

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 10/RP/2016

Subject : Review of the order dated 9.2.2016 passed by the Commission in Petition No. 381/MP/2014 determining the generic tariff applicable for the 5 MW Solar PV Project of NTPC Limited at Garacharama in South Andaman District, Andaman and Nicobar Islands.

Date of hearing : 26.4.2016

Coram : Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Petitioner : NTPC Limited

Respondent : Electricity Department, Andaman and Nicobar Administration Limited

Parties present : Shri M.G. Ramachandran, Advocate, NTPC Ltd.
Ms. Poorva Saigal, Advocate, NTPC Ltd.
Shri Nishant Gupta, NTPC Ltd
Shri V.K. Garg, NTPC Ltd.
Ms. Ruchi Sindkumari, Advocate for respondent
Ms. Megha Bharara, Advocate for respondent
Shri Mahesh, A&N Administration

Record of Proceedings

Learned counsel for the petitioner submitted that the review petition has been filled on following grounds:

- (a) The delay in the commissioning of the project was due to the late delivery of land by the Electricity Department, A &N Administration and was not attributable to NTPC. In terms of Clause 2 of the land lease agreement signed on 14.7.2011, the Electricity Department, A&N administration was to deliver vacant

possession of the Land free from all encumbrances to NTPC within 1 month from the date of signing of the Agreement i.e. by 13.8.2011 whereas the Electricity Department, A&N administration could only allow NTPC to go ahead with the project construction work on the land during September 2012 i.e after a delay of more than a year.

(b) While taking cognizance of the said delay, the Commission in the impugned order held that the RE Regulations do not provide any relaxation or benefit to the petitioner due to such delay, even if the same is not attributable to the petitioner. The decision of the Commission is contrary to the settled principle of law that no one can take advantage of its own wrong.

(c) As per the Regulation 8 (2) of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination for Renewable Energy Sources) Regulations, 2012 (RE Regulations), the RE developers are allowed to charge the generic tariff of a particular year of the control period for the projects/units commissioned during the following tariff year in case of solar PV projects and for the next two years for the solar thermal projects. In this case PPA was signed on 14.7.2011 and the entire capacity was commissioned on 15.4.2013 i.e. during financial year 2013-14 and therefore the tariff applicable shall be @ Rs 9.35/kWh tariff for the financial year i.e. FY 2012-13.

(d) The reason and objective of the Regulation 8 (2) of the RE Regulations is clear that the project/ unit commissioning takes time and the equipments are ordered, purchased and expenditure is committed in the previous year. Accordingly, the tariff to service the capital cost should relate the capital expenditure already committed in the earlier years.

(e) The Commission should have exercised its 'Power to relax' under the RE Regulation, and should have considered the facts and circumstances of the present case, namely the delay in handing over the land, torrential rainfall, inaccessible terrain etc. as detailed in Petition No. 381 of 2014.

2. Learned counsel for the respondent, Electricity Department, Andaman and Nicobar Administration submitted as under:

(a) The scope of review is very limited and cannot be used to reargue the matter. In para 9 of the petition, the petitioner has submitted that “non-

consideration of the full scope and extent of the proviso to Regulation 8 of the RE Regulations constitutes an error apparent on the face of record or otherwise sufficient reason for review the order dated 9.2.2016". The Supreme Court in various judgments has explained that the error apparent is one in which there is point of law and there is no two views on the same. If Regulation 8 of the RE Regulations, gives two views but the Commission has already taken one view, then review will not lie in such case.

(b) There is no error apparent on the face of the record and the ground for review is not covered under the purview of Order 47 Rule 1 of the Code of Civil Procedure.

(c) The present review petition is merely an attempt to re-agitate the questions already raised and dealt in Order dated 9.2.2016. This is a settled principle of law that a matter cannot be reopened on merit in the garb of review. In this connection, learned counsel relied upon the following judgments: Jain Studios Limited V Shin Satellite Public Co. Limited [(2006) 5 Supreme Court Cases 501], State of West Bengal and others V Kamal Sengupta and another [(2008) 8 Supreme Court cases 612], Parsion Devi and Others vs. Sumitri Devi and Others [1997 (8) SCC 715], Haridas Das vs. Usha Rani Banik and others [2006 (4) SCC 78].

(d) On the 'land' issue, it was submitted that the issue was agitated before the Commission and has been dealt with in the order dated 9.2.2016 under para 14 and was found to be not relevant. The respondent had handed over the site to the petitioner in time and while taking over possession of the same, the petitioner had never raised any objection nor prayed for extension of time for commissioning of the project.

(e) As regard the relaxation of the RE Tariff Regulations, the power to relax can be exercised to avoid grave injustice. The petitioner has not made out the case for exercise of power of relaxation in this case.

3. Learned counsel for the review petitioner in its rejoinder submitted as under:

(a) Whenever the court disposes of the case without advertent to or applying its mind to provision of law which gives jurisdiction to act in a particular manner, it amounts to error apparent on face of record and is sufficient to bring the case within the purview of Order 47 Rule 1 of CPC.

(b) Proviso to Regulation 8 speaks about “On or before last day of the year”, and not during the previous year. Second part of the proviso refers to generic tariff of the year and not to the PPA signed. The generic tariff applicability therefore will be of the previous year.

(c) In para 14 of the order, the Commission has observed that “ RE Tariff Regulations do not provide any relaxation or benefit to the petitioner due to such delay, namely handing over of land and delay due to heavy rain even if same are not attributable to the petitioner. Therefore, no relief is granted to the petitioner in this regard”. The review petitioner has demonstrated that the Commission has power to relax under RE Tariff Regulations. The Commission should have exercised its power to relax in this case and grant the tariff for the year 2012-13 to the petitioner.

4. After hearing the learned counsels for the review petitioner and the respondent, the Commission reserved the order in the review petition.

By order of the Commission
Sd/-
(T. Rout)
Chief (Law)