

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

**Dated: 12<sup>th</sup> Feb. 2014**

**Present:**

**HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON**  
**HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

**Appeal No. 152 of 2012**

**M/s. Soham Mannapitlu Power Pvt Ltd.,**  
**(Previously known as M/s. Bobba Aviation**  
**Services Pvt Ltd.,)**  
**HMG Ambassador Building,**  
**7<sup>th</sup> Floor, 137 Residency Road,**  
**Bangalore-560 025**

**... Appellant**

**Versus**

- 1. Karnataka Power Transmission Corporation.**  
**A Block, Cauvery Bhavan,**  
**Bangalore-560 009**
- 2. Mangalore Electricity Supply Co. Ltd.,**  
**Paradigam Plaza (1<sup>st</sup> Floor)**  
**A B Shetty Circle,**  
**Mangalore-575 101**
- 3. The State Load Despatch Centre,**  
**Karnataka Power Transmission Corporation Ltd.,**  
**28 Race Course Road,**  
**Bangalore-560 001**
- 4. Karnataka Electricity Regulatory Commission,**  
**Mahalakshmi Chambers,**  
**6<sup>th</sup> and 7<sup>th</sup> Floor,**  
**9/2, M.G. Road,**  
**Bangalore-560001**

**Respondent(s)**

**Counsel for the Appellant (s): Mr. Udaya Holla, Sr Adv  
Mr. Chandrashekar S.  
Mr. Pankaj Singh  
Mr. Pankaj Mishra  
Mr. Ajit S Bhasme**

**Counsel for the Respondent (s): Mr. Anand K Ganesan  
Ms. Swapna Seshadri for R-1  
Mr. S Sriranga  
Mr. Sumana Naganand  
Mr. Venkata Subramaniam T R  
Mr. Raghavendra S Srivatsa for R-2**

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

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

1. M/s. Soham Mannapitlu Power Pvt Ltd is the Appellant herein.
2. Challenging the Order dated 7.6.2012 passed by the Karnataka State Commission dismissing the Petition filed by the Appellant seeking for the declaration of the termination of the Power Purchase Agreement as well as for the grant of Open Access; the Appellant has filed this Appeal.
3. The short facts are as follows:

(a) The Appellant, previously known as M/s. Bobba Aviation Services Private Limited is a Generating Company.

(b) The Karnataka Power Transmission Corporation is the first Respondent.

(c) It entered into a Power Purchase Agreement with M/s. Bobba Aviation Services Private Ltd, the predecessor of the Appellant on 26.11.2004 where under the first Respondent agreed to purchase the electricity generated in the project of the Appellant which has a capacity of 15 MW.

(d) The Bobba Power Project suffered heavy losses due to the natural calamity resulting in its inability to complete the project. Therefore, Mr. K Sadananda Shetty and his Group agreed to take over the project. Accordingly, it purchased the shares of M/s. Bobba Aviation Services Pvt Limited.

(e) Thereafter, the name of the Company was changed into M/s. Soham Mannapitlu Power Private Limited, the Appellant herein.

(f) There were huge liabilities of the Generating Company while the project was taken over by the Appellant's group. Therefore, the Appellant obtained

loans from different banks. With a great difficulty, the project in question was completed in the year 2009.

(g) As the project could not be completed within the period in terms of the PPA dated 26.11.2004, the Appellant approached the Karnataka State Commission on 9.8.2009 and filed a Petition in OP No.27 of 2009 seeking for a declaration that the PPA dated 26.11.2004 stood automatically terminated in terms of the PPA and in the alternative, seeking for re-fixation of the Tariff due to escalation in the Project cost.

(h) While entertaining the said Petition, the State Commission on 10.9.2009, passed an interim order directing the MESCOM, the 2<sup>nd</sup> Respondent, the assignee of the 1<sup>st</sup> Respondent, to purchase the electricity generated by the Appellant at the rate of Rs.2.90/per kWh.

(i) Ultimately, on 23.12.2010, the State Commission dismissed the Petition in OP No.27 of 2009 filed by the Appellant holding that the PPA dated 26.11.2004 entered into between the Appellant and the first Respondent was valid.

(j) With regard to the alternative prayer of the Appellant for re-fixation of the tariff due to escalation

in Project Cost, the State Commission directed the Appellant to approach the MESCOM, the second Respondent with all the details to substantiate its claim.

(k) Accordingly, the Appellant made a representation to MESCOM, the 2<sup>nd</sup> Respondent seeking for the revision of the tariff. However, the 2<sup>nd</sup> Respondent after having several rounds of meetings, rejected the Appellant's request for tariff revision through the letter dated 17.3.2012.

(l) As indicated above, in terms of the PPA dated 26.11.2004, the Appellant started supplying the power to the 2<sup>nd</sup> Respondent (MESCOM) from 7.9.2009 onwards.

(m) Despite the PPA dated 26.11.2004 for creation of Letter of Credit in favour of the Appellant and the same was required to be kept in operation 30 days prior to the date of commercial operation, the 2<sup>nd</sup> Respondent (MESCOM) failed to establish the Letter of Credit in terms of the PPA.

(n) That apart, the Appellant raised invoices every month for the power supplied but on each occasion, the 2<sup>nd</sup> Respondent (MESCOM) defaulted in making payments in time in terms of Article 6.2 of the PPA.

(o) As the 2<sup>nd</sup> Respondent (MESCOM) failed to make the payment in time, the Appellant sent a letter dated 28.4.2011 seeking for cancellation of the PPA and for permission to sell the power to 3<sup>rd</sup> parties in terms of the Article 9.3 of the PPA. But, there was no response. However, the second Respondent (MESCOM) settled the invoices for the month of December, 2010 and Jan, 2011 on 2.6.2011 that too after a delay of 135 and 108 days respectively.

(p) Subsequently, also there was a default in the payment of tariff invoices by the 2<sup>nd</sup> Respondent (MESCOM) for a continuous period of three months.

(q) On account of continuous delay of over 15 months in making payment of tariff bills, the Appellant claimed for the interest. Despite the claim, the interest was not paid.

(r) Hence, the Appellant initiated the present proceedings and filed a Petition before the State Commission in OP No.34 of 2011 on 23.8.2011 seeking for two prayers namely (i) Declaration that the PPA dated 26.11.2004 is terminated due to violation of Article 9.3 of PPA and (ii) Grant of Open Access to the Appellant in terms of Article 9.3 and Article 6.4 of the PPA to sell the power to 3<sup>rd</sup> parties in view of the

various defaults and breach committed by the 2<sup>nd</sup> Respondent (MESCOM).

(s) The matter was heard by the State Commission which, in turn reserved the matter for orders on 23.2.2012. During the pendency of the said matters in which the order was reserved, the Respondent sent a modified Letter of Credit dated 26.3.2012 which was accepted by the Appellant without prejudice to the legal rights in July, 2012.

(t) Similarly, the 2<sup>nd</sup> Respondent (MESCOM) in June, 2012, after passing of the Impugned Order, informed the Appellant that they have deposited the interest on delayed payment to the Appellant's account as per the calculation sheet.

(u) At that stage nearly after about 4 months, the State Commission dismissed the Petition filed by the Appellant through the impugned order dated 7.6.2012. The main grounds for the dismissal are that: (1) the Appellant during the pendency of the earlier Petition in OP No.27 of 2009 filed by the Appellant before the State Commission did not raise the issue with reference to the failures in making the payment for invoices for the relevant period and (2) the delay in making the payment by the MESCOM was only due

to the non submission of the inter connection approval for the unit by the Appellant (3) the Appellant straightway rushed to terminate the PPA without making an attempt to resolve the dispute between the parties as per the Article 10 of the PPA.

(v) On these grounds, the State Commission held that the Appellant is not entitled to get the relief sought for in that Petition.

(w) Aggrieved over this Impugned Order dated 7.6.2012, the Appellant has filed the present Appeal before this tribunal.

4. The learned Counsel for the Appellant has urged the following grounds while assailing the Impugned Order:

(a) The State Commission has wrongly referred to the earlier proceedings in OP No.27 of 2009 and held that the question of delay in making payments of tariff invoices raised by the Appellant in the present proceedings in OP No.34 of 2011 had not been raised as an issue in the earlier Petition in OP No.27 of 2009.

(b) The State Commission failed to take note of the fact that the 2<sup>nd</sup> Respondent (MESCOM) was required to make the payment within 15 days from the date of receipt the invoice in terms of the PPA but the Respondent (MESCOM) defaulted in making the

payment for four continuous months in 2009-10 and eight continuous months in 2010-11. That apart, the State Commission has not considered the fact that the Second Respondent (MESCOM) was required to open the Letter of Credit within 30 days prior to the commencement of the commercial operation of the Appellant's project in terms of the PPA but though commercial operation was commenced on 7.9.2009, till the filing of the above Petition, the 2<sup>nd</sup> Respondent (MESCOM) neglected to open the Letter of Credit in terms of the PPA. This would also entitle the Appellant to cancel the PPA and ask for the permission for Open Access.

(c) In terms of the Article 9.3 of the PPA, the Appellant is entitled to sell power to 3<sup>rd</sup> parties by entering into a Wheeling and Banking Agreement with the Corporation in the event of any default of payments by the Corporation for a continuous period of three months. In the instant case, admittedly, the MESCOM, 2<sup>nd</sup> Respondent, has committed continuous defaults in meeting the financial obligation by not making the payment invoice amount for over three months. Therefore, the Appellant, under Article 9.3 of the PPA, is entitled to go for Open Access. This

aspect has been totally ignored by the State Commission.

(d) Even though the State Commission in the Impugned Order has recognised the fact that there was a delay on the part of the Second Respondent in making payment and also there was a failure in making the payment as well as the fact that there was a failure to make the payment of interest on such delayed amount, it has failed to recognise the rights of the Appellant for 3<sup>rd</sup> party sale which accrues as a consequence of those defaults.

(e) The State Commission in fact, in the Impugned Order holding that there was default in payment of interest, has directed the Respondent to make the payment of interest on such a delayed payment of tariff invoice to the Appellant. Thus, there is a categorical finding that there was not only the delay in payment of tariff invoice but also failure to make the payment of interest which was not disputed by the 2<sup>nd</sup> Respondent. When that being the case, the Appellant is entitled to open access in terms of Clause 9.3.

(f) The State Commission has failed to notice that the earlier Petition in OP No.27 of 2009 was filed for a different Cause of Action namely, the PPA dated

26.11.2004 which was sought to be terminated was due to non-fulfilment of the condition precedent in Article 2.1, 2.2 and 3.4 of the PPA. But the present petition in OP No.34 of 2011 was filed on the ground that the MESCOM failed to meet its financial obligation for consecutive three months to the Appellant which entitled the Appellant for 3<sup>rd</sup> party sale. The State Commission has erroneously related the present Petition to the earlier Petition which does not have any relevance.

(g) The State Commission is totally wrong in holding that even assuming that the Appellant had a right to terminate the PPA for the default in payment of tariff, it cannot straightway proceed to terminate the PPA since the Appellant before termination, must have made an attempt to resolve the dispute in terms of Article 10 of the PPA by mutual negotiations and this was not done by the Appellant. This finding is against the settled law. In the present case, the 2<sup>nd</sup> Respondent (MESCOM) never replied to the termination notice dated 28.4.2011 sent by the Appellant giving sufficient opportunity to the Respondent. The above finding that the Appellant is not entitled to the grant of Open Access since there was no attempt to solve the dispute through the

mutual negotiation is contrary to Clause 9.3 of the PPA. As such, the Order Impugned suffers from the infirmity and consequently, the same is liable to be set-aside.

5. In support of his argument the learned Counsel for the Appellant has cited the following decisions of the Hon'ble Supreme Court as well as other authorities:

(a) AIR 1965 SC 1288 in the case of The Central Bank of India Limited Amritsar Vs The Hartford Fire Insurance Co., Ltd.,

(b) AIR 1966 SC 1644 in the case of General Assurance Society Ltd Vs Chandmull Jain and another

(c) AIR 1966 GUJ 189 in the case of M/s. Lalbhai Dalpathbhai & Company Vs Chittaranjan Chandulal Pandya

(d) AIR1960 SC 588 M/s. Alopi Parshad and Sons Ltd., Vs Union of India

(e) 1988 (3) SCC 82 Continental Construction Co. Ltd. Vs State of Madhya Pradesh

6. The above decisions have been cited by the Appellant in order to substantiate their arguments that Courts must give effect to the plain meaning of the contract and it must look into the intention of the parties through the words of the

contract and it is not for the court to make a new contract as the parties must perform the conditions of the contract however onerous they may be.

7. The Appellant has cited the another decision in Appeal No.176 of 2009 dated 18.5.2010 in the case of Bangalore Electricity supply Company Limited (BESCOM) vs Davengere Sugar Company Limited in which it is held that if there are defaults in making payments for consecutive three months, the parties are entitled to seek for Open Access for the 3<sup>rd</sup> party sale.
8. In reply to the above grounds of the Appellant, the learned Counsel for the Respondent has made the following submissions:
  - i) As per clause 9.3 of the PPA, there has to be continuous default of 3 months in payment by the utility. In this case payment was made between October, 2009 to December, 2010 pursuant to the interim order dated 10.9.2009 passed by the State Commission and not under the PPA. Therefore, the question of any default under the PPA would not arise up to 23.10.2010. If this period is excluded there is no continuous default of 3 months in payment of invoices. Therefore, there is no right which has accrued in favour

of the Appellant for seeking for wheeling and banking agreement.

ii) According to the termination notice dated 28.4.2011, there have been defaults from October,2009 to Jan,2010 for a period of 4 months, from Jun, 2010 to November,2010 for a period of 6 months and from December,2010 to Jan.2011, no payments have been made. However, till 28.4.2011 the Appellant did not raise any issue seeking for wheeling and banking agreement. Hence, this would constitute a waiver as per clause 12.4 of the PPA.

iii) In view of the fact that the Respondent MESCOM has made payment subsequently, though delayed, the subsequent payment cures the defect and consequently, no right accrues in favour of the Appellant under Article 9.3 of the PPA to seek for Open Access.

iv) Article 10 of the PPA provides for the dispute resolution which provides that all the disputes and differences will be tried to be settled through mutual negotiations and only when the said process fails, the parties are expected to approach the Commission under clause 10.5. In this case there has been no such attempt made by the Appellant for mutual negotiations

to resolve the disputes. Therefore, the Appellant is not entitled to any relief.

v) The Appellant has committed a default by delaying the project. The agreement entered into with the Government of Karnataka dated 11.11.2002 provided that the project has to be completed within 36 months. However, the project was completed only in the year 2009. Though the PPA was signed on 26.11.2004, the power generation commenced only on 07.9.2009. Therefore, it is clear that the Appellant has committed default by delaying the Project. Having so breached the contract, the Appellant cannot claim that there was a default by the Respondent in terms of delay in making the payment of tariff under invoices.

vi) The alleged defaults had occurred during the pendency of the earlier petition in OP No.27 of 2009. However, the same was not brought to the notice of the State Commission nor any reliefs were claimed with respect to the same. The State Commission disposed of the Petition in OP No.27 of 2009 on 23.12.2010 holding that PPA dated 26.11.2004 was valid. Therefore, the present proceedings initiated in OP No.34 of 2011 are barred by the principles of constructive res-judicata. Therefore, the re-agitating

the issues decided earlier are not permissible under law in the present proceedings.

vii) There was no submission of approval for inter-connection between December, 2010 and May, 2011, which is a breach in terms of Article 4 (1) (5) of the PPA. Therefore, the Appellant is precluded from seeking relief.

viii) The conduct of the party in the proceedings is relevant factor to be considered. The Appellant made first attempt before the State Commission to nullify the PPA by contending that PPA had been rendered null and void due to the Respondent's default. The said petition was pending before the State Commission from 9.8.2009. Ultimately, the orders were pronounced on 23.12.2010 rejecting the said Petition. Now again, Appellant has made a second attempt to terminate the contract by issuing notice on 28.4.2011 i.e. after a gap of 4 months seeking for Open Access through this fresh Petition. These facts would show that the intention of the Appellant is only to wriggle out of the PPA.

9. The learned Counsel for the Respondent has cited the following authorities with reference to the principle of res judicata:

(a) AIR 1961 SC 1457 Daryao Vs State of UP

- (b) AIR 1965 SC 1150 Devlal Vs Sales Tax Officer
- (c) AIR 1965 SC 1153 Gulabchand V State of Gujarat
- (d) (1999) 5 SCC 590 Hope Plantations Ltd Vs aluk Land Board, Peermade and Another
- (e) (2006) 6 SCC 94 Standard Chartered Bank Vs Andhra Bank Financial Services Ltd., and Ors

10. The learned Counsel for the Respondent has also cited the following decisions to show that when an adjudication is already concluded, it has attained finality not only to the actual matter determined but also to the every other matter which the parties might and ought to have litigated and the other matter coming within the legitimate purview of the original action:

- (a) (1977) 2 SCC 806 State of UP Vs Nawab Hussain
- (b) (1986) 1 SCC 100 Forward Constructions Co Vs Prabhat Mandal
- (c) (2008) 11 SCC 753 Dadu Dayalu Mahasabha, Jaipur (Trust) Vs Mahant Ram Nivas and Another

11. With regard to the principle laid down by the Hon'ble Supreme Court that the Court while examining the question

of substance of contract should look into the conduct and intention of the parties also to decide the ultimate issue, the learned Counsel for the Respondent has cited the following decisions:

- (a) (2011) 10 SCC 420 Cauvery Coffee Traders, Mangalore Vs Hornor Resources (International) Co Ltd.,
- (b) AIR 1993 SC 212 Sewaram Vs Sobaran Singh
- (c) (2005) 11 SCC Claude-Lila Parulekar Vs Sakal Papers (P) Ltd., & Others
- (d) (1984-80) All ER rep 751 Freeth & Anr V Burr and Anr
- (e) (2010) 6 SCC 178 Naresh Aggarwala & Co Vs Canbank Financial Services Lintied.,
- (f) (1977) 2 SCC 529 Govind Prasad Chaturvedi V Hari Dutt Shastri & Another
- (g) (1969) 3 SCC 120 Nathulal Vs Phoolchand
- (h) (2009) 5 SCC 678 Madhya Pradesh Housing Board vs Progressive Writers And Publishers;

12. In the light of the rival contentions indicated above, the following questions would arise for consideration:

**i) Whether the action of the State Commission in denying the Open Access to the Appellant to supply electricity to third parties in terms of Article 9.3 of PPA is wholly illegal?**

**ii) Whether in terms of Article 9.3 of the PPA, the Appellant is entitled to sell power to third parties through Grid system by entering into wheeling and banking agreement with the Respondent when there are materials to show that the Respondent has committed continuous defaults for more than 3 months and in that event, the Appellant is entitled to go for Open Access?**

**iii) The State Commission having given a categorical finding that there was a delay in making payment of the invoice amount as well as the failure to make the payment of interest by the Respondent and on the basis of the said finding, the Respondent has been directed to pay the interest amount to the Appellant in the Impugned Order which indicates that there was a breach of Article 9.3 of the PPA which entitles the Appellant for third party sale is justified in rejecting the claim of the Appellant?**

13. Before dealing with these issues let us first refer to the findings in the Impugned Order. The State Commission while dealing with these issues in the Impugned Order framed two questions and made the analysis on those issues.
14. We shall now quote those issues and the discussions leading to the conclusion which are hereunder:

***“Issue No.1: Whether the PPA dated 26.11.2004 executed by the Petitioner with the 2<sup>nd</sup> Respondent stands terminated based on the notice dated 28.4.2011 and whether it gives a right to the Petitioner to seek Open Access?***

***To determine the above question, i.e. whether the termination of the PPA dated 26.11.2004 is valid or not, it is essential to examine closely the Notice of Termination dated 28.4.2011 issued by the Petitioner. It appears from the Notice that the Bills of October, 2009 to November,2010, even though paid by Respondent No2, there was delay in making payment in each month ranging from 5 to 35 days. From the records it is also seen that during this period, the Petition filed by the same Petitioner, viz., OP No.27/2009, was pending before this Commission for adjudication, till the decision of the Commission was rendered on 23.12.2010 holding that the PPA continued to be valid and binding on the parties. Delay in making payments of amounts claimed in invoices raised by the petitioner till that date was not raised as an issue in the said petition OP No.27/2009. If the***

*period from October, 2009 to November, 2010 is taken out, as on the date of Notices, i.e., 28.4.2011, payment was due only for the months of December, 2010 and January, 2011.*

*From the pleadings, it is seen that the interconnection approval by KPTCL to the Petitioner's Unit had expired on 22.12.2010 and Respondent NO.2 had in its letter dated 01.2.2011 asked the Petitioner to obtain and submit renewed interconnection approval, in the absence of which they could not make payments for the pending invoices. At any rate, it is undisputed that the payments due have been made by the Respondents and accepted by the Petitioner subsequently after the Petitioner furnished the renewed interconnection approval. Thus, there is some substance in the claim of Respondent 2 that the delay in making payments against invoices of December, 2009 and January 2010 was due to the non-submission of the renewed interconnection approval for the unit. However, we have noted that the petitioner had on 28.4.2011 intimated Respondent 2 that the non-availability of the renewed interconnection approval does not grant the latter the power to withhold payments.*

*From the above, it is clear that the petitioner's claim that the PPA dated 26.11.2004 stands terminated is based on the request for termination of PPA issued by it on 28.4.2011 in which delay in payment beyond the due date in respect of invoices relating to the period between October, 2009 and November, 2010 as also the non-*

*payment of the invoices relating to December, 2010 and January, 2011 were cited as the grounds for opting for sale of power to third parties. As noted above, there indeed was some delay in making the payments in respect of invoices up to November, 2010 which was not raised by the petitioner as a ground for termination of the PPA till the disposal of OP 27/2009. In respect of the invoices relating to the months of December, 2010 and January 2011, there existed a request from respondent 2 for the petitioner making available the renewed interconnection approval which was communicated to the petitioner on 01.2.2011 itself. In response the petitioner informed Respondent 2 that the payments pending in respect of the two invoices could not be withheld by the latter on the ground of non-availability of the interconnection approval. Thus, it is clear that there was a dispute between the petitioner and Respondent 2 on this issue. However, the events narrated above clearly show that Respondent 2 was making payments regularly, albeit with some delay, against the invoices received from the petitioner till December, 2010 during which month the interconnection approval for the unit in question expired. It was only thereafter that Respondent 2 withheld payment for the two invoices of December, 2010 and January 2011 on the ground of non-availability of the interconnection approval. Further, payment against these invoices was also settled soon after the submission of the said approval. This clearly shows that there was no attempt on the part of Respondent 2 to deny*

*payments for the power purchased from the petitioner.*

*We have also noted that request for termination of PPA dated 28.4.2011 issued by the petitioner does not cite the non-opening of Letter of Credit by Respondent 2 as a ground for the proposed termination.*

*Even assuming that the Petitioner had right to terminate the PPA for payment defaults, still it cannot straight away proceed to terminate the PPA before initiating the termination. As per Article 10 of the PPA, all disputes or difference between the parties arising out of, or in connection with, the Agreement shall be first tried to be settled through mutual negotiations promptly, suitably and in good faith. In case of failure of mutual negotiations within 90 (ninety) days, the disputes have to be referred to the Commission for adjudication. In the present case, the Petitioner has not resorted to the remedy provided for disputes resolution under the PPA. A perusal of the Notice dated 28.4.2011 makes it clear that the Petitioner has rushed to terminate the PPA without making an attempt to resolve the dispute and also without giving any time to Respondent No 2 to cure the alleged default. Therefore, in our view, the termination of the PPA effected through the Notice dated 28.4.2011 cannot be sustained and it has to be held that the PPA continues to exist and binding on the parties.*

*The Petitioner has referred to the Orders of this Commission made in OP No.3/2009 – M/s. Sandur*

***Power Company Limited –Vs. The Managing Director, KPTCL and others and OP No.34/2009-HESCOM –Vs. GMR Industries Limited. In the first case, this Commission has held that in case of three consecutive months default in payment of Bills, the Generator is entitled to seek Open Access. In the second, this Commission has held that non-opening of the Letter of Credit also is a ground for termination of the PPA. In our view, both these Judgements have no application to the facts of this case.***

***Accordingly, Issue No.1 is held against the Petitioner.***

***Issue No.2 Whether the Petitioner is entitled for payment of interest for the period of delayed payments as per the terms of the PPA dated 26.11.2004?***

***Thus, the issue that needs to be decided is, “Whether the Petitioner is entitled for interest on delayed payments made by the 2<sup>nd</sup> Respondent, as per the terms of the PPA?”***

***From the averments made by both the parties, it is clear that there was delay in making the payments. However, according to the Respondents, the delay was on account of non-production of renewal of interconnection Approval of KPTCL by the Petitioner and therefore no interest is payable. In our view, though the Respondents paid the amount due excluding interest on receipt of the renewal of Interconnection Approval, it cannot be said that***

***the Respondent was not liable to pay interest. As per Article 6.4 of the PPA, if either party fails to make any payment within 60 days after the due date, the overdue amount will attract interest for the delayed period at the SBI Medium Term Lending Rate per annum. From the statement produced by the Petitioner, it is clear that Respondent No.2 did not make the payment within the due dates of the invoices and there is a delay. Therefore, the 2nd Respondent is liable to pay interest as per the above Article of the PPA for the delayed payment.***

***Issue NO.2 is therefore held in favour of the Petitioner.***

***For the foregoing reasons, we order as follows:-***

- a) The PPA dated 26.11.2004 continues to be in force and the Petitioner is not entitled to sell electricity to third parties, as prayed for;***
- b) The Petitioner is entitled to interest for the period of delay in making the payments, as per Article 6.4. of the PPA dated 26.11.2004;***
- c) Respondent No.2 shall calculate the interest payable as per the terms of the PPA dated 26.11.2004 for the delayed payments and pay the same to the Petitioner within thirty (30) days from today.”***

15. The above analysis made by the State Commission would indicate that in respect of first issue, the State Commission

held against the Appellant to the effect that PPA continued to exist and binding on the Petitioner and rejected the prayer for declaration sought for by the Appellant.

16. In respect of second issue relating to the payment of interest, the State Commission held in favour of the Appellant by allowing the prayer of the Appellant and by directing Respondent to make the payment of interest amount within 30 days.

17. The crux of the findings given in the impugned order by the State Commission is as follows:-

i) Though the Petition in OP NO.27 of 2009 filed by the Appellant seeking for declaration that the PPA became null and void was pending till 23.12.2010 on which day the State Commission pronounced the order holding that the PPA continued to be valid and binding on the parties, the issues relating to the defaults in making payment of the amount claimed by the Appellant in the present proceedings were never raised before the State Commission in the Petition in OP NO.27 of 2009.

ii) The payments were withheld by the Respondent for two invoices of December, 2010 and Jan, 2011 on the ground of non-availability of interconnection approval. According to the Respondent, the delay in

making payments against those invoices was due to non-submission of the interconnection approval for the unit. Hence, there was a default on the part of the Petitioner and not on the part of the Respondent.

iii) The payment against the invoices for the month of December, 2010 and Jan, 2011 was admittedly settled, soon after the submission of the interconnection approval. This shows that there was no attempt on the part of the Respondent to deny the payments for the power purchased from the Appellant.

iv) The Appellant has rushed to issue notice of termination of PPA without making an attempt to resolve the dispute and without giving any opportunity to Respondent to cure the alleged defaults as provided under Article 10 of the PPA. Even assuming that the Appellant has right to terminate the PPA for payment default, it cannot straightaway terminate the PPA without resorting to dispute resolution under Article 10 of the PPA.

v) There were delays in payment of tariff invoices ranging from 5 to 35 days for the period from October, 2009 to November, 2010. It is clear that the Respondent was making payments regularly but of

course with some delay against the invoices raised by the Appellant till December, 2010.

vi) However, it is clear from the record that the Respondent did not make the payment within the due date of invoices. As such, there was some delay. This gives right to the appellant to claim the interest. Therefore, the Respondent is liable to pay interest as per Article 6.4 of the PPA for the delayed payment. As this interest has not been paid, the Respondent is directed to pay the said interest amount within 30 days.

18. Keeping in view of these findings rendered by the State Commission in the Impugned Order, we shall now deal with the issues.
19. Though we have framed 3 issues mentioned above, we shall now take up all the issues together for discussion since these issues are interconnected.
20. At the outset, it shall be mentioned that the question of termination cannot be raised since Clause 9.3 does not refer to the termination but it refers to the right of the Appellant Company to seek for Open Access for the 3<sup>rd</sup> party sale. The Appellant also has not pressed the point relating to termination and concentrated on the right for 3<sup>rd</sup> party sale. Hence, the main question in the present case

relating to the right of the Appellant to seek for Open Access for 3<sup>rd</sup> party sale on the basis of the default in making payment of tariff and interest committed by the Respondent. Hence, we shall discuss the issues in detail.

21. One of the main contentions urged by the learned Counsel for the Respondent, as indicated in the impugned order is that the issues relating to the default in payment of invoice amount were not raised in the earlier Petition filed by the Appellant in OP No.27 of 2009 and therefore, the said issues cannot be raised in the subsequent Petition in OP No.34 of 2011 as it is hit by the principle of Res judicata.
22. This contention urged by the Respondent has no substance. As indicated by the Appellant, the cause of action for OP NO.27 of 2009 which was filed by the Appellant on 19.8.2009 was on the ground that financial closure was not achieved within the period of three months and as such there was a non-fulfilment of condition precedent and that therefore there was an automatic termination of PPA. On that ground, the Appellant sought for declaration that the PPA dated 26.11.2004 became automatically terminated in terms of the Article 2.1 and 3.4 of the PPA.
23. It is true that in that Petition, no issues were raised with reference to the default in payment of tariff invoice which

would attract the provisions of Article 9.3, providing the right for Open Access for 3<sup>rd</sup> party sale. But, the issue regarding default in payment of tariff for more than 3 months attracting Article 9.3 of PPA could not be raised in the said case.

