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IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 20th DAY OF OCTOBER 2021

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN

C.S. No.389 of 2011

M/s.Tidel Park Limited

No.4, Rajiv Gandhi Salai,

Taramani,

Chennai – 600 113.

...Plaintiff

Vs.

1. M/s.ArKay Energy(Rameswarm) Limited

GF 1A, Prince Villa,

15, Rajamannar Salai,

T.Nagar, Chennai – 600 017.

2. M/s.Ind Barath Power Infra Limited

Plot No.30-A, Road No.1,

Film Nagar, Jubilee Hills,

Hyderabad – 500 033.

...Defendants

(Amended as per order dated 03.01.2012

In Application No.6059 of 2011)

C.S.389 of 2011:-

Civil suit praying that this Hon'ble Court be pleased to pass a judgment and decree,

***a. declaring that the first defendant has defaulted to supply the contracted demand of power and that they are therefore liable to pay the difference in rate between Arkay Energy billing and TNEB Tariff (“Discount”) amounting to Rs.4,85,32,773/- [as in paragraph 26 (a) +**

(b)] for quantity of power not supplied under the Power supply



Agreement dated 10.11.2005 and consequently,-

***b. directing the first defendant to pay the Discount amount of Rs.4,85,32,773/- in terms of paragraph 26 [(a) + (b)]above;**

***c. directing the first defendant to pay interest pendente lite on the sum of Rs.4,85,32,773/- in prayer (b) from the date of filing the suit until realisation thereof;**

***Deleted as per order dated 26.02.2018 in App.No.1101 of 2018.**

a. declaring that the Plaintiff is entitled to interest at 16% p.a. on the investment of Rs.90 lakh from 05.12.2005 and for a consequent direction for payment of Rs.77,79,945/- being the money payable for interest at 16% p.a. on Rs.90 lakh from 05.12.2005 until 29.04.2011, the date of filing the suit;

b. directing the first Defendant to pay interest at 16% p.a. pendente lite on the investment of Rs.90 lakh from 30.04.2011, the date of filing the suit, until payment by the first Defendant of the value of the shares as assessed by the statutory auditor of the first Defendant in terms of the preliminary decree or the paid up value of the shares, i.e. Rs.90 lakh, whichever is higher;

c. pass a preliminary decree declaring that the second defendant is liable to purchase the whole of the shares in the first defendant held by the plaintiff in the terms of the shareholders agreement dated 10.11.2005, directing an inquiry by the statutory auditor of the first defendant as to the value of shares of the first defendant held by the plaintiff and fixing a date for purchase by the second defendant of the shares in the first defendant held by the plaintiff;

d. pass a final judgment and decree directing the second defendant to pay the value of the shares as assessed by the statutory auditor of the first



defendant in terms of the preliminary decree or to pay the paid up value of the shares, i.e. Rs.90 lakh, in terms of clause 3 of the shareholders agreement, whichever is higher.

e. directing the first and second defendants to jointly and severally pay the costs of the suit.

This civil suit having been heard on 30/09/2021 in the presence of Mr. Jose John for M/s. King & Partridge, advocates for the plaintiff herein and Mr. Anirudh Krishnan, advocate for the defendants herein and upon reading the plaint filed herein and the other exhibits therein referred to and upon perusing the evidence adduced therein and having stood over for consideration till this date and coming on this day before this court for orders in the presence of the said advocates for the parties hereto and this court having observed that the plaintiff has not availed the opportunity to sell the shares at the rate of Rs.19.05 per share, when the 1st defendant offered, thereafter, circumstances have changed, and the plaintiff cannot now harp on the terms of clause 3 and also make an additional claim of 16% interest on the investment, which is not contemplated under the agreement clause 6, in fact clause 6 of the shareholders agreement, which provides assured return of 16% is misinterpreted and misunderstood as interest and being a Public Sector Company, the delay in decision making had already



That the value of the 1st defendant company share be and is hereby declared as Rs19.05/per share as on 04/02/2010 as per the Chartered Accountant certificate dated 04.02.2010 furnished by the 1st defendant(Ex.P18).

2. That the 1st defendant herein be and is hereby directed to buyback the 90,000 shares from the plaintiff on payment of Rs.19.05/per share along with the interest at the rate of 12% from 04.02.2010 till the date of filing the suit, and thereafter, at the rate of 9% p.a. from the date of suit, till the date of decree and 16% p.a. from the date of decree till the date of realisation.

3. That in case, the decree amount and other monetary benefits gained put together fall short of the assured return of 16% p.a., the plaintiff herein shall be at liberty to file fresh suit for the shortfall if any, within a period of 3 years from the date of the decree.

4. That there shall be no costs of this suit.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE,
CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE
20th DAY OF OCTOBER 2021.

Sd/-

ASSISTANT REGISTRAR (Comm. cases)

//Certified to be true copy//

Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)



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R-15.11.2021

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C.S. No.389 of 2011

DECREE

DATED:20/10/2021

THE HON'BLE DR. JUSTICE
G. JAYACHANDRAN

FOR APPROVAL: 30/12/2021

APPROVED ON : 10/01/2022



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**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

Reserved on : 30.09.2021

Pronounced on : 20.10.2021

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN**C.S.No.389 of 2011**

M/s.Tidel Park Limited,
No.4, Rajiv Gandhi Salai,
Taramani,
Chennai – 600 113.

... Plaintiff

/versus/

1. M/s.Arkey Energy (Rameswaran) Limited,
GF 1A, Prince Villa,
15, Rajamannar Salai,
T.Nagar, Chennai – 600 117.

2. M/s.Ind Barath Power Infra Limited,
Plot No.30-A, Road No.1,
Film Nagar, Jubilee Hills,
Hyderabad – 500 033.

... Defendants

(Amended as per order dated 03.01.2012 in A.No.6059 of 2011)

Prayer:- This Suit is filed under Order IV Rule 1 of Original Side Rules read with Order VII Rule 1 of C.P.C.

(a). To declare that the Plaintiff is entitled to interest at 16% p.a on the investment of Rs.90 lakh from 05.12.2005 and for a consequent direction for payment of Rs.77,79,945/- being the money payable for interest at 16% p.a. on Rs.90 lakh from 05.12.2005 until 29.04.2011, date of



(b). To direct the first Defendant to pay interest at 16% p.a. pendente lite on the investment of Rs.90 lakh from 30.04.2011, the date of filing the suit, until payment by the first Defendant of the value of the shares as assessed by the statutory auditor of the first Defendant in terms of the preliminary decree or the paid up value of the shares, i.e., Rs.90 lakh, whichever is higher;

(c). To pass a preliminary decree declaring that the second defendant is liable to purchase the whole of the shares in the first defendant held by the plaintiff in the terms of the shareholders agreement dated 10.11.2005, directing an inquiry by the statutory auditor of the first defendant as to the value of shares of the first defendant held by the plaintiff and fixing a date for purchase by the second defendant of the shares in the first defendant held by the plaintiff;

(d). To pass a final judgment and decree directing the second defendant to pay the value of the shares as assessed by the statutory auditor of the first defendant in terms of the preliminary decree or to pay the paid up value of the shares, i.e. Rs.90 lakh, in terms of clause 3 of the shareholders agreement, whichever is higher;

(e). To direct the first and second defendants jointly and severally pay the costs of the suit and pass such further or other orders as may be deemed fit in the interest of justice.

For Plaintiff : Mr. Jose John for,
M/s. King and Partridge

For Defendants : Mr. Anirudh Krishnan



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J U D G M E N T

The Suit is filed for recovery of the money invested by the plaintiff in the Second defendant Company, pursuant to the Power Purchase Agreement dated 10.11.2005 with the first defendant and the Share Holders Agreement dated 10.11.2005 with first and second defendants.

2. The background facts leading to the dispute:-

The plaintiff M/s.TIDEL PARK is a public sector IT & ITES infrastructure services provider in Tamil Nadu. For easy reference (will be hereinafter referred as 'Captive Power Consumer' wherever necessary). The plaintiff is one of the share holders in the first defendant company, holding 90,000 equity shares of face value Rs.10/-. The first defendant M/s.ARKAY ENERGY (Rameshwaram) Limited is a 'Captive Power Generator' and the second defendant M/s.Ind Bharat Power Infra Limited (formerly known as Kanumuri Holdings Pvt Ltd) is the sister concern of the first defendants. The 3rd defendant substantially holds equity and preferential shares in the first defendant company.



3. Under the scheme of Electricity Act, 2003 and the Tamil Nadu Electricity Rules, 2005 framed thereunder to qualify as a 'Captive Power Generator', not less than 26% of the ownership is to be held by the captive user(s) and not less than 51% of the aggregate electricity generated in such plant, has to be consumed by the said captive users. Therefore, the plaintiff which own and operate the IT/ITES facility in a built up area of approximately 1.2 million sq.ft housing IT companies, for its power need negotiated with the defendants and on 10.11.2005 entered into two agreements for (i). Power Supply and (ii). Share Purchase on 10.11.2005.

(i). Power Supply Agreement ('PSA' in short) entered between the plaintiff and the first defendant (M/s.ARKAY ENERGY) ; and

(ii). Share Holders Agreement ('SHA' in short) entered between the plaintiff and the first defendant (ARKAY ENERGY - IMPLEMENTING COMPANY) and the second defendant (Kanumuri Holdings Private Limited – later renamed as M/s.IND BHARAT POWER INFRA LTD – PROMOTER COMPANY)

4. The essential obligation and undertaking in the Power Supply

Agreement:-

Under the Power Supply Agreement, the parties mutually



The first defendant:- As power generator to supply 26 million

Kwh units of power per year on firm basis and additional supply of 13 million units on non firm basis at the option of the captive consumer (the plaintiff) for the price agreed. In case of default in supplying power contracted demand under firm basis, the first defendant shall pay the discount per unit to the plaintiff for such quantity of power not supplied.

The plaintiff:- As captive consumer, shall evacuate the Monthly

Guarantee Energy to be purchased under firm basis and in case of failure, any loss of revenue due to sale of power at a rate lower than contracted will be borne by the plaintiff.

5. The essential obligations and undertaking in the Share

Holders Agreement:-

The plaintiff to invest Rs.90 lakhs towards the equity shares in the first defendant company. It shall have an assured return of 16% pa. On the expiry of Power Supply Agreement, if the plaintiff decides to transfer the whole or part of the equity shares held by it, the first offer has to be made to the second defendant and the price payable shall be based on prices determined in any one of the manners mentioned in clause 3 of the

agreement, vesting the right to option with the plaintiff. If the second



defendant declines or does not communicate its acceptance to buy the shares of the plaintiff within 30 days for the date of offer, the plaintiff may disinvest its shares to any other parties.

