

**No.N/17/09**

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION  
BANGALORE**

**Dated this 23<sup>rd</sup> December 2010**

- |                               |          |
|-------------------------------|----------|
| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri Vishvanath Hiremath    | Member   |
| 3. Sri K. Srinivasa Rao       | Member   |

**Case No. OP 10/2009**

**Between**

M/s Narayanapur Power Company  
No.44, Bharat Apartments, Ground Floor  
No.44, Race Course Road  
B A N G A L O R E – 560 001  
(Represented by Sri Shridhara Prabhu, Advocate) ... Petitioner

**And**

The Managing Director  
GESCOM, Station Road  
GULBARGA  
(Represented by its Advocate Sri Sriranga) ... Respondents

1. This Petition was initially filed on 13.4.2009 by the petitioner generating company M/s Narayanaur Power Company praying for a declaration that the Power Purchase Agreement (PPA) dated 16.1.2004 stands cancelled due to non payment of bills in violation of the conditions of the PPA by the respondents. The petitioner has also prayed for issue of a direction to the respondent to pay for the electricity supplied as per the invoices already issued.

2. The respondents appeared through their advocates M/s. Just Law Associates and filed their statement of objections on 6.8.2009.

3. The petitioner on 16.7.2009 filed an application for amending the petition to raise certain additional grounds in support of the prayers made. This was

allowed by the Commission. Therefore the respondents on 12.11.2009 filed a further statement of objections to the grounds raised in the amended petition.

4. We have heard counsels appearing for both the parties. We have also considered the averments made in the petition and the objection statements and perused the documents produced by both the parties, and the authorities cited.

5. There is no dispute between the parties that the petitioner has entered into a PPA with KPTCL on 16.1.2004 and subsequently the same is assigned to the GESCOM. There is also no dispute that the petitioner has set up the power project and is producing electricity and supplying to the GESCOM.

6. The petitioner's initial contention was that the respondents were not making payments for the power supplied and due to this it has become impossible for the petitioner to perform the contract and hence the Commission may declare that the PPA has become void and unenforceable for the defaults of the respondents. The petitioner's counsel, in support, has relied upon the judgments of the Hon'ble Supreme Court in the case of Satyabrata Ghosh Vs. Mugneeram Bangur and Company (AIR 1954 SC 44); Sushila Dei Vs. Hari Singh (AIR 1971 SC 1756); and the judgment of the Hon'ble High Court of Karnataka in the case of H.V. Rajan Vs. C.N. Gopal (1960 MLJ 106).

7. In the amended petition, it is contended by the petitioner that the very PPA dated 16.1.2004 is not valid and binding on the petitioner due to the reason that on the date of signing of the PPA, KPTCL which has signed the PPA was barred from entering into Power Purchase Agreements under Section 39 of the Electricity Act, 2003. Further, it is contended that the assignment of PPA from KPTCL to GESCOM is also not valid as the same is done without the consent of the petitioner contrary to clause 12.9 of the PPA.

8. Per contra, the respondent's counsel has submitted that the PPA signed by the petitioner with KPTCL is valid and binding on the petitioner. On the date of signing of the PPA, KPTCL was not barred and was competent to enter into

power purchase transactions as per Gol Notification dated 9.6.2004 issued in exercise of powers under Section 183 of the Electricity Act, 2003, allowing KPTCL to continue bulk purchase and sale of electricity for one year from 10.6.2004. He further contended that the assignment of the PPA is also valid as the same was under a statutory Transfer Scheme issued by the Government of Karnataka under the provisions of the Karnataka Electricity Reforms Act, 1999 and not under the terms of the PPA.

9. The issues that arise for consideration and decision in this petition are –
- (i) whether the PPA dated 16.1.2004 entered into with KPTCL is invalid due to the bar imposed by Section 39 of the Electricity Act, 2003;
  - (ii) whether the PPA dated 16.1.2004 has become void due to impossibility of its performance by the petitioner on account of non payment of bills and non opening of Letter of Credit (L/C) by the respondents;
  - (iii) whether the assignment of PPA to GESCOM is invalid as it has not been done as per clause 12.9 of the PPA; and
  - (iv) Whether the petitioner is entitled to seek open access and sell the power to the third parties.

**Issue No.(i):**

10. It is contended by the petitioner that Section 39 of the Electricity Act, 2003 bars the KPTCL from entering into PPAs with effect from 10.6.2003 and therefore the PPA entered into by the petitioner with KPTCL is not valid and non est in law. It is also contended that even under the transitional provisions of Section 172 of the Electricity Act, 2003, KPTCL had no authority to sign a PPA since KPTCL was not a licensee under the repealed laws as required under Section 172(b), but was only a licensee under the Karnataka Electricity Reforms Act. We would have had no difficulty in accepting this contention but for the Notification dated 9.6.2004 of the Government of India issued under Section 183 of the Electricity Act, 2003 (produced as Annexure P-7 by the very petitioner). This statutory notification allows KPTCL to continue with the function of bulk purchase and sale of electricity for one more year from 10.6.2004. The validity of this notification has

not been challenged by the petitioner before any Forum. Therefore this Commission has to go by the said notification and give effect to it. Admittedly the PPA is signed on 16.1.2004, i.e., well before 9.6.2005 and therefore has to be held as validly entered into by KPTCL. Having signed the PPA, the petitioner cannot now turn around and raise the contention, that too after lapse of more than four (4) years, that the PPA is invalid. It is also noticed that the petitioner has made correspondence for payments with the respondents based on the PPA (Annexures-B&C) and in these letters the petitioner has specifically relied on the PPA and has demanded payments as per the terms of the PPA.

11. As regards the contention of the petitioner that KPTCL was not a Licensee under the repealed laws and hence it cannot sign the PPA under Section 172, it has to be observed that the KEB was a deemed Licensee as per the provisions of the Electricity (Supply) Act, 1948 for the purpose of the Indian Electricity Act, 1910 (Repealed Laws) and KPTCL as the successor of KEB under Section 13 of the Reforms Act had to discharge such powers, duties and functions of the Board including those under the IE Act, 1910 and the Electricity (Supply) Act, 1948 and the Rules framed thereunder. Therefore KPTCL had the competence to enter into a PPA in exercise of its rights under Section 13 of the Karnataka Electricity Reforms Act, 1999. Further the transfer of the functions of KEB was not under Section 131 of the Electricity Act, 2003 but under the KER Act. Therefore Section 131 of the Electricity Act, 2003 has no application.

12. Accordingly, we answer the first (i) issue in the negative.

**Issue No.(ii):**

13. It is contended by Sri Shridhar Prabhu, learned counsel for the petitioner that on account of the defaults in payments and non-opening of L/C by the respondent GESCOM, it has become impossible for the petitioner to perform the contract and supply electricity. Therefore, the PPA should be held to have become void and unenforceable. In our view this contention is misconceived. Non payment and non opening of L/C can be a ground for termination of PPA but not to hold that the contract has become impossible to be performed. In

our view, the contract can still be performed and amounts due can be recovered from the respondents by initiating appropriate proceedings. The petitioner under the PPA has ample remedies available against any breach of contract including the right to sell power to a third party or terminate the contract duly following the procedure prescribed therein. Without taking recourse to any of the remedies available under law or in the PPA, the petitioner cannot plead that it has become impossible to perform the contract. In the judgments relied upon by the petitioner's counsel, the Hon'ble Supreme Court and the High Court have not held that non payment will make a contract voidable. What is held is that a contract would get frustrated if there is an occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into a contract (emphasis supplied).

14. In the case on hand, non payment of the bills is not an event which was not contemplated by the parties at the time of entering into a contract. On the contrary this was contemplated by the parties and therefore the contract provided for suitable remedies to both the parties in Article 6, 9 & 10 of the PPA. Accordingly issue no. (ii) is answered in the negative.

**Issue No.(iii):**

15. The contention of the petitioner's counsel that the assignment of the PPA from KPTCL to the GESCOM is not valid as the same is contrary to clause 12.9 of the PPA does no merit acceptance. According to the petitioner, the PPA can be assigned only with its consent and since no consent has been obtained, the assignment in favour of the GESCOM is not valid and consequently the GESCOM has no right to enforce the PPA. This contention overlooks the fact that the PPA of the petitioner with KPTCL has been assigned to the GESCOM not under the terms of the PPA but under a statutory Transfer Scheme issued under Section 14 of Karnataka Electricity Reforms Act, 1999 (KER Act). The KER Act is specifically saved by the Electricity Act, 2003. When the assignment is in exercise of a statutory power, no consent of a party is necessary. Therefore we hold that the

assignment of the PPA to the GESCOM from KPTCL is valid and binds the petitioner and the respondents as well. Accordingly, issue no. (iii) is also answered in the negative.

**Issue No.(iv):**

16. On behalf of the petitioner it is contended that since the PPA has become void on account of breach of payment conditions by the respondents, the petitioner is entitled to sell the electricity to the third party by availing open access and denial of the same by the respondents is contrary to the provisions of Electricity Act, 2003.

We have already considered the question whether the PPA has become void due to non performance of the payment obligations by the respondents and taken the view that the PPA has not become void. Once the PPA continues to be valid, the obligation of the petitioner to sell power during the subsistence of the PPA continues subject to receiving payments as per the terms of the PPA. 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. However, the question of granting relief of third party sale to the petitioner on the ground that the PPA has become void does not arise.

Accordingly issue no. (iv) is answered against the petitioner.

17. Based on the foregoing findings, this petition is liable to be dismissed and accordingly dismissed.

Sd/-  
(M.R. SREENIVASA MURTHY)  
CHAIRMAN

Sd/-  
(VISHVANATH HIREMATH)  
MEMBER

Sd/-  
(K. SRINIVASA RAO)  
MEMBER