Appellate Tribunal for Electricity
(Appellate Jurisdiction)

REVIEW PETITION No.6 of 2014
IN
APPEAL No.44 of 2013

Dated:1st May, 2014

Present:

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

In the Matter of:

Bangalore Electricity Supply Company Limited(BESCOM)
K R Circle
Bangalore-560 001,

……Respondent/Review Petitioner

Versus

1. **Shamanur Sugars Limited**
   374 4th Main,
   P.J Extension
   Davanagere-577 002 ….Appellant/Respondent

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

3. **Reliance Energy Trading Company Limited**
   3rd Floor, Reliance Energy Limited,
   Santa Cruz East,
   Mumbai-400 005

4. State Load Despatch Centre,
Karnataka Power Transmission Corporation Limited
26, Race Course Road,
Bangalore-560 001

……..Respondents/Respondents 2 to 4

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

Counsel for the Respondent(s): Mr. Basava Prabhu S Patil,Sr Adv
Mr. B S Prasad for R-1

O R D E R

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

1. Bangalore Electricity Supply Company Limited (BESCOM), the Distribution Company, is the Review Petitioner herein.

2. The Petitioner BESCOM filed the Petition in OP No.26 of 2008 before the State Commission claiming compensation from M/s. Shamanur Sugars Limited, the Generating Company, the 1st Respondent for the electricity sold by it to 3rd party during the subsistence of the Power Purchase Agreement between the Petitioner and the said Shamanur Sugars Limited.

3. This Petition was allowed by the State Commission directing the Generating Company to pay the compensation to the Petitioner Company.

4. As against the said order, the Shamanur Sugars Limited filed an Appeal before this Tribunal in Appeal No.44 of 2013.

5. After hearing the parties, this Tribunal allowed the Appeal filed by M/s. Shamanur Sugars Limited by the judgment dated 7.1.2014 holding that the BESCOM was not entitled to compensation.

6. Aggrieved by this judgment of this Tribunal, the BESCOM has filed this Review Petition seeking to set-aside the judgment dated 7.1.2014.

7. The short facts are as under:

(a) M/s. Shamanur Sugars Limited, the 1st Respondent, runs a Sugar Factory having co-generation facilities to generate electricity for its captive consumption. The surplus electricity is sold to the 3rd party.

(b) Erstwhile Karnataka Electricity Board had entered into a PPA with this Generating Company on 07.3.1998 for the purchase of electricity from its co-generation plant. Subsequently, the rights and obligations of the Electricity Board under the PPA were assigned to Karnataka Power Transmission

Corporation Limited and thereafter in favour of the BESCOM, the Petitioner.

(c) As per the PPA, the BESCOM agreed to purchase electricity at the base rate at Rs.2.60 per kWhr for the year 1997-98. The said base rate of Rs.2.60 per kWhr was to escalate at the rate of 5% from every year up to 2004-05. Thereafter, i.e. from 2005-06 onwards, the rate had to be fixed by mutual discussions between the parties. As per Article-11 of the PPA, the PPA was valid for 10 years from the date of synchronization. The plant was synchronised on 21.9.1999.

(d) The Generating Company supplied electricity to the Review Petitioner and raised invoices for the tariff as per the PPA. However, BESCOM was irregular in making payments and consequently the arrears of tariff accumulated in course of time.

(e) As per Article 5 of the PPA, this amount carried default interest at the prescribed rate. The BESCOM failed to honour the agreement for escalation of tariff @ 5% over and above the base rate of Rs.2.60 after 5 years.

(f) In view of the default in making the payments as per the PPA, the electricity charges as on 06.01.2004

amounting to Rs.2,04,14,108/- fell into arrears on which additional amount of Rs.94,50,923/- was payable towards interest. The Generating Company, the 1st Respondent made several requests demanding the payment of electricity charges as well as interest on delayed payments but the BESCOM, the Review Petitioner, failed to comply with it.

(g) As per the PPA, the rate had to be fixed after the year 2004-05 by mutual discussion. The Generating Company, the 1st Respondent in fact, requested the Review Petitioner through the letters dated 01.04.2003 and 24.01.2006 to agree for the same rate for the extended period but there was no response from the BESCOM. The BESCOM did not pay any amount for the energy supplied from 1.4.2005 to 31.12.2005.

(h) Under the above circumstances, the Generating Company, the 1st Respondent filed a Petition in OP No.10 of 2006 before the State Commission praying for the direction for the payment of above said amount including the interest. During the pendency of OP No.10 of 2006, the parties negotiated a settlement based on which, a Supplemental Agreement dated 05.05.2006 came to be entered into. As per this Supplemental Agreement, the rate agreed to under the

Original PPA was revised to the reduced rate. Except this change, there was no other change in respect of the terms and conditions of Original PPA including the provisions regarding interest which were to remain in force and bind the parties for the remaining period of PPA.

(i) In view of the above settlement, OP No.10 of 2006 filed by the Generating Company was withdrawn. Thereafter, the BESCOM paid only the principal amount without paying contractually agreed interest. Though on several occasions the payment of interest was demanded, the BESCOM failed to pay the interest. Therefore, by the Notice dated 5.6.2008, the Generating Company terminated the PPA. After the termination of the PPA, the Generating Company applied to SLDC for Open Access on 1.7.2008.

(j) Accordingly, the SLDC granted the Open Access on 8.7.2008. Thereafter, the Generating Company on the strength of Open Access sold the electricity to the 3rd party as per the Agreement entered with the said 3rd party.

(k) The Open Access was availed between 8.7.2008 and 30.11.2008. Accordingly, the Generating

Company, the 1st Respondent supplied power from 8.7.2008 up to 30.11.2008. Till then, no effort was made by the BESCOM to approach the State Commission for either questioning the Open Access granted on 8.7.2008 or challenging the termination notice issued on 5.6.2008.

(l) Only after the period of Open Access was over, the BESCOM filed Petition in OP No.26 of 2008 before the State Commission on 4.12.2008 seeking to set aside the Open Access consent issued by SLDC and to declare that the Generating Company was bound to supply power to the BESCOM and as well as to direct the Generating Company to pay damages for the period during which the power was not supplied to the BESCOM.

(m) This Petition No. OP 26 of 2008 was opposed by the Generating Company contending that in the absence of challenge to termination, there cannot be any declaration to the effect that the Generating Company was bound to supply power to the BESCOM. Only thereafter, the BESCOM filed an Application for amendment by adding a prayer to declare that the Original Agreement as well as the Supplemental Agreement was valid and binding on the parties up to

20.9.2009 i.e. the date of expiry as per the PPA. In this Amendment Petition, no relief was sought for quashing the termination notice.

(n) At this stage, on 3.5.2009, the Generating Company filed a Petition in OP No.14 of 2009 against the BESCOM seeking for the payment of interest amounting to Rs.1,89,01,696/-.

(o) The State Commission by the Order dated 2.11.2012 dismissed the said OP No.14 of 2009 holding that the Generating Company could not claim the interest especially when the earlier Petition in OP No.10 of 2006 claiming the arrears and the interest was withdrawn. This Order dated 2.11.2012 was challenged by the Generating Company before this Tribunal in Appeal No.72 of 2013. This Tribunal, though found that the Generating Company was entitled for interest, dismissed the Appeal filed by the Generating Company on the ground of delay and latches in preferring the claim towards interest.

(p) Thereupon, OP No. 26 of 2008 filed by the BESCOM was taken up for enquiry and heard. Ultimately, the State Commission through the Order dated 24.1.2013 though did not incline to set-aside the

consent for Open Access, partly allowed the Petition by directing the Generating Company to pay the compensation to the BESCOM at the rate of Rs.3.37/-kWhr for the electricity generated but not supplied to the BESCOM during July, August, September and November, 2008.

(q) Being aggrieved over the directions to pay the compensation through the Order dated 24.1.2013 the Generating Company; the 1st Respondent filed an Appeal in Appeal No.44 of 2013 before this Tribunal. This Appeal was heard and both the parties were given opportunity to make their submissions. They also filed the written submissions.

(r) Ultimately, this Tribunal, by the judgment dated 7.1.2014 allowed the Appeal No.44 of 2013 filed by the Generating Company holding that the BESCOM was not entitled to any compensation.

8. The BESCOM, on being aggrieved by this judgment dated 7.1.2014, has filed this Review petition principally raising two issues:

(a) The Claim of interest made by the Generating Company was not correct.

(b) The Generating Company, the Respondent-1 itself had admitted in the different proceedings before the Central Commission that the PPA was terminated only on 20.9.2009. This admission amounts to judicial admission.

9. The learned Counsel for the Appellant has strenuously contended that this Tribunal committed error by not dealing with these two issues and that therefore, the judgment dated 7.1.2014 is liable to be reviewed by correcting those errors.

10. The brief submissions on these two grounds are as follows:

11. The **first issue** is that the **claim of interest by the Generating Company was not correct**.

12. With reference to the above issue, the learned Counsel for the Review Petitioner has made the following submissions:

(a) Earlier, the Generating Company filed OP No.10 of 2006 claiming the amount of arrears as well as the interest as per the PPA dated 7.3.1998. By the supplemental Original PPA dated 5.5.2006 the parties agreed for the revised tariff for the period up to 20.9.2009. Thus, the tariff as per the Supplemental Agreement was in deviation of the tariff as per Original PPA dated 7.3.1998.

(b) Based on the supplemental agreement the invoices were raised by the Generating Company in regard to the tariff agreed. These invoices related to the period from 1.4.2003 to 31.3.2005. This amount had been paid by the BESCOM to the Generating Company. There was no invoice raised by the Generating Company for the interest.

(c) The principal amount and the interest which had been claimed by Generating Company in OP No.10 of 2006, did not survive upon the execution of the supplemental Agreement. Hence, it was withdrawn. Only on that basis, the Generating Company did not raise any invoice for the interest.

(d) The claim of interest of an amount of Rs.1,89,01,695/- made in OP No.10 of 2006 was withdrawn upon execution of the supplemental PPA which revised the tariff. Hence, the issue relating to the arrear amount as per the Original PPA based on which the interest of Rs.1,89,01,695/- was claimed, would not survive.

(e) At any rate, the interest of Rs.1, 89,01, 695/- was calculated based upon the rate fixed in the Original PPA. When the tariff relating to the principal amount

itself has been revised and reduced through the Supplemental Agreement, the question of payment of interest would not arise.

(f) Under the PPA a default notice of 3 months is to be given before for termination of the PPA. However, in the present case, the Generating Company sought to terminate the PPA by the letter dated 5.6.2008 without any default notice whatsoever.

13. The Second issue is that the Generating Company itself had admitted before the Central Commission in another proceeding that the PPA in question was terminated by an efflux of time only on 20.9.2009 and this is a judicial admission.

14. On this 2nd issue, the following submissions have been made by the learned Counsel for the Review Petitioner:

(a) The Generating Company itself in judicial proceedings before the Central Commission admitted that the PPA came to an end only on 20.9.2009 as per the Supplemental Agreement dated 5.5.2006. This is the judicial admission.

(b) This judicial admission on the part of the Generating Company regarding the fact that the PPA

came to an end only on 20.9.2009 as recorded in the Central Commission's order dated 9.10.2012, is binding on the Generating Company.

(c) It is not open to the Generating Company to take a contrary stand in the present proceedings. If the PPA has been terminated only on 20.9.2009 as admitted by the Generating Company, then the electricity was to be supplied by the Generating Company to the BESCOM up to 20.9.2009. Therefore, the belated stand taken by the Generating Company that the PPA had been terminated as early as on 5.6.2008 through the termination notice cannot be accepted.

(d) It is settled law that the judicial admission made by the party is fully binding. It is not open to the said party in the present proceedings to claim otherwise.

15. In reply to the above submissions made by the learned Counsel for the Review Petitioner on these two issues, the learned Senior Counsel appearing for the Respondent Generating Company has strenuously submitted that the contention in regard to the first ground to the effect that interest claim made by the Generating Company which was not correct, had not been considered by this Tribunal, is factually incorrect. According to the Respondent, this

Tribunal dealt with this issue elaborately and gave a finding in para-34,41 to 46, 83, 84, 85, 86 and 90 of judgment and on the basis of the various reasoinings given in these paragraphs, this Tribunal found that the interest amount was due but not paid and therefore, this cannot be the ground for the Review.

