

No.: N/39/16

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

Dated :12th January, 2017

Present:

Shri M.K. Shankaralinge Gowda	..	Chairman
Shri H.D. Arun Kumar	..	Member
Shri D.B. Manival Raju	..	Member

RP No.3 / 2016

BETWEEN:

Narayanapur 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 Limited,
Station Road,
Kalaburagi – 585 101 ..

RESPONDENT

[Represented by Indus Law, Advocates]

ORDERS

- 1) This Review Petition is filed for: (i) review of the Order dated 7.1.2016 passed by this Commission in OP No.11/2015, whereunder a major portion of the claim for recovery of the money was rejected; and (ii) for allowing the prayer made in OP No.11/2015 in its entirety.

2) The Review Petitioner has mainly urged the following grounds in support of its claim :

- (1) That in the present case, for the purpose of period of limitation, Article 1 of the Schedule to the Limitation Act, 1963 should have been applied, instead of any other Article under the said Act;
- (2) That the cause of action for recovery of the amount due, as prayed for in OP No.11/2015, would arise from 12.12.2013, i.e., from the date on which this Commission passed the consequential Order holding that the Petitioner is entitled to open access or any other facilities under the relevant Regulations;
- (3) That the interest now allowed at the rate of 9% per annum for the amounts due subsequent to the termination of the Power Purchase Agreement (PPA) dated 12.2.2008, should have been at the rate agreed under the PPA, but not at the rate of 9% per annum; and
- (4) That there is acknowledgment of debt by the Respondent, which should have been considered while deciding the question of limitation.

Therefore, the Review Petitioner has contended that, the entire claim made by it in OP No.11/2015 is well within the period of limitation and has requested for allowing the Review Petition.

- 3) The Respondent has appeared through its counsel and orally opposed the claim made by the Review Petitioner.
- 4) We have heard the learned counsel for the parties and perused the material placed on record, including the records in OP No.11/2015.

5) Before considering the actual grounds urged by the Petition in this Review Petition, the material facts in controversy in OP No.11/2015, as noted in the Order dated 7/1/2016, is extracted below :

- (a) 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. 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 for a declaration that, the termination of the PPA was valid. This Petition was dismissed on 2.11.2012. The Petitioner challenged the Order of this Commission before the Hon'ble Appellate Tribunal for Electricity (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 this Commission to pass consequential orders in terms of the findings and the directions in the said Judgment. This 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. 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 a Legal Notice dated 14.1.2015 and also a Notice dated 30.3.2015 along with computation of the dues, 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.
- (b) The Respondent in OP No.11/2015 contested the claim of the Petitioner, mainly on the ground that, the claim pertaining to the

period from January, 2009 to December, 2013 is barred by time as on 8.4.2015, i.e., the date on which OP No.11/2015 was filed before this Commission.

6) After considering the rival contentions and the material placed on record, our findings on the grounds urged by the Review Petitioner are as follows :

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

(a) The learned counsel for the Review Petitioner relied upon Article 1 under the Schedule to the Limitation Act, 1963. In our Order dated 7.1.2016 in OP No.11/2015, we had not referred to any particular Article under the Schedule to the said Act, but it was specifically stated in the said Order that, the period of limitation for filing a Suit for money under the said Act is three years from the date when the amount becomes due. Therefore, it refers to Article 15 under the Schedule to the said Act. Article 1 and Article 15 under the Schedule to the Limitation Act, 1963 read thus :

**“PART I
SUITS RELATING TO ACCOUNTS**

<i>Description of Suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
<i>Art. 1 For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.”</i>	<i>Three years</i>	<i>The close of the year in which the last admitted or proved is entered in the account; such a year to be computed as in the account.</i>

**“PART II
SUITS RELATING TO CONTRACTS**

<i>Description of Suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
Art.15 <i>For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.”</i>	Three years	<i>When the period of credit expires.</i>

- (b) In our Order dated 7.1.2016 in OP No.11/2015, while dealing with the question of limitation, in paragraphs 7(a) to 7(e) thereof, we had noted the reasonings thus :

“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."

- (c) The accounts extract produced by the Petitioner in OP No.11/2015 would clearly indicate that, Article 15, and not Article 1, under the Schedule to the Limitation Act, 1963 would apply to the present case.

