

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE OF RESERVATION : 17.06.2016

DATE OF JUDGEMENT : 15.07.2016

CORAM:

THE HONOURABLE Mr.SANJAY KISHAN KAUL, CHIEF JUSTICE
AND

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

WP.Nos.22097 and 32756 of 2013

1.Simran Wind Project Private Limited
Kolkatta 700 016 ... Petitioner in WP.22097/13

1.Wind Independent Power Producers Association
DLF Corporate Park Tower, Gurgaon 122002

2.Paharpur Cooling Towers Limited, Kolkatta 700027

3.Savita Oil Technologies Limited
Mumbai 400 021 ... Petitioners in WP.32756/13

Versus

1.Tamil Nadu Electricity Regulatory Commission
by its Secretary, 19A, Rukmini Lakshmipathy Salai
Egmore, Chennai-8

2.The Tamil Nadu Generation and Distribution
Corporation Limited
144, Anna Salai, Chennai-2 ... RR1 & 2 in both WPs

3.Central Electricity Regulatory Commission
3rd Floor, Chander Lok Buildings, 36, Ganpath
New Delhi-1 ... R3 in WP.22097/13

Prayer:- These Writ Petitions are filed to issue a writ of declaration, declaring the impugned Tamil Nadu Electricity Regulatory Commission (renewable energy Purchase Obligation) Regulations, 2010, notification no.TNERC/RPO/ 19/3, dated 21.01.2013 and all consequential orders, including the consequential order no.TNERC/M.04-2/E/RPO, dated 15.7.2013 as being arbitrary, illegal and ultra vires the powers of the TNERC and contrary to the provisions of the Electricity Act, 2003 and the applicable CERC regulations.

For Respondents : Mr.P.H.Aravind Pandian, AAG, assisted
by Mr.M.Venkatakrishnan-R1-Both WPs
Mr.S.K.Rameshwar-R2-Both WPs
Mr.T.Mohan, Standing counsel-R3
(WP.22097/2013)

ORDER

The writ petitions have been filed to declare that the Tamil Nadu Electricity Regulatory Commission (renewable energy Purchase Obligation) Regulations 2010, notification no.TNERC/RPO/19/3, dated 21.01.2013 and the consequential order no.TNERC/M.04-2/E/RPO, dated 15.7.2013 as arbitrary, illegal and ultra vires the provisions of the Electricity Act 2013 and the regulations framed there under.

2. Since, the issues involved in both the writ petitions are one and the same, they are taken up together for final disposal, with the consent of the parties. The parties are addressed as per their ranks in WP.No.22097/2013.

3. The case of the petitioners is that they have invested huge sums for installation of the wind energy generators. The electricity so generated is injected into the grid based on power purchase agreement entered into with the states under preferential tariffs. The Electricity Act and the National Electricity Policy encourage the promotion of non-conventional energy sources through its various provisions. Central Electricity Regulatory Commission (herein after referred to as CERC) introduced to the renewable energy certificate (hereinafter referred to as REC) mechanism to strike a balance between the availability and requirement of the obligated entities vide notifications dated 14.01.2010 and modified subsequently by orders dated 29.09.2010 and 10-07-2013. The mechanism was evolved as the non-conventional energy sources are available in only certain parts of the country and to facilitate sale to the distribution licensee at the same rates of conventional power and to recover the balance from obligated entities by selling the RECs. Further, the sale of energy at the pooled cost of power purchase of such distribution licensee as determined by the appropriate commission was introduced by the CERC to address the renewable purchase obligation (hereinafter referred to as RPO) vide order dated 09.11.2010. The order laid down the detailed procedure for registration, verification, eligibility and issuance of certificates, etc under the REC scheme with certain distinct features deviating from earlier policies. One of the salient features is the absence of power purchase agreement (herein after referred to as PPA). All the wind energy generators (herein after referred to as WEGs) of the petitioners are commissioned in consonance with the REC scheme.

4. Further, the Regulation 5 (c) of the CERC terms and conditions for recognition and issue of renewable energy certificate for renewable Generation Regulations 2010, describes the "pooled cost of power purchase" and the Tamil Nadu Electricity Regulatory Commission (herein after referred to as TNERC) has notified the Renewable Power Purchase Obligation Regulations, 2010 in line with the CERC regulations which among various other regulations paved way for purchase of renewable certificates by the obligated entities who were unable to fulfil their RPO. Regulation 2(h) has described the pooled cost of power purchase. The definition under the TNERC regulations is different from the CERC regulations with sizeable exclusion on the cost apart from renewable energy. The rate of pooled cost of power purchase was notified periodically from time to time by the TNERC. While so, the TNERC issued a draft to amend the existing regulation 2(1) (h) of renewable energy Purchase Obligation Regulations, 2010 on 16.10.2010 by fixing a cap at 75% of the preferential tariff fixed by the commission on the purchases from renewable energy sources. A meeting of the forum of regulators was also conducted on 29.07.2011, in which TNERC also participated as a member and it was agreed that there must be uniformity in fixation of average pooled power purchase cost (hereinafter referred to as APPPC). Detailed objections were raised by the petitioners raising various points inter alia that TNERC has no authority to bring in such regulations, that the definition would end up in providing different pooled cost for different energy and the amendment is against the object of the REC scheme promoted by the CERC. However, the amendments were notified by TNERC vide impugned proceedings dated 21.01.2013 and published in the official gazette on 19.06.2013. Subsequently, the TNERC vide the other impugned proceedings dated 15.07.2013, fixed the pooled cost of power purchase payable by the TANGEDCO at Rs 3.11 subject to maximum of 75% of the preferential tariff fixed by the commission to that category/sub category of NCES (non-conventional energy sources) generators. Aggrieved and also contending that the implementation of the amendment would shut the entire renewable energy industry, the petitioners are before this court by way of the above writ petitions.

5. The learned counsel for the petitioners painstakingly contended that the impugned amendment to the TNERC Regulations 2010, dated 21.01.2013 notified on 19.06.2013 and the consequential order dated 15.07.2013 fixing the pooled cost of power purchase at Rs 3.11 is unsustainable and ultra vires and liable to be struck down as they are against the regulations of the CERC/REC Regulations 2010 and the provisions of the Electricity Act 2003. The learned counsel took us through the various provisions of the act and the regulations of both the CERC and TNERC to illustrate the power, objectives and vision to promote the renewable energy. The learned counsel pointed out that the need for investment

in non conventional source of energy gained momentum throughout the world to substitute the conventional power to avoid environmental degradation. Our constitution in Articles 48-A, 51, 51-A and 21 also emphasises the need for environmental protection and sustainable development. India is also a party to the United Nations Framework Convention on Climate change (UNFCCC) and Kyoto Protocol.

6. The learned counsel for the petitioners further contended that the investment cost in cases of renewable energy is high even though comparing to other sources, its availability throughout the year is low. Therefore, the pricing is based on "Feed in Tariffs" mechanism, whereby the gap between the conventional energy price and renewable energy price is bridged. The Tariff Policy, 2006 and the section 86 (1) of the act enabled the appropriate commissions to fix the minimum purchase of electricity from renewable energy sources. The preferential tariffs are determined by the SERCs. To annul the mismatch between the supply and requirement of the renewable energy (RE) in the country, the REC scheme was introduced after due discussions and deliberations in the forum of regulators, which comprised of CERC and representations from SERCs as well. Since, it was a national level policy, the power to frame the regulations is with the CERC and the SERCs had only a lesser role to recognise the entities and for that purpose frame regulations in conformity with the central regulations. As per the REC scheme floated by the CERC, the electricity component was to be paid at APPPC and the environmental component was permitted to be traded in power exchange to any obligated entity. It was also contended by the learned counsel that the definition of the amended APPPC of the TNERC is contradictory to the definition of CERC, whereby a cap of 75 % on the preferential tariff is introduced and that is against the law and beyond the scope of delegated legislation. The action of the TNERC is against section 61 (a) and (i) of the Electricity Act.

7. The learned counsel for the petitioners has further vehemently contended that the 1st respondent has induced the petitioners to enter into an agreement for power purchase under the existing tariff and conditions cannot subsequently alter the same to the disadvantage of the petitioners who have invested in crores. The power purchase agreements having statutory force cannot be overlooked. Further, the impugned amendment and orders are without reasoning or logic and no public hearing was conducted. It was also contended that in the meeting of the forum of regulators (FOR) on 29.07.2011, it was resolved that there must be uniformity throughout the country in fixing the APPPC. Despite the same, TNERC has gone ahead and fixed the cap with retrospective effect when no other states in the country has fixed the cap. Hence, they are in violation of Articles 14, 19 (1) (g) and 300A of the Constitution of India. It was contended by the learned counsel pointing out to the resolution of the forum of

regulators' meeting that the subsequent amendment to the CERC regulations also does not come into the aid of the 1st respondent as it merely states that the APPPC must be "At the pooled power purchase cost" replacing the earlier "not exceeding APPPC". It was also contended that the role of the TNERC was only in computing the APPPC and it has to be in accordance with the definition of CERC regulations as the subject involved is an interstate matter. It was also contended by the learned counsel for the petitioners that under the REC scheme, since the generating companies can sell the energy to more than one state, the SERCs cannot determine the cost contrary to the decision of the CERC regulations. The contention of the respondents that the petitioners can earn more revenue was rebutted by the learned counsel for the petitioners, who pointed out that the unsold stock of RECs have grown enormously to 117 lakh till January 2015 and at present is estimated at 1.55 Lakh RECs per month and therefore, the contention ought to be rejected as fallacious.

