IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.12.2023

CORAM

THE HON'BLE MR.SANJAY V.GANGAPURWALA, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

WA Nos.213, 215, 217, 218, 220, 1551, 1553 of 2022,
and
1337, 1335 of 2023

WA No.213 of 2022

1.The Tamil Nadu Generation and Distribution Corporation Ltd.,
rep. By its Chairman cum Managing Director,
10th Floor, 144, Anna Salai, Chennai 600002

2.The Chief Engineer, NCES, TANGEDCO,
2nd Floor, 144, Anna Salai, Chennai 2

3.The Superintending Engineer,
Non-Conventional Energy Sources
TANGEDCO, 15, 15A Kumaralingam road,
Udumalpet 642 154

4.The Superintending Engineer,
TANGEDCO, Gobi Electricity Distribution Circle,
Gobi : Appellants

versus

1.Pariyur Amnan Spinning Mills (P) Ltd.,
rep. By P.M.Viswanathan, Executive Director,

2.The Tamil Nadu Electricity Regulatory Commission
rep. By its Secretary
19A, Rukumani Lakshmipathy Salai,
Egmore, Chennai 8 : Respondents

Prayer: Writ appeal filed under Clause 15 of the Letters Patent against the order of the learned Single Judge dated 20.10.2021 in WP No.19703 of 2017.

Appearances:

Mr.J.Ravindran, Additional Advocate-General, for Mr.D.R.Arun Kumar, for the appellants in WA Nos.213, 215, 217, 218, 220, 1551 and 1553 of 2022, for respondents 2 to 5 in WA Nos.1335 and 1337 of 2023

Mr.P.Muthukumar, State Government Pleader, for the first respondent in WA Nos.1335 and 1337 of 2023

Mr.Satish Parasaran, Senior Counsel, for Mr.M.V.Swaroop, for the first respondent in WA Nos.213, 1551 and 1553 of 2022 and appellants in WA Nos.1335 and 1337 of 2023.

Mr.Rahul Balaji, for the first respondent in WA Nos.215, 220 of 2022

Mr.R.S.Pandiyaraj, for the first respondent, in WA Nos.217, 218 of 2022

COMMON JUDGMENT

(Made by the Hon'ble Chief Justice)

We have heard Mr.J.Ravindran, learned Additional Advocate-General, for the appellants in WA Nos.213, 215, 217, 218, 220, 1551 and 1553 of 2022, for respondents 2 to 5 in WA Nos.1335 and 1337 of 2023, Mr.P.Muthukumar, learned State Government Pleader, for the first respondent in WA Nos.1335 and 1337 of 2023, Mr.Satish Parasaran, learned Senior Counsel, for the first respondent in WA Nos.213, 1551 and 1553 of 2022 and appellants in WA Nos.1335 and

1337 of 2023, Mr.Rahul Balaji, learned counsel for the first respondent in WA Nos.215, 220 of 2022, Mr.R.S.Pandiyaraj, learned counsel for the first respondent in WA Nos.217, 218 of 2022.

2. The spectrum of dispute amongst the parties is the interpretation of the energy purchase agreement entered into between them and covered under Tariff order No.7 of 2014 dated 12.09.2014.

3. The Government of Tamil Nadu launched the Tamil Nadu Solar Energy Policy, 2012 to promote solar energy, in accordance with the provisions of the Electricity Act, 2003, and the electricity policies issued by the Government of India. The Tamil Nadu Electricity Regulatory Commission issued comprehensive tariff order on solar power bearing No.4 of 2014 and as amended by tariff order No.7 of 2014.

4. Pursuant thereto, the Tamil Nadu Generation and Distribution Corporation Ltd., (TANGEDCO) and the original writ petitioners entered into energy purchase agreements in the month of January,

2016. The gamut of dispute between the TANGEDCO and the writ petitioners is the rate of tariff payable by the TANGEDCO to the original writ petitioners. According to TANGEDCO, the commercial production commenced on and after 01.04.2016. As per TANGEDCO, the tariff order No.2 of 2016 would apply and the rate applicable would be Rs.5.10 per unit. According to the original writ petitioners, the unit has commissioned on 31.03.2016 and as such, Tariff order No.7 of 2014 would apply. The learned Single Judge held that the plants were commissioned on 31.03.2016, and that tariff order No.7 of 2014 would apply and the TANGEDCO is liable to pay the original writ petitioners at the rate of Rs.7.01 per unit. The learned Single Judge further directed payment of interest at the rate of 6% per annum.

5. TANGEDCO has filed appeals challenging the order of the learned Single Judge directing payment at the rate of Rs.7.01 per unit. Some of the original writ petitioners have filed appeals assailing non-grant of interest at the rate of 12% per annum.

6. According to the learned Additional Advocate-General, Clause

9 of the agreement between the parties is explicitly clear. The learned Additional Advocate-General has emphasised on clause 9(b) of the said agreement. According to him, the actual period of sale/purchase of the power by Solar Power Generator/Distributing licensee under the agreement shall be valid for 25 years from the Date of Commercial Operation (COD). According to the learned Additional Advocate-General, COD would be the date of commercial production. So, the period of agreement of 25 years has to be computed from the date of commercial production. As such, the date of commercial production is the date on which the agreement has to take effect. The commercial production commenced only after 1st of April 2016 and as such, in view of the tariff order No.2 of 2016, the TANGEDCO was well within its right to pay the tariff for the energy received by it at the rate of Rs.5.10 per unit. It is further submitted by the learned Additional Advocate-General that reliance of the petitioner upon the Superintending Engineer giving letters about the commissioning of the plant and the letters directing the original writ petitioners to forward the bill at the rate of Rs.7.01 per unit would not establish the case of the original writ petitioners. The superintending engineer is not the final authority.

7. The learned Additional Advocate-General further submits that rate fixed at Rs.7.01 per unit would be payable if the plant is commissioned and the commercial production has commenced during the control period of Order No.7 of 2014. As the commercial production had not commenced during the control period, TANGEDCO was correct in making the payment at the rate of Rs.5.10. It is further submitted that at no material point of time, the bill raised by the original writ petitioners at the rate of Rs.7.01 was accepted by the TANGEDCO. Though the bill was raised at Rs.7.01 by the original writ petitioners, TANGEDCO made the payment at Rs.5.10 per unit. This would establish that since beginning, TANGEDCO was firm that the amount payable was only Rs.5.10 per unit. The learned Additional Advocate-General further submits that the learned Single Judge ought not to have entertained the writ petition inasmuch as there is a remedy provided under the agreement for settlement of disputes. If any dispute or difference of any kind whatsoever arises between the parties relating to the agreement, the same, at the first instance, be settled amicably by the parties, failing which, either party may

approach the commission for adjudication of such disputes under Section 86(1)(f) of the Electricity Act, 2003, and in accordance with the Conduct of Business Regulations, 2004 and Fees and Fines Regulation 2004 of the Commission. In view of the said clause, the Court ought not to have exercised its writ jurisdiction under Article 226 of the Constitution of India as the parties are governed by the agreement.

8. The learned Senior Counsel and learned counsel appearing for the writ petitioners support the order passed by the learned Single Judge and submit that in fact, the dispute was not such that was required to be referred to commission but the question was of the interpretation of the agreement. Even otherwise, this Court can still exercise the jurisdiction under Article 226 of the Constitution in spite of the alternate remedy.

9. It is further submitted that the terms of agreement are abundantly clear, and the date of commissioning is the relevant date. The agreement no where speaks about the date of commercial production to be the relevant date. It is further submitted that more

than four-five days prior to 31.03.2016, their plants were ready for operation. The safety measure certificate is also issued to the original writ petitioners on 29.03.2016. Inspection was made by TANGEDCO authorities only on 31.03.2016 though the original writ petitioners were requesting the authorities to make inspection prior to four-five days. It is further submitted that as per the tariff regulation, if there is delay in making the payment, then TANGEDCO is liable to pay interest at the rate of 1% per month; i.e. 12 % per annum. The learned Single Judge ought not to have reduced the rate of interest. They further seek relief that the interest be awarded at the rate of 12% p.a.

10. The learned counsel for the original writ petitioners have relied upon the judgment of the Apex Court in the case of ***Maharashtra State Electricity Distribution Company Ltd. vs. Maharashtra Electricity Regulatory Commission, 2022(4) SCC 657*** to buttress the submission that interest at the contractual rate ought to be awarded.

11. Reliance is also placed on the judgment of the Apex Court in

the case of ***Commissioner of Customs (Imports) Mumbai vs. Tullow india Operations Ltd., (2005) 13 SCC 789*** to contend that it was not in the hands of the writ petitioners to make authorities of TANGEDCO to inspect on a particular date. The original writ petitioners have complied with all the requisites. The writ petitioners cannot be blamed for the late inspection of the units.

12. We have considered the submissions canvassed by the respective parties.

13. The horizon of the dispute is in a narrow compass. The same would relate to the interpretation of agreement between the parties. Clause 1(e) defines 'effective date'. Effective date means, the date of execution of agreement between the distributing licensee and the solar power developer and the date on which the agreement shall come into effect. Clause 9(a) suggests that the agreement shall come into effect from the effective date. The date of commercial operation or COD means COD as defined in Regulation 2(m) of TNERC (Terms and Conditions for the Determination of Tariff) Regulations, 2005.

14. Covenant 5 of the agreement deals with tariff and other charges. 5(a) provides that the solar power tariff for SPG commissioned during the control period Order No.7 of 2014, dated 12.09.2014 shall be Rs.7.01 per unit without accelerated depreciation benefit. TANGEDCO would be liable to pay charges at the rate of Rs.7.01 per unit for the SPG commissioned during the control period of Order No.7 of 2014. The control period of Order No.7 of 2014 is up to 31.03.2016. As per clause 5(a), the date of commission is the relevant date. The date of commissioning of the plant during the control period of Order No.7 of 2014 is the relevant date for deciding the tariff.

15. A certificate has been issued by the Superintending Engineer that the writ petitioners have commissioned the solar power plant satisfactorily on 31.03.2016. Invoices are submitted subsequently, as per the directions of the Superintending Engineer. The Superintending Engineer had directed the writ petitioners to furnish the invoices as detailed in the statement enclosed with its letter. The statement enclosed detailed that the net claim would be at the rate of Rs.7.01 per unit. Of course, the Superintending

Engineer would not be the final authority to decide the contention of the parties. However, at the relevant time, the officer of the TANGEDCO understood the rate payable per unit at Rs.7.01.

16. There is no manner of doubt that the solar plants of the original writ petitioners had commissioned on 31.03.2016 and the relevant aspect for attracting the tariff at Rs.7.01 per unit is the date of commissioning and not the date of commercial operation. Even otherwise, from the documents on record, it is clear that the plants had all the necessary certificates and the plants commissioned on and before 31.3.2016. The agreement between the parties stipulates the date of the plant being commissioned as the relevant date. The tariff control order No.7 of 2014 also provides that the order shall come into force from the date of its issue. The tariff fixed in the order shall be applicable to solar power plants commissioned during the control period of the said order. The commissioning of the plant during the control period would be relevant for determining the tariff fixed in the order. Clause 11.06 of the tariff order provides for the control period and the tariff period. One year was set as the control period.

17. Reading the agreement and the control order, the relevant and material date for determining the rate of tariff would be the date of commissioning of the plant. Undisputedly, the plant was commissioned on 31.03.2016. As such, tariff order No.7 of 2014 would be relevant and the rate would be Rs.7.01 per unit. The learned Single Judge has not committed any error while passing the impugned order.

18. The writ petitioners have filed appeals challenging the grant of rate of interest at 6% per annum. The contention is that the contractual rate is to be awarded. It is true that in commercial transactions, the award of interest at the contractual rate is the rule. However, the circumstances are also required to be considered. There appears to be a *bona fide* dispute between the parties regarding the tariff order to be applied. TANGEDCO was of the opinion that Tariff Order No.2 of 2016 would apply. In that event, the learned Single Judge has exercised his discretion. We are not inclined to interfere with the said discretion exercised by the learned Single Judge in awarding interest at the rate of 6% per annum.

19. The another argument of the learned Additional Advocate General is that alternate remedy was provided in the agreement and as such, the learned Single Judge ought not to have entertained the writ petitions. We are at the appeal stage. The rule of alternate remedy is a rule of self-restraint. The learned Single Judge has already exercised the jurisdiction and has interpreted the agreement and the tariff order. Once, discretion and jurisdiction under Article 226 of the Constitution are already exercised by the learned Single Judge, after hearing the arguments in detail, in appeal, we are not inclined to relegate the parties to an alternate forum.

20. In light of the aforesaid, all the appeals are dismissed with no order as to costs. Consequently, CMP Nos.10238, 10225, 1622 and 1621, 1615, 1614 and 1619 of 2022 are closed.

21. The difference of amount shall be paid by the TANGEDCO to the original writ petitioners within three months.

(S.V.G., CJ.) **(D.B.C., J.)**

22.12.2023

Index : Yes/No
Neutral Citation : Yes/No
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To
The Secretary
Tamil Nadu Electricity Regulatory Commission
19A, Rukumani Lakshmipathy Salai,
Egmore, Chennai 8

THE HON'BLE CHIEF JUSTICE
AND
D.BHARATHA CHAKRAVARTHY, J.

(tar)

WA Nos.213 of 2022 etc. batch

22.12.2023