

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No. 10/RP/2016
in
Petition No.381/MP/2014**

**Coram:
Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member**

Date of order: 25th July 2017

In the matter of

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

**And
In the matter of**

NTPC Limited
NTPC Bhawan, SCOPE Complex,
7, Institutional Area, Lodhi Road,
New Delhi- 110003.

....Petitioner

Vs

Electricity Department,
Andaman and Nicobar Administration
Vidyut Bhawan, Port Blair- 744101

....Respondent

Following were present:

Shri M.G. Ramachandran, Advocate, NTPC Ltd.
Ms. Poorva Saigal, Advocate, NTPC Ltd.
Shri Ranjitha Ramachandran, Advocate, NTPC Ltd.
Shri S.K. Mandal, NTPC Ltd.
Shri M.K. Malviya, NTPC Ltd.
Shri R. Chhabra, NTPC Ltd.
Ms. Ruchi Sindhwani, Advocate for the respondent
Ms. Megha Bharara, Advocate for the respondent
Shri Mahesh Lal, Junior Engineer, Electricity Deptt., A&N Administration

ORDER

The Petitioner, NTPC Ltd., had filed Petition No. 381/MP/2014 for adjudication of dispute with regard to applicability of generic tariff for 5 MW Solar PV project of NTPC Ltd. The Commission after considering the submissions of the parties, vide order dated 9.2.2016 in Petition No. 381/MP/2014 decided that the generic tariff of Rs. 8.75/ kWh (without accelerated depreciation) and Rs. 7.87/kWh (with accelerated depreciation) determined by the Commission for Solar PV for the year 2013-14 shall be applicable to the Petitioner.

2. The Petitioner has sought review the said order dated 9.2.2016 (hereinafter referred to as 'impugned order') on the following grounds:

(a) The impugned order suffers from non-consideration of the full scope and extent of the proviso to Regulation 8 of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination for Renewable Energy Sources) Regulations, 2012 (RE Regulations). Even on the basis that the project was commissioned in the FY 2013-14, the generic tariff for the FY 2012-13 being Rs.9.35/kWh, and not Rs. 7.87/kWh for the FY 2013-14 should be made applicable in terms of proviso to Regulation 8 of RE Regulations.

(b) Delay in commissioning of the project was on account of delay in the delivery of land by Electricity Department, A&N Administration. The Commission while taking cognizance of the said delay has held in the impugned order that the RE Regulations does not provide for any relaxation or benefit to the Petitioner on account of such delay, which observation is

contrary to the settled legal principles that no one can take advantage of its own wrong.

(c) The Commission should have considered the facts and circumstances of the case such as delay in handing over the land, torrential rainfall, inaccessible terrain, etc. and exercised its “power to relax”.

(d) In addition to the above, there are certain typographical errors as listed below:

Order Reference	Error	Correction prayed
Para 19, Line-8	Inspection report dated 1.3.13	Inspection report dated 1.4.13
Para 21 Table, Column -2	first year of the control period is from 2013-14	first year of the control period is from 2012-13
Para 5 (d)	The Commission vide order dated 25.10.2012 in Petition no.243/SM/2012	The Commission vide order dated 28.2.2013 in Petition no. 243/SM/2012

3. The respondent in its reply has submitted that the present review petition is merely an attempt to re-agitate the questions already raised and dealt with in the impugned order. There is no error apparent on the face of the record and the points raised by the Petitioner for review of the impugned order are not covered under the purview of order 47, Rule 1 of the Code of Civil Procedure. On specific grounds of review, the Respondent has submitted as under:

(a) Regulation 8 of the RE Regulations has to be read in its entirety for true interpretation and intent. The proviso to Regulation 8 provides that the same would apply provided that the PPA was signed on or before last day of the year for which generic tariff is determined and the entire capacity covered by the PPA is commissioned on or before 31st March of the next year in respect of Solar PV projects. The applicability of generic tariff determined in a particular year may be valid for the following year if the plant is fully commissioned before the next year. In the present case, the PPA was signed in 2011-12 which was two years before the financial year in which commissioning was done. As per the proviso to Regulation 8 (2) and admitted facts, the applicable tariff would be Rs.7.87/kWh.

(b) The Respondent had handed over the land in time to the Petitioner and while taking possession of the land, the Petitioner had never raised any objection nor prayed for extension of time for commissioning of the project. The issue of delay in handing over land has categorically been dealt with by the Commission in the impugned order and found to be not relevant. Under the principles of res-judicata, any relief claimed which is not expressly granted is deemed to have been refused.

(c) With regard to Para 19, line 8 and Para 5 (d), the same can be corrected as there is a typographical error but in Para 21, table column 2, there is no typographical error as the commercial date of operation was 15.4.2013 and as such 1st year of the control period is from 2013-14 as correctly mentioned in the table.

4. The Petitioner in its rejoinder has submitted that whenever the court disposes of the case without adverting to or applying its mind to the provisions 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 preview of Order 47 Rule 1 of CPC. As regards the applicability of Proviso to Regulation 8 of RE Regulations, the Petitioner has submitted that the said provision speaks about “on or before last day of the year”, and not during the previous year and the second part of the proviso refers to generic tariff of the year, and not to the PPA signed. Therefore, the generic tariff of the previous year would be applicable. As regards the exercise of “power to relax”, the Petitioner has submitted that Regulation 85 of the RE Regulations has a provision of Power to Relax and keeping in view the facts of the present case, such as delay in handing over the land, torrential rainfall, inaccessible terrain, etc., the Commission should have exercised its power to relax in this case.

5. During the hearing, learned counsel for the Petitioner submitted that there is no express prohibition in the RE Regulations that a Solar PV Project where the PPA has been entered into in a previous year and the project has been delayed beyond the subsequent year, shall not be subject to the generic tariff, as applicable to the year subsequent. Learned counsel submitted that the RE Regulations only state that the PPA must be signed before the previous year, and not the PPA must have necessarily been signed during the previous year and therefore, the PPA could have been signed any time prior to 31st March of the previous year. Learned counsel submitted that non-consideration of full scope of the proviso to Regulation 8 constitutes an error apparent on the face of the record or otherwise sufficient reason for review of the order dated 9.2.2016. Learned counsel submitted that the Commission, while taking cognizance of the delay on account of handing over the

land by A&N Administration in the impugned held that the RE Regulations do not provide for any relaxation or benefit to the Petitioner due to such delay, even if the same are not attributable to the Petitioner and therefore, no relief can be granted. Learned counsel submitted that the decision of the Commission in regard to the above is contrary to the settled legal principle that no one can take advantage of its own wrong. In support of its contention, learned counsel relied upon the judgments of Hon`ble Supreme Court in U.P. SEB v. Shiv Mohan Singh, {(2004) 8 SCC 402}, Union of India vs. Major General Madan Lal Yadav {1996 (4) SCC Pg. 127}, B. M. Malani vs. Commissioner of Income Tax and Anr. {2008 (10) SCC 617}, Kushweshwar Prasad Singh Vs. State of Bihar {(2007) 11 SCC 14}, Nirmala Anand v. Advent Corporation (P) Ltd {(2002) 5 SCC 481}, Ashok Kapil v. Sana Ullah {(1996) 6 SCC 342}, Eureka Forbes v. Allahabad Bank {(2010) 6 SCC 193}, Panchanan Dhara v. Monmatha Nath Maity (Dead) through LRs. {(2006) 5 SCC 340}, Samina Venkata Sureswara Sarma v. Meesala Kota Muvullayya {AIR 1996 AP 440}, Ramani Ammal vs Susilammal {AIR 1991 Mad. 163} and Corpus Juris Secundum on Contracts, Volume 17A and 423.

