

No.N/17/09/1837

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION BANGALORE

Dated 2nd November, 2012

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

OP No.10/2009

BETWEEN

Narayanpur Power Company
No.44, Bharat Apartments
Ground Floor, No.44
Race Course Road
BANGALORE-560 001
(Represented by Shri Shridhar Prabhu, Advocate)

... **Petitioner**

AND

Gulbarga Electricity Supply Company Ltd.
Station Road
GULBARGA – 585 101
(Represented by M/s. Justlaw, advocates)

... **Respondent**

1. This Petition was originally initiated by the Petitioner - Narayanpur Power Company, for a declaration that the Power Purchase Agreement (PPA) dated 16.1.2004 (Annexure-A) is not valid and stands cancelled due to violation of conditions of the PPA by the Respondent, and for issuance of directions to the Respondent to make the tariff invoice payments and interest thereon.

2. The Respondent has appeared and filed objections.

3. After hearing both the parties and considering the material placed before it, this Commission, by its Order dated 23.10.2010, dismissed the Petition, holding that the PPA dated 16.1.2004 signed by the Petitioner is valid and binding on the parties.

4. The Petitioner, aggrieved by the above Order of this Commission, filed an Appeal in Appeal No.31/2011 before the Hon'ble Appellate Tribunal for Electricity (ATE). The Hon'ble ATE, by its Order dated 15.2.2012, while not interfering with the Order dated 23.10.2010 of this Commission, has remanded the matter back to the Commission for taking a decision on the points framed by it as (f) and (g) in its Order.

5. As per the Remand Order of the Hon'ble ATE, the Petition has been taken up for consideration and the parties have been heard.

6. The two points, which have been directed to be considered by this Commission, are :

(1) Whether the appellant has any obligation to supply power even if payment for the delivered energy remains outstanding for more than 90 days?; and

(2) Whether the agreement has been validly terminated by the appellant because of the alleged breach of the terms of the agreement?

7. We have considered the submissions made by both the parties on the above points and the terms of the PPA dated 16.1.2004 (Annexure-A).

Question No.1 :

8. The first question is 'Whether the appellant has any obligation to supply power even if payment for the delivered energy remains outstanding for more than 90 days?'

9. In our view, this question gets answered by Article 9.3 of the PPA dated 16.1.2004 itself, which reads as under :

"In the event of any payment default by the Corporation for a continuous period of three months, the Company shall be permitted to sell power to third parties through the Grid System by entering into a Wheeling and Banking Agreement with the Corporation for which it shall pay Wheeling charges to the Corporation at the rates applicable from time to time in addition to banking charges at the rate applicable from time to time as approved by the Commission."

10. As per the above clause of the PPA, in the event of payment default by the Purchaser for a continuous period of three months, the Generating Company has a right to sell electricity generated by it to third parties by paying Wheeling and Banking charges to the concerned Utility. In other words, the Petitioner will not be under an obligation to supply power generated by it, if

there is a continuous payment default for a period of three months and it is entitled to sell power to third parties by entering into a Wheeling and Banking Agreement with the Respondent and by paying Wheeling and Banking charges, till the Respondent makes up the default and starts paying as per the terms of the Agreement. It is seen that the PPA does not contemplate termination of the PPA on continuous default in payment for three months and it only provides for third party sale. This becomes clear, if Article 9.4 of the PPA is seen. Article 9.4 of the PPA dated 16.1.2004 reads as under :

"In the event of default by Corporation in offtaking power produced by the Company for a continuous period of three months (other than due to events of force majeure and system constraints) or due to default on the part of Corporation in making payments to the Company for a continuous period of three months, the Company is entitled to be compensated by the Corporation, for which Company may initiate arbitration proceedings in accordance with Article 10. The amount of compensation to be paid will be determined by Arbitrators taking into consideration the life of the plant, the reasonable amount of return that the company is expected to achieve and the profits the company makes from sale of power to third parties through Wheeling & Banking arrangement. The amount of such compensation shall however be limited for a period not exceeding one year from the date of default."

11. This Commission, in OP No.30/2009, disposed of on 11.12.2009, had an occasion to deal with a similar Clause as contained under Article 9.3 of the PPA

therein. After considering Article 9.3 of the PPA, this Commission has held as follows :

'8. In our considered opinion the contention of the respondent that PPA stands abandoned once there is a default by the petitioner and it has opted for third party sale is not tenable. Clause 9.1 does not say so. It only gives a right to respondent to sell the electricity to third parties in the event of any payment default by the petitioner for a continuous period of three months. This is part of the PPA and it operates only when PPA continues. In other words, obligation to supply electricity to the petitioner stands suspended only during the period of default of the petitioner and not for all the time to come. The PPA continues to exist till terminated as per Clause 9.3 and obligation of the respondent to supply electricity to the petitioner under PPA gets revived once the petitioner is ready and willing to perform the contract and the respondent shall have to perform its obligation.'