24. It is pertinent to note that the prayer sought for by the Appellant in the present proceedings in OP NO.34 of 2011 is totally different from the prayer made by the Appellant in the earlier Petition. The said Petition in OP No.27 of 2009 was dismissed on 23.12.2010 by the State Commission only in respect of the prayer relating to the non-achievement of financial closure, which is the condition precedent as per the PPA dated 26.11.2004, which was filed on 19.8.2009.
25. Now the present prayer in OP No.34 of 2011 is not with reference to same cause of action mentioned in OP No.27 of 2009 but with reference to the different cause of action which gave rise to the two different prayers sought for in OP NO.34 of 2011. They are follows:-
- i) Declaration that the PPA dated 26.11.2004 is terminated due to violation of Article 9.3 of the PPA;
  - ii) Grant of Open Access in terms of Article 9.3 of PPA since the Respondent committed continuous defaults in excess of 3 months in honouring the

invoices raised by the Appellant for the power supplied.

26. As mentioned above, the Petition in OP No.27 of 2009 was filed by the Appellant on 19.8.2009. The question was raised in that Petition only with reference to automatic termination due to the financial closure as per the Article 3.4 of PPA. But that is not the issue in the present Petition in OP No.34 of 2011.
27. As a matter fact, the hearing in OP NO.27 of 2009 which was filed on 19.8.2009 was over on 27<sup>th</sup> May, 2010 itself, but the events of defaults in this case would relate to even after June, 2010 up to January, 2011. Therefore, the issue of default in making payments of tariff invoices raised in OP NO.34 of 2011 could not be raised as an issue in earlier OP NO.27 of 2009. Even otherwise, this cause of action in the present Petition seeking for the Open Access for 3<sup>rd</sup> party sale due to default in payment is entirely different from the cause of action of complaining about the financial closure, which was involved in the earlier case.
28. The principles of res-judicata would apply only when the cause of action in both the cases are one and the same. In that case, the cause of action in OP NO.27 of 2009 arose prior to the year 2009 with reference to the financial closure whereas, cause of action in the present case in OP

NO.34 of 2011 arose with reference to delay in making payment during the year 2010-2011.

29. As mentioned earlier, the issue in OP NO.27 of 2009 was as to whether there was non-fulfilment of conditions precedent by the company in attaining financial closures within 3 months from the date of PPA and as to whether as result of such failure, PPA stood automatically terminated or not.
30. On the other hand, the issue involved in the present proceedings in OP No.34 of 2011 is as to whether the Respondent had defaulted in making payment of tariff for continuous period of more than 3 months which gives right to the Appellant under Article 9.3 of the PPA to claim Open Access for 3<sup>rd</sup> party sale or not.
31. Therefore, the issues involved in both these cases are totally different. Consequently, the finding given by the State Commission that the issues relating to delay in making payments, have not been brought to the notice of the State Commission in the earlier case as well as the contentions urged by the Respondent that it is barred by the principles of res-judicata are wholly untenable.
32. In view of the fact that the cause of Action which has been raised in the present proceedings is different from that of the Cause of the Action raised in the earlier proceedings,

the authorities cited by the Respondent with reference to the principle of Res judicata would not be of any help to the Respondent.

33. Next contention of the learned Counsel for the Respondent is that the Respondent has made the payments subsequently though delayed and as such the said subsequent payment made, would cure the earlier defects and consequently, no right accrues to the Appellant for Open Access under Article 9.3 of the PPA.
34. This contention requires the interpretation of the Clauses of the PPA.
35. Let us examine Article 6 regarding billing of payment.
36. Article 6.2 of the PPA provides that the Respondent Corporation shall make payment of the amount due within 15 days from the date of receipt of tariff invoice. Article 6.4 provides that if there is a failure to make payment within 60 days after the due date, then such overdue amount shall attract interest for such period of delay at the rate of SBI medium term lending rate per annum. Article 6.5 stipulates that the Corporation shall establish Letter of Credit in favour of the Generating Company 30 days prior to the Commercial Date of Operation of the project.
37. Article 9 stipulates the term termination and default. Article 9.2 of the Agreement reads as under:

*“If the Company commits a Construction Default or a O&M Default, Corporation reserves the right to terminate the Agreement after giving a notice of 90 days to the Company and inform the same to the Commission.”*

38. As per Article 9.2 when the Company namely the Appellant commits a Construction Default of Operation and Maintenance Default, the Respondent Corporation reserves the right to terminate the Agreement after giving a notice of 90 days to the Generating Company and informing the same to the State Commission. In the present Appeal, this Article is not applicable as there is no default on the part of the Appellant Company.

39. Article 9.3 which deals with the default of the Respondent Corporation is reproduced below:

*“In the event of any payment default by the Cooperation for a continuous period of three months, the Company shall be permitted to sell power to third parties through the Grid System by entering into a Wheeling and Banking Agreement with the Corporation for which it shall pay Wheeling Charges to the Corporation at the rates applicable from time to time in addition to banking charges at the rate applicable from time to time as approved by the Commission.”*

40. According to the Article 9.3 after the Respondent Corporation makes a payment default for a continuous period of 3 months, the Appellant Company shall be permitted to sell power to the third parties through the Grid

by entering into Wheeling and Banking Agreement with the Respondent Corporation.

41. Thus, PPA provides for termination of PPA only by the Respondent Corporation for a default of the Appellant. On the other hand for a payment default for a continuous period for 3 months by the Respondent Corporation, the Appellant Company can only sell power to third parties by entering into a Wheeling Agreement with the Respondent Corporation. Article 9.3 does not confer any right on the Appellant Company to terminate the PPA in case of a payment default.
  
42. In other words, the PPA gives right to the Respondent Corporation alone to terminate the Agreement on Construction Default or Operation and Maintenance Default by the Appellant Company under Article 9.2. Similar right for termination of PPA has not been provided to the Appellant Company under Article 9.3. Only in case of payment default for a continuous period of three months by the Respondent Corporation, the Appellant can only sell power to third parties. Thus, if the Respondent Corporation commits a payment default for a continuous period of 3 months, the Appellant generating company can seek for Open Access and sell power to third parties. Once the default is cured, i.e. the principal amount and the interest for the delay in payment has been paid by the

Respondent Corporation, then the Appellant generating company has to restore supply of power to the Respondent Corporation according to the terms of the PPA.

43. The Respondent has contended that in the event of any payment of the principal sum not being made in time or even if there was any delay on their part in this regard, it would not give a right to the Appellant to seek for 3<sup>rd</sup> party sale since there is a provision for penal interest. This contention cannot be countenanced. If there is a failure to make payment within 15 days, it amounts to breach of the contractual obligations. Merely because the payment was made belatedly would not be considered to be compliance of Clauses 6.1 and 6.2 of the PPA. Furthermore, under Clause 6.3, the penal interest is payable for late payments. If penal interest is not paid, that is also a breach of obligation under the Contract. So when there is a failure to carry out the obligation under the contract in making the payment in time or not making the payment of interest due to the Appellant on account of delay in payment, it would certainly amount to breach of the integral obligation as contemplated in the PPA which gives the right to the Appellant under Article 9.3.
44. In the present case, admittedly neither the amount due was paid in time nor the penal interest was paid as per Clause 6.3 of the Contract.

45. Now let us see those relevant Clauses of the PPA.

46. Clause 6.2 of the PPA reads as under:

***“Clause 6.2 Payments: Corporation (Purchaser) 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 Officer of the Corporation (Purchaser)”.***

47. As per this Clause, the Purchaser i.e. the Corporation shall make the payment of the amount due within 15 days from the date of the receipt of the monthly tariff invoice.

48. Let us quote Clause 6.4 of the PPA which reads as under:

***“Clause 6.4: If either party fails to make any payment within 60 days after the due date under this agreement, the overdue amount shall attract interest for such period and the interest payable on the delayed payments shall be at SBI Medium term lending rate”.***

49. Under Clause 6.4 if the payment is not made in time, the overdue amount shall attract interest for such period and such interest on the delayed payment shall be a SBI medium term lending rate.

