

**No.N/61/10**

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION  
BANGALORE**

**Dated this 3<sup>rd</sup> March 2011**

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

**Case No. OP 37/2010**

**Between**

M/s Dishaa Power Corporation Private Ltd.,  
No.37, 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**

1. Bangalore Electricity Supply Company Limited  
K.R. Circle  
BANGALORE – 560 001
2. Karnataka Power Transmission Corporation Limited  
Kaveri Bhavan  
BANGALORE – 560 009
3. State Load Dispatch Centre – Karnataka  
Ananda Rao Circle  
BANGALORE – 560 009
4. Hubli Electricity Supply Company Limited  
Navanagar, P.B.Road  
HUBLI – 580 029
5. Chamundeshwari Electricity Supply Corporation  
No.927, LJ Avenue Commercial Complex  
New Kantharaja Urs Road, Saraswathipuram  
MYSORE – 570b 009
6. Gulbarga Electricity Supply Company Limited  
Station Road  
GULBARGA – 585 101
7. Mangalore Electricity Supply Company Limited  
Paradigm Plaza, A.B. Shetty Circle  
MANGALORE – 575 001  
(Represented by Assistant Law Officer, BESCOM)

... Respondents

1. In this petition the petitioner has sought a declaration that the PPA dated 24.8.2007 and the Supplemental Agreement dated 2.12.2008 do not subsist and are not binding on the petitioner. In the alternative, a declaration is sought that the petitioner is not obliged to supply power exclusively to the 1<sup>st</sup> Respondent BESCO even if the PPA is held to be valid and binding on the petitioner. As a consequence the petitioner has also sought a direction to the respondents to execute a Wheeling and Banking Agreement with the petitioner for the power generated by its plant.

2. The respondents have entered appearance and have filed a detailed statement of objections dated 30.9.2010.

3. The petitioner on 20.1.2011 has filed an application for amendment of the grounds and has prayed for adding Paragraph No. 24 to the effect that there is no legal obligation whatsoever for the petitioner to supply to the respondents as the PPA is not adequately stamped as per the Stamp Act.

4. The respondents have expressed no objection for the amendment sought and consequently IA for amendment is allowed.

5. We have heard counsels appearing for both the parties and also considered the averments made in the petition and the objection statement and the documents submitted along with them.

6. Before dealing with the issue that has arisen in this case, we would like to summarise the facts of the case. The project of developing 3.6 MW mini hydel scheme across the river Gundia at Hosamatha village of Puttur taluk was initially

allotted to M/s. Vakkal Power Corporation Limited in Government Order dated 3.1.2005. This was transferred to M/s. Dishaa Power Corporation Private Limited, the petitioner in the present case, on 5.3.2007 by the Government. The petitioner also has signed a PPA with the 1<sup>st</sup> Respondent on 24.8.2007 for generating and selling electricity to the respondents. This has been approved by the Commission on 27.3.2008. The petitioner thereafter got the capacity of the plant increased and signed a Supplemental Agreement on 2.12.2008 for the increased capacity of 4.8 MW on the same terms and conditions as in the original PPA. This Supplemental Agreement was submitted to the Commission for approval by the 1<sup>st</sup> Respondent on 12.12.2008 and 4.2.2010. However, as the prescribed processing fee was not paid, the Commission directed the respondent on 17.2.2010 to pay the prescribed fee. The petitioner, instead of paying the prescribed fee, after one year of submission of PPA for approval, requested BESCO on 18.12.2009 for modification of the tariff to Rs.3.40 per unit as per the Commission's later Order dated 11.12.2009. Further, the petitioner on 9.2.2010 informed the respondent that in his case the revision of tariff is not acceptable to it and the PPA may be cancelled. The respondent on 1.3.2010 in reply informed the petitioner that the PPA cannot be cancelled and the petitioner has to abide by the terms and conditions of the PPA. On 3.3.2010, the petitioner addressed a letter to the respondent informing that the PPA has become null and void as per Article 2.2 and 3.4 of the PPA and expressed its intention to enter into a Wheeling and Banking Agreement and sell electricity to third parties. The petitioner also addressed a letter to the Commission that the Commission cannot give approval

to the Supplemental Agreement as the original PPA has become void on the grounds stated in the letter.

7. It is contended by the petitioner that the PPA dated 24.8.2007 has become void as it had not achieved the financial closure and had not obtained the required approvals specified in Article 2 of the PPA within the prescribed time schedule. According to the counsel for the petitioner, once the main PPA has become void, the Supplemental Agreement also becomes void and therefore both have to be considered as invalid and not subsisting. It is also contended by the petitioner as per the amended petition that the PPA is not enforceable as the same has not been adequately stamped as per the provisions of the Stamp Act in view of the law laid down by the Hon'ble Supreme Court in the case State of Uttaranchal Vs. M/s. Khurana Brothers in Civil Appeal No.5876 of 2009.

8. The respondents in reply have contended that the PPA has not become void as contended by the petitioner as admittedly the petitioner had complied with the terms of the PPA by achieving financial closure and obtaining the Environmental Clearance and other approvals even before entering into the PPA. This is clear from the letter dated 10.12.2007 of the petitioner addressed to the respondent (produced as Annexure R-4).

9. From the above facts, the issues that arise for consideration and decision in the case are –

- (i) whether the PPA dated 24.8.2007 and the Supplemental Agreement dated 2.12.2008 have become void as contended by the petitioner; and

- (ii) whether the petitioner is entitled to seek Wheeling and Banking facility from the respondent.

**Issue No.(i)**

10. In our view the PPA dated 24.8.2007 and the Supplemental Agreement dated 2.12.2008 have not become null and void as contended by the petitioner as the petitioner had achieved the financial closure and had obtained required approvals even before signing the PPA, i.e., well before the prescribed time. This is clear from the very letter of the petitioner dated 10.12.2007 produced as R-4 by the respondents. We are dismayed at the stand taken by the petitioner in the face of admitted facts as revealed in its own letters. It appears to us that the petitioner has come up with the present case only with a view to somehow wriggle out of a binding contract which might have become inconvenient now. Therefore we have no hesitation in holding that the PPA has not become void as contended, and continues to bind the petitioner.

Issue No. (i) is accordingly answered in the negative.

11. Consequently, Issue No. (ii) also gets answered in the negative.

12. The petitioner's counsel finally raised a contention that the PPA is unenforceable (Issue No. iii), as the same is not adequately stamped as per the provisions of the Stamp Act. In support of this contention he relied upon the judgment of the Hon'ble Supreme Court in Civil Appeal No. 5876/2009.

13. In our view this contention has no substance. As held by the Hon'ble Supreme Court in the case of Dharma Naika Vs. Rama Naika and another (2008) 14 SCC 517, an agreement for sale is not the same as sale and in the case of an agreement for sale the property agreed to be sold remains with the seller. The petitioner has failed to notice that there is no transfer of property (electricity) under the Power Purchase Agreement so as to bring the same with the definition of 'conveyance' under Section 2(10) of the Stamp Act and Section 2(d) of the Karnataka Stamp Act. What is provided for in the PPA is only a right to sell and right to purchase and not actual sale per se. The Hon'ble Supreme Court in the case cited by the learned counsel for the petitioner, on facts of that case, has held that the contract of sale referred therein amounted to conveyance as defined under Section 2(10) of the Stamp Act. Therefore, in our view, the said judgment has no application to the case on hand.

Issue No. (iii) raised regarding provision of inadequate stamp value, therefore, is also answered against the petitioner.

14. Consequent to the above discussion, this petition fails and accordingly is rejected.

Sd/-

(M.R. SREENIVASA MURTHY)  
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)  
MEMBER

Sd/-

(K. SRINIVASA RAO)  
MEMBER