BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

ORDER RESERVED : **09.03.2021**
ORDER PRONOUNCED : **26.03.2021**

CORAM :
THE HONOURABLE MR.JUSTICE V.PARTHIBAN

W.P.(MD) Nos.14580, 16092 and 20775 of 2017
and
W.M.P.(MD) Nos.11429 to 11431, 12768 to 12770, 13010, 17059 & 17060 of 2017 & 17061 of 2017

Sunrise Knitting Mills (P) Ltd-WEG No.277,
SF.No.242/3 A(P), 3B(P) of Kuthirakulam Village,
Ottapidaram Taluk,
Tuticorin District,
represented by its Authorized Signatory,
R.Palraj. .. Petitioner in W.P.(MD) No.14580 of 2017

Indian Wind Power Association,
represented by its Secretary General,
Door.No.E, 6th Floor,
Shakti Towers-II, 766, Anna Salai,
Chennai 600 002. .. Petitioner in W.P.(MD) No.16092 of 2017

M/sPSG Spinning Mills (P) Ltd-WEG No.1715,
SF.No.391/2 (P), 390/3(P), Nambithalaivanpattayam Village,
Nanguneri Taluk, Tirunelveli District,
represented by its Authorized Signatory,
C.Senthilkumar .. Petitioner in W.P.(MD) No.20775 of 2017

Vs

1.Tamilnadu Generation and Distribution
Corporation Ltd., (TANGEDCO),
10th Floor, 144, Anna Salai,
Chennai 600 002,
represented by its Chairman cum
Managing Director.

2.The Chief Engineer, NCES,
TANGEDCO, 2nd Floor,
144, Anna Salai,
Chennai 600 002.

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

4.Tamilnadu Electricity Regulatory Commission,
19-A, Rukumini Lakshmipathy Salai,
Egmore, Chennai 600 008,
represented by its Secretary.
.. Respondents in W.P.(MD) No.14580 of 2017

1.The Chairman cum Managing Director,
Tamilnadu Generation and Distribution
Corporation Ltd.,
144, Anna Salai, Chennai 600 002.

2.Chief Engineer/NCES,
Tamilnadu Generation and Distribution
Corporation Ltd.,
2nd Floor, Eastern Wing,
NPKRR Maligai, 144, Anna Salai,
Chennai 600 002.

3.Tamilnadu Electricity Regulatory Commission,
represented by its Secretary,
No.19-A, Rukumini Lakshmipathy Salai,
Egmore, Chennai 600 008.
.. Respondents in W.P.(MD) No.16092 of 2017

1.Tamilnadu Generation and Distribution
Corporation Ltd., (TANGEDCO),
10th Floor, 144, Anna Salai,
Chennai 600 002,
represented by its Chairman cum
Managing Director.

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.Tamilnadu Electricity Regulatory Commission,
19-A, Rukumini Lakshmipathy Salai,
Egmore, Chennai 600 008,
represented by its Secretary.
.. Respondents in W.P.(MD) No.20775 of 2017

PRAYER in W.P.(MD) No.14580 of 2017: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records relating to the issuance of the impugned Proceedings in (CMD) No.266 on 20.05.2017 of the 1st and 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 300 A and confine the Respondents within the statutory provisions of Electricity Act 2003 in the matter of allowing the Utility Charges 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 WF HTSC No.277 of Tuticorin EDC for adjustment against consumption at the petitioner's spinning mill at HTSC No.142 at Gobi EDC.

PRAYER in W.P.(MD) No.16092 of 2017: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records of the impugned proceedings bearing (Pet) 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 migration filed by the members of the petitioner.

PRAYER in W.P.(MD) No.20775 of 2017: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records relating to the issuance of the impugned Proceedings in (CMD) No.266 on 20.05.2017 of the 1st 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 300 A and confine the Respondents within the statutory provisions of Electricity Act 2003 in the matter of allowing the Utility Charges 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 WF HTSC No.1715 of Tirunelveli EDC for adjustment against consumption at the petitioner's spinning mill at HTSC No.395 at Tirupur EDC.

