IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.12.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

W.P.No.32824 of 2022
and
W.M.P.Nos.32233 to 32235 of 2022

OPG Power Gen Private Limited,
Represented by its Senior Manager,
OPG Nagar,
Periya Obulapuram Village,
Nagaraja Kandigai,
madharapakkam Road,
Gummidipoondi,
Thiruvallur – 601 201. ..Petitioner

Vs.

1.Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO),
Represented by its Chairman and Managing Director,
10^{th} Floor, 144 Anna Salai,
Chennai – 600 002.

2.Chief Engineer/ PPP
NPKRR Maaligai,
6^{th} Floor/ Eastern Wing,
No.144, Anna Salai,
Chennai – 600 002.

3.Ministry of Power,
Union of India,
Shram Shakthi Bhawan,
Rafi Marg,
New Delhi – 110 001.
Represented by its Principal Secretary ..Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India seeking issuance of Writ of Certiorarifed Mandamus, calling for the records of the 2nd respondent in its impugned Letters bearing Lr.No.CE/PPP/SE/PP/EE-2/PP/AEE4/F.OPG/D.740/2022 dated 23.11.2022 and Lr.No.CE/PPP/SE/PP/EE-2/PP/AEE4/F.OPG/D.759/2022 and quash the same as arbitrary, illegal and contrary to the provisions of the Electricity Act, 2003 and to consequently direct the 1st and 2nd respondents to procure the contracted power of 74 MW under long-term on pass through basis in terms of the directions of the 3rd respondent.

For Petitioner : Mr.Rahul Balaji
For Respondents : Mr.P.Wilson, Senior Counsel,
Assisted by Mr.D.R.Arunkumar,
Standing Counsel for R1 and R2

Mr.V.Chandrasekaran,
Senior Panel Counsel – Central Government
for R3

ORDER

Considering the limited prayer sought for in the Writ Petition, this Writ Petition is taken up for disposal at the admission stage with the consent of the learned counsel appearing on either side.

2. Challenge in the writ petition is to the communication issued by the TANGEDCO dated 23.11.2022 followed by another communication dated 30.11.2022, in and by which, the TANGEDCO had dis-continued the process to allow pass through coal price implemented pursuant to the directions of Ministry of Power dated 05.05.2022.

3. In view of the steep increase in the price of imported coal, power generating Companies operating on the imported coal were unable to generate power as per the Power Purchase Agreement. Taking note of the alarming situation, the Ministry of Power in exercise of the powers under Section 11 of the Electricity Act, 2003 issued certain directions allowing the generators to pass through the coal price to the Distribution Companies as a one time measure till 31st October 2022. An Expert Committee was appointed by the Ministry of Power to fix the bench mark rates depending upon the price of the coal in the International Market. It was also left open to the Power Purchase Agreement Holder to negotiate the rate with the generators.

4. The sub-clauses (h) and (i) of Clause 4 of the order passed by the Ministry of power on 5th May 2022 in exercise of powers under Section 11 of the Electricity Act reads as follows:-

> *'h. Where any DISCOM/ State is not able to enter into mutually negotiated rates with the generating company and is also not willing to procure power at the bench mark rate worked out by the Committee; or is not able to make weekly payment then such quantity of power shall be sold in the Power Exchanges.*
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> *i. The net profit, if any, by sale of power which is not sold to the PPA holder and is sold in the Power Exchanges, shall be shared between the generator and PPA holder in the ratio of 50 : 50 on monthly basis.'*

5. The above notification gives an option to the Power Purchase Agreement Holder either to purchase at the rate fixed by the Committee or at the agreed rate. If the Power Purchase Agreement Holder is unable to or unwilling to purchase at the rates fixed by the Committee or at the agreed rate, it will be open to the generator to sell the power produced in the Power Exchanges and the Power Purchase Agreement Holder would be entitled to 50% of the profit so earned by selling power in the power exchanges. These directions which were to be in force till 30.10.2022 were extended till 31.12.2022 by order dated 28.09.2022.

6. The TANGEDCO by its letter dated 23.11.2022 informed the petitioner, who is the generator, that it is not willing to purchase power at the rates fixed by the Committee allowing pass though of the coal price. It has required the petitioner to supply power on the basis of the Power Purchase Agreement with effect from 01.12.2022.

7. It is the contention of the petitioner that the TANGEDCO has to go by the directions of the Ministry of Power issued under Section 11 and it will have to purchase the power only at the rates fixed by the Committee. It cannot revert back to the Power Purchase Agreement ignoring the directions issued by the Ministry of Power.

8. While Mr.P.Wilson, learned Senior Counsel appearing for the TANGEDCO would claim that the price has actually come down Mr.Rahul Balaji, learned counsel appearing for the petitioner would submit that the Committee has on 02.12.2022 fixed the bench mark energy charges at Rs.7.83 per unit from 27.11.2022 and the same is likely to be re-fixed every two weeks. The fixed charges will be Rs.1.50 per unit.

9. The question that begs the attention of the Court is as to whether the TANGEDCO can compel the petitioner to sell power at the Power Purchase Agreement rates till such time the notification under Section 11 by the 3rd respondent is in force. The answer has to be a firm No. Clause h and i of the notification dated 05.05.2022 extracted above would lead to a definite conclusion that while it is open to the TANGEDCO to refuse to purchase power at the bench mark rate fixed by the Committee, it cannot compel the generator to sell at the lesser rate as per the Power Purchase Agreement. It is open to the parties to agree upon a price. Such an agreement has not been reached. Therefore, the TANGEDCO will have to allow the generator to sell power at the Power Exchanges and seek a share in the profit as per clause i of the notification dated 5th May 2022.

10. Mr.Rahul Balaji, learned counsel appearing for the petitioner is more concerned with the language used in the letter of the TANGEDCO dated 30.11.2022, wherein, it is stated that the petitioner shall supply power as per the provisions of the Power Purchase Agreement following the despatch instructions of State Load Despatch Centre without any deviation.

11. Mr.P.Wilson, learned Senior Counsel appearing for the 1st and 2nd respondents would upon instructions from the Assistant Executive Engineer submit that the word 'shall' occuring in 3rd paragraph of the letter dated 30.11.2022 be read as 'may' and the TANGEDCO will not insist upon power supply as per the Power Purchase Agreement till such time the directions under Section 11 are in force. In the light of the above, the apprehension of the petitioner is addressed.

12. Hence, the writ petition is **disposed of** giving liberty to the petitioner to sell the power produced by it in accordance with the notification issued by the Ministry of Power from time to time. The TANGEDCO will also comply with the directions of the Ministry of Power from time to time. No costs. Consequently, the connected miscellaneous petitions are closed.

06.12.2022

dsa
Index : No
Internet : Yes
Speaking order

To

1.Chairman and Managing Director,
Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO),
10th Floor, 144 Anna Salai,
Chennai – 600 002.

2.Chief Engineer/ PPP
NPKRR Maaligai,
6th Floor/ Eastern Wing,
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3.Principal Secretary,
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R.SUBRAMANIAN, J.

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