6. Though the Power Supply Agreement dated 10.11.2005 was for a period of 6 years from the date of commencement of supply, within a year there was short supply of power to the plaintiff. The defendants were not able to supply the committed 26 million units per year as firm supply. The 75 MW gas based captive power plant promoted by the defendants was not able to meet out its supply obligations to its captive consumers, including the plaintiff due to the change in gas quantity and quality supplied by GAIL. Citing the clause of “force majeure” and anticipating 70% reduction in supply, the first defendant vide its letter dated 28.09.2008 gave option to the plaintiff to either bear with the short supply and share the available power equitably among the other captive consumers or in alternate to terminate the Power Supply Agreement by mutual consent and get the refund of the amount invested. This triggered spate of communications between parties as narrated below.

7. In the letter dated 15.05.2008, the plaintiff/Tidel Park

Limited posed certain queries relating to, (a). total power generated by the



first defendant, (b).power exported to the plaintiff day wise and (c). the gas allotted and consumed. In response to these queries, the 1st defendant in its letter dated 21.06.2008 replied that, the information sought cannot be furnished. But added GAIL has continuously reducing the supply of gas. There is power generation failure to a considerable extent of capacity, resulting in impossibility to make the contracted quantity of power to the captive consumers. If the plaintiff is unable to bear with the situation, the plaintiff may terminate the agreement and the first defendant is ready to buy back the equity shares. The proposal to buy back the shares of the plaintiff was again reiterated by the first defendant in the letter dated 05.11.2008.

8. While so, by the end of April 2009, three of the shareholders in the first defendant Company who were the captive consumers withdrew from the company and sold their shares to the promoters. So, the first defendant vide letter dated 18.04.2009 informed the plaintiff that, due to the withdrawal of three share holders, the requirement of minimum 26% of the share holders as captive consumer is breached. As a result, the first defendant company had lost the qualification of a captive power generator. Consequently, the plaintiff also lost the status of captive consumer.



9. Thereafter, on 13.11.2009, the plaintiff agreed to disinvest its shares and sought for the statutory audit valuation from the defendants. In response, the first defendant forwarded the Chartered Accountant's certificate dated 04.02.2010 indicating the Intrinsic value of the first defendant company equity share of face value Rs.10/- is worth Rs.19.05 each. The plaintiff Company, on receipt of this Chartered Accountant certificate, reverted back to the first defendant for clarification on the CA's certificate which was not from the statutory auditor M/s.B.S.R & Company but from M/s.Manohar & Venkata. Thereon, there was no response from the first defendant.

10. The plaintiff for reasons stated in their letter dated 19.01.2011 terminated the Power Supply Agreement. Vide letter dated 23.02.2011, the plaintiff reiterating its right to elect either the intrinsic value of the shares as assessed by the statutory auditors or the paid up value of shares along with compound interest at 13.5% p.a whichever is advantageous and in addition to the value of the shares, its entitlement of 16% assured return per annum on the investment. Hence, the plaintiff called upon the first defendant to forward necessary information to enable the plaintiff to exercise its option under the Shareholders agreement. The



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11. Gist of pleadings:-

Plaint:

The first defendant under the Power Purchase Agreement dated 10.11.2005, agreed to supply 21,67,000 units of power every month to the plaintiff. At no time did the first defendant supplied the said quantity of power. From the inception, there was short supply of power varying from 37% to 74%. From April 2008, the plaintiff did not receive any power from the first defendant. The power supply to the plaintiff was illegally stopped by the first defendant. The first defendant, on 25.04.2008 wrote a letter alleging non-payment of bills. In fact, the consumption bills raised the first defendant did not match the real consumption and there was discrepancies in calculating the peak hour consumption and night hour consumption rebate. Those were the reasons for withholding the bills. Hence, based on the terms of the agreement in the Power Purchase Agreement dated 10.11.2005, the plaintiff sought for declaration that the first defendant is a defaulter in supplying the contracted demand of power, so liable to pay the discount amount of Rs.4,85,32,773/- and interest pendent lite.

12. Relying upon the Share Holders Agreement dated

10.11.2005, which permits the plaintiff to disinvest the shares held in the first defendant company in the manner prescribed under clause 3 and 4 and



the assurance of 16% return for its investment of Rs.90,00,000/- under clause 6, relief of declaration that, the plaintiff is entitled for interest at 16% from the date of investment till realisation, in addition to the value of the shares as per the assessment of the statutory auditor of the first defendant company and consequential reliefs sought.

13. Written Statement:-

The written statement of the first defendant is adopted by the second defendant. In the written statement it is contented that, as per the scheme of the Share Holders Agreement, the right of first refusal is vest with the second defendant. The second defendant did not communicate to the plaintiff its interest to buy the shares within 30 days from the date of offer. Therefore, under clause 4 of the Share Holders Agreement, the plaintiff is at liberty to disinvest the shares to any other third party other the second defendant and its associates. The claim of 16% interest as assured return is not in addition to the price of the shares. After disinvesting the shares either under clause 3 or under clause 4, if the plaintiff is unable to recover the assured return of 16 %, only then, the plaintiff will get the right to sue the defendants for the shortfall.



14. After three of its captive customers sold their shares to the promoters, the shareholding by the captive customers fall below 26%. As a result, the first defendant company lost the status of ‘Captive Generating Plant’ and the Power Supply Agreement has worked itself out. This change of status was informed to the plaintiff. Under the said circumstances, when the plaintiff offered to sell the shares, the first defendant furnished the auditor’s report, with certificate regard the value of the shares. The plaintiff, for one reason or the other, never took up the option. The condition precedent for granting 16% return on the investment is based on the compliance of power supply agreement by the plaintiff. The plaintiff has failed to pay its dues for the power supplied and defaulted in making payment citing frivolous reasons. Therefore, the plaintiff is not entitled for the assured 16% returns. The short supply of power was due to reduced supply of gas by GAIL. This fall within the definition of ‘force majeure’ under Article VIII Clause 2.6 of the Power Supply Agreement. After the termination of Power Supply Agreement on 19.01.2011, the plaintiff is not entitled for any interest on its investment. When there is an option to sell the shares to any third parties, the plaintiff cannot compel the defendants to purchase the shares held. Without exercising the said option, the plaintiff has rushed to the Court, hence the suit is liable to be dismissed.



15. Pending suit, this Court in the Application filed by the first defendant held that, under Article X of the Power Supply Agreement dated 10.11.2005 any dispute or differences arisen between the parties, is agreed to be resolved through arbitration, therefore dispute regarding power supply raised by the plaintiff to be referred to arbitration. Accordingly, the proceedings against the first defendant was stayed. The above order passed on 17.01.2013 in the Application No.4804 of 2011 in C.S.No.389 of 2011 was challenged before the Division Bench of this Court and the Division Bench of this Court confirmed the order in O.S.A.No.313 of 2013 dated 08.02.2017.

16. As a consequence, the pleadings was amended by the plaintiff. Reliefs (a) to (c) arising out of the Power Supply Agreement were deleted. The Court fees paid for those prayers was also allowed to be refunded. It is now informed across the bar by the Learned Counsels that, in the Arbitration proceedings award, passed in favour of the plaintiff.

17. Issues:-

Based on the amended plaint, the written statement of the second defendant as adopted by the first defendant, the following issues framed for consideration:-



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“1. Whether the plaintiff is entitled to interest at the rate of 16% per annum from 05.12.2005 till realization, for the investment of Rs.90 lakh made in the 1st Defendant Company?

2. Whether the 2nd Defendant is liable to purchase the shares of the 1st Defendant Company held by the plaintiff, as per the shareholders agreement dated 10.11.2005?

3. If the answer to Issue No.2 is in the affirmative, what is the value that the 2nd Defendant has to pay for the shares?

4. Whether the suit filed by the plaintiff is premature and consequently whether the suit is liable to be dismissed?

5. Whether the 1st Defendant or 2nd Defendant are liable to pay the cost of the suit to the plaintiff?

6. To what other reliefs is the plaintiff entitled to?”

18. Trial:-

The parties went before the Additional Master - I for recording their evidence. On behalf of the plaintiff Mr.Ganesh Babu, the General Manager of the plaintiff Company was examined as PW-1. Ex.P-1 to Ex.P-40 were marked in support of the plaintiff case. On behalf of the defendant, Mr.T.S.Das Vice President (Commercial) was examined as DW-

1. One document namely the letter of authorisation to give evidence marked

**19. Findings:-**

Prior to execution of the two agreements namely the Shareholders Agreement (Ex.P-7) and the Power Supply Agreement (Ex.P-8), there were few letter correspondence between the plaintiff and the 1st defendant. Those letters are marked as Ex.P-1 to Ex.P-4. Reading these letters, the assurance given by the first defendant to allure the plaintiff to invest could be palpable seen.

20. Particularly in Ex.P-1 dated 08.07.2005, the first defendant has assured uninterrupted 100% capacity generations and even if power is not supplied by them, in the event of any major unforeseen circumstances, TNEB (Tamil Nadu Electricity Board) obligated to supply power to the participating industries. In Ex.P-2 letter dated 26.07.2005, the first defendant had informed that, the power generation will commence by November, 2005 and the investment by the plaintiff will carry assured return of 16% p.a. from the date of investment. The plaintiff thereafter, getting further information from the first defendant had entered into the Power Supply Agreement and the Share Holders Agreement. The first and second defendants are signatories to the Share Holders Agreement as the promoter company and implementing company, respectively.



21. To avail the statutory concessions provided under the Electricity Act 2003, Rule 3 of the Electricity Rules, 2005 mandates that, the captive user/consumer should be a shareholder in the captive generation company and the said company should supply not less than 51% of its production to the captive users. This has prompted the plaintiff to invest Rs.90,00,000 in the first defendant Company since the plaintiff housing several IT/ITES desired to ensure uninterrupted firm power supply. The parties have agreed that the term of the power supply agreement will be 6 years and on expiry of the power supply agreement, the plaintiff, if decides to transfer its share (whole or in part), should first offer it to the second defendant. If the second defendant not inclined to buy or refuse to buy, the plaintiff can sell it to third party. Nowhere, in the Share Holders Agreement Ex.P-7, the Court could find a clause which confers right on the plaintiff to force the first defendant to buy back its shares or duty or obligation on the first defendant to buy back the shares. The terms of the shareholders agreement only indicates that, in case, the plaintiff decides to disinvest its share, he should first offer to the M/s.Kanumuri Holdings the second party to the agreement (i.e., the second defendant). If the second defendant accepts the offer, the price shall be fixed in any one of the manners enumerated in clause 3. Being the holder of the shares, the option to choose any one of the manners enumerated under clause 3 for fixation of price is



reserved with the plaintiff. If the parties could not arrive at a consensus over the price, then under clause 4 the plaintiff shall fetch any third party buyer other than the 2nd defendant and its associates.

