

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BENGALURU**

Dated : 13th March, 2018

Present:

Shri M.K. Shankaralinge Gowda	..	Chairman
Shri H.D. Arun Kumar	..	Member
Shri D.B. Manival Raju	..	Member

OP No.30/2017

BETWEEN:

BSK TRADING Inc.,
No.12, 80 Feet Road,
Padmanabhanagar,
Bengaluru - 560 070.

.. **PETITIONER**

[Represented by Navayana Law Offices, Advocates]

AND:

- 1) Hubli Electricity Supply Company Limited,
P.B. Road, Navanagar,
Hubballi – 580 025.
- 2) Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan,
K.G. Road,
Bengaluru – 560 009.

.. **RESPONDENTS**

[Respondents are represented by Shri Shahbaaz Husain, Advocate]

OP No.31/2017**BETWEEN:**

SHAKAMBARI ENTERPRISES,
No.293, 7th Main,
Behind D.G. Hospital,
Padmanabhanagar,
Bengaluru - 560 070.

PETITIONER

[Represented by Navayana Law Offices, Advocates]

..

AND:

- 1) Hubli Electricity Supply Company Limited,
P.B. Road, Navanagar,
Hubballi – 580 025.
- 2) Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan,
K.G. Road,
Bengaluru – 560 009.

..

RESPONDENTS

[Respondents are represented by Shri Shahbaaz Husain, Advocate]

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COMMON ORDER

- 1) In the above two Petitions, the parties and the question of law and facts involved for consideration are the same. Hence, this common Order is being rendered.

OP Nos.30/2017 and 31/2017

- 2) In each of these Petitions, the Petitioner has prayed for a declaration that the respective Power Purchase Agreement (PPA) dated 24.02.2007 (ANNEXURE – P2 in both the Petitions) had been validly terminated, and for consequential relief of grant of open access, and also for recovery of the amounts claimed in the Default Notices dated 17.10.2016 (ANNEXURE – P10 in both the Petitions) along with interest, and for costs of the proceedings.

- 3) The facts relevant for the disposal of these Petitions may be stated as follows:
 - (a) The Petitioners have established a 1.25 MW capacity Wind Turbine Generator (WTG) each, located in Sy.No.55, measuring one acre, situated at Matsikopa Village, Mundargi Taluk, Gadag District. These WTGs are connected to Dambal Sub-Station and each of the Petitioners has executed PPAs dated 24.02.2007 with the 1st Respondent – Hubli Electricity Supply Company Limited (HESCOM) for the sale of electricity, as per the terms and conditions contained therein. The Petitioner, in OP No.30/2017, is a Partnership Firm and the Petitioner in OP No.1/2017 is a Proprietary Concern and both the Petitioners are represented by the same Authorized Signatory. It is seen that, in OP No.31/2017, the Petitioner is described as a Company registered under the provisions of the Companies Act, 1956 though, in fact, the Petitioner is only a Proprietary Concern, as could be

seen from the Letterheads used in the correspondences with the Respondents, annexed to the Petition.

- (b) The Petitioners have based their claims for termination of the PPAs on the default Notices dated 26.10.2016, and the Termination Notices dated 28.11.2016. In both the Default Notices, the 1st Respondent (HESCOM) has been called upon to: (i) issue a proper and valid Letter of Credit, in accordance with the terms of the PPAs; and (ii) make payment of arrears of interest and arrears towards payment of the Monthly Tariff Invoices.
- (c) In OP No.30/2017, a sum of ₹14,12,399.24 has been claimed towards interest due and a sum of ₹50,03,050/- towards the arrears of payment of the Monthly Tariff Invoices, totally, a sum of ₹64,15,449.24, till September, 2016. In OP No.31/2017, a sum of ₹12,36,709.90 has been claimed towards interest due and a sum of ₹46,04,924/- towards the arrears of payment of the Monthly Tariff Invoices, totally, a sum of ₹58,41,634.98, till September, 2016. In both the cases, the Default Notices were served on the 1st Respondent (HESCOM) on 26.10.2016, itself.
- (d) The 1st Respondent (HESCOM) replied to the Default Notices to the effect that, the Letter of Credit was opened, as required, in both the cases and that it has made all the efforts to pay the arrears in time and requested the Petitioners for resolving the issues, if any, by way of mutual negotiations, as

per Article 10 of the PPAs, and that for terminating the PPAs, the consent of both the parties was necessary and it was not willing to terminate the PPAs.

