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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 22.08.2022
Pronouncing orders on : 26.08.2022

CORAM

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

W.P.No.13097 of 2010
and W.M.P. No.1 of 2010

M/s.Sri Varahiamman Steels Pvt. Ltd.,
No.19/1, M.G.Chetty Palayam (P.O)
Near Ganesapuram, S.S.Kulam (Via)
Coimbatore – 641 107.

...Petitioner

vs.

1.The Tamil Nadu Electricity Board (TNEB),
Represented by its Chairman,
Anna Salai, Chennai – 600 002.

2.The Superintending Engineer,
Coimbatore Electricity Distribution Circle/North,
Tatabad, Coimbatore – 12.

3.Tamil Nadu Electricity Regulatory Commission (TNERC),
Rep. by its Secretary,
Rukmani Lakshmipathy Road,
Chennai.

Respondents

COMMON PRAYER: 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 2nd respondent culminating in his impugned



order Lr.No.SE/CEDC/N/CBE/DFC/AO/Rev/F.CMRI/D.92/10 dated 07.06.2010 confirming the demand made in Lr.No.SE/CEDC/N/CBE/DFC/AO/Rev/F.CMRI/D.35/2010 dated 21.05.2010 and to quash the same.

For Petitioner : Mr.N.L.Rajah
Senior Counsel for
Mr.Arun Anbumani

For Respondents : Mr.J.Ravindran
Additional Advocate General
assist by

Mr.M.Abul Kalam
Standing Counsel for R1 & R2

ORDER

This writ petition has been filed challenging the impugned proceedings of the 2nd respondent dated 07.06.2010, confirming the demand made through letter dated 21.05.2010.

2.The case of the petitioner is that they are running a steel melting furnace industry which is a continuous process industry. According to the petitioner, the TNEB through Circular Memo dated 16.03.2009, informed that there will be no peak hour restriction for continuous process industries.

3.The further case of the petitioner is that a power cut was imposed with effect from 01.11.2008 and the quota was fixed. This was



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communicated by the 2nd respondent to the petitioner through letter dated 01.11.2008. Since, the quota that was fixed was not adequate to run the industry, the petitioner opted for clubbing the quota with another HT Service Connection provided to them for another unit standing in their name. The representation made by the petitioner was considered by the Electricity Board and a revised quota was fixed after clubbing.

4.The petitioner received the demand letter dated 13.01.2010, calling upon the petitioner to pay a sum of Rs.34,10,544/- allegedly for exceeding the quota allotted. The petitioner challenged this demand letter in W.P.No.1769 of 2010 and this writ petition was allowed through an order dated 02.02.2010. The relevant portions in the order are extracted hereunder:

6. In view of the submissions made by the learned counsels appearing for the petitioner, as well as the respondents, and in view of the orders passed by this Court, in a number of writ petitions, wherein similar issues have been raised, the impugned demand notice/bill, issued by the third respondent, is set aside. However, it would be open to the third respondent to pass appropriate orders, afresh,



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including the issuing of the appropriate demand notice/bill, after giving due notice and after affording sufficient opportunity of hearing to the petitioner.

7. After due notice is issued by the third respondent, the petitioner would be at liberty to challenge the same, if it is found necessary to do so, by raising all the grounds available to the petitioner, including those which have been raised in this writ petition. It would also be open to the petitioner to raise the ground that the third respondent has no authority to levy the penalty, on the ground that it is against the dictum laid down by the Tamil Nadu Regulatory Commission, in M.P.No.42 of 2008, dated 28.11.2008.

8. In case the petitioner had already paid the bill amount it would be adjusted to the amounts that may be claimed by the Tamilnadu Electricity Board, in the future bills relating to the petitioner, in case the final decision is in favour of the petitioner. The petitioner shall fully cooperate by participating in the inquiry or hearing that may be held by the concerned authorities of the respondent Electricity Board.