22. The preamble of the Share Holders Agreement dated 10.11.2005 reads as below:-

SHAREHOLDERS' AGREEMENT

“Agreement entered into this 10th day of November 2005 at Chennai between TIDEL Park Limited, a Company registered under the Companies Act, 1956, having its registered office at No.4, Canal Bank Road, Taramani, Chennai - 600 113, hereinafter referred to as "the First Party" (which expression shall unless repugnant to the context or meaning thereof include its successors and assigns) of the First Part, M/s.Kanumuri Holdings Private Limited (Promoter Company), a company registered under the Companies Act, 1956 and having its registered office at Plot No.30-A, Road No. 1, Film Nagar, Jubilee Hills, Hyderabad - 500 033, hereinafter referred to as "the Second Party" represented by Mr. K. Raghu, Chairman, (which expression shall unless repugnant to the context or meaning thereof include its successors and assigns) of the Second Part and M/s.ArKay Energy (Rameswarm) Ltd (implementing company), a company registered under the Companies Act, 1956 and having its registered office at Plot

No.30-A, Road No.1, Film Nagar, Jubilee Hills, Hyderabad - 500 033, hereinafter referred to as "the Third Party" (which expression shall unless repugnant to the context or meaning thereof include its successors and assigns) of the Third Part."

23. The Parties under clauses 3, 3-A and 4 had agreed about the manner in which the shares of the plaintiff could be disinvested. The said clauses reads as below:-

"3. On the expiry of the Power Supply Agreement, if the First Party decides to transfer the whole or part of the equity shares held by it in the Third Party, the first offer will be made to the Second Party or his nominee and the price payable in respect thereof shall be based on the prices determined in accordance with one of the following manners, option of which is rest with the First Party:

i). The paid up value of the shares plus interest thereon at the rate of 13.5% (thirteen and half per cent) compounded yearly from the date of subscription minus dividends paid by the Third Party upto the date of offer; or

ii). The assessed value of the shares as determined by the Auditors of the Third Party on the basis of the net worth of the Third Party as on the date of the offer; or



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iii). *The average price of the shares ruling on the Chennai Stock Exchange on which the shares are quoted for the three months preceding the date of the offer. The highest price of other stock exchanges will be taken on a day when there is no quote in the Chennai stock Exchange.*

DATE OF OFFER

i). *In case where the Second Party or his nominees agrees to buy the shares held by the First Party consequent to the enquiry by the First Party, the date of offer shall be the date on which the Second Party or his nominees communicates his willingness to buy the shares held by the First Party.*

ii). *In case, where the Second Party or his nominees makes the first offer to buy the First Party's shares that date will be treated as the date of offer.*

3-A. *However, if as a result of any other agreement or instrument executed or understanding arrived at between the parties hereto, the First Party disinvests the shares held by it in the Third Party in favour of the Second Party or any nominee of the Second Party, the Second Party agrees that it shall pay to the First Party or cause to be paid to the First Party such value for the disinvested shares as shall not be less than the par value of the shares disinvested. The Second Party agrees that the terms of this clause shall be specifically enforceable.*



from the first defendant through its letter dated 28.04.2018 (Ex.P-10). The relevant portion of the letter reads as below:-

“As referred to already the above incident would constitute an act of force majeure which is beyond our control. We are therefore to inform you that effective from 26.04.2008 or thereabout there is bound to be power generation failure to a considerable extent of the capacity resulting in impossibility to make available the contracted quantity of power to the captive consumers.

We are addressing this to give you an opportunity to either bear with the situation and purchase the available power equitably among the captive consumers or in the alternative to have the power supply agreement terminated by mutual consent and get a refund of the amount invested by you towards equity without any further liability on the part of each other.”

26. Nearly after 20 months, the plaintiff has come forward to accept the offer made by the first defendant. In the letter dated 13.11.2009, the plaintiff had wrote to the defendants 1 and 2 that the Board of Directors of Tidel Park had considered the proposal of the first defendant to buy back the shares and have agreed to sell the shares in accordance with the shareholders agreement dated 10.11.2005.



27. In this letter dated 13.11.2009, the plaintiff has further stated that, “In the terms of the shareholders agreement aforesaid, Tidel Park is entitled to choose the option upon which it will disinvest the shares. Accordingly and in order for the Tidel Park to elect its option, it is requested that the statutory auditor's valuation of the shares of M/s.Arkey Energy (Rameswaram) Limited, may be furnished at the earliest”.

28. On reverting back to the terms of the agreement in Ex P-7, Clause 3(ii) we find that, the assessed value of the shares to be determined by the auditors of the third party (i.e., the first defendant). The agreement does not say it should be determined by a statutory auditors. However, the plaintiff was keen on getting the valuation from the statutory auditor of the first defendant company. The Chartered Accountant Valuation certificate annexed to the first defendant letter dated 12.02.2010 (Ex.P-18) was not accepted by the plaintiff. At this stage, the negotiation between the plaintiff and the first defendant got aborted.

29. Under clause 6 of the share purchase agreement, the 1st defendant has guaranteed and assured return of 16% per cent per annum on the investment. This guarantee of assured return is a stand alone clause independent of the other clauses.



