

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.20 OF 2013

Dated: 07th Oct, 2013

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MRV J TALWAR, TECHNICAL MEMBER**

In the Matter of:

**M/s. Narayanpur Power Company
A-21, Manyatha Residency,
Arabic College Post,
Bangalore-560 045**

..... Appellant

Versus

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

**2. Gulbarga Electricity Supply Company Limited.,
Station Road,
Gulbarga-585 102**

..... Respondent(s)

**Counsel for the Appellant : Mr. Basava Prabhu Patil, Sr.Adv
Mr. Venkata Krishna Kunduru
Mr. Debjyoti Basu
Mr. Venkatesh M
Mr. B. S Prasad**

**Counsel for the Respondent(s): Mr. Venkita Subramaniam
Mr. Raghavendra S Srivatsa
Mr. Sriranga Subhanna
Mr. Sumana Naganand
Mr. A.M. Shodhan Babu for R-2**

J U D G M E N T

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

1. Narayanpur Power Company is the Appellant herein.
2. The Appellant filed a Petition in OP No.21 of 2012 before the Karnataka State Commission praying for the declaration that the PPA dated 12.2.2008, entered into between the Appellant and GESCOM (R-2) stood terminated. The State Commission however, dismissed the said Petition by holding that the termination of PPA was not valid.
3. Aggrieved by this order, the Appellant has presented this Appeal.
4. The short facts are as under:
 - (a) The Appellant is a Generating Company. Pursuant to sanction accorded by the Government of Karnataka, it has set-up a 7.2 MW Mini Hydro Electric Project in Raichur District. Pursuant to the same, the Appellant had established mini Hydro Power Station having capacity of 7.2 MW.
 - (b) Gulberga Electricity Supply Company Limited (GESCOM-R2) is a Distribution Licensee in the State of Karnataka.

(c) Generating Station of the Appellant is a Renewable Source of Energy.

(d) On 21.1.2004, the State Commission published its Regulations for procurement of power from Renewable Sources by Distribution Licensee. One of the options under the Regulation available to the Generating Company was to enter into a PPA with the Distribution Licensees in the State of Karnataka.

(e) Accordingly, on 12.2.2008, the Appellant and the GESCOM (R-2) entered into a Power Purchase Agreement by which the GESCOM, the Distribution Licensee, agreed to purchase the power to be generated from the Appellant's project on terms set out in the tariff. Subsequently, the PPA was submitted to the State Commission for its approval.

(f) The State Commission approved the PPA subject to incorporating certain corrections by the order dated 21.4.2008.

(g) This was intimated to the Appellant by the GESCOM and the Appellant was requested to attend to the same for correcting the PPA incorporating the said corrections.

(h) However, the Appellant sent intimation to the GESCOM stating that they had certain reservations in making those corrections and for correcting the PPA.

(i) In the meantime, the Appellant wanted to sell power from its hydro-electric power station through power exchanges to 3rd parties and requested for 'No Objection Certificate' from the State Load Despatch Centre (SLDC). But, the State Load Despatch Centre declined to grant concurrence on the ground that the PPA with GESCOM was subsisting.

(j) That apart, the Government of Karnataka issued directions dated 30.12.2008 under Section 11 of the Electricity Act directing all the power generators to maximise their generation and to supply power to the State Grid to be consumed by the consumers of the State. Accordingly, the Appellant started supplying power generated in the project to the GESCOM and submitted invoices for the power supplied based on the daily average rate adopted from Indian Energy Exchange Rate. However, the GESCOM did not pay any amount against those invoices till 27.8.2009. Thereafter, they started making payment not as per the rate of invoices but, as per the rate mentioned in the PPA.

(k) In order to offset the adverse financial impact caused by the denial of open access by the State Load Despatch Centre, the Appellant sought from the GESCOM the payment for the power supply at the rate of average price prevailing as per Indian Energy Exchange Rate and raised invoices accordingly. However, this request was rejected by the GESCOM. Therefore, the Appellant disputing the validity of the PPA filed the Petition in OP No.19 of 2009 before the State Commission and seeking for directing the GESCOM to pay the amount as per the tariff invoices raised by the Appellant.

(l) The State Commission however, rejected the said petition in OP NO.19 of 2009 by the order dated 19.8.2010 holding that the PPA executed by the Appellant was valid and binding and consequently, the Appellant (Petitioner) had to supply electricity to the GESCOM as per the terms of the PPA and the GESCOM, in turn, has to pay the amount at the rate specified in the PPA.

