

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:17th Oct, 2014

Present:

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

APPEAL NO.275 OF 2013

In the Matter of:

Mangalore Electricity Supply Company Limited
Paradigm Plaza,
A B Shetty Circle,
Mangalore-575 001

..... Appellant

Versus

- 1. M/s. AMR Power Private Limited**
Suite No.701-702, Prestige Meredian-2,
No.30, M.G. Road,
Bangalore-560 001

- 2. Karnataka Electricity Regulatory Commission**
6th & 7th Floor, Mahalaxmi Chambers,
No.9/2, M.G. Road,
Bangalore-560 001

...Respondent(s)

Counsel for the Appellant(s) : Mr. S S Naganand, Sr Adv
Mr. Raghavendra S Srivatsa
Mr. Shodhan Babu
Ms. Sumana Naganand

Counsel for the Respondent(s):Mr. B S Patil, Sr Adv
Mr. B S Prasad
Mr. D J Basu
Mr. Venkata Krishna for R-1

J U D G M E N T

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

1. Mangalore Electricity Supply Company Limited (MESCOM) is the Appellant herein.
2. Aggrieved by the Order of the Karnataka State Commission dated 14.8.2013 dismissing the Petition filed by the Appellant seeking for quashing of the termination notice, the Appellant has filed this Appeal.
3. The short facts are as follows:
 - (a) MESCOM, the Appellant is the Government Company. It is also a Distribution Licensee. M/s. AMR Power Private Limited is the 1st Respondent. It is a mini hydel generator having a capacity of 24.75 MW. The Karnataka State Commission is the 2nd Respondent.
 - (b) On 2.8.2006, a PPA was entered into between the Appellant, the Distribution Licensee and M/s. AMR Power, a Generating Company, for purchase of power from the 24 MW Hydel Power Plant. The PPA sets out the tenure of Agreement to be for a period of

20 years. Thereafter, on 4.8.2008, the capacity of the plant was enhanced from 24 MW to 24.75 MW.

(c) Earlier in view of the dispute arose between the parties, the AMR Power, 1st Respondent filed OP No.28 of 2009 before the State Commission seeking for a declaration that the PPA entered into between the parties is void ab initio and also for the direction to the State Load Despatch Centre to grant Open Access or in the alternative to revise the tariff fixed in the PPA.

(d) This Petition was originally dismissed by the State Commission holding that the PPA was valid. The Review Petition filed by M/s. AMR Power was also dismissed.

(e) At this stage, the Generating Company, the 1st Respondent issued a default notice to the Appellant on 26.5.2011 on the ground that the Appellant has defaulted in making payments in time after receipt of invoices as well as the interest on delayed payments and also failed to open the Letter of Credit.

(f) The Appellant sent a reply on 4.7.2011 giving certain explanation for delay in payment.

Thereupon, the AMR Power issued a termination notice on 22.7.2011 stating that the Appellant did not cure the defaults referred to in the default notice and terminated the PPA.

(g) After issuing the termination notice, the AMR Power filed OP No.48 of 2011 on 18.10.2011 for a declaration that the PPA stood terminated and for the consequential direction to the Appellant to give Intra State Open Access to the AMR Power to supply power to 3rd parties and also for the direction to the Appellant to pay interest for the delayed payments along with damages.

(h) However, ultimately, the AMR Power, the 1st Respondent decided to withdraw the said Petition and filed a memo for withdrawal on 22.3.2012. Accordingly, the said Petition was dismissed as withdrawn by the order dated 22.3.2012.

(i) Thereupon, the AMR Power, the Generating Company on the basis of the Termination Notice already issued, filed a Petition before the Central Electricity Regulatory Commission in OP No.141 of 2012 dated 12.6.2012 for a direction to grant Inter State Open Access.

- (j) At this stage, , the Appellant filed the Petition in Petition No.37 of 2012 before the State Commission challenging the Termination Notice dated 22.7.2011 and for a consequential direction.
- (k) In view of the pendency of the proceedings before the State Commission questioning the termination notice, the Central Commission by the Order dated 13.12.2012, dismissed the Petition No.141 of 2012 and directed the AMR Power to put forth its plea in the proceedings before the State Commission to enable the State Commission to come to the conclusion with reference to the validity of the termination notice.
- (l) Accordingly, the AMR Power, the Generating Company approached the State Commission and filed its objections in OP No.37 of 2012. The State Commission during the pendency of the proceedings in OP No.37 of 2012 passed the interim order dated 23.8.2012 directing both the parties to maintain the status-quo pending disposal of the main Petition. This interim Order dated 23.8.2012 was challenged by the AMR Power in Appeal No.223 of 2012 before this Tribunal.

(m) This Tribunal, after hearing the parties by the judgment dated 4.1.2013 held that the interim order granting status-quo passed by the State Commission would not amount to stay of the operation of the termination notice and consequently directed the State Commission to dispose of the main Petition after hearing the parties expeditiously.

(n) Accordingly, both the parties were heard by the State Commission in OP No.37 of 2012. Ultimately, by the Impugned Order dated 14.8.2013, the State Commission dismissed the Petition in OP No.37 of 2012 filed by the Appellant holding that since the defaults committed by the MESCOM were not cured within time allowed as per the terms of the PPA, termination notice was valid.

(o) Aggrieved by the Impugned Order dated 14.8.2013 passed in Petition in OP No.37 of 2012, the MESCOM has filed the present Appeal.

4. The learned Senior Counsel appearing for the Appellant has urged the following grounds to assail the Impugned Order:

(a) The State Commission while coming to the conclusion that the PPA has been validly terminated, has failed to take note of the following facts:

(i) The long term PPA for 20 years was executed between the parties on 2.8.2006. Even before the plant was set up, the AMR Power, the Generator filed OP No.28 of 2009 seeking to declare the PPA void and to grant Open Access. This would show that the Generator wanted to wriggle out of the long term PPA which provided for supply of energy at the rate of Rs.2.80/per kWh.

(ii) The Generator obtained an Interim Order on 27.8.2009 and made supplies as per the said interim order to the Appellant for more than one year. Ultimately, the Original Petition in OP No.28 of 2009 was dismissed on merits by the State Commission 23.12.2010 holding that the PPA was valid. This had not been challenged.

(iii) The AMR Power, the Generator, after commencement of supply initiated another proceedings by filing OP No.48 of 2011 seeking for a declaration that the PPA had expired and

also for grant of Intra State Open Access. At the same time, instead of filing the Appeal as against the Order in OP NO.28 of 2009, the Generator filed a Review Petition and the same also had been dismissed on 22.12.2011. This order also had not been challenged before the Appellate Forum. Similarly, the OP No.48 of 2011 was sought to be withdrawn by the AMR Power, Generator and accordingly, the same was dismissed as withdrawn on 22.3.2012. Despite these proceedings, the Generator continued the supply under the PPA and received the payment of bills. In the meantime, the termination notice was issued on 22.7.2011.

(iv) At that stage, challenging the termination notice, the Appellant filed OP No.37 of 2012 and sought for declaration that the PPA was valid and subsisting.

The above factors have not been taken into consideration by the State Commission while dismissing the OP No.37 of 2012.

(b) The termination notice dated 22.7.2011 is not in conformity with the Article 9.3.2 of the PPA. There

are no details in the said notice. No interest rate has been specified in the PPA or in the termination Notice.

(c) The termination notice was never acted upon as the Generator continued to effect the supply as evidenced by the claims made by the Generator for the period 1.11.2011 to 1.8.2012. This conduct would indicate that there is waiver, acquiescence and Estoppel.

(d) The State Commission failed to take note of the litigative resourcefulness of the Generator and the multifarious Petitions filed right from very inception of the project and even before the supply were commenced. This clearly indicates that this was a mere ruse to obtain financial assistance from lenders with the clear intention of not fulfilling their obligations under the PPA.

(e) It is the specific case of the Appellant that there is issue Estoppel operating against the Generator due to withdrawal of the OP No.48 of 2011. It is settled law that concept of Res-judicata is a matter of public policy which is also enshrined in Section 11 of the CPC. The bar of Res-judicata is a mixed question of

fact and law. There should be plea with regard to the Res-judicata. In the present case, there is a specific pleadings by the Appellant with regard to the question of issue of Estoppel.

(f) The specific case of the Appellant is that the termination notice and the default notice are bereft of details. The allegation in the default notice was that there was non payment for the months of January, 2011 and February, 2011. Admittedly, it is not alleged that there was default for three months continuously. No amount of interest is quantified in the said notice. Though the Appellant did not deny the liability to open the Letter of Credit, the Letter of Credit in fact has been opened subsequently although beyond 30 days from the date of receipt of the default notice.

(g) The PPA casts obligation on both the parties. It is the obligation of the Generator that as per the Article 4 to obtain all approvals as per the schedule which includes evacuation approval as specified in the PPA. It was an admitted fact that there was default of the Generator in this regard.

5. On the basis of the above grounds, it is contended by the Appellant that the Impugned Order suffers from the infirmity and that therefore, the same is liable to be set-aside.
6. The learned Senior Counsel for the Appellant has cited several authorities.
7. The learned Senior Counsel for the AMR Power, the contesting Respondent while pointing out various reasons given by the State Commission in the Impugned Order for concluding that the termination notice was valid, has elaborately argued that the grounds urged by the Appellant have no merits.
8. The learned Senior Counsel for the Respondent also cited various authorities in support of its submissions.
9. In the light of the rival contentions, the following questions would arise for consideration:
 - (a) **Whether the termination notice of the PPA dated 2.8.2006 by the Generator is legal or not?**
 - (b) **Whether a case has been made out for giving direction to the Generator to act in accordance with the PPA dated 2.8.2006 and to continue to supply power to the Appellant in terms of the PPA?**

10. Since both the issues are inter-connected, let us discuss these issues together.
11. Before dealing with these issues, let us refer to the discussions and findings of the State Commission in the Impugned Order on these very same issues. The findings are as under:

ISSUE No.1 : Whether the termination of the PPA dated 2.8.2006 by the Respondent is illegal and invalid, as contended by the Petitioner ?

16) In order to decide the above issue, we have looked into the Default Notice dated 26.5.2011 (ANNEXURE-E) issued by the Respondent to the Petitioner and the reply dated 4.7.2011 (ANNEXURE-F) sent by the Petitioner to the Respondent and the Termination Notice dated 22.7.2011 (ANNEXURE-G) issued by the Respondent to the Petitioner in the light of the terms of the PPA dated 2.8.2006.

17) In the Default Notice dated 26.5.2011, Respondent has alleged that: (a) the Petitioner-MESCOM is not making payments within the specified time, as provided in the PPA, continuously; (b) the Petitioner has defaulted in paying the interest accrued on account of the delayed payments as per Article 6.3 of the PPA; and (c) the Petitioner has failed to open the Letter of Credit as per Article 6.5 of the PPA. Therefore, the Petitioner shall take action to cure the defaults within 30 (thirty) days, failing which it will take further action as per the provisions of the PPA to terminate the PPA. The Petitioner sent a reply to the Respondent on 4.7.2011, but did not deny the delay in

the payments. On the contrary, by way of the statement enclosed to the said reply, the Petitioner virtually admitted the delay, but gave the reasons justifying the delay. Further, as regards delay in payment for the months of January, February and March, 2011, the Petitioner stated that it has occurred on account of non-furnishing of KPTCL interconnection approval by the Respondent. Further, the Petitioner did not deny the liability to pay the interest, nor expressed its willingness to pay the interest as per the terms of the PPA for the delay caused while making the payments. As regards the Letter of Credit, which was required to be opened by the Respondent under Article 6.5 of the PPA, the Petitioner stated that it is taking action to open the Letter of Credit. Considering the allegation of defaults made in the Default Notice by the Respondent and the reply sent by the Petitioner, in our view, the Petitioner's contention that the termination of the PPA dated 2.8.2006 was invalid cannot be accepted and has to be rejected. When the Respondent in the Default Notice dated 26.5.2011 was alleging that the Petitioner is continuously defaulting in making payments of monthly bills, is not paying any interest even though payments have been made after much delay and has not opened Letter of Credit as required under the PPA, the Respondent-MESCOM, should have taken action to clear all the pending payments, including interest within the time given for curing the defaults, and express its willingness to make the future payments within the due date. We are of the view that merely making a statement that it will endeavour to make payments still early, cannot be considered as curing of payment defaults alleged in the Notice of Default.

18) *The contention of the Petitioner that there was no delay in making payments if the Interim Order dated 27.8.2009 of the Commission is taken into account, cannot be countenanced. As contended by the Respondent, the Interim Order of this Commission did not suspend the PPA and the PPA continued to exist, more so when it was held to be so in the final orders. Similarly, the contention of the Petitioner that the PPA dated 2.8.2006 cannot be held terminated, when in OP No.28/2009, the Respondent having sought a declaration to the effect that the PPA is validly terminated, it had withdrawn the same, cannot be countenanced, as mere withdrawal of the said Petition will not have the effect of reviving the PPA which is already terminated.*

19) *The Respondent, drawing our attention to the Order dated 30.4.0213 of the Hon'ble ATE in Appeal No.145/2012 in the case M/s. Jasper Energy Private Limited –Vs- KPTCL and others, contended that the present case is fully covered by the said Judgment and the Petitioner cannot contend that during the pendency of OP No.28/2009 the Respondent could not have terminated the PPA dated 2.8.2006, as the very existence of the PPA was in dispute. The Hon'ble ATE has held that if the issues pending in a Petition do not relate to the non-payment, etc., then the pendency of the proceedings will not bar the non-defaulting party, i.e., the generator, from terminating the PPA. If the facts of the present case are seen in the light of the Hon'ble ATE's Order, the termination of the PPA dated 2.8.2006 on the ground of non-payment as per the terms of the PPA during the pendency of the original proceedings cannot be found fault with.*

