

(2011) 04 MAD CK 0370

In the Madras High Court

Case No : Writ Petition No. 16984 of 2010

Saheli Export Private Ltd.

APPELLANT

Vs

The Joint Electricity Regulatory Commission for the State of
Goa and Union Territories, The Secretary Electricity
Department Government of Puducherry Chief Secretariat and
Renewable Energy Agency Pondicherry

RESPONDENT

Date of Decision : 12-04-2011

Acts Referred:

Electricity Act, 2003 — Section 11(1), 61, 62, 64, 64(1)

Citation : (2011) 3 CTC 862

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : Vijay Narayanan, for Vinod Kumar, for the Appellant; Krishna Ravindran and D. Srinivasan, Government Pleader (Pondy) for Respondent Nos. 2 and 3, for the Respondent

Judgement

V. Dhanapalan, J.—By consent the Writ Petition is taken up for final disposal. Heard Mr. Vijay Narayanan, learned Senior Counsel appearing for the Writ Petitioner and Mr. R. Krishna Ravindran, learned Counsel appearing for the 1st Respondent and Mr. D. Srinivasan, learned Government Pleader (Pondicherry) appearing for the Respondents 2 and 3.

2. This Writ Petition has been filed for a direction to direct the 1st Respondent to determine the tariff for small solar generating system for purchase of electricity by the distribution utilities in Puducherry in terms of Electricity Act, 2003.

3. According to the Petitioner, it is a Company incorporated under the provisions of the Companies Act, 1956 and is primarily involved in the business of setting up small and medium power plants using both conventional and non-conventional resources. It is their case that electricity being an essential requirement for every day living and a critical infrastructure for socio-economic development of the country, the Government of India during February 2005

came out with the National Electricity Policy with a aim to achieve access to electricity for all households, supply of reliable and quality power of specific standards, financial turn around and commercial viability of electricity Sector. The said policy addresses several issues with regard to achieving the aforesaid objectives including environmental issues and promotion of cogeneration and non-conventional energy sources. As a step towards promoting power generation using non-conventional sources, during February 2010 the Government of India brought out the Jawaharlal Nehru National Solar Mission with an objective to establish India as a Global leader in solar energy by creating the policy conditions for its diffusion across the country as quickly as possible. The immediate aim of the Solar Mission was to focus on setting up and enabling environment for solar technology penetration in the country both at the centralized and decentralized level. Therefore, the Ministry of New and Renewable Energy, on 16.06.2010, issued the guidelines for Rooftop and other small solar power plants connected to distribution network (below 33KV). The program known as the "Rooftop PV & Small Solar Power Generation Programme" (RPSSGP) provides for selection of project proponents from across the country for development of solar power projects to be connected to the distribution network at voltage level below 33KV. As per the guidelines, before applying for registration with the Programme Administrator, the project proponents will have to first get themselves pre-registered with the respective State Level competent authority after complying the eligibility criteria and enter into a MoU with the concerned distribution utility for sale of power from the proposed project.

4. It is their further case that the guidelines stipulate that project schemes from only those States wherein tariff tenure for duration of 25 years with tariff structure on levelised basis has been determined by the respective State Electricity Regulatory Commission shall alone be eligible to participate in this program. Clause 3.2.1 of the Guidelines states issuance of relevant Tariff order from concerned SERC as one of the conditions for being eligible for registration with the Second Respondent. Further it is provided under Clause 3.2.2 of the Guidelines that Applications from project proponents who have been granted the pre-registration certificate will be considered only if the concerned State Electricity Regulatory Commission has issued orders determining tariff for rooftop/small solar generating system for purchase of electricity by the distribution utilities in that State. As the Petitioner wishes to set up a solar power plant at Karaikal, Puducherry, to be selected under the RPSSG Programme, the Petitioner submitted its Application for pre-registration with the Renewable Energy Agency Pondicherry, which the Competent Authority appointed for the Union Territory of Puducherry. The Petitioner has been granted the pre-registration certificate by the Competent Authority and has also entered into an MoU with the Electricity Department, Puducherry. The Petitioner has also registered online for registration with the Programme Administrator and forwarded its Application in physical form to the Programme Administrator. The

Petitioner is filing a separate Writ Petition challenging the said Clause 3.2.1 and 3.2.2 of the guidelines which provides that only pre-registrants from only those states whose concerned State Electricity Regulatory Commissioner has issued orders determining tariff for rooftop/small solar generating systems for purchase of electricity by the distribution utilities in that State, will be considered. There is no exclusive Electricity Regulatory Commissioner for the Union Territory of Pondicherry. The Central Government in exercise of its power u/s 83 of the Electricity Act, 2003 has constituted the First Respondent as the Electricity Regulatory Commission in respect of State of Goa and all Union Territories. The constitution of the First Respondent although notified during 2006, the Commission became functional only in the year 2009.

