IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.02.2024

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.1352 of 2021
and
W.M.P.No.1520 of 2021

M/s.Vaithieswara Kraft Paper Mills Private Limited ... Petitioner

Vs.

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

2. The Chief Engineer – NCES,
TANGEDCO, 2nd Floor,
144, Anna Salai,
Chennai – 600 002.

3. The Chief Financial Controller / Revenue,
TANGEDCO, 7th Floor,
No.144, Anna Salai,
Chennai – 600 002.

4. The Superintending Engineer,
TANGEDCO,
Palladam Electricity Distribution Circle / North,
Palladam. ... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records of the 4th Respondents Impugned Letter bearing க.எண்.மேபாபொ/பமிவ/ப/துநிகஅ/கஅ(வ)/உமி/கமே/கோ.457/அ.எண.400/20, நாள் 15.09.2020 and to quash the same as illegal, arbitrary, without authority of law, against the circular Memo dated 19.07.2016 issued by the 2nd Respondent under the order of the 1st Respondent / Chairman , TANGEDCO.

For Petitioner : Mr.M.Saravanakumar

For Respondents : Mr.L.Jai Venkatesh,
Standing Counsel for TANGEDCO

<u>O R D E R</u>

The learned counsel for the petitioner would submit that the issues raised in the present writ petition are no more *res integra*.

2. This Court passed an elaborate order in W.P.Nos.8634 of 2019 etc., batch dated 17.08.2021 and the relevant portion of the order reads as under:

> *" 21. This is a classic case of how two wings of TANGEDCO viz., the Chief Engineer-NCES and Chief Financial Controller/Revenue are dealing with the same issue in two diametrically opposite directions. The concept of transfer of un utilised*

wind energy to a banking account and redrawing it during lean season and encashment of the un utilised banked wind energy at the end of the financial year, are in the nature of deeming fiction. This court is reminded of the popular observation made by Lord Asquith in East End Dwellings Co. Ltd Vs Finsbury Borough Council reported in (1951) 2 All E R 587 and the same is extracted here under:

> *"when one is bidden to treat an imaginary state of affairs as real, he must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which inevitably have flowed from it - one must not permit his 'imagination to boggle' when it comes to the inevitable corollaries of that state of affairs"*

22. The 2nd respondent seems to be understanding the issue in the manner observed by Lord Asquith but however the 3rd respondent seems to be looking at the issue purely from an accounting perspective and as a result he is "permitting his imagination to boggle". That is the reason why right from the *start, both these authorities are taking divergent views on the issue.*

23.The short issue that arises for consideration is as to whether the revised demand made by the fourth respondent towards the differential amount due to the alleged incorrect adjustment of banked wind energy is legally sustainable.

24. A careful reading of the impugned proceedings of the fourth respondent and the counter affidavit of the third respondent, justify the revised demand made against the petitioners on the following grounds:

(a) The requirements of captive generating plant as provided under Rule 3 of the Electricity Rules, 2005 is not satisfied for the period before the agreement was terminated by the captive user who came into the picture only from the date of execution of fresh energy wheeling agreement and became entitled from that date for allotment of energy generated from the captive generator with whom the fresh energy wheeling agreement was entered into.

(b)The instructions dated 21-05-2013, 01.06.2016 and Circular Memo dated 31-03-2017, based on the Electricity Rules, 2005, makes it very clear that the banked energy prior to fresh energy wheeling agreement cannot be allotted to the new captive users and at the best the unutilised banked energy generated during the terminated agreement period at the end of the financial year, if any, after allotment to the new captive user, can be encashed at the rate of 75% of the relevant purchase tariff.

(c) The Circular Memo dated 19-07-2016, did not supersede the letter dated 21-05-2013 and Memo dated 01-06-2016 and that apart after the issuance of Circular Memo dated 31-03-2017, the earlier Memo dated 19-07-2016, stood modified.

(d) The order passed in W.P(MD).No.9320 of 2017, dated 25-05-2017, pertained to only the new energy accounting procedure which was directed to be kept in abeyance till the issue is decided by TNERC. Therefore, till it is decided by TNERC, the procedure prescribed in letter dated 21-05-2013 and Memo dated 01-06-2016, will be applicable. and;

(e) The order passed in W.P(MD).Nos.6221 and 6222 of 2018, has recognised this stand taken

by TANGEDCO and the respondents were directed to adjust banked energy to the existing captive users prior to the agreement by encashing it at the rate of 75% of the relevant purchase tariff.

25.This Court will now proceed to answer all the above issues and determine whether the same justifies the revised demand made against the petitioners. Before undertaking this exercise, it must be borne in mind that the trigger for the revised demand was the Audit Slip No.90, dated 23-07-2018. Insofar as the scope of judicial scrutiny into an audit slip/report is concerned, this Court had an occasion to deal with it in ***Godrej Properties Limited vs. Accountant General (A &E), Tamil Nadu and Others*** *in W.P.No.29304 etc., of 2019 and by order dated 08-12-2020, it was held as follows:-*

> *"21.As rightly contended by the learned Additional Solicitor General of India appearing on behalf of the 1 st respondent, the Audit Inspection Report is always issued to the concerned Department and not to any individual or third party. No*

individual or third party will have any say on the Audit Report or Audit Objections. Ultimately, when it is sought to be accepted and implemented by the concerned Department, the action of the Department can become a subject matter of challenge. Incidentally, during those proceedings, the findings made in the Audit Inspection Report and which has been adopted by the Department, can be subjected to judicial scrutiny. To put is simply, if the Audit Objections remains as it is without being implemented or acted upon, no one can be allowed to challenge the same by way of filing a Writ Petition under Article 226 of the Constitution of India. This will typically happen in a case where the Department justifies its action and contest the findings in the Audit Report. However, when the Department

> *decides to accept and act upon the Audit Objection and take action against the concerned person, the Audit Observations / Objections, will be treated as if it is forming part of the action initiated by the concerned Department and therefore will be subject to judicial scrutiny. Even in such a case, the Audit Report cannot be challenged and only the consequential action initiated based on the Audit Objection can be put to challenge"*

26.In the present case, the audit slip has been acted upon by the 4 th respondent and hence, this Court can always have a look at the audit slip in order to ascertain the basis on which it was issued. The audit party had placed reliance upon the 3 rd respondent's letter dated 01-06-2016, revised Circular Memo dated 31-03-2017 and further Circular Memo issued by 3 rd respondent dated 03-10-2017 and had come to a conclusion that the banked energy prior to commencement of the new wheeling agreement should not be allotted to the *new captive consumer. Hence, the incorrect adjustment of banked energy and short collection of current consumption charges was directed to be recovered. It is quite surprising that the audit party, for reasons best known decided to place reliance upon letters and memos which supported its view and completely neglected the Circular Memo dated 19-07-2016, which was in force during the relevant point of time for the period 01-04-2016 to 31-03-2017. Once the audit slip was received, the 4 th respondent ought to have brought to the notice of the audit party the relevant Circular Memo dated 19-07-2016 and instead the 4 th respondent decided to act upon the audit slip which ultimately trigerred the issuance of the revised current consumption bills to the petitioners.*

27.This Court will now proceed to consider grounds a, b and c and make an analysis to find out if they justify the action taken by the respondents. The 3 rd respondent viz., the CFO/revenue, who was looking at the issue only from an accounting perspective, was never comfortable in giving the benefit of an accrued benefit to the new captive user who comes into the scene during the interregnum *period after the execution of the fresh wheeling agreement. For proper appreciation of the stand taken by the 3 rd respondent, it will be beneficial to extract the relevant portions from letter dated 21-05-2013, hereunder:*

2.The instructions issued inadvertently vide Lr.CFC/REV/FC/DFC/AAO/HT/D.No.12/12-13, dated 03.01.2013, is hereby withdrawn and in this regard, it is informed as follows:

(i) Whenever fresh EWA/Revised EWA is executed to include additional HT Service(s) for wheeling/adjustment of energy by the WEGs, the generation on and from the date of execution of the such agreement is only eligible for wheeling and adjustment, as the contract commences from the date of its execution.

(ii) The unutilized energy prior to the revised EWA will be continued to get adjusted against that service as per the original agreement standing prior to revised EWA or sold to TANGEDCO at the purchase rate as per the terms and conditions of the Agreement. 3.In view of the above, the unutilized banked units remaining in HT.SC.No.1, M/s.India Cements Ltd., as on 17.11.2012 could not be

transferred and adjusted in HT.SC.No.13 of Mettur EDC, HT.SC.No.42 of Perambalur EDC and HT.SC.No.1854 of Chennai North EDC as per the revised agreement.

4.Therefore, the Superintending Engineer/ Tirunelveli is hereby requested to withdraw the already allotted unutilized banked units which was remaining in HT.SC.No.1 of Tirunelveli EDC as on 17.11.2012, from the aforesaid HT Services [3 Nos]. Pursuant to the above, the Superintending Engineer/Mettur, Perambalur and Chennai North EDCs are also requested to revise the respective C.C.Bills, if so, the short levy amount shall be included in the ensuing respective C.C.bills without fail. In this regard, necessary compliance report shall be furnished to this office immediately. 28.The 3 rd respondent once again relied upon letter dated 21-05-2013 and issued a clarification dated 01-06-2016, reiterating the same stand and gave the following direction:

3.Under the said circumstances, the benefit of 23,09,015 units of unutilized banked energy in existence prior to the execution of the Second Energy Wheeling Agreement cannot be adjusted *against the consumption of HT units. However, as per clause 6(2) of the terminated Agreement, the unutilized energy of M/s.S.G.Wind Farm (P) Ltd., which has already been injected into TANGEDCO's grid as on the date of termination of agreement, may be eligible for encashment at the rate of 75% of relevant purchase tariff.*

29.The 3 rd respondent obviously took note of Rule 3 of the Electricity Rules, 2005 and gave it an interpretation as is reflected in the above two letters. The interpretation given by the 3 rd respondent pales into insignificance after the coming into force of the Circular Memo dated 19-07-2016, issued by the 2 nd respondent on the approval and orders of the 1 st respondent. Once this Circular Memo came into force, the two earlier letters issued by the 3 rd respondents gets superceded and thereafter reliance can never be placed upon those two letters. If those two letters are given effect even thereafter, it will result in the 3 rd respondent over powering the 1 st respondent and it will result in chaotic state of affairs in administering TANGEDCO.

30.The Circular Memo dated 19-07-2016, came into effect from 01-04-2016 and obviously this was issued after taking into consideration the rule position. On the coming into force of this Circular Memo, all the Superintending Engineers were directed to adhere to the procedure prescribed under the memo for maintaining banking account and for adjustment of banked energy for captive use. This was acted upon and the current consumption bills were raised accordingly for the period 01-04-2016 to 31-03-2017.

31.Insofar placing reliance on Circular Memo dated 31-03-2017 is concerned, it came into effect only from 01-04-2017 and therefore, it cannot be applied retrospectively for any period prior to 01-04-2017. It is therefore clear that none of the letters issued by the 3 rd respondent and the modified Circular Memo dated 31-03-2017, will have any bearing during the relevant period between 01-04-2016 to 31-03-2017 and consequently, there was no justification for the 4 th respondent to place reliance upon these proceedings. Grounds a, b and c are answered accordingly.

32.Insofar as ground 'd' is concerned, even if the justification given by the 3 rd and 4 th respondents are accepted for the sake of argument, even then the modified Circular Memo dated 31-03-2017, cannot be given a retrospective effect to the period prior to 01-04-2017. This position was made clear even while discussing grounds a, b and c and rendering a finding. Hence, ground 'd' is answered accordingly.

33.Before proceeding further to deal with the next ground, this Court must also deal with yet another Circular Memo dated 03-10-2017, which has been relied upon by the 4 th respondent along with modified Circular Memo dated 31-03-2017. The Circular Memo dated 03-10-2017, was again issued by the 3 rd respondent and it pertains to implementation of the order issued by TNERC in R.A.No.6 of 2013, dated 31-03-2016. Instructions were issued for current consumption bills in respect of wind energy captive users from 01-08- 2012 to 31-03-2016. This Circular Memo will not apply to the case on hand since it pertained to the period from 01-04-2016 to 31-03-2017, when Circular

Memo dated 19-07-2016 was in force. In view of the same, the Circular Memo dated 03-10-2017, can have no applicability and the 4 th respondent went wrong in placing reliance upon the same.

34.Now, this Court will proceed to deal with the last ground 'e' which pertains to the Order passed by this Court in W.P(MD).Nos.6221 and 6222 of 2018. A careful reading of the facts in this case shows that the petitioner therein had sought for adjustment of banked energy prior to the revised energy wheeling agreement dated 26-09-2017 and this is after the issuance of the modified Circular Memo dated 31-03-2017, by the 2 nd respondent. This Court took into consideration the modified memo and held as follows:

4.The respondents have also filed counter affidavit, wherein it is stated as follows: "Based on the above instructions, the banked energy prior to revised energy wheeling agreement dated 26.09.2017 has not been allotted to the new captive user, M/s.Shree Renga Polymers, HT.SC.No.121, however, the said banked energy is being allotted to existing captive user i.e.,M/s.Obli Granites, HT.SC.No.127 of Salem EDC, who is the captive *user in the old agreement as well as newly executed energy wheeling agreement upto end of the financial year. Further, in this connection, it is most relevant to mention that the energy generated from the date of executive of revised energy wheeling agreement dated 26.09.2017 is being allotted to the new captive user M/s.Shree Renga Polymers, HT.SC.No.121 upto end of the financial year. The unutilized energy at the end of the financial year may be enxahsed at the rate of 75% of the relevant purchase tariff. The payment fill be released after verification of captive generating plant status as per Rule 3 of Electricity Rules, 2005".*

5.In view of the said stand taken by the respondents, the respondents are directed to adjust banked energy to the existing captive users prior to the agreement or the respondents shall pay 75% of the cost of the energy to the petitioners in respect of new captive users as per the agreement. The release of the amount will be made after verification of the captive generation plant as per Rule 5 of the Electricity Rules, 2005. 35.The above order has absolutely no relevance to the facts of the present batch of cases since almost all the cases pertains to *the energy wheeling agreements entered into during the period 01-04-2016 to 31-03-2017 and the adjustment has been done as per the Circular Memo dated 19-07-2016, which was in force during the relevant point of time. Ground 'e' is answered accordingly. 36.The facts of the present case will also attract the principles of promissory estoppal. The 2 nd respondent who issued the Circular Memo on the approval and order of the 1 st respondent, had given an assurance to all group captive consumers, who entered into an energy wheeling agreement during the period from 01-04-2016 to 31-03-2017, the manner in which the banking of wind energy, maintenance of banking account and adjustment of banked wind energy for captive use will be dealt with. This was acted upon by TANGEDCO and the captive users and bills were raised accordingly and payments were also made. The captive users had also arranged their affairs in line with the Circular Memo in force. The captive users cannot at a later point of time be informed that their current consumption bills are revised by relying upon a subsequent Circular Memo and superceded letters of the 3 rd respondent and such an action on the part of the 4 th respondent is* *certainly vitiated by the principles of promissory estoppal.*

37.It is also noticed that in some of the writ petitions viz., W.P.Nos.11294 and 34444 of 2019, it pertains to the period prior to 01-04-2016, wherein, the bills are sought to be revised through the impugned proceedings bills issued by the 4 th respondent. In all these cases, the 2 nd respondent's Circular Memo dated 25-06-2015, was in force and it was implemented by the 4 th respondent in letter and spirit and adjustments were permitted accordingly. None of the reasons cited by the 4 th respondent in the impugned proceedings through which the bills are sought to be revised, will justify the demand. Therefore, the demand made by the 4 th respondent whereby, a concluded payment is sought to be revived, cannot be sustained.

38.In the light of the above discussion, this Court is of the considered view that the demand made by the 4 th respondent from the petitioners, by virtue of the respective impugned letter is held to be unsustainable in law and accordingly, all the impugned letters are quashed.

39.In the result, all the writ petitions are allowed and if any payments have been made by any of the petitioner on the basis of the impugned letter issued by the 4 th respondent, the same is liable to be reimbursed or in the alternative adjusted in the future bills. Any consequential benefits to which the petitioners are entitled to, if any, will enure in their favour by virtue of quashing the impugned letters issued by the 4 th respondent.

40.All the writ petitions are allowed with the above directions. No costs. Consequently, all the connected miscellaneous petitions are closed."

3. The learned counsel for the respondents also agreed that the issues are covered. Thus, this Writ Petition stands allowed in terms of the order passed in the writ petition (cited *supra*). No costs. Consequently, the connected Miscellaneous Petition is closed.

08.02.2024

Jeni
Index : Yes
Speaking order

Neutral Citation : Yes

To

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   Tamil Nadu Generation and Distribution
   Corporation Limited (TANGEDCO),
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   Chennai – 600 002.

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S.M.SUBRAMANIAM, J.

Jeni

W.P.No.1352 of 2021

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