

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No.53, 94 & 95 of 2010

Dated: 21st Sept, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson,
Hon'ble Mr.V J Talwar, Technical Member,

Appeal No.53 of 2010
I.A. Nos.70 & 71 of 2010

Tamil Nadu Electricity Board,
No.144, Anna Salai,
Chennai-600 002

... Appellant(s)

Versus

1. Tamil Nadu Electricity Regulatory Commission,
TIDCO office Building,
No.19 A, Rukmani Lakshmipathi Salai,
Marshells Road,
Chennai 600 008
2. Indian Wind Power Association,
No.40, Ground Floor,
Besant Avenue, Adyar,
Chennai-600 008
3. M/s. Eveready Spinning Mills (P) Ltd.,
No.16, Jothi Theatre Road,
Tirupur-641 601
4. M/s. Mani Spinning Mills (P) Limited,
Unit-I,
No.12, Jothi Theatre Road,
Tirupur-641 601
5. M/s. Mani Spinning Mills (P) Limited,
Unit-II,
No.12, Jothi Theatre Road,
Tirupur-641 601

6. M/s. Shri Ganesa Textiles,
21, Pollachi Road,
Palladam,
Tirupur-641 601
7. M/s. Hemalatha Mills Pvt. Ltd.,
SF No.68/3H,
Arumuthampalayampark
College Road
Naranapuram (PO)
Palladam-600 075
8. M/s. Sri Lakshmi Venkateshwara Spg Mills (P) Ltd,
No.9,Sriram Layout,
Sai Baba Mission Post,
Coimbatore-641 011
9. M/s. VSM Wears India Ltd.,
Pallipalayam-600 072
10. M/S. Pallava Textile Limited,
27-C Bye Pass Road,
Pallipalayam,
Erode-638 006
11. M/s. Arunachala Gounder Textiles Mills Ltd,
Pallipalayam-637 107,
12. M/s. Leeds Spinning Mills Pvt Ltd.,
S.F.No.233, Elango Layout,
II Street, Kangayam Cross Road,
Tirupur-603 110
13. M/S. Hindustan Spinners,
Site No.223, Mettupalayam Road,
Narasimha Naicken Palayam,
Coimbatore-600 001
14. M/S. Hindustan Textiles,
2/73, Mettupalayam Road,
K Vadamadurai Post,
Coimbatore-638 006
15. M/s. Jeyare Spinning Mills,

16. M/s. Hindustan Spinners
B Unit, 862/1, Bettathapuram,
Pudurakaramadai-641 104
17. M/s. Hindustan Cotton Spinning Mills,
SF No.34, Mettupalayam Road,
NSN Palayam Post,
Coimbatore-641 031
18. M/s. Spintex Cotton Mills (P) Ltd.,
19. M/s. Senthil Nathan Spinning Mills (P) Ltd.,
SF No.165, Adiyaman Kottai Village,
Dharmapuri-600 017
20. M/s. Hindustan Textiles,
Unit-B, SF No.1079,
Gudalur Village,
Coimbatore Taluk-603 116
21. M/s. Karur K.C.P Packagings Ltd,
FIBC Division,
Karur K.C.P Packagings Ltd,
FIBC Divmayanur,
S.F. No.212/2A1 Kulithalai,
Karur Distt-600 002
22. M/s Arun Textiles (P) Ltd.,
80 Perumal Koil Street,
Tiruppur-638 604,
Coimbatore DT
23. M/S. K.S.R Textile Mills (P) Ltd.,
Thokkavadai PO
Tiruchengodu TK-603 112
24. M/s. Thakadoor Spinning Mills Ltd,
1-C, Ramalinga Chetty Road,
Dharamapuri-600 041,
25. M/S. Nilgiri Textiles (P) Limited,
Finance House,
17, CO. OP. Colony,
Mettupalayam-641 301

26. M/S. Shree Bharani Spinnings (India) Ltd.,
SF No.129/2, Uthukuli Road,
Vijayamangalam,
Erode-638 056
27. M/S. R.R.D Tex (Unit of Best Corporation Ltd),
SF No: 607, Suriyanallar Village,
Dharampuram Taluk-600 372
28. M/s. BEST Cotton Mills,
(Unit of Best Corporation Limited)
BEST Industrial Estate,
45, Avinashi Road,
Tirupur-600 023
29. M/s. Karikaliamman Spinning Mills (Pvt) Ltd.,
Elumathur,
30. M/s. Armstrong Spinning Mills (P) Ltd.,
S.F. No.178, Meenkarampalayam
Lagampalayam Village,
Gobichettipalayam-638 462,
31. M/s. Raghav Industries Limited,
TS No.7, Kattipalayam Village,
Thiruchengode,
Elanagar (Post),
32. M/s. Armstrong Knitting Mills,
SF No.323/3, 15,
Velampalayam Village,
Tirupur Taluk,
33. M/S. Armstrong Process,
SF No.156/1, 14/1& 14/2,
No.4, Vaniamman Koil Street,
BP Agraharam,
ERODE-600 102
34. M/S. Viking Textiles (P) Ltd.,
505, Avinashi Road,
Tiruppur-600 272

35. M/s. Anand Textiles,
SF No.71/1, Nalligoundenpalayam,
Pudupalayam Post,
Thekkaluravanshi (TK)-603 012
36. M/s. Rohini Textile Industry (P) Ltd.,
Plot No.FF2, SIPCOT, Industrial Growth
Processing Division
Perundurai-600 032
37. M/s.Vasu Yarn Mills India (P) Ltd.,
Chinnaveerasangili,
Vijayamangalam,-603012
38. M/s. Sri Karvembu Textiles (P) Ltd.,
No.94, Thottipalayam Village,
Muthur-603 012
39. M/s. Sri Palani Murugan Spinning Mills.,
SF No.238/1, 238/2, 239/2, Modavadi,
Satyamangalam,
Kaspapettai Post,
Poondurai Main Road-600 009
40. M/s. Sakthi Murugan Textiles,
Mathakadi Thottam,
SF No.141/2,
Pallapalayam-603015
41. M/s. Angalakshmi Spinning Mill,
Madhagadi Thottam,
SF.No.141/2 & 154/1,
Pallapalayam-603 115
42. M/s. Prospun Textile India (P) Ltd.,
SF No.234/1,2 Mettubavi Village,
Poorandampalayam Road
Vadachithur VIA,
Pollachi Taluk-603015
43. M/s. Selvi Spinning Mill,
SFNo.356/3, 357/7 & ANNUR,
Avinashi Taluk-603 015

44. M/s. Sri Karpagam Mills India Private Limited.,
M/S. Sri Karpagam Spinners 'B' Unit,
No.3, Samian Thottam,
SF No.248/4, Udayampalayam,
Chinnavedampatty PO-603 012
45. M/s. Speedline Spinners India (P) Ltd.,
2/12, CM Thottampallapalayam-600014
46. M/s. VKSM Cotton Mills Ltd.,
SF 2/2, Pappampatti Main Road,
Nadupalayam Peedampalli Post
Ondipudur (Via) 600 013
47. M/s. Sree Kilati Spinners Pvt Ltd.,
SF No.126, Vellakinar,
Coimbatore-600 365
48. M/s. PKPN Spinning Mill (P) Limited
PB No.114, 5 Bypass Road,
Pallipalayam-600 018,
49. M/s. SJLT Textiles (P) Ltd.,
NH-7, Namakkal Karur Main Road,
Villipalayam Post,
Nadandai (VIA), P Velur,
Namakkal District-600 038
50. M/s. Mallur Siddeswara Spinning Mills (P) Ltd.,
Attayampatti Road,
Athanoor – (Post),
636301 Rasipuram –Taluk,
Namakkal District-603 032
51. M/s. JPP Mills (P) Ltd,
SF No.412, Patharai,
Sowthapuram (Post),
Tiruchengodu (TK),
Namakkal DT-603015
52. M/s. Aswin Textiles (P) Ltd.,
Therapatti Piruvu. Palani Road,
Dharapuram

53. M/s. Saravana Spinning Mills,
Unit of Kumaragiri Electronics Ltd.,
Convent Road, Thokkampatty (PO),
Dharamapuri-603 015
54. M/s. Sri Karunambikari Mills Pvt Ltd.,
PB No.2, Mill Road, Somanur
55. M/s. Kumaragiri Textiles Ltd.,
PMP Nagar,
Thokkampatty PO-603 046
56. M/s. Lawn Textiles (P) Ltd.,
SF No.37, Polavalpalayam,
Nambiyur,
Gobichettipalayam-600 037
57. M/s. Vijayalakshmi Spinning Mills (India) Pvt Ltd.,
80 Perumal Koil Street,
Tirupur-638 604
58. M/s. KP Textiles CBE (P) Ltd.,
AT SF No.391/A2B, Kodangipalayam Village,
Caltonpet POST-638 666
59. M/s. Santhi Casting Works,
SF No.415/1, 416/1-D, 416/1-C,
Kurudampalayam Village,
Coimbatore-641 031
60. M/s. S S Spinning Mills,
S.F. No.174/1, Thekkalur Road,
Nambiyampalayam Village,
Avanashi Taluk,
Coimbatore-641 042
61. M/s. Sri Vignesh Yarns (P) Ltd.,
17C, Kamaraj Road,
Tirupur-641 604
62. M/s. Pongalur Pioneer Textiles (P) Ltd.,
Flat No.8, Sundaram Apartment,
83, Race Course Road-603 215

63. M/s. Mothi Spinner Limited.,
No.108, Komarapalayam Main Road,
Pallipalayam Erode-638 006,
64. M/s. Sri Visaka Textiles Pvt Ltd.,
SF No.253 & 254 Mooppripalayam Village,
Annur Road,
Palladam Taluk-603049
65. M/s. Suryadev Alloys & Power Pvt Ltd.,
S.No.298, New Gummidipoondi
Gummidipoondi Taluk-600 038

.....Respondents

Counsel for Appellant(s): Mr. P S Raman, Adv General
Mr. S Vallinayagam,
Mr. H S Mohmed Rafi,
Ms. Vaishnavi Ramachandran,

Counsel for Respondent(s): Mr. ARL Sundaresan, Sr Adv. With
Mr. R S Pandiya Raj for R-
5,10,13,14,16,18,20,21,31,
34,36,37 to 48,50 to 52 & 62
Mr. Rahul Balaji for R-2
Mr. T Srinivasa Murthy for R-2
Mr. Sreekumar Panicker,
Mr. Parthasarathy,
Mr. G. Ethirajulu for R-54
Mr. P. Parthiban for R-54
Mr. Senthil Jagadeesan for R-2,
Mr. Sri Ram Parakkat for R-2
Mr. R Anand Padmanabhan for R-3 to 5

Appeal No.94 of 2010 & IA No.121 & 122 of 2010

&

Appeal No.95 of 2010 & IA No.124 of 2010

Karunambikai Mills Pvt Ltd,
HTSC-10,
Post Box No.2, Mill Road,
Somanur,
Coimbatore-641 668

... Appellant(s)

Versus

1. Tamilnadu Electricity Regulatory Commission,
TIDCO office Building,
No.19 A, Rukmani Lakshmipathi Sali,
Marshells Road,
Chennai 600 008
2. Tamilnadu Electricity Board,
No.144, Anna Salai,
Chennai-600 002

....Respondent(s)

Counsel for Appellant(s): Mr. G. Ethirajulu,
Mr. M P Parthiban,

Counsel for Respondent(s): Mr. P. S. Raman, Advocate General
Mr. S Vallinayagam for TNEB
Mr. H S Mohmed Rafi,

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. The **Tamil Nadu Electricity Board** is the **Appellant** in **Appeal No.53 of 2010** and **M/s. Karunambikai Mills Pvt Ltd.** is the **Appellant** in **Appeal No.94 & 95 of 2010** herein.
2. These Appeals are being disposed of through this Common Judgement since the impugned order passed by the Tamil Nadu State Commission in these Appeals is a common order.
3. Let us now deal with **Appeal No.53 of 2010.**

4. Aggrieved by the Order of the Tamil Nadu Electricity Regulatory Commission (State Commission) dated 28.10.2009, the present **Appeal No. 53 of 2010, has been filed.** In this Appeal, the Appellant has confined itself with the challenge to the findings so far as the conclusion arrived at and the consequential directions to make payment of Rs.3.50 per unit for the unutilised banked wind energy as on 30.4.2009 and the directions to make payment for the banked energy remained unutilised as on 31.3.2010 to be encashed at the rate prescribed in para 8.2.2. of Order No 1 of 2009 dated 20.3.2009 to wind energy captive users.

5. The short facts are as follows:

- i. Due to power shortage in Tamil Nadu State, the Government of Tamil Nadu issued orders on 28.10.2008 for 40% power cut to HT services and 20% power cut to LT Industrial and Commercial services. Accordingly, instructions were issued by the Appellant Electricity Board on 1.11.2008.
- ii. In order to levy extra charges from the consumers, for the exceeding the quota limit, the Appellant Electricity Board filed a Petition before the State Commission in MP No.42 of 2008 on 6.11.2008.
- iii. The Appellant Board issued instructions on 17.11.2008 giving formula for fixing the demand and energy quota for the HT consumers including the Captive Power Projects (CPP).
- iv. On 28.11.2008, the State Commission passed an order on MP 42 of 2008 directing the Appellant Electricity Board (i) to segregate the supply from Board and the supply from the captive generator for the purpose of determination of demand and energy quota for wind generating captive consumers; (ii)

to permit the utilization of banked wind energy between 1.12.2008 and 30.4.2009 in five monthly equal instalments by enhancing the demand and energy quota charges. In this order formula dated 17.11.2008 was approved.

- v. Considering that the above directions could be detrimental to the financial position of the Appellant Electricity Board, the Appellant Board filed a Review Petition before the State Commission to re-consider their directions. The said Review Petition was dismissed on 24.12.2008.
- vi. Thereupon, the Appellant Board filed a Writ Petition in the Madras High Court and obtained stay on the State Commission's order on 30.12.2008. On the application filed by the other party requesting to vacate the stay order, the High Court directed the Appellant Board to approach this Tribunal against the order dated 28.11.2008 passed by the State Commission within two weeks from the date of said order. The High Court further directed that unutilised banked energy as on 31.3.2009 shall not lapse but shall be subjected to outcome of such Appeal. The stay granted on 30.12.2008 was extended for four weeks.
- vii. However, no Appeal was filed by the Board before this Tribunal. Thus the State Commission's Order dated 28.11.2008 attained finality. Since the power position had improved considerably, the Appellant Board proposed to relax/withdraw the Regulation & Control measures w.e.f. 26.5.2009.
- viii. On 19.12.2008 the Appellant Board issued formula for fixing quota for Regulation & Control measures in respect of deemed demand charges. Again on 4.8.2009 the Appellant

Board issued memo to its field officers laying down revised formula for fixing energy quota for those consumers using wind power during period between 12/2008 and 4/2009. Yet again on 21.8.2009 the Appellant Board issued another memo laying down yet another formula for fixing energy quota for consumers using wind power. These formulas were at variance with the formula dated 17.11.2008 approved by the State Commission by its order dated 28.11.2008. The energy quota of the Respondents was brought down considerably by the Appellant Board through these formulas. Both the memos and formulas laid therein were not brought to the notice of the State Commission.

- ix. Indian Wind Power Association filed a Writ Petition before the High Court of Madras and prayed that the penalty charges should not be levied for the exceeding the quota so long as there was credit of banked energy units lying in the generators account. However, High Court disposed of the said writ petition on 28.8.2009, directing the State Commission to decide about the validity of the two memos issued by the Board on 4.8.2009 and 21.8.2009.
- x. Then, the State Commission in pursuance of the High Court direction passed an order on 28.10.2009 for the payment of Rs.3.50 per unit for the unutilised banked wind energy as on 30.4.2009 and for the payment of Rs.3.39 per unit for the unutilised banked wind energy as on 31.03.2010 to wind energy captive users and quashed the Memos dated 4.8.2009 and 21.8.2009 issued by the Appellant Board. Therefore, the Appellant Board has filed this Appeal as against the said order dated 28.10.2009.

