

3. **KARNATAKA POWER TRANSMISSION CORPORATION LTD.,**
Kavery Bhavan,
Bangalore - 560 009
Karnataka)
4. **BANGALORE ELECTRICITY SUPPLY COMPANY LIMITED,**
K.R. Circle,
BENGALURU – 560 001)
5. **KARNATAKA ELECTRICITY REGULATORY COMMISSION**
912, 6 & 7TH Floor,
Mahalakshmi Chambers,
Near ING VYSYA Bank,
Mahatma Gandhi Road,
Bengaluru,
Karnataka - 560001)
- ... Respondents**

Counsel for the Appellant(s)

:Mr. Basava Prabhu Patil, Sr. Adv.
Mr. Shailesh Madiyal
Ms. Shivani Srivastava

Ms. Rachitha

Counsel for the Respondent(s) :

Mr. Anand K. Gaensan
Ms. Swapna Seshadri for **R.1 to R-4**

J U D G M E N T

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON:

1. The Appellant is a generating company which has set up a 7.5 MW biomass-based power project at Marlanahalli,

Gangavathi Taluk, Koppal district in Karnataka. Respondent No.3 is Karnataka Power Transmission Corporation Ltd.(“**KPTCL**”), the predecessor of Respondent No.1 Gulbarga Electric Supply Company Ltd.(“**GESCOM**”). Respondent No.2 is the State Load Despatch Centre (“**SLDC**”). Respondent No.4 is Bangalore Electric Supply Company Ltd. and Respondent No.5 is the Karnataka Electricity Regulatory Commission (“**the State Commission**”). In this appeal, the Appellant has challenged judgment and order dated 11/02/2016 passed by the State Commission dismissing OP No.33/2014 filed by the Appellant.

2. Gist of the facts disclosed in the appeal memo is as under:

- a) On 10/06/2002 the Appellant entered into a Power Purchase Agreement (“**PPA**”) with KPTCL. The said PPA was assigned to GESCOM upon unbundling of KPTCL. Under the PPA the tariff was fixed at Rs.3.85 per khr with an annual escalation of 5% based on the guidelines issued by the Ministry of Non-Conventional Energy Sources, Government of India on 13/09/1993.

On 10/06/2005 the PPA was assigned to GESCOM.

- b) Pursuant to the PPA, the Appellant commenced generation and supply of power from July 2005 to GESCOM and submitted monthly tariff invoices as per Article 6.1 of the PPA. However, GESCOM committed persistent defaults and failed to pay the amounts due within 15 days from the date of receipt of tariff invoices as per Article 6.1 of the PPA. GESCOM failed to pay the interest on arrears as required under Article 6.3 and 6.4 of the PPA. It defaulted in opening Letter of Credit (“**LC**”) as per Article 6.6.

- c) On 28/10/2011 as the failure to meet the aforesaid financial and material obligations constituted event of default by GESCOM as specified under Article 9.2.2 of the PPA, the Appellant issued notice dated 28/10/2011 specifying the details of aforesaid event of defaults. Despite receipt of the default notice, GESCOM failed to pay the interest for delayed

payments or open irrevocable LC though tariff invoices were paid belatedly much after 30 days.

d) On 08/12/2011 and 30/12/2012 the Appellant issued reminder letters to GESCOM. As GESCOM failed and neglected to cure the defaults, the Appellant issued Termination Notice dated 27/02/2012 which was delivered to GESCOM on 28/02/2012. Accordingly, the PPA stood terminated.

(e) The Appellant then entered into a PPA dated 01/06/2012 with the PTC India Ltd. (“**PTC**”), a trader, for sale of electricity through Exchange. As the transaction involved Inter-State transmission of electricity, it required No Objection Certificate (“**NOC**”) of SLDC. However, SLDC by its letter dated 03/07/2012 declined to issue NOC for open access on the ground that the Appellant was having valid PPA with the GESCOM. Therefore the Appellant filed a petition before the Central Electricity Regulatory Commission (“**the CERC**”) praying for a direction

against the SLDC to issue NOC and for other consequential reliefs. The CERC by its order dated 25/03/2013 dismissed the said petition. The Appellant, being aggrieved by the said disposal, preferred appeal before this Tribunal being Appeal No.17 of 2013, which was dismissed on 05/09/2014. The CERC as well as this Tribunal held that the State Commission has to adjudicate upon the validity of the termination or otherwise of the PPA in question before it could consider directing the SLDC to issue NOC.

- f) In the meanwhile, GESCOM filed OP No.7 of 2013 before the State Commission praying for a declaration that the PPA dated 10/06/2002 and the supplemental PPA dated 14/11/2006 are valid and binding and for quashing the Termination Notice dated 27/02/2012. The Appellant filed its objections. On 17/10/2013, a memo was filed by GESCOM for withdrawal of

the said petition and it was dismissed as withdrawn on 17/10/2013.

- g) On 17/09/2014, the Appellant filed an application before the SLDC requesting for grant of approval for entering into a Wheeling and Banking Agreement (“**W and BA**”) for supply of power from its generating station to third parties in Bengaluru. However, SLDC failed to accord approval for W and BA.
- h) The Appellant in the circumstances filed OP No.33 of 2014 before the State Commission praying for a direction to SLDC and KPTCL to grant W and BA to the Appellant and for a direction to SLDC and KPTCL to sign W and BA with the Appellant.
- i) By the impugned judgment the State Commission dismissed OP No.33 of 2014 *inter alia* holding that withdrawal of OP No.7 of 2013 by GESCOM did not preclude GESCOM from denying the termination of the PPA. The State

Commission further held that the Appellant not having prayed for any declaration that the PPA stood terminated, the State Commission was not required to consider the validity of termination of PPA. In this appeal the Appellant has assailed the said judgment.

3. We have heard Mr. Basava Prabhu Patil, Senior Advocate who appears for the Appellant. We have perused the written submissions filed by him. Gist of the submissions is as under:

- a) Upon delivery of the termination notice on 28/02/2012 the termination of the PPA dated 10/06/2002 was complete as per Clause 9.3.2 thereof.
- b) GESCOM withdrew OP No.7 of 2013 filed by it to challenge the termination notice on 01/10/2013 without any liberty. Any fresh proceedings for the same relief are barred by *res judicata* /constructive *res judicata*.

- c) There can be no dispute that the PPA was validly terminated.
- d) Since the PPA was validly terminated as per the provisions of the PPA the Appellant had not raised the question of validity of termination. The State Commission was wrong in observing that the question of termination of the PPA was a debatable issue.
- e) If GESCOM had any grievance about the termination of the PPA it was for GESCOM to challenge it. In fact, GESCOM had withdrawn petition filed by it seeking quashing of the termination.
- f) Until the termination of the PPA is declared invalid in duly constituted proceedings the termination is valid.
- g) It was for GESCOM to get the termination declared void and not the Appellant.
- h) An order is valid until such time as it is declared to be invalid. Any party which wants to get rid of

such an order is required to have the same set aside or declared invalid (**Board of Trustees of Port of Kandla v. Hargovind Jasraj & Anr.**¹ and **I. S. Sikandar(Dead) by LRs v. K. Subramani & Ors.**².)

- i) GESCOM's reliance on the Supreme Court's judgment in **Manglore Electricity Supply Company Ltd. v. M/s AMR Power Pvt. Ltd & Anr.**³ is misplaced. The said judgment supports the Appellant.
- j) The State Commission has wrongly relied on Order XXIII Rule 1 of the CPC and the judgments thereunder to come to the conclusion that there was no bar on GESCOM taking the defence of invalidity of the termination of the PPA. The PPA is terminated on receipt of the Termination Notice by GESCOM as per Article 9.3.2 of the PPA. Such termination is valid unless the same is set aside in duly constituted legal proceedings.

¹ (2013) 3 SCC 182

² 2013(15) SCC 27

³ (judgment dated 15/09/2016 in CA No.1665 of 2015)

In the absence of any challenge to the termination GESCOM cannot, in defence of the Appellant's petition, contend that the termination was invalid.

- k) Without prejudice to the above, even on merits the termination of the PPA is valid. In the circumstances the impugned order deserves to be set aside.

4. We have heard Mr. Ganesan learned counsel appearing for GESCOM. We have perused the written submissions filed by him. Gist of the submission is as under:

- a) It is well-settled position of law that the withdrawal of a petition does not involve any adjudication on the merits of the petition filed and the order dismissing the petition as withdrawn does not constitute *res judicata* between the parties. By application of the principles contained in Order XXIII Rule 1 of the CPC, the only legal consequence of the withdrawal is that the party who withdraws the

petition would be precluded from instituting another petition against the same Respondent on the same issue. (See: **Kandapazha Nadar & Ors. v. Chitraganiammal & Ors**⁴ and **Mangalore Electricity Supply Co.** (supra).

- b) Withdrawal of the petition by GESCOM would not in any manner result in a situation wherein termination of the PPA gets effected or that GESCOM is precluded from disputing the termination of the PPA.
- c) The onus of having the declaration that the PPA is terminated is on the Appellant as it is the Appellant who requires permission for supply of electricity to third parties and the termination of the PPA is disputed by GESCOM.
- d) The principal issue that was required to be adjudicated upon was whether the PPA is terminated. The Appellant made no such prayer. GESCOM denied the validity of the termination notice. The only issue that arose before the State

⁴ (2007)7 SCC 65

Commission was whether upon withdrawal of OP No.7 of 2013 by GESCO, GESCO was barred from disputing the validity of the termination of the PPA. The State Commission rightly held that there was no such bar.

- e) Even on the merits there was no case of the Appellant alleging any default on the part of GESCO.
- f) In any event there being no prayer on the issue of termination of the PPA, the petition was liable to be dismissed in view of the fact that the termination of the PPA was disputed by GESCO.
- g) The PPAs entered into by the distribution licensees are for supply of electricity to the public at large. The generator may unilaterally claim termination of the PPA. But public interest requires that the termination of the PPA is determined on merits before the electricity can be diverted and supplied to third parties.

h) In the circumstances there is no merit in the appeal. It is liable to be dismissed.

5. To understand the nature of the controversy it is necessary to have a look at the background of the case. Under the CERC (Open Access in Inter-State Transmission) Regulations 2008 (**“Inter-State Open Access Regulations”**) the Appellant is an Inter-State Entity. Under Section 32(1) of the said Act, the SLDC as the apex body has to ensure integrated operation of the power system in a State. Under Section 32(2)(a) of the said Act the SLDC is responsible for optimum scheduling and dispatch of electricity within a State in accordance with the contracts entered into with the licensees or the generating companies operating in the State. As per the Inter-State Open Access Regulations any transaction involving Inter-State transmission requires NOC of the SLDC. Under the Inter-State Open Access Regulations the SLDC has to verify the availability of metering and energy accounting infrastructure and surplus transmission capacity before granting NOC to an application for Inter-State Open Access. Therefore, when the distribution licensee claims that it has a valid PPA with the generating company and power from the

generating station has to be dispatched within the State for consumption by the distribution licensee, then the SLDC cannot give NOC for Inter-State Open Access for the same power as sought by the generating company on the ground of termination of the PPA ignoring the claim of the distribution licensee.

6. In this case, the Appellant, who is an Inter-State Entity under the Inter-State Open Access Regulations entered into a PPA with PTC for sale of electricity through the Exchange. As the transaction involved Inter-State transmission of electricity it required NOC of the SLDC. Accordingly, the Appellant applied to SLDC for grant of NOC for Inter-State Open Access. The Appellant's case is that its PPA with GESCOM is terminated. GESCOM's case is that it is not validly terminated. For considering whether NOC should be granted to the Appellant for Inter-State Open Access, it was necessary to decide whether the Appellant's PPA with GESCOM is validly terminated or not.

7. Admittedly, SLDC cannot decide whether the PPA is validly terminated or not. There is no dispute that the State Commission is empowered to adjudicate upon the dispute

regarding termination of the PPA between the Appellant and GESCOM under Section 86(1) (f) of the said Act. When the Appellant approached the CERC by filing Petition No.227/2012 being aggrieved by SLDC's communication dated 03/07/2012 refusing to grant NOC the CERC rightly dismissed the petition holding that there was dispute regarding termination of the PPA and that dispute fell within the jurisdiction of the State Commission, who alone can adjudicate on the validity of the PPA. This Tribunal by its judgment dated 05/09/2014 dismissed the Appellant's appeal carried from the said order and confirmed the CERC's view. We are informed that the judgment of this Tribunal is challenged in the Supreme Court. The Supreme Court has admitted the appeal. However, there is no stay to the operation of the judgment.

8. In the impugned order the State Commission has taken note of the above facts, but it has taken a view that since the Appellant had not made a prayer for a declaration that the PPA in question has been validly terminated and had not argued the case on merits it need not consider the question of validity of the

termination of the PPA. How correct is this approach is what we are going to examine.

9. At this stage it is necessary to have a look at the averments made in OP No.33 of 2014 on which the impugned order is passed. In the said petition the Appellant has entered the entire history of litigation which we have noted hereinabove. Though whether the termination of PPA is legal or not is not adjudicated upon by the State Commission the Appellant has in this petition proceeded on the assumption that the termination is valid. However, the Appellant has asserted that all these facts which include the termination of PPA have no bearing on the present case as they relate to Inter-State Open Access while the present case relates to Intra State Open Access. But the relevance of termination of PPA even in Intra State Open Access is accepted by the Appellant in the petition. In ground 'B' of the petition, the Appellant has stated as under:

“B. Because there is no subsisting PPA between the parties. In fact, once it was demonstrated before this Hon’ble Commission that Event of Default was not cured as the LC was not opened at all, the Respondent Supply Company withdrew the Petition. Once the petition came to be withdrawn, the Termination Notice attained finality. Hence, there is no bar for the nodal agency to provide Wheeling and Banking.”

As already noted the Appellant has proceeded on the assumption that PPA is validly terminated and withdrawal of OP No.7 of 2013 by GESCOM is the sheet anchor of the Appellant's case. The said withdrawal according to the Appellant gives finality to the termination of PPA. We shall therefore turn to the question of legal effect of the said withdrawal.

10. Admittedly GESCOM had filed OP No.7 of 2013 before the State Commission praying *inter alia* for a declaration that the PPA dated 10/06/2002 and supplemental PPA dated 14/11/2006 are valid and binding and for quashing the Termination Notice dated 27/02/2012. On 17/10/2013 GESCOM withdrew the petition. The State Commission by its order dated 17/10/2013 dismissed it as withdrawn. It was argued before the State Commission that withdrawal of OP No.7 of 2013 amounted to GESCOM accepting the termination of the PPA in question and GESCOM was barred from taking the defence in the present case that the termination of the PPA was invalid. The State Commission in the impugned order held that withdrawal of OP No.7 of 2013 does not amount to *res judicata* and did not preclude GESCOM from taking a defence that there existed a valid PPA and that termination of the

PPA was invalid. Before us there has been considerable argument on this issue. We shall therefore refer to the judgments of the Supreme Court to which our attention is drawn by the counsel.

11. In **Kandapazha Nadar**, the appeal to the Supreme Court was filed by the Defendants in the Plaintiff's suit for recovery of possession of the suit property and for past and future mense profits. The Plaintiff's case was that he had purchased the suit property from one Chelliah Nadar under sale deed dated 26/02/1973. According to the Plaintiff the Defendants had fraudulently created a conveyance deed in their favour in respect of the suit property. The Defendants filed a suit in the District Munsif's court and obtained an order of injunction and on that basis they entered the suit premises though they had no right. The Defendants' suit was dismissed. The first appellate court passed a decree in favour of the Defendants. The Plaintiff preferred a second appeal to the High Court. During the pendency of the said appal the Defendants were permitted to withdraw the suit but without liberty for filing a fresh suit on the same cause of action. Since the Defendants were illegally cultivating the suit property the Plaintiff filed the suit for

possession and mense profits. The Defendants defended the suit *inter alia* on the ground that the suit filed by the Defendants was decreed by the first appellate court and when the Plaintiff's second appeal was pending the Defendants withdrew the suit as the Plaintiffs had not proved execution of sale deed in their favour by Chelliah Nadar. The trial court decreed the suit. The first appellate court observed that the withdrawal of suit debarred the Plaintiffs therein from filing a subsequent suit, but did not affect the defence of the Defendants. The High Court in the second appeal held that by application of general principles of *res judicata*, the defence of the Defendants was barred in view of withdrawal of their suit. This issue was debated before the Supreme Court in the Defendants' appeal. The Supreme Court while allowing the Defendants' appeal considered relevant judgments on the point and relevant provisions of the Code of Civil Procedure ("**CPC**") particularly Order XXIII Rule 1(3) and held that the position in law is clear that when the court allows the suit to be withdrawn without liberty to file a fresh suit, without any adjudication, such order allowing withdrawal cannot constitute a decree and it did not affect the Defendants' defence that the sale deed executed by Chelliah Nadar in favour of the

