# TAMIL NADU ELECTRICITY REGULATORY COMMISSION

**(Constituted under section 82 (1) of the Electricity Act, 2003)**
**(Central Act 36 of 2003)**

**PRESENT**:

**Thiru S.Akshayakumar …. Chairman**

**and**

**Dr.T.Prabhakara Rao …. Member**

**I.A.No.1 of 2019**

**in**

**D.R.P.No.19 of 2012**

1. Tamil Nadu Generation and Distribution
Corporation Ltd.
Represented by its Chairman Cum Managing Director
No.144, Anna Salai
Chennai – 600 002.

2. The Chief Financial Controller (Revenue)
TANGEDCO
144, Anna Salai
Chennai – 600 002.

**… Applicants / Respondents**
(Thiru M.Gopinathan,
Standing Counsel for TANGEDCO)

Vs.

Madurai Power Corporation Private Limited
No.3, 1st Floor, 2nd Street
Subbarao Avenue, College Road
Chennai - 600 006.

**…Respondent / Petitioner**
(Thiru Rahul Balaji
Advocate for Respondent /
Petitioner)

**Date of hearing** : **31-01-2019, 14-02-2019, 07-03-2019 and 25-03-2019**

**Date of Order** : **27-03-2019**

We have considered the prayer of the applicant in the I.A., TANGEDCO to re-open the proceedings in D.R.P.No.19 of 2012. We have also heard the objection of the learned Counsel for the respondent company, Thiru Rahul Balaji.

2. The Counsel for the respondent company vehemently objected to the present application for re-opening of the D.R.P. which has been reserved for orders. On the other hand, the learned Counsel for the Applicant in the D.R.P., Thiru T.Mohan contended that no fresh evidences are sought to be adduced and only the originals in regard to the documents already adverted to in the Written Submission are sought to be produced and hence, the same may be taken on record.

3. On a careful consideration of rival submissions, we find that the respondent company has filed a counter affidavit as well written submission opposing the opening of main petition by TANGEDCO. It is seen from the counter affidavit that the respondent company has opposed the re-opening on three grounds namely, 1) Dilatory tactics 2) limitation and 3) absence of judicial member in the Commission. Let us now examine each of the grounds raised by the Respondent company in the counter affidavit.

**4. Dilatory Tactics:-**

4.1 Before proceedings to examine the objection of the respondent company, it is necessary to extract the relevant portions of the counter affidavit filed on 14-02-2019 by the respondent company in the main petition:-

> ***"Thus there is no ground made out for reopening the case when orders had been reserved. Such action on the part of the applicant herein appears to adoption of dilatory tactics to somehow drag on the proceedings and effectively prevent the delivering judgment by the Commission prior to the retirement of the Member Mr.G.Rajagopal by filing such an affidavit on the eve of the retirement when the Commission had heard a large number of matters and was delivering judgments in the same."***

4.2 It may be seen from the above that the respondent company has sought to impute motive to the action of the Applicant in moving the I.A. for re-opening by alleging that the same has been done to effectively prevent a judgment being delivered prior to the retirement of former Member Thiru G.Rajagopal. We are at a loss to understand how the name of the former Member could be dragged into the dispute. Needless to say that having held a judicial office, the name of the Member ought not to have been referred in the averments for substantiating the case. The averment seeks to insinuate that the former Member was biased against TANGEDCO and was in favour of the respondent company. The final decision of the Commission, in any case has nothing to do with the composition of the Commission but it is based only on the merits of the case. It amounts to casting aspersion on the

judicial functions of the former Member which cannot be allowed. Hence, we are of the view that reference to the former Member of the Commission is totally unwarranted. It hardly matters who formed the composition of the Commission so long the quorum is satisfied. Hence, we find that the reasons given for opposing the re-opening on this ground is not sustainable.

5. **Limitation:**

5.1 The second issue is with regard to limitation. The respondent company has alleged that filing of additional documents after a long time is an amendment to pleadings when there is no reference to the said documents in the pleadings and all such claims are barred by limitation. Here again, we are constrained to observe that the averments have been made with an absolute presumption that all the claims are barred by limitation when the fact is that the matter is sub-judice before the Commission. The question whether the claims are barred by limitation or not is still under the consideration of the Commission in the main petition (D.R.P.No.19 of 2012) and it is not known why such a categorical presumption has been made as to the finality of the issue. Be that as it may, the limited issue that arises for consideration is whether the documents supposedly served after the date of reserving the main petition for orders can be admitted or not and whether there is any justification or need for the same. It is seen from the averments of the applicant TANGEDCO that these documents which are proposed to be filed are vital and the same were already referred to in its written submissions. It is also seen that the applicant TANGEDCO filed the documents on 24.12.2018 itself as ordered by the Commission and the same was objected to by the respondent Company on the ground that filing of such documents are effectively an amendment to pleadings and

