IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.07.2019

PRONOUNCED ON : 11.07.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Writ Petition No.16872 of 2019 and
W.M.P.No.16462 of 2019

M/s.Natesan Precision Components Private Limited,
54/4, Paulwals Road,
Sripuram Colony,
St. Thomas Mount,
Chennai - 16. ... Petitioner

Vs

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

2.Director Finance,
Tamil Nadu Generation and Distribution
Corporation Limited, 144, Anna Salai,
Chennai - 600 002.

3.The Chief Financial Controller,
Tamil Nadu Generation and Distribution
Corporation Limited, 144, Anna Salai,
Chennai - 600 002.

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

5.The Superintending Engineer,
Theni Electricity Distribution Circle,
Theni.

6.The Superintending Engineer,
Chengalpet Electricity Distribution Circle,
Chengalpet. ... Respondents

Prayer :- This Writ Petition is filed under Article 226 of the Constitution of India for a writ of mandamus directing the respondents not to collect current consumption charges, demand charges and any arrears from the petitioner until the respondents make payment of the outstanding dues of Rs.56,69,298/- (Rupees fifty six lakhs sixty nine thousand two hundred and ninety eight only) payable to the petitioner along with interest thereon at 1% per month payable from the time such payments became due or to give adjustment in the current consumption charges payable by the petitioner till the entire amount is adjusted.

For petitioner :Mr.Rahul Balaji

For Respondents :Mr.P.H.Aravind Pandian,
Additional Advocate General,
Assisted by Mr.S.K.Rameshwar

ORDER

The petitioner company is engaged in manufacturing of automobile Gears and Shafts. The petitioner company also generates wind energy through wind mills at Thirunelveli District and Theni District having combined capacity of 2 MW.

2.The petitioner has entered into power purchase agreements with the Tamil nadu Generation and Distribution Corporation Limited (hereinafter referred to as "the TANGEDCO") for supply of power generated by it through its windmills. For its industrial units at Maraimalainagar, Chengalpet District it consume electricity supplied by the TANGEDCO. Under the provisions of the Power Purchase Agreement, the invoice raised by the petitioner every month for the power sold by it to TANGEDCO, the respondents have to pay within 30 days of receipt of the bill. Any delayed payment beyond 30 days is liable for interest at the rate of 1% per month.

3.As of December 2018, the respondents have to pay a sum of Rs.56,69,298/- to the petitioner for the power sold to it. Since October 2017, the respondents neither paid the invoice amount in full nor the interest for delayed payment. Despite provision for payment security is in the agreement, the respondents have not provided any mechanism for its enforcement. The substantial delay in making payment for the energy sold has crippled the functioning of the petitioner company.

4.Whereas, for the power consumed by the petitioner, for its manufacturing units, the respondents raises invoices on the petitioner and demanded payment, within the due date or, to face disconnection. Therefore, the petitioner seeks mandamus to direct the respondents until payment of the outstanding dues of Rs.56,69,298/- towards the power sold by the petitioner, the respondents should not collect current consumption charges or in alternate, to adjust the amount towards the current consumption charges payable by the petitioner from the outstanding dues of Rs.56,69,298/-.

5.The respondents, as a counter to the above contentions, state that the writ petition is not maintainable, in view of alternate and efficacious remedy available under section 86(1)(f) of the Electricity Act, 2003 (hereinafter referred to as "the Act"). Under clause 9 of the power purchase agreement, any dispute or difference of any kind whatsoever between the parties shall in the first instance, be settled amicably, by the parties failing which, either party may approach the Commission for adjudication of such disputes.

6.In so far as the power consumed by the petitioner, under section 43 of the Act, the TANGEDCO is duty bound to supply electricity to a consumer if requested, provided, such consumer pays the charges as may be fixed by the Tamil Nadu Electricity Regulatory Commission. Section 56 of the Act, empowers the TANGEDCO to disconnect the supply of electricity in the event of non-payment of dues by the consumer after giving 15 days notice. Therefore, Current Consumption charges are covered under statutory dues. On the other hand, payments for the sale of wind energy are covered under contractual dues.

7.Considering the infirm nature of the wind generation, the respondents have extended the banking facility for the wind energy generators which is not available to other generators. By virtue of banking facility, the wind energy generators are not maintaining their wind capacity proportionate to their captive consumption. This has led to imbalance in payment. Despite severe financial constraints faced by the TANGEDCO, sincere efforts are made to clear the pending bills of the wind energy generators as per seniority basis.

8.The learned Additional Advocate General besides pointing the relevant provisions under the Electricity Act 2003 and in the power purchase agreement submitted that, the relief sought in the writ petition is contrary to the Act and the Code. Adjustment of statutory due towards contractual due will adversely affect the fund flow of the respondents. Being assigned with discharge of statutory obligation of generation and distribution of electricity in the State if its fund flow is affected, the respondents will not be able to discharge its statutory obligation. In support of his submission, the Learned Additional Advocate General would rely on a judgment of the Hon'ble Supreme Court in Assam State Electricity Board -vs- Brahama putra Steels (P) Ltd and others (1996 (8) SCC 73), wherein, in paragraph No.6, it has been held as follows:-

> "6.We have heard learned counsel for the parties. A bare reading of the Policy statement reproduced above shows that the grant of subsidy to an industry was not linked with the payment of electricity charges by the industry to the Board. The industry is under a contractual as well as statutory obligation to pay the charges to the Board in respect of electricity consumed. If there was any delay in the payment of subsidy that would not be the ground for the industry to withhold the electricity charges. We are of the view that the High Court ell into patent error in linking the grant of subsidy with payment of electricity charges. Neither the contents of the interim orders granted by the High Court on 31.03.1993 and 18.06.1993 nor the concept of legitimate expectations of the industry to get subsidy can be validly made the grounds for linking the payment of electricity charges/surcharge with the receipt of the subsidy under the policy. We, therefore, set aside the above-quoted part of the High Court judgment and the direction given by the High Court quoted above. We allow the writ petition to the above extent."

9.The learned counsel for the petitioner, in turn, states that, the act of the respondents not paying the due is not at all a dispute for adjudication. They admit the dues payable and delay of the payment because of their financial inability. Being in manufacturing business, the petitioner is in need of funds. The respondents being 'State' for the purpose of Article 12 of the Constitution of India, it is required to act in a just, fair and reasonable manner.

10.On considering he rival submissions and the law governing the subject, the following two points arise for consideration. First, 'whether the writ is maintainable in view of clause 9 of the Power purchase agreement' and secondly, 'whether the statutory dues can be set off against the contractual dues'.

(i)Clause 9 of the Wind Energy Purchase Agreement reads as under:-

> "9.Settlement of Disputes - Arbitration:
>
> (i)If any dispute or difference of any kind whatsoever arises between the parties relating to this agreement, it shall, in the first instance, be settled amicably, by the parties, failing which either party may approach the Commission for the adjudication of such disputes under section 86(1)(f) of the Electricity Act, 2003."

(ii)Section 86(1) of the Electricity Act reads as under:-

> "86. Functions of State Commission
>
> (1) The State Commission shall discharge the following functions, namely: -
>
> (a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:
>
> Providing that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;
>
> (b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;
>
> (c) facilitate intra-state transmission and wheeling of electricity;
>
> (d) issue licences to persons seeking to act

as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote congenration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licence;

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;"

11.It is well settled preposition of law that, in the matters of contractual obligation, if there is discrimination or un-even bargaining powers or arbitrariness, despite alternate statutory remedy, Court can exercise its power under Article 226 of the Constitution of India. (ref: Ramana Dayaram Chetty -vs- The International Airport Authority of India and others, reported in AIR 1979 SC 1642; Shrilekha Vidyarthi -vs- St. Of Uttar Pradesh reported in AIR 1991 SC 537; United India Insurance Co -vs- Manubhai Dharmasinhbhai Gajera and others reported in JT 2008(5)SC 457 and Delhi Development Authority and another -vs- Joint Action Committe, Allottee of SFS Flats and others reported in 2008(2) SCC 672). Therefore, availability of alternate remedy is a rule of discretion and not one of compulsion.

12.Before entertaining a writ petition, where alternate remedy is available, the Court has to satisfy 'whether the relief sought is for enforcement of fundamental rights' or, 'whether the order or action/inaction impugned is arbitrary, irrational or without jurisdiction'. The facts of the case in hand does not fall under any of the above category.

13.In the present case, non-payment/delayed payment is alleged by the petitioner and the same is accepted by the respondents. The respondents being the 'monopoly procurer' and discharging the function of the State, it falls within the meaning of the 'State' under Article 226 of the Constitution of India. Long delay in payment for the energy sold is a dispute which is squarely covered under clause 9 of the Wind Energy Purchase Agreement.

14.No doubt, the respondents as 'State' should act fairly and reasonably and be a model to citizen. Unfortunately the respondents have not honoured its commitment. But then, the remedy is to resort the statutory remedy available and not the constitutional remedy which can be invoked only in cases of irrationality, un-even terms of contract or gross arbitrariness.

15.In the course of the arguments, the learned Additional Advocate General informed that, as against the total fund outflow (revenue expenditure) of Rs.5150 crores, the fund inflow (revenue from sale of power to its consumers and subsidy from Government) is around Rs.3200 Crores. The respondents (the TANGEDCO) is facing shortfall of about Rs.1350 crores. In the said circumstances, releasing of huge payments to wind generators like petitioner will be difficult one. However, efforts will be taken for releasing payments in one or two months.

16.In respect of delayed payment, the TANGEDCO has requested the wind energy generators for waiver of 50% of the rate of interest and many of the generators have agreed for such waiver. Thus, from the above information, undoubtedly, it is a case where one of the party to the contract who is unable to pay its dues in time, seek for an amicable settlement as per the terms of the contract and the negotiation is in process. In such circumstance, this Court finds nothing arbitrary. Hence, the writ petition is not maintainable.

17.Secondly, regarding the prayer of set-off, the Honourable Supreme Court in Union of India -vs- Karam Chand Thapar 2004(3) SCC 504, while considering a similar prayer, it has considered the principle of 'statutory set off' and 'equitable set-off' vis-a-vis Order 8 Rule 6 of C.P.C., and has held as below:-

> "11.The question which arises for decision is: whether the Central Government can withhold the release of stowing assistance, which is its statutory obligation to do, for the purpose of satisfying its demand of money arising under the contractual obligation (i.e.in mining lease) incurred by the Coal Company qua it.
>
> ....
>
> 19.In Bhupendra Narain Singha Bahadur v.

> Bahadur Singh (AIR 1952 SC 201) this Court ruled that a plea in the nature of equitable set-off is not available when the cross-demands do not arise out of the same transaction. A wrongdoer who has wrongfully withheld monies belonging to another cannot invoke any principle of equity in his favour and seek to deduct therefrom the amounts which may have fallen due to him. There would be nothing improper or unjust in telling the wrongdoer to undo this wrong and not to take advantage of it.
>
> 20.In the present case, what the Coal Company has sought to enforce is a statutory obligation of the appellant Union of India. The Coal Mines (Conservation and Development) Act, 1974 has a public purpose and a beneficial object to achieve. The stowing assistance is released to the Coal Company in the interest of securing safety at the coal mines and the development thereof. In the absence of stowing, there may be accidents, casualties and difficulties of operation. Non-payment of stowing allowance may discourage the coal mines from carrying out the stowing operations which would be detrimental to the interest of the workers. It would not be a sound exercise of discretion on the part of the court to permit set-off or recognize an adjustment made out of court which would have the effect of withholding the release of stowing assistance and appropriating the amount thereof for the recovery of dues not arising out of the same transaction."

18.Thus, it is clear from the above judgment, a statutory due cannot be set off against contractual due. The prayer in the writ petition is in effective set off of a statutory due against contractual due, which is impermissible under law. Though on equity, the plea of the petitioner may sound appropriate, since, law prohibits grant of such relief under article 226 of the constitution, this Court is constraint to dismiss the writ petition both on maintainability as well as on merits. If the negotiation with the wind mills power generators does not reach an amicable settlement, the petitioner is at liberty to approach the Regulatory Commission and get relief as per clause 9 of the

Wind Energy Purchase Agreement read with section 86(1)f of the Electricity Act, 2003.

19.In the result, the writ petition is dismissed. No order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

jbm
To

1.The Chairman,
Tamil Nadu Generation and Distribution
Corporation Limited,
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Chennai - 600 002.

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Chengalpet.

+2ccs to Mr.R.Parthasarathy , Advocate SR.No. 58650,59274
+1cc to Mr.S.K.Rameshwar, Advocate SR.No. 58875

W.P.No.16872 of 2019

A.SK(16/07/2019)