

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13-06-2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND

THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

W.A.Nos.1644, 1645, 1646 & 1647 of 2019

Tamil Nadu Generation and
Distribution Corporation Ltd.,
represented by its Chairman,
144, Anna Salai,
Chennai - 600 002.

...Appellant in all Appeals

-Vs-

1.Terra Energy Limited

..1st Respondent in
W.A.No.1644 & 1647/19

1.Shree Ambika Sugars Limited

..1st Respondent in
W.A.Nos.1645 & 1646/2019

2.Tamil Nadu Electricity Regulatory Commission,
No.19-A, Rukmani Lakshmipathy Salai,
Egmore,
Chennai.

...2nd Respondent in all appeals

W.A.No.1644 of 2019 is filed under Clause 15 of the
Letters Patent against the Order, dated 29.04.2019, passed in
W.M.P.No.13297 of 2019 in W.P.No.13170 of 2019 on the file of
this Court.

W.A.No.1645 of 2019 is filed under Clause 15 of the
Letters Patent against the Order, dated 29.04.2019, passed in
W.M.P.No.13302 of 2019 in W.P.No.13173 of 2019 on the file of
this Court.

W.A.No.1646 of 2019 is filed under Clause 15 of the
Letters Patent against the Order, dated 29.04.2019, passed in
W.M.P.No.13301 of 2019 in W.P.No.13172 of 2019 on the file of
this Court.

W.A.No.1647 of 2019 is filed under Clause 15 of the
Letters Patent against the Order, dated 29.04.2019, passed in

W.M.P.No.13304 of 2019 in W.P.No.13174 of 2019 on the file of this Court.

W.P.No.13170 of 2019:-

Calling for the records of the first respondent commission comprised in its order dated 22-2-2019 in DRP No 24/2011 and quash the same as illegal and contrary to the provisions of the Electricity Act 2003 and also the judgment of the Honble supreme court and consequently direct the first respondent commission to take up the matter in DRP No 24/2011 and hear the same after appointment of a judicial member and dispose of the same on merits.

W.P.No.13172 of 2019 :- Calling for the records of the first respondent commission comprised in its order dated 22-2-2019 in DRP No 27/2011 and quash the same as illegal and contrary to the provisions of the Electricity Act 2003 and also the judgment of the Honble supreme court and consequently direct the first respondent commission to take up the matter in DRP No 27/2011 and hear the same after appointment of a judicial member and dispose of the same on merits.

W.P.No.13173 of 2019:- Calling for the records of the first respondent commission comprised in its order dated 22-2-2019 in DRP No 26/2011 and quash the same as illegal and contrary to the provisions of the Electricity Act 2003 and also the judgment of the Honble supreme court and consequently direct the first respondent commission to take up the matter in DRP No 26/2011 and hear the same after appointment of a judicial member and dispose of the same on merits.

W.P.No.13174 of 2019 :-Calling for the records of the first respondent commission comprised in its order dated 22-2-2019 in DRP No 25/2011 and quash the same as illegal and contrary to the provisions of the Electricity Act 2003 and also the judgment of the Honble supreme court and consequently direct the first respondent commission to take up the matter in DRP No 25/2011 and hear the same after appointment of a judicial member and dispose of the same on merits.

WMP.No.13297 of 2019, 13301/19, 13302/19 and 13304/19 filed to grant an order of Interim stay of the order dated 22.02.2019 in DRP No.25/2011, 26/2011, 27/2011 and 24/2011 respectively passed by the first Respondent and all proceedings pursuant thereto pending disposal of the above Writ Petition.

For Appellant in all W.As.: Mr.PH.Arvind Pandian,
Addl.Advocate General,
assisted by Mr.S.K.Rameshwar,
Standing Counsel.

For Respondent 1 in all W.As.: Mr.Rahul Balaji,

JUDGMENT
(By Dr.Vineet Kothari,J.)

These Writ Appeals have been filed by Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO), aggrieved by the interlocutory order passed by a learned Single Judge of this Court on 29.04.2019 in W.M.P.No.13297 of 2019 in W.P.No.13170 of 2019 and other connected matters filed by the Power Generating Companies, namely, Terra Energy Limited and Shree Ambika Sugars Limited, by which, they challenged the order passed by Tamil Nadu Electricity Regulatory Commission (TNERC) on 22.02.2019, adjudicating the dispute between the Power Generating Companies, who are writ petitioners, and the Power Distribution Companies, who are made as respondents in the Writ Petitions.

2. The main ground on which the order passed by TNERC was assailed by the Power Generating Companies was that the Commission, namely, TNERC, which passed the impugned order on 22.02.2019, was not properly constituted, as a Legal Person was not a Member of that Commission on the date when the impugned order was passed, which fell foul with the directions of the Hon'ble Supreme Court in the case of State of Gujarat v. Utility Users' Welfare Association, (2018) 6 SCC 21, decided on 12.04.2018, and, therefore, the said order passed by Two Members of the Commission was without jurisdiction and deserved to be quashed.

