



WEB COPY



W.A.Nos.191 of 2023 & 2563 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved On : 07.11.2023

Judgment Delivered On : 22.11.2023

CORAM :

THE HON'BLE MR.SANJAY V.GANGAPURWALA, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

W.A.Nos.191 of 2023 & 2563 of 2022

and

CMP.Nos.1823 of 2023 & 20216 of 2022

Tamil Nadu Generation and Distribution Company Ltd.,
(TANGEDCO), Represented by its
Chairman cum Managing Director,
No.144, Anna Salai, Chennai – 600 002.

... Appellant
(in both cases)

Versus

Arkay Energy (Rameshwaram) Limited,
Represented by its authorized signatory,
No.20, (Old No.29), Chamiers Road,
Nandanam, Chennai – 600 035.

... Respondent
(in both cases)

Prayer in W.A.No.191 of 2023 : Writ Appeal filed under Clause 15 of Letters Patent to set aside the order dated 24.01.2022 made in W.P.No.18122 of 2020 and allow the Writ Appeal.

Prayer in W.A.No.2563 of 2022 : Writ Appeal filed under Clause 15 of Letters Patent to set aside the order dated 07.09.2022 made in Review Application No.123 of 2022 in W.P.No.18122 of 2020 and allow the Writ Appeal.



W.A.Nos.191 of 2023 & 2563 of 2022

For Appellant : Mr. P. Wilson, Senior Counsel.
(in both cases) for Mr. I. Jai Venkatesh.

For Respondent : Mr. Anirudh Krishnan
(in both cases)

COMMON JUDGMENT

(Judgment of this Court was made by Mr. Justice. D.Bharatha Chakravarthy)

These two writ appeals arise out of the order of the Learned Single Judge, in the same matter; (i) in the Writ Petition No.18122 of 2020 dated 24.01.2022 in and by which the petition was disposed off by directing the appellant herein to pay the balance 50% of the admitted dues to the petitioner/respondent herein; (ii) in Review Application No.123 of 2022 dated 07.09.2022 thereby dismissing the review filed by the appellant and confirming the earlier order directing to pay the balance 50% of the admitted amount of Rs.5,02,94,220/-.

2.The brief facts leading to the filing of the writ appeals are that in the year 2008, the appellant issued a Tender No.3, dated 24.12.2008, seeking short-term power procurement for the period between January 2009 to June 2009. The writ petitioner was granted an award dated 29.01.2009 for the purchase of 40 MW at the rate of Rs.6.70/Kwh.



W.A.Nos.191 of 2023 & 2563 of 2022

3.Pursuant thereto, a power purchase agreement was also entered into

between the parties on 31.01.2009. As per Clause-4 of the said agreement, the rate was fixed as Rs.6.70/Kwh. The said agreement also has an Arbitration Clause in respect of any disputes arising between the parties.

4.It seems that, the appellant thereafter, issued a letter dated 25/03/2009 intimating the respondent that any excess generation not exceeding 10% is identified and accounted for on an annual basis after taking into account the self-consumption, CPP use, and this short-term sale to the appellant over and above the accepted quantum of power shall be purchased at the rate of Rs.6.70/kWh or as per TNERC notified rate. It is relevant to extract the said letter which reads as hereunder:-

“Any excess generation not exceeding 10% is identified and accounted on annual basis after taking into account the self consumption, CPP use and this short term sale to TNEB over and above the accepted quantum of the power, then the same shall be purchased at their PPA or TNERC notified rate.

It is informed that the above approval will be followed in the above LOA please"

(emphasis supplied)

5.Pursuant thereto, the writ petitioner had supplied 75,06,600 units

over and above the 40 MW agreed between the parties. Claiming at the rate



W.A.Nos.191 of 2023 & 2563 of 2022

of Rs.6.70/kWh in respect of such additionally supplied units, the writ petitioner claims that a total sum of Rs.5,02,94,220/- is due and payable by the appellant. When the petitioner made representations and demands requesting for payment of the above said sum, the following reply was issued by the appellant :-

“ M/s.ArKay Energy (Rameswaram) Ltd. vide ref.1 has requested payment of Rs.5.02 crores withheld by TANGEDCO stating that all the pending cases have been withdrawn by them as agreed between TANGEDCO and M/s.ArKay Energy (Rameswaram) Ltd. as notified by NCLAT Order dated 29.05.2018 in respect of Company Appeal (AT) (Insolvency) No.215 of 2017, No.231 of 2017 & No.232 of 2017.

