



27.2.2009 or in the alternative to direct the respondent by way of mandatory injunction to commence and continue supply of power as per the terms of the PPA dated 27.2.2009.

2. On notice, the respondents have put in appearance through their counsel Sri Prabhuling Navadgi.

3. Before the petition was taken up for consideration, the petitioner has filed an application IA No.1/201 under Order 6 Rule 17 of CPC read with Section 86 of the Electricity Act, 2003 for amendment of the prayers by replacing the existing ones as follows :

- (i) Direct the Respondent to commence and continue supply of power as per the terms of the Power Purchase Agreement dated 27.2.2009;
- (ii) Declare that the Respondent is bound by the provisions of the PPA dated 27.2.209 and is bound to adhere to the supply schedule provided therein;
- (iii) Declare that the Respondent is in breach of the terms of PPA dated 27.2.2009 and compensate the Petitioners for the said breach and non availability of power committed to be delivered under the PPA.

OR IN THE ALTERNATIVE

Appoint an arbitrator in order to resolve the disputes between the Petitioner and the Respondents as per the Power Purchase Agreement dated 27.2.2009;

- (iv) Grant such other and further reliefs as this Hon'ble Commission may deem fit in the facts and circumstances of this case, in the ends of justice.

4. The petitioner in the application has submitted that the amendment has become necessary because by inadvertence prayers sought in the original petition have got interchanged.

5. The respondents have filed detailed objection to the application for amendment and prayed for rejection of the same.

6. As the amendment application of the petitioner is opposed as not maintainable in law, it has become necessary to decide whether the amendments sought have to be allowed or not before proceeding to consider the petition on merits.

7. Therefore we have heard the counsels appearing for the petitioner and the respondents only on the question whether the amendment application has to be allowed or not. We have also considered the contentions of both the parties and the judgments submitted in support of their respective contentions.

8. Before we proceed to deal with the application of the petitioner and objections of the respondents, we may state brief facts of the case in order to appreciate the respective contentions in the light of the facts providing the background.

9. The Power Company of Karnataka Limited (PCKL) on 27.8.2007 had invited bids for supply of 1,500 MW of power on behalf of all the power distribution companies of the State. The 1<sup>st</sup> Respondent company submitted its bid for supplying 600 MW of power through its special purpose company M/s. Konaseema Gas Power Limited (3<sup>rd</sup> Respondent). After scrutiny of the bid and

negotiations, PCKL issued a Letter of Intent on 16.2.2008 to the 1<sup>st</sup> Respondent company for procuring power from the 3<sup>rd</sup> Respondent M/s. Konaseena Gas Power Company Ltd., and also called upon the 1<sup>st</sup> Respondent to furnish the performance bank guarantee of Rs.4.00 lakh per MWs for the contracted capacity as per the bid conditions.

10. Thereafter, PCKL approached the Commission for approval of the tariff obtained through the bid under Section 63 of the Electricity Act, 2003. This Commission considered the request and through its letter No.S/03/0/4988, dated 7.10.2008 conveyed its approval for procurement of power from the respondent at a price of Rs.3.733 per unit obtained through bid.

11. PCKL thereafter invited the respondent company to sign a PPA incorporating the quantity and the rate as approved by the Commission so that further action can be taken. The respondent also showed its keenness in signing a PPA. Accordingly the PPA was executed on 27.2.2009. As per the PPA, the respondent had to initially supply 80 MW of power from its existing plant at the rate of Rs.3.66 from 1.2.2008 itself over and above the 600 MW power for which the Respondent had submitted its bids.

12. After signing the PPA based on the bid and Lol, the respondent company on 3.3.2009 made a request for modification of the schedule of supply for reasons stated therein and also expressed its inability to supply 80 MW of power agreed to be supplied from the existing plant from 1.2.2008 which was over and above tendered quantity of 600 MW. The reason given by the Respondent was

that due to an order passed by the APERC it is not able to supply power (80 MW) from the existing plant as agreed while negotiating PPA with PCKL.

13. The above request for revision of the schedule of supply was not agreed to by PCKL/ESCOs and they insisted on compliance of the PPA as signed by the 1<sup>st</sup> Respondent.

14. As disputes persisted, the petitioner company BESCOM on 24.6.2009 filed AA No. 431 of 2009 for issuance of a mandatory injunction to commence supply of electricity as per PPA dated 27.2.2009, pending reference to arbitration before the Court of Additional City Civil Judge, Bangalore.

15. Simultaneously the petitioner company filed the present petition before this Commission in OP 48/2010 under Section 86(1)(f) of the Electricity Act, 2003 praying for appointment of an Arbitrator to resolve the disputes between the petitioner and the respondents as per the PPA dated 27.2.2009 or in the alternative direct the respondent by way of mandatory injunction to commence and continue supply of power as per the provisions of the PPA.

16. In the meanwhile, the respondent generating company had filed a Civil Suit in OS No.668/2008 seeking permanent injunction restraining PCKL and BESCOM from invoking or making any claim against the bank guarantee dated 25.10.2007 produced by the respondent and also to restrain SBI from making the payment under the said bank guarantee. Initially Additional Chief Judge, City Civil Court, Hyderabad granted a Status Quo Order on 3.12.2008 till 18.12.2008 when this suit was withdrawn with liberty to file fresh petition.

