

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 142 of 2007

Dated: 13th February, 2009

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member

IN THE MATTER OF:

Southern Spinners and Processors Ltd.
(Subsidiary of Fenner India) Ltd., Textile Division),
Sarada College Main Road,
Salem- 636007, Tamil Nadu. ... Appellant

Versus

1. The Chief Engineer (Non-Conventional Energy Sources),
Tamil Nadu State Electricity Board,
Anna Salai, Chennai-600 002.
 2. The Superintending Engineer,
Tamil Nadu Electricity Board,
Dharmapuri Electricity Distribution Circle,
Dharmapuri- 635 001, Tamil Nadu
 3. Tamil Nadu Electricity Regulatory Commission
Chennai, Tamil Nadu ... Respondents

Counsel for the Appellant(s) : Mr. R.S.Pandiyaraj

Counsel for the Respondent(s): Mr. Ramji Srinivasan with
Ms. Vartika Sahay for Respns.
1, 2 & 3

JUDGMENT

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

Southern Spinners and Processors Limited, who owns Captive Generation Plant comprising of six wind mill generators, is the Appellant herein.

2. Aggrieved by the Order passed by the State Commission of Tamil Nadu dated 12/09/07 rejecting their prayer to direct the Respondents, the Tamil Nadu Electricity Board (for short 'Board') to pay 75% of the sale amount for the unutilized banked wind energy, the Appellant has filed this Appeal.

3. The short facts are as follows:

- (i) The Appellant's spinning mill manufacturing yarn is situated at Papireddipatti, District Dharmapuri, Tamil Nadu. In order to have uninterrupted production, the Petitioner set up six windmills at Dharmapuri which are under the jurisdiction of the Board;
- (ii) Two types of agreements were entered into by the Appellant with the Board for the generation of electricity in windmills:
 - (a) Power Purchase Agreement (PPA) was entered in respect of windmills SC No. 169 and 170 under which the Board has agreed to purchase electricity generated in the said windmills which is surplus to the requirement of appellant and the sale of surplus energy instead of banking with the Board.

(b) In respect of the wind generators in SC No. 75, 167, 189 and 191 agreements were entered into with the Board to bank the surplus energy for consumption.

4. With reference to these agreements as well as future agreements, the State Commission was approached and the State Commission, by the order dated 15/5/06, held that for the supply of any surplus energy banked as on 31st March, the windmill owners may claim from the electricity board @ Rs. 2.75 per unit for the 75% of the surplus energy.

5. On the implementation of the terms of those two agreements referred to above, and also for seeking implementation of the Order dated 15/5/06, the Appellant demanded the cost in respect of the units sold to the Electricity Board under the agreements. The Respondent Board sent a reply rejecting the said request.

6. Hence, the Appellant was constrained to approach the State Commission of Tamil Nadu seeking for the following two directions to be issued to the Board which are as under:

(i) Direct the Respondent Board to implement the order No. 3 of 15/5/06 passed by the State Commission in connection with the unutilized portion of banked energy so as to enable the petitioner to get 75% of the rate for 547,945 units of unutilized banked wind energy as on 31/3/07 generated from SC No. 75, 167, 189 and 191.

(ii) To direct the Respondent Board to pay the cost of Rs. 453,807 units of electricity available for adjustment or consumption deemed to have been purchased by the State Electricity Board as per the agreement with respect to the wind generators in SC Nos. 169 and 170.

7. The State Commission, after issuing notice to the Respondents enquired into the issues relating to the aforesaid prayers. The Respondent Board raised objection against both the prayers. However, the State Commission ultimately rejected the first prayer relating to the payment of 75% of the compensation and allowed second prayer with reference to the payment of the cost of 453,807 units of electricity as it was deemed to have been purchased by the State Electricity Board.

8. Assailing the rejection Order in respect of the first prayer, the Appellant has filed this appeal. The Learned Counsel for the Appellant would make the following contentions, in order to establish that the rejection of its prayer by the State Commission is not valid in law. The gist of the submissions made by the Counsel for the Appellant is as follows:

a. ***In June 2007, the Appellant's factory was not able to consume the entire units produced in their windmills due to the sudden strike announced by the employees of the factory. Therefore, they transmitted all the units produced in their windmills to the respondents' transmission grid at the production points and banked the same with the respondents. Since electricity cannot be stored, these banked units were sold by the***

Respondents TNEB then and there, and the revenue has been collected by the Respondents.

- b. As per the earlier order No. 3/6 dated 15/5/06 passed by the State Commission, the Appellant is entitled to the benefit of 75% of the unutilized units banked as on 31/3/07. Despite this, the State Commission by the impugned order dated 12/9/07 denied the benefit arising out of the Order No. 3/6 dated 15/5/06 quoting the earlier agreements. This is clearly wrong because the order No. 3/06 dated 15/5/06 is having a statutory force issued under the Electricity Act 2003 and it supersedes the terms and conditions of the earlier agreements entered into between the parties in so far as the issue relating to unutilized units banked with the Respondents is concerned.***
- c. The very intention of the order dated 15/5/06 passed by the State Commission is to recover the loss of wind power producers in the event of having unutilized banking units as on 31st March every year and that is why the State Commission ordered to give 75% of such banked unutilized after it is sold to the Respondents TNEB in Clause VI of the Order.***
- d. When the State Commission by the impugned order dated 12/9/07 accepts the first issue to order payment of cost of unutilized units by treating them as sold on the basis of the earlier order of the State Commission dated 15/5/06, it is not open to the State Commission to deny the benefit of 75% of the unutilized banked units to the Appellant. On the basis of the same order, the State Commission has gone wrong in holding that the benefit would go only to the future and fresh agreements as per Clause IV of the Order dated 15/5/06 and as there is no fresh agreement, the Appellant is not entitled to the benefit relating to 75% of the rate as compensation.***
- e. The Appellant is not seeking any benefit under Clause IV of the Order dated 15/5/06 which stipulates entering into fresh agreements regarding changing of arrangement of deemed sale or banking, but on the other hand, the Appellant is seeking relief under Clause VI of the order dated 15/5/06 which does not prescribe***

entering into fresh agreement for getting the benefit of 75%.”

9. On the above reasonings, the impugned order dated 12/9/07 is sought to be set aside by the Learned Counsel Mr.Pandiyaraj, for the Appellant.

10. Refuting the above contentions, Shri Ramji Srinivasan, the Learned Senior Counsel appearing for the Respondents would make the following reply:

“In the earlier order passed by the State Commission on 15/5/06, being the Order No.3, Clause (4), the State Commission has specifically stated that the order dated 15/5/06 shall be applicable to all the future agreements and renewal of existing agreements for the non-conventional energy sources- based generating plants and the existing agreements between the generators and the distribution licensees would continue to remain in force. In the light of this Order, entered earlier in respect of the units which clearly provided that unutilized banked units as on 31st March will be lapsed, would still remain in force.

Admittedly, the Appellant neither came forward to execute the revised agreement for the said windmills as required under the Order dated 15/5/06 nor approach the Board to execute a fresh agreement, so as to attract the applicability of the order dated 15/5/06 passed by the State Commission which saves the existing agreements which in the instant case clearly provided that unutilized banked units as on 31st March will be lapsed. Under those circumstances, the Order rejecting this prayer by the State Commission in the absence of the revised agreements or execution of the fresh agreements as provided on 15/5/06 is perfectly justified.”

11. On these grounds, Shri Ramji Srinivasan, the Learned Senior Counsel for the Respondent Board pleaded that the order impugned has to be held valid.

12. We have carefully considered the submissions made by the Counsel on either side and have given our thoughtful consideration to the same.

13. The question that arises for consideration in this matter is as to whether the Appellant is entitled to 75% of the cost of the units for surplus banked energy on 31st March, as a compensation as provided for in the Order dated 15/5/06 passed by the State Commission .

14. Both the Counsel for the parties rely upon the Order dated 15/5/06. The Appellant relies upon Clause VI of the Order to substantiate his plea that the Appellant is entitled to get 75% of the cost of the surplus banked energy. On the contrary, the Counsel for the Respondent would rely upon Clause IV of the order stating that 75% of the rate would apply only when there is revised agreement or a fresh agreement and would not apply to the instant case.

15. Now let us quote both the Clauses and consider the same in order to decide the question raised in this case as to whether the Appellant is entitled to 75% of the cost in respect of the unutilized banked wind energy as per Order No.3/6 dated 15/5/06.

Clause IV

“This order shall come into force from the date of its issue. This order shall be applicable to all future and renewal of existing contracts/agreements for the NCES-based generating

plants and NCES-based cogeneration plants located in the State of Tamil Nadu. It should be noted that existing contracts and agreements between NCES-based generators and the distribution licensees signed prior to the date of issue of this Order would continue to remain in force. However, the NCES-based generators and the distribution licensees shall have the option to mutually renegotiate the agreements/contracts, if any, in line with this order even before the expiry of the contracts.”

16. A reading of the above Clause as provided in the Order dated 15/5/06 lays down the criteria of applicability of the said order which *inter alia*, provide that the existing contracts and agreements signed prior to the date of issue of this order would continue to remain in force with the option to renegotiate the existing agreements to have the revised agreements or to enter into fresh agreements.

Clause VI of the order which deals with the banking units:

“Considering the above facts and time value of the power generator, the State Commission decides a rate of 75% of the normal purchase rate for purchasing the unutilized portion of the energy banked by the NCES-based wind electric generators, slot-wise banking is permitted to enable unit to unit generation for the respective slots towards rebate in extra charges. However, unutilized portion at the expiry of the banking period will not be distinctly eligible for adjustment. Such unutilized portion is eligible only for 75% rebate.”

17. A reading of Clause VI as referred to above would indicate that the State Commission has decided a rate of 75% of the normal purchase rate for purchasing the unutilized portion of the energy banked by the wind

electric generator, only on the basis of future agreements to be entered into by both the parties or revised agreements through renegotiation.

18. As indicated above, Clause IV clearly provides that the order relating to the establishment of costs of the unutilized banked energy would be applicable only for the future agreements or renewable of the existing agreements.

19. Admittedly, there is no attempt made by the Appellant to approach the Respondent Board during the existing period of agreement either for renegotiation or modification, or to enter into a fresh agreement with reference to the applicability of the payment of 75% of the cost with regard to the unutilized and banked energy.

20. When the order dated 15/5/06 clearly states that the existing agreement signed prior to the date of issue of the order would continue to remain in force unless it is renegotiated, it is clear that the earlier agreements would continue to be in force where it was clearly provided that unutilized banked units as on 31st March will be lapsed. In this context, it would be worthwhile to refer to the approval with reference to the banking period as well to the terms of the agreements executed earlier.

21. The Approval dated 1/3/02 is as follows:

“That the banking period of one year commencing from 1st April every year and permitting energy adjustment up to 31st March of the next year, the balance unadjusted energy if any, available after adjustment as on 31st March is to be treated as lapsed.”

In accordance with the said approval granted by the electricity board to the appellant, supplementary agreements dated 18/3/02 were executed between the Appellant and the Respondent. Both the agreements provided as follows:

“Once it has been agreed that the banking of power will be for one year commencing from 1st April to 31st March of next year, the unutilized banked energy at the end of the banking period cannot be carried over to the next banking period that is beyond 31st March. The outstanding energy as on 31st March every year is deemed to be lapsed and cannot be sold to Tamil Nadu Board at any point of time thereafter, subject to the condition laid down in the Board B.P.(FB) No. 20 dated 11/3/02.”

22. Similarly on a request made by the Appellant, the approval dated 3/11/04 was granted by the Board to the Appellant to wheel the energy generated by them. In accordance with the said approval, again supplementary agreements were executed on 5/5/05 between the Appellant and the Respondents. These agreement also clearly provided that the unutilized banked energy at the end of the banking period commencing from 1st April to the 31st March of the next year will be treated as lapsed.

23. In the absence of challenge to any Clause of the order dated 15/5/06, it cannot be contended that the Appellant would be entitled any other compensation as provided under Clause VI of the order dated 15/5/06 after ignoring Clause IV. In order to have the benefit of Clause VI, the condition precedent would be the compliance of Clause IV namely, to enter into the agreement or revised agreements through renegotiation. In other words, Clause VI cannot be read in isolation and it must be read in conjunction with Clause IV.

24. In the Written Submission filed by the Respondent, it is specifically stated by the Respondent that the Respondent has always been ready and willing to enter into the appropriate agreements as may be requested by any of the windmill operators in accordance with the orders dated 15/5/06. There is no material placed either before the State Commission or before the Tribunal that the Appellant had requested the Board to enter into such agreements with reference to the prayer. On the other hand, it is noticed that the Appellant wrote two letters one on 17/4/07 and another on 9/5/07 requesting to carry forward the unutilized banked units as on 31/3/07 for which the Electricity Board sent a reply stating that the said request was not feasible.

25. It is made clear that the Appellant cannot claim benefit of Clause VI of the State Commission's order as it will not be available to the

Appellant by virtue of Clause IV which puts the condition that it would be applicable prospectively, i.e. only from the financial year 1/4/07.

26. In view of the above discussions, we do not find any merit in the contentions urged by the Learned Counsel for the Appellant, especially when we are of the opinion that the reasonings given by the State Commission for rejecting the prayer is valid.

27. Hence, the Appeal is dismissed as devoid of merits. No costs.

(A.A. Khan)
Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 13th February, 2009.

REPORTABLE / NON - REPORTABLE