

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. 72 of 2013

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

... Appellant(s)

Versus

- 1. The Karnataka Power Transmission Corporation Ltd.,
Cauveri Bhavan,
Bangalore-560 001**
- 2. Karnataka Electricity Regulatory Commission
6th & 7th Floor,
Mahalaxmi Chambers,
9/2 M.G Road,
Bangalore-560 001**
- 3. M/s. Bangalore Electricity Supply Company Limited.,
K.R. Circle,
Bangalore-560 001**

Respondent(s)

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

Counsel for the Respondent (s): Mr.Venkita Subramaniam for R-1
Mr. Anand K Ganesan
Ms. Swapna Seshadri for R-1
Ms. Sumana Naganand
Mr. Shodhan 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. Aggrieved by the order dated 2.11.2012 passed by the Karnataka State Commission dismissing the Petition in OP No.14 of 2009 filed by the Appellant and rejecting its claim for amount towards interest due and payable by the Distribution Company namely BESCO, the Appellant has presented this Appeal.
3. The short facts are as follows:
 - (a) The Appellant is a Generating Company having Co-Generation facility. It runs a Sugar Factory with installed capacity of 20 MW for its Captive Consumption and sells electricity to 3rd parties.
 - (b) The BESCO, the 3rd Respondent is the Distribution Company. The predecessor of the 3rd Respondent, the erstwhile Karnataka Electricity Board

entered into a Power Purchase Agreement on 7.3.1998 with the Appellant for the purchase of electricity from the Appellant's co-generation plant.

(c) Subsequently, the rights and obligations of the Electricity Board under the PPA were assigned to KPTCL and thereafter in favour of the BESCO, the 3rd Respondent.

(d) As per the PPA, the Electricity Board agreed to purchase the electricity from the Appellant at the base rate of Rs.2.60 per Kwh for the year 1997-98 and the said base rate was escalated at the rate of Rs.5% every year up to the year 2004-05 and thereafter the rate had to be fixed by mutual discussions between the parties.

(e) As per Article 5, if there is any delay in payment beyond 30 days, the Distribution Company is liable to pay the interest at the default rate of Bank Prime Lending Rate +2% per annum.

(f) After synchronization i.e. on 21.9.1999, the Appellant supplied electricity to the Distribution Company and raised the invoices for tariff as per the rate agreed to under the PPA. However, the Distribution Company, the 3rd Respondent was irregular in making payment. As per the PPA, this

amount carried a default interest on the prescribed rates.

(g) The arrears of the principal and interest continued to increase in due course of time. As per the PPA, the initial time of five years got expired on 21.9.2004. As per the PPA for the year 2004-05 a fresh rate had to be fixed by mutual discussion. The Appellant requested the Distribution Company to agree for the same rate of tariff for the extended period. But there was neither any response nor any payment made to the Appellant by the Distribution Company. Thereafter, the Appellant made various representations demanding the arrears as well as the interests from 6.1.2004 to 23.7.2005. Despite the receipt of those representations, the Distribution Company did not make the payment either towards the principal or the interest.

(h) Therefore, the Appellant filed a Petition in OP No.10 of 2006 before the State Commission on 24.1.2006 seeking adjudication of the dispute and for a direction to the Respondent to pay the amount of Rs.6,55,27,646/- for the period of supply of electricity between 1.4.2003 to 31.3.2005. This amount included the interest claim of Rs.1,89,01,685/-.

(i) When the proceedings in OP No.10 of 2006 were pending before the State Commission, both the parties negotiated over the matter as a result of which they entered into a supplemental PPA on 05.5.2006. Under the said agreement entered into between the parties, Clause 6.01 of the existing PPA stood replaced by revising the rate of tariff.

(j) In view of the subsequent development, the Appellant reported about the execution of the supplemental agreement before the State Commission and requested for the withdrawal of the Petition. Accordingly, the State Commission permitted the said withdrawal and disposed of the said application by the Order dated 18.5.2006.