6. The gist of the findings rendered by the Commission in the impugned order dated 28.10.2009 are as under:

- I. The State Commission in its order dated 28.11.2008 arrived at the basis of computation of demand and energy quota for wind energy generators on the basis of formula contained in the Memo of the Board dated 17.11.2008. But this formula had been modified by the Board by another formula circulated to its field officers vide memo dated 19.12.2008 without getting permission from the State Commission. This formula was again altered by the Board through Memos dated 4.8.2009 and 21.8.2009. This process without informing the Commission or without obtaining the permission from the Commission amounts to change the findings of the State Commission behind the back of the Commission and thus amounts to wilful violation of the orders of the Commission.
- II. The modifications of the earlier formula dated 17.11.2008 by issuance of new formula dated 19.8.2008, the Memos dated 4.8.2009 and 21.8.2009 were never brought to the notice of the State Commission at any point of time. Since no approval was obtained from the Commission for issuing such memos, these memos are set-aside as they are violative of its orders dated 28.11.2008. Out of the 315 MU banked energy as on 1.11.2008, the Board reported that the 224 MU units remained in the bank as on 31.3.2009. This statement by the Board has supported the contention of the wind energy generators that significant portion of the banked energy as on 1.12.2008 was prevented from being utilised. Therefore, they are entitled to encash the surplus energy remaining in the bank at the end of 2009-10.

7. In view of the above findings, the following directions were issued through the impugned order. They are as follows:-

- I. The memos issued by the Appellant Board on 19.12.2008, 4.8.2009 and 21.8.2009 for calculation of demand and energy quota of captive consumers of wind energy which were contrary to the order passed by the State Commission on 28.11.2008 in MP No.42 of 2008 are quashed.
- II. The applicability of the formula contained in the Memo dated 17.11.2008 has been recognised and approved by it.
- III. Since the captive consumers were prevented from utilising the banked energy between the period between 1.12.2008 and 30.4.2009 as directed by the State Commission in its Order dated 28.11.2008, the Wind Energy Generators would be allowed to encash the surplus banked energy at the rate of Rs.3.50 per unit as on 30.4.2009 and Rs.3.39 per unit as on 31.3.2010.

8. Let us now see the main grounds raised by the Ld. Counsel for the Appellant in this Appeal. They are as under:

- (i) The State Commission exceeded its jurisdiction by granting relief to the wind energy captive users which was not the subject matter in MP No.42 of 2008 and in the instant suo-moto proceedings.
- (ii) The banking of energy is not a statutory right. It is only a contractual obligation arising out of the agreement between the Board and the Wind Energy Generators.
- (iii) The State Commission without considering the pleadings in MP No.42 of 2008, directed the Appellant to enhance the

demand and energy quota for the Windmill Captive Users.

There is no jurisdiction for issuing such a direction.

- (iv) The State Commission also wrongly directed the Appellant Electricity Board to permit the Windmill Captive Consumers to utilise the banked wind energy from 1.12.2008 to 30.4.2009 in five monthly equal instalments.
- (v) In the absence of any application filed by the Wind Energy Generators for disbursing the banked energy, the State Commission can not intervene in the field of contractual matter. So the State Commission by invoking suo-moto powers wrongly directed the allotment of banked energy to the Wind Energy Generators. Therefore, the order, directing to pay Rs.3.50 per unit for the unutilised banked wind energy as on 31.3.2010 to wind energy captive uses has to be set-aside.
- (vi) This order is in pursuance with the reference made by the High Court in its order dated 28.8.2009 in the Writ Petition filed by the Board. The High Court merely transferred the matter to the State Commission and permitted the State Commission to go into the validity of the memos issued by the Electricity Board. High Court did not direct State Commission to consider the fixing of the fresh rate. So this order is contrary to the order of the High Court.
- (vii) The State Commission has no powers to order payment by the Board to Wind Energy Generators for the unutilised wind energy which remained banked.
- (viii) The State Commission fixed the rate of Rs.3.50 and Rs.3.39 per unit for banked unutilised units without any basis for calculation. Further, this rate is higher than the contractual

rates as well as the rates fixed under the tariff order. Therefore enhancement of the amount of tariff without following the procedure under the Act, 2003 is illegal.

- (ix) The State Commission ought not to have permitted banking of wind energy units of captive consumers since Act, 2003 has not statutorily recognised banking.

9. In reply to above submissions made by the Appellant, the Learned Counsel for the Respondent made the following submissions:

- (i) The Wind Energy Generators generate wind energy and supply the same to the Electricity Board with a right to consume electrical energy for the purpose of their industrial activity with a right to adjust the unit which they have generated and supplied on unit to unit basis. If the wind energy generators fail to consume equal amount of units for the purpose of their industrial activities, there would be a surplus of energy. In that situation, the generators are entitled to bank the said energy for a period of one year and at the end of the year they are entitled to encashment of 75% of the normal purchase rights. This position is evident as per the order No.03 dated 15.5.2006 passed by the State Commission.
- (ii) In the order passed in MP No.42 of 2008, the State Commission, in the light of the fact that wind energy generators were prevented from using full capacity of energy for the purpose of their industrial activities on account of restrictions and control measures, gave suitable directions in its order dated 28.11.2008 directing the Electricity Board to enhance the demand of energy quota for five months between 1.12.2008 and 30.4.2009 to enable utilisation of banked quota

in 5 equal monthly instalments. However, the Electricity Board did not comply with this order. Without implementing the said order, the Appellant Board filed a Writ Petition before the High Court and obtained a stay. Ultimately, the High Court directed the Appellant Board to approach the Appellate Tribunal. But, the Board did not choose to approach the Appellate Tribunal by filing the Appeal. Instead, they undertook the process of implementing the order dated 28.11.2008 passed by the State Commission. Thus, during the interregnum period i.e. for 5 months the generators were prevented from utilising the banked energy. Under those circumstances, the State Commission rightly held that wind energy generators are entitled to relief for the above said period.

- (iii) Without complying with the orders of the State Commission dated 28.11.2008, the Board changed the formula and issued Memos dated 4.8.2009 and 21.5.2009. Therefore, the State Commission validly passed the impugned order quashing those formulas and Memos and holding that the Wind Energy Generators are entitled to the enhanced rate by way of compensation for that period.