5.Pursuant to the above order, the petitioner received Notice dated 21.05.2010, calling upon the petitioner to remit a sum of Rs.2,26,52,628/-.

On receipt of the same, the petitioner through letter dated 05.06.2010,



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informed the 2nd respondent that they are a continuous process industry and they have complied with the Power Cut Policy and are exempted from peak hour power restriction and hence, requested the 2nd respondent to afford a personal hearing to the petitioner to explain their stand. The 2nd respondent called the petitioner for a personal hearing and in spite of the explanation given by the petitioner, issued the impugned proceedings dated 07.06.2010, whereby, the petitioner was informed that excess charges of Rs.2,26,52,628/- should be paid on or before 15.06.2010, failing which the service connection of the petitioner will be disconnected. Aggrieved by the same, the present writ petition has been filed before this Court.

6.The 1st and 2nd respondents have filed a counter affidavit and they have taken the following stand:

10. The petitioner had been informed that the Circular memo No: CFC/R/FC/R/AO/HT/D No 51/2009 dt 16.03.2009 clearly states that procedure to be adopted for continuous process industry operating under optimum demand and quota to be fixed during holiday period. Also in the Memo No CE/Coml/EE/DSM/AEE/PMM/ F.Power Cut/ D.394/ 09 dt 31.08.2009, it has been stated that, those continuous process



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industries notified by the government and if opted for continuous running with optimum demand, peak hour restrictions need not be insisted. Industries other than continuous process industries, notified by the government and if opted for running with optimum demand, peak hour restrictions shall be insisted. Though the HTSC 196 is a continuous process industries, but run with out optimum demand up to 08.07.2009, so the violation of peak hour restriction detected from 28.11.2008 to 07.07.2009.

(a) The petitioner has two melting industries bearing HTSC 196 and 337. one No Steel re rolling Mill bearing HTSC 237

(b) Optimum demand sanctioned for HTSC 337 under group A category and for 237 under Group B category from 07.11.2008 to 02.01.2009. The consumer has not applied for optimum demand for HTSC 196. After he availed clubbing of quota from 02.01.2009, after getting approval from the Chief Engineer /Dist/CBE the, optimum demand was cancelled to the HTSC 337 and HTSC 237 vide this office letter dt 28.11.2009 and intimated the consumer to obey R& C measures.

(c) There was no written instructions to the consumer to observe 30 days power holiday to HTSC 337. He himself under presumption has observed 30 days holiday to HTSC



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337, and he run the HTSC 196 continuously without peak hour restrictions.

(d) The consumer's statement is not true.

(e) He followed quota only during normal hours and not followed during peak hour ie he has to consume only 5% of the quota demand and energy. But from the CMRI downloaded data, it is confirmed that he has violated the peak hour restrictions.

(f).During that time there is no facility to see the peak hour violation alone. Only after down loading the data's from CMRI it has been confirmed that the consumer has violated the R&C measures during peak hours from 28.11.2008 to 07.07.2009.

(g) & (h) Inspite of prevailing instructions to monitor the R&C measures, due to unavoidable work pressure, the inspection could not be done. However, it is the responsibility of the HT consumer to adhere to the peak hour restriction.

12.Initially all the HT consumers were allowed to make payment of peak hour penalty on or before 20.5.10, as per Head Quarters instruction dated 7.5.10 and SEs were permitted to give 3 instalments. Subsequently the time was



extended up to 31.5.2010 vide Head Quarters instructions dated 20.5.10. Again vide letter dt 22.5.10, 6 nos instalments were permitted. In the meanwhile, certain associations filed petition before the Hon'ble ATE, New Delhi and requested for stay for collection of peak hour penalty. ATE in its interim order dated 31.5.10 has directed TNEB to allow 8 monthly instalments to the consumer and the first instalment is payable on or before 15.6.2010. After personnel hearing only the consumer has intimated vide this office Lr.No. SE/CEDC/N/CBE/ DFC/AO/Rev/F CMRI/D 92/10 dt 07.06.2010 to pay a sum of Rs.2,26,52,658/- as already assessed by down loading the data's of HTSC 196 from CMR before 15.06.2010. But the consumer has requested for 15 days time extension for making payment .By considering the huge amount payable by the consumer and as special case the consumer was permitted 15 days time up to 28.06.2010.

7.Heard Mr.N.L.Rajah, learned Senior Counsel appearing on behalf of the petitioner and Mr.J.Ravindran, learned Additional Advocate General appearing on behalf of the 1st and 2nd respondents.

8.The learned Senior Counsel appearing on behalf of the petitioner made the following submissions:



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- There was a serious procedural irregularity in the present case, since the 2nd respondent issued the impugned demand dated 21.05.2010 and thereafter, conducted a post-decisional enquiry and confirmed the demand through impugned proceedings dated 07.06.2010.
- Even assuming that the petitioner had violated the quota in December 2008, the same should have been informed to the petitioner immediately or atleast during January 2009 and whereas, the 2nd respondent thought it fit to make a demand from December 2008 to June 2009 and the petitioner therefore, did not have an opportunity to correct themselves on the quota availed by them and attempt not to exceed the limits fixed.
- The petitioner is a continuous process industry with a clubbed quota and the peak hour restriction will not apply to such industries.
- The TNERC approved the excess demand while passing an order in M.P.No.42 of 2008, dated 28.11.2008 and this order came to be clarified by the TNERC only on 04.05.2010 in M.P.Nos.4 & 7 of 2010 with respect to excess demand and excess energy charges for



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evening peak hour. This came to be challenged before APTEL and the APTEL through order dated 04.05.2010, held that excess demand charges and excess energy charges for evening peak hour restriction has to be given effect to only from 04.05.2010 and further directed that the amounts paid by the consumers prior to this date should be adjusted in the future bills. Aggrieved by the order passed by the APTEL, the Electricity Board filed Civil Appeals before the Apex Court. Some of the associations/consumers also filed Civil Appeals. The appeals are pending and in the meantime, several writ petitions were filed by the HT consumers challenging the levy and excess demand and excess energy charges in respect of evening peak hour and those writ petitions were disposed of by this Court by directing the Electricity Board to maintain *status quo* subject to the outcome of the civil appeals pending before the Hon'ble Supreme Court.

- If according to the 1st and 2nd respondents, their impugned demand is towards excess demand and excess energy charges for evening peak hour, they have to necessarily await for the final outcome of the Civil Appeals.



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9. Per Contra, the learned Additional Advocate General appearing on behalf of the 1st and 2nd respondents made the following submissions:

- The petitioner was aware of the fact that peak hour restrictions should be followed even for clubbed services and in spite of the same, they exceeded the quota and based on the readings from the energy meter, the consumption details were ascertained and the petitioner was directed to pay the excess demand and excess charges for the period from December 2008 to July 2009.
- A personal hearing was conducted and the petitioner was given an opportunity and only thereafter, the final Demand Notice dated 07.06.2010, was issued.
- Even as per the Memo dated 01.11.2008, for continuous process industries, the Chief Engineer/Distribution can fix optimum/minimum demand to operate the industry on the request of the consumer and this will be subject to the power supply made available only for such



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restricted specified period. Since the petitioner did not opt for the optimum demand/minimum demand, the same was not fixed by the Chief Engineer/Distribution and hence, there is no justification for the petitioner to claim that they are exempted from peak hour restriction altogether.

- The TNERC approved the excess demand to be charged at the rate of thrice the normal rate and excess energy consumption at thrice the normal rate for both high tension industrial and commercial consumers. Accordingly, the demand made by the Board had the backing of the order of TNERC.
- The TNERC while passing orders in T.A.Nos.1 to 9 of 2011, dated 28.12.2011, made it clear that even insofar as continuous process industries, optimum demand concept is applicable and those industries must make a specific request to fix the optimum demand. Once the same is done, the peak hour restriction will not apply to such industries. If the optimum demand is not fixed, even a continuous process industry will be bound by the peak hour



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restriction.

- The 1st respondent has assigned sufficient reasons while confirming the demand made against the petitioner and there is absolutely no ground to interfere with the same and accordingly, the present writ petition is liable to be dismissed by this Court.

10.This Court has carefully considered the submissions made on either side and also the materials available on record.

11.It is an admitted case that the petitioner approached the 2nd respondent and sought for the clubbing of HT SC No.337 along with HT SC No.196. The 2nd respondent revised the quota in the following manner:

S.No.	HT SC No.	Already Fixed Quota	Revised Quota after Clubbing
1.	196	2479.84 KVA (8,20,896 Units)	3930.64 KVA (13,47,731 Units)
2.	337	1839.84 KVA (6,46,370 Units)	3 KVA (2580 Units)

When the permission was granted by the 2nd respondent, it was also



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made clear that peak hour restriction should be followed for the clubbed service.

12. According to the petitioner, the purpose of such clubbing was to observe full power holiday for HT SC No.337 and to run continuously HT SC No.196. The petitioner has taken a stand that HT SC No.196 is a continuous process industry, to which the quota of HT SC No.337 was clubbed and hence, peak hour restriction cannot be applied to such industries. The stand taken by the Electricity Board is that even for a continuous process industry, the HT consumer must exercise an option and get an approval for optimum demand from the Chief Engineer/Distribution and only then, the industry is permitted to run continuously without evening peak hour restriction.

13. Before taking a decision on the rival claims made by both sides, this Court wants to deal with the preliminary issue raised by the learned Senior Counsel appearing on behalf of the petitioner on the ground that the procedure adopted by the 2nd respondent is vitiated by serious irregularity.



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14. In the present case, the 2nd respondent initially issued a demand notice dated 13.01.2010 and directed the petitioner to remit a sum of Rs.34,10,554/- on the ground that the petitioner utilized the power in excess of the quota during the month of December 2008. This demand was put to challenge before this Court mainly on the ground that the demand was raised even without affording an opportunity to the petitioner. This Court interfered with the said demand and allowed the writ petition in W.P.No.1769 of 2010 through order dated 02.02.2010. After this order was passed, the 2nd respondent was expected to issue a fresh notice and afford an opportunity of hearing to the petitioner and thereafter, pass appropriate orders.

15. The 2nd respondent straight away proceeded to issue a communication dated 21.05.2010 and directed the petitioner to remit excess charges of a sum of Rs.2,26,52,628/-. While making this demand, the 2nd respondent had determined the utilization of power in excess of the quota from December 2008 to June 2009. The 2nd respondent by virtue of issuing this demand notice, had already concluded that the petitioner is liable to pay



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the excess charges. On carefully going through the work sheet that was enclosed along with the letter dated 21.05.2010, this Court finds that it is bereft of particulars. The 2nd respondent did not even provide the details of the workings and the calculation on the basis of which the alleged excess demand and excess energy charges was arrived at. That apart, such a demand made by the 2nd respondent was contrary to the directions issued by this Court in the earlier writ petition in W.P.No.1769 of 2010. This Court directed the 2nd respondent to issue a notice and give an opportunity of personal hearing to the petitioner and thereafter, issue the demand. Whereas, the 2nd respondent decided to comply with the order on the reverse mode by first issuing the demand and then calling the petitioner for an enquiry. As rightly contended by the learned Senior Counsel appearing on behalf of the petitioner, the so-called personal hearing is a post-decisional hearing and it is now well a settled law that such a procedure is in direct violation of the principles of natural justice.

16. Once the 2nd respondent decided to raise the demand against the petitioner, it is but natural that the 2nd respondent will only come up with a justification to sustain such a demand and that is exactly the effect of the



confirmation order passed through proceedings dated 07.06.2010.

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17. An action becomes bad where the true object is to reach an end which has already been pre-decided by the concerned authority and this is termed as confirmation bias. This Court had an occasion to deal with the same and for proper appreciation, the relevant portions of the judgment in ***Sri Kanchi Kamakoti Peetathipathi Jayendra Saraswathy Sankara Nursery & Primary School, rep. by its Hon. Correspondent & Chairman - School Committee, Prof.V.Janakiraman vs. The Chief Educational Officer, Tiruvarur and others*** reported in (2021) 4 CTC 683 are extracted hereunder:

13. An action becomes bad where the true object is to reach an end which is different from the one for which the power is entrusted and it is influenced by irrelevant considerations. This is in legal parlance, it is called as "Legal malice or malice in law".

14. This concept has been succinctly dealt with by the Hon'ble Supreme Court of India in two judgments and the same is extracted hereunder:-



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[i]State of Punjab v. Gurdial Singh reported in (1980) 2. SCC 471 at page 475 :-

"9. The question, then, is what is mala fides in the jurisprudence of power? Legal malice is gibberish unless juristic clarity keeps it separate from the popular concept of personal vice. Pithily put, bad faith which invalidates the exercise of power — sometimes called colourable exercise or fraud on power and oftentimes overlaps motives, passions and satisfactions — is the attainment of ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal. If the use of the power is for the fulfilment of a legitimate object the actuation or catalysation by malice is not legicidal. The action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the court calls it a colourable exercise and is undeceived by illusion. In a broad, blurred sense, Benjamin Disraeli was not off the mark even in law when he stated: "I repeat . . . that all power is a trust — that we are accountable for its exercise — that, from the people, and for the people, all springs,



and all must exist”. Fraud on power voids the order if it is not exercised bona fide for the end designed. Fraud in this context is not equal to moral turpitude and embraces all cases in which the action impugned is to effect some object which is beyond the purpose and intent of the power, whether this be malice-laden or even benign. If the purpose is corrupt the resultant act is bad. If considerations, foreign to the scope of the power or extraneous to the statute, enter the verdict or impel the action, mala fides or fraud on power vitiates the acquisition or other official act"

[b]Kalabharati Advertising v. Hemant Vimalnath
Narichania, (2010) 9 SCC 437 : (2010) 3 SCC (Civ)
808 at page 448

25. The State is under obligation to act fairly without ill will or malice— in fact or in law. “Legal malice” or “malice in law” means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for “purposes foreign to those for which it is in law intended”.



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It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. (Vide ADM, Jabalpur v. Shivakant Shukla [(1976) 2 SCC 521 : AIR 1976 SC 1207] , S.R. Venkataraman v. Union of India [(1979) 2 SCC 491 : 1979 SCC (L&S) 216 : AIR 1979 SC 49], State of A.P. v. Goverdhanlal Pitti [(2003) 4 SCC 739 : AIR 2003 SC 1941], BPL Ltd. v. S.P. Gururaja [(2003) 8 SCC 567] and W.B. SEB v. Dilip Kumar Ray [(2007) 14 SCC 568 : (2009) 1 SCC (L&S) 860] .)"

15.The above two judgments beautifully brings out this concept of malice in law. It is not an act necessarily done with an ill-feeling and spite. However, it is an act which is done with an oblique or indirect motive, some times called as colourable exercise of power.

16.It has always been considered that when a remand is made to an authority, more particularly after commenting about the conduct of the authority and also imposing a cost like in the present case, it is always expedient that the file is placed before a different authority. The reason is that there is something called as confirmation bias which would make a remission to the original decision maker undesirable.



