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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.02.2022

CORAM :

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

WRIT PETITION NO.36875 OF 2015

&

M.P.NOS.1, 2 & 3 OF 2015

M/s.Ultra Tech Cement Limited,
Rep. by its Senior Vice President (Technical),
Arakkonam Cement Works,
Chitteri P.O.,
Arakkonam - 631 003,
Vellore District.

... Petitioner

-Vs-

1. The Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO),
Rep. by its Chairman and Managing Director,
144, Anna Salai,
Chennai - 600 002.
2. The TANTRANSCO,
Rep. by its Superintending Engineer (ABT),
Office of SE/OA & CO,
TANTRANSCO (A subsidiary of TNEB LIMITED),
144, Anna Salai,
Chennai - 600 002.
3. The Superintending Engineer,
Vellore Electricity Distribution Circle,
Gandhi Nagar,
Vellore - 632 006.
4. The Deputy Financial Controller,
Vellore Electricity Distribution Circle,
Gandhi Nagar,
Vellore - 632 006.
5. The Chairman,
The Tamil Nadu Electricity Board,
144, Anna Salai,
Chennai - 600 002.

... Respondents



PRAYER:-

Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus, calling for the records on the file of the third respondent comprised in current consumption bill dated 29.10.2015 in respect of service connection HTSC No.1203 and quash the same in so far as it relates to levy of cross subsidy surcharge of Rs.43,11,694.03 and consequently direct the respondents not to levy cross subsidy surcharge in respect of power that is wheeled by the petitioner from its captive generating plants wherever situate, including its unit in the state of Andhra Pradesh.

For Petitioner : Mr.Rahul Balaji

For Respondents : Mr.L.Jai Venkatesh
(Standing Counsel)

O R D E R

Petitioner is the largest manufacturer of gray cement, Ready Mix Concrete (RMC) and white cement in India. He has also setup power generation unit in Andhra Pradesh. For running his manufacturing unit he utilized the power generated by him at Andhra Pradesh. The respondents, by bill dated 28.10.2015 demanded the consumption charges to the tune of Rs.1,37,63,482/- wherein, the respondent has not charged any cross subsidy surcharges as per the provisions of the Electricity Act. However, on 29.10.2015 they issued an impugned revised bill demanding Rs.43,11,694.03/- as cross subsidy surcharge. Challenging the same, the petitioner has approached this Court.

2. According to the petitioner, the cross subsidy surcharge is not payable by the captive generation and consumption of electricity despite a clear statutory bar. As per Section 9(2) of the Act, that every person who has constructed a captive generation plant and maintains and operates such plant, has a right to open access for the purposes of carrying electricity from its captive generating plant to the destination of his use. Section 42 specifies the duties of distribution licensee and open access. Proviso 1 of Section 42 reads as under:

" It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act. "



3. A person is entitled to open access on payment of surcharge in addition to the charges of reading. However, the 4th proviso to Section 42 would specify that it is not leviable for a person who has established captive generation plants and using the electricity for his own purposes. Sec.42(4) reads as under:

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

4. Therefore, it is very clear that a person who has established captive generation plant and consumes the electricity power for his own manufacturing unit is not liable to pay cross subsidy surcharges and is free to consume the electricity generated by him for his own purposes. This issue has already been settled by the Judgement of the Hon'ble Supreme Court in *MSEDC Vs. J.S.W.Steel Ltd*, 2021 SCC OnLine SC 1220. The relevant portion reads as under:

9. On a fair reading of Section 9, it can be seen that captive generation is permitted Under Sub-section (1) of Section 9. As per Sub-section (2), every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use, but of-course subject to availability of adequate transmission facility determined by the Central Transmission Utility or the State Transmission Utility, as the case may be. So, the captive generation/captive use is statutorily provided/available and for which a permission of the State Commission is not required. The submission on behalf of the Appellant that the captive generation Under Section 9 is subject to the Regulations as per first proviso to Sub-section (1) of Section 9 and that even open access for the purpose of carrying electricity from his captive generating plant to the destination of his use shall be subject to availability of the adequate transmission facility determined by the Central Transmission Utility or the State Transmission



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Utility, as the case may be, Sub-section (4) of Section 42 shall be applicable and such captive users are liable to pay the additional surcharge leviable Under Sub-section (4) of Section 42, has no substance and has to be rejected outright. Construction and/or maintenance and operation of a captive generating plant and dedicated transmission lines is not subjected to any permission by the State Commission. As provided Under Section 9 of the Act, 2003, any person may construct, maintain or operate a captive generating plant and dedicated transmission lines. Merely because the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company or the open access for the purpose of carrying electricity from the captive generating plant to the destination of his use shall be subject to availability of the adequate transmission facility determined by the Central Transmission Utility or the State Transmission Utility, it cannot be said that for captive generation plant, the State Commission's permission is required. Right to open access to transmit/carry electricity to the captive user is granted by the Act, and is not subject to and does not require the State Commission's permission. The right is conditioned by availability of transmission facility, which aspect can be determined by the Central or State transmission utility. Only in case of dispute, the State Commission may adjudicate.

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14. Even otherwise, it is required to be noted that the consumers defined Under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves. So far as captive consumers are concerned, they incur a huge expenditure/invest a huge amount for the purpose of construction, maintenance or operation of a captive generating plant and dedicated transmission lines. However, so far as the consumers defined Under Section 2(15) are concerned, they as such are not to incur any expenditure and/or invest any amount at all. Therefore, if the Appellant is held to be right in submitting that even the captive consumers, who are a separate class by themselves are subjected to levy of additional surcharge Under Section 42(4), in that case, it will be discriminatory and it can



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be said that unequals are treated equally. Therefore, it is to be held that such captive consumers/captive users, who form a separate class other than the consumers defined Under Section 2 (15) of the Act, 2003, shall not be subjected to and/or liable to pay additional surcharge leviable Under Section 42(4) of the Act, 2003.

5. Therefore, from the reading of the above judgment and Section 9 (2) and 4th proviso of Section 42, it is very clear that a person who has established his captive generating plant carrying electricity to the destination of his own use is not liable to pay cross subsidy charges. In that event, the demand raised by the respondent in their bill dated 29.10.2015 demanding payment of cross subsidy surcharge to the tune of Rs.43,11,694.03/- is contrary to the provisions of the Electricity Act as well as the settled judgment of Hon'ble Supreme Court in this aspect.

6. Hence, in that view of the matter, the impugned demand raised by the respondent is not sustainable in law and accordingly set aside. This writ petition stands allowed. There shall be no order as to costs. Consequently connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

sha/kpr

To

1. The Chairman and Managing Director,
The Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO),
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5. The Chairman,
The Tamil Nadu Electricity Board,
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Chennai - 600 002.

+1cc to Mr.L.Jai Venkatesh, Advocate, S.R.No.12869
+1cc to Mr.R.Parthasarathy, Advocate, S.R.No.13091

W.P.NO.36875 OF 2015 &
M.P.NOS.1, 2 & 3 OF 2015

KV(CO)
PBS/01/06/2022