



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.12.2021

CORAM :

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.Nos.18962 and 18963 of 2010
and

M.P.Nos.4, 5, 6 of 2010 and M.P.Nos.3, 4 of 2010

1. M/s.Balu Spinning Mills Pvt.Ltd.
C.Ammapatti
Ellis Nagar, Pollachi Road
Dharapuram

...Petitioner
(in W.P.No.18962 of 2010)

2. M/s.Balu Spinning Mills Pvt. Ltd.(Unit 2)
Chinnaputhur Village,
Ellis Nagar, Pollachi Road
Dharapuram 638657

...Petitioner
(in W.P.No.18963 of 2010)

Vs.

1. Tamil Nadu Electricity Regulatory
Commission,
19-A,Rukmini Lakshmipathy Salai,
(Marshall's Road),
Egmore, Chennai-600 008
Rep. by its Secretary

2. The Chairman
Tamil Nadu Electricity Board,
144, Anna Salai,
Chennai-600 002.

3. Superintending Engineer
Udumalpet Elec. Distribution Circle,
Tamil Nadu Electricity Board,
Udumalpet

...Respondents
(in both W.Ps)

Prayer in W.P.No.18962 of 2010 : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus, calling for the records of the 3rd respondent in its impugned bills for the months of June and July, 2010 dated 30.06.2010 and 31.07.2010 levying penalty charges to the tune of Rs.1,51,079.40/- and Rs.13,30,682.40/-



respectively based on the calculation later communicated to the petitioner in the notice dated 27.07.2010 Lr. No. SE/UEDC/UDT/AO/ REV/AS/HT/F.POWER CUT/2010 dt 27.07.2010 and quash the same as illegal, arbitrary and without authority of law and direct the 3rd respondent to permit the petitioner to avail the deemed demand for the energy purchased from the third party also over and above the Quota demand fixed by the 3rd respondent.

Prayer in W.P.No.18963 of 2010 : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus, calling for the records of the 3rd respondent in its impugned bills for the months of June and July, 2010 dated 30.06.2010 and 31.07.2010 levying penalty charges to the tune of Rs.35,934/- and Rs.1,94,384.40/- respectively and quash the same as illegal, arbitrary and without authority of law and direct the 3rd respondent to permit the petitioner to avail the deemed demand for the energy purchased from the third party over and above the Quota demand fixed by the 3rd respondent.

For Petitioner : Mr.Rahul Balaji
(in both W.Ps)

For R1 : No Appearance
(in both W.Ps)

For R2 and R3 : Mr.L.Jai Venkatesh
[For TANGEDCO]
(in both W.Ps)

COMMON ORDER

The facts and circumstances narrated by the petitioners in the present writ petitions are similar to that of the issues considered and decided by the Tamil Nadu Electricity Regulatory Commission in D.R.P.No.41 of 2014 dated 13.02.2015. Thus the issues are not more res integra and the petitioners are entitled to get the benefits pursuant to the orders passed by the Tamil Nadu Electricity Regulatory Commission. Further, the 1st order passed by the Tamil Nadu Electricity Regulatory Commission in M.P.Nos.6 of 2010, 9 of 2010 and 17 of 2010 and D.R.P.No.9 of 2010 dated 07.09.2010 and paragraph 4.4 provides findings of the Commission which reads as under:

"4.4 The consumer is at present permitted to utilise power from captive sources. The present order would enable a consumer to purchase power from third party sources as well. Procurement of power by a consumer through Open Access is protected by the Electricity Act, 2003. The role of the licensee is limited to that of a carrier.



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Provided that 1[such open access shall be allowed on payment of a surcharge] in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee :

Provided also that such surcharge and cross subsidies shall be progressively reduced 2[***] in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

3[Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.]

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access .

(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

The Electricity Act 2003 does not differentiate the captive user and third party buyer in



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providing open access except the payment of surcharge in case of third party purchase. The role of the distribution licensee shall be that of a common carrier for non-discriminatory open access. Therefore, the contention of the respondent that they provided open access only to third party purchasers violates the provision of "non-discriminatory" open access to the open access users as mandated by the Electricity Act 2003.

5.3.To analyse the prayer of the petitioner further, the relevant portion of the summary of findings of APTEL in its Order dated 31-10-2012 in Appeal No.36 of 2012 is reproduced below :

"51. Summary of our findings:-

(i) xxxxxxxxxx

(ii) TNEB issued two memos dated 30-12-2008 and 17-07-2009 permitting to go up to the sanctioned demand by third party purchase to HT consumers with connected load upto 500 KW and 250 KW respectively. In the memo dated 17-07-2009 issued by the Chairman, TNEB it has been specifically stated that the purchaser can use the purchased power over and above the original quota fixed for him under restriction and control measures upto the sanctioned demand. TNEB cannot take a contrary stand to its own memos dated 30-12-2008 and 17-07-2009.

(iii) In the order dated 07-09-2010, the State Commission after taking note of the memo dated 17-07-2009 from the Chairman, TNEB directed the TNEB to act in accordance with its own stand. Thus, the State Commission has erred in deciding the date of effect of its order to 17-08-2010.

(iv) The procurement of power through open access from third party is protected under the Electricity Act, 2003 and the State Commission could not restrict the operation of its order effective from 17-08-2010 as the same has to be made effective from the date when third party purchase through open access was permitted by the Electricity Board.

In the above order, the words "the State Commission could not restrict the operation of its order effective from 17-08-2010 as the same has to be made effective from the date when third party purchase through open access was permitted by the Electricity Board" are very significant. In line with the APTEL's Order, the Commission in its Order dated 25-02- 2013 in R.A.No.4 of 2013



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directed that the date of effect of the Commission's Order dated 07-09-2010 in M.P.No.6 of 2010, M.P.No.9 of 2010 and M.P.No.17 of 2010 and D.R.P.No.9 of 2010 shall be 17-07-2009. In this Order, the Commission took into account only one date i.e. 17-07-2009 the date on which the TANGEDCO permitted open access to HT consumers with sanctioned demand of 250 kW and above. However, as rightly pointed out by the petitioner, the TANGEDCO permitted third party power purchase for the consumers with sanctioned demand of 500 kW and above with effect from 30-12-2008 and for the consumers with sanctioned demand of 250 kW and above with effect from 17-07-2009. These are two different dates on which the TNEB permitted open access for HT consumers with different sanctioned demand limits. The Commission accepts that the effective dates of Commission's Order in R.A.No.4 of 2013 should have been 17-07-2009 for the consumers with sanctioned demand of 250 kW and above, and 30-12-2008 for the consumers with sanctioned demand of 500 kW and above. Accordingly, in line with the direction of the Hon'ble Appellate Tribunal for Electricity, the Commission hereby directs that the date of effect of the order dated 07-09-2010 of the Commission in M.P.No.6 of 2010, M.P.No.9 of 2010 and M.P.No.17 of 2010 and D.R.P.No.9 of 2010 shall be 17-07-2009 for the consumers with sanctioned demand of 250 kW and above, and 30-12-2008 for the consumers with sanctioned demand of 500 kW and above. To that extent the Commission's Order dated 25-02-2013 in R.A.No.4 of 2013 has been modified. The other part of the Commission's Order dated 25-02-2013 in R.A.No.4 of 2013 holds good. Consequently, TANGEDCO is directed to effect refund to the HT consumers accordingly. This exercise shall be done within the period of two months from the date of the issue of this order.

6. Appeal:-

An appeal against this order shall lie before the Appellate Tribunal for Electricity under section 111 of the Electricity Act, 2003 within a period of 45 days from the date of receipt of a copy of this order by the aggrieved person."

3. In view of the proposition considered and laid down, the present writ petitions are also require consideration. Accordingly, the impugned orders passed by the third respondent in proceedings dated 30.06.2010 are quashed and the respondents



are directed to comply with the directions issued by the Tamil Nadu Electricity Regulatory Commission in the subject matter.

4. With these directions, these writ petitions stand allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

Cse/Jeni

To

1. The Secretary,
Tamil Nadu Electricity Regulatory Commission,
19-A, Rukmini Lakshmi Pathy Salai,
(Marshall's Road),
Egmore, Chennai-600 008.
2. The Chairman,
Tamil Nadu Electricity Board,
144, Anna Salai, Chennai-600 002.
3. The Superintending Engineer,
Udumalpet Elec. Distribution Circle,
Tamil Nadu Electricity Board, Udumalpet.

W.P.Nos.18962 and 18963 of 2010

GJ(CO)
RGA(04/01/2022)