to the tune of Rs.1,19,56,130/- with interest even after one year and therefore, the petitioner Company had sent a notice

dated 20.08.2018 for termination of Energy Purchase Agreement dated 17.03.2017.

9. Adding further, it is submitted that the petitioner Company is buying energy at Rs.7.50/- per unit, although they are selling the energy produced by them to the Board at Rs.2.78/- per unit. It is further submitted that the petitioner Company had obtained a huge loan from the Bank and they have been paying a sum of Rs.18 lakhs per annum towards interest. However, due to continuous non-payment of the dues, the petitioner Company could not even pay the day to day electricity charges and that the Bank had also threatened to issue a notice under SARFAESI Act. It is further contended that the pendency of huge dues by the TANGEDCO is causing financial crisis to the petitioner's business and therefore, a direction may be given to the respondents for the termination of EPA agreement dated 17.03.2017 and also to permit them to switch over to the captive consumption.

10. In support of his submissions, Mr.T.Chezhian, learned counsel for the petitioner in W.P.No.5196 of 2019 has also relied on a judgment of the Hon'ble Apex Court in Mangalore Electricity Supply Company Limited Vs. M/s.AMR Power Private Limited and another [2016 (16) SCC 135] for a proposition that failure or refusal by the Distribution Licensee to perform its financial obligation as per the agreed terms of the Agreement constitutes an event of default and that the parties to the agreement are bound by the terms thereof. By relying so, it is further contended that in the case on hand, although there is a specific term as per Clauses 6(2) and 8(2) of the Energy Power Agreement dated 17.03.2017 with regard to payment of bills within 30 days and having an option to exit from the Agreement after serving notice of three months, the TANGEDCO/Distribution Licensee has never come forward either to settle the dues or for termination of said Agreement.

11. Mr.R.S.Pandiyaraj, learned counsel for the petitioner in W.P.No.6694 of 2018 submitted that the petitioner Company had purchased one Windmill of 1.25 KW capacity bearing WEG HTSC No.3011, situated at Tirunelveli District, and the said Windmill was transferred to the name of the petitioner Company on 09.06.2017 after getting all clearances from the TANGEDCO. As the petitioner Company was not having infrastructure to consume the power for its captive purpose, they entered into an Energy Purchase Agreement dated 12.06.2017 with the TANGEDCO to sell the energy generated by them to the TANGEDCO, with a tariff rate of Rs.2.90/- per unit. From the date of said transfer, although the petitioner has been raising the invoices for the amount of energy sold to the respondent, sadly, till date, the respondent has not paid even a single pie to the petitioner

Company against the invoices raised by them towards the sale of wind energy. Thus, till date, the total dues payable by the respondent works out to Rs.44,45,446/- to the petitioner Company. Likewise, in W.P.No.11725 of 2019, total dues payable by the respondent/TANGEDCO works out to Rs.2,74,51,898/- and in W.P.No.8459 of 2019, it works out to Rs.4,57,44,703/-. Despite repeated representations by the petitioners, there is no symptom of making such payment by the respondent/TANGEDCO.

12. Continuing further, it is submitted that now the petitioner Company themselves required the power for their own purposes of captive consumption and therefore, the petitioner Company made a representation dated 01.03.2018 requesting to convert the existing Energy Purchase Agreement (EPA) into an Energy Wheeling Agreement (EWA) for the purpose of allowing the captive consumption as their industry itself required such power generated by them for its operations. However, the said request was not acted upon and it is still pending before the second respondent. Whileso, the TANGEDCO issued a proceedings dated 20.05.2017, which is impugned herein, stating that all such changes from Energy Purchase Agreement to Energy Wheeling Agreement are ordered not to be conceded and accordingly, any request by the Wind Energy Generators (WEGs) to permit them to migrate from Sale to Board category either to captive use or to third party sale was ordered not to be acted upon. The said proceedings dated 20.05.2017 is also challenged in W.P.Nos.1275 and 6694 of 2018.

13. When the first respondent/Chairman, TANGEDCO, has to act only within the statutory functions and scopes as provided under Part VI of the Electricity Act, 2003, any attempt to travel beyond Sections 42 to 60 of the Electricity Act, 2003, would be an administrative excess and hence, the impugned order passed by the first respondent requires to be set aside in its entirety. When there is every legitimate expectation available to every WEG owner to change the utility depending upon their contingencies, curtailing the facility of Utility Change for their own use is unjustified and against the law, he contended.

14. Relying on the Energy Purchase Agreement dated 25.03.2017 entered between the parties, it is submitted that as per Clause 8(b) of the said Agreement, the parties to the agreement shall have the option of exiting in case of violation with three months notice to other party and as per Clause 8(c), the parties to the agreement are at liberty at any time to renegotiate the existing agreement mutually in accordance with the Commission's order in force. Therefore, as per Clause 8(b), the petitioner has given a notice dated 25.10.2018 to the second respondent requesting to convert the Energy Purchase Agreement into an Energy Wheeling Agreement, however, the second

respondent has neither acted upon on the said request nor has come forward to settle their respective dues as stated above. Therefore, it is further contended, the petitioners, having invested huge money in Wind Energy Generator by borrowing huge loan from the Bank, have been selling the energy generated by them to the TANGEDCO, but, till date, the respondents have not come forward to heed any of the request made by the petitioners and on the other hand, they have blindly passed an order stating not to concede any request of WEGs under Sale to Board category to migrate either to captive use or to third party sale.

15. It is further contended that after coming into force of the Electricity Act, 2003, regulation of all the affairs relating to administration of Electricity in the States is entrusted with the respective State Electricity Regulatory Commission and in respect of Tamil Nadu, it is vested with the fourth respondent herein and hence, neither the Electricity Board nor the TANGEDCO has a role to take a decision on the request made by the petitioners seeking permission to migrate from Energy Purchase Agreement to Energy Wheeling Agreement.

16. Supporting the above said arguments of Mr.T.Chezhian and Mr.R.S.Pandiyaraj, Mr.Rahul Balaji, learned counsel for the petitioners in W.P.Nos.1275 of 2018 and 8463 of 2019, relying on the judgment of the Hon'ble Apex Court in Union of India and others Vs. Tantia Construction Private Limited [(2011) 5 SCC 697], submitted that arbitration clause is not a bar to the invocation of writ jurisdiction when injustice is caused and rule of law is violated, inasmuch as the Constitutional powers are vested with the High Court and therefore, the same cannot be fettered by any alternative remedy available to the authorities. In view of such ratio of the Hon'ble Apex Court, the stand taken by the respondents in their counter affidavit that the writ petitions are not maintainable in view of alternative remedy available to the petitioners cannot be sustained, he contended.

17. Per contra, Mr.P.H.Aravindh Pandian, learned Additional Advocate General appearing for the respondents/TANGEDCO, submitted that the writ petitions are not maintainable either on law or facts, as, in the light of Clause 9 of the Renewable Energy Purchase Agreement executed by the petitioners, they have liberty to approach the Tamil Nadu Electricity Regulatory Commission for adjudication of disputes raised in these writ petitions. Apart from this, they have also got an effective alternative remedy before the Tamil Nadu Electricity Regulatory Commission (TNERC) under Section 86(1)(f) of the Electricity Act, 2003, and therefore, the petitioners

cannot be permitted to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

18. It is further submitted that at the time of commissioning, the Wind Energy Generator (WEG) has an option to choose either 'Preferential Tariff' or 'Renewable Energy Certificate(REC)' Schemes. Under Preferential Tariff, the WEG is paid a single part tariff (flat rate), whereas, under REC Scheme, the tariff is in two parts consisting of Energy component and Environmental component in the form of REC certificate and a Generator would have to register itself with the National Load Desptach Center (NLDC) to trade the REC certificate. Adding further, it is pleaded that the petitioners having entered with their respective EPA, they are fully aware of the fact that as of now, around 300 MW WEGs are under Sale to Board in REC scheme with APPC Rate of Rs.2.54/Rs.2.63 per Kwh etc. Hence, the TANGEDCO has taken a decision not to allow migration of projects from REC to preferential scheme, for, if the migration is allowed, the TANGEDCO may incur a loss of Rs.0.85/- per unit and this would ultimately cause a huge loss of Rs.1220/- crores to the TANGEDCO. It is further submitted that TANGEDCO is now under temporary financial crisis due to unforeseen expenses occurred to resume supply to the GAJA cyclone hit areas . As per the terms and conditions of the agreement, there is no provision for termination of agreement due to non-payment of energy charges to the petitioners , but, alternatively, they are entitled to claim the interest at 1% per month for the delayed payment. Therefore, the prayer sought for by the petitioners cannot be entertained and on this basis, learned Additional Advocate General sought for dismissal of all the writ petitions.

