

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.223 of 2012

Dated: 04th Jan, 2013

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

In the Matter of:

**AMR Power Private Limited
Suite No.701-702,
Prestige Meridian-2, No.30,
MG Road, Bangalore-560 001**

...Appellant

Versus

- 1. Karnataka State Electricity Regulatory Commission
6th & 7th Floor,
Mahalaxmi Chambers
No.9/2, M G Road,
Bangalore-560 001**
- 2. Mangalore Electricity Supply Co. Limited (MESCO)
1st Floor, Paradigm Plaza,
A.B. Shetty Circle
Mangalore-575 101**

...Respondent(s)

**Counsel for the Appellant(s) : Mr. Basava Prabhu S Patil, Sr Adv
Mr. Sanjeev Kr. Saxena
Mr. Anirudh Sanganeria
Mr. Venkata Krishna Kunduru**

Counsel for the Respondent(s): Mr. Venktia Subramaniam
Mr. S Sriganga
Mr. Raghavendra Srivastava
Ms. Swapna Seshadri
Mr. Rahat Bansal
Mr. Anand K Ganesan
Ms. Astha Tyagi

J U D G M E N T

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

1. The impugned order dated 23.8.2012 in this Appeal, is the interim order passed by the Karnataka State Commission directing the parties to maintain status-quo pending disposal of the main proceedings before the State Commission.
2. Aggrieved by the said order, the Appellant has presented this Appeal. The short facts are as follows:
 - (a) The Appellant, AMR Power Private Limited is a Generating Company. Karnataka Electricity Regulatory Commission is the First Respondent. Mangalore Electricity Supply Company Limited (MESCO), the Distribution Licensee, is the Second Respondent.

(b) The Appellant has developed a 24.75 MW capacity Hydel Power Project at Dakshina Kannad District in the State of Karnataka.

(c) Thereafter, the Appellant entered into a Power Purchase Agreement with the Distribution Licensee (Second Respondent) on 2.8.2006. By this agreement, the Distribution Licensee agreed to purchase from the Appellant the delivered energy from the project as per the terms set out in the PPA.

(d) As per the PPA for the first 10 years, the Distribution Licensee has to purchase from the Appellant the delivered energy @ Rs.2.80 per kWh.

(e) The construction of the Power project got delayed due to the various reasons beyond the control of the Appellant. While originally, the project cost was scheduled for Rs.97 Crores, the actual expenditure got increased to Rs.157 Crores. The tariff fixed under the PPA @ Rs.2.80 per kWh was without any escalation for 10 years. This was said to be much lesser than the tariff required by the project to meet the Appellant's financial commitments.

(f) Therefore, the Appellant approached the State Commission and filed a Petition in OP No.28 of 2009

against the Distribution Licensee (MESCO) praying for the declaration that the PPA was null and void ab initio and also for the direction for grant of Open Access and in the alternative, to fix revised tariff of Rs 5 per unit. However, the State Commission passed the final order on 23.12.2010 holding that the PPA was valid and however in regard to the alternative prayer for revising the tariff, opportunity was given to the Appellant to approach the Distribution Licensee, MESCO and to make the claim for revised tariff by producing all materials along with the supporting documents.

(g) The Appellant, challenging this order, filed a Review Petition in RP No.2 of 2011 before the State Commission seeking review of the order dated 23.12.2010. However, this Review Petition was dismissed by the State Commission.

(h) Thereupon, in pursuance to the liberty granted by the State Commission to approach the Distribution Licensee (R-2) for revised tariff, the Appellant sent representation dated 1.3.2011 to the Distribution Licensee furnishing all the particulars and documents relating to the actual project cost and consequent need for revision in tariff. However, there was no response for the same from the Distribution Licensee (R-2).

(i) In the meantime, the project started generating power from 6.9.2009. Consequently, the Appellant started supply of electricity to the Distribution Licensee (R-2) and raised the bills on 3.10.2009 at tariff as per the PPA. Thereafter, the Appellant submitted the invoices for subsequent months also.

(j) In respect of each of the bills, the distribution licensee (R-2) committed default by not making the payment within 15 days of the receipt of the bills as per the PPA. Thus, the Distribution Licensee made a delay in making payment of tariff for a continuous period of over 3 months which would amount to default as per the PPA. Apart from that, the Distribution Licensee failed to establish Letter of Credit in terms of the PPA even after repeated representation made by the Appellant to the Distribution Licensee, which also amounted to default.

(k) In the light of the consistent failure of the Distribution Licensee to perform its financial obligations in making payments for the outstanding bill amount within prescribed 15 days, the Appellant served a default notice on 26.5.2011 to the Distribution Licensee (R-2) demanding the distribution licensee to remedy the events of default under the PPA by making the

payment along with the interest within 30 days from the date of receipt of default notice.

(l) Despite receipt of the said notice, the Distribution Licensee failed to cure the events of default within 30 days. Therefore, the Appellant on 22.7.2011 issued notice of termination to the Distribution Licensee.

(m) Consistent with its statutory entitlement in the light of termination, the Appellant by the letter dated 16.9.2011 requested the Distribution Licensee (R-2) to grant consent for entering into wheeling and banking agreement to enable the Appellant to supply the electricity from the project to the 3rd parties within the State of Karnataka. However, on 22.9.2011, the Distribution Licensee (R-2) took a stand of refusal for giving such consent on the ground that the PPA was subsisting.

(n) Under those circumstances, the Appellant filed OP No.48 of 2011 before the State Commission on 18.10.2011 praying for the declaration that the PPA stood terminated and consequently seeking for a direction to the Distribution Licensee and other concerned to grant Intra State Open Access to the Appellant and for payment of interest and damages.

(o) In the meantime, after the termination of the PPA through the termination notice dated 22.7.2011, the Distribution Licensee continued to consume the electricity from the Appellant and therefore, the Appellant submitted provisional invoices from 1.10.2011 with a request to treat the same as invoice towards damages and requested for payment mentioning that the submissions of invoice dated 22.7.2010 was without prejudice to its right.

(p) On receipt of the invoice, the Distribution Licensee (R-2) on 17.10.2011, issued a cheque for Rs.3,36,05,600/- purporting to be full payment towards the power supplied for the month of September, 2011. Upon receipt of the said cheque, the Appellant by communication dated 20.10.2011, intimated that the payment could be deposited on provisional basis and not towards the power supply bill for the month of September, 2011. The Distribution Licensee (R-2), thereupon by the letter dated 3.11.2011, intimated to the Appellant that termination had not been agreed upon by the Distribution Licensee and therefore, the PPA was subsisting and consequently the invoice dated 1.10.2011 cannot be treated towards damages.

(q) In view of the stand taken by the Distribution Licensee, the Appellant filed an interim application in main OP No.48 of 2011 seeking for interim order directing the Distribution Licensee to pay for the power pumped by the Appellant to the Grid of the Distribution Licensee as per the PPA pending disposal of the OP No.48 of 2011. Accordingly, the same was ordered by the State Commission.

(r) At this juncture, the Appellant decided to supply power under Open Access to other States. Therefore, the Appellant sought permission from the State Commission to withdraw the OP No.48 of 2011 filed before the State Commission seeking for the Intra State Open Access, as it had decided to seek for the relief for the Inter State Open Access from the Central Commission. Accordingly, the State Commission by the order dated 22.3.2012 permitted the Appellant to withdraw the said Petition and dismissed the OP No.48 of 2011 as withdrawn.

(s) Thereafter, on 30.4.2012, the Appellant entered into an Agreement with PTC India limited for the sale of electricity through their exchange on becoming member client.

(t) In view of the above, the Appellant applied to State Load Despatch Centre to grant no objection certificate to sell the power under Open access to exchange through PTC India Limited. However, the State Load Despatch Centre by its communication dated 17.5.2012 declined NOC on the ground that PPA with Distribution Licensee (R-2) was subsisting.

(u) Being aggrieved, the Appellant approached the Central Commission in Petition No.141 of 2012 seeking for the direction to State Load Despatch Centre for issuing NOC.

(v) On 21.6.2012, the Central Commission admitted the Petition and issued notice to the Distribution Licensee (R-2). The Distribution Licensee (R-2) also appeared before the Central Commission and took time to file the objection. Accordingly, time was granted.

(w) At that stage, the Distribution Licensee (R-2), approached the State Commission and filed a Petition on 9.8.2012 in OP No.37 of 2012 before the State Commission praying for quashing of the termination notice dated 22.7.2011 and seeking for declaration that PPA was valid and subsisting. The Distribution Licensee (R-2) also sought an interim relief in the said Petition by seeking stay of the termination notice. The

Appellant took notice in the matter and filed preliminary objection for grant of stay contending that the stay cannot be granted as against the private action of termination especially when the termination notice had come into effect long back.

(x) The State Commission though agreed that the stay of termination notice cannot be granted against the private action of the termination of contract by way of interim order, passed an interim order issuing status-quo directing both the parties to maintain status-quo, pending disposal of the Main Petition before the State Commission.

(y) Aggrieved by this interim order, the Appellant has filed this Appeal mainly contending that the State Commission in fact granted stay of the termination notice under the garb of status-quo even though the State Commission accepted the principle that no stay could be granted as against the termination of the PPA.

3. The learned Counsel for the Appellant while assailing the interim order dated 23.8.2012 directing the parties to maintain the status-quo pending disposal of the main proceedings before the State Commission, has made the following submissions:

(a) The interim order of status-quo was passed in the Petition in OP No.37 of 2012 filed by the Distribution Licensee (R-2), the Respondent praying for quashing of the termination notice dated 22.7.2011 and for declaration that the Power Purchase Agreement dated 2.8.2006 is valid and subsisting. In fact, the Distribution Licensee sought interim relief seeking stay of the termination notice dated 22.7.2011 issued by the Appellant. The interim order directing the parties to maintain the status-quo passed by the State Commission, in effect amounts to stay of termination of PPA. That apart, this interim order would amount to granting final relief sought for in the Petition praying for declaration that the PPA was valid. It is settled law that during the pendency of the proceedings, the final relief cannot be granted as an interim relief which is contrary to the settled law as well as the Electricity Act, 2003.

(b) Without having formed any opinion as to the existence of the prima face case or balance of convenience in favour of the Distribution Licensee, the State Commission ought not to have passed the interim order directing the parties to maintain status-quo. In the absence of the Distribution Licensee making out a case of irreparable injury, the grant of interim order of status-quo is legally untenable.

(c) Having held that the stay could not be granted in the present case in the light of the principles laid down by the Hon'ble Supreme Court, the State Commission ought not to have granted the interim order of status-quo which would amount to stay of the termination notice without even imposing any condition so as to protect the interest of the Appellant. If at all any interim order is permissible justifying the prayer, the State Commission should have ensured that the Appellant is paid either as per the present market rate or by fixing the fresh tariff instead of the PPA rate which is very lower rate pending disposal of the main Petition.

