IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 15.09.2020
CORAM
THE HON'BLE MR.JUSTICE N.ANAND VENKATESH
WP No.9319 of 2020
and WMP Nos.11378 and 11379 of 2020

M/s.E.I.D.Parry India Limited
Rep. By its Vice President - Legal, Biswa Mohan Rath,
with its registered office located at 'Dare House'
Parrys Corner, Chennai 600 001.
and one of its Sugar Factory,
located at Pugalur,
Karur 639 113 ..Petitioner

Vs.

1.Tamil Nadu Electricity Generation
and Distribution Company (TANGEDCO),
Rep. By its Chairman and Managing Director,
No.144, Anna Salai, Chennai 600 002.

2. The Superintending Engineer,
Karur Electricity Distribution Circle,
Karur.

3. The Superintending Engineer,
Cuddalore Electricity Distribution Circle,
Cuddalore.

4. The Superintending Engineer,
Pudukottai Electricity Distribution Circle,
Pudukottai.

5. The Chief Financial Controller / Reevenue,
TANGEDCO,
No.800, Anna Salai,
Chennai 600 002.

6. Deputy Financial Controller,
Karur Electricity Distribution Circle,
Karur ..Respondents

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Prayer:- Writ petitions filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus directing the 2nd, 3rd and 4th respondents to duly honour the petitioner's export invoices for the period from 2017 to 31st May, 2020along with interest amounting to Rs.12,43,45,237/- (Rupees twelve Crore Forty three lakhs forty five thousand two hundred and thirty seven only).

For Petitioner	:	Mr.R.Parthasarathy
For Respondent	:	Mr.N.Damodharan, Standing Counsel

ORDER

This writ petition has been filed for the issue of a writ of mandamus directing the respondents to make the payment towards the invoices raised by the petitioner from 2017 to 31st May 2020.

2.The case of the petitioner is that they are owning Bagasse based power plants at the electricity distribution circles belonging to the 2nd ,3rd and 4th respondents. The petitioner entered into power purchase agreements with the TANGEDCO and the petitioner was also regularly supplying power to TANGEDCO at a mutually agreed tariff rate. The grievance of the petitioner is that the respondents are not remitting the payments for the invoices raised by the petitioner for the period from 2017 to 31st May 2020. Aggrieved by the same, the present writ petition has been filed seeking for appropriate directions.

3.Mr.Rahul Balaji, learned counsel appearing on behalf of the petitioner submitted that a total sum of Rs.12,43,45,237/- is due and payable by the respondents and this is an admitted amount that has to be paid by the respondents in accordance with the power purchase agreements. The learned counsel further submitted that there is a substantial delay in making the payments, as a result of which, the petitioner is put to severe financial constraints and the respondents were also not giving any reasons as to why the payment was not made to the petitioner Company.

4.The respondents have filed a counter affidavit in this case. The relevant portions in the counter affidavit is extracted hereunder:

> 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

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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.3,200 Crores. The respondents (the TANGEDCO) is facing shortfall of about Rs.1,350 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 payer of Set-off, the Hon'ble 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 Cr.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?
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> In Bhupendra Narain Singha Bahadur Vs. Bahadur Singh and Ors. 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 wrong-doer who has wrongfully withheld monies belonging to another cannot invoke any principle of equity in his favour and seek to deduct therefrom the

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> amounts which may have fallen due to him. There would be nothing improper or unjust in telling the wrong-doer to undo his wrong and not to take advantage of it.
>
> 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 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.

5.Mr.N.Damodaran, learned Standing Counsel appearing on behalf of the respondents apart from reiterating the contentions raised in the counter affidavit, submitted that fixing of purchase price for power supplied by TANGEDCO to two other entities became a subject matter of challenge before the Tamil Nadu Electricity Regulatory Commission [TNERC] . A final order came to be passed by TNERC on 29.07.2016. As per this order, the Commission directed that the supply of Electricity from the Bagasse based generating plant should be construed as a supply of electricity by a generating Company and accordingly, the tariff was fixed. Aggrieved by this order, an appeal has been filed before the Appellate Tribunal (APTEL) and the same is pending. A final decision in this appeal will have a bearing in the present case also and therefore, the respondents are awaiting for final orders in the appeal in order to decide the amount to be paid to the petitioner and therefore, the payment has been kept on hold.

6.In reply to this submission, the learned counsel for the petitioner submitted that the TANGEDCO attempted to collect the amount from the petitioner by revising the power purchase bills and it was challenged by the petitioner in W.P.24498 of 2018 and

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this Court by an interim order dated 27.09.2018, stayed the operation of the demand made by the TANGEDCO and this writ petition is pending. The learned counsel submitted that the pendency of the appeal before APTEL has nothing to do with the amount payable to the petitioner and once a stay order has been granted by this Court, the earlier demand made by TANGEDCO cannot be put against the petitioner to deny payment to the petitioner. In order to substantiate the said submission, the learned counsel relied upon the order passed by the Division Bench in W.A.Nos.1652 and 1653 of 2013 dated 06.11.2013. The relevant portions in the order is extracted hereunder:

> 16. This Court is of the considered view that unless and until the interim orders granted by this Court in the above said writ petitions are vacated, varied or modified in favour of or to the advantage of the appellants herein, they cannot insist for payment of the said amount or directing them to withdraw the Court cases. Any view would definitely result in undermining the interim orders passed by this Court and it is also not open to the appellants herein to interpret the interim orders passed by this Court to their advantage and the remedy open to them, if any is to approach this Court by filing petitions for vacating the interim orders or seeking modification of the interim orders. In the imppugned orders, which are the subject matter of challenge in these writ appeals, reliance has been placed on the common judgment dated 06.11.2012 made in W.A.(MD) No.895 and 896/2012, in which TANGEDCO are the appellants therein and no challenge was made to the said common judgment and it had attained finality and therefore, it is not open to the appellants to take a different stand by insisting the respondents in these writ appeals to clear the arrears which are the subject matter of challenge in these writ appeals and also to clear / withdraw those cases.

7.This Court has carefully considered the submissions made on either side and the materials available on record.

8.There is absolutely no dispute with regard to the fact that TANGEDCO has to pay the petitioner under the power purchase agreements for the supply of power made by the petitioner to TANGEDCO during the period from 2017 to 31st May 2020. The petitioner has raised the invoices and TANGEDCO did not respond to any of the invoice raised by the petitioner.

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9.In the counter affidavit, a stand has been taken at paragraph 17 to the effect that TNERC has passed an order revising the tariff and this amount has not been paid by the petitioner and has been challenged before this Court in W.P.No.24498 of 2018 and the same is pending and therefore, till this amount is paid, the TANGEDCO will not make the payments for the invoices raised by the petitioner.

10.This stand taken by the TANGEDCO is totally unsustainable. The parties are bound by the power purchase agreements and this agreements itself stipulates the tariff rate that has been mutually agreed by the petitioner and TANGEDCO. The amount arrived at by the petitioner is in accordance with the tariff rate fixed under the agreements and there is no dispute with regard to the same. Curiously, the respondents never responded for any of the invoice raised by the petitioner and for the first time, a stand has been taken in the counter affidavit by placing reliance upon the order passed by the TNERC. The order passed by TNERC pertains to an interse dispute between Sakthi Sugars Limited, Tamil Nadu News Print and Papers Limited and TANGEDCO. The final direction given by TNERC specifically deals with the concerned entities involved in the dispute and it is an order in personam. This order cannot be applied for any other entity which is not a party to the proceedings.

11.The TANGEDCO by relying upon this order attempted to unilaterally revise the tariff and make a claim against the petitioner. This was challenged by the petitioner in W.P.24498 of 2018 and this Court stayed the demand made by the TANGEDCO by an interim order dated 27.09.2018. The order of the Division Bench relied upon by the petitioner and which has been extracted supra, categorically states that where interim orders are granted by this Court and the same has not been vacated, varied or modified, TANGEDCO cannot insist for payment and take those orders to their advantage. This order passed by the Division Bench was taken note by TANGEDCO and a circular was also issued on 23.01.2014, where the directions given by this Court was brought into force.

12. In view of the above, the TANGEDCO cannot be permitted to take a stand that they will not make any payment till the earlier writ petition filed by the petitioner is disposed of. Unfortunately, the petitioner has already supplied power to TANGEDCO and are not getting the payment for the last three years inspite of being entitled to receive the payment under the power purchase agreements. The reasons given by the respondents for not making the payment to the petitioner is

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unsustainable and unacceptable to this Court.

13. In view of the above discussion, there shall be a direction to the respondents to immediately take steps to make the payments to the petitioner towards the invoices raised by the petitioner from 2017 to 31st May 2020. This payment shall be made within a period of three months from the date of receipt of the copy of this order.

14. This writ petition is allowed with the above directions. No costs. Consequently, the connected miscellaneous petitions are closed.

-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

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To
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