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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.03.2022

CORAM :

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

W.P.NO.24413 OF 2014

&

M.P.NOS.2 & 3 OF 2014

Jayalakshmi Spinning Mills Ltd.,
HTSC No.299, Chikkanampatty,
Omalar Taluk, Salem District.
Repd. By its Director
R.Ravichandran

... Petitioner

Vs.

1. The Chairman
Tamil Nadu General and Distribution Corporation Limited,
[TANGEDCO],
144, Anna Salai, Chennai - 600 002.
2. The Chief Financial Controller/Revenue,
TANGEDCO, (Accounts Branch)
144, Anna Salai, Chennai - 600 002.
3. Tamil Nadu Electricity Regulatory Commission,
Through its Secretary,
No.19A, Rukmini Lakshmipathy Salai,
Egmore, Chennai - 600 008.
4. The Superintending Engineer,
TANGEDCO,
Mettur Electricity Distribution Circle,
Mettur Dam.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records of the second respondent contained in impugned letter CFC/FC/DFC/AAO, HT/AS.3/REV/D.N.115/13 dated 29.07.2013 and quash the same as arbitrary, illegal and violative of the provisions of the Electricity Act, 2003 and the orders of the TNERC.



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For Petitioner : Mr.R.S.Pandiyaraj
For Respondents : Mr.M.Abulkalam
Standing Counsel
for the respondents 1, 2 & 4

O R D E R

The order of cancellation of the benefit of Deemed Demand Charges issued by the second respondent in proceedings dated 29.07.2013 is sought to be quashed in this writ petition.

2. The writ petitioner is the High Tension Electricity Consumers and they are purchasing the electricity power from the third parties for generating power and adjusting the same for the benefit of petitioner's establishments.

3. In this regard certain terms and agreements were agreed upon between the parties by way of adjudicative process before the Tamil Nadu Electricity Regulatory Commission.

4. The learned counsel appearing on behalf of the writ petitioner contented that the unilateral withdrawal of concession granted to the writ petitioner are arbitrary and unsustainable in view of the order dated 15.05.2006 in petition No.TP 1/05 by the Tamil Nadu Electricity Regulatory Commission. It is contended that the adjudicative process had been conducted statements, objections and suggestions were received from all stakeholders and thereafter a decision was taken by the Tamil Nadu Electricity Regulatory Commission, Chennai in petition No.T.P.1/2005 and an order was passed in order No.2 dated 15.05.2006. The preamble of the order stipulates as follows:-

Sub-section (2) of Section 42 of the Electricity Act, 2003, stipulates that the State Commission shall introduce open access in such phases and subject to such conditions as may be specified, within one year of the appointed date. Accordingly, the Commission has notified the Tamil Nadu Electricity Regulatory Commission - Intra State Open Access Regulations 2005 in the Tamil Nadu Government Gazette dated the 3rd August, 2005 so as to introduce open access in Tamil Nadu. As per Regulation 9 of the aforesaid Regulations, various charges payable to State Transmission Utility / Transmission Licensee and Distribution Licensee by an open access customer have to be determined by the Commission. As directed by the Commission, the TNEB filed a petition for



determination of the above charges on 26.09.2005 and the Petition was registered and numbered as T.P. 1 of 2005.

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In exercise of the powers conferred by section 42 of the Electricity Act, 2003 (Act 36 of 2003) and all other powers enabling it in this behalf, the Tamil Nadu Electricity Regulatory Commission (TNERC) after having considered the written objections, consulted the members of the State Advisory Committee, heard the issues raised by the stakeholders in a public hearing, the reply of the Tamil Nadu Electricity Board, the applicant herein, and having considered the relevant documents available on record, passes this order, fixing the transmission charges, wheeling charges and other charges specified under the aforesaid Open Access Regulations and payable by an open access customer.

Sd.....
B.Jeyaraman
Member

Sd.....
S.Thangarathnam
Member

Sd.....
A.Balraj
Chairman

5. The learned senior counsel relied on the preamble of the said order, which states that the Regulatory Commission considered the written objections, consulted the members of the State Advisory Committee, heard the issues raised by the stakeholders by way of public hearing and the reply from the Tamil Nadu Electricity Board and considered all the issues. Pursuant to the said order dated 15.05.2006 the applicability of Deemed Demand Charges has been stipulated and in respect of Deemed Demand Charges it is stated that the transmission losses in each voltage play a vital role in deciding the deemed demand. The loss levels at each voltage are given above. The loss factor depends on the voltage at which the power is injected and the voltage at which the open access user draws. Since various combinations are possible, a simple methodology is adopted to approximate the loss factor under various scenarios. Even though the power, in an interconnected grid, flows by displacement and does not actually traverse the whole distance from point of injection to the point of travel, the accepted principle, in general is, that the loss estimation shall be based on the theoretical route of flow. For example, even though the generated power is injected by a generator at 11 K V and is also



drawn at the same voltage of 11 KV at a distant place, the power is supposed to have been transformed through the higher voltages of 33, 110, 230 KV etc., again transformed into the lower levels and reach the point of drawal. To emulate such scenarios it is assumed that the said power, flows in an upward and downward direction as indicated below, through various transformation levels and undergoes 50% of the loss, in each direction, in that level. The percentage of deemed demand supplied by the licensee for typical cases of injection and drawal and based on the loss factors and also considered by the Regulatory Commission. Considering the technical aspects the Regulatory Commission passed an order in respect of billing of monthly consumption which is segregated into two parts as under.

- (i) Quantum of energy supplied by the generator at open access user end and;
- (ii) Quantum of energy supplied by Distribution licensee to open access user.

The demand charges in a billing month are to be arrived at as detailed below;

(a) The maximum demand recorded in a month shall be segregated into demand supplied by the generator and the demand supplied by the licensee taking into account the actual energy consumed in units, the actual energy in units supplied by the generator and average power factor maintained at the consumption point in the billing month.

(b) The demand charges payable by the open access customer will be calculated as below:

Case 1:

Injection Voltage	110 kV
Drawal Voltage	33 kV
Percentage of deemed demand as per the table	= 41.28
Sanction Demand	1000 Kva
Recorded Demand	855 Kva
Units consumed	650000 units
Power factor	0.95
Units supplied by generator (at consumption point) :	500000 units
Demand supplied by generator =	$500000/720 \times 0.95 = 659.72$ Kva
Demand supplied by the licensee =	$855 - 659.72 = 195.28$ Kva
Billable demand-supplied by licensee =	$900 - 659.72 = 240.28$



(at 90% of the sanctioned demand)

$$\begin{aligned} \text{Demand charges payable} &= (659.72 \times 0.4128 \times 300) + \\ & (240.28 \times 300) \\ &= 81699.72 + 72084 = 153783.72 \end{aligned}$$

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Case 2:

$$\begin{aligned} \text{Injection Voltage} & 230\text{kV} \\ \text{Drawal Voltage} & 22/11 \text{ kV} \\ \text{Percentage of deemed demand as per the table above} & = 40.04 \\ \text{Sanction Demand} & 1000 \text{ Kva} \\ \text{Recorded Demand} & 950 \text{ Kva} \\ \text{Units consumed} & 700000 \text{ units} \\ \text{Power factor} & 0.92 \\ \text{Units supplied by generator (at consumption point)} & : 700000 \text{ units} \\ \text{Demand supplied by generator} & = 700000/720 \times 0.92 = 894.44 \text{ Kva} \\ \text{Demand supplied by the licensee} & = 950 - 894.44 = 55.56 \text{ Kva} \\ \text{Billable demand-supplied by licensee} & = 950 - 894.44 = 55.56 \text{ Kva} \\ \text{Demand charges payable} & = (894.44 \times 0.4004 \times 300) + (55.56 \times 300) \\ & = 107440.13 + 16668 = 124108.13 \end{aligned}$$

6. Importantly in paragraph No.5.24.2 the order passed by the Regulatory Commission itself categorically states that all the orders will take effect from the date of this order and till such time the charges are revised. Further revision shall normally be along with the regular tariff petition by the licensee. The licensee may also approach the Commission for revision of these charges by filing a distinct revision petition without linkage to the regular tariff revision. Further the commission reserves the right to initiate suo-motu procedure for revision of the charges. Thus it is made clear that the licensee has got right to approach the Commission for revision of these charges by filing a distinct revision petition. The commission also shall initiate suo-motu procedure for revision of the charges. Thus both the licensee as well as the Commission are empowered to re-open the concession granted in respect of Deemed Demand charges. It is further made clear that re-opening of the concession of Deemed Demand Charges is payable either by way of revision petition by the licensee or by way of suo-motu revision by the Regulatory Commission. Thus the authorities of the board has no authority to cancel the concession granted unilaterally without reference to the order passed by the Regulatory



Commission by invoking clause 5.24.2 of the order dated 15.05.2006 in petition No.T.P.1 of 2005.

7. The learned senior counsel is of the opinion that the Regulatory Commission has not passed any such order withdrawing the concession granted in respect of Deemed Demand Charges to the open access consumers/fossil fuel based generators. In the absence of any such order by the Regulatory Commission, it is not open to the authorities of the electricity board to cancel the concession unilaterally by passing the impugned order.

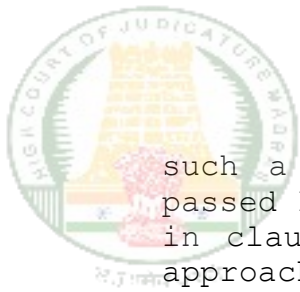
8. The learned Additional Advocate General appearing on behalf of the respondents 1, 2 & 4 opposed the contentions of the learned counsels appearing for the writ petitioner by stating that grant of Deemed Demand Charges is a concession extended by the Commission at the instance of the board. Such a concession was agreed to be granted by the board on certain terms and conditions. The concession was extended undoubtedly for many years, however on account of certain financial implications the board has decided to withdraw the concession of the Deemed Demand Charges and the competent authorities are empowered to do so. In view of the fact that in the subsequent order passed by the Regulatory Commission, the concession of Deemed Demand Charges were omitted. The omission of extending the concession of Deemed Demand Charges will provide an implied power to the authorities competent of the Electricity board to cancel the concession of the Deemed Demand Charges granted to open access consumer/fossil fuel based generators. Thus there is no irregularity or infirmity in respect of the impugned circular passed in this regard. It is further contended that the benefit extended is being a concession can never be claimed as a right by the writ petitioner. The concession is granted considering various other factors by the commission in the year 2012. On account of the changed circumstances the board by way of an order dated 30.03.2012 in order No.2/2012 the concept of grant of Deemed Demand Charges were dispensed with. However the learned Additional Advocate General admitted the fact that there is no specific clause withdrawing the concession or to dispense with the concession granted earlier. However such an order for withdrawal of concession was passed with reference to the wind mill energy case. However in respect of the open access customers/fossil fuel based generators no such order was passed by the Tamil Nadu Electricity Regulatory Commission. This being the factum of the case there is no irregularity or illegality in respect of the cancellation of concession of Deemed Demand Charges granted earlier to this writ petitioner. The learned Additional Advocate General further contended that in respect of Wind Mill Generators and bio-gas power generators the said



concession has been withdrawn and the Regulatory Commission had passed orders to that effect. When such being the factum of the case the mere omission shall not be construed as an extension of the concession granted in all other cases. The concession has been withdrawn and the same cannot be continued in respect of the writ petitioner alone, who is coming under the category of open access customers/fossil fuel based generators. Thus the writ petition is liable to be rejected.

9. Considering the arguments advanced on both sides, this Court is of the opinion that admittedly the concession of Deemed Demand Charges were granted to all the writ petitioners by way of an order by the Tamil Nadu Electricity Regulatory Commission in T.P.1 of 2005 dated 15.05.2006. The preamble of the order categorically enumerates that an adjudicative process had been conducted and written objections, suggestions, consulted the members of the State Advisory Committee, heard the issues raised by the stakeholders by way of public hearing and were obtained before passing an order. This Court is of the opinion that such a process ought to have been conducted before withdrawing the concession granted to these writ petitioners. Concept of implied withdrawal can never be accepted. In view of the fact that through an agreement the concession was granted and it is contractual in nature. The petitioner is generating electricity power and keeping the same for their own usage. The service of the electricity board is also utilised by the petitioner for transmitting the electricity power. Thus the services ought to be compensated by the writ petitioner undoubtedly all these conditions were considered by providing opportunity to all the parties and a decision was taken by the Tamil Nadu Electricity Regulatory Commission. Such being the factum, while withdrawing the concession it is necessary on the part of the electricity board to approach the Electricity Regulatory Commission by filing a proper application or with a request to initiate suo-motu revision under clause 5.24.2 of the said order dated 15.05.2006 in respect of the open access customers/fossil fuel based generators. In respect of all other categories the Regulatory Commission had already passed orders withdrawing the concession of Deemed Demand Charges. Thus it is made clear that the electricity board has to approach the Tamil Nadu Electricity Regulatory Commission for the purpose of revision of all such concessions granted to this category.

10. This Court is of the considered opinion that when certain concession are granted for a clause/group of people by way of adjudicative process, the said concession can be withdrawn only by following the procedure. In the event of unilateral cancellation of such concession, certainly rights of the persons, who enjoyed the concession will be prejudiced. Even



such a consultation process has been stipulated in the order passed by the Electricity Regulatory Commission dated 15.05.2006 in clause 5.24.2 which contemplates that the licensee may also approach the Commission for revision of these charges by filing a distinct revision petition without linkage to the regular tariff revision. Further the commission reserves the right to initiate suo-motu procedure for revision of the charges. When such a power has been provided under the very order, there is no impediment to the Regulatory Commission to initiate suo-motu revision to re-open the case of open access consumers/fossil fuel based generators. Electricity board is also competent to submit an application for revision of the charges before the Regulatory Commission.

11. On a perusal of the entire records it is made clear that no adjudicative process had been conducted before issuing the impugned order by the Tamil Nadu Regulatory Commission in respect of the category of open access consumers/fossil fuel based generators. When the concession is extended to this category withdrawal of the same must be done by providing an opportunity to the persons who are benefited from and out of the concession. Admittedly no such opportunity was provided to the writ petitioner before issuing impugned circular by the respondents. An opportunity to be provided is for the purpose of submitting the objections in respect of cancellation of such concession. Thus it is made clear that as per clause 5.24.2 the Electricity Board is at liberty to approach the Regulatory Commission if so advised.

12. The learned Additional Advocate General on behalf of the third respondent Tamil Nadu Electricity Regulatory Commission further contended that the concept of Deemed Demand benefit was introduced in Order No.3 of 2006 by the Commission. Though there was no regulation governing the said subject, it was introduced solely with a view to extend a concession to generators as the introduction of open access was in the initial stage. The deemed demand is a fiction, which was evolved to promote open access in the formative stages and rightly Commission has reviewed its own decision in the subsequent statutory order to dispense with the same. The concept of demand charges has found statutory sanction in the Electricity Act, 2003 which provides for recovery of fixed charges but the same is not the case in respect of deemed Demand charges which does not have statutory sanction. At best, the facility so far enjoyed can be termed to be a concessional one to promote open access in the initial stages and any move to make such concessions to the generators a permanent affair would amount to unfair enrichment at the cost of the licensee/other consumers. Further, the demand charges being a component of tariff, the



Commission has the power to revisit the same and revise subsequently as circumstances warrant.

13. With reference to the submissions made by the respective learned counsels appearing on behalf of the parties to the lis on hand, this Court is of the opinion that the power to revisit the entire concession of Deemed Demand Charges is granted to the Tamil Nadu Electricity Regulatory Commission. The Commission is empowered to revise the order even by initiating suo-motu revision. The power of suo-motu revision has been contemplated in the order dated 15.05.2006 itself. Thus there is no impediment for the commission to initiate suo-motu revision for the purpose of revisiting the entire concession and to revise the same if necessary. The grievance of the writ petitioner is that such a suo-motu power had not been exercised by the Regulatory Commission nor the Commission had undertaken the process of adjudication by providing an opportunity to the stakeholders. Without undertaking any such process the unilateral decision has been taken by the respondent Electricity Board for the withdrawal of the concession granted earlier. In the absence of a specific order by the Regulatory Commission in this regard, the power of the Commission to revise the concession of Deemed Charges cannot be usurped by the authorities of the Electricity Board. Thus the impugned order is one where the respondents are not following the procedures contemplated nor the Commission exercised the suo-motu power of revision.

14. It is contended by the learned Additional Advocate General that the petitioner is attempting to take undue advantage of the omission made by the authorities in the impugned order. However, this Court cannot consider the same in view of the fact that the powers conferred on the Regulatory Commission had not been exercised admittedly by the respondents. Procedures to be followed also had not been adhered. Thus the very submission made that the omission on the part of the respondent is taken as an advantage by the writ petitioner deserves no merit. This apart this Court cannot draw an inference from and out of such omission made by the Electricity Board or by the Regulatory Commission. There cannot be any implied withdrawal of concession, which is permissible. The concession already granted and in force for long years can be withdrawn or taken away only by following the procedures contemplated and therefore the unilateral decision of the respondent Board can never be appreciated by this Court.

15. It is further contended by the learned counsel appearing for respondents that the Regulatory Commission had withdrawn the Deemed Demand Charges concept in respect of the



Wind Energy Generators, Biomass generators, Bagasse Based Co-generators in Orders No.6, 7 & 8 dated 31.07.2012. However, the open category of the writ petitioner namely open access consumer/fossil fuel based generators has not been stated in the counter affidavit. Thus the reason for non-inclusion is not known to this Court. This Court cannot draw any factual inference in respect of the withdrawal of the concession granted to all other categories but it should be applied to the writ petitioner also who belongs to a different category. Such an inference is not only improbable, which cannot be made, in view of the fact that specific clause is available in the order of the Regulatory Commission dated 15.05.2006 for initiation of revision procedures even suo-motu. Thus it is made clear that the respondents in the event of passing an appropriate orders by following the procedures contemplated cannot withdraw or cancel the benefit of Deemed Demand Charges already extended to the writ petitioner. The said concession can be cancelled by invoking the power by Electricity Regulatory Commission. Accordingly this writ petition is to be considered.

16. The learned counsel appearing for the writ petitioner has stated that such an adjudicative process in compliance with the principles of natural justice has been contemplated in the Tamil Nadu Electricity Regulatory Commission conduct of business regulations 2004 clause 16 1 & 2 reads as under :-

16 (1) The Commission may initiate any proceedings suo motu or on a petition filed by any affected or interested person.

(2) When the Commission initiates the proceedings, it shall be by a due notice issued by the Commission. The Commission may give such orders and directions as may be deemed necessary, for serving of notices to the affected parties; for the filing of replies and rejoinders against or in support of the petition in such form as the Commission may direct. The Commission may, if it considers appropriate, issue orders for publication of the petition inviting comments from the public or any class of persons on the issue involved in the proceedings in such form as the Commission may direct.

17. In view of the discussions made in the afore mentioned paragraphs, this Court is of the opinion that the Regulatory Commission has to under take the process of revision either suo-motu or through an application if any filed before the commission and conduct the adjudicative process by issuing notice to all the stakeholders and after hearing the parties



aggrieved, decision shall be taken on merits and in accordance with law. The compliance of principles of natural justice has been contemplated in the business regulations, as stated supra. Thus Electricity Regulatory Commission is bound by that and they have to follow the procedures and thereafter take a decision and pass orders on merits and in accordance with law in respect of the withdrawal of the concession of the Deemed Demand Charges in respect of the writ petitioner. However, it is made clear that the observations made in this judgment will not affect the independent adjudication if any undertaken by the Electricity Regulatory Commission in accordance with the procedures contemplated. The Electricity Regulatory Commission is at liberty to decide the merits and de-merits independently and pass orders without causing undue delay in view of the fact that the concession has been already cancelled in respect of other categories. Accordingly the impugned order passed by the second respondent in letter No.CFC/FC/DFC/AAO.HT/AS.3/REV/D.N.115/13 dated 29.07.2013 is quashed and the writ petition is allowed. No costs. Consequently connected miscellaneous petitions are also closed.

Sd/-

Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

vrc

To

1. Tamil Nadu General and Distribution Corporation Limited,
[TANGEDCO], 144, Anna Salai, Chennai - 600 002.
2. Chief Financial Controller/Revenue,
TANGEDCO, 144, Anna Salai, Chennai - 600 002.
3. The Superintending Engineer,
TANGEDCO, Mettur Electricity Distribution Circle,
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4. Tamil Nadu Electricity Regulatory Commission,
Through its Secretary,
No.19A, Rukmini Lakshmipathy Salai,
Egmore, Chennai - 600 008.

+1cc to Mr.R.S.Pandiyaraj, Advocate, S.R.No.19741

W.P.No.24413 of 2014

SVI (CO)

RLP (08/04/2022)