Plaintiff was not valid. Following are the relevant paragraphs of the said judgment:

“15. *In (Rani) Kulandai Pandichi v. Indran Ramaswami Pandia Thevan [AIR 1928 Mad 416] it has been held as follows:*

“Permission to withdraw a suit decides no matters in controversy and does not confer any rights on a party and the fact that the person withdrawing is precluded from bringing a fresh suit on the same cause of action cannot be said to have that effect. It has been held that an order permitting the withdrawal of a suit or appeal is not a decree within the meaning of the Civil Procedure Code. We need only refer to Patloji v. Ganu[ILR (1891) 15 Bom 370], Jogodindro Nath v. Sarut Sunduri Debi[ILR (1891) 18 Cal 322] and Abdul Hossein v. Kasi Sahu[ILR (1900) 27 Cal 362].”

[emphasis supplied]

16. *In Saraswati Bala Samanta v. Surabala Dassi [AIR 1957 Cal 57] it has been held vide para 3 as follows:*

“3. The order recording the withdrawal of the suit is not a decree. There was no question therefore, of drawing the order as a decree. The order recording the withdrawal can however be formally drawn up under Rule 187 Part I, Chapter 1 of the Civil Rules and Orders, Vol. 1, inasmuch as the order directed payment of costs by the plaintiff to the defendant. We, therefore, treat the so-called decree as an order.”

[emphasis supplied]

17. *In Devassi v. Anthoni [AIR 1969 Ker 78] it has been held vide para 1 as follows:*

“1. None of the conditions in sub-section (1) of Section 100 of the Code is here satisfied. Indeed, the dismissal of the appellant-defendant’s appeal to the court below can be supported on the short ground that that appeal did not lie. This is a case where the plaintiff withdrew his suit under sub-rule (1) of Rule 1 of Order 23—he was competent to do that and required nobody’s permission since he was the sole plaintiff, the defendant, as we shall presently see, being in no sense a plaintiff—and the so-called dismissal of the suit as withdrawn by the trial court was not really a dismissal but a mere recording of the fact of withdrawal. It determined none of the matters in controversy in the suit—there was no claim by

*the defendant to be determined—and is not a decree as defined by Section 2(2) of the Code. It stands on the same footing as a dismissal under Rule 8 of Order 9 which, because the word, ‘dismissal’ implying a determination on the merits is used by the rule, is expressly excluded from the definition in Section 2(2) by clause (b) of the exclusions therein. It is the provision in sub-rule (3) of Rule 1 of Order 23 (like that in Rule 9 of Order 9) and not any principle of res judicata that precludes the plaintiff in such a case from bringing a fresh suit in respect of the same matter. It follows that there being no decree no appeal lay under Section 96 of the Code. Reference may be made in this connection to *Kulandai v. Ramaswami*[AIR 1957 Cal 57], *Saraswati Bala v. Surabala Dassi*[AIR 1957 Cal 57] and *Raisa Sultana Begam v. Abdul Qadir*[AIR 1966 All 318].”*

[emphasis supplied]

18. *In Nathji v. Languria [AIR 1925 All 272] it has been held that where in the case of an application to withdraw a suit in terms of Order 23 Rule 1(2) CPC, the court allows the suit to be withdrawn but refuses permission to bring a fresh suit, the court’s order is erroneous. It was held that if the trial court saw no reason for allowing the withdrawal in terms of Order 23 Rule 1(2), the trial court should have refused the application seeking liberty to file a new suit and it should have proceeded with the suit on merits.*

19. *In view of the above judgments, the position in law is clear that when the court allows the suit to be withdrawn without liberty to file a fresh suit, without any adjudication, such order allowing withdrawal cannot constitute a decree and it cannot debar the petitioners herein from taking the defence in the second round of litigation as held in the impugned judgment. The above judgments indicate that if the plaintiff withdraws the suit, the order of the court allowing such withdrawal does not constitute a decree under Section 2(2) of the Code. That in any event, it will not preclude the petitioners herein (the defendants in second round) from raising the plea that the sale deed executed by Chelliah Nadar on 26-2-1973 in favour of Thangaraj Nadar was not true and valid. Thus, the civil appeal needs to be allowed.”*

12. In **Kandla Port**, Kandla Port (“**the lessor**”) had leased a plot of land to Respondent No.2 (“**the lessee**”) on long term basis. The lessee committed default in the payment of lease rent.

