

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
Order of the Commission dated this the 2nd Day of March 2023

PRESENT:

| | | |
|----------------------------|------|-----------------------|
| ThiruM.Chandrasekar | | Chairman |
| ThiruK.Venkatesan | | Member |
| ThiruB.Mohan | | Member (Legal) |

R.P.No.3 of 2022 in D.R.P.No.9 of 2020

1. Tamil Nadu Generation and Distribution Corporation Limited
Represented by its Chairman,
No. 144 Anna Salai,
Chennai 600 002.

2. The Chief Engineer,
NCES – TANGEDCO,
No.144, Anna Salai,
Chennai 600 002.

... Review Petitioners
(Adv.N.Kumanan & Adv.A.P.Venkatachalapathy,
Standing Counsel for TANGEDCO & TANTRANSCO)
Versus

Tirunelveli Solar Project Private Limited,
29, Hare Krishnam Regency,
Rampura Road, Sukhiya, Sanganer,
Jaipur, Rajasthan 302 011.

... Respondent
(Adv.Rahul Balaji)

This matter coming up for hearing on 14.02.2023 in the presence of
ThiruN.Kumanan and A.P.Venkatachalapathy, Standing Counsel for the Review

Petitioners, and on consideration of the arguments advanced by the Standing Counsel with regard to the maintainability of the connected Review Petition and on consideration of the relevant provisions of the Code of Civil Procedure and TNERC Conduct of Business Regulations, 2004 and the matter having stood over for consideration before us till this date, the Commission passes the following:-

ORDER

1. The Review Petition under scrutiny with regard to its maintainability pertain to the order dated 05.05.2022 passed by the Tamil Nadu Electricity Regulatory Commission in D.R.P. 09 of 2020.

2. The Review Petitioners stood arrayed as Respondents 1 & 2 in the Dispute Resolution Petition preferred by M/s. Tirunelveli Solar Projects Private Limited seeking a prayer to grant an extension of the commercial operation date from 26.09.2017 till 30.01.2019 in as much as the actual commissioning of its Solar Power Plant was delayed due to justifiable reasons and could be commissioned only on 29.01.2020 and for a direction to the 1st and 2nd respondents not to take precipitative action including not enforcing any security for the delay in commercial operation date.

3. By affording sufficient opportunity to both the parties to place all best possible evidence to support their contentions, the matter was heard by TNERC. Ultimately, on consideration of the rival submissions and on appreciation of the evidence placed through documents in the light of the relevant provisions of the Electricity Act and other relevant Acts and Rules, this Commission passed an order

dated 05.05.2022 in favour of the petitioner M/s. Tirunelveli Solar Projects Private Limited by allowing the petition.

4. The Review Petitioners, who are the respondents in D.R.P.09/2020, having not preferred any appeal against the order dated 05.05.2022, have come forward with the present Review Petition by invoking the provisions of Sec. 94 (1) (f) of the Electricity Act, 2003 read with Regulation 43 of the TNERC Conduct of Business Regulations 2004, to review the order by claiming that there are errors apparent on the face of record in the said order.

5. The Review Petition having been assigned number as R.P.No.3/2022 came up for admission before the Commission. As the Commission entertained genuine doubt about the maintainability of the Review Petition, opportunity was given to the Counsel for the Review Petitioner to make submissions with regard to the maintainability of the Review Petition. The Learned Counsel by pointing out the relevant portions of the order sought to be reviewed in conjunction with the relevant provisions of the Code of Civil Procedure and Regulation 43 of the TNERC Conduct of Business Regulations 2004 strenuously argued that since all the conditions required under order XLVII Rule 1 of CPC stand satisfied in the present case, the Review Petition under scrutiny is very much maintainable under law.

6. The seminal point that arises for consideration in the present case is as to whether the conditions adumbrated under Order XLVII Rule 1 of CPC and Regulation 43 of TNERC Conduct of Business Regulations 2004 stand satisfied for exercising the extraordinary power of Review conferred upon this Commission?

“A perusal of order 47 Rule 1 shows that review of a judgement or an order could be sought : (a) from the discovery of new and important matters of evidence which after the exercise of due diligence was not within the knowledge of the applicant; (b) such important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made; and (c) on account of some mistake or error apparent on the face of the record or any other sufficient reason.”

7. A cursory reading of the grounds for Review set out in the Review Petition preferred by the Review Petitioner disclose that the power of the Review conferred upon this Commission is sought to be exercised primarily on two grounds. The first ground urged is that as TANTRANSCO has not been added as a party in the main DRP 9/2020, the petition is bad for non-joinder of necessary party but the Commission had turned Nelson’s Eye to this apparent technical defect and thus committed a colossal error in allowing the application. The second ground urged is that as per Clause 2(e) of the Power Purchase Agreement dated 28.09.2017 entered into between the parties, the responsibility of getting transmission connectivity and access to transmission system owned by the Distribution Licensee is upon the Petitioner M/s. Tirunelveli Solar Project Private Limited but the Commission without considering this vital clause incorporated in the Power Purchase Agreement dated 28.09.2017 has come to an erroneous conclusion that the delay in the commercial operation date was occasioned due to the conduct of the respondents in DRP No.9/2020.

8. The Learned Counsel for the Review Petitioners assiduously argued that the above referred grounds showcase that there is apparent error on face of record in the impugned order and as such the Commission had jurisdiction to review the

order in question and as a corollary the Review Petition preferred by the Review Petitioners is maintainable under law.

9. What can be said to be an error apparent on the face of the records came to decided by our Hon'ble Supreme Court in several cases and to quote a few:-

- (i) T.C. Basappa
Vs.
T. Nagappa
AIR 1954 SC 440
- (ii) State of West Bengal and others
Vs.
Kamal Sengupta and another
(2008) 8 SCC 612

10. The recent decision on this legal position came to be rendered by our Apex Court in the case of Shri Ram Sahu (Dead) through Lawyers Vs. Vinod Kumar Rawat and Others vide judgement dated 03-11-2020 passed in Civil Appeal No. 3601/2020.

11. The principles laid down in the above referred cases, in a nutshell are as hereunder:-

Under Order 47 Rule 1 CPC a judgement may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 of CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A

Review Petition, it must be remembered has a limited purpose and cannot be allowed to be “an appeal in disguise.”

12. The sustainability of the submissions made by the Counsel for the Review Petitioner in support of the maintainability of the instant Review Petition have to be considered in the back drop of the above referred golden principles that govern the field.

13. With regard to the plea of non-joinder of necessary party raised in the grounds of review, this Commission is of the firm view, that as the said plea is a belated one, the same cannot be entertained even for a moment for more than one reason. Firstly, in the counter affidavit in DRP 9 of 2020 the plea of non-joinder of necessary party (i.e.) non-impleading of TANTRANSCO as a party to the proceedings was not taken by the Review Petitioners. Secondly, even at the time of advancing arguments also, this defense was not urged on behalf of the Review Petitioners. It is settled law that a party to a proceeding cannot be permitted to deviate from his pleadings and let in evidence with regard to matters not pleaded. The trite law is that if any evidence is let in without pleadings, the same has to be ignored by Courts.

14. If the above referred settled law relating to pleadings is applied to the case in hand, it would be pellucid that the plea of non-joinder of TANTRANSCO as party in DRP 9/2020 now raised by the Review Petitioner cannot be considered by this Commission on any score. Situated thus, it does not lie in the mouth of the Review Petitioners to contend that non-consideration of non-impleadment of

TANTRANSCO as party in DRP 9/2020 by the Commission in the order dated 05.05.2022 would tantamount to error apparent on face of records.

15. The second ground urged by the Review Petitioners with regard to non-consideration of the vital clause (i.e.) 2 (e) of the Power Purchase Agreement dated 28.09.2017 entered into between the parties by the Commission, while deciding as to which party is obliged to take all necessary preparatory steps for getting Transmission connectivity and access to transmission system owned by the Distribution Licensee (TANGEDCO). According to the Review Petitioner, the non-consideration of vital clause in the Power Purchase Agreement by the Commission is an error apparent on the face of record.

16. A thorough reading of the impugned order which is sought to be reviewed, make it abundantly clear that the grievance of the Review Petitioner that vital clause incorporated in the Power Purchase Agreement dated 28.09.2017 was not considered by the Commission while deciding as to who is responsible for the delay in getting route approval and railway lines approval has no factual or legal foundation. Paras 10.4. to 10.7 of the impugned order specifically deal with the factum of delay occasioned in getting the requisite railway route approval and railway line crossing approval. The Commission by referring several letters exchanged between both the parties and NLC and TANTRANSCO in respect of the subject of railway route approval and railway line crossing approval, has rendered as categorical finding that the entire process of obtaining route plan approval and railway line crossing approval falls within the domain of TANTRANSCO and the petitioner cannot expedite the process in any manner.

Apposite to point out that the Commission had relied upon the law propounded by APTEL in this regard in the case of M/s. Solitarie BTN Solar Private Limited Vs. TNERC and another vide Order dated 29.06.2021 passed in Appeal No.67/2019 to support its conclusion.

17. Hence it cannot be contended by the Review Petitioner, at any stretch of imagination, that all relevant documents, more specifically, the Power Purchase Agreement dated 28.09.2017 was not considered by the Commission while deciding the factum of delay. The present attempt of the Review Petitioner is for substituting the earlier findings rendered by the Commission on the point of delay with a new finding on reappraisal of evidence on record. This is impermissible under law as a review petition cannot be allowed to be an appeal in disguise.

18. In the upshot of the above elaborate discussion, this Commission has no reservation in coming to the irresistible conclusion that the instant Review Petition under consideration is not at all maintainable under law.

In fine, the Review Petition in question is hereby dismissed at the admission stage since not maintainable under law.

(Sd.....)
Member (Legal)

(Sd.....)
Member

(Sd.....)
Chairman

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission