

No.: N/22/15

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BENGALURU**

Dated : 7th January, 2016

Present:

- | | |
|---------------------------------|----------|
| 1. Sri M.K. Shankaralinge Gowda | Chairman |
| 2. Sri H.D. Arun Kumar | Member |
| 3. Sri D.B. Manival Raju | Member |

O P No.11/2015

BETWEEN:

Narayanpur Power Company Private Limited,
A-21, Manyata Residency,
Arabic College Post,
Bengaluru – 560 045

..

PETITIONER

[Represented by Navayana Law Offices, Advocates]

AND:

Gulbarga Electricity Supply Company Ltd,
Station Road,
Kalaburagi – 585 101.

..

RESPONDENT

[Represented by Just Law, Advocates]

ORDERS

- 1) This petition is filed on 8.4.2015, under Section 86 (1) (f) of the Electricity Act, 2003, read with Regulation 21(1) of KERC (G&C of Proceedings) Regulations, 2000, praying to:

Direct the respondent to make payment of dues legally and contractually payable to the petitioner from the date of execution of the power Purchase Agreement (PPA) up to the date of its valid termination on 12.12.2013 as per computations at Annexure P-1.

- 2) The material facts for the disposal of this case are as follows:

The petitioner is a generating company with a mini hydel plant of 7.2 MW capacity. The petitioner had executed a PPA dated 12.2.2008 with the respondent (Annexure P-2). The petitioner had issued a notice dated 23.4.2012 for termination of the PPA. OP No.21/2012 was filed by the petitioner on 11.5.2012 before the Commission seeking declaration that, the termination of the PPA was valid. This petition was dismissed on 2.11.2012. The petitioner challenged the order of the Commission before the Hon'ble ATE in Appeal No.20/2013, which came to be allowed on 7.10.2013, holding that the termination of PPA through Notice dated 23.4.2012 is valid. The Hon'ble ATE also directed the Commission to pass consequential orders in terms of the findings and the directions in the said judgment. The Commission passed the consequential order on 12.12.2013 holding that the petitioner is entitled to open access or any

other facility under relevant regulations (Annexure P-3). It is stated by the petitioner that, as the respondent had failed to make payments for the energy delivered in certain months during the period from January, 2009 to December, 2013, the petitioner made representations dated 22.8.2014, 9.10.2014 and 19.12.2014 and issued legal notice dated 14.1.2015 and also a Notice dated 30.3.2015 along with computation of the dues (Annexures- P-4 to P-7 & P-1), calling upon the respondent to pay Rs.1,22,99,816/-, towards short payment of invoice amounts and interest for the delayed payments. The petitioner has alleged that no action was taken by the respondent in the matter, hence the petition.

- 3) Upon issuance of Notice, the Respondent has entered appearance through its Counsel and filed Statement of Objections to the petition, in which it is mainly contended as follows:
 - (a) The respondent has not denied the termination of the PPA and the supply of energy made by the petitioner from January, 2009 to December, 2013.
 - (b) The respondent has contended that the claims of the petitioner pertain to the period from January 2009 to December 2013 and the petition is filed on 8.4.2015, hence, the entire claim of Rs.1,22,99,815/- towards principal and interest on belated payments, is to be dismissed on the grounds of

- delay and laches, as no explanation is provided for approaching the Commission belatedly.
- (c) It is contended that Article 6.4 of the PPA provides for raising the dispute or making a claim with regard to an invoice, within one year from the date the invoice becomes due, and the petitioner has failed to act accordingly.
- (d) It is also contended that the petitioner had instituted proceedings earlier alleging violation of the terms of the PPA by the respondent but had not made any prayer for payment of any amount towards principal or interest in the said petition. Hence, the claim made in the present petition is barred by the principles of constructive *res judicata*.
- (e) It is the contention of the respondent that no amount is due to the petitioner, as the payments were made within reasonable time after receipt of the monthly invoices.
- 4) We have perused the records in OP No. 21/2012 and that of the case on hand and heard the Counsel for both parties.
- 5) The issues which arise for our consideration are:
- (1) Whether the claim of the petitioner for payment of dues as per the statement enclosed to Annexure P-1, is legally sustainable?

(2) What order?

6) After considering the material on record and hearing the counsel for both parties, our findings on the above issues are as follows:

7) **ISSUE NO.(1) :**

(a) It is the contention of the respondent that the claim of the petitioner is barred on the principles of Order 2 Rule 2 of the Code of Civil Procedure (CPC). We are unable to accept this contention. In OP No.21/2012, the petitioner had sought a declaration that the termination of PPA was valid. In the case on hand, the petitioner has sought payment of the alleged dues for the supply of power as per the PPA. The subject matters being different, the claim cannot be said to be barred by the principles of Order 2 Rule 2 CPC.

(b) Further, it is the contention of the respondent that, if any amount, as alleged, was due, the Petitioner ought to have claimed the same immediately or in the subsequent Invoice when the amount became due and not after a lapse of five years.

(c) We need to see if the claims are barred by Limitation or the principle of delay and laches. The period for filing a suit for money under the Limitation Act, 1963 is three years from the date when it became due.

- (d) We note that the Hon'ble Supreme Court, in its recent decision dated 16.10.2015 in Civil Appeal No.6036/2012 (*A.P. Power Co-ordination Committee & others –Vs- Lanco Kondapalli Power Ltd & others*), has held that the provisions of the Limitation Act apply to the claims under Section 86(1)(f) of the Electricity Act, 2003. The relevant portion of the Order reads thus:

“29.In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike Labour laws and Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view.

30..... Hence we hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court.....”

- (e) The petitioner has filed the petition on hand on 8.4.2015. The claim of the petitioner is mainly for recovery of interest on delayed payments of invoices and in four instances for short payment of invoice amounts for the period from January, 2009 to December, 2013. As per Articles 6.2 and

6.3 of the PPA the amount in the invoice has to be paid within 15 days from the date of receipt of the invoice by the respondent and if the payment is not made by the respondent within the due date, the respondent shall pay to the petitioner penal interest at the rate of SBI medium term lending rate per annum for such payment from the date such payment was due until it is made in full. The petitioner has in the statement attached to Annexure P-1 stated all the particulars regarding invoices and other details of due date, number of days of delay, etc. The claim of the petitioner should be within 3 years from the due date for recovery of the invoice amount or interest as per the Limitation Act, 1963. In such circumstances, the claims of the petitioner which are beyond 3 years from the date of filing the petition would be barred by Limitation. Only the claims due on or after 8.4.2012 would be within the period of limitation. From the statement to Annexure P-1, it can be said that the claims from March, 2012 to December, 2013 are within the period of limitation. In the light of the aforesaid decision of the Hon'ble Supreme Court, we find that the petition claiming interest from January 2009 has been belatedly filed before the Commission and hold that the claim of the Petitioner for amounts for the period from January, 2009 to 7.4.2012 is barred by limitation.

- (f) Now, we proceed to see if the claims for the subsequent period from 8.4.2012 to 12.12.2013 are justifiable. Admittedly, the petitioner had issued the termination notice on 23.4.2012, which has been received by

the Respondent on 30.4.2012. Hence, termination takes effect from 30.4.2012. OP No.21/2012 was filed on 11.5.2012 before the Commission seeking declaration of valid termination of the PPA. This petition was dismissed on 2.11.2012. The petitioner challenged the order of the Commission before the Hon'ble ATE in Appeal No.20/2013, which was allowed on 7.10.2013, holding that the termination of the PPA through Termination Notice dated 23.4.2012 was valid. The Hon'ble ATE also directed the Commission to pass consequential orders in terms of the findings and the directions in the judgment. The Commission passed the consequential order on 12.12.2013 holding that, the petitioner is entitled to open access or any other facility under relevant regulations. Thus, the effect of termination of the PPA dates back to the date of service of termination notice viz., 30.4.2012. It can be inferred that the petitioner had never claimed other consequential reliefs like payment of interest or payments for the energy delivered after the date of termination when the Commission passed order on consequential reliefs.

- (g) The respondent has paid for the energy delivered by the petitioner as per the invoices raised after the date of termination notice till the date of the order of the Commission i.e., during the period from 30.4.2012 (date of service of the termination notice) to 12.12.2013 (date of the order of the Commission). The respondent has not produced any documents to show that the payments were made in time. However, the petitioner has claimed interest on delayed payments as per the terms of the PPA

for the period even after the date of termination viz., 30.4.2012. We are unable to accept this stance of the petitioner for after the termination of the PPA, the parties are not bound by the terms of the PPA and therefore the petitioner is not entitled to the penal interest as specified in the PPA. The petitioner is also not entitled to interest at 12.95 % p.a. or interest on interest, as claimed. However, the petitioner can only be compensated for the belated payments made by the respondent beyond reasonable time even during the period when no PPA existed between the parties. We feel that 15 days' time from the date of invoice is a reasonable time for making payment of invoices. For any delay thereafter, we feel that the petitioner needs to be compensated by way of interest. In the facts of the case, we deem it proper to direct the respondent to pay simple interest at 9% p.a. on the payments made beyond 15 days, if any, from the date of receipt of invoice towards supply of power, for the period from 30.4.2012 to 12.12.2013. The respondent is also required to make the payment of Rs.5771/- towards short payment of invoice dated 5.8.2013. It is also seen that there is no delay in making payment and hence, no interest is claimed for the period from 8.4.2012 to 29.4.2012 in the Statement attached to Annexure P-1. Hence, we hold that there is no payment due for the said period.

- 9) For the foregoing reasons, we pass the following:

ORDER

The Respondent is directed to pay simple interest at 9% p.a. for the belated payments, if any, for the period from 30.4.2012 to 12.12.2013 and also pay Rs.5771/- being the short payment in respect of the invoice dated 5.8.2013. The payments, directed in this order, shall be made within two months from the date of this order.

Sd/-

(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER