
(2012) 06 MAD CK 0194

In the Madras High Court

Case No : Writ Petition No. 14264 of 2012 and M.P. No's. 1 and 2 of 2012

Sanmar Ferrotech Ltd.

APPELLANT

Vs

Tamil Nadu Electricity Regulatory Commission

RESPONDENT

Date of Decision : 29-06-2012

Acts Referred:

Electricity Act, 2003 — Section 3, 42, 86(1)(f), 9(2)

Citation : (2012) WritLR 774

Hon'ble Judges : R. Sudhakar, J

Bench : Single Bench

Advocate : A.R.L. Sundaresan, for Mr. R.S. Pandiyaraj, for the Appellant; G. Vasudevan, for the Respondent

Final Decision : Allowed

Judgement

R. Sudhakar, J.—This Writ Petition is filed praying to issue a Writ of Certiorarified Mandamus, calling for the records of the 3rd Respondent in his Notice No. SE/ CEDC/N/AEE.GL/F. Power Cut/D 866/2012, dated 01.06.2012, in so far as the withdrawal of Optimum demand concept is concerned, to quash the same as illegal, arbitrary, without authority of law and consequently, direct the 3rd Respondent to permit the petitioner to run their industry continuously in optimum demand concept with restricted working days and power holidays without evening peak hour restrictions vide in Clause 1(n) of the Circular Memo dated 01.11.2008 issued by the 2nd Respondent and adjust the wind energy in banking/current generation. Heard Mr. A.R.L. Sundaresan, learned Senior Counsel for Mr. R.S. Pandiyaraj, Learned Counsel appearing for the petitioner and Mr. G. Vasudevan, Learned Counsel appearing for the Respondents.

2. The short issue, which arises for consideration in this writ petition is as to whether the Optimum Demand Concept is applicable only to consumers availing Board Power and not to others.

3. Para 2 of the affidavit reads as follows:-

I respectfully submit that the petitioner industry is a continuous process industry involved in the manufacture of cast iron and SG iron castings having High Tension Electricity Supply in H.T.SC. No. 1865 [(CEDC) North]. I respectfully submit that the 2nd and 3rd respondents have sanctioned the said H.T. Supply with a Maximum demand of 10,000 K.V.A. to run the said industry. I submit that the petitioner industry has been providing employment to about 350 persons.

4. The petitioner industry is an Induction Melting Industry which is a continuous process industry listed as Serial No. 14 of the Annexure-I attached to the Memo dated 01.11.2008, issued by the 2nd Respondent.

5. Paras 7, 8 and 9 of the affidavit reads as follows:-

7) It is respectfully submitted that the modality of restriction and control measures were enumerated by the 2nd respondent's Memo dated 01.11.2008. However, for continuous process industries like the petitioner, the 2nd respondent has permitted the petitioner to run their industry continuously for certain days in a month depending upon the grid availability without any restriction during peak hours by permitting the petitioner to avail the optimum demand and energy to run the entire industry continuously without any break with restricted holidays in a month as stipulated under Clause 1(n) of the above memo dated 01.11.2008 and fixed from time to time by the jurisdictional Superintending Engineer of the 2nd respondent.

8) Accordingly, the petitioner was also permitted to run continuously for 25 days in a month from 01.11.2008 and declaring holidays for the remaining days of the month, viz., 5 to 6 days in a month during which period only lighting and security purpose load will be allowed. This allotment of working days and holidays are fixed by the 3rd respondent every month to the petitioner depending upon the power/grid availability. The latest one such letter issued by the 3rd respondent dated 27.02.2012 clearly shows that the petitioner was approved to avail continues running for 14 days March, 2012 to May, 2012 with a power holiday of 16 days. Further, the petitioner is also exempted from evening peak hour restrictions between 6.00 P.M. to 10.00 P.M. to run their industry continuously with optimum demand fixed by the 3rd respondent vide Clause 1(n) of memo dated 01.11.2008 issued by the 2nd respondent. Though the petitioner's sanctioned load is 10,000 KVA, as per the optimum demand fixed by the 3rd respondent, the petitioner was permitted to avail 7300 KVA to run their industry continuously.....

9) The petitioner respectfully submits, on 26.03.2012, the petitioner has entered into Energy Wheeling Agreement with the respondent Board, wherein the respondents have permitted to wheel the banked energy to HTSC No. 1865 of Chennai EDC/North. The petitioner is owning banked energy of 800000 units as on May 2012 to the petitioner's credit in their wind mills. The petitioner is eligible for adjustment of coming month Current Consumption Bill in the above HTSC No. 1865 of Chennai EDC/North. The petitioner gave a detailed

representation to the 3rd respondent to adjust the above banking as per Clause 4 of the Energy wheeling Agreement dated 26.03.2012.

Thereafter, the third respondent passed the impugned order.

6. Referring to the letter of the Superintending Engineer dated 27.10.2010, the impugned proceedings have been issued stating that if the petitioner opts for wind energy the Optimum Demand fixed along with restricted working days will be cancelled. The Respondents authority stated that since the petitioner is availing Optimum Demand it is not feasible to adjust the wind energy units in the respective bills of HT A/c No. 1865. The authority further proceeded to cancel the Optimum Demand without peak hour restriction granted for HT service connection and refixed the energy and demand quota. It further stated that the order of the Tamil Nadu Electricity Regulatory Commission TNM 1 to 9/2011 dated 28.12.2011 is applicable to the 9 HT service connections mentioned in that order only. For better clarity the order impugned is extracted hereunder:-

Ref: 1. Lr. No. SE/CEDC/N/AEE.GL/F. Power cut/D.1485/12, dt: 27.10.2010.

2. Lr. No. SE/CEDC/N/AEE.GL/F. Power cut/D.313/12, dt: 26.02.2012.

3. Lr. No. SE.CEDC/N/AEE.GL/F.Power cut/D.351/12, dt: 01.03.2012.

4. Your Letter dated: 26.05.2012.

As per the R & C conditions, optimum demand concept is applicable for consumers availing Board power only and the same was already intimated vide reference (1). It has also been intimated in the same reference that in case if you opt for wind energy, the optimum demand fixed along with restricted working days will be cancelled. You have also furnished necessary undertaking dated 27.10.2010 stating that you will not opt for 3rd party/CPP/Wind energy, as you are availing optimum demand.

As you are availing optimum demand it is not feasible to adjust the wind energy units in your HT A/c No. 1865, as per your request upto the billing of 5/2012.

The optimum demand of 7300 KVA without peak hour restrictions with 14 working days fixed to your HT A/c No. 1865 is hereby cancelled from the billing month of 6/2012 and your normal quota (60% quota) is 5400 KVA demand and 16,50,000 Units energy.

You are requested to adhere to the peak hour restrictions and avail only 10% of the quota during peak hours.

On cancellation of optimum demand now, you are eligible for wind energy adjustments from the billing month of 6/2012.

Further, it is also intimated that the Hon''ble TNERC's order in TA No. 1 to 9 dated: 28.12.2011 is applicable for the 9 nos. HT services mentioned in that order only

7. The Tamil Nadu Electricity Board by Memo No. CE/Comml/EE/DSM/F.Powercut/D.001/2008, dated 01.11.2008, imposed electricity restriction and control measures by way of power cut for HT industrial, Commercial services and others falling under Tariff I and III. Clause (n) of that Memo refers to the continuous power supply for a specified period. Clause (n) at page 2 reads as follows:-

n. In the case of continuous process industries and those HT services which cannot operate with the present level of cut, the Chief Engineer/distribution concerned can fix such optimum/minimum demand as may be required to operate the industry, but this will be subject to the power supply being made available only for such restricted specified period depending upon the nature of process of the industry so as to keep with the overall capability of the grid.

8. The petitioners were availing the above said benefit. The petitioners are also utilising the power from wind energy generators which is either self generated or purchased from third party sources. On 31.8.2009, the Tamil Nadu Electricity Board's Technical Branch issued a Memo No. CE/Comml./EE/DSM/AEE/PMM/F.Powercut/D.394/09, dated 31.08.2009, wherein instructions were issued regarding refixing of demand quota for continuous process and other industries. Instruction No. 5 reads as follows:-

5. Optimum demand concept is applicable for those consumers availing Board's power only. Optimum demand will not vary and once opted is final.

