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W.P.No.19552 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.12.2024

Pronounced on : 03.01.2025

CORAM : JUSTICE N.SESHASAYEE

W.P.No.19552 of 2020
and WMP.No.24167 of 2020

M/s.J.G.Spining Mills (P) Ltd., HTSC No.193
S.F.No.267, Sathy Road,
Kariampalayam Village, Annur, Coimbatore.
Rep by its Manager N.Kumar

.... Petitioner

Vs

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

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

3.The Chief Financial Controller / Revenue
TANGEDCO, 7th Floor
144, Anna Salai - 600 002.

4.The Superintending Engineer
TANGEDCO
Coimbatore Electricity Distribution Circle/North
Tatabad, Coimbatore - 641 012.

.... Respondents



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PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorari calling for the records of the fourth respondent's impugned Letter bearing Lr.No. SE/CEDC/N/EBE/DFC/AO/REV/AAO/HT/A2/F.HTSC 193 /D.1016/20 dated 20.11.2020 and quash the same as illegal, arbitrary without authority of law, against the Circular Memo dated 19.07.2016 issued by the second respondent under the order of the first respondent / Chairman, TANGEDCO and also the order dated 25.05.2017 in WP(MD) No.9320 of 2017.

For Petitioner : Mr.S.P.Parthasarathy

For Respondents : Mr.P.Wilson, Senior Advocate
Assisted by Mr.L.Jaivenkatesh,
Standing Counsel for TANGEDCO
[R1 TO R4]

ORDER

1. The dispute between the parties is required to be explained, but it must be stated that the petitioner ensures that its case is not easily understood on a plain reading of the affidavit. Therefore, facts which are stated and admitted on either side forms the basis of this narration. It is as below:

- a) The petitioner, herein was a wind energy-generator through its Windmill installed in Tirunelveli District, bearing WEG NO:4303. It was also 100% captive consumer of the energy that it generated. At



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the consumption end, it had a High Tension Supply Connection in HTSC 193.

- b) For the transmission of electricity that it generated, petitioner had entered into a wheeling agreement with the TANGEDCO, in terms of which whatever energy that was generated but not utilised will remain in the banking account of the electricity generator, and can be carried forward for future utilisation in the subsequent months, with a rider that if there is any surplus energy still available in the banking account of the energy generator as at the end of the financial year (31st March of every year) it should be sold to TANGEDCO, not at the prevailing tariff but at 75% of the tariff prescribed. (In the process, TANGEDCO will make a gain of 25% per unit of electricity). There is no dispute on this aspect between the parties.
- c) The issue arose when on 14.09.2017 the petitioner sold its Windmill referred to above to a third party. And as on 13.09.2017, the petitioner had to its credit a certain units of electricity (which runs to few lakhs units) in its banking account. It was not the end of the financial year yet. The petitioner had used the electricity in its banking account for its HTSC 193. And the TANGEDCO while



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raising its monthly bills for the consumption of electricity on the petitioner had adjusted what was actually consumed by the petitioner against the energy that was available in its banking account.

- d) Be that as it may, the Superintending Engineer of TANGEDCO, vide his proceedings dated 10.07.2020 had raised a demand for Rs.1,29,47,301/- alleging that adjustment given for consumption of energy by the petitioner against the unutilized banked energy that was in its banking-account till 13.09.2017, after the sale of its windmill was impermissible, and that it should have been sold to the TANGEDCO at the purchase rate as per the terms of the Agreement, i.e @ 75% the tariff.
- e) Even though this demand notice refers to a Circular of the Chief Financial Controller of the TANGEDCO, dated 01.06.2016, it is apparent it is made more in tune with Circular dated 31.03.2017.
- f) Petitioner responded to it with its reply dated 24.07.2020, where it emphasised that the energy in the banking account upto 12.09.2017 had been used, and vide proceedings of the Chief Engineer dated 19.07.2016 adjustments had also been given, and that the Circular of 31.03.2017 was directed to be kept in abeyance by the Madurai



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Bench of this Court in W.P.(MD) 9320 of 2017. The petitioner informed that TANGEDCO appears to be confusing the rule applicable to Group Captive consumers with 100% captive consumers.

- g) The petitioner then was given a hearing on the issue, during which it also gave its written submissions dated 15.10.2020 where it broadly reiterated the earlier positioned it assumed.
- h) However, rejecting the petitioner's submissions, the 4th respondent came out with its impugned proceedings dated 20.11.2020. In this proceedings, the petitioner was informed that after the termination of ownership over the windmill, the surplus energy generated and remained as banked energy cannot be transferred neither to the owner nor to the captive consumer. And, the Order does not say why?

2. The objections of the respondents may be succinctly stated: The issue is covered by clause 10.11 of the Comprehensive Tariff Order No.3 of 2016, and it reads:

10.11. Banking period and charges :-

.....

10.11.6. The Commission decides to continue with the provision



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of banking in this order also. The banking period shall be for a period of twelve months commencing from 1st April and ends on 31st March of the following year. The energy generated during April shall be adjusted against consumption in April and the balance if any shall be reckoned as the banked energy. The generation in May shall be first adjusted against the consumption in May. If the consumption exceeds the generation during May, the energy available in the banking shall be drawn to the required extent. If the consumption during May is less than the generation during May, the balance shall be added to the banked energy. This procedure shall be repeated every month.

Unutilized energy as 31st March every year may be encashed at the rate of 75% of the respective applicable wind energy tariff rate fixed by the Commission.”

Its core contention vis-a-vis the issue is that on transfer of the windmill, the petitioner should have obtained an Open Access Approval from the 2nd respondent. And Clause 5 of the Energy Wheeling Agreement, dated 29.04.2015 which the petitioner had originally entered into with the TANGEDCO provides:

“5. Adjustment of Energy Generated and Wheeled :

The minimum limit of load for sale to third parties by the Wind Energy Generator shall be governed by the clause 11 of the Intra State Open Access Regulations, 2005. When the Wind



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Energy Generator is synchronized with the grid, the captive/third party consumer shall be liable to pay to the Distribution Licensee for the net energy consumed during the billing month at the applicable rate. The net energy consumption shall be slot wise as detailed below :

- (a) That is peak generation shall be adjusted against peak consumption.*
- (b) Normal generation shall be adjusted against normal consumption.*
- (c) Off peak generation shall be adjusted against off peak consumption.*
- (d) Peak and normal generation may be adjusted against lower consumption at the request of WEG.”*

And in its written submissions, the respondent would submit that “in accordance with the agreement clause stated above, the petitioner is eligible for wind energy captive adjustment from the current month banking as well as banked energy. And, if a dispute arises it should be resolved only through TNERC.

3. The issue involved is short as to whether the petitioner is entitled to utilise its banked electricity which it had generated through its windmill before it was sold to the third party on 14.09.2017, for its own consumption? And the ancillary issue is if there is a dispute, should it be



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decided only by TNERC, which implied the petition possibly is not entertainable.

4. Heard Mr.S.P.Parthasarathy, learned counsel for the petitioner and Mr.P.Wilson, learned senior counsel assisted by Mr.L.Jaivenkatesh, learned Standing Counsel for TANGEDCO / respondents. According to the petitioner, the entitlement of captive consumer of electricity to use the banked energy at its generation end before sale of the energy generator (windmill) is covered by the order of TNERC dated 13.08.2024 in *M/s.Krishnaveni Carbon Products P Ltd.*, in D.R.P.No.10 of 2023, whereas, the respondents would submit that the same was covered by the order of TNERC dated 13.08.2024 in *M/s.Sri Gomathy Mills Private Limited* in D.R.P.No.18 of 2023. And an ancillary issue that has arisen is , whether this Court should stay away from deciding the issue and leave it to the expert body in TNERC to decide in terms of the dictum in *Jaipur Vidyut Vitran Nigam Limited and others Vs MB Power (Madhya Pradesh) Limited and others* [(2024) 8 SCC 513].

5. In the course of arguments, the learned Senior Counsel appearing for the



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respondents essentially stressed on the aspect that with the transfer of the windmill by the petitioner, leading to transfer of ownership over it, the Energy Wheel Agreement (EWA) stands terminated and therefore, unless the petitioner enters into an Open Access Agreement with TANGEDCO, it cannot use the energy. This Court agrees with this absolutely. But here the issue is not about procuring fresh energy after the sale of its windmill by the petitioner, but about its entitlement to utilize the unutilized energy generated and banked. If for instance, if the entire energy generated at the generation end is fully utilized by the 100% captive consumer, then on transfer of ownership of the wind energy generator, there will be no supply of energy for the consumption end. Therefore, the consumer necessarily have to go for an Open Access Agreement for procuring energy from whatever source it could obtain. Can that be equated to a situation where the petitioner already has few lakh units of energy banked with TANGEDCO?

6. The clause in the EWA which the respondents had relied on, does not deal with the situation here, nor does the Comprehensive Wind Energy Tariff 2016 also provides for it. It is required to be underscored that the energy which the petitioner has generated is its property and it can lose it



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only based on any agreement. Here, the respondents are not able to pinpoint any specific term in the WEA which dis-entitles the petitioner to use its own property – the banked energy to its credit prior to transfer of its WEG.

7. So far as the authorities cited at the Bar goes, in ***Krishnaveni Carbon Products case*** [D.R.P.No.10 of 2023 dated 13.08.2024], the facts there are slightly different. There the petitioner had a WEG and it was also a captive consumer for the energy supplied vis-a-vis to one its High Tension Service Connection (HTSC). Subsequently, it wanted to include one more HTSC as part of its captive consumption. Therefore, to include a new HTSC, it entered into a separate agreement with TANGEDCO, and it was originally allowed. In effect, the petitioner there, who was only a 100% captive consumer vis-a-vis one HTSC now chooses to use the energy it generated for two HTSC. Initially TANGEDCO found nothing illegal about it, and allowed it, but later the TANGEDCO reversed its earlier decision on the ground that since a new agreement was entered into vis-a-vis the 2nd HTSC, the petitioner was not entitled to bring the 2nd HTSC for captive consumption purposes. This was negated by TNERC when it stated that



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when the ownership at the generation end and consumption end remains the same, the 2nd HTSC will also be entitled to be brought within the captive consumption. *Stricto sensu*, the ratio in this case does not fit perfectly on the facts of the case on hand.

8. So far as the ratio in ***Sri Gomathi Mills case*** [D.R.P.No.18 of 2023 dated 13.08.2024] is concerned, the issue before TNERC involve Group Captive Consumers where a group of consumers will own a WEG. In the case of Group Captive Consumers, it was made clear that where one of the owners transfers his or its share over the WEG, then neither the transferor entity nor the purchaser of the shares of the seller in the WEG would be entitled to the share of banked energy of the transferor. There the rule is hardly confusing. On transfer, since a new agreement comes into existence, the erstwhile ownership stands automatically cancelled and the rights of the predecessor cannot be transferred to the successor. Indeed, TNERC was addressing a question whether the name transfer of WEG in the middle of the year would disentitle the new owner or its captive consumer of previous owner utilising the banked energy standing to the credit of WEG is sustainable. And TNERC had held that the transferee is not entitled to the banked energy of



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erstwhile owners. And insofar as group captive consumers are concerned, even consumption of banked energy by the erstwhile owner is barred.

9. The situation at hand is different. It is not in dispute that the petitioner was not a 100% captive consumer of its own wind energy that it had generated. In other words, the ownership both at the generation end and the consumption end remained with the same entity, namely the petitioner. Therefore, whatever that it generated belonged to it. Hence, the case in ***Sri Gomathi Mills*** may not also fit in with the facts of the case on hand.

10. Turning to the present case, as stated earlier, the banked energy which the petitioner had generated and standing to its credit at the time of transfer of its WEG, is the property of the petitioner, and since no agreement was specifically brought to the notice of the Court that the petitioner is not entitled to the property of banked electricity, necessarily it must be held that the petitioner is entitled to use the banked energy available to its credit as on the date of transfer of its WEG.

11.1 Now, turning to the aspect on entertainability of the present petition in



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view of the dictum in *Jaipur Vidyut Vitran Nigam case* [(2024) 8 SCC 513] is concerned, it arises out of a situation where Rajasthan Vidyut Parasaram Nigam Ltd., applied for bidding for procurement of 1000 MW of electricity as per Competitive Bidding Guidelines issued under Sec.63 of the electricity Act, 2003 before the Electricity Regulatory Commission. It is in that context, the Hon'ble Supreme court has held that Electricity Regulatory Commission is an expert body, and had advised the Court to stay away from meddling with the issues which fall exclusively within its domain except under exceptional circumstances.

11.2 So far as the present case is concerned, petitioner had entered into a wheeling agreement with the respondent, and it is very evident from the terms thereof that TANGEDCO is entitled to force the energy generator to sell the banked energy in its account only on 31st March. The agreement on the face of it does not contemplate a situation how to deal with the banked energy if the wheeling agreement was terminated due to the sale of the windmill. And, as stated earlier, the energy that was in the banking account till the sale of the windmill is the property of the generator and TANGEDCO is only entitled to wheeling charges and banking charges.



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And, it has used it only for its own purposes. Therefore, the issue is more related to how to understand the terms of the Wheeling Agreement, which the court are also competent to decide. Secondly, how can TANGEDCO engage in unilateral construction of the terms of the Wheeling Agreement and impose its understanding on the contracting parties, namely the Energy Generators? If it has any doubts, it can as well approach the TNERC. There is not bar for it to approach the Commission. Therefore, if it is interested it may move.

12. In the end, this petition is allowed and the proceedings of the fourth respondent dated 20.11.2020, is set aside. However, the respondent-TANGEDCO is at liberty to approach the TNERC if it is so interested and get a clarification from TNERC, and until then, this order will have force. No costs. Consequently, connected miscellaneous petition is closed.

03.01.2025

Index : Yes / No
Speaking order / Non-speaking order
Neutral Citation : Yes / No
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N.SESHASAYEE.J.,

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Pre-delivery order in
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