

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

Dated : 25th September, 2014

- | | |
|-------------------------------|----------|
| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri H.D. Arun Kumar | Member |
| 3. Sri D.B. Manival Raju | Member |

OP No.1/2014

BETWEEN:

Khandaleru Power Company Limited,
No.807, 8th Floor, Raghava Towers,
Chirag Ali Lane, Abids,
HYDERABAD – 500 001 ..
(Represented M/s. Link Legal India Law Services, Advocates)

PETITIONER

AND

- 1) Gulbarga Electricity Supply Company Limited,
Station Road,
GULBARGA – 585 102
- 2) State Load Despatch Centre,
Cauvery Bhavan,
K.G. Road,
BANGALORE - 560 009. ..
[Respondents represented by M/s. Thiru & Thiru, Advocates]

RESPONDENTS

- 1) The Petitioner has filed this Petition praying for the reliefs of declaration that the Power Purchase Agreement (PPA) dated 9.10.2007 entered into between the Petitioner and the 1st Respondent with respect to the Mini Hydrel Project, produced at ANNEXURE-P3, has been terminated by the Petitioner, and

OP No.1/2014

for issuance of a direction to the Respondents to provide Wheeling and Banking facility to the Petitioner, and for such other reliefs as may be deemed appropriate to meet the ends of justice and equity.

2) The material facts relevant for the disposal of this Petition may be stated as follows :

(a) As per the Government Order dated 25.1.2006, the Petitioner was allowed to construct a Mini Hydel Project of 1.4 Mega Watts (MW) capacity, at Rayabasavanna Canal, Right Bank of Tungabhadra Dam, Hospet Taluk, Bellary District (Project), on certain terms and conditions. Pursuant to the said Government Order, the Petitioner entered into the PPA dated 9.10.2007, as per ANNEXURE-P3, with the 1st Respondent. The Project achieved Commercial Operation on 31.8.2013, after obtaining several extensions from the Government of Karnataka for completion of the Project. Article 6.5 of the PPA, which relates to the opening of the Letter of Credit by the 1st Respondent and is relied upon by the Petitioner in support of the main relief claimed, reads as follows :

“6.5 Letter of Credit : *The GESCOM 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. The Letter of Credit shall be established in favour, 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 the GESCOM at any and all times during the Term of the Agreement. Such Letter of*

Credit shall be in form and substance acceptable to both Parties and shall be issued by any Scheduled Bank and be provided on the basis that:

- (i) In the event a monthly Invoice or any other amount due and payable by GESCOM pursuant to the terms of this Agreement is not paid in full by GESCOM as and when due, the Letter of Credit may be called by the Company for payment in full of the unpaid monthly Invoice or any such other unpaid amount.*
 - (ii) The foregoing as determined pursuant hereto, upon presentation of such monthly Invoice or other Invoice or claim for such other amount by the Company on the due date therefor or at any time thereafter, without any notification, certification or further action being required.*
 - (iii) The amount of the Letter of Credit shall be equal to one month's projected payments payable by the GESCOM based on the average of the annual generation.*
 - (iv) The GESCOM shall replenish the LC to bring it to the original amount within 30 days in case of any valid draw down.*
 - (v) The Company shall allow a rebate of 1.8% of the monthly Invoice amount or actual expenditure / charges for the LC account incurred, whichever is higher, and the same shall be deducted from the monthly Invoice payable to the Company.*
 - (vi) The Letter of Credit shall be renewed and/or replaced by the GESCOM not less than 60 days prior to its expiration."*
- (b) The 1st Respondent had not opened the Letter of Credit as required under Article 6.5 of the PPA, which prompted the Petitioner to issue the Default Notice dated 17.9.2013, as per ANNEXURE-P9, calling upon the 1st Petitioner to open the Letter of Credit within thirty days from the date of