4. On these grounds, the Learned Counsel for the Appellant has prayed for the following:

(a) To set-aside the impugned interim order dated 23.8.2012

(b) Direct the Distribution Licensee to pay for the electricity pumped by the Appellant to the Grid of the Distribution Licensee after termination of the PPA either at the rate of CERC or at any rate which is not less than R.3.80 per kWh subject to final determination.

5. In reply to the above submissions, the Learned Counsel for the Distribution Licensee (R-2) has made the following submissions:

(a) The Appellant originally filed Petition before the State Commission in OP No.28 of 2009 seeking for a declaration that the PPA was null and void. This Petition was dismissed by the State Commission on 23.12.2010. Thereafter, the Appellant filed Review Petition in RP No.2 of 2011 seeking Review of the order dated 23.12.2010.

(b) During the pendency of the Review, the Appellant issued default notice dated 25.6.2011 and in spite of appropriate reply received from the Distribution Licensee, the Appellant sent termination notice on 22.7.2011. Even after the termination, the Appellant continued to supply power to the Grid of the Distribution Licensee. Thus, this termination notice has not been acted upon by the Appellant. At that stage, the Review Petition also was dismissed on 22.12.2011.

(c) After dismissal of the Review Petition, the Appellant made a second attempt by filing OP No.48 of 2012 before the State Commission seeking for declaration that the PPA was terminated in pursuance of the termination notice dated 22.7.2011 and sought

for grant of Open Access. In this main Petition, the Appellant filed an application seeking interim payment of Rs.2.80 per unit as per the PPA for the energy supplied. Accordingly, the State Commission passed interim order on 23.2.2012 granting the said prayer as interim measure and directed the Distribution Licensee to make payment to the Appellant at PPA rate pending disposal of the main Petition in OP No.48 of 2012. Despite the fact that Appellant obtained the interim order as prayed for, the Appellant decided to withdraw his main Petition and sought permission for the withdrawal. Accordingly, the State Commission on 22.3.2012 dismissed the Petition in OP No.48 of 2012 as withdrawn. Thus, the attempt made by the Appellant to wriggle out of PPA has ended.

(d) Even after withdrawal, he made another attempt by approaching Central Commission seeking for the direction to the State Load Despatch Centre to grant Open Access.

(e) At that stage, the Distribution Licensee (Respondent) was constrained to file the Petition in OP No.37 of 2012 seeking for the declaration that the PPA was subsisting and also for quashing of the termination notice. This was entertained by the State Commission

and after hearing the parties, the State Commission on taking note of the fact that the Appellant was continuing to supply power to the Grid of the Distribution Licensee, the State Commission directed both the parties to maintain status-quo pending disposal of the main petition filed by the Distribution Licensee challenging the validity of the termination notice. As such, the interim order of the status-quo is as imminently just and perfectly legal order since it is well within the power of the State Commission U/S 94 (2) of the Act, 2003. The order passed by the State Commission in no way, amounts to stay of the Termination notice as claimed by the Appellant.

6. On these grounds, the Distribution Licensee (R-2) prayed for the dismissal of the Appeal so as to enable the State Commission to continue with the present proceedings and to dispose of the same.
7. In the light of the rival contentions urged by both the parties, the following question would arise for consideration:

“Whether the State Commission was justified in directing both the parties to maintain status-quo thereby giving the effect of stay on the termination notice, during the pendency of the main proceedings seeking for the quashing of the said

termination notice, when the State Commission itself, has held in the impugned order that the stay of the termination notice cannot be granted as against the private action of a termination of contract as laid down by the Hon'ble Supreme Court?

8. Before deciding the above question, it would be appropriate to refer to the relevant observation giving the reasons for granting status-quo in the impugned order dated 23.8.2012:

“9. We have considered the rival submissions.

10. At this stage of the Petition, we cannot go into the merits of the action of the Respondent. However, the facts, which are undisputed, indicate that the Respondent, at the first instance, had filed a Petition before this Commission seeking a declaration that the PPA had become null and void on account of the non-fulfilment of the Conditions Precedent prescribed in the PPA. The said Petition came to be dismissed by this Commission, holding that the Petitioner therein cannot take advantage of its own wrong and contend that the PPA had become null and void. The Respondent thereafter filed a Review Petition for review of the Order of dismissal passed by this Commission. The said Review Petition came to be rejected by this Commission, holding that the Review Petition cannot be used for re-arguing the case. The Petitioner (Respondent in the present case) during the pendency of the Review Petition terminated the PPA on 22.7.2011, on the ground of breach of terms of the PPA, even though the Petitioner had sent a reply in response to the Termination Notice explaining as to

why the PPA is not liable to be terminated. We have noticed the above facts only to ascertain whether the Petitioner has a prima facie case and we have not gone into the actual merits of the case pleaded by the Petitioner and the Respondent. From the above narration of facts, it is clear that the issues raised in the Petition on the validity of termination of the PPA by the Respondent needs to be gone into and decided.

11. It is contended by the Respondent's Counsel that this Commission cannot grant a Stay of the termination of the PPA as per the Judgment of the Hon'ble Supreme Court reported in AIR 1967 SC 1386. This submission of the Respondent's Counsel merits acceptance. However, this does not take away the power of this Commission conferred on it to grant an Interim Order justified in the circumstances, under Section 94(2) of the Electricity Act, 2003.

12. Section 94(2) of the Electricity Act, 2003 reads as under:

“An Appropriate Commission shall have the powers to pass such interim order in any proceeding, hearing or matter before the Appropriate Commission, as that Commission may consider appropriate.”

Under the above provision, in our view, this Commission has the power to grant an Interim Order as the Commission may consider appropriate.

13. Reference to the Order dated 2.8.2002 of this Commission passed in OP No.18/2002 between KPTCL and Tanir Bavi Power Co. P. Ltd., will be of no assistance to the Respondent's case, as the Stay Order in that Petition was passed under the Karnataka Electricity Reform Act, 1999, which did not contain any

express provision for grant of an Interim Order. As pointed out above, under the Electricity Act, 2003, Section 94(2) specifically confers a power on this Commission to grant such Interim Order as the Commission may consider appropriate.

14. At the time of hearing, it is submitted by the Petitioner that the Respondent is pumping electricity to the Petitioner's Grid even after termination of the PPA (vide Memo dated 14.8.2012 filed by the Petitioner). This is not denied by the Respondent. This is also admitted by the Respondent in its Interim Application dated 13.2.2012 filed in OP No.48/2011.

15. All other contentions of the Respondent, like whether this Commission can order specific enforcement of the Contract (PPA) entered into between the Petitioner and the Respondent, etc., cannot be looked into at this stage and can be decided at the time of final hearing and disposal of the main Petition.

16. Considering the facts and circumstances of this case, this Commission deems it appropriate to direct both the parties to maintain the status quo as existing, pending final disposal of the main Petition”.

9. The crux of the findings given in the impugned order while granting the interim order of status-quo is as follows:

(a) The issue raised in the Petition regarding the validity of the termination of the PPA filed by the Distribution Licensee needs to be gone into and to be decided only at the time of the final disposal.

(b) According to the AMR Power Private Limited (the Appellant), the State Commission cannot grant stay of the termination of the PPA as per the judgment of the Hon'ble Supreme Court reported in AIR 1967 Supreme Court 1386. This contention of the Learned Counsel for the party merits acceptance. However, this does not take away the power of the Commission to grant an interim order U/S 94 (2) of the Electricity Act, 2003 in the circumstances justified by the same.

(c) According to the Distribution Licensee, the AMR Power Private Limited is still pumping electricity to the Grid of the Distribution Licensee even after termination of the PPA. This is not disputed by the AMR Power Private Limited, the Generating Company. Therefore, the State Commission directs both the parties to maintain the status quo as existing, pending final disposal of the main Petition.

10. According to the Appellant, the State Commission ought not to have granted the order of the status-quo in the circumstances of the case which in effect amounts to stay of the termination notice having held that the stay of the operation of the termination notice issued by the private parties cannot be granted as laid down by the Hon'ble Supreme Court.

11. On the other hand, the Learned Counsel for the Respondent refuted the same by contending that this order of the status-quo would not amount to stay of the termination notice and in the present case, the State Commission has correctly passed the order of status-quo which helps the reservation of the status-quo when the question of validity of the termination is pending adjudication.

12. The Learned Counsel for the Appellant in order to support their plea, has cited following judgments as referred to in the impugned order such as:

(a) Mulraj –Vs- Raghonathji
[AIR 1967 SC 1386]

(b) PTC India Ltd, -Vs- Jaypee Karcham Hydro Corporation Ltd.[MANU/DE/1942/2010]

(c) Dale and Carrington Investment (P) Ltd. Vs P.K. Pratapan
[AIR 2005 SC 1624]

(d) Indian Oil Corporation Ltd. Vs Amritsar Gas Service and others [1991(1) SCC 533]

(e) M/s. NIBRO Ltd. –Vs- National Insurance Co.Ltd.
[AIR 1991 Del.25]

(f) KPTCL –Vs- M/s. Tanir Bavi Power Co.P.Ltd. and another (Dated 2nd August, 2002]

13. Apart from these decisions, he has also cited one more judgment which was decided by this Tribunal in Appeal No.176 of 2009 BESCO Vs. Davangere Sugar Co. Ltd.,

which dealt with the question of validity of the termination of the PPA on similar facts.

14. The learned Counsel for the Respondent on the other hand, has cited the following judgments:

- (a) 1990 (Supp) SCC 727
Wander Ltd and Another Vs Antox India Pvt Ltd
- (b) (1999) 9 SCC 449
Arason Enterprises Ltd v. Union of India and Another
- (c) (2001) 3 SCC 397 U.P. State Electricity Board
V. Searsole Chemicals Ltd
- (d) (2006) 5 SCC 282 Seema Arshad Zaheer and
Others Vs Municipal Corpn of Greater Mumbai and
Others
- (e) (2012) 5 SCC 416 Chandrika Chunilal Shah Vs
Orbit Finance Pvt Ltd & Others
- (f) (1998) 1 SCC 640 State of U.P Vs State of
Nagaland and Ors
- (g) Super Cassettes Industries Limited Vs. Music
Broadcast Private Limited (2012) 5 Supreme Court
cases 488
- (h) Vishwanath Sugars Ltd Vs. KPTCL (APTEL)
judgment in Appeal No.112 of 2008
- (i) Bihar Public Service Commission and Another Vs
Dr. Shiv Jatan Thakur 1994 Supp (3) SCC 220

15. These decisions are cited by learned Counsel for the Respondent in order to support his contention that the interim order passed by the subordinate authorities cannot be inferred with by the Appellate Court when the interim order is factual and the same was passed by the subordinate authorities to protect the interest of both the parties.
16. We have carefully considered the submissions of both the parties and given our thoughtful consideration.
17. At the outset, it shall be stated that we are not concerned with the question relating to the validity of the of the termination notice issued by the Appellant terminating the PPA entered into between the Appellant and the Distribution Licensee.
18. The said issue is pending before the State Commission and the State Commission alone is competent to go into said question. We make it clear that we do not incline to enter into the merits of the matter though various arguments were advanced by both the parties in respect of the validity of the termination notice.
19. In this Appeal, we are only concerned with the question as to **“Whether the State Commission was right in directing both the parties to maintain status-quo having held that**

the stay of the operation of the termination notice cannot be granted, in view of the Hon'ble Supreme Court judgment Mulraj –Vs- Raghonathji [AIR 1967 SC 1386] .”

20. In this context, firstly we have to see as to whether the State Commission has given a finding on accepting that the stay of the termination of PPA cannot be granted in the light of the Supreme Court judgment. The relevant observations made by the State Commission with regard to such finding are quite relevant. The said observation is as under:

“It is contended by the Respondent’s Counsel that this Commission cannot grant a Stay of the termination of the PPA as per the Judgment of the Hon’ble Supreme Court reported in AIR 1967 SC 1386. This submission of the Respondent’s Counsel merits acceptance. However, this does not take away the power of this Commission conferred on it to grant an Interim Order justified in the circumstances, under Section 94(2) of the Electricity Act, 2003”.

21. So, these observations would make it clear that the State Commission has accepted the argument of the learned Counsel appearing for M/s. AMR Power Private Limited that the operation of the termination of the PPA cannot be stayed as per the Hon'ble Supreme Court judgment.
22. So, this portion of the observation made by the State Commission would clearly indicate that the State

Commission has taken a view that the termination notice issued by the private party cannot be stayed in the light of the ratio decided by the Hon'ble Supreme Court.

23. Having decided so, the State Commission has granted the order of the status-quo directing both the parties to maintain the status quo. According to the Appellant, the status quo order would amount to stay order since by virtue of the status-quo order, the Appellant was constrained to supply its power to the Distribution Licensee (R-2) and the Distribution License could pay at Rs.2.80 as per the PPA rate, even though the PPA entered into between the parties on 2.8.2006 has already been terminated by the termination notice issued by the Appellant on 22.7.2011 which already ceased to exist.
24. It is contended by the Appellant that by directing the parties to maintain the status-quo, the Appellant has compelled to act upon the PPA by virtue of granting the stay of the operation of the termination notice issued on 22.7.2011.
25. On the other hand, it is contended by the Distribution Licensee that the interim order of the status-quo passed by the State Commission would not amount to stay. Therefore, we have to first consider the question as to whether the order of the status-quo would amount to stay of the operation of the termination notice or not.

26. It cannot now be disputed as accepted by the State Commission in the impugned order that the notice of termination of the private contract issued by the private party cannot be stayed by the quasi-judicial authorities as held by the Hon'ble Supreme Court. On the strength of this factual position, the Appellant has made the 1st prayer for setting aside the interim order of status-quo.
27. In the facts and circumstances of the case, if we conclude that the order of the status-quo would amount to stay order of the termination of the PPA which is not permissible as per the dictum of the Hon'ble Supreme Court, then the said status-quo order has to be set aside.
28. On the other hand, if we conclude that status-quo order passed in the present case would not amount to stay of the operation of the termination notice issued by the private party, then the said order has to be sustained.
29. In view of the above, we will now discuss the issue as to whether the order of the status quo passed in the present case would amount to the order of the stay of the operation of the termination notice.
30. In this context, we have to refer to the relevant observations made by the State Commission which decided to grant the status-quo order in spite of the fact that the State

Commission accepted the principle laid down by the Hon'ble Supreme Court.

31. According to the State Commission, even though the argument of the learned Counsel for the Generating Company that the stay of the termination of the PPA cannot be granted as per the Hon'ble Supreme Court judgment, this decision would not take away the power of the State Commission to grant the interim order under the circumstances justified U/S 94 (2) of the Electricity Act, 2003. We again quote this relevant observation which is as follows:

“It is contended by the Respondent's Counsel that this Commission cannot grant a stay of the termination of the PPA as per the Judgment of the Hon'ble Supreme Court reported in AIR 1967 SC 1386. This submission of the Respondent's Counsel merits acceptance. However, this does not take away the power of this Commission conferred on it to grant an Interim Order justified in the circumstances, under Section 94(2) of the Electricity Act, 2003”.

32. This observation would mean that the State Commission accepted the principle that no stay of the termination notice issued by the private party could be granted but, it is well within its power to grant an interim order in the circumstances of the case U/S 94 (2) of the Electricity Act, 2003. We quote this provision:

*“An Appropriate Commission shall have the powers to pass **such interim order** in any proceeding, hearing or matter before the Appropriate Commission, as that Commission **may consider appropriate.**”*

33. The reading of this provision would indicate that the State Commission will have the powers to pass **such** interim order when the State Commission considers **it appropriate**. This indicates two aspects:

(a) Even though the Stay Order of the termination of PPA could not be granted, the State Commission has got powers to pass **such interim order**; other than the stay order.

(b) Even this interim order could be passed only when the Commission considers it **appropriate** to pass **such interim order in the circumstances of the case.**

34. The above things would indicate that the State Commission has got the powers to pass such interim order after considering the circumstances but **it should not be such** in the nature of a stay of the operation of the termination notice issued by the private party as held by the Hon'ble Supreme Court.

35. In this case, the State Commission merely relied upon Section 94 (2) of the Electricity Act and observed that even

after termination, the generating companies have been pumping electricity to the Grid of the Distribution Licensee which is not disputed and under such circumstances, the State Commission passed the order of status-quo. This is the only circumstance to pass the order of status-quo. The State Commission has failed to consider two aspects:

(a) The interim order may be passed by the State Commission U/S 94 (2) of the Act, 2003 which must be such that it should not be in the nature of an order, staying the operation of the termination notice which has already been issued by the Private Party and served on the Distribution Licensee.

(b) The State Commission while passing the interim order must give reasonings in the said impugned order as to the various circumstances under which that order was to be passed taking into consideration of the balance of convenience of the parties to ensure that the interest of both the parties are not effected.

36. Both these aspects have not been taken into consideration by the State Commission in this case. The only material which has been relied upon by the State Commission to pass the status-quo order is of the pumping of the electricity by the Appellant into the Grid of the Distribution Licensee even after termination. In fact, by granting the

order of status-quo, both the parties are directed to act upon the clauses of the PPA by directing the Appellant to supply electricity to the Distribution Licensee and directing the distribution licensee to pay the rate of Rs.2.80 per unit as per the PPA.

37. In other words, the State Commission has actually granted the stay of the operation of the termination notice asking the parties to act upon the PPA which was said to be terminated long back. When it was brought to the notice of the State Commission relating to the ratio laid down by the Hon'ble Supreme Court that stay of the operation of the termination notice cannot be granted as against the private action of the termination, the State Commission in fact had accepted the merit of the said ratio but even then it passed the interim order giving the effect of stay. In the present case, the State Commission could have passed some interim order after hearing the parties providing some interim arrangements as agreed to by the parties. The State Commission could have given the reasonings which constrained the State Commission to pass such an order directing the parties to maintain the status quo by showing various circumstances regarding the balance of convenience, and irreparable injury etc. without affecting the interest of any party so as to ensure the termination

notice is not affected. Admittedly, those circumstances have not been quoted in the impugned order.

38. While the Appeal was heard by this Tribunal, the learned Counsel for the Appellant insisted for making some interim arrangements pending disposal of this Appeal since the Appellant was constrained to supply the power generated by it to the Grid of the Respondent as the power cannot be stored and even after such supply, the Respondent Distribution Company did not pay amount for the said supply. On the other hand, the Learned counsel for the Respondent Licensee submitted that the Appellant did not raise the invoices for the said supply and unless invoices are raised, they may not be able to pay the amount for the power supplied.
39. Therefore, regarding interim arrangements sought for, we have heard the learned Counsel for both the Appellant as well as the Respondent. After hearing the parties, we have passed the interim order dated 22.11.2011 making interim arrangement pending disposal of this Appeal:

“According to the learned senior counsel for the Appellant, they have been supplying power to Respondent No. 2 but they have not received any amount for the same from the 2nd Respondent and so the suitable direction be issued. On the other hand, the learned counsel for the 2nd Respondent submits

that based upon all the invoices so far received, they have been paying the amount towards those invoices.

In view of the above statements made by the parties, we deem it appropriate to direct the Appellant to raise the invoice and in turn, the 2nd Respondent shall pay the rate as per PPA to the Appellant. Accordingly directed.

It is made clear this arrangement is made as agreed by the parties, without prejudice to the rights of the respective parties. This is subject to the outcome of the proceedings”.

40. This was the interim arrangement made by this Tribunal taking into consideration the interest of both the parties making it clear that it was only ad-hoc arrangement. The State Commission could have made similar arrangements to ensure that the interests of both the parties are not affected. But, the State Commission simply passed an interim order of status-quo simply because the Appellant has been pumping into the Grid of the Distribution Licensee. This cannot be the appropriate order in the absence of the such circumstances warranting for the same.

41. In view of the above fact, we conclude that the interim order granting status-quo which is in effect a stay order of termination of PPA passed without showing the valid and appropriate circumstances is not legally sustainable.

42. However, instead of setting aside the status-quo order in entirety, we deem it appropriate to modify the said impugned order by making some interim arrangements as agreed by the learned Counsel for the parties as referred to in the order of this Tribunal dated 22.11.2011 pending disposal of the main petition before the State Commission.
43. Accordingly, it is directed that whenever the Appellant is supplying the power to the Distribution Licensee by pumping it to its Grid, the Appellant has to raise the invoices and send it to the Distribution Licensee and the Distribution Licensee in turn, shall pay the PPA rate to the Appellant which is an ad hoc rate. We make it clear that this order would not be taken to mean that pending disposal of the main proceedings before the State Commission, the operation of the termination of the PPA is stayed as it is only interim arrangement which is subject to the outcome of the proceedings pending before the State Commission.
44. With regard to the question as to the validity of the termination notice issued by the Appellant on 22.7.2011, the State Commission has to give the opportunity of hearing to both the parties and also to permit them to furnish the relevant documents before the State Commission and then the State Commission would decide

about the validity of the same without going to the other issues.

45. The Appellant through the 2nd prayer is seeking for direction to the Distribution Licensee to pay at the rate of CERC or at any rate not less than Rs.3.80 subject to final determination.
46. We would not be inclined to provide this relief since, we have directed for the interim arrangement as quoted in the earlier paragraphs. Therefore, this prayer is rejected.
47. Before parting with this case, we feel it is appropriate to record some of the aspects noticed in this case, which do not sound well.
48. One of the grounds in the Appeal raised by the Appellant is that the State Commission granted the interim order without considering the aspects of balance of convenience, irreparable loss or injury and comparative hardship etc of both the parties and consequently the impugned order suffers from infirmity. This ground is raised in Para 9.8 of the Memo of Appeal.
49. Admittedly, as we indicated above, the aspect of balance of convenience and comparative hardship etc., have not been considered in the impugned order. It is strange to notice that while replying to the said ground, the State

Commission in para 21 of its Written Submissions filed before this Tribunal has given its own reasonings to sustain the interim order directing the parties to maintain the status-quo which are not reflected in the impugned order. The relevant para is as under:

“The balance of convenience and irreparable loss would also lie in favour of the status quo order as otherwise; the distribution licensee and the consumers would be deprived of the electricity in case the petition succeeds. Supply of the electricity to the distribution licensee and onward to the consumers is in public interest. On the other hand, even if the petition is to be dismissed, the Appellant can be restituted as it is only the tariff, namely, monetary relief that the Appellant seeks”.

50. These reasonings relating to the balance of convenience and irreparable hardship etc admittedly, have not been referred to in the impugned order. The State Commission, one of the Respondents in the Appeal while filing written submissions, is not expected to give its own reasonings to defend the impugned status-quo order. The State Commission is expected to confine itself to the reasonings and circumstances mentioned in the impugned order only. The State Commission cannot find out new reasons or circumstances in order to sustain the status-quo order before this Tribunal. This attitude of the State Commission would indicate that the State Commission has

been trying to find out the new circumstances as against the Appellant in order to defend its status-quo order in an attempt to give reply to the ground urged by the Appellant with regard to the non consideration of the aspects of the balance of convenience and comparative hardship etc. Therefore, these reasonings cannot be accepted in the absence of those reasonings in the impugned order. If those reasons are available in the impugned order then this Tribunal would be able to consider the question as to whether these reasons are valid while directing the parties to maintain the status-quo which would amount to stay of the termination of the PPA.

51. The another ground urged by the Appellant in the Appeal is about unfair conduct of the Distribution Licensee in approaching the State Commission challenging the termination notice with huge delay i.e. after more than a year from the date of termination notice. This ground is mentioned in Para 9.12 of the Memo of the Appeal.
52. The reading of this ground would show that the Appellant found fault with the conduct of the Distribution Licensee, the Respondent in keeping quite for one year and then approaching the State Commission to initiate the proceedings challenging the termination of the PPA.

53. This is a direct allegation as against the Distribution Licensee. This has to be replied only by the Distribution Licensee and not by the State Commission.

54. Strangely, the State Commission has given plausible explanation as to how the delay was caused. This explanation by the State Commission contained in para-13 to 17 of the Written Submissions is as under:

“13. The other contention raised by the Appellant was that the State Commission ought not to have passed an order of status quo, when the petition was filed before the State Commission by the distribution licensee almost one year of the termination notice sent by the Appellant.

14. In this regard, the State Commission has in the impugned order already taken note of the fact that even after the termination notice being sent by the Appellant, the Appellant himself filed a petition for declaration that the PPA was validly terminated, during the pendency of the petition the Appellant supplied electricity to the distribution licensee and also claimed tariff as per the PPA. The application of the Appellant as late as on 13.2.2012 was for payments to be made as per the PPA, which order was granted by the State Commission on 22.2.2012.

15. In such circumstances, when the proceedings are pending before the State Commission in Petition initiated by the Appellant, there was no occasion for the distribution licensee to separately challenge the termination.

16. The above petition was withdrawn by the Appellant on 22.3.2012. The above would naturally

imply that the Appellant did not seek the termination of the PPA, which was the subject matter of the petition filed by the Appellant himself. The Appellant had continued to supply electricity to the distribution licensee all throughout and had risen by in terms of the PPA.

17. However, thereafter, the Appellant sought to avoid the PPA and supply electricity to third parties. In the circumstances, the distribution licensee had approached the State Commission with the petition leading to the passing of the impugned order. It is not the case that the Appellant had terminated the PPA, the parties had accepted the termination and acted on the basis of one year and after one year the distribution licensee approach the State Commission and the interim order was passed”.

55. These paragraphs referred to above would indicate that the State Commission is fully convinced with the delay by quoting various circumstances under which the Distribution Licensee was constrained to approach the State Commission after one year. The question whether there was enormous delay without any valid explanation, did not arise at all before the State Commission while considering the issue relating to the passing of the interim order namely status-quo. The aspect of the delay and the explanation has to be gone into only at the time of final disposal of the main Petition and not at this stage. Moreover, the State Commission did not refer to this explanation and did not

give any finding over this explanation in the impugned order.

56. There is no reason as to why the State Commission took pains to give a detailed explanation in support of the Distribution Licensee which is a party in the proceedings before the State Commission. It is not the case of the State Commission that the status-quo orders to be passed in the light of the valid explanation for the delay. It is not the case of the Appellant that the status quo order can only be passed when the Distribution Licensee approached the State Commission promptly without any delay.
57. The main objection raised by the Appellant before the State Commission was that the State Commission cannot grant the stay of the termination as per the dictum laid down by the Hon'ble Supreme Court. The Appellant before this Tribunal contends that the State Commission should not have circumvented the said legal bar by granting the status-quo order which in effect is a stay order. Instead of replying to this ground, the State Commission has unnecessarily referred to various earlier events which took place prior to the filing of this Petition and gave an explanation to say that there was no delay.
58. As indicated above, this is not the point which has been decided by the State Commission in the impugned order

and this explanation has been given only now before this Tribunal that too by the State Commission. In our considered view, the State Commission ought to have avoided in giving this explanation on behalf of the Distribution Licensee in the written submissions filed before this Tribunal. This aspect, as mentioned earlier, has got to be considered by the State Commission only at the time of final disposal after hearing the explanation from the Distribution Licensee and not at this stage.

59. One more ground has been raised by the Appellant. According to the Appellant, the State Commission by virtue of the status-quo order, prevented the Appellant from not availing the Open Access. This ground has been taken in Para 9.3 of the Memo of Appeal.
60. On this ground, it is contended by the Appellant that that State Commission by granting status-quo has actually passed an order of stay on the termination notice as the Appellant has virtually been prevented from availing the Open Access. The Appellant has raised the point as against the State Commission because of the fact that it became handicapped from seeking Open Access to supply to 3rd parties due to the status-quo order.
61. In dealing with this ground, the State Commission has replied in the written submissions stating that the Appellant

cannot claim rights to obtain Open Access to sell electricity to the 3rd party, when there is an existing PPA. The relevant portion of the statement is as follows:

“The reference to the proceedings before the Central Commission by the Appellant is irrelevant for the reason that it is the State Commission alone that can adjudicate upon the rights and obligations of the parties under the PPA. The very same question of the right of the Appellant to sell electricity to third parties is subject to the obligation on the part of the Appellant to sell electricity to the distribution licensee in terms of the PPA. Open Access is not an absolute right granted to the parties, but is subject to the other rights and obligations of the parties.....”

62. How can the State Commission decide the question with regard to the rights over the open access? The State Commission shall confine itself to the question as to whether status-quo order would amount to stay of the termination of PPA or not and whether the said order is proper in the light of the prevailing circumstances of the case or not. The State Commission is not expected to decide about the Appellant’s right of the Open Access in these proceedings that too at this stage through the written submissions.
63. As a matter of fact, the State Commission has actually given an opinion with reference to the right of the Appellant to seek the Open Access in the written submissions stating

that the PPA was existing. The relevant portion of the observation of the State Commission in the Written Submissions is as follows:

“In the circumstances, when there is an existing PPA and disputes arise between the parties, one party cannot be permitted to unilaterally apply for and obtain open access to sell electricity to third parties, without first settling the disputes under the PPA”.

64. The above observations would make it evident that the State Commission has made a reference that there is an existing PPA and dispute have arisen between the parties and therefore, the Appellant cannot be permitted to obtain Open Access. How can the State Commission now decide as to whether the PPA is existing or not in this Written Submissions? This observation in our view would amount to prejudging the issue. The State Commission ought to have avoided to observe that there is an existing PPA. That was the main question to be decided in the main Petition.
65. The learned Counsel for the Appellant by quoting these various observations as referred to above would raise a question now “as to whether in the light of the opinion and reference given by the State Commission in the written submissions on the various issues as against the Appellant, could the Appellant be able to project its case before

the State Commission fully without any apprehension and could the State Commission hear the Appellant with open mind?

66. Of course, we find some force in the apprehension expressed by the Appellant with regard to the opinion framed by the State Commission which is reflected in its written submissions as against the rights of the Appellant. However, we shall state that the State Commission in its anxiety to reply to each and every point, has observed in the written submissions which cannot be considered to be the final decision of the State Commission. We do not want to give any finding with reference to the alleged apprehensions of the Appellant and the alleged attitude of the State Commission as in our view, there need not be any apprehension.
67. As indicated above, we do not approve of the various observations and expressions contained in the written submissions filed by the State Commission as they are not relevant to the issue in question, raised before the State Commission as well as before this Tribunal namely the legality and propriety of the status-quo order. We have already dealt with about the same in the earlier paragraphs and modified the status-quo order by providing interim arrangements in line with the order passed by this Tribunal earlier dated 22.11.2011 as quoted above. At the same time, we would like to direct the State Commission that the question relating to the

validity of the termination notice which is a subject matter before the State Commission has got to be gone into, in the light of the submissions to be made by both the parties and the documents to be furnished by those parties before the State Commission, **uninfluenced by any of the observations or opinion referred to by the State Commission in its written submissions which are not germane to the main issue before the State Commission.**

68. We are sure that the State Commission will conduct the pending proceedings in an appropriate manner by providing full opportunity to both the parties to project their case without giving any room to any party to raise an accusing finger as against the State Commission with reference to its impartiality.

69. As a matter of fact, we must mention in this context that we have been dealing with several orders passed by the Karnataka State Commission in various Appeals filed against them and in those orders, we invariably find that the State Commission has been applying its judicial mind completely and giving its rulings on the basis of the detailed reasonings after thorough preparation for which the State Commission deserves our appreciation. Therefore, we have no doubt that the State Commission will deal with the

issue in question uninfluenced by any of the statements made by the Appellant with reference to the attitude of the State Commission as well as the views or opinion already expressed by the State Commission in its written submissions. We are only remind the State Commission the popular principle that **“Justice should not only be done but it should also appear to be done”**.

70. Accordingly, the status-quo order passed by the State Commission dated 23.8.2012 has been modified to the effect which has been mentioned in the above paragraphs pending disposal of the main petition before the State Commission. We must reiterate and make it clear that this interim order providing interim arrangement taking into consideration of the interests of both the parties cannot have the effect of stay of the termination of PPA.
71. The State Commission will dispose of the matter as expeditiously as possible. Both the Appellants and Respondents are directed to fully co-operate with the State Commission to enable the State Commission to pass appropriate orders in accordance with the law.
72. With these observations, the Appeal is disposed of.

(V J Talwar)

Technical Member

Dated:04th Jan, 2013

(Justice M. Karpaga Vinayagam)

Chairperson

✓ ~~REPORTABLE/NON-REPORTABLE~~