Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 31th Jan, 2014

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

Appeal No. 89 of 2013

Bangalore Electricity Supply Company Limited
KR Circle,
Bangalore - 560001

... Appellant(s)

Versus

1. **Karnataka Electricity Regulatory Commission**
   6th & 7th Floor,
   Mahalaxmi Chambers,
   9/2 M.G Road,
   Bangalore-560 001

2. **Davanagere Sugar Company Limited.,**
   No. 73/1, P.B. No. 312, Shamanur Road,
   Davanagere - 560 001

Respondent(s)

Counsel for the Appellant (s): **Mr. Anand K Ganesan**
Ms. Swapna Seshadri

Counsel for the Respondent (s): **Mr. Prabhuling Navadgi,**
Ms. Vedanayagi Kiran D.

J U D G M E N T

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

1. "**Whether the State Commission is justified in determining the tariff payable by the Appellant Distribution Licensee to the Generating Company at Rs.5/-per unit when the actual prevailing market tariff was much lower for the energy supplied by the Generating Company to the Distribution Licensee from 8.7.2009 to 16.12.2010"?**

2. This is the question posed in this Appeal by Banglore Electricity Supply Company Limited (BESCOM) who is the Appellant herein.

3. The Appellant, aggrieved by the Order dated 24.1.2013 passed by the Karnataka State Commission holding that the tariff of Rs.5/- per unit paid by the Appellant to the Generating Company Davangere Sugar Company Limited, the Respondent, was justified at the Short Term Rate during the relevant period i.e. 8.7.2009 to 16.12.2010, has filed this Appeal.

4. The short facts are as follows:

(a) BESCOM, the Appellant herein, is a Government of Karnataka undertaking and one of the Distribution Licensees operating in the State of Karnataka.

(b) After unbundling of the entities of the erstwhile Electricity Board, the BESCOM, the Appellant has been vested with the functions of the distribution of electricity in the State of Karnataka.

(c) The Karnataka State Commission is the first Respondent. Davanagere Sugar Company Limited, the Generating Company operating a Co-Generation Plant with an installed capacity of 24.5 MW is the Second Respondent.

(d) The Generating Company, the 2nd Respondent entered into a Power Purchase Agreement on 17.1.2002 with the Karnataka Power Transmission Corporation Limited (KPTCL), the predecessor of the Appellant for sale of power generated from its plant. The PPA was subsequently assigned to the Appellant, the Distribution Licensee.

(e) Since there was breach of terms of the PPA committed by the Appellant, the 2nd Respondent, the Generating Company on 8.7.2009, terminated the PPA on the ground that the Appellant had violated the terms of the PPA.

(f) Disputing this termination, the Appellant, the Distribution Licensee, filed a Petition in OP No.17 of 2009 challenging the said termination before the State Commission contending that the PPA was valid and subsisting.

(g) At this stage, the Generating Company had applied to the State Load Dispatch Centre for Open Access for supply of electricity to 3rd parties. The Open Access was rejected by the State Load Dispatch Centre. Hence, the Generating Company filed a Petition before the Central Commission as against the non-granting of Open Access.

(h) The Central Commission by the order dated 14.7.2009, passed an Order and allowed the said Petition filed by the Generating Company directing the State Load Dispatch Centre to consider and grant the Open Access to the Generating Company. The Central Commission had also taken a view that Section 11 orders passed by the State Government would not mandate the generating Company to supply electricity to the State and open access was to be granted to the generating Company in case such application was made.

(i) As against this order passed by the Central Commission, the State Government of Karnataka filed a Writ Petition before the High Court of Karnataka on 25.8.2009. The High Court of Karnataka, after entertaining the Writ Petition granted the stay of the operation of the order of the Central Commission. When this stay order was sought to be vacated in an application filed by the Generating Company, the High Court of Karnataka passed a modified order directing the Generating Company to supply power to the Appellant at Rs.5/- per unit as an interim tariff on 2.9.2009 during the pendency of the Writ Petition. In this order, the High Court directed the State Commission to dispose of the Petition in OP No.17 of 2009 filed by the Appellant against the termination expeditiously.

(j) Accordingly, the Generating Company, the 2nd Respondent supplied the power to the Appellant at the rate fixed by the High Court as Interim Tariff.

(k) Thereafter, the State Commission, after hearing the parties, dismissed the OP No.17 of 2009 challenging the termination notice by the order dated 8.10.2009.

(l) Being aggrieved by the said order, the Appellant preferred an Appeal before this Tribunal in Appeal No.176 of 2009. This Appeal was dismissed by this Tribunal confirming the termination on 18.5.2010.

(m) As against this judgment of this Tribunal, the Appellant filed the Appeal before the Hon'ble Supreme Court which also in turn, dismissed the Appeal on 4.10.2010. Thus, the termination of the Power Purchase Agreement became final.

(n) The State Government of Karnataka withdrew the Writ Petition filed before the Karnataka High Court. Accordingly, the said Writ Petition was dismissed as withdrawn on 16.12.2010.

(o) In view of the disposal of the Writ Petition, the Generating Company (R-2) on 28.1.2011 filed a Petition in OP No.5 of 2011 seeking for a direction to the Appellant for the payment of arrears not paid from October, 2010 to January, 2011.

(p) After considering the objections raised by the Appellant in their Petition, the State Commission by the order dated 21.4.2011, allowed the said Petition and directed the Appellant to make the entire payment claimed by the Generating Company within two weeks. Accordingly, the entire payment was made by

the Appellant to the Generating Company in the month of May, 2011.

(q) It is at that stage, the Appellant filed a Petition in OP No.16 of 2011 on 5.5.2011 before the State Commission seeking for re-determination of tariff for the period of supply by the Generating Company to the Appellant and for refund of excess charges which was paid to the Appellant at the rate of Rs.5/-per month.

(r) The State Commission, after hearing the parties, dismissed the Petition filed by the Appellant on 24.1.2013 and held that the payment of Rs.5/-per unit was fair as the same was in accordance with the earlier Tariff Order passed by the State Commission in OP No.16 of 2010 while dealing with the order issued by Government of Karnataka u/s 11 of the Electricity Act, 2003.

(s) Aggrieved by this order dated 24.1.2013, the Appellant has filed this Appeal.

5. Questioning the legality of the Impugned Order dated 24.1.2013, the learned Counsel for the Appellant has urged the following grounds:

(a) The Impugned Order is erroneous as it merely proceeds on the basis of the Short Term Market Rate

instead of determining the rate on the basis of the cost and expenses incurred by the Generating Company to ensure that the interests of both the Generator as well as the interest of the consumer are protected.

(b) The final tariff of Rs.5/- per unit as determined by the State Commission is incorrect since the legitimate tariff ought to have been much lower. The approach of the State Commission in the tariff determination ought not to be to ensure more profits to Generating Company at the cost of the consumers in the State.

(c) In the present case, the relevant period is from 8.7.2009 to 11.1.2011. In fact, for the period prior to 8.7.2009, the Generating Company generated and supplied electricity to the Appellant at the tariff of only about Rs.3.60 per unit which was duly accepted by the Generating Company without any protest.

(d) Similarly, the tariff for the period from 17.12.2010 to 11.1.2011 when the Generating Company supplied electricity to the Distribution Company had been determined by the State Commission only as Rs.3.90/- per unit by the order dated 14.2.2013. This also has been accepted by the Generating Company without any protest. Further, the actual cost of generation by the Generating Company was in the

region of Rs.3.20/- per unit. Thus, when the actual cost of generation is about Rs.3.20/- per unit, when the tariff for the period from 8.7.2009 was about Rs.3.60/-per unit and when the tariff for the period after 16.12.2010 was Rs.3.90/- per unit, there is no justification for the State Commission to direct the Appellant to pay the tariff of Rs.5/-per unit during the relevant period.

(e) In fact, before the State Commission, the Appellant has furnished full details of the cost and expenses incurred by the Generating Company to show that the tariff worked out to be about only Rs.3.20/- per unit but, the same has not been considered by the State Commission. On the other hand, the Impugned Order merely proceeds on the basis that the Generating Company would be entitled to Short Term Market Rate and not on reasonable tariff on Cost plus basis.

(f) Having adopted the process of tariff determination for adjudication of dispute u/s 86 (1) (f), the State Commission is required to apply its mind and arrive at the just and fair tariff. In other words, the State Commission is mandated to determine the just tariff rather than to justify provisional tariff which was

fixed as interim tariff by the High Court. But, this has not been done. Hence, the Impugned Order is bad.

6. In reply to the above grounds urged by the Appellant, the learned counsel for the Respondent has made the following submissions:

(a) Admittedly, the termination by the Generating Company on 8.7.2009 has been confirmed by the State Commission by the order dated 8.10.2009 and by the judgment of this Tribunal dated 18.5.2010 and thereafter by the order of the Hon'ble Supreme Court dated 4.10.2010. In view of the above development, the Writ Petition which was pending in which the stay of the operation of the order of Central Commission relating to the grant of Open Access was withdrawn on 16.12.2010. On this basis, the Generating Company, the 2nd Respondent filed a Petition in OP No.5 of 2011 for direction for payment of entire arrears for the supply of energy for October, 2010 to January, 2011. This Petition was allowed by the State Commission on 21.4.2011 by directing the Appellant to pay the entire amount at the rate of Rs.5/- per unit as earlier fixed. In these proceedings, the claim of the rate per unit fixed earlier was not challenged by the Appellant. On the other hand, the Appellant made entire payment as directed by the State Commission

by the order dated 21.4.2011 in the month of May, 2011 itself. Therefore, the present Petition in OP No.16 of 2011 filed on 5.5.2011 praying for the fresh determination of tariff was not maintainable. Consequently, the present Appeal also is not maintainable and hence it is liable to be dismissed.

(b) The High Court of Karnataka during the pendency of the Writ Petition had directed the payment of Rs.5/- per unit to be paid to the Generating Company. However, it was subject to the final accounting by the State Commission or by the Tribunal. At that time, the dispute between the Appellant and the Generating Company relating to termination of PPA was still pending before this Tribunal. Therefore, the High Court held that it was subject to the final accounting. This means that in the event of Appellant being successful in having the PPA restored, then it would be the tariff under the PPA that would be applicable and the payment of Rs.5/- per unit as per the order of the High Court should have been re-adjusted. But, in the present case, the same did not happen. The termination was upheld by this Tribunal as well as by the Hon'ble Supreme Court. Therefore, supply of power by the Generating Company to the Appellant after termination of the PPA

could be only at the tariff fixed by the High Court as correctly decided by the State Commission.

(c) After the Writ Petition was dismissed as withdrawn and after the disposal of the OP No.5 of 2011 by the State Commission directing the Appellant to make the entire payment which was complied with, it is not permissible under law for the Appellant to once again invoke the jurisdiction of the State Commission for re-fixation of tariff.

(d) It is settled principle of law that an interim relief granted by the High Court to a party in a proceedings can be reversed only if the party who gets the benefits from the said interim order suffers an order from that very same form adverse to their interest and not otherwise.

(e) The entire payment of arrears was made without a demur or protest. In the Petition in OP No.5 of 2011 filed by the Generating Company for payment of the entire amount, the Appellant did not question the rate fixed by the High Court nor questioned the liability to pay but their contention was only with regard to the question of the liability contending that the liability to pay has to be shared not only by the Appellant but also by the other parties namely State Load Dispatch

Centre and Power Company of Karnataka Limited. The State Commission in OP No.5 of 2011 having considered the above contention of the Appellant directed for the entire arrears at the rate of Rs.5/- per unit to the Generating Company and gave liberty to the Appellant to collect the balance amount from the others as per their share of liability. In compliance of this order, the entire amount had been paid by the Appellant and therefore, the Appellant is estopped from claiming re-determination of tariff. In view of the above, the Impugned Order is just and proper.

7. Having regard to the above rival contentions of the parties the only question that arises for consideration is again quoted as under:

"Whether the State Commission is justified in determining the tariff payable by the Appellant, the Distribution Licensee to the Generating Company at Rs.5/-per unit when the actual prevailing market tariff was much lower for the energy supplied by the Generating Company to the Distribution Licensee from 8.7.2009 to 16.12.2010"?

8. Before dealing with the question framed above, we shall refer to the findings given by the State Commission in the Impugned Order. The main question that has been framed

by the State Commission in the above proceedings, is as follows:

> "**Whether the Petitioner (the Distribution Licensee) based on the observation made by the Hon'ble High Court of Karnataka in WP No.25431 of 2009 could seek fixation of tariff for the electricity supplied by the Respondent (Generating Company) to it under the interim order of the Hon'ble High Court invoking Section 62 of the Electricity Act, 2003?**

9. While dealing with this question, the State Commission has given the following findings:

> **(a) The Karnataka High Court while dismissing the Writ Petition on the basis of the request of withdrawal by the State of Karnataka through Advocate General, the High Court gave liberty to the BESCOM to workout its remedy in so far as it relates to the claim for refund pursuant to the interim order granted by the High Court if they are so entitled to in accordance with the law.**
>
> **(b) On the basis of this liberty, the Distribution Licensee filed this Petition for refund of the amount after re-determination of the tariff u/s 62 of the Electricity Act, 2003. Section 62 can be**

applied only in a case where the power is supplied to a buyer, the Distribution Licensee under an Agreement for sale. In the present case, the supply of electricity during the said period was made not under the PPA. This was made only in pursuance of the interim order passed by the High Court. If such an interim order had not been passed by the High Court, the Generating Company would have sold the electricity in the market at the market rate after the grant of Open Access as ordered by the Central Commission. Therefore, the tariff determination in the present case cannot be done u/s 62 of the Electricity Act, 2003, as the issue is relating to the payment for energy supplied during the period in which interim order of the High Court was in force. This issue can be decided by the State Commission only u/s 86 (1) (f) of the Electricity Act, 2003 and not u/s 62 of the Electricity Act, 2003.

(c) According to the Distribution Licensee, the Generating Company is not entitled to Rs.5/- per unit as it was only interim rate subject to the rates which has to be determined by the State Commission as referred to in the High Court order dated 7.12.2009. On this basis, the Petitioner,

Distribution Licensee has claimed to fix Rs.3.59/- per unit instead of Rs.5/- per unit as per the State Commission's tariff order dated 11.12.2009. This claim cannot be accepted since the rate determined by the Commission on 11.12.2009 would be applicable only to the new projects coming after the date of this order. But, admittedly, the prayer made in this case has come up even prior to the said order passed by the State Commission. Therefore, the rate fixed in the order dated 11.12.2009 cannot be made applicable to this case.

(d) **In view of the above situation, the rate has to be fixed only considering the question as to what rate the Generating Company would have sold if it were to sell the power to 3rd parties' i.e. market rate. The weighted average rate during the relevant months for a Short Term Power procured from traders was Rs.5.07 per unit. The State Commission in OP No.16 of 2010 while dealing with the Government order u/s 11 determined the rate of average for the period from April, 2010 to June, 2010, the State Commission fixed the rate at Rs.5/-per unit. Therefore, considering the said general market rate as fixed in the order in OP**

No.16 of 2010, it cannot be held that the Generating Company has collected in excess of the average rate than prevailing in the market from the Petitioner. Therefore, the Petitioner, the Distribution Licensee is not entitled to any refund of the amount which has already been paid at the rate Rs.5/-per unit as the said rate is just and appropriate.

10. On the above findings, the State Commission rejected the Petition filed by the Appellant through the Impugned Order which is the subject matter of this Appeal before this Tribunal.

11. According to the Appellant, the tariff of Rs.5/- per unit as determined by the State Commission is incorrect as the State Commission has proceeded on a incorrect approach without considering the cost and expenses incurred by the Generating Company and without considering the interest of the consumers and at any rate, the tariff must have been determined only between the range of Rs.3.60 to Rs.3.90 per unit as is fixed earlier and not at the rate of Rs.5/- per unit and that hence, the fixation of tariff of Rs.5/- per unit for the relevant period by the State Commission is liable to be set-aside as it is erroneous.

12. While dealing with this contention, it would be appropriate to recall some of the relevant events which had taken place in the present case:

(a) The PPA entered into between the parties on 17.1.2002 was terminated by the Generating Company on 8.7.2009. After termination, the Appellant filed a Petition in OP No.17 of 2009 challenging the said termination before the State Commission. At this stage, the Generating Company approached the SLDC and sought for Open access but the same was rejected despite the termination. As against this order, the Generating Company filed a Petition before the Central Commission which in turn directed the SLDC to grant Open Access by the order dated 17.8.2009.

(b) At this stage, the State of Karnataka rushed to the High Court of Karnataka and filed a Writ Petition challenging the order of the Central Commission dated 17.8.2009 and obtained a stay of the operation of the said order on 25.8.2009. In this order, the High Court directed the State Commission to dispose of the Petition in OP No.17 of 2009 filed by the Distribution Licensee challenging the termination expeditiously.

(c) Accordingly, the State Commission by the Order dated 8.10.2009 dismissed the OP No.17 of 2009 filed by the Appellant by confirming the termination.

(d) As against this order, the Appellant filed the Appeal before this Tribunal in appeal No.176 of 2009. At this stage, the High Court during the pendency of the Writ Petition by way of an interim order dated 7.12.2009, directed the Appellant, the Generating Company to supply power to the Distribution Licensee at the tariff of Rs.5/- per unit as interim arrangement subject to the final accounting.

(e) This Tribunal on 18.5.2010 dismissed the Appeal No.176 of 2009 filed by the Appellant confirming the termination while affirming the order of the State Commission.

(f) In the Appeal before the Hon'ble Supreme Court filed by the Appellant, the judgment of this Tribunal was confirmed by the Hon'ble Supreme Court by dismissing this Appeal by the Order dated 5.10.2010.

(g) The Government of Karnataka withdrew the Writ Petition on 16.12.2010. Thereupon, the Generating Company filed OP No.5 of 2011 for direction to the Appellant for payment of entire arrears from October, 2010 to Jan, 2011 at the tariff rate of Rs.5/-per unit.

This Petition was allowed by the State Commission by the Order dated 21.4.2011 and directed the Appellant to make the entire payment to the Generating Company within two weeks. Accordingly, the entire payment was made in the month of May, 2011 without any protest.

(h) Even after the said payment, the Appellant once again filed a Petition in OP No.16 of 2011 before the State Commission for fresh determination of tariff for the above period and for refund of the amount already paid u/s 86 (1) (f) and 62 of the Electricity Act, 2003. This Petition was dismissed by the State Commission by this Impugned Order.

13. Keeping in view of the above chronological events which have not been disputed, we have to deal with the issue in question.

14. At the outset, we shall point out two important aspects which we have noticed in the present case which assumes significance.

15. Let us deal with the **First Aspect**.

16. The main ground urged by the Appellant before the State Commission in the present Petition in OP No.16 of 2011 filed by the Appellant for the re-determination and for refund of the excess amount, is that the Appellant

approached the State Commission seeking for the said relief was mainly because of the liberty which was given by the High Court of Karnataka to the Appellant to work out its remedy for the claim for refund pursuant to the interim tariff which was fixed by the High Court if they are so entitled in accordance with the law.

17. The relevant portion or the Order giving liberty to the Appellant while dismissing the Writ Petition as withdrawn is as follows:

> "*The learned Advocate General submits that the prayer in the Writ Petition do not survive for consideration.*
>
> *2. Accordingly, the Writ Petition is hereby dismissed, as same do not survive consideration. Further the legal issues raised in this Writ Petition are kept open.*
>
> *3.* ***Respondent No.3 is at liberty to work out his remedy in so far as it relates to their claim for refund, pursuant to the interim order granted by this Court if they are so entitled in accordance with law."***

18. This order has been passed by the High Court on 16.12.2010.

19. The Appellant has claimed that only on this basis of this order, for fixation of tariff for the electricity supplied during the pendency of the proceedings and for the refund of the excess amount. Admittedly, this Petition was filed invoking

Section 62 of the Electricity Act. The High Court while giving the liberty was pleased to give the said liberty to the Petitioner/Appellant to workout its remedy with reference to the claim for refund of the amount pursuant to the interim order **if at all, they are so entitled** in accordance with the law.

20. As mentioned by the High Court, the State Commission is required to consider the question as to whether the Appellant was so entitled for refund of the amount paid in accordance with the law. In that context, the State Commission went into the question and has held in the Impugned Order that the Distribution Company cannot invoke Section 62 of the Act for fixation of tariff or re-fixation of tariff as during that period, the PPA was no longer in existence, since it was already terminated.

21. Admittedly, the energy was supplied during that period not under the PPA which was already terminated but under the interim order of the High Court in the Writ Petition during the pendency of the Writ Petition. Therefore, the State Commission went into the question whether the Appellant is entitled for the refund of the amount on the basis of the re-determination of the tariff u/s 62 of the Electricity Act, 2003. The State Commission ultimately held that the tariff determination cannot be done u/s 62 of the Act, 2003, since there was no PPA. Hence, the State Commission

dealt with the issue u/s 86 (1) (e) of the Act, 2003 without invoking Section 62 of the Electricity Act, 2003. As indicated in the Impugned Order, only when Section 62 is invoked, the tariff should be determined on the basis of the various components relating to the cost plus and other circumstances like expenditure etc incurred by the Generating Company.

22. In this case those things cannot be taken into consideration in view of the fact that Section 62 of the Electricity Act, 2003 cannot be invoked.

23. In view of the above, the decision rendered by this Tribunal in 2010 ELR (APTEL) 833 in the case of NTPC Vs Central Electricity Regulatory Commission cited by the Appellant dealing with the provisions of Section 61 (d) of the Act, 2003 would be of no use to the Appellant as it has no relevance.

24. Under those circumstances, the very Petition filed by the Appellant before the State Commission u/s 62 of the Electricity Act, 2003 was not maintainable.

25. One another thing has to be noticed in this context.

26. As indicated above, the order passed by the Central Commission dated 17.8.2009 granting Open Access, had been stayed by the High Court on 25.8.2009. When the Generating Company filed a Petition for vacating the stay in

the Writ Petition before a Writ Court, the stay order earlier passed on 25.8.2009 was modified by the order dated 2.9.2009 to the effect that the Generating Company would supply to the Distribution Company, the Appellant at the interim tariff of Rs.5/- per unit. Further, the High Court directed the State Commission to dispose of the proceedings challenging the termination in OP No.17 of 2009 as expeditiously as possible.

27. Accordingly, the OP No.17 of 2009 was disposed of by the Order dated 8.10.2009 by the State Commission by dismissing the said Petition challenging the termination. Thus, the termination was upheld by the State Commission. This order was challenged before this Tribunal in Appeal No.176 of 2009 and this was pending for some time before this Tribunal. The pendency of this Appeal was brought to the notice of the High Court. Hence, the High Court passed the interim order on 7.12.2009 fixing the interim tariff of Rs.5/- per unit as an interim arrangement subject to the final accounting by the Appellate Tribunal.

28. Thus, this fixation of interim arrangement is subject to the final outcome of the Appeal before this Tribunal. The said observation of the High Court is as follows:

> "*Having regard to the facts, I am of the view that the Tariff as an interim arrangement is fixed at Rs.5/- per unit and the said amount shall be calculated from the*

date the amount becomes due and shall be paid to the 1st Respondent deducting the amount already paid. Indeed the said amount payable ***is subject to the final accounting.*** *Indeed this is only an interim arrangement since the Appellate Authority as well as the Karnataka Electricity Regulatory Commission are required to consider the matters before them independent of this interim arrangement."*

29. So, the observation made by the High Court in the Interim Order dated 7.12.2009 as well as the final order passed by the High Court dated 16.12.2010 giving liberty to the Appellant to move to the appropriate forum would show that ultimately either the State Commission or the Tribunal has to consider the issue and decide through the final accounting.

30. So, both these orders had not given any specific direction either to the State Commission or to the Tribunal during the pendency of the Writ Petition or while disposing the Writ Petition to the effect that the tariff must be fixed u/s 62 of the Act.

31. On the other hand, it simply stated that it is open to the Appellant to approach the proper forum for refund of the amount if it is legally entitled to.

32. Hence, the question whether the Appellant is legally entitled for refund of the amount has been considered by the State Commission in the Impugned Order and a correct conclusion has been arrived at holding that the tariff cannot

be re-determined u/s 62 of the Electricity Act, 2003. This is the first aspect of the matter.

33. Let us now deal with the **Second Aspect** of the matter.

34. After disposal of the Writ Petition through the order dated 16.12.2010, the Appellant did not choose to exercise his right by resorting to any remedy with reference to the issue of refund of the amount, before the appropriate forum.

35. On the other hand, the Generating Company, the Respondent, in the light of the failure to make a payment of entire amount for the energy supplied from October, 2010 to January, 2011 filed a Petition in OP No.5 of 2011 on 28.1.2011 before the State Commission seeking for the direction for the said payment. Even during this proceeding, the Appellant who was the party to the said proceedings did not raise any question with reference to the claim for refund of the amount after fixing fresh tariff.

36. On the other hand, the Appellant in the said proceedings took a stand that the Appellant alone is not liable to pay entire amount but this liability has to be shared by the Appellant as well as the other two parties namely State Load Dispatch Centre and the Power Company of the Karnataka Limited who have to share the payments of power supplied by the Generating Company during the relevant period. Admittedly, in these proceedings, the

Appellant did not question the rate fixed earlier. In other words, the Appellant in the said proceeding had admitted the rates.

37. Let us refer to the stand taken by the Appellant as well as the Generating Company in the proceedings in OP No. 5 of 2011 as pointed out by the State Commission in the order dated 21.4.2011 while disposing the OP No.5 of 2011. This original Petition in OP No.5 of 2011 was filed by the Generating Company on 28.1.2011 i.e. subsequent to the liberty given to the Appellant by the Order of the High Court in Writ Petition on 16.12.2010 to seek for refund of the amount if any.

38. Let us quote the relevant observation made by the State Commission in the order dated 21.4.2011 in OP No.5 of 2011:

> "*10. It appears from the pleadings that after the dismissal of the civil appeal by the Hon'ble Supreme Court on 4.10.2010 and till the final disposal of the writ petition on 16.12.2010, the 1st Respondent did not make the payments as per the interim order. Therefore the petitioner has filed the present petition seeking payments for the power supplied during the above period as per the interim order of the Hon'ble High Court along with interest at 18 %.*
>
> *11. It is contended by Sri Prabhuling Navadgi, counsel appearing for the petitioner that the 1st Respondent is liable to pay Rs.5.00 per unit for the electricity supplied during the period from October to December as per the interim order since as on that*

date the interim order was still in operation and the petitioner was bound to sell the electricity to the 1st Respondent and the 1st Respondent was liable to pay for the same.

12. Per contra Sri Sriranga, counsel appearing for the respondents has contended that the electricity charges claimed by the petitioner are not liable to be paid only by BESCOM as PPA with BESCOM was already terminated by the petitioner on 8.7.2009 and the supply was not under the PPA but to the State grid in general and therefore all ESCOMs together have to pay for the electricity supplied.

13 to 15……..

16. *……In the counter filed on behalf of BESCOM, the only contention of BESCOM is as regards the portion of its liability and not per se about the rate fixed by the Hon'ble High Court. It is further mentioned therein that BESCOM has already written to Respondents 2 & 4 in the matter of sharing the payments of power supplied during the period subsequent to 4.10.2010. In our opinion BESCOM therefore cannot dispute the amount payable as per the interim order of the learned Single Judge. However, BESCOM shall be at liberty to recover appropriate amounts from the other ESCOMs in proportion to the power utilized by the latter during the period subsequent to 4.10.2010. Further, as observed by the Hon'ble High Court while finally disposing the petition, the payments to be made by BESCOM are without prejudice to the rights of BESCOM to workout its remedy in so far as its claim relating to refund if they are so entitled in accordance with law."*

39. So, the perusal of the above paragraphs would clearly indicate that the Generating Company pleaded before the

State Commission complaining that even after the disposal of the Appeal by the Hon'ble Supreme Court, the Appellant did not make the payments despite receipt of the supply of energy as per the interim order passed by the High Court.

40. In reply to this allegation, the Appellant as a Respondent in those proceedings without questioning the rate of tariff, merely contended that the arrears claimed by the Generating Company are not liable to be paid only by the Appellant BSECOM but it is also by the SLDC as well as all other Distribution Licensees including the Appellant, and as such all the distribution licensees together have to pay for the electricity supply. In fact, the specific stand taken by the Appellant in the counter filed by them that it questioned only the entire liability by contending that the Appellant is liable to pay only the portion of its liability but not about the rate fixed by the High Court.

41. Admittedly, in these proceedings in OP No.5 of 2011, the Appellant has not claimed for the re-determination of the tariff.

42. On the other hand, the State Commission on consideration of the pleadings made by both the parties allowed OP No.5 of 2011 filed by the Generating Company and directed the Appellant to make the entire payment claimed in the Petition filed by the Generating Company while giving the

liberty to the Appellant to recover from other Distribution Company's share of their liabilities.

43. Pursuant to this order dated 21.4.2011 by the State Commission the Appellant has paid the entire amount in May, 2011.

44. The above facts would clearly indicate that the termination of PPA had been upheld by the hierarchy of all Forums and the controversy also had been settled by the Appellant by making the entire payment to the Generating Company in compliance with the final order passed in OP No.5 of 2011 by the State Commisison.

45. As indicated above, the High Court observed in the Interim Order that the payment of Rs.5/- per unit to be paid to the Generating Company which was subject to the final accounting.

46. When this observation was made by the High Court, the dispute between the Appellant and the Generating Company relating to the termination of the PPA was still pending before this Tribunal at that stage. Therefore, the High Court held that it would be subject to the final accounting. This means that in the event of Appellant being successful in having the PPA restored by setting-aside the termination; it would be the tariff payable by the

Distribution Licensee to the Generating Company under the PPA.

47. In other words, if the Appellant has ultimately succeeded, the Generating Company would be entitled to the tariff only under the PPA and in that event the payment of Rs.5/- per unit as ordered by the High Court would have to be readjusted. However, the Appellant has not succeeded in its attempt in all those forums as the same did not happen.

48. It is settled law that an interim relief granted to a party to a proceedings can be reversed only if the party who benefits from the said interim order suffers an order from that Forum adverse to their interest and not otherwise. This principle has been laid down in (2004) 2 SCC 783 in the case of Karnataka Rare Earth and Another Vs Senior Geologist, Department of Mines & Geology and Another. The relevant portion of the observation of the Hon'ble Supreme Court is as follows:

> "*When on account of an act of the party, persuading the court to pass an order, which at the end is held as not sustainable, has resulted in one party gaining advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party, then the successful party finally held entitled to a relief, assessable in terms of money at the end of litigation, is entitled to be compensated in the same manner in*

which the parties would have been if the interim order of the court would not have been passed."

49. It was in this background that the High Court while passing the above order had observed that it was subject to final accounting.

50. As stated above, the termination of PPA was upheld by the State Commission by this Tribunal as well as the Hon'ble Supreme Court. Therefore, the supply of power by the Generating Company to the Appellant after the termination of PPA would have to be only be as per the order of the High Court.

51. As mentioned above, since the entire payment was not made by the Appellant, the Generating Company filed OP No.5 of 2011 for direction for the payment of the said amount. The defense projected by the Appellant is not with reference to the rate of the tariff but only with reference to the portion of its liability.

52. As a matter of fact, the Appellant admittedly had written to the State Load Dispatch Centre and Power Company of Karnataka Limited in the matter of sharing the payments of power supply during the period subsequent to the order of the Hon'ble Supreme Court dated 4.10.2010.

53. In view of the same, the Appellant having admitted the rate in the above proceedings and having paid the same without

any protest cannot now be allowed to claim to have the tariff re-determined particularly when this issue had not been raised in the proceedings in OP No.5 of 2011.

54. The period of supply of power for which Rs.5/- per unit was paid was between 7.12.2009, ie. the date of the interim order of the High Court fixing the tariff as Rs.5/- and 16.12.2010, i.e. the date of withdrawal of the Writ Petition. During this period i.e. the period between April to June, 2010, the State Government in exercise of its powers u/s 11 of the Act had directed all the Generating Companies including the Respondent Company to compulsorily supply power to the State Grid.

55. In order to off-set the financial impact of such a supply, the State Government had fixed a tariff rate of Rs.5/- per unit as payment per unit for the energy supplied by the Generating Companies.

56. As pointed out by the State Commission in the impugned order, the generating companies earlier approached the State Commission seeking the approval of the said tariff in OP No.16 of 2010.

57. After hearing all the parties concerned, the State Commission considered, the tariff fixed by the Government and held that the tariff of Rs.5/- per unit was appropriate as the same would be in consonance with the prevalent

market rate. As a matter of fact, the fixation of Rs.5/- per unit by the State Government was challenged by some of the generators before this Tribunal in Batch of Appeals No.141 of 2011 etc. But, this Tribunal ultimately affirmed the order of the State Commission and held that the payment of Rs.5/- per unit was appropriate. This order passed by the State Commission as well as this Tribunal have attained finality.

58. The learned Counsel for the Appellant contended that in the other matters for the earlier period, only lesser tariff was fixed and therefore, the same tariff has to be fixed in this case also. This contention is misplaced.

59. In the present proceedings, the State Commission considered the weighted average of Short Term Market for bilateral transactions between September, 2009 to December, 2010. As per the calculation, the weighted average rate during that period for Short Term Power Procurement comes to Rs.5.07/- per unit. The State Commission in the Impugned Order fixed the tariff as Rs.5/- per unit after taking note of the above factual position.

60. Thus, these relevant factors have been taken into consideration by the State Commission which in turn has come to the correct conclusion that the tariff paid by the

Appellant to the Generating Company is perfectly justified and as such, their cannot be any direction for the refund.

61. In view of the above analysis we have to conclude that the Impugned Order does not suffer from any infirmity.

62. <u>Summary of Our Findings</u>

(a) The Petition filed by the Distribution Licensee, the Appellant herein, before the State Commission in OP No.16 of 2011 seeking for re-determination and for the refund of the excess amount, cannot be construed to be u/s 62 of the Electricity Act, 2003. The High Court passed the orders in the Writ Petition giving the liberty to the Appellant, the Distribution Licensee to approach the proper Forum for the re-determination and refund of the amount only if the party is entitled to claim for the same in accordance with the law. In this case, the State Commission considered the said question whether the Appellant is entitled for the refund of the amount on the basis of the re-determination of the tariff u/s 62 of the Electricity Act and correctly held that the tariff determination cannot be done u/s 62 of the Electricity Act, 2003 since there was no PPA. Therefore, the State Commission has invoked only Section 86 (1) (f) of

the Electricity Act, 2003 to decide the issue raised in the said Petition.

(b) Even though liberty was given by the High Court to the Distribution Licensee, the Appellant to approach the Forum to seek for refund if it was so entitled, the Appellant initially did not choose to exercise its right of resorting to remedy with reference to refund of the amount before the appropriate Forum as per the liberty. On the other hand, the Generating Company, the Respondent filed a Petition in OP No.5 of 2011 before the State Commission seeking for the directions to the Appellant for payment of the entire arrears at the rate of Rs.5/- per unit for the relevant period. The State Commission allowed this prayer and directed the Appellant to pay the entire amount. In these proceedings, the Appellant did not raise the question with reference to the rate fixed earlier. On the other hand, in pursuance of the said order, the Appellant has paid the entire amount. Taking a contrary stand now, the Appellant has now filed the Petition on the basis of the liberty given by the High Court praying for the re-determination and for the refund. The State Commission considered the said claim and rejected the prayer for the

refund by fixing the tariff of Rs.5/- per unit which was already paid. While fixing this rate, the State Commission considered all the relevant factors including the weighted average of the Short Term Market for bilateral transactions and fixed the tariff as Rs.5/- per unit even though the calculations of the weighted average would come to Rs.5.07/- per unit. Thus, the conclusions as well as the reasonings given in the Impugned Order are valid and justified.

63. In view of the above findings, we do not find any merit in the Appeal. Accordingly, the Appeal is dismissed.

64. However, there is no order as to costs.

(Rakesh Nath) **Technical Member**

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

Dated: 31th Jan, 2014
√REPORTABLE/~~NON REPORTABLE~~