IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.09.2023

Delivered on : 11.12.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.S.(Comm Div). No. 57 of 2021

M/s.OPG Power Generation Pvt.Ltd.,
Rep by its Authorized Signatory,
Mr.P.Venkatasubramanian,
OPG Nagar, Periya Obulapuram Village,
Nagarajakandigai,
Madharapakkam Road,
Gummidipoondy, Thiruvallur,
Tamil Nadu 601 201 ... Plaintiff

Vs

1. The Tamil Nadu Generation and Distribution Corporation Ltd.,
(TANGEDCO),
Rep by its Managing Director,
No.144, Anna Salai,
Chennai 600 002.

2. The Superintending Engineer,
Electricity Distribution North,
TANGEDCO, No.144, Anna Salai,
Chennai 600 002.

3. The Chief Engineer -Grid Operation,
Tamil Nadu Transmission corporation Ltd.,
No.1444, Anna Salai, Chennai 600 002 ...Defendants

PRAYER: Plaint is filed under Order VII Rule 1 C.P.C and Order IV Rule 1 of Original Side Rules read with Section 2(1)(C)(I) and (XVIII) and Section 7(1) of the Commercial Courts Act to pass a judgment and decree against the defendants directing the defendants

a) To pay the plaintiff a sum of Rs.50,03,58,540/- together with interest @ 15% per annum on Rs.26,81,08,916/.- from the date of the plaint fill the date of full payment.

b)To pay the cost of the suit to the plaintiff.

For Plaintiff : Mr.A.R.L.Sundaresan, Senior Counsel
for Mr.A.R.Karthik Lakshmanan

For defendants 1&2: Ms.M.Senha

For Defendant-3 : Served – No Appearance.

JUDGMENT

This suit is filed for recovery of a sum of Rs.50,03,58,540 together with interest @ 15% per annum on Rs.26,81,08,540/-from the date of the plaint till the date of payment.

2. PLAINTIFF'S CASE:

(i) Plaintiff is a Company incorporated under the Companies Act carrying on business of generation and sale of electric energy. The plaintiff uses coal for generating electricity and has set up its power plant in Gummidippoondi with a total installed capacity of 422 MW. This thermal plant of the plaintiff is a recognized captive generating plant and supplies power to over 200 captive consumers under Medium Term Open Access (MTOA) and includes the supply of power of unit 3 under the Long Term Open Access (LTOA) with the state distribution licensee, i.e. TANGEDCO.

(ii) The first defendant is a wholly owned Company of the Government of Tamil Nadu involved in generation and distribution of electrical energy in the State of Tamil Nadu as a licensee under the Electricity Act. For the purpose of supplying electricity, they purchase electrical energy from power generating plants. In this regard, they had floated a tender bearing Tender No.6 of 2014 inviting bids for supply of electrical energy round the clock for a period of one year from 01.10.2014 to 30.09.2015 initially for 954 MW and thereafter, the tenure was extended from 01.10.2015 to 11.10.2015 with electrical energy upto 240.60 MW.

(iii) The plaintiff, who had participated in the tender, emerged the successful bidder. The second defendant thereafter had issued the letter of acceptance on 26.09.2014 and entered into a Power Purchase Agreement (PPA) with the plaintiff on 01.10.2014. The agreement was initially for a period of one year, i.e 01.10.2014 to 30.09.2015 and thereafter, it was extended till 11.12.2015.

(iv) The plaintiff would submit that in terms of Clause 26(ii) of the tender condition, the injection of energy was to be to the tune of 85% of the contracted energy and the back-down could not be more than 15% of the contracted energy. However, the plaintiff would contend that contrary to this clause, the defendants were giving instructions for back-down more than the permitted percentage as a result of which, the plaintiff was not able to inject the contracted energy. The plaintiff would contend that they were not able to sell this excess energy to third parties and further electricity is not a commodity which can be stored. Consequently, the plaintiff had suffered loss. The plaintiff therefore contended that the defendants were bound to pay compensation at 20% of the tariff rate i.e, Rs.1.10 per KWH. Since the defendants had not come forward to pay the compensation, the plaintiff was constrained to file W.P.No.22648 of 2015 on the file of this Court directing the defendants to permit the plaintiff to inject energy for the contracted quantum and pay the price for the same. This Court was pleased to pass an interim order dated 27.07.2015 allowing the plaintiff to inject the power as per the PPA. Despite the interim orders, the defendants continued to issue back-down instructions more than the contracted quantity, as a result of which the plaintiff had suffered a substantial loss. By letter dated 27.04.2016 addressed to the second defendant, the plaintiff had demanded a sum of Rs.26,81,08,916/-, being the compensation amount payable by the defendants to the plaintiff for the shortfall of consumption and exceeding the maximum deviation of 15% of the contracted energy for the period October 2014 to December 2015. The plaintiff had sent a reminder dated 10.09.2018 reiterating the demand for compensation. Meanwhile, the payments for energy supplied for the period July and August 2015 fell due and a demand was also made.

(v) The third defendant, without complying with the demand, addressed a letter dated 20.08.2020 to the plaintiff stating that the amount for the energy supply in July and August 2015 to the tune of Rs.15,93,09,497/- would be paid only if an undertaking was given by the plaintiff that they would withdraw the writ petition, not claim interest on the amount and not claim compensation for the entire contract period covered under Tender No.6 of 2014 which included the months of July and August, 2015.

(vi) The plaintiff would submit that they had to bend to this pressure, as otherwise they would not receive the money for the electrical energy supplied by them. Therefore, they had executed an undertaking dated 21.08.2020 and on 08.09.2020, they had communicated to the third defendant that they had withdrawn the writ petition in terms of the undertaking. Thereafter, the plaintiff has sent a representation dated 11.11.2020 to defendants calling upon them to pay the compensation for the deviation from the contracted back-down energy. The plaintiff would submit that there was no response to this communication. Therefore, the plaintiff has come forward with the suit in question, which is for the compensation due for the deviation from the contracted back-down energy.

3. The defendants, who had entered appearance, had not filed the written statement within the stipulated time and had therefore, forfeited their right to file the written statement. However, the Court had permitted the defendants to cross examine the plaintiff on the basis of the plaint and the documents.

4. ISSUE:

Based on the pleadings and documents filed by the plaintiff, the issue, in respect of which this Court has to return a finding is as follows:

> *"Whether the plaintiff is entitled to the sum claimed, especially in the light of the undertaking*

dated 21.08.2020 given by them to defendants".

5. EVIDENCE:

(i). The plaintiff has examined one T.Venkateswaran, the authorized agent, as P.W1 and marked Exhibits P1 to P13. In his Chief examination, the plaintiff's witness has reiterated the contents of the plaint and had marked the documents. In his cross examination, in answer to question No.23 as to whether the plaintiff has filed the alleged back-down instructions, the witness had answered that they have filed the instructions and in answer to question No.24, the witness stated that with reference to the back-down instructions, they have already taken up the matter to this Court and they have got an order that TANGEDCO has to give back-down instructions as per the PPA. With reference to the question regarding the undertaking given, a question was put (question

No.38) that the present claim is against the undertaking given by the plaintiff as per Ex.P6 and the witness had answered as follows "Yes, as per the PPA, we are entitled to claim the compensation".

6. The learned counsels, in addition to the oral arguments, also presented their written arguments.

7. SUBMISSIONS OF THE LEARNED COUNSEL FOR THE PLAINTIFF:

Mr.AR.L.Sundaresan, learned senior counsel for Mr.A.R.Karthik Lakshmanan, learned counsel for the plaintiff had submitted the oral arguments. He would submit that the claim is with reference to the compensation for not drawing the power to the contracted extent and issuing back-down instructions more than the contracted percentage. The learned senior counsel would submit that, as per the terms of the tender, the plaintiff had to be compensated to the tune of 20% for the quantum of shortfall in excess of the permitted deviation of 15%, The learned senior counsel would draw the attention of this Court to Clause 26 of Ex.P1-Tender specifications. He would submit that the defendants had issued the back-down instructions from May 2015 to December 2015, as a result of which the plaintiff was constrained to file W.P.No.22648 of 2015 and Ex.P3 is the interim order that had been issued by this Court. He would submit that in the interregnum, the amounts were due towards bills for the months of July and August 2015 to the tune of Rs.15,93,09,497/-. When the plaintiff had demanded the payment of this amount, the third respondent, by letter dated 20.08.2020, had directed the plaintiff to give an undertaking letter. Consequent to the defendant submitting this letter, the plaintiff had given Ex.P6-Undertaking. It is his argument that Ex.P6-undertaking had been given only under coercion. He would draw the attention of the Court to the pleadings in this regard at paragraph Nos.11, 12 and 17. He would further argue that this would not amount to waiver as the plaintiff had immediately given a representation dated 27.04.2016 (Ex.P5) followed by a reminder dated 10.09.2018 (Ex.P6). He would further argue that the amount claimed is only compensation payable for the deviation in the back-down instructions and would therefore not be covered under the undertaking. The learned counsel would draw the attention to the statement of accounts annexed to Ex.P12-letter, which would clearly show that the amounts are being claimed for the period May 2015 to December 2015. The final bill has also been submitted on 10.09.2018. He would therefore pray that the suit be decreed as prayed for.

7. SUBMISSIONS OF THE LEARNED COUNSEL FOR DEFENDANTS 1 AND 2

Ms.M.Sneha, learned counsel for defendants 1 and 2 would submit that on the face of the claim, the same is barred by limitation, since the compensation in the form of penalty is sought from the period May 2015 whereas the suit has been filed on 16.08.2021. Therefore, she would submit that the defendants are not estopped from raising the plea of limitation without even filing the written statement, as the same is obvious from the very reading of the plaint. She would further submit that the claim is based on the back-down instructions given by the defendants, which, according to the plaintiff, is more than the contracted percentage. However, none of these instructions have been filed into the Court and D.W1 has admitted the same. She would draw the attention of the Court to the answers given to question Nos. 20 to 22. It is also her contention that the claim for compensation is made under the PPA which was valid only till 11.12.2015. Therefore, on this ground also, the suit is barred by limitation.

8. Heard the learned counsel on either side and perused the pleadings and evidence available on record.

9. DISCUSSIONS:

(i) The plaintiff has come to Court claiming the amounts that are due to them as compensation for the defendants having given back-down instructions more than the contracted quantity. The plaintiff and defendants had entered into an agreement for the supply of energy by the plaintiff to the defendants. As per the terms of the tender, the plaintiff was bound to inject 85% of the contracted energy and the back-down was to be only to an extent of 15%. Clause 26 of the tender[Ex.P1], would provide that in the event of a deviation from the procurer side of more than 15% of the contracted energy for which open access has been allocated on a monthly basis, then the procurer shall pay compensation at 20% of tariff per KWH for the quantum of shortfall in excess of the permitted deviation of 15%. This compensation is independent of the amount that was payable by the defendants to the plaintiff for the electrical energy procured by them. The plaintiff has no claim against the defendants towards the charges for electricity energy procured, as the amounts have been fully settled pursuant to the undertaking given by the plaintiff to defendants-under Ex.P6. In fact, it is the contention of the plaintiff that since there was a loss on account of the deviation being more than 15% of the contracted energy, they have demanded compensation from the defendants. Since there was no response, they had filed a writ petition and an interim order came to be passed in the writ petition directing the first respondent to restrict the percentage of backing down between 30 and 40% till 18.08.2015 (Even this is more than the contracted quantity). Thereafter, the plaintiff was permitted to operate the remaining capacity or as per the requirement of the defendants on a need basis. It appears that, pursuant to the filing of the writ petition, the amounts were due for the electrical energy supplied for the period July and August 2015. The plaintiff had made a demand for the same. Thereafter, under Ex.P5 dated 20.08.2020, the third respondent had addressed a letter to the plaintiff, stating that pursuant to the meeting held between the representatives of the plaintiff and the third defendant, a consensus had been arrived that the amount would be paid subject to the plaintiff giving the following undertaking.

> *"1. That we hereby undertake to accept the payment of Rs. 15,93,09,497/- (Rupees Fifteen Crores ninety three lakh nine thousand four hundred and ninety seven only) from TANGEDCO towards power supplied to TANGEDCO during the month of July 2015 and August 2015 based on the Tender No.6 of 2014, dated 19.08.2014 to be made within one (1) month from the date of furnishing the undertaking. The undertaking for the same is to be furnished to the Chief Engineer/Grid Operation/TANTRANSCO:*
>
> *2. That we hereby undertake that, within fifteen (15) days from the date of receipt of the above said payment, we shall withdraw the Writ Petition, W.P.No. 22648 of 2015 pending before the Hon'ble High Court of Judicature at Madras and immediately intimate the same to the office of Chief Engineer/Grid Operation/TANTRANSCO, Chief*

Engineer/PPP/TANGEDCO and Superintending Engineer/Chennai North EDC/TANGEDCO.

3. That we hereby undertake that, M/s OPG Power Generation Private Limited shall not claim any interest for the amount of Rs. 15,93,09,497/- (Rupees Fifteen Crores ninety three lakh nine thousand four hundred and ninety seven only).

4. That we hereby undertake that, M/s OPG Power Generation Private Limited shall not claim any compensation for the entire contract period of Tender No. 6 of 2014, dated 19.08.2014 from the TANGEDCO including for the months of July 2015 and August 2015.

5. That we hereby further undertake that, M/s OPG Power Generation Private Limited shall not go for any litigation before any Court/Forum in respect of Tender No.6 of 2014, dated 19.08.2014 and the LOA, dated 26.04.2014.

6. On receipt of withheld payment for the injected energy for the month of July-2015 & August-2015 and after withdrawal of Court case within 15 days on receipt of payment, the subject matter shall be treated as completely closed in all aspects".

Therefore, the plaintiff has given the undertaking as requested. Clause 4, 5 and 6 of this undertaking letter which is extracted herein below has become the bone of contention between the parties:

"4. That we hereby undertake that, M/s OPG Power Generation Private Limited shall not claim any compensation for the entire contract period of Tender No. 6 of 2014, dated 19.08.2014 from the TANGEDCO Including for the months of July 2015 and August 2015.

5. That we hereby further undertakes that, M/s OPG Power Generation Private Limited shall not go for any litigation before any Court/Forum in respect of

Tender No.6 of 2014, dated 19.08.2014 and the LOA, dated 26.04.2014.

6. On receipt of withheld payment for the injected energy for the month of July- 2015 & August-2015 and after withdrawal of Court case within 15 days on receipt of payment, the subject matter shall be treated as completely closed in all aspects."

(ii). A reading of Clause 5 would clearly indicate that the plaintiff had given up their claims in respect of the Tender No.6 of 2014 dated 19.08.2014 as well as the Letter of Acceptance dated 26.09.2014. This letter of acceptance dated 26.09.2014 is also referred to as the Power Purchase Agreement/ Power Sale Agreement which is evident from a reading of Clause 12 of the Letter of Acceptance, which reads as follows:

"12. Legality

This Letter of Acceptance and the letter in which this Letter of Acceptance has been accepted by the generator put together shall be deemed as a valid document of Power Purchase Agreement/ Power Sale Agreement. In the event of arising of any commercial / operational dispute, this deemed agreement document will have a status of a legal document before the appropriate judicial forum."

The fact that the plaintiff had decided to close the issue is evident from the reading of Clause 6, where the plaintiff has clearly stated that on receipt of the withheld payment and the withdrawal of the court case, the subject matter would stand completely closed. The subject matter from a reading of the undertaking is both tender as well as the letter of acceptance.

(iii). The plaintiff would contend that this undertaking has been obtained by coercion. A reading of Ex.P5 would indicate that there was a face to face meeting between the representatives of the plaintiff and the third defendant and a consensus was arrived at during this meeting. The consensus that was arrived at, was that the defendant would pay the due towards bills for the months of July and August 2015 and the plaintiff would give an undertaking on stamp paper to the defendants which included an undertaking regarding the withdrawal of the writ petition. From the proof affidavit of P.W1, it can be seen that not only was the writ petition withdrawn but the amount of Rs.15,93,09,497/- constituting the dues for the month of July and August 2015 was also paid. Therefore, the terms of the undertaking letter had been given effect o by both parties. That apart, if really the plaintiff had been coerced into signing the undertaking, they should have at the first instance put it on record that the undertaking letter dated 21.08.2020 was obtained by coercion. Such a communication has not been filed by the plaintiff. On the contrary, it is only under Ex.P13 dated 27.04.2016 that a demand for the compensation has been made. Even here, there is no mention that the undertaking had been obtained by coercion. This was followed by another letter Ex.P12 issued two years thereafter, i.e. on 10.09.2018 and even in this letter, there is no mention that the undertaking had been obtained under coercion. Therefore, considering the fact that the plaintiff has voluntarily signed the undertaking letter, they are bound to adhere to its terms.

(iv). Though the defendants have not filed the written statement, they have been permitted to cross examine the witness and submit their arguments. A perusal of the claim for compensation would indicate that the compensation was claimed for the period May 2015–December 2015 and the suit has been filed only on 16.08.2021, which clearly shows that the claim is barred by limitation. Further, it is the clear case of the plaintiff that the compensation is now being claimed does not form part of undertaking given under Ex.P6. Therefore, the undertaking given on 21.08.2020 would also not enure to the benefit of the plaintiff.

However, since this defense was not raised and the plaintiff has not been given an opportunity to lead evidence in this regard and refute the defendant's claim to argue on that point. Therefore, there is no necessity to given a finding in this regard.

(v). In the light of the discussion regarding the undertaking letter given by the plaintiff, the plaintiff cannot plead that there is no waiver on their part, particularly when under Clauses 5 and 6 of the undertaking letter, they have in very clear terms stated that they have no further claim under the tender document as well as under the PPA.

(vi). Therefore, in the light of the categoric undertaking and the failure on the part of the plaintiff to prove the undue influence, the issue has to be answered against the defendant and accordingly, the suit is dismissed. However, there shall be no order as to costs.

.12.2023

Internet : Yes/No
Index :Yes/No
Speaking / Non-Speaking
srn

APPENDIX

I. Witnesses :

P.W.1	Mr.Venkateswaran

II. Exhibits :

Ext.P1	Tender No.6 of 2014 (Relevant Pages)	19.08.2014
Ext.P2	Power Purchase Agreement between the plaintiff and the second defendant	26.09.2014
Ext.P3	Affidavit and petition in W.P.No.22648 of 2015	23.07.2015
Ext.P4	Interim order in W.P.No.22648 of 2015	27.07.2015
Ext.P5	Letter to the 2nd defendant	27.04.2016
Ext.P6	Letter to the 2nd defendant	10.09.2018
Ext.P7	Letter by the 2nd defendant	20.08.2020
Ext.P8	Undertaking submitted by the plaintiff	21.08.2020
Ext.P9	Letter by the plaintiff to the 3rd defendant herein	21.08.2020
Ext.P10	Order in W.P.No.22648 of 2015 dismissed it as withdrawn	04.09.2020
Ext.P11	Letter by the plaintiff to the 3rd defendant herein	08.09.2020
Ext.P12	Letter by the plaintiff to the 2nd defendant demanding the compensation amount	11.11.2020
Ext.P13	Statement of calculation of plaint claim comprising of principal and interest	11.08.2021

P.T. ASHA. J,

srn

Pre-delivery Judgment in

C.S.(Comm Div). No. 57 of 2021

11.12.2023