

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.21 OF 2013

Dated: 7th October, 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. Karnataka State Commission passed the impugned order dated 2.11.2012 dismissing the Petition filed by the Appellant in OP No.10 of 2009 by rejecting the prayer of the Appellant for the declaration of the termination of PPA and holding that the notice of termination of PPA sent by the Appellant to Gulbarga Electricity Supply Company Limited (GESCOM R-2), is not valid.
3. Aggrieved over this order, the Appellant has filed this Appeal.
4. The short facts are as under:
 - (a) The Appellant is a Generating Company. It has set-up a Mini Hydro Power Generating Station in two stages. The first stage comprises of one unit of 6 MW capacity. The second stage comprises of 7.2 MW capacity.
 - (b) The present case pertains to the Unit No.1 of 6 MW capacity in the first phase.
 - (c) The Appellant and the Karnataka Power Transmission Company Limited (KPTCL),the

predecessor in interest of GESCOM (R-2), entered into a Power Purchase Agreement on 16.1.2004. By this Agreement, the Transmission Company (KPTCL) agreed to purchase power to be generated from the Appellant's project as per the terms contained in the PPA.

(d) The Unit No.1 was commissioned in July, 2006. From then onwards, the Appellant started supplying power to GESCOM (R-2), the successor of KPTCL and raised the tariff invoices. However, the GESCOM (R-2) failed to pay the tariff in time. It also failed to pay the interest due on arrears for the delayed payment. In addition to this, the GESCOM (R-2) also failed to open the Letter Of Credit and provide security mechanism as per the PPA. Therefore, the Appellant issued a Default Notice dated 30.1.2009 and demanded for the payment and compliance with the terms of the PPA. GESCOM (R-2) however did not respond to this notice and continued to remain in breach.

(e) In view of the above, the Appellant on 4.3.2009 sent Termination Notice informing the GESCOM (R-2) that the PPA stood terminated in the light of the failure of compliance of the Default Notice and called-upon the GESCOM (R-2) to make the tariff payments with the

penal interest. Even for this notice, there was no response.

(f) Therefore, on 13.4.2009, the Appellant filed OP No.10 of 2009 before the State Commission praying for a declaration that the Power Purchase Agreement dated 16.1.2004 became void and to direct the GESCOM (R-2) to make the payment with interest. Later, the Appellant filed an amendment Petition before the State Commission raising additional grounds in support of the prayers made. The State Commission allowed this amendment. In this Petition, the GESCOM (R-2) filed objections. This is the first round of litigation.

(g) In this proceedings, the State Commission heard the parties and passed the order dated 23.12.2010, dismissing the said Petition in OP No.10 of 2009 filed by the Appellant and holding that when there is a breach of terms of payment or other terms, the Petitioner (Appellant) has a right to 3rd party sale but, the prayer for declaration of termination sought for in this Petition could not be granted.

(h) Aggrieved by this order of the State Commission, the Appellant earlier filed an Appeal before this Tribunal in Appeal No.31 of 2011.

(i) After hearing the parties, this Tribunal by the Judgment dated 15.12.2012, set aside the order of the State Commission and remanded the matter back to the State Commission directing the State Commission to give a finding as to whether there was any breach of the term of contract by way of non-payment and non-opening of the Letter Of Credit and to pass the consequential order.

(j) Accordingly, the matter was taken up by restoring the Petition in OP No.10 of 2009 for consideration of those issues by the State Commission. Ultimately, the State Commission by the order dated 2.11.2012 dismissed the Petition holding that though there was a breach of the term of the PPA, the termination was not valid as the PPA does not provide a right to terminate on account of non-payment.

(k) Being aggrieved over this order, the Appellant has preferred the present Appeal.

5. The learned Senior Counsel for the Appellant has submitted the following grounds to assail the impugned order dated 2.11.2012:

(a) The findings given by the State Commission to the effect that the PPA does not provide a right to terminate merely on the ground of non-payment of

arrears, is contrary to the findings rendered in the judgment of this Tribunal in Appeal No.31 of 2011. In fact, this Tribunal in the said judgment has made an interpretation and gave the meaning of Article 9.3 of the PPA is that when the Corporation commits default in making payment for a continuous period of three months, the company shall be permitted to sell power to third parties after termination of the PPA for such a default. This interpretation has not been followed by the State Commission.

(b) The State Commission has transgressed the scope of the limited remand by this Tribunal. The scope of enquiry on remand was confined as to whether the PPA has been validly terminated by the Appellant because of alleged breach of the terms thereof. It is only on this issue, the State Commission was asked to render a finding. This scope of enquiry could not be enlarged to reverse the findings given by this Tribunal. As a matter of fact, this finding given by the Tribunal was based upon the State Commission's findings given in the earlier order dated 22.12.2010 to the effect that the PPA was terminable when there is a default in making payment.

(c) The State Commission has totally misconstrued the scope and effect of Article 9.3 and 9.4 of the PPA in

holding that in case of a continuous payment default for a period of three months, the Appellant is entitled to sell power to third parties only till such time GESCOM (R-2) makes up the default and starts paying as per the terms of the PPA but the Appellant Company does not have a right to terminate as the Articles of the PPA do not contemplate termination of the PPA on continuous default in payment for three months.

(d) If the interpretation on Articles 9.3 and 9.4 of the PPA given by the State Commission is accepted, it is not only contrary to the intent of the PPA but also would create anomalous results. It will be virtually impossible that the Appellant would be ever able to supply energy to 3rd party. By holding that the 3rd party sale is only till the default continues, the State Commission has virtually rewritten the contract. This is not permissible under law.

(e) In the event of payment default by the GESCOM (R-2) for a continuous period of three months, the obligation of the Appellant to supply power to the GESCOM (R-2) ceases and the Appellant becomes entitled to sell power to the 3rd party thereby resulting in termination of the PPA except to the extent that the Appellant continues to be entitled to recovery of GESCOM's (R-2) default in payment of tariff. Thus, the

State Commission has totally misconstrued the scope of Article 9.3 and 9.4 of the PPA.

6. On the other hand, in justification of the impugned order dated 2.11.2012, the learned Counsel for the Respondent has elaborately argued that the interpretation given by the State Commission on the Articles 9.3 and 9.4 is perfectly valid and as such, the grounds urged by the Appellant do not warrant the interference of the order impugned.
7. Having regard to the submissions made by both the parties, we deem it appropriate to frame the following issues:
 - (a) Whether the conclusion arrived at by the State Commission that the PPA does not provide a right to terminate on the ground of non payment, is contrary to the conclusion recorded by this Tribunal in Appeal No.31 of 2011 dated 15.2.2012?
 - (b) Whether the State Commission could transgress the scope of the order of the limited remand passed by this Tribunal in Appeal No.31 of 2011 and enlarge the scope of enquiry by reversing the findings rendered by this Tribunal as well as the earlier findings of the State Commission in its order dated 22.12.2010 to the effect that the PPA was terminable on default of payment for a continuous period of three months?

(c) Whether the interpretation given by the State Commission with regard to scope and effect of Article 9.3 and 9.4 of the PPA is correct or not ?

(d) Whether the Appellant has established that the GESCOM (R-2) had committed payment of default for a continuous period of three months and therefore, in terms of Article 9.3 of the PPA, the PPA stood terminated?

8. Before analysing these questions, it would be proper to refer to some of the relevant facts so that the core of the issues raised in the Appeal could be well understood.
9. As narrated in the facts earlier, the Appellant issued a Default Notice on 13.1.2009 to the Respondent. As there was no response from the Respondent, the Appellant issued a Termination Notice on 4.3.2009 since there was a default committed by the GESCOM (R-2) for the continuous period of 3 months. Even after receipt of this Termination Notice, the GESCOM (R-2) did not come forward to make the payment.
10. Therefore, the Appellant filed OP No.10 of 2009 on 13.4.2009 before the State Commission praying for a declaration. In that Petition, the Appellant prayed stating that the Respondent was not making payment for the power supplied and due to that, it became impossible for the

Appellant/Petitioner, to perform the contract and hence the State Commission may declare that the PPA became void and unenforceable for the defaults committed by the GESCOM (R-2). In this Petition, the GESCOM (R-2) filed objections to the prayer made by the Appellant. Later, the Appellant filed an amended Petition to urge certain additional grounds. In that Petition, the Appellant has raised the grounds that the very PPA dated 16.1.2004 is not valid and binding on the Appellant (Petitioner) since on the date of the signing of the PPA, the KPTCL, the predecessor of the GESCOM (R-2), which had signed the PPA was barred from entering into PPA under Section 39 of the Electricity Act, 2003.

11. It was further stated in the amendment Petition that the assignment of the PPA by the KPTCL to GESCOM (R-2) itself is not valid as the same has been done without the consent of the Petitioner contrary to Clause 12.9 of the PPA.
12. On the basis of the pleadings of the parties, the State Commission had framed 4 questions for its consideration.
13. In this Appeal, we are concerned with the question No.2 and 4 which are as follows:

Question No.II: *Whether the PPA dated 16.1.2004 has become void due to impossibility of its performance by the Petitioner on account of non*

payment of bills and non opening of Letter Of Credit (L/C) by the respondents ?

Question NO.IV: *Whether the Petitioner is entitled to seek open access and sell the power to the third parties?*

14. On these grounds, the State Commission by the earlier order dated 23.12.2010, gave the following findings while dismissing the said Petition on these two issues:

Findings on Question No.II:

According to the Petitioner, the PPA shall be held to become void and unenforceable. This contention is misconceived. Non-payment and non-opening of the Letter Of Credit can be a ground for termination of the PPA but these cannot be the ground to hold that the contract has become void and impossible to be performed. The contract has provided for suitable remedies to the parties in Article 6, 9 and 10 of the PPA which could be resorted to. However, it cannot be held that the PPA has become void. Accordingly, issue No.2 is answered in negative.

Findings on Question No.IV:

The PPA has not become void. Once the PPA continues to be valid, the obligation of the Petitioner to

sell power during the subsistence of the PPA continues subject to receiving payments as per the terms of the PPA. If there is a breach of payment or other terms, the Petitioner has a right to 3rd party sale as well as to put an end to the contract. However, the question of granting relief on third party sale on the ground that PPA has become void, would not arise.

15. Aggrieved by this finding in the order dated 23.12.2010, the Appellant filed the Appeal No.31 of 2011. This Tribunal in that Appeal had framed the issues (a) to (g). Issues at (f) and (g) framed by this Tribunal are relevant in the present context. There are as follows:

(f) Whether the Appellant has any obligation to supply power to GESCOM (R-2) even if payment for the delivered energy remains outstanding for more than 90 days continuously?

(g) Whether the Agreement has been validly terminated by the Appellant because of alleged breach of the terms of the Agreement?

16. On these issues referred to above, the matter was remanded by this Tribunal to the State Commission by referring to the grounds of remand. Grounds for the remand referred to by this Tribunal on these issues are as follows:

(a) When an issue on fact as to whether there has been breach of the terms of the contract or not was raised before the State Commission, it was required to deal with the said issue and decide the same. But, the State Commission did not decide the said issue in the impugned order even though the documents were placed before the Commission to establish the alleged breach of contract.

(b) It is not prudent on the part of this Tribunal to embark for the first time on this question and to give a decision on a point of fact. Hence, it is better that the State Commission, as a Court of first instance, could be directed to render a finding instead of this Tribunal to embark upon this issue which has not been decided by the State Commission.

(c) Accordingly, as the State Commission did not render a findings in issues No. (f) and (g), this Tribunal is remanding the matter to the State Commission directing the State Commission to give findings on these issues after analysing the facts and figures placed before the State Commission and also after hearing the parties.