16. In regard to the 2nd ground for Review, the learned Senior Counsel for the Respondent Generating Company submitted that there was no pleadings regarding the judicial admission in the original petition filed by the BESCOM before the State Commission and that therefore, this new ground introduced for the first time in Appeal that too as a Respondent, can not be the basis for reviewing the Impugned Order passed by the State Commission and at any rate, the statements made before the Central Commission the different forum in a different proceedings and in a different context, cannot be construed to be a judicial admission so as to attract relevancy as per the Evidence Act in this proceeding and as such that cannot be the ground for Review.

17. Both the parties have cited a number of authorities to substantiate their respective submissions.

18. We have given our anxious consideration to the above submissions made by both the parties.

19. In the light of the above rival submissions, we are called upon to consider the following question: **"Whether any ground is made out in this Petition for Review of our judgment dated 7.1.2014"?**

20. The first ground is relating to the interest claim which is said to be incorrect.

21. As pointed out by the learned Senior Counsel appearing for the Generating Company in respect of the first ground that the claim of interest by the Generating Company was not correct, this Tribunal considered the said issue in detail in Para No.34, 41 to 46, 83, 84, 85, 86 and 90 of the judgment dated 7.1.2014. In these paragraphs, we have elaborately dealt with this point giving categorical finding that the interest amount payable by the BESCOM was due and the same was not paid. Therefore, the correctness of our findings cannot be gone into in the Review Petition. The question as to whether our findings in these paragraphs referred to above, are valid or not is to be considered only by Appellate Forum and the same cannot be re-agitated in this Review Petition.

22. That apart, the Petitioner itself admits that in terms of the Original PPA, the Tariff was agreed to be at the rate of Rs.2.60 per kWhr for the year 1997-98 subject to escalation

at the rate of 5% every year up to 2004-05 and in terms of the above, the tariff for the year 2002-03 was escalated to Rs.3.32 per unit. It is also an admitted fact that for the subsequent years i.e. 2003-04 and 2004-05, the tariff was only paid by the BESCOM at the rate of Rs.3.32 per unit i.e. without any escalation as agreed by the parties through PPA.

23. In that situation, the Generating Company filed a Petition in OP No.10 of 2006 claiming for the tariff as well as the interest as per Original PPA for the period from 1.4.2003 to 31.3.2004. The supplemental PPA was entered into on 5.5.2006, thereby both the parties had agreed to revise the tariff w.e.f. 1.4.2003, though the rate of escalation agreed was slightly lower. When that being the case, the liability to pay the interest on arrears as per revised rate cannot be disputed.

24. According to the Petitioner, no invoices were raised by the Generating Company for the interest and in any event, the question of interest would not arise as the principal amount as per the supplemental PPA had already been paid. This contention is misplaced.

25. The entitlement of the Generating Company for interest flowed from the original PPA. The supplemental PPA only

confirms the right and entitlement of the Generating Company for tariff at the enhanced rate as well as the interest on arrears though the rate of enhancement of tariff was slightly reduced. In other words, in the supplemental PPA, only the rate of tariff has been reduced by modifying the relevant Article. But, the Article relating to the entitlement of the claim for interest had not been modified.

26. Thus, the supplemental PPA confirms the right and entitlement of the Generating Company for the tariff at the revised rate as well as the interest on arrears though the rate of tariff was slightly reduced. As a matter of fact, this Tribunal in Appeal No.72 of 2013 filed by the Generating Company challenging the dismissal order in OP No.14 of 2009, by the judgment dated 7.1.2004 categorically held that the Generating Company was entitled for the interest by the judgment dated 2.11.2012.

27. Of course, the said Appeal No. 72 of 2013 filed by the Generating Company had been dismissed on the ground of delay and latches in preferring the claim but the findings with regard to the entitlement of interest remains intact. Therefore, the contention that no invoice was raised and that therefore, the BESCOM was not liable to pay interest cannot be accepted in view of the specific findings given by this Tribunal in the other Appeal disposed of earlier.

28. In other words, merely because rates were revised and consequently, the entitlement of tariff rate was revised, the liability to pay the interest on the amount to the extent revised cannot be wiped out, particularly when PPA did not provide for invoices to be raised towards interest.

29. It is submitted by the Review Petitioner that the quantum of the interest amount fixed on the basis of the original PPA rate cannot be correct, as the Original PPA rate has been revised under Supplemental PPA.

30. We are not concerned with the exact quantum of interest. We are only concerned with the question as to whether the Generating Company is entitled to the interest for delayed payments which we have already dealt with and given a findings in Appeal No.72 of 2013 dated 2.11.2012 as well as the Appeal No.44 of 2013 by our judgment dated 7.1.2014 to the effect that BESCOM was liable to the pay interest.

31. Similarly, the Petitioner incidentally raised another point that the termination notice dated 5.6.2008 is not valid in the absence of default notice. This contention also is misconceived.

32. Admittedly, the Review Petitioner filed a Petition in OP No.26 of 2008 before the State Commission mainly praying for setting aside the Open Access consent and consequently

claiming for compensation. In this Petition, there was no challenge to the validity of termination notice.

33. Thereafter, the Petitioner filed an Amendment Petition seeking for a declaration that the PPA was subsisting. Thus, it is clear that even in the Amendment Petition, the validity of the termination notice was not challenged before the State Commission. Similarly, no arguments were advanced before the State Commission questioning the termination notice on the ground that since default notice was not issued, the termination notice was invalid. In the absence of the specific plea raised before the State Commission, this point before this Tribunal cannot be urged by the Review Petitioner that too in the Review Petition.

34. The learned Senior Counsel for the 1st Respondent has cited the following authorities relating to the failure to make a specific plea with regard to the point and its impact:

(a) (2008) 17 SCC 491 Bachhaj Nahar V Nilima Mandal

"12. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully arrive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the

court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties and to prevent any deviation from the course which litigation on particular causes must take.

13. *The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the Court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when the defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus, it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.*

35. As indicated above, the termination notice was not challenged in OP No.26 of 2008. Even in the Amendment

Petition, the additional prayer was made to declare that the PPA dated 7.3.1998 and 5.3.2006 was valid and binding. Neither in the original Petition nor in the Amendment Petition, there were any grounds challenging the termination notice.

36. It is settled law that in the absence of the prayer made by the Petitioner seeking for quashing the Termination Notice, the Petitioner would not be entitled to claim for the damages.

37. With reference to the above legal aspect, the following decisions were cited by the Respondent:

(a) (2008) 3 SCC 491 182 Kandla Port V Hargovind Jasraj

"27. The termination of the lease deed was by an order which the plaintiffs ought to get rid of by having the same set aside, or declared invalid for whatever reasons, it may be permissible to do so. No order bears a level of its being valid or invalid on its forehead. Anyone affected by any such order ought to seek redress against the same within the period permissible for doing so.

(b) MANU/SC/1093/2013 I S Sikandar (D) by L.Rs. Vs K Subramani and Ors

"*As could be seen from the prayer sought for in the original suit, the Plaintiff has not sought for declaratory relief to declare the termination of Agreement of Sale as bad in law. In the absence of such prayer by the plaintiff, the original suit filed by him before the trial court for grant of decree for specific performance in*

respect of the suit schedule property on the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law."

38. In view of the above position of law, we do not see any ground to review the findings given on this aspect in our judgment especially when we do not find any apparent error.

39. Thus, the first ground of Review being not valid is accordingly rejected.

40. In regard to the **2nd Ground**, it is submitted by the learned Counsel for the Petitioner that M/s. Shamanur Sugars Limited , the Generating Company had itself admitted in a judicial proceedings before the Central Commission that the PPA came to an end only on 20.9.2009 as per the supplemental PPA Agreement dated 5.5.2006 and this judicial admission made by the Generating Company was in fact, recorded by the Central Commission in its order in Petition No.124 of 2011 and as such, this admission in the judicial proceedings would amount to judicial admissions and this is fully binding on the Generating Company and as such, it is not open to the Generating Company to contest the same in the present proceedings before the State Commission and as this aspect has not been taken into consideration, this Tribunal may consider that aspect and on that basis, the judgment of this Tribunal could be reviewed.

41. In order to substantiate its plea that the judicial admission made by the party is fully binding on the said party, the learned Counsel for the Appellant has cited the decision of Hon'ble Supreme Court in the case of Nagindas Ramdas V Dalaptram Ichharam (1974) 1 SCC 242. The relevant observations are as follows:

> *".....Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence are by themselves, not conclusive. They can be shown to the wrong."*

42. On the strength of this decision, it is submitted that the said admissions made by the Generating Company before the Central Commission that the PPA came to an end on 20.9.2009 and the same is conclusive and the Generating Company cannot now claim that the PPA was terminated on 5.6.2008 itself.

43. The 1st Respondent pointed out that this plea was not raised before the State Commission and hence, this plea cannot be entertained in the Appeal that too as a Respondent.

However, the learned Counsel for the Review Petitioner though admits that this point had not been raised before the State Commission has submitted that this new plea can be raised during the Appellate proceedings in order to show that even if the order was liable to be set-aside by rejecting the grounds on the basis of which conclusion was arrived at in the Impugned Order, yet the said order could be sustained on the basis of the some other ground which was not considered by the State Commission and that therefore he is entitled to raise a new ground to sustain the Impugned Order. The decision is (2014) 2 SCC 600 Sundaram Industries Limited V Employees Union. The relevant portion of the decision is as under:

> " 35. …..*A person who has entirely succeeded before a Court or Tribunal below cannot file an Appeal solely for the sake of clearing on one of the issues as he would not be a person falling within the meaning of the words 'person aggrieved'. In an appeal or revision as a matter of general principle, the party who has an order in his favour, is entitled to show that even if the order was liable to be set aside on the grounds decided in his favour, yet the order could be sustained by reversing the finding on some other ground which was decided against him in the court below."*

44. Refuting this point, urged by the Review Petitioner, the learned Senior Counsel appearing for the Respondent Generating Company cited the two decisions i.e. Udham

Singh V Ram Singh (2007) 15 SCC 529 and Sita Ram Bhau Patil v. Ramchandra Nago Patil (1977) 2 SCC 49.

45. On the strength of these decisions, it is argued that in the absence of an opportunity given to the party under cross examination to tender its explanation with reference to the question of admissions, the said admissions cannot be construed to be a relevant fact. The relevant observations are as follows:

(a) *Udham Singh V Ram Singh (2007) 15 SCC 529*

*"9…..**No doubt admission is the best evidence against the person who is said to have made it, but it can always be explained. One whose previous statement is to be treated as an admission or it is sought to be used, he has to be confronted with such a statement.** We find that though the documents, namely, the plaint in the earlier suit, has been brought on record but no request seems to have been made for summoning the plaintiff….**It would be appropriate that an opportunity is given to the person under cross examination to tender this explanation and clear the point on the question of admission**".*

(b) *Sita Ram Bhau Patil v Ramchandra Nago Patil (1977) 2 SCC 49*

*"13. **Section 17 of the Indian Evidence Act states that "An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the***

circumstances, hereinafter mentioned". In regard to dispute between the Appellant and the Respondent arising out of Surveys Nos. 194/15 and 200/29, Survey Nos. 201/2 and 194/13 were neither issues in fact nor relevant fact."

46. We have carefully considered the submissions of both the parties and gone through the decisions cited by both of them.

47. As pointed out by the learned Senior Counsel for the Respondent, unless an opportunity has been given to the party to show the circumstances under which such admissions was made by making a specific plea in the original proceedings, the so called admission before the some other Forum in some other proceedings cannot be considered to be a judicial admission with reference to the issue in question raised before the State Commission. Admittedly, there are no pleadings in the original proceeding filed by the Petitioner before the State Commission either in the Original Petition or in the amendment Petition sought to be incorporated such a plea.

48. As admitted by the Petitioner, this point had never been raised before the State Commission by making a specific plea in its Petition No.26 of 2008. The Order in OP No.26 of 2008 was passed only on 24.1.2013. Till then, the proceedings continued. During the course of the

proceedings, the so called judicial admission which was made by the Generating Company before the Central Commission in Petition No.124 of 2011 had not been brought to the notice of State Commission even though the so called judicial admission of the Generating Company was recorded by the Central Commission in as early as on 9.10.2012.

49. There is one more aspect in this case.

50. While considering the Appeal, we are called upon to go into the validity of the order of the State Commission only in the light of the plea of the parties before the State Commission. Now a new ground has been introduced for the first time that too as the Respondent in the Appeal which should not be the basis for considering the validity of the Impugned Order passed by the State Commission. According to the 1st Respondent, the specific stand taken by the Generating Company before the State Commission in the reply before the State Commission in OP No.26 of 2008 that the PPA was terminated by the Notice dated 5.6.2008. On that basis, the State Commission arrived at a conclusion that the Generating Company was liable to pay the compensation to the BESCOM, the Review Petitioner.

51. It is pertinent to point out in this context that even though the compensation was claimed through the consequential orders on the basis of the main prayer seeking for quashing of the consent of Open Access issued by the SLDC, the State Commission has ultimately held that the prayer for setting aside the Open Access consent cannot be granted.

52. Therefore, in the light of the stand taken by both the parties before the State Commission and also the conclusion arrived at by the State Commission with reference to the main prayer as well as the amended prayer; we are to deal with the issue raised by the Review petitioner in this Review Petition.

53. According to the learned Senior Counsel for the Generating Company, it filed a subsequent Petition in Petition No.124 of 2011 before the Central Commission altogether for a different and unconnected relief for which the date of termination bore no relevance and in that context, the admission of the Generating Company that PPA terminated by efflux of time would not be considered to be a judicial admission to be taken into account in the present proceedings.

54. It is further contended by the Respondent that the Petition No.124 of 2011 was filed before the Central Commission by

the Generating Company, challenging the insertion of modified Clause (m) in the Standing Clearance/NOC issued by the BESCOM in March, 2010 for selling power through exchange and in these proceedings the date of termination of PPA was of no relevance. If the opportunity had been given by raising this plea before the State Commission by the Review petitioner, the Generating Company would have filed relevant documents relating to this proceedings pending before the State Commission and would have demonstrated before the State Commission that in those proceedings, the date of termination of PPA was not relevant.

55. As pointed out by the 1st Respondent, no opportunity had been given to the party to tender his explanation and clear the point on the question of judicial admission. Therefore, the contention that said judicial admission would apply to the present case and the same was binding on the Generating Company does no merit consideration for Review of our judgment.

56. One more aspect which has been brought to the notice of this Tribunal at this stage by the Generating Company through the written submissions has to be taken note of at this juncture.

57. According to the 1st Respondent, the PPA had been terminated on 5.6.2008 through the termination notice. Thereafter, the energy was supplied by the Generating Company during the period from 1.12.2008 to 31.12.2009 to the BESCOM through the State Grid. This supply was made in pursuance of the Order of the Government of Karnataka under Section 11 of the Electricity Act. Acting upon the said Government Order, the Review Petitioner received supply voluntarily and without any reservations paid a tariff of Rs.6.50 per unit as quoted in the Government Order. This aspect pointed out by the 1st Respondent has not been disputed.

58. If this is not disputed, then it is clear that the Petitioner acted upon the Government Order and paid the tariff at the rate of Rs.6.50 per unit as fixed by the Government Order and at that point of time the Review Petitioner did not raise any objection with reference to the said rate which is not the rate quoted in the PPA or Supplemental PPA. This would show that the Review Petitioner itself admitted that both the parties acted upon the Government Order in the matter of supply and the payment of the rate without reference to the PPA or Supplemental Agreement which were already terminated.

59. As laid down by the Hon'ble Supreme Court, it may be true that even when the Impugned Order was laible to be set aside holding that the grounds decided by the State Commission were not valid but yet the Order could be sustained on some other ground, on the basis of some other material.

60. But the question which would arise is as to whether any material was made available before the State Commission for this Tribunal to consider the question as to whether the said material could be relied upon by the Appellate Forum for sustaining the Impugned Order.

61. In the present case, the plea had not been raised by the Review Petitioner before in the original proceedings nor was any material placed before the State Commission so that this Tribunal would consider the same for the purpose of sustaining the Impugned Order.

62. As pointed out by the 1st Respondent, unless an opportunity had been given to the party to explain the situation under what context the so called judicial admission had been made before the other Forum, that too in a different proceedings, the said admission cannot be considered to be a relevant fact so as to attract the Evidence Act to decide about the admissibility of the same. Therefore, the 2nd ground also in our view cannot be said to be valid to review our judgment.

63. Thus, both the grounds, in our view, are not valid grounds for Review. As such, they are liable to be rejected.

64. Accordingly, the Review Petition is dismissed.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:1st May,2014

√REPORTABLE/~~NON-REPORTABALE~~