

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
Order of the Commission dated this the 25th day of July 2024

PRESENT:

Thin M. Chandrasekar	...	Chairman
Thiru K.Venkatesan	...	Member
Thiru B. Mohan	...	Member (Legal)

D.R.P. No.20 of 2023

M/s. SEP Energy Private Limited,
G-409, Capstone, Sheth Mangaldas Marg.
Opp Chirag Motors, Ellisbridge,
Ahmedabad – 380006.

...Petitioner
MSA Partners
Advocate for the Petitioner

Vs

1. The Chief Engineer – NCES
Tamil Nadu Generation and Distribution
Corporation Ltd. (TANGEDCO)
2nd Floor, No. 144, Anna Salai
Chennai-600 002.
2. The Chief Financial Controller/Revenue
Tamil Nadu Generation and Distribution
Corporation Ltd. (TANGEDCO)
2nd Floor, No. 144, Anna Salai
Chennai-600 002.
3. The Superintending Engineer TANGEDCO
Tirunelveli Electricity Distribution Circle
Tirunelveli

4. Tamil Nadu Generation and Distribution
Corporation Ltd
Through its Managing Director NPKRR Maligai
6th Floor, Eastern Wing,
144, Anna Salai,
Chennai-600 002

..... Respondent
Thiru.N.Kumanan and
Thiru.A.P.Venkatachalapathy,
Standing Counsel for TANGEDCO

This Dispute Resolution Petition stands preferred by the Petitioner M/s.
SEPC Power Private Ltd., with a prayer to-

- (a) Hold and declare that TANGEDCO to compensate and pay SEP Energy an amount of Rs.2,53,97,360/- (Rs.1,13,67,502/- being the principal amount and Rs.1,40,29,858/- being interest calculated at the rate of 18% as of 15.11.2023) (Annexure F) towards the loss caused to SEP Energy by TANGEDCO.
- (b) Hold and direct TANGEDCO to pay interest at the rate of 18% on the principal amount (amounting to Rs.1,40,29,858/- as of 15.11.2023) computed from the date when the supply of electricity was effected by SEP Energy till the date of payment of compensation by TANGEDCO;
- (c) Award costs of the present petition in favour of SEP Energy and against TANGEDCO; and pass any such other and further reliefs as the Commission may deem just and proper in the facts and circumstances of the present case.

This Dispute Resolution Petition coming up for final hearing on 09.07.2024 in the presence of M/s MSA Partners, Advocate for the Petitioner and Thiru.N.Kumanan and Thiru.A.P.Venkatachalapathy, Standing Counsel for the Respondent upon hearing the arguments on both sides and on perusal of relevant material records and the matter having stood over for consideration till this date this Commission passes the following

ORDER

1. Contention of the Petitioner:-

1.1. The present petition under Section 86(1)(f) of the Electricity Act seeking adjudication of disputes including, but not limited to, consequential determination of loss caused to the Petitioner due to non-performance of obligations of the Respondent under Article 8(c) of the Power Purchase Agreement dated 6/05/2009 entered between the Parties.

1.2. The Petitioner (hereinafter referred to as the "**SEP Energy**") is a company existing under the provisions of the Companies Act, 2013 and having its registered office at G-409, Capstone, Sheth Mangaldas Marg, Opp. Chirag Motors, Ellisbridge, Ahmedabad 380 006. SEP Energy is wind power generating company under Section 2(28) of the Electricity Act, 2003 operating 2 x 250 MW of wind generating units at

SF No. 226, 1B of North Kavalakurichi Village, V.K. Pudur Taluk, Tenkasi District in the State of Tamil Nadu (hereinafter referred to as "**Generating Units**").

1.3. Respondents 1, 2 & 3 are employees of and represent the distribution licensee - Tamil Nadu Generation and Distribution Corporation Ltd, the distribution licensee in the State of Tamil Nadu. The Petitioner seeks remedy against the distribution licensee TANGEDCO and not against the officers in their Individual capacity.

1.4. The Respondent No. 4. Tamil Nadu Generation and Distribution Corporation Limited (hereinafter referred to as "TANGEDCO"), is a distribution licensee in the State of Tamil Nadu.

1.5. M/s Art Rubber Industries Limited is a company existing under the provisions of the Companies Act, 2013 having its registered office at H-1, MIDC, Ambad, Nashik- 422010 and was generating power from the Generating Units. Art Rubber Industries Limited agreed to sell power from its Generating Units and had entered into a power purchase agreement dated 06/05/2009 with Tamil Nadu Electricity Board for sale of such power (hereinafter "referred to as the **PPA**").

1.6. The Generating Units of the Art Rubber Industries Limited were subsequently acquired by the SEP Energy by way of an agreement to sale dated 30/03/2017.

1.7. After the enactment of the Electricity Act, 2003, the Tamil Nadu Electricity Board was unbundled in 2009, into separate subsidiary companies for distribution and transmission - with the Tamil Nadu Electricity Board being the parent company. Post reorganisation of the Tamil Nadu Electricity Board in 2008, the distribution business now stands transferred to TANGEDCO.

