IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO.328 OF 2021

Dated: 01.07.2022

Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

TAQA NEYVELI POWER COMPANY PRIVATE LIMITED
(formerly known as ST-CMC Electric Company Private Limited)
[Through its Authorized Representative]
Uthangal, Umangalam,
VridhachalamTaluk,
Cuddalore District – 607 804 …. Appellant(s)

VERSUS

1. **TAMIL NADU ELECTRICITY REGULATORY COMMISSION**
   [Through its Secretary]
   4th Floor, SIDCO Corporate Office Building.
   Thiru Vi Ka Industrial Estate, Guindy,
   Chennai-600 032
   E-mail ID: tnerc@nic.in

2. **TAMIL NADU GENERATION AND DISTRIBUTION CORPORATION LIMITED**
   [Through its Chairman cum Managing Director]
   6th Floor, Eastern Wing, 144, Anna Salai,
   Chennai- 600002
   E-mail ID: chairman@tnebnet.org ....Respondent(s)

Counsel for the Appellant(s) : Mr. M.G. Ramachandran, Sr. Adv.
Ms. Divya Chaturvedi
Ms. Srishti Rai

Counsel for the Respondent (s): Mr. Basava Prabhu S Patil, Sr. Adv.
Ms. Anusha Nagarajan
Ms. Aakanksha Bhola
Mr. Geet Ahuja for R-2

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. The *Neyveli Lignite Corporation* (hereinafter referred to as, "NLC") the predecessor-in-interest of the appellant herein (formerly known as *ST-CMS Electric Company Private Limited*) had set up a 250 MW lignite-based thermal power project in 1992 and had entered into *Power Purchase Agreement* ("PPA") on 04.11.1993 with *Tamil Nadu Electricity Board* ("TNEB"), the predecessor of second respondent *Tamil Nadu Generation and Distribution Corporation Limited* ("TANGEDCO"), the said PPA having been amended and restated on 20.11.1996 followed by certain modifications through addendums dated 09.10.1997, 27.01.1998, 22.01.1999 and 25.08.1999. Prior to the said events, in the run-up for setting up of the said power project, NLC had approached the *Ministry of Environment, Forest and Climate Change* ("MOEF&CC") of the Government of India for environmental clearance which concededly was granted by Office Memorandum dated 23.12.1988 under the then prevalent Environment (Protection) Rules, 1986, framed under Environment (Protection) Act, 1986. The said Rules were amended by Notification dated 07.12.2015 through Environment (Protection) Amendment Rules 2015 in terms of which there is a mandate to all thermal power projects, existing as well as new, to comply with the norms under the said regulatory framework,

inter alia, by installing a *Fuel Gas Desulfurization* (“FGD”) plant by 31.12.2024. The petition (M.P.No. 17 of 2021) of the appellant, *inter alia,* seeking in-principle approval for consequent project cost to the tune of Rs.289 crores plus taxes along with ancillary/associated costs to the tune of Rs.120.22 crores has been rejected by the first respondent *Tamil Nadu Electricity Regulatory Commission* (hereinafter referred to as, “TNERC” or “State Commission”) by Order dated 05.10.2021 which is assailed by the appeal at hand.

2. That if the Notification dated 07.12.2015 constitutes a*Change in Law* (“CIL”) event entailing additional expenditure, it would result in a legitimate expectation for the appellant to be duly compensated in terms of existing provision contained in Article 14 of the PPA is not in dispute. Both parties *i.e.* the appellant (generator) and respondent TANGEDCO (procurer)have placed reliance on decision of this Tribunal by judgment dated 28.08.2020 in the case of *Talwandi Sabo Power Limited v Punjab State Electricity Regulatory Commission &ors* (Appeal nos. 21 and 73 of 2019), in terms of which a generating company may approach the appropriate Commission for grant of a prior in-principle approval for incurring expenditure of such nature envisaged by Change in Law for “*regulatory certainty*” of recovery of costs, *inter alia,* securing funding from the lenders.

3. By the impugned decision, the State Commission has, *inter alia,* held that in terms of the original environmental clearance accorded on 23.12.1988 it was the obligation of the appellant to earmark sufficient funds for installation of FGD so as to discharge its obligation under the law to comply with the requirements of Environment Protection Act, there being no concept of in-principle approval under the PPA, the appellant having given up the prayer for declaration that the notification of 2015 constitutes a change in law event in terms of the PPA.In this context, the appellant relies on a communication dated 07.11.1990 issued by MOEF&CC clarifying that only space was required to be earmarked for FGD.

4. Contrarily, TANGEDCO relies on the original environmental clearance issued on 23.12.1988 followed by another communication of MOEF&CC dated 03.05.1994 to contend that there was a duty cast on the appellant to install FGD at the time of establishing the power project and consequently the amendment of the Environment Rules in 2015 cannot be claimed as a Change in Law event to press now for in-principle approval for such expenditure to be granted by the Commission.It is the submission of TANGEDCO that the arguments of the appellant are wrongly premised on a factually incorrect averment that there is an admission on the part of former (TANGEDCO) that

2015 notification constitutes change in law event for the parties and under the PPA at hand.

5. As has been pointed out by TANGEDCO, the appellant had approached TNERC (State Commission), not by a Dispute Resolution Petition (DRP) but, invoking the regulatory/administrative jurisdiction by miscellaneous petition with the following prayers:-

> *"(a) declare that the amendment of the Environment (Protection) Amendment Rules, 2015 by way of the Notification dated 07.12.2015 is a 'Change in Law' event in accordance with Article 14 of the PPA dated 20.11.1996 executed between the Petitioner/TAQA and the Respondent/TANGEDCO and that the Petitioner/TAQA is entitled to relief thereunder;*
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> *(b) approve in-principle the project cost to the tune of Rs. 289 Crore plus taxes i.e., capital expenditure based on the cost discovered pursuant to the competitive bidding procedure undertaken by the Petitioner/TAQA with further estimations regarding the ancillary/associated costs to the tune of Rs. 120.22 Crore i.e., a total of Rs. 409.22 Crore, as set out in para 42 above;*
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> *(c) allow the Petitioner/TAQA to approach this Hon'ble Commission after incurring the actual costs (i.e. capital expenditure and operation and maintenance expenditure) pursuant to installation and commissioning of the FGD system in terms of Article 14 of the PPA read with Regulation 19 of the Tariff Regulations;*
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> *(d) allow the reimbursement of the legal and administrative costs incurred by the Petitioner/TAQA in pursuing the instant Petition; and*
>
> *(e) grant such order, further relief/s in the facts and circumstances of the case as this Hon'ble Commission may deem just and equitable in favour of the Petitioner/TAQA."*

6. The registry of the Commission appears to have taken exception to the above prayers being pressed by miscellaneous

petition and, by communication dated 17.07.2020, had returned the petition stating that it was not maintainable since the appellant instead should have invoked the adjudicatory jurisdiction filing the proper fee. The matter was taken by the appellant to Madras High Court by Writ Petition (WP 12584 of 2020) which was allowed by a learned Single Judge, the objections raised by the Commission having been set aside and a direction issued for the petition to be considered. The State Commission challenged the said order of the ld. Single Judge by intra-Court Appeal (Writ Appeal No. 80 of 2021) which was disposed of by a Division Bench of the High Court by Order dated 11.03.2021, taking note of the submission of the appellant, that it would not pursue the prayer for declaratory relief and instead seek only in-principle approval, it having been advised to initiate separate proceedings to claim capital cost from TANGEDCO. The relevant part of the Order of the Division Bench dated 11.03.2021 reads thus:-

> *"8. On the other hand, Mr. Satish Parasaran, learned Senior Counsel for the first respondent, submits that the petition before the TNERC was filed only for obtaining the in-principle approval of the TNERC for incurring capital expenditure for purposes of procuring and installing the equipment in terms of the notification dated December 7, 2015. He also points out that both the Chief Engineer of the Ministry of Power, Government of India and the counter-party to the Power Purchase Agreement, namely, TANGEDCO, had called upon the first respondent to file an application before the TNERC for in-principal approval for incurring such capital cost.*
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> *9. With regard to the pending writ petitions before this Court, he submits that the first respondent had stated on affidavit that it did not intend to pursue the petitions, inasmuch as it was not contesting the jurisdiction*

of the TNERC. Even with regard to the declaratory relief prayed for before the TNERC, he states that the first respondent intends to institute separate proceedings to make a claim against TANGEDCO in respect of the capital cost and, therefore, such declaratory relief is not being pursued as evidenced by the explanation tendered to the registry of the TNERC in response to the return.

…

11. Ordinarily, in the light of the existence of an efficacious alternative remedy, we would have declined to exercise discretionary jurisdiction and would have left it open to the parties to avail of such alternative remedy. However, it follows from the submissions made on behalf of the first respondent that prayer (a) in the petition before the TNERC would not be pursued by the first respondent herein and the first respondent would be content with seeking in-principle approval and permission from the TNERC to institute separate proceedings to claim the capital cost from TANGEDCO. Once prayer (a) is given up, prayer (b) is clearly nonadversarial in nature and relates to the performance of regulatory functions by the TNERC while prayer (c) pertains to permission to institute separate adversarial proceedings against TANGEDCO separately to claim the capital cost.

12. Therefore, except to the extent of requiring the first respondent herein to give up prayer (a) in the petition before the TNERC, the order impugned of the Writ Court does not call for interference. Accordingly, subject to the first respondent re- presenting the petition before the TNERC after deleting prayer (a), the TNERC is directed to accept such petition as a miscellaneous petition and pass appropriate orders thereon within a period of two weeks from the date of receipt of a copy of this order."

7. Thus, the miscellaneous petition was pressed by the appellant before TNERC after withdrawing prayer Clause (a) for declaration that the amendment dated 07.12.2015 constituted Change in Law event under Article 14 for which appellant was entitled to relief under the PPA.

8. The prime argument of the appellant before us is that the rejection of the petition by the State Commission is erroneous since it

had been conceded before the learned Single Judge of the High Court that there was no dispute between the parties regarding 2015 notification being a change in law event, this rendering the declaratory relief redundant there being no dispute between the parties on such score requiring adjudication. The appellant refers to letter dated 07.11.1990 addressed to NLC by the Department of Environment clarifying that only requirement at that stage was to provide the space for installation of FGD. It is argued that the need for grant of in-principle approval for regulatory certainty having been ruled upon by this Tribunal in the judgment in the case of *Tawandi Sabo* (supra), it was inappropriate for the State Commission to hold to the contrary.

9. The respondent TANGEDCO, however, seeks to point out that by the environmental clearance issued on 23.12.1988 by MOEF&CC, there was an obligation on the project proponent to provide the FGD plant with 95% efficiency and make it functional before the unit was commissioned. It is submitted that NLC had sought clarification by its letter dated 09.07.1990 from MOEF regarding the provision for FGD and in answer thereto the Department had simply stated that space for installation of FGD plant may be provided for so that "*it could be installed if the situation so demands*". This, it is argued, cannot be construed as waiver of the conditions as to FGD in the environmental clearance dated 23.12.1988, particularly because, by a subsequent

communication dated 12.05.1994, while transferring the environmental clearance in favor of the predecessor of the appellant, the MOEF had reiterated the need for compliance with conditions of environment clearance dated 23.12.1988.

10. In view of the approach that we make towards the prime issue at hand, we would rather not express any opinion in the present proceeding on the question as to whether there was an obligation on the part of the project developer to provide for FGD coinciding with the commissioning of the unit or as to whether such requirement has arisen only later on account of mandate by 2015 Rules under environment protection law rendering it a change in law event. In our view, the said questionsought not be addressed by us at this stage for the simple reason in the miscellaneous petition brought for decision of the respondent State Commission, the prayer for declaration of the 2015 notification as change in law event had been given up on the wrong premise that there was no dispute in such regard.

11. We agree with the learned counsel for TANGEDCO that in the chronology of events that occurred after filing of the miscellaneous petition, there was no occasion for TANGEDCO to join issue on the subject, the petition having been rejected, the prayer for declaration having been given up, the contest having been restricted, by the time

TANGEDCO came into the fray, to the prayer for grant of in-principleapproval only on expenditure. The contention raised to the contrary by the appellant on the basis of TANGEDCO's letters dated 19.08.2017 and 24.01.2019 to plead that there is no dispute is misplaced sincethe said communications of TANGEDCO do not carry any such admission. For the same reasons, we would also refrain from expressing any opinion in the present proceedings on the contention of TANGEDCO that the estimated cost of FGD, as indicated in the miscellaneous petition by the appellant, is inflated. Scrutiny of such aspect, whether for grant of in-principle approval or at the stage of prudence check, will have to be undertaken first at the level of the Regulatory Commission which exercise has not been done.

12. The respondent TANGEDCO refers, and rightly so, to the following observations of this Tribunal in the case of *Talwandi Sabo (Supra)*:

> *"97. It is also seen that the environmental clearance granted by MoEF& CC for thermal power projects prior to revised norms of 2015 with reference to installation of FGD system broadly categorized into two types. One category covers the projects which were given environmental clearances similar to that of the Appellants envisaging a condition that a space provision is to be kept for the installation of the FGD equipment if required at a later stage in terms of environmental Regulations. The other category of environmental clearance is where MoEF& CC specifically mandated installation of FGD equipment as a statutory requirement.*

98. Apart from the Appellants, between 2007 and 2008 two other power projects i.e., Corporate Ispat Alloys Limited in Jharkhand and Rayalseema Thermal Project were also required to keep only space provision for retrofitting of FGD unit if required at a later stage or at a later date. Pertaining to second category, installation of FGD was a statutory mandate, if such thermal power projects or any associated assets thereof fell under environmentally sensitive areas…

99. Therefore, in all those thermal power projects where there was requirement of only space provision, it is difficult to accept the contention of the Respondents that in spite of absence of specification and design for FGD, the Appellants were still required to estimate the cost and earmark funds anticipating revised norms after six years or so from the cut-off date. To substantiate their contention, Respondent No.2 submits that some thermal plants did install the FGD system, therefore FGD system was available in the market. It is nobody's case that FGD was not available in the market. Depending upon the requirement in terms of conditions of EC recommended by relevant authority some thermal plants like JSW, Adani etc., might have installed FGD system. But one has to see what were the existing norms, conditions imposed in EC or other allied documents before notification in question and not the availability of FGD system in the market. As already stated, anticipating such change, substantial cost cannot be included as capital cost of the project at the time of bidding itself. If such requirement of FGD did not occur during the entire term of the Project, the consumer would be burdened with higher tariff. As a matter of fact, such substantial and significant cost as part of capital cost of the project would not have been approved at all."

13. It is the contention of TANGEDCO that the case of the appellant falls in the category where there was a requirement for installation of FGD as a condition imposed by the environmental clearance issued on 23.12.1988 and, consequently,it cannot be allowed to be claimed that installation of FGD has become mandatory only after 2015 Amendment. This clearly presents a scenario where the parties have not been not *ad idem* on the crucial issue of the 2015 Amendment having the character of CIL event. In these

circumstances, it was wholly inappropriate for the appellant to insist on the consideration of its miscellaneous petition for grant of in-principle approval. The Commission could not have gone for consideration as to whether a case of in-principle approval was made out or not unless and until the dispute over the issue concerning change in law event had been resolved. Since the appellant did not approach the State Commission for resolution of such dispute by appropriate petition invoking its jurisdiction under Section 86(1)(f) of the Electricity Act, 2003, the rejection of the case as done by the impugned judgment cannot be faulted.

14. For the foregoing reasons, we do not find any substance in the appeal. It is dismissed.

PRONOUNCED IN THE OPEN COURT ON THIS 01ST DAY OF JULY 2022.

(Sandesh Kumar Sharma)	**(Justice R.K. Gauba)**
Technical Member	**Officiating Chairperson**

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