- receipt of the Default Notice. This Default Notice was served on the 1st Respondent on 23.9.2013.
- (c) Thereafter, the Petitioner on 24.10.2013 issued the Termination Notice, as per ANNEXURE-P10, which was served on the 1st Respondent, on the same day, stating that the 1st Respondent failed to comply with the Default Notice (ANNEXURE-P9). Soon thereafter, the Petitioner applied for 'NOC' for inter-State open access for sale of electricity to third parties.
- (d) On 11.11.2013, the Petitioner received a letter dated 7.11.2013, as per ANNEXURE-P12, from the 1st Respondent, enclosing therewith a Letter of Credit dated 22.10.2013, for Rs.30,62,000/-, favouring the Petitioner, issued by the State Bank of Hyderabad, Super Market Branch, Gulbarga.
- (e) The Petitioner, without communicating any grievances against the validity of the Letter of Credit received by it, has filed this Petition on 10.1.2014, alleging that the default Notice was not complied with by the 1st Respondent and that the Letter of Credit was not opened in terms of Article 6.5 of the PPA. The relevant averments in this regard, made by the Petitioner at paragraphs 28 and 29 of the Petition, are extracted below :

“28. It is pertinent to highlight at this stage that:

- a. the draft, format and contents of this Letter of Credit was never furnished to the Petitioner;*

- b. *the actual expenditure / charges for the LC account incurred was not disclosed or pre-agreed with the Petitioner;*
- c. *the generating details or average monthly or annual consumption from the Petitioner's Project was never summoned or discussed with the Petitioner;*
- d. *The Bank Letter says that it contains an enclosure containing the terms and conditions of LC. However, the same was not given to the Petitioner along with the 1st Respondent's letter dated 07th November, 2013;*
- e. *Presuming without admitting that the purported LC contained the Terms and Conditions, the LC would be a Conditional Letter of Credit, invocation of which was conditional upon several factors, which are not even known to the Petitioner. Further the Petitioner was not informed or discussed of any of the terms and conditions;*
- f. *More importantly, all this has been done after the due termination of the PPA by the Petitioner.*

Hence, purported Letter of Credit sent by 1st respondent, on its own volition, can at best be termed as a Bankers Letter and not LC contemplated in the PPA, opened well after the termination of the PPA.

29. *Further, presuming without admitting that the said Letter dated 22nd October, 2013 is the Letter of Credit, the same reached the Petitioner only on 11th November, 2013, i.e., well after the expiry of the thirty (30) days' time as envisaged in the PPA and subsequent to the Termination of the PPA effected on 24th October, 2013."*

3) Upon Notice, the 1st Respondent appeared through its learned counsel and filed its Statement of Objections, mainly contending that a valid Letter of Credit has been opened within the stipulated time, and that there are no

bonafides in filing the Petition. The 1st Respondent has also made a Counter-Claim of huge amount against the Petitioner, for not achieving the completion of the Project and its Commercial Operation within period as stipulated in the PPA

4) We have heard the learned counsel for the parties.

5) From the rival contentions of the parties, the following issues would arise for our consideration :

(1) Whether the Event of Default, i.e., non-opening of Letter of Credit as per Article 6.5 of the PPA, has been validly remedied by the 1st Respondent?

(2) What Order?

6) After considering the material placed on record and the respective submissions of the parties, our findings on the above issues are as follows :

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

(a) The Petitioner has urged two grounds to contend that it was entitled to terminate the PPA. Firstly, according to the Petitioner, the establishing of the Letter of Credit was not intimated to it within thirty days from the date

of service of the Default Notice, thereby the Petitioner was entitled to issue Termination Notice. The second ground urged by the Petitioner is that the Letter of Credit furnished by the 1st Respondent was obtained without finalizing the terms and conditions of the Letter of Credit with the Petitioner, and therefore, the Letter of Credit furnished by the 1st Respondent was not in accordance with the terms of the PPA and the Petitioner was entitled to issue the Termination Notice.

- (b) The Default Notice dated 17.9.2013 (ANNEXURE-P9) was served on the 1st Respondent on 23.9.2013. The Event of Default of not furnishing the Letter of Credit was required to be remedied within thirty days from the date of receipt of the Default Notice. The 1st Respondent has established the Letter of Credit on 22.10.2013, well within thirty days from the date of receipt of the Default Notice. The establishing of the Letter of Credit, however, came to the knowledge of the Petitioner on 11.11.2013, when it received the letter dated 7.11.2013 (ANNEXURE-P12). Paragraph-2 of Article 9.3.2 of the PPA reads as follows :

"...At the expiry of 30 (thirty) days from the delivery of the 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 GESCOM. Company may terminate this Agreement by delivering such a Termination Notice to GESCOM and intimate the same to the Commission. Upon delivery of the Termination Notice this Agreement shall stand terminated and Company shall stand discharged of its obligations."

From the above clause, it is clear that, if the Event of Default giving rise to the issuance of Default Notice had been remedied within thirty days from the date of receipt of the Default Notice, the Petitioner is not entitled to issue Termination Notice. The above clause does not require the communication of the curing of the Event of Default mentioned in the Default Notice within thirty days to the other party. Hence, mere non-communication of the curing of the Event of Default within thirty days from the date of receipt of the Default Notice, does not entitle the Petitioner to issue the Termination Notice. For the above reasons, the first ground urged by the Petitioner has no validity.

- (c) The main clause of Article 6.5 of the PPA provides that the Letter of Credit shall be established in favour of, and issued to, the Company on the date of execution of the PPA itself and it is to be made operational thirty days prior to the Commercial Operation Date (COD) of the Project. Admittedly, in the present case, the Letter of Credit was not established on the date of signing of the PPA, i.e., 9.10.2007. The Petitioner also did not raise the issue of the Letter of Credit not being opened for nearly six years thereafter, till the Project was commissioned. It was only after the Project was commissioned by the Petitioner with a delay of about forty months beyond the thirty months provided in the PPA that the Petitioner has chosen to raise the matter by issuing the Default Notice (ANNEXURE-P9) to the 1st Respondent, calling upon it to remedy the defect. The Petitioner itself has stated that it received the Letter of Credit

dated 22.10.2013 on 11.11.2013, with the covering letter dated 7.11.2013 (ANNEXURE-P10) from the 1st Respondent. Therefore, one can say that on 11.11.2013, the Petitioner was well-aware that the Letter of Credit was opened in its favour. It can also be seen that subsequent to 11.11.2013, the Petitioner had not objected, either orally or in writing, regarding the form and the contents of the Letter of Credit. The main clause of Article 6.5 of the PPA further states that the Letter of Credit shall be in a form and substance acceptable to both parties. It does not stipulate that the form and substance of the Letter of Credit should be accepted by the other party, before it is got issued from the Bank.

- (d) Normally, there would be a prescribed format of Letter of Credit, and the specific terms and conditions of a Letter of Credit are separately drafted and annexed to the same. We are, therefore, of the view that the drafting of the Letter of Credit and its terms and conditions is not a complicated issue. In such circumstances, a party can obtain the Letter of Credit with its usual terms and conditions and forward it to the other party. If the other party needs any further clarifications / modifications, it can come forward with its suggestions. In the present case, the cover-page of the Letter of Credit issued by the State Bank of Hyderabad, Super Market Branch, Gulbarga, indicating the various particulars of the Letter of Credit, states that, "The enclosure to this form contains terms and conditions governing the LC and forms an integral part of the LC." The Petitioner, in paragraph 28(d) of the Petition, has alleged that it had not

