

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

APPEAL NO. 351 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. Kamuthi Renewable Energy 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. In the instant Appeal, the Appellant, M/s. Kamuthi Renewable Energy Ltd., is questioning the legality, validity and propriety of the order dated 30.06.2017 passed by Tamil Nadu Electricity Regulatory Commission, (1st Respondent herein) in P.R.C. No. 1 of 2017 whereby the State Commission has held that the Petition filed by the Appellant, *inter alia*, seeking "Must-Run Status" of its Solar Power Plant can only be filed as a Dispute Resolution Petition ("**D.R.P.**") and not as a Miscellaneous Petition ("**M.P.**").
4. We have heard the learned counsel, Mr. Amit Kapur, appearing for the Appellant, the learned counsel, Mr. Sethu Ramalingam, appearing for the State Commission and the learned counsel, Mr. S. Vallinayagam, appearing for the Respondent No. 4 and Mr. Dilip Kumar, appearing for the Respondent No. 5.

5. The present Appeal arises from the Order dated 30.06.2017 passed by the Tamil Nadu Electricity Regulatory Commission. Since the facts and circumstances of the present appeal are common in nature to the facts and circumstances raised in the Appeal 350 of 2017 in case of M/s. Ramnad Solar Power Ltd. Vs. Tamil Nadu Electricity Regulatory Commission, the judgment dated 30.05.2019 passed by this Tribunal in Appeal 350 of 2017 squarely covers the facts and circumstances in issue in the instant appeal and therefore is applicable to the present dispute.

The relevant findings of judgment dated 30.05.2019 passed by this Tribunal in Appeal 350 of 2017 are as follows:-

“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.1 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