

No.N/41/10

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 23rd December 2010

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

Case No. OP 22/2010

Between

M/s. Jasper Energy Private Limited
No.49, KHB Colony, Koramangala
BANGALORE – 500 022
(Represented by its Advocates Sri Shridhar Prabhu)

... Petitioner

Vs.

1. Hubli Electricity Supply Company Limited
Navanagar, P.B. Road
HUBLI – 580 029
2. Karnataka Power Transmission Corporation Limited
Cauvery Bhawan, Kempegowda Road
BANGALORE – 560 009
3. Government of Karnataka
Department of Energy, Vikasa Soudha
Dr. Ambedkar Veedhi
BANGALORE - 560 001
4. State Load Dispatch Centre – Karnataka
No.278, Ananda Rao Circle, Race Course Road
BANGALORE - 560 001
(Represented by its Advocate Sri Sriranga)

... Respondents

1. This petition is filed seeking a declaration that the PPA dated 1.2.2007 has become null and void and consequently a direction to the 4th Respondent to grant approval for wheeling and banking to the petitioner.

2. On notice the respondents have put in appearance through their counsel M/s. Just Law and have also filed statement of objections.

3. The petitioner has submitted that it has executed a PPA with the 1st Respondent on 1.2.2007 for supply of electricity to be generated by their mini hydel plant to be established at Sonna Barrage, Near Devangaon Village, Sindgi Taluk, Bijapur District. It is further submitted that the project was expected to be completed before June 2009, that is, 30 months from the date of financial closure. But, the same could not happen on account of delay in the construction of the barrage by Government and for other unavoidable reasons beyond the control of the petitioner. The petitioner therefore submits that as per Clauses 2.2 and 3.4 of the power purchase agreement, the PPA has become null and void automatically. Consequently the PPA is not in force and there is no obligation on the petitioner to supply electricity to the respondents.

4. In reply the respondents have contended that the PPA has not become null and void as the non-fulfillment of the conditions required under clauses 2.1 and 3.4 is attributable to the petitioner. Further, as per the settled position of law no person shall be allowed to take advantage of his own wrong or omission.

5. Both the petitioner and respondents have cited several judgments in support of their respective positions.

6. We have considered the case put forth by the petitioner and the documents produced as also the reply of the respondents as stated in their statement of objections. We have further perused the judgments cited by both the parties.

7. The two questions that arise for consideration and decision in this case are

- (i) Whether the PPA dated 1.2.2007 has become null and void;
- (ii) Whether the petitioner is entitled to wheeling and banking agreement with the respondents.

8. Sri Shridhar Prabhu, Learned Counsel appearing for the petitioner vehemently contended that the PPA dated 1.2.2007 has become automatically null and void as per clauses 2.2 and 3.4 of the PPA as the petitioner could not comply with the conditions precedent specified therein within the time schedule for reasons beyond its control. Further, according to him, on account of non-construction of the barrage by the Government, the contract entered into with the 1st Respondent is frustrated and the petitioner is under no obligation to supply electricity to be generated. In support of his contention, he has relied upon the judgment of the Hon'ble Supreme Court reported in M/s Alopri Prasad & Sons Vs. Union of India (AIR 1960 SC 588).

9. Sri Sriranga, learned counsel appearing for the respondents submitted that the petitioner who has not complied with the conditions precedent specified cannot take shelter under clauses 2.2 and 3.4 and submit that the PPA has become void. As per the law laid down by a series of decisions, no party can be allowed to take advantage of its own wrong or omission.

Issue No.1

10. We had occasion to deal with a similar contention in OP 27/2009 with reference to an identical condition in the PPA. After considering the terms of the PPA and the established law which is reiterated in this case also, this Commission has held that –

“.....As pointed out above, in the present case, it is the petitioner who has failed to complete the project within the scheduled date (may not be deliberately). Therefore he cannot be allowed to take advantage of it and contend that the contract has become void on account of non-happening of events mentioned in clauses 2&3. As observed above, under clauses 2.2 and 3.4, it is only the respondents who can treat the contract as void for the petitioner not adhering to the time schedule and not the petitioner. The word 'void' used in the PPA has to be treated as voidable at the

instance of MESCOM considering the intention of the parties and the context in which it is used.

Considering the entire facts of the case and the material placed before us and the settled position of law as stated above, we hold that the PPA dated 26.11.2004 has not become null and void and continues to be valid and binds the petitioner as well as the Respondents. Accordingly Issue No.1 is answered in the negative."

11. The case put forth by the petitioner is exactly in line with the facts pleaded in the above case (OP 27/2009). In this case also, it is the petitioner who has not been able to adhere to the time schedule and therefore as per Clauses 2.2 & 3.4 of the PPA, it is HESCOM, which alone can treat the PPA as null and void and not the petitioner. In this case HESCOM has not repudiated the contract and on the contrary is willing to abide by the same.

12. It is observed that the petitioner by his own conduct has also shown that he has understood that the PPA has not become void. This is clear from the letter of the petitioner dated 8.6.2009 addressed to the General Manager, HESCOM (produced as Annexure P-11) wherein the petitioner has stated that the time for completion of the project will get over by 31st July 2009 and the PPA needs to be extended by seventeen months till 31st December 2010 from 1st August 2009 for the reasons stated therein including non completion of barrage across the river Bhima by the KNNL and for other reasons. If the PPA had already become null and void by 8.6.2009 as now being contended by the petitioner, there was no occasion for the petitioner to seek extension of the validity of the PPA from a future date, i.e., 1st August 2009. Further, the reasons pleaded in this letter for delay are claimed by the petitioner himself to be reasons beyond the petitioner's control and as such fall within the scope of clause 8.1 of the PPA. Clause 8.1 of the PPA states that neither party shall be responsible for breach of the contract if such breach is on account of reasons beyond the reasonable control of the party. Clause 3.4 also excludes the reasons beyond the control of the parties for the purpose of default. Clause 3.4 read as follows :

*"Notwithstanding anything contained anywhere else in this Agreement or any other agreement between the Parties, if the Company does not achieve Financial Closure within 6 (six) months from the date of signing of this Agreement or commence construction of the Project before the Scheduled Date of Commencement, other than due to occurrence of Force Majeure Events, this Agreement, shall automatically become null and void and HESCOM shall stand discharged of all obligations and liabilities, HESCOM shall not also in any way, be liable for any damages for any loss, whatsoever, arising from termination of the Agreement".
(emphasis supplied)*

A reading of the above clause makes it clear that the agreement has not become void since the company has failed to commence construction of the project, and complete the same within the stipulated schedule for reasons beyond the control of the petitioner. In our view in the above circumstances the contract survives even if there is non-fulfillment of conditions precedents by the petitioner until the respondents repudiate the contract. Accordingly Issue No.1 has to be answered in the negative.

Issue No.2:

13. As we have held that the PPA so far as the petitioner is concerned, has not become void it continues to bind the petitioner as well as the respondents. The parties have to perform the same as per the terms incorporated therein. In other words, the petitioner is bound to supply the electricity and the respondents are bound to pay for the same as per the terms of the PPA. The contention of the petitioner that the PPA has become impossible to be performed cannot be countenanced, as this plea, as contended by respondents, appears to be an afterthought and advanced to wriggle out of the binding contract. This is clear from the letter of the petitioner dated 17.9.2009 addressed to MD, HESCOM (Annexure P-13) wherein the petitioner lays emphasis on the financial problems it may face if PPA has to be adhered to. In our view, if the cost of the project has

gone up as contended by the petitioner due to delay in execution of the work that will not give a right to the petitioner to contend that the contract has become impossible to be performed. This is what has been held in the case of *Alopi Prasad & Sons Vs. Union of India* (AIR 1960 SC 588). The Hon'ble Supreme Court in the said case has held that a contract is not frustrated merely because the circumstances in which the contract was made are altered subsequently. The Hon'ble Supreme Court in the case of *Neihati Jute Mills Vs. V. Khyaliram* (AIR 1968 SC 522) also has observed that "It is not hardship or inconvenience or material loss which brings about the principle of frustration into play. There must be a change in significance of obligation that the thing would it performed be undertaken a different thing from that which was contracted for". Further, the Hon'ble Supreme Court in the case of *Continental Construction Co. Ltd., Vs. State of Manhya Pradesh* [1988(3) SCC 82] also has held at [Para (5)] that the contractor having contracted cannot go back from agreement simply because it does not suit him to abide by it. It has further held that there is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an un contemplated turn of events the performance of the contract has become onerous. In the light of the facts of this case and the law laid down, we are of the view that the contract has not become frustrated and the petitioner has to perform the same.

14. The argument advanced by the petitioner in the rejoinder that the obligation to supply electricity is not exclusive to HESCOM has only to be stated for rejection. Under the terms of the PPA, the petitioner has undertaken to supply electricity to the respondents and respondents have agreed to pay for it. Further, as per agreement entered into by the Company with the Government of Karnataka dated 2nd December 2004, vide Para No.6 (Pages 21 & 22 of the petition), the Company shall enter into a Wheeling and Banking Agreement with KPTCL in case of selling power to the third party and PPA agreement in case of selling power to KPTCL. Having chosen to enter into PPA, the Company is duty bound to sell power only to KPTCL / HESCOM. So long as the PPA exists, respondents have a right to compel the petitioner to supply electricity to it only

subject to the obligation to pay for the same. Consequently the petitioner cannot seek a direction to the 4th Respondent to allow it to wheel the power generated by it to third parties. Accordingly this issue is also answered against the petitioner.

15. For the foregoing findings, this petition stands rejected.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)
MEMBER

Sd/-

(K. SRINIVASA RAO)
MEMBER