received the enclosure containing the terms and conditions of the Letter of Credit, though such a fact was mentioned in the cover-page of the Letter of Credit. This allegation appears to be not true. If really such enclosure was missing from the cover-page of the Letter of Credit, the Petitioner should have immediately brought this fact to the notice of the 1st Respondent or of the issuing Bank. It is not the case of the Petitioner that till drafting of the Petition, it had not noticed the contents of the cover-page of the Letter of Credit. The Petitioner has not given any reason for not noticing such an endorsement on the cover-page of the Letter of Credit. If really such an endorsement was noticed for the first time at the time of preparing the Petition, the Petitioner would have taken steps to call for the copy of such terms and conditions from the 1st Respondent or the issuing Bank. The Petitioner has not taken any such steps during the pendency of these proceedings. Therefore, it appears that there is no basis for the allegation that the Petitioner had not received the terms and conditions of the Letter of Credit shown to have been annexed to the cover-page of the Letter of Credit. It also appears that the Petitioner had no suggestions or modifications to propose in respect of the terms and conditions of the Letter of Credit received by it. For the above reasons, we hold that there is no merit in the Petitioner's contention that the Letter of Credit furnished by the 1st Respondent does not comply with the requirements of Article 6.5 of the PPA, which entitles the Petitioner to issue the Termination Notice. Therefore, the second ground urged by the Petitioner also has no validity.

- (e) It may not be out of place to observe here that the Petitioner appears to be seeking to wriggle out of the Contract on invalid and flimsy grounds. The Petitioner executed the PPA on 9.10.2007, undertaking that the Project would be completed, at the latest, within thirty months from the date of signing of the PPA. Such date would have expired on 8.4.2010. The Petitioner failed to complete the Project before that date. It sought extension of time from the Government of Karnataka three times, repeatedly, and finally could achieve COD on 31.8.2013. The Petitioner has been allowed to use the water from a public irrigation project for generation of electricity. Having taken advantage from a public resource for its Project, it is unfair on the part of the Petitioner to seek to wriggle out of its obligation to supply power to a public utility, instead of resolving the differences, if any, through mutual negotiations, as provided under Article 10 of the PPA. It appears that the moment the Project was ready for generation, the Petitioner has attempted to look for ways to terminate the PPA. Even in the first invoice for the delivered energy, the Petitioner has demanded for payment of the amount within fifteen days from the date of receipt of the invoice, and in default, threatened to terminate the PPA. It can be seen that mere delayed payment or non-payment of tariff invoice does not entitle the Petitioner to terminate the PPA. At best, it may lead to issuance of a Default Notice on this count. One can also take note of the fact that, while the Letter of Credit is opened to assure the timely recovery of the amount due under the monthly tariff invoice, or

any other head, at the time of issuing the Default Notice, even the first monthly tariff invoice, or any other amount, had not become due to the Petitioner.

- (f) The Petitioner has also raised the issue that the PPA was only a draft agreement. A careful reading of the document, and the conduct of the parties shows that the insertion of the word, "draft" in the title of the PPA was an inadvertent error. It is quite apparent that the PPA was signed by both the parties, intending to be a final document, and the same was submitted to this Commission for approval, and the Commission had also conveyed its approval to the terms of the PPA. Therefore, the irresistible inference should be that the word, "draft" appearing in the title of the PPA was inadvertently inserted. The parties might not have noticed this error at the time of the execution of the PPA. This unintended error is made much of by the Petitioner even to contend that there existed no PPA. Therefore, we are of the view that the grounds urged by the Petitioner in support of his case do not hold water. Accordingly, we answer Issue No.(1) in affirmative.

8) **ISSUE No.(2) :**

As Issue No.(1) is held in affirmative, the Petitioner is not entitled to any reliefs. It is noticed that the 1st Respondent has made a Counter-Claim for a huge amount. We have found no sufficient reason to decide the merits of the Counter-Claim

OP No.1/2014

along with the present proceedings. The 1st Respondent also had not paid the prescribed fee on its Counter-Claim. Hence, we reserve the liberty to the 1st Respondent to agitate the counter-claim in separate proceedings, if so advised. Accordingly, we pass the following :

ORDER

The Petition is dismissed. The claim of the Petitioner that the PPA dated 9.10.2007, as per ANNEXURE-P3, has been validly terminated, is rejected. Consequently, the said PPA shall continue to be in force. The Petitioner is not entitled to any of the reliefs sought in the Petition.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER