

Southern Power Distribution Company Limited of Andhra Pradesh & Anr. Vs. Union of India & Ors.



INTRODUCTION

The High Court of Andhra Pradesh at Amravati vide its Order dated 15.03.2021 has suspended the operation/proceedings of letter dated 10.10.2019 issued by Power System Operation Corporation Limited (POSOCO), pursuant to the Direction dated 06.09.2019 received from Ministry of New Renewable Energy (MNRE).

Through the Letters/Directions, the Southern Power Distribution Company Limited of Andhra Pradesh and Eastern Power Distribution Company Limited of Andhra Pradesh (APDISCOMs) were directed to comply with the requirement for opening a Letter of Credit (LC) in respect of the respective long term Power Purchase Agreements (PPAs) executed with solar and wind power developers. That failing such compliance, the Southern Region Load Despatch Centre (SRLDC) would be constrained to disallow power transactions under Short - Term Open

Access (STOA) and/or through Power Exchange, from 16.10.2019, in compliance of directions/Circular dated 28.06.2019 issued by Ministry of Power (MoP).

FACTUAL BACKGROUND

APDISCOMs approached the High Court under Article 226 of the Constitution of India challenging the letter/directions passed by POSOCO vide letter dated 10.10.2019 issued pursuant to the Direction dated 06.09.2019 issued by MNRE.

On 15.10.2019, the Single Judge passed an ex-parte interim order thereby restraining POSOCO and MNRE from disallowing APDISCOMs to operate through power exchange and to secure power through Open Access. Pertinently, none of the wind and solar generators had been made a party to the said Writ Petition.

In view of the aforesaid, on 01.11.2019, various wind and solar generating companies, including Tata Power Renewable Energy Limited (TPREL)

and Walwhan Renewable Energy Limited (WREL) filed Interlocutory Applications seeking Impleadment in the Writ Petition being a necessary and proper party to the proceedings which was subsequently allowed on 28.11.2019. In addition to the Impleadment Application, TPREL and WREL also filed an Interlocutory Application seeking vacation of stay of the Interim Order dated 15.10.2019 passed by the Single Judge.

During the period from November 2019 to March 2020, the Writ Petition was listed and heard from time to time, however, no orders concerning the application for vacation for stay was passed by the Single Judge. Thereafter, on account of the outbreak of Novel Coronavirus (COVID-19) and the subsequent lockdown imposed coupled with the restricted functioning of the High Court, the matter could not be taken up for hearing.

In view of the above, TPREL and WREL were constrained to approach the Supreme Court of India by way of Special Leave to Appeal against the Interim order dated 15.10.2019 as despite various Applications seeking urgent listing, the matter was not taken up for hearing. Notice in the said SLP was issued on 01.02.2021.

Despite the notice of Special Leave Appeal being served upon APDISCOMs, none appeared on 22.02.2021 before the Supreme Court. Considering the above, the Supreme Court was pleased to pass a peremptory order in following terms:

(a) High Court of Andhra Pradesh was requested to hear and dispose of the applications filed by Appellant on or before 12.03.2021.

(b) The ad-interim order dated 15.10.2019 shall be limited in terms of its tenure until 12.03.2021.

(c) In event, Respondents continue to remain absent in the course of present proceedings, the

Supreme Court will proceed to hear and finally dispose the Special Leave Petitions on next date of listing.

In view of the direction passed by the Supreme Court of India, the Writ Petition No. 15950 of 2019 was finally heard on 02.03.2021 and 04.03.2021 and was reserved for Orders.

ISSUES

The following issues were framed by the High Court

(a) Whether in the circumstances of the case, directions issued by POSOCO vide letter dated 10.10.2019 be suspended and Interim Order of the nature as sought by the APDISCOMs be granted?

(b) Whether all authorities under the Electricity Act, 2003 (the Act) from an appropriate government to SLDC have the power/authority and jurisdiction to interfere, regulate and oversee the terms of the contract under the PPA executed between the RE Power Generators and APDISCOMs?

FINDINGS

The High Court held as follows:-

(a) MoP OM dated 28.06.2019 applies to all entities including RE generators (Para 53);

(b) MoP/ MNRE are not empowered under Section 37 of the Act to enforce contracts signed by DISCOMs. Power of RLDC is confined to efficient performance of the Grid. Therefore, the Letter dated 10.10.2019 was issued by POSOCO essentially seeks to enforce terms of the PPA which is not in accordance with the provisions of the Act. Power of SRLDC are ascribed under Section 28 and the same does not specifically include enforcement of contract. (Para 56, 57 & 60);

(c) POSOCO has not been empowered under the Act to take any coercive action to enforce the terms of the PPA against APDISCOMs. For this purpose an adjudication is required to be carried out by APERC (Para 60);

(d) Even though APDISCOMs have not challenged the OM dated 28.06.2019 itself. However, they are entitled to challenge any consequent action pursuant to the said OM issued by MoP/MNRE (Para 64);

(e) There is no Natural Justice violation as Private Generators were permitted to be impleaded (Para 66);

(f) MoP/ MNRE threatened and coerced APDISCOMs to enforce the terms of the PPA. Hence, filing of the Writ Petition was justified (Para 94);

(g) There is an element of public interest involved therefore, the Writ Petition is maintainable (Para 99).

Therefore, MoP/ MNRE and POSOCO were restrained to take any coercive action as per its letter 10.10.2019 for non-creation of LC as MoP OM dated 28.06.2019.

SKV Comment

This Order hurts the OM dated 28.06.2019 immensely as essentially the power of MoP/ MNRE and the POSOCO to enforce terms and conditions of the PPA with RE and non-RE generators has been held to be beyond the Act. The most critical aspect of the Judgment is that the High Court has also read down the power of NLDC/ RLDC being limited to performance of the system. Hence, basis this Judgment, MoP/MNRE's goal of achieving discipline in payment of current dues would be in jeopardy.

TATA Power Renewable was represented by a team from SKV Law Offices comprising of Mr. Shri Venkatesh (Managing Partner), Mr. Suhael Buttan (Senior Associate) & Mr. Rishub Kapoor, Mr. Anant Singh and Mr. Siddharth Joshi (Associates).