raising new pleas. Per contra, TANGEDCO submitted that the documents were referred to in the pleadings / written submissions already filed before the Commission and nothing new has been introduced. In such circumstances, we have no doubt of whatsoever nature to state that such disputed question could be decided only when the I.A. is allowed and the documents are placed before us for perusal. Only upon scrutiny, it can be ascertained whether the documents so filed seek to introduce any new set of facts or filed only in support of averments already made. If it is found that new facts are sought to be introduced, the Commission, will no doubt discard such evidence and therefore, the objection of the respondent company at this stage is highly pre-mature in our well considered view. Further, we are convinced that no pre-judice would be caused to the respondent company by mere admission of the documents and every opportunity will be given to question the authenticity and admissibility of such documents. Therefore, we have to hold that the averments with regard to limitation are irrelevant insofar as the production of documents in support of the averments of TANGEDCO and hence, we reject the contentions in this regard.

5.2 It is for the Commission to conclusively arrive at a finding as to whether the claims are barred by limitation and the final order is yet to be passed in the main petition and therefore, these averments are pre-mature and pre-determined.

**6. Competency to adjudicate disputes:-**

6.1 Finally on the question of competency of the Commission to take up the Dispute Resolution in the absence of judicial Member, we find that the Supreme

Court has already clarified that the proceedings in a State Commission can go on with the existing composition until the appointment of new Member with legal qualification and we see no reason as to why we should refrain ourselves from taking up the Dispute Resolution matters. It is seen from the averments of the respondent company that a Clarificatory Petition is sought to be filed before the Supreme Court on the question of jurisdiction and the respondent, no doubt, is at liberty to avail the legal remedy. However, insofar as we are concerned, we have no iota of doubt on the competency present composition of the Commission to hear the D.R.Ps. in terms of the clarificatory orders of the Supreme Court dated 10-09-2018 in M.A. No.2217 of 2018 in TC (C) No.137 of 2015 and therefore, we find no merit in the contention. The respondent company is free to work out his remedy in a manner known to law, in case it doubts the competency / jurisdiction of the Commission.

6.2 Further, a writ petition No.8081 of 2019 was filed by Tamil Nadu Spinning Mills Association with a prayer among other things to restrain the Commission from hearing DRP cases on the ground that consequent on the retirement of one of the Members of the Commission on 09-01-2019, the re-constitution of the Commission took place and hence, the Commission cannot hear the DRP cases in the absence of a judicial Member. This argument was not accepted by the Principal Bench of the Hon'ble High Court of Madras and no orders restraining the Commission was passed by the Hon'ble Single Judge in that case.

6.3 Again, a Public Interest Litigation (PIL) in W.P(MD) No.7021 of 2019 was filed in the Madurai Bench of the Madras High Court with more or less with a similar

prayer. In the said W.P.(MD) No.7021 of 2019 also the Hon'ble Division Bench did not issue any interim order to defer the proceedings before this Commission in regard to DRP cases although we are informed that the petitioner's counsel vehemently argued the case for stay. All these events amply makes its clear that there is no merit in the contention of the respondent company and this Commission has jurisdiction in terms of the clarificatory orders of the Hon'ble Supreme Court dated 10.09.2018 which is very clear. Hence, we do not see any merit in the argument of the respondent company in this issue.

7. **Supremacy of procedural laws:**

7.1 Now let us refer to the written submission filed by the respondent company on 13-03-2019 and examine the merits of the averments. We find that the contentions are three-fold, namely, a) Principles enshrined in the Civil Procedure Code are part of substantive law and laws of procedure are not merely handmaid to justice but have been picturesquely referred so and therefore, cannot be wantonly ignored b) Once a matter has been finally heard and reserved, nothing can be done except to pronounce the judgment c) when no case has been made out for re-opening and when sufficient time was given for leading evidence, re-opening is impermissible.

7.2 We have gone through the submissions of the respondent company on the above issues. Reliance has been placed on the decisions in A.P. Co-ordination Committee Vs Lanco Kondapalli (2016) 3 SCC 468, Sri Gangai Vinayagar Temple Vs Meenakshi Ammal (2015) 3 SCC 624, Arjun Singh Vs Mohindra Kumar (1964) 5

SCR 946, Rabiya Bi Kassim Vs The Country Wise Consumer Financial Services Ltd (2004) SCC online Kar 195, S.K. Sreedhar Vs R. Raghavan (2015-2 L.W.88).

7.3 On the question (a) above, we cannot agree to the proposition sought to be canvassed by the respondent company that provisions of CPC have acquired the status of substantive law. There is no such categorical pronouncement to that effect in the decisions cited by the respondent company. The facts cited by the respondent company in Sri Gangai Vinayagar Temple Vs Meenakshi Ammal relate to a case where consolidated orders have been passed by virtue of inherent powers of the Court and where common trial was conducted. The question that came up before the court for consideration in the said case was whether a losing party is required to file appeals in respect of all adverse decrees. The issue was set at rest by observing that a decree not assailed thereupon metamorphoses into the character of a “former suit” and if that is not to be so viewed, it would be possible to set at naught a decree passed in suit A by challenging the decree in suit B. More conspicuously, the Hon’ble Supreme Court observed that law considers it an anathema to allow a party to achieve a result indirectly when he has deliberately or negligently failed to directly initiate proceedings and that laws of procedure have picturesquely been referred to as hand-maid of justice but it would not mean that they could be wantonly ignored. This observation, in our, view does not apply to the case on hand. Here is a case where the application of procedural law in a strict sense would render the substantive justice ineffective. If we are to accept the view of the respondent company, the documents which may turn out to be vital in determining an issue, would be reduced to mere sheath of papers. It is only for this reason, we are to observe that procedural law cannot shackle the substantive justice and mere delay

which is very minimal in the production of documents cannot override the delivery of justice. It is seen that the respondent company has placed reliance on the decision rendered in Sri Gangai Vinayagar Temple Vs Meenakshi Ammal (2015) 3 SCC 624 which observed as follows;

***"Procedural norms, technicalities and processual law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice".***

***Laws of procedure have picturesquely been referred to as handmaidens to justice, but this does not mean that they can be wantonly ignored because, if so done, a miscarriage of justice inevitably and inexorably ensues. The statutory law and the processual law are two sides of the judicial drachma, each being the obverse of the other".***

7.4 However, we are of the view that the said decision can only be said to be an exception to the settled position of law that procedural law is only to aid the substantive law. The decision relied upon by the respondent company is, in our view, is applicable only to the specific case and it cannot be said to be a general preposition of law. The Hon'ble Supreme Court carved out only an exception and did not overrule the general preposition of law that procedural law is only an aid to the substantive law which means the procedural law cannot subsume or override the substantial law or justice. In this connection, the observation as to the validity of procedural law vis-a-vis the substantive law was well propounded by the Hon'ble

Supreme Court of India in State of Punjab & Anr Vs. Shyamlal & Anr. (1976) AIR SC 1177 in the following words which are re-produced as follows;

> ***"(c) Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the hand-maid and not the mistress, a lubricant, not a resistant in the administration or justice".***

This was again reiterated in Kailash Vs Nanhku & Ors. (C.A.No.7000 of 2004) by the Hon'ble Supreme Court of India;

> ***"(iv) The purpose of providing the time schedule for filing the written statement under Order VIII, Rule 1 of CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the Court to extend the time. Though, the language of the proviso to Rule 1 of Order VIII of the CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the Procedural Law, it has to be held directory and not mandatory. The power of the Court to extend time for filing the written statement beyond the time schedule provided by Order VIII, Rule 1 of the CPC is not completely taken away".***

7.5 In view of the above, we have no hesitation in holding that the procedural law cannot override the substantive justice and hence, the documents which are supposed to be of significant value cannot be discarded in determination of rights of the parties in adjudication.

7.6 The deciding point, in this regard, is whether by allowing such documents the procedural law would be wantonly ignored as the stress on the judgment in Sri Gangai Vinayagar Temple Vs Meenakshi Ammal is on the wanton

ignoring of procedural law. Further, here, the term" wantonly" is of significant import. We do not for a moment think or suggest that the procedural law can be ignored. All that we are trying to say here is that the procedural law cannot subsume the provisions of substantive law of justice.

7.7 Now on the point as to whether any case has been made out by the applicant for re-opening a case when sufficient time was given for leading evidence, we are of the considered view that there was no deliberate or wilful intention on the part of the applicant to produce the record. When these documents are supposedly found to be extremely useful to the applicant as per their own contentions, it is hard to believe or think that the applicant would have deliberately delayed the production. Even though, we cannot entirely absolve, the applicant of the delay in production of record, we cannot conclusively say that there was any wilful intention to delay the production of records. Still, we are to observe that what is required to be seen in the delivery of justice is whether such documents are essential in resolution of disputes. After all, the ultimate purpose is to resolve the disputes in a fair manner by giving adequate opportunities to both sides. Here, we may also point out that even the respondent company was granted time to file additional written submission and advance oral arguments based on the alleged omission to record the request for adjournment vide daily order dated 7.3.2019 of the Commission. The respondent company also has fairly acknowledged the same in its written submission. This is not to say that all the procedural defects can be ignored. This is only to say that, in a quasi-judcial proceedings, what is of importance is the ultimate justice and not the hyper technical considerations which obstruct substantive justice. We also hasten to add that even the purported delay in production of records on the part of applicant before the

reserving of the orders, would not by itself denude the inherent powers of the Commission to admit such documents when the stakes are high and any indiscreet rejection would result in improper appreciation of material records and facts essential for determination of disputes.

7.8 On the question whether a case can be re-opened at all after reserving and the contentions of the respondent company that nothing can be done except to pronounce the judgment, we have to necessarily refer to the judgment dated 30-8-2017 of the Hon'ble High Court of Madras in C.R.P.(PD) Nos.3309 to 3312 of 2011 in Dharani Sugars and Chemicals Ltd. Vs. T.M.N. Engineering Industries is the latest authority. We are of the view that the said judgment of Madras High Court would be applicable to the case on hand. The following portion of the said judgment of the Hon'ble Madras High Court would be relevant:-

> ***"11. The points for consideration in all the CRPs is whether the impugned orders of the learned Judge allowing the applications after suit was reserved was judgment is correct or not.***
>
> ***12. The contention of the learned counsel for the petitioner is that the respondent is that the respondent is now seeking to file the certified copy of the registration certificate in Form A of the respondent firm issued by the Registrar of Registration of Firms, Tiruchirapalli. This document was available to the respondent at the time of filing of the suit and when the evidence on behalf of the respondent was re-opened, PW1 was recalled and respondent was permitted to file additional document. The respondent did not avail the said opportunity and failed to***

***produce the document now sought to be marked. The respondent has not given any reason for not producing the said document at the time of filing of the suit or earlier. It only amounts to filing up lacuna. These contentions are without any merits. The Court has discretionary power to re-open the evidence and to re-open any witness suo moto or on submission by a party. The discretionary power has to be exercised judicially, sparingly and in exceptional cases. The Court has to consider whether re-opening of the evidence on behalf of the parties and permission to mark a document is necessary to decide the issue. The Court has power to reopen, recall and permit marking of documents, if the same is to clarify certain ambiguity in the evidence let in by the parties. Only when the intention of the party is to fill up lacuna, drag on the proceedings and is malafide or it will cause great prejudice and prejudice to other party, the Court cannot allow the request of the party for re-opening and let in further evidence.***

***13. In the judgment reported in AIR 2009 (SC) 1604, cited supra, the Hon'ble Apex Court has held that the Court can exercise discretionary power to recall any witness to clear any ambiguity that may have arisen during the course of his examination and re-examination of a witness has a bearing on the ultimate decision of the suit.***

***14. From the judgment referred to by the learned counsel for the petitioner, it is seen that the Court has discretion to recall the witness but the said discretionary powers must be exercised sparingly and cautiously and should not be exercised to allow the party to fill up lacuna. The courts have***

***power to reopen, recall and permit further oral and documentary evidence if the same has a bearing to decide the issues in the suit. In the present case, the petitioner has raised the issue of registration of respondent firm as well as authority of person who has filed the suit on behalf of the respondent during cross examination and at the time of arguments. The respondent has already filed certificate of registration of respondent's firm, now the respondent seeks to file certified copy of the registration certificate to show the names of the partners. The respondent has stated that certified copy of registration certificate in Form 'A' maintained by Registrar of Firm, Tiruchirapalli showing the names of partners of the respondent is obtained and seek permission to mark the said document. This will not amount to filling up lacuna, as contended by the learned counsel for the petitioner. On the other hand, the names of the partners of respondent's firm, as contained in the document sought to be marked has a bearing to decide the issue in the suit.***

***x x x x***

***16. The learned Judge has considered all these materials and law in proper perspective and allowed the applications. I do not find any illegality or irregularity in the impugned order warranting interference by this Court.***

***17. In the result, all these Civil Revision Petitions are dismissed. No costs. Consequently, connected Miscellaneous Petition is closed."***

