

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY**  
(Appellate Jurisdiction)

**APPEAL No. 222 OF 2022**

Dated: 22.03.2024

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

**In the matter of:**

**M/s Arkay Energy (Rameswarm) Ltd.**

New No.20, Old No.129,  
Chamiers Road, Nandanam,  
Chennai-600035

... Appellant

*Versus*

**1. The Secretary**  
**Tamil Nadu Electricity Regulatory Commission**  
TIDCO Office Building  
No.19-A, RukmaniLakshmipathySalai,  
Marshalls Road, Egmore,  
Chennai-600 008

**2. Tamil Nadu Generation and**  
**Distribution Corporation Limited**  
*Rep. by its Chairman and Managing Director,*  
144, Anna Salai  
Chennai-600 002

**3. The Government of Tamil Nadu,**  
*Rep. by its Secretary,*  
Energy Department,  
Fort St. George,  
Chennai-600009

... Respondent(s)

Counsel on record for the Appellant(s) : Amit Kapur  
Akshat Jain  
Aditya H. Dubey  
Avdesh Mandloi  
Abhimanyu Maheshwari  
Shikhar Verma  
Sayan Ghosh

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

## **J U D G M E N T**

### **PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER**

1. The appellant company is carrying on the business of generation and sale of power and has its power generation plant at Valuthur village, Ramnad District, State of Tamil Nadu having capacity of 149.18 MW.
  
2. In the year 2014, the State of Tamil Nadu faced severe power crises and accordingly the 3<sup>rd</sup> respondent Government of Tamil Nadu issue G.O.M. No.77 of 2014 thereby directing all the power generators within the State to sell power to the 2<sup>nd</sup> respondent which is a distribution licensee in the State of Tamil Nadu or to any other open access consumer within the State alone. In pursuance to the said G.O., the appellant began supplying power to the 2<sup>nd</sup> respondent at the rates fixed by the 2<sup>nd</sup> respondent in various tenders issued by it.

3. A petition being M.P. No.6/2016 came to be filed by the appellant company before the 1<sup>st</sup> respondent Commission under Section 11(2) and 86(1)(b) of the Electricity Act, 2003, with the following prayer:

*“Under the circumstances stated above, the Petitioner is compelled to approach this Hon’ble Commission for issuing appropriate directions for the payment of compensation as per Annexure I that may be fixed by this Hon’ble Commission under Section 11(2) of the Electricity Act, 2003 or any other amount as deemed fit and proper and thus render justice.”*

*(Emphasis supplied)*

4. The appellants contention in the petition was that in view of the G.O. No.77 of 2014, it was constrained to supply power to 2<sup>nd</sup> respondent alone but the 2<sup>nd</sup> respondent was not taking the entire agreed quantum of 85% of power, as fixed in the LoAs, from it. It was, further, contended that even after a letter dated 07.03.2016 was addressed in this regard by the appellant to the 2<sup>nd</sup> respondent, the 2<sup>nd</sup> respondent did not agree to lift the agreed quantum of power. In the affidavit dated 21.03.2016 filed by the appellant before the Commission, it was averred that the 2<sup>nd</sup> respondent has been adopting a lethargic attitude in making payment of price of the power supplied by appellant to it and huge amounts had accumulated on this count to be received by the appellant. It was, further, averred that the 2<sup>nd</sup> respondent was liable to pay the price for 19,64,51,237 units to the appellant which had been exported by the appellant to the grid under the above referred G.O. No.77 of 2014.

5. It may be noted that initially only the Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) was impleaded as respondent in the petition but later on Government of Tamil Nadu was also impleaded as 2<sup>nd</sup> respondent in the petition.

6. It appears that the appellant did not affix any fee upon the petition and accordingly was called upon by the Registry of the Commission to pay 1% of the claimed amount as the requisite fee in order to get the petition numbered. However, instead of paying the requisite fee, the learned counsel for the appellant made an endorsement on the petition to the following effect:

*“I restrict my prayer only with regard to applicability of the provisions under section 11(2) of the Electricity Act, 2003 under section 11(2) of the Electricity Act, 2003 as directed by the Hon’ble High Court of Madras. Thereafter I will file my claim petition before this Hon’ble Commission in future” (sic)*

7. In view of the said endorsement made by the appellant’s counsel on the petition, it was entertained, numbered and proceeded with.

