

No.N/54/09

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

Dated : 24th January, 2013

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

OP No.42/2009

BETWEEN

M/s. Bangalore Electricity Supply Company Limited
K.R. Circle
BANGALORE-560 001
(Represented by M/s. Justlaw, Advocates)

... **Petitioner**

AND

Davanagere Sugar Company Limited
No.73/1, P.B.No.312, Shamanur Road
DAVANAGERE-577 304
(Represented by Prabhuling K. Navadgi, Advocate)

... **Respondent**

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ORDER

PER SHRI M.R. SREENIVASA MURTHY, CHAIRMAN AND

SHRI VISHVANATH HIREMATH, MEMBER :

1) This Petition is initiated by Bangalore Electricity Supply Company Limited (hereinafter referred to as 'BESCOM'), a Distribution Licensee, which had a Power Purchase Agreement (PPA) dated 17.1.2002 with the Respondent for supply of electricity generated from the Respondent's Co-generation Plant, situated at Kukwad Village, Davanagere Taluk at the rate agreed therein. It is submitted by

the Petitioner that as per the terms of the PPA, the Respondent had to sell the power generated only to it and not to anyone else.

2) It is submitted that contrary to the terms of the PPA dated 17.1.2002, the Respondent on 19.4.2008 applied to the State Load Despatch Centre (SLDC) for 'NOC', to sell electricity to a third party and the Chief Engineer, SLDC, granted 'NOC' for Open Access contrary to the terms of the PPA, thereby enabling the Respondent to supply electricity to a third party in violation of the PPA with the Petitioner. According to the Petitioner, the grant of 'NOC' on 19.4.2008 for Open Access by the Chief Engineer, SLDC, was illegal and has resulted in a loss of Rs.35,42,79,840/- to it, as it had to buy power to compensate for the electricity not supplied by the Respondent at a higher cost. Therefore, it is prayed that this Commission may direct the Respondent to pay the difference in cost of power as loss suffered by it on account of breach of the obligation undertaken in the PPA by the Respondent.

3) In reply, the Respondent has filed the Statement of Objections dated 20.7.2011. It is contended on behalf of the Respondent that, since the PPA dated 17.1.2002, on which the Petitioner strongly relies, has been terminated with effect from 8.7.2009 and the said termination has become final as per the orders of this Commission in OP No.17/2009 dated 8.10.2009, there was no obligation on the Respondent to supply electricity to the Petitioner under the said PPA. Consequently, the Petitioner cannot claim damages on the ground of non-supply of electricity as per the PPA. Further, it is contended that as per Section

51 of the Contract Act, the performance of an obligation undertaken by a party under a Contract cannot be insisted upon, if the other party, which seeks enforcement of the Contract, has committed default. In this case, the Petitioner had failed to fulfil its obligations of making payment of charges for electricity supplied and interest for delayed payment, and opening of Letter of Credit, which resulted in termination of the PPA, and therefore, the Petitioner cannot seek specific enforcement of the PPA. Therefore, the question of supply of electricity under the PPA to the Petitioner does not arise and consequently, there is no question of paying any damages to the Petitioner by the Respondent on the ground of non-supply of electricity.

4) We have considered the respective pleadings and the oral submissions made by the Counsel for both the parties during the course of the hearing, and also the material placed before the Commission.

5) The issues that arise for consideration are:

(1) Whether the Respondent was under an obligation to supply the electricity generated to the Petitioner as per the terms of the PPA dated 17.1.2002, till the same came to be terminated on 8.7.2009?;
and

(2) If the answer to Issue No.1 above is yes, whether the Petitioner is entitled to damages, as claimed in the Petition, or to pay any other sum.

Issue No.1 :

6) There is no dispute that the Petitioner and the Respondent had signed a PPA dated 17.1.2002 and the same, as per Article 9.1 of the PPA, was to be in force for a period of 20 years. Under the said PPA, the Respondent was required to supply electricity generated only to the Petitioner, and the Petitioner had to pay the charges as per the Rate Clause provided in the PPA. Admittedly, the PPA dated 17.1.2002, read with the Supplemental Agreement dated 9.6.2005, was in force and operative when the Respondent sought for Open Access on 19.12.2007. When the Open Access was denied on the ground that the PPA was in force and the electricity generated had to be supplied to the Petitioner-BESCOM only, the Respondent filed a Petition before the CERC contending that the denial of Open Access was contrary to the CERC Open Access Regulations. The CERC on 10.4.2008 held that the SLDC had to grant of Open Access only as per the CERC Open Access Regulations. When the matter was taken up in Appeal before the Hon'ble Appellate Tribunal for Electricity (ATE) by KPTCL and BESCOM, though the Hon'ble ATE, by its Order dated 18.5.2010, upheld the Order of the CERC, it observed that the rights of the parties under the PPA could be independently agitated upon by the aggrieved party before the State Commission and the State Commission should consider the rights of the parties under the PPA, uninfluenced by the observation of the CERC. Pursuant to the said observations of the Hon'ble ATE, the Petitioner has now come up with the present Petition.

7) In our view, the PPA dated 17.1.2002 was valid and subsisting on 19.4.2008, as the same came to be terminated only on 8.7.2009. Once there was a subsisting PPA, as per its terms, the Respondent was under an obligation to sell the electricity generated by it to the Petitioner and could not have sold the same to third parties. As the Respondent has sold the electricity generated by it to third parties in breach of the terms of the PPA entered into by it with the Petitioner, it has become liable to face the consequences thereof, i.e., to compensate the Petitioner for non-supply of electricity contracted to be sold. The fact that the Respondent was granted 'NOC' to sell electricity to third party as per the orders of the CERC will not take away the right of the Petitioner to agitate against the breach of the PPA, in view of the Hon'ble ATE's observations made on 18.5.2010. Accordingly, Issue No.1 is answered in the affirmative.

Issue No.2 :

8) Section 73 of the Contract Act, which deals with the consequences of breach of a Contract, provides that,

“When a Contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the Contract, compensation for any loss or damage caused to him thereby which naturally arose in the usual course of things from such breach or which the parties knew when they made the Contract to be likely to result from breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.”

9) The term, 'compensation' in Contract Law signifies that which is given in recompense, an equivalent rendered. It denotes a sum of money payable to a person on account of loss or damage caused to him by the breach of a Contract.

10) 'Breach of Contract', in law, is committed when a party refuses to perform his part of a Contract. The measure of damages in Contract is compensation for the consequences which flow as a natural and capable consequence of the breach of a Contract, or in other words, which could be foreseen.

11) Section 57 of the Sale of Goods Act, 1930 provides that, "Where the Seller wrongfully neglects or refuses to deliver the goods to the Buyer, the Buyer may sue the Seller for damages for non-delivery."

12) The measure of compensation depends upon the circumstances of the case. In this case, the Agreement is to sell electricity which is 'goods'. Normally, the measure of damages when the Seller fails to deliver the goods is the difference between the Market Price of the relevant goods at the time of delivery and the Contract Price.

13) Having noticed the law on breach of Contracts and measure of damages, let us now examine the facts of this case.

14) In this case, the Petitioner had a subsisting Power Purchase Agreement (PPA) with the Respondent, and as per the said PPA, it had to generate and supply electricity at the agreed rate of Rs.3.28 per Unit to the Petitioner. However, the Respondent, in breach of the said PPA, has supplied electricity to third parties. Thereby, the Respondent has committed a breach of Contract, and as per the law stated above, has become liable to compensate the Petitioner for the loss suffered by the Petitioner on account of non-supply of electricity.

15) The Petitioner in the present case has claimed a sum of Rs.35,42,79,840/- as damages (as worked out in Annexure-G produced by the Petitioner at Page-56 of the Petition) for the months of April to December, 2008, on the ground that in these months, on account of non-supply of electricity by the Respondent, it had to buy the electricity at the high cost. In support of the said claim, it has produced Annexures 'E' and 'F', wherein the basis of the calculation of damages is provided. We have looked into the calculations. It appears that the Petitioner has calculated the rates for claiming damages, not on the basis of the rate at which it has actually purchased additional power, but on the basis of the high cost rate at which it has purchased from regular supply sources. We have looked into these sources. Except IEX, the other sources of power are the sources wherein the Petitioner has/had a Long-Term Contract and was purchasing at the rate fixed in the PPAs depending on the fuel used therein. These purchases of electricity by the Respondent are not comparable with the Respondent's generation, as the same is bagasse-based. Further, no case has

been made out by the Petitioner that it had to purchase increased quantities of power from these high cost sources as a consequence of the failure of supply from the Respondent. Therefore, in our view, the basis of calculation adopted by the Petitioner for calculation of damages cannot be considered as appropriate.