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30. In common parlance, “returns on investments in shares” means the dividend and other monetary benefits which may accrue on the shares. The returns on share investment is not equivalent to interest. If clause 6 of the shareholders agreement to be implemented in isolation, as pointed out by the Learned Counsel for the defendant, it may amount to derivative in nature falling foul of the definition a forward contract.

31. The Learned Counsel for the defendant relying upon the judgment of this Court rendered in *Rajshree Sugars and Chemicals Limited -vs- Axis Bank* reported in *2008 Online Mad 746*, emphasis that, clause 6 of the shareholders agreement if interpreted in the way, the plaintiff wants to interpret 16% interest on share investment will amount to forward contract and such contract which is derivative in nature is permissible under Section 18-A, Securities Contracts (Regulation) Act, 1956, only if such contract are;

“18-A. Contracts in derivative:-

- (a) traded on a recognised stock exchange;
- (b) settled on the clearing house of the recognised stock exchange; or in accordance with the rules and bye-laws of such stock exchange.”



32. In response to this argument, the Learned Counsel for the plaintiff would submit that, the shareholders agreement is not a contract to buy and sell securities. The shareholders agreement (Ex.P.7) is not a forward contract. On the other hand the investment was made with a lock in period of six years commensurating the period of Power Supply Agreement agreement. To fall under the definition of forward contract, the contract must be prefixed price/amount and there must be a preexisting security. In the subject agreement, the parties have an obligation to buy and sell at the predetermined and on the predetermined date. In the absence of those characters, the shareholders agreement cannot be termed as a forward contract or derivative in nature.

33. This Court have no doubt about the character of the share purchase agreement. Court is in full agreement with the submissions made by the Learned Counsel for the plaintiff for the reason that, reading of clause 6 in isolation may give an illusive impression that, it is a forward contract with prefixed price and preexisting security. However, it is not so because, clause 6 of the Shareholders Agreement, has to be read with the other clauses in the Shareholders agreement as well as in Power Supply agreement because 16% assured return guaranteed in clause 6 depends upon the concession gained by the shareholder as “Captive consumer” and the dividend, bonus shares if any, given during this period.



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34. In *Rajshree Sugars and Chemicals Limited* case cited supra, the Court has held that, a derivative in a financial instrument if it satisfies,

“(a) whose value changes in response to the change in a specified interest rate, security price, commodity price, foreign exchange rate, index of prices or rates, a credit rating or credit index, or similar variable (sometimes called the ‘underlying’);

(b) that requires no initial net investment or little initial net investment relative to other types of contracts that have a similar response to changes in market conditions; and

(c) that is settled at a future date.”

Actually, derivatives are assets, whose values are derived from values of underlying assets. These underlying assets can be commodities, metals, energy resources, and financial assets such as shares, bonds, and foreign currencies.

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7. There are atleast 4 categories of derivatives, commonly in use. Some of them are traded through exchanges and they are known as Exchange-Traded-Derivatives (ETD). Others are traded directly between the parties and they are known as Over-The-Counter (OTC) derivatives. The 4 categories of derivatives are as follows:—

(1) Forwards: A contract between two parties.

One party agrees to buy a commodity or financial

asset on a date in the future at a fixed price, while the other agrees to deliver that commodity or asset at the predetermined price. These are not traded on exchanges because they are negotiated directly between two parties.”

35. As far as the investments made by the plaintiff in the shares of the 3rd defendant's Company and the guarantee of assured return doesn't fall within the definition of derivative. For the reason that, neither under clause 3 nor under clause 6 of the shareholders agreement, there is any compulsion on the parties to buy the shares on a fixed future date, for a fixed price. As pointed out earlier, under Clause 3 of the shareholders agreements doesn't even compel the defendants to buy back the shares. It is only an optional right. The price to buy back the share or date also not fixed. It is neither speculative or derivative to hold the clause as void. However, the clause which says, 16% assured return guaranteed by the defendants to be read along with clause 3, 3-A and 4 of the shareholders agreement and also the terms of Power Supply Agreement. If the plaintiff decides to disinvest his shares, the price for which the shares are sold to be taken into account along with the returns so far gained or accrued on the shares. If money realized fall short of 16% p.a on the investments then and only then,



36. Strangely in this case, the relief so couched that, the plaintiff wants to shoot two sparrows in a single arrow. While seeking a preliminary decree of declaration the 2nd defendant is liable to purchase whole of the shares as per the value fixed by the statutory auditors report of the 1st defendant and pay the value, also in addition seeks for return of the investment along with 16% interest.

37. The declaratory relief regarding the liability on the 2nd defendant to purchase whole of the shares in the 1st defendant's Company itself not maintainable since there is no cause of action for the said relief. All along, the plaintiff was only negotiating with the 1st defendant for the buyback of shares. No doubt, the 2nd defendant is sister concern of the first defendant and the entire transactions was known to the 2nd defendant but then, when the 1st defendant offered price of Rs.19.05 per shares based on the Chartered Accountant certificate, it was the plaintiff who refuse to accept the same but had insisted the first defendant is bound to produce statutory auditors' report. When the agreement never contemplate the statutory auditors' report, the plaintiff ought not to have insisted for statutory auditor report or should have exercise the alternate right under clause 4 of the shareholders agreement and should have sold the shares to any other third parties.



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38. On harmoniousness reading of Shareholders Agreement

(Ex.P.7) particularly clause 3, 3-A, 4 & 6, the right of the plaintiff while offering its shares to the 2nd defendant, the price should be ascertained in one of the following manners:-

“i). the paid up value of the shares plus interest thereon at the rate of 13.5% (thirteen and half per cent) compounded yearly from the date of subscription minus dividends paid by the Third Party upto the date of offer; or

ii). the assessed value of the shares as determined by the Auditors of the Third Party on the basis of the net worth of the Third Party as on the date of the offer; or

iii). the average price of the shares ruling on the Chennai Stock Exchange on which the shares are quoted for the three months preceding the date of the offer. The highest price of other stock exchanges will be taken on a day when there is no quote in the Chennai stock Exchange.”

39. The Learned Counsel for the defendant submitted that the

1st defendant offered Rs.19.05 per share as early as February 2010. The

plaintiff failed to accept the price suggested and also not opted to exercise



its right under clause 4 of the shareholders agreement. Therefore, after refusal to accept the offer, the plaintiff cannot insist for the 13.5% compound interest and buyback clause or assured 16% return guaranteed. The plaintiff ought to have dis-invested long back exercising the right under clause 4 of the shareholders agreement and ought to have mitigated its loss. The failure on the part of the plaintiff to take appropriate decision at appropriate time should not be mulcher on the defendant. Further, the Learned Counsel would submit that the defendant is not liable to pay any interest for the investment, after expiry of 30 days from the last date on which the plaintiff offered the shares held by it vide letter dated 22.03.2011.

40. In view of the above facts, this Court holds that the prayer to declare the interest at the rate of 16% p.a on the investment of Rs.90,00,000/- is not maintainable. What assured under the agreement is 'returns' and not interest. Calculating the returns on shares invested depends on several variables and data in the absence of those particular plaintiff not entitled for this relief. The consequential direction to pay Rs.77,79,945/- being the money payable for interest at 16% p.a on the investment also not maintainable.



41. The declaration of entitlement of 16% return is subject to proof of monetary benefits so far accrued on the plaintiff's share. In the absence of any material, the declaration of interest on the investment at the rate of 16% p.a cannot be granted. Having decided to disinvest the shares by invoking Clause 3 of the shareholders agreement, it is to be noted that, the return assured is subject to the money likely to be realized on disinvestment of the shares.

42. Clause 6 of the Shareholders agreement only assures return of 16% and not interest at the rate 16% p.a. The meaning of 'returns for the investment' and 'interest on investments' are two different expression. They are not interchangeable. The return includes interest but not vice versa. Hence, the prayer of declaration regarding entitlement of 16% interest and consequential direction for payment of Rs.90,00,000/- and Rs.77,79,945/- are declined.

43. For the same reason, the claim of 16% p.a *'pendente lite'* on the investment, till the payment also declined. The relief to ascertain the value of the shares by the statutory audit of the 1st defendant is not inconsonance with the clause 3(ii) of the shareholders agreement. When

the parties have earlier agreed for an auditor to access the value, the plaintiff



cannot insist for statutory auditor even though, the assessment of the statutory auditor may be more persuasive. Court cannot travel beyond the agreement and substitute the intention of the signatories to the agreement.

44. In view of this Court, for the first time, the plaintiff has expressed his intention and option to disinvest the shares on 13.11.2009 through (Ex.P.15) and vide letter dated 23.02.2011 (Ex.P.27), the plaintiff has claimed the value of the share in addition to 16% annual assured interest on the investment. While the terms of the agreement is clear and unambiguous about the assured returns and the process for disinvestment. The plaintiff misinterpreting the clauses of agreement had laid the suit for value of the shares as fixed by the statutory Auditor as well as 16% interest. By wrongly construing that, the minimum guarantee of assured return as “assured interest” and the same is in addition to the valuation fixed for the shares.

45. The relief of declaration of “16% interest” is not based on the terms of the contract. Further, even if the relief of declaration is to be construed as 16% returns on investment, the suit is not sustainable since it suffers bereft of details and facts. In so far as the relief of preliminary



defendant held by the plaintiff. Clauses 3, 3-A and 4 of the shareholders agreement read together does not contemplates any compulsory obligation on the 2nd defendant/Ind Barath Power Infra Limited, to purchase the shares from the plaintiff. It is an optional right. The 2nd defendant may accept or decline the offer made by the plaintiff. The Court cannot compel the defendant to purchase the shares from the plaintiff. It is always open for the plaintiff to exercise its right under clause 4 of the Shareholders Agreement and sell the shares to any third party since the defendant had not exercised the right of purchase within 30 days from the date of offer. The contract between the plaintiff and the defendants are governed by the terms of the contract and beyond the agreed terms, except on equity the Court cannot read down the terms of contract.

46. For the reason obviously known, the plaintiff has not availed the opportunity to sell the shares at the rate of Rs.19.05 per share, when the 1st defendant offered. Thereafter, circumstances have changed. The plaintiff cannot now harp on the terms of clause 3 and also make an additional claim of 16% interest on the investment, which is not contemplated under the agreement clause 6. In fact clause 6 of the shareholders agreement, which provides assured return of 16% is misinterpreted and misunderstood as interest.



