IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 21.09.2020

Delivered on: 22.09.2020

CORAM

THE HONOURABLE MR. JUSTICE N.ANAND VENKATESH

WP.No.12584 of 2020
&
WMP.Nos.15516 & 15520 of 2020

TAQA Neyveli Power Company Private Limited
(formerly known as ST-CMS Electric Company Private Limited)
Represented by its Authorized Representative
Mr.K.Raghunathan
Uthangal, Umangalam
Vridhachalam Taluk
Cuddalore District - 607 804.

..Petitioner

.vs.

1. Tamil Nadu Electricity Regulatory Commission
Through its Secretary
TIDCO Building No.19-A
II Floor, Rukmini Lakshmipathy Road
Egmore, Chennai - 600 008.

2. Tamil Nadu Generation and Distribution
Corporation Ltd.
Through its Director Generation - Private Power Projects
6th Floor, Eastern Wing
NPKRR Maligai, 144, Anna Salai
Chennai - 600 002.

..Respondents

Prayer :- Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of mandamus calling for the records of the 1st respondent Commission in its order dated 17.07.2020 returning the petition dated 18.05.2020 by the petitioner herein, quash the same and consequently, direct the 1st respondent Commission to accept the petition filed by the petitioner expeditiously Miscellaneous petition.

For Petitioner : Mr.Sathish Parasaran
Senior Counsel
for Mr.Abishek Jenasenan

For Respondents : Mr.Abdul Saleem
Standing Counsel

ORDER

This writ petition has been filed challenging the Tamil Nadu Electricity Regulatory Commission (TNERC) returning the petition submitted by the petitioner on 18.05.2020, through an order of return dated 17.07.2020.

2. The petitioner was formerly known as ST-CMS Electric Company Private Limited. Subsequently, the name was changed and a fresh certificate of incorporation was issued by the Registrar of Companies, Chennai on 16.04.2013. The petitioner is a generating Company and the power generated from the project is being sold to the TANGEDCO. There is a power purchase agreement entered into between the parties.

3.Initially, there was a dispute between the Company and the Electricity Department arising out of the power purchase agreement and the same was sought to be agitated before TNERC. The sum and substance of the dispute is as to whether the dispute between the Electricity Board and the Company, which is covered under an arbitration Clause in the agreement, before the introduction of Electricity Act, 2003, can be agitated before TNERC. The Company had questioned the jurisdiction of the TNERC in entertaining a dispute of that nature. Two writ petitions were filed in WP.Nos.23804 & 23805 of 2008.

4.Initially an interim order of stay was granted by this Court by an order dated 29.09.2008. Subsequently, it was made absolute by an order dated 10.08.2009. It was informed that this writ petitions of the year 2008 is still pending without being finally adjudicated.

5.The Ministry of Environment and Forest introduced an amendment in the relevant Act and Rules and prescribed new environmental norms. A notification was also issued in this regard on 07.12.2015 in which three categories of Thermal Power Projects were identified and they were asked to comply with the new norms.

6.The petitioner Company also fell within the norms introduced by the above said notification and it was required to install requisite emission control systems. According to the petitioner, this development falls within the term "Change in Law" in terms of Article 14 of the Power Purchase Agreement. The petitioner therefore appraised TANGEDCO about this development and informed that TNGEDCO may reimburse the petitioner towards the cost to be incurred by the petitioner towards the required installation of the requisite emission control system. The petitioner received a letter from 2nd respondent dated 19.08.2017 asking the petitioner to file necessary application before TNERC and get permission since it involves additional capitalization / expenditure. The petitioner went ahead in hiring the consultants to advice on the optimal technology and also got a report. The petitioner also floated tenders and invited bids for engineering, procurement and construction contract for installation of the system.

7.The petitioner made an application before TNERC on 18.05.2020, seeking for the approval as required under the communication made by the Government of India dated 30.05.2018. This application was initially returned seeking for various clarifications on 19.05.2020. The petitioner represented the application by giving their response to each clarification sought for. Inspite of the same, the application was again returned by an endorsement dated 17.07.2020, informing the petitioner that since the earlier writ petitions filed by the petitioner is pending before this Court and a stay has been granted which touches upon the very jurisdiction of TNERC, the application itself is not maintainable. Aggrieved by the same, the present writ petition has been filed before this Court.

8.The 1st respondent represented by its Secretary has filed a counter affidavit in this writ petition. In the counter affidavit broadly three grounds have been raised. The first ground is that the petitioner has an alternative remedy under the relevant regulations and without exhausting the same, the present writ petition is not maintainable. The 2nd ground that has been raised is that the petitioner has questioned the jurisdiction of TNERC in the earlier writ petition and stay was also granted and therefore, till the writ petition is disposed of, the Commission cannot entertain the application filed by the petitioner Company. The 3rd ground that has been raised in the counter is that the petitioner cannot file a miscellaneous petition, since a dispute has been raised against TANGEDCO and therefore, the petitioner must file a dispute resolution petition (DRP) by paying 1% fees on the claim amount as per the regulations. Even this petition should be filed only after withdrawing the earlier writ petitions filed before this Court.

9. Mr. Sathish Parasaran, learned Senior Counsel appearing on behalf of the petitioner made the following submissions:

- The earlier dispute between the Company and the TANGEDCO was resolved amicably and the same was recorded by TNERC by an order dated 03.11.2010 and the petition itself was withdrawn by the Electrcity Board. This development was not taken into consideration by the TNERC.
- The petitioner company itself is submitting to the jurisdiction of TNERC and there is nothing much to be decided in the earlier writ petitions, in view of the subsequent development and therefore, TNERC should not have refused to entertain the application on the ground of the pendency of the earlier writ petitions.
- The communication of the Central Government dated 30.05.2018, clearly stipulates that wherever there is a additional capital expenditure and compensation for additional costs on account of change in law in respect of a power purchase agreement, the respective Thermal Power Plants will have to approach the Commission in order to get the approval. Therefore, except the Commission there is no other body which can grant approval .
- Even TANGEDCO had requested by letter dated 19.08.2017, to go before the Commission for getting the necessary approval and there is no dispute with regard to the said fact.
- What is sought before the Commission is only an in-principle approval which does not involve a dispute and therefore, the petitioner need not pay the 1% fees demanded by TNERC.
- The petitioner will be able to carry out the necessary installations only if the approval is granted by TNERC and if it is not done immediately, there is a chance of the entire plant being shut down by the Central Government. Already steps are being taken by the Central Government to shut down all Thermal Plants which have not satisfied the environmental clearance as required under the notification.

10.Mr.Abdul Saleem, learned counsel appearing on behalf of the 1st respondent apart from reiterating the stand taken in the counter affidavit, submitted that if TNERC entertains the application, it will amount to contempt of the interim order passed by this Court in the pending writ petitions. The learned counsel further submitted that the issue involved in the present case pertains to determination of a capital cost and the same is sought to be recovered from TANGEDCO, which is a dispute to be resolved and therefore, the petitioner will have to file a regular dispute resolution petition by paying the appropriate fees. The learned counsel further submitted that the petitioner cannot on the one hand question the jurisdiction of TNERC and on the other hand come before the TNERC by submitting an application and the petitioner will have to withdraw the earlier writ petitions in order to enable the TNERC to consider only if a DRP is filed by the petitioner.

11.This Court has carefully considered the submissions made on either side and the materials available on record.

12.The Company had filed the earlier writ petitions before this Court only on the ground that the Company and the Electricity Board (as it then was) were governed by a Power Purchase Agreement which provided for an arbitration as a dispute resolution mechanism. This was prior to the introduction of the Electricity Act, 2003. Infact, there was also arbitration proceedings that went on between the parties. At that stage, the Electricity Board had raised a dispute before TNERC and the TNERC issued notice to the petitioner and called upon the petitioner to file a petition for determination of the final capital cost of the project in order to determine the tariff. This notice issued by TNERC was challenged mainly on the ground that TNERC lacks jurisdiction.

13.The dispute between the Electricity Board and the Company was resolved amicably between the parties and the settlement reached between the parties was recorded by TNERC and it was dismissed as withdrawn by an order dated 03.11.2010. By virtue of this development, nothing much will survive in the pending writ petitions and deciding the grounds raised in the writ petition will be more academic in nature. TNERC which passed the order, should have taken into consideration this important development.

14.The petitioner Company had to comply with certain requirements pursuant to the notification issued on 07.12.2015 under the Environment (Protection) Amendment Rules, 2015. This required the petitioner Company to install systems in place to comply with the Environmental norms that was brought into force by the notification. The letter issued by the Government of India dated 30.08.2015, makes it very clear that the respective Thermal Power Plants should approach the appropriate commission for approval of additional capital expenditure and compensation for additional cost on account of the change in law. The TANGEDCO also by its letter dated 19.08.2017, had requested the petitioner Company to file necessary application before TNERC to get approval for the additional capitalization / expenditure for installation of the necessary equipments.

15.As on today, TNERC is the only body that is vested with the powers to consider the application for approval of additional capital expenditure and compensation for the additional costs. A dispute resolution petition is required to be filed before TNERC only where there is a dispute between parties. Only on filing such a petition, 1% fees on the claim amount is contemplated. In the present case, the petitioner is only seeking for an in-principle approval for incurring the additional capital expenditure. This has resulted only due to the change in law.

16.In the considered view of this Court, the TNERC ought not to have taken a hyper technical view and returned the application filed by the petitioner. The miscellaneous petition filed by the petitioner before TNERC seeking for in-principle approval is clearly maintainable. The issue raised in the earlier writ petitions has nothing to do with the present application filed by the petitioner Company and infact, the petitioner Company itself is submitting to the jurisdiction of TNERC. Therefore, entertaining the application will not in any way go against the interim orders passed by this Court in the earlier writ petitions. This is more so because the earlier dispute has already been resolved among the parties by mutual settlement and it was also recorded by TNERC. In the absence of any dispute, TNERC cannot insist the petitioner Company to file a DRP and pay 1% fees. There is no amount claimed by the petitioner in the application and what is sought for by the petitioner before TNERC is only an in-principle approval of TNERC to incur additional capital expenditure. This petition ought to have been entertained by TNERC considering the urgency expressed by the petitioner and orders should have been passed.

17.Insofar as the issue of alternative remedy is concerned, it is only a self imposed restriction exercised by a writ Court and it is not an absolute rule of law. This Court is not inclined to reject this writ petition on the mere ground of alternative remedy since the Appellate Authority, who is the Secretary of the Commission, has himself chosen to file a counter affidavit in this writ petition.

18.In view of the above discussion, the impugned return endorsement of the Commission dated 17.07.2020, is hereby set aside. The TNERC is directed to immediately entertain the application filed by the petitioner as a miscellaneous petition and pass appropriate orders touching upon only the issue of in-principle approval sought for by the petitioner, within a period of two weeks from the date of receipt of a copy of this order. This Court is fixing a short time by taking into consideration the fact that the Central Government is taking steps to close down thermal power plants which are functioning without the environmental clearance. In the present case, the petitioner is waiting to get the approval from TNERC for the last four months.

19.This writ petition is allowed with the above directions. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. Tamil Nadu Electricity Regulatory Commission
Through its Secretary
TIDCO Building No.19-A
II Floor, Rukmini Lakshmipathy Road
Egmore, Chennai - 600 008.

2. Tamil Nadu Generation and Distribution
Corporation Ltd.
Through its Director Generation - Private Power Projects
6th " Floor, Eastern Wing
NPKRR Maligai, 144, Anna Salai
Chennai - 600 002.

+1cc to Mr.Abdul Saleem, Advocate in SR.NO..31207
+2cc to Mr.Abishek Jenasenan, Advocate in SR.NO..30790

WP.No.12584 of 2020

RLD(CO)

RV(16/10/2020)