

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 07th Jan.2014

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

Appeal No. 44 of 2013

**Shamanur Sugars Limited.,
No.374, 4th Main,
P.J Extension,
Davanagere-577 002**

... Appellant

Versus

- 1. M/s. Bangalore Electricity Supply Company Limited.,
K.R. Circle,
Bangalore-560 001**
- 2. Karnataka Electricity Regulatory Commission
6th & 7th Floor,
Mahalaxmi Chambers,
9/2 M.G Road,
Bangalore-560 001**
- 3. Reliance Energy Trading Company Limited.,
3rd Floor, Reliance Energy Limited.,
Santa Cruz (East)
Mumbai-400 055**
- 4. The Chief Engineer,
State Load Despatch Centre,
Karnataka Power Transmission Corporation Ltd.,
No.26, Race Course Road,
Bangalore-560 001**

Respondent(s)

**Counsel for the Appellant : Mr. Basavaprabhu Patil, Sr Adv.
Mr. Prabhuling Navbadgi,
Mr. Rajesh Mahale
Mr. Satya Prakash**

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

J U D G M E N T

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

1. Shamanur Sugars Limited is the Appellant herein.
2. The Appellant has filed this Appeal as against the Order dated 24.1.2013 passed by the Karnataka Electricity Regulatory Commission in the Petition filed by the Respondent Distribution Company allowing the claim for damages against the Appellant for the electricity sold by the Appellant to third party during the subsistence of the Power Purchase Agreement between the Appellant and the Respondent Company.
3. The short facts are as follows:-

(a) The Appellant Company is a sugar mill having co-generation facility. It generates electricity for its captive consumption and sells the surplus electricity to third party. M/s. Bangalore Electricity Supply Co. Ltd. (BESCOM) is the distribution licensee, the 1st Respondent. Karnataka State Commission is the 2nd Respondent.

(b) The Appellant Company entered into a Power Purchase Agreement on 07.03.1998 with the then existing Karnataka Electricity Board, the predecessor of the 1st Respondent by which the Appellant agreed for the sale of surplus power generated from its co-generation unit to the Electricity Board at Rs.2.60 per unit for the year 1997-98 and to be escalated at 5% till 2004-05. This PPA was subsequently assigned in favour of the 1st Respondent Company after unbundling of the sector.

(c) From 04.04.2002 to 31.03.05, the predecessor of the first Respondent defaulted in paying the tariff as contemplated under the Agreement in respect of supply of electricity by the Appellant to the distribution licensee.

(d) Therefore, on 06.01.2004, the Appellant Company sent a demand asking the distribution Company, the first Respondent, to pay the arrears of 2,04,24,018/- as principal amount and interest of Rs.94,50,923/-.

(e) Similar demand notices were sent on subsequent dates but there was no response. On 24.03.2005, the Appellant Company sent a representation to the distribution Company seeking extension of the same tariff rate for the next five years. Again on 24.10.2005, another representation was sent seeking extension of the same tariff. Even for these representations, there was no response. Therefore, the Appellant Company on 24.01.06, filed a Petition in O.P. No. 10 of 2006 before the State Commission seeking for a direction to the 1st Respondent Company to release the arrears for the period from 01.04.03 to 31.12.05 for the power supplied by the Appellant Company to the Respondent Company under the PPA dated 07.03.1998.

(f) During the pendency of the petition, the Respondent Company disputed contending that the same tariff cannot be extended for the balance of the

period of 5 years. In view of this stand taken by the Respondent Company, both the parties agreed to negotiate and settle their disputes. Accordingly, the supplemental PPA was entered into between these periods on 05.05.2006.

(g) As per the supplemental PPA, the energy charges to be paid from 01.04.03 to 20.09.2009 would be at the rate of Rs.3.32. Since the supplemental PPA was entered into between the parties, the Appellant Company withdrew the Petition in O.P. No. 10 of 2006 intimating about the execution of supplemental PPA after negotiation.

(h) Thereafter, the Respondent Company paid the entire principal amount to the Appellant. However, the Respondent Company did not pay the interest amount payable as per the PPAs, in spite of repeated demands.

(i) Therefore, on 05.06.08, the Appellant issued the notice terminating the PPA and the supplemental PPA to the Respondent Company on the ground that the Respondent Company had violated the terms of Agreements on account of non-payment of interest despite repeated demands. Even for this, there was

no immediate response. Thereafter, the Appellant applied for Open Access for third party sale on 1.7.2008. Accordingly, State Load Despatch Centre gave consent for the Open Access on 8.7.2008. Consequently, the Appellant Company entered into a Power Purchase Agreement with M/s. Reliance Energy Trading Company, the 3rd Respondent for the supply of electricity and began to supply electricity availing the Open Access.

(j) After about five months i.e. on 04.12.08, the Respondent Company filed a Petition before the State Commission in O.P. No. 26 of 2008 seeking to set aside the consent given by the State Load Despatch Centre for Open Access and also for awarding damages for the supply of electricity to third party by the Appellant instead of supply to the Respondent Company on account of which the Respondent Company had to procure the electricity at a higher rate from the other sources. When that Petition in OP No.26 of 2008 was pending, the Appellant filed a Petition before the State Commission in O.P. No. 14 of 2009 praying for the direction to the Respondent Company for the payment of interest to the tune of Rs.1,89,01,695/- .

(k) At that stage, the Respondent Company filed an Interim Application in O.P. No. 26 of 2008 on 26.11.2010 seeking for amendment of the prayer seeking for declaration that the Power Purchase Agreement dated 07.03.98 and the Supplemental PPA dated 05.03.06 were valid and binding on the parties.

(l) When the proceedings in OP No.26 of 2008 filed by the Respondent Company was pending, the State Commission took-up the matter in OP No.14 of 2009 filed by the Appellant seeking for the direction for the payment of interest and dismissed the same on 2.11.2012 holding that on an earlier occasion in O.P. No. 10 of 2006 filed by the Appellant, the same relief was sought for and the said Petition was dismissed as withdrawn and that therefore, there cannot be any fresh adjudication on the said issue . Against this order dated 2.11.2012, the Appellant Company filed a separate Appeal being No. 72 of 2013 before this Tribunal which is pending.

(m) In the meantime, the State Commission allowed the Petition in OP No.26 of 2008 filed by the Respondent Company by the impugned order dated 24.1.2013 granting the relief for the claim for

compensation for the loss caused to the Respondent Company by the Appellant by selling electricity to the third party and directing the Appellant to pay the said amount of compensation to the Respondent Company.

(n) However, the State Commission rejected the prayer for setting aside the Open Access consent and held in the impugned order that the consent given by the State Load Despatch Centre for Open Access was valid.

(o) As against this portion of the said order dated 24.1.2013, directing the Appellant Company to pay the compensation for the breach of contract committed by them to the Respondent Company, the Appellant has presented this appeal, seeking to set aside the said order.

3. The Appellant while assailing the Impugned Order, has urged the following grounds:-

(a) The Appellant had terminated the PPA in terms of the Appellant's Notice dated 05.06.08, on account of the failure of the Respondent Company to pay the interest on delayed payment in violation of the PPA. Admittedly, this termination notice dated

05.06.08 has not been challenged. In the absence of any challenge to the termination of PPA, there cannot be any occasion for the distribution licensee to contend that the supply of power to third party that too, after the termination of PPA constituted the breach of PPA and to claim damages from the Appellant.

(b) The perusal of the Original Petition in OP No.26 of 2008 filed by the Respondent Company seeking for the damages, would make it clear that the Respondent Company itself has stated that the Appellant Company terminated the Power Purchase Agreement on 05.06.08 on account of failure to make interest payment and thereafter the Appellant Company obtained Open Access on 8.7.2008 and from then onwards, the Appellant has availed the Open Access granted by the State Load Despatch Centre. The above admission would show that the Distribution Company-Respondent, kept silent all along during the entire period when the Open Access was availed. It is only on 4th December, 2008 for the first time the Respondent Company filed a Petition in OP No.26 of 2008 seeking to set aside the consent for Open Access granted by the State Load

Despatch Centre in June, 2008 without challenging the termination. There is no explanation for this delay as well as for the failure to challenge the termination.

(c) The Appellant Company filed the counter before the State Commission in OP No.26 of 2008 bringing to the notice of the State Commission that the Power Purchase Agreement stood terminated and after the termination the Appellant had legitimately proceeded for sale of electricity to the third party on the basis of the consent for Open Access and there was no challenge to the termination notice. Only at that stage, the Distribution Company on 26.11.10 filed an Amendment Petition in OP No.26 of 2008 seeking for a declaration that the PPA was still subsisting. Even in the said Petition, admittedly, there was no challenge to the termination. This Amendment Petition also was strongly opposed by the Appellant Company by filing a counter raising various grounds. However, the State Commission without passing any order on the said Amendment Petition straightway disposed of the Main Petition in OP No.26 of 2008 allowing the same by holding the termination notice

is not valid although there was no challenge to the said termination. This approach of the State Commission is not legal and unwarranted.

(d) The only reason given by the State Commission for concluding that the termination was not valid was that the interest amount was earlier claimed by the Appellant but the same was dismissed as withdrawn and so there cannot be a fresh adjudication. This conclusion is erroneous.

(e) The issue in O.P. No. 10 of 2006 was with regard to non-payment of arrears of electricity as well as the interest in the said arrears. Since, there was a settlement between the parties with regard to the payment for principal as well as interest; the supplemental Power Purchase Agreement was entered into. Accordingly, the said Petition was withdrawn. Thereafter, the arrears alone have been paid but the interest had not been paid. Only on that ground, the Appellant Company proceeded to terminate the Power Purchase Agreement on the ground that the Respondent Company did not adhere to the terms of PPA and the Supplemental PPA. The mere withdrawal of the Petition on the ground of negotiation for settlement which resulted in the

execution of the Supplemental PPA cannot take away the accrued right of the Appellant who is the party to the contract. The State Commission failed to understand the distinction between abandonment of the claim and withdrawal of a Petition.

(f) The impugned order is bad in law since the State Commission itself on issue No.3 categorically has held that the consent granted to the Appellant by the State Load Despatch Centre for sale to the third party was legal and valid as it was granted pursuant to the Central Commission's order. In the absence of invalidating the supply to the third party, no damages could be awarded.

(g) The impugned order is unsustainable in law since the Respondent Company was barred from making the claim as it was hit by the principles of promissory estoppel. The Respondent Company did not approach the State Commission immediately after the Appellant Company obtained consent for Open Access from the State Load Despatch Centre. In fact the Respondent Company allowed the Appellant Company to effect sales to the third party for four months period. It had only approached the State Commission for damages only

after the sale was effected for the entire period of Open Access. This course adopted by the Respondent Company is not in accordance with the law.

4. In reply to the above grounds urged by the Appellant, the distribution company – the first Respondent in reply, has made the following submissions:-

- (a) In terms of the Original PPA, the PPA was to expire only on 20.09.2009. Therefore, the contention of the Appellant that the PPA was validly terminated by the Appellant on 05.06.2008 itself is misconceived. The ground for termination of the PPA through the communication dated 05.06.2008, was the violation of PPA by the non-payment of the interest amount payable by the Respondent Company to the Appellant. This is factually incorrect. In fact, this was refuted by the Respondent Company by sending a reply dated 15.07.2008 intimating that it was fully complying with the PPAs entered into between the parties and therefore, the Appellant was bound to supply electricity to the Respondent in terms of the existing PPA.

(b) In fact, with regard to the claim for the amount towards interest, the Appellant filed a Petition in O.P. No. 14 of 2009 raising the claim of interest from the Respondent. This Petition was filed only on 03.05.2009. Even prior to this, the Respondent Company filed a Petition in O.P. No. 26 of 2008 on 4th December 2008 itself seeking for the declaration that the Appellant was bound by the terms of the PPAs and liable to pay compensation for the loss caused to the Respondent Company due to the sale of electricity to third parties. This Petition in OP No.14 of 2009 is nothing but a counter-blast to the Petition in O.P. No. 26 of 2008 filed by the Respondent.

(c) When the very same claim for the said amount was made before the State Commission by the Appellant in O.P. No. 10 of 2006, due to settlement between the parties, the Appellant withdrew the said Petition on 18.05.2006 in view of the settlement of the parties. Subsequently, the bill was raised only in respect of the arrears and not with reference to the interest. Admittedly, the principal arrears amount had been paid. When such being the case, there cannot be any question of the claim for the interest

amount after the supplemental PPA and withdrawal of OP No.10 of 2006.

(d) The interest amount was claimed by the Appellant by filing the fresh Petition in O.P. No. 14 of 2009. The State Commission while disposing of this Petition has held that the said Petition was not maintainable as the Appellant withdrew the earlier Petition in O.P. No. 10 of 2006 regarding the said claim. Therefore, the termination notice on the ground that interest amount was not paid cannot be valid. As a matter of fact, this termination notice dated 05.06.2008 was refuted through the reply notice sent by the Respondent Company on 15.07.2008 by not accepting the said termination.

(e) The Open Access consent sought for by the Appellant was granted by the State Load Despatch Centre in terms of the then prevailing orders passed by the Central Commission to the effect that the State Load Despatch Centre was not entitled to consider the question of subsisting PPA while deciding the application for Open Access. Therefore, the grant of Open Access was to be decided without reference to the existence of the PPA. Therefore, the fact that Open Access consent

was obtained cannot be the ground for violating the terms of PPA. The State Commission has considered this aspect and came to the correct conclusion that the Appellant is liable to pay the compensation for the injury caused to the Respondent Company.

5. In the light of the these rival contentions, the following questions would arise for our consideration:

(a) Whether the impugned order dated 24.1.2013 passed by the State Commission holding that the termination notice was not valid and, therefore, the PPA entered into between the parties continued to exist is sustainable particularly when there was no issue raised between the parties with regard to the validity of the termination notice?

(b) Whether the impugned order of the State Commission in holding that no claim for interest amount could be made after withdrawal of the Petition in O.P. No.10 of 2006 for the same claim, is sustainable when the Distribution Company had not honoured its commitment of settlement?

(c) Whether the impugned order of the State Commission in awarding damages/compensation is

sustainable when the Distribution Company did not object to the Appellant Company availing the Open Access especially when the Petition seeking compensation was filed only after the Open Access period is over?

6. Since all these issues are inter-connected, let us discuss these issues together.
7. Before dealing with these questions, let us refer to the impugned order in which the issues were framed and the findings rendered on those issues:-

Issue No.1: *Whether the PPA dated 7.3.1998 as amended on 5.5.2006 was subsisting on the date when the Generating Company applied for NOC for Open Access?*

Findings

1) *To examine whether the PPA dated 7.3.1998 (Annexure-A), as amended on 5.3.2006 (Annexure-B), was valid and subsisting on the date when Respondent No.1 applied for 'NOC' for Open Access, we may necessarily have to look into the question, 'Whether the Termination of the PPA effected by Respondent No.1 on 5.6.2008 is valid and legal?' In the Termination Letter, the ground mentioned for termination of the PPA is that the Petitioner had failed to release the interest of Rs.1,89,01,695.29, accrued on account of the belated payments from April, 2002 to March, 2005. We have looked into the material placed before us*

to see whether there was any default in paying the interest and find that there was no interest due as claimed by the Respondent. The Respondent had earlier initiated proceedings in OP No.14/2009 for claiming the very same amount and this Commission, in its Order dated 2.11.2012, had held that:

“10. In our view, the present Petition is liable to be rejected, as the earlier Petition, filed for the same amount of interest, was withdrawn by the Petitioner. This Commission, on 18.5.2006, has recorded in OP No. 10/2006 that:

‘Counsel for the Petitioner submits that the parties have negotiated the tariff and a separate proposal is sent by KPTCL to the Commission and in view of this he seeks permission to withdraw the Appeal. The Counsel is permitted to withdraw the Appeal in the circumstances mentioned by him. ’

11. Pursuant to this submission, the Petitioner has signed a Supplemental PPA dated 5.5.2006, duly modifying the rates contained in the original PPA. Once the Petitioner has settled the matter with the Respondents and withdrawn the Petition filed for claim of interest, it cannot again initiate a fresh Petition for the very same amount, on the very same cause of action.

In our view, the present Petition cannot be maintained by the Petitioner and therefore the Petition is liable to be rejected. ”

Therefore, the 1st Respondent could not have terminated the PPA on the ground that the interest

amount was not paid. Consequently, we have to hold that the termination of the PPA was invalid and the PPA continued to subsist, till it came to an end by efflux of time. As a result of this, the 1st Respondent was obliged to supply the electricity generated by it to the Petitioner as per the terms of the PPA. Accordingly, Issue No.1 is answered in the affirmative in favour of the Petitioner.

ISSUE No.2 : Whether the Generating Company has committed a breach of contract and is liable to compensate the distribution company for the same?

Findings

2) While dealing with Issue No.1, we have held that the termination of the PPA affected by the 1st Respondent was invalid and that the PPA continued to exist till it came to an end by efflux of time. Further, we have held that the 1st Respondent was obliged to supply electricity generated by it to the Petitioner as per the terms of the PPA. Admittedly, the 1st Respondent, on the ground of termination of the PPA, has not supplied the electricity generated by it to the Petitioner and instead has sold the electricity to third parties. This act of the 1st Respondent is therefore nothing but a breach of the Contract and the 1st Respondent has to meet the consequences of the breach of Contract.

