BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on 03.03.2023	Delivered on 27.04.2023

CORAM

THE HONOURABLE MR.JUSTICE K.KUMARESHBABU

W.P.(MD)Nos.17091, 17858, 17129, 17857, 17168, 17169, 17170, 17171, 17856, 17166, 17143, 17141, 17142, 17140, 17138, 17139, 17137, 17132, 17133, 17131, 17167, 17130 and 17587 of 2015 & W.P.No.17588 of 2015 and 17882, 17913, 17969 and 20586 of 2015

W.P.No.17091 of 2015
Tamilnadu Spinning Mills Association
#2, Karur Road, Near Beschi College,
Modern Nagar, Dindigul – 624 001
Rep., by its Chief Advisor,
Dr.K.Venkatachalam & Ors., ... Petitioner

Vs

1.The Tamilnadu Generation and Distribution Corporation Ltd., (TANGEDCO)
144, Anna Salai, Chennai – 600 002.
Rep., by its Chairman and Ors.,

2.The Chief Financial Controller-Revenue
Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO)
144, Anna Salai, Chennai – 600 002.

3.The Superintending Engineer,
TANGEDCO,
Tirunelveli Electricity Distribution Circle,
Tirunelveli.

4.The Superintending Engineer,
TANGEDCO,
Udumalpet Electricity Distribution Circle,
Udumalpet.

5.The Superintending Engineer,
TANGEDCO,
Dindigul Electricity Distribution Circle,
Dindigul.

6.The Superintending Engineer,
TANGEDCO,
Theni Electricity Distribution Circle,
Theni.

7.The Superintending Engineer,
TANGEDCO,
Tirupur Electricity Distribution Circle,
Tirupur.

8.The Superintending Engineer,
TANGEDCO,
Coimbatore Electricity Distribution Circle,
(South), Coimbatore – 641 012.

9.The Superintending Engineer,
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Erode Electricity Distribution Circle,
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10.The Superintending Engineer,
TANGEDCO,
Tuticorin Electricity Distribution Circle,
Tuticorin

11.The Superintending Engineer,
TANGEDCO,
Nagercoil Electricity Distribution Circle,
Nagercoil.

12.Tamil Nadu Electricity Regulatory Commission,
Rep., by its Secretary,
19-A, Rukmini Lakshmipathy Salai,
(Marchall's Road), Egmore,
Chennai – 600 008. ... Respondents

Prayer in W.P.(MD) No.17091 of 2015 : Petitioner filed under Article 226 of the Constitution of India to issue a Writ of Certiorified Mandamus or any other Writ or order or direction in the nature of a Writ, calling for the records of the second respondent's impugned letter in No.CFC/REV/FC/REV/AS.3/D.No.197/15, dated 30.05.2015, in so far as the members of the petitioner are concerned and quash the same as illegal, arbitrary and against the 12th respondent's tariff orders dated 20.03.2009 and 31.07.2012 and consequently forbear the respondents and their subordinates, men, agents from recovering/demanding and collecting the 25% of the encashment amount for the periods from 2009-10 to 2013-14 and from including the said amounts in the generation statements to be issued for September 2015 or during any other period.

For Petitioners : Mr.S.P.Parthasarathy
Mr.N.L.Rajah, Senior counsel
in W.P Nos.17166 to 17171/2015
Mr.Rahul Balaji

For Respondents : Mr.Veera Kathiravan AAG
Assisted by Mr.S.Deenadhayalan
standing counsel for respondents
in all WPs

COMMON ORDER

These batch of cases have been filed basically challenging the communication issued by the Chief Financial Controller-Revenue of TANGEDCO, dated 30.05.2015 and the consequential demand notices issued by the respective authorities calling upon the petitioners to remit back the excess payment made on unutilized banked energy.

2. The common thread to consider the batch of cases is that the petitioners are all captive wind energy generators utilizing such generated

energy for their own purposes.

3. The issue involved in these Writ Petitions are with regard to whether the petitioners are entitled to receive full payment for the banked energy or whether they would be entitled to receive only 75% of the value of the banked energy.

4. Heard Mr.S.P.Parthasarathy, learned counsel appearing for the petitioner and Mr.N.L.Rajah, learned Senior counsel for the petitioner in W.P.(MD) Nos.17166 to 17171 of 2015, Mr.Rahul Balaji learned counsel appearing for the petitioner in W.P.(MD).Nos.17882 & 17913 of 2015 and Mr.Veera Kathiravan, learned Additional Advocate General appearing for the respondents and perused the materials placed on record.

5. Mr.N.L.Rajah, the learned Senior counsel appearing for the petitioner would submit that the Tamil Nadu Electricity Regulatory Commission (hereinafter referred to as 'TNERC') which is an expert body created under the Electricity Act, 2003, formulated various tariff orders.

The petitioners are all captive wind energy generators and that the State of Tamil Nadu being blessed with favourable environmental conditions enables the State to be a forerunner and pioneer in the field of wind power generation as an non-conventional energy source. Various industries have set up wind energy generators for their captive consumption. The TNERC had issued three tariff orders in respect of the wind energy generation in the years 2006, 2009 and 2012 respectively. The final of such order was issued on 31.07.2012, which is a super-session of the earlier orders. He would submit that the energy produced by the petitioners are wheeled through the grid provided by the TANGEDCO. The TANGEDCO has also issued a Restriction and Control Measures (R&C Measures) in the use of energy by the industries. In that process, the petitioners would not be able to use the entire electricity produced by them. Hence a concept of banking electricity was envisaged. Such banked energy could be utilized by the industry within the banking period which commences on the 1st April of every year and ends on the 31st March of the succeeding year. As per tariff order dated 31.07.2012, the unutilized energy as on 31st March of every year was to be encashed at the rate of 75% of the relevant purchase tariff. However, when the distribution licencee enforces R & C Measures and if such measures restrict the wind energy generators to consume their power in any manner, the un-utilized energy at the end of the banking period shall be encashed at full value of the relevant tariff as sale to the licensee. He would submit that since the power position in the State of Tamil Nadu was not comfortable. Power cuts ranging from 20% to 40% were imposed by the licensee namely, TANGEDCO. The R&C measures were enforced from 01.11.2008 to 04.06.2015. There were announced and un-announced load shedding. The generator power was also not allowed for consumption, but such generator powers were permitted to be used by various other consumers specifically in the Chennai Metropolitan area where there was no power cut or load shedding down intensively as enforced in the other parts of Tamil Nadu. This allowed the licensee/TANGEDCO to realize huge revenues at the cost of the petitioners. He would submit that it is pertinent to note that during a particular year, during particular season there would be a lien generation from wind energy generators. During such season, the petitioners would utilize their banked energy. In view of R & C measures imposed by the TANGEDCO, the petitioners were not able to fully utilize their banked energy. For all the un-utilized banked energy, by the tariff order issued by the TNERC, the petitioners had encashed their un-utilized energy at full value in view of the R&C measures. While that being so, the second respondent had issued a letter dated 30.05.2015 to the Superintending Engineer, Theni Electricity distribution and marking a copy to various other authorities including the Chief Internal Audit Officer. He would submit that the said letter is contrary to the tariff order passed by the TNERC. At the outset, he would submit that the issuance of the said order is in violation of the tariff order dated 31.07.2012 and that before passing, issued the said order, the second respondent had not approached the TNERC seeking for clarification. He would also further submit that pursuant to the said letter various demands have been made against each of the petitioners calling upon them to repay the excess amount that was paid to the petitioners and that each of the petitioners are entitled to only 75% of the value on un-utilized banked energy.

6. He would further submit that the second respondent was addressed by the sixth respondent herein seeking for a clarification in respect of a

claim made by one Spinning Mill, who also installed a wind energy generator. The said Spinning Mill seems to have been made a claim for 100% of the un-utilized banked energy for the financial year 2012-13. Originally the Spinning Mill was paid 75% of the value of the un-utilized banked energy for the financial year 2012-13, but however they have made a claim for the full value. The sixth respondent had also pointed out audit department's query pointing out that only 75% payment should be made. It was also pointed out by the second respondent that hither to the full value of the un-utilized banked energy had been paid and sought permission/instructions regarding the payment of the balance 25% in respect of the said Spinning Mill. To such an enquiry, the second respondent taking into account that the power supply interruption was not for a longer duration, considering the fact that the said Spinning Mill had only a supply interruption of 12.7% which is much less than 20% of the power interruption had indicated that the Spinning Mill would be entitled to only 75% of the relevant tariff in respect of un-utilized banked energy. The tariff order of the year 2012 had permitted encashment of the un-utilized banking energy at 100%. If R&C measures were implemented during the relevant year. There is no classification as to the duration of R&C measures. The second respondent is interpolating with the tariff order to give it a meaning that such R&C measure would mean that the power supply should have been interrupted by more than 20% that is to say that the company/industry should have suffered minimum of 20% interruption in their power supply. He would submit that such interpretations, directly violates the order passed by the TNERC, dated 31.07.2012. He would submit that the second respondent ought to have approached the TNERC and sought for such a clarification. Without seeking such a clarification, he would submit that the letter dated 30.05.2015, is without any authority, jurisdiction on the ground alone, the same is liable to be set aside. He would further submit that prior to issuance of this order, the second respondent had not sought for the views of the wind mill energy generator. He would also submit that even if such views were sought for and even if views are given by the respective wind mill energy generator even then the same could not be implemented without the TNERC altering or modifying the tariff order passed by it on 31.07.2012. He would further submit that pursuant to the said letter, the audit department of TANGEDCO had raised objections for payment of the full value of the un-utilized banked energy of the respective wind energy generators. On the basis of the said objection, the respective Superintending Engineer of the respective circle had issued demand notices calling upon the petitioners to pay the difference amount that had been allegedly paid in excess to the tariff order. He would submit that when the letter dated 30.05.2015, which formed the basis of audit objection upon which the consequential notices were issued are all in violation of the tariff order. Hence, he would seek intervention of this Court.

