

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 30th June, 2014

Present:

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

RP NO.15 OF 2013
IN
APPEAL No.21 of 2013

In the Matter of:

**Narayanpur Power Company Limited
A-21, Manyatha Residency,
Arabic College Post,
Bangalore-560 045**

.....Review Petitioner/Appellant

Versus

- 1. Karnataka Electricity Regulatory Commission
6th and 7th Floor,
Mahalakshmi Chambers,
No.9/2, M.G. Road,
Bangalore-560 001**
- 2. Gulbarga Electricity Supply Company Limited,
Station Road,
Gulbarga-585 102**

...Respondent(s)

Counsel for the Appellant(s) : Mr. Basava Prabhu S Patil, Sr. Adv
Mr. Venkatakrisna Kunduru
Mr. D J Basu
Mr. B S Prasad

Counsel for the Respondent(s): Mr. S S Naganand, Sr Adv
Mr. Raghavendra S Srivastava
Mr. A M Shodhan Babu

ORDER

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

1. Narayanpur Power Company Limited is the Review Petitioner.
2. This Review Petition has been filed by the Petitioner for the review of the Judgment of this Tribunal dated 07.10.2013 dismissing the Appeal no. 21 of 2013 filed by the Petitioner.
3. The said Appeal No. 21 of 2013 was filed by the Petitioner before this Tribunal assailing the Order of the Karnataka State Commission dated 02.11.2012, whereby the Petition in O.P. No. 10 of 2009 filed by the Petitioner was dismissed.
4. The short facts leading to filing of this Review Petition are as follows:
 - (a) The petitioner is a generating company.
 - (b) It has set up a Mini Hydro Power Generating Station in two stages. The first stage comprises of one

unit of 6 MW Capacity and the second stage comprises of 7 MW Capacity.

(c) Originally, the Review Petitioner and the Karnataka Power Transmission Company Limited (KPTCL), the purchaser in interest of the GESCOM, the Respondent herein, entered into a Power Purchase Agreement on 16.01.2004.

(d) In terms of the said Agreement, the GESCOM agreed to purchase power to be generated by the Review Petitioner from Unit No.1. Unit – I was commissioned and the Petitioner started supplying the power to GESCOM and raised tariff invoices.

(e) GESCOM committed the breach of the financial obligations stipulated under the PPA. The breaches are as follows:

(i) It failed to pay tariff in time, and as on 31.12.2008 Rs.69,25,198/- was outstanding towards tariff and penal interest.

(ii) It failed to open Letter of Credit.

(f) Therefore, the Petitioner issued a default notice dated 30.01.2009 calling upon the Respondent to cure the same. However, GESCOM did not respond and chose to remain in breach.

(g) Hence, the Petitioner sent a termination notice on 04.03.2009 and called upon GESCOM to make the tariff payments due with penal interest. Even for this notice, there was no response.

(h) Under the above circumstances, the Petitioner filed the Petition before the State Commission in O.P. No. 10 of 2009 seeking for the declaration that the PPA between the parties stands cancelled due to the breach of the conditions and for giving a direction to the Respondent to pay the tariff invoice payment with penal interest. After hearing the parties, the State Commission dismissed the O.P. No. 10 of 2009 by the Order dated 23.12.2010.

(i) Being aggrieved over this Order, the Petitioner filed the Appeal No. 31 of 2011 before this Tribunal challenging the said Order.

(j) Ultimately by the Judgment dated 15.02.2004, this Tribunal allowed the Appeal and remanded the matter for consideration of the two issues.

(i) Whether there was breach of financial obligations on the part of the Respondent GESCOM.

(ii) Whether the termination notice had been validly issued.

(k) After remand, the State Commission restored O.P. No. 10 of 2009 and took up the matter for fresh consideration. After hearing the parties, the State Commission by the Order dated 02.11.2012 dismissed the Petition holding that (1) there was breach of the financial obligations on the part of the GESCOM (2) but

Petitioner could not resort to the issue of termination notice, since the PPA does not provide a right to terminate on the ground of non-payment.

(l) Being aggrieved over this Order, the Petitioner again filed the Appeal before this Tribunal in Appeal No. 21 of 2013.

5. According to the Petitioner in the said Appeal before this Tribunal, the finding of the State Commission that the PPA does not provide a right to terminate on the ground of non-payment is contrary to the finding given by this Tribunal in the earlier Judgment in Appeal No. 31 of 2011, which had attained finality, and as such, the State Commission without going into the aspect of the scope of the limited remand, has gone beyond by holding that there is no provision in the PPA giving right for termination.
6. On this issue, both the parties were heard by this Tribunal in Appeal No. 21 of 2013, and ultimately by the Judgment dated 07.10.2013, this Tribunal dismissed the Appeal confirming the order of the State Commission dated 2.11.2012 by holding that there is no provision in the PPA that confers right to the Petitioner to terminate the PPA in

the event of default committed by the GESCOB except the right to claim for compensation and to sell the power to third parties.

7. Aggrieved by this Judgment, the Petitioner has filed this Review Petition seeking for Review of the aforesaid Judgment.
8. The learned Senior Counsel appearing for the Review Petitioner has urged the following grounds:

(a) In earlier Appeal No. 31 of 2011, this Tribunal, while remanding the matter to the State Commission conclusively held that when the GESCOB Corporation commits default for continuous period of three months, the generating company shall be permitted to sell the power to the third parties, meaning thereby that the contract would stand terminated for such default. Similarly, the State Commission also in its Order in O.P. No. 10 of 2009 dated 23.12.2010 observed that “if there is a breach of terms of payment or other terms, the Petitioner has a right to third party sale as

well as to put an end to the contract". In the light of the said observation, this Tribunal in Appeal No. 31 of 2011 remanded the matter only on this ground to decide about the breach of financial obligations and to pass the consequential Order relating to the termination. Despite the specific finding given by this Tribunal, the State Commission again dismissed the O.P. No. 10 of 2009 holding that the PPA does not provide a right to terminate on the ground of non-payment. Thus, the scope of enquiry in the remand had been enlarged by the State commission. When this Tribunal in the earlier Judgment in Appeal No. 31 of 2011 has specifically held that the Petitioner had a right to third party sale as well as to put an end to the contract by termination, this Tribunal has now wrongly held that the said finding is not a ratio. Thus the conclusion of the Tribunal in Judgment in Appeal No. 21 of 2013, that the findings given in Appeal no. 31 of

2011 are mere observations is wrong since this Tribunal in the earlier Appeal gave a finding that binds the parties to the Judgment by application of the principles of res-judicata. As such, there is an apparent error in the Judgment in Appeal No.21 of 2013.

(b) Earlier in another matter, the State Commission while interpreting the PPA has held that when there is breach of obligation, the seller company is permitted to terminate the PPA in O.P. No. 3 of 2009. This view of the State Commission was upheld by the Tribunal in the case of “SANDUR POWER COMPANY LIMITED VS. K.P.T.C.L” in Appeal No. 180 of 2009 and Appeal No. 104 of 2010 decided on 11.04.2011. In view of the above ratio laid down in Appeal No. 180 of 2009 and Appeal No. 104 of 2010, the conclusion arrived at by this Tribunal in Appeal no. 21 of 2013 is wrong and as such it calls for Review.

(c) Even assuming that there is no provision for termination in the PPA, the right of the petitioner to put the PPA to an end by its conduct of refusing to pay the tariff, interest or failure to open Letter of Credit is also traceable to law of contract particularly Section 39 of the Indian Contract Act. As per this Section, when a party to a contract has refused to perform its promise in its entirety, the promise may be put an end to the contract. In the present case, there is failure of GESCOM either to make good the defaults or respond to the default notice. This would make it clear that the defaults were deliberate and the GESCOM had no intention to cure the same by committing breach of these obligations. Hence, the petitioner would be entitled to put an end to the contract. The right to put an end to the contract in view of Section 39 of the Indian Contract Act is available to the Petitioner, independent of any clause in PPA. Having regard to

this position also, the review of the Judgment of this Tribunal in Appeal No. 21 of 2013 is called for.

(d) In support of his contentions, the learned Senior Counsel appearing for the Petitioner has cited various authorities.

9. In reply to the above grounds, the learned Senior Counsel appearing for the contesting Respondent has elaborately argued in justification of our Judgment in Appeal No. 21 of 2013 by referring to the various paragraphs of the said Judgment.
10. In view of the rival contentions, the only question that arises for consideration is whether there is any case made out for review of our Judgment in Appeal No. 21 of 2013 dated 07.10.2013.
11. It is settled law that the review of an Order or Judgment can be sought only on the following three grounds;
 - a) If there is an apparent error on the face of the record; or

b) If there is discovery of any new fact or important matter or evidence which after exercise of due diligence was not within the knowledge of the Review Petitioner or could not be produced by him when the Judgment was rendered or Order was made;

c) If there is any other sufficient ground to review the matter.

12. In the light of the limited grounds, which can be urged in the review and also in view of the submissions made by both the parties, we do not find that any of these grounds have been established warranting for review of our Judgment. We are of the view that the petitioner has not made out a case for review of the impugned judgment but on the other hand, the present attempt through review petition on the part of the Petitioner is to re-agitate his case in this review petition, when there is remedy of an Appeal available to the Petitioner. The reason for our above conclusion are as follows:

a) The Petitioner issued a default notice to GESCOM on 30.01.2009 to cure the defects by making the payment of arrears of tariff and interest as well as to open the Letter of Credit. There was no response. Hence, the Petitioner on 04.03.2009 sent a termination notice and called upon the GESCOM to make the tariff payments with penal interest. Even for this, there was no response. Hence, the Petitioner filed O.P. No. 10 of 2009 to give a declaration with reference to the termination in view of the breach of condition and also for direction to the GESCOM to make the payments.

b) This Petition in O.P. No. 10 of 2009 was dismissed on 23.12.2010. As against this Order, the Petitioner filed an Appeal No. 31 of 2011 before this Tribunal. After hearing the parties, this Tribunal had set aside the Order of the State Commission dated 23.12.2010 and remanded for consideration of the two

issues. Accordingly, the State Commission on receipt of the remand Order had framed those two issues as directed by this Tribunal. They are as follows:

i) Whether the Appellant has any obligation to supply power even if payment for the delivered energy remains outstanding for more than 90 days?

ii) Whether the agreement has been validly terminated by the Appellant because of the alleged breach of the terms of the agreement?

13. On these two issues, as directed by this Tribunal, the State Commission heard the parties and passed the Order dismissing the Petition in O.P. No. 10 of 2009 on 02.11.2012 by giving its findings.

14. The finding for the first issue was that the Petitioner has no obligation to supply electricity to the GESCOM since there was a default in making the payment by the GESOCM for continuous period of ninety days and hence the Petitioner was at liberty to sell the electricity to the third party so long as the default continues. The finding for the second issue

was that even though there was breach of terms of PPA by not making the payment in time and by not opening the letter of Credit, the petitioner cannot straight away issue termination notice on that ground, since the PPA does not provide the right to the petitioner to terminate the PPA.

15. The crux of this finding is that though there was no obligation to supply electricity to GESCOM since there was a breach, the Petitioner can sell the power to third party, but the Petitioner has no right to straight away terminate the PPA as there is no provision for termination. As against these findings, the Appellant has filed the Appeal in Appeal No. 21 of 2013.

16. The main argument advanced by the Appellant in Appeal No. 21 of 2013 is that the finding rendered by the State Commission that the PPA does not provide the right to the Petitioner to terminate is not valid in law as the said finding is contrary to the findings given by this Tribunal in Judgment in Appeal No. 31 of 2011 dated 15.02.2012. This aspect has

been considered by this Tribunal in Appeal No. 21 of 2013 and gave a finding that the State Commission's Order that there was no provision for termination of the PPA is perfectly justified.

17. In this Review, the Petitioner has raised the very same ground that the said finding given by both the State Commission as well as this Tribunal in Appeal No. 21 of 2013 is completely contrary to the finding given by this Tribunal in earlier Appeal No. 31 of 2011.

18. In fact, this Tribunal in the above Appeal in Para No. 7 of the Judgment formulated four questions for consideration. The first question was as to whether the State Commission's conclusion that the PPA does not provide for the right of the termination on the ground of non-payment was contrary to the finding arrived at by this Tribunal in Appeal No. 31 of 2011. The other question framed in the said Judgment was as to whether the State Commission transgressed the scope of the Order of the limited remand and enlarged the scope of

the remand Order by reversing the finding of this Tribunal in the earlier Appeal No. 31 of 2011. The another specific question is with regard to the consideration of the scope and effect of articles 9.3 and 9.4 of the PPA and as to whether there was any default in payment for a continuous period of three months resulting in the PPA being terminated.

19. On a perusal of our Judgment in Appeal No. 21 of 2013, it is clear that these questions have been elaborately considered by this Tribunal and finding has been given with reference to the scope of the earlier Judgment. On a detailed consideration, this Tribunal had come to the conclusion after detailed discussions in Para Nos. 25 to 48 of the Judgment in Appeal No. 21 of 2013.

20. In this judgment, we have dealt with the earlier Order passed by the State Commission as well as the Judgment given by this Tribunal in Appeal No. 31 of 2011. In that, we have elaborately discussed the scope of remand by virtue of the direction given by this Tribunal in Appeal No. 31 of 2011

directing the State Commission to give finding with regard to two issues as mentioned above.

21. The first issue was with reference to the breach of obligations; the second issue was with reference to the right to terminate the agreement.
22. The Judgment given in Appeal No. 31 of 2011 directing the State Commission to frame these two specific issues would clearly indicate that these two issues are mutually different. Therefore, this Tribunal in Appeal No. 21 of 2013 confirmed the finding with regard to the first issue, which is a different and a separate issue. While referring to the second issue, this Tribunal found that the right of termination has been given only to the respondent-Corporation but such right had not been conferred on the generating company of the Petitioner. At the most, the Petitioner has got the right to seek third party sale and for claiming compensation. The answer for the second issue cannot be considered to be consequential to the first issue. The first issue has been

decided by the State Commission in favour of the Petitioner. With regard to the second issue, it has been decided by both the State Commission as well as this Tribunal that the breach of obligation would not straight away give the right to the Petitioner for termination, in the absence of the provision in the PPA relating to the termination. In this finding, we do not find any apparent error on the face of the record, as claimed by the Petitioner.

23. According to the Petitioner, the ratio laid down by this Tribunal in Appeal No. 180 of 2009 and Appeal No. 104 of 2010 in the matter of SANDUR POWER COMPANY LIMITED would clearly be applicable to the facts of the present case, but the said ratio has not been followed both by the State Commission as well as this Tribunal.
24. This contention is misplaced. The Article 9.3 and 9.4 of the PPA in the present case, is not *para materia* with the PPA in Appeal No. 180 of 2009 and Appeal No.104 of 2010. Therefore, the ratio decided in that case would not

apply to the present case. Thus, this contention would also fail.

25. The Petitioner in this Review Petition for the first time placed reliance on the provisions of the Contract Act to contend that once there was breach of obligations, the contract must be put an end to, and this aspect has not been considered by this Tribunal. This argument has to be rejected on two reasons:

(1) This ground has not been urged either before the State Commission or before this Tribunal earlier. Therefore, this cannot be the ground for review.

(2) The genesis of the Appeal in Appeal No. 21 of 2013 would arise out of the remand Order passed by this Tribunal. So the question would arise as a result of the remand as to whether the State Commission has actually considered the second question which it was directed to re-consider. The scope of the present proceedings is limited to this issue only by virtue of the

limited. Hence, the question of considering whether the PPA in question has been rendered void due to the uncertainty under the Contract Act would not arise at all. As a matter of fact, the Petitioner is attempting to enlarge the scope of the proceedings before this Tribunal in this Review, which is not permissible under the law especially when the question of considering whether the Petitioner has right to put an end to the contract in view of the Contract Act would not arise at all.

26. SUMAMRY OF OUR FINDINGS:

- i) The Petitioner has not made out a case for review of the impugned judgement dated 7.10.2013 but on other hand the present attempt on the part of the Petitioner is to re-agitate his case in this review petition.**
- ii) The Petitioner in this Review Petition for the first time placed reliance on the provisions of the Contract Act to contend that once there was breach of obligations, the**

contract must be put to an end, and this aspect has not been considered by this Tribunal in its judgement. This argument is also rejected as this ground was not urged either before the State Commission or before this Tribunal earlier and therefore cannot be a ground for review. The Petitioner is only attempting to enlarge the scope of the proceedings before this Tribunal in this Review which is not permissible under the law.

27. In view of our above findings, there is no merit in this Review Petition. Accordingly, the same is dismissed. No order as to costs.

(Rakesh Nath)
Technical Member
Dated:30th June, 2014

(Justice M. Karpaga Vinayagam)
Chairperson

✓ ~~REPORTABLE/NON-REPORTABLE~~