

No.N/71/10

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 17th March 2011

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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 43/2010

Between

M/s SRS Energy Private Limited
953/A, 1st Floor
II Main, IV Block, Rajajinagar
Kanakapura Road
BANGALORE – 560 010
(Represented by Sri Shridhara Prabhu, Advocate)

... Petitioner

And

1. Gulbarga Electricity Supply Company Limited
Station Road
GULBARGA – 585 101
2. State Load Dispatch Centre – Karnataka
Ananda Rao Circle
BANGALORE – 560 009
3. Karnataka Power Transmission Corporation Limited
Kaveri Bhavan, K.G. Road
BANGALORE – 560 009
(Represented by Just Law Advocates)

... Respondents

1. The petitioner in this petition has sought for a declaration that the PPA dated 29.12.2005 is not subsisting. In the alternative a declaration is also sought that the petitioner is not obliged to supply power to the 1st Respondent even if the PPA is held to be valid.

2. The respondents have put in appearance and filed their statement of objections. The petitioner has filed an application on 20.1.2011 for amendment of the petition. This is allowed as the respondents have no objection for the same.

3. We have heard counsels for both the petitioner and the respondents.

4. It is undisputed that the petitioner has executed a PPA on 29.12.2005 with the 1st Respondent and the same has been approved by this Commission on 12.1.2006.

5. It is contended by the petitioner that the PPA no longer survives as the conditions precedent provided in Article 2 of the PPA have not been fulfilled by the petitioner.

6. It is further contended that even assuming that the PPA continues to be valid and binding, the petitioner is entitled to sell the power generated by it to third parties as the PPA is only an agreement which imposes an obligation on the purchaser to purchase whatever energy is delivered. It is further contended that since the agreement is not adequately stamped the same cannot be enforced by the respondents.

7. In reply it is contended on behalf of the respondents that the PPA has not become void as contended by the petitioner and it continues to be valid and binding on the parties. It is further contended that even assuming that some of the conditions are not fulfilled by the petitioner, the petitioner cannot take advantage of it and avoid the contract. It is also submitted that under the PPA

the petitioner cannot sell electricity to any third parties and is bound to supply the power generated to the 1st Respondent only.

8. The issues that arise for consideration and decision of the Commission are—

- (i) Whether the PPA has become void or continues to be valid and binding;
- (ii) Whether the petitioner can sell electricity during the subsistence of the agreement to any third parties; and
- (iii) Whether the PPA executed is in violation of the Stamp Act.

9. It is contended by the petitioner that the PPA is void in law since the conditions precedent of obtaining the interconnection approval has not been fulfilled within six months from the date of the signing of the PPA as the 1st Respondent has failed to assist the petitioner in obtaining the interconnection approval. In our view, the submissions made that on behalf of the petitioner are untenable. Under the PPA, if the petitioner is not able to obtain interconnection or other approvals required within the period prescribed, it cannot take advantage of the same to claim that the PPA has become null and void under Article 2 of the PPA. At any rate, this does not arise in this case as the statement of the petitioner is factually incorrect. It is noticed from Annexure P-3 that the interconnection approval has been given by the 3rd Respondent on 18.3.2008 for which request was made only on 10.3.2008. The petitioner having not carried out its part of work cannot blame the respondents and take advantage of it. Therefore we hold that the PPA has not become void as contended by the petitioner and continues to be in force.

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

10. It is further contended by the petitioner that even if it is held that the PPA continues to be in force, it has a right to sell the electricity to third parties as the agreement in question only contemplates compulsory purchase of electricity by the 1st Respondent and not compulsory generation and supply by the petitioner. This contention in our opinion is devoid of any merit. The agreement executed with the Government of Karnataka on 16th day of July 2004 at Clause 6 had given an option to the petitioner either to enter into a PPA with KPTCL in case it wants to sell power to it or enter into a Wheeling and Banking Agreement with KPTCL in case it desires to sell power to a third party. The petitioner exercised its option and entered into a PPA with KPTCL thereby gave up the right to sell the electricity generated to the third parties. Therefore petitioner now has no choice except to sell all electricity generated to GESCOM, which is a successor / assignee of the contract entered into with KPTCL. Further, the PPA imposes mutual rights and obligations on both the parties which have to be honoured by them. This is clear from the very preamble of the PPA which reads as under :

- (i) The Govt. of Karnataka by its Orders 1] DE 13 NCE 2004 Bangalore dated 13.02.2004 and 2] DE 190 NCE 2004 Bangalore dated 14.06.2004 has accorded its sanction to the proposal of M/s. SRS Energy Pvt. Ltd., for installation of a Mini Hydro Electric Power Generating Station of 10 MW capacity, across Krishna River near Kadhrapura village in Shahapur Taluk, Gulbarga District and permitted GESCOM to enter into an agreement with the Company for purchase of Electricity.
- (ii) Pursuant to (i) above the Company has plans to develop, design, engineer, procure finance, construct, own, operate and maintain a Mini Hydro Electric Power Generating Station, hereinafter defined as

the Project, with a gross capacity of 10MW across Krishna River near Kadhrapura village in Shahapur Taluk, Gulbarga District, and desires to sell Electricity to GESCOM.

However, consequent to the coming into force of Electricity Act, 2003, corporation is barred from trading in power and the projects have been allotted to respective GESCOM based on the geographical location of the project vide GO No.EN 131 PSR 2003 dated 10.05.2005 of Government of Karnataka.

(iii) GESCOM, which is at present engaged in the purchase, supply and distribution of electricity has agreed to purchase Electricity (as hereinafter defined) from the Company to be generated across Krishna River near Kadhrapura village in Shahapur Taluk, Gulbarga District on the conditions set forth herein.

Further under Clause 4.1, the generator is obliged to construct, operate and maintain the same and as per Clause 4.2, GESCOM has to off take and purchase the electricity generated by the Company.

11. Reading of the agreement as a whole, the intention of the parties becomes crystal clear that the entire power generated by the petitioner has to be sold only to the 1st Respondent and the 1st Respondent has an obligation to purchase all the electricity generated and pay for it. If the intention of the parties was otherwise, the PPA would have said so and conferred such a right on the petitioner. Further, as per the PPA third party sale is permitted only after the 11th year that too when the 1st Respondent is unwilling to purchase the power at the rates determined by the Commission. Therefore we have no hesitation to hold that during the subsistence of the PPA petitioner has to sell all electricity

generated only to GESCO and there is no question of any third party sale by the petitioner except as specifically provided in Clause 5.2 of the PPA.

Accordingly Issue No. (ii) is answered in the negative.

12. It is contended by the petitioner's counsel that the PPA is unenforceable as the same has not been executed in accordance with the Stamp Act. We have already dealt with a similar contention raised in OP 37/2010 and taken a view that there is no transfer of property (electricity) under the PPA so as to bring the same within the definition of 'conveyance' and therefore need not be stamped on the said basis. Duly following the said reasoning this contention deserves to be rejected in this case also and the 3rd issue has to be answered in the negative.

13. For the foregoing reasons and findings, this petition is rejected.

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

Sd/-
(VISHVANATH HIREMATH)
MEMBER

Sd/-
(K. SRINIVASA RAO)
MEMBER