5. In terms of the National Tariff Policy, it is mandatory for all State Electricity Regulatory Commission to fix a minimum percentage of energy purchase from renewable sources of energy taking into account availability of such resources in the region and its impact on retail tariff. The 1st Respondent is yet to fix such limits in respect of Puducherry. The Electricity Act 2003 inter alia provides for determination of tariff for generation of electricity from renewable sources of energy by the appropriate commission. Section 86 of the Electricity Act 2003 inter alia provides that the State Commission shall promote generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid of sale of electricity and also specify for purchase of electricity from such sources, a percentage of total consumption of electricity in the area of the distribution licensee. Under the provisions of the Electricity Act, 2003 the First Respondent has suo motu powers to pass orders determining tariff in respect of sale and purchase of electricity from generators. However, the 1st Respondent is yet to pass appropriate tariff orders. The Petitioner has also represented to them on 10.07.2010 and 17.07.2010 and there is no action on the part of the 1st Respondent, and hence, this Writ Petition.

6. The 1st Respondent has filed Counter Affidavit and stated that the Commission is required to issue tariff order within 120 days of the receipt of the Application for determination of tariff. The Application is required to be submitted by the licensee/generating company u/s 64 of the Act. The factual position regarding submission of Application for determination of tariff by Renewable Energy Agency Pondicherry is as under:

On 29.06.1010, the Commission required REAP to submit status/information regarding facts and figures about the potential of renewal energy in the State/ UT. REAP vide letter dated 16.07.2010 submitted some data about the potential of renewal energy in the Union Territory of Puducherry. REAP vide letter dated 16.07.2010 submitted some data about the potential of renewal energy in the Union Territory of Puducherry. The letter specifically stated that the REAP is in the process of submitting an application for fixation of tariff for RE Power (SPV/ SPT) and RPO for DISCOM in Puducherry with due consultation with the Government of Puducherry and Electricity Department (DISCOM). The letter

further stated that the papers would be filed soon after approval of the Government of Puducherry. The relevant portion of the letter is extracted for reference:

Renewable Energy Agency, Pondicherry, (REAP) is in the process of submitting an Application for fixation of tariff for RE power (SPV/SPT) & RPO for DISCOM in Puducherry with due consultation with Government of Puducherry and Electricity Department (DISCOM). The papers would be filed soon after approval of the Government of Puducherry.

REAP filed Application for fixation of Tariff dated 26.07.2010 which was received in the office of the Commission on 02.08.2010. The Secretariat of the Commission scrutinized the application and vide letter dated 03.08.2010 informed the following defects and called upon REAP to rectify the same:

1. The Petition is not in the form (JERC-2) prescribed in Chapter II of the JERC (Conduct of Business) Regulations, 2009.
2. The Affidavit is not on the form prescribed in Chapter II of the JERC comprehensive conduct of Business Regulations.
3. The Affidavit has not been signed and sworn before the Competent Authority.
4. Six copies of the Petition have not been filed.
5. The copies of the Petitioners are not complete in all respects.
6. The copies of the documents are not legible and duly attested.
7. The vakalatnama/letter of authorization has not been filed.
8. The prescribed fee for the Petition/Application has not been paid.

REAP vide letter dated 04.08.2010 and 09.08.2010 changed their stance and stated that REAP is neither a project proponent nor a Distribution

Agency and the request of the REAP dated 26.07.2010 be treated as background material to enable the Commission to take up fixation of solar power tariff suo moto. In view of the above, no Application for fixation of tariff is filed or pending before the Commission.

7. The 3rd Respondent has filed Counter Affidavit and submitted that the Joint Electricity Regulatory Commission (JERC) has issued a Joint Electricity Regulatory Commission (Conduct of Business) Regulations, 2009. According to Section 11(1), the Commission may initiate any proceedings suo motu or on a Petition filed by any affected or interested person. It is further submitted that Renewable Energy Agency, Pondicherry, being the State Competent Authority and State Nodal Agency for MNRE, has requested the JERC vide letter dated 26th July 2010 to fix preferential tariff for Solar Photovoltaic and Solar Thermal Power Plant for supply of Power to Electricity Department, Puducherry, under Generation Based Incentive (GBI) and Non-GBI categories. REAP has pointed out that Tamil Nadu

Electricity Regulatory Commission has issued suo motu orders in respect of solar power tariff and also enclosed a copy of the same. In response to this, JERC has raised certain queries for the above said proposal vide its letter dated 3rd August, 2010. In response to the query raised by JERC, a reply has been furnished to JERC vide letter dated 9th August, 2010 and requested JERC to fix the tariff suo moto in exercise of the powers conferred u/s 11(1) of the Notification No. JERC-01/2009 dated 30th July, 2009.