50. The above provision would show that the payment has to be made within 15 days from the date of the receipt of the tariff invoices and if the payment is not made within 15 days it shall be construed to be a default in payment and even

the delayed payment after the default would confer right to the parties to claim the interest.

51. Now let us again quote the relevant Clause 9.3 of the PPA which reads as under:

***“Clause 9.3: In the event of any payment default by the Corporation for a continuous period of three months, the Company shall be permitted to sell power to third parties through the Grid system by entering into a Wheeling and Banking Agreement with the Corporation for which it shall pay Wheeling Charges to the Corporation at the rates applicable from time to time in addition to banking charges at the rate applicable from time to time as approved by the Commission”.***

52. As per this Clause if the payment in default has been committed by the purchaser for a continuous period of three months, the Appellant Company namely the Seller **shall be** permitted to seek for Open Access for the 3<sup>rd</sup> Party sale through the Grid System by entering into a Wheeling and Banking Agreement with the Corporation for which the Appellant company is liable to pay wheeling charges to the Corporation at the rates approved by the State Commission.

53. Thus the reading of the above Articles would indicate that whenever the payment default occurs for a continuous period of three months, the seller i.e. the Appellant under Clause 9.3 is entitled to sell the power to the third parties.

In this case, admittedly the payment default has occurred for a continuous period of 3 months and even after the principal amount has been paid belatedly, the interest has not been paid.

54. It is a settled law as laid down by the Hon'ble Supreme Court in the decisions referred to above relied upon by both the parties that when a document is to be construed, it shall be read as a whole to find out the actual intention of the parties. In other words, in interpreting the document, the real intention of both the parties has to be ascertained. The rule of interpretation is well settled that the intention of the executor of a document is to be ascertained after considering the words contained in the document, in the ordinary natural sense. This means that the contract is required to be read as a whole to ascertain the intention of the parties who entered into the Agreement.
55. If these principles laid down by the Hon'ble Supreme Court are applied to the present case, it is clear that when there is a default of payment for three continuous months, Article 9.3 comes into play and if the payment of interest has not been made then Article 9.3 gives a right to the Appellant to seek for Open Access. As such, the failure to discharge the obligation of the Respondent Purchaser in making the payment in time or in making the payment of interest would certainly amount to breach of the terms of the PPA which

gives the right to the Appellant Seller to seek for Open Access. This is actually what has happened in the present case.

56. According to the State Commission, as referred to in the impugned order, the Appellant has rushed to issue the termination notice of the PPA without giving any time or issuing prior notice to the Respondent giving opportunity to cure the defaults. This finding of the State Commission is not in consonance with the Article 9.3 of the PPA.
57. The said Article does not require the issuance of any prior notice to be issued before seeking for Open Access. However, the State Commission misinterpreted the Article 9.3 by observing that absence of notice giving opportunity for curing the defects before seeking Open Access for third party sale would make the notice for third party sale invalid. As already stated by us earlier, the payment default as per the Article 9.3 of the PPA would entitle the Appellant to seek for Open Access till the default is cured. While termination of PPA would require a prior notice as stipulated in Article 9.2 regarding termination by the Respondent Corporation for construction or O&M default by the Appellant, no such prior notice is stipulated for sale by the seller to third party in the event of payment default by the Respondent Corporation for a continuous period of three months. Hence, the conclusion of the State

Commission virtually amounts to change the meaning of Article 9.3 by adding the following words namely “after issue of notice of default”. Hon’ble Supreme Court laid down the principle that the court cannot add words in the contract to have the different meaning. Such a course of action is impermissible in law.

58. As laid down by the Hon’ble Supreme Court it is not open for the Court to make new contract.

59. On this point, both the parties have cited the authorities.

60. The Appellant has cited the following authorities on the point:

(a) AIR 1965 SC 1288 in the case of the Central Bank of India Limited Amritsar Vs the Hartforded Fire Insurance Co Ltd.,

(b) AIR 1966 SC 1644 in the case of General Assurance Society Ltd Vs Chandmull Jain and Another

(c) AIR 1960 SC 588 in the case of M/s. Alopi Parshad and Sons Ltd Vs Union of India

61. On the same point, the Respondent has cited the following decisions:

(a) AIR 1993 SC 212 Sewaram Vs Sobaran Singh

(b) (2005) 11 SCC Claude-Lila Parulekar Vs Sakar Papers (P) Ltd & Others

(c) (2010) 6 SCC 178 Naresh Aggarwala & Cio Vs Canbank Financial Services Limited.,

62. In this context, it would be desirable to refer to the termination notice dated 28.4.2011 issued by the Appellant to the Respondent Corporation seeking permission to sell the power to 3<sup>rd</sup> party through Open Access by entering into a Wheeling and Banking Agreement:

“Soham Mannapitlu Power Private Limited”

(Previously known as M/s Bobba Power Projects – A Division of M/s Bobba Aviation Services Pvt. Ltd)  
#137, 7<sup>th</sup> Floor , HMG Ambassador Building, Residency Road, Bangalore-560025,India.  
Ph+91 80 41474800,01,02 Fx +918041474604 e.mail – [www.sohamenergy.in](http://www.sohamenergy.in)

---

Ref No.SMPPL/MESCOM/FN(MB)/074/2011

28<sup>TH</sup> April,2011

The Managing Director,  
Mangalore electric Supply Company Limited  
Corporation Office,  
Paradigm Plaze  
A.B. Shetty Circle  
Mangalore-575 001.

**WITHOUT PREJUDICE**

Dear Sir,

Sub: **Request for termination of the Power Purchase Agreement(PPA) dated 26.11.2004 entered into by and between the company and Karnataka Power Transmission corporation Ltd(KPTCL)due to delayed settlement /Non settlement of Tariff Invoices relating to energy delivered to you to by the company from its 15 MW Mini Hydel Project across Puchamoguru River, Mannapitlu Village,, Mangalore Taluk, Dakshina Kannada District, Karnataka State.**

1. In the above regard, you may please note that as per Articles 6.2 of the PPA under reference, the Corporation(MESCOM) is required to make payment of the amount due, within 15 days from the date of receipt of the Tariff Invoice by its designated officials As against this, in respect of the tariff Invoices submitted to you by the company in the past, the payment record is as under:-

Billing month	Bill Date	Date of receipt of bill by MESCOM	Bill Amt.	Amt paid	Due date for payment	Actual date of payment	Delay in days
2009 Oct	03.11.09	04.11.09	85,30,060	50,00,000 35,30,060	19.11.09 19.11.09	27.11.09 17.12.09	28
- Nov	02.12.09	03.12.09	46,31,880	15,00,000 31,31,380	18.12.09 18.12.09	15.01.10 22.01.10	35
- Dec	02.01.10	04.01.10	22,71,280	22,71,280	19.01.10	10.02.10	22
2010 Jan	02.02.10	03.02.10	6,8,660	6,82,660	18.02.10	19.03.10	29
- Jun	30.6.10	03.07.10	82,01,490	82,01,490	18.07.10	23.07.10	5
- Jul	31.07.10	02.8.10	1,83,45,690	1,40,00,000 43,45,690	17.08.10 17.08.10	30.08.10 08.09.10	21
- Aug	31.8.10	02.09.10	2,23,14,050	1,50,00,000 73,14,050	17.09.10 17.09.10	23.09.10 13.10.10	26
- Sept	30.9.10	04.10.10	1,76,21,560	1,00,00,000 7,21,560	19.10.10 19.10.10	30.10.10 11.11.10	22
- Oct	31.10.10	03.11.10	1,58,28,780	1,00,00,000 58,28,780	18.11.10 18.11.10	26.11.10 09.12.10	22
- Nov	30.11.10	02.12.10	1,20,74,150	75,00,000 45,74,150	17.12.10 17.12.10	23.12.10 11.01.11	25
- Dec	31.12.10	03.01.11	27,75,300	Not recd	18.01.11	No payment is received till dated	
2011 Jan	31.01.11	02.02.11	3,25,380	Not recd.	17.02.11		

No generation since February 2011 and hence, no sale of power to MESCOM since 31.01.2011.

2. You may kindly note from the above table that delay in payment beyond the due date for payment has occurred continuously from October 2009 to January 210(4 months) and from June,2010 to November 2010(6 months) and in respect of the Tariff Invoice relating to December 2010 and January 2011 no payment has been received so far and as on date, the delay in payment in respect of these two invoices is 101 days and 71 days respectively.
3. As per Article 9.3 of the PPA, in the event of any payment default by the Corporation for a continuous period of 3 months, the company shall be permitted to sell power to third parties through the grid system by entering into a Wheeling & Banking Agreement with the Corporation.
4. As delay in settlement of our bills for a continuous period of 3 months and above has taken place as explained under Point (1) &(2 above and this in turn has resulted in our not being able to service our loan account with the banking system, we are forced to opt for the provision available under Article 9.3. of the PPA.
5. Therefore, we hereby request you to treat the PPA dated 26.11.2004 entered into by and between us as cancelled/terminated with immediate effect and simultaneously grant us permission to sell power to third parties, by entering into a Wheeling & Banking Agreement with you.
6. Further, we would also like to reiterate here that our observation that MESCOM has committed a payment default and hence, we are legally entitled to terminate the PPA and opt for sale of power to third parties, is in consonance with the order dated 13.8.2009 passed by the KERC in Case No. OP 03/2009(M/s Sandur Power

Company Ltd), which has also been upheld by the Appellate Tribunal for Electricity, vide its Order dated 11.04.2011 in Appeal No.180 of 2009 and 104 of 2010.

Thanking you in anticipation of an early favourable reply,

Yours faithfully  
For Soham Mannapitlu Power Private Ltd  
Sd/xx  
Chairman

63. The perusal of the above notice dt. 28<sup>th</sup> April 2011 making specific allegations against the Respondent would make it clear that the Appellant pointed out the following aspects in the Notice:

(a) The Table which has been referred to in the notice would show that the delay in payment beyond the due date for payment has occurred continuously from October, 2009 to January, 2014 (4 months) and from June, 2010 to November, 2010 (6 months). No payment has been made in respect of the tariff invoice relating to December, 2010 and January, 2011. As on date, the delay in payment in receipt of these invoices is 101 and 71 days respectively.

(b) As per Article 9.3 of the PPA, if there is any default in making payment for a continuous period of three months, the Company, the Appellant shall be permitted to sell the power to 3<sup>rd</sup> parties by entering into a wheeling and banking agreement with the Corporation.

(c) As delay in settlement of bills for a continuous period of 3 months and above has taken place, we intend to invoke article 9.3 of the PPA. Therefore we request to treat the PPA dated 26.11.2004 as cancelled and grant us permission to sell the power to 3<sup>rd</sup> parties by entering into Wheeling and Banking Agreement with you.

64. In this notice, the Appellant specifically refers to Article 9.3 of the PPA which entitles the Appellant to sell power to the third parties through Grid System by entering into wheeling and banking agreement with the Respondent. On that ground, the Appellant requested the Respondent Corporation to grant them permission to sell power to third parties by entering into wheeling and banking agreement.
65. We find that there were defaults in payment from October, 2009 to November, 2010 but the payment was made with the delay varying from 5 days to 35 days. However, payment for December, 2010 and January, 2011 had not been made at all and there was delay in respect of these two months of 101 days and 71 days. Thus, the Appellant was entitled to seek third party sale. Even when the payment for December, 2010 and January, 2011 was made belatedly, the interest amount was not paid along with the payment of the principal amount and therefore, the payment default continued.

66. There is no dispute in the fact that this notice which has been sent by the Appellant on 28.4.2011 was received by the Respondent. However, there was no response from the Respondent by sending reply to the notice rectifying the defaults nor any attempt was made to cure those defaults. Since there was no reply from the Respondent, for about 4 months, the Appellant thereafter, filed the present Petition in OP No.34 of 2011 on 23.8.2011 seeking for declaration that the PPA entered into between the Appellant and Respondent is cancelled/terminated and to grant Open Access to the Appellant to supply the power to third parties in terms of Article 9.3 and Article 6.4 of the PPA by executing the Wheeling and Banking Agreement.
67. Therefore the contention urged by the Respondent that no right accrues to the Appellant under Article 9.3 after payment was made belatedly deserves to be rejected.
68. One more contention urged by the Respondent is that the delay in payment was due to the fact that there was no submission of the approval for interconnection between December, 21 and May, 2011 which is a breach of PPA committed by the Appellant and therefore, the Appellant cannot claim Open Access. This contention also is not tenable.

69. PPA dated 26.11.2004 does not mandate anywhere that interconnection approval is mandatory to release payments for the power supplied by the Appellant. Article 6.1 requires the generating company to submit tariff invoices for each billing month. Article 6.2 stipulates that the Respondent shall make the payment of the tariff invoices within 15 days from the date of receipt of the same. None of the Articles in the PPA including Article 6.1 and 6.2 provide that the obtaining of interconnection approval is a condition precedent for payment of tariff invoices.
70. The Approval for interconnection has to be given by the Respondent. If they have not given it, they can not hold the same against the Appellant.
71. As a matter fact, the Respondent Corporation has received the power from the Appellant without any protest even after interconnection approval got expired. Having received the supply of power from the Appellant, the Respondent is bound to pay for it in time in terms of the PPA. At any rate, the interconnection approval has admittedly been in force till December, 2010. But, the defaults in payment of tariff have occurred continuously from October, 2009 to December, 2010.
72. Despite this fact, the State Commission wrongly held that Respondent did not make the payment due to non

submission of interconnection approval by the Appellant. Therefore, the contention on this aspect raised by the Respondent is wholly untenable.

73. One another contention raised by the Respondent, as referred to in the impugned order, is that when the remedy lies under Article 10 of the PPA which provides for dispute redressal mechanism, the Appellant, before exhausting that remedy, could not file the present Appeal. Though this objection was not raised by the Respondent before the State Commission, the State Commission unilaterally relied upon the Article 10 to dismiss the Petition.
74. Article 10 of the PPA specifies that in case of dispute raised between the parties, the same should be sought to be settled through negotiations and in the event of the failure of the negotiations, the same shall be adjudicated by the State Commission.
75. But, Article 10 has no application to the present facts of the case. The Appellant had issued termination notice dated 28.4.2011 calling upon the Respondent to give Open Access on account of continuous default in payment tariff invoices. Though the notice had been received by the Respondent, admittedly no reply was sent by the Respondent to show that there was some dispute.

76. According to Article 10, it would come into play only when the dispute is raised by the parties. In the absence of any dispute raised by the Respondent through the reply, the Appellant need not resort to Article 10 as he is entitled to seek for Open Access under Article 9.3 of the PPA by asking permission for the same from the Respondent and thereafter by approaching the State Commission.
77. That apart, Article 10 cannot be a bar to the maintainability of the Petition. Therefore, the contention urged by the Respondent before this Tribunal on this point on the basis of the finding of the State Commission is wholly untenable.
78. One more contention urged by the Respondent is that the Appellant did not seek for Wheeling and Banking Arrangements till the notice was issued on 28.4.2011 and therefore the same construed to be waiver under Article 12.4 of the PPA.
79. This point also does not deserve acceptance for the following reasons:
- (a) As per Article 12.4 of the PPA any failure on the part of the party to exercise and any delay in exercising such right exceeding 3 years only will act as a waiver. In the present case, the Appellant raised the invoices every month for the power supplied. On each occasion, the Respondent defaulted in making

payments in terms of Article 6.2 of the PPA dated 26.11.2004. Admittedly, all the payments were made only after the expiry of the prescribed period. Against the invoices for the month of December, 2010 and Jan, 2011 the Respondent delayed by 135 days and 108 days respectively. The Respondent made the payment only on 2.6.2011 and the Respondent failed to make the payment in time in terms of Article 9.3. Moreover, no interest for delay in payment was made to the Appellant. The Appellant sent a letter dated 28.4.2011 seeking the permission to sell the power to third party by entering into a Wheeling and Banking Agreement with the Respondent.

(b) The Appellant has mentioned that the Respondent continuously defaulted in payment of tariff invoices for four continuous months of October, November, December, 2009 and January, 2010. Further they also defaulted in payment of tariff invoices for eight consecutive months from June, 2010 to January, 2011. The above facts have not been disputed by the Respondent.

(c) As provided under Article 12.4 of the PPA, the failure to exercise any right exceeding 3 years will only act as a Waiver. In this case, even though the payment for the various months between October, 2009 and

November, 2010 had been made belatedly, the payment for the months of December, 2010 and January, 2011 was pending for more than 90 days. Even after payment of the invoice amount for the months of December, 2010 and January, 2011, the interest for delay in payment had not been made till the date of Impugned Order. Thus, it clearly attracted Article 9.3 of the PPA giving right to the Appellant for sale of power to third parties by seeking for Open Access. The Appellant has issued the notice by invoking Article 9.3 by issuing notice on 28.4.2011 and sought wheeling and banking Agreement. As such, this notice was issued within two months from the last date of the default. In view of the same, the delay in raising the default in making the tariff seeking for open access cannot be held as against the Appellant as the same does not act as a waiver or estoppel in terms of Article 12.4 of the PPA.

80. On more contention urged by the Respondent that it is the Appellant who has committed the default by delaying the project and it cannot take advantage of its own wrong.
81. We are at loss to understand as to how this point would be of relevance with reference to the invoking of Article 9.3 of the PPA.

82. According to the Appellant it has not committed any default nor has it delayed the project. In fact, it was the Appellant's predecessor M/s. Bobba Power Project which had taken the project and they were unable to complete the same on account of natural calamities which resulted in washing away of the civil works, etc.
83. In fact, the Appellant took over the said project long thereafter with permission of the State Government. Thereafter, the Appellant has completed the project. The State Government never raised an objection regarding the delay in the completion of the project by the Appellant. Similarly, the Respondent also never raised such a contention before the State Commission. Therefore, raising the issue which has no relevance before this Tribunal is untenable. The relevant question in the present case is as to whether the Appellant is entitled to Open Access in view of the continuous default of more than 3 months in making the payment of tariff by the Respondent.
84. In the instant case, there is no dispute in the fact that the Respondent has committed default in making payment for nearly 20 months and consequently the Appellant was constrained to approach the State Commission to seek for Open Access and for payment of interest.

85. Therefore, this contention urged by the Respondent which has no applicability to the fact of this case is also rejected.
86. Lastly one more aspect has to be taken note of in this context.
87. As indicated above, the State Commission framed two issues.
88. The First issue is relating to the right of the Generating Company to seek for Open Access based on the Termination Notice dated 28.4.2011. This issue was decided as against the Generating Company, the Appellant herein, in the Impugned Order.
89. But, the second Issue which has been framed by the State Commission with reference to the question whether the Generating Company is entitled for payment of interest for the period of delayed payments as per the terms of the PPA, has been decided by the State Commission in favour of the Generating Company, the Appellant.
90. As pointed out by the Appellant, the findings given in both the issues are mutually contradictory.
91. Admittedly, there is a categorical finding by the State Commission that there was not only delay in making payment of tariff invoice but also failure to make the payment of interest. Accordingly, the Sate Commission

directed the Respondent Company to make the payment of interest on such a delayed payment of tariff invoice to the Appellant within a specific period. When that is the nature of finding with regard to the second issue, then the State Commission ought not to have given a finding in regard to the First issue by holding that the Appellant is not entitled to Open Access.

92. As narrated above, when there is material to show that there was a delay in making the tariff invoice and also there was a failure on the part of the Respondent Distribution Licensee to make the payment of interest, then automatically Clause 9.3 would get attracted in which event the Appellant is entitled to Open Access.
93. This aspect has been totally ignored by the State Commission.
94. Therefore, we are of the considered opinion that the Appellant is not only entitled for an interest amount which was not admittedly paid by the Respondent but also entitled to claim for Open Access and to demand for execution of the Wheeling and Banking Agreement from the Respondent Company.
95. However, we are not convinced that the present case of termination of PPA can be pressed by the Appellant on the basis of findings of this Tribunal in Appeal No.176 of 2009

dated 18.5.2010 in the case of Davangere Sugar Company Limited. In Davangere Sugar Company case the PPA provided for termination of the Agreement by the Generating Company for default in payment for continuous period of 3 months by the Distribution Licensee. Such termination clause is not present in the present PPA entered into between the Appellant and the Respondent Corporation. The Appellant could only seek Open Access under payment default as per Article 9.3 of the PPA. Once the default is cured, i.e. the full principal amount with interest on delayed payment as per Article 6.4 is paid, the supply has to be restored to the Respondent Corporation as per the terms of the PPA.

96. In the present case, it has been informed by the Respondent Corporation that subsequent to the Impugned Order, the interest due to the Appellant on delayed payment of invoice has been paid by them to the Appellant. If that be the case, no Cause of Action would survive in the present Appeal. However in future, the Appellant would be entitled to exercise its right under Article 9.3 for Open Access in case of a payment default as per the findings given in this judgment. In order to avoid any delay in granting Open Access to the Appellant in the event of seeking remedy to further default in payment, we also direct the Appellant and the Respondent Corporation to

enter into Wheeling & Banking Agreement. This will enable the Appellant to seek Open Access from the State Load Dispatch Centre and seek remedy for third party sale as per Article 9.3 in the event of a payment default in future.

**97. Summary of Our Findings**

**(i) The Appellant is entitled to sell power to third parties through the Grid in the event of payment default by the Distribution Licensee for a continuous period of 3 months as per Article 9.3 of the PPA. Once the default is cured i.e. the principal amount along with the interest for delay in payment is made in full, the supply has to be restored to the Distribution Licensee.**

**(ii) The right for termination is with the Respondent Corporation for a Construction Default or an O&M default by the Generator (Appellant) after giving a notice of 90 days under Article 9.2 of the PPA. No such right has been given to the Appellant, the seller in the PPA.**

**(iii) The Generator (Appellant) has right to seek Open Access and sell power to third parties in the event of any payment default by the Respondent Corporation for a continuous period of 3 months under Article 9.3 of the PPA. No right vests with**

**the Generator (Appellant) for termination of PPA for default in payment. Thus, when the default is cured i.e. the principal amount along with interest for delayed payment is made in full, the supply to the Respondent Corporation has to be restored.**

98. In view of our above findings, the Impugned Order is set aside to the extent indicated above. However, as the payment of invoice along with interest has since been made by the Respondent Corporation, no cause of action for seeking Open Access for third party sale remains. However, the Appellant is entitled to sell its power to the parties till the default in payment is cured fully in terms of Article 9.3 of the PPA as per the findings given in this judgment in future.
99. With these directions, the Appeal is allowed in part. However, there is no order as to costs.
100. Pronounced in the Open Court on **12<sup>th</sup> day of February, 2014.**

**(Rakesh Nath)**  
**Technical Member**

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

Dated: 12<sup>th</sup> Feb. 2014

√REPORTABLE/~~NON REPORTABLE~~