

**Appellate Tribunal for Electricity**  
(Appellate Jurisdiction)

**Appeal No. 324 of 2013**

**Dated: 16<sup>th</sup> February, 2015**

**Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER  
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER**

**In the Matter of:**

**SHREE RENUKA SUGARS LIMITED**

**(A Company incorporated and**

**Governed under the provisions of the Companies act, 1956),**

**Having its Registered Office at**

**BC 105, Havelock Road, Cantonment,**

**BELGAUM – 590 001**

**... Appellant(s) / Petitioner**

**Versus**

**1. HUBLI ELECTRICITY SUPPLY COMPANY LIMITED**

Navanagar, P. B.Road,

HUBLI – 580 025

(Represented by its Managing Director)

**2. KARNATAKA ELECTRICITY REGULATORY COMMISSION**

6<sup>th</sup> and 7<sup>th</sup> floor, Mahalaxmi Chambers,

No. 9/2, M. G. Road,

BANGALORE – 560 001

**... Respondent(s)**

**Counsel for the Appellant(s) :**

Mr. Sanjay Sen, Sr. Advocete,

Mr. Buddy A Ranganadhan

Mr. Shubhranshu Padhi and Mr. Kush  
Chaturvedi

**Counsel for the Respondent(s):**

Mr. Anand K. Ganesan and

Ms. Swapna Seshadri for Resp. No.1

## **J U D G M E N T**

**PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER**

The appellant Shree Renuka Sugars Ltd. has filed the instant appeal under section 111 of the Electricity Act 2003 against the order dated 18.09.2013 passed by the Ld. Karnataka Electricity Regulatory Commission (in short 'State Commission') in OP No. 12 of 2013 whereby the Ld State Commission has dismissed the Petition filed by the appellant holding that the payment made by the respondent No.1 / Hubli Electricity Supply Co. Ltd. (distribution licensee) to the appellant co-generator is in order and the claim of the appellant for higher rates of tariff cannot not be acceded to.

2. that the appellant, is a generating company, which owns and operates a co-generation based power project. The respondent No.1 (HESCOM) is a distribution licensee and respondent No.2 is the State Commission having powers to determine the tariff etc. as provided under the Electricity Act 2003.

3. The relevant facts for the purpose of deciding this appeal are as follows:

(a) that the appellant is a generating company which owns a co-generating power based project at Munavalli Village, Saundatti Taluk, Belgaum District with 15 MW surplus exportable capacity ("Project").

- (b) that the appellant had initially executed a Power Purchase Agreement (PPA) dated 10<sup>th</sup> February, 1999 for a period of ten years with the then Karnataka Electricity Board (which is the predecessor in interest of the respondent No.1) with respect to the unit in question, wherein the tariff for the first ten years was agreed upon and the eleventh year tariff was subject to the extension of the PPA with the consent of both the parties.
- (c) that in the tenth year of the project, under the then PPA dated 10.02.1999, the tariff was Rs.4.44 Per Unit which was being paid by respondent No.1 to the appellant for supply of electricity from the project of the appellant.
- (d) that the original PPA was for a period of ten years and the PPA came to an end on 08<sup>th</sup> February, 2009 after the expiry of ten years period. As per the material available on record it becomes evident that after the expiry of the PPA, on 08<sup>th</sup> February, 2009, there was no obligation on the part of the appellant to sell electricity to the respondent No.1 and the respondent No.1 distribution company was also under no obligation to purchase electricity from the appellant as there was no fresh PPA for the further period.
- (e) that on 11.03.2010, the appellant / petitioner filed the petition, being Petition O.P. No. 13 of 2010 under Section 62, read with Section

86(1)(b) of the Electricity Act, 2003 before the State Commission making the following prayers:

- (i) Allow the petition for project specific determination of electricity tariff
  - (ii) Fix the tariff at the rate of Rs.4.68 per unit
  - (iii) Pass such other orders as the Commission deems fit.
- (f) In the said Petition, being No. 13 of 2010, the appellant petitioner filed an application claiming the interim tariff of Rs.3.83 Per Unit. The State Commission passed the following order dated 11.12.2010 on the interim application:

*“Case called, Counsel for both parties present. Counsel for HESCOM confirms that HESCOM will receive supply of energy to be supplied from the petitioner’s units as an interim measure at rates fixed by the Commission’s order for cogen units dt. 11.12.2009 till the Commission disposes of the present petition. Ordered accordingly. Call on 30.12.2010.”*

- (g) The O.P No. 13 of 2010 was taken up by the State Commission on different dates. The following dates and orders are relevant for our purpose:

<u>Date</u>	<u>Order</u>
11.08.2011	Case called. Counsel for petitioner absent. Call on 29.09.2011.

- 29.09.2011 Case called. Counsel for the petitioner present and seeks further time to produce certificate regarding station Heat Rate. This case may be listed after the certificate is filed by the applicant with an application for listing.
- 27.09.2012 Case called. Counsel for petitioner present and prays for adjournment. Call on 18.10.2012.
- 18.10.2012 Case called. Counsel for the petitioner not present. To be listed in December 2012 or earlier if documents are filed.
- 03.01.2013 Case called. Counsel for both parties present. Counsel for petitioner files memo for withdrawal of petition. Counsel for respondents have no objection. Dismissed as withdrawn.
- (h) that the State Commission had passed the tariff order dated 11.12.2009 determining the tariff for sale of power from renewable source of energy from distribution companies. The tariff order was applicable for supply of electricity by generating companies to the distribution licensees. The relevant part of the tariff order dated 11.12.2009 is as under:

***“13. Tariff for the existing Plants, which have completed 10 years of PPA period***

*The Commission, during the course of public hearing, had directed the existing plants, which have completed the initial*

*PPA period of 10 years, to file proposals for fixation of tariff after the completion of 10 years.*

*IWPA had filed a proposal requesting the Commission to fix a tariff of Rs.3.70 per unit in respect of wind power projects. Konark Power projects Ltd. has proposed a tariff of Rs.6.82 per unit. Both IWPA & Konark Power have adopted different parameters as compared to the Commission approved parameters.*

***In view of the fact that, after completion of 10 years debt servicing will have been fully met and the only increase (marginal) would be in respect of O & M expenses, but at the same time the opportunity cost of the power has gone up, the Commission decides to allow the rate equal to the rate at the end of the tenth year, without escalation for the next ten years for all renewable projects. This tariff is also applicable to such PPAs in which ten years period is already completed but no tariff has been determined.”***

- (i) That the O.P. No. 13 of 2010 filed by appellant / petitioner, in which interim order dated 11.12.2010 was passed, was withdrawn by the appellant / petitioner by moving the withdrawal application before the State Commission and the same was allowed to be withdrawn on

03.01.2013. Thus the petition being O.P. No, 13 of 2010 was withdrawn by the appellant / petitioner without allowing its decision on merits with intent to take undue advantage of the interim order dated 11.12.2010.

- (j) That after the withdrawal of the aforesaid petition by the appellant petitioner, the appellant on 17.04.2013 filed another petition being O.P. No. 12 of 2013 before the State Commission making following prayer:

“a) *to direct the respondent Hubli Electricity Supply Co. Ltd. to honour its commitment and the interim order dated 11.12.2010 passed by the State Commission and pay for the energy received from the respondent’s project ...*

*b) pass such order including an order as to costs in the interest of justice and equity.”*

- (k) That it is not disputed that during the pendency of the O.P. No. 13 of 2010, the petitioner supplied electricity to the respondent distribution licensee and the respondent paid for the same @ Rs. 3.59 Per Unit.
- (l) That in a nutshell the case of the appellant petitioner is that the payments made by respondent No.1 / DISCOM @ Rs.3.59 Per Unit during the period of about three months, after the expiry of the PPA

period of ten years, during the existence of the aforesaid interim order, were not according to the Commission's tariff order dated 11.12.2009. The appellant submits that as per the tariff order dated 11.12.2009 of the State Commission, the appellant was entitled to be paid @ Rs.4.44 Per Unit having completed the ten years of PPA period.

(m) That it is also not in dispute that after the expiry of the PPA period, no other PPA was entered into between the appellant (co-generator) and the respondent No.1 DISCOMs. The appellant, instead of going to the State Commission for determination of tariff for further period, preferred to file a petition for its project specific tariff determination, in which the aforesaid interim order was passed. Ultimately the appellant withdrew the petition for the reasons best known to it. After the withdrawal of the aforesaid petition, the appellant filed, as stated above, O.P. No. 12 of 2013 which has been dismissed by the Impugned Order dated 18.09.2013 by the State Commission which is under challenge before us in the instant appeal.

4. We have heard Mr. Buddy A. Ranganadhan on behalf of the appellant and Mr. Anand K. Ganesan on behalf of the respondent No.1. We have gone through the written submissions filed by rival parties and the material available on record including the impugned order.