16) From the details produced by the Petitioner, it is further observed that the Petitioner had not made any short-term purchases, except from IEX, during the months from January, 2008 to June, 2008. As per Section 73 of the Contract Act, during this period, no damages can be claimed by the Petitioner. During the months of July, August, September, November and December, 2008, the Petitioner had made short-term power purchases at a higher rate from sources other than regular sources, as stated in Annexure-E (Page-47), which may be attributable to non-supply from the Respondent to the extent of the actual power generation by the latter. Therefore, the Petitioner, in our view, can claim damages only for those months, and the measure of damages for those months has to be the difference between the PPA rate and the prevailing market rate during the relevant period as per Section 57 of the Sale of Goods Act, and not at the highest cost paid by the Petitioner as claimed. In order to determine the market rate for power, we have to go by the weighted average of the rates at which power was sold in the short-term market at that time, as there is no single market rate for power available at any given point of time. For this purpose, therefore, we have considered the weighted average of the rates of short-term bilateral transactions during the period July to December, 2008, which was

Rs.7.23 per Unit as per the CERC published data. The Petitioner, according to us, is thus entitled to damages at the difference between the market rate of Rs.7.23 per Unit and the PPA rate of Rs.3.28 per Unit of energy supplied by the Respondent to third parties depriving the Petitioner of the said supply. This works out to Rs.3.95 (i.e., Rs.7.23 – Rs.3.28) per Unit, for the electricity generated by the Respondent and exported to third parties during the months of July, August, September, November and December, 2008. Therefore, the Respondent shall pay damages to the Petitioner at the rate of Rs.3.95 per Unit for the electricity generated but not supplied to the Petitioner during the months of July, August, September, November and December, 2008, within 6 (six) weeks from the date of communication of this Order. Accordingly, Issue No.2 is answered in the affirmative in favour of the Petitioner.

17) For the foregoing reasons and the conclusions reached by us on the material placed before us, the Petition is allowed in part in the above terms.

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

Sd/-
(VISHVANATH HIREMATH)
MEMBER

ORDER**PER SHRI K. SRINIVASA RAO, MEMBER:**

1) Being not in agreement with the views expressed by my colleague-Members in the Order in this case, I am detailing my views in respect of this Petition as under.

2) As the facts of the case have been detailed in the Order by my colleague-Members, I am not going into detailing the facts herein again.

3) I am also in agreement with one of the two Issues that has been framed in the Order, as reproduced for reference hereunder :

(1) Whether the Respondent was under an obligation to supply the electricity generated to the Petitioner as per the terms of the PPA dated 17.1.2002, till the same came to be terminated on 8.7.2009?; and

(2) If the answer to Issue No.1 above is yes, whether the Petitioner is entitled to damages, as claimed in the Petition, or to pay any other sum.

ISSUE No.1 :

4) I am in agreement with the detailing in regard to Issue No.1 and since the Respondent has sold the electricity generated by it to third parties prior to its termination of PPA on 8.7.2009, in breach of the terms of the PPA entered into by

it, the Respondent has become liable to face the consequences thereof, i.e., to compensate the Petitioner for non-supply of electricity contracted to be sold. The fact that the Respondent was granted 'NOC' to sell electricity to third party as per the orders of the CERC will not take away the right of the Petitioner to agitate against the breach of the PPA, in view of the Hon'ble ATE's observations made on 18.5.2010. Accordingly, Issue No.1 is answered in the affirmative in favour of the Petitioner.

ISSUE No.2 :

- 5) Issue No.2 is reproduced for reference hereunder for convenience :
- “If the answer to Issue No.1 above is yes, whether the Petitioner is entitled to damages, as claimed in the Petition, or to pay any other sum?”
- 6) It has been held that the Respondent has sold the electricity generated by it to third parties in breach of the terms of the PPA entered into by it with the Petitioner and has become liable to face the consequences thereof, i.e., to compensate the Petitioner for non-supply of electricity contracted to be sold. The fact that the Respondent was granted 'NOC' to sell electricity to third party as per the orders of the CERC will not take away the right of the Petitioner to agitate against the breach of the PPA, in view of the Hon'ble ATE's observations made on 18.5.2010. It has also been held that the Respondent was obliged to supply electricity generated by it to the Petitioner as per the terms of the PPA. By supplying power to third parties under Open Access, the Respondent has failed

to supply the electricity generated by it – what would have been supplied to the Petitioner-BESCOM; instead it has sold the same to third parties, resulting in breach of Contract by the Respondent, thereby becoming liable to meet the consequences of the said breach.

7) The Petitioner has prayed that the Respondent be directed to pay damages and interest on damages. It is submitted that during the period of Open Access supply of energy by the Respondent under 'STOA', due to non-availability of power the Petitioner had to purchase power from outside sources by spending large sums of money and the same has resulted in a total loss of Rs.35,42,79,840/- for the period April, 2008 to December, 2008; that due to non-availability of power, the Petitioner had no other option but to purchase power from other sources at a higher cost, which will have a bearing on the cost of procurement and in turn, at the rate at which power is supplied to the ultimate consumer; and that the Petitioner is seeking recourse before this Commission in the form of damages for the duration between April, 2008 and December, 2008, during which period the Respondent availed Open Access. It is submitted by the Petitioner that the loss suffered as a result of the illegal actions of the Respondent has to be made good by the Respondent; otherwise, the consumer's interest will be jeopardized and that this Commission being the custodian of public interest is required to pass appropriate orders to safeguard public interest.

8) As far as UI energy purchases during April, 2008 to December, 2008 are concerned, the same is allowed in computing the Weighted Average Rate for

short-term purchases, in terms of this Commission's Tariff Order 2010, which approved UI energy purchases as short-term purchases, as submitted by the Petitioner. Besides, the costly sources of power, like VVNL-DG Plants, though on a long-term PPA, apparently are normally not scheduled, except during periods of shortages due to non-availability of power for various reasons, including that of non-supply in this case on account of 'STOA' sale by the Respondent. The Petitioner has submitted the details of energy drawn by it from UI energy and purchases on short-term basis from various agencies, like VVNL-DG, M/s.JSW, Tata Trading, GMR, IEX and UI, during the months of April, 2008 to December, 2008. The damages to be reimbursed by the Respondent, as per the Petitioner, are Rs,35,42,79,840/-.

9) In order to deal with this Issue, it would be relevant to look into the provisions of Section 73 of the Contract Act, Breach of Contract, provision for non-delivery of goods under the Sale of Goods Act, 1930, etc., as under :

(a) The definition of the words, "compensation" and "damages", as given in P. Ramanatha Aiyer's 'The Law Lexicon' (2nd Edition, 1997), is reproduced hereunder for convenience :

“Compensation : *An act which a Court orders to be done, or money which a Court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order that thereby the person damnified may receive equal value for his loss, or be made whole in respect of his injury; the consideration or price of a privilege purchased; some thing given or obtained as an*

equivalent; the rendering of an equivalent in value or amount; an equivalent given for property taken or for an injury done to another; the giving back an equivalent in either money which is but the measure of value, or in actual value otherwise conferred; a recompense in value; a recompense given for a thing received; recompense for the whole injury suffered; remuneration or satisfaction for injury or damage of every description; remuneration for loss of time, necessary expenditures, and for permanent disability if such be the result; remuneration for the injury directly and proximately caused by a breach of contract or duty; remuneration or wages given to an employee or officer." [Case Law details given.]

"Damages : *Compensation for legal injury. As a general rule the theory upon which the law allows damages for the violation of a civil right is based upon the doctrine that where a civil injury has been sustained the law provides a remedy that should be commensurate to the injury sustained. The term 'damages' in clause (c) and S.630, C.P. Code, includes 'mesne profits.'* (9 Cal 695.)

The sum claimed or awarded in compensation for loss or injury sustained (S.12, Indian Evidence Act)."

(b) Section 73 of the Contract Act is reproduced below :

"When a Contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the Contract, compensation for any loss or damage caused to him thereby which naturally arose in the usual course of things from

such breach or which the parties knew when they made the Contract to be likely to result from breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach."

(c) 'Breach of Contract' is reproduced below :

"'Breach of Contract', in law, is committed when a party refuses to perform his part of Contract. The measure of damages in Contract is compensation for the consequences which flow as a natural and capable consequence of the breach of a Contract, or in other words, which could be foreseen."

(d) Section 57 of the Sale of Goods Act, 1930 provides that, "Where the Seller wrongfully neglects or refuses to deliver the goods to the Buyer, the Buyer may sue the Seller for damages for non-delivery."

10) As the Petitioner has prayed for award of damages and interest on damages, it would be relevant to have a look at the definition of "damages". extracted above, it could be seen that the award of 'damages' is a compensation for a legal injury, based on the doctrine that 'where a civil injury has been sustained the law provides a remedy that should be **commensurate** to the injury sustained'. [Emphasis supplied].

11) From the definition of "compensation", it could be seen that it is 'An act which a Court orders to be done, or money which a Court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order

that thereby the person damnified may receive **equal value for loss**; something given or obtained as an equivalent; the rendering of an equivalent in value or amount; an equivalent given for property taken or for an injury done to another; the giving back an equivalent in either money which is but the measure of value, or in actual value otherwise conferred; **a recompense in value**'. [Emphasis supplied].

