

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL Nos. 155 of 2022

Dated : 15th February, 2024

Present: Hon`ble Mr. Sandesh Kumar Sharma, Technical Member
Hon`ble Mr. Virender Bhat, Judicial Member

In the matter of:

APPEAL No. 155 of 2022

M/s. Grace Infrastructure Pvt. Ltd
Rep. by its Chairman & Managing Director
Mr. A. L. Shah
A-5, Industrial Estate
Thattanchavady
Pondicherry – 605 009
Email : ruganandarya@gmail.com

... Appellant

Versus

1. TANGEDCO
Rep by its Chairman cum Managing Director
No. 144, Annasalai
Chennai- 600 002.
Email : chairman@tnebn.org
2. The Directorate of Finance
TANGEDCO
No 144, Annasalai
Chennai-600 002.
Email : dirfintangedco@tnebn.org
3. The Chief Engineer (NCES)
TANGEDCO
No 144, Annasalai

Chennai-600 002.
Email : cences@tnebnet.org

4. The Superintending Engineer
TANGEDCO
Tirunelveli Electricity Distribution Circle
Tirunelveli- 627011.
Email : setin@tnebnet.org

5. The Superintending Engineer
TANGEDCO
Theni Electricity Distribution Circle
Theni- 625531.
Email : setheni@tnebnet.org

6. The Superintending Engineer
TANGEDCO
Dindigul Electricity Distribution Circle
Dindigul-624306.
Email : sedgl@tnebnet.org

7. Tamil Nadu Electricity Regulatory Commission
4th floor, SIDCO Corporate Office Building
Thiru. Vi. Ka Industrial Estate
Guindy, Chennai- 600 032
Email : tnerc@nic.in

...Respondents

Counsel on record for the Appellant(s) : K. Ravi, Sr. Adv.
Anand K. Ganesan
R Murugan
Swapna Seshadri for App. 1

Counsel on record for the Respondent(s) : Anusha Nagarajan for Res. 1
Anusha Nagarajan for Res. 2
Anusha Nagarajan for Res. 3
Anusha Nagarajan for Res. 4

Anusha Nagarajan for Res. 5

Anusha Nagarajan for Res. 6

JUDGEMENT

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The Order dated 6th July, 2021 passed by the 7th Respondent, Tamil Nadu Electricity Regulatory Commission (hereinafter referred as "TNERC") in the Petition bearing number D.R.P. No. 23 of 2020 has been assailed by the Appellant/Petitioner in this appeal.
2. The Appellant is in the business of Wind Power Generation and is running several wind mills in Tamil Nadu. The entire power generated by these units is being sold to Respondent Nos. 4 to 6 under the terms of various wind power purchase agreements executed between the Appellant and these Respondents with respect to Tirunelveli, Theni, Dindigul EVCs.
3. In the Petition filed by the Appellant before the Commission, it sought directions to the Respondents to pay a sum of Rs.80,81,31,929/- plus Rs.14,80,198.65/- being the balance amount due to it for the period from 16-03-2017 to 07-12-2020 for power supplied to the

Respondents from its wind generation units together with interest @1% per month from 07-12-2020 till the date of actual payment.

4. The Commission, vide the impugned order, has allowed the claim of the Appellant except to the extent of Rs.4,44,25,933/-, which amount, is said to be curtailed/deducted by the Respondents. To clarify, we find it relevant to produce herein paragraph No. 6 of the impugned order.

“6. Findings of the Commission :-

“6.1 We have considered the rival contentions. Except for setting up the defence of financial difficulty, the respondent has not set out any cogent reasons for non-settlement of bills but has set out a brief defence for deduction of Rs.4,44,25,933/ by placing reliance on the order of the Commission in TNERC/MO-04-5/RPO/Dt. 14-09-2017 for revising the bill for APPC. The petitioner, too has not totally disowned the said liability and merely stated in para 15 of the petition that the said communication having been received during the lock down period and having had no access to the books of accounts at that point of time, a letter was issued as a preliminary reply without prejudice to finalization of accounts at petitioner’s end. However, the petitioner claims the entire amount of Rs.80,96,12,127.60(Rs.80,81,31,929+Rs.14,80,198.65) and did not dispute the liability for the sum of Rs.4,44,25,933/- during the course of further hearings on the above amount and place any records in support of its defence. Hence, we

are of the view that the payment of Rs.4,44,25,933/- by the respondent to the petitioner is an admitted fact by both parties and accordingly we hold that the petitioner is not entitled to be paid this part of the total claim made.”

(Emphasis supplied)

5. Finally, the Commission has held/directed as under in paragraph No. 6.5 of the impugned order :-

“6.5 In the above circumstances and subject to Paras 6.1 and 6.3 TANGEDCO is directed to verify the claim made by the petitioner again and after deducting the amount if any, already paid and settle the same within 30 days from the date of this order. In the circumstances, there will be no order as to costs.”

6. The Appellant, in this appeal, is aggrieved by the portion of the impugned order whereby the counter demand of the Respondents to the tune of Rs.4,44,25,933/- has been accepted as valid by the Commission and the Appellant has been held not entitled to this portion of its claim.

7. It is relevant to note here that the Appellant had also filed a Review Petition bearing no. 3 of 2021 before the Commission against the said portion of the impugned order; which has been dismissed by the Commission vide order dated 19th January, 2022. The operating

portion of the order of the Review Petition, paragraph No. 7.12 is reproduced hereunder :-

“7.12 Seen in the above backdrop of events, we have no hesitation to hold that the observations in para 6.1 of the order in D.R.P. No.23 of 2020 do not call for review and hence the review fails. However, the respondent is directed to furnish the exact calculation for the amount of Rs.4,44,25,933/- over and above the reasoning set out in the letter dated 19-05-2020. Correspondingly, the prayer for waiver of court fee also fails.”

Maintainability of the Appeal

8. Before advertent to the rival contentions of the parties on the merits of the appeal, it is necessary to note that a legal objection has been raised by the Respondents with regards to the maintainability of the Appeal. It is contended on behalf of the Respondents that the order dated 19th January, 2022 on the Review Petition of the Appellant has modified the original order dated 6th July, 2021 and therefore, the said order dated 6th July, 2021 got merged into the review order dated 19th January, 2022 and is no longer appealable. It is stated that in view of the said merger, it is only the review order dated 19th January, 2022 which remains operative and capable of being challenged in the appeal. Thus, it is argued that the instant appeal which has been filed against the original order dated 6th July, 2021 is not maintainable and is liable to be dismissed straightway. The reliance is placed upon the

Judgement of the Hon'ble Supreme Court in Rahimal Bathu Vs. Ashiyal Beevi, 2023 SCC Online SC 1226.

9. On the other hand, it is argued on behalf of the Appellant that since the Review Petition has been dismissed by the Commission, the doctrine of merger does not come into play and it is the original order of the Commission which could have been challenged. Learned Counsel for the Appellant also cited the above noted Judgement of the Hon'ble Supreme Court in Rahimal Bathu's case.

10. The law laid down on this aspect is found in paragraph no. 25 of the Judgement of the Hon'ble Supreme Court in Rahimal Bathu's case which is reproduced hereunder :-

“What is clear from the above observation is, that where the review is allowed and the decree/order under review is reversed or modified, such an order shall then be a composite order whereby the court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated, reversed or modified is then the decree that is effective for the purposes of a further appeal, if any, maintainable under law. But where the review petition is dismissed, there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or Court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition. Time

taken by a party in diligently pursuing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.”

11. The order passed by the Commission on the Review Petition of the Appellant has already been reproduced herein above which clearly reveals that Review Petition has been dismissed. It cannot be taken to have modified the original order dated 6th July, 2021 merely for the reason that an additional direction has been given to the respondents to furnish exact calculation for the amount of Rs.4,44,25,933/-. Perusal of the entire order dated 19th January, 2022 on the Review Petition would reveal that the grounds for review agitated by the Appellant did not find favour with the Commission and accordingly the Review Petition was rejected. There is nothing in the said order which would indicate that it has substituted or modified the original order dated 6th July, 2021.

12. It is very clearly held by the Hon'ble Supreme Court in the above noted judgement that where the Review Petition is dismissed, there is no question of merger and any one aggrieved shall have to assail the original order and not the order dismissing the Review Petition.

13. As regards the limitation for filing the appeal is concerned, we note that the Hon'ble Supreme Court in Suo Motu W.P. (C) No. 3 of 2020 has directed that the period from 15th March, 2020 till 28th February, 2022 shall not be reckoned for computing the period of limitation in any suit/appeal/petition/application etc. on account of prevalence of Covid 19 Pandemic during that period. Since the impugned order has been passed during the aforesaid period and the instant appeal has also been filed during the said period, the same cannot be said to be beyond limitation.

14. Hence, we have no hesitation in holding that the instant appeal is clearly maintainable.

Merits of the Appeal

15. It is not in dispute that the Superintendent Engineer, TEDC, Tirunelveli Circle had vide his communication dated 19th May, 2020 intimated the Appellant that in pursuance to the orders issued by Respondent No. 7, TNERC thereby fixing the APPC rate in respect of sale to board by wind energy generators commissioned under Renewable Purchase Obligation (generally referred as REC category) for the financial year 2012-13, 2017-18, an amount of Rs.4,44,25,933/- will be recovered

from its pending outstanding bills. We find it apposite to reproduce the content of the said letter hereunder :-

“TANGEDCO

TO

*Er.P.Selvaraj., B.E.,M.I.E,
Superintending Engineer,
Tirunelveli EDC Circle,
Tirunelveli-11.*

*M/s. Grace Infrastructure Pvt. Ltd,
A-5, Industrial Estate,
Thattanchavady,Pondicherry – 605009*

*LR.No-SE/TEDC/TIN/DFC/AO/WIND/AS/RERC/D.NO-224...../20. DT-
19.05.2020*

Sir,

*Sub:- Elcec-APPC rate fixed by the TNERC – order dt. 06.09.2018 –
APPC rate for REC category for the FY 2018-19 – recovery
intimation-reg.*

*Ref:- 1. TNERC/M.O. 04-5/RPO, DT-14.9.2017
2. TNERC/M.O. 04-6/RPO, DT-25.9.2017
3. Memo.No.CFC/FC/REV/DFC/AS.3/D.No.388/2017,
dt.15.11.2017
4. TNERC/M.O. 04-5/RPO, DT-17.9.2017
5.Memo.No.CFC/REV/FC/REV/DFC/AAO/AS/HT/D.250/19,
dt.30.04.2019*

*Based on the TNERC orders under ref (1) & (2) cited, the instruction has
been issued by the CFC/Revenue under ref (3) cited with regard to APPC
rate in respect of sale to board WEGs commissioned under Renewable
Purchase Obligation (generally referred as REC category) for the financial
year from 2012-13 to 2017-18.*

*The TNERC has issued the orders by fixing the APPC rate for the above
category of WEGs for the financial year 2018-19 vide ref (4) cited. The
applicable APPC rate for the WEGs commissioned under the RPO regulation
for the financial year 2018-19 is as follows,*

- c) WEGs commissioned under the RPO Regulation availing Accelerated Depreciation benefit – 2018-19 – Rs. 2.10/-
d) WEGs commissioned under the RPO Regulation not availing Accelerated Depreciation benefit – 2018-19 – Rs. 2.145/-

As per the ref (4) & (5) cited, the billing rate per unit has to be revised for your monthly generation unit for the financial year 2018-19.

It is informed, that an amount of Rs. 4,44,25,933/-(Rs. Four Crores Forty Four Lacks Twenty Five Thousand Nine Hundred and Thirty Three Only) will be recovered from your pending outstanding bills.

In this regard, objection or enquiry if any, it may be intimated to the undersigned within 07 days.”

(Emphasis supplied)

16. The said letter has been replied by the Appellant vide communication dated 16th June, 2020. We find it appropriate to reproduce here the paragraph Nos. 8, 9 & 10 of the said reply for reference :-

“8. Further you have provided no calculations for arriving at the sum of Rs.4,44,25,933/- as the sum to be recovered from us in your letter under reply. Without proper statement of accounts as to how you have arrived at such arbitrary number of Rs.4,44,25,933/- as allegedly due and payable by us, we are unable to accept or contest your demand.

9. It is strange that you have unilaterally reduced the mutually agreed to rate payable by you for the energy purchased from us, that too, after several years and are now demanding the differential amounts from us, while you have been withholding the lawful sums payable by you to us as per our pending Bills and Debit Notes. With the present situation given rise to by COVID-19, we are unable to finalize accounts. As such we do not admit that you are entitled to recover the said sum or any sum as claimed by you in your letter now under reply. Without prejudice to the same we are

sending this communication to you and making the demand as herein below.

10. *We hereby demand that you pay us immediately the sum of Rs.65,35,08,681/- that is indisputably due and payable by you to us, as seen below :*

1. *Rs.56,64,23,729/- towards our Bills.*

2. *Rs.13,15,10,885/- towards our Debit Notes raised for interest on delayed payments made by you.*

3. *Total of 1 and 2 being Rs.69,79,34,614/-*

4. *However, since you have now raised a demand for Rs.4,44,25,933/-, which, though we do not concede to, you may please withhold and release the balance sum of Rs.65,35,08,681/- forthwith so that we may sort out our dispute pertaining to only Rs.4,44,25,933/- through remedies available to us in law.”*

(Emphasis supplied)

17. Paragraph 6.1 of the impugned order, in which the Commission has recorded its findings on this aspect has already been reproduced hereinabove.

18. It was argued on behalf of the Appellant that the observation of the Commission that the Appellant had not disputed the demand of TANGEDCO for Rs.4,44,25,933/- is not correct and is not borne out from the record. In this regard, reference is made to the paragraph no. 14 of the petition filed by the Appellant before the Commission which is reproduced hereunder :-

“14. The Petitioner submitted that at this juncture, the Petitioner had received a **letter dated 19.05.2020** from the 4th Respondent, Superintending Engineer, Tirunelveli EDC Circle, making a bald demand of Rs.4,44,25,933/-, allegedly payable by the Petitioner. The Petitioner submit that the contractually agreed to rate cannot be unilaterally reduced. Without prejudice to the same, the Petitioner further submits that in the said letter NO calculations or justification for arriving at such sum of Rs.4,44,25,933/- is provided and it is also conspicuous that there is no reference to any contract or the specific Windmill Units with respect to which such rate was allegedly reduced. Thus such demand, without even a proper statement of accounts as to how the alleged sum of Rs.4,44,25,933/- was arrived at as due and payable by the Petitioner, is arbitrary and not maintainable. Further, vide the said letter, it has also been unilaterally decided that such sum of Rs.4,44,25,933/- will be recovered from the pending bills of the Petitioner. However, the Petitioner submits that such action cannot be legally sustained.”

(Emphasis supplied)

19. It was argued that even though in para 16 of the counter filed on behalf of the Respondents, reference has been made vide letter dated 19th May, 2020 from the 4th Respondent to justify the recovery of the said amount of Rs.4,44,25,933/- on the basis of order dated 30th April, 2019 issued by the 7th Respondent (TNERC), yet this point was never agitated before the Commission during the course of arguments and nothing was submitted on this aspect by the Learned Counsel for the Respondents in this case and, therefore, there was no occasion for the Appellant’s counsel to make any submission on this aspect. It was argued that all the wind energy generators of the Appellants were commissioned before the end of

September, 2015 i.e. much before the commencement of the control period specified in wind energy Order No. 3 of 2016 dated 31st March, 2016 and Order No. 6 of 2018 dated 13th April, 2018 issued by the Respondents and, therefore, these did not apply to these generating units of the Appellant.

20. Thus, it was sought to be agitated that the Commission has erred in holding the respondents liable to recover the said amount of Rs.4,44,25,933/- from their bills.

21. Per contra, it was argued on behalf of the Respondents that neither in the reply dated 16th June, 2020 to the communication dated 19th May, 2020 addressed to the Appellant by Superintendent Engineer, TEDC, Tirunelveli Circle nor in the petition filed by the Commission had the Appellant disputed the revision in the outstanding amount of the financial year 2018-19 and the Appellant had only raised their objections with respect to lack of calculation of the amount of Rs.4,44,25,933/- sought to be adjusted against it. Thus, according to the respondents, the dispute raised by the Appellant regarding the adjustment of the said amount of Rs.4,44,25,933/- was regarding the absence of specific details of the calculations of the said amount and not with regard to the adjustment itself. It is argued that the submission of the Appellant that no occasion had

arisen for its counsel to advance arguments on this aspect before the Commission are entirely erroneous for the reason that both the orders of the Commission dated 27th December 2020 and 9th March, 2021 clearly record the submissions of the Appellant's counsel on this aspect also. On these submissions they have sought dismissal of the Appeal.

22. We have considered rival submissions made on behalf of the parties by their counsels and have perused the impugned order of the commission and the entire record.

23. The reasoning given by the Commission in paragraph No. 6.1 of the impugned order for holding the Appellant not entitled to the said part of the claim to the tune of Rs.4,44,25,933/- has been already reproduced hereinabove in paragraph number 4. It appears that the Commission has proceeded on the assumption that the Appellant has not disowned or disputed its liability to pay to the respondent the said amount of Rs.4,44,25,933/- and in fact the Appellant has admitted the payment of such amount of money to it by the Respondent.

24. We are unable to persuade ourselves about the correctness of these observations of the Commission. It is not understandable to us as to how the Commission has held that the petitioner does not dispute or disown its liability to the tune of Rs.4,44,25,933/- towards the respondents.

We have already noted hereinabove the contents of the reply dated 16th June, 2020 sent by the Appellant to the communication dated 19th May, 2020 received by it from Superintendent Engineer, TEDC, Tirunelveli Circle in which the intimation about the recovery of the said amount was conveyed to the Appellant. In paragraph number 9 of the said reply, the Appellant has very clearly expressed wonder upon such unilateral reduction of the mutually agreed rate by the Respondents and that too after several years. In the same paragraph, the Appellant has further clearly stated that it does not admit that respondents are entitled to recover the said sum or any sum as claimed by them in the letter under reply.

25. Even though the Appellant has in paragraph No. 8 of the said reply stated that no calculations have been provided for arriving at the said sum of Rs.4,44,25,933/- sought to be recovered from it and in the absence of the calculations they are unable to accept or contest such demand but at the same time it has specifically countered the said demand in paragraph number 9 as mentioned hereinabove.

26. Similarly, in paragraph number 14 of the petition filed before the Commission also, the Appellant has stated that the contractually agreed rate cannot be unilaterally reduced and such action of the respondents cannot be legally sustained. It is also mentioned therein by the Appellant

that in the demand letter dated 19th May, 2020, there is no reference to any contract or the specific wind mill unit of the Appellant with respect to which such rate was sought to be reduced.

27. Thus, it is evident to us from the perusal of the record that the Appellant had in so many words denied as well as disputed its liability to pay the said sum of Rs.4,44,25,933/- to the respondents, which was sought to be recovered vide letter dated 19th May, 2020. Even otherwise also, we are of the opinion that in the absence of detailed calculations for arriving at the said amount of Rs.4,44,25,933/-, regarding which the objection was raised by the Appellant at the very first instance in its reply dated 16th June, 2020, it was not proper for the Commission to hold that the Appellant is not entitled to the amount. The Commission has, to some extent, attempted to rectify its error by issuing a direction to the respondents vide order dated 19th January, 2022 from the Review Petition filed by the Appellant, to furnish exact calculation for said amount of Rs.4,44,25,933/-. It is also a matter of concern as to what would happen in case the calculation so furnished by the respondents before the Commission in pursuance to the directions, is found not acceptable.

28. For the reasons, we are unable to sustain the impugned order of the Commission on the aspect under consideration in this appeal. The said

aspect needs to be decided *de novo* by the Commission after further detailed hearing.

29. Hence, impugned order is hereby set aside.

30. The matter is remanded back to the Commission for a *de novo* hearing on the issue which is under consideration in this appeal, as already set out in detail hereinabove.

Pronounced in the open court on this 15th day of February, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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REPORTABLE / ~~NON-REPORTABLE~~

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