

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : **26.09.2018**

Delivered on : **09.10.2018**

CORAM

THE HON'BLE MR. JUSTICE **M.M.SUNDRESH**  
and  
THE HON'BLE MR. JUSTICE **N.SATHISH KUMAR**

**W.A.(MD)Nos.930 and 931 of 2017**  
**and C.M.P.Nos.6256 to 6258 of 2017**

- 1.Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO),  
10<sup>th</sup> Floor, 144, Anna Salai,  
Chennai-600 002.  
Rep., by its Chairman and Managing Director.
- 2.The Director-Distribution,  
(TANGEDCO), 10<sup>th</sup> Floor,  
144, Anna Salai, Chennai-600 002.
- 3.The Chief Financial Controller-Revenue,  
(TANGEDCO), 10<sup>th</sup> Floor,  
144, Anna Salai, Chennai-600 002.
- 4.The Superintending Engineer,  
(TANGEDCO), Virudhunagar Electricity  
Distribution Circle, Virudhunagar.

... Appellants in  
both Writ Appeals

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Vs.

- 1.Sugapriya Paper & Boards (P) Ltd.,  
(HTSC No.147, Virudhunagar EDC),  
107/2, N.Subbniahpuram, Sattur Taluk,  
Virudhunagar District-626 205.  
Rep., by Mr.V.Surya, its Director.

2. Tamil Nadu Electricity Regulatory Commission,  
19-A, Rukumani Lakshmi Pathy Salai,  
Egmore, Chennai-600 008.  
Rep., by its Secretary.
3. Tamil Nadu Spinning Mills Association,  
Regn.No.330/1997), #2, Karur Road,  
Modern Nagar, Dindigul-624 001.  
Represented by its  
Chief Advisor Dr.K.Venkatachalam.
4. Indian Wind Power Association,  
Represented by its Secretary General,  
Door No.E, 6<sup>th</sup> Floor, Shakti Towers-II,  
766, Anna Salai, Chennai-600 002.
5. The Southern India Mills' Association,  
Represented by its Deputy Secretary  
General Mr.V.Regurajan,  
41, Race Course Road, Coimbatore-641 018.  
Represented by its Vice President Mr.K.Sathiavan
6. Tamil Nadu Electricity Consumers' Association,  
Regn. No.181-8524/1998, 1<sup>st</sup> Floor,  
SIEMA Building, 8/4 Race Course,  
Coimbatore-641 018.  
Represented by its Vice President Mr.K.Sathiavan

(Respondents 3 to 6 are impleaded vide Court order dated 20.02.2018 made in CMP (MD) Nos.7149, 7159, 7157, 7158, 7159 and 7168 of 2017 in W.A.(MD)Nos.930 and 931 of 2017 by MSNJ & RHJ).

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... Respondents in  
W.A.No.930 of 2017

1. Sri Venkateshwara Boards,  
(HTSC No.231, Virudhunagar EDC),  
1/40A, NH 7 Road, Pethureddipatti Village,  
Odaipatti Post, Sattur Taluk,  
Virudhunagar District-626 205.  
Represented by Mr.G.Seenivasan its Director.

2.Tamil Nadu Electricity Regulatory Commission,  
19-A, Rukumani Lakshmipathy Salai,  
Egmore, Chennai-600 008.  
Represented by its Secretary.

3.Tamil Nadu Spinning Mills Association,  
Regn.No.330/1997),#2, Karur Road,  
Modern Nagar, Dindigul-624 001.  
Represented by its  
Chief Advisor Dr.K.Venkatachalam.

4.Indian Wind Power Association,  
Represented by its Secretary General,  
Door No.E, 6<sup>th</sup> Floor, Shakthi Towers-II,  
766, Anna Salai, Chennai-600 002.

5.The Southern India Mills' Association,  
Represented by its Deputy Secretary  
General Mr.V.Regurajan,  
41, Race Course Road, Coimbatore-641 018.

(Respondents 3 to 5 are impleaded vide Court  
order dated 20.02.2018 made in CMP (MD)  
Nos.7149, 7150, 7156, 7157, 7158, 7159 and 7168 of 2017  
in W.A.(MD)Nos.930 and 931 of 2017 by MSNJ & RHJ).

... Respondents in  
W.A.No.931 of 2017

Writ Appeals are preferred under Clause 15 of the Letters Patent  
against the common order dated 25.05.2017 made in W.P.Nos.9304  
and 9305 of 2017.

