

# SUPREME COURT OF INDIA

Mangalore Electricity Supply Company Limited

Vs.

AMR Power Private Limited & Anr.

C.A.No.1665 of 2015

(Anil R.Dave and L.Nageswara Rao,JJ.,)

15.09.2016

## JUDGMENT

**L.Nageswara Rao,J.,**

1. Mangalore Electricity Supply Company Ltd. (MESCOM), the Appellant herein, is a distribution licensee. M/s. AMR Power Private Limited, the First Respondent herein, is a renewable power generator which has developed and is operating a 24.75 MW run of the river mini hydel power project in the State of Karnataka. The Karnataka State Electricity Regulatory Commission is the Second Respondent in the present Appeal.

2. The Appellant and the First Respondent entered into a Power Purchase Agreement (hereinafter referred to as 'PPA') on 02.08.2006 for the supply of 24 MW of electricity. It was mentioned in the PPA that the Government of Karnataka accorded its sanction to the proposal of the First Respondent for installation of a mini hydel electric power generating station of 24 MW capacity across River Netravathi, Dakshina Kannada District and that the Appellant was permitted to enter into a PPA with the First Respondent for purchase of electricity. Article 5 of the PPA provides for payment of Rs 2.80 per kilowatt-hour for the first 10 years for the delivered energy. From the 11th year onwards, the PPA provides that the Appellant shall pay to the company a rate determined by the Commission for the energy delivered at the metering point. Article 6 of the PPA deals with billing and payment, Article 9 covers the term, termination and default of the PPA. As per Article 9.1.1, the PPA shall continue to be in force for a period of 20 years from the commercial operation date and may be renewed for a period of 10 years on such terms and conditions as may be mutually agreed upon. Article 6 and Article 9 which fall for consideration in this case will be dealt with in detail in the subsequent paragraphs. On 04.08.2008, the First Respondent increased the capacity from 24 MW to 24.75 MW.

3. The First Respondent started generating power and commenced supply of electricity to the Appellant on 12.09.2009. The First Respondent approached the Karnataka Electricity Regulatory Commission, the Second Respondent herein, by filing O.P. No. 28 of 2009 for a declaration that the PPA executed on 02.08.2006 was null and void. A further relief for grant

of open access was also sought by the First Respondent. An interim order was passed by the Second Respondent Commission on 27.08.2009 directing the Appellant to synchronize the plant and pay for the power at the rate of Rs. 2.80 per unit pending final adjudication. The Second Respondent Commission dismissed O.P. No. 28 of 2009 on 23.12.2010. Pursuant to the observations made in the said order dated 23.12.2010, the First Respondent requested the Appellant to revise the tariff which was not considered by the Appellant. The First Respondent also filed a review of the order passed in O.P. No. 28 of 2009 which was dismissed on 22.12.2011.

4. The First Respondent by a letter dated 26.05.2011 served a Default Notice as provided in Article 9.3.2 of the PPA and requested the Appellant to remedy the default. The First Respondent referred to default in payment of power bills, default in payment of interest for the delay caused in payment of the power bills and default in opening a Letter of Credit. Details of the default were annexed to the said letter dated 26.05.2011. The Appellant responded to the Default Notice by sending a letter dated 04.07.2011 in which it was stated that an attempt was being made to clear all dues towards power purchase to all the generators without any delay. The Appellant also stated that the payment of bills for the month of January, February and March 2011 were delayed because of the inter-connection approval not being produced by the First Respondent. It was also stated that an endeavour would be made in the future to make the payments without delay and that the Letters of Credit would be opened. The First Respondent, not being satisfied with the reply dated 04.07.2011, issued a Notice of Termination of the PPA on 22.07.2011.

5. The First Respondent approached the Second Respondent by filing O.P. No. 48 of 2011 seeking a declaration that the PPA dated 02.08.2006 stood terminated and was not subsisting. A further declaration for intra-state open access was sought. The Second Respondent Commission by an order dated 23.02.2012 passed an interim order for payment of tariff at the rate of Rs. 2.80 per unit, pending disposal of O.P. No. 48 of 2011. On 22.03.2012, the First Respondent moved an application for withdrawal of O.P. No. 48 of 2011. The Second Respondent Commission dismissed O.P. No. 48 of 2011 as withdrawn. The First Respondent approached the Central Electricity Regulatory Commission (CERC) by filing petition No. 141/MP/2012 seeking permission for inter-state open access to supply electricity to third parties. On 23.08.2012, the Appellant filed O.P. No. 37 of 2012 before the Second Respondent Commission seeking quashing of the termination notice dated 22.07.2011 and for a declaration that the PPA dated 02.08.2006 was valid and subsisting. A further direction was also sought to the First Respondent to act in accordance with the PPA dated 02.08.2006 and to supply power in terms thereof. The CERC dismissed Petition No. 141 of 2012 filed by the First Respondent for grant of inter-state open access in view of the pendency of O.P. No. 37 of 2012 before the State Commission in which the validity of the PPA was challenged. The Second Respondent Commission directed status quo to be maintained on 23.08.2012 in O.P. No. 37 of 2012. The said interim order dated 23.08.2012 was challenged by the First Respondent before the Appellate Tribunal for Electricity (APTEL). The APTEL continued the interim arrangement but clarified that the order of status quo passed by the Second Respondent Commission would not mean that the operation of the termination of the PPA was stayed. By an order dated 14.08.2013 the Second Respondent Commission dismissed

O.P. No. 37 of 2012 upholding the Termination Notice dated 22.07.2011 and declaring that the Appellant was not entitled for a direction to the First Respondent to act in accordance with the PPA dated 02.08.2006. Appeal No. 275 of 2013 filed by the Appellant before the APTEL was dismissed on 17.10.2014, the correctness of which is assailed in the present Civil Appeal.

6. The Second Respondent Commission framed two issues for consideration. They are as follows:

“(1) Whether the termination of the PPA dated 02-08-2006 by the Respondent is illegal and invalid, as contended by the petitioner?”

(2) Whether the petitioner has made out a case for a direction by the Commission to the Respondent to act in accordance with the PPA dated 02-08-2006 and supply power in terms of the PPA, as prayed for?”

7. The Commission held that the Appellant in its reply to The Default Notice did not deny the delay in payment. The Commission further found that the Appellant made an attempt to justify the delay and virtually admitted the delay. The Commission also held that in response to the Default Notice dated 26.05.2011 the Appellant should have cleared all the pending bills including interest within the time specified in the PPA for curing the defects. Issue No.1 was held in favour of the First Respondent and the Termination Notice dated 22.07.2011 was upheld. As a consequence, Issue No. 2 pertaining to a direction to the Respondent to act in accordance with the PPA was refused.

8. The APTEL after considering the submissions made by the parties held that the Appellant failed to make out a case of either res judicata or issue estoppel as the scope of the proceedings in the petitions filed by the First Respondent was different. After a detailed consideration of the Default Notice dated 26.05.2011, the reply to the notice dated 04.07.2011 and the Termination Notice dated 22.07.2011 in the light of the provisions contained in the PPA, the APTEL confirmed the order of the Tribunal.

9. Mr. V. Giri, learned Senior Counsel appearing for the Appellant submitted that the First Respondent had repeatedly made valiant efforts to wriggle out of the obligations under the PPA. He submitted that the First Respondent initially filed a petition for a declaration that the PPA was void. Having failed in that attempt, the First Respondent resorted to issuance of the Termination Notice for delay in payments.

10. Mr. Giri urged that the First Respondent should not have been permitted to take a defence justifying the Termination Notice and seeking open access in O.P. No. 37 of 2012, particularly after O.P. No. 48 of 2011 was withdrawn from the State Commission without seeking permission to initiate fresh proceedings. He submitted that the withdrawal of O.P. No. 48 of 2011 by the First Respondent before the State Commission would act as a bar under Order 23, Rule 1 of the Code of Civil Procedure, 1908 and the Respondent should not be permitted to raise the grounds in O.P. No. 48 of 2011 before any other forum. He placed

reliance upon the judgment of this Court in *Sarguja Transport Service v. State Transport Appellate Tribunal, MP Gwalior and Ors. reported in*<sup>1</sup> wherein it was held that a fresh Writ Petition was not maintainable after withdrawal of a Writ Petition without permission to file a fresh Petition in respect of the same subject matter. He also submitted that there is no admission of any default in his letter dated 04.07.2011. In any event, according to him, the delay was not inordinate and there was no further delay in making payments after May 2011. He also stated that the First Respondent continued to supply power even after the Termination Notice dated 22.07.2011 which amounts to condoning the default, if there was any, in the payment of earlier bills. He also stated that the inter-connection renewal was obtained by the First Respondent on 23.03.2011 and the First Respondent cannot complain of any delay in payments made prior to that date.

11. Mr. Basava Prabhu S. Patil, learned Senior Counsel appearing for the First Respondent submitted that it is clear from the reply to the default notice that the Appellant admitted the delay in payments. He stated that the Appellant did not deal with the Letter of Credit at all in the said reply to the default notice. He also submitted that the defects were not cured within a period of 30 days, as the payment for the months of Jan 2011 and Feb 2011 which were due on 18.02.2011 and 18.03.2011 were made only on 25.05.2011. No interest for the delayed payment was paid as provided for in the agreement. A Letter of Credit was not opened even after the default notice. Mr. Patil stated that the inter-connection approval was only an excuse for non-payment and that it was not a condition precedent for payment of tariff invoices. He relied upon an earlier judgment of the APTEL in Appeal No. 152 of 2012. Countering the argument of the Appellant on Order 23, Rule 1, Mr. Patil stated that withdrawal of a petition without liberty to file a fresh petition would not bar the First Respondent from taking a defence in another round of litigation. He relied upon a judgment of this Court in *Kandapazha Nadar & Ors. v. Chitraganiammal & Ors*<sup>2</sup>. reported in.

12. In reply, Mr. Giri submitted that no time limit is prescribed for payment of bills in Article 9.2.2. Letters of Credit would not fall within the purview of the words “payments default” in Clause 9.2.2. He also submitted that the right to terminate the contract ought not to have been exercised by the First Respondent for non-opening of a Letter of Credit which was not a fundamental default of the conditions of the PPA. He further stated that the Appellant is a public utility and any order against the Appellant would have a huge impact on public revenue.

13. The point for determination in the present appeal pertains to the validity of the Termination Notice dated 22.07.2011 and the entitlement of the Appellant to seek a declaration that the PPA is valid and binding on Respondent No.1. It would be necessary to examine the relevant Articles in the PPA for a proper adjudication of the lis in this case. Article 6.3 of the PPA provides for payment of penal interest at the rate of SBI Medium Term Lending Rate per annum in case of delay in payment by the Appellant. Clauses 9.2 and 9.3 are also relevant and they are as follows:

“9.2 Events of Default 9.2.1 Company’s Default [ . . ]

9.2.2 MESCO Default: The occurrence of any of the following at any time during the Term of this Agreement shall constitute an Event of Default by Corporation:

1. Failure or refusal by MESCO to perform its financial and other material obligations under this Agreement.

2. In the event of any payment default by the MESCO for a continuous period of three months, the Company shall be permitted to sell electricity to third parties by entering into a wheeling & banking agreement with the MESCO for which it shall pay transmission and other charges to the MESCO at the rates applicable from time to time and as approved by the Commission.

9.3 Termination.

9.3.1 Termination for Company's Default.

9.3.2 Termination for MESCO's Default: Upon the occurrence of an event of default as set out in sub-clause

9.2.2 above, Company may deliver a Default Notice to the MESCO in writing which shall specify in reasonable detail the Event of Default giving rise to the default notice, and calling upon the MESCO to remedy the same. At the expiry of 30 (thirty) days from the delivery of this 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 MESCO. Company may terminate this agreement by delivering such a Termination Notice to MESCO 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.”

14. Article 9.2.2 contemplates that the failure of the Appellant in performing its financial and other material obligations under the PPA would constitute an event of default on its part. The said Article also provides for the First Respondent being permitted to sell electricity to third parties in the event of payment default by the appellant for a continuous period of three months. The procedure prescribed in Article 9.3.2 for termination for the Appellant's default is that the First Respondent should deliver a Default Notice giving details in the event of default and asking the Appellant to remedy the same. If the Appellant does not remedy the defaults within the prescribed period of 30 days or any extended period as mutually agreed upon, the First Respondent may issue a Termination Notice.

15. The Default Notice dated 26.05.2011 refers to default in payments of bills, non-payment of interest for the delayed payments and non-opening of a Letter of Credit as provided for in Article 6.5 of the Agreement. In the reply dated 04.07.2011, the Appellant did not expressly deal with any of the defaults mentioned in the Default Notice. On the other hand the Appellant stated that it relied heavily on Government subsidy for payment to be made, an

attempt would be made in the future to make payments promptly, LCs would be opened and that payment for January, February and March 2011 were delayed because the approval for inter-connection was given only on 23.06.2011. The invoice for December 2010 which was due to be paid on 19.01.2011 was actually paid on 24.02.2011. The payment to be made for the months of January 2011 and February 2011 due on 18.02.2011 and 18.03.2011 was actually done on 25.05.2011. Admittedly, interest on the delayed payments as provided for in Article 6 was not paid and a Letter of Credit was not opened. In view of the default mentioned by the First Respondent in the notice not being remedied within a period of 30 days, we are of the opinion that the Second Respondent Commission and the APTEL were correct in upholding the termination notice dated 22.07.2011. We do not agree with the submissions of Mr. Giri that non-opening of Letter of Credit would not be a default covered by Article 9.2.2. As per Article 9.2.1, a failure or refusal by the Appellant to perform its financial and other material obligations under a PPA constitutes an event of default. Both the parties to the PPA are bound by the terms thereof and they are free to resort to action in accordance with the provisions contained therein.

16. This Court in *Sarguja Transport Service* (supra) held that withdrawal of a Writ Petition without seeking permission to file a fresh Writ Petition would bar filing of a fresh Writ Petition. But there is no bar for taking a defence in a fresh round of litigation in respect of the same point involved in a suit which was withdrawn without seeking liberty. (See *Kandapazha Nadar*, (supra)). The First Respondent initially sought for open access for sale of electricity to third parties intra-state by filing O.P. No. 48 of 2011. After withdrawing O.P. No. 48 of 2011, the First Respondent filed a Petition before the CERC for inter-state open access. It is no doubt true that in O.P. No. 48 of 2011, the First Respondent also sought for a relief of a declaration that the PPA is not binding on it. Strictly speaking, there was no need for such a declaration being sought by the First Respondent as the PPA was terminated by issuance of a notice dated 22.07.2011. In any event, we are at present concerned with O.P.No.37 of 2012 in which the First Respondent raised a defence that Termination Notice was valid and that it was entitled to open access, which is legally permissible.

17. The APTEL found that the grant of inter-connection approval on 26.03.2011 could not be a justification for delayed payment of bills. It was held that there was delay in payment of bills for January and February 2011 even after the inter-connection approval was given on 23.03.2011, as admittedly the payments were made only on 26.05.2011. The APTEL relied upon an earlier order passed by it in Appeal No.152 of 2012 to hold that an inter-connection approval was not a condition precedent for payment of tariff invoices. We approve the above findings recorded by the APTEL.

18. It is an admitted fact that the First Respondent continued to supply power to the Appellant on payment of Rs.2.80 per unit even after the notice of termination dated 22.07.2011. There was a refusal of open access to the First Respondent in the pending proceedings. There was also an interim order for maintenance of status quo in O.P.No.37 of 2012 by the Second Respondent Commission. In view of the fact that the power was being generated by the First Respondent and had to be supplied, the continuation of the supply

made by the First Respondent after the Termination Notice dated 22.07.2011 cannot be taken to be a condonation of the events of default by the Appellant.

19. In view of the foregoing, we do not find any error in the judgment of the APTEL confirming the Order of the Second Respondent Commission. The Civil Appeal is dismissed. No order as to costs.

<sup>1</sup>(1987) 1 SCC 0005

<sup>2</sup>(2007) 7 SCC 0065