For Petitioner
in W.P.(MD) Nos.14580
and 20775 of 2017 : Mr.S.P.Partha Sarathy

For Petition in W.P.(MD) No.
16092 of 2017 : Mr.Rahul Balaji

For Respondents
in all W.Ps., : Mr.SMS.Johnny Basha

COMMON ORDER

All these writ petitions raise common issue and grounds and therefore, they are taken up together for disposal as under:

2.The petitioners are all the private limited companies registered under the Repealed Companies Act, 1956. The petitioner companies have commissioned a new windmill with certain capacity, falling within the jurisdiction of the 3rd respondent. The energy generated by the windmill of the petitioner companies was sold to the respondent TANGEDCO by executing an Energy Purchase Agreement (EPA), which was entered into at the time of commissioning of the windmill. The companies did not have any infrastructure for consumption of powers for its captive purpose and therefore, the energy was sold to the TANGEDCO as per the tariff price at Rs.3.70 per unit as fixed by the 4th respondent, the regulatory Commission through its comprehensive tariff order.

3.At the time when the windmills were commissioned, there was no scope for wheeling arrangement for the companies to have captive consumption of the energy generated in the windmills. However, subsequently, assets were acquired and the capacity for captive consumption has been achieved in terms of the provisions of the Electricity Act, 2003. According to the companies, they have a legal right to consume the electricity generated by its own windmills commissioned by them by conversion of the existing energy purchase agreement into Energy Wheeling Agreement. According to them, the 1st respondent does not have any say on such conversion.

4.The collective grievance of the petitioners herein is that when a request was made to the TANGEDCO for changing the category from sale to Board to captive consumption at its own windmills as per the practice followed, which practice is commonly called as "Utility Charges", the same was not agreed to by the Board and therefore, issued impugned proceedings in regard to the respective writ petitions. The substance of the objection of the TANGEDCO is stated in the penultimate paragraph of the impugned proceedings, dated 20.05.2017 which reads as under:-

> *"In view of the steep raise of the RPO to be met by the TANGEDCO year after year (which is 14.00% for 2017-18 which includes 9% non-solar RPO), in order to avoid shortage in meeting the RPO, to avoid purchase of Renewable Energy Certificate at high rate from the market and in order to avoid passing of the cost incurred to purchase the REC to the end consumers, in public interest, it is decided not to concede any request of the WEGs under sale to board category to migrate either to captive use or third party sale."*

5.Challenging the rejection of the request of all the petitioners, they are before this Court.

6.Mr.Rahul Balaji, learned counsel appearing for the petitioner in W.P.(MD) No.16092 of 2017 would submit that the issue of migration from sale to Board to captive consumption is no more *res integra*, as this Court by a detailed order in a batch of writ petitions, has allowed similar claims. He would rely on the decision of the learned single Judge of this Court dated 30.08.2019 in W.P.(MD) Nos.5196, 11725, 8459 & 8463 of 2019. He would rely on the following reasoning and the directions of the learned single Judge of this Court, as under:-

> *"28.It is settled law that both the parties are bound by the terms of the Agreement and therefore, as per Clauses 6(b) and 8(b) of the Agreement, the TANGEDCO has failed to perform its financial and other material obligations and therefore, the parties are free to resort to action in accordance with the provisions contained in the Agreement. A reference can be had from the judgment of the Hon'ble Apex Court in Mangalore Electricity Supply Company Limited Vs. M/s.AMR Power Private Limited and another [(2016) 16 SCC 135], wherein the Hon'ble Apex Court has confirmed the termination of agreement on the ground of the delayed payment by the Distribution License. For better appreciation, paragraph No.15 thereof is extracted below:-*
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>> *"15.The Default Notice dated 26.05.2011 refers to default in payments of bills, non-payment of interest for the delayed payments and non-opening of a Letter of Credit as provided for in Article 6.5 of the Agreement. In the reply dated 04.07.2011, the Appellant did not expressly deal with any of the defaults mentioned in the Default Notice. On the other hand the Appellant stated that it relied heavily on Government subsidy for payment to be made, an attempt would be made in the future to make payments promptly, LCs would be opened and that payment for January, February and March 2011 were delayed because the approval for inter-connection was given only on 23.06.2011. The invoice for December 2010 which was due to be paid on 19.01.2011 was actually paid on 24.02.2011. The payment to be made for the months of January 2011 and February 2011 due on 18.02.2011 and 18.03.2011 was actually done on 25.05.2011. Admittedly, interest on the delayed*