For Appellants  
in both appeals

: Mr.C.Manishankar,  
Addl. Advocate General  
Assisted by Mr.G.Kasinatha Durai  
Standing Counsel for TNEB.,

For Respondents  
in both appeals

: Mr.P.S.Raman, Senior Advocate  
for Mr.C.M.Arumugam for R1

Mr.M.Muthugeethayan for  
Mr.Abdul Saleem for R2 (TNERC)

Mr.AR.L.Sundaresan, S.C., for  
Mr.R.S.Pandiyaraj for R3 & R6

Mr.Rahul Balaji for R4 & R5

**COMMON JUDGMENT**

**M.M.SUNDRESH,J.**

These appeals have arisen against the common order passed by the learned single Judge, by which, the appellants were directed to process the core issue, before the second respondent in the light of the decisions in which it was a party. Incidentally, the second respondent was further directed to verify the Captive Status of Captive Generating Plants(CGPs) and Captive Users within a stipulated time in the manner known to law.

2. Heard Mr.C.Manishankar, learned Additional Advocate General, for Mr.G.Kasinatha Durai, learned Standing Counsel for appellants-TNEB, Mr.P.S.Raman, learned Senior Advocate for Mr.C.M.Arumugam, learned counsel for the first respondent,

Mr.M.Muthugeedhaiyan, learned counsel for Mr.Abdul Saleem, counsel for the second respondent (TNERC), Mr.AR.L.Sundaresan, learned Senior Counsel for Mr.R.S.Pandiyaraj, counsel for Respondents Nos.3 and 6 and Mr.Rahul Balaji, learned counsel for Respondent Nos.4 and 5 and perused the documents and written arguments.

3. The private respondents in both these appeals along with its members are availing cross subsidy surcharge on the premise of being Captive Generating Plants. This was sought to be verified by the appellants as it was not done at the time of entering into agreements leading to issuance of impugned proceedings, which are inter departmental communications in nature, by which, it was decided to seek certain particulars.

4. The learned Single Judge while recording the statement made by the learned Additional Advocate General appearing for the appellants, directed the second respondent to look into the matter to the extent which is being disputed before us. This is inclusive of its jurisdiction with respect to both verification and adjudication of the status of the Captive Generating Plants/Captive Users. To put it in a nutshell, once the status is lost, the cross surcharge subsidy goes.

5. There are two issues raised. One is with respect to the verification and other is adjudication. While it is a case of the appellants that both the above are available to them, the respondents including the second respondent contend to the contrary. According to them, the second respondent viz., Tamil Nadu Electricity Regulatory Commission, is the authority constituted both for verification and adjudication.

6. Though the learned Additional Advocate General would submit that the admission made before the learned single Judge has been misunderstood and misinterpreted, the said issue is no longer alive in view of the stand taken already by the second respondent before us through its affidavit filed. The stand of the second respondent is extracted hereunder.

"4. It is submitted that from the above decision of the Hon'ble APTEL, it is clear that a State Commission has got jurisdiction to declare the Captive Status of the generating company and therefore, the stand taken by TANGEDCO in the present appeal in Ground-8 to the effect that a State Electricity Regulatory Commission is not the authority to verify the status of CGPs is incorrect. Further, the Hon'ble APTEL in the above Appeal No.116 of 2009 has reached the conclusion that the State

Commission is competent to determine the CGP Status of a generator on the ground that it is the State Commission which has the jurisdiction to determine whether the exemption provided under Section 42(2) can be accorded or not and in the same manner as it is entrusted with the responsibility of determination of tariff and the charges payable by the consumers in the State. The Tribunal further went on to add as follows in page -21 of its judgment in Appeal No.116 of 2009.

**"In view of the aforementioned discussions, we have no manner of doubt that the State Commission has the jurisdiction to determine the captive generating plant status of the first respondent which in turn will determine whether or not surcharge is payable."**

5. Without prejudice to the above submissions made in para-3 above, it is respectfully submitted that in the verification of CGP Status, there are certain practical constraints too which require consideration. Firstly, the captive consumers in the State of Tamil Nadu are large in numbers. The Commission with its limited staff strength will not be able to carry out such a mammoth task. The TANGEDCO which has sufficient wherewithal/work force would be in a better position to carry out the initial work of verification since it has got data of generation of electricity and consumption of its captive users. The CGP Status of the generator would confer a right on them for exemption from levy of cross subsidy surcharge and collection of the same in the event of not qualifying for

CGP Status and hence the determination of CGP status of the generator have direct bearing on the finances of TANGEDCO. Secondly, the determination of CGP Status is dynamic in nature and the composition of the group consumers changes quite often within the financial year and therefore, continuous tracking is essential. It is the TANGEDCO, the distribution licensee, which is closely connected to these CGPs and maintains the list of the CGPs and their history. It is only the TANGEDCO which can be said to be in a position to monitor the change in the composition of CGPs as it has commercial transactions and operations with these CGPs. Therefore, it is submitted that the Commission considers it appropriate to direct the licensee under Section 97 of the Electricity Act, 2003 (Central Act No.36 of 2003) to verify the consumption and shareholding pattern of the generators claiming the CGP Status in the first instance and to issue a show cause notice to those generators who do not qualify for CGP Status with the direction to approach the Commission within 30 days of such notice to get the CGP status determined by the Commission and in the meanwhile not to resort to penal action (i.e., levy of CGS) against such generators. On receipt of such notice, the generators may file a Miscellaneous Petition before the Commission for determination of CGP status."

7. Thus, according to the second respondent, it alone has got the jurisdiction to verify and adjudicate CGP Status. Reliance has been made on the CERC Regulations to buttress the aforesaid stand through



the following paragraphs.

“(iv) It is also submitted that TNERC Grid Connectivity and Open Access Regulations, 2014 has been issued by this Commission specifying the conditions and eligibility for open access. But the applications for open access are actually processed and permitted by CERC (Terms and Conditions for Recognition and Issuance of REC for Renewable Energy Generators) Regulations 2010 provides for REC benefits to CGPs under certain circumstances including the conditions that such generators do not avail or propose to avail any benefit in the form of concession or promotion in transmission or wheeling or banking. The question of deciding whether or not such generators avail any promotional or concessional benefits is left to be decided by the licensees and where there is a dispute as to whether such generators availed promotional or concessional benefit, it will be referred to the decision of the Appropriate Commission. The said provision of the CERC Regulations is as follows:

**“Provided also that if any dispute arises as to whether a CGP or any other renewable energy generator has availed such concessional/promotional benefits, the same shall be referred to the Appropriate Commission for decision.”**

From the above, it is clear that it is permissible for the distribution licensee to undertake verification of the information furnished by the generators with regard to captive status, if authorized by the State Commission.

The Renewable Purchase Obligation Regulation, 2010 of this respondent Commission also has an analogous provision in Regulation 6(2) which reads as follows:

**“(2) The dispute, if any, on the question as to whether such concessional/promotional benefits were availed by a CGP or not shall be referred to the Commission and the decision of the Commission shall be final.”**

8. Having said that, a stand has been taken that such an exercise can be delegated by exercise of power conferred under Section 97 of the Electricity Act, 2003, and therefore, appropriate orders would be passed detailing the procedure to be followed by the appellants for verification of the CGP Status. The following paragraphs are referred appositely.

“6. It is submitted that the respondent Commission has powers under Section 97 of the Electricity Act, 2003 to delegate any of its powers and functions under the Electricity Act, 2003 excepting the powers to adjudicate disputes and the powers to make regulations to any person subject to such condition as may be specified in a general or special order. In such a context, this respondent Commission is of the view that the power to verify the Captive Status of the Generating Companies can be delegated under Section 97 of the distribution licensee i.e., TANGEDCO which falls within the meaning of the term “Person” as occurring in Section 2(49) of

the Electricity Act, 2003 without prejudice to the powers of the Commission to adjudicate the dispute arising out of such verification by the distribution licensee.

7. It is further submitted that the respondent Commission is of the view that a general or special order to be issued separately by the Commission detailing the procedures to be followed for verification of the CGP status directing the TANGEDCO to verify the captive status of the generating companies without in any manner resorting to adjudicatory function which is the exclusive function of the Commission would achieve the desired objective. This Commission is of the view that such direction can be issued subject to the condition that in cases where there is divergence of views between the CGPs and the licensee on the status of CGP, the licensee shall not resort to any penal action (i.e., levy of CSS) against generators without the status being finally decided by the Commission in the petition filed by them before the Commission."

9. Though the appellants have got some reservation over the aforesaid stand referred in the preceding paragraphs, the private respondents concur with it. It is submitted by the learned Additional Advocate General that without prejudice to the legal issue qua verification and determination by the appellants, this Court may direct the second respondent to issue appropriate orders to be followed for

verification of the CGP Status by them. Accordingly, it is stated that the second respondent may be directed to undertake the said exercise of permitting/directing the appellants to verify the Captive Status of the Generating Companies.

10. In view of the above, we are not inclined to undertake any academic exercise in deciding the jurisdiction qua verification and adjudication as ultimately, final adjudication, in any case, would lie in the court of the second respondent. We may note that we are at the initial stage and therefore it would only be just and proper to proceed further resulting the adjudication. There is also a broad agreement on this course. In such view of the matter, these writ appeals stand disposed of with the following directions/observations.

- (i) The issue qua the jurisdiction and power of the appellants to verify and determine CGP Status leading to entitlement of cross surcharge subsidy is left open;
- (ii) The second respondent is directed to issue either a general or special order detailing the procedure to be followed for verification of the CGP Status either by directing or giving liberty to the appellants to

verify the Captive Status of the Generating Companies;

(iii) The aforesaid order will have to be passed within a period of six weeks from the date of receipt of a copy of this order;

(iv) The private respondents are directed to furnish the particulars to facilitate the process of verification as per the procedure contemplated and the directions of the second respondent when asked by the appellants preferably within a period of four weeks;

(v) The appellants can make a determination on receipt of the aforesaid verification particulars from the respective Generating Companies and in the event of disputes, place them before the second respondent for adjudication after marking copies of the same to the concerned Generating Companies.

(vi) As and when the said exercise is done with respect to each and every Generating Company, the adjudication process will have to be commenced and thereafter completed by the second respondent within a period of six weeks;

11. It is open to the second respondent to pass a common order in view of the commonality of the issues involved. All other issues both on fact and law are left open to be agitated by the appellants and the private respondents and thus, adjudicated by the second respondent. No costs. Consequently, connected civil miscellaneous petitions are closed.

(M.M.S.,J.) (N.S.K.,J.)  
09.10.2018

Index:Yes/No

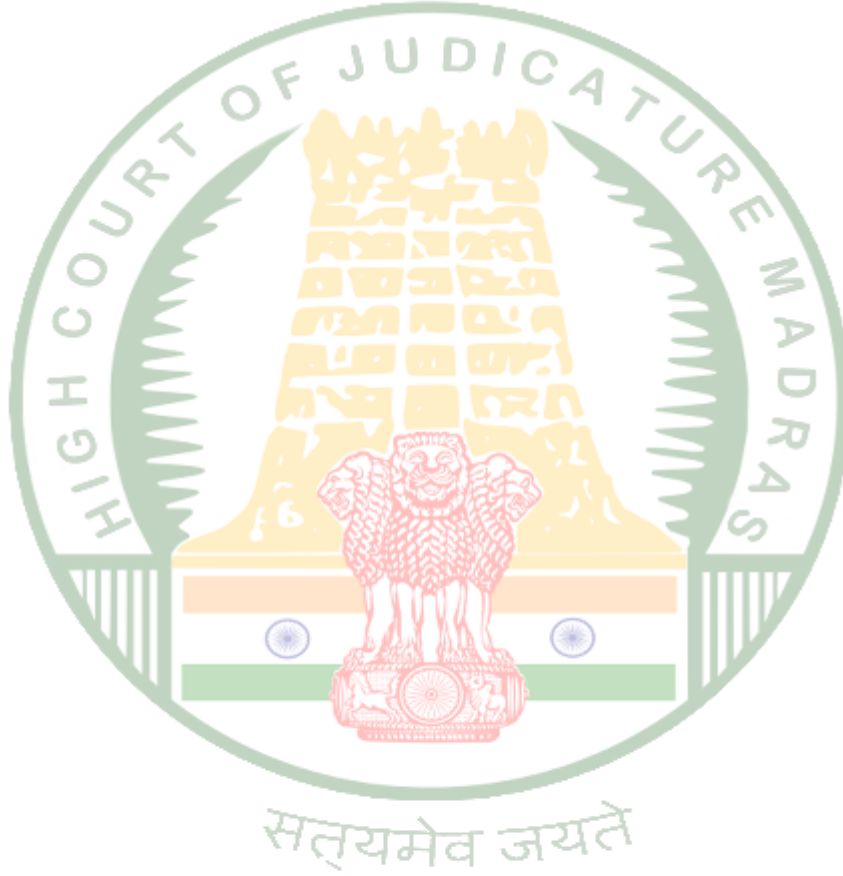
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To

- 1.The Secretary,Tamil Nadu Electricity Regulatory Commission,  
19-A, Rukumani Lakshmiipathy Salai,  
Egmore, Chennai-600 008.
- 2.Dr.K.Venkatachalam, Chief Advisor  
Tamil Nadu Spinning Mills Association,  
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- 3.The Secretary General,  
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**M.M.SUNDRESH, J.**  
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**N.SATHISH KUMAR,J.**

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Pre-Delivery Common Judgment in  
**W.A.Nos.930 and 931 of 2017**

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**09.10.2018**