IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.08.2019

PRONOUNCED ON : 07.08.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Writ Petition No.8644 of 2019 and
W.M.P.Nos.9167, 9170, 9173, 9177 & 9180 of 2019

Kamuthi Renewable Energy Ltd.,
Adani House,
Nr.Mithakhali Six Roads,
Ahmedabad - 380 009
Gujarat, India ... Petitioner

Vs

1.Tamil Nadu Generation and
Distribution Corporation Limited,
Represented by its Chairman &
Managing Director,
No.144, Anna Salai,
Chennai - 600 002.

2.Tamil Nadu Transmission Corporation Limited,
Represented by its Chairman &
Managing Director,
No.144, Anna Salai,
Chennai - 600 002.

3.The Chief Engineer/NCES,
Tamil Nadu Generation and Distribution
Corporation Limited,
No.144, Anna Salai,
Chennai - 600 002.

4.The Superintending Engineer (NCES),
Tamil Nadu Generation and
Distribution Corporation Limited,
Tirunelveli - 627 011. ... Respondents

Prayer :- This Writ Petition is filed under Article 226 of the Constitution of India praying to issue a writ of certiorarified mandamus calling for the records of the third respondent comprised in its order dated 20.09.2016 in Memo

No.CE/NCES/SE/Sol/EE/SCB/A1/F./D.1248/16 and consequential order of the fourth respondent dated 30.09.2016 in Lr.No.SE/NCES/TIN/Tech/F.KREL/D.517/2016 directing the petitioner to segregate its 72MW Solar Power Plant into 25 MW and 47 MW with separate energy meters and seeking to make payment for 47 MW at the tariff of Rs.5.10 per unit, as fixed by this Hon'ble Commission in its order on "Comprehensive Tariff Order on Solar Power" dated 28.03.2016 and quash the same as arbitrary, illegal and consequently direct the respondent to pay the petitioner the tariff of Rs.7.01 per unit for the entire 72 MW project as the project is one Commissioned under the "Comprehensive Tariff Order on Solar Power" dated September 12, 2014 being Order No.7 of 2014 for the entire period commencing from the date of commissioning of the 72MW project together with interest thereon for such delayed payment from the date the payments became due until date of payment as also comply with the obligations under the Energy Purchase Agreement including establishment of the payment security mechanism set out in the Energy Purchase Agreement in Clause xx by opening of revolving irrevocable letter of credit to secure timely payment of the petitioner's invoices.

For Petitioner :Mr.Rahul Balaji

For Respondents :Mr.P.H.Aravind Pandian,
Additional Advocate General,
Assisted by Mr.S.K.Rameshuwar,
Standing Counsel

ORDER

The petitioner company is engaged in generation of electricity using renewable resources. It has set up a solar PV power plant of 72 MW capacity at O.Karisalkulam Village, Kamuthi Taluk, Ramnad District. The petitioner company and the first respondent namely, the Tamil Nadu Generation and Distribution Company (TANGEDCO) entered into a Energy Purchase Agreement (EPA) on 4/07/2015. The agreement is subject to the Comprehensive Tariff Order on Solar Power dated 12/09/2014 issued by the Tamil Nadu Electricity Regulatory Commission (TNERC).

2.As per the Order No. 7 of 2014, the tariff payable to solar power plants commissioned during the control period was fixed at the rate of Rs.7.01 per unit. The control period of tariff was fixed as two years. The TNERC by an order dated 01/04/2015, extended the control period of solar power tariff till 31/03/2016. By virtue of this order, solar power projects commissioned on or before 31st March, 2016 eligible and entitled to a tariff of Rs 7.01 per unit.

3.Before entering into the Energy Purchase Agreement (EPA) on 04/07/2015, the first respondent vide its letter dated 17/06/2015 proposed to interface the power plant of the petitioner with the 2nd respondent Tamil Nadu Transmission Corporation Ltd (TANTRANSCO) grid at the sanctioned Kamuthi 400/230-110 KV sub-station at 110 KV level by erecting 110 KV line for a distance of 7 km and asked the petitioner to deposit a sum of Rs.212.75 lakhs towards the 50% of the security deposit. On payment of the total security deposit of Rs.425.50 lakhs in furtherance of the letter issued by TANTRANSCO dated 4/07/2015, the EPA was entered between the petitioner and the first respondent on 04/07/2015 as stated above.

4.The control period was extended upto 31/03/2016 by TNERC suo-motu. Subsequent to the agreement, the petitioner commenced the construction of its 72 MW project. However, due to cyclone during the month of November, 2015, the construction work got stopped for some time and resumed later. On completion of the construction work, the Tamil Nadu Pollution Control Board carried out necessary inspections and issued consent to operate on 10/02/2016.

5.The petitioner contends that, as per the terms of the EPA dated 4/07/2015, the petitioner was to provide the evacuation facility from the point of generation to the interconnection point. The first respondent was not able to complete the construction of the evacuation facilities with the time. On 09/02/2016, the petitioner intimated the first respondent that the 72 MW solar power project is in the last phase of commissioning and will be ready for commissioning by 20/02/2016. So, requested the first respondent to consider the alternate grid interface arrangement for evacuating power with one circuit of 110 KV D/C in existing Kamuthi Sub-station.

6.After obtaining the approval for commissioning from the Chief Electrical Inspector on 04/03/2016 and consent for operation from the Tamil Nadu Pollution Control Board, the petitioner through its letter dated 21/03/2106, requested the respondents to provide the necessary connectivity and evacuation facility on regular basis since, the plant is ready for commission from 20/02/2016. To provide service code, the first respondent asked documents from the petitioner. All required documents were furnished by the petitioner on 30/03/2016. Thereafter, the second respondent granted a temporary connectivity at 110 KV Kamuthi Sub-Station at 110 KV level on 31/03/2016.

7.The Superintending Engineer, Ramanathapuram issued commissioning certificate on 31/03/2016. At the request of 2nd respondent through its letter dated 15/04/2016, the energy injection was restricted to 25 MW (out of 72 MW) at Kamuthi 110 KV sub-station at 110 KV level to avoid overloading of 230 KV Karaikudi - Karambiam line. Though, on commissioning the plant, the petitioner was capable of generating 72 MW energy only at the request of the respondents they fed upto 25 MW in the changed grid connectivity. The lack of evacuation capacity upto 72 MW was due to the respondent's delay in not completing the proposed Sub-station work at Kamuthi in time.

8.After repeated request, the 3rd respondent issued letter dated 30/09/2016, granting permanent connectivity at new Kamuthi 110 KV sub-station, subject to the condition that the petitioner has to install two separate meters for 25 MW and 47 MW. The energy exported by the petitioner from its solar power plant to the grid of the 2nd respondent will be purchased at the rate of Rs 7.01 per unit for 25 MW as per the TNERC tariff order No 7 of 2014 and at the rate of Rs 5.10 per unit for the remaining 47 MW as per the TNERC tariff order No. 2 of 2016 dated 28/03/2016. Thus, the submission of the learned counsel for the petitioner, in short, is that, having commissioned the plant with 72 MW capacity within the control period of 31/03/2016, the petitioner is entitled for the tariff fixed under order 7 of 2014.

9.The case of the petitioner is that the energy export was restricted to 25 MW due to the incapacity of the first respondent to evacuate the total 72 MW generation capacity of the petitioner. Later, after the new substation at Kamuthi came into operation, from 5/10/2016, the power generated by the petitioner evacuated through this new sub-station. Therefore, the post facto segregation of contracted capacity is illegal and unjust. Fixation of tariff at the rate of Rs.7.01 for 25 MW and refusal to pay the same tariff for the energy of remaining 47 MW generated and supplied based on the tariff orders dated 12/09/2014 and 28/03/2016 is breach of EPA resulting in grave miscarriage of justice.

10.On behalf of the respondents, a counter affidavit has been filed. In the counter, it is averred that, based on the Tamil Nadu Solar Power Policy 2012, the TANGEDCO have implemented the tariff order issued by the TNERC, in the State, for the procurement of solar energy. Under the preferential tariff order, 86 developers with combined capacity of 1484 MW have executed power purchase agreement with TANGEDCO including the petitioner company. M/s.Adani Green Energy (Tamil Nadu) Ltd., gave application and request for approval for establishment of 5 solar plants at Kamuthi Taluk, Ramanathapuram of combined capacity of 648 MW. Three solar plants each with 72 MW capacity and two solar plants each with 216 MW capacity.

11.On receipt of the applications, load flow study was conducted and the study report was communicated to the petitioner vide its letter in CE/NCES/SE/Sol/EE/SCB/A 1/F Kamuthi Renewable/D 760/15 dated 17/06/2015. In the said letter, the petitioner was further informed that, the power plant can be interfaced with the TANTRANSCO grid at proposed sanctioned Kamuthi 400/230-110 KV SS at 230 level by erecting 110 KV evacuation line for a distance of 7 km connecting the petitioner's proposed 72 MW solar PV power plant and the proposed sanctioned Kamuthi 400/230-110 KV SS with necessary breaker and protection arrangement as per the TANGEDCO norms. The above said grid connectivity shall be effected only after commissioning of proposed sancationed Kamuthi 400/230-110 KV SS. While so, on 29/06/2015 M/s Adani Green Energy (Tamil Nadu) limited informed that they would be doing the 72 MW (Phase V) project through its subsidiary company namely M/s Kamuthi Renewable Energy Ltd and requested for name change. On the acceptance of the request, the petitioner company remitted the balance 50% of the security deposit.

12.On submission of relevant records and payment of security deposit the respondent issued "noted for record letter" dated 04/07/2015, the condition for interfacing with TANTRANSCO mentioned in the earlier letter dated 17/06/2015 was reiterated. Further, the petitioner was requested to furnish an undertaking that it will not claim any deemed generation in the event of delay in commissioning of the 400 KV SS and the applicable tariff will be fixed by the TNERC at the time of commissioning of 400 KV SS. Pursuant to this letter, the petitioner has given a letter dated 16/06/2015 that they will not claim any deemed generation or any other benefits whatsoever, from TANGEDCO, in case TANTRANSCO could not commission the proposed 400 KV substation at Kamuthi, Ramnad District.

13.The petitioner company though know well that grid connectivity shall be effected only after commissioning of proposed sanctioned Kamuthi 400/230-110 KV SS, sought for permission to evacuate power through 110 KV substation to set record of commissioning the project at the shortest span of 6 months. Though TANGEDCO had no obligation to consider this request, in order to implement the vision of the Government Solar Policy to promote green power in the State and to explore the technical possibilities of accommodating the petitioner, solar plant through 110 KV SS, as temporary arrangement grid tie-up approval was issued on 29/03/2016 for parallel operation of 72 MW solar PV power plant of the petitioner interfacing with TANTRANSCO grid at 110 bus of existing Kamuthi 110 KV SS through 110 KV feeder till commissioning of Kamuthi 400 KV SS, limiting the feed upto 25 MW.

14.The petitioner accepted this proposal of restricting the capacity to 25 MW without any protest. Agreed not to claim any deemed generation charges or any other benefit whatsoever. Not raised any clarification regarding applicability of tariff. Had the intention of the petitioner made known that it wanted to commission the plant well before the commissioning of Kamuthi 400 KV SS to claim the tariff of Rs 7.01 per unit, the respondent would not have extended the temporary arrangement as it is not bound to do so.

