

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.02.2020

CORAM :

The Hon'ble Mr.A.P.SAHI, THE CHIEF JUSTICE

AND

The Hon'ble Mr.JUSTICE SUBRAMONIUM PRASAD

W.A.Nos.4189, 4194, 4197, 4201, 4204 & 4205 of 2019
and C.M.P.Nos.26131, 26185, 26112, 26157, 26161, 26074, 26184,
26189 26186, 26110 and 26073 of 2019

W.A.No.4189 of 2019

- 1.Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO),
10th Floor, 144, Anna Salai,
Chennai 600 002.
Rep. by its Chairman cum Managing Director.
Appellant 1 & 2 in all Writ Appeals
- 2.The Chief Engineer,
NCES, TANGEDCO, 2nd Floor,
144, Anna Salai, Chennai 600 002.
- 3.The Superintending Engineer,
TANGEDCO, Tirunelveli Electricity
Distribution Circle, Tirunelveli
... 3rd Appellants in WA.
4189/19 & 4205 of 2019

The Superintending Engineer,
Tangedco,
Udumalpet Electricity Distribution Circle,
Udumalpet
... 3rd appellant in
WA.4194 of 2019

The Super Engineer,
Tirunelveli Electricity Distribution Circle,
TANGEDCO, Maharaja Nagar,
Tirunelveli 627 001

... 3rd Appellant in WA. 4197/19

The Superintending Engineer,
TANGEDCO, Tuticorin Electricity Distribution Circle,

Tirunelveli 627 001.

... 3rd Appellant in WA. 4201/19

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

... 3rd Appellant in WA 4204 of 2019

-vs-

1. Atlas Processing Mills,

Rep. by its Partner, Mr.M.Nachimuthu

Karur 639 002.

... 1st Appellant in WA.4189/19

2. Tamil Nadu Electricity Regulatory

Commission, 19-A, Rukmini Lakshmipathy Salai,

Egmore, Chennai 600 008,

Rep. by its Secretary.

... 2nd Respondent in all WA.4189,
4194, 4197, 4201 & 4205/19

THE DIRECTOR / GENERATION

TAMIL NADU GENERATION AND DISTRIBUTION

CORPORATION LTD, 144,

ANNA SALAI CHENNAI

APPELLANT IN WP.4204 OF 2019

ROYAL CLASSIC MILLS P LTD

REB BY ITS ASSISTANT MANAGER,

ACCOUNTS MR.R.VELUMANI,

TIRUPPUR.

... 1st RESPONDENT IN WA.4194/19

M/S.SEP ENERGY PVT LTD

REP. BY ITS DIRECTOR G-409 CAPSTONE OPP.

CHIRAG MOTORS SHETH MANGALDAS ROAD

ELLISBRIGE AHMEDABAD - 380 006.

... 1st RESPONDENT IN WA.4197/19

M/S ART RUBBER INDUSTRIES LTD

302 CENTURY TOWERS 45 SHAKESPEARE

SARANI KOLKOTA -700 017 ... 3RD RESPONDENT IN WA.4197/19

M/S.HINDUSTAN HARDWARES

NO.356 PATEL ROAD COIMBATORE-641 009 REP

BY ITS AUTHORIZED SIGNATURE S. PRABHU.

... 1ST RESPONDENT IN WA.4201/19

M/S.VIVID WIND ENERGY PVT LTD
REP BY ITS AUTHORIZED SIGNATORY A.MARIA
SELVAKUMAR S F NO.708/2 THATCHAN THOTAM G
H BACKSIDE TIRUPUR 641608.

... RESPONDENT IN WA.4204/19

1 M/S.SRI KRISHNA PACKS
WF.HT SC NO. 3011 S.F.NO. 248/1B KARUKKAN
THOTTAM EATTI VEERAMPALAYAM POST
PERUMANALLUR-641666 TIRUPUR REP BY ITS
AUTHORIZED SIGNATORY A.GOPAL

... 1st RESPONDENT IN WA.4205 OF 2019

Appeals filed under Clause 15 of the Letters Patent against the common order dated 30.08.2019 passed in W.P.Nos.8463 of 2019, 8459 of 2019, 1275 of 2018, 11725 of 2019, 5196 of 2019 and 6694 of 2018, on the file of this Court.

