

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 05.12.2019

Delivered DATED:10/2/2020

C O R A M

THE HON'BLE MR.AMRESHWAR PRATAP SAHI, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

Writ Petition No.31798 of 2019

and

W.M.P.Nos.32035 and 32036 of 2019

Vaayu (India) Power Corporation (P) Limited
rep. By Mr.V.Chandrasekar.Petitioner

Vs

1. Tamil Nadu Electricity Regulatory Commission
No.19 A Rukmini Lakshmipathy Salai
(Marshalls Road) Egmore
Chennai 600 008.
2. Central Electricity Regulatory Commission
3rd and 4th Floor, Chanderlok Building
36 Janpath
New Delhi 110 001.
3. Tamil Nadu Generation and Distribution Co Ltd
rep. By its Chairman-cum-Managing Director
10th Floor, 144 Anna Salai
Chennai 600 002.
4. The Superintending Engineer (i/c)
Tamil Nadu Generation and Distribution Co Ltd
Tirunelveli EDC Circle
Tirunelveli 11.Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of certiorari to call for the records pertaining to the first respondent being Regulation 2 (1) (h) of the Tamil Nadu Electricity Regulatory Commission (Renewable Energy Power Obligation) Regulations, 2010 amended vide the impugned Notification No.TNERC/RPO/19/3 dated 21/1/2013 published by the Tamil Nadu Electricity Regulatory Commission (Respondent No.1)

and all consequential orders, including its Order No.TNERC/M.O.4-7/E/RPO dated 6/9/2018 and Demand/Letter LR.No.SE/TEDC/TIN/DFC/AO/WIND/AS/F.REC/D.No.1763/19 dated 17/10/2019 of the fourth respondent and quash the same as invalid.

For petitioner ... Mr.N.L.Rajah
Senior Counsel
for Mr.N.Balamuralikrishnan

For respondents ... Mr.T.Mohan
for R.1

No appearance for R.2

Mr.N.Damodaran
Standing Counsel for TNEB
for R.R.3 and 4.

ORDER

SUBRAMONIUM PRASAD,J

Instant writ petition challenges the Regulation 2 (1) (h) of the Tamil Nadu Electricity Regulatory Commission (Renewable Energy Power Obligation) Regulations, 2010 [hereinafter called as the REC Regulations], amended vide impugned Notification No.TNERC/RPO/19/3, dated 21/1/2013, and consequential orders passed, after the amendment.

2. Petitioner a Company incorporated under the Companies Act, 1956, itself a Renewable Generating Company. Petitioner has established thirty six units 800 KW each, total capacity of 28.80 MW under the provisions of REC Regulations in Tirunelveli District of Tamil Nadu.

3. It is the submission of the petitioner that in pursuance of the policy of the Government, for promotion of renewable energy under Section 86 (1) (e) read with Section 181 of the Indian Electricity Act, 2003. Various State Commissions have been fixing separate Renewable Purchase Obligations (RPO), in their respective States. Since the availability of renewable energy is not equal in all the States and certain States are unable to fulfill their Renewable Purchase Obligations. Government of India framed the Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of

Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2010, hereinafter called as the CERC REC Regulations.

4. CERC REC Regulations provide that Central Electricity Regulatory Commission shall designate the agency to undertake various functions such as registration of eligible entities, issuance of certificates, maintaining and settling accounts in respect of certificates, repository of transactions in certificates, and such other functions incidental to the implementation of REC mechanism as may be assigned by the Central Commission from time to time. It is pertinent to mention herein that for the promotion of renewable energy, the State Commissions have been fixing separate Renewable Purchase Obligations, because of the difference in the renewable energy and options and the capacity to produce electricity from various renewable energy source is different in various States. A report was prepared for promotion of renewable energy which provided for renewable energy certificate mechanism.

5. Under the CERC REC Regulation, the Central Commission designated the National Load Dispatch Centre as the central agency, vide its order, dated 29/1/2010. The Central Commission issued the CERC (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation (First Amendment) Regulations, 2010.

6. A detailed procedure was notified for registration of eligible entities, verification of electricity generation and its injection into the grid by the eligible entity and issuance of certificates, etc., under the REC mechanism wherein cost of electricity generation from Renewable Energy Sources is divided into two parts as (a). cost of electricity generation equivalent to conventional energy source and (b). cost of green/environmental attributes containing various distinct features to be complied by the Renewable Energy Generating Companies to ensure that the RE Generators opting for REC mechanism necessarily sell its power at par with conventional sources and should forego all regulatory benefits available to RE generators.

7. Pursuant to the CERC REC Regulations, the State Commission, on 7/12/2010, framed REC Regulations providing for RPO on the Obligated Entities which was to be fulfilled either by purchase of physical power from renewable sources or by purchasing the RECs from the power Exchanges approved by the State Commission.

8. The State Commission fixed the average power cost APPC for the period 2010-11, 2011-12 and 2012-13. On 16/10/2012, State Commission issued a draft to amend the Regulation 2 (1) (h) of the REC Regulations by fixing a cap at 75% of the preferential tariff fixed by the Commission on the purchases from the Renewable Sources. Amendment was notified by the State Government by its Notification, dated 21/1/2013, published in the Official Gazette on 19/6/2013. The amended Regulation, explanatory statement and the statement showing the existence of 2 (1) (h) and the provisions as amended reads as under:-

AMENDMENT

"Pooled cost of power purchase means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self generation in the previous year from all the long-term energy suppliers, but excluding those based on liquid fuel, purchase from traders, short-term purchases and renewable energy sources subject to the maximum of 75% of the preferential tariff fixed by the Commission to that category/sub category of NCES generators.

EXPLANATORY STATEMENT

In the long run, Pooled Cost or Power Purchase may exceed the preferential tariff fixed by the Commission for renewable energy due to escalation of conventional fuel cost. It is prudent that a limit has to be fixed for arriving at the reasonable Pooled Cost of Power Purchase. Therefore, it is proposed to amend the said regulation.

STATEMENT SHOWING EXISTING PROVISION AND THE PROVISION AS AMENDED

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S. No	Existing Provision	Provision as amended
	(h). Pooled cost of power purchase means the weighted average pooled price at which the distribution license has purchased the electricity including cost of self generation in the previous year from all the long-term energy suppliers, but excluding those based on liquid fuel, purchase from traders, short-term purchases and renewable energy sources.	(h). Pooled cost of power purchase means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self generation in the previous year from all the long-term energy suppliers, but excluding those based on liquid fuel, purchase from traders, short-term purchases and renewable energy sources subject to the maximum of 75% of the preferential tariff fixed by the Commission to that category/sub-category of NCES generators.

9. Petitioner had entered into various power purchase agreements, on the basis of certain factors, which are prevalent at the time, when the power purchase agreements were entered into by the petitioner. Petitioner state that they have made substantial investments on account of the same. It is the contention of the petitioner that it was the legitimate expectation of the petitioner that the same position would continue to insist and the respondents are bound by the principles of legitimate expectation on promissory estoppel and therefore, the terms of the power purchase agreements must hold good during the tenure of the power purchase agreements. It is the contention of the petitioner that if the tariff applicable is to be changed in a mid way, during the subsistence of the agreement, it would vitally affect the petitioner and the change in tariff would be detrimental to the interest of the petitioner. The petitioner, therefore, argued that after entering into power purchase agreements, State Government cannot change the factors midway during the subsistence of the agreement.

10. Two writ petitions viz., W.P.Nos.22097 and 32756 of 2013 were filed, challenging the Regulation 2 (1) (H), as amended, on 21/1/2013. This Court, by its judgment, dated 15/7/2016, dismissed the writ petitions. Despite the dismissal of W.P.Nos.22097 and 32756 of 2013, by a Hon'ble Division Bench of this Court, instant writ petition too challenges the very

same amendment, which as stated earlier was also filed by invoking the principles of promissory estoppel and legitimate expectation.

11. In the instant writ petition, apart from challenging the amendments on the ground of promissory estoppel, it is also contended that choosing the limit of 75% of the preferential tariff fixed by the State Commission is absolutely whimsical and arbitrary. It is argued that there is no rationale behind fixing the figure of 75% as the capping figure on the preferential tariff.

12. On notice being issued, the Tamil Nadu Electricity Regulatory Commission has entered appearance.

13. Heard Mr.N.L.Rajah, learned Senior Counsel for Mr.N.Balamurali Krishnan, Mr.T.Mohan for the first respondent and Mr.N.Damodaran, learned Standing Counsel for TNEB/R.R.3 and 4.

14. Mr.N.L.Rajah, learned Senior Counsel for the petitioner contends that the petitioner has invested more than 15 crores in registering their units and they entered into Power Purchase Agreements on the basis of the existing factors. Huge investments were made on the basis of an implied assurance that operations would continue during the period of agreement. Learned Senior Counsel for the petitioner would argue that the respondents would be bound by the principles of promissory estoppel and the State Government must not be permitted to make amendments in the REC Regulations by capping the preferential tariff to a maximum of 75%.

15. Learned Senior Counsel would further argue that the judgment dated 15/7/2016 would not bind on this Court, inasmuch as the earlier judgment has been passed without taking into account several aspects. Learned Senior Counsel would rely on a judgment of this Court in U.BARKATH Vs. DIRECTOR GENERAL OF POLICE {2019 SCC Online Mad 4347} and MUNICIPAL CORPORATION OF DELHI Vs. GURNAM KAUR {(1989) 1 SCC - 101}, to contend that if an earlier judgment is hit by the principles of sub silentio, then the previous judgment cannot be said to be a binding precedent. Learned Senior Counsel would also contend that the capping of 75% on the preferential tariff is whimsical, arbitrary and without any basis.

16. Learned Senior Counsel appearing for the petitioner contends that there is no rationale in the arguments advanced by the Tamil Nadu Electricity Regulatory Commission and TANGEDCO that the Wind Energy Generators must not be permitted to

unjustly enrich themselves. He would contend that there is no explanation given as to why and from where figure of 75% of preferential tariff has been got. He would state that figure is completely arbitrary. Renewable Energy Generators cannot be supplied into two different classes on the basis of choice option. Learned Counsel would further argue that by introducing REC mechanism, the intent was not to treat the same inferior or competing with the preferential tariff mechanism. It is submitted that it is an alternative to the preferential tariff mechanism by which the generators can sell power almost equivalent at the cost of conventional power (APPC). The Preferential Tariff Mechanism and the REC Mechanism as both are two different schemes and are not comparable which has also been recognized by the Forum of Regulators, and an intelligible differentia cannot be created between the two sets of generators wherein the ones opting for Preferential Tariff mechanism are protected and the RE generators opting for the REC mechanism are treated as inferior and subject to regulator's caprice.

17. On the other hand, Mr.Mohan, learned counsel appearing for the first respondent would state that the entire issue has been considered extensively by the earlier Division Bench and the present issue is being completely covered by the judgment of the earlier Division Bench. He would argue that nothing new has been argued in the present writ petition. All points raised in the present writ petition were answered in the counter affidavits filed by the Commission in the earlier round.

18. Learned counsel appearing for the first respondent would further argue that generators can sell their energy to the distribution licensee at a preferential tariff i.e., both energy component and green component was fixed by the State Commission or sell their energy component at APPC rate, i.e., 75% of the preferential rate and trade the green component by selling the REC certificate at the exchange.

19. Mr.Mohan would contend that generators can also sell their energy to a third party at a mutually agreed rate through open access. Petitioner cannot exercise their option as they wish to and therefore, there is no room for any complaint about the APPC mechanism by the generators. It is contended that the entire exercise on the part of the Wind Energy Generators. In their written submissions, REC has stated as under:-

"23. The entire exercise on the part of the WEGs who have opted for the REC mechanism seems to be to realize a price for their energy equal to the price available under the preferential tariff mechanism which is entirely an excessive demand on their part. While fixing preferential tariff, the

Commission examines the capital cost of setting up a project and bills in a return of the investment while determining the preferential tariff over the lifetime of the EPA. It must be borne in mind that a generator opting for preferential tariff route, transfers not only the physical energy but also the entitlement to account for this energy as part of the renewable purchase obligation of the distribution licensee. As far the generator opting for the RE mechanism, it chooses to sell the physical energy alone to the distribution licensee and reserves to itself the environmental component (the RE certificate) that it can trade not below the floor purchase and not above the forbearance price. Clearly, while selling the unbundled energy, there must be discount applied for the environmental entitlement or the RE component. Given the nascent stage of the market mechanism, a 25% was sought to be applied to which applies to a bundled sale of energy plus environmental component. Such a fixation by its very nature cannot be mathematical accuracy and as long as there is nothing arbitrary in stipulating that a sale of energy alone cannot be at a price greater than 75% of the price at which energy plus environmental entitlement is sold under the preferential tariff route. The Regulation 2 (1) (h) is thus, not a conditional piece of subordinate legislation which is dependent on the APPC exceeding the preferential tariff in futuro. It is a distinction between the sale price of physical power alone to a licensee and the sale price of power plus environment component to a distribution licensee. Such a distinction is not arbitrary, much less manifestly so, so as to attract constitutional infraction. Such a distinction comes into play inpresentile and is not to be postponed as otherwise a distribution licensee may be compelled to pay more than 75% of the preferential tariff for purchase of physical energy alone and the generator may end up realizing more than the preferential tariff under the RE mechanism and enriching himself at the cost of the distribution licensee and the ultimate consumer of power who will be subject to tariff shock as there would be a clear dis-insentive for RE generators to enter into EPAs with distribution licensees under the preferential tariff route. This would subject to the distribution licensee to the vagaries of the market for purchase of renewable energy certificates to comply with their renewable purchase obligation, if by virtue of pricing

generators would be encouraged to only sell power to the distribution licensee under the RE route.

20. Since the same regulation was the subject matter of challenge before this Court in SIMRAN WIND PROJECT PRIVATE LIMITED, KOLKATTA AND THREE OTHERS Vs. 1. TAMIL NADU ELECTRICITY REGULATORY COMMISSION, CHENNAI AND TWO OTHERS {W.P.Nos.22097 and 32756 of 2013}, it would be appropriate to extract the relevant portions of the discussion of the earlier Division Bench and they are as follows:-

"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 24 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 41 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 25 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 has 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 preferential tariff 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."

21. A perusal of the above would show that issue of promissory estoppel has been considered extensively. In fact, a perusal of the counter affidavit filed by TNERC in the earlier round would show that as to how the figure of 75% was fixed.

"15. As regards the averment in para 21 of the affidavit, it is submitted that the choosing of limit of 75% of the preferential tariff is not arbitrary as alleged. Major renewable energy power generation in Tamil Nadu comes from the Wind Energy Generators. The 75% limit is fixed in such a way that the Wind Energy Generators who are eligible for the highest preferential tariff of Rs.3.51 should not suffer by choosing the REC route. By the Commission's logic of 75% limit the Wind Energy Generators can get at least $2.63 + 1.50 = \text{Rs.}4.13$ paise per unit by choosing the REC route which is more than the preferential tariff of Rs.3.51 per unit. Similarly, for the Wind Energy Generators who is eligible for the least preferential tariff of Rs.2.75 per unit will get $2.06 + 1.50 = \text{Rs.}3.56$ per unit by choosing the REC route as per the Commissioner's formulae. Therefore, the Commission has fixed 75% limitation so as to promote the Wind Energy Generators like that of the petitioners. Even going by the petitioner's contentions in para 19 of the affidavit, the REC prices (floor price and forbearance price) vary depending upon the APPC if the APPC is reduced, the REC price will go up and compensate the full recovery of cost by the renewable energy sources. Hence 75% limit fixed by the Commission will not affect the petitioner."

22. It can therefore be said that earlier, Division Bench has completely considered all the issues raised in the instant writ petition and nothing survives for consideration. The

argument of the learned Senior Counsel that figure of 75% in the amendment is completely arbitrary cannot be accepted. As stated earlier, the first respondent had given a justification in its counter affidavit, quoted supra, which has been accepted by the earlier Division Bench. Further it is well settled that Courts cannot sit as an expert over decisions arrived at by the expert bodies, unless it is shown that the finding of the expert body is completely perverse.

23. The Hon'ble Supreme Court in {(2019) 3 SCC - 352 RELIANCE INFRASTRUCTURE LTD Vs. STATE OF MAHARASHTRA, has observed as under:-

37. Tariff fixation is a complex exercise involving a careful balance between numerous considerations. The "shall be guided" prescription under Section 61 requires the appropriate Commission to bear those considerations in mind. Deducing past performance on the basis of historical data, balancing diverse policy objectives and evaluating the comparative weight to be ascribed to the interests of stakeholders is a scientific exercise which is carried out by the Commission. The nature of judicial review that is exercisable in a given subject area depends in a significant measure on the nature of the area and the body which is entrusted with the task of framing subordinate legislation. In A.P. TRANSCO v. Sai Renewable Power (P) Ltd. [A.P. TRANSCO v. Sai Renewable Power (P) Ltd., (2011) 11 SCC 34] a two-Judge Bench of this Court held thus: (SCC pp. 56-57, paras 36, 38 and 40)

"36. Fixation of tariff is, primarily, a function to be performed by the statutory authority in furtherance to the provisions of the relevant laws. We have already noticed that fixation of tariff is a statutory function as specified under the provisions of the Reform Act, 1998; the Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003. These functions are required to be performed by the expert bodies to whom the job is assigned under the law...

38. ... The functions assigned to the Regulatory Commission are wide enough to specifically impose an obligation on the Regulatory Commission to determine the tariff. The specialised performance of functions that are assigned to Regulatory Commission can

hardly be assumed by any other authority and particularly, the courts in exercise of their judicial discretion. The Tribunal constituted under the provisions of the Electricity Act, 2003, again being a specialised body, is expected to examine such issues, but this Court in exercise of its powers under Article 136 of the Constitution would not sit as an appellate authority over the formation of opinion and determination of tariff by the specialised bodies. ...

40. ... This Court has consistently taken the view that it would not be proper for the Court to examine the fixation of tariff rates or its revision as these matters are policy matters outside the purview of judicial intervention. The only explanation for judicial intervention in tariff fixation/revision is where the person aggrieved can show that the tariff fixation was illegal, arbitrary or ultra vires the Act. It would be termed as illegal if statutorily prescribed procedure is not followed or it is so perverse and arbitrary that it hurts the judicial "conscience" of the court making it necessary for the court to intervene. Even in these cases the scope of jurisdiction is a very limited one.

38. MERC is an expert body which is entrusted with the duty and function to frame regulations, including the terms and conditions for the determination of tariff. The Court, while exercising its power of judicial review, can step in where a case of manifest unreasonableness or arbitrariness is made out. Similarly, where the delegate of the legislature has failed to follow statutory procedures or to take into account factors which it is mandated by the statute to consider or has founded its determination of tariffs on extraneous considerations, the Court in the exercise of its power of judicial review will ensure that the statute is not breached. However, it is no part of the function of the Court to substitute its own determination for a determination which was made by an expert body after due consideration of material circumstances.

39. In Assn. of Industrial Electricity Users v. State of A.P. [Assn. of Industrial Electricity

Users v. State of A.P., (2002) 3 SCC 711] a three-Judge Bench of this Court dealt with the fixation of tariffs and held thus: (SCC p. 717, para 11)

"11. We also agree with the High Court [S. Bharat Kumar v. State of A.P., 2000 SCC OnLine AP 565 : (2000) 6 ALD 217] that the judicial review in a matter with regard to fixation of tariff has not to be as that of an appellate authority in exercise of its jurisdiction under Article 226 of the Constitution. All that the High Court has to be satisfied with is that the Commission has followed the proper procedure and unless it can be demonstrated that its decision is on the face of it arbitrary or illegal or contrary to the Act, the court will not interfere. Fixing a tariff and providing for cross-subsidy is essentially a matter of policy and normally a court would refrain from interfering with a policy decision unless the power exercised is arbitrary or ex facie bad in law."

24. Competence to amend the Regulation 2 (1) (h) of the Tamil Nadu Electricity Regulatory Commission (Renewable Energy Power Obligation) Regulations, 2010, has not been challenged. It is also to be noted that the State is not estopped from taking away benefits of concessional tariff if there are sufficient reasons to do so.

25. We are of the view that the earlier, Division Bench has considered the entire gamut of challenge. Moreover, all the issues raised by the petitioner have been challenged before the earlier Division Bench and only after considering all the challenges the order, dated 15/7/2016 has been passed.

26. In view of the above nothing survives for further consideration in the present round of litigation. Accordingly, Writ Petition is dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

s/d-
Assistant Registrar (CS-III)

True Copy

Sub-Assistant Registrar

mvs.
To

1. Tamil Nadu Electricity Regulatory Commission
No.19 A Rukmini Lakshmipathy Salai
(Marshalls Road) Egmore
Chennai 600 008.
2. The Central Electricity Regulatory Commission
3rd and 4th Floor, Chanderlok Building
36 Janpath
New Delhi 110 001.
3. Tamil Nadu Generation and Distribution Co Ltd
rep. By its Chairman-cum-Managing Director
10th Floor, 144 Anna Salai
Chennai 600 002.
4. The Superintending Engineer (i/c)
Tamil Nadu Generation and Distribution Co Ltd
Tirunelveli EDC Circle
Tirunelveli 11.

Writ Petition No.31798 of 2019

MR (CO)
SP (24/02/2020)



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