17. Consequent to filing of the present petition, the petitioner withdrew the application AA No. 431/2009 filed before the Court of Additional City Civil Judge, Bangalore under the Arbitration and Conciliation Act, 1996.

18. Thereafter the petitioner has filed the present application under Order VI Rule 17 of CPC for amendment of the prayers made in the original petition.

19. Order VI Rule 17 of CPC reads as under :

“The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial”.

20. The Hon'ble Supreme Court in the latest case of Revajeeetu Builders and Developers Vs. Narayanaswamy and Sons and others cited by the respondents' counsel [reported in (2009) 10 SCC 84] while dealing with the scope of Order VI Rule 17 has held that –

“On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

1. whether the amendment sought is imperative for proper and effective adjudication of the case;

2. whether the application for amendment is bona fide or mala fide;
3. the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
4. refusing amendment would in fact lead to injustice or lead to multiple litigation;
5. whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
6. as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

21. Now let us consider the application for amendment filed by the petitioner in the light of Order VI Rule 17 of CPC and the law as summarized by the Hon'ble Supreme Court in the above judgment.

22. The essence of the amendments now sought by the petitioner is for a declaration that the PPA dated 27.2.2009 is binding on the respondent and it has to adhere to the terms of the said PPA and since the respondent has committed breach of it the petitioner shall get compensated for the same. These amended prayers also include an alternative prayer for appointment of an Arbitrator.

23. The original prayers made by the petitioner were first to appoint an arbitrator in order to resolve the disputes between the Petitioner and the

Respondents as per the Power Purchase Agreement dated 27.2.2009 and in the alternative direct the respondent by way of mandatory injunction to commence and continue supply of power as per the terms of the PPA dated 27.2.2009.

24. Sri Sriranga, Counsel appearing for the petitioner submitted that the amendments sought by the petitioner are well justified and perfectly within the scope of Order VI Rule 17 of CPC. According to him, the amendments sought do not alter the nature of the petition and also in no way defeat any of the claims of the respondents. Further, according to him, as per the law laid down by various decisions of the Hon'ble Supreme Court and High Courts cited by him the amendment application has to be allowed.

25. Sri Syed Jafar Alam, Counsel appearing for Link Legal Advocates for the respondents on behalf of Sri Prabhuling Navadgi vehemently opposed the amendment application of the petitioner point by point by citing several judgments of the Hon'ble High Court and the Hon'ble Supreme Court. According to him, the application lacks bona fide as the PPA was got signed by the respondent assuring that the schedule of supply will be amended. In support of this, he cited the reasons mentioned by the respondents in the application filed for withdrawal of the original suit filed before the Hyderabad Court. If the amendment is allowed, the same will alter the very nature of the petition and the amendments sought are not necessary for determining the real question in controversy between the parties and the application will affect the case of the respondent prejudicially.



26. Under Order VI Rule 17, the courts are empowered to allow the either of the party to alter or amend the pleadings at any stage of the proceedings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

27. As held by the Hon'ble Supreme Court in the case of Revajeethu Builders referred to above, the courts have very wide discretion in the matter of allowing the amendments of pleadings. As per this decision, the first condition which must be satisfied before the amendment is allowed is that such an amendment should be necessary for the determination of the real question in the case / issue in dispute. The second condition is that allowing of an application will not cause prejudice or injustice to the other side.

28. In our view the amendments sought by the petitioner are necessary for the determination of the real question in controversy, i.e., whether the respondent has committed breach of the PPA. The question of breach will arise only if there is a binding PPA and not otherwise. Further the counsel for the respondents has failed to establish any injustice that may be caused to it by allowing the amendments as sought. Accordingly, in our view, allowing of the amendments sought will in no way affect the case of the respondent and cause any prejudice or injustice to the respondent as the amendments sought by the petitioner are taken up for consideration before considering the petition on merits and the respondent will have adequate opportunity to counter the averments made in the petition as well as in the amendment application. Thus

the two conditions set out in Para (27) are satisfied and therefore the application for amendments has to be allowed.

29. As regards the allegation of lack of bona fides submitted by the respondents' counsel supported by the application filed before the Hyderabad Court, we are of the opinion that we cannot assume mala fides on the part of the petitioner. Neither the application filed before the Court for withdrawal of the suit nor the final order of the City Civil Court, Hyderabad indicate that the petitioner herein had accepted the submissions made by the petitioner therein. Therefore we hold that the application is bona fide and does not suffer from any mala fide.

30. Though both the parties have cited several other judgments on the interpretation of Order VI Rule 17 of CPC, we deem it not necessary to refer to all of them as the Hon'ble Supreme Court in the case cited above has succinctly stated the law on the scope of Order VI Rule 17 of the CPC and we have examined the amendment application in the light of the said judgment.

31. In view of the foregoing discussion, we allow the amendment application filed by the petitioner. The petitioner accordingly shall carryout the amendment in the original petition and respondents may file their objections, if any on the petition as amended, within a period of two weeks.

32. Post the matter for further hearing on 31.3.2011.

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

Sd/-  
(VISHVANATH HIREMATH)  
MEMBER

Sd/-  
(K. SRINIVASA RAO)  
MEMBER