

**(2011) 08 MAD CK 0365**

**Madras High Court (Madurai Bench)**

**Case No:** Writ Petition (MD) No. 3544 of 2011 and M.P (MD) No's. 1 and 2 of 2011

Beta Wind Farms Private Limited

APPELLANT

Vs

The Government of Tamil Nadu

RESPONDENT

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**Date of Decision:** Aug. 24, 2011

**Hon'ble Judges:** R. Sudhakar, J

**Bench:** Single Bench

**Advocate:** N.R. Chandran for A. Thirumurthy, for the Appellant; M. Govindan, Special Govt. Pleader, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

@JUDGMENTTAG-ORDER

R. Sudhakar, J.

This writ petition has been filed by the Petitioner praying to issue a writ of Certiorarified Mandamus, to call for the records of the order No. A3/2409/2010 dated 14.07.2011 passed by the second Respondent and quash the same and consequently, direct the Respondents to grant permission to the Petitioner to erect and commission the wind mill at a distance of 3.5 kms from the Koodankulam Nuclear Power Plant at Koodankulam, at Vijayapathi and at Irukkanthurai Village in Radhapuram Taluk, Tirunelveli District.

2. Heard Shri N.R. Chandran, learned Senior Advocate for Mr. A. Thirumurthy, Learned Counsel appearing for the Petitioner and Mr. M. Govindan, learned Special Government Pleader appearing for the Respondents.

3. By consent, the writ petition itself is taken up for final disposal.

4. The Petitioner challenges the order of the second Respondent District Collector dated 14.07.2011 made in No. A3/2409/2010.

5. The Petitioner is a Private Limited Company engaged in the establishment of Wind Farms. They sought permission of the District Collector -competent authority

for erection of 23 Windmills in two Village Panchayat areas during May 2010.

6. The Village Panchayats concerned forwarded the applications to the Commissioner of the Panchayat Union, Radhapuram Taluk so as to place the same before the Koodankulam Project Local Committee constituted under G.O. Ms. No. 829, Public Works Department, dated 29.04.1991 for its consideration and approval.

7. Initially, the Commissioner of Radhapuram Panchayat Union by proceedings dated 19.07.2010 informed the Petitioner that their application for erection of 23 Wind Mills was rejected as it amounts to an industrial activity. Against this, the Petitioner filed an appeal to the District Collector on 27.07.2010. The said appeal has not been disposed of even as on today.

8. Thereafter, based on certain clarification issued by the various Government authorities, the Petitioner once again approached the Commissioner of Radhapuram Panchayat Union for approval and the matter was placed before the Koodankulam Project Local Committee for consideration. The request was considered and a favourable report/order was passed in the meeting of the Koodankulam Project Local Committee on 25.02.2011, by way of a resolution which reads as follows:

Applica-tion Nos.	Details	Abstract of the Resolution
1 to 24	Establish-ment of wind mills	The applications received for the establishment of wind mills have been rejected in the local committee meeting held on 16.7.2010 on the ground that establishment of wind mill amounts to the development of industry. It has also been clarified that the applicants shall make appeal before the District Administration. The letters of the Principal Secretary, Energy (C-2) Department, Export Promotion Bureau and the certificate dated 25.1.2011 of the Managing Director of Tamil Nadu Energy Development Agency have been considered in this meeting. In the above three documents, it has been stated that wind mill is not an industrial development. Therefore, the applications 1 to 24 are forwarded to the District Collector for favourable decision.

9. This was forwarded by the Commissioner of Panchayat Union, Radhapuram to the Assistant Director of Rural Development (Panchayats), Tirunelveli, on the same day vide proceedings in Na.Ka.A4/2092/2010 dated 25.02.2011.

10. Based on the above, the Petitioner filed the present writ petition for a Writ of Mandamus directing the second Respondent to grant permission to the Petitioner to erect and commission the wind mill at a distance of 3.5 Kms from the Koodankulam Nuclear Power Plant at Koodankulam, at Vijayapathi and at Irukkanthurai villages in Radhapuram Taluk, Tirunelveli District. On 31.03.2011, an interim order was passed in M.P(MD) No. 1 of 2011 in W.P(MD) No. 3544 of 2011 to inspect the erection of 7 wind mills which is said to have been completed by the Petitioner and the District Collector was asked to pass an order. The interim order has been passed with a rider that the Commissioning or erection of the windmill will not give any right to the Petitioner to claim the substantial relief (i.e.) permission for erection of the windmills. It was specified in that order that the Department can seek necessary order from the Government since the matter was pending before the Government.

11. Based on the interim order, it appears that on 05.04.2011, the Koodankulam Project Local Committee submitted a report with regard to the erection of 7 wind mills. Thereafter, the District Collector passed an order on 14.07.2011 rejecting the request of the Petitioner.

12. The Petitioner was given liberty to challenge the said order by filing an application for amendment of the prayer in the pending writ petition. The amendment as sought for was ordered and the writ petition is now taken up for consideration on merits. The Respondents stated that the counter already filed will suffice.

13. The impugned order passed by the District Collector dated 14.07.2011 is challenged on the following grounds:

(i) The District Collector, having relied upon the Government Order has failed to exercise the power in the manner prescribed under G.O. Ms. No. 829, Public Works Department, dated 29.04.1991.

(ii) No opportunity was given to the Petitioner to be heard before rejecting their claim and therefore, there is a violation of principles of natural justice.

(iii) The letter of the Principal Secretary to Government in Letter No. 3282/C2/2011 dated 19.07.2011, in particular, paragraph 4, has not been complied with in pith and substance.

14. Counter-affidavit was filed in respect of the unamended writ petition on 29.03.2011 before the impugned order of the District Collector dated 14.07.2011 was passed. The counter, however, is almost on the same lines as that of the impugned order. The very same reasons are contained in the counter affidavit.

Therefore, it will be sufficient if the impugned order is taken into consideration on the points urged by the Learned Counsel for the Petitioner and on the basis of the counter filed.

15. The order under challenge proceeds on the basis that the Inspector of Factories, Tirunelveli, was asked to clarify whether the windmill is an industry. The said authority has sent an extract of National Industrial Classification (All Economic Activities) issued by the Central Statistical Organization, Ministry of Statistics and Programme Implementation, Government of India, New Delhi, wherein it is shown that Electric Power Generation using other Non-Conventional sources is classified as Industry as per code No. 35106. Hence, the windmill sought to be erected by the Petitioner is an industry.

16. Relying upon the guidelines of the Atomic Energy Regulatory Board (AERB) with regard to the Sterilized Zone and the Emergency Planning Zone (EPZ), the District Collector came to the conclusion that the industrial activity in the nature of erection of wind mill should not be allowed in the Sterilized Zone. He came to the conclusion that erection of wind mill will hamper the evacuation of people during the time of emergency and that the activities of the Petitioner are coming within the Sterilized Zone and in terms of the guidelines of the Atomic Energy Regulatory Board, the request of the Petitioner for NOC for erecting 23 wind mills is rejected in order to avoid evacuation of people during the unlikely event of an accident.

17. The Commissioner of the Radhapuram Panchayat Union, *prima facie*, was of the view that the erection of windmill is an industry. For all these reasons, the request was rejected.

18. After going through the order under challenge and the contentions raised by the Petitioner, this Court finds that the order under challenge deserves to be set aside and remitted back to the said authority by way of remand for the following reasons:

1. The District Collector has placed reliance on G.O. Ms. No. 829, Public Works Department, dated 29.04.1991, but he has, however, come to the conclusion that NOC should be rejected. Clauses (ii) and (iii) of the G.O., clearly state that if the District Collector comes to the conclusion that the recommendations of the Committee need to be revised or amended, he shall forward it to the State Government with his comments and the State Government alone will decide the issue. Since the District Collector in this case has decided to reject the applications for grant of NOC in spite of specific recommendation by the Koodankulam Project Local Committee, he has to follow the procedure under Clauses (ii) and (iii) of G.O. Ms. No. 829, Public Works Department, dated 29.04.1991. Failure to do so would render the order bad.

2. In the order under challenge, the District Collector has referred to several documents which have been received including the letter of the Inspector of Factories, Tirunelveli and the proceedings of the District Collector in Proceedings

No. A3/2409/2010 dated 24.11.2010. Both the documents as above have not been furnished to the Petitioner and therefore, there is a violation of principles of natural justice.

3. The District Collector while considering the claim of the Petitioner, failed to take into consideration the letter of the Principal Secretary to Government, Energy (C2) Department, in Letter No. 7703/C2/2010 dated 06.09.2010 which clearly states that the windmill is not a factory or an industry engaged in manufacturing process. A copy of it has been addressed to the District Collector, Tirunelveli and hence, it shows non-application of mind to relevant factor.

4. The District Collector has not taken into consideration the Certificate issued by the Tamil Nadu Energy Development Agency which is headed by the Additional Chief Secretary, the Chairman cum Managing Director -an Officer in the rank of Indian Administrative Service, who has clearly stated that windmill does not constitute an activity under the category of Industry for prohibition. This is a relevant fact not considered.

19. Therefore, the non-consideration of these factors has resulted in passing of the impugned proceedings erroneously. If it was considered, it would have made a difference in the final outcome of the decision of the District Collector. It is relevant to consider whether a windmill is an industry or not.

20. In any event, subsequent to the filing of the writ petition, in the letter of the Principal Secretary to Government in Letter No. 3282/C2/2011 dated 19.07.2011, addressed to the District Collector, Tirunelveli, at paragraph 4, the District Collector has been requested to consider the report of the Koodankulam Project Local Committee and follow the procedures laid down in G.O. Ms. No. 829, Public Works Department, dated 29.04.1991. The District Collector has failed to give any reason as to whether he is accepting the views of the Koodankulam Project Local Committee positively or negatively except a mere reference. There is no reason whatsoever in the order to state as to whether the report of the Koodankulam Project Local Committee is accepted or rejected. Therefore, there is a clear omission on the part of the District Collector to consider relevant fact which is the mandate of the Government Order. It is trite law that subsequent events can be taken into consideration if it is relevant to the point in issue. The Honourable Apex Court has held so in many cases.

21. The reference to the guidelines of the Atomic Energy Regulatory Board (AERB) is for the Government to consider in the event of the District Collector rejecting or refusing to grant NOC and therefore, the rejection order on this ground will be without jurisdiction.

22. In the result, for all the above reasons, the impugned order passed by the second Respondent in No. A3/2409/2010 dated 14.07.2011, is set aside and the matter is remitted to the District Collector -second Respondent for reconsideration

on merits in accordance with law after giving the Petitioner an opportunity of personal hearing. Such exercise shall be completed within a period of eight weeks from the date of receipt of a copy of this order.

23. The writ petition is ordered by way of remand. Consequently, the connected Miscellaneous Petitions are closed. No costs.