- (d) Article 5.1 of the PPA dated 12.2.2008 provides that, the Respondent shall pay for the Energy Delivered at the rate agreed every month from the Commercial Operation Date (COD).
- (e) Article 5.5 of the said PPA provides that, the Petitioner is permitted to draw upto 10% of the installed capacity for start-up and 105% of such energy provided by the Respondent for start-up purposes shall be deducted from the energy pumped into the Grid by the Petitioner for determining the amount to be paid by the Respondent to the Petitioner. If energy over and above 10% of the installed capacity for start-up is drawn from the Grid, the same would be billed under the tariff applicable to HT industries including the demand charges.
- (f) Article 6.1 of the said PPA provides that, a Monthly Invoice for each Billing Period in the prescribed format from time to time shall be submitted by the Petitioner to the Respondent for making payments.
- (g) Article 6.2 of the said PPA provides that, the Respondent shall make the payment in respect of the Monthly Invoices within fifteen (15) days from the date of receipt of the Invoices.
- (h) Article 6.3 of the said PPA provides interest for late payment, in the event the Respondent fails to make payment of the Monthly Invoices within the due date.

(j) According to the Petitioner, there were many instances of late payments, though the Respondent has made payment of the amounts due under the Monthly Invoices and further that, in a few cases, part of the Monthly Invoice amounts was due, apart from there being delay in payment of the remaining part of the amounts. The accounts extract produced by the Petitioner does not indicate that, at any time, the Petitioner owed any amount to the Respondent on certain dealings between the parties. Therefore, we are of the considered view that, the cause of action for recovery of the amount due under each Monthly Invoice becomes due within fifteen days from the date of receipt of the tariff invoice by the Respondent. There was no agreement, either express or implied, that the accounts should be settled between the parties at some stage of the transactions and only thereafter one or the other party would be liable to pay the balance amount to the other party. Therefore, we hold that Article 1 under the Schedule to the Limitation Act, 1963 would not apply to the facts of the present case.

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

The contention of the Petitioner that, from the date of passing of the consequential Order, the cause of action would arise for recovery of the amounts due under the various Monthly Invoices or the interest due on them, is not tenable. As already noted, the cause of action for recovery of the entire or part of the Monthly Invoice amounts and the overdue interest amounts payable for the delayed payments, would

arise from the respective dates as noted above. Hence, we hold that, this ground is to be rejected.

9) **Ground No.(3) :**

It is found that, the PPA dated 12.2.2008 was terminated with effect from 30.4.2012. The Petitioner can claim only the compensation for the energy supplied subsequent to 30.4.2012, i.e., the date of termination of the PPA. The Respondent had paid for the energy supplied subsequent to the date of termination of the PPA, but there were certain delays in making payment of those Monthly Invoices. The Petitioner cannot claim the interest as agreed in the PPA for this period as there would be no binding PPA between the parties subsequent to 30.4.2012. This Commission therefore deemed it appropriate to direct the Respondent to pay simple interest at the rate of 9% per annum for the period, from 30.4.2012 to 12.12.2013, for the delay in making payment of those Monthly Invoices. For the above reasons, we hold that this ground is also not maintainable.

10) **Ground No.(4) :**

The Petitioner has contended that, the Respondent has neither disputed nor denied the claim made by the Petitioner through issuance of different Notices including the Legal Notices, therefore it amounted to an admission of debt due to the Petitioner and because of such admission, the Respondent is barred from taking the plea of

limitation. Assuming that the said fact is taken as proved, at best it may amount to an admission of debt, unless the Respondent had explained the reason for not replying such Notices of the Petitioner. At any rate, such an admission does not amount to acknowledgment of debt for the purpose of extension of period of limitation in a proceeding for recovery of amounts due. For a valid acknowledgment of debt, the Debtor should acknowledge the existence of debt, in writing, within the period of limitation and duly sign the acknowledgment of debt. Therefore, the admission of debt by the Respondent, as contended by the Petitioner, cannot be a ground for extension of limitation. For the above reasons, we hold that, this ground is also not tenable.

- 11) For the foregoing reasons, we hold that the Petitioner has not made out any valid ground for review of this Commission's Order dated 7.1.2016 passed in OP No.11/2015. Hence, we pass the following :

ORDER

The Review Petition stands dismissed.

Sd/-
(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(D.B. MANIVAL RAJU)
MEMBER