

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal Nos. 180 of 2009 and 104 of 2010

Dated: 11th April, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

Appeal No. 180 of 2009

In the matter of

SANDUR POWER COMPANY LTD.,
56 B/34, 1st Main,
Lower Palace Orchards,
Vyalikaval
Bangalore-560003

...Appellant(s)

Versus

1. KARNATAKA POWER
TRANSMISSION CORPORATION LTD.,
Kaveri Bhavan,
Bangalore-560 001,
2. MANAGALORE ELECTRICITY SUPPLY COMPANY
LTD.,
Corporate Office,
Paradigm Plaza,
A.B. Shetty Circle,
Mangalore-575 001

3. Karnataka STATE LOAD DESPATCH CENTRE,
28, Race Course Road,
Bangalore -9

4. STATE POWER PROCUREMENT CO-ORDINATION
COMMITTEE,
Kaveri Bhavan,
Bangalore -560 001

5. KARNATAKA ELECTRICITY REGULATORY COMMISSION
6th & 7th Floor, Mahalaxmi Chambers,
No. 9/2. M.G. Road,
Bangalore-560 001 ...Respondents

Counsel for Appellant(s): Mr. Shanik Sanjanwala &
Ms. Sudha Malla

Counsel for Respondent (s): Mr. Venkat Subramanian TR
Mr. Raghavendra Srivatsa

Appeal No. 104 of 2010

In the matter of

MANAGALORE ELECTRICITY SUPPLY COMPANY LTD.,
A Company incorporated under the provisions
Of Companies Act 1956 having its office at
Paradigm Plaza,
A.B. Shetty Circle,
Mangalore-575 001Appellant(s)

Versus

1. M/s SANDUR POWER COMPANY LTD.,
Having its Registered office at
No. 56 B/34, 1st Main,
Lower Palace Orchards,
Vyalikaval
Bangalore-560003

2. KARNATAKA ELECTRICITY REGULATORY COMMISSION
6th & 7th Floor, Mahalaxmi Chambers,
No. 9/2. M.G. Road,
Bangalore-560 001Respondents

Counsel for Appellant(s): Mr. Venkat Subramanian TR
Mr. Raghavendra Srivatsa

Counsel for Respondent (s): Mr. Shanik Sanjanwala &
Ms. Sudha Malla

JUDGMENT

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

1. M/s. Sandur Power Company Ltd is the Appellant in Appeal No.180/2009. M/s. Mangalore Electricity Supply Company Ltd is the Appellant in Appeal No.104/2010.

2. Since in both the Appeals, the impugned order is the same, this common judgement is being rendered in both these Appeals.

3. M/s. Sandur Power Company Ltd, a generating Company filed a Petition before the Karnataka Electricity Regulatory Commission (State Commission) seeking for the open access to enable to make a third party sale and praying for damages from M/s. Mangalore Electricity Supply Company Limited, the distribution licensee

following the termination of the Power Purchase Agreement on account of delayed payments.

4. The State Commission by the impugned order dated 13.8.2009, though upheld the contention that M/s. Sandur Power Company Limited is entitled to terminate the PPA on the ground of payment default, declined to grant open access to M/s. Sandur Power Company Ltd on the ground that there was bonafide dispute on the meaning of the clause of the Power Purchase Agreement between the parties.

5. M/s. Sandur Power Company Ltd., generating company aggrieved over the rejection of its prayer to grant open access and damages, has filed the Appeal in Appeal No.180 of 2009. Similarly, M/s. Manglore Electricity Supply Company Ltd., the distribution licensee on being aggrieved over the findings given by the State Commission that M/s Sandur Power Company Ltd. is entitled to terminate the agreement and seek for open

Access, as the M/s Mangalore Electricity Company Ltd. has committed the payment default, has filed the Appeal No.104 of 2010.

6. For the convenience sake, we may refer M/s. Sandur Power Company Ltd as the Appellant who filed the Appeal No.180 of 2009 and M/s. Manglore Electricity Supply Company Limited as Respondent who filed the Appeal No.104 of 2010. We will now refer to the minimal facts.

7. M/s. Sandur Power Company Limited, the Appellant is a Company engaged in generation of electricity. The Manglore Electricity Supply Company Limited, the Respondent is a distribution licensee. On 3.2.2004, the Appellant, a generating Company entered into a Power Purchase Agreement with Karnataka Power Transmission Corporation Limited. The said agreement

was subsequently transferred to M/s. Manglore Electricity Supply Company Limited, the Respondent.

8. In terms of the PPA, the Appellant agreed to supply the electricity to the Respondent Distribution Licensee @ Rs.2.90 per KWh subject to an escalation of 2% per annum over the base tariff every year. As per the PPA, the payments for electricity supply were to be made by the distribution licensee (the Respondent) to the Appellant within 15 days from the date of the receipt of the tariff invoice failing which, the distribution licensee is liable to pay penal interest. That apart, in the event of payment default by the distribution licensee for a continuous period of three months, the Appellant will be entitled to terminate the PPA and permitted to sell power to third party through the grid system by entering into a wheeling and banking agreement with the Respondent.

9. Pursuant to the said Agreement, the Appellant fed electricity regularly into the grid system. Tariff invoices were raised every month towards the electricity supply. However, the Mangalore Electricity Supply Company, the Respondent was irregular in making payments for the electricity supplied and payments were not made on time despite repeated demands made by the Appellant through the letters.

10. Ultimately, on 25.6.2008, the Appellant addressed a letter to the Respondent intimating the termination of PPA on the ground of continuous payment defaults and invoking its right under Article 9.3 of the PPA to sell power to the third parties. Consequent upon the termination, the Appellant entered into a power purchase agreement on 21.7.2008 with M/s. Tata Power Trading Company Limited.

11. Pursuant to this, the Appellant made an application on 7.8.2008 with the Transmission

Corporation seeking for open access to the grid system. However, there was no response from the Transmission Corporation. Therefore, on 2.2.2009, the Appellant filed a claim Petition in OP No.3/2009 before the State Commission seeking a direction for grant of open access and also for payment of damages and interest on delayed payments. The Respondent M/s. Manglore Electricity Supply Company Limited, the Distribution Licensee contested the matter contending that the Appellant is not entitled to open access and damages since payment were made by the Respondent to the Appellant within time as per Article 9.3 of the PPA.

12. On 13.8.2009, the State Commission after hearing both the sides, passed the impugned order holding that the Respondent Distribution Licensee had committed a payment default for three continuous months and as per article 9.3 of the PPA, the Appellant was entitled to terminate the PPA to seek for open access.

However, the State Commission declined to grant open access and damages as the payment default committed by the Respondent was due to the bonafide wrong impression of the Respondent over the interpretation of Article 9.3.

13. M/s. Sandur Power Co Ltd, the Appellant has filed the Appeal in Appeal No.180 of 2009 aggrieved over the findings of the State Commission in favour of the Respondent that the Appellant is not entitled to the consequential relief of open access and damages even though the Appellants plea regarding interpretation of article 9.3 was accepted.

14. Similarly, the Manglore Electricity Supply Company Limited, the first Respondent on being aggrieved over the findings given by the State Commission in favour of the Appellant, with reference to the interpretation of clause 9.3 of the PPA, holding that the Manglore Electricity Company Limited have committed payment default, has filed this Appeal No.104 of 2010 even though

the State Commission did not incline to grant the consequential relief in favour of M/s. Sandur Power Company Limited.

15. Challenging the impugned order dated 13.8.2009, both the parties through both these Appeals have elaborately argued at length to substantiate their respective pleas. In the light of their rival contentions, the following questions of law may arise for consideration:

(a) Whether the State Commission has rightly interpreted clause 9.3 along with the clause 6.2 and 6.3 of the PPA entered into between the Appellant and Respondent to the effect that the payment default was committed by the Respondent (Manglore Electricity Supply Company Limited) for a continuous period of three months which entitles the Appellant to terminate the PPA and seek for open access for 3rd party sale?

(b) Whether the State Commission, after having found that the Appellant is fully entitled to terminate the PPA and to make third party sale as per clause 9.3 of the PPA as there was a payment default committed by the Respondent (M/s. Mangalore Electricity Supply Company Ltd) for a continuous period of three months, was justified in refusing to grant open access to the Appellant, M/s. Sandur Power Company Limited ?

16. Before dealing with these questions, it would be appropriate to reiterate and refer to the chronological facts and event leading to the filing of the Claim Petition before the State Commission.

17. The Appellant is a generating Company having a mini hydel Plant with a total installed capacity of 22,500

KW in Udupi District of Karnataka. The Appellant entered into a Power Purchase Agreement dated 3.2.2004 with Karnataka Power Transmission Corporation Limited. The said agreement was subsequently transferred to M/s. Mangalore Electricity Supply Company Limited, the Respondent.

18. In terms of the PPA, the Appellant agreed to supply electricity to the Respondent and the Respondent agreed to pay for the same at the rate of Rs.2.90 per KWh subject to escalation of 2% p.a. over the base tariff every year within 15 days from the date of the receipt of tariff invoice. If the Respondent fails to make payments when due, the Respondent would be liable to pay penal interest @ SBI medium term lending rate per annum from the date such payment was due until such payment was made in full. It was also agreed that in the event of payment default by the Respondent for a continuous period of three months, the Appellant shall be permitted

to sell power to third parties, through the grid system by entering into wheeling and banking agreement with the Respondent.

19. Pursuant to the PPA, the Appellant regularly fed electricity into the grid system and issued tariff invoices every month towards the electricity supply. The payment for the month of Jan, 2008 was due on 23.2.2008. The said amount was not paid within time. Similarly, the payments for the month of February, 2008 were due on 19.3.2008. The said amount was also not paid within time. The tariff invoices for the month of March, 2008 were also not made in time. Similarly, the amount relating to the tariff invoices for the month of April, 2008 also remained unpaid. So demanding the said amount, the Appellant sent several letters to the Respondent on 5.4.2008, 6.5.2008, 21.5.2008 and 19.6.2008 calling upon the Respondent to make payments. Though the portion of the said amount have been paid belatedly, there

was a continuous default in payment in respect of these invoices and payments were highly delayed well beyond the agreed upon time period.

20. Therefore, the Appellant finally addressed a letter dated 25.6.2008, to the Respondent stating that the above payment defaults committed by the Respondent have necessitated the Appellant to invoke article 9.3 of the PPA which entitled the Appellant to sell power to the third parties. Through the said letter, the Respondent was called upon to permit such a third party sale. In the said letter it was specifically mentioned that in the light of the continuous payment defaults committed by the Respondent in relation to the tariff invoices pertaining to five continuous months from January 2008 to May 2008, the Appellant was constrained to invoke article 9.3 of the PPA which entitled the Appellant to sell the power generated to the third party. The letter dated 25.6.2008 is reproduced below:

Annexure-G

Sandur Power Company Limited

SS/MESCOM/Delay/06

25.06.08

To,
The Managing Director,
Mangalore Electricity Supply Company,
Corporate Office, Paradism Plazea
AB-Shetty Circle, Manglore

Sub: Frequent Delay in disbursement of Energy Invoice.

Ref: Our Letter dated July 06, 2007
Our letter No.SS/MESCOM/Mar-inv/02 dated 05/04/08
Our Letter No.SS/MESCOM/Mar-Inv/03 dated 06/05/08
Our Letter No.SS/MESCOM/Apr.inv/04 dated/05/08
Our letter No.SS/MESCOM/May-inv/05 dated 19/06/08
PPA between KPTCL and Sandur Power Co. Ltd.
Dated 03.02.2004

Dear Sir,

Kindly refer to various communications had with you regarding frequent delays in receiving our payment against the energy invoice since Jan.08. In this regard we wish to bring to your kind notice the following:

As per the provisions of PPA Clause No.6.2, we are entitled to receive payment within 15 days from the receipt of Tariff Invoice by Corporation. Whereas till date following has been the record of payment receipts:

Month	Bill Amount	Due Date	Payment Received	Over due amount as on date
			Amount Dated	
JAN 08	31948488.00	23.02.08	5100000.00 03/03/08 26848488.00 25/04/08	
FEB 08	36083065.00	19.03.08	36083065.00 30/05/08	
MAR 08	33767136.00	18.04.08	21916935.00 30/05/08 873000.00 23/06/08	3120000.00
APR 08	34368828.00	22.05.08		34368828.00
MAY 08	30921975.00	17.06.08		30921975.00

The delay in payment is continuing since last Five months and payment security has become of great concern. Due to the above payment irregularities we are facing severe financial difficulties in keeping up of payments to the financial institutions.

Hence, we are forced to opt for provisions in the **PPA Clause No.9.3 i.e. "In the event of any payment default by the Corporation for a continuous period of three months, the company shall be permitted to sell power to third parties"**, for which we are eligible and request you to kindly permit us to do the same.

Yours truly,
For Sandur Power Co Ltd.

Sd/-25.6.08
Sanjay Sharma
GM (T)

CC:

1. Financial Advisor, MESCOM, Corporate Office- Mangalore
2. The General Manager (Tech), KPTCL, Kaveri Bhavan, Dist. Office Road, Bangalore-9.

21. Consequent upon the intimation about the termination of PPA in the light of the continuous payment defaults for more than three continuous months, the Appellant entered into a power purchase agreement dated 31.7.2008 with Tata power Trading Company Limited providing for the third party sale.

22. Thereafter, the Appellant filed an application before the Transmission Corporation seeking for open access and intimating the termination of the PPA with the distribution licensee Respondent through letter dated 25.6.2008. In the mean time, the electricity from the Appellant's generating stations continued to be pumped into the grid. In view of the termination of the PPA and the failure on the part of the Transmission Corporation to

consider the Appellant's request for open access, the Appellant demanded damages. However, there was no response. Therefore, the Appellant approached the State Commission and filed a Claim Petition in O.P.No. 306 of 2009 seeking for the grant of open access on payment of wheeling charges and seeking payment of damages on electricity supply following the termination of the PPA and the interest for the delayed payments. In the context of the above facts, let us now deal with the questions framed as above.

23. The 1st question is this whether M/s. Sandur Power Company Limited, the Appellant on account of default in payments by Respondent M/s. Manglore Electricity Supply Company Limited for a continuous period of three months was entitled to invoke clause 9.3 for terminating the PPA and seeking the open access from the Respondent as interpreted by the State Commission?

24. This question relates to the interpretation of clause 9.3 read with clause 6.2 and 6.3 of the PPA. In this case, as pointed out, the State Commission has interpreted these clauses and given the finding that the Mangalore Electricity Supply Company Limited, the Respondent had committed payment default for a continuous three months invoices for a period of three months and therefore, the Appellant is entitled to sell power to third parties.

25. According to M/s. Mangalore Electricity Supply Company Limited, the Respondent, the said interpretation by the State Commission is wrong. It is submitted by the Respondent that in view of the fact that under clause 9.3 of the PPA, the Appellant will be entitled to sell the electricity to third parties only in case when single invoice remains unpaid for a continuous period of three months and not otherwise. It further contends that the Appellant

will not get a right under clause 9.3 to sell the power to third parties unless the Respondent fails to pay any particular single tariff invoice of the amount for a continuous period of three months. On the other hand, the Appellant submits in justification of the interpretation of the State Commission, that as per clause 9.3 read with clause 6.2, if there is any payment default by the Purchaser Company for a continuous period of three months, the generator Appellant shall be entitled to sell power to the third party.

26. In the light of two different interpretation, we have to find out as to whether the interpretation given by the State Commission accepting the contentions of the Appellant is valid or not?

27. Before quoting the relevant clauses of the PPA, it would be worthwhile to refer to the finding of the State Commission with reference to the interpretation of these clauses. The relevant portion is as follows:

“In our considered view, the contention of the petitioner’s Counsel is consistent with clause 9.3 of the PPA and not that of the 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 the receipt of the tariff invoices. If the same is not made within 15 days this 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”.

28. The above finding would indicate that both the clauses i.e. 6.2 and 9.3 of PPA have been interpreted by

the State Commission to mean that the Respondent in breach of clause 6.2 had committed payment default for three consecutive invoices for the continuous period of three months and hence under clause 9.3, the Appellant Company is entitled to sell power to the third party through Open Access. Now let us see the relevant clauses of the PPA.

“6.2 Payments: Corporation (Purchaser) shall make payment of the amounts due in Indian rupees within fifteen (15) days from the date of receipt of the tariff invoice by the designated Officer of the Corporation (Purchaser)”.

29. As per this Clause, the Respondent (Purchaser) shall make payment of the amount due within 15 days from the date of the receipt of the monthly tariff invoice.

30. The word “Due Date of Payment” has been defined in the agreement in the clause 1.1 of the PPA. The said definition is as follows:

“Due Date of Payment” in respect of tariff invoice means the date which is 15 days from the date of receipt of such invoice by the designated official of the Corporation (Purchaser)”.

31. This shows that the payment has to be made within due date i.e. 15 days from the date of receipt of the tariff invoice. This means if the payment is not made within 15 days by the Purchaser, it shall be construed to be a default in payment.

32. Next relevant clause is 9.3 of the PPA which is as follows:

“In the event of any payment default by the Corporation (Purchaser) for a continuous period of three months, the Company (seller) shall be permitted to sell power to third parties through the grid system by entering into a wheeling and banking agreement with the Corporation (Purchaser) for which it (Seller) shall pay wheeling charges to the Corporation (Purchaser) at the rates applicable from time to time in addition to

banking charges at the rates applicable from time to time as approved by the Commission”.

33. As per this Clause, if the payment default has been committed by the Purchaser for a continuous period of three months, the Seller Company shall be permitted to terminate the PPA and sell power to the third parties through the grid system by entering into a Wheeling and Banking Agreement with the Purchaser for which the Seller is liable to pay wheeling charges to the Purchaser on the rates approved by the State Commission. Thus, the reading of this clause shows whenever similar defaults occur for a consecutive invoices for a continuous period of three months under clause 9.3, the Company (Seller) is entitled to sell power to the third parties.

34. It is a settled law that when a document is to be construed, it shall be read as a whole to find out the actual intention of the parties. The intention of the parties shall be inferred not from the force of the single

expression but the same has to be culled out by reading the entire document. In interpreting the document, the real intention of both the parties has to be ascertained. The Rule of interpretation is well settled that the intention of the executor of a document is to be ascertained after considering the “words” contained in the document, in the ordinary natural sense. In other words, the document is required to be read as a whole to ascertain the intention of the parties who entered into the agreement. These principles have been laid down by the Hon’ble Supreme Court in the case reported in 1994 (II) SCC Page 10 in the case of Keshav Kumar Swarup Vs Flown Ore Private Limited.

35. Bearing these principles in mind, we will now ascertain the true meanings of the relevant clauses of the PPA quoted by the parties in the light of the arguments advanced by them.

36. In order to substantiate the plea that the interpretation made by the State Commission is wrong, the Learned Counsel for the Respondent would make the following submissions:

“ (A) Clause 9.3 is a termination clause and therefore it has to be interpreted strictly. Resort to a termination clause in a contract should always be the last resort. If there are other mechanisms provided by the contract, they should be operated before invoking the termination clause. Article 5 for the payment of monthly energy charges and the rate is crystallised”.

(B) On conjoint reading of these clauses, it is revealed that the obligation of the Appellant is only the payment of rates and charges. The clause 6 does not have any substantive provision and as such it does not constitute any obligation.

(C) Article 6.2 provides for payment of the tariff invoice within 15 days. Article 6.3 provides for payment of interest on over due payments made after 60 days of the due date. Article 6.5 provides for payment of penal interest.

Therefore, if any payment is delayed beyond 15 days, as per the article 6.2, the only consequence is that the interest will be payable on delayed payment and nothing else. A default can only be of an obligation. If there is no obligation in article 6, there is no question of any default. If the termination clause in article 9.3 has to be invoked in every case of delayed payment, the provision for payment of interest in article 6 would be rendered redundant.

(D) Article 9.3 uses the words “any payment default by the Corporation for a continuous period of three months”. The word ‘any’ preceding the words ‘payment default’ for a continuous period of three months clearly indicates that the reference is to a default in receipt of any one particular invoice for a continuous period of three months. If the parties intended to mean that article 9.3 is to operate for any payment of default for three consecutive invoices in a continuous period of three months, the parties would have used the expression as ‘Any payment default for consecutive three months or “any payment of default for three months consecutively”. The use

of words ‘ continuous period of three months’ clearly indicate a time of 3 months provided in respect of one invoice.

37. On the basis of these grounds, the Learned Counsel for the Respondent would venture to stress that the failure to make a payment of the single invoice within 15 days will not attract clause 9.3 for third party sale but same would be attracted only when the Respondent has failed to make the payment of amount in respect of one particular invoice within a period of three months i.e. 90 days and not otherwise. According to the Respondent, the delay in payment beyond 15 days as provided in clause 6.2 will attract only the penal interest or payment of interest of over due payment as per clause 6.3 and clause 6.5 respectively and not clause 9.3 of the PPA.

38. The Learned Counsel has cited the judgements reported in AIR 1996 MP-247 Kanshi Ram vs State of UP in order to show the meaning of the word “continuous

period” which is different from the meaning of “consecutive period”. He also cited the following authorities to substantiate his plea that termination of entire contract is not a rule but it is only an exception:

- (a) AIR 1933 Madras 175
- (b) AIR 1942 Madras 139
- (c) AIR 1942 Allahabad 370
- (d) AIR 1957 Orissa 8

39. The perusal of these decisions would clearly indicate that the points decided in those cases would not apply to the present facts of the case. In the case cited by the Learned Counsel for the Respondent, the wordings contained in the contract have been interpreted on the basis of the wordings contained in the said contract, which was read as a whole. We are not concerned with those contracts referred to in those decisions. On the other hand, it is to be stated that we have to confine ourselves with the terms of the present PPA entered into

between the Appellant and the Respondent. If we go through the said PPA carefully, the perusal of the PPA in entirety would clearly reveal that the interpretation given by the State Commission for the clause 9.3 read with 6.2 is perfectly justified. The reasons are as follows:

- (a) The clause 6.2 which we quoted above expressly provides that the payments shall be made within a period of 15 days from the date of receipt of the tariff invoice. The definition of “Due Date of Payment” would also indicate that the payment must be made within 15 days from the date of receipt of the tariff invoice. If the same is not made within 15 days as stipulated, the default in payment occurs. As pointed out by the State Commission once there is occurrence of default, the same continues to be remained as event of default even after three months, irrespective of the

facts that the said dues were settled later or otherwise. In that context, the State Commission has correctly held that whenever similar default occurs for three consecutive invoices in a continuous period of three months, the Appellant is entitled to sell power to the third party under clause 9.3 of the PPA.

(b) If the interpretation as projected by the Respondent is accepted, it would amount to virtually amending clause 6.2 by replacing 15 days period by 90 days period for making such payment under the said clause. The said clause specifically penalises the Respondent if it makes three defaults in the payment beyond the period as prescribed in clause 6.2. The continuous period of three months is prescribed under clause 9.3. Since the wheeling cycle is a monthly cycle, when

defaults were made in payment of three cycles it would mean continuous default over a period of 90 days which would attract consequences under clause 9.3. The word continuous referred to in clause 9.3 which assumes significance clearly indicates the intention of the parties.

(c) If the intention is to make clause 9.3 invocable only upon a default within three months period on a single invoice, then the clause would have been differently worded. In that event, they would have directly used the wording ‘in the event of payment default upon a single invoice for a period of three months, clause 9.3 would be liable to be used’. That is not the case here. On the contrary, the wordings in clause 9.3 is so specific and clear by stating ‘any payment default by the Corporation (Purchaser) for a continuous

period of three months, the Company (Seller) shall be permitted to make a third party sale”.

(d) Thus these clauses envisage that if there is a continuous negligence in making any payment which can be seen by checking as to whether at least a minimum of three invoices have been defaulted upon, then the consequences envisaged in article 9.3 should be faced by the Respondent. In other words, it is to be stated that this clause does not seek to penalise mere default of one single payment but rather seeks to penalise only when there is continuous default for a 3 months' period of time in respect of consecutive invoices. Thus, it is noticed that this clause seeks to keep the interest of both the parties in mind. This definitely means that the interest of the Respondent should not be allowed to suffer

merely because there was a default on one single invoice but only for a continuous defaults on consecutive invoices.

(e) It is argued that the 'word' consecutive is absent in the clause. This contention does not merit consideration in view of the fact that the reading of the entire PPA as a whole would make it clear that default on one single invoice would not attract clause 9.3 but it attracts only when there is continuous default for three consecutive invoices. Thus, this interpretation as referred to in the finding given by the State Commission is in consonance with the reading of clause 6.2 and 9.3 conjunctively as well as with the reading of the whole PPA.

40. In the present case, it is an admitted fact that payment for the month of January, 2008 was not paid

within due date. Similarly the payment for the month of Feb, 2008 were also not paid within due date. Payment of tariff invoices for the month of March, 2008 was also not made within the time stipulated. As referred to in the facts, the Appellant sent letters after letters such as on 5.4.2008, 6.5.2008, 21.5.2008 and on 19.6.2008 and called upon the Respondent to make payments. Admittedly, these payments have not been made within the stipulated time as per clause 6.2. As mentioned earlier, the contention of the Respondent is that all these payments have been made within 90 days, as such the said payment was within time. This can not be construed to be the payment within time. As a matter of the fact, the Appellant addressed letter of 25.6.2008 narrating the circumstances like non-payment of invoice within 15 days for the past 5 months, under which the Appellant was constrained to invoke article 9.3 which entitled the Appellant to sell power to the third parties

and on the basis of that, Appellant sought for permission for the third party sale.

41. The Learned Counsel for the Respondent has further submitted that the delay in payment beyond 15 days would give rise to a cause of action only for the payment of interest and nothing else and that merely because the payment has not been made within 15 days as per the clause 6.2, the party can not resort to termination clause.

42. It is pointed out by the Learned Counsel for the Appellant that the very same argument had been advanced before this Tribunal in Appeal No.176 of 2009 dated 18.5.2010 reported in 2010 ELR (APTEL) 754 but this Tribunal rejected the said contention. Let us quote the relevant observations made by this Tribunal in the above decision.

“14. The Learned Senior Counsel for the Appellant would raise the following contentions while assailing the order impugned:

(1) *Though the dues were not paid in time, the said dues were paid later. The non-payment within the prescribed period cannot be construed to be integral obligation of the Appellant as per the contract. Therefore, non-payment of dues within time prescribed or the non-payment of interest on the late payment cannot be construed to be defaults which may give rise to the right of termination of contract.*

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17. *According to the Learned Senior Counsel for the Appellant, the non-payment of the dues within the prescribed period can not be construed to be a default as it is not an integral obligation of the Appellant as per the contract and therefore, payment made after the stipulated period or the non-payment of the interest on the said dues can not be the ground for termination of the contract.*

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19. *The present contract is a contract for the supply of power. It envisages supply of power by the generating company, the Respondent herein. The payment to be made by the Purchaser, the Appellant, for the said supply to the Respondent is as per the rate fixed and mentioned in the PPA under Clause 5.1 of the contract:*

Clause 5.1: Monthly Energy Charges; Corporation shall for the Delivered Energy pay, for the first 10 years from the date of signing of Agreement to the Company every month during the period commencing from the Commercial Operation Date on the basis of the base price applicable for the year 1994-95 at the rate of Rs.2.25 (Rupees Two and twenty five paise) per kilowatt-hour (the tariff) for energy delivered to the Corporation at the Metering Point with an escalation at a rate of 5% per annum over the tariff applicable for the previous year as per guidelines issued by the Ministry of Non-Conventional Energy Sources of the GOI.

6.2 *Payment: Corporation shall make payment of the amounts due in Indian Rupees within fifteen (15) days from the date of delivery of the Tariff Invoices by the Company to the designated Officer of the Corporation.*

6.3 *Late Payment: If any payment from Corporation is not paid when due, there shall be due and payable to the Company penal interest at the rate of SBI Prime Lending Rate plus 2% per annum for such payment from the date such payment was due until such payment is made in full.*

21. *Thus, these clauses provide for the mechanism as to how the payment is to be made.*

According to Clause 6.2, the Corporation (Appellant) shall make payment of the amount due within 15 days from the date of delivery of the tariff invoice issued by the Respondent to the designated officer of the Corporation (Appellant)

As per Clause 6.3, if any payment from Corporation is not paid when due, there shall be penal interest at the rate of SBI Prime Lending

Rate +2% per annum for such payment from the date such payment was due until such payment is made in full to the company (Respondent).

22. *In the instant case, the Appellant has taken a stand that in the event any payment of the principal sum not made in time or even if there is any delay on their part in this regard, it would not give a right to the Respondent to terminate the contract since there is a provision for penal interest. We are unable to appreciate this stand. If there is a failure to make payment within 15 days, it amounts to breach of the contractual obligation. Merely because the payment was made belatedly would not be considered to be the compliance of clauses 6.1 and 6.2 of the PPA. Furthermore under Clause 6.3, penal interest is payable for the late payment. If penal interest is not paid, that is also a breach of the obligation under the contract. So when there is a failure to carry out the obligation under the contract in making the payment in time or not making the payment of interest would amount to breach of the integral obligation as contemplated in the contract.*

48. *Further, the Appellant, at no point of time, complained that it has caused some prejudice to them by not granting exactly 30 days time before terminating the PPA. In the absence of any prejudice due to the service of Notice of Termination even before the expiry of 30 days and also in the light of the reply dated 02.07.2009 that they would not rectify the defects and another reply dated 22.7.2009 even after expiry of 30 days reiterating their earlier stand, we have to hold that the issuance of Notice of Termination on 08.07.2009 even before the expiry of 30 days would not make the Notice of Termination in valid”.*

43. The above findings given by this Tribunal would clearly give the answer to the above points urged by the Learned Counsel for the Respondent. The said finding is applicable to the present case also and, therefore, there is no merit in the contention urged by the Respondent in its Appeal No. 104 of 2010.

44. Incidentally, it is pointed out by the Appellant that there was a default on the part of the Respondent not only in respect of the 'payment default' but also in respect of the 'payment of interest' within due date. According to the Appellant, this is again a breach of obligation. Even though it was contended by the Respondent that there was no default of payment since all the payments have been paid later, i.e. within 90 days, admittedly, the interest amount for the non payment of the said amount within time has never been paid. Therefore, it is clear that there is a default on the part of the Respondent not only in respect of the payments of the dues within the prescribed period but also non payment of the interest till date. In view of the above discussions, we are to hold that the interpretation given by the State Commission is perfectly valid as it is in consonance with the intention expressed in the PPA in general and clause 9.3 in particular. This question is answered accordingly.

45. The second question relates to the consequential relief which the Appellant is entitled on the basis of the said interpretation. According to the Appellant despite giving the findings in favour of the Appellant accepting its interpretation, the State Commission was wrong in not granting consequential relief such as grant of open access and damages.

46. Let us deal with this question. It is not disputed that the State Commission up-held the Appellant's contention and gave a finding that the Mangalore Electricity Company Limited, the Respondent had committed payment default for a period of three continuous months in breach of clause 6.2 thereby entitling the Appellant to invoke article 9.3 to terminate the tariff PPA with the said Company and to seek for open access. It is also not disputed that the State Commission rejected the interpretation of clause 9.3 as projected by

the Respondent holding that the said interpretation is untenable and contrary to the spirit of the PPA.

47. Despite this finding, the State Commission rejected the prayer of the Appellant for consequential relief in the grant of open access. Once a specific finding has been given by the State Commission that the Mangalore Electricity Supply Company, the Respondent had committed the payment default in breach of the PPA and therefore, the Appellant was fully entitled to invoke clause 9.3, the natural corollary for the State Commission is to grant the consequential relief sought for. But in the present case, as noted above, despite the said findings in favour of the Appellant, the State Commission did not incline to grant consequential relief such as grant of open access and damages on the basis of some reasonings. We will now see what are those reasonings and whether those reasonings are valid or not?

Those reasonings contained in the impugned order are as under:

“So far as the prayer for direction to pay the petitioner as per the contract entered into with TPTCL during the period during which the petitioner’s application for open access was not granted, we are of the view that since the petitioner has pumped the power to the respondent and respondents have paid for it as per the subsisting PPA rates, question of paying any higher amount or damages will not arise. Clause 7 of the agreement entered into by the petitioner with TPTCL dated 31.7.2008 specifically provides for obtaining NOC from SLDC (which operates under the 1st Respondent). If NOC is not there then the agreement for supply and purchase of power between the petitioner and TPTCL does not operate. Admittedly in the present case, SLDC has not granted NOC and therefore, the agreement with TPTCL has not been operated and the agreement with Respondent No.2 continues. Further till now, there was a bonafide dispute on the meaning of clause 9.3 of the PPA between the parties. Respondents had

understood if in one way and the petitioner meant in another way. Now this commission is clearing the doubt as above. Therefore, question of paying the charges by the 2nd Respondent at the rate agreed to by the TPTCL with the petitioner does not arise till the date of this order”.

48. The perusal of the observations of State Commission as referred to above would show that following are the gist of the reasonings given for rejecting the consequential relief:

(a) There is a bonafide dispute over the meaning of clause 9.3 of the PPA. According to the Appellant under clause 9.3, the payment must be made within 15 days from the date of the receipt of the invoice. According to the Respondent, the payment must be made within 90 days. Thus, the Appellant has meant the interpretation one way. On the other hand, the Respondent had understood it in another way. Thus there is a bonafide dispute between the

parties over the understanding of the real meaning of clause 9.3 of the PPA. Since the Respondent bonafidely disputed the meaning of clause 9.3, the State Commission has now cleared the doubt to both parties with reference to the real meaning of the interpretation.

(b) Since the Appellant has pumped the power into the Respondent Company for which the Respondent had already paid for it as per the subsisting PPA rates, question of paying damages will not arise.

(c) Clause 7 of the agreement entered by the Appellant with the Transmission Corporation dated 31.7.2008, provides for obtaining 'No Objection Certificate' from State Load Dispatch Centre. In the present case, stated Load Dispatch Centre has not granted 'No Objection

Certificate'. Therefore, the agreement with the Transmission Corporation has not been operated and consequently PPA entered into with the Respondent Company continues. As such the Appellant is not entitled for the open access.

49. Now let us deal with the validity of these reasonings:
- (a) The reasoning given by the State Commission with reference to the bonafide dispute for refusing the grant of consequential relief can not be held to be a proper one particularly when the State Commission has rejected the pleas of the Respondent that there was no delay in payments and that all the payments were made within the time i.e. three months as referred to in clause 9.3 of the PPA. That apart, it has never been the case of the Respondent that he had bonafiedly disputed the period of time due to the misunderstanding of the meaning of clause 9.3.

On the other hand, it has been the consistent case of the Respondent Company that the Appellant's interpretation of clause 9.3 of the PPA which has been accepted by the State Commission was wrong as that they were not liable to pay any single invoice within period of 15 days but the clause 9.3 would be attracted only when the payment is not made within a period of three months. Thus, it is clear that it is not a bonafide dispute. That apart, the Respondent sticking to its stand has filed a separate Appeal in 104/2010 contending that the said interpretation was wrong, and strenuously prayed to set aside the said finding. So the ground of bonafide dispute cannot be the basis for rejecting the prayer for consequential relief.

(b) This has to be viewed from yet another angle as well. According to the Appellant, apart from three continuous default committed by the Respondent in making the payment in time, which entitled the Appellant to invoke clause 9.3 independently, the default in payment of interest as per article 6.3 would also entitle the Appellant to invoke clause 9.3. Admittedly, the interest amount which is required to be paid under clause 6.3 on the delayed payments, has never been paid to the Appellant till date. This non payment of the interest amount within time has not been denied. According to the Appellant even assuming that the Respondent's interpretation of clause 9.3 is to be accepted, independently, the default in payment of interest under clause 6.3 would give an independent right to the Appellant to invoke clause 9.3. We find force in this contention as well. The State

Commission has not considered this aspect. Hence, the question of bonafide dispute does not arise in this case.

(c) The State Commission has observed that 'No objection Certificate' had not been obtained by the Appellant from State Load Dispatch Centre and therefore, the Appellant is not entitled to the relief claimed on this account also. This ground also does not merit acceptance. It cannot be debated that the State Load Dispatch Centre operates under the Karnataka Power Transmission Corporation Ltd. Therefore, non grant of 'No Objection certificate' by the State Load Dispatch Centre would not disentitle the Appellant from consequential relief which would follow from the payment default committed by the Respondent Company. Further, the question of obtaining a no objection certificate is a matter which pertains to the

contract entered into by the Appellant with the third party being Tata Power Company limited and the same can not be made as the basis for rejecting the prayer of the Appellant. That Apart, the Appellant sought for the approval from the State Load Dispatch Centre for a third party sale. The State Load Despatch Centre is none other than the Karnataka Power Transmission Corporation Limited, the first respondent. The first Respondent, Transmission Corporation as well as the Mangalore Electricity Supply Company Limited, Respondent are related entities. Admittedly, they are controlled by the same person. Therefore the failure of the first Respondent, the Transmission Corporation to respond to the Appellant's application for approval can not be the ground for rejecting the prayer of the Appellant for open access. As pointed out by the Appellant 'No objection

Certificate' is only a procedural requirement and the same can be obtained even subsequently and this should not be a ground for rejecting the consequential relief.

(d) Similarly, the State commission did not grant the relief of damages. According to the Appellant, the damage suffered by the Appellant from 25.6.2008 thereon a loss of revenue for not being able to supply electricity to the Tata Power Company Limited at the higher rate of Rs.3.60 per KWh. This also has not been considered by the State Commission in the proper perspective.

50. Therefore, we are to hold that the State Commission having held that there was a payment default for 3 continuous months, thereby the Appellant is entitled to terminate the PPA and to have the right of third party sale, there is no valid reason for the State Commission to hold that the Appellant is not entitled for open access for

the sale of electricity to the third party for the past payment default. In our view, the interpretation of Clause 9.3 of the PPA which has correctly been given by the State Commission would apply not only for the future but for the past payment default also.

51. Summary of Findings

(i) Clause 6.2 of the PPA expressly provides that the payment shall be made within a period of 15 days from the date of the receipt of the tariff invoice. The definition of “Due Date of Payment” as contained in clause 1.1 would indicate that the payment must be made within 15 days from the date of the receipt of the tariff invoice. If the payment is not made within 15 days as stipulated in clause 6.2 of the PPA, the default in payment occurs. Once there is an occurrence of default, the same continues to remain as an event of

default even after three months, irrespective of the fact that the said dues were settled later or otherwise. Whenever similar default occurs for the three consecutive invoices in a continuous period of three months, the Appellant is entitled to sell power to the third party under the clause 9.3 of the PPA. The wordings in clause 9.3 of the PPA is so specific and clear by stating “any payment default by the Purchaser for a continuous period of three months, the seller shall be permitted to make third party sale”. In other words, these clauses do not seek penalise mere default of one single payment but seeks to penalise only when there is a continuous default of three months period of time of 3 consecutive invoices. Thus, it is clear that these clauses seeks to keep the interest of both the parties in mind. On the basis of these clauses, the State Commission has correctly made a correct

interpretation and held in the present case that the Respondent had never paid the payment of the tariff invoices within time continuously for three months period. In view of the above, the interpretation projected by the Respondent is not correct. Therefore, the Appeal filed by the Respondent would fail. This point is answered accordingly.

(ii) According to the Respondent, there is no default of payment since all the payments have been paid later i.e. within 90 days. But it is noticed that the interest amount to be paid under clause 6.3 has never been paid till date. Thus, it is clear that there is a default on the part of the Respondent not only in respect of the payment of the dues, as per the tariff invoice within the prescribed period but also in respect of the non

payment of interest within due date and as such there is an action of breach of obligation.

(iii) The State Commission in the impugned order, rejected the Prayer of the Appellant for consequential relief with reference to the grant of open access even though a specific finding has been given by the State Commission to the effect that the Respondent had committed payment default in breach of the PPA and therefore, the Appellant is fully entitled to invoke Clause 9.3 of the PPA. This is not a correct approach. The main ground on the basis of which the consequential relief was rejected is that there is a bonafide dispute over the meaning of clause 9.3 of the PPA. According to the Appellant, under clause 9.3, the payment must be made within 15 days from the date of the receipt of the invoice and according to the Respondent, the payment

can be made within 90 days. According to the State Commission, the Respondent bonafidely disputed the meaning of clause 9.3. Therefore, the Appellant would be entitled to invoke clause 9.3 only in the future and not for the past payment default. The Respondent never made such plea as defence before the State Commission that the Respondent's impression about interpretation was bonafide. On the other hand the Respondent filed an Appeal in Appeal No.104 of 2010 challenging the findings of the State Commission on the ground that the interpretation given by the State Commission is wrong. Thus, the ground of bonafide dispute does not hold good.

(iv) The State Commission has observed that no objection certificate had not been obtained by the Appellant from the State Load Despatch Centre.

This ground also is not tenable. The question of obtaining a no objection certificate is a matter pertaining to contract entered into by the Appellant with Tata Power Company Limited namely third party. Therefore, the same can not be the basis for rejecting the consequential relief. That apart, the State Load Despatch Centre is none other than the Karnataka Power Transmission Corporation Limited. Both the Transmission Corporation as well as the Mangalore Electricity Supply Company Limited, the Respondent are related entities. Both are controlled by the same person. Therefore, the failure of the Transmission Corporation to respond to the Appellant's application for approval can not be the ground for rejecting the prayer of the Appellant for consequential relief. Similarly, the State Commission has not considered the aspect of the damages in a proper

perspective, even though it was pleaded by the Appellant that the damage has been caused to the Appellant from 25.6.2008 through the loss of revenue for not being able to supply electricity to the Tata Power Company Limited at a higher rate of Rs.3.60 per KWh.

52. In view of our above findings, we allow the Appeal in Appeal No.180 of 2009 filed by M/s. Sandur Power Company Limited and set aside the findings with reference to rejection of prayer related to consequential relief and remand the matter to the State Commission with the direction that the State Commission may pass an appropriate order relating to consequential relief to be granted to the Appellant in Appeal No.180 of 2009 in terms of the findings given in this judgement by way of implementation. The Respondents shall also grant open access to the Appellant for third party sale according to the law.

53. Since in our view, the interpretation given by the State Commission in the impugned order with regard to the clauses 6.2 and 9.3 of the PPA is correct, we do not find any merit in Appeal No.104 of 2010 filed by M/s. Mangalore Electricity Supply Company Limited. Accordingly, the said Appeal is dismissed.

54. However, there is no order as to cost.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

REPORTABLE/NON-REPORTABLE

Dated: **11th April, 2011**