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47. If the terms of agreement are interpreted strictly and the relief sought, the Suit is liable to be dismissed. If this Court dismiss the suit for mis-joinder of cause of action and misconception of fact, with liberty to file fresh suit, it will put the parties to square one and perpetuate the litigation. Being a Public Sector Company, the delay in decision making had already cost heavily to the parties. Hence to mitigate and to meet the ends of justice, the relief sought in the suit is moulded and suit allowed on the below terms:-

(a). It is declared that the value of the 1st defendant Company share as Rs.19.05 per share as on 04.02.2010 as per the Chartered Accountant Certificate dated 04.02.2010 furnished by the 1st defendant (Ex.P.18).

(b). The 1st defendant is directed to buyback the 90,000 shares from the plaintiff on payment of Rs.19.05/per share along with interest at the rate of 12% from 04.02.2010 till the date of filing the suit. Thereafter, at the rate of 9% p.a from the date of suit, till the date of decree and 16% p.a from the date of decree till the date of realisation. In case, the decree amount and other monetary benefits gained put together fall short of the assured return of 16% p.a. The plaintiff is at liberty to file fresh suit for the shortfall if any, within a period of 3 years from the date of the decree.



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48. Accordingly, the Suit is decreed on the above terms. No costs.

List of Witness examined on the side of the Plaintiff:-

Mr. Ganesh Babu (P.W.1)

List of Witness examined on the side of the Defendants:-

Mr.T.S.Das (D.W.1)

List of the Exhibits marked on the side of the Plaintiff:-

Sl.Nos.	Exhibits	Dated	Description of documents
1.	Ex.P.1	08.07.2005	Letter from 1st Respondent to Plaintiff
2.	Ex.P.2	26.07.2005	Letter from 1st Respondent to Plaintiff
3.	Ex.P.3	02.11.2005	Letter from Plaintiff to 1 st Defendant
4.	Ex.P.4	03.11.2005	Letter from 1st Respondent to Plaintiff
5.	Ex.P.5	03.11.2005	(Extract of Board Resolution of 1 st Defendant
6.	Ex.P.6	03.11.2005	Extract of Board Resolution of 2 nd Defendant
7.	Ex.P.7	10.11.2005	Shareholders Agreement
8.	Ex.P.8	10.11.2005	Power Supply Agreement
9.	Ex.P.9	17.08.2006	Letter from Plaintiff to 1 st Respondent
10.	Ex.P.10	28.04.2008	Letter from 1 st Respondent to Plaintiff
11.	Ex.P.11	15.05.2008	Letter from Plaintiff to 1 st respondent
12.	Ex.P.12	21.06.2008	Letter from 1 st respondent to Plaintiff
13.	Ex.P.13	05.11.2008	Letter from 1 st respondent to Plaintiff
14.	Ex.P.14	18.04.2008	Letter from 1 st Respondent to Plaintiff
15	Ex.P.15	13.11.2009	Letter from Plaintiff to 1 st Defendant



Sl.Nos.	Exhibits	Dated	Description of documents
16.	Ex.P.16	14.12.2009	Letter from Plaintiff to 1 st Defendant
17.	Ex.P.17	27.01.2009	Letter from 1 st respondent to Plaintiff
18.	Ex.P.18	12.02.2010	Letter from 1 st respondent to Plaintiff
19.	Ex.P.19	22.02.2010	Letter from Plaintiff to 1 st Defendant
20.	Ex.P.20	17.03.2010	Letter from Plaintiff to 1 st Defendant
21.	Ex.P.21	09.04.2010	Letter from Plaintiff to 1 st Defendant
22.	Ex.P.22	26.04.2010	Letter from Plaintiff to 1 st Defendant
23.	Ex.P.23	16.10.2009	Letter from Plaintiff to 1 st Defendant
24.	Ex.P.24	27.10.2009	E-mail from Plaintiff to 1 st Defendant
25.	Ex.P.25	28.10.2009	Letter from Plaintiff to 1 st Defendant
26.	Ex.P.26	29.10.2010	Letter from Plaintiff to 1 st Defendant
27.	Ex.P.27	23.02.2011	Letter from Plaintiff to 1 st Defendant
28.	Ex.P.28	23.02.2011	Letter from Plaintiff to 2 nd Defendant
29.	Ex.P.29	22.03.2011	Letter from Plaintiff to 1 st Defendant
30.	Ex.P.30	05.07.2019	Letter of authority
31.	Ex.P.31		Index of documents filed in the arbitration proceedings.
32.	Ex.P.32	24.03.2009	Letter dated 24.03.2009 of Meenakshi Udyog addressed to 1 st defendant.
33.	Ex.P.33	25.03.2009	Letter dated 25.03.2009 of Sri Balaganapathy Mills addressed to 1 st defendant.
34.	Ex.P.34	25.03.2009	Letter dated 25.03.2009 of Kamachi Steels addressed to 1 st defendant.
35.	Ex.P.35	30.04.2009	Letter dated 30.04.2009 of Tulsyan NEC Ltd.
36.	Ex.P.36	15.09.2009	Letter dated 15.09.2009 of Ashok Leyland.
37.	Ex.P.37		Agreement dated 31.10.2009 with Exide Industries Limited.
38.	Ex.P.38		Form-20B for the year ending 2008.
39.	Ex.P.39		Form-20B for the year ending 2009.
40.	Ex.P.40		Form 20B for the year ending 2010.



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List of the Exhibits marked on the side of the Defendant:-

Sl.Nos.	Exhibits	Dated	Description of documents
1.	Ex.D.1	28.03.2018	Original Board Resolution.

Sd./-G.J.J.,

20/10/2021

//Certified to be true copy//

Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.