WP No.8463 of 2019: Petition filed under article 226 of the Constitution of India praying to issue writ of 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

WP No.8459 of 2019:
Petition filed under article 226 of the Constitution of India praying to issue writ of 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

WP No.1275 of 2018
Petition filed under article 226 of the Constitution of India praying to issue writ of 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

WP No.11725 of 2019

Petition filed under article 226 of the Constitution of India praying to issue writ of 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 respective invoices till date

WP No.5196 of 2019:

Petition filed under article 226 of the Constitution of India praying to issue writ of Mandamus, Directing the respondents for the termination of the PPA dated 17-3-2017 and to order switch over the captive consumption

WP No.6694 of 2018:

Petition filed under article 226 of the Constitution of India praying to issue writ of 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 Tirnelveli, EDC For adjustment against consumption at the petitioner spinning mill at HTSC No. 501 at Tiruppur EDC.

For Appellants

: Mr.N.Damodaran

Stdg. Counsel for TANGEDCO

For Respondents

in WA.Nos.4189,4194,
4201 and 4205/2019

: Mr.R.S.Pandiaraj for R-1

In WA.No.4197/2019

: Mr.Rahul Balaji for R-1

JUDGMENT

(Delivered by Subramonium Prasad, J.)

The Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO), in this batch of writ appeals, seeks to challenge the judgment and order dated 30.08.2019 passed by a learned Single Judge disposing of six writ petitions by a common judgment.

2.The writ petitioners/respondents harvest wind energy and generate electricity. The writ petitioners/respondents entered into agreements with the appellants (TANGEDCO) for sale of electricity to the appellants by executing an Energy Purchase Agreement (EPA). The energy was to be sold to the appellants at a tariff rate of Rs.2.90 per unit. The writ petitioners have approached the appellants herein for converting the Energy Purchase Agreement into Energy Wheeling Agreement for captive consumption. This was done because the appellants were not paying the amounts due to the writ petitioners/ respondents for the electricity purchased by them. Since there was no payment being made, the writ petitioners thought it advantageous to them to convert the Energy Purchase Agreement to one of Energy Wheeling Agreement, so that they can either use the electricity either for captive consumption or sell to other units. The appellants did not pass any order.

3.The respondents/writ petitioners, therefore, approached the Court for a writ of mandamus directing the appellants herein, to convert the Energy Purchase Agreement into one of Energy Wheeling Agreement and also for a direction to make payments for the electricity purchased by the appellants.

4.It is the contention of the learned counsel for the respondents/ writ petitioners that they had taken huge loans from banks for setting up their wind mills for producing energy and since no payment is forthcoming from the appellants, they are being declared as NPAs by the banks. The appellants filed a counter challenging the maintainability of the writ petitions contending that the writ petitioners ought to have approached the Electricity Regulatory Commission or to invoke the Arbitrators as the Agreement contains an arbitration clause. It was, therefore, submitted that in view of an efficacious alternative remedy available to the writ petitioners, the Writ Court should not have exercised its extraordinary jurisdiction under Article 226 of the Constitution of India. The learned Single Judge, by the impugned order, allowed the writ petitions. Challenging the said order, the TANGEDCO has filed the instant

writ appeals.

5.The fact that the appellants have purchased electricity from the respondents/writ petitioners is admitted. The amount that is due and payable by the appellants to the writ petitioners/respondents is also admitted. On one hand, the appellants are not making any payment to the respondents and on the other hand, the respondents are not being permitted to convert the Energy Purchase Agreement to Energy Wheeling Agreement. The attitude of the appellants, to say the least, is oppressive. More than two years have passed, but no payments have been made by the appellants. What is further to be noted is that during the pendency of the writ petitions, the learned Single Judge, on 26.04.2019, had passed the following order:-

"Mr.T.Chezhiyan, learned Counsel appearing for the petitioner referring to Clause 8(2) of the Renewable Energy Purchase Agreement dated 17.03.2017 in W.P.No.5196/2019 which is given as under:

'8 (2) The parties to the agreement shall be given the option to exit for violation of the agreement after serving a notice of three months on the other party.'

vehemently submitted that since the TANGEDCO has blindly violated the said condition from July, 2017 in W.P.No.5196/2019, from September, 2017 in W.P.No.8459/2019, from July, 2017 in W.P.No.8463/2019, from August, 2017 in W.P.No.11725/2019 and from June, 2017 in W.P.No.6694/2018, the petitioners have issued notices for termination of the PPA Agreement seeking for payment of complete dues from the respondents, but, till date, no reply whatsoever has been given. That shows that they impliedly agree with Clause 8(2) of the Renewable Energy Purchase Agreement dated 17.03.2017. Therefore, the learned Counsel for the petitioners requested this Court to allow all these writ petitions thereby allowing the petitioners to exit from the agreement, enabling them to consume the powers generated for their own use.