19. Heard the learned counsel appearing on either side and perused the materials available before this Court.

20. Before going into the other issues raised in these writ petitions, this Court is inclined to deal with the preliminary issue raised by the learned Additional Advocate General regarding the maintainability of the writ petitions.

21. In these writ petitions, all these petitioners are Wind Energy Generators (WEGs). They have also commissioned their respective Windmills after getting necessary clearances from the respondents/TANGEDCO, like No Objection Certificate and also borrowing huge loan from the Bank. They have also entered into an Energy Purchase Agreement (EPA) with the respondents/TANGEDCO. For better appreciation, Clauses 6 and 8 of the said Agreement are extracted below:-

"6.Billing and Payment:

a) The Wind Energy Generator shall raise a bill every month for the net energy sold after deducting the charges for start up power and reactive power.

b) The Distribution Licensee shall make payment to the generator within 60 days of receipt of the bill. Any delayed payment beyond 60 days is liable for interest at the rate of 1% per month.

c) The Wind Energy Generator agrees that if the consumption of the wind mill is more than the generation during a particular month, such excess consumption shall not be allowed to be carried forward to next month and the billing shall be done on the same month at the per unit realization rate of HT industrial service as per tariff order in force.

d)The Wind Energy Generator agrees to remit the amount at the rate of Rs.2.144 lakhs per MW per year with 5% escalation every year, if the WEG is connected in the TANGEDCO / TANTRANSCO SS.

8. Terms and Conditions Agreement Period.

a) This agreement shall valid for a minimum period of 20 years from the date of execution.

b) The parties to the agreement shall have the option of exiting in case of violation with three months notice to the other party.

c) The parties to the agreement are at liberty at any time to renegotiate the existing agreement mutually in accordance with the Commission's order in force."

A cursory reading of Clause 6 shows that the Wind Energy Generator shall raise a bill every month for the net energy sold and thereafter, the Distribution Licensee/TANGEDCO shall make payment to the Generators within 60 days or 30 days (in some cases) of receipt of such bill and it is further made clear that if the payment is made beyond 60 days or 30 days, they are liable to pay the interest at the rate of 1% per month. Coming to Clause 8(b), it says that the parties to the agreement shall have the option of exiting in case of violation with three months notice to the other party.

22. In these writ petitions, admittedly, all these petitioners have installed Wind Energy Generators (WEGs) by obtaining huge loan from the Banks and that the energy produced by them is being sold to the TANGEDCO at the rate specified in

their respective agreement. However, the TANGEDCO has never come forward to settle the bills raised by the petitioners Company as detailed below:-

W.P.	Total amount dues	Pending from
W.P.No.5196 of 2019	Rs.1,19,56,130/-	April, 2017
W.P.No.11725 of 2019	Rs.2,74,51,898/-	August, 2017
W.P.No.8459 of 2019	Rs.4,57,44,703/-	September, 2017
W.P.No.8463 of 2019	Rs.42,35,590/-	July, 2017

In view of non-payment of the above dues by the TANGEDCO, the petitioners have committed default to their respective Banks and therefore, the respective Banks have issued notices to the petitioners calling upon them to pay their own loan dues, but, still they are unable to respond to the said notices in view of non-payment of such dues by the TANGEDCO. For better understanding, relevant portion of notice dated 17.09.2018 issued by Punjab National Bank, Tirupur, to M/s.Royal Classic Mills Private Limited, demanding to deposit the over-dues, is quoted below:-

> "The captioned loan account of yours is overdue despite our repeated reminders/telephone calls on various dates. At present the loan account shows overdue amount of Rs.87,53,998.92/-.
>
> Please note that the overdues in your loan account will adversely affect your credit rating in CIBIL/RBI websites and it is in your interest to keep your accounts in regular category. And penal interest, recovery agent charges, out of pocket expenses etc; will be recovered as per bank's guidelines.
>
> We request you to deposit the overdues and EMIs within three days and ensure to pay future installment/EMIs regularly on or before 7th of every month to save penal interest and other charges."