15.In the counter, it is further contended that, the Kamuthi 400 KV SS was commissioned on 07/09/2016. Thereafter, revised tie-up approval was accorded on 20/09/2016 for parallel operation of 72 MW solar PV power plant interfacing with TANTRANSCO grid at new Kamuthi 400/230-110 KV level. As per the agreement the tariff applicable is only as on the date of commission of Kamuthi 400/230-110 KV level. However, since as temporary measure the petitioner was permitted to fed 25 MW interfaced through Kamuthi 110 KV the TANGEDCO agreed to pay the higher tariff of Rs 7.01 per unit as far as evacuation commenced prior to the control period of 31/03/2016 and the revised rate of Rs 5.10 per unit for the evacuation commenced after that.

16.The other two subsidiary company of M/s.Adani Green Energy (Tamil Nadu) Ltd., did not commission its plant within the due date, however, has raised dispute before the APTEL vide Appeal No. 31 and 32 of 2017 to extend the control period from 31/03/2016 and to pay tariff of Rs.7.01 per unit by declaring the commission of their plant as on or before 31.03.2016. Similarly, if the petitioner is aggrieved by the fixation of tariff it ought to have approached the APTEL and the present writ petition is not maintainable.

17.Heard the learned counsel for the petitioner and the learned Additional Advocate General appearing for the respondents.

18.It is an admitted fact by the petitioner company as well as the respondents have entered into the power purchase agreement on 07/04/2015. As per clause 5 of the agreement, the solar power tariff for the Solar Power Generation (SPG) commissioned during the control period of order 7 of 2014 dated 12/09/2014 shall be Rs 7.01 per unit without Accelerated Depreciation (AD) benefit. The control period is upto 31/03/2016.

19.While the petitioner claims that, it has commissioned the plant before 31/03/2016 and the same been acknowledged by the respondents. Therefore the respondents are liable to pay Rs 7.01 per unit for their entire generation of 72 MW. The respondents claim that as per the terms of the agreement the rate as applicable on the date of commissioning the Kamuthi 400/230-110 KV SS alone is payable. The petitioner has committed in its letter of undertaking dated 16/06/2015 that they will not claim any deemed generation or any other benefits whatsoever from TANGEDCO in case TANTRANSCO could not commission the proposed 400 KV Sub-station at Kamuthi, Ramanad district even though they complete 72 MW PV power plant well in advance. Therefore the prayer in the writ petition to pay Rs.7.01 per unit as per the TNERC tariff order dated 12/09/2014 is not sustainable.

20.While the learned Additional Advocate General appearing for the respondents states that if the petitioner is aggrieved by the tariff fixed, the remedy is before APTEL to resolve the dispute and High Court under Article 226 of the constitution is not the appropriate forum. The petitioner counters this submission saying only an existing dispute can be redressed before APTEL. The refusal of the respondent to pay the agreed tariff is contrary to the agreement and existence of dispute is only spurious, hypothetical and illusory.

21.To appreciate these rival submissions, the communication between the parties prior to the agreement, the terms of agreement and undertaking letter given by the respondents are to be scrutinised.

22.The proposal of the petitioner company to establish 72 MW Solar PV Power plant at Karisalkulam Village, Kamuthi, Ramanad District was considered by the first respondent and finalised the transmission scheme on 17/06/2015 and communicated it to the petitioner. One of the terms found in the said communication is that, 'the above referred power plant can be interfaced with the TANTRANSCO grid at proposed sanctioned Kanuthi 400/230-110 KV SS at 110 KV level by erecting 110 KV evacuation line for a distance of 7KM connecting your proposed 72 MW solar PV power plant and the proposed sanctioned Kamuthi 400/2300110 KV SS with necessary breaker and protection arrangement as per the TANGEDCO norms. The above grid connectivity shall be effected only after commissioning of proposed sanctioned Kamuthi 400/230-110 KV SS.'

23.In the above said communication, it is also stated that, (TNERC order No. 7 dated 12/09/2014) "Comprehensive tariff order on solar power" shall be applicable for the solar projects commissioned within the control period of this order. The proposal was subsequently approved by TANGEDCO vide letter dated 04/07/2015. In this letter, the TANGEDCO has made it clear to the petitioner that, they should not claim any deemed generation in the event of delay in commissioning of the 400 KV SS and the applicable tariff will be fixed by the TNERC at the time of commissioning of 400 KV SS. In this regard, the petitioner has to furnish an under taking.

24.Pursuant to this communication, the petitioner has executed an undertaking on 16.06.2015, in which, it has been stated as follows:-

"Whereas the TANGEDCO, after having conducted the load flow study, informed the Solar Generator that the proposed 72 MW Solar PV Power Plant can be connected to the sanctioned 400 KV Sub-Station at Kamuthi, Ramnad District, subject to commissioning of 400/230/110 KV Kamuthi SS and accordingly issued connectivity approval.

> Whereas we, M/s.Kamuthi Renewable Energy Ltd., have requested TANGEDCO to enter into Power Purchase Agreement for the power to be generated and to be sold to TANGEDCO from the said proposed 72 MW solar PV Power Plant. We hereby agree to give the following undertaking:
>
> 1.That we will not claim any deemed generation or any other benefits whatsoever, from TANGEDCO, in cse the TANTRANSCO could not commission the proposed 400 KV Sub-station at Kamuthi, Ramnad District even though we complete 72 MW PV Power Plant well in advance."

25.On the same day, the petitioner and the first respondent had entered into the power purchase agreement. In which, the parties have agreed the price of Rs.7.01 per unit for the solar power generated during the control period of order number 7 of 2014 dated 12/09/2014 .

Clasue 1 (d) of the agreement defines the word 'disputes:

(d)"Dispute" means any dispute or difference of any kind between the SPG and the Distribution licensee in connection with or arising out of this Agreement including but not limited to any issue on the interpretation and scope of the terms of this Agreement."

Clause 11 provides for settlement of disputes:

> "11.Settlement of Disputes:
>
> If any dispute or difference of any kind whatsoever arises between the parties relating to this agreement, it shall, in the first instance, be settled amicably, by the parties, failing which either party may approach the Commission for the adjudication of such disputes under section 86(1)(f) of the Electricity Act, 2003 in accordance with the Conduct of Business Regulations 2004 and Fees and Fines Regulations 2004 of the Commission. This agreement shall be governed

> by the laws of India and the Courts at Chennai alone shall have jurisdiction."

26.In deviation to the agreed terms regarding evacuation of power generated, the request to evacuate power through 110 KV SS at Kamuthi before the commission of 400/230-110 KV Sub-station at Kumuthi has emanated from the petitioner through its letter dated 09/02/2016 a month prior to the expiry of the control period the date which is very crucial to fix the tariff. This letter of the petitioner reads as below:-

"In furtherance of our letter cited under reference 2 above, we are pleased to intimate you that substantial progress has been achieved in establishment of KREL's 72 MW Solar Power Project at Kamuthi Taluka, District Ramanathapuram and is on the verge of completion in all respects and shall be ready for commissioning by 20.02.2016. We also wish to inform you that this project is being commissioned in a shortest period of 6 months from the date of signing of EPA.

> Since, there is a system constraint for evacuation of power to be generated from KREL's solar power plant, we request your good offices to consider the grid interface arrangement proposed vide our letter cited above favorably by permitting to evacuate KREL's power through existing 110KV Kamuthi substation. Through this arrangement, it is proposed to interface the outgoing S/C 110 KV feeder of 72MW KREL's Solar Power project with the circuit of 110KV D/C existing Kamuthi substation to 400 KV new Kamuthi Substation Transmission line at 400KV Kamuthi substation end. A brief sketch is attached herewith for ready reference.
>
> We request you to kindly consider our grid interface proposal for KREL's 72MW Solar Power Plant evacuation and convey your concurrence on the above at the earliest which will enable us to achieve the COD for KREL's 72MW Solar Power Project and also to set a record of commissioning of this project in short span of 6 months from the date of signing of EPA."

27. From these portion of the documents it is clear that the power purchase agreement has been entered between the parties only after the undertaking given by the respondent. In the undertaking letter the petitioner has agreed not to claim any benefit whatsoever in case of delay in commissioning of

400/230-110 KV SS at Kamuthi. The petitioner company was permitted to evacuate upto 25 MW of power through 110 KV SS as a temporary measure and on the request of the petitioner based on the undertaking that it will not claim any benefit whatsoever. Having agreed to claim the tariff prevailing on the date of commissioning of 400/230-110 KV Substation at Kamuthi , the petitioner is estopped from saying that claim of tariff at the rate of Rs 7.01 per unit is not a benefit but a lawful claim. The respondents have accepted the request of the petitioner on temporary basis and accommodated the evacuation of energy upto 25 MW through 110 KV SS interface. This will not confer any right on the petitioner to claim the tariff prevailing on the date of the commission of 400/230-110 KV SS. The present claim of the petitioner is contrary to the terms of the agreement and its own undertaking.

28.Therefore, this Court is of the opinion that, the petitioner claim is unsustainable for the following reasons:

(i)The TANGEDCO vide its letter dated 04/07/2015 has approved the project only on certain conditions. On such condition is that, " your proposed 72 MW Solar PV Power Plant can be interfaced with the TANTRANSCO grid at sanctioned Kamuthi 400/230-110 KV SS at 110 KV level by erecting 110 KV line for a distance of 7 KM connecting your proposed 72 MW solar PV power plant and the sanctioned new Kamuthi 400/230-110 KV SS. The above grid connectivity will be effected only after commissioning of sanctioned new Kamuthi 400/230-110 KV SS. You should not claim any deemed generation in the event of delay in commissioning of the 400 KV SS and the applicable tariff will be as fixed by the TNERC at the time of commissioning of400 KV SS. In this regard, you are requested to furnish an undertaking".

(ii)On receiving the undertaking from the petitioner, the respondent has entered into the power purchase agreement with the petitioner.

(iii)From the letter of the petitioner dated 09/02/2015 which is extracted above and the counter of the respondents, it could be seen that the respondent has acceded to the request of the petitioner to give temporary interface through 110 KV SS to achieve the date of commercial operation (COD) in record time (within the span of 6 months from the date of signing EPA). This accommodation was made by the respondent only after ensuring from the respondent that the petitioner will not claim any benefit out of it. Contrary to the undertaking, the petitioner now trying to take advantage of the concession given by the respondent.

(iv)That apart, as per clause 11 of the power purchase agreement, in case of dispute or difference of any kind between the solar power generator and the distribution licensee (TANGEDCO) in connection with or arising out of the power purchase agreement, such dispute has to be settled through adjudication under section 86(1)(f) of the Electricity Act 2003 in accordance with the conduct of business Regulations 2004 and Fees and Fines Regulations 2004 of the commission. So, the contractual disputes not to be resolved in a writ petition when parties have agreed to resort their disputes through the redressal forum prescribed under statute.

29.For the said reasons, the writ petition is dismissed. However, if the petitioner resort to Clause 11 of the Power Purchase Agreement and approach the TNERC, the same may be decided independently without being influenced by any of the observations made in this writ petition. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-)

//True Copy//

Sub Assistant Registrar

Jbm

To

1.Tamil Nadu Generation and
Distribution Corporation Limited,
Represented by its Chairman &
Managing Director,
No.144, Anna Salai,
Chennai - 600 002.

2.Tamil Nadu Transmission Corporation Limited,
Represented by its Chairman &
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4.Superintending Engineer (NCES),
Tamil Nadu Generation and
Distribution Corporation Limited,
Tirunelveli - 627 011.

+1cc to Mr.R.Parthasarathy Advocate, S.R.No.67943
+1cc to Mr.S.K.Rameshuwar, Advocate, S.R.No.67278

MR(CO)
CB(17/09/2019)

Pre delivery Order made in
W.P.No.8644 of 2019