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*17. The mind of this Court is redolent of the judgment in **R V. Sussex Justices [1924 1 KB 256]**, wherein it was held that "A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."*

*18. The U.K. Court of Appeal recently had an occasion to consider this concept of confirmation bias where it felt that a confirmation bias always warrants a remand to be made to a different authority. The relevant portions of the judgment in **HCA International Limited V. Competition and Markets Authority** reported in **2015 [1] WLR 4341** is extracted hereunder:-*

"70 It is, however, always the case that the presence of actual bias, apparent bias or confirmation bias would make remission to the original decision-maker undesirable, because any such bias would amount both to reasonably perceived unfairness to an affected party and potentially serious damage to public confidence in the decision-making process.

71 It is important also to understand the kind of unfairness that is relevant to the question of whether the decision should be remitted to the original decision-maker.



The unfairness concerned is such as contravenes the public law duty of fairness, not some abstract concept of unfairness based on a colloquial usage of that word. It is well- established that what fairness requires will vary with the factual circumstances, but what is required in order to achieve fairness is a matter of law, and not a matter of discretion for the decision-maker."

19. In the considered view of this Court, the remand made by this Court in the earlier writ petition in WP.No.17285 of 2019, before the same CEO after commenting upon his conduct and imposing a cost, has really impacted his mind in the decision making process and it would have been more appropriate if the file was considered by a different authority. The 1st respondent seems to have decided not to grant the upgradation and he was only finding reasons as to why it should not be granted. Obviously, the confirmation bias and the malice in law has, to a great extent, made the decision making process, more questionable.

18. The above judgment clearly captures the concept of confirmation bias and how it vitiates the decision making process. When the custodian of power acts under the influence of confirmation bias and seeks to achieve an end which is already pre-decided, such an act is called as colourable exercise of power. Once such power is exercised with an oblique or indirect



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motive, whatever reasons that are assigned in the final order will become irrelevant, since the very procedure adopted before passing the final order is illegal and vitiated.

19. In the instant case, the impugned proceedings dated 07.06.2010, is not only vitiated due to violation of principles of natural justice (post-decisional hearing), but also due to confirmation bias. The 2nd respondent straight away issued a demand notice and after realizing that it is not in confirmation with the earlier order passed by this Court, conducted a so-called personal hearing only to complete the formalities and to confirm the earlier demand made on 21.05.2010. In view of the same, this Court is inclined to interfere with the impugned demand dated 21.05.2010 and the confirmation order dated 07.06.2010, on this ground alone.

20. There is no requirement for this Court to get into the merits of the case and render findings on the other issues raised by both the parties. It will be more appropriate to set aside the impugned demand and the impugned proceedings and direct the 2nd respondent to follow a proper procedure before arriving at a conclusion.



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21. In the result, the impugned demand notice dated 21.05.2010 and impugned proceedings dated 07.06.2010, issued by the 2nd respondent is hereby quashed. There shall be a direction to the 2nd respondent to issue a fresh notice to the petitioner by providing all the particulars/workings/calculations. The petitioner on receipt of the notice, is permitted to raise all the grounds and submit their explanation. On receipt of the same, the 2nd respondent shall call the petitioner for personal hearing and afford opportunity. Thereafter, the 2nd respondent shall pass orders on considering the explanation given by the petitioner and in line with the relevant regulations and orders passed by TNERC and APTEL, in this regard. This process shall be completed by the 2nd respondent, within a period of three months from the date of receipt of copy of this order.

22. This writ petition is allowed in the above terms. No Costs. Consequently, connected miscellaneous petition is closed.

26.08.2022

Speaking Order/Non-Speaking Order
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To

- 1.The Tamil Nadu Electricity Board (TNEB),
Represented by its Chairman,
Anna Salai, Chennai – 600 002.
- 2.The Superintending Engineer,
Coimbatore Electricity Distribution Circle/North,
Tatabad, Coimbatore – 12.
- 3.Tamil Nadu Electricity Regulatory Commission (TNERC),
Rep. by its Secretary,
Rukmani Lakshmipathy Road,
Chennai.



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N.ANAND VENKATESH.J.,

ssr

Pre-Delivery Order in
W.P.No.13097 of 2010
and W.M.P. No.1 of 2010

26.08.2022