1.8. The PPA stipulates that the wind generator will have the following options with respect to utilisation of the wind energy generated by it:

- a. sale of power to TANGEDCO,
- b. sale to captive consumers using the distribution system of TANGEDCO; and
- c. sale to third party.

The PPA further stipulates that for migrating from sale to TANGEDCO to captive consumers, the generator must serve a notice of three months and thereafter the Parties will execute a wheeling agreement with TANGEDCO. Article 8(c) reads as under:

"8. Agreement Period

c. It is agreed that the change of utilization of wind energy, from sale to captive consumption may be done after giving three months notice by the Wind Generator to the Board and after executing energy wheeling agreement on the terms applicable as per order Nos. 2 and 3, dated 15.05.06 issued by the commission."

1.9. It is pertinent to note here it was only based on the abovementioned clause in the PPA that SEP Energy had purchased the wind power generating units from Art Rubber Industries Limited. SEP Energy along with several other wind generators invoked Article 8(c) of the PPA and served notices on TANGEDCO seeking migration from selling power to TANGEDCO to captive consumers. However, TANGEDCO vide proceedings dated 20/05/2017 refused the request of the wind generators and recorded its arbitrary reasons as under:

"In view of the steep raise of the RPO to be met by the TANGEDCO year after year (which is 14.00% for 2017-18 which includes 9% non-Solar RPO), in order to avoid shortage in meeting the RPO, to avoid purchase of Renewable Energy Certificate at high rate from the market and in order to avoid passing of the cost incurred to purchase the REC to the end consumers, in public interest, it is decided not to concede any request of the WEGs under Sale to Board category to migrate either to captive use or third party sale."

1.10. The arbitrariness and high-handed manner in which TANGEDCO wriggled out of its contractual obligations were challenged in the Hon'ble High Court of Madras by way of Writ Petition under Article 226 bearing number W.P. 1275/2018. In the meanwhile, as a result of purchase of wind energy generating units from Art Rubber Industries Limited, SEP Energy vide letter dated 22/02/2019 requested TANGEDCO for a name transfer as well as to approve the utility transfer. TANGEDCO did not respond to this letter.

1.11. The writ petitions of the wind generators including that of the SEP Energy was allowed and the proceedings dated 20/05/2017 were set aside in the Judgment dated 30/08/2019. The Hon'ble High Court held that:

"(c) Consequently, in view of permitting the petitioners to migrate from EPA to EWA, the proceedings dated 20/05/2017 of the first respondent deciding not to concede any request for migration is set aside."

1.12. The above Judgment dated 30/08/2019 was challenged by way of an appeal before the High Court of Madras which was disallowed by the Hon'ble Division Bench of the High Court vide Order dated 18/02/2020 in WA 4189, 4194, 4197, 4201, 4204 & 4205 of 2019. Further, the Hon'ble Supreme Court vide Order dated 24/09/2020 in SLPs 8513-8518/2020 upheld the decision of the Hon'ble High Court of Madras dated 30/08/2019.

1.13. It is pertinent to note here that there was no stay on the Order dated 30/08/2019 of the Hon'ble High Court of Madras and yet TANGEDCO did not comply with the said Order and continued to force SEP Energy to sell power at Rs. 2.90/- under the PPA which continued to cause substantial financial loss to the Petitioner. It was only on 25/11/2021, i.e., after more than 2 years of passing of the Order in favour of SEP Energy that TANGEDCO entered into an Energy Wheeling Agreement with SEP Energy in compliance with **Article 8(c) of the PPA**.

1.14. Through forceful procurement of power at Rs. 2.90/- unit in defiance with the Order dated 30/08/2019, TANGEDCO had caused a financial loss of SEP Energy to the tune of **Rs. 1,13,67,502/-** which must be compensated by TANGEDCO.

1.15. Despite the specific obligation of TANGEDCO and further despite the judicial orders, TANGEDCO did not execute the Energy Wheeling Agreement with SEP Energy thereby causing substantial financial loss. The Order dated 20/05/2017 clearly shows that this was solely to cause financial gain to TANGEDCO as availing power from market would have been expensive for TANGEDCO. Therefore, SEP Energy must be restituted to the financial position it would have been, if SEP Energy had been permitted to migrate from sale to board to captive consumers under Article 8(c) of the PPA.

1.16. As a consequence of the above action of TANGEDCO, SEP Energy has been put to a loss of **Rs. 1,13,67,502/-** as per the details attached hereto and marked as **Annexure F**. The quantum of loss is based on the difference in the tariff that SEP Energy was entitled to in case TANGEDCO has not acted in breach of the PPA, and the actual tariff that was paid to SEP Energy. This being a direct consequence of the action of TANGEDCO, the same is liable to be compensated by TANGEDCO to SEP Energy.

1.17. In view of the above, SEP Energy is filing the present petition seeking compensation on account of financial loss caused to it due to a material breach of the PPA by TANGEDCO.

1.18. The Petition is within the exclusive jurisdiction of the Commission under Section 86 and other applicable provisions of the Electricity Act, 2003. The supply from the SEP Energy's generating station is wholly within the State of Tamil Nadu and therefore within the exclusive jurisdiction of the Commission.

1.19. The present petition is not barred by limitation. The cause of action arisen continued to due to continuous non-compliance of the directions of the Hon'ble High Court of Madras till the date of signing of Energy Wheeling Agreement - i.e, 25/11/2021. The petitioner reserves its right to amend, modify, add any pleadings if the situation so demands and subject to permission of the Commission.

2. Counter Affidavit filed on behalf of the Respondents:-

1.2. The generating units involved in the present lis were owned by M/s Art Rubber Industries Limited who had executed a Energy Purchase Agreement dt.06.05.2009 "hereinafter referred to as **PPA**" with the Respondent No.1 to sell power from its generating units.

2.2. The Petitioner has annexed the PPA dt. 06.05.2009 which is not the model PPA approved by this Hon'ble Commission. For the purposes of adjudicating the disputes the model PPA has been considered by the Hon'ble High Court and the Hon'ble Supreme Court as well.

2.3. As per Clause 8(b) of the PPA, both the parties had the option of exiting in case of a violation with three months notice to the other party.

2.4. As per the Clause 6(b) of PPA, 1st Respondent was liable for an interest at the rate of 1% per month i.e. 12% p.a. that for any delayed payment beyond 60 days. The petitioner herein vide an agreement to sale dt.30.08.2017 had acquired all the Generating Units owned by M/s Art Rubber Industries Limited.

2.5. The Petitioner had invoked Clause 8(b) of the PPA and served notices on 1st Respondent for seeking migration to captive consumption which was refused by the 1st Respondent vide letter dt. 20/05/2017 citing the steep raise in the RPO to be met by 4th Respondent.

2.6. Subsequently, the Petitioner instead of invoking the Clause 9 of the PPA which mandated it to approach the Commission for adjudication of such disputes under Section 86(1)(f) of the Electricity Act, 2003; the Petitioner chose to seek their

remedy by invoking the Hon'ble Madras High Court's jurisdiction under Article 226 by filing WP(C) No. 1275 of 2018.

2.7. By virtue of the WP(C) No. 1275 of 2018, the Petitioner herein preferred the following reliefs:

- i. dispense with production of the original of the impugned proceedings bearing (Pet) TANGEDCO Proceedings (CMD) No. 266 dated 20.05.2017 issued by the 1st Respondent.
- ii. grant an order of interim stay of the impugned proceedings bearing (Pet) TANGEDCO Proceedings (CMD) No. 266 dated 20.05.2017 issued by the 1 Respondent; and all further proceedings pursuant there to pending disposal of the above writ petition.
- iii. grant an order of interim injunction restraining the restraining the Respondent's; their subordinates, men and agents from in any manner seeking to act pursuant to the impugned proceedings bearing (Pet) TANGEDCO Proceedings (CMD) No. 266 dt. 20.05.2017 issued by the 1 Respondent, pending disposal of the above writ petition.
- iv. Grant an order of interim direction, directing the 2nd Respondent to process the Petitioner's application dt.31.08.2017 requesting for Name Transfer and Utility Change from 5th Respondent to the Petitioner with

Wheeling and Banking arrangements with the Petitioner's group concerns, pending disposal of the above Writ Petition;

- v. Issue a Writ of Certiorarified Mandamus or any other Writ, Order or Direction in the nature of Writ of Certiorarified Mandamus calling for the records of the impugned proceedings bearing (Pet) TANGEDCO Proceedings (CMD) No. 266 dt.20.05.2017 issued by the 1 Respondent and quash the same as being arbitrary and illegal and consequently direct the Respondents to permit the application for name transfer and migration filed by the Petitioner dt. 31.08.2017 and pass such further or other orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and thus render justice.

2.8. The Hon'ble High Court of Madras vide order dt.30.08.2019 allowed WP(C) No. 1275 of 2018 along with the Writ Petitions filed by other generators seeking similar reliefs holding the following:

"29. Thus, for the reasons stated above, the Writ Petitions deserve to be allowed with the following directions;

- i. The Respondents/TANGEDCO are directed to permit the petitioners to switch over to captive consumption so as to use the same for their own industry;*

- ii. *The Respondents/TANGEDCO are directed to settle the respective dues to the petitioners as per their respective invoices raised by them, along with interest as per Clause 6(b), within a period of two months from the date of receipt of a copy of this order;*
- iii. *Consequently, in view of permitting the petitioners to migrate from EPA to EWA, the proceedings dated 20.05.2017 of the first respondent deciding not to concede any request for migration is set aside."*

2.9. The Respondents herein preferred WA No. 4197 of 2019 challenging the order dt. 30.08.2019 passed by the Ld. Single Judge along with other Writ Appeals in connected matters.

2.10. The Hon'ble Division Bench of the Madras High Court vide order dt.18.02.2020, dismissed the Writ Appeals filed by the Respondents holding the following:

"10. In view of the above, we do not find any infirmity in the order of the learned Single Judge and we dismiss the Writ Appeals. However, we enhance the time by another two months from today to repay the amounts due to the respondents/ writ petitioners. No Costs. Consequently, connected miscellaneous petitions are closed."

2.11. Subsequently, the Respondents preferred to file an SLP before the Hon'ble Supreme Court against the order dt.18.02.2020 which was dismissed by the Hon'ble Supreme Court vide order dt.24.09.2020.

2.12. The present Miscellaneous Petition filed by the Petitioner is nothing but an afterthought and an abuse of process of law. The Petitioner while invoking the Writ Jurisdiction of the High Court to seek resolution for its disputes with the Respondents herein did not claim any compensation and interest before the Hon'ble High Court.

2.13. The reliefs sought by the Petitioner in the present Miscellaneous Petition is of a consequential nature which ought to be raised by the Petitioner before the Hon'ble High Court at the first instance itself because it arises from the same cause of action.

2.14. The present Miscellaneous Petition is barred by doctrine of constructive res judicata enshrined under Order 2 Rule 2 of the Civil Procedure Code since the Petitioner omitted the consequential relief while approaching the Hon'ble High Court of Madras with respect to compensation for loss caused to the Respondent due to alleged delay by the Respondents herein.

2.15. As per the Constitutional Bench of Hon'ble Supreme Court of India in **Gurbux Singh vs. Bhooralal (1964) 7 SCR 831**, it was postulated that for a plea of a Bar under Order 2 Rule 2(3) of CPC should succeed the defendant who raises the plea must make out:

- i. That the second suit was in respect of the same cause of action as that on which the previous suit was based.
- ii. That in respect of that cause of action the plaintiff was entitled to more than one relief.
- iii. That being entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed.

2.16. The cause of action before the Hon'ble High Court at the Writ Petition stage was that the Respondents had refused to grant permission to the Petitioner for exit from the PPA dt. 06.05.2009; switch to different utility vide proceedings dt. 20.05.2017. The Petitioner was very well aware of the fact that due to subsequent litigation, the proceedings dt. 20.05.2017 will take some time to be quashed due to which the Petitioner may suffer loss due to non-payment of its dues by the Respondents herein but still chose to omit the relief seeking any compensation arising out of the same non-payment of dues and delay in switching of utility. Therefore, the present petition is not maintainable and deserves to be dismissed at this ground alone.

2.17. The Hon'ble Supreme Court in **Forward Construction Co. vs. Prabhat Mandal (Regd.) Andheri and Others (1986) 1 SCC 100** while explaining the concept of res judicata, the Hon'ble Court opined that an adjudication is conclusive

and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence.

2.18. The Hon'ble Supreme Court in **Bharat Amratlal Kothari and Anr. vs. Dosukhan Samadkhan Sindhi and Ors. (2010) 1 SCC 234** it was held that every petition under Article 226 of the Constitution must contain a relief clause and when petitioner is entitled to or is claiming more than one relief, he must pray for all the reliefs. If the plaintiff omits, the except with the leave of the court, to sue for any particular relief which he is entitled to get, he will not afterwards be allowed to sue in respect of the portion so omitted or relinquished. Furthermore, the Court opined that though a High Court has power to mould reliefs to meet the requirements of each case, that does not mean that the draftsman of a writ petition should not apply his mind to the proper relief which should be asked for and throw the entire burden of it upon the court.

2.19. The Petitioner not only omitted their consequential relief, but also has attempted to split its relief before the Hon'ble High Court and this Commission.

2.20. Subsequent to the dismissal of the Respondents SLP by the Hon'ble Supreme Court, the subject matter was placed for obtaining approval from the Board of Directors of the Respondent for issuing migration orders to the Petitioner. That subsequently after the obtaining the approval from the Board of Directors of the Respondents on 05.08.2021, migration orders were issued to the Petitioner herein on 03.12.2021 and a fresh Energy Wheeling Agreement executed on 21.01.2022 and the Petitioner has been wheeling power to their captive use.

2.21. Post execution of the Energy Wheeling Agreement dt. 21.01.2022 the Petitioner has been happily wheeling power to their captive use and did not raise any claim of such compensation to the 1 Respondent. There is not even a single notice or communication raised by the Petitioner pertaining to so called loss caused and such claim of compensation.

2.22. In order to comply with the court orders, on 05.04.2022 the Respondents had settled all the wind energy payments due to the Petitioner till the date of termination of the PPA dt. 06.05.2009 along with the 12% p.a. interest amount of Rs. 6,92,964/- for the delay in making payments from 2017-18 to 2021-22 in compliance of the Clause 6(b) of the PPA.

2.23. It is pertinent to mention herein that the Petitioner neither objected to such payment nor disputed the amount paid by the Respondents herein which makes it

evident that the Petitioner had accepted the payments made by the Respondents on account of such delay and the matter was already put to quietus.

2.24. The Petitioner's claim of 18% interest is untenable and not sustainable in law since the Clause 6(b) of the PPA clearly stipulates that the 1st Respondent is liable to 1% per month i.e. 12% p.a. as interest for the delayed payments.

2.25. The Petitioner is seeking directions which are beyond the scope of PPA terms and conditions since the Clauses of the PPA do not envisage payment of 18% interest. Therefore, the Commission cannot grant such orders which are not envisaged i.e. are beyond the terms of the PPA which was entered by the parties which mutual consent.

2.26. The Hon'ble Supreme Court in **Gujarat Urja Vikas Nigam Limited vs. EMCO Limited and Anr. (2016) 11 SCC 182** has held that the terms of the PPA have a binding effect and the terms of the PPA are to be strictly followed in their entirety. The relevant paras are reproduced hereunder:

"37. But the availability of such an option to the power producer for the purpose of the assessment of income under the IT Act does not relieve the power producer of the contractual obligations incurred under the PPA. No doubt that the first respondent as a power producer has the freedom of contract either to accept the price offered by the appellant or not before the PPA was entered into. But such freedom is extinguished after the PPA is entered into.

38. The first respondent knowing fully well entered into the PPA in question which expressly stipulated under Article 5.2 that "the tariff is determined by the Hon'ble Commission vide tariff order for solar based power project dated 29-1-2010"

2.27. That the Hon'ble Supreme Court in the case of **Gujarat Urja Vikas Nigam Limited vs. Solar Semiconductor Power Company (India) Pvt Ltd and Anr. (2017) 16 SCC 498** has opined that the State Commission in its inherent jurisdiction cannot substantially alter the terms of the contract between the parties so as to prejudice the distribution licensee and ultimately the consumers. That it was further held that the parties are bound to the terms of the PPA entered by mutual consent.

The relevant extract is reproduced herein below:

"60. In the case at hand, rights and obligations of the parties flow from the terms and conditions of the Power Purchase Agreement (PPA). PPA is a contract entered between GUVNL and the first respondent with clear understanding of the terms of the contract. A contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties. As per the terms and conditions of the PPA, to have the benefit of the tariff rate at Rs 15 per unit for twelve years, the first respondent should commission the solar PV power project before 31-12-2011. It is a complex fiscal decision consciously taken by the parties. In the contract involving rights of GUVNL and ultimately the rights of the consumers to whom the electricity is supplied, the Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of GUVNL, and ultimately the consumers

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Respondent 1 is bound by the terms and conditions of PPA entered into between the Respondent 1 and the Appellant by mutual consent and that the State Commission was not right in exercising its inherent jurisdiction by extending the first control period beyond its due date and thereby substituting its view in the PPA, which is essentially a matter of contract between the parties."

2.28. The Commission cannot issue orders contrary to the terms of the agreement between the parties with respect to payment of 18% interest since the Clause 6(b) of the PPA provides for 12% p.a. The Hon'ble Supreme Court in the case of **Union of India vs. Manraj Enterprises (2022) 2 SCC 331** has held that the Arbitrator being the creature of contract has no power to award interest, contrary to the terms of the agreement/contract between the parties.

2.29. All claims of the Petitioner are false and untenable and rather infructuous since the Petitioner has already paid the interest as per Clause 6(b) of the PPA at 12% p.a.

2.30. The Commission having regulatory functions has to strike a balance between the distribution licensee and the wind energy generators. That any orders directing to pay such compensation and excessive interest would encourage other wind energy generators to file similar petitions before the Commission which would bring substantial damage to the financial conditions of the 4th Respondent. The petition is

not legally maintainable and filed for enriching at the cost of the respondents and the general public and hence may be dismissed as devoid of merits.

3. Rejoinder on behalf of the Petitioner to the Counter Affidavit filed on behalf of the Respondents:-

3.1. The contents of the Petition are reiterated and the same may be read as a part of the present Rejoinder, the contents whereof are not repeated for the sake of brevity.

3.2. The Petitioner craves leave to reply to the issues raised by the Respondent, rather than a para-wise reply. Save as otherwise expressly admitted in the present Rejoinder, the contentions and averments of the Respondent in seeking to contest the present Petition are wrong and are denied.

3.3. The contention of the Respondent to the above effect is wholly irrelevant for adjudication of the present Petition. The Respondent has contended that the PPA is not in line with the model PPA that was considered by the Hon'ble High Court of Madras and the Hon'ble Supreme Court of India.

3.4. The Petitioner and similarly placed generators has approached the Hon'ble High Court of Madras not on the question of interpretation of the PPA, but on the

validity of the proceedings dated 20.05.2017 (Annexure B pages 21-22 of the Petition) issued by the Respondent stating that any request of wind energy generators under sale to board category, to migrate either to captive use or third party sale is not being conceded The Hon'ble High Court of Madras vide Order dated 30.08.2019 in W.P No. 1275 of 2018 (Annexure C@ pages 23-54 of the Petition) set aside the proceedings dated 20.05.2017 and held as under:

"29. Thus, for the reasons stated above, the writ petitions deserve to be allowed with the following directions,

(a) the respondents/TANGEDCO are directed to permit the petitioners to switch over to captive consumption so as to use the same for their own industry:

(b) the respondents/TANGEDCO are directed to settle the respective dues to the petitioners as per their respective invoices raised by them, along with interest as per Clause 6(b), within a period of two months from the date of receipt of copy of this order.

(c) Consequently, in view of permitting the petitioners to EPA to EWA, the proceedings dated 20.05.2017 of the first respondent deciding not to concede any request for migration is set aside."

3.5. The Petitioner had also independently approached the Hon'ble High Court of Madras and the High Court passed a common order disposing off the writ petitions of the Petitioner and similarly placed generators. Further, the clause based on which the above directions were issued to the Respondent is pari materia with Article 8 (c) of the PPA. Under both of the above clauses, the parties had the option to convert the energy purchase agreement into an energy wheeling agreement after giving

three months' notice to the Respondent. The Respondent, having acted in terms of the PPA, cannot seek to wriggle out of its obligations citing hyper technical issues.

3.6. Without prejudice to the above contention, the PPA was originally executed by M/s. Art Rubber Industries Limited with the TNEB. The PPA has been executed by the Superintending Engineer / Tirunelveli Electricity Distribution Circle, Tirunelveli on behalf of TNEB and the same has, at no point in time, been disputed by the Respondent. Even on an independent interpretation of Article 8 (c) the Petitioner must have been permitted to migrate to captive consumption as per its request and the Respondent must have executed a wheeling agreement with the Petitioner in terms of the PPA. This right of the Petitioner has been upheld by the Hon'ble High Court and cannot be disputed by the Respondent at this juncture.

3.7. Admittedly, the Writ Appeal against the Order of the Ld. Single judge dated 30.08.2019 was dismissed vide Order dated 18.02.2022 in W. A. No. 4189 of 209 & batch and the Special Leave Petition against the Order in Writ Appeal was dismissed by the Hon'ble Supreme Court vide Order dated 24.09.2020 in SLP Nos. 8513-8518/2020.

3.8. The Respondent has needlessly pointed out that the Petitioner had approached the Hon'ble High Court of Madras instead of approaching the Commission under Article 9 of the PPA. The Petitioner had approached the Hon'ble

High Court of Madras invoking its jurisdiction under Article 226 of the Constitution of India to issue a writ of Certiorarified Mandamus to call for the proceedings of the Respondent dated 20.05.2017 and quash the same as illegal and arbitrary and process the application of the Petitioner for name transfer. The contentions of the Respondent are thus wholly irrelevant for the purposes of the present proceeding. The bar under order II Rule 2 of the Code of Civil Procedure does not apply to the present petition

3.9. The present petition is barred by Order II Rule 2 as the Petitioner failed to claim compensation in the proceedings before the Hon'ble High Court. However, the same is incorrect as, as stated hereinabove, the Petitioner had approached the Hon'ble High Court of Madras challenging the proceedings issued by the Respondent and not on the issue of enforcement of the PPA.

3.10. The claim of the Petitioner in the writ petition were independent and exclusive of the claim in the present Petition and could have formed a part of or subsumed the claim in the present petition as envisaged under Order II Rule 2 of the Civil Procedure Code. The same cannot, thus, be considered to be have been relinquished or omitted.

3.11. It is settled law that for bar under Order II Rule 2 to operate, it is the burden of the party alleging such bar to establish the following position:

- a. That, the second suit is in respect of the same cause of action as that on which the previous suit was based;
- b. That, in respect of that cause of action the plaintiff was entitled to more than one relief; and
- c. That being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed.

3.12. The Respondent having miserably failed to establish the above position cannot seek to escape liability by stating that the present proceedings are barred under Order 11 Rule 2 of the Code of Civil Procedure, 1908. Hence the reliance placed on the decisions in the case of Gurbux Singh v Bhooralal. Forward Construction Co. v. Prabhat Mandal (Regd.). Andheri and Ors, and Bharat Amcatlal Kothari and Anr. v. Dosukhan Samadkhan Sindhi and Ors, are wholly incorrect.

3.13. The bar under Order II Rule 2 thus does not operate in respect of the present Petition as the nature of the proceedings and remedies claimed in the two proceedings are distinct and independent of each other. The Respondent has stated that the Petition must have pre-empted that legal proceedings will take time and must have claimed and any all legal reliefs that the Petitioner is likely to become entitled to. The above position is incorrect.

3.14. Even after the Writ Petition was disposed off by the Ld. Single Judge, the Respondent, despite there being no stay against the order of the Ld. Single Judge, did not execute an energy wheeling agreement with the Petitioner immediately. The energy wheeling agreement was executed as late as on 21.01.2022 and the Respondent has no justification for such delay in execution of the same. Stating that the present proceeding is barred by Order II Rule 2 would mean that the Petitioner must have preempted that the Respondent will be in default and will not perform its obligations under the PPA in a timely manner/not comply with the Order of the Hon'ble High Court.

3.15. While the Respondent has made payment towards the energy supplied by the Petitioner which is due and payable to it under the PPA, after the Order in the Writ Appeal, the Petitioner in order to receive the amount rightfully accrued to it, had to give a forced discount of Rs. 3,53,644/-

3.16. Further, the Respondent has not considered the amount the Petitioner would have received had the Respondent complied with the terms of the PPA and allowed the Petitioner to migrate from sale to board to sale to captive consumers at the request of the Petitioner itself. The Petitioner has suffered significant losses at the instance of the Respondent and is entitled to be rightfully compensated for the same

3.17. The clause 6 (b) of the agreement relied on by the Respondent does no form part of the PPA between the Petitioner and the Respondent and the same is thus not applicable herein. The Respondent has made payment of the invoices with a delay of over 500 days and the Petitioner is rightfully entitled to be compensated for the time value of the money receivable by it. The interest on delayed payment was also made with a delay of over 1,000 days. As claimed by the Respondent, the delayed payment along with along with interest was not made at the same time.

3.18. In terms of the decision in the case of Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Pvt. Ltd. and Anr, relied on by the Respondent, the Respondent is bound by the terms of the contract i.e., the PPA and consequences that ensue for non-performance of the same.

4. Arguments advanced on either side heard. Evidence tendered along with the pleadings in the form of documents analysed. Relevant provisions of the Electricity Act, 2003, Regulations and the Code of Civil Procedure considered.

5. The points for determination that arise in the present are enumerated hereunder:-

- 1) Whether the petition is barred by virtue of the provisions of Order II Rule (2) CPC as contended by the respondents?

- 2) Whether the petitioner is entitled to claim compensation from the respondent for the alleged breach of contract covered under the PPA dated 06.05.2009?
- 3) Whether the petitioner is entitled to any relief?

6. **Findings of the Commission:-**

6.1. **Point No.1:-**

The categorical stand taken by the respondents in the counter-affidavit and in the course of advancing arguments is that since the claim for compensation, which was very much available to the petitioner when proceedings were initiated by the petitioner before the Hon'ble High Court In W.P.No.1275 of 2018 challenging the proceedings of TANGEDCO dated 20.05.2017, was deliberately omitted to be claimed without the leave of the Hon'ble High Court, the present claim for compensation is barred as per the provisions of Order II Rule 2 CPC and as such the petition deserve to be dismissed in limine.

6.2. To fortify the above said technical plea, reliance was placed by the respondents counsel on the following judgements of the Hon'ble Supreme Court.

- a) **Gurbux Singh
Vs.
Bhooralal (1964) 7 SCR 831.**

b) Forward Construction Company

Vs.

Prabhat Mandal (Regd.) Andheri and Others

(1986) 1 SCC 100.

6.3. The learned counsel for the petitioner, countering the above referred legal defense raised on the side of the respondents, submitted that as the claim of the petitioner in the writ petition and the present petition are independent and exclusive, the bar envisaged under Order II Rule 2 of the CPC is not applicable to the instant case.

6.4. The necessary discussions that will have to follow may be initiated by extracting the provisions of Order II Rule 2 CPC.

“2. Suit to include the whole claim- (1) *Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.*

(2) **Relinquishment of part of claim-** *Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*

(3) **Omission to sue for one of several reliefs –** *A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.*

Explanation- For the purpose of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action”

6.5. Order II Rule 2(1) requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However the plaintiff has an option to relinquish any part of his claim if he chooses to do so.

6.6. Order II Rule 2 (2) contemplates a situation where the plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts Order 2 Rule 2 (2) make it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished.

6.7. Order II Rule 2 (3) contemplates a situation where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted, except in a situation where the leave of the court had been obtained.

6.8. A conjoint reading of the provisions of Sub-Rule 2 and 3 of Rule 2 of Order II the CPC make it abundantly clear that the aforesaid two sub-rules of Order II Rule 2 contemplate two different situations, namely, where a plaintiff omits or relinquishes a part of the claim which he is entitled to make and secondly, where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It

is only in the latter situations where the plaintiff can file a subsequent suit seeking the relief omitted proved that at the time of omission to claim the particular relief he had obtained leave of the court in the first suit.

6.9. The object behind the enactment of Order II Rule 2 (2) and (3) of the CPC is not far to seek. The rule engrafts a laudable principle that prohibits / discourages vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to the plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the Court which leave, naturally will be granted upon due satisfaction and for good and sufficient reasons.

6.10. This Commission deem it seemly that the above referred cardinal principles of law propounded by our Apex Court in a catena of cases have to be borne in mind to evaluate the merit of the defense projected by the respondents that the present petition is barred as per the provisions of sub-rule 2 and 3 of Rule 2 of Order II CPC.

6.11. The cause of action which prompted the petitioner to approach the Hon'ble High Court seeking remedy by filing the writ petition W.P.No.1275 of 2018 is the proceedings of the 1st respondent dated 20.05.201 whereby the 1st respondent declined to honour the request of the petitioner for migrating from sale to Board category to either captive consumption or third party sale. The petitioner in the writ

petition interalia had prayed for an order to call for the records of the impugned proceedings (CMD) No. 266 dated 20.05.2017 issued by the 1st respondent and quash the same being arbitrary and illegal. Pertinent here to point out that the relief of claiming compensation in regard to the alleged financial loss suffered by the petitioner as a result of the arbitrary refusal of the 1st respondent in acceding to the request of the petitioner for migration was very much available to the petitioner on the basis of the cause of action set out in the writ petition. But, admittedly the petitioner did not evince any interest in claiming compensation from the respondents in the writ petition.

6.12. In the instant petition also the cause of action set out in the petition for claiming compensation is the proceedings dated 20.05.2017 issued by the 1st respondent and consequent delay in according permission for migration from Sale to Board to captive consumption.

6.13. The Hon'ble High Court, Madras vide Order dated 30.08.2019 allowed the writ petition No.1275 of 2018 preferred by the petitioner and a host of writ petitions filed by the identically placed generators. The Hon'ble High Court while permitting the petitioner to migrate from Energy Purchase Agreement to Energy Wheeling Agreement set aside the proceedings of the 1st respondent dated 20.05.2017.

6.14. Aggrieved by the said order, the respondents in W.P.No.1275 of 2018 and other connected writ petitions, preferred Writ Appeal No.4197 of 2019 challenging the order of the learned Single Judge. The Hon'ble Division Bench of Madras High Court vide Order dated 18.02.2020 dismissed the Writ Appeal No.4197 of 2019 preferred by the respondents herein. While dismissing the Writ Appeal, the Hon'ble Division Bench was pleased to grant two months time to repay the amounts due to the writ petitioners, which included the present petitioner.

6.15. Subsequently, the respondents herein preferred an SLP before the Hon'ble Supreme court challenging the order of the Division Bench passed in W.A. No.4197 of 2019. But the same came to be dismissed by the Hon'ble Supreme Court through order dated 24.09.2020. After the dismissal of SLP, approval for migration was obtained from the Board of Directors of TANGEDCO on 05.08.2021 and migration orders came to be passed in favour of the petitioner on 03-12-2021. As a sequel, a fresh Energy Wheeling Agreement came to be executed on 21.01.2022 between TANGEDCO and the petitioner and the petitioner started wheeling power to its captive users.

6.16. From the evidence placed on record it is manifest that the respondents were pursuing the legal proceedings in all earnest and the same attained finality when the

SLP preferred by the respondents came to be dismissed by the Hon'ble Supreme Court on 24.05.2020.

6.17. Records disclose that subsequent to the dismissal of SLP, as the respondents did not comply with the order of the Hon'ble High court dated 18.02.2020 passed in W.A.No.4197 of 2019, the present petitioner preferred contempt petition being C.P.No.668 of 2022 before the Hon'ble High Court, Madras for not only punishing the respondents but also for payment of dues to the tune of Rs.11,10,043/- for the period from July 2020 to April 2021. Vide Order dated 22.06.2022, the Hon'ble High court was pleased to close the contempt proceedings as the counsel for the petitioner reported compliance of the order by the respondents.

6.18. Records disclose that the present petition stand preferred by the petitioner almost a year after the passing of the order in the contempt petition. The inordinate delay in preferring the claim for compensation supports the contention of the respondents that the claim for compensation now raised is an afterthought one.

6.19. Be that as it may, the bar of Order II Rule 2 CPC is based upon the principle of waiver to avoid multiplicity of litigation and is applicable to all civil suits. As per the rigour of the provisions of Order II Rule 2 CPC the left out cause of action cannot be pursued in a subsequent proceedings. In the instant case the cause of action for

claiming compensation was left out by the petitioner in the writ proceedings initiated by it in W.P.No.1275 of 2018. Since the claim of compensation is incidental / consequential to the cause of action set out in the writ petition, as per settled law, the left out cause of action cannot, as rightly contended by the respondents, be pursued by initiating separate proceedings such as the present one.

6.20. The cardinal requirement for the application of the provisions of sub-rule 2 and 3 of Rule 2 of Order II CPC that cause of action in the present proceedings is the same as in the proceedings initiated by the petitioner in W.P.No.1275 of 2018 stand satisfied and as such this Commission decides that the defense raised by the respondents that the present petition is barred as per the provisions of Order II Rule 2 (2) and (3) of CPC is very much sustainable under law and facts.

Accordingly this point is decided.

7. **Point No.2:-**

7.1.) Article 9 of the Power Purchase Agreement dated 06.05.2009 entered into by the Petitioner and the Distribution Licensee TANGEDCO read as follows:-

“If any dispute or difference of any kind whatsoever arises between the parties relating to this agreement, it shall, in the first instance, be settled amicably by

the parties failing which either party may approach the Commission for the adjudication of such disputes under Section 86 (1) (f) of the Electricity Act 2003.”

7.2. Quite strangely, the petitioner instead of approaching the State Electricity Regulatory Commission to ventilate its grievance that arose out of the PPA dated 06.05.2009, for inexplicable reasons had approached the Hon'ble High Court for redressal invoking the provisions of Article 226 of the Constitution of India. Even though the jurisdiction of the Hon'ble High court in entertaining the writ petition preferred by the petitioner in regard to a dispute covered under the Electricity Act 2003 which squarely fall within the adjudicatory domain of the State Electricity Commission constituted as per Sec 82 of the Act cannot be questioned at this stage, since the petitioner had omitted to claim the relief of compensation without leave of the Hon'ble High Court as per the mandate of sub-rule 3 of Rule 2 of Order II CPC, the claim for compensation made in the present petition is not legally sustainable. Having exercised its choice of Forum, the petitioner now cannot approach the Commission for the part of the relief which it omitted to claim in the writ proceedings. This Commission therefore decides that the petitioner is not entitled to any compensation.

Accordingly, this point is answered.

8. **Point No.3:-**

In the light of the findings rendered by this Commission on Point No.1 and 2, this Commission decides that the petitioner is not entitled to any relief, much less the relief of compensation.

Accordingly this point is determined.

In the result the petition is dismissed. However there will be no order as to cost.

(Sd.....)
Member (Legal)

(Sd.....)
Member

(Sd.....)
Chairman

/True Copy /

**Secretary
Tamil Nadu Electricity
Regulatory Commission**