12) All the terms used, including 'recompense', convey that the Petitioner in this case is eligible to get compensated with the equivalent amount for the damages sustained [Emphasis supplied] on account of a breach of Contract by the Respondent. The definition of the word "recompense", as given in P.Ramanatha Aiyar's 'The Law Lexicon' (2nd Edition, 1997), is reproduced below :

"Recompense. *The meaning of the word 'recompense' according to the Webster's Dictionary is –*

(1) To give compensation to; to requite, remunerate; compensate.

(2) To give an equivalent for; to make up for as by atoning or requiting; to pay for.

(3) To return in kind; to reciprocate as by rewarding or avenging; to payback. Mool Chand v. Rulia, AIR 1963 Pun 516, 518."

13) It is interesting to note from the above definition that the idea of recompense in the award of damages by the Courts is also to 'requite', which according to the Chambers Twentieth Century Dictionary, conveys as one of its meanings, 'to counterbalance' as well as 'to avenge'. Taken as a whole, this

conveys the meaning that the loss or damage suffered by the injury caused by the breach committed by the Respondent-Generator has to be compensated to the Petitioner by the Court, measure-to-measure. Accordingly, it is my considered view that the Petitioner has to be compensated pie-to-pie for the loss suffered by it – whatever be the price at which the Petitioner has procured the power that has been denied to be supplied by the action of breach by the Respondent-Generator. As regards interest claim on damages by the Petitioner, since this Commission is deciding on the quantum of damages only now, any interest payment will accrue only after the expiry of the period allowed by this Commission for payment of damages.

14) In Annexure-F of the Petition, the Petitioner has enclosed invoices of purchase of power from various sources during the Open Access availed by the Respondent.

15) It now converges to the aspect of determining to what extent the Petitioner is entitled to be compensated at whatever price he has purchased these quantum of energy, including purchases not carried out in the usual course by way of Long-Term Contracts; hence, the computation of compensation should include all short-term purchases, irrespective of the price at which they are purchased during April, 2008 to December, 2008.

16) What is now required to be done is to see is whether the compensation to be awarded for damages is a recompense or compensation in equivalent terms.

I would like it to be clearly understood that the Petitioner is not entitled to any compensation for any energy procured by it in excess of the energy that has been denied to it and exported by the Respondent-Generator on third party sale and the compensation that accrues to the Petitioner is only for that much quantum of energy denied to the Petitioner at the KPTCL Periphery. The compensation that accrues to the Petitioner shall stand restricted only to that quantum of energy that has been denied by the Respondent, and not more, during the entire period of April, 2008 to December, 2008. Having said that, what remains to be determined is the admissible quantum of compensation amount to the Petitioner. This amount is the sum-total of the admissible quantum of compensation every month during the period April, 2008 to December, 2008. The rate of compensation applicable for any month between April, 2008 to December, 2008 is the difference between the Weighted Average Rate of all the short-term procurements made by the Petitioner from various sources during the respective month on account of denial by the Respondent to supply the contracted energy and the respective PPA rate applicable during the same month. The amount of compensation admissible for the above month will be arrived at by multiplying the above rate (as explained in the previous sentence) by the denied quantum of energy to the Petitioner at the KPTCL Periphery during that month. The total compensation amount for the entire period of April, 2008 to December, 2008 will thus be the sum-total of all the compensation amounts admissible during each month during the period April, 2008 to December, 2008. To reiterate, the Petitioner is eligible to be compensated only for the quantum of energy that has been exported by the Respondent-Generator, computed at the

KPTCL Periphery, applying the regional loss figures on the REA denoted export figure every month, obtained from the SRPC published monthly REA statements.

17) The Petitioner shall claim compensation in terms of the directions herein within 2 (two) weeks and the Respondent is directed to make the payment within 4 (four) weeks succeeding the date of preferred claim of the damages by the Petitioner, in terms of this Order.

18) Accordingly, Issue No.2 is answered in the affirmative in favour of the Petitioner.

19) It is seen from the facts of this case that the Respondent-Generator has unnecessarily resorted to 'STOA' even ignoring a valid and subsisting PPA on a misguided premise that it was entitled to it. This action of the Respondent-Generator has resulted in undue adjudication process, resulting in considerable and avoidable wastage of time and is condemnable. I place on record my condemnation of the action of the Respondent-Generator.

20) For the foregoing reasons, the Petition is allowed in part in the above terms.

Sd/-
(K. SRINIVASA RAO)
MEMBER