10. In the light of the above rival contentions of the parties, the following comprehensive question would arise for consideration:

“Whether the State Commission is right in fixing the rate of Rs.3.50 per unit for the unutilised banked wind energy as on 30.4.2009 and at Rs.3.39 per unit for unutilised banked energy as on 31.3.2010 to wind energy captive users which is higher than the contractual rates as approved by the State Commission through the tariff order No.1 dated 20.3.2009 Power Procurement from Wind Energy by exercising suo-moto power even though there was no application

filed by the Wind Energy Generators praying for disbursing the banked energy ?

11. We have heard the Learned Counsel for the parties on this comprehensive question and have given our anxious consideration to their respective submissions.

12. Having regard to the materials available on record, having considered the impugned order and having heard the respective submissions made by the learned Counsel for both the parties, we are of the view that the grounds urged by the Learned Counsel for the Appellant assailing the impugned order, are not legally sustainable, as in our view, the directions and findings given in the impugned order passed by the State Commission are perfectly legal and justified.

13. The reasons for our above conclusion are as follows:

- I) The Wind Energy Generators generate the electricity for their own consumption utilising the Appellant's transmission and distribution system through open access. If the generator fails to consume equal amount of units generated there is a surplus energy. Then they are entitled to bank the said surplus energy with the Appellant Board up till 31st March of the year. At the end of the year, they are entitled for encashment of 75% of normal purchase rates. This position was settled by the State Commission as per the order of the State Commission dated 15.5.2006. Upon introduction of Regulation & Control measures, the Appellant did not segregate the energy received from the captive wind generators from the energy received from the Appellant Board thereby R&C measures were also wrongly imposed on the energy and demand received from the wind generators. Thus

the Respondents were prevented from utilising their banked energy during the relevant period.

- II) After the restrictions and control measures were imposed by the Board, an application was filed before the State Commission by the Board for approval for the same in MP No.42 of 2008. Admittedly, during that period, the wind energy generators were prevented from utilising full capacity of energy for the purpose of their industrial activities on account of control measures. It has, further, been reported by the Board that out of 315 million units of wind energy generated between 1-4-2008 and 31-10-2008, 224 MU Units have been banked and has remained unutilised. This wind energy so banked by the generators during the difficult months of May, June, July, August, September and October 2008 enabled the Appellant Board to ward off load shedding and power cut effectively. Thus, they came to the rescue of Board in difficult times.
- III) The State Commission while disposing of MP No.42 of 2008 through the order dated 28.11.2008, had noted that whereas, in regard to other captive users, the TNEB supply and the captive supply have been segregated for the purpose of determination of the demand and energy quota for captive users and cut has been enforced with reference to the TNEB segment of demand and energy supply only and the captive consumer had been permitted to avail of the entire demand and energy supply by the captive generator, the same method has not been adopted for captive users of wind energy. In their case, the cut has been enforced on the total base demand and energy consumption without segregating the TNEB and captive components.

- IV) Taking note of above discrimination, the State Commission directed the Appellant that the method for determination of demand and energy quota for wind energy captive users shall be the same as that of other captive users.
- V) Accordingly the State Commission directed the Appellant Board to enhance the demand and energy quota for five months between 1.12.2008 and 30.4.2009 to enable the utilisation of banked energy during that period. This order admittedly, was not complied with by the Board. On the other hand, the same was challenged in the High Court. Ultimately, High Court directed the Board to file an Appeal before this Tribunal. But this order of High Court also was not complied with. Thus the State Commission's Order dated 28.11.2008 in MP 42 of 2008 had attained finality and directions given therein cannot be challenged now on the pretext of challenging the impugned order.
- VI) On the other hand, without filing the Appeal, the Appellant Board affecting the right of the Wind Generators had issued the memos contrary to the order of the Commission. At that stage, Wind Generators Association took up the matter and brought to the notice of High Court. Then, High Court referred the matter to the State Commission with a direction to go into the validity of these Memos issued by the Appellant Board and pass the appropriate order. Accordingly, the State Commission after inquiry found that the memos dated 4.8.2009 and 21.8.2009 issued by the Electricity Board were not brought to the notice of the State Commission and the tariff through the said Memos had been fixed by

the Board without the approval of the Commission. On that ground, the State Commission quashed these Memos through the impugned order dated 28.10.2009. Admittedly, this portion of the order has not been challenged in this Appeal. The Appellant Board seeks to challenge only one portion of the order with reference to the direction issued by the State Commission relating to the payment of the rate.

VII) According to the Appellant, the State Commission does not have any powers to pass such orders fixing the tariff. This contention is not tenable as this is not a tariff order. Regulation 48 of the Conduct of the Business Regulation 2004 provides for the exercise of inherent powers for the Commission to pass appropriate orders, in order to meet the ends of the justice with a view to prevent the abuse of the process.

VIII) In the instant case, as indicated above, the Electricity Board has disobeyed the direction issued in the order of the State Commission dated 28.11.2008. There is no dispute in the fact that the Generators were not allowed the adjustment of the banked unutilised wind energy units in five equal monthly instalments between 1.12.2008 and 30.4.2009 as per the said order. Instead, the Board by not allowing the adjustments and utilisation of the excess unutilised energy sold the same to its consumers and realised revenues out of the same. At the same line, the Wind Energy Generators were charged on the tariff rate of Rs.3.50 per unit for the units purchased by them. In view of the above peculiar circumstances, the State Commission in the interest of justice directed the Board to pay

at the rate of Rs.3.50 per unit for the excess unutilised banking wind energy. This was done in order to prevent abuse of process and to undo the wrong which was done by the Appellant Board by exercising the inherent powers. There is nothing wrong in giving such directions.

