

(2009) 11 MAD CK 0116

In the Madras High Court

Case No : Original Side Appeal No's. 363, 364, 361, 317, 318, 163 to 168, 169, 170, 192 to 201, 213 to 215 and 385 to 387 of 2009 and connected M.Ps.

Arkay Energy (Rameswaram) Ltd.

APPELLANT

Vs

Sundaram Brake Linings Ltd.

RESPONDENT

Date of Decision : 18-11-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Contract Act, 1872 — Section 56
Electricity Act, 2003 — Section 10, 11, 2(8), 42(2), 7
Electricity Rules, 2005 — Rule 3 3(1)
Specific Relief Act, 1963 — Section 14, 41

Citation : (2009) 11 MAD CK 0116

Hon'ble Judges : V. Periya Karupiah, J;M. Chockalingam, J

Bench : Division Bench

Advocate : R. Thiagarajan for N.C. Ramesh and T.Sivaprakasam, in OSA 363, 364, 361, 317, 318, 163 to 168, 192 to 201 and 213 to 215 of 2009, M.S. Krishnan for Sarvabhauman Associates in OSA 385 to 387 of 2009 and N.P. Jayakumar in OSA 169 and 170/2009, for the Appellant; P.R. Raman in OSA 361, 169 and 170, 192 to 197, 317, 318 and 363 of 2009, R. Thiagarajan for N.C. Ramesh and T. Sivaprakasam in OSA Nos. 385 to 387 of 2009, M.S. Krishnan for Sarvabhauman Associates in OSA 163 to 168 and 213 to 215 of 2009, Krishna Srinivasan Advocate for Ramasubramaniam and Associates in OSA 198 to 201 of 2009 and V. Vijayan, for King and Partridge in OSA 364 of 2009, for the Respondent

Final Decision : Dismissed

Judgement

M. Chockalingam, J.—This judgment shall govern all these intra court appeals, which have arisen from a common order dated 29.04.2009 of the learned single Judge of this Court made in the Original Applications No. 374, 375, 356, 357, 324, 325, 248, 418, 419 and 435 to 438 of 2009 and Applications No. 1939 to 1941, 1842 to 1844 and 1734 to 1739 of 2009, all filed u/s 9 of the Arbitration and Conciliation Act, 1996. While Appeals No. 363, 364, 361, 317, 318, 163 to

168, 169, 170, 192 to 201 and 213 to 215 are at the instance of the respondent in those applications challenging the impugned order, the other three appeals, namely, Appeals No. 385 to 387 of 2009 are at the instance of the applicants, seeking expulsion of certain observations made in the said order. For the sake of convenience, the respondent in the original applications is described as the appellant herein.

2. The facts and circumstances leading to these appeals can be stated as follows: The appellant/respondent, a captive power plant as defined in Section 2(8) of the Electricity Act, 2003, entered into agreements with the applicants for investment and for power supply. Every agreement entered into between the appellant company and the applicants referred to the requirements of the power for the plant, the investment and in return thereof, the allotment of shares at Rs. 10/-. The capacity of the power plant was 75 MW and the supply of fuel was to be from Gas Authority of India Limited (GAIL), for which purpose, the appellant company had contracted with GAIL for the supply of fuel till December, 2010. The captive power plant was set up at Valantharavai Village, Ramanathapuram District. The contract also stipulated that in the event the appellant/respondent could not supply the electrical energy to the extent of the contracted demand, there should be a discount of 12.5% of TNEB energy charges for such non-supply by the company and the same has to be settled to the applicants within 30 days from the date of receipt of the respective claim. The agreement was for a period of six years and renewable on mutual terms. The agreement could be terminated if the appellant/respondent company stopped supplying of electrical energy for the continuous period of 90 days or if the applicants stopped consumption of the power for such continuous period of 90 days without assigning any reason. The parties also entered into a supplementary agreement to the power supply on 28.10.2005, which provided for investment in the order as mentioned in the agreements. It also contained a clause for getting appropriate number of equity shares. The appellant company informed all the other captive consumers, who are the applicants, that few of them transferred their shares held by them and as a result of which, the percentage of share which would be held by the captive consumers fell below 26% and thus, the appellant company no longer retained the status as the captive power unit. By a communication dated 07.03.2009, the appellant company informed to all the applicants that they had not consumed the units allocated in the peak hour slot, which resulted in a loss to the company and in order to overcome the loss, the appellant was compelled to enter into an agreement for sale of power. In view of the power position in the State and the quantity of supply of gas, the appellant company would not be able to allot any units as per the agreement. Following the said communication, a meeting was held between the parties in which the applicants were informed that the appellant was no longer interested in maintaining its status as a captive power plant and wanted to convert as merchant power plant and that there was already a contract with TNEB till June 2009 for supply of 40 MW at the rate of Rs. 6.75 per unit and the total production has dropped to 44 MW and hence, nothing was

left for the captive consumers. Under such circumstances, there arose necessity for referring the matters to the Arbitration Proceedings. Pending the arbitration proceedings, all the applicants filed the said applications u/s 9 of the Arbitration and Conciliation Act, 1996 for an order of interim injunction restraining the appellant/respondent (i) from supplying 51% of the electrical energy generated by it to anyone other than its captive consumers pending disposal of the Arbitral proceedings and (ii) from stopping the supply of power to the applicants pursuant to the power supply agreements pending disposal of the Arbitral proceedings.

3. The said applications were resisted by the appellant/ respondent that the applicants had not taken into consideration the mandatory requirements and regulations under the Electricity Act. The applicants have made an attempt to make an unfair advantage of the situation. In their communication dated 30.04.2008, the appellant company had informed the applicants to bear with the situation and purchase the available power equitably among them or in the alternative, to have the power supply agreements terminated by mutual consent and get refund of the amount invested by the applicants towards the equity. Relying on Section 9 of the Electricity Act, 2003 and also the Electricity Rules, 2005 particularly to Rule 3, it was averred that the statutory prescription to retain a status as the Captive Generating Plant required not less than 51% of the aggregate electricity supply generated in such a plant determined on an annual basis be consumed for the captive use and also there is another condition that not less than 26% of the shares were to be owned by the captive users. In view of the reduction of the holding below 26%, it was not possible to supply units to the captive consumers in terms of the agreements entered into between the parties, without violation of the statutory provisions and breaching the rules. Since the appellant did not enjoy the status as a captive power plant, the applications made were thoroughly misconceived.

4. The learned single Judge, after looking into the materials placed and also hearing the learned Counsel on either side, allowed all the applications filed by the applicants and dismissed the applications filed by the appellant herein for vacating the order of interim injunction. Under these circumstances, the above appeals have arisen at the instance of the appellant while 3 of those appeals, namely, O.S.A. Nos. 385 to 387 of 2009 were brought forth by the applicants, seeking to expunge certain remarks made by the learned single Judge in the course of the order under challenge.

5. Advancing the arguments on behalf of the appellants, Mr. R. Thiagarajan, the learned Senior Counsel, would submit that it is an admitted position that a few of the units have transferred their shares held by them and as such, the shareholding of the captive consumers fell below 26% and thus, the appellant company has lost the status as a Captive Generating Plant; that under such circumstances, the learned single Judge should have dismissed all the applications as misconceived; that as per the Power Supply Agreements entered

into between the parties, once the appellant plant has been treated as a generating station, the agreements become otiose; that a fresh agreement has to be entered into between the parties, which would fulfill the requirements contemplated under the provisions of the Electricity Act, 2003, Regulations and Order passed by the Regulatory Commission; that when the learned single Judge has pointed out that the appellant plant has become a generating station, consequent on non-fulfilling the qualification to claim the status of a captive generating plant as laid down under the Electricity Rules, 2005, the power supply agreements entered into between the parties could not be worked out and the question of the appellant being directed to supply power in pursuance of the power supply agreements entered into between the parties as a generating station, did not arise; that the power supply agreements entered into between the parties specifically described the respective applicant as a captive user, which presupposes that the power was being supplied as a captive power plant and hence, a direction given to the appellant to continue the supply as per the power supply agreements did not arise, especially having regard to the fact that the learned Judge has found that the appellant has lost the status of a captive power plant.

6. Added further the learned senior counsel that a captive generating plant does not require any licence for selling power to captive users, but a generating company requires a licence for selling power to any consumer; that merely because a captive generating plant's operation has to be regulated in the same manner as a generating station of a generating company the same did not mean that the agreement entered into between the parties still subsisted and hence, the finding of the learned single Judge that though the appellant has lost the status of a captive power plant, it should supply power to the applicants as a generating plant in terms of the agreement is erroneous; that it remains to be stated that even after losing the status of a captive generating plant, any power supplied as per the power supply agreements entered into between the parties, as directed by the learned single Judge, would result in the distribution licensee, namely, the Tamil Nadu Electricity Board, charging the respondents for the supply made at the HT consumer rate and hence, the order is unworkable; that once the status of a captive power plant is lost on the ground of not maintaining 26% of the shares by the appellant generating station, the appellant plant automatically loses its status of a captive power plant and the other requirements, namely, 51% of consumption of the power generated by the captive user did not arise and the requirement of 51% of consumption of electricity by the captive user, in a given year can always be achieved in the next year and in case of failure the power supplied is treated as a generating station, such a position could not be applied, when the shareholdings of 26% is lost, as in the instant case and hence, the direction given to the appellant to supply power as per the terms of the power supply agreements would be neither here nor there, in the sense that, it cannot be complied with, as per the provisions of the Act.

7. Added further that having observed in the order that the appellant has pleaded that the power supply agreement could be terminated without assigning any reason, the learned single Judge has failed to consider the effect of such a clause, especially when reliance was placed on Sections 14 and 41 of the Specific Relief Act; that the appellant has well informed the applicants that there was a contract till June 2009 with Tamil Nadu Electricity Board for sale of the power at the rate of Rs. 6.75 per unit was besides the issue which arose consideration in the application indulged in by the applicants because what was contended before the learned single Judge was when once the status of appellant's captive generating plant itself was lost, the question of enforcing the agreement by the respondents did not arise and that the agreements to sell power to the Tamil Nadu Electricity Board were over and above 51% of the power generated; that the reason for the applicants moving the Court arose because of the fact that the appellant suddenly informed that it no longer retained its status as a captive power unit was not correct, because this position, namely, that the appellant has lost the status of the captive power plant occurred on and from 1st of April, 2009, that too after passing of the interim order in the application filed by one of the applicants, notice of which was received by the appellant only on 04.04.2009.

8. Added further the learned senior counsel that the application of the illustration to Rule 3 of the Electricity Rules, 2005 to the facts of the present case was wrong because in the first place, the said illustration speaks of not complying with the consumption of captive use of 51% in any year and nowhere it talks about the non fulfilling of the 26% of shareholding in any year, especially when the illustration clearly prescribes that if 51% of power is not consumed in any year, then automatically any supply made in a given year, would be treated as a supply of electricity by a generating company; that when once the appellant's status as captive power plant is lost, the power supply agreements entered into between the parties could not be worked out; that hence, direction to the appellant to supply electricity as per the terms of the agreements did not arise; that in view of the fact that the appellant has lost the status of a captive power plant, the power supply agreements cannot be enforceable in the eye of law; that under these circumstances, the appellant cannot be termed as a captive power plant and equally, the captive power consumers have also lost their status; that the judgments rendered by the Supreme Court in AIR 1974 SC 2177 and AIR 1975 SC 915 were applicable to the present facts of the case; that the finding of the learned single Judge that the appellant could not wriggle out of the contractual obligations was not correct because from the language used in the power supply agreements it could be seen that the respective applicant has been shown as a captive user, thereby qualifying the plant of the appellant as a captive generating plant; that when once the status of the captive power plant itself was lost, it does not automatically become a generating plant for the purpose of supply of power to the applicants and under such circumstances, a different criteria and method has to be fulfilled by the appellant, as per the provisions of the Electricity Act, 2003.

9. Added further the learned senior counsel that as could be seen from the agreements entered into between the parties, it will be quite clear that it was a contract terminable and hence, the applicants/respondents cannot seek enforcement of such contract and apart from that, the contracts have become frustrated and got terminated by operation of law; that in the instant case, the balance of convenience is in favour of the appellant, but the respondents have not made out any prima face case for temporary injunction either to restrain the appellant to sell the electrical energy to others holding licence or to direct the appellant to continue the supply as per the agreements and hence, the order under challenge has got to be set aside and the appeals filed by the appellant have got to be allowed and the appeals filed by the applicants have got to be dismissed. In support of his contention, the learned senior counsel has relied on the decisions reported in AIR 1968 SC 522 and 1969 SC 110.

10. Contrary to the above contentions, after reiterating the contentions put forth before the learned single Judge, the learned Counsel appearing for the respondents/ applicants, inter alia, would further add that the appellant has not lost the status of a captive generating plant; that even assuming that it falls under the category of generating station, the appellant should continue to supply energy as per the agreements entered into between the parties; that neither the provisions of Section 42(2) of the Electricity Act nor the Rules made under the Enactment, prohibits the supply of the energy generated; that even as per the agreements entered into between the parties, it is for the appellant to see that the shareholdings of the captive consumers do not fall below 26% and also the consumption of energy not below 51%; that the case of the appellant that the shareholding of the captive consumers, namely the applicants, fell below 26% was actually one created by the appellant with a mala fide intention to defeat the rights of the applicants/ respondents; that originally there were 28 captive consumers having a share of 27.56%; that out of whom, according to the appellant company, they have withdrawn 2.52% of shareholdings and thus, it has come to 25.04%; that this was artificially created by the appellant; that it is clearly stipulated in the agreements that whenever there is any termination of the agreement by any one of the captive consumers, the shares of that captive consumer has got to be transferred inter se among the captive consumers; that while 25 agreements between the appellant and applicants stood so, the appellant while entering into agreements with three of the captive consumers later, introduced a clause in such a way that the shareholdings of those three captive consumers, on termination, could be purchased by the appellant company itself or by its promoters, which was actually a thorough deviation and violative of the agreements entered into between the parties and that it is quite clear that it has schemed a device in order to cause detriment, prejudice and loss to the applicants/respondents. Added further the learned Counsel that the rulings relied on by the appellant were in respect of the distribution of electric energy and not in respect of generation and supply; that the applicants/respondents have made out a prima facie case before the learned single Judge and the

learned single Judge has also pointed out in the order that the appellant was under the obligation, as per the terms of the agreements, to continue the supply of electric energy and under such circumstances, till the arbitral proceedings are over, the appellant should be directed to make the supply of electric energy as per the terms of the agreements and the appellant also should be restrained from selling electric energy to third parties and hence, the order of the learned single Judge has got to be affirmed.

11. Advancing arguments on behalf of the appellants in O.S.A. Nos. 385 to 387 of 2009, the learned senior counsel would submit that the finding of the learned single Judge that the appellant has lost the status of a captive generating plant has got to be expunged for the reason that the issue whether the appellant has lost the said status is in controversy between the parties and the same has got to be decided only in the arbitral proceedings and hence, the said finding has got to be expunged.

12. The Court paid its anxious consideration to the submissions made by the learned Counsel on either side and looked into all the materials available.

13. Admittedly, the appellant company, a captive power plant as defined u/s 2(8) of the Electricity Act, 2003, entered into 28 agreements between January, 2005 and January, 2006. All the agreements were for the purpose of investment and for power supply. The capacity of the power plant was 75 MW and the supply of fuel was to be from the Gas Authority of India Limited. After entering into the agreements, the supply was made to the applicants, who were the captive consumers. As could be seen from the available materials, the appellant company sent communications to the applicants one after another that there was a deficiency of gas supply and the captive consumers have not taken the allocated units during the peak hours and hence, the appellant company was running in a loss and under such circumstances, the agreements entered into with the applicants for supply of power could not be continued. Hence, the relationship of the parties became strained. The applicant in O.A. No. 248 of 2009 filed the same on 31.03.2009 and thereafter, all the applicants filed the respective applications. What was all contended by the appellant before the learned single Judge and also before this Court is that in view of Section 9 of the Electricity Act, 2003 and also Rule 3 of Electricity Rules, 2005, there is a statutory prescription to retain the status of captive generating plant not less than 51% of the aggregate electricity generated which must be taken by the captive consumers and apart from that, not less than 26% of the shares were to be owned by them; that since 3 of the captive consumers have terminated the agreements and also surrendered their shares, the shareholdings with the captive users fell below 26% and also the captive consumers could not consume 51% for the captive use and under such circumstances, the appellant has lost the status of the captive generating plant and thus, it has become a regular generating unit; that in view of the said situation, the contracts between the parties became terminated and that in the absence of any licence, if there was

any supply continued by the appellant as a generating plant, it would be a breach of and in violation of law. This contention was opposed strongly by the learned Counsel for the applicants on different grounds supra. It is not in controversy that one of the main contentions put forth by the learned Counsel for the respondents/applicants is that this situation as if the appellant has lost the status of captive generating plant was self made by the appellant and it lacks bona fide and hence, till it is decided, the appellant has to continue the power supply.

14. Before adverting to the question in controversy, it would be fit and proper to reproduce Sections 2(8), 9 and 42(2) of the Electricity Act and Rule 3 of the Electricity Rules, 2005:

2(8) Captive Generating Plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association.

9. Captive generation:-(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines: Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company: Provided further that no license shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under Sub-section (2) of Section 42.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.

42. Duties of distribution licensees and open access:

(1)....

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission: Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003 by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

3. Requirements of Captive Generating Plant:

(1) No power plant shall qualify as a "captive generating plant" u/s 9 read with Clause (8) of Section 2 of the Act unless- (a) in case of a power plant - (i) not less than twenty six percent of the ownership is held by the captive user(s), and (ii) not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use: Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the co-operative society: Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent; (b) in case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy (s) the conditions contained in paragraphs (i) and (ii) of Sub-clause (a) above including -

Explanation:

(1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and (2) the equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

(2) It shall be the obligation of the captive users to ensure that the consumption

by the Captive Users at the percentages mentioned in Sub-clauses (a) and (b) of Sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.

15. A reading of the above provisions would clearly indicate that nowhere it prohibits or places a bar for supply of electric energy. Even if the appellant company, a captive generating plant becomes a non-captive generating plant, it cannot take it as the ground to come out of its obligation, which it has undertaken to perform in the agreements. Rule 3 of the Electricity Rules, 2005, makes it clear that in order to call a power plant as a "captive generating plant" u/s 9 read with Clause (8) of Section 2 of the Act, there should be not less than 26% of the ownership held by the captive users and not less than 51% of the aggregate electric energy generated in such plant determined on an annual basis, was consumed by such captive users. Pointing to this provision, the learned senior counsel for the appellant would submit that out of the 28 captive users, three have terminated their agreements and they have also surrendered their shares and were paid for the same and thus the shares held by the captive consumers fell below 26% as required under the above Rule. Contrarily, it is contended by the learned Counsel for the respondents that the falling of the percentage of the ownership with the captive users was one created by the appellant.

16. In order to appreciate the contentions put forth on either side, it would be fit and proper to look into the relevant terms under the Power Supply Agreement:

In the event of the termination of the agreement for whatever reasons, ARKAY shall identify another party as the next captive consumer, who will replace the captive consumer and the captive consumer agrees to transfer the shares held by him in ARKAY in its entirety at par the value to the party so identified by ARKAY.

The Captive Generation Plant Holder will have to satisfy the provisions of Sub Rule 1(a) and (b) of Rule 3 of Electricity Rules, 2005.

Cl. (12) The Captive Power Plant holder should adhere to the provisions in Section 7, 9, 10 and 11 of Part III of Electricity Act, 2003.

The Company shall not sell generated energy to any third party.

The power wheeled from the CPP of M/s. ARKAY Energy (Rameswaram) Limited shall be used only by the above said companies.

There shall not be any transfer of shares held by the abovesaid 30 companies consuming power under the wheeling approval accorded to M/s. Arkay Energy (Rameswaram) Limited without the written approval of TNEB.

17. Apart from that, the letter dated 16.11.2005 addressed to the respondent (Brakes India Limited) in O.S.A. Nos. 163 to 168 of 2009 by M/s. ARKAY Energy

(Rameswaram) Limited, reads as follows:

M/s. Arkay Energy (Rameswaram) Limited hereby confirms that the 26% equity required from the captive users will be maintained at all times to maintain the status of "Captive Generating Plant" and Brakes India Limited will not be called upon for any further equity investment in Arkay Energy (Rameswaram) Limited for whatever reasons.

18. A very reading of the above clauses found in the agreements entered into between the parties and the contents in the said letter, would make it clear that the appellant undertook to maintain the shareholding of the captive consumers not to fall below 26%. It was also clearly stipulated therein that whenever there was termination of the agreement, the appellant company undertook to identify another party as the next captive consumer, who would replace the captive consumer seeking termination, and the captive consumer who came forward to terminate the contract also agreed to transfer the shares held by him in the company in its entirety at par value to the party so identified by the appellant. When three of the captive consumers, out of 28, came forward to terminate the contract, as contended by the appellant, the appellant should have identified any one of the existing captive consumers to get a transfer of the same. But the appellant company had not done so. On the contrary, it has taken the shares of those three companies for itself and paid for them, which was never contemplated by the parties.

19. It is pertinent to point out that those three companies, namely, Meenakshi Udyog (India) Pvt. Ltd., has addressed a letter dated 24.03.2009 to the appellant expressing their desire of termination of the agreement from 01.04.2009. Equally, Sri Balaganapathy Mills Limited addressed a communication on 25.03.2009 and also Sri Kamachi Steels Limited addressed a communication on 25.03.2009. Accepting the same, all their equities were given by way of cheque on 01.04.2009. If really those three captive consumer companies have terminated their respective contracts on 24.03.2009 and 25.03.2009 respectively and they were also paid equities on 01.04.2009, as claimed by the appellant, at that juncture itself it should have been known to the appellant company that the shares held by the captive consumers fell below 26%. But the appellant company has not informed to any one of the applicants.

20. At this juncture, it is pertinent to point out that the appellant when addressed number of communications on different reasons even setting out the excuse for non-supply as per the Agreements, has never whispered at any point of time that the percentage of the shareholdings of the captive consumers fell below 26%. But, for the first time, the appellant put forth such a plea only in the counter filed to the applications filed by the captive consumers.

21. It is to be noted that the appellant filed W.P. No. 6323 of 2009 in the month of April, 2009 against the State Government and the Chairman, the Tamil Nadu Electricity Board, wherein paragraph 6 of the affidavit reads as follows:

6. The petitioners submit that they are group captive power plant. As a group captive power plant it has got a right to sell the surplus power not exceeding 49% of the power generated by it to any licensee....

The said averments would make it abundantly clear that when this writ petition was filed in April, 2009, the appellant has maintained that it had the status of captive power plant.

22. Subsequently, the appellant has filed W.P. No. 16978 of 2009 against the Tamil Nadu Electricity Board and others, seeking a Certiorarified Mandamus, and also as a Generating Company, the writ petitioner has stated that consequent upon certain disputes that arose between the captive users and the petitioner, some legal proceedings were pending before this Court in O.A. No. 374 of 2009 and after considering the contentions, this Court has recognised that the appellant has lost its status as a Captive Generating Plant.

23. It is relevant to state that the said writ petition was filed in August, 2009, i.e., after the disposal of the applications made by the applicants. Thus the Court is able to see force in the contention put forth by the learned Counsel for the respondents that the appellant has not lost its status as captive generating plant.

24. While all the agreements entered into between the appellant company and the applicants were to the effect that whenever there was a termination of agreement by any one of the captive consumers, there should be a transfer of shares inter se in order to maintain 26% of the shareholdings by the captive consumers, there was a deviation that was made only in three agreements entered into between the appellant company and those three captive consumers, who have terminated the agreements as above. The agreements entered into between the appellant company and those three captive consumers reads as follows:

In the event of termination of the agreement, the shares held by the captive consumers in the company in its entirety at par value will be paid by the ARKAY or the promoters of ARKAY.

25. This will be quite indicative of a deviation from the earlier agreements. The appellant, taking advantage of this clause as found in the agreement between the appellant and three captive consumers, has now come forward to state that they have terminated the agreements and surrendered their shares and the same was purchased by the appellant or its promoters. The situation was never contemplated by the parties. The said clause that was entered into in these three agreements was not only a deviation from the earlier agreements but also a violation of the obligation of the appellant to maintain 26% of the shareholding with the captive consumers which it was to maintain.

26. It is not in controversy that there is an arbitral clause in all the agreements entered into between the parties. Out of 28 cases, in 11 cases arbitrators have been appointed and the claims have also been made. In view of the above

controversy, the issue whether the appellant has lost the status of a captive consumer plant, as contended by them, or whether the said case of the appellant should not be accepted since it was a created one in order to defeat the rights of the applicants, is left open to be decided in the arbitral proceedings, and equally so whether the agreements entered into between the parties are specifically enforceable and the last issue that would arise would be as to the question on quantum of damages.

27. The contention put forth by the learned Counsel for the appellant that by operation of law, the agreements have become terminated cannot be accepted for the reason that one of the issues to be decided in the arbitral proceedings is whether the agreements between the appellant and the applicants continue to be in force or not. Apart from that, the appellant company, either in law or as per the agreements entered into between the parties, which is under obligation to maintain 26% of the shareholding with the captive consumers, cannot take advantage of its own act by purchase of the shares either by the appellant or by its promoters and plead frustration of contract by an act done by or fault on its part.

28. At this juncture, learned Counsel for the respondents relied on the decisions rendered by the Apex court in *Baiju alias Bharosa Vs. State of Madhya Pradesh*, and *Boothalinga Agencies Vs. V.T.C. Poriaswami Nadar*, . In *Baiju alias Bharosa Vs. State of Madhya Pradesh*, , the Apex Court has held as follows:

10. ...

Where the contract makes provision (that is, full and complete provision, so intended) for a given contingency, it is not for the court to import into the contract some other different provisions for the same contingency called by different name.

In such a case the doctrine of discharge by frustration cannot be available, nor that of an implied terms that the existing state of affairs would continue at the date of performance. The reason is that where there is an express term the court cannot find on construction of the contract an implied term inconsistent with such express term".

In AIR 1969 SC 110, it has been held as follows:

14. Counsel on behalf of the respondent, however, contended that the contract was not impossible of performance and the appellant cannot take recourse to the provisions of Section 56 of the Indian Contract Act. It was contended that under Clause 1 of the Import Trade Control Order No. 2-ITC/48, dated March 6, 1948 it was open to the appellant to apply for a written permission of the licensing authority to sell the chicory. It is not shown by the appellant that he applied for such permission and the licensing authority had refused such permission. It was therefore maintained on behalf of the respondent that the contract was not impossible of performance. We do not think there is any substance in this

argument. It is true that the licensing authority could have given written permission for disposal of the chicory under Clause 1 of Order 2-ITC/48, dated March 6, 1948 but the condition imposed in Ex. B-9 in the present case is a special condition imposed under Clause (v) of para (a) of Order 2-ITC/48, dated March 6, 1948 and there was no option given under this clause for the licensing authority to modify the condition of licence that "the goods will be utilised only for consumption as raw material or accessories in the licence holder's factory and that no portion thereof will be sold to any party". It was further argued on behalf of the respondent that, in any event, the appellant could have purchased chicory from the open market and supplied it to the respondent in terms of the contract. There is no substance in this argument also. Under the contract the quality of chicory to be sold was chicory of specific description-"Egberts Chicory, packed in 495 wooden cases, each case containing 2 tins of 56 lb. nett". The delivery of the chicory was to be given by "S.S. Alwaki" in December, 1955. It is manifest that the contract, Ex. A-1 was for sale of certain specific goods as described therein and it was not open to the appellant to supply chicory of any other description. Reference was made on behalf of the respondent to the decision in *Maritime National Fish, Limited v. Ocean Trawlers, Limited* 1935 AC 524. In that case, the respondents chartered to the appellants a steam trawler fitted with an otter trawl. Both parties knew at the time of the contract that it was illegal to use an otter trawl without a licence from the Canadian government. Some months later the appellants applied for licences for five trawlers which they were operating, including the respondents' trawler. They were informed that only three licences would be granted, and were requested to state for which of the three trawlers they desired to have licences. They named three trawlers other than the respondents', and then claimed that they were no longer bound by the charter-party as its object had been frustrated. It was held by the Judicial Committee that the failure of the contract was the result of the appellants' own election, and that there was therefore no frustration of the contract. We think the principle of this case applies to the Indian law and the provisions of Section 56 of the Indian Contract Act cannot apply to a case of "self-induced frustration". In other words, the doctrine of frustration of contract cannot apply where the event which is alleged to have frustrated the contract arises from the act or election of a party. But for the reasons already given, we hold that this principle cannot be applied to the present case for there was no choice or election left to the appellant to supply chicory other than under the terms of the contract. On the other hand, there was a positive prohibition imposed by the licence upon the appellant not to sell the imported chicory to any other party but he was permitted to utilise it only for consumption as raw material in his own factory. We, are accordingly of the opinion that Counsel for the respondent has been unable to make good his argument on this aspect of the case.

These two decisions are applicable to the facts of the case on hand.

29. It is not the case of the appellant that they ceased to generate energy. But it is admitted that they are generating energy, and they would also distribute

energy to others, but not to the applicants, who are the captive consumers. It remains to be stated that under the agreements, the appellant has given an undertaking to maintain the shareholdings of the captive consumers at the level of 26% and also not to allot energy to others. While the appellant is obliged to maintain the shareholdings of the captive consumers, the applicants, at 26% in order to ensure them to give energy, now the appellant cannot be permitted to say that it would generate energy and also distribute to others and not to the captive consumers. That apart, it is quite evident that it was the appellant who created such a situation to take advantage of the same in order to wriggle out of the contract and also not to distribute energy to the applicants which cannot be permitted.

30. Having regard to the different clauses found in the agreements, the conduct of the parties, the assertion of the appellant as a captive consumer plant in the later writ petitions, not whispering the same in any one of the communications already addressed before the filing of the counter in the court proceedings and the deviation as to the transfer of shares found in the agreements entered into between the appellant and the applicants on the one hand and the appellant and the three captive consumers on the other hand, all would clearly indicate that the appellant must be directed to continue the supply till the matter is decided by the arbitral proceedings.

31. Under such circumstances, the Court is of the considered opinion that the respondents captive consumers/applicants have made out a prima facie case, and the Court has no option than to grant the relief. Hence, the order of the learned single Judge does not call for interference in the hands of this Court. Hence, the appeals filed by the appellant have got to be dismissed.

32. Equally, a perusal of the judgment under challenge would clearly indicate that there is no specific finding that the appellant has lost the status of captive generating plant and hence, the request of the learned senior counsel for the appellant in seeking expulsion in that regard does not arise consideration. Hence, those appeals, namely, also have got to be dismissed.

Hence, all the appeals fail and accordingly they are dismissed, leaving the parties to bear their costs. Consequently, connected M.Ps. are closed.