THE HON'BLE THE CHIEF JUSTICE SRI THOTTATHIL B.RADHAKRISHNAN
AND
THE HON'BLE SRI JUSTICE S.V. BHATT

<u>WRIT PETITION No.19562 OF 2018</u>

ORDER: (Per the Hon'ble the Chief Justice Sri Thottathil B. Radhakrishnan)

The petitioner has a 'captive generating plant' as defined in sub-section (8) of Section 2 of the Act, it having, established and commissioned a 46 MW Captive Wind Power Project, for short, 'CWPP', as a captive generating plant in Anantapur District, for the specific purpose of captive consumption, variously depending on the quantum of generation from time to time, by the petitioner's industrial units at Sarapaka Village in Bhadradri Kothagudem District, Bollaram in Sangareddy District, at Anaparthi in East Godavari District and Chirala in Prakasam District, and also at other industrial units and/or establishments of the petitioner. That CWPP was synchronized with the then Andhra Pradesh Grid and the Commercial Operations date was declared as 25.07.2014. Though the CWPP is stated to have been conceived and set up for generation and captive consumption within the undivided State of Andhra Pradesh; the Andhra Pradesh Reorganisation Act, 2014, for short 'Reorganisation Act', came into effect from 02.06.2014; that is, before 25.07.2014, which was declared as the Commercial Operations date of the petitioner's CWPP. With that situation, the generation of power through the petitioner's CWPP became an activity within the State of Andhra Pradesh and the consumption of the petitioner referable to that CWPP by the industrial units within the erstwhile State of Andhra Pradesh got bifurcated with effect from 02.06.2014 as between the State of Andhra Pradesh and the State of Telangana by the operation of the Reorganisation Act.

2. The captive consumption by the industrial units within Andhra Pradesh was possible through intra-state open access, and the captive consumption by the industrial units in Telangana requires inter-state open access in terms of the Central Electricity Regulatory Commission (Open Access in the Inter-State Transmission) Regulations, 2008, hereinafter referred to as 'the 2008 Regulations', as amended from time to time.

3. Adv. K.Gopal Choudary, the learned counsel for the petitioner, submits that the petitioner is a wind power generator and the transmission charges within the State of Andhra Pradesh as well as Telangana are expressly exempted under different Tariff Orders, more particularly, the Tariff Order, dated 09.05.2014. He submits that through that Tariff Order, the Commission exempts Solar Wind and Mini Hydel Generation from wheeling charges. That Tariff Order also claries that there shall be no transmission charges for Non-Conventional Energy Generators using Wind, Solar and Mini hydel. Hence, the fifth respondent cannot be permitted to demand and collect the transmission charges from the petitioner. He further submits that Clause 16(2) of the 2008 Regulations provides that where the State Commission has not determined the transmission charges for use of the state network, the charges for that use shall be payable at the rate of Rs.80/- per MWh for the energy approved, and that contrary to the same, the fifth respondent is demanding and collecting higher tariffs. He seeks a direction to the respondents concerned not to demand and

collect the transmission charges for the States of Telangana and Andhra Pradesh in respect of the inter-state open access fro the wind power generated by the petitioner. He also seeks an alternative relief that if the transmission charges are held to be applicable, the petitioner be charged Rs.80/- per MWh and be refunded the excess amount collected by the fifth respondent along with interest at bank rate under Section 62(6) of the Act.

4. The fifth respondent filed counter affidavit stating that it is the Power System Operation Corporation Limited, which operates the Regional Load Despatch Centre and going by the counter affidavit sworn to on its behalf, it is the apex body for operation of the integrated Grid in the region and is the nodal agency in charge of scheduling and grid management in the Southern Region. It also stated in the counter affidavit that under Regulation 5 of the 2008 Regulations, the nodal agency for inter-state bilateral transactions shall be the Regional Load Despatch Centre of the region, where point of drawl of electricity is situated and as such, the fifth respondent is the nodal agency for the Short Term Open Access (STOA) transaction from the petitioner located in Andhra Pradesh to consumption in Telangana. Regulation 16(1) of the 2008 Regulations specifies that the inter-state transmission charges (point of connection charges) for the energy approved at the regional periphery shall be payable for each point of injection and for each point of drawl in accordance with the provisions of the CERC (Sharing of Interstate Transmission Charges and Losses) Regulations, 2010, hereinafter referred to as 'the 2010 Regulations', as amended from time to time. Clause (*z*) to the Clause (1) of Regulation 7 of that Regulations allows exemptions

only to some categories of the units and that the petitioner is not the one, which comes under the exempted category. Adv. K.Siddharth Rao, the learned counsel for respondent No.5 reiterated these contentions.

5. We have also heard the learned standing counsel for respondents 1 and 3 Adv. N.Siva Reddy and Adv. R.Vinod Reddy, the learned standing counsel for respondents 2 and 4.

6. Part V of the Electricity Act, 2003, hereinafter referred to as 'the Act', bunches the primary legislative provisions, which govern the Transmission of Electricity. Sub-section (1) of Section 27 of the Act provides for the establishment of a Centre for each region to be known as the Regional Load Despatch Centre having territorial jurisdiction as determined by the Central Government in accordance with Section 25 for the purpose of exercising the powers and discharging the functions under Part V of the Act.

7. Going by the affidavit on behalf of the petitioner, it started commercial operations on 25.07.2014, after the Reorganisation Act came into force with effect from 02.06.2014. In view of that, the petitioner's wind power generating unit came to be in the State of Andhra Pradesh, and the consumption of the captive power came to be in the State of Telangana and the State of Andhra Pradesh. Though the petitioner claims that it is eligible to get exemption from transmission charges by virtue of Clause 16(2) of the 2008 Regulations, the petitioner cannot be exempted from paying the same as per clause (z) to Clause (1) of Regulation 7 of the 2010 Regulations. It is relevant to extract clause (z) to Clause (1) of Regulation 7 of that Regulations, which is as under:-

"(z) No transmission charges and losses for the use of ISTS network shall be payable for the generation based on wind power resources for a period of 25 years from the date of commercial operation of such generation if they fulfil the following conditions:

(i) Such generation capacity has been awarded through competitive bidding; and

(ii) such generation capacity has been declared under commercial operation between 30.09.2016 till 31.03.2019; and

(iii) Power Purchase Agreement(s) have been executed for sale of such generation capacity to the Distribution Companies for compliance of their renewal purchase obligations.

8. Perusal of the above provision would show that to avail the exemption from payment of transmission charges, one has to satisfy the conditions mentioned in that provision. In the case on hand, the petitioner, in order to have the exemption under category (i) of the above provision, needs to have the generation capacity awarded through competitive bidding, whereas the petitioner's generation capacity has not been awarded through competitive bidding. Hence, on this score, the petitioner is not eligible to have exemption from paying the transmission charges. As per category (ii) of that provision, the generation capacity ought to have been declared under commercial operations between 30.09.2016 till 31.03.2019, whereas the petitioner has started commercial operations on 25.07.2014, which also disqualifies the petitioner to have such exemption.

9. On to the issue of the tariff applicable to the petitioner, clause 16(2) of the 2008 Regulations provides that the charges for use of state network is Rs.80/- per MWh, where there is no

determination of transmission charges by the State Commission. In this case, it is not known whether the respective State Commissions have determined the Tariff rates for transmission charges/for the use of the State network. If it is determined by the State Commissions, the petitioner has to pay such charges. Otherwise, the petitioner is liable to pay Rs.80/- per MWh for use of respective State network as transmission charges. Any amount collected by the fifth respondent from the petitioner in excess has to be adjusted towards the future payments under that head. Therefore, the alternative relief of the petitioner insofar as refund of the excess amount collected from the petitioner and for interest at bank rate on that amount is not eligible to be allowed.

10. It is not within the jurisdiction of this Court under Article 226 of the Constitution of India to decide the issue whether, as a matter of fact, the fifth respondent is demanding and collecting Rs.80/- per MWh, or at any other excess tariff rates for use of respective State network as transmission charges from the petitioner and whether there is any excess amount collected from the petitioner. The petitioner can agitate such issues before the Central Electricity Regulation Commission, as per Regulation 26 of the 2008 Regulations, if so advised.

11. In the result, this writ petition is ordered rejecting the plea of the petitioner that it is exempted from payment of transmission charges and that it is entitled to refund. It is held that if there is excess collection, that is a matter for reconciliation against future accruals, which become eligible for collection or payment. The question whether the demand and collection of Rs.80/- per MWh

or at any other rate is applicable to the petitioner is left open to be agitated by the petitioner before the Central Electricity Regulation Authority, if so advised.

The writ petition is ordered accordingly. There shall be no orders as to costs.

Miscellaneous petitions, pending if any, shall stand closed. There shall be no order as to costs.

THOTTATHIL B. RADHAKRISHNAN, CJ

S.V.BHATT, J

28.12.2018
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