(m) Challenging above order dated 19.8.2010; the Appellant filed the Appeal before this Tribunal in Appeal No.195 of 2010. This Tribunal after hearing both the parties, dismissed the Appeal by the judgment dated 15.12.2011 after holding that the PPA was valid and

subsisting by confirming the Order of the State Commission.

(n) In spite of the above judgment, the GESCOM failed to pay the arrears towards the tariff as well as the interest as per the PPA and also failed to open Letter Of Credit. Hence, the Appellant issued a Default Notice on 22.3.2012 demanding the arrears of the tariff as well as the interest and also to open the Letter Of Credit within 30 days as prescribed in the PPA.

(o) However, the GESCOM neither responded to the Default Notice, nor cured the defaults as referred to in the Default Notice dated 22.3.2012.

(p) Therefore, the Appellant sent a Termination Notice dated 23.4.2012 to the GESCOM as provided under Article 9.2 and 9.3 of the PPA. Only after termination of the PPA, the Appellant received the letter from GESCOM on 30.4.2012 admitting default in not opening the Letter Of Credit and without denying the liability to pay the interest.

(q) Thereafter, since the Appellant was not permitted to deal with the energy project and GESCOM claimed that the PPA was subsisting, the Appellant filed a Petition in OP No.21 of 2012 before the Karnataka State Commission for a declaration that the PPA stood

terminated. The GESCOM in these proceedings filed objections to the claim of the Appellant.

(r) Ultimately, the State Commission, after hearing the parties passed the impugned order dated 2.11.2012 dismissing the Petition in OP No.21 of 2012 by holding that the termination of the PPA was not valid.

(s) Hence this Appeal as against the order dated 2.11.2012.

5. The learned Senior Counsel for the Appellant has urged the following grounds in order to substantiate his plea that the termination of the PPA was valid in law:

(a) The Appellant issued a Default Notice dated 22.3.2012 to the GESCOM intimating that the GESCOM failed to pay Rs.19,77,926/- towards tariff for the power purchased from the Appellant; failed to pay interest amount of Rs.55,41,933/- on delayed payments and also failed to open the Letter Of Credit as per the terms of the PPA. Despite the receipt of the Default Notice, the GESCOM not only failed to cure the defaults within 30 days but also did not bother to respond. Therefore, the Appellant was constrained to resort to Article 9.3.2 of the PPA by sending the Termination Notice on 23.4.2012. This aspect has not been gone into by the State Commission.

(b) Only after termination of the PPA through Termination Notice dated 23.4.2012 which was received by the GESCOM on the same date, the Appellant received a letter from GESCOM on 30.4.2012 purported to have been signed on 16.4.2012 wherein GESCOM admitted default in non-opening of Letter Of Credit as well as the default in payment of charges but it was contended that the reason for non payment because PPA was signed only for 6 MW and not for 7.2 MW Capacity. This letter would show that the defaults based on which, the PPA was terminated, was not made good within 30 days of the Default Notice dated 22.3.2012. Having failed to cure the defaults in 30 days, the GESCOM cannot claim that the termination of PPA was not valid merely because Letter Of Credit opened later i.e. on 24.7.2012 which was subsequent to termination of the PPA. This aspect also has not been considered by the State Commission.

(c) As far as the defaults in making payment of the tariff and the interest are concerned, the Appellant had produced the statements showing the defaults and mentioned the same in the Default Notice as well as the Termination Notice. This is disputed by the GESCOM now by stating that payments have been made. The GESCOM having asserted that it has made

all the payments in time, the onus to prove the said assertion is on the GESCOM. This was not established. The GESCOM has raised only a bald contention that all the payments have been made and no details like dates/mode of payment are mentioned to show that no dues were outstanding. Having failed to demonstrate the payment of all dues and timely payments, the only possible inference is that GESCOM did commit the default.

(d) In the earlier round of litigation i.e. in OP No.19/2009 the Appellant took the stand that there was no valid and subsisting PPA but the GESCOM took the stand that there was a valid and binding PPA. The stand of the GESCOM was accepted by the State Commission in its final order dated 19.8.2010. This finding also was upheld by this Tribunal in Appeal No.195/2010 by the judgment dated 15.12.2011. In view of the orders as aforesaid, the GESCOM was bound by the terms of the PPA which was subsisting by making tariff payment in time or in the event of delayed payment with interest. Admittedly, there was no material to show the payment was made either in time or delayed payment with interest.

(e) The State Commission has wrongly held that the Appellant has not produced invoices in respect of the

interest claimed. The liability to pay the interest in terms of Article 6.3 is absolute and automatic. There was no requirement of issuing invoices as regards the interest payable. The State Commission wrongly assumed that there was no material to show that the interest was demanded. As a matter of fact, the Default Notice dated 22.3.2012 which was received by the GESCOM on the same date had clearly set out that interest amounting to Rs.55,41,933/- was outstanding. This demand in the Default Notice was consistent with Article 9.3.2 of the PPA. The demand made by the Appellant intimating the Defaults and the failure of GESCOM to make good the defaults are not in dispute. In that context, the Appellant validly exercised the right under Article 9.3.2 by terminating the PPA.

(f) The reasoning of the State Commission for invalidating termination of the PPA to the effect that the Appellant did not raise the issue of interest in earlier proceedings is not tenable. The scope of the earlier proceedings was confined to the issue as to the existence of valid PPA. In the said proceedings, the Appellant could not raise the issue with regard to the interest for the enforcement of the terms of the PPA which according to the Appellant was not even in existence. Therefore, the State Commission wrongly

held that the interest issue was not raised in the earlier proceedings.

(g) In the Default Notice issued by the Appellant, it is clearly notified about the default of GESCOM to open Letter Of Credit and demanded that the said default be made good in thirty days. In fact, the GESCOM admitted the default in its letter to the Appellant in not opening the Letter Of Credit. In the said letter, it also admitted the non payment of the tariff amount. It only gave a reason for justifying the non payment to the effect that PPA was signed only for 6 MW and not for 7.5 MW and therefore, the GESCOM did not pay for energy in excess of 6 MW. This letter shows that GESCOM did not deny its liability to make payment of tariff, interest and to open Letter Of Credit. This aspect also has not been considered by the State Commission.

On the above grounds, , the impugned order is sought to be set aside in this Appeal.

6. In reply to the above grounds, the learned Counsel for the GESCOM elaborately argued refuting the submissions made by the Appellant and filed written submission in justifying the impugned order.

7. In the light of the rival contentions of the parties, the only question that may arise for consideration is this:

“Whether the termination of the PPA through the Notice dated 23.4.2012 sent by the Appellant to GESCOM was valid or not?”

8. Before analysing this question, it would be worthwhile to refer to the impugned findings with discussions in the impugned order which reads as under:

“10) The question that needs to be examined and decided by this Commission is, “Whether the Termination of the PPA affected by the Petitioner on 23.4.2012 is valid and legal?”

11) There is no dispute that the Petitioner had executed a PPA with the Respondent on 12.2.2008 and disputed the validity of the same in OP No.19/2009 before this Commission, on the ground that the same has not been approved by the Commission, among other grounds. It is also not in dispute that the said Petition came to be dismissed by this Commission on 19.8.2010 and this Order of the Commission came to be upheld by the Hon’ble ATE in Appeal No.195/2010 on 15.12.2011.

12) What is in dispute is the termination effected by the Petitioner on 23.4.2012 and the grounds on which the said termination has been effected.

13) From the Notice of Termination (Default Notice) dated 22.3.2012, it is seen that the two grounds taken for termination of the PPA are that: (i) the Respondent has defaulted in making payment of Rs.55,41,933/- towards interest; and (ii) Letter Of Credit has not been opened as required under the PPA.

14) Let us first consider the first ground of non-payment of interest of Rs.55,41,933/- (as detailed in Attachment-1 to Annexure-P5 produced at Page Nos.96 and 97 of the Petition). It is observed that nowhere in the Notice of Termination, nor in its Annexure, the Petitioner has stated that it had raised the claim for interest and the same was not paid by the Respondent. Under article 6.1 of the PPA, the Petitioner has to raise invoices, setting forth the amounts payable. Only after raising of invoices, the amount claimed and interest thereon become due. The Petitioner has not produced the invoices raised in respect of interest claimed. In the absence of production of invoices and in the absence of any other material to show that the interest was duly demanded from the Respondent at any time before the issue of the Default Notice, we cannot hold that the Respondent defaulted in payment and interest thereon. Further, it appears to us that the Petitioner may not have raised this issue during the pendency of its proceedings before this Commission and the Hon'ble ATE, as the same may have adversely affected its claim that the PPA was not subsisting. If the Petitioner was genuinely interested in payment of interest, it could have raised necessary invoices and brought the same to the notice of this Commission. Further, as pointed out by the learned Counsel for the Respondent, the interest calculated and claimed in the Termination Notice is also not in accordance with the terms of the PPA, as there is no provision in the PPA to compound the interest. Article 6.3 of the PPA, which provides for payment of interest, does not contemplate any compounding of the interest. Considering the facts of this case, in our view, the termination of the PPA on this ground cannot be sustained.

15) As regards the second ground of termination of the PPA, i.e., non-opening of the Letter Of Credit, we are of the view that the same is also not sustainable as the Petitioner has not produced any material to show that it

had called upon the Respondent to open Letter Of Credit and the Respondent did not comply with the same, before issuing the Default Notice. Apparently, the Petitioner may not have called upon the Respondent for giving a Letter Of Credit, for the very reasons that the same would have adversely affected its stand taken in the earlier proceedings before this Commission and the Hon'ble ATE, that the PPA does not subsist. Therefore, we hold that the second ground of termination is also unsustainable.

16) For the foregoing reasons, we hold that the termination of the PPA affected by the Petitioner is not valid and the PPA continues to be in force and binding on the parties.

- 9.** The crux of the findings holding that the termination of the PPA was not valid in the impugned order is as follows:

(a) Appellant has not produced invoices raised in respect of interest claimed; and in absence of material to show that interest was demanded, it cannot be held that GESCOM defaulted in payment and interest thereon;

(b) If the Appellant was really aggrieved by the non payment of interest and non-opening of Letter Of Credit, nothing stopped the Appellant from approaching State Commission or other forum available under law to enforce the same and seek necessary orders, more so when proceedings were pending before the State Commission on the same PPA.

(c) The claim for interest relates to the very period when the dispute of Appellant as to subsistence of a valid PPA was pending. The present termination has been effected soon after the Appellant failed in earlier proceedings. The action of Appellant in terminating the PPA is not bona fide but is another “attempt” to escape from the obligations undertaken under the binding PPA.

(d) With reference to the ground of termination viz., failure of GESCOM to open Letter Of Credit, Appellant has not produced any material to show that it had called upon GESCOM to open Letter Of Credit and despite that, the GESCOM did not comply with the same before issuing Default Notice;

(e) Apparently, the Appellant may not have called upon the GESCOM to open Letter Of Credit for the very reason that the same would have adversely affected its stand in the earlier proceedings.

10. The above reasonings in the impugned order would show that the State Commission has proceeded on the basis as if the termination of the PPA was only on the ground of the failure of the GESCOM to cure the defaults in payment of interest as well as for non-opening of the Letter Of Credit.

11. The perusal of the above finding would clearly show that default on the ground of failure of GESCOM to pay tariff

amount of Rs.19,77,926/-towards power supply has not at all been taken into consideration by the State Commission.

12. Now let us now discuss this issue keeping in mind the above aspect.

13. The perusal of the impugned order would reveal that the State Commission has rejected the prayer of the Appellant for declaration of the PPA mainly on two grounds:

(a) The Appellant did not raise the invoice for payment of interest as per Clause 6.1 of the PPA.

(b) The Appellant did not ask for opening of the Letter Of Credit.

14. Let us now examine the veracity of findings of the Commission while rejecting the claim of the Appellant.

15. Firstly, the Commission has stated that the Appellant did not raise the invoices for interest as per Clause 6.1 of the PPA.

16. Clause 6.1 of the PPA reads as under:

“6.1 Tariff Invoices: The Company shall submit to the designated officer of GESCOM, a monthly invoice for each billing period ...setting forth amounts payable by GESCOM for the delivered Energy in accordance with Clause 5.1.

17. The above Clause 6.1 requires the Appellant to raise invoices for the energy delivered during the month. The provision relating to payment and late payments are in

clause 6.2 & 6.3 respectively. These Clauses are quoted below:

“6.2 Payment: *GESCOM shall make payment of the amounts due in Indian Rupees within fifteen (15) days from date of receipt of Tariff invoice by the designated officers of GESCOM.*

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

- 18.** In the light of the above Clauses, let us now refer to the Default Notice as well as the Notice of Termination.
- 19.** The relevant portion of the **Default Notice dated 22.3.2012** is extracted as under:

“

1. *The PPA contemplated the payments as per Article 6, wherein the tariff, late payment charges and payment under the Letter Of Credit are specifically detailed.*

2. *It is our specific contention that you have committed an Events of Default by not opening the Letter Of Credit as per Article 6.5 of the PPA.*

3. *Further, you have defaulted in making payment of Rs.55,41,933 (Rupees Fifty Five Lakh Forty One Thousand Nine Hundred Thirty). The details of the invoices raised and amounts due along with the*

aggregate due up to February, 2012 is enclosed herein as Annexure-I.

4. You are hereby called upon to make payment of all the defaulted amounts along with applicable interest due as on date within 30 (thirty) days from the date of receipt of this Default Notice.

At the expiry of 30 (thirty) days from the delivery of this Default Notice, if the Events of Default (payments of the demanded amount and opening of Letter Of Credit) giving rise to this Default Notice are not remedied, we shall be constrained to deliver the Termination Letter to you, as agreed under the PPA, without further notice to you.”

20. This Default Notice dated 22.3.2012 indicated that GESCOM was in default of three material payment obligation:

(a) GESCOM had failed to pay Rs.19,77,926/- towards electricity purchased from the Appellant.

(b) It failed to pay interest of Rs.55,41,933/- on delayed payments;

(c) It failed to open Letter Of Credit.

21. This Default Notice was in pursuant to Clause 9.2 and 9.3 of the PPA. Clause 9.2 of the PPA reads as under:

“2. In the event of any payment default by teh GESCOM for a continuous period of three months, the Company shall be permitted to sell electricity to third parties by entering into a wheeling and banking Agreement with the GESCOM for which it shall pay

transmission and other charges to the GESCOm at the rates applicable from time to time as approved by the Commission.”

22. The above Clause 9.2 would provide that in the event of any payment default by the GESCOm for a continuous period of three months, the Appellant Company is permitted to sell electricity to third parties. Before that, the Company shall issue a Default Notice to the GESCOm under Clause 9.3.2 which reads as under:

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

23. This Clause would reveal that the Company in the Event of Default as provided in Article 9.2 Shall give an opportunity to the GESCOm by sending Default Notice and call upon the GESCOm to remedy the same within the time frame. The time frame has been given under second part of Clause 9.3.2 which reads as under:

“9.3.2.....

.....

At the expiry of 30 (thirty) days from the delivery of this Default Notice and unless the Parties have agreed otherwise, or the Event of Default giving rise to the Default Notice has been remedied, Company may

deliver a Termination Notice to GESCOM. Company may terminate this Agreement by delivering such a Termination Notice to GESCOM and intimate the same to the Commission. Upon delivery of the Termination Notice this Agreement shall stand terminated and Company shall stand discharged of its obligations.”

24. As per this Clause, 30 days time is to be given to GESCOM to cure the default. If the default has not been cured within 30 days, the Company is at liberty to send the Notice of Termination of the PPA and intimate the same to the Commission. Upon delivery of the notice, the Agreement shall stand terminated. This is clearly provided in Clause 9.3.2.

25. In the present case, as mentioned earlier, Default Notice had been issued on 22.3.2012 demanding the GESCOM to cure the 3 Defaults as mentioned above and intimating that if the Default has not been cured within 30 days, the Appellant Company would be constrained to issue Notice of Termination of the PPA.

26. In the present case, admittedly, within 30 days, there was no response through a reply nor remedied the 3 Defaults by the GESCOM. Therefore, the Appellant was constrained to issue **Termination Notice on 23.4.2012** i.e. after expiry of

30 days. Let us now refer to the Termination Notice. The said notice is as follows:

“Ref InL/NPCL/TN/2012-13/01

23rd April, 2012

*Chief Engineer (Electricity)
Corporate Building
Gulbarga Electricity Supply Company Limited.,
Station Road,
Gulbarga-585 102*

Sir,

Sub: Termination Notice under Section 9.3.2 of the Power Purchase Agreement Initiated on 12th February, 2008.

The Termination Notice is issued on behalf of our Clients, M/s. Narayanpur Power Company Private Limited., a Company registered under the provisions of the Companies Act, 1956 having its Registered Office at No.A/21, Manyata Residency, Arabic College Post, Bangalroe -560 045, represented by its Managing Director Mr. Y.S.V.K Vasudeva Rao (hereinafter called as “Our Client”).

You are well aware that PPA dated 12th February, 2008 (the “PPA”) came to be initialled by and between our Client on 12th February, 2008. The Hon’ble KERC did not approve the PPA at any stage.

When a Section 11 application came to be filed before the Hon’ble KERC by Companies seeking compensation under Section 11(2), the issues relating to the validity of PPA came to be adjudicated by Hon’ble KERC. The Hon’ble KERC has declared the PPA to be valid.

Our Client carried Hon’ble KERC’s order in Case No.31/2010 before the Hon’ble Appellate Tribunal under in Appeal No.195 of 2010. The said Appeal came to be rejected by Hon’ble Appellate Tribunal in its order dated 15th February, 2012.

Without prejudice to our Client’s rights to challenge the said order of Appellate Tribunal before an appropriate forum and

importantly without admitting the validity of Power Purchase Agreement but presuming the PPA to be valid since it is held so by Hon'ble Appellate Tribunal in its order dated 15th February, 2012, our Client issued a Default Notice under Article 9.3.2 of the PPA vide our Letter No.NPCPL-F/8/237 dated 22nd March, 2012 calling upon you to make payment of all the defaulted amounts along with applicable interest due and open Letter Of Credit, as agreed under the PPA, within 30 (thirty) days from the date of receipt of the Default Notice.

Our client has specifically stated that if at the expiry of 30 (thirty) days from the delivery of the Default Notice, if the Events of Default viz., payment of the defaulted amount and opening of Letter Of Credit, giving rise to this Default Notice are not remedied, our Client shall be constrained to deliver the Termination letter to you, as agreed under the PPA, without further notice to you.

You have received and acknowledged the Default Notice on 22nd March, 2012. Thus, the thirty days from the receipt of Default Notice expired on 20th April, 2012.

*Our Client rendered all possible co-operation to your during after Default Notice was issued to remedy the events of default. Even then, because you have NOT remedied the Events of Default under the PPA, our Client hereby issues this Termination Notice under the PPA and hereby **terminates the PPA dated 12th February, 2008 as per Articles 9.3.2 of the PPA with immediate effect.***

From today, you may note that there is no contractual or other obligations on our Client under the PPA dated 12th February, 2008."

- 27.** The perusal of the above notice would make it evident that through the Default Notice, GESCOM was called upon to make payment of default amount along with applicable interest due and to open a Letter Of Credit as agreed to under the PPA and despite the receipt of the notice, said defaults had not been remedied or cured within 30 days

from the date of the receipt of the Default Notice and therefore, the PPA was terminated through the Termination Notice dated 23.4.2012.

- 28.** So, both in the Default Notice as well as in the Termination Notice, the Appellant reminded about the obligation of the GESCOM not only to make the defaulted tariff amounts but also to make the payment of interest due and to open the Letter Of Credit.
- 29.** The State Commission has ignored the particulars of the dues drawn in the statement Annexed to the Default Notice dated 22.3.2012. Perusal of this Annexure sent along with the Default Notice gives the details of the amount due and amount paid by the GESCOM along with the dues and also the number of days the payment had been delayed along with the simple interest and compound interest. There is no dispute that the Default Notice as well as the Annexure has been received by GESCOM on the same day i.e. on 22.3.2012. Admittedly, the Respondent GESCOM had not disputed the fact about the details of the amount of interest shown in the Annexure.
- 30.** As narrated above, Clause 6.3 provides interest at the rate of SBI medium term Lending rate per annum which is always compound rate of interest.

- 31.** In the light of these materials available on record before the State Commission, it is quite surprising to note that the State Commission has held that in absence of the materials to show that interest was demanded, it cannot be held that the GESCOM defaulted in payment and interest thereon. This shows that there was complete non-application of mind over the materials available on record with regard to the demand.
- 32.** There is yet another aspect. From the close reading of Clause 6.1, 6.2 and 6.3 two things would emerge.
- 33.** Firstly clause 6.1 talks only of amounts payable for the delivered energy in accordance with Clause 5.1 i.e. at a rate of Rs.2.80 per unit. It does not talk about interest for late payment. Clause 5.1 of the PPA reads as under:

“5.1 Monthly Energy Charges:

a. GESCOM shall for the Delivered Energy pay, for the first 10 years from the Commercial Operation Date, to the Company every month during the period commencing from the Commercial Operation Date at the rate of Rs.2.80 (Rupees Two and Eight paise only) per Kilowatt-hour without any escalation for energy delivered to the GESCOM at the Metering Point.”

- 34.** Secondly, the late payment on interest thereon is dealt in Clause 6.2 and 6.3. These Clauses come after clause 6.1. Thus, the provision of Clause 6.1 cannot include the

provision of Clause 6.3 even by implication. As such, there is no provision mandating the Appellant Company to raise the invoice for the interest.

35. In other words, there is no requirement of raising invoice as regards the interest payable. The liability to pay interest is in terms of the Article 6.3 which is absolute and automatic.

36. If the intention of the parties was to raise the invoice separately for the interest also, then the specific clause could have been provided in the PPA explicitly. In the absence of the provision with reference to raising of invoice for interest, the State Commission cannot hold that since the Appellant did not raise invoice for payment of interest, non-payment of interest cannot be construed to be a default which gives rise to the issuance of Termination Notice.

37. In fact, even the GESCOM did not raise this issue before the State Commission that the Appellant had failed to raise any invoice and that was how it failed to make the payment.

38. In view of the above, the finding that the Appellant did not raise the invoice as regards the interest as per Clause 6.1 of the PPA is patently wrong.

39. Incidentally, the State Commission observed that the Appellant did not raise the issue of interest in the earlier proceedings namely in OP No.19 of 2009 and in the

absence of the said issue having been raised in the earlier proceedings, termination of the PPA is not valid.

40. This observation is totally wrong. The earlier proceedings were confined to the issue as to the existence of the valid PPA. The issue in the earlier proceedings is entirely different from the issue in the present proceedings.

41. According to the Appellant, in the earlier proceedings, the PPA did not come into existence. In the said proceedings, there was no occasion for the Appellant to have sought for the enforcement of the terms of the PPA which according to the Appellant was not even in existence. In the said proceedings, the Appellant could not raise the question of interest as per the PPA. Only after the PPA was held to be valid by the State Commission, which was confirmed by this Tribunal, the Appellant is at liberty to demand GESCOM through Default Notice to cure the defaults in making payment of tariff as well as the interest and when the GESCOM failed to cure the default, the Appellant automatically acquired the right to terminate the PPA as per Article 9.3.2. In the present proceedings only, the issue of interest could be raised. Thus, in this case, the said right has been duly exercised by the Appellant. Therefore, the reasoning given by the State Commission that this issue was not raised in the earlier proceedings is absolutely wrong.

42. The **next issue** is relating to the default of non-opening of Letter Of Credit. The State Commission has rejected the default relating to the non-opening of Letter Of Credit on the ground that the Appellant did not ask for opening of Letter Of Credit. This finding also is misplaced. The opening of Letter Of Credit is a payment security mechanism and provided in Clause 6.5 of the PPA.

43. Clause 6.5 of the PPA reads as under:

“6.5 Letter Of Credit: The GESCOM shall establish and maintain transferable, assignable, irrevocable and unconditional non-revolving Letter Of Credit in favour of, and for the sole benefit of, the Company. The Letter Of Credit shall be established in favour of, and issued to, the Company on the date hereof and made operational thirty (30) days prior to the Commercial Operation Date of the Project and shall be maintained consistent herewith by the GESCOM at any and all times during the Term of the Agreement. Such Letter Of Credit shall be in the form and substance acceptable to both the Parties and shall be issue by any Scheduled Bank and be provided on the basis that:

(i) In the event a monthly invoice or any other amount due and payable by GESCOM pursuant to the terms of this Agreement is not paid in full by GESCOM as and when due, the Letter Of Credit may be called by the Company for payment in full of the unpaid monthly invoice or any such other unpaid amount.

(ii) The foregoing as determined pursuant hereto, upon presentation of such monthly invoice or other invoice or claim for such other amount by

the Company on the due date there for or at any time thereafter, without any notification, certification or further action being required.

(iii) The amount of the Letter Of Credit shall be equal to one month's projected payments payable by the GESCOM based on the average of the annual generation.

(iv) The GESCOM shall replenish the LETTER OF CREDIT to bring it to the original amount within 30 days in case of any valid draw down.

(v) The company shall allow a rebate of 1.8% of the monthly invoice amount or actual expenditure/charges for the LETTER OF CREDIT account incurred, whichever is higher, and the same shall be deducted from the monthly invoice payable to the Company.

(vi) The Letter Of Credit shall be renewed and/or replaced by the GESCOM not less than 60 days prior to its expiration.”

44. The reading of the above Clause would reveal that the GESCOM was required to open the Letter Of Credit and make operational 30 days prior to the Commercial Operation Date of the project. There was no question of asking for the Letter Of Credit through a specific intimation sent by the Appellant. It is more so when the Letter Of Credit was required to be opened at the cost of the Appellant. As a matter of fact, as indicated above in the Default Notice, the Appellant had specifically notified the default of GESCOM to open Letter Of Credit. In the said notice, the Appellant demanded that the said default be made good in 30 days.

Admittedly, this was not done. When such being the case, the State Commission was wrong in holding that the Appellant had not called upon the GESCOM to open Letter Of Credit.

- 45.** Similarly, the State Commission cannot assume that the Appellant is required to make any demand for opening of Letter Of Credit before issuing Default Notice. This is contrary to the express provisions of the PPA which requires the intimation of the default by Default Notice only.
- 46.** Clause 6.5 (V) as quoted earlier, provides that in the event of opening of Letter Of Credit, the Appellant Company shall provide the rebate of 1.8% of monthly invoice amount or actual expenditure for the Letter Of Credit amount. This provision clearly points out that the GESCOM had been completely negligent about its rights and obligations under the PPA.
- 47.** In other words, it surrendered a rebate of Rs.1.8% by not opening the Letter Of Credit. That apart, the GESCOM does not dispute the fact that it failed to open the Letter Of Credit in pursuance of the Default Notice dated 22.3.2012. As a matter of fact, the GESCOM admitted default in its reply in not opening the Letter Of Credit which was received by the Appellant on 30.4.2012. This shows that the GESCOM admittedly defaulted by not opening the Letter Of

Credit in time. In other words, the GESCOM did not dispute having failed to open the Letter Of Credit but, the Respondent has merely contended that the Letter Of Credit was later opened on 24.7.2012, that too during the pendency in OP No.21 of 2012. This admission on the part of the GESCOM is sufficient to show that within 30 days of Default Notice dated 22.3.2012, the GESCOM failed to cure the said default and as such, the termination of the PPA effected in terms of the Default Notice dated 22.3.2012 as provided under Article 9.3 was valid. The opening of Letter Of Credit on 24.7.2012 which is subsequent to termination of PPA that too only after the present proceedings have been initiated by the Appellant is of no consequence.

- 48.** It is noticed that the State Commission has observed in the impugned order that the conduct of the Appellant in approaching the Commission without resorting to the resolution of dispute under Article 10.1 and 10.2 of the PPA is not bona fide. This observation is quite unwarranted. It has already been held by this Tribunal in Appeal No.145 of 2012 on 30.4.2013 in the case of Jasper Energy Private Limited Vs KPTCL that the Company should not be compelled to take recourse to mutual negotiations as per Article 10 of the PPA before the issuance of the Termination Notice. Therefore, this finding also, is quite wrong.

49. As pointed out by the learned Senior Counsel for the Appellant, similar issue has been raised in this Appeal as to the validity of the termination of the PPA with the similar facts interpreting similar provisions contained in the PPA in the other Appeal No.176 of 2009. This Tribunal in that judgment has held that consistent and continuous failure to make payment within 15 days, non-payment of penal interest and failure to open the Letter Of Credit amounts to breach of obligations and the event of default and once a Default Notice is issued in the absence of purchaser having cured the default within the specified time, notice of termination is valid.

50. The relevant findings have been given by this Tribunal in Appeal No.176 of 2009 in the case of BESCO Vs Devangere Sugar Company Limited. The relevant findings are as follows:

“49. Our conclusions are as follows:-

i) In the instant case, there is a consistent and continuous failure to make the payment within 15 days. This would certainly amount to breach of contractual obligation. Merely because the payment is made belatedly could not be considered to be the compliance of Clause 6 (1) & (2) of the PPA. The penal interest is also payable for late payment under Clause 6.3. Admittedly, the penal interest has never been paid. This is again a breach of obligation. There is one more breach under Clause 6.6. Under this clause the Corporation shall establish and maintain the revolving

Letter Of Credit in favour of the Respondent. Admittedly, this also not has been established. When there is a failure to fulfil the material and financial obligations this would amount to the “Event of default” as per Clause 9.2.2. In view of this the Respondent Company is entitled to send a Default Notice asking the Appellant to cure the said defect within time permitted. In the absence of the compliance to cure the defaults pointed out in the Default Notice, the Respondent is entitled to issue the Notice of Termination of Contract.”

- 51.** As decided in the judgment quoted above, when there is a failure to fulfil the material obligation as referred to in the PPA, the said failure would amount to the Event of Default and in that event, the Appellant would be entitled to send the Default Notice and in the absence of the compliance to cure the defaults, the Appellant is entitled to send the termination.
- 52.** The above findings would squarely apply to the present case also in all fours.

53. Summary of Our Findings

The Termination of PPA through Termination Notice Dated 23.4.2012 in this case is justified and valid in law.

- 54.** In the light of our above finding, the impugned order is set-aside and the prayer sought for by the Appellant in OP No.21 of 2012 is granted. The Appeal is allowed.

55. The State Commission is directed to pass consequential orders in terms of the findings and directions given in the judgment.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:07th Oct, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~