> *payments as provided for in Article 6 was not paid and a Letter of Credit was not opened. In view of the default mentioned by the First Respondent in the notice not being remedied within a period of 30 days, we are of the opinion that the Second Respondent Commission and the APTEL were correct in upholding the termination notice dated22.07.2011. We do not agree with the submissions of Mr. Giri that non-opening of Letter of Credit would not be a default covered by Article 9.2.2. As per Article 9.2.1, a failure or refusal by the Appellant to perform its financial and other material obligations under a PPA constitutes an event of default. Both the parties to the PPA are bound by the terms thereof and they are free to resort to action in accordance with the provisions contained therein."*

A mere reading of the above said ratio shows that a failure or refusal to perform its financial oblication as per the agreed terms of the agreement would amount to default. Therefore, in the cases on hand, at the risk of repetition, it may be mentioned that despite receiving notices from the petitioners as stated supra, TANGEDCO has not even come forward to pay even a single pie to the petitioners or permitted them to migrate from EPA to EWA.

29.Thus, for the reasons stated above, the writ petitions deserve to be allowed with the following directions;

(a) the respondents/TANGEDCO are directed to permit the petitioners to switch over to captive consumption so as to use the same for their own industry;

(b) the respondents/ TANGEDCO are directed to settle the respective dues to the petitioners as per their respective invoices raised by them, along with interest as per Clause 6(b), within a period of two months from the date of receipt of a copy of this order.

(c) Consequently, in view of permitting the petitioners to migrate from EPA to EWA, the proceedings dated 20.05.2017 of the first respondent deciding not to concede any request for migration is set aside.

30. In fine, with the above directions, the writ petitions stand allowed. No Costs. Consequently, connected miscellaneous petitions are closed."

7.The learned counsel would submit that the above decision of the learned single Judge of this Court was appealed against in W.A.Nos.4189, 4194, 4197, 4201, 4204 and 4205 of 2019 and a Division Bench of this Court, vide order dated 18.02.2020, by a detailed judgment found no infirmity in the order passed by the learned single Judge and dismissed all the writ appeals. The Division Bench while dismissing all the writ appeals has observed as under:-

"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.

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."

8.It also transpired further that as against the judgment of the Division Bench in the aforesaid writ appeals, Special Leave Petitions have been filed before the Hon'ble Supreme Court in S.L.P.No. (Civil) 8513 to 8518 of 2020, but the same came to be rejected on 24.09.2020. The learned counsel therefore would request that this Court has to follow the directions of the learned single Judge of this Court, as extracted above.

9.In view of the above factual and legal narrative, this Court is convinced that the issue raised in these writ petitions is not any more open for adjudication, as the *lis* has already been settled. In the circumstances, the directions as issued by the learned single Judge of this Court dated 30.08.2019 in a batch of writ petitions as affirmed by the Division Bench of this Court, which have been extracted supra will hold good for these writ petitions as well.

10.All these writ petitions are therefore allowed and the impugned orders passed by the 1st respondent in all the writ petitions are hereby set aside. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS III)

// True Copy //

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Sub Assistant Registrar(CS)

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1CC TO MR. R.PARTHASARATHY, ADVOCATE SR 13955
1CC TO MR. R.S.PANDIARAJ, ADVOCATE SR 13993

KK
20/05/2021
8P/3C

W.P.(MD) Nos.14580, 16092 and 20775 of 2017
26.03.2021