12. For the above reasons, our answer on the above Issue is that the Petitioner has no obligation to supply electricity to the Respondent in case of default by the Respondent for a continuous period of 90 (ninety) days and can sell electricity to third parties, so long as default continues.

Question No.2 :

13. The second question is 'Whether the agreement has been validly terminated by the appellant because of the alleged breach of the terms of the agreement?'

14. To determine this question, it is necessary to examine the Termination Letter dated 4.3.2009 (Annexure-C), issued by the Petitioner through its Lawyer, Shri Shivakumar Kalloor . The said letter reads as under :

“..2. As per the said PPA agreement there are several clauses / articles included and conditions have been stated in the said PPA Agreement. In case, there is any breach of the conditions, the parties are at liberty to revoke or cancel the agreement and can go for open access as per the provisions of the Electricity Act,2003.

3. In the said PPA agreement a condition is stipulated to make tariff payment within time. In case, if the tariff payments are not paid within 30 days time, my client will be entitled for penal interest at the rate of SBI Medium Term Lending rate per annum for such payment of delayed dues until the dues are paid in full. My client has been supplying the electricity generated by his company as per agreement. Even though the tariff rates are fixed at lowest price. Your Corporation is not making tariff payments as per the said agreement.

4. As per Articles 6 (6.3) in case late payments are made, the company can claim penal interest as per rate of SBI Medium Term Lending rate per annum till the whole of the amount due is paid. Article 6 (6.3) also states that you have to furnish a letter of credit. The tariff payment invoices for the months of August, September and October, 2008 are still due for payment. Since you have failed to make tariff payment invoices immediately and also having not furnishing letter of credit in favour of my client company from any schedule bank the agreement dated 16.1.2004 (PPA Agreement) stands cancelled. My clients availing benefit of open access under the provisions of the Electricity act, 2003.

5. My client has been operating the unit to its maximum capacity and supplying energy from the unit No.1 to meet the requirement of the State, though tariff rates are lowest rates, you have failed to make payment of tariff payment within 30 day from due dates,. You have been purchasing the power at the rate of 7 to __ rupees per unit by paying higher rates from other sources.

6. On 30.1.2009, my client had issued a notice to you stating that you have not made tariff payment within the dates and also has claimed penal interest for not having paid tariff payments for various periods. In this regard my client has also enclosed a chart mentioning the period of nonpayment of tariff payment invoices and also penal interest has been also mentioned in the said chart. As on 30.12.2006 your corporation is liable to pay Rs.69,23,198/- to my client. I have enclosed the said chart of amount due by your corporation. In spite of receiving his notice dated 30.1.2009, you have failed to make payment. Till the whole amount is paid upto date, you are liable to pay penal interest. Since you have failed to make payment in due time and since you have failed to open letter of credits in favour of my client company in any scheduled bank, you have violated the conditions mentioned in PPA agreement dated 16.1.2004, therefore, the agreement stands cancelled as there is breach and violation of the PPA agreement.

Kindly take notice that the said agreement dated 16.1.2004 (PPA Agreement) executed by my client in your favour stands cancelled. You are hereby called upon to make tariff payments due to my client with penal interest and also you are liable pay future penal interest from 31.12.2008. As on 31.12.2008, you are liable to pay Rs.69,23,198/- as per chart sent by my client for this penal interest has included, till you make payment for the said

period. If you fail to make payment my client will be constrained to approach Hon'ble High Court or any other proper forum seeking for directions to make payment. My client will be also seeking for compensatory cost. A week's time is granted to you to clear of the dues to my client. The PPA agreement dated 16.1.2004 also stands cancelled due to your breach of the conditions and my client will apply for open access for 1st Unit, before competent authority. ..."

15. It may be seen from the above Notice that while terminating the PPA dated 16.1.2004, the Petitioner has not considered the terms of the PPA relating to issue of non-payment of the charges for the electricity supplied; in particular, Articles 9.3 and 9.4 of the PPA. As per Articles 9.3 and 9.4 of the PPA, which are extracted in the earlier paragraphs, the Petitioner, in case of non-payment of charges for the electricity supplied, cannot terminate the PPA and has to seek only third party sale or compensation on the basis provided under Article 9.4 of the PPA.

16. In the present case, the Petitioner, instead of availing the remedy provided in the PPA under Articles 9.3 and 9.4, has proceeded to terminate the PPA, which, in our view, was not in accordance with the terms of the PPA. Therefore, termination of the PPA was invalid and unenforceable.

17. The Petitioner has strongly relied upon the Order dated 8.10.2009 passed in OP No.17/2009, as well as the Order dated 8.5.2010 passed by the Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal No.176/2009, in the case of *BESCOM –Vs- Davanagere Sugar Company Limited and another*, in support of its

case that the termination of the PPA is valid, without noticing the distinction between the two PPAs. In the case of Davanagere Sugar Company Limited, the PPA signed therein contained specific terms for termination of PPA in case of non-payment. The said terms were as follows :

“9.2 Events of Default:

9.2.2 *Corporation's Default: The occurrence of any of the following at any time during the Term of the Agreement shall constitute an Event of Default by Corporation:*

- a. *Failure or refusal by Corporation to perform its financial and other material obligations under this Agreement.*

9.3 Termination:

9.3.2 *Termination for Corporation's Default: Upon the occurrence of an Event of Default as set out in sub-clause 9.2.2 above, Company may deliver a Default Notice to Corporation in writing which shall specify in reasonable detail the Event of Default giving rise to the Default Notice, and calling upon the Corporation to remedy the same.*

At the expiry of 30 (thirty) days from the delivery of this default notice and unless the Parties have agreed otherwise, or the Event of Default giving rise to the Default Notice has been remedied, Company may deliver a Termination Notice to Corporation. Company may terminate this Agreement by delivering such a Termination Notice Corporation and intimate the same to the Commission. Upon delivery of the Termination Notice this Agreement shall stand terminated.”

In contrast, in the present case, the PPA does not provide for termination of the PPA on the ground of non-payment. It only provides for third party sale and compensation as provided under Articles 9.3 and 9.4 as remedy in case of payment defaults. Therefore, the Order of this Commission as well as the Order of the Hon'ble ATE, referred to above, will not come to the aid of the Petitioner's contention that the PPA is validly terminated by it.

18. The Petitioner has contended that it had again terminated the PPA on 13.1.2011 (Annexure-S) for payment default and for non-opening of Letter of Credit, and therefore, the termination effected continues to subsist and it is not obliged to supply any electricity under the PPA to the Respondent. Further, the Petitioner, in support of the above termination of the PPA, has submitted that the Respondent, as on the date of Notice, had not opened the Letter of Credit, as required under Article 6.6 of the PPA. Further, it is also contended that inspite of repeated requests, the Respondent was not making payments properly as per the terms of the PPA.

19. We have considered the second termination of the PPA effected by the Petitioner on 13.1.2011 and also the arguments made in support of the same.

20. We have already held, while examining the validity of the termination dated 4.3.2009, that in case of continuous payment defaults, the Petitioner under Article 9.3 of the PPA has a remedy and the right to go in for third party sale of

electricity, but has no right to terminate the PPA on the said ground. For the same reason, we hold that the termination of the PPA on 13.1.2011 for defaults in payments is not in accordance with the terms of the PPA and hence not valid.

21. As regards the ground of non-opening of Letter of Credit for termination of the PPA, we have considered the same and the provisions of the PPA relating thereto. Article 6.6 of the PPA states that the 'Corporation (Respondent) shall establish and maintain transferable, assignable, irrevocable and unconditional non-revolving Letter of Credit in favour of, and for the sole benefit of, the Company (Petitioner). The Letter of Credit shall be established in favour of, and issued to, the Company on the date hereof and made operational thirty (30) days prior to the Commercial Operation Date of the Project and shall be maintained consistent herewith by Corporation at all times during the Term of the Agreement.'

22. It is observed that though the above term regarding opening of Letter of Credit existed in the PPA dated 16.1.2004, the Petitioner did not invoke the same at any time, though the Petitioner commissioned the Project on 23.7.2006, much prior to the issuance of Notice, and for the first time, the Petitioner only mentioned about the said requirement in its Legal Notice dated 4.3.2009, that too, as a ground for termination of the PPA and not calling upon the Respondent to open the Letter of Credit even at that point of time. The Petitioner having not enforced the term of opening of Letter of Credit almost for five years from the date of the PPA, cannot suddenly terminate the PPA on the said ground. If the

Petitioner was aggrieved by the non-opening of Letter of Credit, he could have insisted upon the same when it commissioned its Project and started generating electricity and raised Bills, and that too, when these Bills were allegedly not paid by the Respondent. It appears to us from the facts that the Petitioner was more interested in terminating the PPA, on one ground or the other, than performing the same. Therefore, on the facts of this case, in our view, the termination of the PPA dated 16.1.2004 on the ground of non-opening of Letter of Credit, cannot be sustained.

23. The reliance by the Petitioner on the Orders in the Davanagere Sugars case will not help, as in the said case, the Petitioner therein had called upon the Purchaser to open a Letter of Credit and in spite of calling upon the Purchaser to open a Letter of Credit and cure the said default, the Purchaser did not remedy the default. That is not the case in the present Petition.

24. Therefore, on facts as prevailing in this case, we hold that the termination of the PPA dated 16.1.2004, on the grounds urged, cannot be sustained.

25. Accordingly, the points (f) and (g) raised in the Order dated 15.2.2012 of the Hon'ble ATE and the dispute relating to termination dated 13.1.2011 (Annexure-S) stand answered in the above terms, and the Petition is accordingly disposed of.

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| Sd/- | Sd/- | Sd/- |
| (M.R. SREENIVASA MURTHY) | (VISHVANATH HIREMATH) | (K.SRINIVASA RAO) |
| CHAIRMAN | MEMBER | MEMBER |