7. Mr.N.L.Rajah, learned Senior counsel further relied upon the various orders passed by the TNERC to contend that TNERC had time and again deprecated the practice of TANGEDCO in interpreting the tariff orders issued by the TANGEDCO.

8. Mr.S.Parathasarathy, learned counsel supporting the arguments made by the learned Senior counsel would add that what the second respondent proposes to do under the impugned letter dated 30.05.2015 is to modify the tariff order issued by the TNERC. He would submit that if the

impugned letter is permitted to be upheld, it would be allowing the second respondent to interfere with the statutory duty that has been cast upon the TNERC. He would also submit that the fixation of a criteria namely, the power supply should have been interrupted more than 20% of the entire period of power supply has been created by the second respondent to defeat the rightful claim of the petitioners in implementation of the tariff order passed by TNERC. He would submit that such interpretation of the tariff order on certain aspects, when brought to the notice of the TNERC , the TNERC had heavily condemned the action of the TANGEDCO as it was of the view that such alteration would amount to willful violation of the orders of the commission and had also warned the TANGEDCO that it would initiate action under Sections 142 & 146 of the Electricity Act, 2003, which is punishable within imprisonment upto 3 months or to pay a fine of Rs. 1,00,000/- or both. Such illegal memos have been set aside by the TNERC in appropriate cases. Therefore, he would submit that the present letter issued by the respondent is without authority and is also contrary to the tariff order and therefore, since to set aside the letter dated 31.07.2012 and also the consequential demand notices.

9. Mr.Rahul Balaji, learned counsel would submit that TANGEDCO has been a huge beneficiary in view of the implementation of the R&C measures. He would submit that the TANGEDCO has been to its benefit uses un-utilized banked energy by selling it at the full market value. He would submit that as per the tariff orders in view of the R&C measures that were in force, the petitioners are entitled to full value of the un-utilized banked energy. Such banked energy had been sold by the TANGEDCO to other consumers, who are not producing their own captive energy and they have realised the full value of the energy. The TANGEDCO having realised the full value of such banked energy would have to necessarily make it over to the petitioners, who are the manufactures of such energy. The violation of the order in that aspect would only show the intention of TANGEDCO is to unjustly enrich itself. Therefore, he would submit that the petitioners are entitled to the relief as claimed, for the demand issued by the respondents is contrary to the tariff order of the TNERC. In other aspects, he would submit that he adopts the arguments of Mr.N.L.Rajah, learned Senior counsel for

the petitioners.

10. Countering their arguments, Mr.Veera Kathiravan, the learned Additional Advocate General would at the outset submit that the Writ Petitions are not maintainable. He would submit that the letter issued by the second respondent is in consonance with the order of the TNERC and if the petitioners are aggrieved against the order passed by the TNERC, they have to file an appeal before the Appellate Authority in terms of Section 111 of the Electricity Act, 2003. He would further submit that if the claim of the petitioners that the letter dated 30.05.2015 is in violation of the TNERC order approached the TNERC against the said letter and the petitioners ought not to have filed this Writ Petitions. However, without prejudice to the aforesaid submissions, he would submit that the petitioners cannot utilize the whole energy that has been produced by them as the production is firstly over and above the actual intake capacity and secondly, there are restrictions imposed by the TANGEDCO as regards the utilisation of power energy by considering the public interest at large. He would further submit that TNERC by its order dated 28.11.2008, had held that the energy

