

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 204 OF 2018 & IA No. 664 OF 2024

Dated : 16th July, 2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

BEML Limited

(Formerly Bharath Earth Movers Limited)

A Govt. Company registered under

the provisions of the Companies Act, 1956

having its Corporate Office at 'BEML SOUDHA'

No. 23/1, 4th Main Road, S. R. Nagar,

Bengaluru – 560027, Karnataka

Represented by its Deputy General Manager (Legal)

Shri M.K. Vidhyadharan

....APPELLANT

Versus

1. The Karnataka Electricity Regulatory Commission

#No. 16, C-1, Millers Bed Area,

Vasanth Nagar, Bengaluru – 560 052.

Karnataka

Represented by the Secretary

2. Hubli Electricity Supply Co. Ltd.

A Govt. Company registered under

the provisions of the Companies Act, 1956

having its Registered office at Navanagar

P.B. Road, HUBLI – 580 025
Represented by its Managing Director

3. State Load Dispatch Centre – Karnataka

#28, Load Dispatch Centre, KPTCL
Race Course Road, Bengaluru-560009
Represented by its Chief Engineer

4. Gulbarga Electricity Supply Co. Ltd.

A Govt. Company registered under
the provisions of the Companies Act, 1956
having its Registered office at Station Road
Kalaburgi-585101, Karnataka
Represented by its Managing Director

5. Karnataka Power Transmission Corporation Limited

A Govt. Company registered under
the provisions of the Companies Act, 1956
having its Registered office at Kaveri Bhavan,
K.G. Road, Bengaluru – 560 009
Karnataka
Represented by its Managing Director

.... RESPONDENTS

Counsel for the Appellant(s) : K. Gangadharan
Yash Prakash for App. 1

Counsel for the Respondent(s) : Shahbaaz Husain
Fahad Khan
Stephania Pinto
Yeshwanth M Comar for
Res. 2

Ashok Bannidinni for Res. 4

Avimukt Dar
Gaurav Dani
Mohit Chadha
Vaishnavi Rao
Varun Khanna
Yugank Goel
Padmaja kaul
Vanika Gupta
Kshitij Parashar
Ragima R
Swati Mittal for Res. 5

JUDGMENT

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. In this appeal, the Appellant has assailed the order dated 24th November, 2016 passed by the 1st Respondent, the Karnataka Electricity Regulatory Commission (KERC in short) whereby the Appellant's prayer to declare that the Power Purchase Agreement (PPA) dated 27th February, 2008 executed between it and 2nd Respondent, Hubli Electricity Supply Company Ltd. (HESCOM in short) stands terminated, has been declined. Appellant's further prayer to direct the Respondent to execute a wheeling and banking agreement with it, has also been rejected.

2. The Appellant is a public sector undertaking under the Ministry of Defence, Govt. of India and is a Government company established in

May, 1964 under the provisions of the Companies Act, 1956. It is in the business of manufacturing of equipment, spare parts, component parts and aggregates required for Defence, Rail and Metro, Mining and Construction, Aerospace etc. It is having four manufacturing units at Bengaluru, Kolar Gold Fields, Mysore and Palakkad. It is utilizing about more 380 lakh units of electrical energy per annum which is sourced through Bangalore Electricity Supply Company Limited and Chamundeshwari Electricity Supply Company Limited.

3. In pursuance to an application dated 23rd July, 2007 submitted by the Appellant to Karnataka Renewable Energy Development Ltd. (KREDL) for allotment of capacity for developing of wind farm projects in the State of Karnataka, the Appellant was allotted 5MW capacity wind power project at Kappatagudda, Bidanlal Village, Mundargi Taluq of Gadag District, Karnataka. The project was commissioned on 20.12.2007. Since the draft of wheeling and banking arrangements had not been finalized by 5th Respondent - Karnataka Power Transmission Corporation Limited (KPTCL in short), by that time, the Appellant had no option but to sell the power generated from the said power project. Accordingly, it entered into a Power Purchase Agreement dated

27.02.2008 with the 2nd Respondent HESCOM. The PPA is for a period of 20 years from the commercial operation date of the project i.e. 20th December, 2007 and may be renewed for such further period of 10 years upon such terms and conditions as may be mutually agreed between the parties subject to the approval by the first Respondent-Commission. As per the PPA, the Appellant shall supply electricity to the 2nd Respondent @Rs.3.40 per KW for the first 10 years from the date of commercial operation and from the 11th Year onwards the 2nd Respondent shall have to pay to the Appellant for the electricity supply delivered at the metering point @ determined by the Commission.