20) *The learned senior counsel appearing for the Respondent contended that as per the Contract Law, if there are reciprocal promises to be performed by two parties to the Contract, then the party who wants performance of the Contract should state that it has performed its part of the Contract, and not otherwise. In our view, this contention need not be considered by us, as the PPA in question has been terminated and the Petitioner is only challenging the termination on the ground that the same is invalid, and has not filed any Petition for the specific enforcement of the Contract.*

21) *The learned senior counsel for the Respondent submitted that even the cheques issued by the Petitioner were not honoured by the Banks and the same also amounts to default in payment. The Petitioner has asserted that there was no dishonour of cheques issued by it, as the cheques issued by it have been realized and credited to the Respondent's account, and that the statement made on behalf of the Respondent was false. The Petitioner has also produced a letter dated 17.7.2013 issued by the State Bank of Mysore in this regard. In our view, we need not go into this aspect any further, as we have held that the termination of the PPA effected by the Respondent is valid for the reasons stated above.*

22) *For the aforesaid reasons, we answer Issue No.1 against the Petitioner. We hold that the termination of the PPA dated 2.8.2006 effected by the Respondent on 22.7.2011 is legal and valid, and therefore the termination cannot be quashed.*

ISSUE No.2 : Whether the Petitioner has made out a case for a direction by this Commission to the

Respondent to act in accordance with the PPA dated 2.8.2006 and supply power in terms of the PPA, as prayed for?

23) As we have answered Issue No.1 in the affirmative by holding that there was a breach of the terms of the PPA dated 2.8.2006 by the Petitioner, giving rise to a cause for termination of the said PPA by the Respondent, and hence the termination of the PPA is valid and in accordance with law, we are of the opinion that the Petitioner is not entitled for a declaration by this Commission to the Respondent to act in accordance with the PPA dated 2.8.2006 and supply power in terms of the PPA. Accordingly, Issue No.2 is also answered in the negative against the Petitioner.

24) For the foregoing reasons, the Petition is liable to be dismissed and it is accordingly dismissed.

12. The crux of the findings on these issues as quoted above are as follows:

(a) The default notice was issued on 26.5.2011 by the Generator on three grounds (i) the MESCOM has not been making payments within the specified time as per the PPA continuously (ii), the MESCOM has defaulted in paying the interest accrued on account of delayed payments as per the PPA and (iii) the MESCOM has failed to open the Letter of Credit as per the PPA. For this default notice, the MESCOM sent a reply only on 4.7.2011. In this reply, the MESCOM

admitted the default and delay but gave various reasons justifying the said delay. One of the reasons is that the delay had occurred on account of non furnishing of KPTCL inter connection approval by the Generator. As regards the Letter of Credit, the MESCOM stated that it is taking action to open the Letter of Credit. Having considered the allegations in the default notice as well as the reply sent by the MESCOM, it is clear that the MESCOM's contention that the termination notice was not valid cannot be accepted.

(b) When the default notice dated 26.5.2011 mentions about the default of the MESCOM which has continuously defaulted in making payments and not paying the interest amount and has not opened the Letter of Credit, the MESCOM should have taken action to clear all the pending payments including the interest. Merely making a statement that it will endeavour to make the payment early, cannot be considered as a curing of defaults.

(c) According to the MESCOM, there was an interim order passed and they acted upon the Interim Order and as such, the delay could not be taken into account.

The interim Order did not suspend the PPA and as such the PPA continued to exist. Merely because the Generator had withdrawn the Petition it cannot have the effect of reviving the PPA which is already terminated.

(d) Therefore, it is held that the termination of PPA dated 2.8.2006 issued by the Generator is legal and valid as the defaults have not been cured.

(e) In view of the findings with regard to the first issue holding that the termination of PPA was valid, the MESCOM is not entitled for a declaration or a direction to be issued to the Generator to act in accordance with the PPA and to supply power in terms of the PPA.

13. Let us now deal with these issues in the light of the findings of the State Commission rendered in the Impugned Order.

14. Before delving deep into the issues, it would be better to reiterate the relevant chronological events which led to the present proceedings before the State commission:

(a) M/s. AMR Power is a Power Generator and the Developer. MESCOM agreed to purchase the delivered energy from the AMR Power at the rate of Rs.2.80 per kWh. On that basis, the PPA was entered into between these two parties on 2.8.2006.

(b) It was felt that the Tariff fixed at the rate of Rs.2.80 per kWh without escalation for 10 years on the expected project cost of Rs.93 Crores was much lower than the Tariff required by the project to meet its financial commitments for enhanced cost of over Rs.157 Crores. Hence, the AMR Power filed a Petition before the State Commission in OP No.28 of 2009 praying for a declaration that the PPA executed between the parties was null and void ab initio and for a direction to the MESCOM to grant Open Access to the AMR Power or in the alternative to fix a revised tariff at Rs.5/- instead of Rs.2.80 per kWh. The State Commission after hearing the parties passed the Interim Order in OP No.28 of 2009 directing the MESCOM to take the power at the rate of Rs.2.80 kWh per unit as per the PPA pending final adjudication. Accordingly, the AMR Power started supply of electricity from the project to the MESCOM and submitted the invoices. Ultimately, the State Commission by the order dated 23.12.2010 dismissed the Petition filed by the AMR Power in OP No.28 of 2009 holding that the PPA was valid and subsisting. The AMR Power, thereupon, filed Review Petition against the said order. The said Review Petition was

also dismissed. At that stage, between December, 2010 and March, 2011, the MESCOM committed the payment defaults for a continuous period of three months and for the delayed payment no interest was paid and also it failed to open the Letter of Credit. Therefore, the AMR Power issued a default notice dated 26.5.2011 to the MESCOM demanding to cure the same. For this default notice, the MESCOM sent a reply on 4.7.2011 admitting the default and delay in payment. However, it explained the various reasons for justifying the same. Since the defaults were not cured by the MESCOM, the AMR Power issued notice of termination and thereby terminated the PPA on 22.7.2011. Thereupon, the AMR Power requested the MESCOM to grant consent for entering into Wheeling and Banking Agreement to enable 3rd party sale but MESCOM declined to give consent and refused intra-State Open Access for sale to 3rd parties.

(c) Aggrieved by this, the AMR power filed OP No.48 of 2011 for issuance of direction to the MESCOM to grant Open Access and for payment of interest and damages. During the pendency of the said proceedings, the AMR power filed an Application for interim order directing the MESCOM to pay for the

power pumped by the AMR Power to the Grid of MESCOM. Accordingly, the State Commission directed the MESCOM to make the payment for the power supplied at the rate stipulated in the PPA pending OP No.48 of 2011.

(d) At this stage, the AMR Power instead of 3rd party sale inside the State, decided to supply power outside the State. Hence, it took steps to pray for the Open Access for supply of power to other States by filing an Application before the Central Commission which has got the jurisdiction for Inter State transmission of power.

(e) In view of the above decision, the AMR Power withdrew the Petition in OP No.48 of 2011. Thereupon, the AMR Power filed a Petition No.141 of 2012 before the Central Commission for necessary relief on 12.6.2012. When the Petition was pending before the Central Commission, the MESCOM on 9.8.2012, filed a Petition before the State Commission and initiated the present proceedings by filing a Petition in OP No.37 of 2012 seeking for quashing the termination Notice dated 22.7.2011. In those proceedings, through the Interim Order, the State Commission directed both the parties

to maintain the status quo pending disposal of the main Petition.

(f) Aggrieved by this order of the status quo without giving effect to the termination notice, AMR Power filed an Appeal in Appeal No.223 of 2012 before this Tribunal. Ultimately, this Tribunal after hearing both the parties, disposed of the said Appeal by the judgment dated 4.1.2013 holding that the status quo order passed by the State Commission would not mean that the operation of termination notice of the PPA is stayed and on that basis, directed the State Commission to dispose of the main matter i.e. No.37 of 2012 as early as possible after hearing the parties.

(g) Accordingly, both the parties were heard by the State Commission in OP No.37 of 2012. Ultimately by the Impugned Order dated 14.8.2013, the State Commission dismissed the Petition filed by the MESCOM holding that the termination notice was valid since the payment defaults were not cured within the time allowed as per the terms of the PPA.

(h) Aggrieved by this order, the MESCOM has presented this Appeal.

15. The above chronological events would indicate the following factual aspects:

(a) AMR Power first approached the State Commission in OP No.28 of 2009 seeking for a declaration that the PPA was null and void ab initio since certain conditions precedent were not fulfilled. Rejecting the plea of the AMR Power, the State Commission dismissed the Petition in OP No.28 of 2009 by the Order dated 23.12.2010 holding that the PPA was valid and subsisting. This was affirmed in the Review Petition also.

(b) After serving the default notice, the AMR Power sent a termination notice to the Appellant since the defaults were not cured under the procedure set out under Article 9.3.2 of the PPA. When the AMR Power approached the Appellant for intra State Open Access and the same was refused, the AMR Power filed a Petition in OP No.48 of 2011 before the State Commission for a direction to the MESCOM and others to grant intra State Open Access to AMR Power and also for payment of interest and damages etc.,

(c) When the proceedings in OP No.48 of 2011 were pending seeking for the intra-State Open Access, the

AMR Power decided to supply power to other States instead of supplying power within the State. This sale of power to other States requires for inter State Open Access which is governed by the Regulations of the Central Commission. Therefore, the AMR Power withdrew Petition in OP No.48 of 2011 filed before the State Commission. Thereupon, the AMR Power approached the State Load Despatch Centre for Inter State Open Access. The same was declined.

(d) In view of the above, the AMR Power filed a Petition in Petition No.141 of 2012 before the Central Commission seeking for directions for the grant of inter State Open Access. At that stage, the MESCOM filed a Petition before the State Commission in OP No.37 of 2012 seeking for the quashing of the termination notice dated 22.7.2011 and for declaration that the PPA was valid and subsisting.

(e) In view of the pendency of the issue relating to the validity of the termination notice before the State Commission, the Central Commission disposed of the Petition No.141 of 2012 rejecting the prayer and directed the AMR Power to approach the State Commission to make its plea with reference to the

validity of the termination notice in OP No.37 of 2012 and on the basis of the decision on the validity of the termination notice taken by the State Commission, the AMR Power would take further action subject to the result of the proceedings in OP No.37 of 2012.

16. These factual aspects have to be borne in mind while dealing with the grounds urged by the learned Senior Counsel for the Appellant.

17. The primary grounds urged by the learned Senior Counsel for the appellant are as follows:

(a) The AMR Power from the beginning wanted to wriggle out of the PPA by filing Petition after Petition before the State Commission as well as before the Central Commission in OP No.28 of 2009, OP No.48 of 2011 and Petition No.141 of 2012 respectively.

(b) The AMR Power who sought for declaration that the PPA was validly terminated in OP No.48 of 2011 had actually withdrawn the said Petition without any liberty from the State Commission to raise the issue again. Hence, the AMR Power cannot raise the very same issue by way of defence in the proceedings in OP No.37 of 2012 and sought for declaration that the PPA

was validly terminated. Therefore, the principles of Res-judicata would apply in the present case. That apart, even after the termination, AMR Power continued to supply power to the MESCOM. This shows that the AMR Power did not give effect to the termination notice and as such the principles of issue estoppel also would apply.

(c) The termination of the PPA is invalid since the default notice issued by AMR Power did not set out the details of the default and did not raise the invoice for the interest on delayed payment and there were no defaults for continuous period of three months.

(d) Though supply commenced on 12.9.2009, the synchronization was approved only in March, 2011. The invoice amount for January, February, 2011 was not paid for not furnishing inter connection approvals. Further more, the breach alleged is minor in nature and cannot be the basis for termination.

(e) The termination notice was issued during the pendency of the Review Petition challenging the validity of the PPA. While the AMR Power was contesting the Review Petition that the PPA was invalid, it could not terminate the PPA as per the terms of the PPA.

18. The learned Senior Counsel for the Appellant as well as the Respondents elaborately argued and urged their respective contentions by citing various authorities and also distinguished the judgments cited by each of the parties.

19. The learned Senior Counsel for the Appellant has cited the following judgments in support of its plea:

(a) (2005) 1 SCC787 Bhanu K Jain Vs Archana Kumar;

(b) (2013) 1 SCC 524 Ratnagiri Gas Vs RDS Power;

(c) (2011) 10 SCC 420 Cauvery Coffee Traders, Mangalore Vs Hornor Resources (International) Co. Ltd.,

(d) Preeth & Another Vs Burr L R 9 C. P 208;

(e) (2005) 11 SCC 73 Claude-Lila Parulekar v Sakal Papers (P) Ltd & Others;

(f) Appeal No.152 of 2012 dated 2.2.2014 filed by Soham Mannapitlu Power Pvt Ltd V KERC and Ors

20. The learned Senior Counsel for the Respondent has cited the following judgments in support its reply:

(a) Ramesh Chandra Sankla V Vikram Cement (2008) 14 SCC 58;

(b) Kandapazha Nadar V Chitraganiammal (2007) 7 SCC 65;

- (c) I S Sikandar (D) by L.R.S V K Subramani and Ors; MANU/SC/1093/2013;
- (d) Kandla Port V Hargovind Jasraj (2013) 3 SCC 182;
- (e) M/s.Jasper Energy Private Limited v KPTCL and Others in the judgment dated 30.4.2013 in Appeal No.145 of 2012;
- (f) BESCO Vs Davangere Sugar Co Ltd., and Another in Appeal No.176 of 2009;
- (g) M/s. Narayanpur Power Company Vs KERC and Another in the judgment dated 7.10.2013 in Appeal No.20 of 2013;

21. In the light of the grounds urged by the Appellant, let us now deal with the issues.
22. At the outset, it shall be pointed out that the prayers in OP No.28 of 2009, OP No.48 of 2011 filed before the State Commission and the prayer made in Petition No.141 of 2012 filed before the Central Commission by the AMR Power were different from the prayer made by the Appellant before the State Commission in OP No.37 of 2012. In fact, those Petitions in OP No.28 of 2009, OP No.48 of 2011 and Petition No.141 of 2012 were filed for different cause of action and distinct relief by AMR Power.
23. Having regard to above situation, we shall see whether withdrawal of OP No.48 of 2011 from the State Commission

and filing of Application before the Central Commission for inter State Open Access have a bearing in the issues raised before the State Commission in the proceedings in OP No.37 of 2012 filed by the Appellant, questioning of the termination notice.

24. As indicated above, OP No.28 of 2009 was filed by the AMR Power for declaration that the PPA entered into between the parties became null and void ab initio and stood frustrated due to the cause of action namely non fulfilment of certain conditions precedents and un-sustainability due to increase in the project cost from Rs.93 Crores originally estimated to Rs.157 Crores when the project was commissioned in 2009. In those proceedings, the MESCOM contested that the matter contending the PPA, was valid and subsisting.
25. The State Commission dismissed the said OP No.28 of 2009 on 23.12.2010 accepting the plea of the MESCOM that the PPA was valid and subsisting. Thus, it is clear that the Petition filed in OP No.28 of 2009 which has been ultimately dismissed and which is confirmed in the Review Petition was on the different cause of action and distinct relief before the commencement of the Plant.
26. The issue in the present proceedings in OP No.37 of 2012 was not decided in OP No.28 of 2009. Similarly, the prayer

made by the AMR in OP No.48 of 2011 seeking for intra State Open Access for the purpose of 3rd party sale within the State on the basis of the termination is totally different from the present proceedings. Since, the AMR Power subsequently decided to go for sale to the 3rd parties outside the State, they took steps to obtain inter State Open Access by approaching the SLDC.

27. At that stage, the AMR Power withdrew OP No.48 of 2011 in which the prayer was sought for intra State Open Access in order to approach the SLDC seeking for inter State Open Access. Accordingly, after withdrawal, the AMR Power approached the SLDC and made a request. Since the request had been refused by SLDC, the AMR Power filed Petition in Petition No.141 of 2012 before the Central Commission for inter State Open Access which would show that the AMR Power made efforts to obtain Inter State Open Access by approaching the Central Commission. In other words, it is evident, that the AMR Power had not intended to give up its claim for Open Access merely because the OP No.48 of 2011 was withdrawn.

28. As a matter of fact, on the basis of the Memo filed by AMR Power before the State Commission, the State Commission allowed the withdrawal without any adjudication or

determination of the issues raised in the said Petition on merits.

29. Therefore, when the State Commission allowed the Petition to be withdrawn without any adjudication, such an order allowing withdrawal of the Petition, cannot constitute a decree deciding the issue against AMR Power which would debar AMR Power from taking the issue as its defence in the second round of litigation.
30. It is settled law that for Application of Doctrine of Res-judicata or issue of Estoppel, there should be determination of the issue or existence of a particular cause of action.
31. In the present case OP No.48 of 2011 was withdrawn at the preliminary state itself and as such there was no determination of the issue or existence of the cause of action.
32. This principle has been laid down in (2008) 14 SCC 58 Ramesh Chandra Sankla v Vikram Cement and (2007) 7 SCC 65 Kandapazha Nadar v Chitraganiammal.
33. The learned Counsel for the Appellant has relied on the judgment in (2005) 1 SCC 787 Bhanu K Jain Vs Archana Kumar to contend that by withdrawal of OP No.48 of 2011, Doctrine of Res judicata and issue estoppel would apply.

34. On going through the said decision it is evident that it has been held in the said decision that for Application of Doctrine of Res judicata or issue Estoppel there should be determination of issue or lis or otherwise of a particular cause of action.
35. As indicated above, in the present case while the OP No.48 of 2011 was withdrawn; there was no determination of lis or existence or otherwise of a particular cause of action. Therefore, the issue of Res-judicata or issue estoppel would not apply to the present facts of the case as the ingredients for the Res-judicata have not been satisfied in the present case.
36. It is further contended that even after termination, AMR power continued to supply power and thus, not giving effect to the termination notice would amount to issue estoppels. This contention would also in our view is not tenable.
37. According to the AMR power, it has been forced to pump power to the Appellant's Grid in spite of termination of the PPA because the MESCOM and Others have denied the Open Access and Wheeling and Banking Agreement for sale to 3rd party to AMR Power.

38. Thus, the AMR Power was compelled to pump energy generated through the Appellant's Grid on account of refusal to grant Open Access and denied the consent for Wheeling and Banking Agreement.
39. In such a situation, it cannot be contended that the act of AMR Power continuing to supply power would amount to not giving effect to termination and it attracts issue estoppel. In fact, the AMR Power was constrained to pump power and to receive the payment on PPA rates as per the interim arrangements made due to the directions of the State Commission and this Tribunal. Therefore, the question of estoppel would not arise in this case.
40. It was contended by the Appellant that the default notice did not set out the details of the defaults and therefore, the termination notice on the basis of the said default notice is not valid.
41. Let us refer to the details of the defaults in default notice which was issued by the AMR Power as per Article 9.3.2 of the PPA on 26.5.2011.
42. The relevant portion is as follows:

"Dear Sir,

Sub: Default by MESCOM's in meeting with its Financial Obligations under the PPA dated 2 August, 2006.

We wish to bring to your kind attention that we have commenced generation and supply of power from 12.09.2009 to M/s. Mangalore Electricity Supply Company Limited ("MESCOM") from our 24.75 MW Hydel Power Project near Perla-Shambur Village, across Netravathi River, Bantwal Taluk, Dashina Kannada District, in the State of Karnataka.

We have been contending that the PPA became void on several legal grounds, including that we can't supply power at Rs.2.80 per unit due to increase in Project Cost & supplying power at the price is suicidal. The Hon'ble Karnataka Electricity Regulatory Commission has also directed for renegotiation of the tariff and we have already submitted details of our Project Cost and the tariff worked out based on the increased Project Cost. The tariff is yet to be revised by MESCOM. We have been supplying power to MESCOM and billing based on KERC's directions.

While the matter stands as that, MESCOM has been delaying payment of bills continuously, thus worsening our financial position. Assuming that the PPA is valid, without prejudice to our rights, we wish to bring to your kind attention the following defaults by MESCOM of the obligations undertaken by it under the PPA.

- 1. Payment Default: MESCOM is continuously defaulting in making payments for the Power Bills within 15 days of its submission. There were even instances of dis-honouring of cheques given by MESCOM. The details of defaults in this regard are provided in the Annexure.*

2. *Default in payment of Interest: Interest is automatically payable for delayed payments at SBI Medium term Lending Rate. But, no interest was paid till date.*

3. *Default in Opening Letter of Credit: Letter of Credit is required to be opened 30 days before commercial operations date and to be maintained continuously. No request from our Company was needed in this regard as per Article 6.5 of the PPA. But, no Letter of Credit is opened.*

Thus, MESCOM defaulted in its financial and material obligations, that too for over a continuous period of three months.

Therefore, we request MESCOM to remedy the defaults, arrange for payment of interest for the delayed payments and arrange for opening of the LC within 30 days from the date of receipt of this letter.”

43. The perusal of this default notice dated 26.5.2011 would show that the full details have been given in the notice with reference to the details of defaults, no payment of interest and also relating to the Letter of Credit not being opened by enclosing the Annexure along with the notice. The Annexure to the default notice clearly sets out the number of days delay in making payment of each of the invoices. The defaults in payment of interest on late payments as well as opening of the Letter of Credit have also been detailed.

44. All these defaults referred to in the defaults notice constituted event of MESCOM defaults under Article 9.2.2 of the PPA. Article 9.3.2 of the PPA requires the event of default to be set out.

45. Article 9.3.2 of the PPA provides as follows:

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

46. Strangely, in response to the default notice dated 26.5.2011, the MESCOM sent a reply on 4.7.2011 admitting the said defaults though sought to justify the same on various reasons.

47. The perusals of the MESCOM reply dated 4.7.2011 itself would show that the default notice specified the events of defaults in detail.

48. The reply dated 4.7.2011 sent by the MESCOM is as under:

“Sub: Payment of power purchase bills as per PPA dated 02.08.2006 in respect of your MHS Across Netravathi River, Bantwal Taluk

Ref: Your letter No.AMR/MESCOM/PPA/B-24/11-12 dated 26.5.2011.

With reference to the above, I write to state that:

- 1. As you are aware, your request for tariff revision is pending for decision before KERC (RP No.02/2011)*
- 2. MESCOM is endeavouring to clear the power purchase dues of all generators without causing any delay with its resources. However, MESCOM being a Government owned Company, is also dependent on GoK subsidy.*
- 3. There is no single instance of dishonour of cheque issued by MESCOM as stated by you. Even the statement of payment details furnished by you reveals that all the cheques have been realised and credited to your account. Your statement is totally false and MESCOM reserves the right to legally defend the unwarranted allegations against it.*
- 4. Payments of January, February & March, 2011 were delayed only because of delay on your part in furnishing KPTCL Inter connection approvals. This approval was given by KPTCL only on 26.3.2011.*
- 5. In the past, the Principal amount is cleared with the available resources which are accepted by generators over so many years. However, we will endeavour in future to make the payments still early.*
- 6. The request for opening of LCs are made now for which we are open however, you are liable to allow the payment of rebate at 1.80% P.M per Clause 6.5 (v) of the PPA.”*

49. Therefore, it is not correct on the part of the Appellant to contend that the default details have not been given in the default notice. In fact, the Appellant admitted that there was

a delay in payments of January, February and March, 2011 and the reasons for the same was for the delivery of inter connection approval belatedly. Regarding interest for delayed payment, the Appellant stated that in the past, the principal amount is cleared with the available resources but they will endeavour to make payments early in future. Thus, there was no confirmation that interest on delayed payment will be made. On the other hand, the Appellant gave indication that the Generator should accept the principal amount only.

50. The fact remains that there was a delay in payment for continuous three months which was admitted by the Appellant in the reply on 4.7.2011.
51. It is further contended that the termination notice dated 22.7.2011 did not mention the interest rate or AMR Power did not raise invoice for the interest on delayed payments.
52. Let us now refer to the relevant portion of the termination notice which reads as under:

“As there is a huge increase in the cost for the reasons beyond our control, we sought revision in the tariff payable. We approached Hon’ble Karnataka Electricity Regulatory Commission in 2009 and as per their directions. We have submitted all relevant material for favour of your consideration for the

revision in the tariff. We have submitted with required proof to show that the Company can't survive and meet its Banks' commitments if power is to be supplied at Rs.2.80/unit. In addition to the funds required for meeting O&M expenses and servicing the debt promoters are also to be paid a return on their investment for long time sustainability of the Project. So we have also submitted that for survival of the Project (i) tariff to be increased and (ii) payments to be made on time. For any delay in payments we incur additional interest and penalties.

Sir, despite of our above submissions there were delays for each and every invoice raised by us as per details furnished in our letter referred to above and no interest was paid. While the tariff being paid itself is very low, the delays in payment are pushing us into further losses. There were delays for continuous periods and there were instances of cheque bounce and we can place the required evidence before appropriate forum. Sir, acceptance of belated payments shall not be construed as our consent for the continued delays and a right given to MESCOM to pay any time it is not just to claim waiver for MESCOM's financial obligations. No Generator consents for belated payments. Had MESCOM opened a Letter of Credit as per terms of PPA before commencement of operations, we could have received timely payments and saved on interest and penalties. We request you to note that there was no requirement of our consent for opening a Letter of Credit.

Sir, we request you to note that we are still surviving and supplying power to MESCOM only because of continuous support from our Promoters otherwise, we

would have closed the project long ago. We can't expect it any more.

Sir, we can understand your financial situation but can't help. Under these circumstances, we have no other option than to serve this notice of termination under Article 9.3.2 of the PPA without prejudice to our rights and contentions in the proceedings before the Hon'ble KERC and other appropriate Forums”.

53. As indicted above, there is specific reference with the default notice about the non payment of interest of delayed payments as well as the failure to open the Letter of Credit.

54. At this stage, it is appropriate to refer to Clause 6.3 of the PPA which stipulates the rate of interest at SBI Medium Term Lending Rate per annum. Under the PPA, invoices are required only for the Tariff and not for the interest. The liability of payment of interest is automatic once there is a delay in payment.

55. Article 6.3 of the PPA provides as under:

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

56. Article 6.3 of the PPA does not refer to the requirement of raising an invoice for the interest.

57. As mentioned above, the default notice clearly mentions the invoice amount as well as the period of delay on the basis of which the interest at rate stipulated was claimed.
58. The MESCOM in reply to the default notice did not raise the point that the interest rate was not specified in the default notice.
59. Therefore, there is no merit in the contention that the claim for interest for delayed payment in the absence of invoice cannot be sustained.
60. It is also contended by the Appellant that so as to qualify as a ground for termination a default must continue for three months and in the present case, there was a delay only for two months.
61. This contention also is not tenable.
62. Let us refer to the relevant clause of the PPA. The relevant clauses are Clause 9.2 (Events of Default) and Clause 9.3 (Termination) which are as under:

“9.2 Events of Default

9.2.1 Company’s Default

9.2.2 MESCOM Default: *The occurrence of any of the following at any time during the Term of this*

Agreement shall constitute an Event of Default by Corporation:

1. Failure or refusal by MESCOM to perform its financial and other material obligations under this Agreement.

2. In the event of any payment default by the MESCOM for a continuous period of three months, the Company shall be permitted to sell electricity to third parties by entering into a Wheeling & Banking Agreement with the MESCOM for which it shall pay transmission and other charges to the MESCOM at the rates applicable from time to time and as approved by the Commission.

9.3 Termination:

9.3.1 Termination for Company's Default...

9.3.2 Termination for MESCOM's Default: Upon the occurrence of an event of default as set out in sub-clause 9.2.2 above, *Company may deliver a Default Notice to the MESCOM in writing which shall specify in reasonable detail the Event of default giving rise to the default notice, and calling upon the MESCOM 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 MESCOM. Company may terminate this Agreement by delivering such a Termination Notice to MESCOM and intimate the same to the Commission. Upon delivery of the termination Notice this Agreement shall stand

terminated and company shall stand discharged of its obligations.”

63. From the Article 9.2.2 (1) the failure or refusal by MESCOM to perform its financial and other material obligations under this Agreement would amount to event of default and entitles the termination under Article 9.3.2.
64. In the event of any payment defaults by MESCOM for a continuous period of three months under Article 9.2.2 (2) is essential only for eligibility for 3rd party sale. Under Article 9.2.2 (2) it is “any payment default” and not the “same payment default”.
65. The Respondent pointed out following details in order to demonstrate that MESCOM committed payment defaults for more than three continuous months:
- (a) There was continuous defaults for number of consecutive months more than 3 months prior to the State Commission’s order dated 23.12.2010 in OP No.28 of 2009 confirming the validity of the PPA;
 - (b) After the said order dated 23.12.2010, the tariff invoice for December, 2010, January, 2011 and February, 2011 were defaulted for continuous 3 months;

(c) The interest was defaulted for more than 12 months which was never paid;

(d) The letter of credit was not opened till after 4 months after PPA was terminated on 22.7.2011 i.e. the Letter of Credit was opened only on 10.11.2011 after admitting the default.

66. In view of the above details the contention of the MESCOM that there was a delay only for two months and not for three months, is not factually correct.

67. One other reason given by the MESCOM was that only due to the interim order passed by the State Commission in OP No.28 of 2009, there was a delayed payment and failure to pay the interest up to November, 2010.

68. In response to the Default Notice, the MESCOM in its reply did not give any such explanation.

69. In fact, the State Commission clearly held that the interim order passed in OP No.28 of 2011 did not suspend the PPA and as such the PPA continued to be valid even during the said proceedings.

70. As pointed out by the Respondent, though the MESCOM has now taken a new plea that it was paying as per interim

order and interim order did not specify the payment due date, the MESCOM admitted in its letter dated 10.8.2011 that there were delays in payment of tariff invoices right from the first invoice in 2009. The contents of the letter dated 10.8.2011 show the date of receipt of the tariff invoices, when the payments were due and when the payments were not made.

71. From this, it is evident that the MESCOM admitted its defaults. Further, the MESCOM having taken a stand in the above proceedings admitting that the PPA continued to be subsisting, the MESOM was under obligation to continue to comply with the said financial obligations including the timely payment of monthly tariff invoices and the payment of interest for delayed payment and Opening of Letter of Credit. This was not done. Hence, it is clear from the above facts that even after disposal of OP No.28 of 2009, MESCOM had continued to remain in default of its payment obligations.

72. One more reason given by the Appellant for the delayed payment is that the payment for January and February, 2011 invoices were delayed as interconnection approval had not been furnished by the AMR Power.

73. While refuting this contention, the Respondent submitted that when the MESCOM had already drawn and consumed the power supplied, it cannot justify withholding the payment on the ground that interconnection approval had not been furnished.
74. On going through the records, it is clear that December, 2010 invoice which was due on 19.1.2011 was paid only on 24.2.2011. Similarly, the January, 2011 and February, 2011 invoices which were due on 18.2.2011 and 18.3.2011 respectively were paid only on 25.5.2011 through cheque. Thus, the delay in payment was for more than three months. In fact, the interconnection approval was received on 23.3.2011. However, the MESCOM still failed to make the payments till late May, 2011.
75. This would establish that reason for not making payment of invoices in time was not due to non furnishing of interconnection approval but the above reason had been put forth by the Appellant only as a ruse to justify the defaults in payment obligation.
76. In this context, it is to be pointed out that the very same question had been raised in Appeal i.e. Appeal No.152 of 2012 in the case of Soham Mannapitlu Power Pvt Ltd as to

whether the delay in granting interconnection approval would be valid ground for delay in making payments.

77. When a similar contention was raised by ESCOM in the above Appeal No.152 of 2012, this Tribunal rejected the said contention by the judgment dated 12.2.2014 holding that obtaining of interconnection approval is not a condition precedent for payment of tariff invoices.

78. The relevant observation in the said judgment is as follows:

“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 it, they can not hold the same against the Appellant”.

79. In view of the above judgment, this reason given by the Appellant would not justify the delay in making payments.

80. One other contention urged by the Appellant is that the AMR Power having challenged the PPA in OP No.28 of 2009 could not terminate the same in terms of the PPA.
81. This submission is without any merit. The Petition has been filed by the AMR in OP No.28 of 2009 seeking the declaration that the PPA was void and not subsisting. This Petition was dismissed by the State Commission holding that the PPA at that stage was subsisting. This prayer made earlier for seeking for the said declaration at the stage of initial proceedings would not invalidate the PPA till it is pronounced by the competent judicial authority.
82. The order passed in OP No.28 of 2009 by the State Commission upholding the validity of the PPA only reconfirmed the validity of the PPA. Merely by filing the proceedings questioning the validity of the PPA, the PPA would not become in operative during the pendency of the proceedings. Similarly the contention of the Appellant that the default notice and termination notice issued given during the pendency of the Petition for Review of the order passed in OP No.28 of 2009 before the State Commission is bad also does not deserve acceptance.
83. The termination was effected in terms of the PPA and in view of the subsequent cause of action. The pendency of

the Review Petition can have no bearing to the issue of default notice and termination notice as provided under the PPA.

84. This Tribunal in Appeal No.145 of 2012 in the judgment dated 30.4.2013 in the case of M/s. Jasper Energy Private Limited v/s KPTCL and others has repelled the similar contention urged by the KPTCL. The relevant observations are as follows:

“73. As indicated above, the issue in OP No.22 of 2010 filed for declaring the PPA being invalid are totally different and distinct from the present proceedings. Therefore, the observation made by the State Commission that the non mentioning about non payment by the HESCOM in the earlier proceedings is not at all relevant and germane for determining the validity of the notice of termination of the PPA. This constitutes an entirely distinct and different cause of action.

74. In view of the above, the reasoning of the State Commission for doubting the validity of the notice of termination on the ground that events of default relating to the period during the pendency of OP No.22 of 2010 were not brought to the notice of the State Commission is totally unwarranted as the default in payment and non payment after receipt of default notice has created fresh cause of action for the Appellant for terminating the PPA in the present proceedings.”

85. The Appellant has made one another submission that AMR Power by filing Application after Application before the State Commisison had indulged in multifarious litigation only to wriggle out of the PPA.
86. Though it is true that the AMR Power filed several Petitions before the State Commission and Central Commission, those Petitions have not been filed in respect of the cause of action on the basis of which the Appellant initiated the present proceedings in OP No.37 of 2012.
87. As indicated above, the prayer made by the AMR in OP No.28 of 2009 to declare that the PPA as void because of the subsequent developments by which the project cost had been increased astronomically. However, this prayer made by the AMR Power was rejected both in OP No.28 of 2009 as well as in the Review Petition filed by the AMR Power. Against these orders, the AMR power did not choose to file the Appeal before the Appellate Forum.
88. Similarly in OP No.48 of 2011 was filed by the AMR Power in order to obtain the Open Access for 3rd party sale within the State i.e. Intra State Open Access. This was dismissed as withdrawn in view of the decision taken by the AMR Power to go for 3rd party sale outside the State and therefore, it approached the Central Commission and filed

the Petition in Petition No.141 of 2012 for giving a direction to grant Inter State Open Access.

89. So, the cause of action in these Petitions and the relief sought for by the AMR Power in these Petitions are entirely different from the cause of action which arose in the present proceedings namely OP No.37 of 2012. Therefore, it cannot be correct on the part of the Appellant to submit that the AMR Power indulged in the multifarious litigation only to wriggle out the PPA.

90. As a matter of fact, the present proceedings seeking for a declaration that with reference to the validity of the termination was not initiated by the AMR power but by the Appellant that too after the AMR Power took steps to obtain Inter state Open Access from the Central Commission.

91. The MESCOM has admitted the following aspects:

(a) The issuance of defaults notice was on 26.5.2011. The reply had been sent by the Appellant only on 4.7.2011 admitting the defaults by giving reasons justifying the said defaults and delay. In view of the failure on the part of the Appellant to cure the defects even after expiry of 30 days from the date of 26.5.2011, AMR Power issued termination notice.

(b) The MESCOM committed defaults in payment of invoices on due dates for January and February, 2011 and failed to pay interest thereon and also its failure to open the Letter of Credit in time. These defaults have been admitted by the Appellant but only sought to justify such admitted defaults on extraneous grounds.

(c) The MESCOM failed to cure the admitted defaults within 30 days thereby committed an event of defaults as set out in Sub Clause 9.2.2 of the PPA and thus entitles the AMR Power to terminate the PPA as per Clause 9.3.2.

(d) On the expiry of 30 days in view of the failure to cure the defects, the AMR power issued termination notice on 22.7.2011.

92. These things have not been disputed though some extraneous reasons have been given for those defaults.

93. We are not concerned with those extraneous reasons which are not relevant to consider the question raised in this case.

94. We are only concerned with the question as to whether the defaults which have been referred to in the default notice

dated 26.5.2011 have been cured by the Appellant within 30 days or not.

95. As mentioned earlier in the reply to 26.5.2011, the Appellant sent a response on 4.7.2011 admitting the default and delay in payment by giving some reasons. The fact remains that defaults have not been cured before the expiry of 30 days or at least before the issuance of the termination notice dated 22.7.2011.

96. The State Commission also in the Impugned Order while referring to the defaults notice dated 26.5.2011 mentioning the non payment of invoice amount within the specified period continuously for three months and non payment of interest for the delayed payments and the failure to open the Letter of Credit as per the PPA, has specifically observed that the MESCOM on receipt of default notice dated 26.5.2011 sent a reply on 4.7.2011 without denying the delay in payment but gave reasons justifying the delay. The State Commission also has considered those reasons and concluded that those reasons are extraneous which cannot be accepted for justification of the defaults committed by the MESCOM.

97. When the AMR Power alleged specifically in the default notice dated 26.5.2011, that the MESCOM had been

continuously defaulting in making payments on monthly bills and had not paid any interest even though payments made after much delay and had not opened the letter of Credit as required under the PPA, the MESCOM should have taken steps to clear all the pending payments including the interest in time given for curing the defaults. This was not admittedly cured. The mere statement that it will endeavour to make payments in near future cannot be considered as a curing of defaults as referred to in the Notice of Default.

98. The State Commission in the Impugned Order on the strength of the various judgments rendered in various Appeals giving the ratio decided by this Tribunal has upheld the termination notice issued by the AMR Power to the MESCOM.
99. The learned Senior Counsel for the Respondent has given various details as how the MESCOM has at each stage improved its stand for justifying the defaults.
100. Of course, apart from various reasons given by the MESCOM at various stages for justifying the delay, the MESCOM even in the Appeal, has raised a fresh contention that default notice refers to the periods which are prior to synchronization of the plant.

101. We do not want to go deep into the aspect of various stands taken by the MESCOM before the State Commission as well as before this Tribunal as we are more concerned with the question as to whether the defects referred to in the default notice dated 26.5.2011 have been cured within time period and if it is not cured and whether the AMR Power would be entitled to issue termination notice of the PPA.

102. Since the State Commission in the Impugned Order has dealt with this issue in detailed manner and has given the appropriate reasons for rendering the finding that termination notice was valid, we are not inclined to interfere with the said findings as in our view, the said findings rendered by the State Commission are perfectly justified.

103. **Summary of Our Findings:**

(a) The prayer in O.P. No. 28 of 2009 and O.P. No. 48 of 2011 filed before the State Commission and prayer made in Petition No. 141 of 2012 filed before the Central Commission by AMR Power were for different cause of action and distinct relief.

(b) The issue in the present proceedings in O.P. No. 37 of 2012 was not decided in O.P. No. 28 of 2009 by the State Commission.

(c) Withdrawal of Petition No. 48 of 2012 before the State Commission and order of the State Commission allowing withdrawal of Petition, cannot constitute a decree deciding the issue against the AMR Power which would debar AMR Power from taking the issue as its defence in the second round of litigation. While the Petition No. 48 of 2011 was withdrawn, there was no determination of lis and therefore, Res-judicata or issue estoppels would not apply to the present facts of the case.

(d) AMR Power had issued a valid default notice dated 26.05.2011 in terms of Article 9.3.2 of the PPA. In response to the default notice the Appellant had admitted the default by the reply letter dated 04.07.2011 but sought to justify the same on various reasons. The Appellant thus failed to remedy the default within the stipulated time. Failure or refusal by the Appellant to perform its financial and other

material obligations under the PPA would amount to event of default and entitle AMR to terminate the PPA under Article 9.3.2 of the PPA.

(e) The reason given by the Appellant for delay in making payment that the interconnection approval had not been obtained from the transmission licensee by AMR Power is not a valid reason for withholding the payment.

(f) The pendency of Review Petition in O.P. No. 28 of 2009 before the State Commission can have no bearing on the issue of default notice and termination notice in view of the subsequent cause of action.

(g) When the AMR Power alleged specifically in the default notice dated 26.05.2011, that the MESCOM had been continuously defaulting in making payments on monthly bills and had not paid any interest even though payments made after much delay and had not opened the Letter of Credit as required under the PPA, the MESCOM should have taken steps to clear all the pending payments including the interest in time given for curing the defaults. These defaults were admittedly not cured.

The mere statement that it will endeavor to make payments in near future cannot be considered as a curing of defaults as referred to in the Notice of Default.

(h) The State Commission in the Impugned Order on the strength of the various judgments rendered in various Appeals giving the ratio decided by this Tribunal has upheld the termination notice issued by the AMR Power to the MESCOM. We are in agreement with the findings of the State Commission as in our view the said findings are perfectly justified. Therefore, we are not inclined to interfere with the said findings.

104. In view of the above findings, there is no merit in this Appeal. Hence, the same is dismissed. However, there is no costs.

105. Pronounced in the Open Court on this 17th day of October, 2014.

(Rakesh Nath)
Technical Member
Dated:17th Oct, 2014

(Justice M. Karpaga Vinayagam)
Chairperson

✓ ~~REPORTABLE/NON-REPORTABLE~~