

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

Appeal No. 170 of 2013 & Appeal No. 20 of 2014

Dated: 11th March, 2015

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

Appeal No. 170 of 2013

In the matter of:

Rithwik Energy Generation Private Limited,

Unit No. 701-702,

Prestige Meridian-2,

No. 30, MG Road,

BANGALORE-560 001

Represented by its Director,

Mr. C. Purushotham

... Appellant (s)

Versus

1. **State Load Despatch Centre,**
KPTCL, 28, Race Course Cross Road,
Bangalore-560 009, Karnataka
 2. **Karnataka Power Transmission Corporation Limited,**
Corporation Ltd., Kavery Bhavan,
Bangalore-560 009, Karnataka
 3. **Bangalore Electricity Supply Co. Ltd.,**
Corporate Office, K.R. Circle,
Bangalore-560 001, Karnataka
 4. **Central Electricity Regulatory Authority,**
4th Floor, Chander Lok Building,
36, Janpath,
New Delhi-110 001.
- ...Respondent(s)**

Counsel for the Appellant (s): Mr. Basava Prabhu S. Patil, Sr. Adv,
Mr. B.S. Prasad, Mr. S. Prabhu
Mr. B. Subrahmanya Prasad

Counsel for the Respondent(s): Mr. Anand K. Ganesan,
Ms. Swapna Seshadri for R-1 & 2
Mr. Shodhan Babu,
Mr. Asmi Mohan,
Mr. Sriranga S. for R-3

Appeal No. 20 of 2014

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Rithwik Energy Generation Private Limited,
Unit No. 701-702,
Prestige Meridian-2,
No. 30, MG Road,
BANGALORE-560 001
Represented by its Director,
Mr. C. Purushotham

... Appellant (s)

Versus

1. **Bangalore Electricity Supply Co. Ltd.,**
Corporate Office, K.R. Circle,
Bangalore-560 001, Karnataka

4. **Karnataka Electricity Regulatory Commission,**
6th & 7th Floors,
Mahalaxmi Chambers,
9/2, M.G. Road,
Bangalore-560 001, Karnataka

...Respondent(s)

Counsel for the Appellant (s): Mr. Basava Prabhu S. Patil, Sr. Adv.
Mr. B.S. Prasad,
Mr. Anirudh Sanganerza
Mr. B. Subrahmanya Prasad

Counsel for the Respondent(s): **Mr. Anand K. Ganesan,**
 Ms. Swapna Seshadri,
 Ms. Mandakini Ghosh for R-1
 Mr. Shodhan Babu

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

These Appeals have been filed by Rithwik Energy Generation Private Limited, a generating company. Appeal No. 170 of 2013 has been filed against the order dated 9.5.2013 passed by the Central Electricity Regulatory Commission directing the Appellant to approach the State Commission for adjudication of a dispute regarding subsistence of the Power Purchase Agreement ('PPA') entered into by the Appellant with the BESCO, the Distribution Company for supply of power. Appeal no. 20 of 2014 has been filed against the order passed by Karnataka Electricity Regulatory Commission ("State Commission") on 17th October, 2013 holding that the termination of the PPA effected by the Appellant is invalid and declaring that the PPA between the Appellant and BESCO, the Distribution Company, is binding.

2. The facts of the case are as under:

- 2.1 On 8.9.2006, an agreement was executed between the Government of Karnataka and the Appellant in terms of which the Appellant has set up a 24.75 MW mini hydro electric power plant in the State of Karnataka.
- 2.2 On 3.5.2007, the Appellant and Bangalore Electricity Supply Company ('BESCOM'), the Respondent no. 3 in Appeal No. 170 of 2013, entered into a Power Purchase Agreement (PPA) whereunder the Appellant agreed to supply energy to be generated from its hydro power project to BESCOM at a tariff of Rs. 2.80/- per unit. Pursuant to the PPA, the Appellant commenced generation and supply of power from 28.09.2009 to BESCOM from the project.
- 2.3 The Appellant filed a Petition before the State Commission praying for declaration that there is no valid or subsisting PPA between the Appellant and BESCOM and directing the BESCOM to grant open access. BESCOM contended before the State Commission that the PPA is valid and subsisting. The State Commission by order dated 23.12.2010 dismissed the petition holding that the PPA is valid and subsisting. Against the order dated 23.12.2010, the Appellant filed an Appeal before the Tribunal being Appeal No. 51 of 2011.

- 2.4 In the meantime, the Appellant, without prejudice to its rights and contentions supplied power to BESCO regularly submitting monthly invoices for the same as per the terms of the PPA. However, BESCO failed to make payment of the amounts due within 15 days from the receipt of tariff invoices for the months from June 2010 to March 2011. The payment for the month of January 2011 was delayed for over three months. Similarly for February and March, 2011 the payments were delayed by one month. There was further default in payment of interest on the delayed payment as required to be paid under the terms of the PPA. BESCO also defaulted in opening the Letter of Credit as per the terms of the PPA. Consequently, the Appellant issued a notice dated 05.05.2011 specifying the details of the aforesaid events of default.
- 2.5 Thereafter, BESCO paid the energy charges for January, February and March, 2011 but failed to pay the interest. BESCO also opened the LC but the same was returned by the Appellant on the plea that it was not in accordance with the terms of the PPA.
- 2.6 On 4.7.2011, the Appellant filed an affidavit before the Tribunal in the proceedings in Appeal no. 51 of 2011 bringing to its notice the payment default by BESCO in payment of tariff for the months of

- January, February and March 2011 and continuation of default by non-payment of interest.
- 2.7 On 21.10.2011, the Tribunal dismissed the Appeal no. 51 of 2011. Taking note of default in the payment of interest, the Tribunal directed BESCO to remedy the same by paying upto date interest for delay in payment of monthly invoices at the rate specified in the PPA within 30 days. The issue about adequacy of LC was directed to be determined by the State Commission.
- 2.8 Against the order of the Tribunal, the Appellant approached Hon'ble Supreme Court by way of Civil Appeal, which was dismissed.
- 2.9 As BESCO did not pay the interest charges on delayed payment of electricity charges despite the directives of the Tribunal, the Appellant issued Termination Notice dated 11.05.2012 on BESCO as per the terms of the PPA. After receipt of the termination notice, BESCO sent a cheque for Rs.3.22 lakhs to the Appellant by letter dated 29.05.2012 explaining the reason for the delay.
- 2.10 After the termination of the PPA, the Appellant on 29.5.2012 entered into an agreement with PTC India Limited for sale of electricity. As the transaction involved inter-State transmission of electricity, No

- Objection certificate from the Nodal Agency i.e. SLDC, was required. Accordingly, PTC India Limited by letter dated 5.6.2012 requested the SLDC to grant NOC. However, SLDC by communicated dated 15.6.2012 refused to grant NOC on the ground that the Appellant was having valid PPA with BESCO.
- 2.11 Being aggrieved by failure of SLDC to grant NOC for inter-state open access, the Appellant filed a Petition before the Central Commission to set aside the communication dated 15.6.2012 and also sought damages from BESCO from the date of termination of PPA i.e. 11.05.2012 till grant of open access. The Central Commission by impugned order dated 09.05.2013 dismissed the Petition filed by the Appellant and held that the dispute regarding termination of PPA falls within the jurisdiction of the State Commission and that the question of reasonableness of denial of open access will arise only if termination of PPA is found to be valid.
- 2.12 Aggrieved by the order dated 09.05.2013 of the Central Commission, the Appellant has filed Appeal No. 170 of 2013.
- 2.13 During the pendency of the Petition before the Central Commission sometime in February 2013, BESCO filed a Petition before the

- State Commission praying for declaring the PPA dated 03.05.2007 as valid and binding on the parties and directing the Appellant to act in accordance with the PPA and supply power in terms thereof.
- 2.14 On 17.10.2013 the State Commission passed an order allowing the Petition filed by BESCO holding that the termination effected by the Appellant on 11.05.2012 is not valid and declaring that the PPA dated 03.05.2007 continues and binds the parties.
- 2.15 Aggrieved by the order dated 17.10.2013, the Appellant has filed Appeal No. 20 of 2014.
3. Since the issue involved in both the Appeals is related to termination of the PPA and third party sale of power from the Appellant's Power Station, a common judgment is being rendered.
4. In Appeal no. 170 of 2013, the Appellant has made the following submissions:
- 4.1 The Central Commission has framed Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2008 governing the obligations for grant of Open Access for inter-State Transmission of power. Under Regulation 8 of the Open

Access Regulations, the State Load Despatch Centre (SLDC) while giving concurrence to an inter-State proposal is required to check only two parameters viz., (i) availability of transmission capacity and (ii) availability of metering infrastructure. In the present case the refusal of SLDC is not on either of the grounds.

4.2 The reasoning of the Central Commission that since the distribution company has denied the allegation of termination of the PPA and as the adjudication of the dispute regarding termination of PPA falls within the jurisdiction of the State Commission, the Appellant has to approach the State Commission for adjudication of the disputes regarding subsistence or otherwise of PPA and that question of reasonableness of denial of open access will arise only if termination of PPA is found to be valid, is contrary to its own Regulations. The Central Commission has erred in placing reliance on its earlier decision in Petition no. 188 of 2009 dated 7.9.2012, which in turn is based on the observations of the Tribunal in Appeal no. 6 of 2008 wherein based on the consent of the parties therein the dispute regarding termination of PPA was directed for adjudication by the State Commission. The said order of the Tribunal in Appeal no. 6 of

2009 could not be binding precedent as the same was based on the consent of the parties.

5. In respect of Appeal no. 20 of 2014, the Appellant has made the following submissions:

5.1 The default in payment of interest and also opening of LC for specified amount by the BESCO as envisaged under PPA are admitted facts. BESCO accepted its liability to pay interest on delayed payment as also the fact that it was in default as on the date of order in Appeal no. 51 of 2011. BESCO even failed to rectify the deficiency in the Letter of Credit despite being notified by the Appellant vide letter dated 22.6.2011. The notice issued by the Appellant on 5.5.2011 specified the events of defaults and amounted to Default Notice for the purpose of Article 9.3.2 of the PPA.

5.2 In any event the notice dated 05.05.2011, Appellant's contention before this Tribunal and direction of this Tribunal in Appeal no. 51 of 2011, amount to default notice issued in compliance with the requirements of notifying the default and seeking its rectification as envisaged under the PPA.

- 5.3 BESCO failed to cure the default within 30 days of the order in Appeal no. 51 of 2011 i.e. by 21.11.2012 and for several months thereafter. BESCO also did not get adjudication from the State Commission as to quantum of LC and did not furnish fresh LC in terms of PPA and thus continued to remain in breach of obligation as to providing LC. Hence the Appellant has correctly terminated the PPA by issuing a termination notice, which is valid.
- 5.4 It is only after the termination was effected that BESCO tendered some amount towards interest vide cheque dated 29.5.2012 thus making it evident that direction in para 12.6 of the order of this Tribunal in Appeal no. 51 of 2011 was not complied with.
- 5.5 The aforesaid facts conclusively establish that BESCO committed willful default in its financial obligations and the PPA had been validly terminated. Subsequent to termination BESCO also contends having opened LC on 9.8.2012 for Rs. 1.50 crores. This itself evidences that LC opened earlier for Rs. 87 lakhs was not in accordance with the terms of PPA.

5.6 The State Commission has proceeded on erred premise that termination of PPA is wholly based on the letter dated 5.5.2011, though the case of Appellant is that not only the notice dated 5.5.2011 by itself amounted to Default Notice, but the said notice read with the direction of this Tribunal's order in Appeal No. 51 of 2011 together also constituted the default notice envisaged under Article 9.3.2 of the PPA and BESCO having failed to cure the default, the PPA was validly terminated.

6. On the above issues, we have heard Shri Basava Prabhu S. Patil, Sr. Advocate on behalf of the Appellant in both the Appeals, Ms. Swapna Seshdari for Respondents 1 and 2 in Appeal No. 170 of 2013 and for the Respondent no.1 in Appeal No. 20 of 2014 and Mr. Sriranga S. for the Respondent no. 3 in Appeal no. 170 of 2013. Based on the rival contentions of the parties, the following issues arise for our consideration:

(i) Whether the Central Commission has erred in directing the Appellant to approach the State Commission for adjudication of the dispute regarding subsistence of the PPA and holding that the question of reasonableness of denial of open access will

- arise only if the termination of the PPA is found to be valid by the appropriate forum under the law?
- (ii) Whether the State Commission is correct in holding that letter dated 5.5.2011 was not a notice issued for termination of the PPA?
 - (iii) Whether the State Commission is correct in holding that there was no default regarding opening of the Letter of Credit as the Appellant has returned Letter of Credit instead of pursuing the matter regarding correct amount of the Letter of Credit?
 - (iv) Whether the State Commission was correct in holding that the termination effected by the Appellant on 11.5.2012 is not valid and declaring the PPA dated 3.5.2007 as binding on the parties?
7. The first issue (raised in Appeal no. 170 of 2013) is regarding direction of the Central Commission.

7.1 Similar issue has been dealt by this Tribunal in judgment dated 5.9.2014 in Appeal no. 171 of 2013. The findings of the Tribunal in Appeal no. 171 of 2013 are as under:

“12. According to Section 32(2)(a) of the Electricity Act, the SLDC is responsible for scheduling and dispatch of electricity within the State, in accordance with the contracts entered into with the licensee or the

generating companies operating in the concerned State. Thus, if a Distribution Licensee claims that it has a valid PPA with a generating company and if the same generating company seeks “No Objection” for Inter-State open access as it has terminated the PPA, the SLDC cannot grant the “No Objection”. The SLDC cannot sit on the judgment whether the PPA has been terminated legally when the Distribution Licensee is claiming that the termination is not valid. The validity of the Termination Notice can only be decided by the State Commission under Section 86(1)(f) of the Act.

13. Let us now examine the Inter-State Open Access Regulations of 2008 of the Central Commission.”

14. The Appellant under the open access Regulations is an ‘Inter-State Entity’ where metering and energy accounting is done by the SLDC. As per Regulation 8(1), whenever the proposed bilateral transaction has a State Utility or an Inter-State Entity as a buyer or seller, concurrence of the SLDC has to be obtained in advance. While processing the application for concurrence or “No Objection”, the SLDC has to verify the existence of infrastructure necessary for time-block-wise energy metering and accounting in accordance with the Grid Code and availability of surplus transmission capacity in the State network.

15. It is correct that as per 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 “No Objection” to an Applicant for inter-state open access. However, the SLDC has to also consider the responsibility entrusted upon it under the Electricity Act, 2003 to schedule and dispatch electricity within the State in accordance with the contracts entered into between the Distribution Licensee and the generating company. When the Distribution Licensee is claiming 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 “No Objection” for inter-State open access for the same power, ignoring the claim of the Distribution Licensee. The SLDC cannot decide whether the Termination Notice served by the Appellant was valid or not or whether the default of non-payment of dues has been remedied by

GESCOM. Only 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 Electricity Act, 2003.

16. *The Central Commission has correctly held that they would deal with the issue only after the termination of the PPA has been found to be valid by the State Commission as the adjudication of dispute between the Appellant and GESCOMs is within the jurisdiction of the State Commission u/s 86(1)(f) of the Act.*

.....

18. Summary of our findings.

- (i) ***According to Inter-State Open Access Regulations, the SLDC has to verify the availability of metering and energy accounting infrastructure and surplus transmission capacity before granting “No Objection” to an application for inter-state open access. However, the SLDC has to also consider the responsibility entrusted upon it under the Electricity Act, 2003 to schedule and dispatch electricity within the State in accordance with the contracts entered into between the Distribution Licensee and the generating company. When the Distribution Licensee is claiming 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 “No Objection” for Inter-State open access for the same power sought by the generating company on the ground of termination of PPA, ignoring the claim of the Distribution Licensee. The SLDC cannot sit on the judgment about the validity of the termination of the PPA by the generating company. Only 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 Electricity Act, 2003.***
- (ii) ***The Central Commission has correctly held that they would deal with the issue only after the termination of the PPA has been***

found to be valid by the State Commission as the adjudication of dispute between the Appellant and GESCO is within the jurisdiction of the State Commission u/s 86(1)(f) of the Act”.

7.2 The above findings of the Tribunal will squarely apply to the present case. Accordingly, Appeal No. 170 of 2013 is dismissed and the Central Commission’s impugned order dated 9.5.2013 is upheld.

8. The second, third and fourth issues (raised in Appeal no. 20 of 2014) are interconnected and are being dealt with together.

9. Learned Senior Counsel for the Appellant has made the following submissions:

9.1 In the present case the requirements of termination of PPA as per the terms of the PPA are met since the default in payment of interest and also opening of LC for the specified amount by the BESCO are admitted facts and the notice issued by the Appellant on 05.05.2011 specified the events of defaulter and amounts to default notice. In any event the notice dated 05.05.2011, Appellant’s contention before this Tribunal and the direction of this Tribunal in order in Appeal no. 51 of 2011, amount to default notice issued in due compliance with the requirement of notifying the default and seeking its rectification as envisaged under article 9.32 of PPA. Yet, BESCO failed to cure the default within 30 days of the order date in Appeal no. 51 of 2011 i.e.

- by 21.11.2011. The BESCO also did not get the adjudication from the State Commission as to quantum of LC and did not furnish fresh LC in terms of PPA and thus continued to remain in breach of obligation as to providing LC.
- 9.2 It is only after the termination was effected that BESCO tendered some amount towards interest by cheque dated 29.05.2012. Thus, the directions of the Tribunal in Appeal no. 51 of 2011 were not complied.
- 9.3 Subsequent to termination, BESCO also contends having opened LC on 09.08.2012 for Rs. 1.5 crores. This itself evidences that LC opened earlier for Rs.87 lacs was not in accordance with the PPA.
- 9.4 PPA does not prescribe any particular form of default notice. The only purport of the default notice is to notify the defaults to provide an opportunity to cure. By notice 05.05.2011 the Appellant notified the various defaults to BESCO. The defaults were pointed out in affidavit dated 04.07.2011 filed by the Appellant in Appeal no. 51 of 2011 before the Tribunal. Taking note of the default in payment of interest on delayed payment of tariff, the Tribunal by order dated 21.10.2011 in Appeal no. 51 of 2011 directed BESCO to make good the said default within 30 days. In any event, this direction

- issued at the behest of the Appellant read with notice dated 05.05.2011 fully subserved the only objective of default notice i.e. to notify the defaults to BESCO and to provide an opportunity to cure the same.
- 9.5 He referred to (1995) 1 SSC 90; State of Punjab, Balbir Singh V. State of Punjab and various other rulings of the Hon'ble Supreme Court that it is the substance and not the form of notice which is relevant and important.
- 9.6 He also referred to decision of this Tribunal dated 17.04.2013 in Appeal no. 14 of 2013 (Sri Chamudeshwari Sugar Ltd. Vs. KERC) to stress that when default mentioned in the default notice had not been cured, the subsequent termination notice based on such default notice is valid.
10. Learned Counsel for the BESCO submitted as under:
- 10.1 There has already been one round of litigation between the Appellant and BESCO wherein the validity of the PPA has been upheld by the State Commission, by this Tribunal and the Hon'ble Supreme Court.
- 10.2 BESCO sent detailed reply to the termination notice dated 15.05.2012 by letter dated 29.05.2012 and also stated that BESCO has been providing the LC for each year which the Appellant kept on

- returning on one pretext or other. Appellant did not respond to BESCOM's letter dated 29.05.2012 and applied to SLDC for open access on 05.06.2012. Once open access was denied, the Appellant filed a petition before the Central Commission.
- 10.3 The notice dated 05.05.2011 was a default notice in terms of Article 9.2.2. for selling electricity to third parties and not under Article 9.3.2 for termination of the PPA.
- 10.4 The Appellant is now trying to challenge the findings of the Tribunal in judgment dated 21.10.2011 which has already construed the provision of the PPA and after taking into account the conduct of the parties upheld the validity of the PPA.
- 10.5 The Appellant did not approach the State Commission for the correct calculation of LC.
- 10.6 The Tribunal in judgment dated 21.10.2011 has already held that the letter dated 05.05.2011 is not a default notice and is only a letter seeking open access in terms of Article 9.2.2. of the PPA.
- 10..7 None of the judgments relied upon by the Appellant apply to the present case.
11. Let us examine the relevant Articles of the PPA which are reproduced below:

“Due Date of Payment in respect of monthly invoice means the date, which is 15 (fifteen) days from the date of receipt of such invoice by the designated officials of the BESCOM’.

“6.2 Payment: BESCOM shall make payment of the amounts due in Indian Rupees within fifteen (15) days from the date of receipt of the Tariff Invoice by the designated office of BESCOM.

6.3 Late Payment: If any payment from BESCOM is not paid when due, there shall be due and payable to the Company penal Interest at the rate of SBI medium term Lending rate per annum for such payment from the date such payment was due until such payment is made in full.”

“6.5 Letter of Credit: The BESCOM shall establish and maintain transferable, assignable, irrevocable and unconditional non-revolving Letter of Credit in favour of, and for the sole benefit of, the Company. The Letter of Credit shall be established in favour of, and issued to, the Company on the date hereof and made operational thirty (30) days prior to the Commercial Operation Date of the Project and shall be maintained consistent herewith by the BESCOM at any and all times during the Term of the Agreement. Such Letter of Credit shall be in form and substance acceptable to both parties and shall be issued by any Scheduled Bank and be provided on the basis that:

(i).....

(ii).....

(iii) The amount of the Letter of Credit shall be equal to one month’s projected payments payable by the BESCOM based on the average of the annual generation.”

“9.2 Events of Default:

9.2.1 Company’s Default: The occurrence of any of the following events at any time during the term of this Agreement shall constitute an Event of Default by Company:

- a. *O&M Default on part of Company*
- b. *Failure or refusal by Company to perform its material obligations under this Agreement.*

9.2.2 *Corporation's Default: The occurrence of any of the following at any time during the Term of this Agreement shall constitute an Event of Default by Corporation:*

1. *Failure or refusal by Corporation to perform its financial and other material obligations under this Agreement.*
2. *In the event of any payment default by the BESCO for a continuous period of three months, the company shall be permitted to sell the electricity to third parties by entering into a wheeling & banking Agreement with the BESCO for which it shall pay transmission and other charges to the BESCO at the rates applicable from time to time and as approved by the Commission.*

9.3 *Termination*

9.3.1.....

9.3.2 *Termination for corporation's Default: Upon the occurrence of an event of default as set out in sub-clause 9.2.2 above, Company may deliver a Default Notice to the Corporation in writing which shall specify in reasonable detail the Event of Default giving rise to the default notice, and calling upon the BESCO to remedy the same.*

At the expiry of 30 (thirty) days from the delivery of this default notice and unless the Parties have agreed otherwise, or the Event of Default giving rise to the Default Notice has been remedied, Company may deliver a Termination Notice to Corporation. Company may terminate this Agreement by delivering such a Termination Notice to Corporation and intimate the same to the Commission. Upon delivery of the Termination Notice this Agreement shall stand terminated.

Where a Default Notice has been issued with respect to an Event of Default which requires the co-operative of both BESCO and the Company to remedy, BESCO shall render all reasonable co-operation to enable the Event of Default to be remedied."

12. Thus, the terms of the PPA provide for as under:
- i) Failure by BESCO to perform its financial and material obligations shall be an event of default. Non-payment of dues within 15 days from the date of receipt of the Tariff Invoice by BESCO will be an event of default.
 - ii) Non-establishment of LC 30 days prior to the Commercial Operation Date of the project will also be an event of default. The amount of LC shall be equal to one month's projected payments payable by the BESCO based on average annual generation.
 - iii) Under Article of 9.2.2, if the payment default by BESCO continues for a period of three months, the Appellant shall be permitted to sell electricity to third parties.
 - iv) Under Article 9.3.2, on occurrence of an event of default, the Appellant may deliver a Default Notice to BESCO in writing specifying the detail of the event of default, calling upon the BESCO to remedy the same.
 - iv) At the expiry of 30 days from the delivery of the default notice, in the event the default given in the default notice is not remedied by BESCO, the Appellant may deliver a

Termination Notice to BESCO. Upon delivery of the Termination Notice the Agreement shall stand terminated.

13. Let us now examine the findings of this Tribunal in Appeal no. 51 of 2011.
 - 13.1 Appeal no. 51 of 2011 was filed by the Appellant against the order dated 23.12.2010 passed by the State Commission rejecting the petition filed by the Appellant seeking that the PPA is nonest/void and for direction to the Respondents to grant open access for third party sale. The main ground in the Appeal was that there cannot be any valid PPA between the Appellant and the distribution licensee unless it is approved by the State Commission and the State Commission had earlier refused the approval of the PPA.
 - 13.2 During the pendency of the Appeal no. 51 of 2011, the Appellant filed an affidavit on 04.07.2011 regarding violation of terms and conditions of payment of dues by BESCO as there had been a default on part of BESCO for continuous period of three months for the month of January, February and March 2011 in payment of tariff. It was pleaded that BESCO was also liable to pay interest for the delayed payments to the Appellant according to Article 6.39 of the PPA which had not been paid. BESCO had also opened LC for only Rs. 87.65

lakhs on 08.06.2011 instead of Rs. 151.77 lakhs corresponding to one month billing in terms of the PPA. Thus, even if the PPA was valid, the Appellant was entitled to sell electricity to third party due to payment default. The Appellant prayed that the subsequent events should be taken note of by the Tribunal for granting the relief.

13.3 On the delay in payment for January, February and March 2011, the Tribunal held as under:

“12.8 We notice from the affidavit filed on 4.7.2011 filed by the appellant, that the payment for January, February and March 2011 have been made on 26.5.2011 i.e. within 8 days of the order of this Tribunal and within 7 days of the letter dated 5.5.2011 sent by the appellant to the respondent no.2 on 19.5.2011 seeking permission to sell power to third parties.

12.9 We notice that the respondent no.2 had made requests to the appellant for getting the approval of the State Commission for the PPA processed to enable it to make payment against the invoice raised by the appellant. Apparently, the appellant did not want to get the approval of the State Commission for the PPA and instead challenged the order of the State Commission. The appellant sought interim orders from the Tribunal and the Tribunal was pleased to issue interim directions to the respondent no.2 to make payment for the energy supplied by the appellant from January 2011 onwards at PPA rate. We find that the respondent no. 2 promptly made the payment following the order of this Tribunal.

12.10 In view of the circumstances of the case, we do not find any substance in the argument of the appellant seeking termination of the PPA for default in payment.”

13.4 Thus, the plea of the Appellant for termination of PPA for default in payment was rejected by this Tribunal.

13.5 The Tribunal further held as under:

“12.13. Thus for termination of PPA for payment default the following conditions are to be met:

- i) Payment default by the distribution licensee for a continuous period of three months;*
- ii) Upon the occurrence of an event of default the appellant has to serve a notice to the respondent distribution licensee in writing calling upon it to remedy the same.*
- iii) If the default is not remedied at the expiry of 30 days or the parties have not reached an agreement otherwise, the appellant can serve the termination notice. On serving the termination notice the agreement shall stand terminated.*

Admittedly, no notice to remedy the default or termination notice has been served by the appellant on the respondent distribution licensee, only a letter dated 5.5.2011 about payment default and seeking permission to third parties in terms of Article 9.2.2 was sent to the respondent distribution licensee on 19.5.2011 after the interim order of the Tribunal dated 18.5.2011. The payments for the months of January, February and March 2011 had already been made by the distribution licensee when the appellant filed the affidavit before this Tribunal.

12.14. Learned counsel for the appellant has also relied on the judgment of this Tribunal dated 11.4.2011 in appeal no. 180 of 2009, etc. in the matter of Sandur Power Co. Ltd. vs. Karnataka Power Transmission Corporation Ltd.& Ors. In our opinion, this judgment is not applicable in the present case as the circumstances in the present case are different. Further, the PPA in question in the present case has a clause 9.3.2 providing for the notice and remedy for curing the default by

payment within 30 days from the date of delivery of the default notice which was not there in the PPA dated 3.2.2004 entered into by the appellant with Sandur Power Co. Ltd.

12.15. *Conjoint reading of the clauses 4.2, 5.1, 6.2, 6.3, 6.5, 9.2.2 and 9.3.2 of the PPA entered into by the appellant with the respondent distribution licensee would indicate the following:*

- * Event of payment default will occur when the respondent no. 2 fails or refuses to make tariff payments as set out in Article 5 or is in payment default for a continuous period of three months.*
- * On occurrence of payment default for a continuous period of three months the appellant is at liberty to sell electricity to third parties for which open access shall be granted.*
- * On occurrence of an event of default, the appellant may serve a Default Notice on the respondent no.2 calling upon to remedy the same.*
- * If the Default Notice is not remedied by the respondent no. 2 within 30 days of serving of Default Notice the PPA can be terminated.*

In case the default is remedied within 30 days the appellant will have to resume the supplies to the respondent no.2. In this case even if it is assumed that there was a payment default, the same was remedied by the respondent no. 2 by making tariff payment.

12.16. *Learned counsel for the appellant has argued that interest for delayed payment has also not been paid by the respondent distribution licensee. We therefore, direct the respondent no. 2 to pay the up-to-date interest for delay in payment of monthly invoices at the interest rate specified in the PPA within 30 days of date of this judgment to the appellant.*

- 12.17. *According to the learned counsel for the appellant, the respondent distribution licensee has not opened LC for the full amount as per the PPA.*
- 12.18. *According to the learned counsel for the respondent LC of Rs. 87.65 lakhs has been opened in favour of the appellant on 8.6.2011 as per the terms stipulated in clause 6.5 (iii) of the PPA which requires the same to be equal to one month's projected payment payable based on average annual generation. The respondent distribution licensee has also submitted the calculation for the same. However, the learned counsel for the appellant claims that the LC should be for Rs. 151.77 lakhs but has not furnished any calculation for the same. We, therefore, remand this matter to the State Commission to determine the correct amount of LC according to the terms and conditions of the PPA and if it is found that the LC is inadequate, direct the respondent distribution company to enhance the same."*

13.6 Thus, it was held by this Tribunal that the payment default was remedied by BESCO by making tariff payment. The Tribunal also directed BESCO to make up-to-date interest for delay in payment of monthly invoices at the interest rate specified in the PPA within 30 days of the date of the judgment. Regarding quantum of LC, it was noted that the Appellant had not furnished any calculation or the claim for higher amount of LC of Rs. 151.77 lakhs and, therefore, the matter was remanded to the State Commission to determine the correct amount of LC according to the terms of the PPA and in case the LC was inadequate, direct the BESCO to enhance the same.

14. The interest amount for delay in payment of monthly invoices was not paid by BESCO within 30 days of the judgment of the Tribunal in Appeal no. 51 of 2011 despite a clear direction by the Tribunal. Thereafter, the Appellant served notice dated 11.05.2012 to BESCO. The relevant part of the notice dated 11.05.2012 is reproduced below:

- “8. Though, the Appellate Tribunal for Electricity dismissed our Appeal, taking note of default in payment of interest, it directed BESCO to remedy the same by paying upto date interest for delay in payment of monthly invoices at the rate specified in PPA within 30 days, by its Order dated 21.10.2011. The issue as to adequacy of Letter of Credit was directed to be determined by KERC.*
- 9. Despite the due notification of the event of its default to BESCO as aforesaid by our notice dated 5.5.2011 and as required under Article 9.2.2 of the PPA and despite the direction of the Appellant Tribunal in the final order in Appeal No. 51/2011 for remedying/curing the same within 30 days of the final order, the default has not been cured so far as and the BESCO has continued to remain in default of payment of interest due on delayed payment of electricity charges from March, 2010. This amounts to deliberate default and refusal to abide by the financial obligations under the PPA.*
- 10. In the circumstances, in exercise of right conferred by Article 9.3.2 of the PPA, this Termination Notice is issued. Please note that the PPA shall stand terminated upon delivery of this Notice to BESCO and we shall stand discharged of all our obligations henceforth.*
- 11. Without prejudice to the above we further call upon the BESCO to forthwith and in no case later than 30 days of receipt of this notice, pay the entire outstanding towards the*

interest due on delayed payment of electricity charges from March 2010 as per the statement annexed.”

- By the above notice dated 11.05.2012 the Appellant issued notice to the Appellant for termination and called upon BESCO to pay entire outstanding interest for delayed payment within 30 days of receipt of the Notice. The Appellant also requested BESCO to provide open access for supplying electricity to third parties as per Clause 9.2.2(2) of the PPA. The Appellant's claim for interest was Rs. 12,32,321/- for which they enclosed a statement giving the calculation.
15. In reply to the above notice, BESCO by its letter dated 29.05.2012 disputed the amount of interest claimed by the Appellant and also enclosed a cheque for Rs. 3.22 lakhs which was due to the Appellant as per their calculations. BESCO also furnished their calculations of interest amount. Regarding LC, BESCO informed that they had already opened the LC for Rs. 87.65 lakhs valid upto 08.06.2012. The Tribunal had directed the State Commission to determine the actual LC amount and the same is pending for adjudication. Therefore, there was no question of there being default on this account.
 16. The Appellant vide letter dated 29.06.2012 to BESCO reiterated their claim of interest payment and LC and termination of the PPA.

- Thereafter, BESCOM filed a petition before the State Commission seeking setting aside the termination notice.
17. Let us examine the findings of the State Commission in the impugned order dated 17.10.2013 passed in the petition filed by BESCOM.
 18. The main findings of the State Commission are as under:
 - 19.1 The letter dated 05.05.2011 is not a notice terminating the PPA dated 03.05.2007 but for seeking permission under Article 9.2.2 of the PPA to sell electricity to the third parties.
 - 19.2 The Tribunal in its judgment dated 21.10.2011 in Appeal no. 51 of 2011 has explained the procedure to be followed by the Appellant for termination of the PPA and recorded that the letter dated 05.05.2011 based on payment default is not a Termination Notice but it was only for seeking third party sale.
 - 19.3 Once the Tribunal has held that letter dated 05.05.2011 is not a noticed for remedying a default or a notice for termination of the PPA as contemplated under the PPA, there is no question of considering the same as Notice for termination. The judgment in Chamundeshwari Sugar in Appeal no. 14 of 2013 will not be applicable to the present case as in that case Notice was issued by the generating company for termination of the PPA whereas in the

- present case, no Notice to cure default was issued, but only a letter seeking permission to sell electricity to third parties was issued.
- 19.4 The contention of the Respondent (Appellant in the present case) on non opening of the LC is not tenable as the matter was considered by the Tribunal and the Tribunal had only remitted the matter to this Commission regarding determination of correct amount of letter of credit, according to the terms and conditions to the PPA. However, the Respondent (Appellant in the present case) instead of pursuing this with the Commission, has returned the LC. Thus, there was no default on the part of BESCO as regards opening of LC.
- 19.5 As regards the non-payment of interest on bills, the Commission rejected the same in view of the payment made by BESCO as reflected in the reply given by the BESCO in its letter dated 29.05.2012. The above assertion made is not disputed by the Respondent (Appellant herein), except making statement that interest payment is not made as directed by the Tribunal. Therefore, the Respondent was not entitled to terminate the PPA on the ground of non-payment of interest.

- 19.6 The Petition filed by BESCO was allowed, the termination effected by letter dated 11.05.2012 was held invalid. Consequently, the PPA dated 03.05.2007 continues and binds the parties.
20. We find that the Tribunal rejected the claim of the Appellant for termination of PPA due to default in payment energy supplied from January 2011 to March 2011 as the payment was made by BESCO within 8 days of the interim order of the Tribunal and within 7 days of the letter dated 05.05.2011 sent by the Appellant seeking permission to sell power to third parties. Regarding interest, the Tribunal directed BESCO to make payment for interest within 30 days of the date of the judgment. Admittedly, the interest amount was not paid by BESCO as per the Tribunal's directions and was paid only on 29.06.2012 as per their calculations after receipt of Notice dated 11.05.2012.
21. We find that the Appellant vide its letter dated 05.05.2011 had indicated the default by BESCO of their material obligations under the PPA for over a continuous period of 3 years on following grounds.
- a) Default in making payment for power bills within 15 days of its submission as per details attached with the letter.

- b) Default in payment of interest stating that the interest is automatically payable for delayed payment at SBI medium term lending rate.
- c) Default in opening of LC.

- In view of above defaults the Appellant sought permission in terms of Article 9.2.2 of the disputed PPA to sell power from the project to third parties and for entering into wheeling and Banking Agreement with it.
22. We also find that the Appellant vide its letter dated 22.06.2011 also returned the LC amounting to Rs. 87.65 lakhs opened by Bank of India on 20.06.2011 on the plea that the LC was not in consonance with the terms of the PPA.
23. Regarding LC, this Tribunal by judgment dated 21.10.2011 in Appeal no. 51 of 2011 had remanded the matter to the State Commission to determine the correct amount of LC. However, the Appellant instead of pursuing the matter with the State Commission returned the LC opened by BESCOM without giving any calculation. In the Notice dated 11.05.2012, the Appellant has also not given the calculation of LC but admitted that the matter regarding adequacy of LC was directed to be determined by the State Commission. However, no application/affidavit was filed by the Appellant before the State Commission giving their calculation or correct account of LC. Thus,

- the Appellant cannot take the plea of non-opening of the LC for termination of the contract. Accordingly, we reject the plea of non-opening of LC for termination of the PPA.
24. The Tribunal in its judgment dated 21.10.2011 found no substance in the contention of the Appellant seeking termination of PPA as the payment for the months of January to March 2011 had been made by BESCO within 8 days of the interim order of the Tribunal promptly and 7 days of letter dated 05.05.2011 sent to BESCO on 19.05.2011.
25. The Tribunal also held that no notice to remedy the default or termination notice has been served by the Appellant on BESCO and only a letter dated 05.05.2011 against payment default and seeking permission to third party sale in terms of Article 9.2.2 was sent to BESCO on 19.05.2011 after the interim order of the Tribunal dated 18.05.2011. The Appellant paid the bill for the months of January to March 2011 within 7 days of the receipt of the letter dated 05.05.2011.
26. The scheme of the PPA regarding payment default and termination was interpreted by this Tribunal as under:

“ Event of payment default will occur when the respondent no. 2 fails or refuses to make tariff payments as set out in Article 5 or is in payment default for a continuous period of three months.*

** On occurrence of payment default for a continuous period of three months the appellant is at liberty to sell electricity to third parties for which open access shall be granted.*

** On occurrence of an event of default, the appellant may serve a Default Notice on the respondent no.2 calling upon to remedy the same.*

** If the Default Notice is not remedied by the respondent no. 2 within 30 days of serving of Default Notice the PPA can be terminated.*

In case the default is remedied within 30 days the appellant will have to resume the supplies to the respondent no.2. In this case even if it is assumed that there was a payment default, the same was remedied by the respondent no. 2 by making tariff payment.”

27. After the expiry of one month granted by the Tribunal, the Appellant had an option either to serve a default notice to BESCO to remedy the default and if BESCO had not remedied the default within 30 days of service of the notice, the Appellant could have terminated the PPA. Alternatively the Appellant could seek open access to sell power to third party till the default is remedied by the BESCO. However, the Appellant continued to supply power to BESCO and received payment for the same even after expiry of period of one month after the date of judgment of this Tribunal. Only on 11.05.2012,

- i.e. more than 6 months from the date of the judgment, did the Appellant issued a notice to BESCOB terminating the PPA and called upon BESCOB to pay the outstanding of interest charges of Rs. 12.32 lacs. On 29.05.2012 BESCOB made payment of Rs. 3.22 lacs as per their calculation, within one month. No specific submissions were made by the Appellant before the State Commission or before the Tribunal about the calculation of the interest by the BESCOB except to reiterate that the interest payment was not made.
28. We are in agreement with the State Commission that once this Tribunal has held that the letter dated 05.05.2011 is not a notice for remedying the default or notice for termination of PPA but only a request to grant open access, there is no question of considering the Notice dated 05.05.2011 as a Notice for termination under Article 9.3.2 of the PPA. We do not find nay infirmity in the order of the State Commission.
29. **Summary of our findings:**
- i) **The issues raised in Appeal no. 170 of 2013 have been dealt by this Tribunal in judgment dated 05.09.2014 in Appeal no. 171 of 2013. The findings of the Tribunal in Appeal no. 171 of 2013 will squarely apply to the present case. Accordingly, Appeal no. 170**

of 2013 is dismissed and Central Commission's impugned order dated 09.05.2013 is upheld.

- ii) As already held by this Tribunal, letter dated 05.05.2011 from the Appellant was not a notice issued for termination under Article 9.3.2 of the PPA. The Tribunal by its judgment dated 21.10.2011 had remanded the matter to the State Commission to determine the correct amount of LC. However, the Appellant instead of pursuing the matter with the State Commission returned the LC opened by BESCO without giving any calculation. In the Notice dated 11.05.2012, the Appellant has also not given the calculation of LC but admitted that the matter regarding adequacy of LC was directed to be determined by the State Commission. However, no application/affidavit was filed by the Appellant before the State Commission giving their calculation or correct account of LC. Thus, the Appellant cannot take the plea of non-opening of the LC for termination of the contract. Accordingly, we reject the plea of non-opening of LC for termination of the PPA. We do not find any infirmity in the impugned order of the State Commission holding that the termination effected by the Appellant on 11.05.2012 is not valid

and declaring that the PPA dated 03.05.2007 is binding upon parties.

30. In view of above both the Appeals i.e. 170 of 2013 and Appeal no. 29 of 2014 are dismissed as devoid of any merits. No order as to costs.

31. Pronounced in the open court on this 11th day of March, 2015.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

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