(k) Thereafter, in pursuance of the supplemental agreement the Distribution Company paid only the principal amount but did not make payment towards the interest despite the demand. Since, there was no response; the Appellant sent a termination notice dated 5.6.2008 terminating both the power purchase agreements for non payment of the interest amount.

(l) Thereupon, the Appellant made a prayer before the State Load Despatch Centre through the letter dated 1.7.2008 for granting Open Access.

Accordingly, the Open Access was granted by the State Load Despatch Centre in favour of the Appellant on 8.7.2008. This open access was availed by the Appellant during the period between 8.7.2008 and 30.11.2008.

(m) Thereafter, the Respondent Company on 4.12.2008 filed a Petition in OP No.26 of 2008 before the State Commission seeking to set aside the consent for Open Access given by the State Load Despatch Centre dated 8.7.2008 also for awarding damages on account of the procurement of electricity by them at higher rates in view of the default committed by the Appellant in making supply to the Respondent Company. When this Petition in OP No.26 of 2008 was pending, the Appellant filed a separate Petition in OP No.14 of 2009 on 3.5.2009 praying for the direction to the Respondent Company for the payment of interest to the tune of Rs.1, 89,01,695/- for which the principal amount was already given.

(n) Ultimately, the State Commission after hearing the parties passed the Impugned Order dated 2.11.2012 dismissing the Petition in OP No.14/2009 filed by the Appellant primarily on the ground that in respect of same claim of interest an earlier petition

was filed by the Appellant in OP No.10 of 2006 which was ultimately withdrawn and therefore on the very same cause of action, fresh adjudication could not be entertained.

(o) Aggrieved by the above order, the Appellant has filed the present Appeal.

4. The Appellant has urged the following grounds to assail the Impugned Order dated 2.11.2012 passed by the Karnataka State Commission:

(a) The State Commission wrongly dismissed OP No.14 of 2009 filed by the Appellant on the ground that the earlier petition was filed for the same Cause of Action which came to be withdrawn and as such, the second Petition for the same Cause of Action could not be maintained.

(b) While entering into a Supplemental Agreement, the Appellant did not waive off its right to claim the interest. Under the Supplemental Agreement what was agreed was only reduction in the rate of escalation of tariff but not with reference to the interest. As a matter of fact, Article 4 of the Supplemental Agreement specifically provided that except the clause revising the rate of tariff, all other terms and conditions of Article of the PPA including

Article 5 of the said PPA which relates to the interest, shall remain unaltered and the same are binding on the parties for the remaining period of PPA. Under Article 5 of the PPA, the liability to pay interest on delayed payments of tariff is contractual and automatic. The terms of supplemental PPA read with original PPA positively confirms the entitlement of the Appellant for the interest. The Appellant withdrew OP No.10 of 2006 in the light of the Supplemental Agreement as there was an assurance for payment of interest based on the revised rate of escalation of tariff. The Appellant did not withdraw or abandoned its right of claim for interest.

(c) The Distribution Company, BESCO did not dispute the fact but till date no interest was paid even though after supplemental agreement it paid the principal amount as per the revised rates fixed in the supplemental PPA. The State Commission has overlooked the fact that the Supplemental PPA dated 5.5.2006 which modified only the rate of escalation of tariff contained in the original PPA but not with reference to the interest payable. Therefore, subsequent failure of the Distribution Company to pay the interest on the revised rate of tariff has to be construed as a fresh Cause of Action. The second

petition was based on such a subsequent and fresh Cause of Action namely failure to pay interest to adhere to the obligations contained under the supplemental agreement.

(d) The contention of the Distribution Company before the State Commission as well as before this Tribunal that the claim made by the Appellant for the interest was barred by limitation is misconceived. It is settled law that Limitation Act is not applicable to bodies other than Courts. Therefore, the question of Limitation in filing the Petition before the State Commission does not arise.

5. In reply to the above grounds, the Respondent Distribution Company has made the following submissions:

(a) When the Appellant and the Distribution Company, the Respondent have consciously entered into a Supplemental Agreement on 5.5.2006 revising the tariff from 1.4.2003 both the parties have settled the issues which had arisen previously and hence, there cannot be any question of raising the same issues one again.

(b) There is no provision in the supplemental agreement whereby any such interest amount was recognised as due and payable by the Distribution

Licensee. When the Supplemental Agreement had not provided for any interest payable on such tariff w.e.f. 1.4.2003, the question of interest claimed by the Appellant would not arise.

(c) Once the Appellant has settled the matter and has withdrawn the Petition filed for the claim of interest earlier, it cannot file a fresh petition on the very same cause of action. Therefore, the State Commission has rightly rejected the Petition of the Appellant.

(d) The question of delay in payment will arise only after the amount has become due and payable based on the bills raised by the Appellant. Admittedly, the bills have not been raised towards the interest. Without the bills being raised, the question of amount of interest becoming due does not arise. In any event, the Appellant is clearly hit by the principle enshrined in the Order 23 Rule-1 CPC and in case of withdrawal of the previous claims without leave to file a subsequent petition for the same claim; the second Petition for the same claim cannot be entertained. Thus, the impugned order is justified.

- 6.** In the light of the contentions urged by both the parties, the following question would arise for consideration:

(a) Whether the impugned order passed by the State Commission dismissing the Petition filed by the Appellant is legal particularly when the State Commission has failed to take into account the settled principle of law that successive petitions based on the different cause of action are maintainable?

(b) Whether the finding of the fact recorded by the State Commission that the Appellant was precluded from raising a demand of interest for supplemental agreement between the parties is legally correct when the supplemental agreement itself envisages the payment of interest?

(c) Whether the impugned order construed an error apparent on the face of the record when the Petition filed by the Appellant Company itself discloses that the Second Petition was based on the different Cause of Action i.e. to say the failure on the part of the Distribution Company to adhere to the obligations contained under the Supplemental Agreement?

7. Since all the three questions are interconnected, we can discuss these issues together.
8. Before discussing the same, let us quote the relevant portion of the impugned order passed by the State Commission:

“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 Agreement 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.

13. In view of the above findings, we do not consider it necessary to go into the other questions raised in this Petition, including that of limitation.

14. Accordingly, this Petition is liable to be dismissed and therefore stands dismissed.”

- 9. The crux of the finding is this “The earlier Petition in OP No.10 of 2006 claiming the amount of interest was withdrawn, in view of the execution of supplemental agreement dated 5.5.2006 modifying the rates contained**

in the Original PPA by way of settlement. Once the disputes between the parties settled and on that ground the Petition filed for claim of interest was withdrawn, no fresh petition could be entertained for the very same amount for the very same cause of action. Hence, the Petition is liable to be rejected”.

- 10.** According to the Appellant, the cause of action in OP No.10 of 2006 is entirely different from the cause of action in OP No.14 of 2009 and therefore, the Petition is maintainable.
- 11.** On the other hand, it is contended by the Respondent that the claim for the interest amount was made in OP No.10 of 2006 and the very same claim for the very same amount has been made in the second Petition in Op No.14 of 2009 and since OP No.10 of 2006 was withdrawn as per the settlement, the second Petition for the same cause of action is not maintainable.
- 12.** We have carefully considered the submissions made by the parties.
- 13.** While going through the Impugned Order, it is clear that the State Commission dismissed OP No.14 of 2009 filed by the Appellant on the sole ground that OP No.10 of 2006 filed earlier by the Appellant for the same amount of interest had been withdrawn and so, the very same amount of interest

cannot be claimed in the second Petition in OP No.14 of 2009.

- 14.** As a matter of fact, this point has never been pleaded by the Respondent Company before the State Commission. The State Commission itself raised this ground and answered that the second claim on the same cause of action was not maintainable.
- 15.** However, we feel that instead of rejecting the conclusion arrived at by the State Commission merely on the ground that this ground had not been raised by the Respondent Company before the State Commission, it would be better to analyse the question as to whether such a finding with reference to the claim of same amount for same cause of action is legally valid or not.
- 16.** While analysing this question, we have to recall some relevant facts.
- 17.** The Appellant due to failure of the Distribution Company to make the payment of arrears for the electricity supplied by the Appellant as well as the interest for delayed payment despite the repeated demands as per the PPA dated 7.3.1998, filed OP No.10 of 2006 before the State Commission seeking for a direction to the Respondent to pay an amount of Rs.6,55,27,646/- which included an interest claim of Rs.1,89,01,695/- on 24.1.2006. Even

during the pendency of this Petition both the parties negotiated for the settlement. Accordingly, a supplemental agreement came to be entered into between these parties on 5.5.2006.

18. In this context, it is important to note that the Supplemental Agreement dated 5.5.2006 amending the Clause 6.01 of the PPA relating to the energy charges alone by providing energy charges to be paid from 1.4.2003 to 20.9.2009 at the rate of Rs.3.32+2%. All other conditions of original agreement stood unaltered as per specific recital in Article-4. As per Article 5.01 of the PPA, the Distribution Licensee has to make a payment to the Appellant within 30 days. If there is a delay of beyond 30 days they were liable to pay the interest at the default rate of bank prime lending rate. This Article was not altered. So, as per the settlement, the Distribution Licensee had agreed to pay the principal amount of tariff rate revised as well as the interest as per Article 5 of the Original PPA.

19. The question which arises in the light of the above facts is “whether this interest payment has been made by the Distribution Licensee subsequent to Supplemental Agreement”. It is true that the Appellant made a claim in the first Petition OP No.10 of 2006 claiming for the principal amount as well as the interest amount as per the Original PPA dated 7.3.1998. This was withdrawn by the Appellant

in view of the supplemental agreement by which the Distribution Company agreed to pay the revised rates of tariff. The clause of PPA relating to interest for delayed payments was not altered.

20. Hence, it cannot be said that while entering into Supplemental Agreement, the Appellant waived off its right to claim the interest. Under the supplemental agreement, what was agreed was only reduction in the rate of escalation of tariff. There is no provision in the Supplemental Agreement in respect either for reduction in interest or deletion of the same.

21. As mentioned earlier, Article 4 of the supplemental agreement specifically provided that all other terms and conditions of the original PPA including article 5 regarding interest were to remain in force and bind the parties for the remaining period of PPA. Under Article 5 of the PPA, the Distribution Company was liable to pay interest on delayed payment of tariff which is contractual.

22. In view of the above settlement assuring for the payment of interest based on revised tariff; the Appellant withdrew OP No.10 of 2006. This does not mean that the Appellant waived off its right to claim interest on the basis of the revised rate of escalation tariff as per the supplemental agreement.

- 23.** In fact, the Distribution Company does not claim that after supplemental agreement, the entire interest amount had been paid along with the principal amount. Similarly, it is not the case of the Respondent Company that the interest amount was not payable under the PPA. It is the specific case of the Appellant that though the principal amount was paid by the distribution licensee, no interest had been paid till the date of filing of this Petition in Op No.14 of 2009.
- 24.** The State Commission has overlooked the fact that the Supplemental Agreement dated 5.5.2006 modified the rate of escalation of tariff only as contained in the original PPA without disturbing the liability to pay the interest based on revised rate of tariff. The present claim for interest on the revised rate of tariff is a fresh cause of action. This claim has been made in view of the violation of the supplemental agreement which was entered into between the parties on 5.5.2006 on the basis of which the Appellant withdrew the OP No.10 of 2006 on 18.5.2006. This does not mean that the Appellant had completely abandoned his right of claim of interest as per the original PPA and supplemental PPA.
- 25.** The State Commission instead of going into the said question has simply dismissed the Petition holding that the claim was made for same amount for the same cause of action. This finding has been arrived at by the State Commission without going into the aspect of the difference

between the Cause of Action which arose in OP No.10 of 2006 and OP No.14 of 2009.

- 26.** It is a settled law as held in the case of State of Haryana v M.P Mohla (2007) 1 SCC 457 and Uma Shanker v Sarabjeet (1996) 2 SCC 371 that the subsequent event may give rise to a fresh cause of action and when such a fresh cause of action arises, the principle of res-judicata will have no application. So, it has to be held that the Petition in OP No.14 of 2009 filed by the Appellant is perfectly maintainable.
- 27.** It is to be pointed out in this context that only ground of objection before the State Commission raised by the Distribution Licensee was that the claim of interest made before the State Commission was barred by limitation.
- 28.** Of course, this question has not been gone into by the State Commission in the impugned order. However, the very same point has been raised before this Tribunal regarding the limitation.
- 29.** The learned Counsel for the Respondent submits that the interest amount claimed by the Appellant was relating to the arrears of the amount payable for the period from 2003 to 2005 whereas the petition before the State Commission was filed by the Appellant only in the year 2009 and so, it is barred by limitation.

- 30.** This contention deserves to be rejected in view of the settled law as laid down in 1969 (1) SCC 873 Town Municipal Council Athani Vs Presiding Officer, Labour Court, Hubli to the effect that Limitation Act is not applicable to the bodies other than Courts. Therefore, this point regarding the Limitation Act could not be raised as it is not a valid one.
- 31.** Thus, the ground on the basis of which the application was dismissed by the State Commission relied upon earlier order as well as the ground raised by the Distribution Company with reference to the applicability of the Limitation Act are not legally valid to reject the claim of the interest made by the Appellant.
- 32.** However, the present case has to be analysed in a different angle.
- 33.** It is pointed out by the learned counsel for the Respondent Company that the claim made by the Appellant for the interest amount before the State Commission that too belatedly is a clear after thought which was only a counter blast as a defence to the Petition filed by the Distribution Company in OP No.26 of 2008 seeking the enforcement of the contractual right.
- 34.** In view of this stand taken by the Distribution Company, let us look into the sequence of events.

35. Of course, as held above, the Limitation Act would not apply to the authorities other than courts. Therefore, this claim cannot be rejected on the basis of the Limitation Act. But, it is settled law that if there is any latches on the part of the party in approaching the State Commission which lacks bona fide, the same may be considered for deciding the right of the party.

36. Those sequence of events are as follows:

(a) The Appellant sent various demand notices to the Distribution Company demanding claim for both the principal amount as well as the interest on delayed payments. However, the said amount was not paid. Therefore, the Appellant filed OP No.10 of 2006 on 24.1.2006 claiming the principal amount as well as the interest. While the said petition was pending, both the parties settled the matter through negotiations and executed supplemental PPA dated 5.5.2006 thereby rates of electricity tariff was revised w.e.f 1.4.2003. Since, the supplemental agreement was made on 5.5.2006 between the parties the Appellant withdrew the Petition on 18.5.2006. Then bills were raised by the Appellant for the period from 1.4.2003 in terms of supplemental PPA. The entire bills amount towards principal arrears were duly paid. However, the Appellant got aggrieved due to failure to pay the

interest amount as agreed to be paid as per the PPA and supplemental PPA.

(b) In view of the above, the Appellant Company issued Termination Notice on 5.6.2008 on account of non payment of interest amount in spite of repeated demands.

(c) In reply to the said notice, the Distribution Company sent a reply on 15.7.2008 that it was fully complying with the Agreements between the parties. In the meantime, on the basis of the termination notice issued on 5.6.2008, the Appellant sent a letter on 1.7.2008 to the State Load Despatch Centre praying for granting consent for the Open Access for the 3rd party sale. This was not objected by the Distribution Company. The State Load Despatch Centre granted Open Access on 8.7.2008 to the Appellant. From 8.7.2008 to 30.11.2008, the Appellant availed Open Access by supplying electricity to the 3rd party. Despite this, the Appellant did not choose to file any Petition before the State Commission for directing the Distribution Company seeking for the direction for payment of interest on the basis of the termination notice dated 5.6.2008 and also on the basis of the Open Access granted on 8.7.2008 granted by the State

Load Despatch Centre. Ultimately, the Open Access was availed by the Appellant up to 30.11.2008.

(d) Either during this period or even after this period, the Appellant did not move before the State Commission for payment of interest from the Distribution Licensee even though the PPA were terminated as early as on 5.6.2008.

(e) The Distribution Company filed a petition seeking to set aside the consent for Open Access given by the State Load Despatch Centre on 4.12.2008. Till then, the Appellant was not interested in filing the Petition for direction for payment of interest. Even after the petition was filed by the Distribution Company on 4.12.2008, the Appellant did not choose to approach the State Commission for payment of interest immediately. Only after five months, the Appellant filed a Petition in OP No.14 of 2009 on 3.5.2009 when the proceedings before the State Commission in OP No.26 of 2008 was about to be ended. This petition in OP No.14 of 2009 was taken up for inquiry by the State Commission. Ultimately, on 2.11.2012, this Petition was dismissed on the grounds that the second Petition was not maintainable for the same cause of action.

(f) As indicated above, for the reasons mentioned earlier, we are not convinced over the grounds on which the OP No.14 of 2009 was dismissed by the State Commission. But we are at loss to understand as to why the Appellant did not choose to file the Petition before the State Commission seeking for a direction for payment of interest either immediately after termination notice or immediately after grant of Open Access. For the reasons best known to it, the Appellant choose to file application in OP No.14 of 2009 only on 3.5.2009 that too after the Distribution Company filed Petition in OP No.26 of 2008 seeking to set aside the consent by the State Load Despatch Centre on 4.12.2008.

(g) In the above situation we have to consider the submissions made by the Distribution Company with regard to conduct of the Appellant in approaching the State Commission belatedly.

(h) According to the Distribution Licensee, the Respondent, the Distribution Company sought for enforcement of the contractual rights by filing OP No.26 of 2008 in terms of the PPA and to pay the damages for the loss caused to the Distribution Licensee on 4.12.2008. Only thereafter, that too after delay of five months i.e. on 3.5.2009, the Appellant filed OP No.14 of 2009 before the State Commission as a counter

blast and as a defence to the Petition filed by the Distribution Licensee in OP No.26 of 2008.

- 37.** It is strenuously contended by the Respondent Company that the above sequence of events which have not been disputed would indicate that the Petition claiming for interest by the Appellant before the State Commission was a after thought and it was filed only as a counter blast to the petition filed by the Distribution Licensee. We find force in this submission.
- 38.** This conduct of the Appellant, in our view would not be construed to be a bona fide. In the absence of any explanation for this latches and delay in not approaching the State Commission in time promptly, we are not able to reject the contention of the Distribution Company that filing of the Petition by the Appellant Company belatedly was not bona fide.
- 39.** Therefore, even though we have held that the Petition filed by the Appellant Company was for a different cause of action and so, it was maintainable, we cannot grant a relief to the Appellant in view of the latches on the part of the Appellant.
- 40.** Consequently, we have to hold that the dismissal of the Petition filed by the Appellant Company is perfectly justified not on the ground that it was on the same cause of action

but, on the ground that there were latches on the part of the Appellant in approaching the State Commission for which there is no proper explanation.

41. Accordingly, this Appeal is liable to be dismissed.

42. Summary of Our Findings

Even though we hold that the petition filed by the Appellant before the State Commission was maintainable, we are not able to grant a relief to the Appellant in view of the latches on the part of the Appellant.

43. In view of above the Appeal is dismissed. No order as to costs.

44. Pronounced in the open Court on 07th day of January, 2014.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 07th Jan, 2014

√REPORTABLE/~~NON-REPORTABLE~~