3. The learned Single Judge, in the order impugned before us, has referred to an interim order passed by a co-ordinate Division Bench at Madurai of this Court on 03.04.2019 in a Public Interest Litigation (PIL) in W.P.(MD)No.7021 of 2019 (V.Nirmal Kumar v. The Secretary to Government, Energy Department, Government of Tamil Nadu), in which, the Division Bench, after forming a prima facie opinion that there was no transparency in the working of the Commission, directed, by an interim order, that TNERC would not pass any final orders in any of the proceedings in exercise of their adjudicatory functions under Section 86 (1) (f) of the Electricity Act, 2003.

4. The impugned order before the learned Single Judge in the Writ Petitions was passed prior to the said order of the Division Bench in the aforesaid PIL on 03.04.2019. The learned Single Judge, by the order impugned before us, stayed the order, dated 22.02.2019 of the Commission, till 17.06.2019, when the hearing of the Writ Petitions has been scheduled.

5. Mr.PH.Arvind Pandian, learned Additional Advocate General, upon instructions, has submitted before us and has undertaken that the process of appointment of Legal Person, as directed by the Hon'ble Supreme Court in the aforesaid judgment in State of Gujarat v. Utility Users' Welfare Association, (2018) 6 SCC 21, has already been initiated and undertaken and, within an outer-limit of six weeks from today, the appointment of Legal Person to be a Member of TNERC will be passed. However, the learned Additional Advocate General has submitted that the impugned order before the learned Single Judge passed by TNERC on 22.02.2019 in the present case against the Power Generating Companies, namely, Terra Energy Limited and Shree Ambika Sugars Limited, cannot be said to be in conflict with the order passed by the Division Bench of this Court at Madurai, restraining TNERC, on 03.04.2019.

6. The learned Additional Advocate General also submitted that the order passed by Two Members of the Commission on 22.02.2019 cannot be said to be without jurisdiction, as the Hon'ble Supreme Court in the said judgment, namely, State of Gujarat v. Utility Users' Welfare Association itself, gave a direction that in case there is no Member from Law as a Member of the Commission, the next vacancy arising in every State Commission will be filled by a Member of Law. He submitted that the process of appointment of Legal Person has already been undertaken and the appointment of the said person will be made within a period of six weeks, as already indicated above. He, therefore, submitted that order impugned before the learned Single Judge cannot be said to be without jurisdiction. He further submitted that the aggrieved Power Generating Companies could have filed appeals under Section 111 of the Electricity Act, 2003, and, therefore, these companies should be directed to approach the Appellate Authority under that provision.

7. On the other hand, Mr.Rahul Balaji, learned counsel for the respondent Power Generating Companies, has vehemently urged that the order of TNERC is without jurisdiction and directly in conflict with the directions of the Hon'ble Supreme Court and, therefore, it deserves to be set aside. According to him, the learned Single Judge was justified in staying the operation of the same by the impugned order before this Court in the present Writ Appeals filed by TANGEDCO. He also submitted that the adjudication cases were first heard by a Three-Member Bench of the Commission and, after retirement of one of those Three Members, Two-Member Bench took up the cases for final hearing on 31.01.2019 and, thereafter, it decided the cases on 22.02.2019, which calls for interference by this Court.

8. We have heard the learned counsel for the parties.

9. In the interest of justice, we quote below the conclusion of the judgment of the Hon'ble Supreme Court in the case of State of Gujarat v. Utility Users' Welfare Association, (2018) 6 SCC 21, for ready reference :

'Conclusion

125. In view of our observations above, we conclude as under:

125.1. Section 84(2) of the said Act is only an enabling provision to appoint a High Court Judge as a Chairperson of the State Commission of the said Act and it is not mandatory to do so.

125.2. It is mandatory that there should be a person of law as a Member of the Commission, which requires a person, who is, or has been holding a judicial office or is a person possessing professional qualifications with substantial experience in the practice of law, who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge.

125.3. That in any adjudicatory function of the State Commission, it is mandatory for a member having the aforesaid legal expertise to be a member of the Bench.

125.4. The challenge to the appointment of the Chairman and Member of the Tamil Nadu State Commission is rejected as also the suo moto proceedings carried out by the Commission.

125.5. Our judgment will apply prospectively and would not affect the orders already passed by the Commission from time to time.

125.6. In case there is no member from law as a member of the Commission as required aforesaid in para 125.2 of our conclusion, the next vacancy arising in every State Commission shall be filled in by a Member of law in terms of para 125.2 above.

