

No.N/38/09

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 23rd December 2010

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

Case No. OP 27/2009

Between

M/s. Soham Mannapitlu Power Private Limited
137, 7th Floor, HMG Ambassador Building
Residency Road
B A N G A L O R E – 560 025
(Represented by its Advocates M/s Holla & Holla)

... Petitioner

Vs.

1. Karnataka Power Transmission Corporation Limited
Kaveri Bhavan, Kempegowda Road
BANGALORE – 560 009

2. Mangalore Electricity Supply Company Limited
1st Floor, Paradigm Plaza, A.B. Shetty Circle
MANGALORE – 575 101

3. The Chief Engineer
State Load Despatch Centre
Karnataka Power Transmission Corporation Limited
28, Race Course Road
BANGALORE – 560 001

... Respondents

(Represented by its Advocate Sri Sriranga)

1. This petition is filed by the petitioner M/s. Soham Mannapitlu Power Private Limited for a declaration that the Power Purchase Agreement (PPA) dated 26.11.2004 entered by it with the Karnataka Power Transmission Corporation Limited (KPTCL) has stood automatically terminated and is not subsisting and with a prayer for a direction to the respondents to give open access for supply of power produced by it to third parties. In the alternative, it is also prayed by the petitioner for a direction to the respondents to enter into a fresh PPA with a tariff

of Rs.5.15 per unit without escalation. The petitioner has made a further alternative prayer that in case the reliefs as claimed above are not granted, then it may be permitted to sell 78 % of the power generated by it in open access and supply the remaining 22 % to the respondents as per the PPA dated 26.11.2004.

2. The respondents have put in appearance through their advocates M/s. Just Law and have filed a detailed statement of objections on 22.10.2009. Further, the respondents have filed an additional statement of objections on 22.2.2010.

3. We have heard Sri Uday Holla, Learned Senior Counsel for the petitioner and Sri Sriranga, Counsel for M/s. Just Law on behalf of the respondents. We have also considered the various documents and authorities placed before us by both the parties in support of their respective contentions.

4. It is mainly contended by Sri Holla that the PPA signed by the petitioner with KPTCL on 26.11.2004 no longer survives as it has become automatically null and void because the petitioner has not fulfilled the conditions precedent set out in clause 2.1 and clause 3.4 within the time schedule prescribed therein. According to him the intention of the parties to the agreement that can be gathered from clause 2.1, 2.2, 3.1, 3.2, 3.3 and 3.4 was that the agreement shall become automatically void on the non fulfillment of the conditions specified therein within the prescribed time schedule irrespective of the fact as to which party failed to fulfill the conditions. The learned senior counsel has relied upon the following cases in support of his arguments that the PPA has become void:

- (i) AIR 1965 SC 1288 (HN 'a')
- (ii) AIR 1966 SC 1644 (HN 'b')
- (iii) AIR 1966 GUJ 189 (196)
- (iv) AIR 1960 SC 588 (HN & Para 21)
- (v) 1988 (3) SCC 82 (Para 5 – last 15 lines)
- (vi) Case No. OP 17/2009, Dt. 8.10.2009

Further the learned senior counsel has referred to the Oxford Concise Dictionary for the meaning of the word 'automatic' used in clauses 2.2 and 3.4.

5. In support of the alternative prayers, the learned senior counsel has submitted that the cost of the project estimated earlier when the PPA was signed has abnormally increased and on account of this the tariff fixed in the PPA, i.e., Rs.2.90 plus 2 % escalation per annum is not adequate to meet even the running costs of the project. Therefore according to him the project will become economically workable only if this Commission considers increase in the tariff to Rs.5.15 per Kwh from Rs.2.90 or allows the petitioner to sell 78 % of the power generated by it to others. In support of this prayer for increase of tariff, the senior counsel strongly relied upon Annexure-N, the Techno-Economic Feasibility Report prepared by M/s. SJA Industrial Consultant Pvt. Ltd., New Delhi.

6. Per contra it is contended by Sri Sriranga, Counsel for the respondents that the PPA signed by the petitioner with the respondents has not become null and void due to non fulfillment of the conditions specified in clauses 2 & 3 of the PPA since it is the petitioner who has failed to fulfill the conditions. He submits that this is admitted by the petitioner in the correspondence made with the Government and the other respondents. Further he submits that it is a well settled principle of law that no one can take benefit of his own wrong. It is also contended by him that even the conduct of the petitioner till recently showed that the PPA continued to be valid which is contrary to the stand now taken in the petition. According to him the correspondence made by the petitioner with the respondents and the Government clearly supports the correct understanding of the petitioner that the PPA continued to be in existence and that he had an obligation to fulfill the terms of PPA and supply electricity to the Respondent No.2. In support of his submission that no one shall be permitted to take benefit of his own wrong, he has relied upon the commentary made in Pollock & Mulla on Indian Contract and Specific Reliefs Acts (12th Edition) at Page 1250. He has also relied upon the judgments of the Hon'ble Supreme Court [2010 (6) SC Page 193] between Eureka Forbes Limited and Allahabad Bank and others and between Ashok Kapil and Sana Ullah and others [1996 (6) SCC 342] and the

judgment of the Bombay High Court in the First Appeal No.216/1920 Chunilal & Company Vs. Ahmedabad Fine Spinning & Weaving Company.

7. In the light of the contentions of both the parties, the two issues that arise for consideration and decision are –

(i) Whether the PPA dated 26.11.2004 has become null and void due to non fulfillment of conditions as laid down in clause 2 & 3 of PPA by the petitioner; and

In the alternative

(ii) Whether the petitioner can seek increase in the tariff agreed in the PPA to Rs.5.15 per unit on the ground that the cost of the project has gone up considerably.

Issue No.1:

8. As the entire case of the petitioner revolves around clauses 2.2 and 3.4 of the PPA, we deem it necessary to extract them Verbatim.

Clause 2.2 Non-Fulfillment of Conditions Precedent : Non-fulfillment of the Conditions Precedent within three (3) months from the date of signing of this Agreement shall render this Agreement null and void automatically and Corporation shall stand discharged of all obligations.

Clause 3.4 : If the Company does not achieve Financial Closure within 3 (three) months from the date of signing this Agreement or commence the construction of any of the Units of the Project before the Scheduled Date of Commencement other than due to occurrence of Force Majeure Events or fails to complete the construction within the scheduled date this agreement shall automatically become null and void and Corporation shall stand discharged of all liabilities. Corporation shall also not, in any way, be liable for any damages for any loss, whatsoever, arising from such termination of the Agreement under this Article 3, notwithstanding anything contained anywhere else in this Agreement or any other agreement between the Parties.

9. It is contended on behalf of the petitioner that since the petitioner did not achieve financial closure within three (3) months from the date of signing the agreement and also failed to complete the construction within twenty four (24)

months from the date of achievement of financial closure, the PPA has automatically become null and void as per clauses 2.2 and 3.4 of the PPA. It is also contended that as per the well-settled principle of interpretation of documents the clauses of the PPA have to be given the meaning as they are found in the document irrespective of the result that they lead to. In this behalf the learned senior counsel relied upon the judgment of the Hon'ble Supreme Court in the case of Central Bank of India Limited Vs. Hartford Fire Insurance Company Limited (reported in AIR 1965 SC 1288). The learned senior counsel also referred to the Oxford Dictionary and submitted that the word 'automatic' used in clause 2.2 and 3.4 means that the PPA comes to an end without the intervention of either of the parties once the conditions laid down therein are not fulfilled.

10. From a cursory reading of the clauses 2.2 and 3.4, it may appear that the Senior Counsel is right in his submission that the PPA becomes void automatically irrespective of the fact whether it is the petitioner or the respondent who did not fulfill the conditions because of the wordings used in clauses 2.2 and 3.4 of the PPA. However, when the above two clauses are examined more closely, this contention of the petitioner is found to be incorrect and not acceptable.

It is a well settled principle of interpretation of the documents that the intention of the parties has to be gathered from a reading of the entire document and not considering the wordings of individual clauses in isolation. It is held by the Hon'ble Supreme Court in the case of LIC Vs. V. Rajagaria (1999) 3 SCC 465 that "While construing the meaning of particular words found in an agreement between the parties, the intention of parties to the document in question will have to be given necessary weightage".

In the case of Central Bank of India Vs. Hartford Fire Insurance Co. Ltd., (AIR 1965 SC 1288) the Hon'ble Supreme Court has held that "It is the Court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention

correctly. If those words are clear, there is very little that the court has to do. The Court must give effect to the plain meaning of the words however it may dislike the result".

In another case referred to by the learned senior counsel, that is, General Assurance Society Vs. Chandmull Jain and another (AIR 1966 SC 1644), the Hon'ble Supreme Court has held that "In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves".

In the case on hand, we have to gather the intention of the parties in incorporating the clauses 2.2 and 3.4 of the PPA from the language used therein as per the above decisions. In our opinion, the clear intention of the parties is that in case of default by the generating company, the respondent corporation alone shall stand discharged from its obligations and not the generating company. In other words, the generating company which has not fulfilled the conditions precedent cannot take shelter under these clauses and treat the PPA as null and void and wriggle out of the contract.

The learned senior counsel has referred to the decision of the Gujarat High Court rendered in *M/s. Lalbhai Dalpatbai and Company Vs. Chitraranjan Chandulal Pandya* (AIR 1966 Gujarat 189). In our view, this does not advance the case of the petitioner. In the said case it was a service contract which was under consideration and the facts were not similar to the case on hand.

The other two cases namely *M/s Alopi Prasad & Sons Vs. Union of India* (AIR 1960 SC 588) and *Continental Construction Company Limited Vs. State of Madhya Pradesh* (1988 3 sc 82) referred to by the learned senior counsel also do not advance the case of the petitioner. In both these cases, the question before the Hon'ble Supreme Court was whether the contract gets frustrated if the performance of it has become more onerous than what was contemplated by the parties while signing the same. The Hon'ble Supreme Court after considering

the facts of both the cases has held that a contract will not get frustrated merely because the performance of it has become more onerous. In the present case, the case of the petitioner is not that the contract has become frustrated due to change in circumstances. It is the case of the petitioner that the contract has become null and void on account of the non fulfillment of conditions precedent by it.

11. However, in the present case, it is seen that the petitioner had fulfilled the obligations imposed under clause 2.1 and informed the same promptly to the 1st Respondent and accordingly Clause 2.2 will have no effect. This is clear from Annexure-G, the letter of the petitioner dated 21.2.2005 addressed to the General Manager (Tech.), KPTCL in which the petitioner has categorically admitted that it has obtained all approvals and achieved financial closure as required under Article 2 of the PPA. In view of this admission, the question of invoking Clause 2.2 clearly does not arise. Further, as far as Clause 3.4 of the PPA is concerned, it is the petitioner who has committed default in completing the project. This is clear from the letters [which are produced as Annexures R(1) to R(7)] addressed by the petitioner to KREDL. In the letter dated 18.7.2007 (R1) addressed to MD, KREDL the petitioner has stated that it has completed 90 % of the project and will be able to complete the project by January 2008 and therefore sought extension of time for completion. In the letter dated 9.9.2008 (R2) citing reasons of unscheduled rainfall, hike in steel and cement price, delay in supply of machinery, etc., it is stated by the petitioner that it will complete the project by 15.4.2009. This was further postponed to 15.10.2009 at the request of the petitioner [as per (Annexure R-3) letter dated 15.1.2009 addressed to KREDL]. In all these correspondences, the petitioner has pleaded that it is not able to complete the project for reasons beyond its control and needs time to perform the contract. If the PPA had become null and void as being now contended, there was no reason for the petitioner to keep quiet till 2009 and raise it when the plant was about to be commissioned. Thus it is clear that it is the petitioner who has failed to adhere to the time schedule provided for completion of the project

has all along been seeking extension of time for completion of project without raising any point of contention till 2009 about the PPA becoming null and void.

12. As contended by the Learned Counsel for the respondents, the petitioner cannot be allowed to take advantage of his lapses.

13. This principle has been followed by the Hon'ble Supreme Court in the case of Eureka Forbes Limited Vs. Allhabad Bench (2010) 6 SCC 193. The Hon'ble Supreme Court has held that the *maxim nullus cammodum capere potest de injuria sua propria* conveys a clear mandate of law that a person who by manipulation of a process frustrates the legal rights of others, should not be permitted to take advantage of his own wrong.

14. As pointed out above, in the present case, it is the petitioner company which has failed to complete the project within the scheduled date. Therefore it cannot be allowed to take advantage of it and contend that the contract has become void on account of the non-happening of the events mentioned in Clause 3.4. 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.

15. Considering the entire facts of the case, 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.

Issue No.2:

16. The Learned Senior Counsel for the petitioner has in support of the petitioner's alternative prayer contended that on account of increase in the cost of the project due to delay not attributable entirely to it, the Commission may

consider and fix a revised tariff in place of the tariff agreed in the PPA. According to him, the project cost has gone up to Rs.105 crores and the petitioner therefore had to avail additional loans to complete the project. Therefore, in order to make the project economically viable, a minimum rate of Rs.5.15 per unit may be considered to be fixed by the Commission. In support of this, the senior counsel has relied upon a techno-economic feasibility report produced as Annexure-N to the petition.

17. In our view, the material placed before the Commission is not enough to consider refixation of the tariff as contained in the PPA. For fixing of a tariff, all material details of costs incurred with the supporting documents have to be furnished. In the instant case, the report of a Consultant appointed by the petitioner, without the concurrence of the respondent cannot be the basis for considering refixation of the tariff. However the respondents have not dealt with the contention regarding additional cost except making a statement in general that it does not relate to the validity of the PPA. Therefore the petitioner, if so advised, may place all necessary material details before the Respondent MESCOM and substantiate its claim for higher Tariff and the Respondent (MESCOM) shall consider the same and take appropriate decision in accordance with law within a reasonable time frame.

18. The petition stands disposed of in the above terms.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)
MEMBER

Sd/-

(K. SRINIVASA RAO)
MEMBER