

No.N/65/12

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION BANGALORE

Dated 23rd August, 2012

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

OP No.37/2012

[Order on Interim Prayer]

BETWEEN

M/s. Mangalore Electricity Supply Company Limited
Paradigm Plaza, A.B. Shetty Circle
MANGALORE – 575 002
(Represented by M/s. Justlaw, Advocates)

... **Petitioner**

AND

AMR Power Private Limited
Suite No.701-702, Prestige Meridian-2
No.30, M.G. Road
BANGALORE – 560-001
(Represented by M/s. Shridhar Prabhu Associates,
Advocates)

... **Respondent**

- - - - -

1. This Petition has been initiated by the Mangalore Electricity Supply Company Limited (hereinafter referred to as MESCOM), a Licensee, aggrieved by the action of the Respondent, M/s. AMR Power Private Limited, in terminating the Power Purchase Agreement (PPA) dated 2.8.2006, on 22.7.2011. The Petitioner has sought an Interim Order of stay of the operation of the Termination Notice dated 22.7.2011 (Annexure-G), pending disposal of the Petition.

2. It is submitted by the Petitioner that :
- (i) The Respondent-Hydel Generating Company, having a capacity of 24.75 MW across the Nethravathi River in the Dakshina Kannada District, had entered into a PPA dated 2.8.2006 with KPTCL. This PPA has been assigned to the Petitioner by the Government of Karnataka with effect from 10.6.2005.
 - (ii) The Respondent filed OP No.28/2009 seeking a declaration that the PPA dated 2.8.2006 signed by it with KPTCL and assigned to the Petitioner had become *void abinito*, in view of its non-fulfilment of the Conditions Precedent prescribed in the PPA. This Commission, vide its Order dated 23.12.2010, dismissed the said Petition, holding that the PPA dated 2.8.2006 is valid and continues to subsist, as the Petitioner therein cannot take advantage of its own lapses.
 - (iii) The Respondent filed a Review Petition RP No.2/2011 before this Commission, seeking for review of the above Order of the Commission, dated 23.12.2010. The said Review Petition also came to be dismissed on 23.12.2011.
 - (iv) During the pendency of the Review Petition, the Respondent had issued a Termination Notice dated 26.5.2011, alleging that the Petitioner has continuously defaulted in making payment and interest thereon, and also

- did not open the Letter of Credit. The Petitioner replied to the said Notice, denying the allegations and contended that the Termination Notice of the PPA is contrary to the terms of the PPA. Despite this reply, the Respondent proceeded to terminate the PPA, vide its letter dated 22.7.2011. (This termination is being challenged in the present Petition.)
- (v) After termination of the PPA, the Respondent filed one more Petition, OP No.48/2011 on 18.10.2011, seeking a declaration that the PPA stands validly terminated and KPTCL shall be directed to give Open Access. Pending this Petition, the Respondent filed an Interim Application dated 13.2.2012, seeking a direction to the Petitioner-Company to pay for the electricity supplied at the rate of Rs.2.80 per Unit. This Application was allowed by the Commission on 22.2.2012 and the Petitioner has made the payment according to the said Order. Thereafter, the Respondent on 22.3.2012 sought to withdraw the Petition, OP No.48/2011, with the liberty to file a fresh Petition. This Commission, on 22.3.2012, permitted the Petitioner therein (the Respondent in the present Petition) to withdraw the Petition, without reserving the liberty sought.
3. Thus, according to the Petitioner, the Respondent is trying to wriggle out of the Contract in one way or the other and does not want to fulfil the Contractual obligations undertaken by it under the PPA, and therefore it has come up with the present Petition challenging the termination of the PPA dated 2.8.2006

effected on 22.7.2011. Further, pending disposal of the Petition, it has sought for the Stay of the operation of the Termination Notice dated 22.7.2011.

4. The Respondent's Counsel, Shri Shridhar Prabhu, who was present in the Court, on 9.8.2012, when the matter was heard for admission, submitted that he would take notice on behalf of the Respondent and requested for grant of time to make submissions on behalf of the Respondent. Accordingly, the matter was postponed from 9.8.2012 to 13.8.2012.

5. On 13.8.2012, Shri Ananth Mandagi, Senior Advocate, appeared along with Shri Shridhar Prabhu and has filed Statement of Objections against the Interim Prayer made by the Petitioner, and also produced the following Judgments :

- (a) Mulraj –Vs- Raghonathji
[AIR 1967 SC 1386]
- (b) PTC India Ltd, -Vs- Jaypee Karcham Hydro Corporation Ltd.
[MANU/DE/1942/2010]
- (c) Dale and Carrington Investment (P) Ltd. –Vs- P.K. Pratapan
[AIR 2005 SC 1624]
- (d) Indian Oil Corporation Ltd. –Vs- Amritsar Gas Service and others
[1991(1) SCC 533]
- (e) M/s. NIBRO Ltd. –Vs- National Insurance Co.Ltd.
[AIR 1991 Del.25]
- (f) KPTCL –Vs- M/s. Tanir Bavi Power Co.P.Ltd. and another
(Dated 2nd August, 2002)

6. We have heard the Counsel appearing for both the parties only on the Interim Prayer sought by the Petitioner.

7. It is submitted by the Petitioner's Counsel, Sri Sriranga, that the Respondent is trying to wriggle out of the Contract that it has entered into, on one pretext or the other, depriving the Petitioner the electricity it is entitled to receive from the Respondent, and the termination of the PPA is without any valid grounds and illegal, and therefore, pending hearing of the main Petition, the termination needs to be stayed by this Commission.

8. Shri Ananth Mandagi, Senior Counsel appearing for the Respondent, forcefully submitted that the Prayer of the Petitioner for staying the termination cannot be granted by this Commission, as the termination itself has come into force long back. Further, according to him, as per the settled law, Stay Order cannot be issued against a private party and the Stay Order can be directed only against a State Authorities. He further submitted that this Commission, under the provisions of the Electricity Act, 2003, has no power to grant an Injunction against the Respondent's action, as the Petitioner is in breach of the Contract (PPA) and the PPA being a Contract to supply electricity, cannot be specifically enforced, since any damage that may be suffered by the Petitioner can be compensated in terms of money. In support of his contentions, the learned Senior Counsel has relied upon the Judgments referred to at Paragraph-5 above.

9. We have considered the rival submissions.

10. At this stage of the Petition, we cannot go into the merits of the action of the Respondent. However, the facts, which are undisputed, indicate that the Respondent, at the first instance, had filed a Petition before this Commission seeking a declaration that the PPA had become null and void on account of the non-fulfilment of the Conditions Precedent prescribed in the PPA. The said Petition came to be dismissed by this Commission, holding that the Petitioner therein cannot take advantage of its own wrong and contend that the PPA had become null and void. The Respondent thereafter filed a Review Petition for review of the Order of dismissal passed by this Commission. The said Review Petition came to be rejected by this Commission, holding that the Review Petition cannot be used for re-arguing the case. The Petitioner (Respondent in the present case) during the pendency of the Review Petition, terminated the PPA on 22.7.2011, on the ground of breach of terms of the PPA, even though the Petitioner had sent a reply in response to the Termination Notice explaining as to why the PPA is not liable to be terminated. We have noticed the above facts only to ascertain whether the Petitioner has a *prima facie* case and we have not gone into the actual merits of the case pleaded by the Petitioner and the Respondent. From the above narration of facts, it is clear that the issues raised in the Petition on the validity of termination of the PPA by the Respondent needs to be gone into and decided.

11. It is contended by the Respondent's Counsel that this Commission cannot grant a Stay of the termination of the PPA as per the Judgment of the Hon'ble Supreme Court, reported in AIR 1967 SC 1386. This submission of the Respondent's Counsel merits acceptance. However, this does not take away the power of this Commission conferred on it to grant an Interim Order justified in the circumstances, under Section 94(2) of the Electricity Act, 2003.

12. Section 94(2) of the Electricity Act, 2003 reads as under :

"An Appropriate Commission shall have the powers to pass such interim order in any proceeding, hearing or matter before the Appropriate Commission, as that Commission may consider appropriate."

Under the above provision, in our view, this Commission has the power to grant an Interim Order as the Commission may consider appropriate.

13. Reference to the Order dated 2.8.2002 of this Commission passed in OP No.18/2002 between KPTCL and Tanir Bavi Power Co. P. Ltd., will be of no assistance to the Respondent's case, as the Stay Order in that Petition was passed under the Karnataka Electricity Reform Act, 1999, which did not contain any express provision for grant of an Interim Order. As pointed out above, under the Electricity Act, 2003, Section 94(2) specifically confers a power on this Commission to grant such Interim Order as the Commission may consider appropriate.

14. At the time of hearing, it is submitted by the Petitioner that the Respondent is pumping electricity to the Petitioner's Grid even after termination of the PPA (vide Memo dated 14.8.2012 filed by the Petitioner). This is not denied by the Respondent. This is also admitted by the Respondent in its Interim Application dated 13.2.2012 filed in OP No.48/2011.

15. All other contentions of the Respondent, like whether this Commission can order specific enforcement of the Contract (PPA) entered into between the Petitioner and the Respondent, etc., cannot be looked into at this stage and can be decided at the time of final hearing and disposal of the main Petition.

16. Considering the facts and circumstances of this case, this Commission deems it appropriate to direct both the parties to maintain the *status quo* as existing, pending final disposal of the main Petition.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)
MEMBER

Sd/-

(K.SRINIVASA RAO)
MEMBER