IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.08.2021

CORAM :

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

Writ Petition No.16614 of 2021
and W.M.P.No.17606 of 2021

OPG Business Centre Private Limited
Rep.by its Director, Old No.4, New No.7
Thiru.Vi.Ka.3rd Street, Royapettah High Road
Mylapore, Chennai 600 004. .... Petitioner

-Vs-

1 The Chairman
Tamil Nadu Generation and Distribution
Corporation Limited 144 Anna Salai
Chennai- 600 002.

2 Chief Engineer / NCES
Tamil Nadu Generation and Distribution
Corporation Limited 2nd Floor Eastern Wing
144 Anna Salai Chennai- 600 002.

3 Tamil Nadu Electricity Regulatory Commission
Rep by its secretary 4th Floor
SIDCO Corporate Office Building
Thiru.Vi.Ka. Industrial Estate Guindy
Chennai- 600 032.

4 The Superintending Engineer
TANGEDCO Tirunelveli Electricity
Distribution Circle Maharaja Nagar
Tirunelveli- 627 011. .... Respondents

Prayer : Writ Petition under Article 226 of the Constitution of India praying for the issuance of a Writ of Mandamus directing the respondents to allow the petitioner company to give effect to the petitioners termination letter dated 02.03.2020 and terminate the current arrangement of sale of electricity generated to the TANGEDCO and allow the petitioner request in letter dated 01.07.2021 and 05.07.2021 seeking change in Utility i.e to move from the category of sale to Board to the category of sale of power to captive consumption / Third Party in terms of its right of open access to utilise the electricity generated and also release all dues pending for power supplied to the Respondents from the petitioner's generating units bearing HTSC Nos.79224722948 and 79224722949 which stood at Rs.1,78,58,620.46/- (Rupees One Crore Seventy Eight Lakhs Fifty Eight Thousand Six Hundred Twenty and Paise Forty Six Only) as on June 2021 together with the mandated interest on delayed payment.

For Petitioner	:	Mr.Rahul Balaji
For Respondents	:	Mr.M.Abul Kalam, Standing Counsel

ORDER

Since the issue involved in the present writ petition is squarely covered by the earlier orders passed by this Court, the main writ petition itself is taken up for final hearing on the consent given by either side.

2. This writ petition has been filed for the issue of a Writ of Mandamus directing the respondents to allow the petitioner to give effect to the termination letter dated 02.03.2020 and terminate the current arrangement of the sale of electricity generated to TANGEDCO and allow the petitioner to change the utility and move from the category of 'Sale to the Board' to the category of 'Sale of Power to Captive Consumption / Third Parties' in terms of the right to open access and for a

further direction to the respondents to make the payment that is due and payable to the petitioner along with interest.

3. The petitioner Company has two Wind Energy Generators bearing HTSC Nos.79224722948 and 79224722949 at Radhapuram, Tirunelveli District. The petitioner Company entered into two Energy Purchase Agreements dated 16.03.2019 with the respondent TANGEDCO to sell electricity generated by it. Due to huge pending dues payable to the petitioner by the TANGEDCO and the petitioner not being able to carry on with the existing arrangements, the petitioner issued Termination Letter dated 02.03.2020 requesting the respondents to terminate the purchase agreements and to process the application submitted by the petitioner for open access to enable the petitioner to utilize the energy for captive consumption or supply the same to third parties. The petitioner was also claiming for a sum of Rs.1,78,58,620.46/- (Rupees One Crore Seventy Eight Lakhs Fifty Eight Thousand Six Hundred Twenty and Paise Forty Six Only) towards the amount due and payable by the respondents for the energy generated by the petitioner and supplied to TANGEDCO under the purchase agreements. Since there was no response on the side of the respondents, the petitioner also made a further request through two letters dated 01.07.2021 and 05.07.2021 and this also did not evoke any response and therefore, left with no other option, the present writ petition has been filed before this Court seeking for appropriate directions.

4. The issue involved in the present writ petition is squarely covered by the

judgment of the Division Bench in W.A.No.4189 of 2019 etc., batch by order dated 18.02.2020, wherein the Hon'ble Division Bench had reiterated the right available under the agreement. The relevant portions in the judgment are extracted hereunder.

> " *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......

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."*

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 worser 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. "*

5. It is clear from the above order that, the Division Bench had recognized the right and had permitted the appellants therein for a change over. The Division Bench has further directed TANGEDCO to make payments for the electricity purchased. The present case will also squarely fall within the dictum of the Hon'ble Division Bench.

6. In view of the above, there shall be a direction to the first respondent to act upon the letters given by the petitioner on 01.07.2021 and 05.07.2021 and permit the petitioner to change the utility and also release all the dues that are pending for the power supplied by the petitioner to the respondent from the generating units bearing HTSC Nos. 79224722948 and 79224722949. This process shall be completed by the first respondent within a period of six weeks from the date of receipt of a copy of this order. The petitioner is directed to make a fresh representation to the first respondent along with all the relevant documents and also a copy of this order.

7. The learned Standing Counsel appearing on behalf of the TANGEDCO submitted that, pursuant to the order passed by this Court recently, commenting upon

the functioning of the TANGEDCO and the difficult position in which it is placed, the Chairman of TANGEDCO has taken steps to immediately revamp the entire functioning of the TANGEDCO. The learned counsel submitted that, the first respondent will submit the plan of action before this Court by explaining the steps to be taken by TANGEDCO to revive its functioning and to augment its income. This Court appreciates the initiative taken by the first respondent.

8. As general directions, this Court would direct the first respondent to specifically identify the areas where there are pending issues. If the issues can be resolved by discussing it with the industry, immediate steps shall be taken to convene a meeting and resolve the disputes through dialogue. Wherever there are issues which requires a judicial intervention and determination of rights between the parties, those issues shall be identified and brought to the notice of this Court and this Court will give priority in disposing of those writ petitions covering the issues. This Court is more interested in ensuring that TANGEDCO revives its entire functioning and develops an attitude of resolving disputes through dialogue rather than approaching Courts at the fall of the hat. It is important that the TANGEDCO starts focussing on augmenting its income and improving its standards rather than spending most of its time before the Courts. These general directions shall be kept in mind by the first respondent and an action plan shall be submitted before this Court. The same will be recorded while closing this writ petition.

9. This writ petition is disposed of with the above directions. No costs. Consequently, connected miscellaneous petition is also closed. Post this writ petition under the caption "For Filing Report" on **07.09.2021 at 2.15 P.M**.

10.08.2021

Index :Yes/No
Internet : Yes/No
KST

Note : Issue Order copy on 11.08.2021

To

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Corporation Limited 144 Anna Salai
Chennai- 600 002.

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N.ANAND VENKATESH, J.

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