IX) It is clear from the conduct of the Appellant in the present case that the Appellant had flouted the specific directions of the State Commission and had adopted various delaying tactics in order to defeat the right of the captive consumers. They are as follows:

- i) The Board instead of obeying the orders in MP No.42 of 2008 dated 28.11.2008, filed a Review Petition before the State Commission with reference to the directions given by the State Commission. This Petition was dismissed on 24.12.2008. Even thereafter, the Appellant did not choose to comply with the directions.
- ii) Non compliance of the directions issued was reported to the State Commission. The State Commission again directed the Board to comply with the order dated 28.11.2008. This also was not complied with.
- iii) However, instead of complying with the directions, the Appellant Board filed a Writ Petition as against the orders of the State Commission dated 28.11.2008 and 24.12.2008 with reference to the banking of wind energy and enhancement of the demand of energy quota. Ultimately, the High Court vide its order date 30.3.2009 directed the Electricity Board to approach the Tribunal to

file an Appeal. The Board did not comply with this order as well. In the meantime, one year had elapsed. Thus, it has been effectively prevented the utilisation of the banked energy unit during the said one year period.

- iv) At that stage, the Respondents approached the High Court and brought to the notice of the High Court about this. Only then, the undertaking was given by the Board to the High Court that it would comply with the orders.
- v) As a matter of fact, the Wind Energy Generators Association filed a Petition before the State Commission seeking for compensation of Rs.3.50 per unit for the banked unutilised energy. It is pointed out that the wind energy generators, due to action of the Appellant Board in not allowing the wheeling and adjustments of the wind generation, were constrained to purchase power at higher cost from 3.12.2009 onwards. The State Commission in the above circumstances directed the Generators to submit their claims and directed the Appellant Board to make the payment along with the interest at the rate of Rs.18% annum for the delayed period. This order also has not been challenged.
- vi) When the Board initiated penalty proceedings against the wind energy generators, the same was challenged before the High Court by the Wind Generators. In that context, the High Court ordered transfer of the matter to the State Commission to decide about the validity of

memos issued on 4.8.2009 and 21.8.2009, which has been done in this case.

vii) By the impugned order, the State Commission struck down those memos as being contrary to the orders passed by the State Commission on 28.11.2008 and directed that any surplus banked energy remained unadjusted as on 30.4.2009 would be liable for encashment at the rate of Rs.3.50 per unit.

X) The above facts would reveal that the Appellant Board has adopted all the tactics to delay the implementation of the order of the Commission to prevent the wind energy generators to use the banked energy.

14. As indicated above, on 19.12.2008, the Board issued instructions for fixing a quota for the restriction and control measures in respect of dealing with demand charges. This was never brought to the notice of the State Commission. Admittedly, no approval was obtained from the State Commission. Similarly, on 4.8.2009 and 21.8.2009, the Board issued instructions purporting to lay down fresh formula for fixing energy quota for those who are using wind and captive power without getting approval from the State Commission. That apart, these memos were not in consistent with the formula dated 17.11.2008 which was approved by the Commission.

15. The State Commission on noticing all those delaying tactics adopted by the Board, suo-moto fixed the rate by way of compensation in order to prevent the abuse of process by invoking the inherent powers. This is entirely within the jurisdiction of the State Commission.

16. The Section 129 of the Act specifically provides that in the event the State Commission is satisfied that the Distribution Licensee is contravening or is likely to contravene any of the conditions of its licence, or the provisions of the Act, the State Commission is empowered to pass the orders giving appropriate directions to the Distribution Licensee as may be necessary for the purpose of securing compliance with the said conditions or the provisions. We now quote Section 129 of the Electricity Act, 2003, which is extracted as under:

“129. Orders for securing compliance.—(1) *Where the Appropriate Commission, on the basis of material in its possession, is satisfied that a licensee is contravening, or is likely to contravene, any of the conditions mentioned in his licence or conditions for grant of exemption or the licensee or the generating company has contravened or is likely to contravene any of the provisions of this Act, it shall, by an order, give such directions as may be necessary for the purpose of securing compliance with that condition or provision.*

(2) While giving direction under sub-section (1), the Appropriate Commission shall have due regard to the extent to which any person is likely to sustain loss or damage due to such contravention.”

17. The perusal of this Section would make it clear that the State Commission is mandated to give such directions to the licensee for ensuring compliance of the provisions of the Act or the conditions of the licence. Admittedly the Appellant had contravened the directions of the State Commission in order dated 28.11.2008. Therefore, the State Commission has, by virtue of Section 129 of the Electricity Act, 2003, power to issue such directions to secure compliance of its directions.

18. Further, the Tamil Nadu Electricity Commission Conduct of Business Regulation 2004 provides the Regulation 16 for initiation of proceedings suo-moto to pass suitable orders in respect of violations. The said Regulation is quoted below:

“Regulation 16: Initiation of proceedings

The Commission may initiate any proceedings suo motu or on a petition filed by any affected or interested person;

(1) When the Commission initiated the proceedings, it shall be by a due notice issued by the Commission. The Commission may give such orders and directions as may be deemed necessary for serving of notices to the affected parties for the filing of replies and rejoinders against or in support of the petition in such form as the Commission may direct. The Commission may, if it considers appropriate, issue orders for publication of the petition inviting comments from the public or any class of persons on the issue involved in the proceedings in such form as the Commission may direct.

(2) While issuing the notice of inquiry, the Commission may, in suo motu proceedings and other appropriate cases, designate an officer of the Commission or any other person whom the Commission considers appropriate to present the matter in the capacity of a petitioner in the case.”

19. Similarly, the inherent powers have been conferred under Regulation 48. The said Regulation is quoted below:

“Regulation 48: Saving of inherent power of the Commission

(1) Nothing in these regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission;

(2) Nothing in these regulations shall bar the commission from adopting in conformity with the provisions of the Act, a procedure, which is at variance with any of the provisions of these Regulations if the Commission, in view of the special circumstances of a matter or class of matters and for reasons

to be recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters.