supplied by the TANGEDCO alone will be subjected to restrictions and control measure, the captive energy of the wind energy will not be limited or restricted for uses of the energy generated by them. Hence he would submit that there was no restrictions on the utilization of the captive energy whatsoever and that was therefore banked was what was left out by the wind energy generators after utilizing the energy generated to its fullest capacity. He would submit that the clarification vide letter dated 30.05.2015, has been issued considering the various aspects including the order of the TNERC, dated 15.09.2014. The TNERC had fixed norms with regard to the standard of performance regulation. It had held that a supply interruption of 20% or more in a billing cycle can be considered as a longer duration. Since that interruption above 20% alone was to be considered as a longer duration any period below the said 20% interruption cannot be set to have impacted the industries. Therefore, any R & C measure less than 20% cannot be termed to be a R & C measure to attract full value payment of the un-utilized banked energy. Therefore, he would submit that the tariff order of the TNERC has to be read along with the other orders passed by the TNERC. The learned Additional Advocate General have also placed reliance upon the formula that was arrived at and upheld by the TNERC in respect of levying the charges. Reiterating his submissions made earlier, that what was restricted and controlled is the use of energy supplied by TANGEDCO and not the use of energy captively generated power, there is no question of banking, which could not be utilized them in view of the R & C measures. When that be the position, he would submit that the petitioners would be entitled to only encash 75% of the value of the un-utilized banked energy. Therefore, he would submit that there is no violation of the orders passed by the TNERC in this aspect. Hence, he would submit that the demand notice issued upon the respective petitioners are all valid in law and all the Writ Petitions will have to be dismissed in *limine*.

11. Considered the rival submissions made by the respective parties and perused the materials placed on record.

12. Mr.Veera Kathiravan the learned Additional Advocate General had at the outset tried to impress upon me as regards the maintainability of this Writ Petitions. His contention is that the demand notices pursuant to

the letter of clarification dated 30.05.2015 are all in consonance with the tariff order dated 31.07.2012. The petitioners have not filed any appeal against the said tariff order. Therefore a demand made based upon the said tariff order and other relevant orders passed by the Commission cannot be a subject matter of Writ Petition under Article 226 and that they should have only approached the TNERC. This contention in my view is without any merits. It has been time and again held by the Hon'ble Apex Court that an availability of an alternative remedy cannot take away the jurisdiction of the High Court under Article 226, when it is pleaded that such exercise of authority is in violation of principle of natural justice, without authority or jurisdiction. In the present case what is sought to be done by way of letter dated 30.05.2015 is to clarify the order issued by the TNERC based upon other orders passed by the same authority. If the second respondent was of the opinion that a clarification is required as regards to the payment towards un-utilized banked energy in view of various other orders passed by the TNERC, it should have approached the TNERC for such clarification. An author of an order alone has the power/jurisdiction to clarify such order, an authority which is subject to the orders passed by the TNERC/Commission has no authority to clarify the orders. This conduct of the second respondent is permitted, they would go to an extent of even clarifying the order passed by this Court too. Hence, in my view the second respondent not being the author of the order, which it seeks to clarify is without any authority. Hence, I am of the view that these Writ Petitions are maintainable as the authority of the second respondent to issue the impugned letter dated 30.05.2015 have to be necessarily addressed by this Court. Even if the contention that an alternative remedy is available, is correct, I do not propose to relegate the parties after a period of eight (8) years. These Writ Petitions have been kept pending before this Court. It is also pertinent to note that the learned Standing counsel had taken notice, when the interim order was granted in W.P.No.17091 of 2015 and that the learned Standing counsel do not raise the little finger as to the maintainability of the Writ Petitions and the same have to be raised in their counter, which has been filed nearly 7 years after filing the Writ Petitions and granting of interim orders by this Court.

