

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

**Appeal No. 51 of 2011 &
I.A. No. 113 of 2011**

Dated: 21st October, 2011

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

In the matter of:

**Rithwik Energy Generation Private Limited,
Shamboor Village,
Narikombu Post, Bantwal Taluk
Dakshina Kannada-574 231
Through its Director
Mr. C. Purushotham**

... Appellant

Versus

- 1. Karnataka Power Transmission Corpn. Limited,
Cauvery Bhavan,
Bangalore-560 009.**
- 2. Bangalore Electricity Supply Co. Ltd.,
K.R. Circle,
Bangalore-560 001.**
- 3. State Load Despatch Centre,
Karnataka Power Transmission Corpn. Limited,
28, Race Course Road,
Bangalore-560 001.**
- 4. State Power Procurement Co-ordination Committee,
Kaveri Bhavan,
Bangalore-560 001.**
- 5. The Karnataka Electricity Regulatory Committee,
Having its office at KERC Maha Laxmi Chambers
M.G. Road, Bangalore-560 001
Through its Secretary**

... Respondents

Counsel for the Appellant(s): Mr. Ajit Bhasme, Mr. Udaya Holla,
Mr. Pankaj Mishra

Counsel for the Respondent(s): Mr. Venkat Subramanian T.R.
Mr. S. Sriranga
Mr. Raghvendra S. Srivasta

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

This appeal has been filed by Rithwik Energy Generation Private Ltd. challenging the order dated 23.12.2010 of Karnataka Electricity Regulatory Commission ('State Commission'). Karnataka Power Transmission Corporation Ltd., the transmission licensee, is the first respondent. The second respondent is Bangalore Electricity Supply Co. Ltd., a distribution licensee which entered into a Power Purchase Agreement ('PPA') with the appellant. The third and the fourth respondents are State Load Despatch Centre and State Power Procurement Co-

ordination Committee respectively. The State Commission is the fifth respondent.

2. The brief facts of the case are as under:

2.1. The appellant is a generating company with a 24.75 MW Hydel Power Project. On 26.09.2006 an agreement was executed between the appellant and the Government of Karnataka under which it was stipulated that the appellant should enter into a Wheeling and Banking Agreement with the first respondent in case of sale of power to the third party and a Power Purchase Agreement ('PPA') in case of sale of power to the first respondent. On 3.5.2007 the appellant signed a Power Purchase Agreement with the Distribution Licensee, the second respondent herein, for sale of energy from its Hydel Power Project @ Rs. 2.80 per kWh.

2.2. Thereafter, the Power Purchase Agreement was forwarded by the second respondent to the State Commission for approval on 25.5.2007. The State Commission returned the Power Purchase Agreement vide its letter dated 6.6.2007 for the reason that the quantum of power purchase from non-conventional energy projects for the respondent distribution licensee, had crossed the upper limit of 10% of the input energy fixed as per the State Commission's Regulations, 2004 for Procurement of Power from Renewable Sources by Distribution Licensee. The State Commission also informed that it had already floated a discussion paper for amending the Regulations with a view to enhance the upper limit.

2.3. However, the appellant on 27.6.2008 signed an agreement for sale of power with PTC Ltd., a trading

licensee. Under this agreement PTC Ltd. agreed to purchase power for the months of October and November, 2008 at a price of Rs. 6/- per unit and thereafter the price was to be based on the market price and decided mutually by the parties.

2.4. The appellant had scheduled completion of the Hydel Plant by mid 2008. However, due to flooding of the plant caused by flash floods in the river, there was delay in its commissioning and the plant commenced generation only in September, 2009.

2.5. PTC Ltd. filed an application with the third respondent for open access on 16.7.2008. However, open access was not granted despite sending reminders. The appellant also addressed a letter to the third respondent seeking open access which was not replied to.

2.6. On 31.8.2009, the appellant filed a petition, being O.P. No. 29 of 2009 before the State Commission seeking declaration that there is no valid and subsisting PPA between the appellant and respondent no. 2 and PPA dated 3.5.2007 is *non est*/void and prayed for direction to the respondents to grant open access for sale of power from the hydel plant to PTC Ltd.

2.7. The State Commission by its order dated 23.12.2010 rejected the petition of the appellant and decided that the PPA was valid. Aggrieved by the impugned order dated 23.12.2010, the appellant has filed this appeal.

3. The appellant in the original appeal had submitted the following:

3.1. There cannot be any valid PPA existing between the appellant and the distribution licensee unless it is approved by the State Commission according to Section 25 of the Karnataka Electricity Reform Act, 1999 ('Karnataka Reform Act'). Thus, the State Commission was wrong in holding that the PPA between the appellant and the distribution licensee was valid and subsisting, when the PPA had not been approved by the State Commission.