- (e) Both the Petitioners had, earlier, issued Default Notices dated 30.11.2015 and also Termination Notices dated 11.01.2016, on similar grounds as urged in the Default Notices dated 26.10.2016. After issuance of the Termination Notices dated 11.01.2016, they had also approached the 2nd Respondent – Karnataka Power Transmission Corporation Limited (KPTCL) for grant of Open Access, to transmit the energy generated from their Projects to the Captive Consumption Points. However, the Open Access was not granted by the 2nd Respondent (KPTCL) for one reason or the other.
- (f) Both the Respondents appeared through the same learned counsel. The 1st Respondent (HESCOM) has filed its Statement of Objections in both the cases, the gist of which is as follows:
- (i) That, a major portion of the claim towards the arrears of interest is barred by time;
- (ii) That, the Default Notices, in question, are faulty and on the basis of such Default Notices, the termination of the PPAs cannot be effected.

- 4) We have heard the learned counsel for the parties. The learned counsel for the Petitioner submitted that, the Limitation Act does not apply to the proceedings before the State Electricity Regulatory Commission, therefore the claims made by the Petitioners towards payment of interest, from 2006-07 are valid. He further submitted that, the amounts claimed in the Default Notices are not, admittedly, paid by the 1st Respondent (HESCOM) within the stipulated period, therefore, the Termination of the PPAs is valid. On the other hand, the learned counsel for the 1st Respondent (HESCOM) submitted that, the period of limitation prescribed under the Limitation Act would apply to the proceedings before this Commission and a substantial portions of the claim made in the Default Notices are time barred and that the Default Notices are defective and are not in accordance with the procedure provided under the PPAs. He further submitted that, the 1st Respondent (HESCOM) was making payments and there were delays in making the said payments because of the financial constraints of the 1st Respondent (HESCOM). Further, he submitted that the 1st Respondent (HESCOM) is ready to pay the amounts legally due to the Petitioners.
- 5) The following issues would arise for our consideration:
- (1) Whether any part of the claims of the Petitioners is barred by time?
 - (2) Whether the termination of the PPAs is valid and legal?
 - (3) What Order?

6) After considering the submissions of the parties and material placed on record, our findings on the above issues are as follows:

7) **ISSUE No.(1):** *Whether any part of the claims of the Petitioners is barred by time?*

(a) Now, it is a settled law that the Limitation Act would apply to the claims made before this Commission, under Section 86(1)(f) of the Electricity Act, 2003. In the decision, reported in **(2016) 3 SCC 468**, in Paragraph-31 of the Judgment, the Hon'ble Supreme Court has observed thus:

"31. ... Hence we hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court. But in an appropriate case, a specified period may be excluded on account of the principle underlying the salutary provisions like Section 5 or Section 14 of the Limitation Act. We must hasten to add here that such limitation upon the Commission on account of this decision would be only in respect of its judicial power under clause (f) sub-section (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory."

(b) A Suit for recovery of an amount should be filed within three years from the date when such amount became due and payable. The present Petitions are filed before this Commission on 10.02.2017. Therefore, any amount becoming due and payable on or after 10.02.2014 would be within the period of limitation and the same could be recovered under these

proceedings. The amount payable under a Monthly Tariff Invoice becomes due and payable within fifteen days from the date of receipt of the Monthly Tariff Invoice by the 1st Respondent (HESCOM). If the Monthly Tariff Invoice is not paid within the due date, interest at the rate of SBI Medium Term Lending Rate per annum would be payable from the date of the default till such payment is made, in full.