4. Be it noted here that the first Respondent-Commission duly approved standard wheeling and banking arrangement for renewable energy projects by order dated 11.07.2008 on the terms and conditions as stated thereunder.

5. The case of the Appellant company is that it had executed PPA with the 2nd Respondent upon the condition that the Appellant should be permitted to switch over to wheeling and banking facilities as and when wheeling and banking arrangement comes into force in the State of Karnataka. It is contended that as soon as the wheeling and banking

arrangement was approved by the Commission dated 11th July, 2008, it has been approaching the officials of 2nd Respondent-HESCOM for permission to switch over to wheeling and banking facilities but in vein. Thereafter, it sent a written request on 09.11.2013 to the 2nd Respondent in this regard, but the same was declined. According to the Appellant, it had made clear in the application dated 23rd July, 2010 that it is seeking the power project in question for its captive use and the entire power generated from the same would be consumed at its various manufacturing units on the wheeling and banking arrangement which was to be approved by the Commission.

6. It is further case of the Appellant that the 2nd Respondent committed several defaults in determining payments to it for the electricity supply to it by failing to honor the monthly tariff invoices and the delay has been from 15 days to 183 days. It is contended that the 2nd Respondent had not paid any interest on the delayed payments on the monthly tariff invoices on account of which the PPA stood terminated and the Appellant became entitled to wheel the energy to its destination.

7. Accordingly, the Appellant approached the first Respondent-Commission with the petition bearing O.P. No. 29 of 2014 with the following prayers :-

(a) "To declare that the Power Purchase Agreement (PPA) dated 27.2.2008, executed between the petitioner and the 1st Respondent-Hubli Electricity Supply Company Limited (HESCOM), stands terminated:

(b) Consequently, to direct the Respondents to execute the Wheeling and Banking Agreement (W&BA) to wheel the energy from the wind power project of the petitioner to its captive consumption points; and

(c) to Direct the 1st Respondent-HESCOM to pay a sum of Rs.32,54,782/- being the interest due for the delay in payment of the Monthly Tariff Invoices."

8. The Respondents denied that the PPA was executed by the Appellant on a pre-condition that it would be permitted to execute the wheeling and banking agreement as and when the same is approved by the Commission. It is contended that the Appellant has consciously chosen to enter into the PPA dated 27.02.2008 with the 2nd Respondent

knowing fully well that the term of PPA was for a period of 20 years from the commercial operation date of the project and the Appellant never stated that it was entering into the PPA for a limited period only as there was no approved wheeling and banking agreement. The 2nd Respondent-HESCOM further contended that it has made every payment to the Appellant regarding the monthly tariff invoices and the Appellant's claim for interest towards delayed payment was barred by limitation.

9. On the basis of the pleadings of the parties, the Commission formulated following five issues for determination :-

(1) "Whether the PPA dated 27.02.2008 was executed subject to the condition that the petitioner should be allowed to wheel the energy from its wind power project to its captive consumption points, on approval by the Commission of the standard format of the Wheeling and Banking Agreement?"

(2) Whether the PPA dated 27.02.2008 stands terminated for non-payment of interest?

(3) Whether the Petitioner is entitled to open access under Article 9.2.2.(b) of the PPA dated 27.02.2008.

(4) Whether the 1st Respondent (HESCOM) is liable to pay interest occurred due to delayed payment of the Monthly Tariff Invoices? If So to what extent?

(5) What orders?"

10. Vide the Impugned Order, the Commission decided the issue Nos. 1, 2 & 3 against the Appellant. The issue No. 4 has been decided partly in favour of the Appellant holding it entitled to the interest accrued on delayed payments w.e.f. 14th November, 2011 and not prior to that date.

11. We have heard Learned Counsel for the Appellant and Learned Counsel for Respondent No. 2. Nobody has come forward to make submissions on behalf of Respondent Nos. 1, 3 & 4. We have also perused the impugned order as well as the entire record and also the written submissions filed by the Learned Counsels for the Appellant and Respondent No. 2.

12. Learned Counsel for the Appellant vehemently argued that the Appellant had very clearly indicated in the application dated 23.07.2007 that the power project is meant for its self-consumption i.e. for meeting for its own energy requirements in various units on a wheeling and banking arrangement. It is further pointed out that in the said

application, it was also made clear that annual wheeling and banking arrangement is finalized by KPTCL, the power generated in the project shall be sold to KPTCL. According to the Learned Counsel, it is amply clear that the Appellant had obtained the power project for its captive consumption only but there was no possibility of including the said contention in the PPA dated 27.02.2008 executed with the 2nd Respondent for the reason that the PPA is a 'Boilerplate Contract' i.e. on a 'Standard form of Contract'. He vehemently argued that the PPA is a one-sided contract with no opportunity for the Appellant to modify it and, therefore, should be held as 'Contract in Terrorem'.

13. Learned Counsel further argued that the Commission having arrived at a finding that the 2nd Respondent committed default in timely payment of monthly tariff invoices, ought to have held the Appellant entitled to sell electricity to third parties as envisaged under Article 9.2.2(a) & (b) of the PPA by entering into wheeling and banking agreement with the 2nd Respondent. He further submitted that the demand for the interest on delayed payments cannot be said to be held barred by limitation for the reason that the default is a continuing one as the PPA is still in force.

14. On behalf of the 2nd Respondent, it is argued that even though the Appellant had mentioned in the application that it is acquiring the power project for self-consumption yet neither was a copy of the application shared with 2nd Respondent nor were its contents communicated to the 2nd Respondent at any time before or after the execution of the PPA. He submitted that since the 2nd Respondent was not party to the application, it cannot be bound by its contents. He argued that there is no material on record to show or suggest that the 2nd Respondent was aware of such condition that the Appellant would be at liberty to exit the PPA and enter into a wheeling and banking agreement, subsequently. Referring to paragraph No. 1 of the PPA, it was pointed out by the Learned Counsel that the allotment of wind power project by the Government to the Appellant was not for its captive consumption but for selling the power to the licensee only and, therefore, the Commission has rightly declined the prayer of the Appellant in this regard.

15. Learned Counsel further argued that even after the wheeling and banking agreement was approved by the Commission on 11th July, 2008; the Appellant continued selling power to the 2nd Respondent till the year 2013 without seeking to opt for wheeling and banking

arrangement, which shows that the Appellant had no intention to exit the PPA. He would further argue that non-payment of interest on the delayed payment of monthly tariff invoices cannot be treated as a “Payment Default” as contemplated under Article 9.2.2(b) of the PPA for the reason that no timeline is specified thereunder for payment of interest.

16. We have given our thoughtful consideration to the pleadings of the parties and rival submissions made by the Learned Counsels appearing on behalf of the Appellant and Respondent No. 2, as noted herein above.

17. Concededly, there is nothing in the PPA dated 27.02.2008 executed between Appellant and 2nd Respondent to show or suggest that there had been any pre-condition from the Appellant’s side to the effect that it would be at liberty to exit the PPA and execute Wheeling and Banking Agreement as soon as the Wheeling and Banking arrangement is approved by the Commission. According to the Appellant, there was an oral agreement in this regard between it and the 2nd Respondent. We may note that such an oral agreement which would contradict, vary, add to or subtract from the terms of any such written

contract is not admissible and is clearly barred by Section 92 of the Indian Evidence, which is quoted hereunder :-

Section 92. Exclusion of evidence of oral agreement.

“When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms;

Proviso (1): Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party want or failure of consideration, or mistake in fact or law:

Proviso (2): The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document:

Proviso (3): The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4): The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5): Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved; Provided that the annexing of such incident would not be repugnant to, or inconsistent with the express terms of the contract:

Proviso (6): Any fact may be proved which shows in what manner the language of a document is related to existing facts.”

18. This legal provision clearly makes inadmissible any oral agreement which is contrary to the terms of a written contract and tends to add or subtract from its terms. The case of the Appellant does not fit into any of the provisos attached to the said Section 92 which make such oral agreements admissible. Therefore, the Appellant is precluded from putting forth any oral agreement which contradicts the terms of the written agreement i.e. the PPA dated 27th February, 2008 executed by it with 2nd Respondent.

19. Even otherwise also, the material on record as well as the conduct of the Appellant itself, no where indicates that there was any such pre-condition put forth by the Appellant to the 2nd Respondent before execution of the PPA, to which the 2nd Respondent acceded. To canvass its point, much reliance was placed on behalf of the Appellant on the contents of the application dated 23rd July, 2007 submitted by it to KREDL for allotment of the wind power projects. True it is that the Appellant had indicated in its application that the power project is meant for its self-consumption. However, it is significant to note that the 2nd Respondent was not a party to the said application. There is nothing on record to show that

the 2nd Respondent was made aware about the contents of the said application at any time prior to or after the execution of the PPA. To the contrary, the paragraph No. 1 of the PPA refers to order dated 18th August, 2007 of Govt. of Karnataka, vide which the Appellant was allotted 5 MW wind power project in question, and which states that the Appellant is permitted to enter into an agreement with the licensee only. For clarity, we find it pertinent to quote the recitals in paragraph No. 1 of the PPA hereunder :-

“... GoK by it's order No. EN 271 NCE 2007 dated 18.8.2007 has approved cancellation of 5.00 MW Wind Power Capacity from M/s. VRL Logistics Limited Phase 7 & 8 and transfer the same capacity of 5.00 MW to the Company at Bidanhal Village, Mundargi Taluk, Gadag District, Karnataka State from out of the 21.25 MW capacity allotted to M/s. Suzlon Energy Limited and permitted Corporation to enter into an agreement with the Company for purchase of Electricity.”

20. A bare reading of these recitals clearly indicates that allotment of wind power project was made in favour of the Appellant with the direction that power generated in it should be sold to the licensee only. Therefore, it is manifest that the condition put forth by the Appellant in application dated 23rd July, 2007 was not accepted by the Government and the Appellant was required to sell the power

generated in the power project to the licensee alone and was not permitted to use it for its captive consumption.

21. In case, the contentions of the Appellant in this regard are assumed to be true for the same of arguments, it should have exited the PPA as soon as Wheeling and Banking arrangement for renewable energy projects was approved by Respondent-Commission on 11th July, 2008. However, it did not do so. It continued supplying electricity to the 2nd Respondent under the PPA for about five more years till 2013 without seeking to opt for Wheeling and Banking arrangement. Such conduct of the Appellant is indicative of the fact that no pre-condition was put forth by it before executing the PPA with 2nd Respondent and it had no intention to exit the PPA. It is for the first time vide letter dated 9th November, 2013 that the Appellant made a request to the 2nd Respondent for permission to switch over to Wheeling and Banking arrangements. Even though, the Appellant contends that it had been approaching the 2nd Respondent for such permission since the date of approval of Wheeling and Banking arrangement by the Commission, nothing has been mentioned about the same in the

entire letter dated 9th November, 2013. We find it apposite to reproduce relevant portion of the said letter hereunder :-

“It should be noted that, during December, 2007 when the 5 Mw Wind Project was commissioned, the BESCO energy tariff was Rs. 430 per unit, which is at present enhanced to Rs. 5.75 per unit. This is causing enormous burden on our energy bills. Hence, we request you to permit us to withdraw from PPA arrangement and to permit for self-use of Wind Power generated through Wheeling and Banking facility.”

22. Thus, it is evident that permission to withdraw from the PPA was sought by the Appellant only on account of unfavourable market condition caused due to enhancement of electricity tariff by HESCO and not on the basis of any pre-condition or an oral agreement.

23. We do not find any force in the arguments on behalf of the Appellant that the PPA is one-sided agreement and should be held as ‘Contract in Terrorem’. It is claimed that the PPA is prepared on a standard format of a contract and there was no possibility of including any further term in the same. We may note that when the Appellant found it difficult to include any further term in the PPA, nothing precluded it from entering into a separate written agreement with the 2nd Respondent with regards to the terms/pre-condition stated to be put forth by it. It is further argued on behalf of the Appellant that only the 2nd

Respondent has been permitted to terminate the PPA from the 11th Year onwards and no such authority has been bestowed to the Appellant. On this aspect, we feel in agreement with the reasoning of the Commission in the impugned order which is quoted hereunder:-

“There is a valid reason as to why a Distribution Licensee alone is given an option to continue a PPA after the tenth year from the COD. It is so because, after completion of ten years, the debt servicing of the Project Cost would have been fully met with. Having played a prominent supporting role in the first 10 years of the PPA, the Distribution Licensee can thereafter be relieved of the responsibility of both the guaranteed off-take of power, as well as payment of a fixed price, determined in advance. Therefore, the option given to the 1st Respondent (HESCOM) to continue the PPA from the eleventh year onwards from the COD, cannot be considered as a “Contract in Terrorem”, as pleaded by the Petitioner.”

24. The conduct of the Appellant throughout is indicative of the fact that it had made a conscious decision to sell electricity to 2nd Respondent under the PPA dated 27th February, 2008 without any pre-condition and now wants to wriggle out of the PPA due to hostile market conditions. The Appellant cannot be permitted to do so as it is bound by each and every term and condition of the PPA.

25. The contention of the Appellant that the PPA dated 27th February, 2008 stood terminated due to non-payment of interest on delayed

payments on monthly tariff by the 2nd Respondent, is also sans any merit.

26. On this aspect, we find it necessary to quote Article 6.2, 6.3, 9.2.2 and 9.3.2 of the PPA dated 27th February, 2008 hereunder :-

“6.2 **Payment** : HESCOM 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 the Corporation.”

“6.3 **Late Payment** : If any payment from HESCOM is not paid when due, there shall be due and payable to the Company 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.”

“9.2.2 **HESCOM’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 HESCOM:

- a. Failure or refusal by HESCOM to perform its financial and other material, obligations under this Agreement.
- b. In the event of any payment default by the HESCOM for a continuous period off three months, the Company shall be permitted to sell Electricity to third parties by entering into Wheeling & Banking agreement with the HESCOM for which it shall pay transmission and any other charges to HESCOM at the rates applicable from time to time as approved by the Commission.”

“9.3.2 **Termination for HESCOM’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 HESCOM in writing which shall specify in reasonable detail the Event of Default giving rise to the Default Notice, and calling upon HESCOM 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 the HESCOM Company may terminate this Agreement by delivering such a Termination Notice to HESCOM and intimate the same to the Commission. Upon delivery of the Termination Notice this Agreement shall stand terminated and Company shall stand discharged of all its obligations.

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

27. Article 6.2 of the PPA makes it obligatory upon 2nd Respondent to make payment of amount due within 15 days from the date of receipt of tariff invoices from the Appellant. Article 6.3 provides that if the 2nd Respondent does not make the payment when due, it shall be liable to pay interest to the Appellant @SBI Medium Term Lending Rate upon such payment from the date when it was due till such payment is made in full.

28. It is in terms of Clause(b) of Article 9.2.2 of the PPA that the Appellant becomes entitled to terminate the PPA and sell electricity to 3rd parties in the event of any “Payment Default” by the 2nd Respondent-HESCOM.

29. Manifestly the term “Payment Default” used in clause (b) of 9.2.2. refers to the default in payment of amounts reflected in the tariff invoices raised by the Appellant in the name of 2nd Respondent and cannot be construed to include within its ambit non payment of interest on such invoice amount. Therefore, we concur with the opinion of the commission contained in the impugned order to the effect that non-payment of interest on late payment of monthly tariff invoices cannot be treated as “Payment Default” as contemplated under Article 9.2.2(b) of the PPA.

30. Even otherwise also, in case it is assumed for the sake of arguments that the term “Payment Default” used in Article 9.2.2(b) of the PPA covers the instances of default in paying the interest on delayed payment of monthly tariff invoices, then also case of the Appellant must fail. A combined reading of Article 9.2.2 and Article 9.3.2 of the PPA would reveal that in the event of any “Payment Default” by the 2nd

Respondent for a continuous period of three months, the PPA shall not get terminated automatically and the Appellant would not become automatically entitled to sell electricity to third parties. The Appellant is bound to follow the procedure set out in Article 9.3.2 and only thereafter would the PPA stand terminated thereby discharging the Appellant on all its obligations.

31. It is nowhere the case of the Appellant that it had served any default notice or the final termination notice upon the 2nd Respondent as provided in Article 9.3.2 of the PPA. Therefore, in the absence of any averments and material on record on behalf of the Appellant to show compliance of the procedure set out in Article 9.3.2, we affirm the findings of the Commission to the effect that the PPA did not get terminated for non-payment of interest and the Appellant did not become entitled to open access under Article 9.2.2(b) of the PPA.

32. We also do not find any error in the decision of the Commission on issue No. 4 to the effect that the Appellant is entitled to interest w.e.f. 14th November, 2011 upto 30th November, 2014 only and the interest accrued prior to 14th November, 2011 had become barred by the limitation. The Appellant had claimed interest on the monthly tariff

invoices submitted by it for the period 17th July, 2008 onwards till 18th March, 2014. The petition was filed by it before the Commission on 13th November, 2014. It is elementary that as per the law of limitation, the interest which had accrued on the invoice dated 17th July, 2008 could have been claimed by the Appellant only during the period of three years from the said date i.e. till 16th July, 2011. The same can be said with regards to the invoices raised subsequently by the Appellant in the name of the 2nd Respondent. The Appellant cannot claim the interest amount, which had accrued to it in July, 2008, on 13th November, 2014 when it filed the petition before the Commission. It is for this reason that the Commission has rightly held the Appellant entitled to interest which had accrued on the delayed payments w.e.f. 14th November, 2011 onwards.

33. In view of above discussion, we do not find any flaw or infirmity in the impugned judgement of the first Respondent-Commission. The Appeal is devoid of any merits and hereby dismissed. All pending IAs stand disposed off.

Pronounced in the open court on this 16th day of July, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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