BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 18.03.2019

DELIVERED ON : 01.04.2019

CORAM
THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P.(MD)Nos.13806, 17160 & 18399 of 2018 and W.M.P.(MD)Nos.12536, 12537, 15092, 19129, 22765, 16288 & 16289 of 2018 & 291 & 292 of 2019

W.P.(MD)No.13806 of 2018

Apollo Tyres Ltd.,
Rep. by its Authorised Signatory,
B-25, SIPCOT Industrial Growth Centre,
Sriperumbudur - Singaperumal Koil State Highway,
Oragadam, Sriperumbudur Taluk,
Kanchipuram. ... Petitioner

Vs.

1. Tamil Nadu Generation and Distribution Corporation Limited,
Rep. by its Chairman,
NPKRR Maaligai, 144, Anna Salai,
Chennai - 600 002.

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

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

4. Ind-Bharath Energies (Thoothukudi) Ltd.,
Rep. by its Managing Director,
Eppodumvendran Village,
Ottapidaram(Taluk),
Tuticorin.

Also at : 6th Floor, Corporate Court,
115/1, IT Park, Road No.2,
Behind Sheraton Hotel, Financial District,
Nanakram Guda,
Gachilbouli, Hyderabad - 500 032.

5. Trishul Electric and Power Gen Limited,
Rep. by its Managing Director,
New No.6, Old No.23/1, Yogambal Street,
T.Nagar, Chennai - 600 017. ... Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the second respondent relating to the impugned communication in Letter No.Lr.No. SE/TEDC/TTN/DFC/AO/REV/AS WM/F.HT.224/D.769/18 dated 14.06.2018 and quash the same as being arbitrary and illegal and consequently forbear respondents 1 to 3 from taking any coercive actions against the petitioner.

For Petitioner : Mr.K.Prabhakar

For R-1 to R-3 : Mr.Aravindh Pandian,
Additional Advocate General,
Assisted by,
M/s.S.Srimathy.

For R-4 : Mr.N.L.Rajan,
Senior Counsel,
for M/s.Sarvabhauman Associates.

For R-5 : Mr.R.Sunil Kumar

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W.P.(MD)No.17160 of 2018

Sakthi Auto Component Ltd.,
Rep. by its Vice President(Technical),
K.Sarkaraiappan,
180, Race Course Road,
Coimbatore - 641 018. ... Petitioner

Vs.

1. Tamil Nadu Generation and
Distribution Corporation Limited,
Rep. by its Chairman,
NPKRR Maaligai, 144, Anna Salai,
Chennai - 600 002.

2. The Superintending Engineer,
TANGEDCO, Tuticorin Electricity Distribution Circle,
Tuticorin-2.

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

4. Ind-Bharath Energies (Thoothukudi) Ltd.,
Eppodumvendran Village,
Ottapidaram(Taluk),
Tuticorin.

5. Trishul Electric and Power Gen Limited,
New No.6, Old No.23/1, Yogambal Street,
T.Nagar, Chennai - 600 017. ... Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the second respondent relating to the impugned communication in Letter No.Lr.No. SE/TEDC/TTN/DFC/AO/REV/AS WM/F. HT.224/D.769/18 dated 14.06.2018 and consequential communication of the third respondent vide Lr. No.A/cs.Br./SE/EEDC/HT/A1/F.HT SC No.85/D.114/2018 dated 02.07.2018 and quash the same as being arbitrary and illegal and consequently forbear respondents 1 to 3 from taking any coercive actions against the petitioner.

For Petitioner : M/s.V.Krishnaveni,
Senior Counsel,
for Mr.P.Thiyagarajan

For R-1 to R-3 : Mr.Aravindh Pandian,
Additional Advocate General,
Assisted by,
M/s.S.Srimathy

For R-4 : Mr.N.L.Rajan,
Senior Counsel
for M/s.Sarvabhauman Associates.

For R-5 : Mr.R.Sunil Kumar

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W.P.(MD)No.18399 of 2018

M/s.Ind Bharath Energies
(Thoothukudi) Limited,
Eppodumvendran Village,
Ottapidaram Taluk, Thoothukudi District,
Tamil Nadu, Represented by
Das, Vice President(Commercial) ... Petitioner

Vs.

1. The Superintending Engineer,
   Tamil Nadu Generation and
   Distribution Corporation Limited,
   Tuticorin Electricity Distribution Circle,
   Tuticorin - 2.

2. M/s.Trishul Electric and Powergen Limited,
   No.180, Race Course Road,
   Coimbatore - 641 018.

3. M/s. Sakthi Auto Component Ltd.,
   Mukasipallagoundanpalayam, Perundurai - 638 056.

4. M/s. Apollo Tyres Ltd.,
   Sipcot Industrial Growth,
   Oragadam Village,
   Sriperumbudur Taluk.

5. Tamil Nadu Electricity Regulatory Commission,
   No.19-A, Rukmini Lakshmipathy Salai(Marshalls Road),
   Egmore, Chennai - 600 008. ... Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records leading to the impugned notice bearing Lr.No.SE/TEDC/TTN/DFC/AO/REV/AS WM/F.HT.224/D.769/18 dated 14.06.2018 issued by the first respondent and quash the same as unsustainable in law.

For Petitioner : Mr.N.L.Rajan,
Senior Counsel,
for M/s.Sarvabhauman Associates.

For R-1 & R-5 : Mr.Aravindh Pandian,
Additional Advocate General,
Assisted by,
M/s.S.Srimathy

For R-2 : Mr.R.Sunil Kumar

For R-4 : Mr.K.Prabhakar

For R-3 : M/s.V.Krishnaveni,
Senior Counsel,
for Mr.P.Thiyagarajan

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COMMON ORDER

M/s.Ind-Barath Energies(Thoothukudi) Ltd., is engaged in the business of generating power and owns 20 MW Coal based power plant located at Eppodumvendran Village, Ottapidaram Taluk, Thoothukudi District, Tamil Nadu. It entered into an Energy Wheeling Agreement for captive use on 18.05.2016 with Tamil Nadu Generation and Distribution Corporation Limited, Tuticorin Electricity Distribution Circle, Tuticorin, represented by its Superintending Engineer. The recital of the said agreement clearly mentions that this agreement was for the parallel operation of the Captive Generating Plant (CGP) and wheeling of power/energy from the said plant to the destination of its use through the transmission/distribution network of TANGEDCO. M/s.Sakthi Auto Component Limited, Erode and M/s.Apollo Tyres Limited, Chengalpet were identified as the captive users. The drawl voltage of the captive users was fixed at 110 KV. The quantum at the receiving end was 9.000 and 8.514 of MW respectively. The total MW at the receiving end was thus 17.514 MW. The quantum at injection end was 9.250 MW and 8.750 MW respectively, totaling 18 MW. It was noted that M/s.Ind-Barath Energies (Thoothukudi) Limited had paid the open access registration fee and other fees as notified by the Tamil Nadu Electricity Regulatory Commission. Addendum to the said agreement was also made on 07.10.2016 and the following modification was made:-

1.Lr.No.CE/GO/SE/OA&CO/STU/EE/ABT/AEE1/F.Ind.Bharath Energies/R03/D.344/16 dated 12.09.2016.

1	Name of the Generator	M/s.Ind-Barath Energies (Thoothukudi) Ltd.
2.	Nature of Power Plant	Coal-Based
3.	Quantum of Wheeling Approved	18MW
4.	Source of Wheeling	1x20 MW power plant at Eppodumvendran Village, Ottapidaram (TK), Tuticorin - Dist.
5.	Period	From the date of execution of addendum to existing agreement to 31.03.2019
6.	No. of Captive Users	2 Nos.
7.	Details of Captive Users	Annexure-I enclosed
8.	Terms & Conditions	Published in www.tnebldc.org/CAPTIVE APRROVAL

List of Captive Users

Sr. No	Name of Captive users	HTSC No.	Drawl Voltage KV	Distribution Circle	Quantum at Receiving End(MW)	Quantum at Injection End(MW)
1.	M/s.Sakthi Auto Component Ltd.	85	110	Erode	5.700	5.858
2.	M/s.Apollo Tyres Ltd.	774	110	Chengalpattu	11.814	12.142
	Total MW =				17.514	18.000

2. While so, M/s.Ind-Barath Energies (Thoothukudi) Limited entered into a lease agreement in respect of the said plant with M/s.Trishul Electric and Powergen Limited on 02.08.2016. M/s.Ind-Barath Energies (Thoothukudi) Limited had authorised the captive users, namely, M/s.Sakthi Auto Component Limited and M/s.Apollo Tyres Limited to pay the charges directly to M/s.Trishul Electric and Powergen Limited. While so, it was made to appear that during November 2016, there was power allocation of 152432 units and 6386002 units in respect of the power wheeled for the use of M/s.Sakthi Auto Component Limited and M/s.Apollo Tyres Limited respectively. But it turned out that in the month of November 2016, there was nil allocation. Likewise, contrary to the statement that there was power allocation of 786857 units and 7194246 units, there was the injection of only 858800 units. Based on the statement given by M/s.Ind-Barath Energies (Thoothukudi) Limited, the energy consumed by M/s.Sakthi Auto Component Limited and M/s.Apollo Tyres Limited were treated as captive consumption and adjusted against the given allocation and were not charged. After the factum of non-injection and lower injection of power during November and December 2016 came to be known, show cause notice dated 19.03.2018 was issued by the first respondent/Superintending Engineer, TANGEDCO, Tuticorin Electricity Distribution Circle, Tuticorin, calling upon M/s.Ind-Barath Energies(Thoothukudi) Limited, M/s.Sakthi Auto Component Limited and M/s.Apollo Tyres Limited to submit their explanation as to why the actual charges should not be collected from them. M/s.Ind-Barath Energies (Thoothukudi) Limited as well as M/s.Sakthi Auto Component Limited and M/s.Apollo Tyres Limited submitted their explanations. After considering the same, the first respondent passed the impugned order dated 14.06.2018 holding that M/s.Ind-Barath Energies (Thoothukudi) Limited being responsible for the injection of power is liable to pay for the units consumed by M/s.Sakthi Auto Component Limited and M/s.Apollo Tyres Limited for the entire sum of Rs.11,78,16,392/-. Joint and several liability was fastened on M/s.Sakthi Auto Component Limited and M/s.Apollo Tyres Limited for the number of units respectively consumed by them from TANGEDCO, i.e., 1,48,317 and 1,31,43,581 respectively. The open access granted to M/s.Ind-Barath Energies (Thoothukudi) Limited which was already suspended was directed to continue to remain under

suspension. This order is under challenge at the instance of M/s.Ind-Barath Energies (Thoothukud) Limited in W.P.(MD)No.18399 of 2018, M/s.Sakthi Auto Component Limited in W.P.(MD)No.17160 of 2018 and M/s.Apollo Tyres Limited in W.P.(MD)No.13806 of 2018.

3.The TANGEDCO has filed a detailed counter affidavit controverting the contentions of the respective parties. The stand of M/s.Ind-Barath Energies (Thoothukudi) Limited is that it is the lessee M/s.Trishul Electric and Powergen Limited which must bear the liability. M/s.Apollo Tyres Limited and M/s.Sakthi Auto Component Limited would contend that they should not be mulcted with any liability. M/s.Trishul Electric and Powergen Limited is under insolvency resolution process and it is not being represented. TANGEDCO asserts that the liability should be borne by all the parties.

4.Heard the learned Senior counsel on either side.

5.The stand of M/s.Ind-Barath Energies (Thoothukudi) Limited is that the first respondent lacks the jurisdiction to pass the impugned order. According to the learned Senior Counsel appearing for the writ petitioners, there is no valid charging provision as claimed by the first respondent in the Tamil Nadu Electricity Regulatory Commission (Grid connectivity and Intra-State Open Access) Regulations, 2014. Regulations 33 referred to by the first respondent deals only with the discrepancies in the scheduling and injection of the power by Generation Company. More than anything else, the first respondent has not been vested with any jurisdiction to decide the dispute that may arise between the parties to the agreement. The first respondent can only raise a dispute and thereafter, refer it to the Tamil Nadu Electricity Regulatory Commission if the same cannot be amicably resolved between the parties. At present, Tamil Nadu Electricity Regulatory Commission is not in a position to adjudicate the dispute because it has no judicial member. M/s.Ind-Barath Energies (Thoothukudi) Limited had duly intimated to TANGEDCO about the leasing out of the plant and that the entire arrangement was in place with the full knowledge of the TANGEDCO authorities. Hence, M/s.Ind-Barath Energies (Thoothukudi) Limited cannot be visited with consequences for the acts of the lessee. The learned Senior counsel would further submit that there is no need for getting permission of the TANGEDCO for entering into a private lease agreement with M/s.Trishul Electric and Powergen Limited and there is no provision in the open access regulations insisting on obtaining such a permission from the TANGEDCO.

6.The learned Senior counsel appearing for M/s.Sakthi Auto Component Limited and M/s.Apollo Tyres Limited would submit that they made the payments based on the invoices raised by the TANGEDCO. The meter reading must be done in the presence of generator and TANGEDCO officials. If some fraud has taken place, obviously it was done in collusion with the officials of the TANGEDCO. The captive users cannot be blamed for making payment directly to the generator. The principle of estoppel will clearly apply and it was for the TANGEDCO to resolve its dispute with M/s.Ind-Barath Energies (Thoothukudi) Limited in the manner known to law and by no stretch of imagination M/s.Sakthi Auto Component Limited and M/s.Apollo Tyres Limited could be called upon to bear the responsibility.

7.The learned Additional Advocate General appearing for the TANGEDCO pointed out that the TANGEDCO never approved the arrangement between M/s.Ind-Barath Energies (Thoothukudi) Limited and M/s.Trishul Electric and Powergen Limited. He passed on a copy of the memo bearing No.CFC/REV/FC/REV/AS 3/D.No.267/16, dated 25.04.2016 by which the name transfer proposal received from the Tuticorin EDC Based on the lease agreement executed between M/s.Ind-Barath Energies (Thoothukudi) Limited and M/s.Trishul Electric and Powergen Limited was rejected as not feasible of compliance.

8.This Court posed a specific question to the learned Senior counsel appearing for M/s.Ind-Barath Energies (Thoothukudi) Ltd., as to whether this proceeding was within the knowledge of M/s.Ind-Barath Energies (Thoothukudi) Ltd. I must state that I did not receive any direct reply to this query.

9.The learned Additional Advocate General submitted that it is M/s.Ind-Barath Energies (Thoothukudi) Ltd., that must bear the primary responsibility for the fraudulent acts committed by its lessee M/s.Trishul Electric and Powergen Limited. TANGEDCO has lodged a criminal complaint in this regard and the matter is under investigation. As per the relevant Wheeling clauses in the agreement, the distribution licensee would raise bills for the net energy consumed by the captive user after adjusting the wheeled energy, where the consumption by the captive user is more than the generation of CGP holder at the rate applicable. In this case, this is exactly what was done by the TANGEDCO and that therefore there was no cause for the complaint. If there was injection of energy as originally claimed for the relevant months, the TANGEDCO would not have taken any action at all. Since certain false figures were projected, the TANGEDCO did not raise any bill for the said period on that basis. After coming to know the actual state of affairs, the TANGEDCO had sought to act in terms of the Energy Wheeling Agreement for captive users.

10.The parties have also filed their detailed written arguments. I carefully considered the rival contentions.

11.Before we deal with the main dispute between Ind- Barath and TANGEDCO, it would be easier to dispose of the writ petitions filed by Appollo Tyres Ltd and Sakthi Auto Component Ltd. Though the energy wheeling agreement for captive use was one between Indhu Bharath and TANGEDCO, in essence, it is a tripartite arrangement between the generating plant, distribution licensee and the captive user. The name of the captive user, the quantum at the ceiling end and all other relevant particulars were set out in the said energy wheeling agreement. There is a specific clause with regard to the metering arrangements. They provide for installation of main and check meters which will have the facility to communicate their reading to State Load Dispatch Centre/Distribution Control Centre on real time basis or otherwise, as may be specified by the Commission. Meter reading shall be taken as per the procedure devised by the licensee. The CGP holder can also have a standby meter of the same specification, tested and sealed by the distribution licensee. Reading of main and check meters shall be taken periodically at the appointed day and hour by the authorised officer of the licensee in the presence of the CGP holder/his representative. The clause relating to billing provides that the distribution licensee shall raise bills for the net energy consumed by the captive user after adjusting the wheeled energy, where the consumption by the captive user is more than the generation of the CGP holder at the applicable rates. The captive user is obliged to make payments based on the bills raised.

12.In the case on hand, the dispute relates to the months of November and December 2016. During November 2016, there was generation of only nil unites as per the CMRI down loaded data. But, it was made to appear as if there was generation of power and there was allocation of 152432 units (with loss) and 6386002 units (with loss) in respect of the power wheeled for the use of the Sakthi Auto Component Ltd and Appollo Tyres Ltd. Likewise, during December 2016, there was generation of only 858800 unites based CMRI downloaded data. But, there was a power allocation of 786857 unites (with loss) and 7194246 units (with loss) in respect of the power wheeled for the use of Sakthi Auto Component Ltd and Appollo Tyres.

13.Sakthi Auto Component Ltd and Appollo Tyres Ltd have enclosed materials in the typed set of papers indicating that their payments for the use of energy during the months of November and December 2016 were made pursuant to the bills raised by the Trishul including statements of the Superintending Engineers of the jurisdictional distribution circles.

14.The stand of the TANGEDCO is that since there was falsification of figures and forgery of records, the captive users namely Sakthi Auto Component Ltd and Appollo Tyres Ltd will have to pay for the energy consumed by them. The learned Additional Advocate General appearing for the TANGEDCO drew my attention to Clause 7 of the Wheeling Energy Agreement which states as follows :

"7.*Billing :-*

(a)The distribution licensee shall raise bills for the net energy consumed by the captive user after

adjusting the wheeled energy, where the consumption by the captive user is more than the generation of the CGP holder at the rate applicable to that category of consumer.

(b)The distribution licensee shall raise bills on the CGP holder for the charges payable towards startup power and power drawn for other purpose, wheeling charges, excess demand & excess energy charges, etc., as per the order / regulations of the Commission for the time being in force; and

(c)The STU shall raise bills on the CGP holder for the charges payable towards transmission charges, scheduling and system operation charges, etc., as per the order/regulations of the Commission for the time being in force."

15.TANGEDCO has merely enforced the mandate in the aforesaid contractual clause is the submission of the learned Additional Advocate General. But the snag in this case is that a fraudulent bill was raised. Trishul had raised an invoice and it enclosed the bill issued in the name of TANGEDCO. Therefore, captive users namely Sakthi Auto Component Ltd and Appollo Tyres Ltd acted on the said demand and made payments accordingly. TANGEDCO did not wake up till February 2017. The fraud perpetrated by Trishul in connivance and collusion with TANGEDCO employees was discovered only in February 2017. The question that now arises for consideration is whether TANGEDCO can justifiably fasten the liability on the captive users namely Sakthi Auto Component Ltd and Appollo Tyres Ltd.

16.I am clearly of the opinion that TANGEDCO cannot do so. Section 115 of the Indian Evidence Act enshrining the principle of estoppel will clearly come into play. The Hon'ble Supreme Court in the decision reported in (2014) 4 SCC 196 (Pratima Chowdhury vs. Kalpana Mukherjee) held as follows :

"**35.** Section 115 of the Evidence Act is being extracted herein below:

"115.*Estoppel*.—When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Illustration

A intentionally and falsely leads *B* to believe that certain land belongs to *A*, and thereby induces *B* to buy and pay for it.

The land afterwards becomes the property of *A*, and *A* seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title."

It needs to be understood that the rule of estoppel is a doctrine based on fairness. It postulates the exclusion of the truth of the matter. All for the sake of fairness. A perusal of the above provision reveals four salient preconditions before invoking the rule of estoppel.

(*i*) *Firstly*, one party should make a factual

representation to the other party.

(*ii*) *Secondly*, the other party should accept and rely upon the aforesaid factual representation.

(*iii*) *Thirdly*, having relied on the aforesaid factual representation, the second party should alter his position.

(*iv*) *Fourthly*, the instant altering of position, should be such, that it would be iniquitous to require him to revert back to the original position.

Therefore, the doctrine of estoppel would apply only when, based on a representation by the first party, the second party alters his position, in such manner, that it would be unfair to restore the initial position."

17.Now, we have to see whether the ingredients set out above stand fulfilled. By entering into an energy wheeling agreement with Ind-Barath, TANGEDCO has made a factual representation that the captive users can make payments based on the bills raised by TANGEDCO. In this case, the bills raised in the name of TANGEDCO are vitiated by fraud. But then, it was done by none other than the employees of TANGEDCO. Its employees working in Tuticorin Distribution Electricity Distribution Circle had colluded with Trishul and that is how the forged bills came to be raised. But then, TANGEDCO will have to bear the cross. The consequences of the fraud committed by its employees cannot be passed on to innocent third parties.

18.I therefore hold that TANGEDCO will have to take the responsibility for the acts of fraud committed by its employees. The captive users namely Sakthi Auto Component Ltd and Appollo Tyres Ltd had accepted and relied on the representation made by TANGEDCO and made payments to Trishul. Sakthi Auto Component Ltd and Appollo Tyres Ltd had been directed by Ind-Barath to make payments directly to Trishul and it was agreed that payments to Trishul would be payments to Ind-Barath. Thus, the captive users have altered their position. To call upon them to revert their original position will be monstrous and iniquitous. Hence, the stand of the captive users is fortified by the doctrine of estoppel. Therefore, the demand notices impugned in WP(MD)Nos.13806 and 17160 of 2018 filed by the Sakthi Auto Component Ltd and Appollo

Tyres Ltd stand quashed and the writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

WP(MD)No.18399 of 2018 :

Having disposed of the cases filed by the captive users, we may now come to the Captive Generating Plant (CGP) holder. The first contention emphatically submitted by the learned Senior Counsel appearing for the Ind-Barath is that TANGEDCO does not have the power under the open access regulations to decide a dispute. Regulation No.44 of Tamil Nadu Electricity Regulatory Commission Grid Connectivity and Intra State Open Access Regulations, 2014 reads as follows :

> “44.Redressal Mechanishm :
>
> (1)All disputes and complaints relating to open access shall be made to the respective Nodal agency, which may investigate and endeavour to resolve the grievance within thirty days ; and
>
> (2)Whenever the Nodal agency is unable to resolve a grievance, the matter may be referred to the Commission.”

2.According the learned Senior Counsel for the petitioner, even a reading of the bare text of the said regulation would indicate that TANGEDCO does not have the power to decide the dispute and that it can only refer it to Tamil Nadu Electricity Regulatory Commission. He also drew my attention to Clause 11 of the Energy Wheeling Agreement. The said agreement also reads that if any dispute or difference of any kind whatsoever arises between the parties 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.

3.I am in agreement with this contention. TANGEDCO and Ind-Bharath are merely two contracting parties. A party to an agreement cannot have the jurisdiction to decide a dispute may arise between them. Merely because TANGEDCO is a Government corporation, it does not acquire a higher status. The proposition enunciated by the learned Senior Counsel appearing for the writ petitioner is in accord with the basic principles of natural justice.

4.One cannot be a Judge of his own cause. But, the order impugned in this writ petition cannot by any stretch of imagination be characterized as an order amounting to an adjudication. The impugned order states that an appeal can be filed against the same before the Commission. The learned Senior Counsel for the petitioner rightly faulted the said portion of the order. Therefore, the order impugned in this writ petition will have to be treated as raising of a dispute between Ind-Barath on the one hand TANGEDCO on the other.

5.The learned Senior Counsel appearing for the writ petitioner would contend that there is no valid charing provision in Tamil Nadu Electricity Regulatory Commission Grid Connectivity and Intra-State Open Access Regulations and that in the absence of a relevant charing provision, no liability can be fastened on the writ petitioner.

6.I am unable to agree with this contention. The demand raised by the TANGEDCO is grounded on the terms of the Energy Wheeling Agreement entered into between the parties. The Clause relating to billing reads as follows :

> "7.Billing :-
>
> (a)The distribution licensee shall raise bills for the net energy consumed by the captive user after adjusting the wheeled energy, where the consumption by the captive user is more than the generation of the CGP holder at the rate applicable to that category of consumer.
>
> (b)The distribution licensee shall raise bills on the CGP holder for the charges payable towards startup power and power drawn for other purpose, wheeling charges, excess demand & excess energy charges, etc., as per the order / regulations of the Commission for the time being in force; and
>
> (c)The STU shall raise bills on the CGP holder for the charges payable towards transmission charges, scheduling and system operation charges, etc., as per the order/regulations of the Commission for the time being in force.

7.In this case, according to the TANGEDCO there was nil generation of power during November 2016 and 858800 units of injection during December 2016. But, the captive users have consumed energy during both these months. TANGEDCO did not however raise any bills for the consumption of energy by the captive users. This was because of acts of fraud committed by Trishul employees and TANGEDCO employees. While I held that the captive users cannot be blamed for these acts of fraud, Ind-Barath cannot wash away its liability. The learned Senior Counsel for the petitioner would claim that they were not obliged to seek permission from TANGEDCO for entering into a lease agreement with Trishul. That may be so. But, it is a matter of record that Ind-Barath did not produce any letter of approval from TANGEDCO for such an arrangement. On the other hand, the learned Additional Advocate General produced a copy of the proceedings dated 25.04.2016 indicating that this arrangement was not accepted by TANGEDCO. The fact remains that TANGEDCO did not take any action for terminating the energy wheeling agreement on the ground that Ind-Barath has entered into a lease agreement with Trishul. While the lease agreement between Ind-Barath and Trishul may not be perse illegal, Ind-Barath is squarely bound by the acts of Trishul. It may be that as per the terms of the lease agreement between Ind-Barath and Trishul, it is only the Trishul that is squarely responsible. But then, TANGEDCO is not a party to this agreement.

8.While the provisions of the agreement between Ind-Barath and Trishul are enforceable as between them, Ind-Barath cannot hide behind those provisions in its dispute with TANGEDCO. TANGEDCO is not having any privity of contract with Trishul. It is not a party to the arrangement between Ind-barath and Trishul. Therefore, TANGEDCO is entirely justified in taking a stand that it would ignore the arrangement between Ind-Barath and Trishul. I already held that the consequences of the fraud committed by its employees will fall on TANGEDCO. Likewise, the fraud committed by Trishul will definitely fall on Ind-barath also. It cannot liquidate its liability on the ground that there was commission of fraud while preparing the meter reading statement or raising invoices during the months of November and December, 2016.

9.The learned Senior counsel for the petitioner also strongly contended that the proceedings in these regulations are rather penal in nature and therefore the element of mens rea is essential. He placed reliance on the decision reported in 1995 (95) CC 101 Cal (Bata India Ltd vs. Special Director, Enforcement Directorate. He also placed reliance on the decision reported in (2009) UKHL II (Mitchell and another vs Glasgow City Council). While the propositions enunciated therein would come to the rescue of Ind-Barath in the matter of criminal prosecution, they are no defence in these proceedings.

10.In fact, in the criminal case, Ind-Barath has been deleted from the array of accused. The battle of course has to shift to Tamil Nadu Electricity Regulatory Commission. At this stage, this Court has to take note of the contention raised by the learned Senior Counsel that the present composition of TNERC is not in consonance with the law laid down by the Hon'ble Supreme Court in the decision reported in (2018) 6 SCC 21 (State of Gujarath vs. Utility Welfare Association). The Hon'ble Supreme Court in the aforesaid decision held as follows :

> **117.**In *Madras Bar Assn.* (MJ-II), the Constitution Bench, referring to the decision in *Madras Bar Assn.*MJ-I) observed that members of tribunals discharging judicial functions could only be drawn from sources possessed of expertise in law and competent to discharge judicial functions. We are conscious of the fact that the case (MJ-I) dealt with a factual matrix where the powers vested in courts were sought to be transferred to the tribunal, but what is relevant is the aspect of judicial functions with all the "trappings of the court" and exercise of judicial power, at least, in respect of same part of the functioning of the State Commission. Thus, if the Chairman of the Commission

is not a man of law, there should, *at least*, be a member who is drawn from the legal field. The observations of the Constitution Bench in *Madras Bar Assn.*MJ-II) constitute a declaration on the concept of basic structure with reference to the concepts of "separation of powers", "rule of law" and "judicial review". The first question raised before the Constitution Bench as to whether judicial review was part of the basic structure of the Constitution was, thus, answered in the affirmative.

118. We are, thus, of the view that it is *mandatory* to have a person of law, as a member of the State Commission. When we say so, it does not imply that any person from the field of law can be picked up. It has to be 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. 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 motu 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."

11.Clarification was sought from the Supreme Court as to whether the Tribunal as then constituted could continue to adjudicate the disputes. On 10.09.2018, the following order was passed :

"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."

But thereafter, a vacancy arose in the Tribunal and there has been a retirement of a Member. When the aforesaid clarificatory order was passed on 10.09.2018, the Commission had Thiru.S.Akshayakumar as the Chairman and Thiru.T.Prabhakararao I.A.S., and Thiru.Rajagopal as Members. On 09.01.2019, Thiru.Rajagopal retired from the Commission. Thus, the Tribunal that existed on 10.09.2018 has ceased to exist. Therefore, the law declared in the aforesaid decision will have to be scrupulously adhered to.

12.This Court makes use of this occasion to direct the Government to choose a member from the legal field and constitute the Commission at the very earliest not exceeding six weeks from the date of receipt of a copy of this order. The Hon'ble Supreme Court bemoaned that more than half of the Tribunals that were set up to ease the work burden of the High Court are remaining non functional or disfunctional because of the non filling up of the vacancies.

13.The learned Additional Advocate General drew my attention to Clause 9 of the Tamil Nadu Electricity Regulatory Commission Grid Connectivity and Intra-State Open Access Regulation, 2014 which reads as follows :

"*9.Eligibilty for Open Access and Conditions to be satisfied.-*

(1)Subject to the provisions of these Regulations, the licensees, generating companies, captive generating plants and consumers shall be eligible for open access to the intra-State transmission system of the State Transmission Utility or any transmission licensee on payment of transmission and other charges as may be determined by the Commission from time to time.

(2)Subject to the provisions of these Regulations, the licensees, generating stations, captive generating plants and consumers shall be eligible for open access to distribution system of a distribution licensee on payment of the wheeling and other charges as may be determined by the Commission from time to time.

(3)Subject to the provisions of these Regulations, open access shall be permissible to the consumers seeking open access capacity up to which the Commission has introduced open access and are connected through an independent feeder emanating from a sub-station of licensee:

Provided that the consumers who are not on independent feeders, shall be allowed open access subject to the restrictions in the feeders serving them in line with the Commission's Regulations /Codes/Orders :

Provided further that duties of the distribution licensee with respect to such open access customers shall be of a common carrier providing non-discriminatory open access as per sub-section (3) of section 42 of the Act.

4)An un-discharged insolvent or a person having outstanding dues against him for more than two months billing of distribution/transmission licensee at the time of application shall not be eligible for open access.

5)In case a person, to whom open access has already been allowed, is declared insolvent or is having outstanding dues for more than two months billing of transmission or distribution Licensee, he shall not be eligible for open access from the day he is adjudged as insolvent or failed to clear the amount outstanding for more than two months billing

6)Open Access shall be allowed to the intra state transmission system subject to the satisfaction of the conditions contained in the Act and in these Regulations. Having regard to the operational constrains and other relevant factors, open access shall be allowed to all EHT & HT consumers within their contracted demand subject to the terms and conditions of supply. In case of generation of electricity from new and renewable sources, open access shall be allowed as specifically permitted by the Commission in its relevant regulations/orders in force."

The learned Additional Advocate General therefore contended that the TANGEDCO was right in taking the stand that the Ind-barath will not be eligible for open access. Of course, Ind-Barath had technically denied the stand of the TANGEDCO that there was nil injection of units in November 2016 and less injection of units during December 2016. Their core contention is that the entire burden should fall on the shoulders of Trishul and not on them. The agreement between the parties provided for installation of a standby meter also. It is not the case of Ind-barath that the said standby meter gave a different reading than what was projected by TANGEDCO.

14.Looked at from this angle, there is virtually no dispute whatsoever. This is a simple demand for the energy utilised. Tamilnadu Electricity Supply code 2004 and tariff orders that are issued from time to time provide for levy of appropriate energy charges. The impugned demand of TANGEDCO falls within their framework. If Ind-barath is disputing the readings of TANGEDCO for the aforesaid months of November and December 2016, then the matter will have to shift to TNERC for adjudication. If it not disputing, there is no dispute at all for TNERC to adjudicate.

15.I have already held that Ind-Barath cannot take shelter behind the lease agreement entered into Trishul. I find no merit in the writ petition filed by Ind-barath and I dismiss WP(MD)No.18399 of 2018. I cannot however leave it at that. Following the the discovery of fraud and forgery, Crime No.8 of 2018 was registered on the file of the District Crime Branch, Tuticorin Police Station for the offences punishable under Sections 406, 465, 467, 468, 471, 420 and 120 B IPC. I granted anticipatory bail to one Sudhakar of Ind-barath as the enquiry revealed that he was not a party to the commission of acts of fraud and forgery. His name was subsequently deleted from the list of accused also. The current status of the said case is not known.

16.Since it is a case of massive fraud involving several crores of rupees, the Superintendent of Police, Thoothukudi District is directed to ensure that the final report is filed in this case within a period of eight weeks from the date of receipt of a copy of this order if it has not already been filed. Without the active involvement of the employees of TANGEDCO, the fraud could not have been perpetrated. Therefore, those in charge of Trishul and the employees of TANGEDCO will have to be prosecuted. As and when the final report is filed, it shall be taken on file at the earliest and the trial of the case itself shall be fast tracked. The Superintendent of Police, Thoothukudi is directed to submit a status report to the Registry once in three months.

17.With this direction, WP(MD)No.18399 of 2018 stands dismissed and WP(MD)Nos.13806 and 17160 of 2018 stand allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (P AND A)

// True Copy //

Sub Assistant Registrar(CS)

Skm

To

1. THE CHAIRMAN, TAMIL NADU GENERATION AND
DISTRIBUTION CORPORATION LIMITED,
NPKRR MAALIGAI, 144, ANNA SALAI, CHENNAI - 600 002.

2. THE SUPERINTENDING ENGINEER,
TANGEDCO, TUTICORIN ELECTRICITY DISTRIBUTION CIRCLE,
TUTICORIN.

3. THE SUPERINTENDING ENGINEER,
TANGEDCO, CHENGALPET ELECTRICITY DISTRIBUTION CIRCLE,
CHENGALPET.

4. THE SUPERINTENDENT OF POLICE,
THOOTHUKUDI DISTRICT.

5. THE SUPERINTENDING ENGINEER,
TANGEDCO, ERODE ELECTRICITY DISTRIBUTION CIRCLE,
ERODE.

Copy to:
THE SECTION OFFICER,
WRIT SECTION,
MADURAI BENCH OF MADRAS HIGH COURT,
MADURAI.

2CC'S TO MR. K. PRABHAKAR,ADVOCATE SR 58485 AND 58486

2CC'S TO M/S. SARVABHAUMAN ASSOCIATES, ADVOCATES 58214 AND 58215

1CC TO MR. S.M.S.JOHNNY BASHA, ADVOCATE SR 58832

1CC TO MR. P. THIAGARAJAN, ADVOCATE SR 58212

KK
06/06/2019
19P/13C

ORDER MADE IN

W.P.(MD)Nos.13806, 17160 & 18399 of 2018

and

W.M.P.(MD)Nos.12536, 12537, 15092, 19129, 22765, 16288 & 16289 of 2018 & 291 & 292 of 2019

01.04.2019