8. Learned Senior Counsel appearing for the Petitioner would submit that in terms of the Electricity Act, 2003 the National Electricity Policy and National Tariff Policy, there is an obligation on the part of the 1st Respondent, as the regulator, to determine tariff for procurement of power by the distribution utilities from generators. He would also submit that in terms of the Electricity Act, 2003 and its regulations, the 1st Respondent, has suo motu power to determine tariff in respect of matters relating to procurement of power by the respective State utility and that the 1st Respondent ought to have exercised such powers and determined the tariff and passed appropriate tariff order. It is also stated before this Court that REAP filed an Application for fixation of tariff dated 26.07.2010 which was received in the Office of the Commission on 02.08.2010. The Secretariat of the Commission scrutinized the said Application and vide letter dated 03.08.2010, informed certain defects and called upon REAP to rectify the same. REAP vide letter dated 04.08.2010 and 09.08.2010 changed their stand and stated that REAP is neither a project proponent nor a Distribution Agency and that the request of the REAP dated 26.07.2010 be treated as background material to enable the Commission to take up fixation of solar power tariff suo moto. Hence, no Application for fixation of tariff is filed or pending before the Commission.

9. Per contra, the learned Counsel appearing for the 1st Respondent would submit that though REAP filed an Application for fixation of tariff on 26.07.2010, the Secretariat of the Commission scrutinized the Application and had pointed out certain defects vide its letter dated 03.08.2010 and called upon the REAP to rectify the same. By its letters dated 04.08.2010 and 09.08.2010, REAP informed that the request of the REAP dated 26.07.2010 be treated as background material to enable the Commission to take up fixation of solar power tariff suo moto and therefore, no Application for fixation of tariff is pending before the Commission. Counsel would also state that it is the primary duty and obligation of the licensee or the generating Company to submit Application for determination of tariff as per Section 64(1) of the Act. The learned Counsel appearing for the Respondents 2 and 3 would submit that the Jawaharlal Nehru National Solar Mission Guidelines has nominated Indian Renewable Energy Development Agency (IREDA) as the "Programme Administrator". The Clause 3.2.1 of the Guidelines says that all Applications should fulfill the following four conditions namely: (1) issuance of relevant tariff order from concerned JERC; (2) MoU with utility; (3) Pre-Registration Certificate from the State Competent Authority; and (4) Commitment Guarantee of requisite amount to become

eligible for registration with the Programme Administrator. He would further submit that the issuance of tariff order is not a pre-condition for pre-registration which has to be done in accordance with Clause (3) and Clause (5) of the Guidelines. The main task of REAP is to issue Pre-Registration certificate after getting satisfied with records produced by the Project Developer. Obtaining Pre-Registration certificate from REAP is one of the eligible conditions to become eligible for registration with the Programme Administrator. He would also submit that as per the provisions of the Act unless the tariff is determined, the Petitioner cannot proceed further.

9-A. Section 61 of the Electricity Act, 2003 deals with "Tariff. Section 61 of the said Act provides that,

61. Tariff Regulations.-- The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:

(a)...

(b)...

(c)...

(d)...

(e)...

(f)...

(g)...

(h) the promotion of co-generation and generation of electricity from renewable sources of energy ;

Section 62 of the Act deals with the "Determination of tariff. It reads thus,--

Determination of tariff.-- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for--

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating Company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

Further, Section 64 of the said Act deals with the procedure for tariff order, namely,--

64. Procedure for tariff order.-- (1) An Application for determination of tariff u/s 62 shall be made by a generating Company or licensee in such manner and

accompanied by such fee, as may be determined by Regulations.

(2) Every Applicant shall publish the Application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an Application under Sub-section (1) and after considering all suggestions and objections received from the public,--

(a) issue a tariff order accepting the Application with such modifications or such conditions as may be specified in that order;

(b) reject the Application for reasons to be recorded in writing if such Application is not in accordance with the provisions of this Act and the rules and Regulations made thereunder or the provisions of this Act and the Rules and Regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an Applicant shall be given a reasonable opportunity of being heard before rejecting his Application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this Section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefore .

(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order.

10. A reading of the above stated provisions would make it clear that if an Application is made for determination of tariff by a generating Company or a licensee, the Appropriate Commission shall within one hundred and twenty days from the date of receipt of Application either issue a tariff order or reject the same for reasons to be recorded in writing. Petitioner claims that they have made an Application to the concerned Commission and therefore, they would for a direction to the Competent Authority to determine the tariff and pass appropriate orders.

11. In the light of the above, this Writ Petition is disposed of with the following directions:

Petitioner is permitted to make an appropriate application as per Sections 62 and 64 of the Electricity Act, 2003 within a period of two weeks from the date of receipt of a copy of this order. If such an Application is made, the Joint Electricity Regulatory Commission, the 1st Respondent herein, is directed to determine the

tariff in the manner as provided under 64 of the Act, after giving an opportunity of hearing to the parties concerned and pass appropriate tariff order as expeditiously as possible, since the Act contemplates the time limit for passing such an award. It is made clear that the authority concerned shall decide the Petitioner's Application on its own merit without being influenced by any observation made in this order.

Consequently, connected Miscellaneous Petition is closed. There shall be no orders as to the costs.