13. Next coming to the contentions raised by the learned senior

counsel as regards to the validity of the letter dated 30-05-2015, by attacking the same has submitted that what the second respondent had done in interpreting the tariff order is interfering with the authority of the TNERC. The tariff order issued by TNERC had held that the wind energy generators are entitled to 75% of the value of un-utilised banked energy, but however if there were restrictions and control measures on the use of electricity then such wind energy generators would be entitled to 100% of the value of un-utilised banked energy. A reading of the tariff order would clearly indicate that there was no quantum prescribed as regards to the restriction and control measures. For better appreciation the relevant paragraph is extracted hereunder:

> *8.2.14 Unutilized energy as on 31st March every year may be encashed at the rate of 75% of the relevant purchase tariff. As and when the distribution licensee enforces restriction and control measures and such measures restrict the WEGs to consume their power in any manner, the unutilized energy at the end of the banking period may be encashed at full value of the relevant tariff as sale to the licensee.*

But by the impugned the letter the second respondent seeks to introduce a quantum as regards to the restriction and control measures. The claim made by the learned Additional Advocate General to support such introduction of quantum is based upon a subsequent order of the TNERC. His contention to support such an action was that the orders of the TNERC should not be read in isolation but should be read in conjunction, in my view is wholly misplaced. It is true that the TNERC passed orders holding that the supply interruption of 20% and more in a billing cycle can be considered as a longer duration. It would be relevant to analyse under what circumstances such a finding was given by the TNERC. The challenge in the proceedings was the levy of penalty in the form of excess demand charges raised by the TANGEDCO for the that the formula for calculating the key to equivalent demand followed was held to be not in order in view of the prevailing scheduled and unscheduled load shedding effected during the peak hours. In that context the commission had considered that the interruption of supply period more than 20% in a billing cycle would be not to the interest of the consumers as there is discrimination among consumers who do not have interruption for longer duration vis-a-vis the consumers who had supply interruption more than 20%. For better appreciation relevant portion of the order dated 15.09.2014 of TNERC is extracted hereunder:-

> *6.6.Having decided that there is a case for revisiting the fixed time factor of 30 X 24 hours to arrive at the equivalent demand in case of longer duration of load shedding and power cut, now the questions before us are what is the duration of load shedding and power cut beyond which the 30X24 time factor shall be modified and how to obtain the supply availability or "power on" time data so as to replace the fixed time of 30X24 hours in the formula.*
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> *6.7 The time factor is nothing but the supply availability or "power on" time during which the consumer can consume his energy. One possibility is that the "power on" parameter can be down loaded from the energy meter and can be used for calculating the equivalent demand. Considering the norms fixed by the Commission in the Standard of Performance Regulation and other practical conditions, a supply interruption of 20% and more in a billing cycle can be considered as a "longer duration". We feel it is a fair criteria for*

replacing the 30X24 hours by the actual "power on" time to find out the equivalent demand supplied by the open access consumer. Though there are demands from the petitioners that the respondents should come out with such modified formula, there is no such submission by the respondents. Before revisiting the time factor, the Commission wants to understand the difficulties in fixing supply interruptions criteria and obtaining the "power on" data during the billing cycle. The distribution licensee may also suggest on the criteria for load shedding duration in a billing cycle beyond which the time period of 30X24 hours can be replaced with "power on" time in the formula. In modifying the formula there shall not be any discrimination among consumers in calculation of equivalent demand. Therefore, we direct the respondents to come out with a proposal on the criteria under which the fixed time of 30X24 hours can be modified with "power on" time and the source of obtaining the "power on" data so as to fairly calculate the equivalent demand. This shall be done in discussion with the petitioners and the proposal may be submitted within one month of issuance of this order.

6.8. By making the above observation, the

Commission has no intention of changing the generalized formula approved by the Commission in earlier orders for calculation of equivalent demand. The Commission's intention is only to identify the specific cases of open access consumers who are affected by the longer duration of load shedding and provide them a reasonable relief in excess demand charges by identifying the right time factor for reasonable calculation of the equivalent demand. Therefore, this interim order is strictly applicable to only the petitioners and the relief also restricted to the specific claim.

14. Hence in my view the reasonings for which 20% supply interruption was arrived at cannot be extended to the benefits that had been vested with the wind power generators by the tariff order. Further the tariff order has been made considering various aspects by the commission, when that be so the second respondent ought not to independently snatched away the vested benefits given under the tariff order, that too without putting on notice the wind power generators of such action. Further the second respondent has no authority to meddle with the tariff order that had been

made by the commission after hearing the parties.

15. In the light of the aforesaid reasonings and findings, I am of the view that the impugned letter dated 30-05-2015 is wholly without any authority much less arbitrary and hence illegal. In view of the aforesaid conclusion the consequential demand notices issued to the petitioners are also liable to be interfered with.

16. In fine the Writ Petitions are allowed, the impugned order dated 30-05-2015 is quashed and the consequential demand notices are also set aside. However no order as to costs.

27.04.2023

Index : Yes/No
Internet : Yes/No
Speaking order :Yes/No
pbn

To
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144, Anna Salai, Chennai – 600 002.
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