- (c) In OP No.30/2017, the interest claimed upto 2013-14 works out to ₹10,37,415.79, as per the Statement of Accounts produced by the Petitioner. This part of the claim towards interest is barred by limitation. The balance claim towards the Monthly Tariff Invoices is for the period from June, 2016 to September, 2016, therefore, this claim would be within the period of limitation. The Petitioner has claimed ₹50,03,050 under this head. The interest payable on this claim of ₹50,03,050 would also be within the period of limitation.
- (d) In OP No.31/2017, the interest claimed upto 2013-14 works out to ₹8,87,673.75, as per the Statement of Accounts produced by the Petitioner. This part of the claim towards interest is barred by limitation. The balance claim towards the Monthly Tariff Invoices is for the period from June, 2016 to September, 2016, therefore, this claim would be within the period of limitation. The Petitioner has claimed ₹46,04,924 under this head. The

interest payable on this claim of ₹46,04,924 would also be within the period of limitation.

- (e) It appears that the Petitioners might have claimed 'interest on interest', as the interest was not paid, though the principal amounts under the Monthly Tariff Invoices were paid. The consideration of the different articles in the PPAs regarding 'Payment of Interest' would show that the Petitioners cannot claim 'interest on interest'. Article 6.1 of the PPA provides for issuance of a Monthly Tariff Invoice for each Billing Period to the 1st Respondent (HESCOM), setting forth the amounts payable by the 1st Respondent (HESCOM) for the Delivered Energy. Article 6.2 provides that the 1st Respondent (HESCOM) shall make payment within fifteen days from the date of receipt of the Monthly Tariff Invoice. Article 6.3, which provides for Late Payment, states that, *"if any payment from HESCOM is not paid when due, there shall be due and payable to the Company interest at the rate of SBI medium term lending rate per annum for such payment from the date such payment was due until such payment is made in full."* The 'Due Date of Payment' is defined in the PPA as, *"'Due Date of Payment' in respect of a Monthly Invoice means the date, which is 15 (fifteen) days from the date of receipt of such invoices by the designated official of HESCOM."* The conjoint reading of Articles 6.1, 6.2 and 6.3 of the PPA, along with the definition of 'Due Date of Payment', would show that these provisions do not authorize the Petitioners (Generators) to claim 'interest on interest'.

Unless there is a specific provision in the PPA for charging of interest on interest, the Petitioners are not entitled to do so. The opening phrase in Article 6.3, "*If any payment from HESCOM is not paid when due*" clearly refers to the amount claimed in the Monthly Tariff Invoice. The further phrase, "*such payment*" used in Article 6.3 would also clearly refer to the amounts mentioned in the Monthly Tariff Invoices. Therefore, we are of the considered opinion that, charging of interest on interest, becoming due on the belated payments of the Monthly Tariff Invoices, is not sustainable.

- (f) For the reasons stated above, a substantial portion of the claim made by each of the Petitioners, towards the arrears of interest, is barred by time. Therefore, we answer Issue No.(1), accordingly.

8) **ISSUE No(2):** *Whether the termination of the PPAs is valid and legal?*

- (a) The relevant provisions in the PPAs relating to the 'HESCOM's Default' and termination due to the 'HESCOM's Default' are contained in Articles 9.2.2 and 9.3.2, which read thus:

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

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

b. *In the event of any payment default by the HESCOM for a continuous period of three months, the Company shall be permitted to sell Electricity to third parties by entering into a Wheeling and Banking agreement with HESCOM for which it shall pay transmission and any other charges to HESCOM at the rates applicable from time to time as approved by this Commission."*

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

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

Where a Default Notice has been issued with respect to an Event of Default, which requires the co-operation of both Company and HESCOM, to remedy, Company shall render all reasonable co-operation to enable the Event of Default to be remedied."

- (b) Though the Petitioners have contended that the 1st Respondent (HESCOM) has failed to issue proper and valid Letter of Credit, in accordance with the terms of the PPAs, during the course of arguments this ground was not pressed and we also note that, no evidence is produced in support of the said contention. The 1st Respondent (HESCOM) has stated that the Letter of Credit was issued to the Petitioners in accordance with the terms of the PPAs.
- (c) As already noted, a substantial portions of the time barred interest have been claimed in the Default Notices dated 26.10.2016, issued by the Petitioners. It is also pointed out on behalf of the 1st Respondent (HESCOM) that the Default Notices are defective, because only 15 (fifteen) days' time was granted from the date of service of the Default Notices for curing the defaults. It is also pointed out that, the provisions in the PPAs would clearly establish that a 30 (thirty) days' time was available for the 1st Respondent (HESCOM) to cure the defaults.
- (d) The first paragraph of Article 9.3.2 of the PPA, extracted above, would show that, upon the occurrence of an Event of Default, the Petitioner may deliver a Default Notice to the 1st Respondent (HESCOM), in writing, specifying in reasonable detail, the Event of Default giving rise to the issuance of the Default Notice and calling upon the 1st Respondent (HESCOM) to remedy

the same. The said paragraph of Article 9.3.2 does not require to state a specific period, within which the Event of Default is to be remedied. However, the second paragraph of Article 9.3.2 states that, at the expiry of 30 (thirty) days from the date of delivery of the Default Notice, unless the parties have agreed otherwise, or the Event of Default giving rise to the Default Notice has been remedied, the Petitioner may deliver a Termination Notice to the 1st Respondent (HESCOM) and the PPA stands terminated upon delivery of the said Termination Notice. Therefore, a conjoint reading of these two paragraphs of Article 9.3.2 would show that, in the Default Notices, a specific period need not be mentioned calling upon the 1st Respondent (HESCOM) to remedy the Event of Default and a cause of action for issuing Termination Notices would arise at the expiry of 30 (thirty) days from the date of delivery of the Default Notices. The Default Notices were served on the 1st Respondent (HESCOM) in both the cases on 26.10.2016 itself. The Termination Notices dated 28.11.2016 were served on the 1st Respondent (HESCOM) on the next day, i.e., on 29.11.2016. Therefore, one can say that the Termination Notices were issued after 30 (thirty) days from the date of the Default Notices.

- (e) In our considered view, the default Notices need not specify a period within which the default is to be remedied. If at all such a period was to be mentioned, it should have been not less than 30 (thirty) days from the dates of service of the Default Notice. In the present cases, the Default Notices

provide only 15 (fifteen) days' time for payment of the arrears. In such an event, though the Termination Notice is issued after 30 (thirty) days from the date of service of the Default Notice, the defect occurred in the Default Notice does not get cured. The Petitioners have to establish that the issuance of the Default Notices and the Termination Notices are as prescribed in the terms of the PPAs. On the basis of the defective Default Notices, they cannot claim termination of the PPAs, even though the 1st Respondent (HESCOM) has failed to pay the legally recoverable amounts. In addition to this, as already noted, the default Notices also contain a claim for a time-barred debt. Hence, we are of the considered view that, because of the defective Default Notices, the termination of the PPAs are not valid.

9) **ISSUE No.(3):** *What Order?*

- (a) The 1st Respondent (HESCOM) has agreed to pay the legally recoverable dues to the Petitioners. The calculation of the amounts due, for the present, is left to the parties. The amounts due shall be calculated, after taking into account our findings on Issue No.(1) regarding the question of limitation and on payment of interest on interest.

(b) For the foregoing reasons, we pass the following:

ORDER

- (1) The prayer for declaration that the PPAs dated 24.02.2007, in OP Nos.30/2017 and 31/2017, have been validly terminated, is hereby rejected. Consequently, the Petitioners are not entitled to claim the Open Access; and,
- (2) The 1st Respondent (HESCOM) shall, after arriving at the amounts payable to the Petitioners by taking into account our findings on Issue No.(1) regarding the question of limitation and payment of interest on interest, pay the amounts found due to the Petitioners in these Petitions, within 04 (four) weeks from the date of this Order.

The original of this Order be kept in OP No.30/2017 and a copy, thereof, in OP No.31/2017.

Sd/-
(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(D.B. MANIVAL RAJU)
MEMBER