23. Even after two years, the TANGEDCO has not come forward to settle the dues, therefore, the petitioners have issued notices dated 20.08.2018, 24.01.2019, 25.10.2018 and 15.10.2018 to the TANGEDCO as per Clause 8(b) of the Agreement requesting to convert the existing Energy Purchase Agreement (EPA) into an Energy Wheeling Agreement (EWA) for use of their own industry. Sadly, till date, on receipt of such notices, the TANGEDCO has neither come forward to pay the pending dues to them nor replied to their request for migration.

24. Moreover, when Clause 6(b), as highlighted above, clearly mandates the Distribution Licensee/TANGEDCO that they shall make payment to the Generators/petitioners herein within 60 days or 30 days in some cases of receipt of the bill, the TANGEDCO, even after a long period of two years, has not cleared dues of the petitioners. Therefore, Clause 6(b) also makes the TANGEDCO liable to pay the interest at the rate of 1% per month on the delayed payment beyond the period of 60 days or 30 days in some cases. Thus, in view of continuous default committed by the TANGEDCO, the accounts of the petitioners are liable to be classified as NPA, which will, in-turn, make the petitioners to face SARFAESI proceedings for sale of properties pertaining to them in public auction.

25. In such circumstances of the case, Clause 8(b) is the only option to be invoked, which clearly states that the parties to the agreement shall have the option of exiting in case of violation with three months notice to the other party. As I mentioned above, when the notices issued by the petitioners, having not been responded by the respondents and not even come forward to pay the dues with interest, one of the hyper-technical contention of the learned Additional Advocate General that the petitioners should be directed to invoke arbitration clause is highly unfair and unacceptable, especially when injustice has been apparently caused by the respondents and the rule of law is violated. When the petitioners have pleaded that as per the EPA entered into with the respondents/TANGEDCO, they have been selling the Wind Energy generated by them by borrowing the loan on interest from the Bank, the respondents have not even disputed their liability in the counter affidavit. Secondly, the respondents also have not even disputed the delay in making the payment to the petitioners, which also make them liable to pay the interest at the rate of 1% per month. Therefore, when the liability to pay the bill raised by the petitioners for every month has not been denied by the respondents, the petitioners are entitled to follow Clause 8(b) to exit from EPA.

26. In a similar circumstances, the Hon'ble Apex Court in Sushil Suri Vs. Central Bureau of Investigation and another [(2011) 5SCC 708] held as follows:

> "33. Apart from the above, even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a

writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.

34.We endorse the view of the High Court that notwithstanding the provisions relating to the Arbitration Clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the Writ Petition filed on behalf of the Respondent Company. We, therefore, see no reason to interfere with the views expressed by the High Court on the maintainability of the Writ Petition and also on its merits."

27. Apart from the above, one another vital fact is to be taken note that Clauses 6(b) and 8(b) of the respective Agreements mandate the payment to the generators within 60 days or 30 days in some cases and it also further gives an option to exit for violation of the Agreement after serving notice of three months. Therefore, by invoking the same, the petitioners in W.P.Nos.5196, 11725, 8459 and 8463 of 2019 have issued notices dated 20.08.2018, 24.01.2019, 25.10.2018 and 15.10.2018 respectively requesting them either to terminate the agreement or to allow them to migrate from EPA to EWA so as to use the energy generated by them for their own industry. But, unfortunately, till date, the respondents have never responded to the said notices issued by the petitioners.

28. It is settled law that both the parties are bound by the terms of the Agreement and therefore, as per Clauses 6(b) and 8(b) of the Agreement, the TANGEDCO has failed to perform its financial and other material obligations and therefore, the parties are free to resort to action in accordance with the provisions contained in the Agreement. A reference can be had from the judgment of the Hon'ble Apex Court in Mangalore Electricity Supply Company Limited Vs. M/s.AMR Power Private Limited and another [(2016) 16 SCC 135], wherein the Hon'ble Apex Court has confirmed the termination of agreement on the ground of the delayed payment by the Distribution License. For better appreciation, paragraph No.15 thereof is extracted below:-

"15. The Default Notice dated 26.05.2011 refers to default in payments of bills, non-payment of interest for the delayed payments and non-opening of a Letter of Credit as provided for in Article 6.5 of the Agreement. In the reply dated 04.07.2011, the Appellant did not expressly deal with any of the defaults mentioned in the Default Notice. On the other hand the Appellant stated that it relied heavily on Government subsidy for payment to be made, an attempt would be made in the future to make payments promptly, LCs would be opened and that payment for January, February and March 2011 were delayed because the approval for inter-connection was given only on 23.06.2011. The invoice for December 2010 which was due to be paid on 19.01.2011 was actually paid on 24.02.2011. The payment to be made for the months of January 2011 and February 2011 due on 18.02.2011 and 18.03.2011 was actually done on 25.05.2011. Admittedly, interest on the delayed payments as provided for in Article 6 was not paid and a Letter of Credit was not opened. In view of the default mentioned by the First Respondent in the notice not being remedied within a period of 30 days, we are of the opinion that the Second Respondent Commission and the APTEL were correct in upholding the termination notice dated22.07.2011. We do not agree with the submissions of Mr. Giri that non-opening of Letter of Credit would not be a default covered by Article 9.2.2. As per Article 9.2.1, a failure or refusal by the Appellant to perform its financial and other material obligations under a PPA constitutes an event of default. Both the parties to the PPA are bound by the terms thereof and they are free to resort to action in accordance with the provisions contained therein."

A mere reading of the above said ratio shows that a failure or refusal to perform its financial oblication as per the agreed terms of the agreement would amount to default. Therefore, in the cases on hand, at the risk of repetition, it may be mentioned that despite receiving notices from the petitioners as stated supra, TANGEDCO has not even come forward to pay even a single pie to the petitioners or permitted them to migrate from EPA to EWA.

29. Thus, for the reasons stated above, the writ petitions deserve to be allowed with the following directions;

(a) the respondents/TANGEDCO are directed to permit the petitioners to switch over to captive consumption so as to use the same for their own industry;

(b) the respondents/ TANGEDCO are directed to settle the respective dues to the petitioners as per their respective invoices raised by them, along with interest as per Clause 6(b), within a period of two months from the date of receipt of a copy of this order.

(c) Consequently, in view of permitting the petitioners to migrate from EPA to EWA, the proceedings dated 20.05.2017 of the first respondent deciding not to concede any request for migration is set aside.

30. In fine, with the above directions, the writ petitions stand allowed. No Costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

rkm

To

1.The Director / Generation,
Tamil Nadu Generation and Distribution Corporation Limited,
144, Anna Salai, Chennai - 2.

2.Chief Engineer / NCES
Tamil Nadu Generation and Distribution Corporation Limited,
144, Anna Salai, Chennai - 2.

3.The Superintending Engineer,
Udumalpet Electricity Distribution Circle,
TANGEDCO,
15, 15A, Kumaralingam Road,
Udumalpet - 624 154.

4 The Chairman Cum Managing Director
Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO),
10th Floor, 144, Anna Salai,
Chennai - 600002.

5 The Superintending Engineer,
TANGEDCO,
Tirunelveli Electricity Distribution Circle,
Tirunelveli.

6 The Secretary,
Tamil Nadu Electricity Regulatory Commission,
19-A Rukumini Lakshmipathy Salai,
Egmore, Chennai - 600008

7 The Superintending Engineer,
TANGEDCO,
Tuticorin Electricity Distribution Circle,
Tuticorin.

+2cc to Mr.T.Chezhiyan, Advocate Sr.76404 , 75108
+1cc to Mr.S.K.Rameshwar, Advocate Sr.75069

Writ Petition Nos.5196, 11725,
8459 & 8463 of 2019
and 6694 & 1275 of 2018

sj[co]
srg 09/09/2019