(3) Nothing in these Regulations shall, expressly or impliedly bar the Commission to deal with any matter or exercise any power under the Act for which no Regulation have been framed and the Commission may deal with such matters with powers and functions in a manner it thinks fit.”

20. In the present case, these powers have been exercised by the State Commission because captive consumers in the scenario of imposition of restrictions and control measures have been prevented from utilising the banked energy by adoption of various tactics, warranting such action to be taken by the State Commission under Regulation 16 and Regulation 48.

21. With regard to inherent powers of the statutory authority in regard to the exercise of the inherent powers, the Learned Counsel for the Respondent cited the following decisions:

(i) Union of India Vs. Paras Laminates (P) Ltd. (1990) 4 SCC 453

“8. There is no doubt that the Tribunal as a Court the limits of its jurisdiction. It has all the powers conferred expressly by the statute. Furthermore, being a judicial body, it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. Certain powers are recognised as incidental and ancillary, not because they are inherent in the Tribunal, nor because its jurisdiction is plenary, but because it is the legislative intent that the power which is expressly granted in the assigned field of jurisdiction is efficaciously and meaningfully exercised. The powers of the Tribunal are no doubt limited. Its area of jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The implied grant is, of course, limited by the express grant and, therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant

effective. As stated in Maxwell on Interpretation of Statutes (11th Edn), “where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution.”

(ii) J.K. Synthetics Ltd. Vs CCE, (1956) 6 SCC 92

“6. If, in a given case, it is established that the Respondent was unable to appear before it for no fault of his own, the ends of justice would clearly require that the ex parte order against him should be set aside. Not to do so on the ground of lack of power would be manifest injustice. Quite apart from the inherent power that every tribunal and Court constituted to do justice has in this respect, CEGAT is clothed with express power under Rule 41 to make such order as is necessary to secure the ends of justice. CEGAT has, therefore, the power to set-aside an order passed ex parte against the Respondent before it if it is found that the Respondent had, for sufficient cause, been unable to appear.”

(iii) Bengal Exercise Licensees Association Vs. Raghabendra Singh & ORS, AIR 2006 SC 1386

“In the instant case, the Respondent have conducted the auction quite contrary to and in violation of an injunction order passed by the High Court. Courts have held in a catena of decisions that where in violation of a restraint order or an injunction order against a party, something has been done in disobedience, it will be the duty of the Court as a policy to set the wrong right and not allow the perpetuation of the wrong doing. In our opinion, the inherent power will not only be available under Section 151 CPC as available to us in such a case but it is bound to be exercised in that manner in the interest of justice and public interest. As rightly observed by the Full Bench of the Madras High Court in AIR 1975 Mad 270, that as a matter of judicial policy the Court should guard against itself being stultified in circumstances like this by holding that it is powerless to undo a wrong done in disobedience of the Court’s orders”.

22. The ratio decided by the Hon’ble Supreme Court in the cases referred above, would squarely apply to the present facts as well. Therefore,

the State Commission is well within its rights to exercise these inherent powers available to it under Regulation 48 in passing the orders for payment of Rs.3.50 and Rs.3.39 per unit for unutilised banked energy by way of compensation.

23. As a matter of fact, the Wind Energy Generator's Association filed a Petition before the State Commission in DRP No.15/09 and MP No.17/09 specifically seeking for compensation at the rate of Rs.3.50 per unit in respect of unutilised banking units. The direction of the State Commission through the order dated 3.10.2009, specifically held that the earlier order would apply and the generators could submit the claim to the Board for encashment of the unutilised banking units as on 30.4.09. The State Commission further directed that the said payment has to be made within 60 days of the claim failing which the Board was liable to pay 18% interest. Admittedly, this order dated 3.10.2009 has not been challenged. On the other hand, this order has been complied with by the Board. Therefore, the prayer in this Appeal has become in fruituous.
24. It is contended that the impugned order would amount to enhancement of the tariff through the impugned order. This contention is misconceived. The impugned order directing payment was passed under the peculiar circumstances mentioned above and it does not amount a tariff order. The State Commission did not fix a tariff as Rs.3.50 per unit but had only directed payment of compensation in exercise of its special inherent powers while dealing with the dispute between the generator and the licensee under Sec 86 (1)(f) of the Act. Therefore, this order cannot held to be a tariff order.

25. It is also to be pointed out that it is only because promises made by the Government and the Electricity Board in respect of wind power generation which included the concept of banking, the generators set up the facilities by incurring heavy expenditure. Therefore, the Board is estopped from making claims contrary to the said promises. The Electricity Board is one of the pioneers in developing regime for wind energy. It has introduced the concept of banking. It was on the basis of the said policy initiative that substantial investments came to be made in the wind sector. After permitting the same for more than 25 years, the Electricity Board now is seeking to take such a different stand.
26. Therefore, the Electricity Board cannot be allowed to deny the benefit of banking which has been contractually and judicially recognised. The tariff orders were also passed recognising the same. The concept of banking is contained in the tariff order applicable to wind energy generators. This order has already been upheld by this Tribunal in Appeal No.98 of 2010. Hence, the grounds of this Appeal have no basis.

27. Summary of Our Findings

(a) The State Commission arrived at the figure of Rs.3.50 per unit for one period and Rs.3.39 per unit for the another period in order to prevent unjust enrichment by the Appellant through adoption of dubious methods and partially compensate the captive consumers for loss suffered as a consequence. The rate, at which the Electricity Board charged its HT consumers under Industrial Tariff, was Rs.3.50 per unit. The State Commission by the impugned order ensured that the Appellant

did not unjustly benefit out of its tactics by directing return of the money calculated at the rate of Rs.3.50 per unit and Rs.3.39 per unit.

(b) The impugned order does not amount to a tariff order. This order was passed under the peculiar circumstances as explained above.

(c) The State Commission did not fix the rate of Rs.3.50 per unit or Rs.3.39 per unit as a tariff but it only directed the payment of compensation in exercise of its specifically conferred inherent judicial powers under Regulation 48 and while dealing with the dispute between a Generator and a Licensee as a provided for under Sec 86 (f) of the Act. The utilisation of the entire banked power was not the captive consumer's fault. Therefore, there is nothing wrong in invoking the sou motu powers conferred under Regulation 16 and directed the payment by fixing a rate by way of payment of compensation.

(d) The concept of "banking" was evolved by the State Commission which is in line with the provisions of the Act, 2003, National Electricity Policy and the National Tariff Policy. Therefore, the impugned order promotes the object of the Act/Rules and the purpose it serves. It would be impossible to set-up the Wind Energy Units without the banking facilities due to the very characteristics of wind power generation. It was only because of the promises made by the Government and the Appellant in respect of Wind Power Generation which included the concept of banking, the wind generators set-up

their facilities by incurring heavy expenditure. Therefore, the Appellant is estopped from making claims contrary thereto.

(e) The State Commission in the impugned order struck down the two memos dated 4.8.2009 and 21.8.2009 holding that they are not valid and as they are contrary to the orders passed by the State Commission on 28.11.2008. In that context, the State Commission directed that the surplus banked energy remained unadjusted would be liable for encashment at Rs.3.50 per unit or Rs.3.39 per unit. Admittedly, the findings with reference to memos and its consequent quashing have not been challenged in this Appeal. The Appellant has merely challenged the encashment at the rate of Rs.3.50 per unit or Rs.3.39 per unit. This order is only consequential order in pursuance of the findings that memos are not valid in law. Further, State Commission, pointing out various factors correctly found that the Appellant adopted all sorts of tactics to delay the implementation of the order of the Commission and to prevent the Wind Energy Generators using the banked energy and fixed the rate by way of compensation by invoking the inherent powers. Therefore, the impugned order cannot be said to be enhancement of tariff through a tariff order.

28. In view of our above findings, we conclude that there is no merit in this Appeal. Consequently, **this Appeal No.53 of 2010 is dismissed.**

Appeal No.94 AND 95 OF 2010

29. **Let us now deal with other Appeals namely Appeal No.94 and 95 of 2010.**

30. M/S. Karunambikai Mills Pvt Ltd, Coimbatore is the Appellant in these Appeals. Tamil Nadu Electricity Regulatory Commission and Tamil Nadu Electricity Board are Respondent-1 and 2 respectively.

31. **The factual matrix of these Appeals is the same as that of Appeal No.53 of 2010.**

32. Tamil Nadu Electricity Board had enforced certain Regulations and Control Measures to overcome acute shortage of power in the State.

33. These measures were approved by the State Commission. However, in case of wind captive generators, Tamil Nadu Electricity Board did not segregate the TNEB Supply from Captive Supply while fixing quota for energy and demand during the period. As a result of this anomaly, wind captive generators could not utilise their full banked energy.

34. Since these consumers were not permitted to utilise their right on banked energy, the State Commission as indicated above, directed that unutilised banked energy to be encashed at Rs.3.50 per unit, the rate at which these consumers purchased electricity from TNEB.

35. The rationale behind this direction of TNERC was that, if these consumers had been allowed to utilise the banked energy, their usage of TNEB supply would have been reduced by equal amount. Since they were prevented from utilising the banked energy, their usage of TNEB energy got enhanced by equal amount and they were forced to make payment for such enhanced energy at the rate of Rs.3.50 per unit. Therefore, the State Commission fixed rate of Rs.3.50 per unit for unutilised banked energy to compensate the wind energy captive generators/consumers.

36. The Appellants in the present Appeals pray that they should be allowed to utilise the banked energy instead of encashing it. This prayer, in our view, cannot be granted for the following reasons:

- (i) The tariff order for wind energy passed in March, 2006 provided that unutilised energy at the end of year could be encashed at 75% of applicable tariff for wind energy sold to TNEB. The provision would indicate that there could be instances where the wind generators could not utilise their banked energy even under normal circumstances.

(ii) Since the Appellant Board did not permit utilisation of banked energy, the State Commission relaxed this provision and fixed rate of Rs.3.50 per unit which is much higher than the applicable rate as per tariff order (75% of tariff). Under those circumstances, it would not be proper to relax it further.

37. **Summary of Our Findings**

As per tariff order in respect of the year 2006, the unutilised energy at the end of the year would be encashed at 78% of the applicable tariff for wind energy sold to Tamil Nadu Electricity Board. This would indicate that there could be instances where the wind generators could not utilised their banked energy even under normal circumstances. Since the Electricity Board did not permit utilisation of banked energy, the State Commission relaxed this provision and fixed the rate of Rs.3.50 per unit which is much higher than the applicable rates.

Under those circumstances, it is not proper to relax it further. That apart, the tariff for HT Industry has been enhanced considerably in recent tariff order. If the relief sought for by the Appellant in these Appeals are granted, it

would amount to put more burden on the consumers which we are not inclined to do so.

38. Therefore, we do not find any merit in these Appeals. Hence these Appeals are dismissed.

39. Thus, all the Appeals No.53, 94 & 95 of 2010 are dismissed as devoid of merits.

40. However, there is no order as to cost.

(V J TALWAR)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 21st Sept, 2011

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REPORTABLE/NON-REPORTABLE