

In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

APPEAL NO. 350 OF 2017

Dated: 30th May, 2019

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. Ravindra Kumar Verma, Judicial Member

In the matter of:

M/s. Ramnad Solar Power Ltd.
Adani House, Nr. Mithakhali Six Roads,
Ahmedabad – 380 009

...Appellant(s)

Versus

- 1. Tamil Nadu Electricity Regulatory
Commission,
No 19A, Rukmini Lakshmi pathy Salai,
Egmore, Chennai - 600 008** **...Respondent No.1**
- 2. Tamil Nadu Generation and Distribution
Corporation Limited
Represented by its Chairman,
No. 144, Anna Salai,
Chennai- 600 002** **...Respondent No.2**
- 3. Tamil Nadu State Load Despatch Centre
Represented by its Director (Operation)
No. 144, Anna Salai,
Chennai 600 002** **...Respondent No.3**
- 4. Tamil Nadu Transmission Corporation
Limited
Represented by its Chairman,
No. 144, Anna Salai,
Chennai- 600 002** **...Respondent No.4**
- 5. The Ministry of New and Renewable Energy**

**Represented by its Secretary
Block – 14, CGO Complex,
Lohdi Road, New Delhi – 110003**

...Respondent No.5

**Counsel for the Appellant(s) : Mr. Amit Kapur
Ms. Poonam Verma
Ms. Aparajitha Upadhyay
Ms. Abiha Zaidi**

**Counsel for the Respondent(s) : Mr. Sethu Ramalingam for R-
1**

**Mr. S. Vallinayagam
Ms. S. Amali for R-2 to 4**

Mr. Dilip Kumar for R-5

JUDGMENT

PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

1. Prayer of the Appellant.

- (a) Allow the Appeal and set aside the Impugned Order dated 30.06.2017, as per the submissions of the Appellant and direct the Respondent Commission to treat the matter as Miscellaneous Petition, register and examine the Petition of the Appellant in exercise of its regulatory powers; and
- (b) Pass such other and further orders, as this Tribunal deem fit and proper in the facts and circumstances of the case

2. Questions of Law:

- A. Whether the Respondent Commission failed to appreciate that the Petition filed by the Appellant was regulatory and not adjudicatory in nature?

- B. Whether the Respondent Commission acted contrary to the settled position of law that:-
- (a) “regulatory” and “adjudicatory” functions of an Electricity Regulatory Commission are different; and
 - (b) Within the regulatory framework under the aegis of the Electricity Commissions, solar project developers are entitled to “Must-Run” status, and protection against back-down instructions;
- C. Whether the Impugned Order is violative of the objectives of Section 86(1)(e) of the Electricity Act, 2003, National Electricity Policy, Tariff Policy, National Solar Mission, Solar Energy Policy 2012 issued by the State of Tamil Nadu, which are binding regulations, and the doctrine of legitimate expectation as also the international convention, UNFCCC, which incentivises generation of electricity from renewable sources?
- D. Whether the Respondent Commission failed to appreciate that there is no dispute involved in the present matter and that the Appellant is only seeking declaration of “Must-Run” status of the power plant and directions to the Respondents to stop issuing back-down instructions to the Appellant, and that too without any written communication?
- E. Whether the Respondent Commission has failed to appreciate that merely because a monetary claim is involved in the matter, the same does not necessarily mean that the matter involves a dispute?
- F. Whether the Respondent Commission failed to appreciate that the identity or character of the party filing the petition is not a determining factor regarding the nature of the petition i.e. whether regulatory or adjudicatory?

- G. Whether the Respondent Commission rightly directed conversion of the Petition filed by Appellant invoking regulatory power, into a Dispute Resolution Petition despite the fact that the affidavit filed by the Respondent Commission in the Tamil Nadu High Court wherein Chairman has voluntarily given under taking that they would not take up hearing of the Dispute Petitions, pending the final outcome of the court case in the Madras High Court (now pending with Hon'ble Supreme Court)?

3. **Brief facts of the Case**

- 3.1 The present Appeal has been filed by M/s. Ramnad Solar Power Ltd. (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) against the Order dated 30.06.2017 (“**Impugned Order**”) passed by the Tamil Nadu Electricity Regulatory Commission (hereinafter referred to as the “**State Commission/TNERC**”) in the Pre-Registration Case No. 2.
- 3.2 M/s. Ramnad Solar Power Ltd., the Appellant herein is primarily engaged in the business of setting up of Renewable Energy power plants and generation of electricity thereof in the State of Tamil Nadu.
- 3.3 Tamil Nadu Electricity Regulatory Commission (hereinafter referred to as the “**State Commission/the Respondent No.1**”) is the regulatory Commission in the State of Tamil Nadu which functions defined in the Electricity Act, 2003.
- 3.4 Tamil Nadu Generation and Distribution Commission Limited (TANGEDCO) (hereinafter referred to as the “**Respondent No.2**”) is the Distribution Company in the State of Tamil Nadu.

- 3.5 Tamil Nadu State Load Despatch Centre (hereinafter referred to as the “**Respondent No.3**”) is the SLDC in the State of Tamil Nadu.
- 3.6 Tamil Nadu Transmission Corporation Limited (hereinafter referred to as the “**Respondent No.4**”) is the State Transmission Utility in the State of Tamil Nadu.
- 3.7 Government of India issued the Jawaharlal Nehru National Solar Mission (“JNNSM”) with an aim to promote solar power generation in the country.
- 3.8 Pursuant to the JNNSM, the Tamil Nadu State Government issued a Solar Energy Policy with a vision to lead the country by generating 3000 MW of Solar Power by 2015 through a policy conducive to promoting solar energy in the State.
- 3.9 Subsequently, the Appellant proposed to set up solar power plants of varied capacity using solar photovoltaic (“PV”) technology in the State in consonance with the new solar initiative.
- 3.10 The State Commission issued a Comprehensive Tariff Order on Solar Power being Order no. 4 of 2014 dated 12.09.2014 (Solar Tariff Order). As per the said Order, tariff for Solar PV plants was fixed at Rs. 7.01 per unit. Further, in terms of the TNERC Power Procurement from New and Renewable sources of Energy Regulations 2008, the format for Energy Purchase Agreement (EPA) was to be determined by the State Commission after discussions with generators and distribution licensees.
- 3.11 Pursuant to the Solar Tariff Order, the Respondent No.2 issued CMD TANGEDCO Proceedings No. 454 prescribing instructions for processing of applications for establishment of solar power plants under Preferential Tariff Scheme.
- 3.12 Energy Purchase Agreement was entered into by the Appellant with Respondent No.2/TANGEDCO. In terms of Clause 2(d)

requires the parties to adhere to and comply with the provisions of the IEGC, Tamil Nadu Grid Code and the applicable Regulations covering the field of renewable energy sources.

- 3.13 The Appellant commissioned the solar PV power plant. Despite commissioning of the Solar Power Project, and duly complying with the EPA and extant legal framework, since 08.02.2016, the Appellant is being regularly instructed by the Respondent No.4 to back-down generation, telephonically, and without any written communication. The issuance of such regular back-down instructions is resulting in huge financial losses to the Appellant, especially in light of the substantial investments having been made in the Solar Power Project.
- 3.14 The Appellant wrote to TANGEDCO and the Tamil Nadu SLDC, i.e. Respondent No.2 & Respondent No.3 respectively, duly marking a copy of the same to the Respondent No.5 MNRE and the Chairperson of the State Commission, with regard to the backing down instructions being issued to the Appellant and its Group companies. It was stated therein that the Appellant has been facing severe hardship due to regular backing down instructions being issued despite the “Must-run” status accorded to solar power plants.
- 3.15 The Appellant sent letters dated 08.06.2016 and 21.06.2016 to the Respondent No.2 reiterating the prevalent legal framework and the impact of regular back-down instructions issued to the Appellant.
- 3.16 In view of the foregoing situation being faced by many solar power plants, on 02.08.2016, the Respondent No.5 had issued a letter to the Central Electricity Regulatory Commission (CERC) with a copy to the Principal Secretary of all States, stating that solar power plants should not be given instructions to back-down. It was stated

that thermal projects should be asked to back-down, which is facilitated by the prevalent two-part tariff model, unlike the single tariff model in the case of solar power plants. MNRE further stated that appropriate regulations should be framed and solar power plants ought to be paid full tariff if they are forced to back down in rare cases.

3.17 In view of the foregoing, and the continued loss being caused, the Appellant filed a Petition under Section 86(1)(e) of the Electricity Act before the State Commission.

3.18 Petition was 'returned' by way of a File Noting/Order by the Secretary and two officials of the State commission stating that:-

"The petitioner is directed to pay the fee for DRP as the prayer of petition falls in the DRP."

3.19 The counsel of the Appellant herein represented before the State Commission that the nature of this Petition is not of a Dispute and a similar Petition filed by NSEFI in MP No. 16 of 2016 has already been admitted by the State Commission. Accordingly, the counsel requested the State Commission to register the Petition filed by the Appellant herein as an M.P. and place it before the State Commission.

3.20 The State Commission vide the Impugned File Noting/Order dated 20.10.2016 "Returned" the Petition filed by the Appellant observing that the matter involves a dispute in terms of Section 86(1)(f) of the Act and accordingly the matter would have to be classified as a dispute resolution petition.

- 3.21 Aggrieved by the aforesaid finding by the State Commission in the File Noting/Order dated 20.10.2016, the Appellant filed Appeal No. 72 of 2017 before this Tribunal.
- 3.22 This Tribunal by way of its common Order dated 16.05.2017, remanded the matter back to the Chairperson of the State Commission, for fresh consideration on the issue of maintainability in terms of Regulation 20(7) of the TNERC (Conduct of Business) Regulations 2004.
- 3.23 Thereafter, the matter was taken up for consideration before the Chairperson of the State Commission on 16.06.2017, in compliance with the aforesaid directions by this Tribunal.
- 3.24 Chairperson of the State Commission passed the Common Impugned Order in P.R.C. No.2 of 2017 holding that the Petition filed by the Appellant herein can only be registered as D.R.P. and not as M.P.
- 3.25 In view of the foregoing, and the continued loss being caused, on 23.09.2016, the Appellant filed a Petition under Section 86(1)(e) of the Electricity Act was filed before the Respondent Commission. On 30.09.2016, the said Petition was 'returned' by way of a File Noting/Order by the Secretary and two officials of the State Commission stating that:-

“The petitioner is directed to pay the fee for DRP as the prayer of petition falls in the DRP.”

Thereafter, on 18.10.2016, the counsel of the Petitioner represented before the Respondent Commission that the nature of this Petition is not of a Dispute and a similar Petition filled by NSEFI in MP No. 16 of 2016 has already been admitted by Respondent Commission. Accordingly, the counsel requested the

Respondent Commission to register the Petition filed by the Appellant herein as an M.P. and place it before the Respondent Commission. The relevant Para is represented as under;

“The Petition has been filed to seek the Hon’ble Commission’s order to exercise its regulatory powers to ensure compliance with the Regulations governing Must Run & Merit Order Despatch. It is not in the nature of a dispute. A similar petition filled by NSEFI in M.P No. 16/2016 has already been admitted by the Hon’ble TNERC. Thus Petition may therefore be numbered and listed before the Hon’ble TNERC at the earliest.”

3.26 On 09.11.2016, the Respondent Commission vide the File Noting/Order dated 20.10.2016 “Returned” the Petition filed by the Appellant observing that the matter involves a dispute in terms of Section 86(1)(f) of the Electricity Act and accordingly the matter would have to be classified as “D.R.P.” i.e. a dispute resolution petition. Accordingly, the Appellant was directed to pay additional court fees and convert the matter into a petition invoking adjudicatory powers of the Respondent Commission, instead of regulatory powers.

3.27 Aggrieved by the aforesaid finding by the Respondent Commission in the File Noting/Order dated 20.10.2016, the Appellant filed Appeal No. 72 of 2017 before this Tribunal. This Tribunal, by way of its common Order dated 16.05.2017, remanded the matter back to the Chairperson of the Respondent Commission, for fresh consideration on the issue of maintainability in terms of Regulation 20(7) of the TNERC (Conduct of Business) Regulations 2004, and, *inter alia*, observed as under:-

“We have perused the relevant Regulations, quoted above. As per Regulation 20(6), a person aggrieved by any order of the designated officer in regard to the presentation of the petition may request the matter to be placed before the Secretary of the Commission for appropriate orders. We notice that the impugned file noting/order is signed by the Secretary himself and two other officers. Therefore, there is no question of the matter being placed again before the Secretary. As per Regulation 20(7), the Chairperson is entitled to call for the petition presented by the party and give such directions regarding the presentation and acceptance of the petition as considered appropriate.

In view of these provisions, without going into the question whether file noting is order or not, in the interest of justice, we direct the Secretary to place the petitions before the Chairperson at the earliest. One of the grievances of the Appellants is that in a similar matter filed by the National Solar Energy Federation of India, the State Commission has admitted the petition. We are not expressing any opinion on this submission, but in the peculiar facts of these cases and without making it a precedent, we direct the Chairperson of the State Commission to hear the counsel for the Appellants and pass appropriate orders. The entire exercise be conducted within a period of two months from the date of receipt of this order. We have not expressed any opinion on the merits of the case. The appeals are disposed of in the aforesaid terms.

In view of the disposal of the appeals, the connected IAs do not survive and are disposed of as such.”

3.28 Thereafter, the matter was taken up for consideration before the Chairperson of the Respondent Commission on 16.06.2017, in compliance with the aforesaid directions by this Tribunal.

3.29 On 30.06.2017, Chairperson of the Respondent Commission passed the Impugned Order holding that the Petition filed by the Appellant herein can only be registered as D.R.P. and not as M.P.

4. Submissions of the Appellant

4.1 By the common Impugned Order on 30.06.2017, the State Commission held that:-

- (a) Prayers sought by the Appellants in their Petitions require adjudication and the State Commission cannot decide the same in exercise of its regulatory powers. The relevant extract is as under:-

*“4... On the question whether the present petition is one of Dispute Resolution or a Miscellaneous one, I have no manner of doubt that the present case requires adjudication by the Commission and cannot be taken up in regulatory jurisdiction, since without hearing the other side, **the Commission cannot decide the monetary claim made by the Petitioners and on previous occasions the Commission has classified the petitions filed by the generators for “MUST RUN” status as Dispute Resolution Petition only. It is for this reason, I am inclined to hold that the issue of “MUST RUN” Status requires formal adjudication and not exercise of regulatory jurisdiction.***

...

*7. As may be seen from the above, **the petitioner being a generator, his case for dispute resolution could be taken up only under Section 86(1)(f) of the Electricity Act, 2003 read with item 7A in the Table under Regulation 6 of the Fees and Fines Regulations which prescribes 1% of the amount of Dispute, subject to a minimum of Rs. 20000/-.** On the other hand, the Miscellaneous Petitions filed by an Association is subject to payment of Rs. 2.00.000/- under item 7 in the Table under Regulation 6 of the Fess and Fines Regulations. The question involved herein being one of monetary nature and the Commission remits the fees collected by it under the Regulations to the Government of Tamil Nadu, the Registry has to classify the petitions and collect fees as per the Regulations to avoid any monetary loss to the Public Exchequer.”*

(b) Appellants shall pay appropriate Court Fees in terms of TNERC – Fees and Fines Regulations, 2004 as amended from time to time (“**Fees and Fines Regulations**”) and register the Petitions as ‘Dispute Resolution Petition’ (“**DRP**”).

4.2. The State Commission has issued such a direction being conscious that:-

(a) It was entertaining Petition M.P. No. 26 of 2016 filed by National Solar Energy Federation of India (NSEFI) claiming identical relief, considering it to be ‘regulatory’ in nature. That Petition was heard on 13 occasions between 09.09.2016 and 14.02.2019 culminating in Order dated 25.03.2019.

(b) The State Commission was not discharging its adjudicatory functions under Section 86(1)(f) of the Electricity Act at that point of time. In this context, it seems that the irrational findings of the State Commission were passed to suit the functioning of State Commission as was prevalent on the said date.

4.3. The Appellants’ projects were constructed, and considerable investment (over Rs. 2,450 crores) was made by the Appellant based on the based on the statutory frame work and the State Government's Solar Energy Policy, with a legitimate expectation of a tariff of Rs. 7.01 per unit. The Energy Purchase Agreements entered into by the Appellants, in terms of Clause 2(d) require the parties to adhere to and comply with the provisions of the IEGC, TNEGC and the applicable Regulations covering the field of renewable energy sources. The Appellant legitimately expected

that on account of the admitted “Must Run” status of solar power plants, no back-down instructions would be issued to the Appellant. It is submitted that this incongruent stance taken by the State Commission has led to a delay of three years in grant of relief to the Appellant, who have suffered adverse financial impact on account of the said delay.

4.4 On account of backing down instructions by SLDC, major solar power developers in the state are placed in a position where despite the possibility of maximum production they are unable to evacuate the power that could have been generated, leading to wastage of renewable power. This creates difficulties in supplying projected quantum of power for viability of the project as well as ensuring financial returns for project activities. The violation thereof infringes upon the doctrine of legitimate expectation of the Appellants to get lawful and reasonable recovery of expenditure. [Reliance is placed on Hon’ble Supreme Court’s judgement in **DERC v. BSES Yamuna Power Ltd. & Ors.** (2007) 3 SCC 33 (para 2) and **Madras City Wine Merchants’ Association & Ors. vs. State of Tamil Nadu & Ors.** (1994) 5 SCC 509 (Para 48)]

4.5 In view of the said violations, 23.09.2016, the Appellant approached the State Commission by filing Petition invoking the regulatory powers of the State Commission stating as under:-

(a) Subsequent to the signing of the Energy Purchase Agreements dated 04.07.2015, the Appellants had taken all steps to commission their Solar Power Plants on schedule.

- (b) Since the date of commissioning of the Appellants' power projects, Appellants have regularly been directed to "back-down" the units. (*Notably, the said back-down instructions have been received telephonically and not in writing*).
- (c) "Must Run" status for Solar Power Plants has statutorily been recognised under the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 [Regulation 5.2(u)] as well as the Tamil Nadu Electricity Grid Code, 2005 [Regulation 8(3)(b)].

4.6 The matters were dealt with the State Commission as under:-

- (a) The State Commission returned the Petition by way of its File Notings dated 30.09.2016, erroneously stating that the Petition fall under the Dispute Resolution Mechanism.
- (b) On receiving the returned Petition with the File Notings, on 18.10.2016 counsel for the Appellants specifically made a representation stating that:-
 - (i) The matters are not in the nature of a dispute and the Petitioner is invoking regulatory powers of the State Commission.
 - (ii) Similar petition filed by NSEFI, seeking the same relief was registered as a Miscellaneous Petition by the State Commission. Hence, petition of the Appellant should be dealt with in same manner.

(c) Instead of registering the case of the Appellant as Miscellaneous Petition, on 20.10.2016, the State Commission once again returned the Petition by way of File Notings being as under:-

“The Petition has been filed u/s 86 (1) (f) of the Electricity Act, 2003 and the prayer is to stop backing down instructions and compensation due to backing down instructions. Thus it is a dispute between licensee and Generating Company. Hence, this has to be classified only on D.R.P. Further a similar petition praying for “MUSTRUN” status for wind filed by Green Infra(D.R.P. No. 28/2012) has been classified only on D.R.P. Therefore comply within 15days.”

4.7 Aggrieved by the File Notings, Appellants challenged filed respective three Appeals before this Tribunal. This Tribunal *vide* Order dated 16.05.2017, remanded the matter to the State Commission and directed the Chairperson to hear the matter and pass appropriate order within the period of 2 months.

4.8 On 30.06.2017, Chairperson of the State Commission passed the common Impugned Order observing that the Petitions can only be registered as D.R.P. and not as M.P.

4.9 It is submitted that the Impugned Order lacks application of mind in so far as it ascribes form to the Petition based on the Fees and Fines Regulations, as opposed to without actually analysing the nature of the issues involved. The aforesaid findings are based on an incorrect interpretation of the provisions of the Electricity Act, 2003 (**“Electricity Act”**) as well as the Fees and Fines Regulations.

4.10 The State Commission had registered a similar matter (M. P. No. 16 of 2016) filed by NSEFI, invoking identical provisions and seeking identical relief (as that in the Appellants' Petitions), as a Miscellaneous Petition. On 09.12.2016, the State Commission admitted the Petition filed by NSEFI, and the matter has been disposed of by the State Commission by Order dated 25.03.2019. To the contrary, the Petitions filed by the Appellants have been directed to be registered as DRP. In doing so, an arbitrary approach has been adopted by the State Commission towards the Appellants which lacks cogent reasoning and it ought to be corrected by this Tribunal. It is submitted that this Tribunal may exercise its powers under Section 121 of the Electricity Act, to issue directions to the State Commission to eschew from adopting such inconsistent and discriminatory approach in deciding matters before it.

4.11 It is settled law that Regulations have force of law and are binding as held by the Hon'ble Supreme Court in *PTC India Ltd. vs. CERC* (2010) 4 SCC 603. Ensuring effective implementation of a binding obligation, i.e., "**Must Run**" status, under the Regulations by the State Commission is an exercise of regulatory powers. The State Commission failed to consider the regulatory "nature" of the matter seeking enforcement of the "Must Run" status of the Appellants' solar power plants, as guaranteed under the CERC (Indian Electricity Grid Code) Regulations, 2010, and the Tamil Nadu Electricity Grid Code, 2004. The State Commission failed to consider that in terms of Sections 79(1)(h) and 86(1)(h), enforcement of IEGC is inherently regulatory and in effect the

provisions are binding on the State Commission. In this regard, the applicable legal and regulatory framework pertaining to “Must Run” status is noteworthy: -

- (a) **CERC (Indian Electricity Grid Code) Regulations, 2010 (“IEGC”)**: As per Clause 5.2 (u), all SLDC/ Regional Load Despatch Centres are obliged to evacuate available solar power, treating same as “Must Run” stations;
- (b) **Tamil Nadu Electricity Grid Code (“TNEGC”)**: As per Clause 8 (3) (b), SLDC is required to regulate overall state generation in a manner that generation from several types of power stations, including renewable energy sources, shall not be curtailed.

4.12 The State Commission failed to appreciate the Scheme of the Act and in particular Section 86, i.e., there is a clear distinction between “regulatory” and “adjudicatory” powers. In this regard, the following submissions are noteworthy: -

- (a) The Electricity Act was enacted to address problems of creditworthiness crisis in the power sector due to uneconomic tariffs. Part VII (Sections 61 to 66) and Part X (Sections 79 and 86) were specifically enacted to fulfil the twin statutory objectives of safeguarding consumer interest while protecting investments by providing for recovery of cost of electricity in a reasonable manner.
- (b) In this background, independent regulators were appointed, vested with diverse roles, i.e., grant of licence, determining tariff, regulating diverse activities, establishing and enforcing standards, conducting investigation, enforcing laws,

adjudicating upon disputes and advising on policy making. [Ref. - *L. Chandra Kumar vs. Union of India* (1997) 3 SCC 261; *Namit Sharma vs. Union of India* (2013) 1 SCC 745. The Central/State Commissions *combines within its ambit functions and powers, being:-*

- (i) **Legislative:** To frame binding regulations under Sections 61, 79(1)(h), 86(1)(h), 178 and 181.
 - (ii) **Executive:** *Granting licence; determining tariff; adopting tariff discovered through competitive bidding; regulate procurement process and PPAs; facilitate inter-state/intra-state carriage of electricity (transmission and wheeling); specify and enforce standards on licensees; fixing trading margin; advising Governments' on policy and sectoral issues.*
 - (iii) **Adjudicatory:** *Re. specified types of disputes under the said statutory and regulated contracts.*
- (c) It is noteworthy that, Parliament has used different words in different provisions to signify different functions of the regulator.
- (i) Section 86(1)(a) of the Electricity Act empowers the State Commission to **determine** tariff.
 - (ii) Section 86(1)(b) empowers the State Commission to **regulate** the price of sale and purchase of electricity between the generating companies and distribution licensees through agreements for power produced for distribution and supply.
 - (iii) Section 86(1)(f) empowers the State Commission to **adjudicate** upon disputes between licensee and generating companies. *The Commission has been vested with the powers of a civil court in respect of inquiry or proceeding*

under the Act including powers for summoning, enforcement of attendance of any person and examination on oath, discovery and production of documents, receiving affidavit of evidence, requisitioning of public records, etc, under Sections 94 and 96; and proceedings before it accorded status of judicial proceedings under Section 95].

4.13 The State Commission has failed to appreciate the import and ambit of the word “regulate”. The power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded plenary over the entire subject. In this regard, reliance is placed on the following Judgments:-

- (a) *Gujarat Urja Vikas Nigam vs. Tarini Infrastructure Ltd.*(2016) 8 SCC 743 (para 17)
- (b) *PTC India Ltd. vs. Central Electricity Regulatory Commission* (2010) 4 SCC 603 (paras 49, 53, 55, 92)
- (c) *Bharat Sanchar Nigam Ltd. vs. Telecom Regulatory Authority of India*(2014) 3 SCC 222 (para 88)

4.14 The State Commission has failed to consider the word “adjudicate” relates to determination of rights or status *inter se* parties. In this regard, it is relevant to note that:-

- (a) The word “dispute” means “to argue about”, “to contend for”, “to oppose by argument”, “to call in question”.
- (b) A “dispute” is a conflict or controversy; a conflict of claims or rights; an assertion of a right, claim or demand on one side,

met by contrary claims or allegations on the other. In this regard, reliance is placed on the following Judgments:-

- (i) *Prabhakar vs. Joint Director, Sericulture Department*; (2015) 15 SCC 1 (paras 34-36)
- (ii) *Canara Bank vs. NTPC*, (2001) 1 SCC 43 (para 12)
- (iii) *Gujarat State Cooperative Land Development Bank vs. P.R. Mankad*, (1979) 3 SCC 123 (para 22);

4.15 Consequently, the State Commission failed to appreciate that the question of must run – i.e. enforcement of a binding right under the statutory framework, can be resolved through exercise of regulatory functions and does not require adjudication under Section 86(1)(f).

4.16 It is submitted that the State Commission ought to treat the issue of “Must Run” status under regulatory power, instead of treating it as a dispute. In fact, that is what the State Commission has done in the case of NSEFI, wherein not only the petition for enforcement of “Must Run” status of solar power plants was registered as a Miscellaneous Petition, the same was decided by the State Commission under its regulatory powers and relief was granted to all solar power developers in the state of Tamil Nadu. Such differential and discriminatory treatment of the Appellants’ petitions *vis-à-vis* NSEFI’s case shows non-application of mind by the State Commission.

4.17 In addition to the above, it is submitted that merely because the matter, *inter alia*, involves a monetary claim, it does not automatically convert the matter into dispute under Section 86(1)(f)

of the Electricity Act. This is an incorrect approach adopted by the State Commission in classifying a Petition. In this regard, it is submitted that:-

- (a) The State Commission while performing its regulatory functions, *inter alia*, for fixation of tariff, is also required to settle monetary claims involved therein.
- (b) It has been wrongly observed by the State Commission that since the matter involves a monetary claim, the Respondents are required to be heard and therefore the matter ought to be registered as a D.R.P. It is a settled position that even in exercise of regulatory powers the State Commission is required to observe principles of natural justice. (eg. In tariff determination, the State Commission is required to afford an opportunity of hearing to the consumers who may like to raise objections)
- (c) Prayer for compensation has been sought only as a consequential relief on account of enforcement of the “Must Run” status of the Appellant’s plant.

4.18 The State Commission was required to decide the nature of the Petition by appreciating the nature of prayers sought in the Petition and then accordingly, the fees would have been paid as per the Fees and Fines Regulations. Instead, the State Commission erred in attempting to determine the form of the Petition on the basis of the provisions of the Fees and Fines Regulations. It is submitted that the State Commission has not considered that while dealing with fresh matters, only the nature of petition and the relief sought are relevant for the purposes of registration and categorisation as

D.R.P. or M.P. The fees to be paid for filing the petition as per Fees and Fines Regulations, neither confer title on the Petition nor does it decide whether the Petition will be a D.R.P. or a Miscellaneous Petition.

4.19 It is submitted that the denial of “Must Run” status to the Appellant is in derogation of principles enshrined in the Electricity Act and policy framework that mandate promotion of renewable energy. In this regards, the following provisions under the existing Statute and policy framework pertaining to promotion of renewable energy are noteworthy:-

- (a) **Electricity Act:** As per Section 86 (1) (e), State Electricity Regulatory Commissions are mandated to promote generation of electricity from renewable sources of energy in their respective States. [Also refer to the preamble of the Electricity Act; Section 3(1) and (4); Section 61(c),(h) and (i), Section 166(5)(c)]
- (b) **National Electricity Policy, 2005:** Clause 5.2.20 and 5.12.1 provides that renewable energy generation of electricity should be encouraged and its potential fully exploited;
- (c) **Tariff Policy, 2016:** As per clause 4, it is the stated objective of the Tariff Policy to promote generation of electricity from renewable sources.
- (d) **Tariff Order No. 7 of 2014 dated 12.09.2014:** As observed in Para 12.5.4, SLDC is required to schedule renewable power in accordance with Grid Code;
- (e) **Jawaharlal Nehru National Solar Mission:** The Solar Policy/Mission’s immediate aim is to focus on setting up an

enabling environment for solar technology penetration in the country both at a centralized and decentralized level.

4.20 The Appellant is simply seeking enforcement of the same by the State Commission, in the context of admitted facts. Further, the State Commission in its Order dated 25.03.2019 passed in Petition M.P. No. 16/2016 has already decided the matter of “Must Run” status of solar power plants. In view thereof, present Appeals may also be similarly decided, and this Tribunal may grant appropriate relief to the Appellant in view of the following:-

- (a) Section 121 of the Electricity Act: which provides that this Tribunal may issue orders, instructions or directions as it may deem fit to any appropriate commission for the performance of its statutory functions.
- (b) The legal maxim ‘*actus curiae neminem gravabit*’, which means that nobody should suffer owing to the mistake of the court. In this reliance is placed on ***Haryana State Electricity Board & Anr. vs. Gulshan Lal & Ors.***(2009)12 SCC 231
- (c) The principle of *ex debito justitiae* which is founded on a recognition of a debt that the justice delivery system owes to a litigant to correct an error in a judicial dispensation. In this reliance is placed on ***Ashiq Hussain Faktoo vs. Union of India & Ors.*** (2016) 9 SCC 739 (para 10).

4.21 The Appellant prays that liberty may be granted to individual solar power developers to challenge any other findings of the State Commission in the Order dated 25.03.2019 passed in Petition M.P. No. 16/2016.

5. Submissions of the Respondent No.1/the State Commission

5.1 Short question raised in this Appeal as well as in the Linked Appeals No. 351 and 352 of 2017 is the sustainability of Common Order dated 30.6.2017 of the Chairperson of the Respondent Commission in PRC No. 1, 2 and 3 of 2017. Operative portion of the impugned order reads as under:

9. Under these circumstances, I hold that the Registry has rightly returned the above petitions with a direction to file the same as D.R.P. I therefore direct the Petitioners to file the petitions as D.R.P. with applicable fee.

With the above orders, the PRCs are disposed of.

5.2 The following reasons have been given in the impugned order in support of the decision:

- (a) A dispute between the parties has been raised in the Petition
- (b) The Commission cannot decide the monetary claim made by the Petitioner without hearing the other side.
- (c) Similar cause of action raised by generators in the past were registered as Dispute Resolution Petition. Para 9 of the impugned order states, *“the learned Counsel himself admitted during the hearing that he has filed with a similar prayer in respect of M/s. Green Infra Wind Farms Ltd. as D.R.P. for “MUST RUN” status of wind energy (vide D.R.P.No.28 of 2012).”*

- (d) The issue of “MUST RUN” Status requires formal adjudication and not exercise of regulatory jurisdiction.
- (e) Admitting the petition as Miscellaneous Petition and not as a Dispute Resolution Petition would lead to financial loss to the public exchequer.

5.3 The thrust of the Appellant’s submissions was: “Whether the Petition disposed off through the impugned order, came under the Regulatory or Adjudicatory jurisdiction of the Respondent Commission?”. In this connection, it is respectfully submitted that this aspect is not germane to the issue before this Tribunal. The question for adjudication before this Tribunal is the sustainability of the direction in the Impugned order “*to file the petitions as D.R.P. with applicable fee*”. The only issue that needs to be decided in the instant appeal is whether the petition filed by a generator against a licensee before the Commission which is necessarily a Dispute Resolution Petition as per the F & F Regulations can otherwise be classified as M.P. as sought for by the petitioner.

5.4 Perusal of the Petition filed by the Appellant before the State Commission reveals beyond the pale of doubt that there was a dispute between the parties and the Petition in question was filed for resolving the dispute. In this connection the Respondent Commission craves leave to the following:

- (a) Paras 6 to 13 of the Petition gives details of the dispute between the parties which has resulted in the filing of the Petition.
- (b) Details of the correspondence between the parties such as letters dated 25 May 2016, 08 June 2016, 21 June 2016, etc. mentioned in the above paras, clearly establish that there was an ongoing dispute between the parties.

- (c) The Petitioner has clearly stated in Para 14 of the Petition, *“Therefore, being aggrieved by the above acts of the Respondents, the Petitioner is filing this Petition before the Hon’ble Commission”*. Thus, the Petitioner brought before the Respondent Commission a dispute and sought resolution by the Respondent Commission.
- (d) Perusal of the grounds urged by the Petitioner, more specifically Grounds 6 to 9 reveals that there was a dispute between the parties.
- (e) It has mentioned in several places of the Petition that the Petitioner was being put to huge financial loss on account of unwarranted and unjustified backing down instructions. This requires establishing several facts over which the parties to the proceedings hold conflicting views.
- (f) As mentioned by the Petitioner in the cause title, the genesis of the proceedings is dispute among the parties which require adjudication under Section 86 (1) (f) of the Electricity Act. Irrespective of whether the Petition comes under Section 86 (1) (f) or any other provision of the Electricity Act, there can be no denial that there was dispute among the parties which has triggered the filing of the Petition before the Respondent Commission.

5.5 Besides, the Petition before the Respondent Commission challenged the backing down instructions issued under the State Grid Code. Thus, it involved dispute resolution under clause 11 (4) of the State Grid Code specified by the Respondent Commission in exercise of the Powers under Section 86 (1) (h) of the Electricity Act, 2003 as elaborated in paras 10 and 11 of its reply which are not being repeated for the sake of brevity.

5.6 In view of the fact that the Petitioner approached the Respondent Commission for resolving a dispute between the parties, the impugned direction to *“file the petitions as D.R.P. with applicable fee”* is liable to be upheld by this Tribunal.

5.7 The Appellant had referred to MP No. 16 of 2016 filed by *National Solar Energy Federation of India* (hereinafter *“NSEF”*) with identical prayers. The Appellant’s contention is that the Petition by NSEF has been registered as a MP and the Appellant was directed to file a DRP.

5.8 At the outset it is submitted that the above averment is not relevant to the present issue as the said petition was filed by the NSEF in the capacity of an Association which require filing of M.P. as per the Fees and Fines Regulations whereas the appellant cannot maintain a M.P. in its capacity as a generator under the Fees and Fines Regulations.

(a) The interests of the Appellants in Appeals No. 350, 351 and 352 of 2017, were taken care of in MP No. 16 of 2016. In this connection, the Respondent Commission respectfully craves leave of this Tribunal to para 9.2 of the final order dated 25.03.2019 in the above MP which inter alia provides as under:

9.2. It is pertinent to state that the Adani Green Energy (Tamil Nadu) Limited (“AGETNL”), a member of the Petitioner Association and four of its 100% owned subsidiaries i.e. RSPL, KREL, KSPL and RREL are

continuously facing backing down from the date of commissioning of the plant”

(b) Further the Respondent Commission in para 9 of its reply had stated, *“there is absolutely no bar on the part of the appellants in joining the petition filed by the National Solar Federation in M.P.No.16 as an intervenor or as a second petitioner by way of impleadment.”*

(c) Besides, as stated in para 4 of the impugned order, *“ and on previous occasions the Commission has classified the petitions filed by the generators for “MUST RUN” status as Dispute Resolution Petition only. “. This repudiates the allegation of hostile discrimination besides establishing that the impugned decision is sustainable on the doctrine of stare decisis.*

5.9 It may be seen from *“Tamil Nadu Electricity Regulatory Commission – Fees and Fines Regulations, 2004”* (as amended) that there are several instances wherein Associations are dealt with differently from other entities. There is an unambiguous provision relating to *“adjudication of disputes between licensees and generating Companies under section 86(1) (f) of the Act”*. By the Appellant’s own admission, the Petition filed before the Respondent Commission was for resolving a dispute under Section 86 (1) (f) of the Electricity Act. The Petitioner is estopped from claiming that it was not a Dispute Resolution Petition.

5.10 Respondent Commission also respectfully submits that the question whether the issue raised in the Petition fell under Regulatory or Adjudicatory jurisdiction of the Respondent

Commission had a significance at a period when the Commission was discharging only its Regulatory functions and was refraining from handling Adjudicatory issues. This restriction was removed through the Hon'ble Supreme Court's clarification vide its order dated 10-09-2018 in MA No. 2217 of 2018 in T.C.(C) No. 137 of 2015 which reads as under:

“Application(s) for impleadment/intervention is/are dismissed.

We are of the view that there is no ambiguity in the Judgment and till such time a reconstitution of the Tribunal does not take place arising from a retirement of a Member from the legal field, the existing Tribunal will decide all the cases.

The application/s for clarification/direction is/are disposed of.

In view of the above, the misc. petition is disposed of.”

5.11 It is notable that the Respondent Commission's order dated 25.03.2019 was passed after the above clarification by the Hon'ble Supreme Court and before the directions dated 03.04.2019 of the Madurai Bench of the Hon'ble Madras High Court which is under Appeal.

5.12 After the admission of MP No. 16 of 2016 by the *National Solar Energy Federation of India*, in which the Appellant was also a member, the Appellant had moved separate Petitions with the identical prayers as in MP No. 16 of 2016. Consequent to the rejection of the same, initially by the Registry and subsequently by the Chairman, two rounds of litigations have taken place before this Tribunal. In the meantime, while the Appeal was pending before this Tribunal, a batch of Writ Petitions were also filed before

the Hon'ble Madras High Court in September 2017 and were withdrawn in November 2018 on the issue of MUST RUN status of Solar power plants.

- 5.13 The issue before this Tribunal in the instant case is not with regard to the extension of the orders passed in M.P.No.16 of 2016 to the case of the appellants, but whether a generator can be permitted to maintain a Miscellaneous Petition before the Commission instead of D.R.P and thereby avoiding payment of significant amount of court fees.
6. We have heard the learned counsel for the Appellant and the learned counsel for the Respondent No.1, the learned counsel for the Respondent Nos. 2 to 4 and the learned counsel for the Respondent No.5 at considerable length of time.
7. In this Appeal the case of the Appellant is that the State Commission in their Impugned Order dated 30.06.2017 have upheld the noting done by Secretary of the State Commission and have classified the Petition filed by the Appellant as Dispute Redressal Petition filed by the Appellant and not as Miscellaneous Petition and have asked the Appellant to deposit fee as per the prevailing Regulations for DRP.
8. On the basis of the submissions made by the Appellant, the counsel representing the Appellant, and the counsel representing the Respondents and the Impugned Order passed by the State Commission, the following points emerged for our consideration.

- i) “Whether the prayer made by the Appellant in their petition filed before the State Commission calls for the exercise of the regulatory powers of the State Commission or the adjudication by the State Commission?”
- ii) “Whether the State Commission in their Impugned Order have taken into consideration the above point and have given a detailed analysis before arriving at the final decision ratifying the orders passed by the Secretary of the State Commission?”

Issue No. i) “Whether the prayer made by the Appellant in their petition filed before the State Commission calls for the exercise of the regulatory powers of the State Commission or the adjudication by the State Commission?”

- i) The Appellant had set up the solar power plant under the Solar Policy notified by the Government of Tamil Nadu for promotion of solar generation in the State. The Appellant and the Distribution Company of the State signed Energy Purchase Agreement for procurement of electricity generated from the solar plant of the Appellant.
- ii) As per Clause 2(d) of this Energy Purchase Agreement, the parties must adhere to and comply with the provisions of the Indian Electricity Grid Code and Tamil Nadu Electricity Grid Code and other applicable Regulations covering the renewable energy sources.

- iii) As per Clause 5.2 (u) CERC (Indian Electricity Grid Code) Regulations, 2010 - all SLDC/Regional Load Despatch Centres are obliged to evacuate available solar power treating the same as Must Run status.
- iv) As per Clause 8 (3) (b) of Tamil Nadu Electricity Grid Code ("TNEGC") - SLDC is required to regulate overall State generation in a manner that generation from several types of power stations, including renewable energy sources shall not be curtailed.
- v) The Appellant approached the State Commission as it was facing severe hardship due to regular backing down instructions being issued by the State Load Despatch Centre despite the Must Run status accorded to solar power plant.
- vi) From the plain reading of the prayer made by the Appellant in their petition filed before the State Commission, it is clear that the Appellant approached the State Commission regarding the non-adherence of the provisions of IEGC and TNEGC regarding the Must Run status of the solar power plant by SLDC. The Appellant requested the State Commission to direct SLDC to stop issuing backing down instructions and strictly enforce Must Run status of solar power plants.
- vii) Basically, the Appellant approached the State Commission for ensuring effective implementation of the Regulations regarding the Must Run status of the solar power plant. The Energy Purchase Agreement clearly provides for adherence of the relevant

provisions of IEGC and TNEGC regarding the Must Run status of the power plants.

- viii) This matter is in-principle related to procurement of electricity from the solar plants of the Appellant. This is a regulatory aspect and not an adjudicatory function. However, the Secretary of the State Commission have not considered this aspect before arriving at a decision that the Petition in question is a DRP and not miscellaneous. The State Commission also in their Impugned Order has not considered the nature of the prayer and has not discussed this issue in their Impugned Order. As such it is serious lapse on the part of the State Commission and the Impugned Order passed by the State Commission needs to be set aside.

Issue No. ii) “Whether the State Commission in their Impugned Order have taken into consideration the above point and have given a detailed analysis before arriving at the final decision ratifying the orders passed by the Secretary of the State Commission?”.

- ix) The submissions made by the learned counsel representing the State Commission that the Petition has been filed under Section 86(1)(f) and therefore is a DRP. He quoted the relevant portion of the Regulation 6 of the fees and fine Regulations of the Commission which is reproduced below:-
- x) The relevant portion of the Regulation 6 of the Fees & Fines Regulations of the Commission is reproduced below:-

“

7	<i>Miscellaneous petitions filed by associations or groups not covered by other listed categories</i>	
	<i>(a) Miscellaneous petitions filed by registered association of consumers or generators</i>	<i>Rs.2,00,000 /-</i>
	<i>(b) Miscellaneous Petitions filed by other registered associations.</i>	<i>Rs.10,000/-</i>
7A	<i>For adjudication of disputes between licensees and generating companies under section 86(1)(f) of the Act.</i>	<i>1% of the amount in Dispute subject to a minimum of Rs.20000/-.</i>

“

- xi) From the above it is clear that the Fees and Fine Regulations only define the fees to be charged from a particular petitioner for a particular type of Petition under Section (a) above. What it means is that for adjudication of dispute between licensees and generating companies which have come under Section 86(1)(f) of the Electricity Act, 2003 should pay 1% of the amount in dispute subject to a minimum of Rs.20000/-. It does not talk about the classification of Petitions and should not be used as a guiding criteria for classifying a Petition into DRP and miscellaneous. One may ask what is the criteria for classifying a Petition as DRP or miscellaneous and the answer is nature of the prayer. It is the nature of the prayer which will define the nature of the Petition. If the nature of the prayer calls for the exercise of the regulatory powers of the State Commission than it is regulatory and it will be termed as a miscellaneous Petition whereas if the nature of the Petition is such that it is not regulatory but adjudicatory than only it can be termed as a DRP. It is also relevant to point out here that the mere fact that the Appellant has filed the Petition under Section

86 (1) (f) and therefore it should be termed as a DRP is wrong and erroneous and need not to be relied upon. In all such cases one must be guided by the nature of prayer alone. All these things have neither been discussed nor been mentioned nor been analysed in the Impugned Order.

ORDER

Having regard to the facts and circumstances of the case as stated above, Appeal filed by the Appellant is allowed.

The Impugned Order dated 30.06.2017 passed by the first Respondent/the State Commission in the Pre-Registration Case No.2. is hereby set aside.

The matter stands remitted back to the first Respondent/the State Commission with the direction to pass the order in the light of the observations made in the preceding paragraphs above in accordance with law as expeditiously as possible within a period of three months after receiving the copy of this judgement.

The Appellant and the Respondents are hereby directed to appear before the 1st Respondent/the State Commission personally or through their counsel on 01.07.2019 without further notice.

No order as to costs.

Pronounced in the Open Court on this **30th day of May, 2019.**

(Ravindra Kumar Verma)
Technical Member

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REPORTABLE/NON-REPORTABLE

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(Justice Manjula Chellur)
Chairperson