8. It was also contended by the learned counsel for the petitioners as a last resort that the impugned proceedings have been issued on assumptions that the APPPC would breach the preferential tariff, which till date has not occurred and therefore, the proceedings are pre-mature and can be given effect as and when such an event takes place. The learned counsel also relied upon the judgment of the honourable supreme court reported in 2009 (15) SCC 570 (Global energy Limited Vs. CERC) in support of his contentions.

9. Per contra, the case of the respondents is as follows:-

According to the learned senior counsel for the 1st respondent, the notifications are within the realm of powers vested with it as per the provisions of the Electricity Act, 2003 and the fixation of price is within its domain and the SERC is not subordinate to the CERC. Since REC is applicable throughout India, the eligibility and procedures are laid down by CERC leaving the fixation with the SERCs. The conditions and the method to be followed for fixing the average pooled cost of power purchases within the state is to be determined only by SERC. Even the CERC has also brought about an amendment on 10.07.2013 leaving the fixation of the pooled cost with the SERC. The due procedures under the statute have been followed and the notification has been effected only after hearing the objections of the petitioners. Considering the consumer interest the cap has been fixed by the expert body and such a cap has been fixed only to prevent the generators under REC scheme claiming more tariff than preferential tariff. It was also contended that the REC generators have the option of selling the energy so generated under the preferential tariff or to sell the electricity generated and its environmental attribute separately as RECs. It was contended that in the absence of cap, the purchase

price of the electrical component would go up and would have to be passed on to the consumers. Pointing out the necessity and contending that the capping will only augur the petitioners to gain more revenue because of the sale of the REC in open power exchange, the learned senior counsel elaborated from the statistics submitted before this court that without the cap on the preferential tariff while computing APPPC, the same would result in unjust enrichment to generators and in public interest, exercising its power under section 61(d), the cap has been fixed. The learned senior counsel also contended that the powers granted to the SERCs being regulatory would have to be widely construed and must facilitate towards achieving the objects enumerated under the act. The fixation of the cap at 75% was made only after considering all the relevant facts prevailing in the state. It was also contended that the petitioners and others under the REC scheme are open to sell the green component in the open market without any restrictions and the same has not been brought to the knowledge of this court by the petitioners. Therefore, the writ petitions are misconceived, non maintainable and liable to be dismissed.

10. The learned counsel for the 2nd respondent contending that the SERC is well within its powers to fix the cap and determine the tariff as per the REC Regulations, 2010, relied upon sections 61(d), 86(1) (b) of the Electricity Act, 2003. The learned counsel contended that both the corporation and the SERC was under obligation to protect the interest of the public while at the same time ensuring supply. The TNERC fixes the targets for renewable energy purchase obligation (herein after referred to as RPO) every now and then and based on it, the 2nd respondent enters into agreement for purchase. As per the preferential tariff scheme, the power purchase tariff determined by the commission is fixed for a specific period of 20 years provided in the agreement. Whereas, the price of electrical component under the scheme depends on price of various factors like coal, gas, demand and power supply of the state and the environmental component depends upon the market price. Hence, to avoid the price of the electrical component to escalate above the preferential tariff, a cap has been fixed. The authority of the commission regarding the fixation of a cap was also raised by the petitioner in WP.No.22097/2013 in MP.No.16/2011, but the same was categorically rejected by the commission vide its order dated 22.03.2012. The CERC has also affirmed the powers of the SERCs in its amendment dated 10.07.2013. The contention that after huge investments and after agreement, the fixation of cap is illegal is again misconceived as tariff under the REC scheme is not based on the agreement as in the case of preferential tariff scheme.

11. It was also contended by the learned counsel for the 2nd respondent that the acceptance of the chairman of TNERC at the meeting would not take away the right of the

commission to fix the price. Moreover, the fluctuations in the price was not discussed. The petitioner cannot be permitted to unjustly enrich themselves. The increase in purchase cost would have to be burdened on the general public and just for the sake of meeting out the RPO, the 2nd respondent cannot incur huge loss and therefore a request was made and after discussions and hearing the objections of all the parties concerned, 75% cap has been fixed. The counsel for the above reasons, sought for dismissal of the writ petitions.

12. The contention of the learned counsel for the 3rd respondent is that the CERC has notified the REC scheme exercising its powers under section 178 r/w section 66 of the Electricity Act. Pointing out the necessity to create a balance between the demand and supply in the renewable energy, the CERC notified the REC scheme in 2010 so as to enable the generators to recover the cost. It was also contended that the FOR, consisting of the members of CERC and SERCs, formulated separate draft regulations for CERC and SERCs. The pooled cost of power purchase was notified in the 2010 regulations and have been subsequently amended on 10.07.2013 enabling the state commissions to fix the power purchase cost. The learned counsel has pointed out from the objects and reasons that to clarify and to ensure that the tariff for electricity component should not be higher than the preferential price, the amendment was issued. Contending that there is no contradiction between the SERC and CERC regulations, the counsel relying upon the judgment of the apex court in 2010 (4) SCC 603 (PTC India Limited Vs. CERC) sought for dismissal of the writ petitions.

13. After hearing all the parties extensively, this court narrows down the points for consideration as below:-

- a. Whether, the TNERC is within its powers to determine the APPPC under the REC Scheme contrary to the CERC Regulations, 2010?
- b. Whether the TNERC by exercising its powers under the statute override the contract, entered into by the TANGEDCO with the petitioners in pursuance of its earlier directions?

14. Scope and applicability of the various provisions under the Electricity Act, 2003, CERC Regulations, TNERC regulations and the national and tariff policies are as under:-

- a. The objects and reasons for enacting the Electricity Act, 2003 clearly spell out that a new comprehensive enactment was culled out replacing multiple laws on the generation and supply of electricity in the country and to expand the market for purchase and sale of electricity in the open market. While so, even under the new act, the legislature continued to abridge the state governments' power to fix the tariff and vest it with the regulatory commissions.

b. Section 3 of the Act enables the central government in consultation with the state governments to formulate long term goals for the generation of electricity through conventional and non-conventional sources and notify the same. The plans and policies of the government act as guidelines for the respective commissions while formulating the regulations.

c. Section 61 enables the appropriate commission to frame tariff regulations and section 62 enables the appropriate commission to determine the tariff. The provisions are exhaustive. The delegation of power under the act is contemplated in sections 61 and 62. Sections 61 and 62 crystallizes the powers of the appropriate commission to fix the tariffs for the sale or purchase of electricity. A reading of the provisions would clearly make out that the term appropriate commission is synonymous with state commission. Therefore, the state commissions are enabled by these provisions to fix the tariff applicable to the generating companies and the transmission licensees. The section also spells out that while fixing the tariff, the commercial aspect is to be considered but at the same time, it cannot be at the cost of consumer interest. The provisions also empower the commission to fix the procedure for fixing the tariff and also fix different tariffs by reasonable classification. The period of pricing has been fixed to one year to ensure yearly appraisal of the market conditions.

d. Section 64 of the Act spells out the procedures to be followed by the appropriate commission while fixing the tariff on an application. It contemplates an opportunity to the public and stake holders to raise their objections before an order is passed fixing the tariff.

e. Section 66 delegates the power to the appropriate commission to develop a market in power in line with Section 3 of the Act to promote and facilitate sale of electricity in the open market.

f. Section 79 speaks about the functions of the central commission as a tariff determining authority relating to inter-state transactions and as an advisory body. It enables the central commission to regulate the tariff for sale or purchase of electricity between the states and also to regulate the tariff in case of sale by generating companies to more than one state. However, the power under this section is subjected to the regulations of the central commission framed under section 178. In case, the power is delegated to the state commissions either by operation of section 61, 62 or by virtue of delegation by the central commission by express or implied implications to the state commissions to determine the tariff and fix the procurement price applicable in case of sale by generating companies, the fixation by the state commission shall prevail.

g. Section 86 speaks about the functions of the state commissions. The state commissions are vested with the powers to determine the tariff and the procurement price from the generating companies within the state. It also contemplates the promotion and co-generation of electricity from renewable sources. The scope of this section is in fact wider than section 79.

h. Section 178 deals with the powers of central commission to make regulations and section 181 deals with the powers of state commissions to make regulations under the act to implement the provisions of the Act. Sections 178 and 181 enable the central and state commissions to frame the regulations in consonance with the national plan and policy. A vigilant reading would spell out that the provisions are independent with similar power vested on both the authorities. The commissions are vested with the powers to pen down the terms and conditions, methods and procedures to be followed while fixing the tariff. Therefore, it is clear that the state commission is empowered to impose restrictions as well while fixing the tariff or procurement price in consumer interest.

i. Regulation 2(k) of the CERC Terms and Conditions for recognition and issuance of renewable energy certificate for renewable energy Generation, Regulations, 2010 defines preferential tariff to be the tariff fixed by the appropriate commission. The said definition has been deleted along with the modification of the definition of APPPC in 2013. The regulations without any shadow of doubt at various places expressly confirm the power of the state commission to fix the tariff. The definition of APPPC clearly spells out that the cost is to be determined at the average purchase cost of the distribution licensee which is actually fixed by the state commissions exercising its powers under sections 61, 62, 86 and 181.

j. The FOR has discussed the necessity of amending APPPC in its 25th Meeting on 29.07.2011 and in its 26th Meeting on 9.10.2011. From the above minutes of the FOR, it is evident that though there was a persistent demand for uniform APPPC throughout the country and the CERC to determine the tariff, the same was not accepted and it was decided in retention of the power of the SERCs to determine the APPPC. Subsequently by CERC notification dated 10/07/2013, the REC regulations were amended. The point in dispute, that is to say the definition of APPPC under regulation 5 was amended. The said amendment was notified, after hearing the stake holders as contemplated under section 64 of the Act.

k. The 1ST respondent in the meantime, in exercise of its powers under section 181 of the Electricity Act, issued the notification in TNERC notification dated 07.12.2010 regarding renewable energy purchase obligation after the CERC

regulations. The pooled cost of power purchase has been defined in Section 2(h). The definition of APPPC under the CERC regulations has been retained to a larger extent but not in full. More exclusions have been included for calculation of APPPC and the same was not objected by the generating companies immediately after the notification. By notification dated TNERC notification no.TNERC/19/2, dated 29.07.2011, the 2010, regulations were amended and further amendment was made vide TNERC notification no.TNERC/19/3, dated 21.01.2013 (Amendment) notified on 19.06.2013, whereby the disputed cap was introduced in the cost of procurement from the renewable energy sources. The reason for such introduction has been explained in the statement of explanation.

1. The national electricity plan, national electricity policies and tariff policies favour development and promotion of renewable energy scheme for generation of electricity. They also indicate the foremost role of SERC in promotion of such industries, access to open market and determination of price of procurement. The policies act as guideline and lay down the various factors to be considered but leaves it to the SERC for ultimate decision, while fixing the tariff and steps for promotion, including grant of subsidies.

15. Discussions and Findings:- The power purchase transaction between the generator and obligated entity is in two forms as enumerated below:

- (i) to sell the energy at preferential tariff or
- (ii) to sell the electrical component to the distribution company or third party and the environmental component in power exchange.

16. Both the schemes have been promoted in public interest to tap the maximum generation by encouraging private players. The participation in either of the schemes undoubtedly involves huge cost. Obviously, the companies making the investment would certainly want to make profits out of investment. This is where the policy of the government comes in. The cost of purchase of such electricity is directly thrust on the consumer. Therefore, a balance approach was necessary and therefore, mechanism was evolved, authorising the SERCs to fix the tariff.

17. It is not in dispute that the role to determine the tariff is vested with the appropriate commission and in the present case with the TNERC. Such a power is derived from sections 61 and 62. It has been contended that the REC scheme is a national level scheme floated in compliance with the national electricity plan and tariff policy by the CERC and only the central commission would have the powers to determine the APPPC. This court is not in consonance with the

contentions of the learned counsel for the petitioner. Section 3 of the Electricity Act lays down that the National Electricity Policy and Tariff Policies are to be prepared by the central government, in consultation with the state governments and such plans shall be notified once in five years. The object of framing such policy is to give a direction to the promotion, development and utilisation of the various sources of energy. They lay down the broader prospective and act as a guidance to the statutory bodies to frame the regulations. From the national electricity policy, it is evident that it is the duty of the SERCs to promote the non-conventional sources of energy and for that purpose determine the tariffs for the purchase and the purchase obligation. The tariff policy in clause 8.3 also confirms the authority of the SERC to determine the tariff.

18. It is also pertinent to mention here that sections 79 and 86 of the Electricity Act, 2003, under which the central and state commissions clearly spell out their distinct and independent role. Section 79 (1) (b) of the act lays down that the power to regulate tariff shall vest with the CERC in case of composite schemes with involvement of more than one state. However, as stated above, it is subject to the regulations framed under section 178 and other provisions of the act. At the cost of repetition, if the CERC either expressly or impliedly empowers the SERC to exercise any of its functions, the authority of the SERC would reign on the subject. Section 86 (1) empowers the SERC to determine the tariff for generation, supply, transmission and wheeling of electricity, etc within the state. Sections 178 and 181 empower the central as well as state commissions, respectively to frame regulations among other things for issuances of tariff orders with modifications or conditions under sub-section 3 of section 64. The powers are independent.

19. The bone of contention of the petitioner is that the REC scheme being a national level scheme, the regulations framed by the TNERC has to be in consonance with the regulations of the CERC. It has also been contended that the regulations of the TNERC being a delegated legislation, cannot override the provisions of the act and the CERC regulations, from where it has derived the power. It was also contended that the notifications are without reasons and hence arbitrary and against Article 14 and 19 of the constitution. The following paragraphs in the judgment reported in 2009 (15) SCC 570 has also been relied upon.

"25. It is now a well settled principle of law that the rule making power 'for carrying out the purpose of the act' is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the regulation making power cannot be exercised so as to bring into existence substantive rights or obligations or

disabilities which are not contemplated in terms of the provisions of the said act.

36. Electricity was subject to strict regulations. It, subject to just exceptions, was the monopoly of the State Electricity Boards, Public Sector Undertakings. Participation of the private sector inter alia in trading was encouraged by the provisions of the act. court's concern, therefore, would be not only to see that the Statute is intra vires the Constitutional scheme including the legislative field, but also as to whether it passes the test of reasonableness having regard to the object and purpose of the act. For achieving the aforementioned purpose not only the premise, relevancy of the constitutional scheme in relation thereto is required to be taken into consideration as would be noticed a little later but therefor the doctrine of purposive interpretation should also be resorted to

39. The Superior court would ensure that the subordinate legislation has been framed within the four corners of the act and is otherwise valid. The issue therefore which arises for our consideration is as to whether the delegation having been made for the purpose of carrying out the object, could the limitation be imposed for ascertaining as to whether the applicant is fit and proper person and disregarding his creditworthiness. There cannot be any doubt whatsoever that a statute cannot be vague and unreasonable."

20. This court after perusal of the regulations of the CERC, with its amendments and the regulations of the TNERC and upon a conjoint reading of the provisions of the Electricity Act, is unable to accept the contention of the counsel for the petitioner.

21. As per the definition of pooled cost of purchase in the CERC regulations, it is the weighted average pooled purchase price at which the distribution licensee, has purchased the electricity, including the cost of self-generation, if any in the previous year from all the energy supplies, long term and short term but excluding those based on renewable energy sources, as the case may be. The authority of the SERC to fix the preferential tariff is not disputed and therefore, section 79 (1) is not applicable. Further, Regulation 2 (k) of the CERC Regulations, 2010, prior to the amendment in 2013 also confirms the authority of the state to fix the preferential tariff. The distribution licensee purchases the electricity at the price fixed by the state Commissions, viz a viz, the TNERC here. Therefore, it cannot

be said that the state commissions cannot fix their own method to calculate the average pooled cost of power purchase. There is force in the contention of the learned senior counsel for the 1st respondent that section 86 (1) (b) gives unfettered power to determine the price of power purchase within the state. In addition, sections 181(2d) and (2f) also empower the state commissions to fix and prescribe the conditions for such fixation.

22. It is also pertinent to mention here that the original definition of APPPC under the TNERC Regulations itself was different from that of the regulations of the CERC. However, the same was not challenged. Now the present amendment has been introduced to put a cap at 75%. The present amendment has been brought into force after hearing the stake holders, which again is not in dispute and therefore is in conformity with the procedure contemplated under section 64. The draft notification was published as contemplated under section 181(3) of the act and objections were called for from the public. The same were examined by the expert body and only then the amendment has been approved and the notification published. Unlike in fixation of tariff for consumers, a public hearing is not necessary. Here, from the explanation to the amendment, it is evident that the cap has been fixed to eschew the APPPC from exceeding the preferential tariff. The same has further been clarified in the counter. The said amendment has been brought into force, to safeguard the consumer's interest as envisaged under section 61 (d) of the act and also at the same time, to balance the procurement cost of purchase price of electricity component. Therefore, this court is of the view that the amendment is neither vague nor arbitrary and therefore there is no violation of Articles 14 and 19 of the constitution. In view of the fact that the power has been exercised within the parameters of delegation, the impugned notification cannot be held to be without authority and ultra vires. Hence the judgment of the hon'ble supreme court does not come to the aid of the petitioner.

23. It was also contended that in the FOR meeting held on 29.07.2011 and 9/10.10.2011, the need to have uniformity in the APPPC was emphasized and accepted by all the members including the chairman of the 1st respondent. The decisions in the forum of regulators' meetings, though are binding in nature, cannot take away the right of the commissions to issue regulations under the statute. In the present case, after the meeting of forum of regulators, the CERC has amended regulation 5 (1) (c) by permitting the appropriate commissions to determine the APPPC. The amendment is with prospective effect.

24. The amendment also was assailed by the counsel for the petitioner on the ground that it only facilitates the appropriate commission to calculate the APPPC based on the available data and does not extend the power to fix any cap.

This court is again of the view that the contention is unsustainable. When the power to fix the tariff under sections 61, 62, 86 and 181 vests with the 1st respondent, it is open to them to impose any restriction for the fixation of APPPC. The object of leaving the function to the SERCs is because, they would be best suited to determine the escalation in prices of fuel, etc within the respective states.

25. The next point for consideration is whether, the 1st respondent is estopped from effecting the notification to the disadvantage of the petitioners after their huge investment. It is now settled law, that there cannot be any estoppel against a statute. The regulations framed exercising the powers under the Electricity Act have the same force as that of a statute. It is a policy decision, of course, in public interest. By operation of law, the rights created to a party under agreement can be annulled. At this juncture, it is relevant to rely upon the judgement relied upon by the counsel for the 3rd respondent in 2010 (4) SCC 603, wherein the apex court has held as follows:-

"19. In this connection, it may also be noted that the Central Government has also, in exercise of its powers under Section 3 of the 2003 Act, notified the Tariff Policy with effect from 6.1.2006. One of the primary objectives of the Tariff Policy is to ensure availability of electricity to consumers at reasonable and competitive rates. The Tariff Policy tries to balance the interests of consumers and the need for investments while prescribing the rate of return. It also tries to promote training in electricity for making the markets competitive. Under the Tariff Policy, there is a mandate given to the Regulatory Commissions, namely, to monitor the trading transactions continuously and ensure that the electricity traders do not indulge in profiteering in cases of market failure. The Tariff Policy directs the Regulatory Commissions to fix the trading margin in a manner which would reduce the costs of electricity to the consumers and, at the same time, they should endeavour to meet the requirement for investments.

25. The 2003 Act contains separate provisions for the performance of the dual functions by the Commission. Section 61 is the enabling provision for framing of regulations by the Central Commission; the determination of terms and conditions of tariff has been left to the domain of the Regulatory Commissions under Section 61 of the act whereas actual tariff determination by the Regulatory Commissions is covered by section 62 of the act. This aspect is very important for deciding the present case. Specifying the terms

and conditions for determination of tariff is an exercise 39 which is different and distinct from actual tariff determination in accordance with the provisions of the act for supply of electricity by a generating company to a distribution licensee or for transmission of electricity or for wheeling of electricity or for retail sale of electricity.

26. The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads section 61 with section 62 of the 2003 Act, it becomes clear that the Appropriate Commission shall determine the actual tariff in accordance with the provisions of the act, including the terms and conditions which may be specified by the Appropriate Commission under section 61 of the said act. Under the 2003 act, if one reads section 62 with section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same under the act is made appealable vide section 111. These provisions, namely, sections 61, 62 and 64 indicate the dual nature of functions performed by the Regulatory Commissions, viz, decision-making and specifying terms and conditions for tariff determination.

28. The 2003 Act contemplates three kinds of delegated legislation. Firstly, under section 176, the Central Government is empowered to make rules to carry out the provisions of the act. Correspondingly, the State Governments are also given powers under section 180 to make rules. Secondly, under section 177, the Central Authority is also empowered to make regulations consistent with the act and the rules to carry out the provisions of the act. Thirdly, under section 178, the Central Commission can make regulations consistent with the act and the rules to carry out the provisions of the act. SERCs have a corresponding power under section 181. The rules and regulations have to be placed before Parliament and the State Legislatures, as the case may be, under section 179 and 182. The Parliament has the power to modify the rules/ regulations. This power is not conferred upon the State Legislatures. A holistic reading of the 2003 Act leads to the conclusion that regulations can be made as long as two conditions are satisfied, namely, that they are consistent with the act and that they are made for carrying out the provisions of the act

50. Applying the above test, price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of Tariff fixation under section 62 made appealable under section 111 of the 2003 Act, though section 61 is an enabling provision for the framing of regulations by CERC. If one takes "Tariff" as a subjectmatter, one finds that under Part VII of the 2003 Act actual determination/ fixation of tariff is done by the Appropriate Commission under section 62 whereas section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the Appropriate Commission has to fix the tariff. This basic scheme equally applies to 54 subject-matter "trading margin" in a different statutory context as will be demonstrated by discussion hereinbelow

58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under section 178 of the act. Instead of fixing a trading margin (including capping) on a case to case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognized, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under section 178 became necessary because a regulation made under section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including power purchase Agreements which have got to be aligned with the regulations under section 178 and which could not have been done across the board by an Order of the Central Commission under section 79(1)(j)."

26. The ratio laid down by the apex court is squarely applicable to the present facts of the case. What that flows from the ratio is that the powers of the CERC under section 79 are administrative and the powers under section 178 are legislative. Also, by exercising the legislative powers, the contractual terms can be overridden. The powers of the state commission under section 181 is pari-materia to that of the central commission under section 178. All that is required is that the regulation must be in conformity with the objects of the act and exercised in furtherance of the provisions of the act. Further, the judgement also clearly spells that the role of the regulatory commission is twin folds, namely, (1)

decision making and (2) specifying terms and conditions for determination of tariff. Therefore, the TNERC would have the power not only to determine the tariff but also to impose conditions.

27. Also, in the judgment relied upon by the counsel for the petitioner, the apex court in 2009 (15) SCC 570 has held as follows:-

"62. Judicial review from an administrative decision lies on a very narrow compass. The superior courts in exercise of their jurisdiction under Article 226 or 32 of the Constitution of India ordinarily would not enter into the merit of the matter. Their primary concern is with the decision making process.

28. In the case on hand, this court has already held that there is no error in the decision making process. Therefore, the call for judicial review should only fail.

29. Also the apex court in the judgment reported in CDJ 2016 SC 079 = 2016 (4) SCC 134 (Kothari Industrial Corporation Limited Vs. Tamil Nadu Electricity Board) has held as follows :

"11. Be that as it may, the question referred has been squarely answered by this court in Shree Sidhballi Steels Limited vs. State of Uttar Pradesh &Ors. (2011 (3) SC 193) wherein this court has considered a similar question with regard to the withdrawal of concessional tariff/rebate to an industrial unit carrying on business in the hill areas of the State of U.P. (now the State of Uttarakhand). After an indepth consideration of the provisions of Section 48/49 of the Electricity Supply Act, 1948 under which the concessional tariff/rebate was granted and the provisions of section 21 of the General Clauses Act as well as the provisions of the U.P. Electricity Reforms Act, 1999 under which the concessional tariff/rebate was later withdrawn this court in para 51 came to the following conclusion -

"From the above discussion, it is clear that the petitioners cannot raise plea of estoppel against the Notification dated 7.8.2000 reducing hill development rebate to 0% as there can be no estoppel against the statute."

30. In view of the ratio laid down by the apex court and in view of the provisions of the act, discussed above, the TNERC is well within its right to deviate from its earlier notification.

31. The next contention of the petitioner is that the actual need as not arrived for the 1st respondent to effect the notification as the APPPC has not breached the preferential tariff. Also it was contended that the REC can be sold at higher rate is far from truth and huge stocks of REC remain unsold. Again, this court cannot venture into the reasons regarding the unviability of the REC in the market. This court taking judicial note of the happenings in the world regarding the climate change and the need for sustainable development, could only see a continuing market for environmental component or carbon credit throughout the world. Hence for all the reasons stated above, the challenge to the notification 21.01.2013 fails. In view of the fact that the order dated 15.07.2013 fixing the **APPPC*** at Rs 3.11 has been passed in exercising the rights under the act and the regulations and following the proceedings dated 21.01.2013, the challenge to the same would also fail. However, this court finds force in the submission of the counsel for the petitioner that considering the object to introduce the cap, the need to implement cap has not arrived. The impugned notification has been enacted in public interest to prevent the generators to unjustly enrich themselves, in the event of the preferential tariff falling below the APPPC. Therefore, this court is of the view that the notification can be implemented with effect from the date of such breach as notified by the TNERC. Therefore, granting liberty to the petitioners to move the TNERC for appropriate directions, the writ petitions are dismissed. No costs.

Sd/-
Assistant Registrar(CS VII)
dt.25/07/2016

Corrected as per order of this Court dt.22.09.2016 made in WP.Nos.22097 & 32756/13

Sd/-
Assistant Registrar(CS VII)
dt.29/09/2016

//True Copy//

Sub Assistant Registrar

Srcm

To:

1. The Secretary,
Tamil Nadu Electricity
Regulatory Commission
19A, Rukmini Lakshmipathy Salai
Egmore, Chennai-8

To be substituted for
the order already
on 23.08.2016

2. The Tamil Nadu Generation
and Distribution
Corporation Limited
144, Anna Salai, Chennai-2

3. The Central Electricity
Regulatory Commission
3rd Floor, Chander Lok Buildings,
36, Ganpath, New Delhi-1.

+1cc to Mr.T.Mohan, Advocate, S.R.No.**54679***

+2cc's to Mr.S.K.Rameshwar, Advocate, S.R.No.39612

+1cc to Mr.M.Venkatakrisshnan, Advocate, S.R.No.39603

+1cc to Mr.Rahul Balaji, Advocate, S.R.No.**54569***

W.P.Nos.22097 and 32756 of 2013

KJI (CO)
CA(27/07/2016)
EU 30.09.2106

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