Based on the above, it is now requested to submit necessary proof for withdrawal of court cases as agreed between TANGEDCO and M/s.ArKay Energy (Rameswaram) Ltd. as notified by NCLAT Order dated 29.05.2018 in respect of Company Appeal (AT) (Insolvency) No.215 of 2017, No.231 of 2017 & No.232 of 2017.”

(emphasis

supplied)

6.Even thereafter, no payments were made, and therefore, the writ petitioner filed the present Writ Petition in W.P. No.18122 of 2020, in which, the Learned Single Judge passed the following interim order dated 16.12.2020, on the basis of the above letter dated 06.02.2020, is extracted hereunder:-

“ Mr.N.Damodaran, learned Standing Counsel



WEB COPY



W.A.Nos.191 of 2023 & 2563 of 2022

takes notice on behalf of the respondent.

2.It is seen from the records that the petitioner was the successful bidder in a tender that was notified by the respondent in the year 2009. The case of the petitioner is that the respondent is due and payable a total sum of Rs.5,02,94,220/- to the petitioner. When the petitioner was requesting for this payment, the respondent directed the petitioner to furnish the split up of this amount and also asked for further details and the petitioner had also provided all the details by letter dated 18.09.2018. It is seen from the records that the respondent by letter dated 06.02.2020 had acknowledged the pending dues to the tune of Rs.5.02 Crores. It is seen from this letter that the respondent had directed the petitioner to withdraw the court cases and submit a proof of the same. The petitioner by letter dated 13.02.2020 informed the withdrawal of the cases and also submitted proof of the same along with this letter. The grievance of the petitioner is that inspite of receipt of this letter and the proof of withdrawal of the pending cases, the respondent for no reasons is delaying the release of money to the petitioner to the tune of Rs.5,02,94,220/-. Aggrieved by the same, the present Writ Petition has been filed before this Court.

3.The leaned Standing Counsel appearing on behalf of the respondent seeks for some time to take instructions.

4.Taking into consideration the facts and circumstances of the case and also of the fact that the amount claimed by the petitioner is an undisputed amount and it continues to be payable for quiet a long time, there shall be an interim direction to the respondent to immediately release 50% out of the total dues of Rs.5,02,94,220/-, within a period of six weeks from the date of receipt of a copy of this order.

5.Post this case under the caption "for reporting compliance" on 27.01.2021. In the



W.A.Nos.191 of 2023 & 2563 of 2022

meantime, the respondent shall also file a counter and come up with a specific stand with regard to the payment of the balance amount to the petitioner.”

7. Thereafter, when the Writ Petition came up for final hearing, it was agreed on behalf of the appellant that they would pay the balance admitted amount of dues and accordingly the same was recorded and the Writ Petition was disposed off. Paragraphs Nos.3, 4 and 5 of the order dated 24.01.2022 in W.P. No.18122 of 2020, states as follows :-

“3. Learned counsel for the petitioner submits that this Court vide its order dated 16.12.2020 had directed the respondents to release 50% of the total dues of Rs.5,02,95,220/, pursuant to which the respondents have released 50% of the dues in favour of the petitioner. However, the balance amount is yet to be released by the respondents. Hence, this Court may direct the respondents to balance 50% of the dues in favour of the petitioner within the time stipulated by this Court.

4. Learned Standing counsel for the respondents submits that the balance admitted amount of dues will be released in favour the petitioner within a period of four weeks.

5. Taking note of the submission made by the learned counsel for respondents, this Court directs the respondents to release the balance 50% of the admitted dues in favour of the petitioner from the date of receipt of a copy of this order, if there is no legal impediments.

6. Accordingly, this Writ Petition is disposed of with the aforesaid direction. No Costs.”

8. Aggrieved by the same, the appellant filed the Writ Appeal No.1691



W.A.Nos.191 of 2023 & 2563 of 2022

of 2022. Since the above order was passed on consent, this Court was not

inclined to entertain the Writ Appeal and the appellant withdrew the Writ Appeal with the liberty to file a review petition before the Learned Single Judge, accordingly the Writ Appeal was dismissed as withdrawn by an order dated 22.07.2022. Thereafter, the appellant once again approached the Learned Single Judge by way of Review Application No.123 of 2022, to contend that there was no such concession or consent given by the Learned Counsel on behalf of the appellant as it was agreed to pay only the admitted dues. The rate of Rs.6.70/Kwh is only for the firm power supplied as per the power purchase agreement. In respect of the excess power injected by the writ petitioner, the rate that would be applicable, is the one, which is fixed by the TNERC. The rate fixed by TNERC as per the Amending Order No.4, dated 10.06.2009, which is applicable in respect of the relevant point of time, which is contained in Paragraph No.xii of the said Order and depending on the frequency range, the price payable to the writ petitioner would be 360 paise per unit(at 49.71Hz) and 408 paise per unit(at 49.56Hz) and the dues claimed by the appellant is, at the rate of 670 paise per unit.

9. The Learned Single Judge, considered the review application, and



W.A.Nos.191 of 2023 & 2563 of 2022

firstly did not agree with the submission made on behalf of the appellant that no such concession was made. As a matter of fact, the Learned Single Judge has recorded in Paragraph 18 of the order passed in the review application that upon the concession made by the Learned Counsel, the order dated 16.12.2020 was passed, and thereafter, the matter was repeatedly adjourned “for reporting compliance” for more than a period of one year, and thereafter only, the contempt proceedings were initiated.

10. This apart, the Learned Single Judge also considered the submissions made on merits and held that when the letter of award dated 25.03.2009 stated that it would purchase the excess injected power at the rate as per the PPA agreement or the TNERC notified rate would only mean the TNERC rate which is fixed in respect of the writ petitioner. As a matter of fact, when the said letter was issued on 25.03.2009, the appellant was before the TNERC pleading to permit them to purchase at the rate of Rs.6.70 per unit and the matter was decided in favour of the appellant by accepting the said price by the order in PPAP. No.1 of 2009. Therefore, once the TNERC also notified the rate of Rs.6.70 per unit, it was concluded that the entire amount as claimed by the writ petitioner stood payable and accordingly dismissed the review application. Feeling aggrieved, these



W.A.Nos.191 of 2023 & 2563 of 2022

present two Writ Appeals are filed.

WEB COPY

11.We have heard *Mr. P. Wilson*, the Learned Senior Counsel appearing on behalf of the appellants and *Mr. Anirudh Krishnan*, Learned Counsel appearing on behalf of the respondents.

12.*Mr. P. Wilson*, the Learned Senior Counsel would submit that the order was passed by TNERC dated 15.05.2006 and would take this Court through the definitions of the term “*firm power*” and “*infirm supply*”. He would submit that only the agreed quantum to the tune of 40MW alone can be considered as “*firm power*” and with respect to the rest of the quantum, which was voluntarily injected by the writ petitioner over and above the agreed quantum, the price has to be paid only at the rate as prescribed by the TNERC as contained in the Amending Order No.4, dated 10.06.2009 in Paragraph xii, which would be 360 paise to 408 paise, as the case may be depending on the frequency range and it cannot be 670 paise. Further he would submit that even on a perusal of the original order passed in the writ petition, there was no consent which was given on behalf of the appellant inasmuch as only the balance of the admitted dues alone was agreed to be paid.



W.A.Nos.191 of 2023 & 2563 of 2022

13. *Mr. P. Wilson*, Learned Senior Counsel would contend that even as per the letter dated 25.03.2009, the excess power shall be purchased at the rate of PPA or TNERC notified rate. When the TNERC notified rate is more beneficial to the appellant, and the same has been agreed by the parties, it is only the said rates as stated above are payable. Therefore, he would pray that these appeals be allowed.

14. The Judgment of the Full Bench of this Court, in ***District Collector and others -Vs- N.Udaiyappan & Anr.,¹***, to contend that the writ appeal is maintainable even against the order passed in the review application is relied upon. *Mr. P. Wilson*, would submit that on the other hand, it was the writ petition which was not maintainable since there is an arbitration clause in the agreement and the claim is entirely within the realm of a commercial contract.

15. Per contra, *Mr. Anirudh Krishnan*, the Learned Counsel appearing on behalf of the respondent would submit that firstly, all through the correspondences, the amount was not disputed. Till the filing of the writ petition, the appellant did not by any communication dispute about the quantum. They only insisted upon the withdrawal of the Court cases. Even

¹ (2021) 2 CTC 369
<https://www.mhc.tn.gov.in/judis>



W.A.Nos.191 of 2023 & 2563 of 2022

before the Learned Single Judge, at the time of admission, no such plea was raised. More so, during the final hearing of the writ petition, the Learned Counsel had expressly consented to pay the balance of 50% and the balance of admitted dues would only mean the balance 50% of Rs.5,02,94,220/- Therefore, once the order has been passed on consent, no appeal is maintainable. No fraud or misrepresentation is alleged, and therefore relying upon the Judgment of the Hon'ble Supreme Court of India, in ***Ajanta LLP -Vs- Caiso Kelsanki Kabushiki***², he would submit that the writ appeal itself is not maintainable.

16. *Mr. Anirudh Krishnan*, would submit that in view of Order XLVII Rule 7 of the Civil Procedure Code the writ appeal against the review order cannot be maintained as the review application is dismissed. In support of his submission, the Learned Counsel would also rely upon the Judgment of a co-ordinate Bench of this Court in, ***The Puducherry Non-Banking Investors -Vs- The Union of Territory of Puducherry***³.

17. The Learned Counsel thereafter would submit that it is not the case as if the writ petitioner voluntarily injected. The excess supply of power was

² 2022 Live Law (SC) 127

³ W.A.No.3011 of 2021 etc., dated 14.06.2022
<https://www.mhc.tn.gov.in/judis>



W.A.Nos.191 of 2023 & 2563 of 2022

on the basis of the letter of the appellant dated 25.03.2009. In the said letter, it was expressly agreed by the appellant to purchase the excess generation not exceeding 10% at the power purchase agreement rate. The words “*or TNERC notified rate*” were included in the letter because, at the relevant point of time, the appellant was before the TNERC requesting approval of the rate fixed in the power purchase agreement. After the letter was issued, once by the order dated 22.05.2009 the TNERC also approved the same rate of 670 paise per unit, the petitioner is entitled to the same. As a matter of fact, the said position was never disputed, the letter dated 06.02.2020 only required them to withdraw the Court cases. Therefore, the appellant do not have any case whatsoever even on merits.

18. We have considered the rival submissions made on either side and perused the material records of the case. The first point to be considered is as to the maintainability of the various proceedings involved in the present case, that is the maintainability of the writ petition, and the maintainability of the writ appeals. As far as the writ petition is concerned, the objection as to the maintainability is that it arises in the realm of a commercial contract and there is a specific Arbitration Clause in the purchase agreement, enabling the parties to invoke arbitration in respect of any dispute. No doubt



W.A.Nos.191 of 2023 & 2563 of 2022

when there is an effective alternative remedy of arbitration, the parties should be relegated to it, it should be seen in this case that such a plea was never raised before the Learned Single Judge. Moreover, the entire proceedings were entertained and concluded on the basis that there was no dispute at all and the amount is an admitted amount, therefore, when there is no dispute whatsoever in the sense of the term, it cannot be now belatedly contended on behalf of the appellant that the writ petition is not maintainable.

19.As far as the maintainability of the writ appeals is concerned, firstly, the order in the main writ petition is quoted above. It is based on the consent and concession given by the Learned Counsel on behalf of the appellant. Earlier when W.A.No.1691 of 2022 was filed, it was dismissed as withdrawn with the liberty to file a review application and as such it could be seen that no appeal was maintainable as against the order which is based on consent. Accordingly, the appellant filed the above review application. In the review application, the Learned Single Judge has not accepted the case of the appellant that actually no such consent/concession was given on behalf of the appellant. That being the position, the present W.A.No.191 of 2023 is not maintainable in law.



W.A.Nos.191 of 2023 & 2563 of 2022

WEB COPY

20.As far as the Writ Appeal No.2563 of 2022 is concerned, it is contended that it is not maintainable inasmuch as the review application was also dismissed. But, however, on a careful reading of the Full Bench decision of this Court held in *N.Udaiyappan case*, (cited supra), it can be seen that even when the review application is dismissed if it would still be a Judgment deciding the rights of the parties, then the writ appeal which is filed under Clause 15 of the Letter Patent, would be maintainable. In this case, the Learned Single Judge did not simply stop by rejecting the review application on the ground that a concession had been given. The Learned Single Judge has also considered the new case on merits for the first time in the review application and has rendered a finding that the price payable per unit would only be 670 paise per unit as per the TNERC Order No.1 of 2009, by interpreting the letter dated 25.03.2009. Therefore, we hold that the W.A.No.2563 of 2022 is maintainable.

21.The second point now arises for consideration is whether the contention of the appellant that only the rates notified earlier pursuant to the Order of the TNERC, dated 10.06.2009, would alone be applicable in



W.A.Nos.191 of 2023 & 2563 of 2022

respect of the excess power purchased by the appellant. Firstly, we are not in agreement with the Learned Senior Counsel that the writ petitioner had voluntarily injected over and above the quantum of purchase. The letter dated 25.03.2009, extracted supra expressly states otherwise. The appellant was willing to purchase the excess quantity up to 10% also on the same rate of power purchase agreement.

22.The words “*or TNERC notified rate*” in the said letter dated 25.03.2009, would have to be considered in the background that even the rate fixed as Rs.6.70 per unit was higher than that of the TNERC rate and the appellant had filed PPAP No.1 of 2009 under Sections 63 and 86B of the Electricity Act 2003, before the TNERC to accept the said rate, justifying the said rate per unit, considering the prevailing circumstances and the power shortages, during the relevant period. Once the same was subsequently approved by the commission by its order dated 22.05.2009, it is only the said rate which would be applicable as per the letter dated 25.03.2009. It is the contention of the Appellant that there will be two rates in respect of the power supplied under PPA, there will be the contractual rate and balance has to be as per the original notified rate. However, the letter dated 25.03.2019 has to be read in the light of the law laid down by the Constitution Bench of



W.A.Nos.191 of 2023 & 2563 of 2022

the Supreme Court of India, in ***PTC India Limited Vs. The Central***

Electricity Regulatory Commission⁴, in which, it has categorically held that the functions of the regulatory commission in fixing tariff are legislative in nature and even the existing power purchase agreement and the existing contracts have to be aligned in tune with such regulation. A reading of the entire order dated 22.05.2009 in PPAP No.1 of 2009, it would be clear that the appellant had pleaded before the TNERC that in view of the prevailing conditions during the relevant period of time, that is January, 2009 to June, 2009 and in view of the need they must be permitted to purchase power at the rate of 670 paise per unit and not at the earlier notified rate. As a matter of fact, adverse comments are made by the Commission and finally, the Commission had agreed to the said price with a condition that in future the provisions of the Act to be strictly complied with. It cannot be said that the said tariff fixed by the TNERC would not be applicable for the excess power purchased through letter dated 25.03.2009. Thus, the submissions made on behalf of the appellants are without any merits.

23. As a matter of fact, the matter was pending for a long time, and in none of the communications whatsoever, the appellant had taken such a stand. On the contrary, their letter dated 06.02.2020 has been extracted

⁴ (2010) 4 SCC 603
<https://www.mhc.tn.gov.in/judis>



W.A.Nos.191 of 2023 & 2563 of 2022

supra, in which, they indirectly admit the quantum as claimed by the writ petitioner. The writ petition was never resisted by the filing counter. Initially, 50% was ordered to be paid and rightly the Learned Counsel had during the final hearing agreed to pay the balance sum of 50%. Therefore, the dispute which is now sought to be raised in respect of the price per unit is only an afterthought and it is absolutely unjustifiable. On the perusal of the communications between the parties, it would be clear that they had consensus *ad idem* regard the purchase price and that the amount remained due.

24. In view thereof, finding no merits, the Writ Appeal No.191 of 2023 and the Writ Appeal No.2563 of 2022 shall stand dismissed. There shall be no order as to costs. Consequently, the connected miscellaneous petitions are also closed.

(S.V.G.,CJ.) (D.B.C.,J.)
22.11.2023

Index : yes
Speaking order
Neutral Citation : yes
klt

To:
The Chairman cum Managing Director,
Tamil Nadu Generation and Distribution Company Ltd., (TANGEDCO),

<https://www.mhc.tn.gov.in/judis>



W.A.Nos.191 of 2023 & 2563 of 2022

No.144, Anna Salai, Chennai – 600 002.

WEB COPY



WEB COPY



W.A.Nos.191 of 2023 & 2563 of 2022

THE HON'BLE CHIEF JUSTICE
AND
D.BHARATHA CHAKRAVARHY, J.

klt

Pre-Delivery Judgment in
W.A.Nos.191 of 2023 & 2563 of 2022
and
CMP.Nos.1823 of 2023 & 20216 of 2022

22.11.2023