2. Mr.P.H.Aravindh Pandian, learned Additional Advocate General assisted by Mr.S.K.Raameshuwar, learned Standing Counsel for the respondents 1 to 3, after some arguments on all the issues raised by the petitioners, he requested this Court to give a final chance to clear all the dues to the petitioners.

3. This Court also directs the respondents to pay all the arrears payable to the petitioners, namely, Rs.1,08,42,430/- in W.P.No.5196/2019, Rs.2,74,51,898/- in W.P.No.11725/2019, Rs.4,57,44,703/- in W.P.No.8459/2019, Rs.42,35,590/- in W.P.No.8463/2019, Rs.27,41,183/- in

W.P.No.1275/2018 and Rs.44,45,446/- in W.P.No.6694/2018 etc. on or before 29.04.2019 and the Superintending Engineer is also directed to file an Affidavit of Undertaking that he would continue to make the payment to the Generators within 30 days on receipt of the bill failing which the petitioners are at liberty to invoke Clause 8(2) of the said agreement.

4. Post the matter on 29.04.2019 at 2.15 p.m. for further hearing."

Despite this direction, which is an agreed order, the payments have not been made by the appellants.

6.The Hon'ble Supreme Court in Surya Constructions vs. State of Uttar Pradesh and Others, reported in 2019 SCC Online 447, decided on 08.03.2019, observed as under:-

1.Leave granted.

2.Having heard learned counsel for all the parties, we find that the present is a case in which payment for extra work by the Uttar Pradesh Jal Nigam has not been made though such work was expressly sanctioned and done to their satisfaction. The appellant before us has had to run from pillar to post to get the money owed to them. By an order dated 21.10.2013, the High Court asked the appellant to make a representation and finally, in a contempt petition moved on 07.02.2014, directed the Uttar Pradesh Jal Nigam to answer this representation. The representation so made was answered by the Uttar Pradesh Jal Nigam as follows:

"Due to aforesaid facts and description it is clear that Rs. 113.29 lacs has to be released by Government/Mela Administration against the Budget presented by U.P. Jal Nigam, Magh Mela 2008-09. There is no money available under account of Magh Mela 2008-09 of U.P. Jal Nigam. And could not obtained the rest of amount from the Mela Administration/Government. Therefore, payment regarding M/s. Surya Construction, 323/3, Alopibagh, Allahabad will be paid after availability of the money from the Government."

3.It is clear, therefore, from the aforesaid order dated 22.03.2014 that there is no dispute as to the amount that has to be paid to the appellant. Despite this, when the appellant knocked at the doors of the High Court in a writ petition being Writ Civil No. 25216/2014, the impugned judgment dated 02.05.2014 dismissed the writ petition stating that disputed

questions of fact arise and that the amount due arises out of a contract. We are afraid the High Court was wholly incorrect inasmuch as there was no disputed question of fact. On the contrary, the amount payable to the appellant is wholly undisputed. Equally, it is well settled that where the State behaves arbitrarily, even in the realm of contract, the High Court could interfere under Article 226 of the Constitution of India ['ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.' ((2004) 3 SCC 553)].

4.This being the case and the work having been completed long back in 2009, we direct the Uttar Pradesh Jal Nigam to make the necessary payment within a period of four weeks from today. Given the long period of delay, interest at the rate of 6 per cent per annum may also be awarded.

5.The appeal stands disposed of accordingly."

7.The contention of the learned counsel for the appellants that the Writ Court ought not to have entertained the writ petitions and should have relegated the parties to the alternate remedy cannot be accepted, in the light of the aforesaid judgment of the Hon'ble Supreme Court.

8.Yet another contention was raised by the learned counsel for the appellants stating that the facts in W.A.No.4204 of 2019 stands on a different footing. He would state that in that case, the writ petitioner had made a request for change over from Energy Purchase Agreement under the REC scheme to the Energy Wheeling Agreement under the Preferential tariff scheme and the appellants had categorically informed that under the Central Electricity Regulation Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) (Fourth Amendment) Regulations, 2016, the writ petitioner was not entitled to in law for a change over and in view of the position that there has no been no registration with the National Load Despatch Centre under the captive scheme in accordance with the amendment regulation, the writ petitioner's units were commissioned between 2010 and 2016, but they had not got themselves registered with the NLDC. He would, therefore, submit that the order of the learned Single Judge is in direct violation of the statutory provisions.

9.We are afraid we cannot accept this contention. In the regime entered into by the writ petitioner, they were selling the electricity at a rate less than Rs.2.90 and they were also

getting certificates, which could be traded. They are not even getting the payment for the electricity purchased, which was at a much lower rate than the other writ petitioners and thereby putting them in a situation which is worse than the other writ petitioners. The appellants, after agreeing to pay the amount before the Court on 26.04.2019 cannot be permitted to take advantage of their own wrong.

10. In view of the above, we do not find any infirmity in the order of the learned Single Judge and we dismiss the writ appeals. However, we enhance the time by another two months from today to repay the amounts due to the respondents / writ petitioners. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

sra

To

1. The Chairman cum Managing Director,
Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO),
10th Floor, 144, Anna Salai,
Chennai 600 002.
2. The Chief Engineer,
NCES, TANGEDCO, 2nd Floor,
144, Anna Salai, Chennai 600 002.
3. The Superintending Engineer,
TANGEDCO, Tirunelveli Electricity
Distribution Circle, Tirunelveli.
4. The Secretary,
Tamil Nadu Electricity Regulatory
Commission, 19-A, Rukmini Lakshmipathy Salai,
Egmore, Chennai 600 008.
5. The Superintending Engineer,
Udumalpet Electricity Distribution Circle,
TANGEDCO, 15, 15A, Kumaralingam Road,
Udumalpet - 624 154.

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

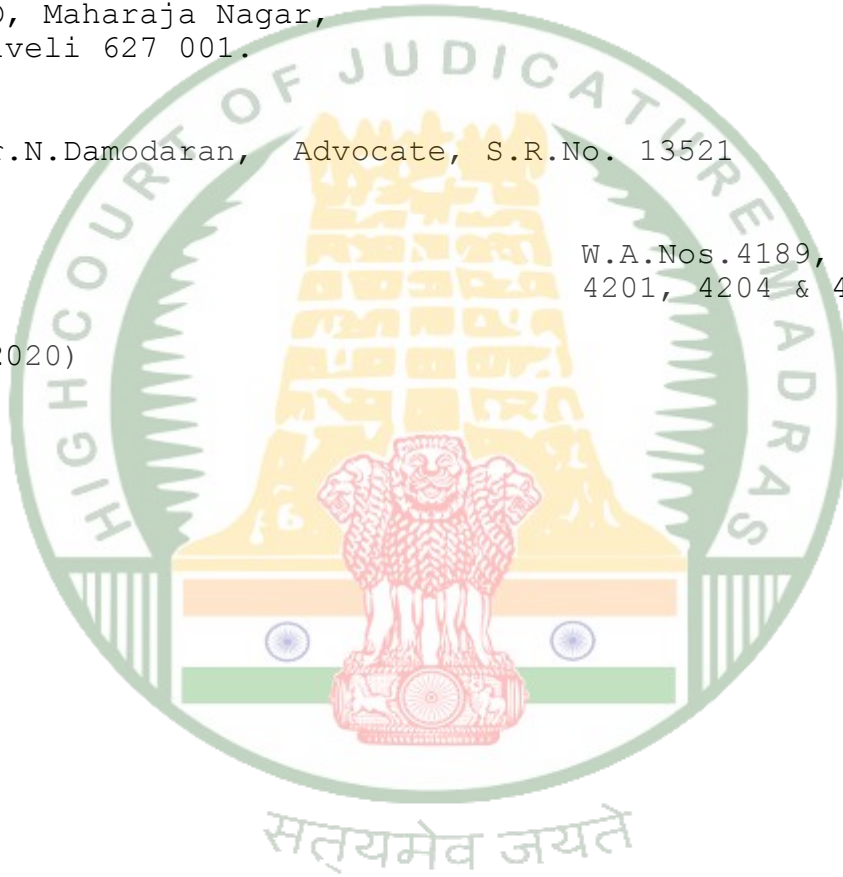
7.The Superintending Engineer,
TANGEDCO,
Udumalpet Electricity Distribution Circle,
Udumalpet.

8.The Superintending Engineer,
Tirunelveli Electricity Distribution circle,
TANGEDCO, Maharaja Nagar,
Tirunelveli 627 001.

+3cc to Mr.N.Damodaran, Advocate, S.R.No. 13521

W.A.Nos.4189, 4194, 4197,
4201, 4204 & 4205 of 2019

GN(16/03/2020)



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