8. The petition came to be dismissed by the Commission vide order dated 29.10.2019. The reasoning of the Commission in dismissing the petition is found in Paragraph No.7.6 of the impugned order which is quoted hereinbelow:-

*“7.6. We have carefully gone through the averments made by the petitioner in his petition and also the endorsement made by the Counsel for the petitioner dated 10-03-2016. It is seen that the petitioner has approached this Commission for issuing appropriate directions for the payment of compensation as per Annexure-I annexed with the petition under section 11(2) of the Electricity Act, 2003. In this connection, it may be pointed out that sub-section (2) of the said section 11 provides that the appropriate Commission may offset the adverse financial impact of the directions issued under sub-section (1) of section 11 on any generating company, in such manner as it considers appropriate. Therefore, the Commission in order to offset the financial impact on a generator has to evolve the manner in which the prayer of the petitioner should be considered. Therefore, the Commission by exercising its regulatory power has to decide unilaterally in the first instance based on the records furnished by the petitioner regarding the financial loss suffered by the petitioner consequent on the direction issued by the Government under section 11. As such at this stage no adjudication of dispute between the licensee and the generating company arises. In the first instance, the Commission has to decide whether or not any financial loss is suffered by the generating company and decide the quantum of compensation, if any, to be paid by the appropriate Government to the generating company. When such is the*

*scheme, we notice that the said prayer is mainly initiated to claim compensation and does not speak anything about the decision taken by this Commission as to the applicability of the section 11(2) in this case as mentioned by the Counsel for the petitioner in his endorsement mentioned above. Further we notice that his subsequent affidavit filed before this Commission on 06-09-2017, the petitioner has elaborately claimed the compensation under various heads. If the endorsement made by the counsel that he is restricting his prayer with regard to the applicability of section 11(2) of the Electricity Act, is true and bonafide he should have amended the prayer suitably to that effect and without doing the same pursuing the case further and filing a compensation claim subsequently clearly indicate that the petitioner has not properly understood the provisions of the said section and there has been no clarity on the contents of the petition. It has also been pointed out by Thiru M.Gopinathan, the learned Senior Counsel for the TANGEDCO that the petitioner has made a submission before the NCLAT, New Delhi that he undertakes to withdraw all cases pending before all Forums in India subject to payment of 229 crores of rupees and that, based on that assurance TANGEDCO has also made certain payments to the petitioner but the petitioner has not come forward to withdraw this petition pending before this Commission. In view of the above submissions and going by the endorsement made by the Counsel on*

*the petition on 10-03-2016 nothing survives on the petition, as rightly pointed out by the learned counsel for the Government.*

*The petition is accordingly dismissed.”*

9. This order has been assailed by the appellant before us in this appeal.

10. It is, thus, clear that primary ground for dismissal of the petition by the Commission was the endorsement made by appellant’s counsel on the petition on 10.03.2016 in pursuance to which, in the opinion of the Commission, nothing survived in the petition.

11. The learned counsel for the appellant argued that the Commission has erred in dismissing the petition solely on the endorsement dated 10.03.2016 made by appellant’s counsel on the petition as it was under a statutory obligation to provide relief to the appellant regarding the adverse financial impact suffered by it on account of the G.O. No.77 of 2014 in terms of Section 11(2) of the Electricity Act, 2003. It is his submission that the said endorsement was made by the appellant’s counsel on the petition merely for the purpose of getting the petition numbered and it should not be taken into account to determine the nature of the petition or the nature of the prayer made in the petition. He would submit that upon entertaining the petition, the Commission was under a statutory duty in view of Section 11(2) of the Electricity Act to determine the extent of compensation to which the appellant was entitled under the said legal provision, notwithstanding the said endorsement on the petition. It was further argued by the learned counsel

that on the one hand, the Commission had, vide order dated 28.04.2017, directed the appellant to file detailed submission on the aspect of compensation, which was duly filed, but, on the other hand, it simply left the said affidavit out of consideration while passing the impugned order holding the petition not maintainable.

12. On behalf of 2<sup>nd</sup> respondent, it was argued that a party is bound by the statement of its counsel made in the proceedings of a case for which a counsel is engaged, and therefore, the Commission had rightly dismissed the petition on the basis of the endorsement dated 10.03.2016 made by appellant's counsel in the petition. It was submitted that the appellant's motive in giving up the claim for compensation by way of the said endorsement was to get the petition registered as a Miscellaneous Petition (MP) before the Commission, and not as a Dispute Resolution Petition (DRP) on which a higher court fee is payable. He, further argued that the appellant cannot take advantage of the order dated 28.04.2017 of the Commission vide which it was directed to file detailed submissions on the aspect of compensation, for the reason that it was only a procedural direction issued by the Commission and by that time the Commission had not heard arguments and had not applied its mind to each and every aspect of the case. He would, further submit that even otherwise also, the 2<sup>nd</sup> respondent is not liable to compensate the appellant under Section 11(2) of the Electricity Act, and if at all, appellant is entitled to any such compensation, the same has to be paid by the 3<sup>rd</sup> respondent.



13. Upon considering the rival submissions made on behalf of the parties, and material on record, we are unable to find any good ground to interfere in the impugned order of the Commission.

14. The prayer made by the appellant in its petition before the Commission has already been quoted in Paragraph No.3 hereinabove. Considering the averments made in the petition by the appellant and the prayer made therein, it is manifest that the appellant's claim was regarding compensation for the power exported by it to the grid in pursuance to the LoAs and for which it had not received payments. When the Registry raised objection regarding the maintainability of the petition without requisite court fee, the appellant's counsel made an endorsement on the petition to the effect that he restricts the prayer in the petition only with regards to the applicability of the provisions under Section 11(2) of the Electricity Act, 2003, and will file a fresh claim petition in future. The endorsement has already been quoted in Paragraph No.6 hereinabove.

15. As would be seen, there was no prayer in the petition with regards to the applicability of the provisions of Section 11(2) of the Electricity Act. The only prayer made in the petition was for payment of compensation to the appellant as per Annexure-I appended to the petition, which stood withdrawn by virtue of the endorsement dated 10.03.2016. Therefore, the Commission correctly held that after such endorsement was made by the appellant's counsel on the petition, nothing survived for adjudication by the Commission and thus dismissed the petition. The correct approach for the appellant should have been to amend the prayer clause of the petition in terms of the said endorsement dated 10.03.2016 and, only then to proceed further with

the petition. That having not been done, no error can be found in the impugned order of the Commission.

16. We are unable to countenance the argument raised on behalf of the appellant that the said endorsement had been made on the petition only to get it numbered and listed and it should not have been relied upon to dismiss the petition. It is evident that this endorsement was made by the appellant's counsel in the petition in order to avoid payment of requisite court fee, as sought by the Registry of the Commission. In case, the endorsement had actually been made only to get the petition numbered and listed, it was for the appellant to come forward and pay requisite court fee on the petition later on in order to avoid the consequences of the endorsement. The appellant did not do so, but proceeded with the petition without payment of requisite court fee. Therefore, on the one hand, the appellant took advantage of such endorsement by getting exemption from payment of requisite court fee, and on the other, is now seeking to contend that it should not have been relied upon by the Commission. The appellant cannot be permitted to approbate and reprobate at the same time. It is also important to note here that the appellant had not, at any point of time during the entire proceedings before the Commission, sought to withdraw the said endorsement, and therefore, cannot be heard to say that it should not have been acted upon.

17. We may note here that the courts/tribunals attach due credibility and sanctity to the statement made by a counsel for a party to the proceedings of the case. It is for the reason that the counsels appearing for the parties before a court/tribunal have the status of the officers of that court / tribunal, and therefore, the statements made by them deserve to be taken at their face

value without doubting the credibility of those statements. In a recent decision, in case of *Balwant Bai Somabhai Bhandari v. Hiralal Somabhai Contractor (deceased) and Ors.* 2023 SCC OnLine SC 1139, the Hon'ble Supreme Court has observed that an undertaking or an assurance given by a lawyer based upon which the court decides upon a particular course of action, would definitely fall within the confines of "undertaking" and the party would be bound by it. The Supreme Court cited a judgment of English court in *M. v. Home Office and Another* (1992) Q.B. 270: (1992) 2 WLR 73: (1992) 4 All ER 97, in which it has been held:-

*"If a party, or solicitors or counsel on his behalf, so act as to convey to the court the firm conviction that an undertaking is being given, that party will be bound and it will be no answer that he did not think that he was giving it or that he was misunderstood."*

18. Therefore, if a party or its counsel conveys to the court a firm conviction that an undertaking is being given, the party will be bound by it and it will be no answer that he did not think that he was giving it or that he was misunderstood. In the instant case, it was very clearly conveyed by the appellant's counsel to the Commission by way of endorsement dated 10.03.2016 that the appellant is restricting its prayer only with regard to the applicability of the provisions of Section 11(2) of Electricity Act, 2003, and will file a separate claim petition before the Commission for compensation. Thus, as already noted hereinabove, the appellant gave up the only prayer made in the petition i.e. claim for compensation rendering the petition sans any prayer clause. The Commission took note of the said endorsement of the appellant's counsel as well as acted upon it by numbering and listing the

petition for hearing without insisting upon payment of requisite court fee, which would have been payable by the appellant if it had not given up the claim for compensation. The endorsement was a conscious statement made by appellant's counsel which bound the appellant, and therefore, it does not lie in the mouth of the appellant to say that the endorsement has been misunderstood and it should not have been taken into account for dismissing the petition.

19. We also find no force in the arguments of the learned counsel for the appellant that *dehors* such endorsement, it was statutory duty upon the Commission to offset the adverse financial impact suffered by the appellant on account of G.O. No.77 of 2014, as envisaged under Section 11(2) of the Electricity Act, 2003. The Commission could not have embarked upon determining the compensation to which the appellant may have been entitled, when there was no such prayer in the petition, the same having been withdrawn by virtue of the endorsement dated 10.03.2016. As we see, upon making of the endorsement dated 10.03.2016 upon the petition by the appellant's counsel, the petition was rendered sans any prayer and could not have met with any other fate than dismissal.

20. There cannot be any dispute with the legal principle enunciated by the Calcutta High Court in *Vinay Kumar Singh v. Kolkata Port Trust & Ors.* 2022 SCC OnLine Cal 3549, to the effect that objection to the maintainability of the petition could be raised at the earliest possible opportunity and cannot be raised at the eleventh hour during the course of final arguments. However, in the instant case, the objection to the maintainability of the petition had been raised by the Registry at the time of its filing, i.e. the first possible opportunity,

due to which the endorsement in question was made by the appellant's counsel on it. Therefore, it cannot be said that the objection regarding maintainability of the petition had been raised for the first time during the course of arguments before the Commission. In this regard, we are fortified by the following observation of the Hon'ble Supreme Court in *Genpact India Private Limited v. Deputy Commissioner of Income Tax and Another* 2019 SCC OnLine SC 1500:-

*“25. We do not, therefore, find any infirmity in the approach adopted by the High Court in refusing to entertain the Writ Petition. The submission that once the threshold was crossed despite the preliminary objection being raised, the High Court ought not to have considered the issue regarding alternate remedy, may not be correct. The first order dated 25.01.2017 passed by the High Court did record the preliminary objection but was prima facie of the view that the transactions defined in Section 115QA were initially confined only to those covered by Section 77A of the Companies Act. Therefore, without rejecting the preliminary objection, notice was issued in the matter. The subsequent order undoubtedly made the earlier interim order absolute. However, the preliminary objection having not been dealt with and disposed of, the matter was still at large.”*

21. The appellant was conscious throughout the proceeding of the petition before the Commission that its counsel had made endorsement on the

petition, thereby withdrawing the prayer for grant of compensation. Despite the same, the appellant neither sought to amend the petition to make an alternative prayer as stated in the endorsement nor sought to withdraw the said endorsement. The appellant proceeded further with the petition knowing fully well that it is devoid of any prayer clause, and therefore, is precluded to contend that the objection to the maintainability of the petition had come up for the first time during the course of arguments before the Commission.

22. Hence, in view of the above discussion, we do not find any error or infirmity in the impugned order of the Commission. It does not call for any interference by this Tribunal. The appeal is devoid of any merit and is hereby dismissed.

**Pronounced in the open court on this 22<sup>nd</sup> day of March, 2024.**

(Virender Bhat)  
Judicial Member

(Sandesh Kumar Sharma)  
Technical Member (Electricity)

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REPORTABLE / ~~NON-REPORTABLE~~

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