3) Section 73 of the Contract Act, which deals with the consequences of breach of Contract, provides that,

“When a Contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the

Contract, compensation for any loss or damage caused to him thereby which naturally arose in the usual course of things from such breach or which the parties knew when they made the Contract to be likely to result from breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.”

4) *The term, ‘compensation’ in Contract Law signifies that which is given in recompense, an equivalent rendered. It denotes a sum of money payable to a person on account of loss or damage caused to him by the breach of a Contract.*

5) *‘Breach of Contract’, in law, is committed when a party refuses to perform his part of Contract. The measure of damages in Contract is compensation for the consequences which flow as a natural and capable consequence of the breach of a Contract, or in other words, which could be foreseen.*

6) *Section 57 of the Sale of Goods Act, 1930 provides that, “Where the Seller wrongfully neglects or refuses to deliver the goods to the Buyer, the Buyer may sue the Seller for damages for non-delivery.”*

7) *The measure of compensation depends upon the circumstances of the case. In this case, the Agreement is to sell electricity which is ‘goods’. Normally, the measure of damages when the Seller fails to deliver the goods is the difference between the Market Price of the relevant goods at the time of*

delivery and the Contract Price.

8) *Having noticed the law on breach of Contracts and measure of damages, let us now examine the facts of this case.*

9) *The Petitioner in the present case has claimed a sum of Rs.17,69,98,024/- as damages for the months of July to November, 2008, on the ground that it has purchased power at a higher rate. In support of the said claim, it has produced Annexure 'B', wherein the basis of the calculation of damages is provided. We have looked into the calculation of damages. It appears that the Petitioner has calculated the damages, not on the basis of the rate at which it has actually purchased additional power, but on the basis of the high cost rate at which it has purchased electricity from regular supply sources. We have looked into these sources. Except IEX, the other sources of power are the sources wherein the Petitioner has/had a Long-Term Contract and was purchasing at the rate fixed in the PPAs depending on the fuel used therein. These purchases of electricity by the Respondent are not comparable with the 1st Respondent's generation, as the same is Bagasse-based. Further, no case has been made out by the Petitioner that it had to purchase increased quantities of power from these high cost sources as a consequence of the failure of supply from the 1st Respondent. Therefore, in our view, the basis of calculation adopted by the Petitioner for calculation of damages cannot be considered as appropriate.*

10) *From the details produced by the Petitioner, vide Memo dated 1.12.2010, it is further observed*

that only during the months of July, August, September and November, 2008, the Petitioner had made short-term power purchases at a higher rate from sources other than regular sources, which may be attributable to non-supply from the 1st Respondent to the extent of the actual power generation by the latter. Therefore, the Petitioner, in our view, can claim damages only for those months, and the measure of damages for those months has to be the difference between the PPA rate and the then prevailing market rate as per Section 57 of the Sale of Goods Act, and not at the highest cost paid by the Petitioner as claimed. In order to determine the market rate for power, we have to go by the weighted average of the rates at which power was sold in the short-term market at that time, as there is no single market rate for power available at any given point of time. For this purpose, therefore, we have considered the weighted average of the rates of short-term bilateral transactions during the months of July, August, September and November, 2008, which was Rs.7.08 per Unit as per the CERC published data. The Petitioner, according to us, is thus entitled to damages at the difference between the market rate of Rs.7.08 per Unit and the PPA rate of Rs.3.71 per Unit of energy supplied by the 1st Respondent to third parties depriving the Petitioner of the said supply. This works out to Rs.3.37 (i.e., Rs.7.08 - Rs.3.71) per Unit, for the electricity generated by the 1st Respondent and exported to third parties during the months of July, August, September and November, 2008. Therefore, the 1st Respondent shall pay damages to the Petitioner at the rate of Rs.3.37 per Unit for the electricity generated but not supplied to the Petitioner during the months of July, August, September and November, 2008, within 6 (six) weeks from the date

of communication of this Order. Accordingly, Issue No.2 is answered in the affirmative in favour of the Petitioner.

ISSUE No.3 : *Whether the consent granted by the State Load Despatch Centre for Open Access is liable to be set aside ?*

Findings

11) *The Petitioner has sought for setting aside the consent granted by the 3rd Respondent-Chief Engineer, SLDC, for Open Access in favour of the 1st Respondent, vide letter dated 8.7.2008. In view of our finding as above, we need not go into this question. However, since the issue has been raised against the consent granted by the 3rd Respondent, we have gone into the same. In our view, the consent granted by the 3rd Respondent cannot be set aside at this length of time and also in view of the fact that the consent granted was as per the directions of the CERC and subject to this Commission's Order on the rights of the parties under the PPA. Accordingly, Issue No.3 is answered the negative against the Petitioner.*

19) *For the foregoing reasons and the conclusions reached by us on the material placed before us, the Petition is allowed in part in the above terms."*

8. As regards the 1st issue relating to the subsistence of the PPA, it has been held that termination of PPA was invalid and the PPA continued to subsist.
9. As regards the second issue, with regard to breach of

contract committed by the Appellant, the State Commission held that the Appellant company was liable to pay the compensation @ Rs. 3.37 per unit for the electricity generated but not supplied to the Distribution Company during the specified period.

10. In regard to third issue, with reference to the prayer for setting aside the consent given by the State Load Dispatch Centre, the State Commission declined to set aside the said consent holding that the consent was granted validly as per the directions of the Central Commission and also on the ground of lapse of the Open Access period.
11. The summary of the reasons for the above said conclusion given by the State Commission is quoted as below:-
 - (a) In view of the Order passed in O.P.No.14/2009 passed by the State Commission earlier rejecting the claim for interest, the Generating Company could not have terminated the PPA on the ground that interest amount was not paid. Consequently, it has to be held that the termination of PPA was invalid and the PPA continued to subsist till it came to an end by efflux of time; and therefore appellant

was obliged to supply electricity to BESCO as per PPA but the same has not been done.

(b) The act of appellant in supplying energy to third party amounts to breach of contract and the Appellant, the Generating Company has to meet consequence of such breach.

(c) Annexure B calculation based on which BESCO has claimed damages refers to sources which are not comparable with generation of appellant. Further no case has been made out by BESCO that it had to purchase increased quantities of power from the high cost source, as a consequence of failure of appellant to supply electricity. Therefore basis adopted by BESCO for calculation of damages cannot be considered as appropriate.

(d) Only during July, August and November 2008 the BESCO has made short terms power purchases at a higher rate from sources other than regular sources, which may be attributable to non supply from appellant to the extent of actual generation from the appellant.

(e) To determine market rate for power, weighted average of rates at which power was sold in short term market at that time has to be taken into account as there was no single market rate for power available at any given point of time.

(f) For the above purpose weighted average of rates, short term bilateral transactions during July, August, September and November, which was Rs.7.08 per unit as per CERC published data, is considered.

(g) BESCO is thus entitled to damages at the rate of Rs.3.37/- per unit, being the difference between market rate of Rs.7.08 per unit and PPA rate of Rs.3.71 (i.e. $Rs.7.08 - Rs.3.71 = Rs.3.37$). (The damages awarded by State Commission to the tune of Rs.10.98 crores).

(h) The consent granted by State Load Dispatch Centre for Open Access in favour of the Generating Company was valid.

12. In the light of above findings and also the arguments advanced by both the parties, let us discuss the 3 issues framed by this Tribunal referred to above.

13. While discussing the issue it would be appropriate to recall some of the relevant chronological events to have a clear understanding of the case as well as the core issue which arises in this Appeal.
14. The Appellant runs a sugar factory having co-generation facility to generate electricity for its captive consumption and also for supply of the surplus electricity on sale to third parties.
15. Erstwhile Karnataka State Electricity Board, the predecessor of the Distribution Company, 1st Respondent had entered into a power purchase agreement on 07.03.1998 with the Appellant for the purchase of electricity from the Appellant's co-generation plant. Subsequently, the rights and obligations of the Electricity Board under the PPA were assigned to Karnataka Power Transmission Corporation Ltd., and thereafter in favour of the Distribution Company- the first Respondent. As per clause 6.01 of the PPA, the Respondent Company agreed to purchase electricity at the base rate of Rs.2.60 kwhr for the year 1997-98, the said base rate was to escalate at the rate of 5% per year up to the year 2004-05 and thereafter the rate had to be fixed by mutual discussion between the parties.

16. As per Article 5.01 of the PPA, based on the joint meter reading, the bills would be prepared and the same would be sent to Electricity Board for arranging payments of the Appellant. For the delay in payment beyond 30 days, the Respondent Company was liable to pay interest at default rate of bank prime lending rate per annum.
17. As per Article 11, the PPA was valid for 10 years from the date of synchronization. The plant was synchronized on 21.09.1999. Both the parties agreed that the period of 10 years would expire on 20.09.2009. Pursuant to the PPA, after synchronization, the Appellant supplied electricity to the Respondent Distribution Company and raised invoices for tariff as per the rate agreed under the PPA.
18. According to the Appellant, the Distribution Company-Respondent was irregular in making payments and arrears of tariff accumulated in course of time. As per Article 5 of the PPA this amount carried default interest at prescribed rate. The Respondent Distribution Company (BESCOM) failed to honour the agreement for escalation of tariff at the rate of 5% over and above the base rate of Rs.2.60 kWhr w.e.f 01.04.2003.

19. In view of the default of the Distribution Company in making payments as per PPA, as on 06.01.2004, the electricity charges amounting to Rs.2,04,14,018/- fell in arrears on which the additional Rs.94,50,923/- was payable towards interest.
20. The Appellant sent several representations on 06.01.2004, 02.02.2004, 15.05.2004, 01.11.2004 and also on 23.07.2005 demanding both arrears on principal as well as interest. Despite the receipt of these representations, the Respondent Company failed to comply with it.
21. In the meantime, the tariff post the year 2004-05, as per Article 5 of the PPA had to be fixed by mutual discussions. With regard to these, the Appellant sent two representations on 24.03.2005 and 24.10.2005 to agree for the same rate of tariff for the extended period. Even for this representation, there was no response from the Distribution Company. Similarly, the Distribution Company did not pay any amount for the energy supplied to the Distribution Company from 01.04.2005 to 31.12.2005. Due to this non-cooperative attitude of the Distribution Company, the Appellant filed O.P. No. 10 of 2006 before the State Commission praying for a direction to the Distribution Company for payment of the aforesaid

amount towards the principal arrears as well as the interest as per the PPA dated 7.3.1998.

22. However, during the pendency of the said Petition before the State Commission, both the parties negotiated for a settlement. On the basis of this settlement, a Supplemental PPA dated 05.05.2006 was entered into between the parties. In the Supplemental PPA, the Clause relating to the rate of energy charges alone was amended by providing energy charges to be paid from 01.04.2003 to 20.09.2009 at the rate of Rs.3.32+ 2%. Under Article 4 of the Supplemental PPA, all other terms and conditions of original PPA dated 7.3.1998 remained intact i.e. including the Article 5 regarding interest. In view of this settlement and the execution of Supplemental PPA, the Appellant withdrew the Petition in O.P. No. 10 of 2006 reporting the State Commission about the subsequent development which took place. Accordingly, the same was allowed to be withdrawn by the order dated 18.05.2006. The said order is as follows:-

“Counsel for the petitioner submits that the parties have negotiated the tariff and a separate proposal is sent by KPTCL to the Commission and in view of this, he seeks permission to withdraw the Appeal (Petition). The counsel is permitted to withdraw the

Appeal (Petition) in the circumstances mentioned by him.”

23. Thereafter, the entire principal amount was remitted by the Distribution Company to the Appellant on various dates between 05.08.2006 to 08.12.2006. However, the Respondent Company did not pay the interest for the delayed payment in spite of the repeated demands. Therefore, the Appellant Company on 05.06.2008, issued notice to the distribution Company terminating the original PPA as well as supplemental PPA on the ground that the distribution Company had violated the terms of agreements by non-payment of interest amount of Rs.1,89,01,695/- despite the repeated demands. There was no response to this termination notice also from the Distribution Company.
24. Thereafter, the Appellant applied to State Load Despatch Centre for Open Access on 01.07.2008. This was never objected to by the Respondent Company/Distribution Company before the State Load Despatch Centre. Ultimately, the Open Access was granted by the State Load Despatch Centre for third party sale on 8.7.2008. Even at that stage, the Respondent Company did not move to the State Commission for restraining the

Appellant Company for sale of power to third party through the Open Access.

25. The Appellant consequently availed Open Access between 08.07.2008 and 30.11.2008 by supplying the power to third party (Reliance, 3rd Respondent) in terms of the PPA entered with them on 08.07.2008. In the meantime, on 15.07.2008 the Distribution Company sent a reply letter to the Appellant Company for the termination notice dated 5.6.2008 that too after the Open Access granted on 8.7.2008 stating that it had not violated any obligations under PPA.
26. In the meantime, the Open Access was availed and the entire period was over. Only at that stage the Distribution Company filed a Petition on 04.12.2008 in O.P. No. 26 of 2008 before the State Commission praying for declaration that the Appellant was bound to supply power to Respondent Company and for setting aside the Open Access consent on 8.7.2008 granted by the State Load Despatch Centre and also for awarding damages on account of the default committed by the Appellant Company in violation of the PPA. The Appellant filed a statement of objections in O.P. No. 26 of 2008 defending the grant of Open Access in their favour and contended that PPA having been terminated and in the absence of

the challenge to the termination that declaration that the Appellant was bound to supply power to the Respondent Distribution Company could not be granted.

27. Only at that stage, i.e. after taking note of the objection raised by the Generating Company about the failure to challenge to the termination, the Respondent Distribution Company on 26.11.2010, filed a interim application in O.P. No. 26 of 2008 seeking for the amendment of the prayer by asking for a declaration that the PPA and the Supplemental PPAs were valid and binding on the parties.
28. In the meantime, the Appellant on 03.05.2009 filed a separate Petition in OP No. 14 of 2009 before the State Commission praying for the direction for the payment of interest amounting to Rs.1,89,01,696/- contending that the Distribution Company paid only principal amount after the supplemental agreement but failed to make the payment of interest amount despite the repeated demand.
29. Even before the disposal of the Petition in OP No.26 of 2008 filed by the Distribution Company, the State Commission took up O.P. No. 14 of 2009, filed by the Appellant Company claiming the interest amount for

enquiry. Ultimately, the State Commission dismissed the same by the order dated 02.11.2012 on the ground that the said relief for interest was earlier claimed by the Appellant in O.P. No.10 of 2006, but the same was dismissed as withdrawn and so there cannot be any fresh adjudication.

30. As against this order, the Appellant Company filed a separate Appeal being Appeal No. 72 of 2013 which is pending before this Tribunal. Thereafter, the State Commission passed the impugned order in O.P. No. 26 of 2008 on 24.01.2013 in favour of the Respondent Company holding that the termination was not valid and the PPA was valid and subsisting and consequently, the Appellant Company is liable to pay compensation to the Distribution Company due to the failure of supply of power to the Distribution Company. This Impugned Order is subject-matter of this Appeal No. 44 of 2012.

31. Bearing these basic facts in mind, we shall now discuss the issues raised in this Appeal.

32. From the chronological events narrated above, the following facts are not in dispute:

(a) As per Article 5 of the PPA, if there is a delay in payment, the Distribution Company is liable to

pay the interest being contractual and automatic. This Article 5 has not been revised as per the Supplemental PPA. Subsequent to the Supplemental PPA, the Distribution Company paid only the principal amount of arrears and failed to pay contractually agreed interest amounting to Rs.1,89,01,696/-. In this regard, a number of representations were sent seeking for the payment of interest from the Distribution Company. Despite this, the interest amount was not paid nor claimed through the reply that the Distribution Company was not liable to pay any interest.

(b) In view of the failure to make the payment of interest as per the PPA, the Appellant by an intimation dated 5.6.2008 terminated the Power Purchase Agreements. There was no immediate reply to this termination notice. Thereafter, the Appellant applied to the State Load Despatch Centre for Open Access on 1.7.2008. The Distribution Company did not object to the grant of Open Access at that stage. Therefore, the State Load Despatch Centre granted Open Access on 8.7.2008. Only thereafter reply to the Termination Notice dated 5.6.2008 was sent by the Distribution

Company, BESCO through the communication dated 15.7.2008 intimating that it had not violated any of the PPA obligation. In this reply dated 15.7.2008, the Distribution Company did not state either the Distribution Company was not liable to pay any interest or the Distribution Company already settled the amount towards the interest and as such there was no dues to be paid by the Distribution Company to the Appellant.

(c) In the meantime, the Appellant availed the Open Access during the period between 8.7.2008 and 30.11.2008 and supplied power to the Reliance Company, the Respondent-3 herein, in terms of the PPA entered into with them. After the Open Access period was over i.e. on 4.12.2008, the Distribution Company filed a Petition in OP No.26 of 2008 on 4.12.2008 seeking to set aside the consent given by the State Load Despatch Centre dated 8.7.2008 and also for awarding damages. In the said Petition, the Respondent Company made the following prayers:

- (i) Set aside the consent given by the State Load Despatch Centre dated 8.7.2008;

(ii) Declare that the Generating Company (Appellant) is bound to supply power to the Distribution Company in terms of the PPA dated 7.3.1998 and Supplemental PPA dated 5.5.2006.

(iii) Direct the Generating Company to pay to the Distribution Licensee the difference in power procurement cost for 20 MW for the period in which the power was denied to the Distribution Company contrary to the terms of the PPA.

(d) Thus, the reading of the prayers would show that the main prayer made by the Distribution Company to the State Commission to set aside the consent granted by the State Load Despatch Centre for Open Access and consequently direct the Generating Company to continuously supply power and to pay the compensation for non supply of electricity to the Distribution Company for the period specified. In this prayer, the validity of the termination was not called in question. Only subsequent to the counter filed by the Generating Company in OP No.26 of 2008 contending that in the absence of the challenge to termination,

direction for supply to the Distribution Company and for payment of compensation could not be issued, the Distribution Company decided and filed an Application seeking for the Amendment of the prayer in the Main Petition for a declaration that the PPA continued to exist between the parties until it came to an end by efflux of time as referred to in the PPA. Even in this application, no prayer was made for quashing of the termination notice nor any ground was raised in the said amendment application and any material was placed to show that the termination notice was illegal. On this ground, an objection was raised by the Generating Company by filing an objection to the application seeking for the Amendment.

(e) Even though the said Application for the Amendment was entertained and the parties were heard separately by the State Commission in the said Application, no separate order had been passed by the State Commission either allowing the said application or rejecting the Application. On the other hand, the State Commission suo-moto framed the question as to whether the termination is legal or not without passing any order in the said

application, even though, the termination was never challenged by the Distribution Company by making out grounds for the quashing of the said termination. Even in the absence of any grievance at all expressed by the Distribution Company regarding the termination or any grounds being made out to question the said termination, the State Commission proceeded to examine the validity of termination and held that since the claim for interest was earlier withdrawn, the termination was bad.

33. In the light of the above undisputed facts, we shall analyse the issue.
34. It was never contended by the Distribution Company, the Respondent herein that the termination of the Agreement was bad in law because the interest was not liable to be paid or the claim for interest earlier made would no longer survive since the interest amount has been settled either in the reply dated 15.7.2008 or in the Petition in OP No.26 of 2008 or atleast in the Amendment Application. Similarly, the Respondent never pleaded that the claim was not legal since the said claim was already withdrawn.

35. In the absence of relevant pleadings with regard to this issue between the parties, the State Commission simply held that the termination was not valid because of the withdrawal of the said claim earlier.
36. A bare perusal of the order passed in OP No.10 of 2006 would show that the Petition filed by the Generating Company came to be withdrawn since the parties had negotiated the issue tariff.
37. According to the Generating Company, the Appellant though the principal amount was settled subsequent to the Supplemental PPA, the interest amount was not paid. Due to this, the Appellant was constrained to file a Petition in OP No.14 of 2009 for a direction for the payment of interest. In the said Petition, the Generating Company has specifically mentioned that they claimed the interest amount alone as assured earlier had not been paid. As such, the cause of the action for filing OP No.10 of 2006 was entirely different from the cause of action necessitated for filing OP No.14 of 2009.
38. In the light of the above facts which are not being seriously disputed, the Appellant has made elaborate submissions stating that the impugned order passed by the State Commission is wrong not only for the reason

that there was no specific pleadings by the Distribution Company challenging the termination of the PPA but also on the ground that it was never pleaded that the claim for interest made in OP No.10 of 2006 was withdrawn and so the Generating Company was not entitled for the interest.

39. On the other hand, the learned Counsel for the Respondent Company strenuously argued that the impugned order was passed concluding that the termination was not valid with detailed reasons and that therefore the same shall not be set aside.
40. The crux of the findings in the Impugned Order passed by the State Commission would show that the State Commission decided that the contention of the Generating Company, the Appellant to the effect that the Termination Notice dated 5.6.2008 was necessitated on account of the failure of the Distribution Licensee to pay the interest on delayed payments was liable to be rejected on the ground that the claim for interest made by the Generating Company earlier in OP No.10 of 2006 was withdrawn and hence, the Generating Company could not terminate the PPA on account of the failure on the part of the Distribution Company to pay the interest.

41. This finding in our view is totally unwarranted for the following reasons:

As enumerated earlier, as per Article 5.01 of the PPA, the payment has to be made within 30 days of receipt of the bills. If there is a delay beyond 30 days in payment, the Distribution Company is liable to pay the interest on default rate of bank prime lending rate plus 2% per annum. The plant was synchronised on 21.9.1999. The parties agreed that the period of the PPA would be for a period of 10 years which expired on 20.9.2009. After the synchronization, the Appellant supplied electricity to the Distribution Company and raised invoices for the tariff as per the rate agreed to under the PPA. But, the Distribution Company was irregular in making payment and arrears of tariff got accumulated in the course of time. As per Article 5 of the PPA, this amount carried the default interest on prescribed rate. This cannot be disputed

The Appellant made several representations demanding the payment of electricity charges as well as the interest on delayed payment in terms of the PPA. However, the Distribution Licensee failed to comply with the same.

As per the Article 6 of the PPA, the tariff rate for subsequent to the year 2004-2005 had to be fixed by the mutual discussions. With regard to this tariff rate, the Appellant sent two representations to agree to the same rate of tariff for the extended period. Even then there was no response from the Distribution Company. Therefore, the Appellant filed OP No.10 of 2006 on 24.1.2006 before the State Commission praying for the payment of aforesaid payment for seeking adjudication of dispute and for a direction to the Distribution Company to pay the amount of principal as well as the interest of the energy supplied from 1.4.2001 to 31.3.2005 as per the terms of the PPA dated 7.3.1998.

During the pendency of those proceedings, both the parties mutually agreed for the settlement and accordingly Supplemental PPA was entered into on 5.5.2006 between these parties. By this Supplemental PPA, the Clause relating to the energy charges was amended by providing energy charges to be paid from 1.4.2003 to 20.9.2009 at the rate of base tariff of Rs.3.32 +2% of base tariff

with effect from 01.4.2003 to be further escalated at a rate of 2% per annum.

Thus, it is clear that there is an amendment in the Supplemental PPA only with regard to the energy charges to be paid from 1.4.2003 to 20.9.2009. But all the other conditions of the original agreement dated 7.3.1998 inclusive of the payment of interest stood unaltered and as such the clause relating to the payment of interest also remained intact.

42. As per the Supplemental PPA both the parties have agreed that the Article 6.01 of the PPA alone shall stand substituted by the following:

“Monthly Energy Charges” KPTCL/BESCOM shall for the delivered energy pay, with effect from 01.04.2003 at the rate, Base Tariff plus 2% on this base tariff. (Rupees Three and Thirty two Paise + Rs.0.0664 only) per Kilowatt Hour for energy delivered to the KPTCL/BESCOM at the Metering Point with further escalation at a rate of 2% simple escalation, per annum. The tariff as per this will be as follows:

<i>Base Tariff</i>	<i>Rs.3,3200</i>	
<i>1-4-03 to 31-3-04</i>	<i>Rs.3.3864</i>	<i>Original tariff period</i>
<i>1-4-04 to 31-3-05</i>	<i>Rs.3,4528</i>	
<i>1-4-05 to 31-3-06</i>	<i>Rs.3,5192</i>	
<i>1-4-06 to 31-3-07</i>	<i>Rs.3,5856</i>	
<i>1-4-07 to 31-3-08</i>	<i>Rs.3,6520</i>	

1-4-08 to 31-3-09	Rs.3,7184	
1-4-09 to 20-9-09	Rs.3,7848	

43. The perusal of the above clauses would show that as per the Supplemental PPA, tariff rate agreed under the original PPA alone was revised to the rates as aforesaid. Therefore, the principal amount of arrears of tariff due and interest thereon had to be calculated and paid based on the revised rates as referred to above.
44. In fact, Article 4 of the Supplemental PPA specifically provided that all other terms and conditions of original PPA were to remain in force which would bind the parties for the remaining period of PPA. This means that the condition relating to the interest as per Article 5 also would stand unaltered. In view of this settlement agreed between the parties with regard to the revised rates of tariff, the Appellant approached the State Commission and reported the development and withdrew the Petition in OP no.10 of 2006 on 18.5.2006. The order was passed on such a request is as follows:

“Counsel for the Petitioner submits that the parties have negotiated the tariff and a separate proposal is sent by KPTCL to the Commission and in view of this he seeks permission to withdraw the Appeal. The counsel is permitted to withdraw the Appeal in the circumstances mentioned by him”.

45. Thus, it is clear that the Appellant withdrew the Petition only on the basis of the Supplemental PPA revising the rate of tariff with regard to energy charges but there was no deletion or amendment with regard to the payment of interest as provided in the main PPA dated 7.3.1998. Thereafter, the Distribution Company, BESCO paid the principal amount alone on various dates between 5.8.2006 and 8.12.2006. However, it did not make the payment of the agreed interest amount to the tune of Rs.1,89,01,696/- to the Appellant in spite of the repeated demands.
46. Having aggrieved over the non payment of the interest amount in spite of the fact that there was no deletion with reference to the payment of interest in the Supplemental PPA, the Appellant thought it fit to issue notice of termination of the power purchase agreement and accordingly, on 5.6.2008 issued the termination notice on the ground that the Distribution Company, BESCO had violated the terms of the PPAs on account on non payment of the interest amount of Rs.1,89,01,696/- in spite of its repeated demands.
47. The contents of the said notice dated 5.6.2008 is quoted below:

“Ref: SSL/07-08/054

Dated, the 5 June, 2008

Managing Director,
Bangalore Electricity Supply Company,
K.R Circle,
Bangalore-560 001

Dear Sir,

Sub: Regarding termination of Power Purchase Agreement Dated 7th March, 1998 with Karnataka Electricity Board Bangalore & the supplemental tripartite agreement dated 5th May, 2006 signed with you & KPTCL Bangalore

We wish to bring to your kind notice that, subsequent to the bilateral Power Purchase Agreement signed with KEB, Bangalore on 7th March, 1998, the company continued to evacuate power to KEB/KPTCL grid and there was no problem till 31.03.2005. Later, we came to know that there has been an injustice done to us when compared with other Co-generations Power Purchase agreements viz Ugar Sugars, Renuka Sugars & Davangere Sugars Co., Ltd., Prabhulingeshwara Sugars etc., The tenure of Agreement and tariff period both were done for 10 years in all above cases but only in our case tenure of agreement for 10 years and the tariff was fixed only for 5 years. We in good faith continued to export power to KPTCL grid upto 31.03.2005 with delay in getting payments and subsequently from 01.04.2005 payment was not made to us at all for over 12 months amounting to around Rs.45.00 Crores on the pretext that the tariff is to be re-fixed by negotiations. After a long battle the Company signed a supplemental tripartite agreement with you and KPTCL Bangalore on 5th May, 2006 for whatever the

rates you finally agreed to pay to us. Thereafter, it was agreed to fix the tariff of power with effect from 01.04.2005 at Rs.3.5192/kwhr, with 2% escalation. This amount was paid to us after a long delay. However, in spite of our repeated request till this day, no interest is paid to us on the said belated payments.

However, after prolonged discussions and negotiations the company could get only the bills amount that too after signing the supplemental tripartite agreement with you and KPTCL Bangalore on 05.05.2006 and an interest on belated payments as per Clause No.5.01 of the PPA dated 7th March, 1998, for the earlier period from 01.04.2002 to 31.03.2005 amounting to Rs.1,89,01,695.29 is not released to us till today in spite of our repeated follow-ups. Thereby, KPTCL Bangalore has failed to release the accrued interest on the belated payments from April, 2002 to March, 2005 of Rs.1,89,01,695.29 and thereby violated the terms of the Agreement.

In view of the facts explained as above, we do not wish to continue to evacuate power to you with strained relations. Therefore, we hereby terminate the Original Power Purchase Agreement bilaterally signed with KEB Bangalore dated 7th Marc, 1998 and the Supplemental tripartite agreement signed with you and KPTCL Bangalore dated 5th May, 2006. You may please treat this as a letter of termination. And from the date of receipt of this letter we are not obliged to supply power to you.

Thanking you,

Yours faithfully,
For Shamanur Sugars Ltd.,
Sd/-
(S S Bakkesh)

Managing Director

*Copy to:
Managing Director
Karnataka Power Transmission Corporation Ltd.,
Kaveri Bhavan,
Bangalore-560 001”*

48. The reading of the above Termination Notice would show that the Distribution Company, BESCOM has been regularly defaulting in making the payments and even after the execution of the Supplemental PPA dated 5.5.2006, the amount of arrears was paid to the Generating Company after long delay and in spite of their repeated requests, no interest was paid to them on the said belated payments and therefore, they terminated the PPA dated 7.3.1998 as well as the Supplemental PPA dated 5.5.2006.
49. The above intimation of termination shows that the principal amount was paid after a long delay but, in spite of repeated requests made by the Appellant, the Generating Company with regard to the payment of interest as per Clause 5.01 of the PPA, no amount was paid by the Distribution Company, BESCOM which necessitated the Generating Company to issue the termination notice.

50. Admittedly, there was no immediate reply for this termination notice dated 5.6.2008. Therefore, the Appellant decided to supply to 3rd party and approached the State Load Despatch Centre on Open Access on 01.07.2008. Admittedly, no objection was raised by the Distribution Company.

51. Therefore, the State Load Despatch Centre granted Open Access by the letter dated 8.7.2008. The said order is as follows:

*“No.CEE/EE/AEE-3/SLDC/333-34 Date:08.07.2008
Encl:*

To

*The Managing Director,
BESCOM,
Bangalore,*

Sir,

*Sub: Consent for Short Term Open Access to
sale 14 MW Power by M/s. Shamanur Sugars
Ltd.,(SSL)*

*Ref: 1) STOA Applications dated 20.6.2008
2) CERC Order dated 3.12.2007 in respect of
the STOA case of M/s. Vishwanath
Sugars Ltd.,(VSL)*

*As per new Regulations and guidelines for STOA
issued by CERC, the consent for sale of Power by M/s.
Shamanur Sugars Limited to an extent of 14 MW
through M/s. Reliance Energy Trading Limited (RETL)*

under STOA has been given, this is for your information and needful.

*Yours faithfully,
Sd/-
(Chief Engineer (Electy)
SLDC, KPTCL, B'lore*

Copy to: SEE, RLPP, BESCO, Bangalore

52. This letter would show that intimation with regard to the application filed by the Generating Company seeking for Open Access as well as grant of Open Access to Generating Company was sent to the Respondent BESCO also.
53. The Appellant Company thereafter without any objection being raised by the Respondent Company availed Open Access throughout the Open Access Period between 8.7.2008 and 30.11.2008.
54. During this period, the Respondent Company, even though they were aware of the fact of grant of Open Access as well as the fact of the Generating Company has availed the Open Access for 3rd party sale, did not move to the State Commission for restraining the Appellant Company from continued sale of power to the 3rd party. In fact, after obtaining the Open Access, the Appellant entered into the PPA with the Reliance Company, the 3rd Respondent herein and in terms of the

PPA, the Appellant supplied power to R-3 from 8.7.2008 onwards till 30.11.2008.

55. In the meantime, the Respondent Company issued a reply to the Generating Company on 15.7.2008 for the Termination Notice issued on 5.6.2008 stating that the BESCO had not violated any clauses agreed to the PPA and the Supplemental PPA. The said letter is as follows:

“

Date: 15 July,2008

*M/s.Shamanur Sugars Ltd.,
No.374, 4th Main, P.J Extension,
Daangere-577 002, Karnataka*

Sir,

Sub: Regarding termination of Power Purchase Agreement dated 7th March, 1998 with Karnataka Electricity Board, Bangalore and Supplemental Tripartite Agreement dated 5th May, 2006 signed with you BESCO and KPTCL-Reg.

Ref: SSL/07-08/054 dated 5th June, 2008

With reference to the above, I write to inform you that BESCO is purchasing power from your Co-generation plant

w.e.f 10.6.2005, as KPTCL has been stopped from power trading owing to Electricity Act, 2003. From the date of assignment and as per Supplemental PPA signed by BESCO on 5.5.2006, BESCO is making prompt & in time payments for energy procured. The statement showing the in time payments made by BESCO is enclosed as Annexure.

As BESCO has not violated any clauses agreed to the PPA and supplemental PPA, you are requested to supply the power up to the validity of PPA or otherwise liable to compensate the BESCO for the default of PPA commitments.

*Yours faithfully,
Sd/-15.7.08
General Manager (Tech),
BESCO, Bangalore*

Copy to:

*(1) The General Manager (Elect), RLPP/EBC/BPPC,
BESCO, Bangalore*

56. This letter does not refer to anything about the payment of interest which was claimed by the Appellant, Generating Company.
57. On the other hand, it merely stated that it has not violated any clause of the PPA and the supplemental PPA.
58. As mentioned earlier, a specific allegations were levelled by the Generating Company in the termination notice dated 5.6.2008 stating that the termination notice was

issued on account of non-payment of the interest amount of Rs.1,89,01,695/-.

