

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

**Appeal No. 14 of 2013**

**Dated: 17<sup>th</sup> April, 2013**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,**  
**Chairperson**  
**Hon'ble Mr. V.J. Talwar, Technical Member**

**In the matter of:**

**M/s. Sri Chamundeshwari Sugar Limited**  
**No.76, Ulsoor Road,**  
**Bangalore-560 042**

**...Appellant(s)**

**Versus**

- 1. Karnataka Electricity Regulatory Commission**  
**Mahatma Gandhi Road**  
**Bangalore-560 001**
- 2. The Government of Karnataka,**  
**Department of Energy,**  
**Vikas Soudha,**  
**Dr. B.R. Ambedkar Bheedi**  
**Bangalore-560 001**
- 3. Power Company of Karnataka Ltd.**  
**KPTCL Building, Cauvery Bhavan,**  
**Bangalore-560 009**

**4. Chamundeshwari Electricity Corporation Limited  
(A Government of Karnataka Undertaking)  
Corporate Office 927, L J Avenue  
New Kantharaj Urs Road,  
Saraswathipuram,  
Mysore-570 009**

**...Respondent(s)**

**Counsel for Appellant : Mr. R Krishnamurty, Sr. Adv  
Mr. Ayya Durai  
Mr. H.N Shashidhara**

**Counsel for Respondent(s) : Mr. Sri Ranga  
Ms. Sumana Naganand**

**JUDGMENT**

**HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,  
CHAIRPERSON**

**“Whether the Termination Notice dated 18.5.2012 terminating the PPA sent by the Appellant to the 4<sup>th</sup> Respondent, in the absence of the prior default notice as required under PPA is valid or not?”**

This is the question posed in this Appeal.

1. M/s. Sri Chamundeshwari Sugars Limited is the Appellant herein.
2. Karnataka Electricity Regulatory Commission(State Commission) is the First Respondent. Chamundeshwari Electricity Corporation Limited, one of the Distribution Licensees in the State of Karnataka, is the contesting 4<sup>th</sup> Respondent.
3. The Appellant filed a Petition before the State Commission in OP No.35 of 2012 for the declaration that in pursuance of their termination notice the Power Purchase Agreement entered into between the Appellant and M/s. Chamundeshwari Electricity Corporation Limited (R-4) stood terminated and for a consequential direction to allow the Appellant to sell the electricity to 3<sup>rd</sup> party through Open Access.
4. The State Commission after hearing both the parties dismissed the said Petition. Aggrieved by this order, the Appellant has presented this Appeal.
5. This case has got a chequered history. The relevant facts leading to the present Appeal are as follows:

- a) The Appellant established a Sugar Factory at Mandya District of Karnataka. To make the sugar industry more viable, the Appellant established Co-generation plant by using the Bagasse, a by product in the manufacture of sugar.
- b) On 19.10.2001, the Appellant entered into a PPA with the predecessor of M/s. Chamundeshwari Electricity Corporation Limited, the 4<sup>th</sup> Respondent for a period of 20 years for supply of Power. Supplementary Agreement was also entered into on 9.6.2005.
- c) The Appellant started generating power from 2.4.2008. From then onwards, the Appellant has been supplying power to M/s. Chamundeshwari Electricity Corporation Limited(R4).
- d) As per the PPA, M/s. Chamundeshwari Electricity Corporation Limited(R4) was required to open the Letter of Credit in favour of the Appellant on the date of signing of PPA and to make it operational 30 days prior to the Commercial Operation Date.

- e) The PPA further provided that if the payment for supply of power is delayed beyond due date, M/s. Chamundeshwari Electricity Corporation Limited (R4) is liable to pay interest on delayed payment. Since the M/s. Chamundeshwari Electricity Corporation Limited (R4) failed to pay interest accrued due to delayed payment for supply of electricity and also failed to open the Letter of Credit, the Appellant issued a default notice on 15.7.2009 pointing out the defaults and requesting the M/s. Chamundeshwari Electricity Corporation Limited to cure the said defaults within 30 days.
- f) However, the defaults as pointed out by the Appellant in the default notice were not cured within thirty days from service of the default notice dated 15.7.2009. Therefore, the Appellant issued the notice of termination dated 7.9.2009 as per Article 9.3.2. of the PPA terminating the PPA.
- g) In view of the failure to cure the defaults and the consequent termination, the Appellant filed a Petition

before the State Commission on 26.10.2009 in OP No.37 of 2009 praying for Declaration that the PPA dated 19.10.2001 and the Supplemental PPA dated 9.6.2005 stood terminated as well as for consequential directions.

- h) During the pendency of the said OP before the State Commission some payments were made by the 4<sup>th</sup> Respondent. The State Commission also suggested for negotiation. Since the entire payments were not made for curing all the defaults referred to in the default notice dated 15.7.2009, the Appellant sent a communication to the 4<sup>th</sup> Respondent on 27.3.2010 reiterating that the 4<sup>th</sup> Respondent did not cure the defaults yet. There was no response from the 4<sup>th</sup> Respondent. Thereafter, another communication was sent on 2.9.2010 requesting the 4<sup>th</sup> Respondent to make the payment of arrears. In spite of the repeated requests, the 4<sup>th</sup> Respondent failed to pay the amount of interest on the delayed payments and also failed to open a Letter of Credit.

- i) In the meantime, a meeting was held between the Appellant and the 4<sup>th</sup> Respondent regarding the payment of arrears and escalation charges etc. During the said meeting, it was decided that both the parties could report to the State Commission regarding their consensus to abide by the terms of the PPA in the future. On that basis on 3.3.2011, both the Appellant and the Respondent-4 reported the same to the State Commission and undertook to abide by the PPA in future. In addition, the Appellant sought for liberty to approach the State Commission if any grievance arises in the future in respect of non compliance of the PPA. Accordingly, the State Commission disposed of the petition in OP No.37 of 2009 by the order dated 3.3.2011 observing that both the parties have agreed to abide by the terms of the PPA. Further, as requested by the Appellant, the State Commission gave the liberty to the Appellant to approach the State Commission if any grievance arises in the future.
- j) Even thereafter, the arrears towards the escalation amount and interest were neither paid by the 4<sup>th</sup>

Respondent to the Appellant nor the Letter of Credit opened. Hence, the Appellant sent two letters, one on 16.3.2011 and another on 01.6.2011 requesting for the payment of arrears and opening of Letter of Credit.

- k) There was a meeting held between the parties regarding the payment of interest on the delayed payments. But, even after the said meeting, the demands of the Appellant were not met. So, again on 9.12.2011, the Appellant sent another letter reminding the 4<sup>th</sup> Respondent about non-payment for power supply charges at escalated rate in terms of PPA, interest on delayed payment and non opening of the Letter of Credit. Even then, there was no response for the said letter.
- l) Since the defects had not been remedied fully, in spite of their demand letters, on 18.5.2012, the Appellant issued the notice of termination of the PPA to the 4<sup>th</sup> Respondent and sought for permission for Open Access. M/s. Chamundeshwari Electricity Corporation Limited(R4) sent a reply dated 27.6.2012 to the



Appellant stating that opening the Letter of Credit in favour of the Appellant was under process and also suggested that issue of interest on delayed payments could be deliberated further. Thus, defaults were not remedied.

- m) Therefore, the Appellant approached the State Commission by filing a Petition on 17.7.2012 in OP No.35 of 2012 seeking for the declaration of the termination of the PPA and for the consequential directions.
  - n) This Petition was hotly contested by the 4<sup>th</sup> Respondent by praying for the dismissal of the Petition mainly on the ground that termination notice dated 18.5.2012 was not valid one in as much as the prior default notice had not been issued to the Respondent giving opportunity to cure the defects before the issuance of notice of termination dated 18.5.2012.
6. The State Commission after hearing the parties accepted the plea of the 4<sup>th</sup> Respondent and dismissed the Petition filed by the Appellant on 22.11.2012. Hence, this Appeal.

7. The submission of the learned Senior Counsel for the Appellant is as follows:

“ The factum of the non-payment of the interest on belated payment and non opening of Letter of Credit in terms of the PPA obligating the Respondents to open Letter of Credit 30 days prior to the Commercial Operation Date which gave rise to the cause of action for issuance of earlier default notice dated 15.7.2009 have not been disputed by the 4<sup>th</sup> Respondent. The said cause of action still subsists in view of the fact that the earlier order passed by the State Commission on 3.3.2011 disposing of the earlier application in OP No.37 of 2009 had not extinguished the cause of action which had already arisen due to the issuance of the earlier default notice dated 15.7.2009 because of the fact that the earlier order dated 3.3.2011 of the State Commission was not passed on merits. Thus, the cause of action which arose resulting in the issuance of default notice dated 15.7.2009 has been kept alive. Therefore, no fresh default notice would be required to be issued before the issuance of the present termination notice dated 18.5.2012. In any event, the subsequent demand letters dated

16.3.2011, 1.6.2011 and 9.12.2011 which were sent by the Appellant to 4<sup>th</sup> Respondent subsequent to the disposal of the earlier petition demanding the arrears of the amount would amount to default notices and so the termination notice dated 18.5.2012 is perfectly valid. Hence, the impugned order is liable to be set aside.”

8. The reply by the learned Counsel for the 4<sup>th</sup> Respondent is this. “The prayer made by the Appellant in the earlier Petition in OP No.37 of 2009 and the prayer made in the present proceedings in OP No.35 of 2012 are one and the same. In fact, when the earlier proceedings for the earlier cause of action was disposed of by the State Commission by the order dated 3.3.2011, both the default notice dated 15.7.2009 as well as the earlier termination notice dated 7.9.2009 got cancelled. Therefore, without issuance of fresh default notice for the fresh cause of action, the issuance of the termination notice dated 18.5.2012 could not be said to be valid one and as such the impugned order is perfectly justified.”

9. The short question that arises for consideration is follows:-  
**“Whether the notice of termination of the PPA dated 18.5.2012 issued by the Appellant to the 4<sup>th</sup> Respondent in the absence of prior default notice as required under Article 9.3.2 of the PPA is valid or not ”?.**
10. Before making our analysis on this question, it would be proper to refer to the relevant portion of analysis and findings of the State Commission on this issue in the impugned order passed on 22.11.2012:

*“5) The only issue that arises for consideration and decision is, “Whether the termination effected by the Petitioner on 18.5.2012 (Annexure-K) is valid and in accordance with law?”*

*6) As the decision on termination of the PPA entirely hinges on the Termination Letter (Annexure-K at Page-73 of the Petition), it is necessary to extract the same below :*

*“Dear Sir,*

*Sub.: Termination of PPA and seeking Open Access.*

*Ref.: 1. Our PPA dt.19.10.2001 and Supplemental PPA dt.0.9.06.2005*

2. Our letter No.SCS/KPTCL09/2009  
dt.07.09.2009

3. Petition No.OP 37/2009

4. Order dt.03.03.2011 of the Hon'ble KERC  
in OP 37/2009

5. Proceedings dt.03.04.2010

6. Proceedings dt.08.08.2011

7.OP 50/2011 before the Hon'ble KERC

*We have signed a Power Purchase Agreement on 19.10.2001 and a Supplemental Agreement in 09.06.2005 with Karnataka Power Transmission Corporation Limited which stood assigned to you consequent to formation of ESCOM's. The ten years tariff as contemplated under the PPA is over with effect from 18.10.2011. The tariff for the remaining ten years effective from 19.10.2011 is not fixed yet. However the proposed tariff is not remunerative in view of the fact that Ten years of Commercial Operation is not over since, we have started our commercial operation only from 02.04.2008.*

*We would like to draw your kind attention to the various references cited above. In our letter cited at reference 2 above we have drawn the attention of the CESCO about the repeated defaults pertaining to:*

*1. Belated payment of power supply bills.*

2. *Nonpayment of escalation.*

3. *Non payment of interest on belated payment on supply bills.*

4. *Non opening of Letter of Credit as per the provisions of the PPA cited at reference above.*

*Interalia we have informed you that we will be terminating our PPA in case the defaults are not cured. Subsequently, since the defaults were not cured we have approached the Hon'ble KERC to direct the CESCOTM to cure the defaults and also to permit us to go for open access in OP No.37/2009. The Hon'ble KERC in its judgment dt.03.03.2011 has directed you to honour the terms of the PPA (Copy enclosed).*

*During the pendency of the petition and as per the directions of the KERC we have had a discussion with you in the meeting held on 03.04.2010 wherein the issues have been discussed. Further, after the final verdict of the KERC another meeting has been held on 08.08.2011. Copies of the proceedings enclosed.*

*While the issues regarding payment of supply bills and payment of escalation as per PPA have been settled, considered by the CESCOTM in pursuance of the judgment of the KERC, the interest on the belated payment has not been settled so far. The outstanding interest as per our records is Rs.1,64,30,939/-. In*

*addition to this the LC which should have been opened as per the provisions of the PPA has not been opened. Therefore, it is evident that the defaults still remain uncured till now inspite of clear directions by the Hon'ble KEREC.*

*In view of the long pending defaults remaining uncured we are invoking the provisions of Article 9 read with 9.2.2 o 3.3.1 of the PPA. And further we are informing you through this letter that we are cancelling our PPA dt.19.10.2001 and 09.06.2005 with immediate effect on the following grounds:*

- 1. The interest to the extent of Rs.1,64,30,939/- arising out of belated payment of supply bills has not been paid.*
- 2. Letter of Credit as required under Article 6.6 has not been opened yet, resulting in defaults being uncured and*
- 3. The tariff from the 11th year onwards as required under Article 5.2 has not been fixed and the proposed tariff from the 11th year is uneconomical in view of the fact that we have started commercial operation of our unit only from 02.04.2008 and as such 10 years of commercial operation is not completed and we are yet to service the interest and principal of term loans.*

*In this connection it would be pertinent to mention here that we had approached the Hon'ble KERC in OP No.50/2011 seeking higher tariff however we have withdrawn this Petition on 17.05.2012 under the existing circumstances. Therefore we are cancelling our PPA and would be selling our power through open access. We request you kindly to issue a no objection certificate from your end with regard to our termination of PPA and to sell power through open access."*

*7) From the above Termination Notice, it is seen that the Petitioner has issued the Termination Letter without calling upon the 1st Respondent to cure the defaults mentioned therein, as required under Article 9.3.2, and has proceeded to terminate the PPA straightaway.*

*8) As pointed out by the 1st Respondent, before termination of the PPA, the Petitioner is required to issue a Default Notice, calling upon the 1st Respondent to cure the defaults alleged to have been committed, within 30 days from the date of receipt of the Default Notice, and only in case of failure by the 1st Respondent to cure the defaults pointed out, the PPA can be terminated by the Petitioner. Therefore, the termination of the PPA, without issuing a Default Notice, is not in accordance with the terms of the PPA and hence cannot be sustained. The contention of the learned Counsel for the Petitioner that no fresh Notice was required for the termination of the PPA, in view of its earlier Notice dated 7.9.2009, cannot be accepted, in*



*view of the specific language contained in Article 9.3.2 of the PPA, which requires issuance of Default Notice of 30 days before terminating the PPA.*

*9) The contention of the Petitioner's Counsel that in view of the Order dated 3.3.2011 of this Commission passed in OP No.37/2009, no fresh Notice is required to be issued to the 1st Respondent before termination of the PPA, is untenable. In the said Petition, the Petitioner had sought for a declaration that the PPA dated 19.10.2001, as amended by the SA dated 9.6.2005, stood terminated, on the grounds that the 2nd Respondent therein (1st Respondent herein) had defaulted in making payments to the Petitioner as per the terms of the PPA, and had not opened the Letter of Credit as required under the PPA. This Commission disposed of the said Petition with the consent of the parties, by recording that "both the parties have agreed to abide by the terms of the PPA." In view of the consent of both the parties to abide by the terms of the PPA, the Petitioner cannot rely on the Notice issued, nor on the events that had taken place earlier to the disposal of OP No.37/2009 on 3.3.2011, and cannot make use of the same for fresh termination of the PPA. The Petitioner may terminate the PPA only if there is a fresh cause of action after the date of disposal of the Petition referred to above.*

*10) Even assuming that the letter of termination of the PPA itself is considered as a Notice for termination of the PPA, as contemplated under Article 9.3.2. of the*

*PPA, the Petitioner was not entitled to terminate the PPA in view of the reply sent by the 1st Respondent to the Petitioner on 27.6.2012. We have looked into the reply given by the 1st Respondent. In our view, the said reply clearly points out that the defaults pointed out by the Petitioner in the Termination Notice have already been cured, or in the process of getting cured. The facts stated in the 1st Respondent's reply regarding the payments made, etc., are also not disputed by the Petitioner. Therefore, the termination of the PPA affected by the Petitioner, on merits also, is not sustainable.*

*11) For the foregoing reasons, we hold that the termination of the PPA dated 19.10.2001 and the SA dated 9.6.2005, effected by the Petitioner vide its letter 18.5.2012, is invalid and unenforceable. Consequently, the Petitioner is not entitled to sell electricity to third parties based on the termination effected by it on 18.5.2012.*

*12) Hence, the Petition is liable to be dismissed and accordingly stands dismissed”.*

11. The crux of the analysis and findings given by the State Commission in the impugned order are as follows:

***“(a) The perusal of the termination notice dated 18.5.2012 would reveal that the Petitioner issued***

***termination notice straightway without sending the default notice to the Respondent to enable him to cure the defects as required under Article 9.3.2.***

***(b) The language of Article 9.3.2 of the PPA is very clear as it requires the issuance of the default notice giving 30 days time to cure the defaults before terminating the PPA. Therefore, the contention of the Petitioner that fresh notice was not required for termination of the PPA in view of its earlier notice cannot be accepted.***

***(c) The State Commission disposed of the earlier petition with the consent of the parties by recording that “both the parties have agreed to abide by the terms of the PPA”. In view of the said consent by both the parties, the Petitioner cannot rely upon the earlier default notice issued nor upon the events that had taken place earlier to the disposal of O.P.No.37/2009 on 3.3.2011.***

***(d) The Petitioner may terminate the PPA only when there is fresh cause of action and fresh default notice after the date of disposal of the petition on 3.3.2011.***

***(e) Even assuming that the letter of termination of the PPA can be considered to be a default notice for termination of the PPA as contemplated under Article 9.3.2 of the PPA, the Petitioner would not be entitled to terminate the PPA in view of the reply sent by the Respondent to the Petitioner on 27.6.2012 pointing out some defaults referred to in the termination notice have already been cured and other defaults are in the process of getting cured. Therefore, the termination of the PPA on merits also is not sustainable. Consequently, the Petitioner is not entitled to sell electricity to the 3<sup>rd</sup> parties based on the said termination notice dated 18.5.2012.”***

12. In the light of the above findings given by the State Commission, we will now enter into the process of analyzing the question framed above. The following aspects are evident from the facts as narrated above.

- a) There is no dispute in the fact that the PPA was entered into between the Appellant and the 4<sup>th</sup> Respondent on 19.10.2001 and thereafter supplemental agreement was entered into on 9.6.2005.
- b) Under Article 6.6.7 of the PPA, the Respondent was obliged to open an irrevocable and unconditional Letter of Credit on the date of PPA and make it operational 30 days prior to date of Commercial Operation. Admittedly it was not opened. That apart, the price for the power supplied to the 4<sup>th</sup> Respondent had not been paid in time. The interest for the belated payment was also not paid. Therefore, the Appellant issued a default notice dated 15.7.2009 in terms of Article 9.3.2 of the PPA.
- c) There was no response nor was there any effort on the part of the 4<sup>th</sup> Respondent to cure those defaults referred to in the default notice. Therefore, as per the PPA, the Appellant sent termination notice on 7.9.2009 on the ground of non-payment of amount towards the bills for the supply of the power, non payment of interest of belated payment as well as non opening of Letter of

Credit as per the PPA. Thereupon, the Appellant filed a Petition in OP No.37 of 2009 for declaration that the PPA dated 19.9.2001 and 9.6.2005 and the consequential direction to 4<sup>th</sup> Respondent to give no objection to give Open Access to the Appellant to enable to sell power to third parties.

- d) The said Petition was entertained in OP No.37 of 2009 by the State Commission and the notice was issued to the 4<sup>th</sup> Respondent. During the pendency of the said Petition, the 4<sup>th</sup> Respondent made certain payments but the entire defects which were referred to in default notice dated 15.7.2009 had not been cured. Therefore, even during the pendency of the Petition before the State Commission, the Appellant by the letter dated 2.9.2010 requested the 4<sup>th</sup> Respondent for reconciliation and settlement of the matter. In the meantime, meetings were arranged and both the parties participated in the meeting. In the meeting, both the parties have decided to report to the State Commission about their decision to abide by the terms of the PPA in the future. Accordingly, the same was reported on 3.3.2011 in OP No.37 of

2009. The said statements by both the parties were recorded in the said order.

- e) While the same was recorded by the State Commission, the Appellant requested for the liberty to be given to the Appellant for approaching the State Commission if any grievance would arise about the non implementation of the PPA in the future. Accordingly, the liberty was given and the same was recorded and the Petition was disposed of on 3.3.2011. The order dated 3.3.2011 is quoted as below:

*“PROCEEDINGS OF THE COMMISSION ON 3<sup>rd</sup> MARCH, 2011*

*Case No.OP 37/2009*

***Between:***

*M/s. Sri Chamundeshwari Sugar Limited  
No.76, Ulsoor Road,  
Bangalore-560 042*

*...Petitioner*

*And*

*1.Karnataka Power Transmission Corpn Ltd.,  
Kaveri Bhavan  
Bangalore-560 009*

2. *Chamundeshwari Electricity Supply Corpn Ltd.,  
No.927, LJ Avenue, New Kantharaj Urs Road,  
Saraswathipuram  
Mysore-570 009*

3. *Karnataka State Load Despatch Centre,  
28, Race Course Road,  
Bangalore-560 009*

4. *State Power Procurement Co-ordination Committee  
Kaveri Bhavan,  
Bangalore-560 009*

...Respondent(s)

*Case called. Counsel for Petitioner present and counsel or Respondents absent. As both parties have agreed to abide by the terms of the PPA Petition is disposed of accordingly with liberty to Petitioner to approach the Commission in case of any grievance arising in the implementation of PPA”.*

- f) The above order would indicate that the State Commission recorded the statement of both the parties to the effect that they have agreed to abide to the terms of the PPA and accordingly, disposed of the same. The above order would also include the liberty having been



given by the State Commission to the Appellant/ Petitioner to approach the State Commission in case of any grievance arising out of non implementation of the PPA.

g) The two aspects are clear on the careful perusal of this short order:

(a) By virtue of the statements made by both the parties giving undertaking to abide by the terms of the PPA, the termination notice dated 7.9.2009 had not been given effect to. However, no adjudication was made in the said Petition for giving declaration with regard to termination notice dated 7.9.2009. It means the termination notice had become infructuous in view of the fact that both the parties would follow the terms of the PPA in the future and as such the PPA had been restored.

(b) By giving the liberty to the Appellant Petitioner to approach the State Commission, the Appellant was permitted to approach the State Commission

again for the appropriate relief if the Appellant Petitioner felt aggrieved over the failure to cure the defaults pointed out in the notice dated 15.7.2009 by non implementation of the term of the PPA.

14. Both these aspects referred to above would make it evident that the Appellant has obtained the liberty from the State Commission to approach the State Commission in case of any grievance in the matter of non curing the defaults already committed by the Respondent or non implementation of the PPA. Since this liberty had been specifically sought for and given in this proceedings to the Appellant, it cannot be said that cause of action arising out of the default notice dated 15.7.2009 got completely extinguished.
15. In other words, if such a liberty had not been given in the earlier order in the earlier proceedings by the State Commission, then naturally the Appellant has to wait till the fresh cause of action is arisen and in that event, the Appellant is required to issue a fresh default notice giving time for curing the fresh defects, causing fresh cause of

action and thereafter to issue termination notice if those defects have not been cured within the time frame.

16. Therefore, in view of the wordings contained in the order dated 3.3.2011 giving liberty to the Appellant, , the cause of action which arose out of the issuance of the default notice dated 15.7.2009 cannot be said to have been completely extinguished. But, as mentioned above, it is true that the termination notice dated 7.9.2009 got cancelled and PPA got restored.
17. According to the 4<sup>th</sup> Respondent, without issuing default notice as required under Article 9.3.2 of the PPA, the notice of termination of the PPA by communication dated 18.5.2012 is bad in law. The said contention was accepted by the State Commission and dismissed the Petition filed by the Appellant by the impugned order dated 22.11.2012.
18. Let us see Article 9.3.2 of the PPA which reads as under:

*“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, the Company may deliver a Default Notice to Corporation in writing which shall specify in reasonable details, the Event of Default giving rise to*

*the Default Notice, and calling upon Corporation 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 rising 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.*

*When a Default Notice has been issued with respect to an Event of Default which requires the co-operation of both Company and Corporation to remedy, Company shall render all reasonable co-operation to enable the Event of Default to be remedied”.*

19. According to this Article, when there is an occurrence of Event of Default, the generating Company may deliver Default Notice to the Corporation (Respondent) giving the details of the events of default for issuing such a Default Notice and call upon the Respondent to cure the defects within 30 days and if the defaults have not been cured within that time, then the Appellant Company may terminate

the Agreement and intimate the same to the State Commission.

20. The event of default is defined in Article 9.2.2 which is quoted below:

*“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:*

- (a) Failure or refusal by Corporation to perform its financial and other material obligations under this Agreement”.*

21. Under Article 6.5 and 6.6, the payment must be made within due date as per the Agreement and if such a payment has not been made in time, the said over due amount will attract interest.

## **“ARTICLE 6**

### **BILLING AND PAYMENT**

*“6.5. Overdue accounts: if either Party fail to make any payment within 60 days after the due date under this Agreement, then such overdue amount shall attract interest for such period at the rate of SBI Prime Lending rate plus 2% per annum. While making such payment, the Party which is making payment shall specify the Tariff Invoice*

*reference (month and date) against which the payment is made, failing which such payment shall be appropriated by the other Party against the oldest outstanding Tariff Invoice.*

*6.6. Letter of Credit: Corporation, shall establish and maintain transferable, assignable, irrevocable and unconditional 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 Corporation 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) In the event a Tariff Invoice or any other amount due and payable by Corporation pursuant to the terms of this Agreement is not paid in full by Corporation as and when due, the Letter of Credit may be called by the company for payment in full of the unpaid Tariff Invoice or any such other unpaid amount.*

*ii) The foregoing as determined pursuant hereto, upon presentation of such tariff Invoice or other invoice or claim for such other amount by the Company on the due date therefor or at any time thereafter, without any notification, certification or further action being required.*

*iii) The amount of the Letter of Credit shall be equal to one month's projected payments."*

22. As per these Articles, the Letter of Credit shall be opened by the 4<sup>th</sup> Respondent Corporation in favour of the Appellant Company on the date of PPA and made operational within 30 days prior to the Commercial Operation Date of the project.
23. These conditions incorporated in above Articles have not been complied with. Hence, the Appellant Company sent a Default Notice on 15.7.2009.
24. The relevant statement made by the Appellant in the Default Notice dated 15.7.2009 is as follows:

*“Further, our company has not received the payment for the energy supplied during March, 2009 to end of May, 2009. The total amount due to the Company is Rs.16,20,94,482/- of which Rs.15,88,39,200/- is towards power supply bills for March, 2009 to May’2009 and Rs.32,55,282.71 towards less paid for the power supply during April’2008 to November, 2008.*

*The said amount is due from your company along with the interest at the rate of Rs.14.25% p.a as stipulated under the Power Purchase Agreement. The interest calculated up to the date is enclosed at Annexure.*

*Further the details of amounts due is as follows:*

1.	<i>Amount less paid for power supply during April'08 to November'08</i>	<i>Rs.32.55.282.72</i>
2.	<i>Power supply bills for March'09 to May'09</i>	<i>Rs. 15,88,39,200.00</i>
3.	<i>Interest for belated payment</i>	<i>Rs. 53,75,346.00</i>
	<i>Total</i>	<i>Rs. 16,74,69,828.72</i>

*You are aware that our company has exported the power to your company from March, 2009 to May, 2009 in excess of 18MWs of power for which no payment was made. The company has supplied 13, 44,960 excess units in the month of March 2009 and 34, 72,080 excess units in the month of May, 2009. While the tariff bill for March, 2009 has been paid on 2<sup>nd</sup> july, 2009, the payment has been restricted only to 18MV and no payment is made for the power supplied to the extent of 13, 44,960 over and above 18MV.*

*Further, KPTCL was also under an obligation as per clause 6.6 of the power Purchase Agreement to open an irrevocable and unconditional revolving letter of credit in favour of our company. However inspite of reminder neither KPTCL nor CHESCOM has opened the revolving letter to credit. Non compliance of the said material obligations amounts to default, thereby authorizing our company to terminate the PPA under the provisions Clause 9.2.1 (b).*



*Kindly note that if the default/s referred to above are not cured within 30days of date receipt of this default notice, we reserve the right to act as per the provisions of the Power Purchase Agreement”.*

25. For this notice, there was no reply. Ultimately, on 7.9.2009, the Appellant sent termination notice to the Respondent on the ground that the 4<sup>th</sup> Respondent failed to cure the defects as pointed out in the default notice dated 15.7.2009. Even thereafter, there was no response. Therefore, on 26.10.2009, the Appellant filed a Petition in OP No.37 of 2009 for declaration that the PPA dated 19.10.2001 and 9.6.2005 stood terminated and for a direction for the consequential relief.
26. During the pendency of the said proceedings, the 4<sup>th</sup> Respondent made some payments to the Appellant without prejudice to its rights to pursue the proceedings before the State Commission. However, the 4<sup>th</sup> Respondent failed to make the entire payments of arrears towards interest and failed to open the Letter of Credit thereby the defaults as per the notice dated 15.7.2009 have not been cured completely.

27. In the meantime, the State Commission repeatedly suggested for reconciliation. In fact, by the order dated 26.8.2010, the State Commission specifically directed both the parties that the reconciliation should be completed and report of reconciliation shall be submitted before the State Commission before 9.9.2010.
28. Under those circumstances, the Appellant sent a letter dated 2.9.2010 requesting the 4<sup>th</sup> Respondent to make the payment of the dues towards escalation, interest on belated payments and for required supply bills pending for the months of July and August, 2009.
29. On the basis of the assurance of the 4<sup>th</sup> Respondent that all the arrears particularly of which were mentioned in the default notice dated 15.7.2009 would be paid in due course, both the parties decided to report to the State Commission about this understanding between the parties and to dispose of the said petition. Accordingly, the matter was reported by both the parties before the State Commission on 3.3.2011. As mentioned above, on that date, the Appellant/Petitioner specifically requested the State

Commission for the grant of liberty to the Petitioner to approach the State Commission in case of any grievance arising out of the implementation of the PPA. The State Commission, accordingly, without going into the merits of the matter, disposed of the petition in O.P. No.37 of 2012 issued direction that both the parties should abide by the PPA in the future. As requested by the Petitioner/Appellant the State Commission also granted the liberty to the Petitioner thought he said order to approach the State Commission in case of any grievance arising out the non implementation of the PPA.

30. On that basis, it has been contended by the Appellant that the cause of action which arose out of the defect notice dated 15.7.2009 sent to the Respondent have not been extinguished and that on the other hand, the State Commission has given liberty to the Appellant to approach the State Commission for the appropriate relief in the event of defects not being cured causing grievance to the Appellant.

31. In the light of above contention urged by the Appellant, we have to analyse the plea of the objection on the part of the 4<sup>th</sup> Respondent raised in this Appeal.
32. According to the Appellant, even after the order passed on 3.3.2011, there were no sincere steps taken by the 4<sup>th</sup> Respondent to cure the entire defects pointed out in the earlier default notice dated 15.7.2009 and therefore, the Appellant had been sending reminders after reminders to cure those defects.
33. Strangely, the 4<sup>th</sup> Respondent has now raised the oral plea that subsequent to the order dated 3.3.2011 by which the earlier proceedings were disposed of and liberty was given to the Appellant, no reminders were sent by the Appellant to the Respondent calling upon him to cure the defects by making payment and as such, there was no fresh default notice before issuing the termination notice dated 18.5.2012.
34. This specific plea has been reiterated in the written submissions filed by the 4<sup>th</sup> Respondent dated 14.3.2013, which is quoted as below:

*“In the entire Appeal Memo, there is no case made out that it was contended before the KERC that subsequent to 3.3.2011, there was correspondence between the parties and that the Appellant had called upon the Respondent to adhere to certain terms which had not been fulfilled”.*

35. According to the Appellant, this plea made by the Respondent in his written submission is factually incorrect because after the order that was passed on 3.3.2011 by the State Commission, the Appellant had been continuously sending a number of reminders calling upon the 4<sup>th</sup> Respondent to cure the entire defects by making the payment of arrears towards the bills as well as towards interest.
36. The Appellant has pointed out that these reminders were sent to the 4<sup>th</sup> Respondent on 16.3.2011, 1.6.2011 and 9.12.2011.
37. Let us refer to those reminders in order to verify whether such a demand had been made by the Appellant after the disposal of the earlier Petition by the order dated 3.3.2011 as claimed by the Appellant, which is being denied by the 4<sup>th</sup> Respondent.

38. Let us first see the letter dated 1.6.2011, which refers to the earlier letter dated 16.3.2011.

SCS/CESC/06/2011/2763

01.06.2011

*The Managing Director,  
Chamundeshwari Electricity Supply Corporation,  
No.927, L J Avenue (Corporate office)  
New Kantharaj Urs Raod,  
Saraswathipuram,  
Mysore – 570009*

*Dear Sir,*

*Sub: Payment of escalation & interest on belated  
payment of power supply bills.*

*Ref: 1. Hon'ble KERC order dt. 3<sup>rd</sup> March, 2011 in OP  
No. 37/2009*

*2. Our letter No. SCS/Co-gen/Ele/11/23 dt.  
16.03.2011*

*At the outset we would like to thank CESCO for  
streamlining the payment cycle and bringing it under  
timely release process, which was earlier being delayed  
inordinately resulting in claims towards interest.*

*Further we would like to submit that in pursuance of the  
directions of the Hon'ble KERC in OP No. 37/2009 we  
have requested in our letter cited at reference to above  
to release the escalation amount and interest on the  
belated payment of power supply bills. The same has  
not so far been released to us.*

*You are aware that as per provisions of the PPA we are  
entitled for escalation at the rate of 2% over the base  
tariff and we have already submitted our calculation on*

*the admissible escalation. However, we are enclosing herewith the latest calculation sheet as on 31.05.2011 which is Rs.2, 35, 25,938.50.*

*Further, as per clause 6.5 of the PPA interest is payable on the belated payment of supply bills at a rate 2% above the SBI prime lending rate. The up to date admissibility of interest as per the said clause is enclosed herewith amounting to Rs.1, 64, 38,705.00.*

*We request you to kindly release the amount of escalation and interest due as already requested in our letter cited at reference to above which will be in accordance with the directions of the Hon'ble KERC dt. 03.03.2011.*

39. The reading of the above letter would clearly show that the Appellant referred to the earlier letter dated 16.3.2011 which was sent to the 4<sup>th</sup> Respondent reminding and demanding to clear the arrears. Thereafter, the Appellant again sent this reminder dated 1.6.2011 requesting for payment of arrears towards escalation amount as well as the interest on the belated payment of supplied bills. In this letter they have specifically referred to the earlier demand letter dated 16.3.2011.
40. The next letter sent by the Appellant is on 9.12.2011 which is as follows:

SCS/CESC/06/2011/276

09.12.2011

*The Managing Director,  
Chamundeshwari Electricity Supply Corporation,  
No.927, L J Avenue (Corporate office)  
New Kantharaj Urs Raod,  
Saraswathipuram,  
Mysore – 570009*

*Dear Sir,*

*Sub: Payment of pending power supply bills.*

*Ref: 1. Govt. Order No. EN 29 EEB 2010 dt. 1<sup>st</sup>  
April, 2010*

*2. Govt. Order No. EN 30 PPC 2010 dt. 3<sup>rd</sup>  
April, 2010*

*3. Judgment of Hon'ble KERC in OP  
No.16/2010*

*4. Judgment of Hon'ble KERC in RP  
No.4/2011*

*5. Judgment of Hon'ble KERC in OP  
No.37/2010*

*Please refer to the above*

*The short term power rates announced by Govt. of Karnataka vide order cited at reference 1 above for the period from April'2010 to June'2010 were accepted by the CESC in pursuance of the interim order in OP No.16/2010 and payments made accordingly. Subsequently, the Hon'ble KERC in its judgment dated*



24<sup>th</sup> March, 2011 has directed that the tariff in respect of the PPA holders shall be as per the tariff approved in the PPA to the extent of power fixed in the PPA and higher rate of Rs.5.00 per unit shall be applicable only if the supplies are made over and above the normal supplies. Further, the Hon'ble KERC has laid down the procedure in arriving excess supply made during the months of April, May and June, 2010 wherein it is said that ESCOMS shall take into account the quantum of power supplied by the generators during the months of April, May & June of the previous three years and supplies made in excess of the average supply of the last three years shall be eligible for payment of Rs.5.00 per unit. (copy enclosed).

Further, while disposing of the review petition No.04/2011 the Hon'ble KERC in its judgment dated 8<sup>th</sup> September, 2011 has come to the conclusion that the purchasing companies shall exclude the quantum of electricity during the corresponding months of 2009. Since, orders under Section 11 were in force. (copy enclosed). Therefore, the average of only two years will have to be taken into account i.e. 2007 and 2008.

In our case, the commercial operation is only from 2008 and therefore, question of computing the quantum during 2007 does not arise. Hence, the quantum of power supply during months of April, May and June, 2008 only will have to be taken into consideration for the purpose of calculation as directed in RP No.4/2011. Accordingly, we are enclosing herewith a statement of power supplied in RP No.4/2011. Accordingly, we are

enclosing herewith a statement of power supplied during April, May and June, 2010 with corresponding figures for April, May & June, 2008, as per this the quantity of power (in Kwhr) eligible at the rate of Rs.5.00 is as follows:

April-2010-	1,2811,080
May-2010-	70,34,760
June-2010-	62,83,680

You will please see that as per this calculation the excess amount would be Rs.3,01,21,040.00 which as per KERC order is to be recovered, the issue of which is pending before the Hon'ble Appellate Tribunal on Electricity, New Delhi and pending final disposal of the appeal we are agreeable for retaining this amount with CESC.COM.

As on date, the details of pending amount from CESC.COM is as follows:

Supply bills outstanding upto November, 2011-	Rs.7,25,96,365.08
Escalation Bills-	Rs. 40,46,146.56
Interest on belated payment as per	
PPA excluding the interest on escalation bills	Rs.1,33,02,534.00
Total	Rs.8,99,45,045.64
Less amount to be retained by CESC.COM	
Pending final disposal of the Appeal	Rs.3,01,21,040.40
Balance payable	Rs.5,98,24,005.24

Payment of escalation and interest on belated payment of supply bills are settled issues, as per the decision of the Hon'ble KERC in OP No.37/2009 (copy enclosed). While no interest has been paid so far a small amount of Rs.40,46,146.56 is still pending towards escalation.

*A detailed calculation sheet towards interest is enclosed.*

*Therefore, pending decision of the ATE on the Appeal, we request that the balance amount of Rs.5,98,24,005.24 may be released immediately to enable us to meet the commitments on cane payments to the farmers which is of top priority.*

*Thanking you,*

*Yours faithfully,  
For Sri Chamudeswari Sugars Limited.,  
Sd/-  
Managing Director”*

41. This letter also would show that the reminder had again been sent by the Appellant for the payment of the arrears as per the directions given by the State Commission in OP No.37 of 2011 on 3.3.2011. When the genuineness of these documents are not disputed, it is quite strange to see that the 4<sup>th</sup> Respondent has chosen to contend that the subsequent to 3.3.2011, there was no correspondence between the parties and the Appellant had never called upon the Respondent to adhere to the terms which had not been fulfilled.

42. In the light of the above materials, the learned Senior Counsel for the Appellant would strenuously contend that even assuming that the earlier default notice dated 15.7.2009 cannot be taken into consideration in the present proceedings, the letters which have been sent subsequent to 3.3.2011 by the Appellant on 16.3.2011, 1.6.2011 and 9.12.2011 should be construed to be default notices in compliance with the requirements of Article 9.3.2 of the PPA and as such the termination notice is valid.
43. However, the learned counsel for the 4<sup>th</sup> Respondent refuted this contention contending that this ground raised by the Appellant would be a new ground raised on the basis of these documents since those documents have never been placed before the State Commission nor referred to in their Petition before the State Commission and as such, it is not permissible for the Appellant to raise this new issue.
44. This contention also is not factually correct. In fact, in the Petition in O.P.No.35/2012 filed by the Appellant before the State Commission, initiating the present proceedings, it is

specifically mentioned about these documents. The relevant portions are as follows:

*“.....This Hon’ble Commission by its order dated 03.03.2011 disposed off the OP No.37/2009 observing that both the parties agreed to abide by the terms of the PPA, reserving liberty to the Petitioner to approach the Commission.*

*7. It is submitted that there after the Petitioner made representation to the Respondent No.3 for payment of the amounts towards interest etc., which had resulted in default as per the terms and conditions of PPA as well as the order of this Hon’ble Commission dated 03.03.2011 in OP No.37/2009. The copy of the representation dated 01.06.2011 addressed to the Respondent No.3 is herewith produced and marked as Annexure-G. As on date, a sum of Rs.169 lakhs is due from the Respondent No.3. Further, the Respondent has failed in opening the LC. In spite of clear directions from this Hon’ble commission in OP No.37/2009 dated 03.03.2011 there is continuous defaults by the Respondent No.3. Hence, it is evident that the Respondent No.3 has failed in curing the defects and as a result the Petitioner has terminated the PPA with immediate effect through their communication dated 18.5.2012. The Petitioner is also producing the statement dated 09.12.2011 showing the details of delayed payment and the interest the petitioner is entitled from the Respondent No.3. The copy of the statement dated 09.12.2011 showing the details of the delayed payment is herewith produced*

*and marked as ANNEXURE-H. From the above, it is clear that the Respondent No.3 at no point of time strictly adhered to the terms of PPA & Supplemental Agreement and complied with the orders of this Hon'ble Commission dated 03.03.2011 in OP No.37/2009."*

45. The above averments made by the Appellant before the State Commission in the present proceedings in Petition No.35 of 2012, would show that the Appellant clearly mentioned in their petition about the steps taken by the Appellant to remind and to call upon the 4<sup>th</sup> Respondent to cure the defects as directed by order dated 3.3.2012, passed by the State Commission through their reminder letters dated 01.6.2011 and 19.12.2011. In fact, the copies of these letters also had been enclosed with the Petition filed before the State Commission.
46. Therefore, the contention of the 4<sup>th</sup> Respondent that these documents are new documents on the basis of which, new ground is raised by the Appellant in this Appeal is untenable.
47. The main contention of the Appellant that the original cause of action which arises out of the issuance of default notice

dated 15.7.2009 had not been extinguished. However, on the basis of the reminder letters which were placed before the State Commission the Appellant would alternately contend that the letters sent by the Appellant subsequent to the order dated 3.3.2011 passed by the State Commission would amount to default notices in compliance with the requirement of Article 9.3.2 of the PPA.

48. In our view, as discussed above, the original cause of action which arose out of the failure to cure the defects as contained in the default notice dated 15.7.2009, had not been extinguished by the order dated 3.3.2011 and at the same time, the same had continued till the date of termination notice i.e. 18.5.2012 especially when the Appellant has established that it sent the reminders and demand letters on 16.3.2011, 1.6.2011 and 9.12.2011 calling upon the 4<sup>th</sup> Respondent to cure the defects. Thus, admittedly, the defects have not been cured in full.
49. There is one more aspect to be noticed in this context. The State Commission in para 10 of the impugned order has observed that the Appellant/Petitioner was not entitled to

terminate the PPA in view of the reply sent by the 4<sup>th</sup> Respondent on 27.6.2012. The State Commission has further observed that the said reply clearly points out that defaults pointed out by the Appellant/Petitioner in the Termination Notice have already been cured or were in the process of getting cured.

50. We have examined the contents of 4<sup>th</sup> Respondent's letter dated 27.5.2010 and noted that the 4<sup>th</sup> Respondent had accepted that the Letter of Credit in favour of the Appellant had not been opened and issue regarding payment of Interest on delayed payment could be deliberated further. This fact clearly points out that the defaults set out in the Default Notice dated 15.7.2009 were not fully cured till 27.6.2012 as admitted by them to the effect that the defaults were in the process of getting cured.
51. As indicated above, Article 9.3.2. of the PPA clearly gives power to the Appellant to terminate the PPA in case the event of default giving rise to Default Notice were not cured within 30 days from the date of Default Notice. In the present case, Default Notice was sent by the Appellant to



the Respondent on 15.7.2009. In this Default Notice the Appellant had clearly pointed out events of defaults as non-opening of Letter of Credit and non payment or interest on delayed payment. Admittedly, both these defaults had not been cured till 27.6.2012 the date of the reply i.e. even after expiry of almost three years. Therefore, the Appellant's right to terminate the PPA at any time after expiry of thirty days i.e. after 14.8.2009 continues to exist as it had not been extinguished.

52. Before concluding we would like to point out the conduct of the parties in the present case. Indisputably, the 4<sup>th</sup> Respondent Power Corporation had defaulted on some terms of the PPA from the beginning. It was required to open Letter of Credit in favour of the Appellant on the date of signing of PPA and to make it operational 30 days prior to CoD. It was also required to make timely payment of bills for the energy it had drawn from the Appellant's plant. It was liable to pay interest on the delayed payment. But, admittedly, the Respondent had failed to pay interest on delayed payment and also had failed to open Letter of Credit.

53. Despite issuance of Default Notice dated 15.7.2009 and Termination Notice dated 7.9.2009, and despite the fact that Appellant thereupon filed a petition before the State Commission on 26.10.2009 for declaration that the PPA stood terminated, the Appellant had agreed before the State Commission to continue with the PPA on the condition that terms of PPA would be honoured by both the parties in the future and on that basis, the Appellant had been making supply of power to the 4<sup>th</sup> Respondent. This conduct on the part of the Appellant would show that the Appellant was interested in generating and supplying power the 4<sup>th</sup> Respondent in terms of PPA reflecting its bonafide intention.
54. On the other hand, the 4<sup>th</sup> Respondent, having achieved the objective of continuation of PPA and got the O.P.No.37 of 2009 disposed of on the premise that it will abide by the terms of the PPA, failed to open the Letter of Credit in time and also failed to make payment of interest for delayed payment which would show that the conduct of the 4<sup>th</sup> Respondent is not bonafide.

**55. To sum up:**

- (i) The original cause of action which arose out of failure to cure the defects as contained in Default Notice dated 15.7.2009 had not been extinguished by the State Commission's order dated 3.3.2011.**
- (ii) Since the defaults creating the cause of action had not been cured fully, the default notice dated 15.7.2009, continued to exist and no fresh notice of default was required to be issued by the Appellant. Only the termination notice dated 7.9.2009 became in-fructuous by virtue of State Commission's order dated 3.3.2011. But the cause of action by default notice dated 15.7.2009 would continue to exist, when all the said defaults mentioned in the default notice admittedly had not been cured, inspite of the several reminders sent after 3.3.2011. Hence, termination notice dated 18.5.2012 is valid.**

56. In the light of our above conclusion, the Appeal is allowed and the impugned order dated 22.11.2012 is set aside. Accordingly, we hold that the PPA stood terminated and the

Appellant is entitled to obtain open access and to sell power to 3<sup>rd</sup> Party through the open access.

57. The State Commission is directed to pass consequential orders in terms of our above observations without any further delay i.e. preferably within a month from the date of this judgment.

58. No order as to costs.

**(V.J. Talwar)**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

**Dated: 17<sup>th</sup> April,2013.**

√

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