**5. The only one issue arising for our consideration in this appeal is whether the appellant is entitled to Rs.3.59 Per Unit or Rs.4.44 Per Unit for supply of energy during December 2010 to February 2011 under the garb of the interim order dated 11.12.2010?**

6. The learned counsel for the appellant has made the following submissions on the issue :

- a) that the appellant had initially executed a PPA dated 10.02.99 for a period of ten years with then Karnataka Electricity Board which is a predecessor in interest of the respondent No.1, wherein the tariff for the first ten years was agreed upon between the appellant and the respondent No.1, distribution licensee. The original PPA came to an end on 08.02.2009 after expiry of ten years. Since there was no renewal or extension of the original PPA and the appellant was supplying electricity to the respondent No.1 @ Rs.4.44 Per Unit, being the tariff in the tenth year of the project, the appellant is entitled to the tariff @ Rs.4.44 Per Unit for the supply of electricity during the period of three months, namely, from December 2010 to February 2011.
- b) that even after the expiry of ten years period of the original PPA, the respondent No.1 was under the obligation to buy electricity from the appellant at the same rate namely Rs.4.44 Per Unit as the same

tariff, as per the then existing PPA, was being paid to the appellant by the respondent No.1.

- c) that the State Commission passed the tariff order dated 11.12.2009 determining the tariff for sale of power from renewable source of energy to distribution companies.
- d) that para 13 of the tariff order dated 11.12.2009 clearly provides for tariff for the existing plants, which have completed ten years of PPA period and in that view the State Commission had decided to allow the rate, equal to the rate, at the end of the tenth year, without escalation for the next ten years for all renewable projects. The same tariff would also be applicable to all such PPAs in which ten years period is already completed but no tariff has been determined.
- e) that in view of the tariff order dated 11.12.2009, since the plant of the appellant was existing, which had completed ten years of PPA period, the appellant is entitled to the same rate of tariff namely Rs.4.44 Per Unit for the power supply of three months during the aforesaid period even in the absence of renewal or execution of fresh PPA between the appellant and the respondent No.1.
- f) that since, as per the interim order dated 11.12.2010, passed by the State Commission, after the consent of both the parties, as an interim measure the distribution company was to receive supply of energy

from the appellant petitioner as per the tariff order dated 11.12.2009, there was no need for execution of a fresh PPA between the appellant and respondent No.1.

- g) that though the appellant in the interim application prayed for a tariff of Rs.3.83 Per Unit, the appellant should be paid for the electricity supplied by it @ Rs.4.44 Per unit.
- h) that though the appellant filed the petition claiming determination of project specific tariff in which the interim order was passed and the same petition was withdrawn by the appellant, the appellant is entitled to the tariff @ Rs.4.44 Per Unit, the rate which he was getting from the respondent No.1 in the tenth year of the PPA's period.
- i) that much correspondence was exchanged between the parties, where the respondent (DISCOMs) sought to renege on its obligation that it consented to the interim order dated 11.12.2010 and stated that it would purchase power only @ Rs.3.59 Per Unit.
- j) that the respondent No.1 vide its letter dated 03.06.2011 informed the appellant that it was agreeable to availing the generated energy @ Rs.3.59 per kwh if the appellant withdrew O.P. No. 13 of 2010 and further stated in the letter that after withdrawal of the said O.P. No. 13 of 2010 the request of the appellant will be considered as HESCOM cannot purchase power at the rate in the vicinity at Rs.4/- Per Unit

and accordingly the appellant filed an application for withdrawal of the petition being O.P. No. 13 of 2010 which was subsequently dismissed as withdrawn by the State Commission's order dated 03.01.2013.

- k) that the impugned petition, being Petition No. 12 of 2013, was filed by the appellant before the State Commission, inter alia, praying that the respondent No.1 / DISCOMs be directed to pay to the appellant in terms of the interim order dated 11.12.2010 in aforesaid petition No. 13 of 2010. Since the claim was only for the period during which the interim order was in operation and not after the withdrawal of the petition. The net claim was for Rs.2.3 Crores, being the difference between Rs.4.44 Per Unit, as the appellant is entitled to and Rs.3.59 Per Unit as was paid by the DISCOM.
- l) that the Ld. State Commission has erroneously dismissed the impugned petition being O.P. No. 12 of 2013 without appreciating the fact that the interim order dated 11.12.2010 in O.P. No. 13 of 2010 had merged with the final order dated 03.01.2013 whereby the O.P. No. 13 of 2010 was allowed to be withdrawn by the State Commission. Since the State Commission did not determine the rate for the electricity supplied by the appellant to respondent No.1 during the pendency of O.P. No. 13 of 2010, the appellant's claim for payment @ Rs.4.44 Per Unit, after the dissolution of the interim order was just and legal one.

- m) that the Commission has committed an illegality in dismissing the impugned petition of the appellant on the ground that the tariff order dated 11.12.2009 would apply to those cases only where PPA was for twenty years and since the appellant's PPA was for a period of ten years and the period of ten years had already expired, the appellant is not entitled to the tariff claimed by him.
- n) that even the interim order passed by the State Commission remains valid, binding and enforceable unless and until the same is vacated or set aside by the competent Forum. Hence, the interim order dated 11.12.2010 in different petition No. 13 of 2010 was valid till 03.01.2013 when the said petition was withdrawn by appellant at the assurance of respondent No.1.
- o) that the Tariff Order dated 11.12.2009, on its terms, does not make any reference to the fact that the same is applicable only to those Co-generation plant that have a PPA for 20 years. As a matter of fact the Order specifically contemplates a situation of existing plants which have completed 10 yeas of the PPA. Hence the impugned order is against law.
- p) that pertinently, even the rate at which the Respondent No.1 has actually made payment to the Appellant i.e. @ Rs.3.59 per unit is only under the terms of the Tariff Order dated 11.12.2009. Hence impliedly the said Order is applicable to the Appellant.”

7. Per contra, the following submissions have been made on behalf of the respondent No.1 / DISCOM :

- a) that on 09.02.1999, the appellant executed a Power Purchase Agreement with the erstwhile Karnataka Electricity Board and the PPA was only for a period of ten years. In clause 9.1 of Article 9 dealing with terms, termination and default there was only one condition in the PPA that with respect to the eleventh year onwards, the parties were to mutually agree on the tariff and if there is no such agreement, the PPA would come to an end.
- b) that as per Article 9 (9.1) of the PPA, the said PPA shall continue to be in force initially for such time until the completion of a period of ten years from the scheduled date of completion and will be renewed for a further period of twenty years and on such terms and conditions as may be mutually agreed between the parties, 90 days prior to expiry of the said period of ten years. However, the Board may renew and revise / modify the terms and conditions of this PPA once in ten years.
- c) that there were other renewable energy generators who had signed a PPA of twenty years, where the tariff was only for ten years subject to further determination by the State commission.

In the case of the appellant, the PPA itself was only for a period of ten years which period expired on 08.02.2009 by efflux of time.

- d) that after the PPA having come to an end on 08.02.2009, beyond the said date of expiry of PPA, there was no obligation on the part of respondent No.1 (DISCOM) to purchase electricity from the appellant, nor was the appellant bound to sell electricity to the respondent No.1. There was also no tariff for such purchase.
  
- e) that the State Commission based on tariff order dated 11.12.2009 determined the tariff for sale of power from renewable sources of energy to the DISCOM. The tariff order was applicable for supply of electricity by generating companies to the distribution licensees. This was applicable where there was a legal relationship between the parties for sale and purchase of electricity. In the said order dated 11.12.2009, the State Commission determined the tariff for the purchase as under :

*“Considering the parameters as approved by the Commission in the preceding paragraphs, the Commission has worked out and approved the following tariff for Co-generation projects and the year wise tariff is indicted below:*

<i>Year</i>	<i>Tariff (Rs. / Unit)</i>
<i>1<sup>st</sup> Year</i>	<b>3.59</b>
<i>2<sup>nd</sup> Year</i>	3.63
<i>3<sup>rd</sup> Year</i>	3.67
<i>4<sup>th</sup> Year</i>	3.72
<i>5<sup>th</sup> Year</i>	3.77
<i>6<sup>th</sup> Year</i>	3.83
<i>7<sup>th</sup> Year</i>	3.90
<i>8<sup>th</sup> Year</i>	3.97
<i>9<sup>th</sup> Year</i>	4.05
<i>10<sup>th</sup> Year</i>	4.14

- f) that for the existing projects in the State, where there was a PPA for twenty years, but the tariff was only for ten years, the State Commission had held that the tenth year tariff would continue. This was for all the projects and not restricted to co-generation projects.
- g) that the appellant in its petition being O.P. No. 13 of 2010 filed on 11.03.2010 before the State Commission for determination of tariff under section 62 and 86 of the Electricity Act 2003 wherein the appellant prayed for fixation of project specific tariff giving its individual costs and sought for a specific tariff of Rs.4.68 per unit. The appellant did not ask for tariff of either



Rs.3.59 or Rs.4.44 per unit to be paid to the appellant. The respondent No.1 had never committed to purchase power at Rs.4.44 per unit, after the expiry of the PPA in February 2009, from the appellant. In fact, upon the expiry of the PPA, the appellant never asked the respondent No.1 to pay the tariff of Rs.4.44 per unit and there remained no correspondence between the parties on this issue. The PPA had come to an end in February 2009 and the appellant by filing O.P. No. 13 of 2010 was seeking a project specific tariff determination for electricity.

- h) that the interim application dated 8.12.2009 was filed by the applicant claiming the interim tariff of Rs.3.83 per unit in O.P. No. 13 of 2010. At that time the appellant also understood that the tariff of Rs.4.44 per unit was not admissible but wanted a higher tariff than Rs.3.59 per unit.
- i) that when the interim application came up before the State Commission on 11.12.2010, the respondent No.1 stated that it would purchase power at the rate fixed by the State Commission in the tariff order dated 11.12.2009 for cogen plants. The respondent No.1 was not willing to purchase electricity at the tariff higher than Rs.3.59 per unit. In terms of the consent of the parties, the State Commission passed the interim order dated 11.12.2010 as an interim measure holding

that the HESCOM will receive supply of energy from the appellant petitioner's cogen units at rates fixed by Commission's order for cogen units dated 11.12.2009 till the Commission dispose of the present petition.

- j) that at the time of passing the impugned order, the intention of the parties was clearly that the tariff was Rs.3.59 per unit, which was less than the tariff of Rs.3.83 per unit as claimed by the appellant at the interim stage. This tariff of Rs.3.59 per unit was applicable to the cogen units at that relevant time.
  
- k) that the appellant by communication dated 14.12.2010, after passing of the interim order on 11.12.2010, claimed interim ad-hoc tariff for supply of electricity relying on the determination by the State Commission by an order dated 11.12.2009, both for the tariff for existing plants and also tariff for Rs.3.59 per unit determined by the State Commission. The appellant further stated in the said communication / letter dated 14.12.2010 that the tariff was purely an interim arrangement for which no PPA was necessary, since the State Commission, in the course of passing the interim order, had made it clear that the present arrangement was an interim one subject to the final fixation of tariff by the State Commission.

- l) that vide communication dated 14.02.2011 and 17.02.2011, the appellant however claimed a tariff higher than Rs.3.59 per unit. The respondent No.1/ DISCOM on 25.03.2011 wrote to the appellant that if the appellant was not willing to sell electricity at Rs.3.59 per unit, the respondent No.1 did not wish to purchase electricity from the appellant and the appellant was further requested not to supply electricity to the respondent No.1.
- m) that the respondent No.1, vide communication dated 03.06.2011, further informed the appellant that the respondent No.1 was willing to purchase electricity at the tariff of Rs.3.59 per unit, subject to the condition that the appellant withdraws the petition from the State Commission.
- n) that it may further be noted that on 02.06.2011, the appellant filed a memo before the State Commission claiming tariff of Rs.4.45 per unit, where as per respondent No.1, the appellant was entitled to only Rs.3.59 per unit. The State Commission clearly held that Rs.3.59 per unit shall be accepted by the appellant which also was not challenged by the appellant in this Tribunal or any other competent forum.
- o) that thereafter the respondent No.1 vide letter / communication dated 14.06.2011 clarified to the appellant that it would pay only

Rs.3.59 per unit giving option to the appellant to opt for an open access if not satisfied with the same.

- p) that on 28.06.2011, the appellant again approached the State Commission seeking higher tariff but no order was passed. The matter was not prosecuted by the appellant as the appellant from August 2011 to January 2013 continuously took adjournments.
- q) that the appellant accepted the payment for energy at the rate of Rs.3.59 per unit without any demur or protest during the entire period. During the said period, the appellant had supplied electricity only for the period from 17.12.2010 to 31.12.2010, 01.01.2011 to 31.01.2011 and 01.02.2011 to 24.02.2011 to respondent No.1, for which the appellant was paid Rs.3.59 per unit. The appellant did not choose to supply electricity to respondent No.1 for the other period and in fact supplied through open access during certain periods. For a period of about three years the said petition being O.P. No. 13 of 2010 was kept pending by the appellant before the State Commission and the appellant supplied electricity for only about 70 days in all.
- r) that the appellant unconditionally withdrew O.P. No. 13 of 2010 on 03.01.2013 by filing a memo before the State Commission.

There were no conditions attached to the withdrawal neither in the withdrawal application filed by the appellant, before the State Commission nor in the withdrawal order dated 03.01.2013 of the State Commission. The last supply by the appellant to respondent No.1 was only on 24.02.2011 (excluding period when the appellant supplied under directions under section 11 at a separate tariff).

- s) that the appellant is illegally seeking to enforce the interim order, after the withdrawal of the original petition before the State Commission. The entire case of the appellant is that the interim order dated 11.12.2010 in O.P. No. 13 of 2010 filed by the appellant should be enforced and the appellant is proceeding on the assumption that the interim order dated 11.12.2010 provides the tariff of Rs.4.44 per unit to the appellant.
  
- t) that the legal basis of the appellant approaching the State Commission for enforcement of the interim order dated 11.12.2010 is misconceived because the interim order gets automatically vacated, once the petition is finally disposed of, either on merits or by withdrawal of the petition from the court, as held by the Hon'ble Supreme Court in *Kalabharati Advertising v. Hemant Vimal Nath Narichania*, (2010) 9 SCC

437 and in *Amarjeet Singh & Ors v Devi Ratan and Ors. (2010)*  
1 SCC 417.

- u) that the interim order gets vacated, if the main petition in which the interim order is passed and any benefit of the interim order automatically gets withdrawn / neutralized on the withdrawal of the petition. Otherwise it would result in a situation wherein the party approaches a court and obtains the interim order and then withdraws the case avoiding adjudication on merits while claiming the benefits of interim order.
  
- v) that it is also true in the present case, the appellant without a PPA supplied electricity for some time under the interim order of the State Commission. However, upon realizing that it would not be profitable to supply electricity to the respondent No.1 and probably getting a higher tariff from third parties, the appellant did not supply electricity and kept the petition pending before the State Commission and finally withdrew it on 03.01.2013. In these circumstances, the appellant cannot be allowed to retain the benefit of interim order after withdrawal of the main / original petition or seek any enforcement of the interim order after the withdrawal of the said petition. In the present case when the petition was withdrawn by the appellant, the parties were to be put back in the same position as if there was no tariff for supply. This was because there was no PPA

and no obligation for purchase by the respondent No.1 and the purchase was only based on the interim order obtained by the appellant, which got vacated when the original petition was withdrawn by the appellant itself. Any benefit derived by the appellant on the strength of the interim order was bound to be given back.

- w) that the State Commission has, however, applying the principle of section 70 of the Contract Act 1870 permitted the appellant to retain the tariff of Rs.3.59 per unit, which was received by the appellant without any protest. This is the substantial benefit provided by the State Commission to the appellant, even though there was no other legal basis for the appellant to claim any tariff. In these circumstances the contention of the appellant for higher tariff than Rs.3.59 per unit is misconceived.

8. Regarding conduct of the appellant lacking bona fide, the learned counsel for the respondent No.1 has drawn our attention to different dates which were fixed in the main petition being O.P. No. 13 of 2010 in which the interim order was passed and the said petition was withdrawn on 03.01.2013 by the appellant petitioner. We have narrated in the upper part of the judgment dates and the orders passed on each date by the State Commission

**9. Our conclusion on the issue:**

From the perusal of the evidence on record and also from the rival submissions, the following facts are established:

- a) The original PPA between the appellant and the then Karnataka Electricity Board (which is the predecessor in interest of respondent No.1) was executed on 10.02.1999 for a period of ten years, wherein the tariff for the first ten years was agreed upon between them and the tariff for the subsequent years from the eleventh year onwards was subject to the extension of PPA with the consent of both the parties.
- b) the tenth year of the PPA period, the tariff was Rs.4.44 per unit which was being paid by respondent No.1 to the appellant for supply of electricity from the project of the appellant.
- c) Original PPA which was for a period of ten years, came to an end after the expiry of ten years period on 08.02.2009.
- d) After the expiry of ten years period of the original PPA, there was no obligation on the part of the appellant to sell electricity to the respondent No.1 and the respondent No.1 (distribution licensee) was also under no obligation to purchase electricity from the appellant, as there was no fresh PPA or renewal of the original PPA for further period.



e) The original PPA expired on 08.02.2009, as stated above, and as per clause 9.1 of Article 9 of the PPA, on the completion of ten years of the PPA, the PPA was to be renewed for a further period of twenty years on such terms and conditions as might be mutually agreed between the parties, namely signatories to the PPA, **90 days prior to the expiry of the said period of ten years.** Thus the parties to the PPA were obliged to initiate proceedings for renewal of the PPA for further period, within 90 days prior to the expiry of said period of ten years. None of the parties including the appellant to the PPA did not take any step for further renewal of the PPA and both the parties allowed the original PPA to end after the expiry of ten years period of the PPA on 08.02.2009. Thus the obligations of the parties under the said PPA came to an end on 08.02.2009. It was on 11.03.2010, namely after a period of more than one year from the date of expiry of the ten year life of the PPA, the appellant petitioner filed a petition, being O.P. No. 13 of 2010 requesting the Commission to determine project specific tariff of electricity of the appellant's cogen project and fix the tariff at the rate of Rs.4.68 per unit. It was in this petition that on the interim application of the appellant claiming interim tariff of Rs.3.83 per unit, the State Commission vide interim order dated 11.12.2010, directed that the respondent No.1 HESCOM will receive supply of energy from the appellant petitioner's cogen units as an interim measures at rates fixed by State Commission's

order dated 11.12.2009 till the disposal of the said petition, fixing the petition for hearing on 30.12.2010.

- f) The orders passed on different dates in the O.P.No. 13 of 2010, by the State Commission, clearly depicts that the appellant petitioner was not sincere and diligent in prosecuting the petition and in the said petition requesting the Commission for project specific determination of tariff, it did not produce certificate regarding station heat rate, in spite of having been granted several opportunities by the State Commission, for more than one year and it was ultimately on 03.01.2013, the appellant petitioner filed an application / memo for withdrawal of the said petition being O.P. No. 13 of 2010 and since there was no objection from the respondent side, the said petition was dismissed as withdrawn vide order dated 03.01.2013 of the State Commission.
- g) After the withdrawal of the O.P. No. 13 of 2010 by the appellant vide Commission's order dated 03.01.2013, the appellant petitioner filed another petition, being O.P. No. 12 of 2013 on 17.04.2013 requesting the State Commission to direct the respondent No.1, Hubli Electricity Supply Co. Ltd. (HESCOM) to comply with the aforesaid interim order dated 11.12.2010 of the State Commission and pay for the energy received from the appellant's cogen projects. The learned State Commission has, by the impugned order dated 18.09.2013, dismissed the appellant's petition being O.P.No. 12 of 2013 holding that

according to the settled law any interim order, passed during the pendency of the petition, merges with the final order disposing of the petition. Once the said petition is finally disposed of, the interim order, in O.P. No. 13 of 2010 directing respondent No.1 to purchase electricity as per the Commission's tariff order during the pendency of the petition, therefore got merged with the final order dated 03.01.2013 dismissing the petition as withdrawn by the appellant petitioner, and further that since in the light of O.P. No. 13 of 2010 the Commission did not determine any rate for the electricity supplied by the appellant petitioner to the respondent HESCOM during the pendency of the petition and therefore, the appellant petitioners claim for payment at the rate of Rs.4.44 per unit for electricity supplied to the respondent HESCOM after dissolution of the interim order is untenable and has to be rejected.

10. For the elaborate discussion on the point in question, we reproduce the relevant part of the impugned order dated 18.09.2013, which is as under :

*“13. Even under the Commission’ Order dated 11.12.2009, the petitioner was not entitled to be paid at Rs.4.44 per unit. Under this order, payment of the 10<sup>th</sup> year tariff was applicable only to the PPAs which were for 20 (twenty) years. Admittedly the PPA dated 10.2.1999 of the petitioner was only for 10 (ten) years and had already expired on 9.2.2009. Further, the*

*respondent-HESCOM was under no obligation to purchase electricity, leave alone at what rate, in the absence of a PPA.*

*14. As observed above, there is no agreement between the parties for supply of electricity and the rate which has to be paid for the electricity supplied. In the absence of an agreement between the parties, the principles of Contract Act enunciated under Section 70 have to be applied, as the supply of electricity was not intended to be free and the electricity supplied has been utilized by the respondent. However, the respondent has agreed to pay Rs. 3.59 per unit and has in fact paid at that rate. Therefore, in our view, the payment made by the respondent to the petitioner is in order and the claim of the petitioner for higher rate cannot be acceded to.*

*15. For the foregoing discussions, the petition is liable to be rejected and accordingly stands dismissed.”*

11. There was lot of exchange of communications between the appellant and the respondent No.1. The respondent No.1 on different occasions requested the appellant petitioner that the respondent No.1 is ready only to sell electricity at the rate of Rs.3.59 per unit and not at any higher rate. Ultimately, the respondent No.1 / DISCOM by sending a letter requested the appellant petitioner not to supply the electricity at any rate above Rs.3.59 per unit and leaving it open to sell electricity in the open access.

The letters exchanged further make it evident that it was the appellant petitioner who continued to supply electricity to the respondent No.1 at the rate of Rs.3.59 per unit even after the expiry of ten years period of PPA and without there being any obligation between the parties.

12. We further note that after the expiry of original PPA on 08.02.2009, the appellant petitioner never approached the State Commission or approached the respondent No.1 seeking renewal of the original PPA or for extension of the period of the original PPA within the mandatory period of 90 days prior to the expiry of the original PPA. The appellant preferred to approach the State Commission by filing the O.P. No. 13 of 2010 seeking project specific tariff determination of its cogen units which was ultimately withdrawn by the appellant petitioner itself. The appellant took benefit of the aforesaid interim order. The same petition was dismissed as withdrawn by the State Commission vide order dated 03.01.2013 on the appellant's withdrawal application. Thus it was the appellant petitioner itself who did not allow the State Commission to decide the said petition on merits. The stand of the appellant petitioner at that stage was that since the appellant petitioner was supplying electricity to the respondent No.1, as per the interim order of the State Commission, there was no need for renewal of the original PPA or extension of the original PPA for a further period.

13. If the appellant was supplying electricity to respondent No.1 without there being any PPA after the expiry of the original PPA, it was supplying at its own risk and for that the learned State Commission, has, by impugned

order, allowed the appellant to retain the payments made to it, at the rate of Rs.3.59 per unit by respondent No.1, under section 70 of the Contract Act 1870. We can see the conduct of the appellant in the way it took part in the disposal of the O.P. No. 13 of 2010 where the appellant did not file any certificate regarding station heat rate for more than one year and continuously took time for that purpose and when the proper stage came, the appellant simply filed a memo seeking withdrawal of the said petition, being No. 13 of 2010, which was dismissed as withdrawn by the State Commission's order dated 03.01.2013.

14. The learned counsel for the appellant relied on the decision of the Hon'ble Supreme Court reported in *Tayabbhai M. Bagasarwalla v. Hind Rubber Industries Pvt. Ltd. (1997) 3 SCC 443*. After going through the said case law we find that the case law was on the proposition that an interim order is binding on the parties and is to be enforced. This was during the pendency of the main petition when the interim order was in force. In this judgment the Hon'ble Supreme Court clearly held that if the suit is finally decided against the party, the parties should be put back in the position that he was on the date of the suit. The Hon'ble Supreme Court further observed that even if the court has no jurisdiction to entertain the suit, but if any interim order even without jurisdiction is passed by the court, then the same will have to be complied with and the plea that the interim order was passed without jurisdiction by the court will be no excuse for the enforcement of interim order. Thus this case law is not applicable in the case before us.

15. In *Kalabharati Advertising v. Hemant Vimal Nath Narichania*, (2010) 9 SCC 437 it was observed by the Hon'ble Supreme Court that no litigant can derive any benefit from the mere pendency of a case in a court of law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. The Hon'ble Supreme Court further observed that it is not permissible for a party to file a writ petition, obtaining certain orders during the pendency of the petition and withdraw the same without getting proper adjudication of the issue involved therein and insist that the benefit of the interim order or consequential orders passed in pursuance of interim order by the writ court would continue. The benefit of the interim relief automatically gets withdrawn / neutralized on withdrawal of the said petition. In such a case concept of restitution becomes applicable otherwise the party would continue to get benefit of the interim order even after losing the case in a court. Once a foundation is removed the super structure is bound to fall. The interim relief is granted only in aid of and as ancillary to the main relief which may be available to the party at the time of final adjudication by the court. Further it was held that after obtaining interim relief, the party cannot avoid final adjudication of matter on merit and claim that he would enjoy the fruit of interim relief even after withdrawal / dismissal of the case. The same view has been reiterated by the Hon'ble Supreme Court in *Amarjeet Singh & Others v. Devi Ratan and Ors.* (2010) 1 SCC 417.

16. In view of the above discussion, we do not find any merit in submissions / contentions raised on behalf of the appellant. The interim order dated 11.12.2010 passed by State commission in O.P. No. 13 of 2010 stood merged with the final order dated 03.01.2013 whereby the said petition was dismissed as withdrawn by the State Commission on the withdrawal application of the appellant petitioner. We agree to the findings recorded by the State Commission in the impugned order as they are based on correct, proper and legal appreciation of the evidence and other material available on record. In the result, the said issue is decided against the appellant. We further hold that the appellant is entitled to Rs.3.59 per unit for the supply of energy during the said period i.e. December, 2010 to February, 2011. The instant appeal is liable to be dismissed.

**17. Summary of findings:**

The interim order dated 11.12.2010 passed by State Commission in O.P. No. 13 of 2010 stood merged with the final order dated 03.01.2013 passed by State Commission whereby the said petition was dismissed as withdrawn by the State Commission on the application of the appellant petitioner seeking withdrawal of the said petition being O.P. No. 13 of 2010. Since, the interim order had merged with the main order disposing of the petition, there remains no question of any enforcement of the said interim order after the disposal of the main petition which was not allowed to be decided on merits by the appellant petitioner because at the fag end the appellant petitioner moved the application seeking withdrawal of the said



petition without obtaining the decision of the petition on merits relating to determination of project specific tariff of the appellant's cogen units.

18. Consequently, the instant appeal is dismissed as being devoid of merits and impugned order dated 18.09.2013 passed by State Commission is hereby affirmed. No order as to costs.

Pronounced in the open court on this **16<sup>th</sup> day of February, 2015.**

(T. Munikrishnaiah )  
Technical Member

( Justice Surendra Kumar )  
Judicial Member



**REPORTABLE / ~~NON-REPORTABLE~~**