- 17.** With these directions, the matter was remanded to the State Commission through the Judgment in Appeal No.31 of 2011 dated 15.2.2011 to decide these issues.
- 18.** On receipt of the remand order, the State Commission has framed the following issues as directed by this Tribunal:
- (a) Whether the Appellant has any obligation to supply power even if payment for the delivered energy remains outstanding for more than 90 days?
 - (b) Whether the agreement has been validly terminated by the Appellant because of the alleged breach of the terms of the Agreement?
- 19.** These two issues framed by the State Commission are the exact issues which were framed by this Tribunal as (f) and (g) which were directed to be decided by the State Commission.
- 20.** Accordingly, the State Commission took up the matter, heard the parties and passed the impugned order rendering a finding on the above issues. The said findings are as follows:
- (a) The Petitioner has no obligation to supply electricity to the Respondent since there was a default in making payments by the Respondent for a continuous period of 90 days and so it is at liberty to

sell electricity to the 3rd party so long as the default continues. The first question is answered in affirmative.

(b) Even though there is a breach of the terms of the PPA by not making payment in time and by not opening the Letter Of Credit, the Appellant on that ground cannot straightway issue the Termination Notice since the PPA does not provide the right to the Appellant Company to terminate the PPA.

- 21.** Thus, it has been found that though there was no obligation to supply to GESCOM (R-2), since there was the breach, it can sell the power to 3rd party but, the Generating Company has no right to terminate the PPA. This finding is under the challenge in this Appeal.
- 22.** As far as the first finding is concerned, we need not go into its validity as the same is rendered in the affirmative. We are concerned with the second finding.
- 23.** The main argument advanced by the Appellant assailing this finding is that the rejection of the prayer by the State Commission for the declaration that the PPA has been validly terminated on the ground that the PPA does not provide such a right to terminate is not valid in law as the said finding is contrary to the findings given by the State Commission in the earlier order dated 23.12.2012 as well

as the findings given by this Tribunal in the judgment in Appeal No.31 of 2011 dated 15.2.2012.

24. Let us now refer to the discussion made and the findings rendered on this issue by the State Commission in the impugned order dated 2.11.2012 on this issue. The same is as under:

Question No.2 :

13. The second question is ‘Whether the agreement has been validly terminated by the appellant because of the alleged breach of the terms of the agreement?’

14. To determine this question, it is necessary to examine the Termination Letter dated 4.3.2009 (Annexure-C), issued by the Petitioner through its Lawyer, Shri Shivakumar Kalloor . The said letter reads as under : “.

“2. As per the said PPA agreement there are several clauses / articles included and conditions have been stated in the said PPA Agreement. In case, there is any breach of the conditions, the parties are at liberty to revoke or cancel the agreement and can go for open access as per the provisions of the Electricity Act, 2003.

3. In the said PPA agreement a condition is stipulated to make tariff payment within time. In case, if the tariff payments are not paid within 30 days time, my client will be entitled for penal interest at the rate of SBI Medium Term Lending rate per annum for such payment of delayed dues until the dues are paid in full. My client has been

supplying the electricity generated by his company as per agreement. Even though the tariff rates are fixed at lowest price. Your Corporation is not making tariff payments as per the said agreement.

4. As per Articles 6 (6.3) in case late payments , the company can claim penal interest as per rate of SBI Medium Term Lending rate per annum till the whole of the amount due is paid. Article 6 (6.3) also states that you have to furnish a Letter Of Credit. The tariff payment invoices for the months of August, September and October, 2008 are still due for payment. Since you have failed to make tariff payment invoices immediately and also having not furnishing Letter Of Credit in favour of my client company from any schedule bank the agreement dated 16.1.2004 (PPA Agreement) stands cancelled. My clients availing benefit of open access under the provisions of the Electricity act, 2003.

5. My client has been operating the unit to its maximum capacity and supplying energy from the unit No.1 to meet the requirement of the State, though tariff rates are lowest rates, you have failed to make payment of tariff payment within 30 day from due dates,. You have been purchasing the power at the rate of 7 to _ rupees per unit by paying higher rates from other sources

6. On 30.1.2009, my client had issued a notice to you stating that you have not made tariff payment within the dates and also has claimed penal interest for not having paid tariff payments for various periods. In this regard my client has also enclosed a chart mentioning the period of nonpayment of tariff payment invoices and also penal interest has been

also mentioned in the said chart. As on 30.12.2006 your corporation is liable to pay Rs.69,23,198/- to my client. I have enclosed the said chart of amount due by your corporation. In spite of receiving his notice dated 30.1.2009, you have failed to make payment. Till the whole amount is paid up-to-date, you are liable to pay penal interest. Since you have failed to make payment in due time and since you have failed to open Letter Of Credits in favour of my client company in any scheduled bank, you have violated the conditions mentioned in PPA agreement dated 16.1.2004, therefore, the agreement stands cancelled as there is breach and violation of the PPA agreement.

Kindly take notice that the said agreement dated 16.1.2004 (PPA Agreement) executed by my client in your favour stands cancelled. You are hereby called upon to make tariff payments due to my client with penal interest and also you are liable pay future penal interest from 31.12.2008. As on 31.12.2008, you are liable to pay Rs.69,23,198/- as per chart sent by my client for this peal interest has included, till you make payment for the said period. If you fail to make payment my client will be constrained to approach Hon'ble High Court or any other proper forum seeking for directions to make payment. My client will be also seeking for compensatory cost. A week's time is granted to you to clear of the dues to my client. The PPA agreement dated 16.1.2004 also stands cancelled due to your breach of the conditions and my client will apply for open access for 1st Unit, before competent authority. .."

15. It may be seen from the above Notice that while terminating the PPA dated 16.1.2004, the Petitioner has

not considered the terms of the PPA relating to issue of non-payment of the charges for the electricity supplied; in particular, Articles 9.3 and 9.4 of the PPA. As per Articles 9.3 and 9.4 of the PPA, which are extracted in the earlier paragraphs, the Petitioner, in case of non-payment of charges for the electricity supplied, cannot terminate the PPA and has to seek only third party sale or compensation on the basis provided under Article 9.4 of the PPA.