6. Learned counsel for A&N Administration submitted that there is no error in the impugned order as the Commission has passed the said order adverting to the relevant provisions of the RE Regulations, PPA between the parties and the facts and circumstances of the case. Learned counsel submitted that the Petitioner is re-agitating the issues on merit which is beyond the scope of review. Learned counsel further submitted that at the stage of review, the party seeking the review cannot argue the matter on merit which can only be subject matter of appeal. Learned counsel relied upon judgements of the Hon`ble Supreme Court in Jain Studios Ltd through its President Vs Shin Satellite Public Company Limited {(2006) 5 SCC 501}

and State of West Bengal and Others Vs Kamal Sengupta and Another {(2008) 8 SCC 612}.

Analysis and Decision:

7. The main ground for review is that the Commission in the impugned order has not considered the scope of proviso to Regulation 8 of RE Regulations in its full extent which constitutes an error apparent or sufficient reason for review of the impugned order. Regulation 8 of the RE Regulations is extracted as under:

“8. Petition and proceedings for determination of tariff

(1) The Commission shall determine the generic tariff on the basis of suo motu petition at least six months in advance at the beginning of each year of the Control period for renewable energy technologies for which norms have been specified under the Regulations.

(2) Notwithstanding anything contained in these regulations,

(a) the generic tariff determined for Solar PV projects based on the capital cost and other norms applicable for any year of the control period shall also apply for such projects during the next year; and

(b) the generic tariff determined for Solar thermal projects based on the capital cost and other norms for any year of the control period shall also apply for such projects during the next two years:

Provided that

(i) the Power Purchase Agreements in respect of the Solar PV projects and Solar thermal projects as mentioned in this clause are signed on **or before last day of the year for which generic tariff is determined** and

(ii) the entire capacity covered by the Power Purchase Agreements is commissioned on or before 31st March of the next year in respect of Solar PV projects and on or before 31st March of subsequent two years in respect of Solar thermal projects.”

8. The Commission after interpreting the above provision came to the conclusion in the impugned order that the generic tariff determined for the Solar PV project shall apply for any year of the control period and during the next year and will not be

applicable if a PPA was signed in a financial year which was two years or more before the financial year in which the commissioning of the Solar PV project took place.

9. The Petitioner has submitted that the Commission has not considered the full scope and extent of the proviso in the impugned order. The Petitioner has submitted that there is no express prohibition in the RE Regulations where the PPA has been entered into in a previous year and the project has been delayed beyond the subsequent year, the project shall not be subject to the generic tariff, as applicable for the year subsequent. In other words, the Petitioner has submitted that in case of delay in commissioning of the project, the generic tariff for the year previous to the year in which the project is actually commissioned should be applicable and not the tariff for the year in which the project was actually commissioned. The Petitioner has submitted that since, the entire capacity was commissioned on 15.4.2013 i.e. FY 2013-14, the generic tariff for the 5 MW power project shall be at the rate of Rs.9.35/kWh as determined by the Commission in its order dated 27.3.2012.

10. We have considered the proviso (i) and (ii) of Regulation 8(2) of the RE Regulations. Two conditions are required to be fulfilled for applicability of generic tariff determined for a particular year, namely the PPA should have been entered on or before the last day of the year for which PPA is determined, and the project should have been commissioned on or before 31st March of the next year. In other words, a minimum period of one year (if the PPA has been executed on 31st March of the Financial year in which generic tariff has been determined) and maximum period of two years (if PPA has been executed on 1st April of the Financial Year in

which generic tariff has been determined) has been prescribed in the regulations for execution of the Solar PV project. Where PPA has been entered into in the previous financial year and the project achieves the commercial operation beyond the 31st of March of the subsequent year, the RE Regulations are silent about the generic tariff of the financial year which should be applicable in such cases. In the absence of any clear-cut provision to cover such cases, the Commission has allowed the generic tariff of the year in which the project was commissioned. The Petitioner has submitted that in such cases, tariff of the previous financial year to the year in which project was commissioned should be applicable i.e. Rs.9.35/kWh as determined by the Commission in its order dated 27.3.2012.

11. In the present case, there was delay in handing over the land by A & N Administration which has been taken cognizance in the impugned order. Though the Respondent has denied that there was any delay in handing over the land, there is no categorical statement as to when the land was handed over to the Petitioner. The Petitioner has submitted that it started the execution of the project in September 2012 and completed the execution by 31.3.2013. However, the project was fully synchronized on 15.4.2013 and accordingly, achieved COD with effect from that date. There is no dispute with regard to the date of commercial operation. The Commission has decided in the impugned order that the generic tariff for the year 2013-14 would be applicable. The Petitioner is aggrieved about this finding and has submitted that generic tariff for the year 2012-13 should be made applicable in its case as there is no prohibition in the RE Regulations to allow tariff for the year subsequent when the actual commercial operation is delayed beyond the subsequent year. We find that RE Regulations provide that generic tariff of a

financial year when PPA is executed will be applicable if the project is commissioned by the 31st March of the following year. However, the RE Regulations are silent as to what should be the treatment of the applicability of generic tariff if the actual commercial operation is delayed beyond the following year when the PPA was executed. In the case of the Petitioner, had the project declared commercial operation on 31.3.2013, the generic tariff for the year 2011-12 would have been applicable as per the RE Tariff Regulations. Since, the project was executed during the financial year 2012-13 and achieved commercial operation on 15.4.2013, generic tariff for the year 2013-14 has been made applicable. If we go by the provisions of RE Regulations, the generic tariff for the year 2012-13 would be applicable in a case where the PPA was signed during 2012-13 and project is executed on or before 31.3.2014 i.e. during 2013-14. On the same analogy, it stands to reason that the Petitioner having achieved commercial operation on 15.4.2013 (i.e. during 2013-14) should be entitled for the generic tariff for the year 2012-13. If the generic tariff for the year 2013-14 is allowed on account of the generating station having declared under commercial operation on 15.4.2013 while the project was implemented in the year 2012-13, it would result in partial recovery of the cost of the project by the Petitioner. We find that there are sufficient reasons to review the impugned order and direct that the Petitioner shall be eligible for the generic tariff for the financial year 2012-13 as determined by the Commission by its order dated 27.3.2012. Accordingly, para 21 of the impugned order shall be modified as under:

“21. The intent of the regulation is very clear wherein the applicability of generic tariff determined for a particular financial year may only be valid for the following financial year if the plant is commissioned before the end of the next financial year. This will not be applicable if the PPA was signed in a financial year which was two years or more before the financial year in which the commissioning of Solar PV project took place. However, the regulations are silent about the generic tariff of which year shall be applicable if the COD has been delayed beyond the end of the next financial year of the year in which PPA was signed. In the view of the

Commission, generic tariff of the year immediately preceding the financial year when the Solar PV project achieved COD should be applicable in such cases. In the present case, since the project achieved COD on 15.4.2013 (i.e. during the Financial Year 2013-14), the generic tariff for the preceding financial year i.e. 2012-13 shall be applicable. Accordingly, the following generic tariff determined by the Commission for Solar PV projects for the year 2012-13 vide order dated 27.3.2012 in Petition No. 35/MP/2012 shall be applicable to the Petitioner:

Ref CERC's order dated in petition number	Description of the relevant clause	Total levelised Tariff ₹/Kwh for Solar PV	Benefit of accelerated depreciation for solar PV	Levelised Tariff in ₹/Kwh if accelerated depreciation benefit is availed
Dated 27.3.2012 in Petition No. 35/MP/2012	Regulation 5 of the RE Regulation provides that the control period for determination of tariff for RE projects shall be of 5 years. The first year of the control period is from 2012-13	10.39	1.04	9.35

12. With regard to the clerical/typographical errors, as printed out in para 16 of the review petition, the corrections in para 19 line 8 and para 5(d) are allowed and accordingly, the impugned order shall be deemed to have been corrected in the appropriate places.

13. With the above, the review petition is disposed of.

sd/-
(A.S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson