

No.: N/60/15

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

Dated : 8th September, 2016

Present:

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

OP No.36 / 2015

BETWEEN:

Bhoruka Power Corporation Limited,
48, Lavelle Road,
Bengaluru – 560 001

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PETITIONER

[Represented by Navayana Law Offices, Advocates]

AND:

1) Gulbarga Electricity Supply Company Limited,
Station Road,
Kalaburagi – 585 101.

2) State of Karnataka,
By the Additional Chief Secretary to Govt.,
Department of Energy,
Vikasa Soudha,
Dr. Ambedkar Veedhi,
Bengaluru – 560 001

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RESPONDENTS

[Respondent-1 represented by Thiru & Thiru, Advocates]

1) The Petitioner has filed the present Petition on 28.9.2015 seeking the following reliefs :

(a) To direct the Respondents to recognize the Petitioner as successor in interest of SLS, as approved and declared by the Hon'ble High Courts of Andhra Pradesh and Karnataka;

(b) To direct the 1st Respondent to honour all the invoices submitted from September, 2014 onwards and the invoices raised during the pendency of the Petition as per the sums due as per the invoices forthwith, together with applicable interest and penal interest rates under the Power Purchase Agreement and the damages.

2) The material facts leading to filing of the present Petition may be stated as follows :

(a) That SLS Power Industries Limited (SLS) was a Company registered under the provisions of the Companies Act, 1956, having its registered Office at Nellore, Andhra Pradesh. It had established a 4.5 Mega Watts (MW) capacity Mini Hydel Power Project (Project) located at Sugur Village of Emmiganur Taluk, Ballari District. The said SLS had entered into a Power Purchase Agreement (PPA) dated 9.1.2004 (ANNEXURE – P1) with the Karnataka Power Transmission Corporation Limited (KPTCL) for sale of energy from its Project. Upon unbundling of the KPTCL, the PPA was

assigned in favour of the 1st Respondent-Gulbarga Electricity Supply Company Limited (GESCOM) with effect from 6.7.2005.

- (b) In the year 2008, the SLS filed Company Petition No.16/2008 before the Hon'ble High Court of Judicature, Andhra Pradesh at Hyderabad, under Sections 391 to 394 of the Companies Act, 1956, seeking approval of the Scheme (former part of ANNEXURE – P5) entered into with the Petitioner-Company, to be effective from 1.3.2007.
- (c) In the said Company Petition No.16/2008, the Hon'ble High Court of Judicature, Andhra Pradesh, passed an Order dated 5.8.2008 (ANNEXURE – P3) allowing the said Company Petition and approving the sanctioning of the Scheme sans Clause-10 thereof and holding that the said Scheme should also be approved by the Hon'ble High Court of Karnataka, in the Petition filed at the instance of the Petitioner-Company.
- (d) The Petitioner-Company had filed Company Petition No.125/2007 before the Hon'ble High Court of Karnataka under Sections 391 to 394 of the Companies Act, 1956. On consideration of the said Company Petition, the Hon'ble High Court of Karnataka, by its Order dated 11.9.2008 (ANNEXURE – P4), allowed the Petition by approving the Scheme and further observed that, the deletion of Clause-10 of the Scheme as noted by the Hon'ble High Court of Judicature, Andhra

Pradesh was justified. Thereafter, the Petitioner has filed the amended Scheme (latter part of ANNEXURE – P5).

- (e) The Petitioner has submitted that, the copies of the said Orders of the Hon'ble High Courts of Andhra Pradesh and Karnataka have been furnished to both the Respondents under letter dated 21.10.2008 (ANNEXURE – P6 collectively) and requested the Respondents to take the said Orders on their records by effecting the change of name from 'SLS Power Industries Limited' to 'Bhoruka Power Corporation Limited' (Petitioner-Company), with immediate effect, in respect of the PPA (ANNEXURE – P1) and other departmental records, and to confirm the same at the earliest.
- (f) It is stated by the Petitioner that, thereafter the 1st Respondent (GESCOM) made payments in favour of the Petitioners towards the energy supplied from the Project as per the Invoices for the months of October, 2008 to August, 2014.
- (g) The Petitioner addressed a letter dated 4.11.2014 (ANNEXURE - P8) to the 1st Respondent (GESCOM) to act as per Article 5.2(a) of the PPA, considering the relevant terms of the Order passed by this Commission in this regard. Article 5.1 of the PPA relating to the Monthly Energy Charges states that, for the Delivered Energy, the 1st Respondent (GESCOM) shall pay for the first 10 years from the Commercial

Operation Date (COD) to the Petitioner, every month, at the rate of ₹2.90 per unit ('the base tariff') for the energy delivered, with an escalation at the rate of 2% per annum over 'the base tariff' every year. Further, it is explained therein that, the actual escalation would be at the rate of ₹0.058 per unit. Further, Article 5.2(a) of the PPA states that, from the eleventh year onwards, from the date of Commercial Operation till the validity of the PPA, the rate would be negotiated between the Petitioner and the 1st Respondent (GESCOM) considering the various factors, with due approval of the Commission. It may be noted that, in the generic Tariff Order dated 11.12.2009, it is ordered that, in case of the existing PPAs, the tariff from the eleventh year onwards shall be equal to the tariff payable at the end of the tenth year of the PPA, without any escalation. Therefore, generally, this principle has been applied for determination of tariff from the eleventh year onwards in respect of the existing PPAs relating to the Renewable Energy Projects. Therefore, one may assume that the request of the Petitioner under ANNEXUR - P8, as noted above, was to pay the tenth year tariff, from the eleventh year onwards, for the next ten years of the PPA, i.e., till the expiry of the PPA. The Petitioner has also issued reminder letters dated 2.12.2014 and 8.12.2014 (ANNEXURES – P9 and P10).

- (h) In response to the above letters, the 1st Respondent (GESCOM) addressed a letter dated 5.3.2015 (ANNEXURE – P11) to the Petitioner,

seeking additional information for effecting the change of name from 'SLS Power Industries Limited' to 'Bhoruka Power Corporation limited' (Petitioner-Company). The said additional information related to production of the following documents :

- (1) NOC for change of name and concurrence;
 - (2) Transfer Capacity GO in the name of M/s. Bhoruka Power Corporation Limited from Energy Department;
 - (3) Certified copy of the Order of High Court of Karnataka and Andhra Pradesh regarding Amalgamation;
 - (4) Certified copy of Registration Certificate from the Registrar of Companies after Amalgamation.
- (j) The 1st Respondent (GESCOM) was not satisfied with the answer given by the Petitioner to the effect that, the documents requested at Sl.Nos.(1) and (2) above were not necessary in view of the Orders in the proceedings before the Hon'ble High Courts of Andhra Pradesh and Karnataka under Sections 391 to 394 of the Companies Act, 1956. The Petitioner had produced copies of the Orders of the said Hon'ble High Courts and also produced a copy of the Registration Certificate issued by the Registrar of Companies, after the above-mentioned High Court proceedings.
- (k) It is contended by the Petitioner that, the 1st Respondent (GESCOM) also withheld the payment of the energy charges from the month of

September, 2014. The Petitioner has further contended that the demand made by the 1st Respondent (GESCOM) for production of various other documents and for fulfilling certain steps, was irrelevant and unnecessary. It may be noted that, the 1st Respondent has demanded to get the change of name effected in all the previous communications that have taken place between the SLS Power Industries Limited and the Government of Karnataka, before executing the PPA dated 9.1.2004 (ANNEXURE – P1). The 1st Respondent has not paid the energy charges as per the Monthly Invoices, on the ground that the Petitioner has not fulfilled the necessary requirements for the change of name, as insisted by it.

- 3) The 1st Respondent has filed its Statement of Objections on 10.3.2016, mainly contending that :
- (a) Soon after the amalgamation, the Petitioner ought to have furnished the certified copy of the Orders of the respective Hon'ble High Courts, instead of furnishing the photostat copies of the said Orders;
 - (b) For change of name in the PPA, the Petitioner was required to seek approval of the Government of Karnataka;
 - (c) Article 12.9 of the PPA provides the terms and conditions for assignment of the PPA and one such condition for assignment was, to obtain prior

written consent of the other party, before effecting any assignment and that in the present case, the SLS had not obtained any consent of the 1st Respondent (GESCOM);

- (d) Clause 6.4 of the Scheme of Amalgamation provides as follows :

“The Transferee Company shall also be entitled, pending sanction of the Scheme, to apply to the Central Government, State Government, and all other agencies, departments and statutory authorities concerned, wherever necessary, for such consents, approvals and sanctions, which the Transferee Company may require, including registrations, approvals, exemptions, reliefs, etc., as may be required/granted under the statutes.”

and that, the Petitioner has not complied with it while applying for the change of name;

- (e) The 1st Respondent (GESCOM) has acted in good faith in withholding the payments to be made to the Petitioner, as the Petitioner failed to fulfill the requirements for the change of name;
- (f) The Petitioner should obtain approval of the Government of Karnataka for the Scheme of Amalgamation.

Therefore, the 1st Respondent (GESCOM) has prayed for dismissal of the Petition.

- 4) We have heard the learned counsel for the Petitioner and the 1st Respondent.
- 5) The following issues would arise for our consideration :
 - (1) Whether the Petitioner-Company has become the successor of the SLS Power Industries Limited by virtue of the Orders passed in Company Petition No.16/2008 on the file of the Hon'ble High Court of Judicature, Andhra Pradesh, and in Company Petition No.125/2007 on the file of the Hon'ble High Court of Karnataka, approving the Scheme of Amalgamation?
 - (2) Whether the 1st Respondent (GESCOM) is justified in insisting upon the Petitioner for production of further documents and to get the change of name effected in the earlier communications between the SLS Power Industries Limited and the Government of Karnataka?
 - (3) What Order?
- 6) After considering the submissions made by the learned counsel for the Petitioner and the 1st Respondent (GESCOM) and the material placed on record, our findings on the above issues are as follows :
- 7) **ISSUE No.(1)** : *Whether the Petitioner-Company has become the successor of the SLS Power Industries Limited by virtue of the Orders passed in Company Petition No.16/2008 on the file of the Hon'ble High Court of Judicature, Andhra Pradesh, and in Company Petition No.125/2007 on the file of the Hon'ble High Court of Karnataka, approving the Scheme of Amalgamation?*
 - (a) The effect of approving the Scheme submitted by two Companies under the provisions of Sections 391 to 394 of the Companies Act, 1956 to transfer the

rights and liabilities of a Company (Transferor Company) to another Company (Transferee Company) is stated in Sub-Section (2) of Section 394 of the said Act thus:

“394. PROVISIONS FOR FACILITATING RECONSTRUCTION AND AMALGAMATION OF COMPANIES

(1) XXX XXX XXX

(2) *Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee-company; and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.”*

(b) The above Sub-Section (2) of Section 394 of the said Act makes it clear that, by virtue of the Order, the rights as well the liabilities of the Transferor-Company would vest with the Transferee-Company. That means, the Transferee-Company steps into the shoes of the Transferor-Company in respect of all Contracts, Deeds, Bonds and other instruments, which the Transferor-Company has entered into with any other third parties.

(c) Further, it indicates that, the Transferee-Company may enter into such further documents, writings or confirmations with such third parties, if necessary, in order to give a formal effect to the vesting Order stated in Sub-Section (2) of Section 394 of the Companies Act, 1956. The vesting Order has come into effect from 1.3.2008, as agreed in the Scheme which has been approved in

- the proceedings of the Hon'ble High Courts of Andhra Pradesh and Karnataka.
- (d) The Clauses contained in the Scheme are also to the above effect, as per Sub-Section (2) of Section 394 of the Companies Act, 1956.
- (e) The assignment of the rights and liabilities of the SLS Power Industries Limited in favour of the Petitioner-Company has arisen in pursuance of the approval of the Scheme by the said Hon'ble High Courts. Therefore, Article 12.9 of the PPA does not apply to such involuntary assignments.
- (f) Clause 6.4 of the Scheme provides that, pending sanction of the Scheme, the Transferee-Company shall be entitled to apply before various authorities, whenever necessary, for such consents, approvals and sanctions, etc., which the Transferee-Company may require under the statutes, for conducting business from the 'Appointed Date' till the 'Effective Date'. The Scheme defines the 'Appointed Date' as 1.3.2007 and the 'Effective Date' as the date on which the certified copies of the orders of the Hon'ble High Courts at Bangalore and at Hyderabad vesting the assets, etc., of the Transferor-Company in the Transferee-Company, are filed with the Registrar of Companies. It is not pointed out by the 1st Respondent that, any provision of law has prohibited the Petitioner from running the Project from the 'Appointed Date' till the 'Effective Date' without obtaining any licence or grant, etc., under any statute. Therefore, for vesting of rights under the approved

Scheme, there is no question of Petitioner complying with Clause 6.4 of the Scheme.

(g) For the above reasons, we answer Issue No.(1) in the affirmative.

8) **ISSUE No.(2)** : *Whether the 1st Respondent (GESCOM) is justified in insisting upon the Petitioner for production of further documents and to get the change of name effected in the earlier communications between the SLS Power Industries Limited and the Government of Karnataka?*

(a) The 1st Respondent (GESCOM) has recognized the rights and liabilities of the Petitioner-Company in the Project and has honoured the invoices presented to it for payment of the energy charges, for the period from October, 2008 to August, 2014. Therefore, when a request was made by the Petitioner to fix the eleventh year tariff as per the terms of the PPA and also in terms of the generic Tariff Order dated 11.12.2009 of this Commission, the 1st Respondent (GESCOM) need not have demanded for production of fresh certified copies of the Orders, in place of the photostat copies already furnished by the Petitioner. The 1st Respondent (GESCOM) was also not justified in insisting upon the Petitioner to get the change of name effected in the earlier communications between the SLS Power Industries Limited and the Government of Karnataka, for allowing the change of name in the PPA. It may be noted that, these communications have been taken place in the year 2002 or earlier to it, before executing the PPA dated 9.1.2004. Absolutely,

- there was no reason for the 1st Respondent (GESCOM) to insist upon the Petitioner to get the change of name effected in those old records, which have taken place earlier to the vesting Order referred to above. We are of the considered view that, those earlier documents and the communications between the SLS Power Industries Limited and the Government of Karnataka need not be altered now, in pursuance of the said vesting Order. All those communications and Agreements between the SLS Power Industries Limited and the Government of Karnataka have the effect of getting merged with the terms of the PPA. Therefore, a formal Supplemental PPA could have been executed between the Petitioner and the 1st Respondent (GESCOM) in pursuance of the vesting Order and the 1st Respondent (GESCOM) should have insisted upon the Petitioner, only to this extent.
- (b) The 1st Respondent (GESCOM) could not have legally withheld the payment of energy charges for the energy supplied subsequent to 1.3.2007, as provided in the Scheme approved by the Hon'ble High Courts of Andhra Pradesh and Karnataka, even without there being a formal Supplemental PPA inserting the name of the Petitioner-Company in place of the 'SLS Power Industries Limited'. As already noted, the approval of the Scheme has the effect of vesting of all the rights and liabilities of the SLS Power Industries Limited in favour of the Petitioner-Company.
- (c) In the above facts and circumstances of the case, the 1st Respondent (GESCOM) should not have insisted upon the Petitioner to produce the

certified copies of the said Orders again, unless it had sufficient grounds to disbelieve the existence of the High Court proceedings.

(d) For the above reasons, we answer Issue No.(2) in the negative.

9) For the foregoing reasons, we pass the following :

ORDER

- (1) The 1st Respondent (GESCOM) shall pay the energy charges for the energy supplied by the Petitioner from its Project, for the period for which it was due and payable, as per the terms of the Power Purchase Agreement (ANNEXURE-P1); and
- (2) The Petitioner and the 1st Respondent (GESCOM) shall execute a Supplemental Power Purchase Agreement for effecting the change of name of the Company, from 'SLS Power Industries Limited' to 'Bhoruka Power Corporation Limited' and also to insert the tariff payable from the eleventh year onwards in the light of the observations made in paragraph 2(g) above.

Sd/-

(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER