Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.43 of 2013

Dated: 14th Nov, 2013

Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. V.J TALWAR, TECHNICAL MEMBER

In the Matter of:

Davangere Sugar Company
No.73/1, P.B.No.312, Shamanur Road,
Davangere- 577 004

…….Appellant

Versus

1. **Karnataka Electricity Regulatory Commission**
   Mahalaxmi Building,
   M.G. Road,
   Bangalore-560 001

2. **Bangalore Electricity Supply Co. Ltd.,**
   K.R Circle,
   Bangalore-560 001

…… Respondent(s)

Counsel for the Appellant(s) : Mr. Basava Prabhu S Patil,Sr.Adv.
Mr. Prabhuling Navadgi
Mr. B S Prasad
Mr. Rajesh Mahale

Counsel for the Respondent(s): Mr. Anand Ganeshan
Ms. Swapna Seshadri for R-1

J U D G M E NT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. M/s. Davangere Sugar Company Limited is the Appellant herein. Karnataka Electricity Regulatory Commission is the First Respondent. Bangalore Electricity Supply Company Limited (BESCOM), is the Second Respondent.

2. This Appeal has been filed as against the impugned order dated 24.1.2013 determining the amount of compensation to be paid by the Appellant to the BESCOM in view of 3rd party sale made by the Appellant through Open Access.

3. The short facts are as follows:

(a) The Appellant is a Generating Company. It entered into a Power Purchase Agreement with KPTCL, the Transmission and Bulk Supply Licensee under Karnataka Reforms Act for the sale of power from its plant situated at Davangere on 17.1.2002.

(b) The KPTCL on 5.7.2003 terminated the PPA between the Appellant and KPTCL without assigning any reason. Therefore, a Writ Petition was filed before the High Court against the said termination.

(c) During the pendency of the said Writ Petition, there was a re-negotiation between the Appellant

Company and BESCOM (R-2), the successor of the KPTCL. Consequently, the supplemental agreement dated 9.6.2005.

(d) However, the BESCOM (R-2) continuously defaulted in making payments to the Appellant towards the energy received by it. The Appellant Company made several representations seeking for the payment of arrears. But, there was no response and the BESCOM did not bother to honour the bills on time.

(e) The PPA, under Clause 9.1 empowered the Appellant for 3rd Party sale in the event the BESCOM defaulted in making payment for 3 months continuously. Since the payment was not made for more than 3 months continuously, the Appellant Company entered into a Power Purchase Agreement for 3rd party sale with the Tata Power Company for supply of power from its units on 27.11.2007.

(f) Thereafter, on 19.12.2007 the Tata Power Company with the consent of the Appellant Company filed an Application before the State Load Despatch Centre seeking for the grant of Open Access. However, the same was rejected by the State Load Despatch Centre on 22.12.2007 on the ground that

there is an existing Power Purchase Agreement between the Appellant Company and the BESCOM.

(g) Being aggrieved over by the said rejection, the Appellant Company on 15.1.2008 filed an Application before the Central Commission seeking to set-aside the rejection communication and for the consequential direction to the State Load Despatch Centre to grant Open Access.

(h) The Central Commission, after hearing the parties, by the order dated 10.4.2008 allowed the Petition filed by the Appellant. The Commission relied upon the decision passed by this Tribunal in Appeal No.06/2008 and held as under:-

> "The Appellant may approach, the Karnataka Electricity Regulatory Commission for matter relating to the rights of the Appellant and the obligations of the Respondent – generating Companies under the Power Purchase Agreements including the interim orders for supply of power to the Appellant as per the rights claimed by the Appellant but denied by the respondent generation companies.
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> In the event of such Petition is being filed, the State Commission shall consider the same uninfluenced in any manner by impugned orders of

the Central Commission, expeditiously in accordance with law.

Subject to above, the impugned order is not interfered with in these appeals but the issue decided shall not be considered as a precedent in any other case. The existing open access arrangement between the parties shall continue in the meanwhile."

(g) Thereupon, the Appellant Company entered into a fresh Power Purchase Agreement with the Reliance Energy Trading Company Limited on 15.4.2008 and made an application to Karnataka SLDC for grant of Open Access. Accordingly, the Open Access was granted by the order dated 21.4.2008.

(i) Against this order, the Respondent BESCOM filed a Petition before the State Commission on 21.4.2008 seeking to set-aside the consent given by the SLDC vide letter dated 19.4.2008 for grant of Open Access.

(j) The State Commission through the order dated 12.3.2009 dismissed the said Petition holding that the consent for Open Access given by the SLDC to the Appellant was legal and justified.

(k) Thereupon, the Appellant Company issued a default notice on 10.6.2009 intimating the BESCOM

that in the event of default being not cured within 30 days, its PPA would stand terminated. In the meantime, the Respondent BSECOM filed a Petition before the State Commission for a declaration that the Appellant Company is barred from seeking Open Access and selling power to the 3rd party during the subsistence of PPA. Since the defaults remained uncured, the Appellant Company terminated the PPA on 8.7.2009.

(l) At that stage, the Respondent amended the Petition filed earlier before the State Commission praying for the quashment of the termination of the PPA dated 8.7.2009. The State Commission by the order dated 8.10.2009, dismissed the Petition filed by the Respondent holding that the termination of the PPA was valid.

(m) This order dated 8.10.2009 was challenged by the BESCOM before this Tribunal in Appeal No.176 of 2009. However, this Tribunal after hearing the parties, dismissed the Appeal by the judgment dated 18.5.2010. Against this judgment, the BESCOM filed an Appeal before the Hon'ble Supreme Court which in turn, dismissed the same.

(n) At that stage, the BESCOM filed another Petition on 16.11.2009 before the State Commission seeking for damages on account of Appellant having availed Open Access for 3rd party supply during the subsistence of the PPA.

(o) The State Commission by the impugned order dated 24.1.2013 though had earlier dismissed the Petition filed by the BESCOM upholding the termination, has now held in the impugned order that the Respondent Company is entitled for damages at the rate of Rs.3.95 per unit of the electricity generated but not supplied to the Respondent during the months of July to December, 2008.

(p) Aggrieved by this Impugned Order dated 24.1.2013, the Appellant has filed the present Appeal.

4. The learned Senior Counsel for the Appellant while assailing the impugned order has made the following submissions:

"The findings on this issue, has already been rendered by the State Commission in OP No.17 of 2009 in its order dated 8.10.2009. In this order, the State Commission dismissed the claim for the damages holding that the termination of the PPA was valid and justified. However, the Respondent has raised the very same plea in OP No.42 of 2009 praying that

when there was a PPA existing between the parties, the sale of power to 3rd party cannot be permitted, and therefore,the Respondent was entitled to get damages for that period during which the supply was to be made to the Respondent. Once the State Commission held earlier that the Respondent BESCOM has defaulted in making timely payment and consequently the Termination Notice was valid, it cannot now hold that the Appellant is not entitled for the 3rd party sale. As a matter of fact, the said question stood answered earlier by the State Commission by holding that the Appellant was at liberty to either sell the power to the 3rd party or take re-course of termination of the Power Purchase Agreement. This finding cannot be disturbed by the State Commission as it is clearly hit by the principles of Res Judicata".

5. In reply to above plea, the learned Counsel for the Respondent countered the arguments of the Appellant in support of the impugned order and submitted as under:

"The Doctrine of Res Judicata is not applicable to this case. The prayer in OP No.17 of 2009 earlier filed is entirely different from OP No.42 of 2009 presently filed. Therefore, the question of Res Judicata will not arise in this case".

6. In the light of the above contentions of the parties, the following questions of law would arise for consideration:

(a) Whether the order of the State Commission directing damages to be paid to the Respondent Company by the Appellant is sustainable in law and hit by the principles of Res Judicata?

(b) Whether it is open for the State Commission to re-open the matter of termination of contract including the defaults of the Respondent when the said issue had earlier stood adjudicated and decided by the State Commission which was confirmed by this Tribunal and thereafter by the Hon'ble Supreme Court of India, once again by way of awarding damages?

(c) Whether the State Commission could have ignored its own findings and binding orders passed by the State Commission earlier confirmed by this Tribunal and thereafter by the Hon'ble Supreme Court of India?

7. On these questions, we have heard the learned Senior Counsel for the Appellant as well as the learned Counsel appearing for the Respondents.

8. Since all these three questions are interconnected, let us deal with all these questions by clubbing all the issues together and discuss the same.

9. The detailed facts enumerated earlier would reveal the following aspects which are not in dispute:

(a) There was a default by the Respondent Company in making the payment as per the Power Purchase Agreement. This is the finding rendered by the State Commission in OP No.17 of 2009 dated 8.10.2009 as against the Respondent Company.

(b) The Central Commission by the order dated 10.4.2008, gave a direction to grant Open Access to the Appellant. However, in the said order it reserved the rights of the Respondent Company to agitate their contractual disputes.

(c) Pursuant to the said liberty given by the Central Commission to the Respondent, it filed Application under OP No.5 of 2008 with the following prayers:

(i) The Appellant cannot be permitted to sell power during the existence of the PPA.

(ii) The Appellant Company to compensate to the Respondent for the said sale effected.

(d) The State Commission in this Application observed that the question of claim of cost could be agitated in different proceedings with available materials if so decided. However, the said Petition filed

by the Respondent Company was dismissed on 12.3.2009.

(e) Pursuant to the same, the Respondent Company filed another Petition in OP No.17 of 2009 stating that by virtue of the liberty given by the State Commission by the order dated 12.3.2009, directing the parties to initiate separate proceedings, the Respondent Company aggrieved by the actions of the Appellant Company in repeatedly seeking grant of Open Access in contravention of the PPA has filed the present proceedings.

(f) The reading of the Petition in OP No.17 of 2009 would make it clear that the entire cause of action for filing OP No.17 of 2009 as claimed by the Respondent Company was due to the action of the Appellant in selling power to the third party during the subsistence of PPA.

(g) This Petition in OP 17 of 2009 was dismissed by the State Commission by the order dated 8.10.2009 holding that the Respondent Company was liable to pay interest for any delay and non-payment of the due amount along with interest was a default in terms of the PPA and in that case, it was held that the Appellant Company has got a right to sell the power to 3rd party

as per Article 9.1 or to take extreme recourse of the termination of the PPA in terms of Article 9.3.2.

(h) This finding given as against the Respondent Company was challenged by the Respondent Company in Appeal No.176 of 2009. On 18.5.2010, this Tribunal while confirming the finding of the State Commission dismissed the Appeal.

(i) As against this judgment, the Respondent Company preferred a civil Appeal against the judgment of this Tribunal before the Hon'ble Supreme Court and the same was dismissed on 4.10.2010.

10. The above facts would clearly indicate that already the State Commission had given a finding in OP No.17 of 2009 by the order dated 8.10.2009 to the effect that the Respondent Company has committed default in making payment and as such the Appellant has got a right for 3rd party sale. This finding as mentioned above, has been confirmed by both this Tribunal as well as Hon'ble Supreme Court.

11. Now the grievance of the Appellant is that the State Commission though it had earlier dismissed the Petition filed by the Respondent Company (BESCOM) upholding the termination on the ground that there was a default by the Respondent Company, now holds that the Respondent Company is entitled for damages at the rate of Rs.3.95 per

unit of the electricity generated and supplied to 3rd party during the months from July to December, 2008.

12. In other words, it has now gone back from its own findings and held that the Respondent Company is entitled to get the compensation to be paid by the Appellant. This is virtually against its own findings in OP No.17 of 2009 dated 8.10.2009 endorsing the right of the Appellant for 3rd party sale since there was a default in making payments.

13. In the light of the above facts, the learned Senior Counsel for the Appellant would raise the point of Res-judicata.

14. As indicated earlier, the learned Counsel for the Respondent would submit that the principles of Res judicata would not apply to the present facts of the case as the prayer and the facts in this case are different from O P 17/2009.

15. In the light of the rival contentions of the parties let us examine the findings of the State Commission in its first order dated 8.10.2009 in OP No.17 of 2009 as well as the present order dated 24.1.2013 in OP No.42 of 2009.

16. Let us now refer to the findings in OP No.17 of 2009 dated 8.10.2009:

Commission's Findings in Impugned Order in OP 17 of 2009 dated 8.10.2009:

"5. We have perused the petition and statement of objections along with the material documents

produced along with them. After hearing the arguments and perusal of the petition and Respondent's objections along with all other materials placed before the Commission, following issues arise to be deliberated and decided:

1) *Whether or not the Respondent is obligated to supply power to the Petitioner notwithstanding the defaults, if any, committed by the Petitioner including delayed payments to the Respondent.*

2) *Whether or not the termination notice dated 8.7.2009 issued by the Respondent (Annexure J of the petition) is legal and valid.*

3) *Whether or not the directions can be issued to the Respondent by the Commission to sell power to the Petitioner in terms of the provisions contained in the PPA dated 17.01.2002 and supplemental agreement dated 9.6.2005.*

6. …

7. We shall take up the issue No.2 first regarding termination notice dated 8.7.2009 issued by the Respondent and record our findings. Depending upon the outcome of this, the other issues will need to be further discussed.

8. Article 9.1 of the PPA provides that the agreement shall continue to be in force for such time until the completion of the period of twenty (20) years from the scheduled date of completion and renewed for such further period of ten (10) years and on such terms and conditions to be mutually agreed upon between the parties within ninety (90) days to the expiry of the said period of twenty (20) years unless terminated. ***Article 9.1 also provides that in the event of any payment default by the Corporation***

for a continuous period of three (3) months, the Company, Respondent herein, shall be permitted to sell power to third parties as per Article 5.2 of the agreement. In terms of Article 9.2.2 failure or refusal by the Corporation to perform its financial and other material obligations under this agreement shall constitute as default by the Corporation.

9. Article 4.2 (iii) casts obligations on the Corporation to off take and purchase all the exportable capacity/made available by the Company at the Delivery Point, subject to system constraints, and Article 4.2 (iv) obligates the corporation to make tariff payment to the company as set out in Article 5.

10. The Petitioner is therefore obligated to off-take and purchase all Exportable capacity made available by the Respondent at the Delivery Point and to make tariff payments as set out. "Exportable capacity" has been defined as the surplus available electricity generated by the project, after providing for captive electricity consumed by the company, the Respondent herein, which shall be normally 12 MW during season and 20 MW during off season.

11. Article 5 provides the rate at which payment has to be made by the Petitioner for the delivered energy. It provides that the petitioner shall for the delivered energy pay monthly Energy Charges during the ten (10) years with effect from 17.1.2002 (date of signing of the agreement) to the Respondent every month for the period commencing from the commercial operation date till 1.4.2005 at the rate of Rs.2.80 (Rupees two and paise eighty only) per kwhr and for the remaining period out of the block of ten (10) years at the rate of Rs.3.10 per kwhr with an escalation at the rate of 2% per annum over the base tariff every year. This means that annual escalation will be at the

rate of Rs.0.062 per kwhr. "Delivered Energy" has been defined as the Kilo watt hours of electricity actually fed and measured by the energy meters at the delivery point in a billing period after deducting therefrom the energy supplied by the Corporation to project as similarly measured during such billing period.

12. Article 6.1 provides that the Respondent shall submit to the Chief Engineer Electricity, Corporation's Load Despatch Centre, Bangalore, tariff invoice for each Billing Period in the format prescribed by the Petitioner from time to time setting forth those amounts payable by the Petitioner for the delivered energy in accordance with Article 5.1. Article 6.2 obligates on the Corporation, the Petitioner herein, to make payment of the amount due in Indian rupees within 15 days from the date of delivery of the tariff invoice by the Respondent to the designated officer of the Petitioner. Article 6.3 provides that if any payment by the Petitioner is not made when due, there shall be due and payable to the Respondent penal interest at the rate of SBI Prime Lending Rate plus 2% per annum for such payment from the date of such payment was due until such payment is made in full.

13. ***The provisions of the PPA as set forth above do not leave any doubt in regard to the rate of payment and interest thereon, if delayed.*** *The rate of payment has been specified in Article 5.1 and the manner in which the payment has to be made has been specified in Article 6.1, 6.2 and 6.3. Mr. Naganand, Senior Counsel for the Petitioner has tried to convince us that Articles 6.1, 6.2 and 6.3 do not constitute obligation on Petitioner as the same is not referred in Article 4.2 of the PPA. According to him, only making payment to the Company as set forth in Articles 5 which is referred in Article 4.2 (iv) is the obligation and violation of this only can be construed*

as default as set out in Article 9.2.2. According to him not making payment as specified in Article 6.1, 6.2 and 6.3 is not a default and hence the notice of termination on the ground of non payment of certain amount by the Petitioner to the Respondent cannot be the cause for the termination of the agreement. ***We are not convinced with what Mr. Naganand has stated. According to us, Articles 5 and 6 are complementary to each other and particularly Article 6.1, 6.2 and 6.3 have to be read together with Article 5 to fulfill the obligation of making payment for the delivered energy to the Respondent by the Corporation. As Article 5.1 talks of only the rate at which payment has to be made, in our view the payment will be complete only when it is regulated by Article 6.1, 6.2 and 6.3. We therefore hold that non payment to the Respondent for the delivered energy at the rate specified in Article 5.1 and in the manner as specified in Article 6.1, 6.2 and 6.3 together constitute default as set forth in Article 9.2.2.***

14. Even though the Petitioner has admitted that there have been delays in making payment to the Respondent, but according to the Petitioner delays are for short periods and the amount involved is also small. *Though according to the Respondent this is not so and the amount involved and delays are considerable. The Petitioner has taken a view that he need not have to pay any interest for the delay in payment up to 60 (sixty) days. We do not agree with this contention. Article 6.2 of the PPA provides only fifteen (15) days for making payment after it becomes due. Payment thereafter is treated as late payment as enjoined in Article 6.3 and attracts interest at the rate mentioned therein.* ***We had occasion earlier to decide the issue of delayed payment and the resultant default giving right to the generators to sell power to third parties by***

invoking Article 9.3 of the PPA in OP No.03/2009 between M/s.Sandur Power Company Ltd., and the KPTCL and others. *The Counsel for the Petitioner herein was the Counsel for the Respondent in OP No.03/2009.*

15. We extract below paras 13 to 16 of Commission Order dated 13.8.2009 in OP No.03/2009.

> *"13. It is contended by the Petitioner that as per clause 9.3 of PPA read with clauses 6.1, 6.2, 6.3 and 6.5, if there is any payment default by the purchaser Company for a continuous period of three months, the generator shall be entitled to sell power to third parties. According to him, if the contention of the Respondents is to be accepted that for any tariff invoice, the purchaser will get 90 days before provision of clause 9.3 could be invoked for third party sale, it will be contrary to the intention of the parties as specifically expressed in clause 6.2 of the PPA.*
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> *14. As against the above, it is contended by Sri. Sriranga, learned counsel appearing for the Respondents, that under clause 9.3 Petitioner will be entitled to sell the electricity generated to the third parties only in case one particular invoice remains unpaid for a continuous period of three months and not otherwise. In other words, according to him, the Petitioner will not get a right under clause 9.3 to sell to third parties unless Respondents fail to pay any particular tariff invoice amount for a continuous period of three months.*
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> *15. In our considered view, the contention of the Petitioner's counsel is consistent with clause 9.3 of the PPA and not that of Respondent's. The*

argument of the Respondent's counsel though on the face of it looks attractive but close scrutiny of it will negate the same. Clause 6.2 of the PPA requires the purchaser to make payment within 15 days from the date of receipt of the tariff invoices. If the same is not made within 15 days as stipulated default occurs. Once there is an occurrence of default, the same continues to remain as an event of default even after three months, irrespective of whether dues are fully settled or otherwise. Accordingly, it is our view that whenever similar defaults occur for three consecutive invoices in a continuous period of three months, under clause 9.3 of the PPA, the Petitioner Company is entitled to sell power to the third parties. Any other interpretation adopted defeats the intention expressed in the contract in general and clause 9.3 in particular.

16. As held by the Hon'ble Supreme Court, the contract has to be read as a whole and intention of the parties has to be gathered from whole of the contract. The reading of the entire PPA will clearly indicate that the Respondents are liable to pay every month within fifteen (15) days of the date of submission of the Tariff Invoice and not within ninety (90) days as contended by the Respondents. If that was the intention clause 6.2 would have expressly said so and 15 days would not have been mentioned. Further, if the argument of the Respondent's counsel is accepted, it will be prejudicial to the Respondents themselves also. In other words, if any one month's payment is not made for a period of

three months the Petitioner will be free to sell power to the third parties. This cannot be the intention of the parties as one month's default is quite reasonable and may occur every now and then. Therefore it has to be held that as per clause 9.3 of PPA, the Petitioner will be entitled to sell power to the third parties in case there is payment default for three months' invoices continuously. Consequently the Respondents shall have to allow the Petitioner to go for third party sale in case 2nd Respondent defaults any payment for three consecutive invoices during a continuous period of three months."

16. Adopting the same, we hereby hold that the Petitioner is liable to pay interest for any delay after fifteen days and non-payment of due amount along with the interest is a default in terms of the PPA giving right to the Respondent to sell the power to third parties as per Article 9.1 or to take extreme recourse of the termination of the PPA in terms of Article 9.3.2.

17. ***We do not propose to get into the calculation of the amount which has remained unpaid to the Respondent by the Petitioner as the delay in payment is admitted by the Petitioner. Further, the payments due to the Respondent from KPTCL, the predecessor of the petitioner, are admitted as they are specifically not denied." {Emphasis mine}***

17. The crux of the findings of the State Commission in the order dated 8.10.2009 in OP No.17 of 2009 are summarised as follows:

(a) There has been a delay in making payment by the Respondent Company to the Appellant for the

energy supplied as such; there was a default in making payments.

(b) If there is any payment default by the Respondent purchaser company for a continuous period of three months, the Appellant Company shall be entitled to sell power to the 3rd parties.

(c) Admittedly, the dues have not been paid to the Appellant by the KPTCL.

18. The perusal of the above order would make it evident that the PPA was entered into between Appellant and KPTCL in the year 2002 and PPA was assigned to the Respondent Company (BESCOM) in the year 2005. On this basis, there is a clear finding given by the State Commission in the above order that there has been a default in making payment.

19. As indicated above, the said finding has been confirmed by this Tribunal as well as the Hon'ble Supreme Court.

20. Let us now examine the findings of the State Commission in OP No.42 of 2009 which is impugned order in this Appeal:

***"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 17.1.002 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.

21. The crux of the findings which has been given in the order in OP No.42 of 2009 are summarised as follows:

"(a) The First Issue is whether the Generating Company was under an obligation to supply electricity generated to the Procurer Company as per the terms of the PPA dated 17.1.2002 till the same came to be terminated on 8.7.2009.

(b) As per Article 9.1 of the PPA, the PPA was to be in force for a period of 20 years. The PPA was dated 17.1.2002. Under the said PPA, the Generating Company was required to supply electricity only to the Respondent Company. Admittedly, the PPA dated 17.1.2002 and the Supplemental Agreement dated 9.6.2005 was in force and operative when the Generating Company sought for Open Access on 19.12.2007. The Open Access was denied on the ground that the PPA was in force. Therefore, the Generating Company filed a Petition before the Central Commission by the order dated 10.4.2008. The Central Commission held that the SLDC had to grant Open Access as per the Central Commission's Open Access Regulations. The Appellate Tribunal also upheld the said order dated 10.4.2008 by the judgment dated 18.5.2010.

(c) The Appellate Tribunal directed that the rights of the parties under the PPA could be independently agitated upon by the aggrieved parties before the State Commission. Pursuant to the said observations of this Tribunal, the procurer Company filed a Petition seeking for damages.

(d) The PPA dated 17.1.2002 was valid and subsisting on 19.4.2008. This was terminated only on 8.7.2009. Once there was a subsisting PPA, the Generating Company

was under an obligation to sell the electricity generated to the Procurer Company and could not have sold the same to the third parties. Therefore, it is held that the fact that the Generating Company was granted NOC to sell electricity to the 3rd party as per the orders of the Central Commission will not take the right of the Generating Company to agitate against the breach of the PPA, in view of the observation of this Tribunal in the judgment dated 18.5.2010.

(e) Accordingly, issue No.1 is answered in the affirmative. Consequently, the procurer Company is entitled to damages."

22. The perusal of the above findings of the State Commission in OP No.42 of 2009 dated 24.1.2013 would reveal that the State Commission has miserably failed to go into the issue of right of the Appellant for 3rd party sale in the event of default on making payment by the Respondent.

23. As correctly pointed out by the Appellant, the State Commission has completely ignored its own findings in OP No.17 of 2009 to the effect that the Respondent Company has in fact, committed a default in making payment.

24. As mentioned earlier, the State Commission in its order in OP No.17 of 2009 has interpreted various Clauses of the PPA, Clause 5, 6 and 9 in particular. On the basis of these

Clauses, the State Commission has held that even non-payment of interest amounts to payment defaults in financial obligation in terms of Clause 9.2 of the PPA.

25. The State Commission has further held that if there is any payment default by the purchaser company for a continuous period of three months, the Generator shall be entitled to sell power to third parties.

26. As a matter of fact, the State Commission has given a categorical finding in the said order that the Respondent Company had defaulted in carrying out its financial obligation by defaulting of payments. For arriving at this finding, the State Commission referred to Clause 9.1 of the PPA.

27. Let us refer to this Clause for proper understanding. This Clause allows the Appellant to sell the power to 3rd party in the event of payment defaults for a continuous period of three months.

28. Clause 9.1 is as follows:

> ***9.1 Term of the Agreement****: This Agreement shall become effective upon the execution and delivery thereof by the Parties hereto and unless terminated pursuant to other provisions of the Agreement, shall continue to be in force for such time until the completion of a period of twenty (20) years from the Scheduled Date of Completion and may be renewed for such further period of ten (10) years and on such terms*

and conditions as may be mutually agreed upon between the Parties, ninety (90) days prior to the expiry of the said period of twenty (20) years. ***In the event of any payment default by Corporation for a continuous period of three months, the Company shall be permitted to sell power to third parties as per Article 5.2 of the Agreement.***

29. The State Commission in the order which has completely ignored the above provision of the PPA as well as its own findings in OP No.17 of 2009 confirmed by this Tribunal as well as the Hon'ble Supreme Court, has now taken a "U" turn to award compensation of more than Rs.35 Crores to the Distribution Licensee to be paid by the Appellant for default of payment.

30. This conduct of the State Commission not only reflects the non-application of mind but also reveals the attitude of the State Commission to ignore its own findings and the ratio decided by this Tribunal as well as the Hon'ble Supreme Court.

31. On the points of Res judicata, the Appellant as well as the Respondents cited number of authorities deciding the ratio in respect of Res judicata. The following are the decisions:

(a) (AIR 1953 SC 33) in the case of Srimati Raj Lakshmi Dasi and others Vs Banamali Sen and Others;

(b) (1994) 4 SCC 149 in the case Ferro Alloys Corporation Ltd Vs Union of India;

(c) (2003) 10 SCC 578 in the case of K Ethiran (Dead) by LRS Vs Lakshmi and Others

32. The observations in the case of Srimati Raj Lakshmi Dasi and others Vs Banamali Sen and Others (AIR 1953 SC 33) are as under:

> *" In view of the arguments addressed to them, their Lordships desire to emphasise that the rule of res judicata, founded on an ancient precedent is dictated by a wisdom which for all time. 'It has been well said' declared Lord Coke, 'interest rei publicae ut sit finis litium- otherwise, great oppression might be done under colour and pretence of law as expounded by the Hindu Commentators. Vijnaneshwara and Nilakanta include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katayana, who describes the plea thus: "If a person who was defeated by law earlier, sue again, he should be answered, 'you were defeated formerly". This is called. This is called the plea of former judgment. And so the application of the rule by the courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law".*

33. The observations in the case of Ferro Alloys Corporation Ltd Vs Union of India (1994) 4 SCC 149 are as under:

> *"21. So far as the question of res judicata is concerned, it has to be kept in view that the Appellant's grievance against the impugned order of the Central Government dated 17.8.1995 and against the report of the Sharma*

Committee as accepted by the aforesaid order of the Central Government proceeds in a narrow compass. The submission of Shri Nariman, learned Senior Counsel for the Appellant is that even though the Appellant joined issues beore the Sharma Committee in connection with assessment of its need for chrome are to enable it to claim mining lease for the entire area which was in possession of TISCO earlier, the ultimate assessment of the Appellant's need as made by the Sharma Committee and as approved by the Central Government by its order dated 17.8.1995 involved a patent error and hence it was required to be revised upwards. ***The short question is whether this grievance was on the anvil of scrutiny of this Court when it decided TISCO case and other cognate matters as per its judgment and whether it is said to be heard and finally decided, the Court considering it has to be shown to have expressly considered such an issue and to have decided it one way or the other and such decision should have obtained finality in the hierarchy of proceedings. Then only such an issue can be said to be heard and finally decided between the parties****. For the present discussion we may assume that the Appellant had joined issue with the contesting Respondents before this Court when it was called upon to decide the rival claims resulting in the decision in TISCO case……"*

34. The observations in the case of K Ethiran (Dead) by LRS Vs Lakshmi and Others (2003) 10 SCC 578 are as under:

"It is settled law that the principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties to a judicial determination from

litigating the same question over and again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, the parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action, nor can they litigate which was necessary for decision in the earlier litigation. These two aspects are 'cause of action estoppel' and 'issue estoppel'. These two terms are of common law origin. Again, once an issue has been finally been determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is to approach the Higher Forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent proceedings in the same unit in which the issue had been determined. It also operates in subsequent suits between same parties in which the same issue arises."

35. The ratio decided by the Hon'ble Supreme Court in these decisions are as follows:

(a) The rule of res judicata prevents the parties to a judicial determination from litigating the same question over and again even though the determination may even be demonstratedly wrong.

(b) When the proceedings have attained finality, the parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the

same cause of action, nor can they litigate which was necessary for decision in the earlier litigation.

(c) Once an issue has been finally been determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. Only remedy is only to approach the Higher Forum if available.

(d) The rule of res judicata, founded on an ancient precedent is dictated by a wisdom which for all time. If a person who was defeated by law earlier, sue again, he should be answered that he was defeated formerly. This is called the plea of former judgment.

(e) When the plea of res judicata has been raised before the Court, it has to be shown to have expressly considered such an issue and to have decided it one way or the other and such decision should have attained finality in the hierarchy of the proceedings. Then only such issue can be heard and finally decided between the parties.

36. The above ratio was decided by the Hon'ble Supreme Court in the above cases by interpreting Section 11 of the CPC. Section 11 of the CPC reads as under:

> ***"11. Res judicata**: No court shall try and suit or issue in which the matter directly and substantially in **issue has been directly and substantially in issue in a former suit between the same parties,** or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, **and has been heard and finally decided by such Court**."*

37. For Section 11 to be applicable in the present case, the following two primary ingredients are essential:

(a) The matter directly and substantially in issue has been directly and substantially in issue in the former suit; and

(b) Such issue has been heard and finally decided by the court in the previous proceedings;

38. According to the Respondent, in the present proceedings there was no issue on the damages for the 3rd party sale for the year 2008 and there was no decision of the State Commission as well as this Tribunal with regard to the said issue and therefore, the claim of the Appellant that the State Commission decided the issue in OP No.17 of 2009 construed Res judicata would not be sustainable under law.

39. We are unable to accept this argument of the Respondent for the following reasons:

(a) Admittedly, in OP No.17 of 2009, as affirmed by the Appellate Tribunal in Appeal No.176 of 2009 and thereafter, affirmed by the Hon'ble Supreme Court, it has been categorically decided that the Appellant Company had the right to sell the power to 3rd party even during the subsistence of the Power Purchase Agreement when the defaults wee committed by the Respondent Company during the said period.

(b) Therefore, it can be seen that both OP No.17 of 2009 and OP No.42 of 2009 relate to the Central issue as to whether the Appellant Company could have sold the power to the 3rd parties during the subsistence of the PPA. The claim of damages is only consequential. If it was to be held that the Appellant Company could not have sold power to third parties, during the subsistence of the PPA, only then the question of damages could arise.

(c) The issue in question has already been decided by the State Commission to the effect that the Appellant Company could have sold the power during the subsistence of the PPA and in that event, the issue regarding awarding of damages would not arise.

(d) If the above position is to be accepted then the issue regarding awarding of damages by the State

Commission once again in another set of proceedings cannot be allowed to be raised as it would hit by Section 11 of the CPC.

40. At the risk of repetition, it has to be stated that the question as to whether there is any illegality to sell power to 3rd parties or take recourse of terminating the PPA, was already considered and decided by the State Commission in OP No.17 of 1009.

41. The said question was answered by the State Commission in the above proceedings by holding that the Appellant was at liberty to either sell the power to 3rd parties or to take recourse of terminating the PPA. As per this finding, the sale to third parties cannot attract the clause regarding damages as the State Commission itself has held that there was a default on the part of the Respondent Company in making the payments in time.

42. This finding by the State Commission, having been confirmed by the Appellate Tribunal has in fact merged with the judgment of this Tribunal as well as the judgement of Hon'ble Supreme Court. Thus State Commission in the impugned order can not take a complete 'U' turn as it would amount to overturning of its own findings as well as of this Tribunal, which is not permissible under law.

43. <u>Summary of Our Findings:</u>

i) **The perusal of the above findings of the State Commission in OP No.42 of 2009 dated 24.1.2013 would reveal that the State Commission has miserably failed to go into the issue of right of the Appellant for 3rd party sale in the event of default on making payment by the Respondent.**

ii) **The State Commission in the order has completely ignored the above provision of the PPA as well as its own findings in OP No.17 of 2009 confirmed by this Tribunal as well as the Hon'ble Supreme Court and has now taken a "U" turn to award compensation of more than Rs.35 Crores to the Distribution Licensee to be paid by the Appellant for default of payment. This is not valid in law.**

44. In the light of above findings, the impugned order is set aside and the Appeal is allowed. However, no order as to costs.

(V.J Talwar) ***(Justice M. Karpaga Vinayagam)***
Technical Member ***Chairperson***

<u>Dated: 14th, 2013</u>

√REPORTABLE/~~NON-REPORTABLE~~