



W.P.No.24498 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.11.2024

Pronounced on : 06.12.2024

CORAM: JUSTICE N.SESHASAYEE

WP.No.24498 of 2018
& WMP.Nos.28508 to 28510 of 2018

E.I.D. Parry (India) Limited
Rep by its Sr.Associate Vice President – Legal
Mr.Biswa Mohan Rath
Pugalur Sugar Factory
Karur – 639 113. ...Petitioner

-Vs-

- 1.The Tamil Nadu Electricity Generation and
Distribution Corporation Ltd (TANGEDCO)
Rep by its Chairman
144, Anna Salai
Chennai – 600 002.
- 2.The Financial Controller / Cost
Tamil Nadu Electricity Generation and
Distribution Corporation Ltd (TANGEDCO)
Rep by its Chairman
144, Anna Salai
Chennai – 600 002.
- 3.The Superintending Engineer
Karur Electricity Distribution Circle
Karur. ...Respondents



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Prayer: Writ Petition is filed under Article 226 of Constitution of India, to issue a Writ of Certiorarified Mandamus calling for the records of the third respondent comprised in his communication dated 14.08.2018 bearing Lr.No.SE/KEDC/KRR/DFC/AS/HT/F.76/D.321/2018 and the consequential communication dated 27.08.2018 bearing Lr.No. SE/KEDC/KRR/DFC/AS/HT/F.76/D.322/2018 and quash the same as arbitrary, illegal and without jurisdiction besides being violative of the principles of natural justice and consequently direct the respondents to make payment of the invoices raised by the petitioner as also the invoices to be raised in future by the petitioner in respect of the Pugalur Plant without adjustment of any amount towards alleged dues under the communication dated 14.08.2018 bearing Lr.No. SE/KEDC/KRR /DFC/AS/HT/F.76/D.321/2018 and the consequential communication dated 27.08.2018 bearing Lr.No.SE/KEDC/KRR/DFC/AS/HT/F.76/D.322/2018 issued by the third respondent.

For Petitioner : Mr.Rahul Balaji

For Respondents : Mr.J.Ravindran
Additional Advocate General
Assisted by Mr.S.Kalaiselvan
Standing Counsel for TANGEDCO



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ORDER

The petitioner herein challenges a demand notice dated 14.08.2018 as modified by another notice dated 27.08.2018 issued by the 3rd respondent, the Superintending Engineer, Karur Electricity Circle.

2.The facts that lead up to the present petition are:

- a) The petitioner runs a sugar factory for which purpose it generates its own electricity based on *Bagasse* Cogen Power Plant. The petitioner also has entered into three Power Purchase Agreements (PPA) with the TANGEDCO for the sale of the surplus energy that it has generated. The first one is dated, 05.08.2005. This was terminated on 21.11.2014, and the second PPA was entered on 01.12.2014. Subsequently, the petitioner had entered into another PPA on 22.07.2016 with the TANGEDCO for sale of its surplus energy. The rates at which the power must be sold and purchased under the PPA was also fixed therein, and the power supply in terms



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of PPA has happened peacefully between 24.08.2007 and 27.11.2017.

- b) In the meantime, another sugar manufacturer viz. M/s.Sakthi Sugars and Tamilnadu Newsprints Ltd., (henceforth TNPL) approached TNERC with PPAP No.1/ 2011 for fixation of tariff for the sale of their surplus energy to TNEB. Vide its proceedings dated 29.07.2016 TNERC fixed the tariff for the sale and purchase of electricity generated by M/s.Sakthi Sugars and TNPL to TNERC.
- c) While things stood thus, petitioner had raised its own bill for the sale of electricity to TANGEDCO. This was responded to by the first notice dated 14.08.2018, wherein TANGEDCO has raised its bill for Rs.28.0 crores. What it in essence has done is that, it has telescoped the effect of the order passed by TNERC dated 29.07.2016 in PPAP 1/2011 which M/s.Sakthi Sugars had filed vis-a-vis its contract with the TNPL. About couple of weeks thereafter, to be precise on 27.08.2018, TANGEDCO issued another notice, wherein it appeared to have re-worked its claim and demanded Rs.25.77 crores adjusting it against four invoices payable to the



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petitioner based on what it contends as revised tariff on the past bills of the petitioner.

These proceedings of the TANGEDCO, dated 14.08.2018 and 27.08.2018 are now under challenge. There are two parts to the petitioner's prayer: the second part regarding payment of its dues has been complied, thanks to the order of this court in W.A. No.2598 of 2021 dated 21.12.2021. Therefore, the second part of the prayer has become infructuous, and what is now under challenge is only the legitimacy of the impugned notice or impugned demand.

3. The 3rd respondent has filed its counter in which it has pleaded:

- a) On 05.08.2005, the petitioner entered into a Power Purchase Agreement (PPA) with TANGEDCO wherein the former agreed to sell the surplus power it generates through its bagasse based co-gen plant to the latter. The petitioner commissioned this plant in Pugalur village in Karur district on 24.08.2007. This plant uses bagasse for power generation during the crushing season and coal during the non-crushing season.
- b) Since the PPA relates to the purchase of power generated through



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bagasse based co-generators, the PPA is covered by the Generic Tariff Order issued by the TNERC (more specifically, Generic Tariff Order No. 3 of 2009 dated 06.05.2009) which fixes the tariff for the purchase of power from the co-gen plants such as the one commissioned by the petitioner.

- c) Even before the petitioner entered into the PPA with TANGEDCO, on 09.02.2004, the petitioner entered into a tie-up agreement with M/s. Tamil Nadu News Print Ltd (TNPL) for purchase of coal in exchange for bagasse.
- d) Since the Generic Tariff Order applies only to bagasse based power generation, M/s. Sakthi Sugar, a concern owning a similar co-gen plant and having a tie-up agreement with TNPL, approached the TNERC with PPAP No. 1 of 2011 seeking separate categorization of power plants that supply bagasse to the TNPL and requested the Commission to determine tariff for fossil fuel based co-generation during the crushing season. In the said matter, the TNERC passed an interim order dated 02.03.2011 wherein it fixed the tariff at Rs. 3.01/unit for co-gen plants having tie-up with TNPL. During the operation of the interim



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order, the petitioner availed this rate from TANGEDCO as well.

- e) However, in the final order that came to be passed by the TNERC on 29.07.2016, the Commission had opined that the co-gen plant of Sakthi Sugars failed to qualify the conditions for bagasse based co-gen plants. Therefore, the Commission held the electricity supplied by the co-gen plant of Sakthi Sugars as electricity supplied from a “generating company”. Consequently, the petitioner too has lost its status of being a bagasse based co-gen plant, and hence only the tariff at the Unscheduled Interchange (UI) rate is applicable to it.
- f) The final order of TNERC was also acknowledged by the petitioner when it addressed a letter to TANGEDCO dated 12.06.2018 wherein it undertook to reimburse any excess amount paid by TANGEDCO if the appeal preferred by Sakthi Sugars was decided in favour of TANGEDCO. Nevertheless, the orders of TNERC having a statutory force, the petitioner is bound by the same.
- g) Therefore, on 14.08.2018, TANGEDCO addressed a letter to the petitioner asking it to repay the excess amount resulting from the change in tariff rates under the final order as compared to the interim order.



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- h) Moreover, though the petitioner was not a party to the proceedings in PPAP No. 1 of 2011, the petitioner is entitled to file an appeal before the APTEL under Section 111 of the Electricity Act, 2003. Hence, the instant writ petition is not maintainable.

4.1 Heard Thiru. Rahul Balaji, for the petitioner and Thiru J.Ravindran, the Additional Advocate General, for the Respondents. The learned counsel for the petitioner submitted:

- a) Tamil Nadu has substantial sugarcane cultivation, and after utilisation of all that the sugarcane can offer to the sugar industry, sugarcane is reduced to unusable fibrous waste called *bagasse* which can be used as a raw material for paper industry, and as fuel for power generation plants. Therefore, to reduce wastage of *bagasse*, the Government of Tamil Nadu commissioned a newsprint plant. That is how TNPL came into existence, long prior to the Electricity Act, 2003. The sugar industries developed power generating units which could operate both through bagasse as well as coal, and these units came to be known as bagasse co-generating



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power plants. The sugar industries soon began to enter into barter agreement with TNPL, by which, for the supply of bagasse it purchases from sugar industries, TNPL would procure and supply coal based on the calorific value of bagasse to the sugar industries. The sugar industries which had established Cogen Power Plants, used bagasse during crushing season, and coal, during other times to generate electricity. Once they began to exchange bagasse for coal with TNPL, these sugar industries also began to use additional coal as fuel for its thermal power generators.

- b) The petitioner runs a bagasse based co-generating power plant. And it had entered into a PPA with the then TNEB, now TANGEDCO. This agreement is dated 05.08.2005. In term of Clause 1 of this PPA, the petitioner shall feed its surplus power from the bagasse based co-generating plant into the TNEB's grid.
- c) In terms of Clause 6(d), the petitioner would be paid @ Rs.3.15 per unit of electricity that it generates through its bagasse based plant for the financial year 2004-2005 during the (sugarcane) crushing season with an annual escalation of 5% over the same up to 2010.



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However, it is limited by a rider that such rate shall not exceed 90% of the prevailing HT industrial tariff. So far as the electricity generated based on coal during non-crushing season, TANGEDCO has to pay Rs.3.01 per unit with a similar 5% annual escalation.

- d) Clause 7(b) goes to define the seasonal and non-seasonal period of the year. Accordingly, from 1st December to 30th June of every year will be the seasonal period (when bagasse will be generated and used), and for the remaining six months, i.e., from July 1st to 30th November, it will be unseasonal (when coal will be used).
- e) Even prior to the PPA, which the petitioner had entered into with TANGEDCO, it had entered into an agreement, dated 09.02.2004, with TNPL for sale of bagasse based electricity and in exchange TNPL was required to supply coal to the petitioner, which the petitioner would be using alongside *bagasse* for generation of electricity.
- f) The petitioner has been regularly feeding its surplus energy generated from its bagasse co-generating plant into the TANGEDCO grid, and the TANGEDCO was also paying it as in



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terms of the price agreed.

g) So far as the petitioner is concerned, it would trade its *bagasse* for TNPL's coal, and it is essentially a barter arrangement. While so, TANGEDCO approached the TNERC with PPAP No.8/2011 *inter alia* for fixation of power purchase tariff for the sugar mill co-generation plants having tie up arrangements with TNPL for supply of *bagasse* in exchange of coal, thus using fossil fuel for power generation throughout the year (i.e.) during crushing and non-crushing seasons and commissioned based on the power purchase agreements entered before 15.05.2006. It has listed as many as 13 respondents, to fall under this category of which the petitioner herein was arrayed as the 8th respondent. The TNERC considered this issue along with a couple of other issues and made its decision vide its order dated 31.03.2016. On the issue which now concerns this court involving tariff fixation for those power generators who have a tie up with TNPL before 15.05.2006 the Commission has held as below:

"Regarding the co-gen plants tied up with TNPL, it is observed that Commission has been issuing tariff order



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for sources like Wind, Biomass, Bagasse based co-gen sugar plants, Solar plants, CPP, etc., from time to time and the licensee can purchase power after entering into the contract (PPA) within the scope of these orders but in the case of TNPL tied up co-gen plants, a barter system of exchange of Bagasse with coal is made between sugar mills and TNPL and therefore it is beyond the scope of any of the tariff orders of the Commission and therefore the Commission is not inclined to determine the tariff for these plants. However, as these contracts have been entered into prior to Electricity Act, 2003 and continued for years after 2003 also, Commission proposes to concede to the prayer of TANGEDCO to fix the tariff for TNPL tied up co-gen plants. Commission notes that whatever power purchase is made by TANGEDCO from such plants, it cannot be accounted for RPO compliance for TANGEDCO. This aspect is to be factored into the Tariff payable to such plants. Previously a different tariff of Rs.3.01/unit was adopted for the TNPL tied up plants while the tariff for a bagasse based Co-generation plants was at Rs.3.15/unit which works out to a reduction of 4.4% on Rs.3.15/unit i.e. overall tariff. Hence a 5% reduction in the overall tariff may be effected from the co-gen plants tied up with TNPL."



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Viewed thus, it has to be held that the PPA has its own sanctity and it cannot be breached..

h) So far as the issue involved in Sakthi Sugars case is that they commissioned operation after 15.05.2006 and before the order passed by the TNERC in P.P.A.P No.8 of 2011. It is hence Sakthi Sugars approached TNERC with its petition for fixation of tariff. Indeed Sakthi Sugars had commissioned its energy generation only on 01.02.2008. Since Sakthi Sugars does not fall within the category of other energy generators covered under P.P.A.P. No.8 of 2011, which covers those who have commissioned their plant pursuant to agreements that were executed prior to 15.05.2006, it is in that context, the Commission found that the case of Sakthi Sugars does not fall in any one of the known categories and hence fixed the tariff. It also has found that Sakthi Sugar's supply of energy hasn't been regular. When the case of Sakthi Sugars is a separate or a stand alone case, whatever that has been decided in its case cannot be deflected on the petitioner.

i) Here another concept steps in. It is all about supply of firm energy,



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and supply of infirm energy. Firm energy is understood as supply of energy *inter alia* regularly at specified quantity, whereas infirm supply of energy is the opposite of firm energy. So far as the agreement which the petitioner had entered into with TANGEDCO is concerned, inasmuch as the petitioner is only required to feed its surplus energy into the grid of TANGEDCO, the quantity to be supplied is not assured, even though the supply can still be regular. However, there is no dispute between the energy supplier and the energy purchaser, read it as the petitioner and the TNEB or the TANGEDCO, as the case may be, vis-a-vis the payment required to be made for the purchase of surplus energy which the petitioner generates from its *bagasse* based cogenerating power plant at the rates agreed upon under the PPA.

4.2 The dispute involved in this litigation spreads over a period of ten years, from 24.08.2007 to 27.11.2017 and relates to the energy which TANGEDCO had purchased in terms of the PPA. It arises out of an order which the TNERC came to pass in PPAP 1 of 2011, which M/s.Sakthi Sugars had filed



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for fixing its tariff pursuant to the agreement it had entered into with TNPL.

This appears to be a new plant, and established after the coming into force of the Electricity Act, 2003, and hence tariff for its *bagasse* based co-generating plant has to be fixed by the TNERC under Sec.62 of the Act. In paragraph 12.7 of the Order, dated 29.07.2006, TNERC holds that “*it is not inclined to create a separate categorisation of power plants who are supplying bagasse fibre to TNPL as it is beyond the scope of power and functions of the Commission.*” The basis for the TNERC's refusal to fix the tariff either for exclusive bagasse based power generating units, or coal based units, and not for hybrid mode of generation of electricity by using both *bagasse* and coal on the basis of the barter agreement that the sugar companies have entered into with TNPL. In fixing the tariff at Rs 2.10/ per unit, the TNERC has taken into account the other facts of the case and found that M/s.Sakthi Sugars was not supplying firm energy in terms of its PPA with TNAGEDCO and classified the energy as infirm energy. This it declares in paragraph No.12.10 of its order, which reads as below:

"12.10. In view of the facts stated as above, Commission considers that it will be more appropriate to classify the supply of electricity to the respondent from the Petitioner's



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Bagasse based generating plant as supply of electricity by a generating company. As contended by the respondent the entire power during the period is to be considered as infirm power.

Hence the tariff for this plant is to be fixed at 90% of UI rate linked to frequency with the floor rate of Rs.2.10 / unit and a ceiling rate of Rs.4.08 / unit for the power supplied during March 2011 to August 2014."

4.3 On receipt of this Order passed in the case of Sakthi Sugars, TANGEDCO reworked the entire amount it had paid the petitioner for a decade at Rs.2.10 /per unit, and has raised a claim for Rs.28,00,39,385/- vide its letter dated 14.08.2018, which it modified it to Rs.25,77,33,542/- vide its letter dated 27.08.2018 These proceedings are bad in law for the following reasons:

- a) What the TNERC has passed is not a generic order fixing tariff across board for all bagasse based co-generating power plants, but only a case specific order which operates *in personem*. If only it were intended to be a generic order, then TNERC ought to have issued a public notice affording all those who are likely to be



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affected by its order an opportunity of presenting their respective case. What was intended for a specific case cannot be telescoped to all.

- b) When TANGEDCO was bound by PPA, if at all it considers that the tariff as it agreed upon under the PPA has to be revisited, then it should move the TNERC for fixation of tariff, and cannot unilaterally alter the terms of the contract, based on an order that does not affect the commercial relationship between the petitioner and the TANGEDCO. Reliance was placed on the dictum of the Supreme Court in ***Gujarat Urja Vikas Nigam Ltd. Vs Renew Wind Energy (Rajkot) (P) Ltd.***, [2023 SCC OnLine SC 411 (para 53 to 55)].
- c) What was decided in Sakthi Sugars case by TNERC is based essentially on facts peculiar to Sakthi Sugars. Indeed, TNERC has fixed the tariff after holding that the energy which Sakthi Sugars had fed into the TANGEDCO grid as infirm energy and directed payment on much lower rate. Unless at least on facts the TANGEDCO can equate the petitioner's case with that of Sakthi



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Sugars, it cannot telescope the effect of order passed by TNERC in Sakthi Sugars case to the petitioner.

- d) Thirdly, at the end of the day, TANGEDCO has made a demand after close to 10 years. While the aspect pertaining to regulation is covered by the Act, it has provided a framework so far as the money claim is concerned, which is covered by the Limitation Act. Reliance was placed on the decision of the Hon'ble Supreme Court in *A.P. Power Coordination Committee Vs Lanco Kondapalli Power Ltd.*, [(2016) 3 SCC 468]. Therefore, the claim is also barred.

5. Per contra, the learned Additional Advocate General appearing for TANGEDCO made the following submissions :

- (a) The dispute has arisen in working the PPA dated 22.07.2016, and the dispute if any, arising out of the working of contract is arbitrable under Clause 11 of the agreement. When a dispute arises based on contract and is also stipulated as arbitrable, the petition is not maintainable.
- (b) Secondly, when the TANGEDCO raised a bill, the petitioner



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responded to it with its reply sometime in June 2018, wherein the petitioner has made reference to the order passed by TNERC in the dispute involving Sakthi Sugars, and also the pending appeal before APTEL. And consequently, the petitioner has undertaken to reimburse any excess amount to TANGEDCO, depending on the outcome of the appeal. In other words, the petitioner at no time has indicated an intent to go beyond the operative ambit of the orders of TNERC.

- (c) So far as the rates which are stipulated in PPA are concerned, as per Clause 6(d), the rates are only provisionally fixed and it will be subject to any retrospective modifications as and when tariff orders are revised by TNERC. That precisely was done now by TNERC in the case of Sakthi Sugars. When in terms of PPA, the rates are fixed for generation of electricity through *bagasse* during seasonal period, but the petitioner himself has admitted that he had generated electricity through coal during crushing season.

6. In response, the learned counsel for the petitioner made the following



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submissions that, so far as the allegation that an official of the petitioner had addressed a communication to TANGEDCO in June, 2018 wherein the petitioner had agreed to make payment depending on the outcome of the appeal in Sakthi Sugars case is concerned, then it cannot be considered as a conclusive admission as to bind the petitioner. Indeed vide its Order dated 30.05.2024, The Appellate Tribunal had set aside the very order passed in PPAP 1/2011 and remanded the matter back to TNERC. This implies that the very foundation for TANGEDCO's claim based on the two letters now goes.

7. Rival contentions are carefully weighed. There are two points: (a) the foundation for the impugned notices of the TANGEDCO dated 14.08.2018 and 27.08.2018 is the order of the TNERC in PPAP 1/2011; and (b) the effect of Order of the APTEL in the ongoing proceedings.

8.1 Both the issues have a single solution. When the APTEL had set aside the order of the TNERC passed in PPAP 1/2011, the very occasion for TANGEDCO to raise the impugned proceedings has been lost to it. It therefore, cannot sustain the impugned notices/letters dated 14.07.2018 and



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27.08.2018 any longer. Necessarily, the petitioner is bound to succeed in this proceedings.

8.2 The second aspect is that, as rightly contended by the counsel for the petitioner, whatever Order that was passed by TNERC is not a generic order, as it was not preceded by a notice to all existing generators of electricity through *bagasse* co-generating unit to participate in the proceeding. In other words, the petitioner has not been heard in the matter. In the course of his arguments, the learned Additional Advocate General submitted that the petitioner could now participate in the proceedings before TNERC. When the petitioner has a contract detailing the terms relating to rates at which TANGEDCO might to have to pay for the electricity generated by the petitioner's *bagasse* co-generating unit and when it has no grievances or complaints in working the contract, there is hardly any reason for it to approach the TNERC. On the other hand, there is nothing that prevents TANGEDCO to approach TNERC, if it is so interested.

8.3 The third aspect is that the attempt to give effect to the tariff initially



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fixed by TNERC in PPAP 1/2011 to a non-party retrospectively by ten years.

Nothing can be more unconscionable than making a retrospective claim unilaterally, overlooking the contract is bad. Till the contract which the petitioner had entered into with respondent is found to be in contravention with the Electricity Act, 2003, there is no reason why the contract should not govern the commercial relationship between the petitioner and the respondent.

9. From whichever angle the matter is viewed, this Court has to hold that there is hardly any justification for sustaining the impugned notices dated 14.08.2018 and 27.08.2018. In the result, this petition is allowed, and the notices dated 14.08.2018 and 27.08.2018 are hereby set aside. No costs. Consequently, connected miscellaneous petitions are closed.

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Index : Yes / No
Speaking order / Non-speaking order
Neutral Citation : Yes / No
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