16. In the present case, the Petitioner, instead of availing the remedy provided in the PPA under Articles 9.3 and 9.4, has proceeded to terminate the PPA, which, in our view, was not in accordance with the terms of the PPA. Therefore, termination of the PPA was invalid and unenforceable.

17. The Petitioner has strongly relied upon the Order dated 8.10.2009 passed in OP No.17/2009, as well as the Order dated 8.5.2010 passed by the Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal No.176/2009, in the case of BESCO –Vs- Davanagere Sugar Company Limited and another, in support of its case that the termination of the PPA is valid, without noticing the distinction between the two PPAs. In the case of Davanagere Sugar Company Limited, the PPA signed therein contained specific terms for termination of PPA in case of non-payment. The said terms were as follows:

“9.2 Events of Default:

9.2.2 Corporation's Default: The occurrence of any of the following at any time during the Term of the Agreement shall constitute an Event of Default by Corporation:

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

9.3 Termination:

9.3.2 Termination for Corporation'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 Corporation in writing which shall specify in reasonable detail the Event of Default giving rise to the Default Notice, and calling upon the Corporation to remedy the same.

At the expiry of 30 (thirty) days from the delivery of this Default Notice and unless the Parties have agreed otherwise, or the Event of Default giving rise to the Default Notice has been remedied, Company may deliver a Termination Notice to Corporation. Company may terminate this Agreement by delivering such a Termination Notice Corporation and intimate the same to the Commission. Upon delivery of the Termination Notice this Agreement shall stand terminated."

In contrast, in the present case, the PPA does not provide for termination of the PPA on the ground of non-payment. It only provides for third party sale and compensation as provided under Articles 9.3 and 9.4 as remedy in case of payment defaults. Therefore, the Order of this Commission as well as the Order of the Hon'ble ATE, referred to above, will not come to the aid of the Petitioner's contention that the PPA is validly terminated by it.

18. The Petitioner has contended that it had again terminated the PPA on 13.1.2011 (Annexure-S) for payment default and for non-opening of Letter Of Credit, and therefore, the termination effected continues to subsist and it is not obliged to supply any electricity under the PPA to the Respondent. Further, the Petitioner, in support of the above termination of the PPA, has submitted that the Respondent, as on the date of Notice, had not opened the Letter Of Credit, as required under Article 6.6 of the PPA. Further, it is also contended that inspite of repeated requests, the Respondent was not making payments properly as per the terms of the PPA.

19. We have considered the second termination of the PPA affected by the Petitioner on 13.1.2011 and also the arguments made in support of the same.

20. We have already held, while examining the validity of the termination dated 4.3.2009, that in case of continuous payment defaults, the Petitioner under Article 9.3 of the PPA has a remedy and the right to go in for third party sale of electricity, but has no right to terminate the PPA on the said ground. For the same reason, we hold that the termination of the PPA on 13.1.2011 for defaults in payments is not in accordance with the terms of the PPA and hence not valid.

21. As regards the ground of non-opening of Letter Of Credit for termination of the PPA, we have considered the same and the provisions of the PPA relating thereto. Article 6.6 of the PPA states that the 'Corporation (Respondent) 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 (Petitioner). 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 Corporation at all times during the Term of the Agreement.'

22. It is observed that though the above term regarding opening of Letter Of Credit existed in the PPA dated 16.1.2004, the Petitioner did not invoke the same at any time, though the Petitioner commissioned the Project on 23.7.2006, much prior to the issuance of Notice, and for the first time, the Petitioner only mentioned about the said requirement in its Legal Notice dated 4.3.2009, that too, as a ground for termination of the PPA and not calling upon the Respondent to open the Letter Of Credit even at that point of time. The Petitioner having not enforced the term of opening of Letter Of Credit almost for five years from the date of the PPA, cannot suddenly terminate the PPA on the said ground. If the Petitioner was aggrieved by the non-opening of Letter Of Credit, he could have insisted upon the same when it commissioned its Project and started generating electricity and raised Bills, and that too, when these Bills were allegedly not paid by the Respondent. It appears to us from the facts that the Petitioner was more interested in terminating the PPA, on one ground or the other, than performing the same. Therefore, on the facts of this case, in our view, the termination of the PPA dated 16.1.2004 on the ground of non-opening of Letter Of Credit, cannot be sustained.

23. The reliance by the Petitioner on the Orders in the Davanagere Sugars case will not help, as in the said case, the Petitioner therein had called upon the Purchaser to open a Letter Of Credit and inspite of calling upon the Purchaser to open a Letter Of Credit and cure the said default, the Purchaser did not remedy the default. That is not the case in the present Petition.

24. Therefore, on facts as prevailing in this case, we hold that the termination of the PPA dated 16.1.2004, on the grounds urged, cannot be sustained.

25. The crux of the findings in the impugned order on this issue is as follows:

(a) On 30.1.2009, the Petitioner/Appellant issued a Default Notice to the Respondent stating that since the Respondent did not make the tariff payment in time thereby the Respondent defaulted in making the payment; the Respondent shall arrange to make the payment of the tariff amount as well as the penal interest within one week. As there was no response, on 4.3.2009, the Petitioner sent a Termination Notice to the Respondent for the breach of the conditions of the PPA by not making the tariff payments in time as well as penal interest and by not opening the Letter Of Credit. However, in the Termination Notice dated 4.3.2009, the Petitioner/Appellant did not refer to the terms of the PPA relating to the issue of non payment of charges for electricity supply in particular under Article 9.3 and 9.4 of the PPA.

(b) As per Article 9.3 and 9.4 of the PPA, the Petitioner in case of non payment of charges for the electricity supplied, cannot terminate the PPA. These

Articles in the PPA have merely to seek only for the 3rd party sale and claim for compensation. In the present case, the Petitioner in stead of availing the remedy by resorting to 3rd party sale or claiming compensation, has proceeded to terminate the PPA. This right is not provided to the Generating Company in the PPA. Therefore, the termination of the PPA was not valid.

(c) The Petitioner relied upon the judgment of this Tribunal in Appeal No.176 of 2009 dated 8.5.2010. That judgment would not apply to the present facts of the case. The PPA referred to in that case, contains specific terms for termination of the PPA in case of non payment. But, in the present case, the terms of the PPA are completely different from the other PPAs and these Articles of the PPA; do not provide any right for the termination of the PPA on the ground of non payment. Article 9.3 and 9.4 provide only for the 3rd party sale and for compensation as remedy in case of payment defaults.

(d) The Petitioner relied upon the subsequent Termination Notice dated 13.1.2011 for payment defaults and non-opening of the Letter Of Credit. While considering the validity of the Termination Notice dated 4.3.2009 in this impugned order, we have concluded that the Petitioner has got the remedy

to have a right to go in for 3rd party sale under Article 9.3 of the PPA and to claim compensation under Article 9.4 of the PPA. This finding would apply for the validity of the second Termination Notice dated 13.1.2011 as well.

(e) As per Article 6.6 of the PPA, the Letter Of Credit shall be established and made operational 30 days prior to the Commercial Operation Date. The Petitioner did not invoke the same in time though the project was commissioned as early as on 23.7.2006. The Petitioner referred to the non-opening of the Letter Of Credit only in the Termination Notice dated 4.3.2009 for the first time. The Petitioner having not enforced the term of opening of Letter Of Credit almost for 5 years from the date of the PPA, cannot suddenly terminate the PPA on the said ground.

(f) The above facts would show that the Petitioner was more interested to terminate the PPA on one ground or the other. Therefore, the ground of non opening of Letter Of Credit cannot be sustained.

(g) The reliance by the Petitioner on the judgment of this Tribunal in Davanagere Sugar Case would not help, as in the said case, the Petitioner had on a number of occasions, called upon the Purchaser to

open Letter Of Credit and in spite of calling upon the Purchaser to open a Letter Of Credit and cure the said default through several letters, the Purchaser did not remedy the default. That is not the case in the present case. Therefore, the termination of the PPA on the above grounds cannot be held to be valid.

- 26.** In the light of the above findings we shall now deal with the submissions made by the parties with reference to the validity of the impugned order by which it was held that the termination was not valid.
- 27.** The main argument of the Appellant is that specific finding had been given by this Tribunal in Appeal No.31 of 2011 which was filed by the Petitioner/Appellant as against the earlier impugned order dated 23.12.2010 to the effect that the relevant Articles of the PPA provide that when the Corporation commits defaults for a continuous period of three months, the Appellant is permitted to sell power to the 3rd party and this would amount to terminating the contract for such defaults and this finding of this Tribunal has not been followed.
- 28.** It is further contended by the Appellant that even the State Commission in the earlier impugned order dated 23.12.2010 while interpreting the Articles observed that “if there is a breach of terms of the payment or other terms,

the Petitioner has a right to 3rd party sale as well as to put an end to the contract” and even then, the State Commission contrary to its own findings, has wrongly held that breach of the terms would not be a ground for termination as the PPA does not provide for the said right to terminate on the ground of non-payment.

29. Let us now see whether any such finding has been given by this Tribunal in Appeal No.31 of 2011 dated 15.2.2012 as claimed by the Appellant. The relevant portion of the judgment is as follows:

“48. The clause 9.3 appears under Article 9 which deals with ‘TERM, TERMINATION AND DEFAULT’. The clause in question gives the clear meaning that when the Corporation commits default for a continuous period of three months the company shall be permitted to sell power to third parties through the grid system, meaning thereby that the contract would stand terminated for such default. No other meaning can be attributed to it...

49. In the original petition dated 13.4.2009 it was alleged that a sum of Rs. 69, 23,198 was remaining outstanding for payment in terms of the invoice and a chart was annexed to the petition and the said chart was sent to the Corporation. A legal notice was issued on 31.1.2009 which was also annexed to the petition before the Commission. The appellant sent another legal notice on 4.3.2009 alleging that there was breach of condition of agreement and as there was breach of condition the agreement stood cancelled. In the amended petition dated 17.8.2009 breach was also

alleged. In the reply before the Commission the respondent no. 2 contended that payments were made in terms of the PPA. The respondent no. 2 has raised a dispute that payment was not due for supply of 6.6 M.W. of power. The respondent no. 2 denied that the sum as alleged was not due for payment. That Letter Of Credit was not opened was a fact. Again, in the additional reply the respondent no. 2 contended that non opening of Letter Of Credit was at the instance of the appellant and it amounted to waiver. When an issue on fact as to whether there has been breach of the terms of the contract was raised before the Commission the Commission was required to deal with the issue but it did not. The impugned order of the Commission itself shows that it was contended before the Commission by the appellant that the contract was liable to be terminated because of breach of terms of payment. The Commission itself observed: "If there is a breach of terms of payment or other terms, the petitioner has a right to third party sale as well as to put an end to the contract". It is not that breach of terms of contract was not alleged before the Commission; yet the Commission avoided a decision although, documents were laid before the Commission through annexure allegedly showing breach of contract. ... Yet these documents require study and examination by the Commission so as to reach a decision as to whether there has been breach of the terms of the contract and whether consequently the contract stood terminated. It is not prudent on the part of this Tribunal to embark for the first time on a decision on a point of fact which for the reasons not known to us the Commission as a court of first instance did not render. It is only on this issue that the Commission should be asked to render a

finding and accordingly on this count alone the matter should be remanded back to the Commission.

51. As the Commission did not render any finding on issue nos (f) and (g) it is found necessary for this Tribunal, it being an appellate forum, to ask the Commission to give finding on analysis of facts and figures as were produced and as may be produced further before the Commission by the parties and on hearing them. Since the original petition was filed by the appellant before the Commission as far back as 13th April, 2009 justice demands that Commission give its finding on factual issues which it omitted to render despite the facts having been lodged with the Commission, by two months from the date of receipt of a copy of this judgment from the appellant or from the date of noticing this decision through web-site of this Tribunal whichever is earlier without indulging in grant of adjournments to either of the parties.”

30. The crux of the observations made in Para 48, 49 and 51 in the above judgment, by this Tribunal are as under:

(a) Article 9.3 deals with the title “Term, Termination and Default”. This clause gives the clear meaning that when the Respondent Corporation commits default for continuous period of 3 months; the Appellant Company shall be permitted to sell power to the 3rd parties, meaning thereby that the contract would stand terminated for such default.

(b) The Appellant sent a Default Notice on 31.1.2009 reminding and demanding for the payment of the outstanding amount. The Appellant sent the Termination Notice on 4.3.2009 alleging that since there was a breach of terms of the PPA, the said PPA stood cancelled. The Respondent GESCOM (R-2) contended that the payment was made in terms of the PPA. But, the fact remains that the Letter Of Credit was not opened. The Respondent contended that non opening of the Letter Of Credit was at the instance of the Appellant as the Appellant did not press for the said claim and it amounted to waiver.

(c) When this issue relating to the breach of terms of contract was raised, the State Commission was required to deal with this issue. But, this issue had not been dealt with by the State Commission. The State Commission itself observed in the impugned order that “if there is a breach of terms of contract, the Petitioner has a right to 3rd party sale as well as to put an end to the Contract”. The documents were produced before the State Commission showing breach of the PPA. However, this was disputed by the Respondent. Hence, documents required study and examination by the State Commission so as to reach at a conclusion as to whether there has been a breach

of the terms of contract and whether consequentially, the contract stood terminated.

(d) On these questions, it is not proper on the part of this Tribunal to embark upon this for the first time. It is appropriate for this Tribunal being the Appellate Forum, to direct the State Commission to give a finding on these issues on analysis of the facts and materials being produced before the State Commission by the parties and on hearing them. For this purpose, the matter is remanded to the State Commission to give its finding on these issues.

- 31.** The learned Senior Counsel for the Appellant vehemently argued that these are the findings given by the Tribunal on the basis of the observations made by the State Commission in its earlier order dated 23.12.2010 and those findings are binding on the State Commission and that therefore, the State Commission could not reject the prayer of the Appellant by giving some other interpretation which is not permissible under law.
- 32.** Though this argument looks attractive at the first blush, a thorough probe into the issue raised in this Appeal would make it evident that there is no merit in the point urged by the Appellant. The reasons are as follows:

- 33.** According to the learned Senior counsel for the Appellant, the interpretation had been made by this Tribunal in the above judgment giving a specific finding that clause 9.3 which deals with the 'Term, Termination and Default' would convey the meaning that when the Corporation (the Respondent) defaults for a continuous period of three months, the Company (the Appellant) would be entitled to sell power to 3rd party after terminating such a contract after the said default. This interpretation giving the finding should have been followed by the State Commission. This contention is misconceived.
- 34.** This Tribunal incidentally observed with regard to putting an end to the PPA on the basis of the observations made by the State Commission in the earlier impugned order dated 23.12.2010 to the effect that if there was a breach of terms of payment and other terms of the PPA, the Petitioner has a right to 3rd party sale as well as to put an end to the contract. In other words, this Tribunal did not make such interpretation on the basis of the relevant Article. Only on the basis of observations made by the State Commission, without referring to the relevant articles, this Tribunal has made this observation with regard to putting an end to the contract through termination. In both the orders dated 23.12.2010 passed by the State Commission and in the

judgment in Appeal No.31 of 2011 dated 15.2.2012, Articles under Clause 9.1 to 9.4 has not been dealt with.

- 35.** But in the impugned order dated 2.11.2012 the State Commission has dealt with this aspect in detail by referring to the relevant Articles not only Clause 9.3 but also Clause 9.4. In order to find out whether the observations made by this Tribunal as well as the observation made by the State Commission in earlier order would be a binding ratio, it would become necessary to refer to all the Articles contained in Clause 9 of the PPA.
- 36.** Article 9 deals with the title as “Term, Termination and Default’ and the relevant Articles 9 to 9.4 which is quoted as below:

9.1 Term of Agreement: *this Agreement shall become effective upon the execution and delivery thereof by the Parties hereto and unless terminated pursuant to other provisions of the Agreement, shall continue to be in force for such time until the completion of a period of twenty (20) years from the Scheduled ate of Completion and may be renewed for such further period of ten (10) years and on such terms and conditions as may be mutually agreed upon between the Parties, ninety (902) days prior to the expiry of the said period of twenty (20) years.*

- 37.** Article 9.1 indicates that the Agreement shall continue to be in force for a period of 20 years and may be renewed for a

further period of 10 years unless terminated as provided under the other provisions of the Agreement.

38. Article 9.2 of the Agreement reads as under:

9.2 If the Company commits a Construction default or a O & M Default thereafter, Corporation reserves the right to terminate the Agreement after giving a notice pf 90 days to the Company and inform the same to the Commission.

As per this provision of Article 9.2, when a Company namely the Appellant commits default, the Respondent Corporation reserves the right to terminate the Agreement after giving a notice to the Appellant and informing the same to the State Commission. We are not concerned in this Article 9.2, because we are not dealing with the default committed by the Appellant. In the present case, we are concerned with the default committed by the Respondent (Purchaser).

39. Article 9.3 of the Agreement deals with the defaults made by the Respondent Corporation as under:

9.3 In the event of an payment default by the Corporation for a continuous period of three months, the company shall be permitted to sell power to third parties through the Grid System by entering into a wheeling and Banking Agreement with the Corporation for which it shall pay wheeling charges to the Corporation at the rates applicable from time in addition to

banking charges at the rate applicable from time to time as approved by the Commission.

As per this Clause, when the Respondent Corporation committed a payment default for a continuous period of 3 months, the Appellant shall be permitted to sell power to the 3rd party through the Grid system by entering into a Wheeling and Banking Agreement with Respondent Corporation agreeing to pay Wheeling Charges as fixed by the State Commission. It is pertinent to point out that Article 9.2 deals with the default committed by the Appellant Company, which provides the right for the Respondent Corporation to terminate the Agreement.

40. On the other hand, Article 9.3 provides in the event of default by the Corporation Respondent, the Appellant Company can only sell the power to 3rd parties by entering into a Wheeling Agreement with the Corporation. It does not provide for the termination even though such a right has been provided under Article 9.2 to the Respondent Corporation.

41. Now let us refer to Article 9.4 which gives further right to the Appellant Company. This reads as follows:

“9.4 In the event of default by the Corporation in off taking the power produced by the Company for a continuous period of three months (other than due to events of force majeure and system constraints) or due to

default on the part of Corporation in making payments to the Company for a continuous period of three months, the Company is entitled to be compensated by the Corporation, for which company may initiate arbitration proceedings in accordance with Article 10. the amount of compensation to be paid will be determined by Arbitrators taking into consideration the life of the plant, the reasonable amount of return that the company is expected to achieve and the profits the company makes from sale of the amount of such compensation shall however be limited for a period not exceeding one year from the date of default.”

Article 9.4 would indicate that apart from the right of selling power to the 3rd parties (1) in the event of any default by the Respondent Corporation in off taking the power generated by the Appellant for continuous period of 3 months or (2) in the event of the default of the terms committed by the Respondent Corporation by not making payments to the Appellant for a continuous period of 3 months, the Appellant Company is entitled to claim for compensation from the Corporation. This right has been specifically given to the Appellant Company to initiate arbitration proceedings claiming compensation. But, this clause does not provide for the termination. In this context, we have to see the meaning of the title given in the Article 9 of the PPA indicating “Term, Termination and Default”.

- 42.** The word “**Termination**” quoted in the title of Clause 9, would relate to the right of the Respondent Corporation alone to terminate the Agreement by issuing notice to the Appellant under Clause 9.2. Similar right has not been provided to the Appellant Company through any other Clause to terminate the PPA in the event of default made by the Respondent Corporation. At the most the Appellant could initiate arbitration proceedings claiming compensation under Article 9.4.
- 43.** It is true that the State Commission while passing the earlier order on 23.12.2010 observed that the Petitioner (Appellant) has a right to 3rd party sale as well as to put an end to the contract. This cannot be the ratio decided by the State Commission since all provisions of the Article 9 in entirety i.e. 9.1 to 9.4, had not been considered in detail as in the present impugned order. Similarly, the Tribunal also made such observation on the basis of the title “Term, Termination and Default” without interpreting and explaining the meaning of the Clause especially 9.2, 9.3 and 9.4 and also in the light of the observations made by the State Commission.
- 44.** The term “Termination” found would only relate to the Article 9.2 which deals with the right of the Corporation to terminate. This right has been omitted to be mentioned in Article 9.4 which deals with the right of the Appellant

Company in the event of default committed by the Respondent Corporation.

- 45.** Therefore, the mere observations made by the Tribunal on the basis of the observations made by the State Commission, cannot be considered to be the ratio as the interpretation of the Articles has to be made only after taking into consideration of all the relevant Articles relating to the termination. But this was not done earlier.
- 46.** As mentioned earlier, there is no provision in the entire PPA which confers any right to the Appellant to terminate the PPA in the event of default committed by the Respondent Corporation except the right to claim for compensation and to sell power to the 3rd party.
- 47.** To put it in a nutshell, a specific right has been conferred by the PPA only to the Respondent Corporation to terminate the Agreement when the Appellant commits a default or O&M default, whereas this right is not available to the Appellant Company when the Respondent Corporation commits default.
- 48.** As a matter of fact, the close reading of the Tribunal's judgment would make it clear that this issue was left to be decided by the State Commission directing the State Commission to decide the issue after taking into consideration of the materials available on record as well

as the submissions made by the parties. As such, the Tribunal has not given any finding on this issue.

- 49.** In fact, the relevant question which has been framed by the State Commission as per the remand order is contained in the issue in (g) of the judgment of this Tribunal. The question is as follows:

“Whether the Agreement has been validly terminated by the Appellant because of alleged breach of the terms of the Agreement?”

- 50.** So, this question would indicate that the issue has to be considered and decided as to whether termination of the PPA was valid or not, because of the breach of the term of the Agreement.
- 51.** In other words, the question has to be considered by the State Commission is as to whether the termination can be held to be valid merely because there was the breach of the terms of the PPA. This Tribunal in the judgment in Appeal No.31 of 2011 dealt with this question.
- 52.** On the other hand, this Tribunal directed the State Commission to go into this question and decide the same after considering the materials available on record and after hearing the submissions made by the parties. That was the reason why this Tribunal has observed in the judgment as follows:

“The question whether there has been breach of contract and whether the contract has been legally terminated is a mixed question of law and fact”.

53. According to this Tribunal, both the questions had to be considered by the State Commission and decided the same as these questions involved mixed question of law and facts.

54. The only finding which has been given by this Tribunal in the judgment that when these issues have not been dealt with and decided by the State Commission, the Tribunal is required to remand the matter to the State Commission for deciding this question, as it is not proper for the Tribunal to give a finding on that. This is apparent from the observations made by this Tribunal as under:

“Yet these documents require study and examination by the Commission so as to reach a decision as to whether there has been breach of the terms of the contract and whether consequently the contract stood terminated”.

55. The above observation would involve two questions:

(a) Whether there has been breach of terms of the PPA?

(b) **Consequently** whether the PPA stood terminated?

- 56.** These questions had to be answered separately.
- 57.** When the breach of the terms of the contract is not established, the question of consequent termination does not arise. On the other hand, if the breach of the terms of the contract is established, then the Commission has to further decide whether the termination would be the direct consequence of the same.
- 58.** So, both these questions have to be considered and decided by the State Commission. That was the reason as to why this Tribunal observed the following:

“It is not prudent on the part of this Tribunal to embark for the first time on a decision on a point of fact which for the reasons not known to us, the Commission as a court of first instance did not render. It is only on this issue that the Commission should be asked to render a finding and accordingly on this count alone the matter should be remanded back to the Commission”.

- 59.** So, these two questions involving mixed facts and law have to be decided by the State Commission as a Court of the first instance. That is why the Tribunal observed that it is not proper on the part of the Tribunal to embark for the first time on a decision on a point of fact which has not been yet decided by the State Commission.
- 60.** Therefore, in our view, the State Commission in this impugned order has dealt with not only Article 9.1 and 9.3 but also dealt with Article 9.2 and 9.4 and made a thorough

analysis and ultimately concluded that the right of termination was vested with the Respondent Corporation alone in the event of default committed by the Appellant Company and that right has not been conferred upon the Appellant, in the event of default committed by the Respondent Corporation and as per these Articles, remedy for the Appellant Company is not by resorting to termination but by resorting to sale of electricity to 3rd party and for claiming compensation.

- 61.** The State Commission as mentioned earlier has for the purpose of answering the questions posed, adverted to various provisions of the PPA and referred to the plain language of the Agreement to come to the conclusion that the PPA contemplates only 3rd party sale in case of continuous default for a period of 3 months or to claim compensation by initiating arbitration proceedings and not the right of termination.
- 62.** As indicated earlier, the observations made by this Tribunal in the earlier judgment cannot be construed to mean that there was a finding that Article 9 contains a termination clause which would apply to the Appellant Company. This Tribunal had simply directed the State Commission to undertake the exercise to find out whether there was any such right as per the PPA by ascertaining the factual

aspects analysing the materials available on record as the same cannot be done in the Appeal at the first instance.

- 63.** At the risk of repetition, it is to be stated that in view of the question framed for the adjudication by the State Commission, as directed by the Tribunal, it is clear that this Tribunal has not recorded a finding on the aspect of the right of the Appellant for termination of the Agreement. If the observations made by this Tribunal on the said aspect are considered to be the findings of this Tribunal, the question of remand for consideration of the very same issue by the State Commission would not arise at all.
- 64.** While answering the question framed for adjudication, the State Commission has dealt with all the relevant Articles and found out that there is no provision countering the right to the Applicant Company to terminate the PPA except providing for a 3rd party sale or claiming compensation by initiating appropriate proceedings which in our is correct and justified.
- 65.** The Appellant has submitted that admittedly, the GESCOM (Respondent) has not established the Letter of Credit despite the receipt of the Notice dated 30.1.2009 in which the Appellant had notified in writing that Default in Opening Letter of Credit was also a continued Default and since the GESCOM had failed to cure the said Defaults, the

Appellant terminated the PPA. There is no dispute in the fact that GESCOM has to open the Letter of Credit in terms of Article 6.6 of the PPA. The Respondent Corporation is obliged to provide the same as a security for payment of tariff invoice. This obligation is a material and integral to payment obligation. We find that the Letter of Credit was not opened despite the Default Notice which resulted in termination, cannot be disputed.

- 66.** The Respondent has contended that the Letter of Credit was not established only at the instance of the Appellant who has not pressed the matter. This contention cannot be accepted.
- 67.** Under Article 6.6 of the PPA, the Respondent Corporation is bound to provide the Letter of Credit even before the Commercial Operation Date as per the PPA. In this case, Letter of Credit has not been opened despite the receipt of Default Notice. But, the failure of opening the Letter of Credit which has been established in this present case as indicated earlier, cannot be the ground for termination of the PPA as this right has not been conferred to the Appellant in the event of Default of not opening the Letter of Credit in the earlier paragraphs.
- 68.** Therefore, it has to be held that both non payment of tariff and interest as well as the non-opening of the Letter of

Credit could not give a right to the Appellant to resort for termination.

- 69.** As mentioned earlier, when there are other remedies available to the Appellant Company as referred in the PPA, the Appellant cannot exercise the right of termination as it has not been provided to the Appellant Company in the PPA.
- 70.** One more fact is to be noticed. There was a proceeding initiated by the Appellant for declaration in OP No.10 of 2009 after issuing a Termination Notice dated 4.3.2009 for declaring that the PPA stands terminated. This Petition in OP No.10 of 2009 was filed before the State Commission on 13.4.2009. This Petition was dismissed by the State Commission on 23.12.2010. This was challenged by the Appellant in Appeal No.31 of 2011 questioning the order of the Tribunal holding that the Termination Notice was not valid.
- 71.** Surprisingly, while this Appeal was pending before this Tribunal questioning the validity of the impugned order dated 23.12.2010, the Appellant sent another Termination Notice again terminating the said PPA on 13.1.2011. This is quite strange. There was no reason as to why the Appellant, while it has undertaken the process of establishing its right for termination and defending the

Termination Notice dated 4.3.2009 in the Appeal filed by the Appellant has chosen to send yet another Termination Notice on 13.1.2011. This would mean that the Appellant has decided not to pursue the earlier Termination Notice but has proceeded with the fresh proceeding on the basis of the 2nd Termination Notice dated 13.1.2011. However, we are concerned with the Termination Notice dated 4.3.2009 and not concerned with the 2nd Notice dated 13.1.2011. Hence we do not want to comment anything further about the 2nd Notice.

72. In view of the above, we do not find any infirmity in the findings given by the State Commission.

73. Summary of Our Findings

(1) The word “Termination” quoted in the title of Clause 9, would relate to the right of the Respondent Corporation alone to terminate the Agreement by issuing notice to the Appellant under Clause 9.2. Similar right has not been provided to the Appellant Company through any other Clause to terminate the PPA in the event of default made by the Respondent Corporation. At the most the Appellant could initiate arbitration proceedings claiming compensation under Article 9.4.

(2) It is true that the State Commission while passing the earlier order on 23.12.2010 observed that the Petitioner (Appellant) has a right to 3rd party sale as well as to put an end to the contract. This cannot be the ratio decided by the State Commission since all provisions of the Article 9 in entirety i.e. 9.1 to 9.4, had not been considered in detail as in the present impugned order.

74. In the light of our above findings, we hold that the Appeal has no merits.

75. Accordingly, the same is dismissed. However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 7th October, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~