

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24 - 9 - 2014

CORAM:

THE HONOURABLE MR.JUSTICE N.PAUL VASANTHAKUMAR
AND
THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Writ Appeal Nos.2812 of 2012 and 1133 to 1262 of 2013
(130 Writ Appeals)

and

M.P.Nos.1 of 2014, 1 of 2012, 2 of 2012 and 1 of 2013 in W.A.No.2812 of 2012,
M.P.Nos.1 and 2 of 2014, M.P.No.1 of 2013 in W.A.Nos.1133 to 1262 of 2013,
M.P.No.2 of 2013 in W.A.Nos.1133 to 1253 and 1261 of 2013
M.P.No.1 of 2013 in W.A.Nos.1254 to 1260 and 1262 of 2013
M.P.No.3 of 2013 in W.A.Nos.1133 to 1253 and 1261 of 2013
M.P.No.2 of 2013 in W.A.Nos.1254 to 1260 and 1262 of 2013

1. The Government of Tamil Nadu,
Represented by its Secretary to Government,
Energy Department, Fort St.George,
Chennai-600 009.
2. Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO),
Rep. by its Chairman and Managing Director,
144, Anna Salai, Chennai-2.
3. Tamil Nadu Transmission Corporation Limited (TANTRANSCO),
Rep. by its Chairman and Managing Director,
144, Anna Salai, Chennai-2.
4. The Chief Financial Controller/Revenue,
Accounts Branch, Revenue Division,
Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO),
144, Anna Salai, Chennai-2.
5. The Superintending Engineer,
Chennai Electricity Distribution Circle (CEDC) West,

Anna Nagar, Chennai-40.

6. The Deputy Financial Controller,
Chennai Electricity Distribution Circle (CEDC) West,
Anna Nagar, Chennai-40.

.. Appellants in W.A.No.2812 of 2012

Vs.

1. Kamakshi Lamipack Private Ltd.,
Rep. by its Director,
No.68 (40), 2nd Main Road,
Ambattur Industrial Estate, Chennai-58.
2. Tamil Nadu Electricity Regulatory Commission (TNERC),
rep. by its Secretary,
19-A, Rukmani Lakshmiipathy Salai (Marshalls Road),
Egmore, Chennai-8.

.. Respondents in W.A.No.2812 of 2012

Writ Appeal No.2812 of 2012 filed under Clause 15 of the Letters Patent,
against the order dated 30.11.2012 in W.P.No.23113 of 2012 on the file of this
Court.

(The Judgment was reserved on 12.9.2014)

For appellants in all Writ Appeals:

Mr.P.H.Arvind Pandian, Addl. Advocate General,
assisted by Mr.P.Gunaraj, Mr.S.K.Rameshwar,
Mr.M.Varunkumar and Mr.P.R.Dilip Kumar,
Standing Counsels and
Mr.C.V.Shailendran, Govt. Advocate

For respondents: Mr.Saravanakumar for R-1 in W.A.No.2812 of 2012

M/s.Royan Law Associates for R-1 in W.A.No.1139 of 2013

Mr.Krishna Srinivasan for M/s.S.Ramasubramanin & Associates
for R-1 in W.A.Nos.1138, 1145, 1220, 1210, 1206, 1203,

1200, 1159, 1158, 1229, 1227, 1248, 1237, 1181, 1180, 1179, 1178, 1170, 1169, 1168, 1167, 1243, 1199, 1247, 1147 of 2013

Ms.Radhika Krishnan for M/s.Sarvabhauman Associates for R-1 in W.A.Nos.1150, 1230, 1187 and 1153 of 2013

Mr.D.Ravichander for R-1 in W.A.No.1213 of 2013

Mr.N.L.Rajah for R-1 in W.A.Nos.1140, 1214, 1215, 1217 to 1219, 1221, 1222, 1238, 1239, 1253, 1254, 1257, 1259, 1262 of 2013

Mr.AR.L.Sundaresan, Senior Counsel for Mr.R.S.Pandiya Raj for R-1 in W.A.Nos.1255, 1256, 1252, 1260, 1197, 1216, 1214, 1232, 1192, 1191, 1224, 1182, 1190, 1250, 1228, 1115 and 1156 of 2013

Mr.Rahul Balaji for M/s.Sathish Parasaran for R-1 in W.A.Nos.1157 and 1223 of 2013

Mr.AR.L.Sundaresan, Senior Counsel for Mr.K.Seshadri for R-1 in W.A.Nos.1148, 1154, 1160, 1151, 1161, 1163, 1164, 1177, 1183, 1188, 1193, 1194, 1198, 1201, 1202, 1211, 1226, 1235, 1236, 1244, 1246 and 1251 of 2013

COMMON JUDGMENT

Though the miscellaneous petitions are listed for hearing, by consent of the learned counsel appearing for the parties, the Writ Appeals themselves are taken up for disposal.

2. These Writ Appeals are filed arising out of the common order passed by the learned single Judge in W.P.No.23113 of 2012 etc. batch, dated 30.11.2012, in setting aside the order impugned in G.O.Ms.No.79, Energy (C.3)

Department, dated 11.7.2012 of the first appellant herein, culminating in the Circular/Memo of the second appellant herein, dated 12.7.2012 and consequently, remanding the matter for fresh consideration by following the principles of "audi alteram partem", by having the views of the writ petitioners and all other stakeholders in order to take a decision in accordance with law.

3. The grievance of the writ petitioners before the learned single Judge were against the collection of Cross Subsidy Surcharge (hereinafter referred to as 'the CSS') from them for procuring energy from the third party sources during the operation of the restriction and control measures (hereinafter referred to as 'the R & C measures') imposed by the appellants herein, which were in force.

4. The facts are common in all the Writ Petitions before the learned single Judge. Their case in short before the Writ Court is as follows:

(i) All the writ petitioners are either Companies or Firms engaged in production of various products. They were sanctioned High Tension Electricity Supply connection by the appellants herein. The first appellant/Government issued directions, vide proceedings, dated 22.10.2008 to the second appellant, by exercising its power conferred under Section 38 of the Tamil Nadu Electricity Distribution Code, to impose restrictions on the consumption of power by the High Tension (for short, 'the H.T') consumers like the writ petitioners. In pursuant to such restrictions, 40% cut of the electricity supply on H.T. industrial and commercial consumers was imposed. By the said letter, dated 22.10.2008, the Government further directed to reduce the demand charges proportionately to the consumers whose demand and consumption have been restricted to the

extent of 40% per month. Accordingly, the second appellant imposed 40% energy cut on the base-demand and base-consumption on and from 1.11.2008. Accordingly, the demand quota and energy quota were revised. Resulting out of such introduction of power cut from 1.11.2008, the writ petitioners and other H.T. industries obtained power through third party sources to meet out their shortage of power to the extent of 40%. The second appellant approached the Tamil Nadu Electricity Regulatory Commission (TNERC) for considering suspension of CSS for third party sale, as per Section 42(2) of the Electricity Act, 2003. The TNERC accepted the said request by observing that for relinquishment of right to levy CSS, no permission was necessary.

(ii) Thereafter, the first appellant issued G.O.Ms.No.10, Energy (C3) Department, dated 27.2.2009, temporarily waiving the CSS. Accordingly, from December 2008 to November 2010, no CSS was levied, demanded or collected. However, on 26.11.2010, the second appellant issued a communication to collect the CSS. The said proceedings were challenged before this Court and interim orders were granted therein, restraining the second appellant from levying, demanding and/or collecting the CSS. During the pendency of those Writ Petitions and after issuance of the interim orders as stated supra, the second appellant issued two letters, dated 6.12.2010 and 21.12.2010, clarifying the earlier communication, dated 26.11.2010. Further, an amended Circular, dated 8.2.2011 was also issued by the third appellant herein, stating that for HT consumers who purchased the power upto their sanctioned demand from power exchanges, traders and generators, the relevant CSS is temporarily waived until

the R & C measures are lifted. Consequent upon the issuance of such amended Circular, dated 8.2.2011, this Court set aside the demand of CSS by its order, dated 17.2.2011 in W.P.No.27983 of 2010, etc. and directed the authorities to adjust the amount, if any paid, in future current consumption bills.

(iii) Thereafter, the second appellant issued another Memo, dated 25.2.2012 introducing additional R & C measures of H.T. consumers and one more Memo, dated 29.2.2012, prohibiting the purchase of third party power as well as exchange power during power holidays and load shedding period and banked wind energy adjustment upto 31.3.2012. Those two Memos were challenged before this Court on the ground that they are illegal, unconstitutional and without jurisdiction. This Court restrained the appellants from enforcing the said two Memos. However, by order dated 27.3.2012 in W.P.No.5125 of 2012, this Court disposed of the Writ Petition, by directing the second appellant herein to approach the TNERC with appropriate application. Based on such application, the TNERC passed Order No.1 of 12, dated 30.3.2012, determining the CSS. Thereafter, the first appellant issued the present G.O.Ms.No.79, Energy (C3) Department, dated 11.7.2012, cancelling the temporary waiver of CSS given under G.O.Ms.No.10, Energy (C3) Department, dated 27.2.2009 and authorising TANGEDCO to collect (for the purchased quantum from outside) from the H.T. consumers who are not availing TANGEDCO quota either fully or partially and purchased power from the outside sources. The second appellant, consequent upon issuance of the impugned G.O., issued Circular, dated 12.7.2012 for levy of CSS accordingly. Challenging the abovesaid Circular, the Writ Petitioners

have approached this Court by filing the present W.P.No.23113 of 2012, etc. batch.

5. The appellants herein, as respondents in the Writ Petitions, opposed the Writ Petitions and filed counter affidavits, by contending as follows:

The impugned G.O. was issued by the first appellant-Government, which is having competency in the policy matters. The Government has the power to decide temporary waiver of the CSS and to withdraw the same. In view of then prevailing acute power shortage, the Government, vide Letter No.21, dated 22.10.2008, issued orders to implement the R & C measures with effect from 1.11.2008 for H.T. industries and H.T. commercial consumers with 40% demand and energy cut. Considering the loss of revenue estimated at Rs.200 crores to Rs.250 crores per year towards the waiver of the CSS, the Government partially modified G.O.Ms.No.10, dated 27.2.2009 and issued the impugned G.O.Ms.No.79, dated 11.7.2012, cancelling the temporary waiver of the CSS. The levy of CSS is in accordance with the rules and regulations. The principles of natural justice are not to be applied in the case on hand, as the writ petitioners are not entitled to any notice, since the Government has issued the impugned G.O. taking into account the reasons stated therein. The TANGEDCO and the TANTRANSCO are under financial crisis, and therefore, the impugned action, cancelling the temporary waiver of CSS was taken, which cannot be found fault with.

6. The learned single Judge, after hearing both the parties and elaborately discussing the facts and circumstances as well as the case laws cited on both

sides, framed three issues for deciding the Writ Petitions, as follows:

- (i) Power of the Government in taking Executive action/policy decision,
- (ii) Judicial Review and
- (iii) Fair play in decision making and principles of natural justice.

7. While considering the first issue, namely the power of the Government in taking Executive action/policy decision, the learned single Judge, after elaborately discussing various Notifications and Government Orders as well as the relevant provisions under the Electricity Act, has observed that the impugned G.O. was issued by the first appellant/Government only based on the request of the second appellant, namely TANGEDCO, and therefore, they are administrative in nature. The learned Judge further observed that though it was pleaded that the decision taken was a policy decision, such decision made based on the request of the TANGEDCO, cannot be termed as a policy decision. The learned Judge also pointed out that for taking a policy decision on a particular matter, there must be an approval by the Government through its Cabinet. Accordingly, the learned Judge concluded on the first issue by observing that though the Government is empowered to take the impugned decision by virtue of the Executive power of the State, such decision should be done only in the manner as contemplated.

8. While considering the second issue, namely Judicial Review, the learned Judge, after elaborate discussion of facts, observed that an opportunity has not been extended to the writ petitioners while cancelling the earlier order,

which granted the benefit of waiver of CSS. Thus, the learned Judge observed that the authorities have not acted with fair play and reasonableness and they acted in a sudden moment, which would have to be construed as an arbitrary exercise of power.

9. While considering the last issue, namely fair play in decision making and principles of natural justice, the learned single Judge pointed out that the impugned orders were passed without notice to the parties or any of the stakeholders involved in the matter and the decision arrived at by the Government for cancellation of temporary waiver of CSS, was only on the basis of the request made by the TANGEDCO. Thus, by pointing out so, the learned Judge held that the impugned orders cannot be sustained, as the principles of natural justice were not followed. Accordingly, the learned Judge concluded as follows:

"10. Conclusion :