9. Some of the industries who had the benefit of the Memo dated 1.11.2008 and were running the continuous process industries with Optimum Demand Concept with restricted power holidays, approached this Court and the case filed by those persons have been transferred to the Tamil Nadu Electricity Regulatory Commission to consider the issue as to whether such of those continuous processing industries under Optimum Demand Category with restricted power holidays and without evening peak hour restrictions are eligible to get the benefit of power supply from third party source viz., wind energy which is self generated or purchased from third party source. The Commission in its order dated 28.12.2011 in TA Nos. 1 to 9 of 2011 in M/s. Shanthi Castings Works and others vs. The Chairman, Tamil Nadu Electricity Board, took up the matter for hearing on 14.09.2011 on the record of hearing which runs as follows:-

3. Hearing on 14-9-2011 :-

The Commission after hearing both sides made the following observations:-

All the above T.As. were taken up for consideration. These petitions basically challenge the discontinuation of the facility of optimum demand concept for wind mill generators communicated in Circular Memo dated 9.10.2011 of the TNEB. The Learned Counsel for the Petitioners contended that the restriction and control measures of the TNEB approved by the Commission in M.P. No. 42 of 2008 contain a provision on the optimum demand for continuous process industries and therefore it is well within the jurisdiction of the Commission to

entertain disputes on this issue. The Commission heard the Learned Counsel for TNEB and also the officials from the TNEB.

The TNEB is directed to file counter within 4 weeks. The case will be posted for arguments thereafter.

In para 6.6.1 Memo dated 1.11.2008 was considered and it is relevant for the present issue.

6.6.1 Memo dated 1.11.2008

The provision regarding the continuous process industries in the above memo is as follows:-

In the case of continuous process industries and those HT service which operate with the present level of cut, the Chief Engineer/Distribution concerned can fix such Optimum/Minimum Demand as may be required to operate the industry but this will be subject to the power supply being made available only for such restricted specified period dependent upon the nature of the process of the industry so as to keep with the overall capability of the grid.

An example has also been included in this Memo with regard to calculation of the Optimum Demand and the number of days for which Optimum Demand can be availed and during the balance period of the month only lighting load for security and essential activities was envisaged to be provided.

The Commission observes that this particular Memo did not distinguish between those consumers who are solely dependent on the TNEB supply and other class of consumers who have their own captive generation and wind power for their consumption.

The Commission at para 6.6.3 dealt with Memo dated 9.10.2009 which was the clarification of Circular Memo, dated 31.8.2009, Thereafter at para 6.6.4 clarified that by order in SMP No. 1/2009 dated 28.10.2009 the Memos dated 19.12.2008, 4.8.2009, 21.8.2009 were struck down and the order quashing the three memos were not contested thereafter, which in effect negated the very same plea of the respondents. Para 6.6.3 and 6.6.4 reads as follows:-

6.6.3 Memo dated 9.10.2009:-

This Memo was by way of clarification to Circular Memo dated 31.8.2009. Paragraphs 5 and 6 of Memo dated 31.8.2009 are extracted below:-

Para 5 - Optimum Demand Concept is applicable for those consumers availing Board's power only. Optimum Demand will not vary and once opted it is final.

Para 6 - Those continuous process industries notified by the Government (i.e. list already communicated) and if opted for continuous running with Optimum Demand, peak hour restrictions need not be insisted. Industries other than continuous process industries notified by the Government and if opted for running with Optimum Demand, peak hour restriction shall be insisted.

6.6.4. This Memo dated 31.8.2009 was further clarified in Memo dated 9.10.2009. Para 4 of the Memo dated 9.10.2009 further stipulates that those who are eligible under Deemed Demand Concept as per the Memos dated 19.12.2008, 4.8.2009 and 21.8.2009 for wind energy, CPP and third party power purchase are not eligible for Optimum Demand Concept. The Commission would like to observe here that these Memos were struck down by this Commission in its Order in S.M.P. No. 1 of 2009 dated 28.10.2009. This issue was argued accordingly by the Petitioners, The Commission also would like to observe that the TANGEDCO did prefer an appeal on certain aspects of the Order in S.M.P. No. 1 of 2009 but never contested the quashing of the three Memos referred above, It was the duty of TANGESCO to have revisited the instructions contained in Memo dated 9.10.2009 soon after the quashing of the three Memos. This was not done. In between, various consumers were exempted from evening peak hour restrictions. During the arguments, reference of the Commission was also invited to Order dated 13.4.2010 in Writ Appeal No. 645 of 2010. This appeal was filed by TNEB. The Division Bench of the High Court of Madras upheld the judgment of the single Judge, where liberty was granted to the Respondent consumer to make a representation to the appellant TNEB with regard to Optimum Demand of power supply without peak hour restrictions or power holidays and also directed the appellant to pass orders thereon.

10. Thereafter, the commission proceeded to interpret the earliest Circular Memo dated 1.11.2008 whereby the Optimum Demand Concept was introduced in so far as continuous process industries are concerned. The Commission was of the view that the circular Memo dated 1.11.2008 did not mention about the eligibility of Optimum Demand Concept being restricted, only to consumers who are solely depending on the power supply by the Board. It is only in the Circular Memo dated 31.8.2009 that the Optimum Demand Concept being made applicable only to consumers availing Board's power was introduced and the Commission held the same to be discriminatory and run contrary to the provisions of Section 9(2) of the Electricity Act 2003 and that it is opposed to the provisions of sub-section (2) of Section 42 of the Act where Open Access Concept is recognized by the Statute. It also relied upon the Commissions Regulations notified in the year 2005 relating to Open Access Concept. The Commission came to the conclusion that it is not correct to discriminate between the consumers who are solely dependent on the power supply of the Board or others who have their own captive power or purchase power from third party source. The finding of the Commission at para 6.6.5 is extracted for clarity:

6.6.5. From the above, it could be seen that the Circular Memo dated 1.11.2008 introduced Optimum Demand Concept for continuous process industries. What was sought to be done in this concept was to provide the eligible quota of KVA days over a continuous period, after adjusting for the lighting load for the security and essential activities as well as load permitted for peak hour for the balance days to be adjusted continuously over certain number of days, the balance days in the month being power holidays. There was absolutely no

mention about the eligibility for such Optimum Demand Concept being restricted only to the consumers who are solely dependent upon the TNEB supply. Instructions contained in Memo dated 31.8.2009 clarified that the Optimum Demand Concept would be available to those consumers who avail Boards power supply. When Memos dated 19.12.2008, 4.8.2009 and 21.8.2009 were struck down by the Commission in order dated 28.10.2009 in SMP 1/2009, Memo dated 9.10.2009 should have been reviewed but this was not done. Further these instructions run contrary to various provisions of the Act.

11. In the view of this Court, the Commission has rightfully considered the provisions of Section 9(2) of the Electricity Act, 2003 which provides that every person, who has constructed a captive generating plant and maintains and operates such plant shall have his right to Open Access for the purposes of carrying electricity from his captive generating plant to the destination of his use subject to availability of adequate transmission facility. Once Open Access is provided, no restriction on captive consumption user is permissible. This is equally applicable for purchase of power from third parties through Open Access in view of sub-section (2) of Section 42 and in terms of the Orders of the Commission regarding Open Access, passed in the year 2005. The Commission's order enables all HT consumers to avail Open Access with effect from 17.2.2010, when an amendment to Open Access Regulations was notified.

12. The Commission came to the conclusion that the captive consumption of electricity and purchase of electricity through Open Access as per the mandate of the Act as well the Regulations cannot be given a go by and that with regard to Optimum Demand the Respondents Board should not discriminate between the consumers who are solely depending on the power supplied by the Respondent's Board and other consumers, who have their own captive power including wind energy or purchase power like wind energy from third party source. The stand of the Respondent that the Optimum Demand Concept for continuous process industries is limited only to consumers of board's power was negated. The Commission therefore held that all nine consumers who filed the writ petition which was transferred to the Commission will be entitled to the benefit of Optimum Demand Concept irrespective of the source of power supply. In view of the above said finding, the respondent Board cannot impose such a restriction on discriminatory basis, more particularly, in respect of all similarly placed industries.

13. The Respondent's plea that the order of the commission should be restricted to the 9 consumers covered by the transfer applications appears to be the primary reason by which the said facility is denied to the petitioner. The Commission in its order, has interpreted the Optimum Demand Concept and the eligibility of HT Consumers to have the said facility by referring to the various provisions of the Electricity Act, 2003, which provides for Open Access facility without restrictions. Therefore, the interpretation that only 9 HT Consumers as stated in the order will be eligible to the benefit of Optimum Demand Concept under Open Access Facility is a misreading of the order of the Commission. An

harmonious reading of the Order of the Commission is that it should apply to all similarly placed HT consumers without discrimination and that is evident from the tenor of the order. The issue canvassed by the 9 HT consumers will be applicable to all similarly placed HT Consumers as there cannot any discrimination among the same group. Further, the Commission does not adjudicate individual disputes in terms of Section 86(1)(f) of Electricity Act 2003. The purpose of the Commission to pass orders as per the Electricity Act, 2003 is to lay down general principle governing generation and distribution of electricity. The Respondent by stating that the order is applicable only to the 9 HT Consumers who had approached the Commission stems on a misconception of law as it will amount to negating the order passed by a statutory authority on discriminatory basis which cannot be permitted. The scope of power of the Commission is defined in Section 86(1)(f) of the Tamil Nadu Electricity Act, 2003 which runs as hereunder:-

86. Functions of State Commission: (1) The State Commission shall discharge the following functions, namely:

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers u/s 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;

(emphasis supplied).

(3) The State Commission shall ensure transparency while exercising its power and discharging its functions.

(4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published u/s 3.

14. In this case, the impugned order is passed by the Superintending Engineer and the contents of the order itself explanatory which reads as follows:

Ref: 1. Lr. No. SE/CEDC/N/AEE.GL/F. Power cut/D.1485/12, dt: 27.10.2010.

2. Lr. No. SE/CEDC/N/AEE.GL/F. Power cut/D.313/12, dt: 26.02.2012.

3. Lr. No. SE.CEDC/N/AEE.GL/F. Power cut/D.351/12, dt: 01.03.2012.

4. Your Letter dated: 26.05.2012.

As per the R & C conditions, optimum demand concept is applicable for consumers availing Board power only and the same was already intimated vide reference (1). It has also been intimated in the same reference that in case if

you opt for wind energy, the optimum demand fixed along with restricted working days will be cancelled. You have also furnished necessary undertaking dated 27.10.2010 stating that you will not opt for 3rd party/CPP/Wind energy, as you are availing optimum demand.

As you are availing optimum demand it is not feasible to adjust the wind energy units in your HT A/c No. 1865, as per your request upto the billing of 5/2012.

The optimum demand of 7300 KVA without peak hour restrictions with 14 working days fixed to your HT A/c No. 1865 is hereby cancelled from the billing month of 6/2012 and your normal quota (60% quota) is 5400 KVA demand and 16,50,000 Units energy.

You are requested to adhere to the peak hour restrictions and avail only 10% of the quota during peak hours.

On cancellation of optimum demand now, you are eligible for wind energy adjustments from the billing month of 6/2012.

Further, it is also intimated that the Hon'ble TNERC's order in TA No. 1 to 9 dated: 28.12.2011 is applicable for the 9 nos. HT services mentioned in that order only.

(emphasis supplied)

The impugned order relies upon the proceedings dated 27.10.2010 which is extracted hereunder for better clarity:-

Lr. No. SE/CEDC/N/AEE/GL/F. Power cut/D/985/2010, dt. 27.10.2010.

Sir,

Sub:- Elecy - CEDC/North - Power cut - M/s. Sanmar Ferrotech Limited, HT A/c No. 1865 -Request to exempt during evening peak Hours - Reg.

Ref: 1. Lr. No. SE/CEDC/N/AEE/GL/F.Power Cut/D.742/2010, dt. 27.05.20210.

2. Your representation dt. 11.10.2010.

You are hereby permitted to run the Industry without peak hour restriction as being a continuous process Industry, subject to the following conditions, from the billing month of November, 2010:

1. You should work continuously for a period of 25 days in a month with an optimum demand of 7300 KVA. However, energy quota will be segregated according to the slots as applicable and billed slot-wise.

2. The balance days of the calendar month should be a continuous power holidays. During the power holiday period, you are eligible for 15% quota only and hence, you should not run your industry during power holidays, penalty will be imposed as per TNEB's R & C conditions. Apart from that, 48 hours notice will be served to your HT industry.

3. The optimum demand of 7300 KVA fixed above is final & any request for increase/decrease of optimum demand at any level of power cut will not be entertained.

4. The above fixed optimum demand quota is for TNEB power only.

5. Optimum demand quota is eligible for those consumers availing Board's power only. Hence, in case if you opt for 3rd party sales/CPP/Wind energy during the continuous working days, the quota fixed along with restricted working days and the peak hour relaxation as above will be cancelled and your quota will be fixed as per TNERC's guidelines.

(emphasis supplied)

The genesis of this letter, granting the benefit of Optimum Demand under the category of continuous process industry is the Memo dated 1.11.2008. On which there appears to be no dispute. It is only thereafter that by proceedings dated 31.8.2009 issued by the Tamil Nadu Electricity Board technical branch wherein in paragraph 5 which has already been extracted above, the new concept of Optimum Demand being made applicable to consumers availing Board's power only was introduced and that was continuously being followed by all the Superintending Engineers in various letters like one which is impugned in the present case viz., 1.6.2012 following the earlier letter dated 27.10.2010. Paragraph 5 of the letter No. SE/CEDC/N/AEE/GL/F. Power cut/D/985/2010, dated 27.10.2010 referred to above, which is referred to in the impugned letter, by the authorities, declined the benefit of Optimum Demand quota, in case the industry opts for third party sales/CPP power/Wind Energy during the continuous working days and also stated that peak hour relaxation will be cancelled. This concept which the Respondent's Board tried to impose on HT consumers who fall under a category of continuous process industries was negated by the Commission in TA Nos. 1 to 9 of 2011 by order dated 28.12.2011. According to the petitioner, no appeal has been filed against that order. The Respondents have also not produced any material to show that the above order has been reviewed or modified. Hence, the impugned order does not have the support of a valid memo or circular. The letter dated 27.10.2010 of the office of the Superintending Engineer is of no consequence after the order of the Commission.

15. In such view of the matter, the finding of the Commission is very specific in that, it clearly holds that the restriction imposed in Memo dated 31.8.2009 is arbitrary and discriminatory and therefore, the Respondent Board's arguments that Optimum Demand Concept should be given only to industries who opted for power of the Board was found to be erroneous and wrong. The Commission clearly holds that the Optimum Demand Concept should be made available to Open Access consumers who have their own captive power or purchase power from third party. Since the Court had referred the writ petitions pending before it to the Commission, the Commission gave a finding that the 9 consumers covered by the transfer application will be entitled to the said benefit.

16. Since the Commission does not deal with the claims of individual persons but interprets the Circular/Memo issued by the Respondent Board u/s 86(1)(f) of the Act, the question of applicability to the Commission's order to 9 persons covered by the order dated 28.12.2011 is totally based on a misconception of the Commission's order and the Electricity Act. The Commission clearly holds that the Circular Memo dated 31.8.2009 is discriminatory as a consequence it applies to all similarly placed. In view of the above finding, utilising the wind energy from captive generation or purchased from third party source cannot be a ground to deny the benefit of Optimum Demand Concept as provided under Memo dated 1.11.2008. The order of the Commission is applicable to all similarly placed HT consumers without discrimination. The reason given by the authority in the impugned proceedings stating that the order will be applicable only to those HT consumers who have approached the Commission is based on a misconception. In view of the above stated reasons, the impugned order is set aside and the writ petition is allowed. Consequently, M.P. Nos. 1 and 2 are closed.