IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.02.2022

PRONOUNCED ON : 24.02.2022

CORAM

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

W.P.Nos.25459, 25464 of 2018
and
W.M.P.Nos.29618 & 37789 of 2018

SEI Adhavan Power Private Limited,
Flat No.6J, Century Plaza
560-562, Anna Salai, Teynampet
Chennai-600 018.
Rep. by its Authorised Signatory
Mr.Swaminathan ...Petitioner in both W.Ps

Versus

1. The State of Tamil Nadu,
   Rep. by the Chief Secretary,
   Secretariat,
   Fort St. George,
   Chennai 600 009.

2. Tamil Nadu Generation and
   Distribution Corporation Limited (TANGEDCO),
   Rep. by the Superintending Engineer,
   Solar Energy (NCES)
   No.144, Anna Salai,
   Chennai 600 002.

3. The Superintending Engineer, TANGEDCO,
   Virudhunagar Electricity Distribution Circle,
   Virudhunagar,
   Tamil Nadu.

4. The Chief Engineer (NCES), TANGEDCO,
   No.144, Anna Salai, Chennai 600 002.

5. The Director Finance, TANGEDCO,
   No.144, Anna Salai,
   Chennai 600 002. ...Respondents in both W.Ps

PRAYER in W.P.No.25459 of 2018: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Declaration, seeking to declare that the petitioner's power plant was commissioned in terms of the PPA dated 28.05.2015 on 31.03.2016, i.e during the control period of the Tariff order No.7 dated 12.09.2014 and that consequentially the petitioner is entitled to a Tariff of Rs.7.01 per unit for the electricity generated and supplied to the respondents.

PRAYER in W.P.No.25464 of 2018: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Mandamus, directing the respondents to open a standby letter of credit in terms of Article 6(c) of the PPA dated 28.05.2015.

In both W.Ps

For Petitioner : Mr.N.L.Rajah,
Senior Counsel
for Mr.M.V.Swaroop

For R1 : Mr.M.Shahjahan,
Special Government Pleader

For R2 to R5 : Mr.J.Ravindran
Additional Advocate General
Asst. by Mr.L.Jai Venkatesh,
Standing Counsel

COMMON ORDER

By virtue of these Writ Petitions, the petitioner sought for a declaration to declare that the petitioner's power plant was commissioned in terms of the Power Purchase Agreement "in short PPA" during the control period of Tariff Order No.7 of 2014 dated 12.09.2014 and consequently the petitioner is entitled for the tariff of Rs.7.01/- per unit for the electricity generated and supplied for the respondents and for a direction to the respondents to open a standby letter of credit in terms of Article 6(c) of the PPA dated 28.05.2015.

2. The brief facts of the cases are as follows:

2.1.The petitioner is a company incorporated under the provisions of the Companies Act, 1956. The petitioner has executed a Power Purchase Agreement dated 28.05.2015 with the second respondent for sale of power generated through its solar power plant at Kokulam Village and Suchaneri Village, Tiruchuli Taluk, Virudhunagar District, having installed Solar Power Generation District with a total capacity of 50 MV (PPA).

2.2. As per the terms of the Tariff Order No.7 of 2014 dated 12.09.2014, tariff of Rs.7.01 per unit was applicable to all solar plants commissioned during the control period of the said order i.e. from 12.09.2014 to 11.09.2015.

2.3. While so, the Tamil Nadu Electricity Regulatory Commission (TNERC) issued another Tariff Order on 01.04.2015, clarifying the control period of its previous Tariff Order No.7 of 2014 dated 12.09.2014. By virtue of the said order, the control period was made effective from 01.04.2015 ending on 31.03.2016.

2.4. According to the petitioner, their power plant was commissioned on 31.03.2016 and in this regard, the third respondent has certified and also issued a certificate on 23.04.2016. Subsequent to the commissioning, the petitioner has been issued invoices to the third respondent in terms of the PPA and the Tariff Order No.7 of 2014. However, the respondents failed to make any payments against the said invoices. After the period of one year from the date of commission of the petitioner's power plant, the third respondent issued a letter dated 04.03.2017 to the petitioner, disputing its liability for the first time to pay tariff at the rate of Rs.7.01 per unit. Further, the third respondent sought to apply the tariff rate of Rs.5.10 per unit as per the Tariff Order No.2 of 2016, on the basis that the petitioner's power plant, although commissioned on 31.03.2016, but did not achieve the Commercial Operation date (COD) on 31.03.2016, and therefore, does not fall within the control period of the Tariff Order No.7 of 2014. Since the respondents has applied tariff at the rate of Rs.5.10 per unit as per the Tariff Order No.2 of 2016, aggrieved against the same, the present Writ Petitions have been filed.

3. Mr.N.L.Rajah, the learned Senior Counsel appearing for the petitioner submitted that, the petitioner's power plant was commissioned on 31.03.2016, ie. during the control period of Tariff Order dated 12.09.2014 and subsequent extended order dated 03.04.2015 and in this regard the third respondent had also issued the certificate for the commissioning of plant in the favour of petitioner on 23.04.2016. By referring to Clause Nos. 6.1 and 10.02 of the Comprehensive Tariff Order on Solar Power dated 12.09.2014, the learned Senior Counsel contended that the tariff fixed vide this Tariff order is applicable to all solar power plants commissioned during the control period of this Tariff order. The Tariff order prevailing at that time was the Tariff Order No.7, therefore, the petitioner is entitled for the tariff rate at Rs.7.01 per unit.

3.1. Further, he also referred to Clause 5 (a) of the Power Purchase Agreement dated 12.09.2014 and submitted that the petitioner is entitled for the tariff at the rate of Rs.7.01 per unit, in terms of Tariff Order No.7 of 2014, which was also signed by the third respondent.

3.2. The learned Senior Counsel further submitted that, though, initially the period of one year was provided for commissioning the power plant from the date of the order i.e. from 12.09.2014 to 11.09.2015, the same was subsequently extended from 01.04.2015 to 31.03.2016, by virtue of subsequent order dated 01.04.2015, extending the period prescribed in the previous order dated 12.09.2014. In the present case, while processing the invoices of the petitioner, the third respondent passed the impugned order stating that the Tariff Order No.7 of 2014 would not apply to the petitioner and only as per the Tariff Order No. 2 of 2016, the petitioner is entitled for the tariff at the rate of Rs.5.01 per unit.

3.3. He would further submit that, according to the petitioner, as of now, even at the rate of Rs.5.10 per unit upto certified period, a huge sum of money is due and payable to the petitioner by the respondents. Further, the issue involved in the present case, has already been decided by the Hon'ble Co-ordinate Bench of this Court in W.P.Nos.19703 of 2017 etc., dated 20.10.2021.

4.Per contra, the learned Standing Counsel appearing for the respondents 2 to 5, while reiterating the averments made in the counter affidavits filed in both the Writ Petitions, submitted in detail that, the commissioning date effected in the Power Purchase Agreement dated 12.09.2014, will be the date of actual Commissioning Operation Date (COD). According to the respondents 2 to 5, though the third respondent issued the certificate in favour of the petitioner by mentioning the date of commissioning of the plant as 31.03.2016, for the purpose of applicability of tariff, the actual date of commencement of production will be taken into consideration as the date of commissioning of the plant and accordingly the tariff rate would be applied to the petitioner. In the present case, the actual commencement of production by the petitioner was subsequent to 31.03.2016. If the actual commencement of production was within 31.03.2016, Tariff Order No.7 of 2014 would apply, otherwise the Tariff Order No.2 of 2016 only would apply. Therefore, the learned counsel for the third respondent contented that the petitioner is not certainly entitled for the Tariff Order No.7 of 2014, at rate of Rs.7.01 per unit. On the other hand, the petitioner is entitled for the tariff at the rate of Rs.5.01 per unit as per Tariff Order No.2 of 2016. Hence, the respondent prayed for the dismissal of the Writ Petitions.

5.Heard Mr.N.L.Rajah, learned Senior Counsel for the petitioner, Mr.M.Shahjahan, learned Special Government Pleader appearing for the first respondent, Mr.J.Ravindran, learned Additional Advocate General appearing for the respondents 2 to 5 and perused the materials available on record.

6.The central issue to be decided in the present writ petitions is as to the applicability of the tariff order vis-a-vis the date of commissioning the plant,i.e. the date on which, the petitioner actually commenced the commercial operation, for the purpose of applicability of tariff order in respect of the petitioners power plants.

7.There are two tariff orders, i.e Tariff Order No. 7 of 2014 and Tariff Order No.2 of 2016. In terms of the Tariff Order No. 7 of 2014, if the plant is commissioned on or before 31.03.2016, the petitioner is entitled for the tariff at the rate of Rs.7.01 per unit and on the other hand, if the plant is commissioned subsequent to 31.03.2016, the petitioner is entitled for the tariff at rate of Rs.5.01 per unit in terms of Tariff Order No.2 of 2016. However, the third respondent has vehemently opposed the claim of the petitioner made in the present writ petitions and filed detailed counter affidavits, stating that only Tariff Order No.2 of 2016 would apply to the petitioner since the petitioner has commenced the Commercial Operation beyond 31.03.2016.

8.There is no dispute on the fact that, initially the period of commissioning of the plant in terms of Tariff Order No.7 of 2014 dated 12.09.2014 was from 12.09.2014 to 11.09.2015 and the same was subsequently extended for a further period of one year i.e from 1.4.2015 till 31.03.2016, by virtue of the order dated 01.04.2015. Hence, the petitioner was supposed to have commissioned the plant on or before 31.03.2016.

9.Here, the issue is whether the Tariff Order No.7 of 2014 would apply immediately after the commissioning of the plant or from the date of commencement of Commercial Operation.

10.For better appreciation of the issue on hand, Clauses 6.1 and 10.2 of the Comprehensive Tariff Order on Solor Power dated 12.09.2014, are extracted hereunder:

> "6.1. The Order shall come into force from the date of its issue. The tariff fixed in this order shall be applicable to all solar power plants commissioned during the control period of this Order. The tariff is applicable for purchase of solar power by Distribution Licensee from Solar Power Generators conforming to its order. The open access charges and other terms and

conditions specified in this Order shall be applicable to all the Solar energy generators, irrespective of their date of commissioning.

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....

10.2. Solar power tariff is computed with reference to the determinants supra and listed in Annexure I. The tariff works out to Rs.7.01 per unit for Solar PV projects and Rs.11.03 per unit for Solar Thermal projects without AD benefit. The AD benefit component of the tariff is Rs.0.73 per unit for solar PV and Rs.1.15 per unit for Solar Thermal. The tariff for the developers / generators availing AD benefit will be the tariff arrived at after deduction of AD benefit from the tariff as determined above. The respective working sheets are enclosed in Annexure IIA and IIB"

11.A perusal of the above, it is clear that in no uncertain terms, the above Clause states that the order shall be applicable to all solar power plants "commissioned" during the control period of this order. Therefore, the applicability of the tariff order is based on commissioning and the above Clause does not mandate COD. Further, this Court has analysed various aspects and from any angle, this Court is unable to accept the views of the respondents for a simple reason that the commissioning of the plant, which has been referred to in the Power Purchase Agreement, would only mean that the commencement of commercial operation is from the date of commissioning of the plant. In the present case, on 23.04.2016 the third respondent issued a Certificate to the petitioner, certifying that the solar plant of the petitioner was commissioned on 31.3.2016. The commission of plant itself would mean that it is ready for the commercial operation on and from 31.3.2016 itself and the petitioner is ready to produce the power and for the one reason or the other the commercial operation would have started in the subsequent date. It is not the case of the respondents that the solar plant of the petitioner was not commissioned on 31.3.2016. Therefore, at any cost, it cannot be considered that the solar plant of the petitioner though was commissioned 31.3.2016, but there was no commencement of commercial operation and thereby deprive the right of the petitioner to avail the Tariff Order No.7 of 2014 at the rate of 7.01 per unit. From any angle, this Court could not able to accept the respondents contention that commissioning of the plant referred to in the Power Purchase Agreement in the Clause 6 would mean that the commencement of the commercial operation of the plant and at no stretch of imagination, one can construe that the commissioning of the plant would mean that the actual commencement of commercial operation. If the plant is commissioned and completion certificate was issued on 31.03.2016, it does mean that from date of commission, i.e., 31.03.2016, it was ready for Commercial Operation and consequently, whatever tariff available on that date, would automatically apply. As such, it is not in dispute that as on the date of commissioning of the plant, i.e. 31.03.2016, the available Tariff Order is Tariff Order No.7 of 2014 and therefore, the petitioner is entitled to claim tariff at the rate of Rs.7.01 per unit in terms of Tariff Order No.7 of 2014.

12.In fact, in similar Writ Petitions in W.P.Nos.19703 etc of 2017 dated 20.10.2021, a Co-ordinate Bench of this Court has taken a similar view. The relevant portion of the order is extracted hereunder:

> "7. The learned Additional Advocate General has raised the issue of the maintainability of the Writ Petitions on the ground of availability of alternative remedy before TNERC under Section 86(1)(f) of the Act. Therefore, this Court will take up this issue for consideration before going into the merits of the case. It is true that the availability of an efficacious alternative remedy is a ground for this Court not to exercise its jurisdiction under Article 226 of the Constitution of India. In the present case, the issue involved, does not pertain to adjudication of a dispute between the petitioners and TANGEDCO. If that is the case, this Court would have referred the parties before TNERC. However, the present case involves only an interpretation of the Tariff Regulations, Tariff Orders and Power Purchase Agreement and therefore, there is no requirement to send the parties to the TNERC and the issue that has been raised can be decided by this Court in the present Writ Petitions. Therefore, the preliminary objection raised by the learned Additional Advocate General on the maintainability of the Writ Petitions is hereby rejected.
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> 8.Before entering into the issue involved in the present case, it becomes relevant to understand how solar energy works in generation of electricity. Solar energy is a known renewable source of energy

which falls under the non-conventional category. A solar plant converts sun light into electrical energy either through photo voltaic panels (as in the present case) or through mirrors that concentrate solar radiation. This energy can be used to generate electricity or it can be stored in batteries or thermal storage. It is therefore clear that solar radiation is light, which is also known as electromagnetic radiation that is emitted by the sun. Solar technology captures this radiation and turn it into useful forms of energy.

9.It is therefore clear that the availability of sunlight is a sine qua non for generating electricity. This fundamental factor must be kept in mind before going into the issue raised in the present case.

10.The power tariff order has been passed based on the New and Renewable Sources of Energy Regulations, 2008. Before going into the 2008 Regulations, it will be relevant to take note of the 2005 Regulations, which deals with conventional sources of energy. Regulation 1 (6) of the 2005 Regulations is extracted hereunder:

> 1. Short Title, Applicability and Commencement (6) They shall not be applicable to co-generation, captive power plants and generation of electricity from renewable sources of energy including mini hydro projects (covered) under NonConventional Energy Sources), which will be covered by a separate regulation to be specified by the Commission under clause (e) of sub-section (1) of Section 86 of the Electricity Act 2003 for promotion of such generation.

11. It is clear from the above that the 2005 Regulations contemplated separate Regulation for non-conventional energy sources. The 2005 Regulations specifically deals with Date of Commercial Operation or COD under Regulations 2(m) and 2(n) and for easy reference, the same is extracted

hereunder:

> 2. Definitions (m) 'Date of Commercial Operation' or 'COD' in relation to a unit means the date declared by the generator after demonstrating the Maximum Continuous Rating (MCR) or Installed Capacity (IC) through a successful trial run, after notice to the beneficiaries, and in relation to the generating station the date of commercial operation means the date of commercial operation of the last unit of the generating station; (n)'Date of Commercial Operation' or 'COD' in relation to transmission system means the date of charging the project or part thereof to its rated voltage level or seven days after the date on which it is declared ready for charging by the transmission licensee. but is not able to be charged for reasons not attributable to the transmission licensee, its suppliers or contractors. Provided that the date of commercial operation shall not be a date prior to the scheduled date of commercial operation mentioned in the implementation agreement or the transmission service agreement or the investment approval, as the case may be, unless mutually agreed to by all parties.

12. A casual reading of the above terms shows that in case of conventional energy, there is a process whereby the generating unit has to establish that the generating station is ready to meet the required maximum level. Only after the successful trial run and the commencement of energy generation into the grid, the COD commences. There is absolutely no difficulty in understanding COD when it comes to conventional sources of energy.

13.When the 2008 Regulations were

notified on 08.02.2008, this regulation was consciously issued under Section 61(h) of the Act. These regulations were made applicable to all new and renewable source based generating plants. Solar power plants will fall under these regulations as per the definition found under Regulations 2(1)(g). Insofar as the determination of tariff is concerned, Regulation 4 gives an exhaustive list of items to be taken into consideration. The regulation also speaks about a model energy purchase agreement under Regulation 7 which requires the approval of the commission. As observed by this Court supra, the term COD is completely absent in the 2008 Regulations and that gives a clear indication that COD may not be a determining factor for availing tariff fixed in the tariff order for a particular control period.

14.When the comprehensive tariff order was issued in Tariff Order No.7 of 2014, Clause 6 of the order deals with the applicability of the proposed order and the same is extracted hereunder:

> 6. Applicability of the proposed order 6.1. The Order shall come into force from the date of its issue. The tariff fixed in this order shall be applicable to all solar power plants commissioned during the control period of this Order. The tariff is applicable for purchase of solar power by Distribution Licensee from Solar Power Generators conforming to this order. The open access charges and other terms and conditions specified in this Order shall be applicable to all the Solar energy generators, irrespective of their date of commissioning.

15. The above clause in no uncertain terms states that the order shall be applicable to all solar power plants "commissioned" during the control period of this order. Therefore, the applicability of

the tariff order is based on commissioning and the above Clause does not mandate COD."

13.In the light of the above discussion, this Court is of the view that the Tariff Order No.7 of 2014 would apply from the date of commissioning of the plant itself, i.e.31.03.2016 which does also mean that commencement of Commercial Operation starts from the date of commissioning of the plant. In such view of the matter, this Court is of the view that the petitioner is entitled to claim the rates prescribed under Tariff Order No.7 of 2014, dated 12.09.2014, i.e at the rate of Rs.7.01 per unit. Hence, the issue is answered accordingly.

14.For the foregoing reasons, this Court directs the third respondent, to pay the entire dues by calculating at the rate of 7.01 per unit as per Tariff Order No.7 of 2014, dated 12.09.2014 along with 6% interest per annum, within a period of three months from the date of receipt of a copy of this order. Though, this Court feels that the petitioner is entitled to commercial rate of interest, since in a similar Writ Petition, the co-ordinate Bench of this Court in W.P.Nos.19703 etc of 2017, dated 20.10.2021, directed the payment to be made along with interest at 6% p.a., and following the same, this Court also award interest at 6% p.a. after expiry of 60 days from the date of invoices raised by the petitioner and submitted to the respondents till the date of realisation.

15.Accordingly, these Writ Petitions are allowed on the above terms. No Costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

jd/rst

To

1. The Chief Secretary,
   State of Tamil Nadu,
   Secretariat,
   Fort St. George,
   Chennai 600 009.

2. Tamil Nadu Generation and
   Distribution Corporation Limited (TANGEDCO),
   Rep. by the Superintending Engineer,
   Solar Energy (NCES)
   No.144, Anna Salai,
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3. The Superintending Engineer, TANGEDCO,
   Virudhunagar Electricity Distribution Circle,
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   No.144, Anna Salai,
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5. The Director Finance, TANGEDCO,
   No.144, Anna Salai,
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+2cc to Mr.L.Jai Venkatesh, Advocate, S.R.No.12081
+1cc to Mr.M.V.Swaroop, Advocate, S.R.No.12412
+1cc to the Government Pleader, S.R.No.13035

W.P.Nos.25459, 25464 of 2018

AD(CO)
RGA(31/03/2022)