

COURT-1**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)****DFR No : 246 of 2021****Dated: 26th July, 2021****Present : Hon`ble Mrs. Justice Manjula Chellur, Chairperson****Hon`ble Mr. Ravindra Kumar Verma, Technical
Member(Electricity)****In the matter of:****Ayana Kadapa Renewable Power Private Limited (s)****Versus****Andhra Pradesh Electricity Regulatory Commission & Ors. Respondent(s)**

Counsel on record for the (s) : Aniket Prasoon
Shweta Vashist
Priya Dhankar
Akanksha Tanvi
Mohd Aman Sheikh For App1

Counsel on record for the Respondent(s) : For Res1

ORDER

Proceedings in this matter are conducted through video conferencing.

IA No. 1133 of 2021***(Application for urgent listing)***

Heard Mr. Basava P. Patil, learned senior counsel for the Petitioner. For the reasons set out in the application, the application is allowed.

DFR No. 246 of 2021

Heard Mr. Basava P. Patil, learned senior counsel along with Mr. Hemant Sahai, learned counsel for the Petitioners, Mr. M. G. Ramachandran, learned senior counsel for SECI/R-4, Mr. Sidhant Kumar, learned counsel for Respondents/AP Discoms. On perusal of our order dated 27.02.2020, in more than one instance, we have expressed our opinion that so far as effective date for commencement of the timelines for completing the solar project, the same has not commenced since the PPA had to be approved. It is also seen that PSA was executed between the Discoms and the intermediary agency NTPC/SECI as the case may be for development of 4 solar projects in Kadapa district and 3 solar projects in Ananthapuramu Districts in Andhra Pradesh. Apparently, there was a PPA back to back agreement with solar power developers. In the above said order, we categorically opined that non-completion of solar projects in question do not arise since the PPA was not approved in terms of the guidelines and the procedure contemplated for the same. In that view of the matter, until and unless the PPA is approved, question of running time for completion of the project would not arise. This was the gist of the above mentioned order. To be precise, paragraphs 58, 59, 60, 61, 62 & 73 of the said order dated 27.02.2020 read as under:-

58. The Respondent-AP Discoms in their stand before this Tribunal contended that there is delay in achieving the SCOD of the project; therefore, the solar developers may have to pay liquidated damages as a consequence of delay to NTPC who in turn has to pay such damages to AP Discoms. This stand of the Discoms is categorically denied and opposed by both the SPDs as well as intermediary procurer i.e., NTPC etc. First and foremost, on this issue of delay, one has to consider whether the stand of the AP Discoms before the Tribunal was similar on the issue of delay. For this we also have to consider the time frame in terms of agreements between the parties. Article 2 of PPA and PSA refers to this which reads as under:

PPA

“ARTICLE 2: TERM OF AGREEMENT

2.1 Effective Date and Condition Precedent

2.1.1 This Agreement shall come into effect from signing of this PPA by both the parties i.e. 5th July 2018 and such date shall be the Effective Date for the purpose of this Agreement.

2.1.2. Notwithstanding the Effective Date, the condition precedent for the enforcement of the obligations of either party against the other under this Agreement shall be that within two (2) months from the Effective Date, the AP Discoms shall duly obtain the order of the Andhra Pradesh Electricity Regulatory Commission adopting the Tariff and the trading margin of NTPC and approving the procurement of the contracted capacity, on the terms and conditions contained in this Agreement read with the terms and conditions contained in the Power Sale Agreement entered into between NTPC and the AP Discom(s).”

PSA

“II. Notwithstanding the Effective Date, the condition precedent for the enforcement of the obligations of either party against the other under this Agreement shall be that within two (2) months from the Effective Date, the Andhra Discoms shall duly obtain the order of the Andhra Electricity Regulatory Commission adopting the Tariff and the trading margin of NTPC and approving the procurement of the contracted capacity on the terms and conditions contained in this Agreement entered into between NTPC and Andhra Discom(s) read with the terms and conditions contained in the PPA to be entered into between NTPC and the SPD.”

59. *It was not the stand of the Discoms before the Commission that there was delay on the part of the intermediary procurer or SPDs. In terms of Article 2.1 which deals with effective date and condition precedent, the effective date of signing of the PPA between both the parties is 05.07.2018. It was incumbent upon the AP Discoms to get the approval of the State Commission adopting the tariff and trading margin of NTPC/SECI, so also approval of procurement of power. The condition precedent for enforcement of obligation of either party against the other under these agreements i.e., PPA and PSA is two months. From the date of such approval, the project in question must start within the prescribed time. Therefore, there was no responsibility on the part of the Appellants to obtain adoption tariff order from the State Commission as it was the responsibility of the AP Discoms. Though AP Discoms have initiated proceedings for approval of procurement of power and adoption of tariff before the Commission, on account of conditional order passed by the State*

*Commission as indicated in the impugned order subjecting the approval to objections/suggestions raised by objectors, there is no finality with regard to approval of procurement of power and adoption of tariff. **Now AP Discoms cannot take advantage of their own mistakes or delay. Such ground cannot be entertained.***

60. The objections of AP Discoms before the State Commission filed on 03.05.2019 pertaining to terms and conditions of PPA, so also tariff and trading margin are as under:

....

*61. Over and above this, it is seen that there were Supplementary PSAs to the original PSAs with intermediary procurer extending the existing timelines up to 31.07.2019. The time is further extended by intermediary procurer. **To commission the project within the timeframe when approval of procurement of power and adoption of tariff reach finality, that would be the starting of time to reach the completion of project in terms of agreements i.e., PPA between the solar developer and intermediary procurer-NTPC/SECI, would come into play.** Therefore, the contention of the Respondent-AP Discoms that there is delay or going to be delay to achieve SCOD is rejected.*

62. That apart, if delay is caused on account of laches on the part of the AP Discoms, they cannot take advantage of their own mistakes. On this issue, settled law is as under:

73. The impugned order though approves procurement of power and adoption of tariff, but subject to amendments/modifications on account of objections raised in a public hearing by two objectors - Sri M. Venugopala Rao and Sri A. Punna Rao, cannot be sustained. Therefore, we allow the Appeals setting aside the highlighted portion of the impugned order which reads as under:

*“Therefore, all the three matters under public hearing under consideration herein are ordered approving the procurement of solar power by Southern Power Distribution Company of Andhra Pradesh Limited (APSPDCL) and Eastern Power Distribution Company of Andhra Pradesh Limited (APEPDCL) respectively from M/s. National Thermal Power Corporation Limited (NTPC) and M/s. Solar Energy Corporation of India Limited (SECI) of a total quantum of 750 MW, 250 MW and 750 MW respectively at the specified Solar Parks under the Power Sale Agreements (PSAs) / Power Purchase Agreements (PPAs) respectively at the tariffs discovered through competitive bidding process, as per the guidelines issued by the Government of India, which stand adopted by the Commission under Section 63 of the Electricity Act, 2003, **subject to the amendments to the Power Sale Agreements (PSAs) / Power Purchase Agreements (PPAs) respectively suggested by Sri M. Venugopala Rao and Sri A. Punna Rao, learned objectors being considered by the Distribution Companies of Andhra Pradesh, M/s. NTPC, M/s. SECI and the Solar Power Developers and their reporting back to the Commission within two (2) months from now their respective views on the proposed amendments. The Commission will examine the proposed amendments and views of the***

stakeholders received and after hearing in accordance with law, order incorporation of any amendments in the Power Sale Agreements (PSAs) / Power Purchase Agreements (PPAs) respectively considered relevant and necessary by the Commission."

The Respondents who did not challenge this order dated 27.02.2020 of the Tribunal till date, as submitted by the Appellant, started meddling with the contract between the parties by terminating PSA on the following grounds in the letter dated 14.06.2021 which reads as under:-

"SOUTHERN POWER DISTRIBUTION COMPANY OF A.P. LTD. CORPORATE OFFICE TIRUPATI

<i>From</i>	<i>To</i>
<i>Chief General Manager</i>	<i>Managing Director</i>
<i>O&M, APSPDCL</i>	<i>Solar Energy Corporation of India</i>
<i>Kesavayanagunta</i>	<i>1st Floor, D-3, A Wing Religare</i>
<i>Tiruchanur Road</i>	<i>Building District Centre, Saket</i>
<i>Tirupati- 517501</i>	<i>New Delhi - 110017</i>
<i>Chittoor Dist. (AP)</i>	

Lr. No. CGN/O&M/GM-IPC/DEE-3/F SECI Mylavaram/D.NO. 149/21, Dt: 14.06.2021

Sub: - APSPDCL (SOLAR) IPC- 1000 MW Kadapa Ultra Mega Solar Park – M/s SECI, New Delhi as intermediary Agency/ procurer entered 3 Nos PSAs with APDISCOMs (Erstwhile APSPDCL & APEPDCL) for commissioning of 3x250 MW solar power projects in 1000 MW Kadapa Ultra Mega Solar Park, located at Ramachandraiahpalli (Vil). Mylavaram (M), Kadapa Dist. - Request of M/s SECI for time extension for commissioning of the solar projects - Not Considered - Decision of APSPDCL to cancel the PSAs entered with M/s SECI as directed by APPCC/APTRANSCO- Communicated- Reg.

Ref: - 1) 3 Nos PSAs entered by Mis SECI. New Delhi with APDISCOMs. Dt. 27.07.2018

2) M/s SECI, New Delhi, Letter Dt. 17.03.2021

- 3) Memo No. CGM/O&M/GM/IPC/DE-II/E. SECI Mylavaram/D. No. 73/21 dt.24.03.2021
- 4) Lr. No. SE/O/KDP/EE. T/DEE.T/AEE.T/JEI/F/D. No. 655/21.._Dt: 24.03.2021
- 5) Memo. No: CGM/O&M/TPT/GM/IPC/DE-II/E. SECI Mylavaram/D. No.74/21 dt.25.03.2021.
- 6) Lr No. CGM/PP/GM-PP-2/DGM/RE-I/Solar/F, SECI/D. No. 18/21. Dt. 01.06.2021.
- 7) Note Approval of CMD/APSPDCL. Dt. 10.06.2021

With reference to the above cited subject. M/s SECI, New Delhi, vide ref. (2) cited. Has addressed a letter to APSPDCL authorise, wherein it was requested for completion and commissioning of their following 3 Nos. solar power Projects for which PSAs were entered with APDISCOMs vide ref (1) cited. Proposed to set up at Ramachandraiahpalli (Vil). Mylavaram (M). Kadapa Dist... in 1000 MW Kadapa Ultra-Mega Solar Park.

1. M/s Ayana Kadapa Renewable Power Pvt. Ltd. 250 MW
2. M/s S.B. Energy Seven Pvt. Ltd. 250 MW
3. M/s Spring SouraKiranVidyutPvt. Ltd 250 MW

As per field status report of ref (4) cited, in all the above said 3 solar power projects, the civil works such as levelling of land, foundations for mounting arrangements are not commenced. Most of the works for establishing the solar power projects in respect of the above said 3 Nos. developers are not yet started.

*In this regard, as per ref (6) & (7) cited, M.s SECI, New Delhi is hereby informed the decision of APSPDCL to cancel the above 3 Nos PSAs entered with M/s SECI, New Delhi with immediate effect, because of the poor works progress in the above 3 Nos solar projects and also **as the due date for completion and commissioning of the solar projects was expired on 29.05.2021 which is 32 months from the effective date of PPAs, i.e., 29.09.2018.***

This is for your information please.

Chief General Manager

O&M::APSPDCL

TIRUPATI

Copy to the Chief General Manager/Power Purchase/APPCC/APTRANSCO/VS/ Vijayawada

Copy to the Chief General Manager/Energy Conservation, Solar, IPC/APEPDCL/Vizag”

It is pertinent to mention that the aforesaid letter refers to effective date as originally intended date i.e. 29.9.2018 totally ignoring the fact in the above said order of the Tribunal dated 27.02.2020, we categorically opined that effective date would be the date on which the PPA is approved i.e., 27.02.2020. This letter is nothing but an indirect method adopted by the Respondent/Discoms to scuttle the contract between the parties. If Respondent did not challenge the order dated 27.02.2020, they are not entitled to meddle with the same impliedly with this process whereby the PSA which is the foundation for PPA in question being interfered with. Therefore, we are of the opinion this is nothing but an action of the Respondent/Discoms in total disregard to the directions given by this Tribunal i.e. in the teeth of the order dated 27.02.2020.

Learned counsel for the Respondent/discom submits that the proceedings being an execution proceeding, the relief sought by the Appellant/Petitioner cannot be entertained since it is not maintainable for the reasons that there is no specific direction in the judgment. We cannot accept this objection raised by the Respondent's Counsel for the simple reasons that if disobedience of the order of this Tribunal is brought to our notice or the Tribunal notes such disobedience on its own, it can always initiate suo-moto proceedings. Therefore, we are of the opinion that it would justify to suspend or stay the termination intimation issued by the Respondent/discom by its letter dated 14.06.2021. Hence, we grant the stay of the termination of PSA between the Petitioners and the SECI dated 27.07.2018 till disposal of the above petitions. Meanwhile, Respondents

can file their objections to the petitions on or before 24.08.2021 with advance copy to the other side. Thereafter, rejoinder, if any by the Petitioners shall be filed on or before 08.09.2021.

We also direct the Registry to initiate separate contempt proceedings against both the Respondent/Discoms for the alleged violation in dishonouring the directions of this Tribunal dated 27.02.2020 and issue notice to the Respondent Discoms/contemnor A.P. Discoms.

List the matter on **04.10.2021** through video conferencing.

Ravindra Kumar Verma
Technical Member(Electricity)

Justice Manjula Chellur
Chairperson

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