10.1. In the light of my above discussion and having considered the earlier decision of the Government in waiving the cross subsidy surcharge and such a benefit having been accrued on the petitioners from the year 2009 onwards, it is to be concluded that the situation, which prevailed in the year 2009, is the same as on today, as stated in the impugned order. That apart, in the petition filed by TNEB in M.P.No.43 of 2008 before the Commission, the Board sought for temporary relinquishment of the right to levy Cross Subsidy Surcharge for a period of six months or till the situation is improved and R&C measures are withdrawn. Hence, in the absence of any improvement in the situation or withdrawing of restriction and control measures, the Government peremptorily took a decision to cancel the waiver of cross subsidy surcharge, which cannot be sustained. Though the Government is empowered to take any such decision in its wisdom and domain, the same is subject to judicial review and, therefore, the only aspect to be looked into is, the fair play and reasonableness under Article 14 of the Constitution. As could be seen from the records, the said founding principles of fair play and reasonableness on the aspect of

audi alteram partem are given a complete go-by by the respondents before taking the decision. As such, to that extent, this Court finds infirmity in the order impugned of the first respondent.

10.2. Accordingly, the order impugned in G.O.(Ms) No.79, Energy (C.3) Department, dated 11.07.2012, of the first respondent, culminating in the Circular Memo of the second respondent vide No.CFC/Rev/FC/Rev/AS-3/D.No./12/dated 12.07.2012, is set aside, remanding the matter for fresh consideration to follow the principle of audi alteram partem, that is to say, to have the views of the petitioners and all other stakeholders in order to take a decision in accordance with law.

10.3. Writ Petitions are allowed accordingly. No costs. Consequently, the connected M.Ps. are closed."

10. Mr.P.H.Arvind Pandian, learned Additional Advocate General appearing for the appellants, after elaborately arguing the matter, has also filed written submissions. The crux of those submissions is as follows:

Due to implementation of R & C measures, the Government of Tamil Nadu issued Notification for temporarily waiving the levy of CSS in G.O.Ms.No.10, dated 27.2.2009. The H.T. consumers who opt to purchase the power from private power generators of Tamil Nadu over and above the TANGEDCO demand quota, were permitted and limited upto the sanctioned demand in consequence of the TNERC's Order dated 7.9.2010. For all such transactions, the waiver of CSS had been extended graciously. However, the H.T. consumers like the writ petitioners, have opted to purchase their entire requirement without availing the TANGEDCO quota, partially or fully from outside sources. Due to technical hardship in the load shedding, the loss of revenue was estimated at Rs.200 crores to Rs.250 crores towards the waiver of CSS, and as such, the Government modified G.O.Ms.No.10 and issued the impugned G.O.Ms.No.79. If R & C measures are lifted, the CSS could be levied for the

entire purchase. In view of the prevailing acute power shortage, based on instructions of the Government, vide Letter No.121, dated 22.10.2008, under Regulation 38 of the Tamil Nadu Electricity Distribution Code, the R & C measures have been implemented from 1.11.2008. In order to impose the R & C measures, it has been clearly mentioned that the quota for the use of power had been fixed based on the consumption of consumer for the period from October 2007 to October 2008. Based on the ratio decided in the judgment of the Honourable Supreme Court in Civil Appeal No.5479 of 2013, dated 25.4.2014 in the case of M/s.Sesa Sterlie Ltd. Vs. Orissa Electricity Regulatory Commission and others, the CSS is leviable, irrespective of the imposition of the R & C measures or otherwise. Applying the principles laid down by the Honourable Supreme Court in the decision reported in 2001 (1) SCC 534 (Raymond Ltd. and another Vs. M.P. Electricity Board and others), the H.T. consumers like the writ petitioners are liable to pay the CSS to the quantum of energy between energy promised to be supplied by the TANGEDCO and actually utilised by them, in view of the availing third party power from sources other than the TANGEDCO by availing open access. The writ petitioners have executed agreements in accordance with the approval of the TNERC and they have given undertaking for the purchase of power under short term open access, accepting their liability to pay the CSS, additional surcharge, etc., applicable to open access customers in accordance with the TNERC open access regulations, as amended from time to time. The writ petitioners being agreement holders, are bound by the terms and conditions and as such, are estopped from disputing the demand. The principles

of natural justice have no application to the facts and circumstances of the present case, as observed by the Honourable Supreme Court in the decision reported in 2005 (1) SCC 625 (Bannari Amman Sugars Ltd. Vs. CTO) that no vested right as to tax holding is acquired by a person who is granted concession and that if any concession has been given, it can be withdrawn at any point of time. There is no right much less any legal right cast upon the H.T. consumers like the writ petitioners, as the impugned G.O. was issued imposing modification prospectively in public interest, and therefore, it cannot be said that there is no fair play and reasonableness in the action of the appellants.

11. Per contra, Mr.AR.L.Sundaresan, learned Senior Counsel, Mr.N.L.Rajah, Mr.Rahul Balaji and other learned counsels appearing for the respective respondents/writ petitioners made elaborate submissions and also given common written submissions. The crux of their submissions is as follows:

The waiver of CSS was given till the R & C measures are lifted. However, the impugned G.O. suddenly imposing the CSS, was issued, when admittedly the R & C measures were in force. Therefore, the impugned action of the appellants is liable to be tested under the principles of promissory estoppel and legitimate expectation. The impugned proceedings were issued without giving notice to the writ petitioners and hearing them, and therefore, they are vitiated on the ground of violation of principles of natural justice. The CSS is in the nature of compensation payable by the electricity consumer to the distribution licensee, when such consumer decided to move away from the distribution licensee to another supplier of electricity, and such CSS is recoverable only in normal

situation when there is enough power. In spite of availability of such power, i.e. 60% to be supplied by the distribution licensee, if the consumer still decides to move away from the distribution licensee to another supplier of electricity, CSS can be recovered. In this case, the H.T. consumers were constrained to purchase the power from outside sources in order to meet their demand, in view of the imposition of R & C measures throughout the State of Tamil Nadu. Only under such circumstances, the imposition and collection of CSS was waived by the appellants till the lifting of R & C measures by them. The appellants have allowed certain rights to accrue in favour of the H.T. consumers like the first respondent (respective writ petitioners) on account of the clear statements and promises made by them, more particularly, in the following proceedings:

(i) application made by the then TNEB in M.P.No.43 of 2008 resulting in the order dated 5.12.2008 passed by the TNERC.

(ii) G.O.Ms.No.10, Energy (C3) Department, dated 27.2.2009.

(iii) Before the Honourable Deputy Chief Minister of Tamil Nadu on 27.1.2011.

(iv) The amended Circular in Circular Memo No.Dir/O/SE/LD&GO/EE/ABT/F interstate/D 3144/11, dated 8.2.2011 issued by the Chief Financial Controller/Revenue of TANGEDCO and

(v) the Order, dated 17.2.2011 passed by this Court in W.P.No.27983 of 2010 etc. batch.

Such rights having been accrued to the writ petitioners, cannot be revoked or annulled/withdrawn, without giving the H.T. consumers an opportunity of being

heard. The Doctrine of Promissory Estoppel and Legitimate Expectation are thus applicable. In this connection, the following decisions are relied upon:

(i) 2007 (5) SCC 447 (Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector & ETIO);

(ii) 2010 (2) LW 746 (Division Bench of Madras High Court) (K.Sakthi Rani Vs. The Secretary of the Bar Council of Tamil Nadu and others);

(iii) 2008 (2) SCC 777 (U.P. Power Corporation Ltd. and another Vs. Sant Steels and Alloys (P) Ltd);

(iv) 2014 (3) MLJ 385 (Division Bench of Madras High Court) (State Industries Promotion Corporation of Tamil Nadu Limited (SIPCOT) Vs. Singapore Reality Private Limited);

(v) 1990 (2) LW 51 (Division Bench of Madras High Court) (The State of Tamil Nadu Vs. Bank of Madura Limited) and

(vi) 2014 (4) SCC 186 (S.V.A. Steel Re-rolling Mills Ltd. Vs. State of Kerala).

The TANGEDCO cannot resile from their undertaking given before this Court in the Writ Petitions challenging the Memos, dated 26.11.2010, 6.12.2010 and 21.12.2010 to collect the CSS. During the pendency of those writ petitions, a meeting was held by the H.T. Consumers Associations and the TANGEDCO with the Honourable Deputy Chief Minister of Tamil Nadu on 27.1.2011 and after discussing the issue at length, it was decided that the CSS shall not be levied till the power cut is lifted. Accordingly, the Circular, dated 8.2.2011 was issued temporarily waiving the CSS till the R & C measures are lifted. The said Circular,

dated 8.2.2011 was placed before this Court on 17.2.2011 in W.P.No.27983 of 2010 and accordingly, this Court, taking note of the said situation and the Circular, dated 8.2.2011, directed the TANGEDCO to adjust the amounts already paid, if any, towards the CSS, in future current consumption bills. Therefore, the said undertaking given by the appellants in Court in 2011 that the CSS is temporarily waived till the R & C measures are lifted, cannot be permitted to resile from the same. In this connection, 2005 (3) SCC 427 (Rekha Mukherjee Vs. Ashis Kumar Das) is relied on. There is no power vested with the Government under the Electricity Act, 2003, to pass the impugned proceedings. Such power is exclusively within the domain of the TNERC. The TANGEDCO has not established any loss. There is no evidence to show that the power has been utilised only by those consumers who paid less than the H.T. industrial consumers and not any other consumer, i.e. other than subsidised / free consumers. Even if there is any loss, the proper authority to be approached is the TNERC under Section 11(2) of the Electricity Act. It is not a policy decision taken by the Government, since the impugned proceedings were passed blindly by accepting the version of the TANGEDCO. The Appellate Tribunal for Electricity (APTEL), in its judgment reported in 2014 ELR (APTEL) 0670 (T.N. Electricity Consumers' Association, Coimbatore Vs. T.N. Electricity Regulatory Commission and others) dealt with the power of the State Government under Section 108 of the Electricity Act, 2003 and held that the policy decisions are not mandatory and binding on the TNERC.

12. We have heard the learned counsel appearing on both sides, perused

the materials placed on record, the decisions relied on and given careful consideration to the facts and circumstances of the case.

13. The core issue involved in this case is as to whether the decision of the Government in issuing G.O.(Ms) No.79, Energy (C.3) Department, dated 11.7.2012 and the Circular issued by the 2nd appellant, dated 12.7.2012, empowering the TANGEDCO to collect Cross Subsidy Surcharges on the H.T. consumers to the extent of not availing the TANGEDCO energy by the respondents' establishment, is valid and what relief the respondents are entitled to?

14. The Government issued G.O.(Ms) No.10 Energy (C3) Department, dated 27.2.2009 temporarily levying CSS. It is relevant to extract paragraph 3 of the said Government Order, which reads thus:-

"3. In this connection, the Government has directed the Tamil Nadu Electricity Board to resort to purchase of power from within and outside the State as and when available. In view of the prevailing shortages the Government has also taken the step of permitting private power producers in the State to avail of open access to sell tradable surplus power generated by them to any HT consumer within the State. As a special measure, keeping in view the restrictions already imposed on such consumers, it has also been decided to temporarily waive cross subsidy surcharges which would be collectable from such consumers under normal circumstances. Keeping in view that the current power deficit is likely to persist during the coming months, Government attaches highest priority to ensure that all power generating stations within the State should function at full capacity and make available all energy thus produced to the State grid, subject to conditions of existing supply commitments to Tamil Nadu Electricity Board and/or other consumers within the State." (emphasis supplied)

15. Even though contrary to the said Government Order a Circular was issued for collection of CSS, the matter was put on rest by the order of this

Court in W.P.No.5125 of 2012, dated 27.3.2012. Thereafter, in the impugned Government Order dated 11.7.2012, it is ordered that temporary waiver of CSS is restricted for the purchase of quantum from outside and the same is not applicable, if energy, is not purchased from TANGEDCO from the quota available. The said position is further clarified by the Circular of the 2nd appellant dated 12.7.2012 stating that CSS is not to be levied for the entire quantity of third party purchase, but restricted to an un-utilised energy of TANGEDCO energy quota. For better appreciation, paragraph 4 of the G.O.(Ms) No.79 Energy (C.3) Department, dated 11.7.2012 is extracted hereunder:-

"4. The Government, after careful examination, accept the request of the Chairman-cum-Managing Director, Tamil Nadu Generation and Distribution Corporation Limited and in partial modification of the orders issued in paragraph 3 of the Government order first read above, cancel the temporary waiver of cross subsidy surcharges. The Government also authorize the Tamil Nadu Generation and Distribution Corporation Limited to collect the cross subsidy surcharges (for the purchased quantum from outside) from the HT consumers who are not availing Tamil Nadu Generation and Distribution Corporation Limited quota power fully or partially and purchase power from the outside sources."

Likewise, paragraph 6 of the impugned Circular, dated 12.7.2012, reads as follows:-

"6. In the aforesaid premises and in order to give effect to the Government Order under reference seventh cited and in supersession of the instructions issued under references third, fourth and fifth cited in so far as such portions relating to waiver of collection of cross subsidy surcharges, the following working instructions are issued with an illustration;-

1	Energy Recorded in the meter (Units) in a month	4,00,000
2	Less Power purchased from Third Party	1,00,000

1	Energy Recorded in the meter (Units) in a month	4,00,000
	sources (units)	
3	Less Power wheeled from CPP (Units)	1,00,000
4	Less Power wheeled from Wind mills (Units)	1,50,000
5	Balance units (1-(2+3+4))	50,000
6	TNEB Quota units (Monthly)	1,00,000
7	Difference/under utilization of TANGEDCO power in the quota (6-5)	50,000
8	Cross Subsidy surcharge leviable units	50,000

Further it is stated that the cross subsidy surcharges is not to be levied for the entire quantity of third party purchase but to be restricted to the unutilized energy of TANGEDCO quota power."

16. Going by the terms of the impugned Government Order and Circular and considering the circumstances under which they were issued, it cannot be said that they are illegal, as CSS was ordered to be collected from the H.T. consumers, who are not availing TANGEDCO quota power fully or partially and purchase power from the outside sources.

17. Further, even as per the impugned Government Order and the Circular, 40% energy can be purchased from private sources and if 60% quota which have to be purchased from TANGEDCO, if not purchased, Cross Subsidy Surcharges is leviable. To explain the said stand, the learned Additional Advocate General has submitted an illustration in the written submissions, which reads as follows:-

"Monthly Energy Quota = 4,50,000 Units
Category - Tariff - IA (HT - Industrial Consumer)
Injection Voltage - 230 KV Drawal Voltage - 230 KV

1. Consumption of energy in a month	7,00,000 Units	A
2. Less: Energy procurement from Third party/LEX	3,25,000 Units	B

1. Consumption of energy in a month	7,00,000 Units	A
3. Energy availed from TNEB (A-B)	3,75,000 Units	C
4. TNEB Energy Quota	4,50,000 Units	D
5. Unavailed portion of the TNEB energy quota (D - C)	75,000 Units	E
6. Cross Subsidy Surcharge leviable units (purchase of power from IEX / Third party without availing TANGEDCO's quota powerfully)	75,000 Units	

If Restriction and Control measures is lifted, the Cross Subsidy Surcharge could be levied for the entire purchased units (ie) 3,25,000 Units (B) as per the above illustration in accordance with Section 42 of the Electricity Act, 2003 and State Commission's Open Access Regulation, 2005. Due to implementation of Restriction and Control measures the Cross Subsidy Surcharge has been levied only for the unavailed portion of TANGEDCO energy quota (ie) 75,000 Units only (E). This means TANGEDCO still continues waiver of the Cross Subsidy Surcharges for 2,50,000 Units (B - E). Therefore, TANGEDCO had not discontinued the waiver of the Cross Subsidy Surcharges even in accordance with the impugned G.O.(Ms).No.79, Energy (C3) Department, dated 11.7.2012. From the above, it is clear that TANGEDCO has not discontinued the waiver of Cross Subsidy Charges as mentioned in the impugned order dated 30.11.2012."

Thus, it is evident that CSS benefit already given has not been taken away fully and on the other hand, the impugned orders have empowered the TANGEDCO to collect CSS only as against the power not availed from TANGEDCO quota.

18. The Hon'ble Supreme Court, in the decision reported in 2005 (1) SCC

625 (Bannari Amman Sugars Limited v. CTO), while considering the withdrawal of concession, in paragraph 7, held thus:-

"7. No vested right as to tax-holding is acquired by a person who is granted concession. If any concession has been given it can be withdrawn at any time and no time-limit should be insisted upon before it was withdrawn. The rule of promissory estoppel can be invoked only if on the basis of representation made by the Government, the industry was established to avail benefit of exemption. In *Kasinka Trading Vs. Union of India* (1995 (1) SCC 274) it was held that the doctrine of promissory estoppel represents a principle evolved by equity to avoid injustice."

In this case, as already stated, it is not having effect of withdrawal of concession and it is in the nature of clarification issued empowering to collect CSS for an un-utilised energy quota of TANGEDCO.

19. The power of the Government to issue the said Government Order dated 11.7.2012 was already upheld by the learned single Judge, holding that the Government is empowered to take a decision. The respondents/H.T. consumers have not challenged the said decision arrived at by the learned single Judge by filing any independent appeal. Hence, the contentions of the respondents that the Government has no power or it cannot change its policy, have to be rejected. Equally, their contention regarding legitimate expectation, cannot be countenanced. The judgments relied on by the learned counsel for the respondents in support of the above contentions are not relevant in the light of the fact that they have not challenged the findings rendered by the learned single Judge.

20. The other contention of the respondents is that energy was uniformly not available to avail 60% quota from TANGEDCO and for continuous production and other activities, they have purchased the energy from private sources, that too with higher cost. Thus, they contend that the appellants may be justified in demanding the CSS, if quota energy was available and the respondents have not availed such 60% quota from TANGEDCO.

21. The said issue has to be ascertained on individual case to case basis as to whether TANGEDCO energy was available to the Industries for purchase to the extent of 60% quota in a particular area and whether, it was available uniformly and whether the availability was varied from different Region to Region or Sub-station to Sub-station and inspite of such availability of TANGEDCO energy, whether the H.T. consumers have purchased the energy from private sources. If it is established that inspite of availability of TANGEDCO energy to the extent of 60% quota, if any one of H.T. consumer has chosen to purchase energy from private sources without availing TANGEDCO energy quota, then the H.T. consumer is bound to pay the CSS to the extent of not availing such quota. For arriving at such factual aspect, the Superintending Engineers are bound to issue notice to the individual Industries and after getting their objection / explanation for such demand, a decision has to be arrived at as to whether TANGEDCO energy to an extent of 60% was available for being utilised for the H.T. consumers and if energy was purchased from private sources, definitely, the H.T. consumers are bound to pay CSS. Since the demand of CSS for such

reason is having civil consequences, an opportunity is to be given to those H.T. consumers to explain as to why they have not availed the energy from TANGEDCO upto 60% and thereafter, a decision has to be arrived at. Without doing so, directly making a demand is against the principles of natural justice as well as fair play in action. Thus, we are of the view that the order of the learned single Judge needs modification, as the Government has not withdrawn CSS for 40%, which was permitted to be purchased from private sources.

22. Considering all these facts and circumstances, all the writ appeals are allowed in part, by modifying the order of the learned single Judge, dated 30.11.2012 in W.P.No.23113 of 2012 etc. batch, as follows:-

- ◆ The order of the first appellant/Government issued in G.O.(Ms).No.79, Energy (C.3) Department, dated 11.7.2012 and the Circular issued by the second appellant in Circular Memo No.CFc/Rev/FC/Rev/AS-3/D.No.12/Dt.12.7.12, are held valid.
- ◆ The Superintending Engineer of respective circle, are directed to issue notice to the individual H.T. consumers seeking for their objection / explanation.
- ◆ After receipt of such objection / explanation from the

individual H.T. consumers, the respective Superintending Engineer shall consider the same and give a finding as to whether 60% of energy supply was available with TANGEDCO at the relevant point of time and inspite of such availability, whether the said H.T. consumers have purchased energy from the outsiders.

- ◆ Based on such finding, the Superintending Engineers shall fix the liability accordingly and demand CSS from the individual H.T. consumers, in accordance with G.O.(Ms).No.79, Energy (C.3) Department, dated 11.7.2012 issued by the first appellant/Government and the Circular of the second appellant in Circular Memo No.CFc/Rev/FC/Rev/AS-3/D.No.12/Dt.12.7.2012.

- ◆ M.P.No.1 of 2014 is filed by the appellants seeking for a direction permitting the TANGEDCO to levy the CSS on and from 1.6.2014 for the energy purchased from outside sources, pending disposal of the above Writ Appeals. Since we have disposed of the Writ Appeals themselves finally by this common judgment, we find that there is no necessity to deal with the above Miscellaneous Petition separately and pass orders thereon, more particularly,

when the issue involved in this Miscellaneous Petition is beyond the scope of these Writ Appeals. Accordingly, without expressing anything on merits, M.P.No.1 of 2014 is closed. Consequently, all other connected pending miscellaneous petitions are also closed.

- ◆ There shall be no order as to costs in these Writ Appeals.

(N.P.V.J) (K.R.C.B.J)
24 - 9 - 2014

Index: Yes
Internet: Yes
cs / bbr

N.PAUL VASANTHAKUMAR,J
and
K.RAVICHANDRABAABU,J

cs / bbr

Judgment in
W.A.No.2812 of 2012
& 1133 to 1262 of 2013

24 - 9 - 2014