*8.* The above order of the Hon'ble High Court clearly indicates that a case can be re-opened after it being reserved for orders, if it is to clarify certain ambiguity in the evidence. Further, as observed by the Hon'ble High Court of Madras we have to ensure that the discretion so exercised should be sparing and cautious in nature and

would be in line with the observations of the High Court of Madras in view of the fact the re-opening will have the bearing on the ultimate decision in the adjudication. The present case is one which involves huge public money and cannot be decided in a hasty manner on a hyper technical ground. Further, it is to be decided whether the documents are required for arriving at a correct decision on the substantive rights of the parties as canvased by the counsel for the applicant and to further the ends of justice and the discretion, if exercised, can be said to be exercised sparingly and cautiously as held by the High Court of Madras and not for filling up gaps. A simple test in this regard would be to see the eventuality in case of rejection of this I.A. On rejection of this I.A. on the ground of filling up of lacuna by the Applicant, the matter will have to be heard without crucial piece of evidence which may be vital in determining the huge financial claim arising out of the D.R.P. This, in our opinion, would amount to travesty of justice and cannot be countenanced.

9. Further, it is apposite to mention here that the Commission has got inherent powers to make such orders as may be necessary under Regulations 48 (1) of the Conduct of Business Regulations. Hence, we find it necessary and expedient to take recourse to said regulation which is similar to the inherent powers of court under section 151 of CPC, for resolving the issue on hand.

10. Given the fact that the case involves a huge monetary claim and the effect of the award in terms of the claim will have to be absorbed on the financials of the Licensee and ultimately the same will have a bearing in the retail tariff and passed on to the consumers, we will be falling in error if we take a pedantic view on this issue.

11. We do not find any case of abuse of process of law on the part of the Applicant though we would have very much appreciated the production of records much earlier. The rendering of justice being the ultimate motto, we are of the view that any rejection of the plea for introduction of documents which are relied upon in the written submissions of the applicant based on the pleadings made before the Commission would result in grave miscarriage of justice. We are convinced that the production of the documents would clarify the evidences on the issues and would assist the Commission in rendering justice. Here, there is another dimension to the issue i.e. the primacy of substantive justice over the procedural hassle. Hence, we are inclined to agree to the plea for the reason that procedural law should not defeat the substantive justice as the mere delayed production of documents should not defeat the substantive relief to be delivered in the process of adjudication under section 86 (1) (f) which requires the consideration of the interests of all stakeholders including the consumers under the Electricity Act, 2003.

12. The judgment of the Hon'ble High Court of Madras and other judgments on the question of preponderance of substantive law over procedural law leads us to an inescapable conclusion that the documents submitted for re-opening will be required for assisting the Commission to adjudicate the matter effectively and hence the re-opening on the said ground is permissible. In this connection, it may be relevant to refer to the order dated 22.2.2018 passed by the Supreme Court in Writ Petition (s) (Criminal) No.182 of 2017 and I.A.No.126274 of 2017 in the matter of filing of additional documents as pointed out by the applicant TANGEDCO in para-9 of its written submissions dated 18.3.2019 which reads as follows;

***"Counsel for the respondent requested time since he could not have made his submissions on merits insofar as certain aspects are concerned, he may be allowed to do so. In the interest of justice we are inclined to grant some time to the counsel for the respondent to make his submissions".***

13 It may be seen from the above that even the Hon'ble Apex Court has permitted the filing of additional documents after the main case is reserved for orders and hence, we do not find anything illegal or irregular in allowing the I.A. for introduction of documents in support of the averments already made in the written submission.

14. The respondent company is still at liberty to dispute the correctness or otherwise of the claims made by TANGEDCO and also the genuineness of the documents relied upon. The opportunity to rebut the claims and to controvert the documents placed by the Applicant before the Commission will be given in the re-opened proceedings. In such case, we are of the firm conviction that the twin principles, namely, avoiding the abuse of process of law and assisting the court to deliver justice have passed the test of the Commission. With the object of assisting the Commission to deliver substantive justice, the plea for re-opening the I.A. for the purpose producing documents adverted to in the Written Submissions is thus, allowed as we do not find any flagrant case of abuse of process of court.

15. In view of the aforesaid reasons read with the powers of the Commission under regulation 48 of the Conduct of Business Regulations, 2004, we are of the view that this I.A. has to be allowed. Accordingly, I.A. is allowed and the applicant is directed to file the necessary affidavit enclosing the document sought to be filed within a day after serving a copy of the same to other side and it is made clear that we have not passed any orders on merit in the main petition and the matter will be listed for hearing on 01-04-2019.

Ordered accordingly.

**(Sd.....)**
**(Dr.T.Prabhakara Rao)**
**Member**

**(Sd.....)**
**(S.Akshayakumar)**
**Chairman**

**//True copy//**

**Secretary**
**Tamil Nadu Electricity**
**Regulatory Commission**