59. After the termination notice, the Appellant approached the State Load Despatch Centre seeking for the Open Access by the letter dated 20.6.2008 which was received on 1.7.2008 and the same was granted by the State Load Despatch Centre on 8.7.2008 after giving intimation to the BESCO. Only thereafter, the Distribution Company deemed it fit to give a reply on 15.7.2008 for the termination notice dated 5.6.2008 to the Appellant for non payment of interest amount. In this reply, which was sent belatedly, there was no reference to the allegation with regard to non-payment of interest. Even after the grant of Open Access on 8.7.2008 and even after having known about the fact of the Appellant getting the Open Access availed for the entire period i.e. from 1.7.2008 to 30.11.2008, the Appellant did not take any steps to approach the State Commission either to object to the grant of Open Access or object to the Appellant selling to 3rd party or to challenge the termination. There is no reason given by the Distribution Company as to why they were silent all along.
60. Only on 4.12.2008, the Distribution Company filed a Petition in PetitionNo.26 of 2008 challenging the consent

by the State Load Despatch Centre dated 8.7.2008 and also for awarding damages on account of the Default of the Generating Company in supplying electricity to the Distribution Company.

61. The prayer made by the Distribution Company in OP No.26 of 2008 is as follows:

“ *Prayer*

WHEREFORE, it is prayed that this Hon'ble Commission may be pleased to issue appropriate order or directions and –

- 1) *Set aside consents referred to in communication dated 8.7.2008 issued by 3rd Respondent (Annexure-C)*
- 2) *Declare that the 1st Respondent is bound to supply power to the Petitioner in terms of the PPA dated 07.03.1998 and Supplemental PPA dated 5.5.2005.*
- 3) *Direct Respondents 1 and 2 to pay the Petitioner the difference in Power Procurement cost for 20 MW for the period in which the power is denied contrary to the terms of the PPA dated 17.01.2002 and Supplemental PPA date d09.06.2005;*

62. The reading of the contents of the Petition in OP No.26 of 2008 and the prayer as referred to above would make it evident that the main ground urged by the Distribution

Company in the Petition that the consent given for the Open Access by the State Load Despatch Centre was not valid since the State Load Despatch Centre had issued consent to sell power to 3rd party without obtaining any permission from the State Commission.

63. Only on that basis, the Appellant has asked for quashing of the said consent and consequently sought for direction to the Generating Company, the Appellant to supply power to the Distribution Company as per the Agreement and to pay the Distribution Company the compensation for the period in which the supply was not made to the Distribution Company. In this petition, there is no prayer for quashing of the termination notice dated 5.6.2008 sent by the Appellant to the Respondent Company.
64. On the other hand, the main prayer was only to quash the consent for the Open Access given by the State Load Despatch Centre.
65. Pointing out these lacunae, the counter was filed by the Generating Company, the Appellant before the State Commission stating that in the absence of the challenge to the termination notice, no direction could be issued to the Generating Company to supply power to the Distribution Company. Only thereafter, the interim

application has been filed by the Distribution Company for Amendment seeking in the main Petition for the declaration that the power purchase agreement dated 7.3.1998 and the Supplemental PPA dated 5.3.2006 were valid and binding upon the Respondent as the same was subsisting up to 20.9.2009. Even in this Application, there was no challenge made to the termination. This Application for Amendment also was opposed by the Generating Company by filing statement of objections. In this objection, the Appellant, generating Company has raised a point that this Application for amendment cannot be entertained since the stand taken now by the Distribution Company is a marked departure from the prayers originally made in the main Petition as it completely changes the nature of the case.

66. The objections filed by the Generating Company are as follows:

“1. The Petitioner, by way of the application, referred to above has sought to include a further prayer, that is to say, that the Power Purchase Agreement dated 7.3.1998 and Supplemental PPA dated 05.05.2006 are valid and binding upon this Respondent and the same were subsisting up to 20th September, 2009. This is a marked departure from the prayers made in the main Petition. It completely changes the nature of the case.

2. *BESCOM had consciously and advisedly not challenged the termination effected by the present respondent and the Power Purchase Agreement though there was a reference to the same in the course of the petition. Therefore, it would not be open for them to challenge the same at this length of time.*

3. *The application filed for amendment is also not maintainable since it has been filed at the time when the hearing is almost complete. The lacuna in pleadings or the relief claimed cannot now be filled up by way of the present amendment. The application, therefore, requires to be rejected.”*

67. Even though there is specific objection raised by the Appellant Generating Company with the fresh prayer which is quite contradictory to the main prayer relating to the consent for the Open Access, the State Commission did not deal with the said objection and no separate orders were passed in the said Petition with regard to the amendment. Furthermore, the issues framed by the Commission are not with reference to the validity of the termination. The three issues which were framed for consideration are as follows:

“(1) Whether the PPA dated 7.3.1998 (Annexure-A), as amended on 5.3.2006 (Annexure-B), was subsisting on the date when the 1st Respondent applied for NOC for Open Access?

(2) Whether the 1st Respondent has committed a breach of Contract and is liable to compensate the Petitioner for the same?

(3) Whether the consent granted by the 3rd Respondent-Chief Engineer, SLDC for Open Access is liable to be set aside?

68. The reading of the above issues would show that there was no reference to the legality of the termination.
69. On the other hand, the State Commission while discussing the Issue No.I has referred to a fresh question as to whether the termination of the PPA by the Generating Company sent on 5.6.2008 was valid or not.
70. While answering this question, the State Commission came to the conclusion that the Generating Company could not terminate the PPA merely on the ground that the interest amount was not paid and that therefore the termination of the PPA was invalid and the PPA would continue to be subsisting. This conclusion was arrived at mainly on the ground that the earlier Petition in OP No.10 of 2006 claiming the amount of arrears was withdrawn by the Appellant in view of the settlement between the parties and as such, this issue cannot be re-agitated as observed in the another order passed by the

State Commission dismissing the OP No.14 of 2009 filed by Appellant claiming the interest amount.

71. In this context, it is necessary to refer to the circumstances under which OP No.14 of 2009 was filed by the Appellant.
72. As mentioned earlier, on 5.6.2008, the Appellant Company issued a termination notice to the Distribution Company and thereafter the Appellant obtained the Open Access and supplied the power to the 3rd party from 8.7.2008 to 30.11.2008. After the Open Access period was over without raising any objection till then, the Respondent Company that too after the Open Access period was over, filed a Petition on 4.12.2008 with a main prayer seeking to set aside the consent given by the State Load Despatch Centre and for the consequential declaration and for awarding damages.
73. At that stage, the Appellant filed OP No.14 of 2009 praying for the payment of interest to the tune of Rs.1,89,01,695/- on the ground that as per Supplemental PPA, the principal amount alone was paid but the interest amount was not paid despite the demand.
74. This Petition in OP No.14/2009 was disposed of separately by the State Commission by its order dated

2.11.2012 rejecting the claim. The said order is as follows:

“10. In our view, the present Petition is liable to be rejected, as the earlier Petition, filed for the same amount of interest, was withdrawn by the Petitioner. This Commission, on 18.5.2006, has recorded in OP No.10 of 2006 that:

“Counsel for the Petitioner submits that the parties have negotiated the tariff and a separate proposal is sent by KPTCL to the Commission and in view of this, he seeks permission to withdraw the Appeal. The Counsel is permitted to withdraw the Appeal in the circumstances mentioned by him”

11. Pursuant to this submission, the Petitioner has signed a Supplemental PPA dated 5.5.2006, duly modifying the rates contained in the original PPA. Once the Petitioner has settled the matter with the Respondent and withdrawn the Petition filed for claim of interest, it cannot again initiate a fresh Petition for the very same amount, on the very same cause of action.

12. In our view, the present Petition cannot be maintained by the Petitioner and therefore, the Petition is liable to be rejected.

75. Thus, the State Commission, on the strength of the order passed earlier in OP No.10 of 2006 dated 18.5.2006 allowing the withdrawal of the Petition and also on the basis of the order passed by the State Commission on 2.11.2012 in OP No.14 of 2009 rejecting

the claim for the interest payment, has held in the impugned order that the interest amount was not liable to be paid and that therefore, termination of the PPA was not valid.

76. This approach of the State Commission is not appropriate. The main question before the State Commission in OP No.26 of 2008 is with reference to the validity of the consent issued by State Load Dispatch Centre. As indicated above, the legality of the termination notice was not challenged in the original Petition in OP no.26 of 2008. Even in the amendment Petition the question of legality of the termination was not raised. It merely asked for a declaration that the PPA was existing. No challenge to the termination was made nor any ground was made out to show that the termination was not legal. The State Commission had suo-moto referred to this question with regard to the legality of the termination notice. Admittedly, this question was referred by the State Commission without any pleadings contained either in the main Petition or in the Application for Amendment.
77. When such being the case, there is no valid reason given by the State Commission to go into the question

with regard to the legality of the termination notice even without being pleaded by the parties.

78. Let us assume that the State Commission would be well within its powers to refer to this legality of the termination issue as it considered it a core issue for deciding about the prayer for declaration of the existence of the PPA even though the same was not pleaded by the Distribution Company. In that event, the opportunity must have been given to the Appellant to explain with regard to this question before the State Commission. But this is not done. Even otherwise, when the State Commission proceeded to consider the said question, it must have gone into the basic question also whether the interest is payable or not by interpreting the various provisions of the PPA dated 7.3.1998 and the Supplemental PPA dated 5.5.2006. There is no reason as to why this process of analysis has not been adopted by the State Commission.

79. As mentioned earlier, in the Supplemental PPA, the Clause relating to energy charges alone was amended by providing energy charges which would be at the rate of Rs.3.32 +2%. However, the clause relating to the interest has not been amended. In fact, Article 4 of the Supplemental PPA has specifically provided for the other

conditions of the Original Agreement stood unaltered. Therefore, the State Commission ought to have analysed this aspect by asking the parties to furnish the material to find out whether interest is payable or not and if so, whether the interest has been paid or interest portion was waived by the parties concerned.

80. As indicated earlier, on receipt of the Termination Notice dated 5.6.2008, the Respondent Company did not reply to the specific allegations made by the Appellant to the effect that the interest was not paid and that therefore, the PPA was terminated. In addition to that, the Distribution Company kept quiet all along without raising any objection, when the Appellant applied for Open Access before the State Load Despatch Centre on 1.7.2008 and even after the grant of Open Access on 8.7.2008.
81. As a matter of fact, from 8.7.2008, the Open Access was availed by the Appellant up to 30.11.2008 for 3rd party sale. In this period, the Respondent Company did not take any steps to approach the State Commission for restraining the Appellant Company for 3rd party sale.
82. In the meantime, the Respondent Company sent a reply on 15.7.2008 to the Appellant for the termination on

5.6.2008 but unfortunately the Respondent Company did not deny the allegations of the Appellant that the interest was not payable. On the other hand, it merely stated that it was following the PPA dated 7.3.1998 and 5.5.2008. Admittedly, the aspect of liability to pay the interest has not been referred to either in the original Petition in OP No.26 of 2008 or in the Amendment Application filed by them seeking for the declaration.

83. As stated above, in the absence of any pleadings with reference to the liability to pay the interest, the State Commission went into the question as to whether the termination notice was valid or not. Even while analysing the said question, the State Commission did not go into the aspect of the liability to pay the interest. Instead, the State Commission has simply arrived at the conclusion that the termination was invalid on the basis of the earlier order passed in OP No.10 of 2006 passed on 18.5.2006 and the order passed in OP No.14 of 2009 on 2.11.2012 referring to the withdrawal of earlier petition. We reiterate that the State Commission ought to have analysed the relevant clauses of the PPA dated 7.3.1998 and Supplemental PPA dated 5.5.2006 and found out whether the Distribution Company was liable to pay the

interest in spite of the settlement of tariff through the Supplemental PPA dated 5.5.2006.

84. As pointed out by the Appellant, no material has been placed before the State Commission by the Distribution Company that the interest was not payable or interest payable had already been paid and therefore, the termination notice was not valid.
85. The Appellant claimed that it had duly terminated the PPA in terms of the Appellant's notice dated 5.6.2008 on account of the failure of the Distribution Company to pay the interest on delayed payments.
86. As mentioned earlier, in the absence of any material, either to show that the Distribution Company was not liable to pay the interest or the Distribution Company had already settled the interest amount, there was no occasion for the Distribution Company to question the termination notice and to claim that the supply of power even after termination of the said PPA to 3rd party construed the breach of the PPA and therefore they are entitled to claim damages from the Appellant.
87. There is no dispute in the fact that the Appellant had supplied power to the 3rd party only after obtaining the Open Access from State Load Despatch Centre in

accordance with the provisions of the Electricity Act, 2003. As a matter of fact, the State Commission while considering the issue No.3 in OP No.26 of 2008 had clearly found that the consent for the Open Access granted by the State Load Despatch Centre was perfectly valid. As such, the main prayer made by the Distribution Company before the State Commission to set-aside the consent order and to pass the consequential order was rejected by the State Commission. While the main prayer was rejected, giving a declaration for the existence of the PPA cannot be sustained under law especially when the Appellant who terminated the PPA on 5.6.2008 was allowed to avail the Open Access for the period between 8.7.2008 to 30.11.2008 by the State Load Dispatch Centre and the Distribution Company did not choose to question the grant of Open Access during that period.

88. In fact, OP No.26 of 2008 was filed by the Distribution Company only on 4.12.2008 i.e. after six months of termination and after five months after grant of Open Access.
89. As stated above, the State Commission merely relied upon the order dismissing the Petition in OP No.10 of 2006 as withdrawn and rejecting the claim of Appellant

for the interest in OP No.14 of 2009. OP No.10 of 2006 was merely withdrawn by the Appellant since there was Supplemental PPA entered into between the parties.

90. It cannot be disputed now that the principal amount was settled and the interest amount was not paid. It was not the case of the Distribution Company that at any point of time that interest amount was already paid. On that ground, the Appellant filed OP No.14 of 2009 claiming the interest alone. The Cause of Action for filing of OP No.10 of 2006 and the prayer made in the said Petition was completely different from the Cause of Action for filing OP No.14 of 2009 and the prayer made therein. In any event it has to be held that the fact that the interest due had not been paid is not disputed by the Distribution Licensee and on that reason, the termination of the PPA cannot be held to be invalid.
91. As indicated above, the State Commission itself on Issue No.3 has categorically held that the consent granted by the State Load Despatch Centre for sale of power by the Appellant in favour of the 3rd party was legal and valid. Only in pursuance of the said legal order which is not disputed by the State Commission, the supply was made to 3rd party. In the absence of invalidating the said sale in favour of the 3rd party, no damages could be awarded.

92. At the risk of repetition, it has to be stated that even though the Appellant terminated the PPA on 5.6.2008, it sought for Open Access and availed the Open Access from 8.7.2008 and it continued to avail Open Access up to 30th November, 2008. The Distribution Licensee conspicuously kept silent during the period when Open Access was applied and availed. It was only on 4th December, 2008 for the first time, the Petition came to be filed seeking to set aside the consent granted by the State Load Despatch Centre on 8.7.2008 which by efflux of time had since then expired. The Distribution Company admittedly did not approach either the State Load Dispatch Centre or the State Commission immediately when the Appellant sought for Open Access.
93. On the other hand, it allowed the Appellant to effect sale to 3rd party for four months as per the PPA with 3rd party and as per the consent issued by the State Load Despatch Centre. The Distribution Company approached the State Commission only after the Open Access period was over and after the sale was effected for the entire Open Access period.
94. To put it in a nut-shell, the Distribution Licensee has not given any explanation, either in the reply to the

termination notice dated 15.7.2008 or in the Petition filed before the State Commission in OP No.26 of 2008 filed on 4.12.2008 or in the Amendment Application as to why it conspicuously kept silent for long period and also as to why the material has not been placed before the State Commission with reference to the absence of liability of the Distribution Licensee from making the payment of interest, thereby quashing the termination.

95. In the absence of any explanation, the impugned order holding that the termination is not valid and consequently, the Appellant is liable to pay damages is not sustainable under law and the same is liable to be set-aside.

96. **Summary of Our Findings:**

- i) **The State Commission has wrongly held that the termination of the PPA by the Appellant on the ground of non payment of interest amount was invalid merely because the Appellant had earlier withdrawn the petition of OP No.10 of 2006 on the ground that the parties had negotiated the tariff. The State Commission did not go into the aspect of**

liability to pay the interest. The State Commission should have analysed the relevant clauses of PPA dated 7.3.1998 and supplemental PPA dated 5.5.2006 to find out whether the Distribution Company was liable to pay interest inspite of the settlement of tariff through the supplemental PPA. No material was placed before the State Commission by the Distribution licensee to show that either the interest was not payable or interest payable had already been paid and therefore, the termination was not valid.

- ii) The State Commission itself had categorically held that the consent granted by the SLDC for sale of power by the Appellant in favour of third party was legal and valid. Only in pursuance of the said legal order which is not disputed by the State Commission, the supply was made by the Appellant to third party. In the absence of invalidating the said sale in favour of the third party, no damages can be awarded to the distribution licensee. The Distribution

licensee also remained silent during the period when the supply to third party through open access was made by the Appellant.

- iii) The impugned order holding that the termination is invalid and consequently the Appellant is liable to pay damages is not sustainable under law and the same is liable to be set aside.

97. In view of our above findings, we hold that the Appellant is not liable to pay any damages to the Distribution Company.
98. Accordingly, the Impugned Order is set-aside. Appeal is allowed. However, there is no order as to costs.

(Rakesh Nath)

Technical Member

Dated: 07th Jan.2014.

~~√REPORTABLE/NON REPORTABLE~~

(Justice M. Karpaga Vinayagam)

Chairperson