Hence, the lessor issued notice to the lessee calling upon the lessee to pay the outstanding amount with interest and stating that the lease would stand determined as per the lease deed and possession of the demised plot would be taken over by the lessor. Since the lessee did not pay the outstanding arrears the lessor by an order terminated the lease. The lessee filed a suit for permanent injunction against the lessor which was dismissed for non prosecution. Six years thereafter, one Hargovind, Respondent No.1 therein filed a suit against the lessee for permanent prohibitory injunction stating that the lessee had sold the demised plot to him and that he was in possession. The said suit was also dismissed for non prosecution. Five years later, Respondent No.1 filed another suit for a declaration and permanent injunction in which the Plaintiff for the first time questioned the termination of the lease. This suit was decreed by the trial court. The first appellate court affirmed the said decree so far as the trial court had declared that the lease deed had not been validly terminated by the lessor. Kandla Port's second appeal was dismissed by the High Court. The said order was challenged by the Kandla Port before the Supreme Court. It was argued on behalf of the lessor that the courts below erred in

holding that the termination of the lease was invalid. It was argued on behalf of the lessee that the termination of the lease was illegal and non-est in law and so the lessee could ignore it and so long as the lessee or anyone of them remained in possession, a decree for injunction could be passed by the competent court. The Supreme Court rejected this submission *inter alia* observing that no order bears a label of its being valid or invalid on its forehead. Termination of the lease deed was an order which the person affected by it must get rid of by getting it set aside. Anyone affected by any such order ought to seek redress against the same within the period permissible for doing so. The Supreme Court held that an order will remain effective and lead to legal consequences unless the same is declared to be invalid by a competent court. Kandla Port's appeal was in the circumstances allowed.

13. In **I.S. Sikandar**, the Plaintiff had entered into an agreement for sale of the suit property with Defendant Nos.1 to 4. Part consideration was paid and the Plaintiff was put in possession. There were disputes between the two and Defendant Nos.1 to 4 sent notice dated 06/03/1985 to the Plaintiff pointing

out that he had failed to perform his part of the contract. The Plaintiff was called upon to pay balance consideration and get the sale deed executed on or before 18/03/1985 failing which legal action would follow. Defendant Nos.1 to 4 by a reply extended the time upto 10/4/1985 and stated that on failure of the Plaintiff to comply with his part of the contract the agreement for sale would be terminated. It is not necessary to enter all the facts. Suffice it to say that the agreement for sale was terminated by Defendant Nos. 1 to 4 with effect from 10/04/1985 by letter dated 28/03/1989. The Plaintiff therefore filed a suit for specific performance and permanent injunction against Defendant Nos.1 to 4 who did not appear in the suit. The Appellant before the Supreme Court, that is Defendant No.5 made an application for impleadment on the ground that he had purchased the suit property from Defendant Nos.1 to 4 which was allowed. The trial court partly allowed the suit in favour of Defendant No.5. The trial court held that Defendant No.5 was owner of the suit property and was entitled to possession of the suit property. The High Court on an appeal preferred by the Plaintiff set aside the trial court's judgment. On appeal the Supreme Court set aside the High Court's judgment and restored the trial court's

judgment. The Supreme Court observed that the Plaintiff had not sought for declaratory relief to declare the termination of agreement for sale as bad in law. The Supreme Court observed that in the absence of such prayer the suit for decree of specific performance on the basis of agreement for sale and consequential relief of permanent injunction is not maintainable in law. It was observed that the relief sought on the basis of non-existing agreement for sale was wholly unsustainable in law. The Appellant has relied on these observations of the Supreme Court.

14. In **Mangalore Electricity Supply Company** the Appellant distribution licensee and Respondent No.1 renewable power generator entered into a PPA dated 02/08/2006 for supply of electricity. Respondent No.1 approached the State Commission by filing OP No.28 of 2009 for a declaration that the PPA executed on 02/08/2006 was null and void and for grant of open access. OP No.28 of 2009 was dismissed on 23/12/2010. Respondent No.1 by letter dated 26/05/2011 served a default notice as provided in Article 9.3.2 of the PPA and requested the Appellant to remedy the default. The Appellant in its reply stated that an endeavour would be made to make the payments without delay

and LC would be opened. Not being satisfied with the reply, Respondent No.1 issued a Notice of Termination of the PPA on 22/07/2011. Respondent No.1 filed OP No.48 of 2011 seeking a declaration that the PPA dated 02/08/2006 stood terminated and was not subsisting. On 22/03/2012 Respondent No.1 withdrew OP No.48 of 2011. Respondent No.1 filed Petition No.141/MP/2012 before the State Commission seeking permission for inter-state open access to supply electricity to third parties. On 23/08/2012, the Appellant filed OP No.37 of 2012 before the State Commission seeking quashing of Termination of Notice dated 22/07/2011 and for a declaration that the PPA dated 02/08/2006 was valid and subsisting. The CERC dismissed Respondent No.1's petition for grant of open access in view of the pendency of OP No.37 of 2012 filed by the Appellant in which validity of termination notice was challenged. The State Commission directed status quo to be maintained in OP No.37 of 2012. The said interim order was challenged in this Tribunal. This Tribunal continued the interim order but clarified that the order of status quo passed by the State Commission does not mean that the operation of the termination of the PPA was stayed. By order dated 14/08/2013 the State Commission

dismissed OP No.37 of 2012 upholding the Termination Notice dated 22/07/2011. Appeal carried from the said order was dismissed by this Tribunal on 17/10/2014. The said order was challenged in the Supreme Court. The Supreme Court upheld the Termination Notice dated 14/08/2013 issued by Respondent No.1 terminating the PPA. It was urged before the Supreme Court that Respondent No.1 had withdrawn OP No.48 of 2011 seeking a declaration that the PPA dated 02/08/2006 stood terminated and was not subsisting. Therefore, Respondent No.1 should not have been permitted to take a defence justifying the termination notice and seeking open access particularly when OP No.48 of 2011 was withdrawn without seeking permission to initiate fresh proceedings. It was argued that withdrawal of OP No.48 of 2011 would act as a bar under Order XXIII Rule 1 of the CPC. While dealing with this submission the Supreme Court referred to its judgment in **Sarguja Transport Service v. State Transport Appellant Tribunal**⁵ where it was held that withdrawal of a writ petition without seeking permission to file a fresh writ petition would bar filing of a fresh petition. Referring to its judgment in **Kandapazha Nadar** the Supreme Court observed that there was however no bar for taking a defence in a

⁵(1987) SCC 5

fresh round of litigation in respect of the same point involved in a suit which was withdrawn without seeking liberty. The Supreme Court held that it was legally permissible for Respondent No.1 to raise a defence that the termination notice was valid in OP No.37 of 2012 even though Respondent No.1 had withdrawn OP No.48 of 2011 seeking a declaration that PPA dated 02/08/2006 was terminated pursuant to valid Termination Notice dated 22/07/2011. While so ruling, the Supreme Court observed that strictly speaking there was no need for Respondent No.1 to seek such a declaration as the PPA was terminated by issuance of a notice dated 22/07/2011. The Appellant has relied on these observations.

15. A careful reading of **Kandapazha Nadar** leads us to conclude that simplicitor withdrawal of a petition without adjudication on the merits of the matter and consequent order dismissing the petition as withdrawn does not constitute res judicata between the parties. Undoubtedly however the party which withdraws the petition would be precluded from instituting another petition against the same Respondent on the same issue. This is based on the principle contained in Order XXIII Rule 1 of

the CPC. But the withdrawal of the petition would not in any manner preclude the Petitioner from taking a defence on the grounds raised in the petition withdrawn by him against the same Respondent. Applying this to the facts of the case it can be said that withdrawal of OP No.7 of 2013 filed by GESCOM for a declaration that PPA dated 10/06/2002 and supplemental PPA dated 14/011/2006 are subsisting and for quashing of Termination Notice dated 27/02/2012 does not preclude GESCOM from raising a defence in OP No.33 of 2014 filed by the Appellant *inter alia* for grant of W and BA that the Termination Notice of the Appellant is invalid; that the PPA is not terminated and that it is valid and subsisting. In our opinion the Appellant cannot draw any support from **Kandla Port** and **I.S. Sikandar**. In those cases the Supreme Court has not considered the question as to whether when the court allows the suit to be withdrawn without liberty to file a fresh suit, without any adjudication, such withdrawal being not a decree can debar the Plaintiff from raising defence in respect of the same points involved in the withdrawn suit in the second round of litigation.

16. In **Mangalore Electricity Supply Company**, the Supreme Court has stated that withdrawal of a writ petition without seeking permission to file a fresh writ petition would bar filing of a fresh petition. But pertinently, the Supreme Court has referred to **Kandapazha Nadar** and observed that there was however no bar for taking a defence in a fresh round of litigation in respect of the same point involved in a suit which was withdrawn without seeking liberty. The observation of the Supreme Court on which reliance is placed by the Appellant that strictly speaking there was no need for Respondent No.1 to seek a declaration as the PPA was terminated by issuance of notice does not help the Appellant in the facts of this case. It does not in any way dilute the law laid down in **Kandapazha Nadar** which the Supreme Court has affirmed in this case.

17. In view of the above we are of the opinion that the State Commission was right in coming to a conclusion that GESCOM could deny the termination of the PPA in question. But we are not inclined to accept the State Commission's stand that since the Appellant has not prayed for a declaration that the PPA in question has been validly terminated and since the Appellant did

not argue the case on merits, it was not necessary for the State Commission to consider the validity of the termination of the PPA. The State Commission has observed that the Appellant has assumed that withdrawal of OP No.7 of 2013 amounted to termination of the PPA attaining finality. It was apparent that both sides were not *ad idem* on the issue of termination of the PPA. The State Commission has therefore observed that termination of the PPA was a debatable issue. It was in the circumstances necessary for the State Commission to frame the issue in this regard and deal with it. It is submitted by GESCOM that the PPAs entered into by distribution licensees are for supply of electricity to public at large and therefore public interest is involved in this case. It is also submitted by GESCOM that the generator may unilaterally claim that the PPA is terminated, but public interest requires that the termination of the PPA is determined on merits before electricity can be diverted and supplied to third parties and it is for this purpose that Inter-State Open Access Regulations specify that open access can be granted only if it is undisputed by the parties that there is no valid and subsisting PPA. We entirely agree with this submission. In the circumstances, in public interest it is necessary to set aside the

impugned order and remand the matter to the State Commission with a direction to adjudicate whether the PPAs between the Appellant and GESCOM are terminated by the Termination Notice dated 27/02/2012.

18. We must however, note that Mr. Patil learned counsel appearing for the Appellant has levelled a scathing attack on the conduct of Respondent No.1. Counsel submitted that Respondent No.1 consistently defaulted in making payment. Respondent No.1 defaulted in opening LC. Respondent No.1 withdrew petition challenging termination notice. Counsel submitted that if this Tribunal sets aside the impugned order and remands the matter, that would amount to reopening the entire matter and giving a chance to Respondent No.1 to re-agitate the issue regarding validity of termination notice. In this connection we must note that we have not expressed any opinion on the merits of the case or conduct of the parties. All contentions of the parties are kept open. But we cannot lose sight of the fact that the decision as to whether termination notice is valid or not or PPA was validly terminated or not is the crux of the matter and

needs to be decided. The central and most vital issue cannot remain undecided and hence the matter needs to be remanded.

19. In the circumstances, we pass the following order:

- (a) Impugned order dated 11/02/2016 passed by the State Commission is set aside.
- (b) The State Commission is directed to decide, after hearing both sides, whether there is valid termination of PPA dated 10/06/2001 and supplemental PPA dated 14/11/2006 entered into by the Appellant with GESCOM, by the Termination Notice dated 27/02/2012 and then pass consequential order on the Appellant's OP No.33 of 2014.
- (c) We have not expressed any opinion on the above issue. The State Commission shall dispose of OP No.33 of 2014 independently and in accordance with law.

(d) The entire exercise should be concluded as expeditiously as possible and preferably within six months from the date of receipt of this judgment.

20. The appeal is disposed of in the aforesaid terms.

21. Needless to say that the pending IAs, if any shall stand disposed of.

22. Pronounced in the Open Court on this **17th day of October, 2017.**

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]