IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.07.2023

CORAM

MR.JUSTICE N.SESHASAYEE

W.P.No.17577 of 2020
and W.M.P.Nos.18038 of 2021 and 21785 and 21788 of 2020

M/s.Maris Spinners Limited
Head office: 11, Cathedral Road
Chennai 600 086, Represented by
its General Manager & Authorised signatory
Mr.R.S.Ganappathi ... Petitioner

Vs

1.Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO)
Represented by its Chairman and Managing Director
144, Anna Salai, Chennai 600 002

2.The Executive Engineer
Open Access
State Load Despatch Centre, / TANTRANSCO
144, Annasalai
Chennai 600 002

3.The Superintending Engineer
TANGEDCO
Trichy Electricity Distribution Circle / Metro
Trichy - 20

4.M/s.ARS Energy Private Limited
D-109, 2nd Floor, LBR Complex
Anna Nagar East, Chennai 600 102 ... Respondents

PRAYER: The writ petition filed under Article 226 of the Constitution of India, for issuance of a writ of Certiorarified Mandamus, to call for the records of the 2nd respondent culminating in their impugned communication dated 18.06.2020 and 18.07.2020 and quash the same as illegal, arbitrary and consequently direct the 1st, 2nd and 3rd respondents to issue standing clearance and NOC permitting the petitioner company to purchase power through IEX under Open Access without any further delay.

For Petitioner : Mr.N.L.Raja
Senior Counsel
For E.Jayasankar

For Respondents : Mr.D.R.Arunkumar - R1 to R3
Mr.Rahul Balaji - R4

ORDER

The petitioner herein challenges the communication of the first respondent dated 18.06.2020 and 18.07.2020 which came to be issued in the following circumstances: The petitioner is a consumer of electricity, and had entered into an agreement with the 4th respondent, the generator of electricity. Sometime during 2020 during COVID days, the 4th respondent could not supply and satisfy the energy requirement of the petitioner in terms of its agreement with the petitioner. This has forced the petitioner to go to the open market for purchase of electricity on a daily basis. To enable it to do so, the 2nd respondent was required to issue a NOC which the 2nd respondent had refused vide the impugned communication. The fundamental objection is that when the petitioner had entered into an agreement with the 4th respondent and when the same subsists, the petitioner should not procure energy from other sources.

2. Clause 12(2) of TNERC's Grid Connectivity and Intra State Open Access Regulation, 2014, provides, *"the application shall be accompanied by an undertaking of not having entered into power purchase agreement (PPA) or any other bilateral agreement with more than one person for the same quantum of power for which open access is sought."*

3. The objection now revolves around clause 12(2) of TNERCs Grid connectivity and Intra State Open Access Regulation, 2014, and Clause 8(3)(a)(ii) of CERC's Interstate Open Access Regulation, 2008, and the

same are extracted below:

Clause 12(2) of TNERCs Grid connectivity and Intra State Open Access Regulation, 2014	***Clause 8(3)(a)(ii) of CERCs Interstate Open Access Regulation, 2008***
The application shall be accompanied by an undertaking of not having entered into power purchase agreement (PPA) or any other bilateral agreement with more than one person for the same quantum of power for which open access is sought.	*....Provided further that while making application to the SLDC for obtaining no objection or prior standing clearance in case of collective transactions, the affidavit shall also include the declaration that there is no other contract for sale or purchase, as the case may be, of the same power for which no objection or prior standing clearance is applied for.*

4. Learned counsel for the petitioner submitted:

   a) Neither of the two aspects which were relied on by TANGEDCO for refusal to issue N.O.C. can have any application given the factual context of the case. When the petitioner entered into an agreement with the 4th respondent for purchase of energy that was the only agreement the petitioner had entered, into and both the above referred to clauses will have application only if this is sought to be breached. The TANGEDCO knew this only too well.

   b) That the refusal to issue N.O.C on the stated ground goes against the spirit of the Electricity Act, 2003, since Sec. 9 thereof provides for open access, and any consumer of electricity has the freedom of choice to procure electricity from whichever source, and the TANGEDCO, as a transmitter of electricity between a private generator and the consumer, is only entitled to wheeling charges, and surprisingly the issue is not on the payment of wheeling charges, but on the issuance of NOC.

c) Today the petitioner terminated the contract with the 4th respondent, and even the shares which the petitioner was required to have in the 4th respondent company too have been returned to it.

The learned counsel added that pursuant to an interim order passed in this case, TANGEDCO has been issuing N.O.C. regularly and as on date things work smoothly without any hiccup.

5. Mr.Rahul Balaji, the learned counsel appearing for the 4th respondent made the following submissions: The 4th respondent, as a generator, had entered into multiple wheeling agreement with TANGEDCO vis-a-vis its

open access purchase of electricity with third party-consumers. The generator has little to do with the stipulation in clause 12(2) of the above referred to Regulations, and it is intended exclusively for the purchaser. All it says is that when an open access purchaser makes an application to SLDC, it has to give an undertaking that it has not entered into more than one PPA with a generator. So far as the present case is concerned, the petitioner has terminated the contract owing to the inability of the 4^{th} respondent to provide electricity and for all practical purposes the status quo ante as was before its PPA with the 4^{th} respondent has been restored. Therefore, it no more requires the assent of the 4th respondent or compliance of clause 12(2) of TNERCs Grid Connectivity and Intra State Open Access Regulation, 2014, for TANGEDCO to issue its NOC. to the petitioner.

6. The learned counsel for the TANGEDCO took this Court extensively through its counter and submitted that:

- the prayer had two parts as the first one relates to issue of NOC for June and July 2020;
- seeking NOC for procurement through IEX could be possible only if

the agreement between the petitioner and the 4th respondent is terminated, and what was terminated by the petitioner is only Medium Term Open Access (MTOA) purchase and not the agreement itself.

7. All the parties however, agree that today NOC is being regularly issued by TANGEDCO to the petitioner for its energy procurement through IEX. This Court considers that TANGEDCO has gone into a casuistic expedition and try to see something where there is nothing. Admittedly, the petitioner and the 4th respondent had entered into a PPA dated 28.03.2019, for sale and purchase of energy from 01.04.2020. As stated earlier, the 4th respondent could not supply energy to the petitioner as per the agreement, and it resulted in the termination of the aforesaid contract by the petitioner. In its communication dated 15.07.2020 to the 4th respondent, the petitioner had made it clear that it had terminated the MTOA by 31.03.2020, and the shares which the petitioner had in the 4th respondent had also been since transferred to the petitioner. Now the interpretation TANGEDCO wants to put on this agreement is that agreement and MTOA are two different aspects of the same agreement, and tries to project a case that agreement needs to be

separately terminated, and not just MTOA.

8. MTOA enables open access for two years. When the purchaser says that it had terminated its contract for purchasing electricity for the two year terms, rather for the medium term, then what else remains in the agreement to be performed? To state it differently, the petitioner has merely informed the 4th respondent, and tells it that its agreement to buy the latter's energy for the Medium Term Open Access i.e. two years, will stand terminated. This is the soul of the very agreement, and when this stands terminated, only the shell remains, and nothing more requires to be performed. Here TANGEDCO has unnecessarily created a dispute where neither the generator nor the purchaser have any conflict.

9.1 This Court therefore, does not agree with the interpretation put on clause 12(2) of TNERCs Grid Connectivity and Intra State Open Access Regulation, 2014, by the TANGEDCO. So far as the second part of the prayer is concerned, today inasmuch as the NOC is being issued to the petitioner from June 2020 till date, nothing really survives. Even if the objection to interpretation of clause 12 (2) of TNERCs Grid Connectivity and Intra State Open Access Regulation, 2014 made by the TANGEDCO is presumed to be valid, even then the two year period has now expired.

9.2 From whichever angle it is seen, today, TANGEDCO cannot refuse issuing NOC to the petitioner to procure energy. To stretch it further, TANGEDCO is under an obligation to issue NOC to the petitioner as and when the same is applied for.

9. To conclude the petition is allowed and the impugned communication of the second respondent dated 18.06.2020 and 18.07.2020 is hereby quashed. No costs. Consequently, connected miscellaneous petitions are closed.

25.07.2023

Index : Yes / No
Neutral Citation : Yes / No

kas

N.SESHASAYEE, J.

kas

To.

1.Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO)
Represented by its Chairman and Managing Director
144, Anna Salai, Chennai 600 002

2.The Executive Engineer
Open Access
State Load Despatch Centre, / TANTRANSCO
144, Annasalai, Chennai 600 002

3.The Superintending Engineer
TANGEDCO
Trichy Electricity Distribution Circle / Metro
Trichy - 20

W.P.No.17577 of 2020
and W.M.P.Nos.18038 of 2021
and 21785 and 21788 of 2020

25.07.2023