126. Transfer Petition (C) No.974/2016 is allowed and the Transferred Case arising out of transfer petition stands disposed of.

127. The appeals as well as the other transferred cases stand disposed of accordingly leaving the parties to bear their own costs. Pending application(s), if any, also stand(s) disposed of.'

The Hon'ble Supreme Court refused to issue any clarification of the said order vide another order, dated 10.09.2018, in M.A.No.2217 of 2018 in T.C.(C)No.137 of 2015. The said order is also quoted below for ready reference :

'Upon hearing the counsel, the Court made the following Order:

Application(s) for impleadment/intervention is/are dismissed.

We are of the view that there is no ambiguity in the Judgment and till such time a reconstitution of the Tribunal does not take place arising from a retirement of a Member from the legal field, the existing Tribunal will decide all the cases.

The application/s for clarification/direction is/are disposed of.

In view of the above, the misc. petition is disposed of.'

10. We also quote below Para 9 of the order passed by the co-ordinate Bench of this Court at Madurai in PIL in W.P. (MD) No.7021 of 2019, dated 03.04.2019 :

'9. The learned Senior Counsel appearing for the petitioner demonstrated that the Tamil Nadu Electricity Regulatory Commission has taken several decisions granting post facto approvals or ratification including the decision of Chairman himself as a Head of TANGEDCO, involving financial implications, affecting TANGEDCO and the public. From the materials produced before this Court, we are of the prima facie opinion that there is no transparency. Initially we had some reservations to grant interim direction as that would pave way for some individuals, escaping from their statutory obligations/liabilities. However, having regard to the nature of orders of Commission, we are convinced that the Commission is neither independent nor competent to perform adjudicatory function. So, it is in these circumstances, this Court, in public interest, issue an interim direction to the Tamil Nadu Electricity Regulatory Commission not to pass any final order in any of the proceedings in exercise of their adjudicatory functions falls under

Section 86 (1) (f) of the Electricity Act,2003.'

11. In the aforesaid context of the order passed by the co-ordinate Bench of this Court at Madurai, the learned Single Judge has passed the interlocutory order on 29.04.2019, which is challenged by TANGEDCO before us.

12. Having heard the learned counsel for the parties, we are of the opinion that the orders passed by the Commission before a restraint order was passed by the co-ordinate Division Bench of this Court in PIL at Madurai on 03.04.2019 are not directly hit by the said order of the Division Bench of this Court and, therefore, the learned Single Judge was not right in placing reliance on the said order of the Division Bench, dated 03.04.2019, to stay the order, dated 22.02.2019, passed by a Two-Member Commission in the present cases. The Hon'ble Supreme Court itself has allowed the Commission to hear and pass orders without there being a Legal Member for the time being, in its order, dated 10.09.2018, as noted above by us.

13. As far as the validity of the said order, dated 22.02.2019, of the Commission on its own merits is concerned, we refrain from expressing any opinion, because, a challenge to that is pending before the learned Single Judge in the Writ Petitions, as these Writ Appeals are only against the interlocutory orders passed by the learned Single Judge.

14. We take on record the Undertaking of the learned Additional Advocate General that the Legal Member of the Commission will be appointed within a period of six weeks from today. We hope and expect that the State Government will not take any further time beyond six weeks from today to complete the process and appoint the Legal Person on the Commission within the period aforesaid.

15. In view of the aforesaid, we are not inclined to continue the interim stay order passed by the learned Single Judge, dated 29.04.2019, which is assailed before us in these Writ Appeals, and we vacate the said stay order, so that, similar issues raised in other Writ Petitions of this nature, which the learned Additional Advocate General submitted before us, which have been passed prior to the orders passed on 03.04.2019 by the co-ordinate Division Bench of this Court at Madurai, are not adversely affected because of the said order of the Division Bench.

16. The learned Single Judge is, therefore, requested to proceed to decide the Writ Petitions in accordance with law, after hearing the parties.

17. Writ Appeals are disposed of accordingly. No costs. Consequently, the connected C.M.P.Nos.11198 and 11201 to 11206 of 2019 are closed.

dixit

Sd/-
Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

To

1. The Chairman,
Tamil Nadu Generation and Distribution Corporation Ltd.,
NO.144, Anna Salai, Chennai - 2.
2. Tamil Nadu Electricity Regulatory Commission,
No.19-A, Rukmani Lakshmipathy Salai,
Egmore,
Chennai.

Copy to:-

The Section Officer,
Writ Section,
High Court,
Madras - 104. (To Post WP before concerned Judge)

+1cc to Mr.S.K.Rameshwar, Advocate, SR.No.48372

+1cc to Mr.R.Parthasarathy, Advocate, SR.No.48744

सत्यमेव जयते

W.A.Nos.1644-1647 OF 2019

Kak (22/08/2019)

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