3.2. The State Commission has also wrongly held that there was no requirement for the appellant to obtain any approval from the State Commission. The conclusion is wrong in view of the provision of Section 25 of the Karnataka Reform Act.

3.3. The State Commission is wrong in holding that it had not refused the approval of the PPA but had only returned the PPA and, therefore, the PPA is binding.

3.4. According to Article 2.1 of the PPA the financial closure should have occurred within a period of six months from the date of the signing of the agreement. Further Article 2.2 of the PPA specifies that the non-fulfillment of the condition precedent shall render the agreement null and void automatically. The agreement was entered into on 3.5.2007 and accordingly the financial closure should have taken place by 2.11.2007. Since the financial closure did not occur by 2.11.2007, the PPA was automatically terminated.

3.5. The appellant has expended nearly Rs. 137.1 Crores on the project due to delay in commissioning of the project due to flooding and the

appellant will not break even unless it is permitted to sell the power generated at a price of at least Rs. 5 per kWh.

4. Subsequently, the appellant filed IA no. 113 of 2011 on 6.5.2011 seeking interim directions either to allow open access or permit an amount of Rs. 5 per kWh to be charged from the second respondent for the power supplied. This Tribunal by its order dated 18.5.2011 directed the respondent no. 2 to pay for the energy supplied by the appellant at the rates and terms and conditions of payment as per the PPA as an interim measure from January, 2011 onwards subject to the final result of the appeal.

5. The appellant again filed an affidavit on 4.7.2011 regarding violation of terms & conditions of payment of dues by the second respondent. According to clause

9.22 of the Draft PPA, in the event of payment default by the second respondent for a continuous period of three months, the appellant is permitted to sell electricity to third parties. The appellant alleged that there had been default on the part of the respondent no. 2 for a continuous period of over three months for the months of January, February and March 2011 in payment of tariff. The respondent no. 2 is also liable to pay the interest for the delayed payments to the appellant according to Article 6.39 of the PPA which had not been paid. The respondent no. 2 has also opened Letter of credit for only Rs. 87.65 lakhs on 8.6.2011 instead of Rs. 151.77 lakhs, corresponding to one month bill of the average annual billing, in terms of the PPA. Thus, even if the PPA is valid, the appellant is entitled to sell electricity to third party due to payment default. According to the appellant, the

subsequent events should be taken note of by the Tribunal for granting the relief.

6. According to the respondents, the State Commission on 6.6.2007 had only returned and not rejected the PPA as the power purchase by the second respondent from the renewable sources exceeded the upper cap of 10% input energy imposed by the Regulations. The State Commission was in active consideration of removal of the upper cap. The open access for sale of power by the appellant to the PTC Ltd. was not granted as the PPA with respondent no.2 was still valid and subsisting. Moreover, the interconnection transmission system and the appellant's power plant had not been commissioned. Under such conditions, open access could not have been granted. As regards the non-fulfillment of condition precedent stipulated in Schedule 4(1), the

appellant on its own accord addressed a letter on 13.12.2007 to the second respondent admitting that it had fulfilled all conditions precedent required in clause 2 of the PPA. In view of this, the averment that the PPA is null and void on account of non- fulfillment of condition precedent is untenable. At any rate, the appellant can not take advantage of its own breach to wriggle out of the contract.

7. As regard the contention of the appellant to seek open access on the basis of delay in payment and interest thereon, the learned counsel for the respondents has argued that such alleged delay is of no consequence to their request for open access and if at all, such request ought to have been made before the State Commission. In the absence of such a plea being taken before the State Commission, it is not

open to the appellant to bring up these issues before the Tribunal.

8. On the above issues, the learned counsel for the appellant made his submissions exhaustively assailing the impugned order of the State Commission. On the other hand the learned counsel for the respondents argued forcefully supporting the order of the State Commission.

9. After considering the rival contentions of the learned counsel for the parties and examining the documents submitted before us, we have framed the following questions for our consideration:

(i) Whether the State Commission was correct in holding the PPA between the appellant and the second respondent to be valid and subsisting even though the same was returned by the State Commission earlier on

account of the second respondent exceeding its upper limit of the renewal purchase obligations as per the Regulations?

(ii) Whether the State Commission has erred in not holding the PPA null & void on account of non-fulfillment of the condition precedent regarding financial closure by the appellant within six months of signing of the PPA?

(iii) Whether the subsequent events regarding default in payment of dues and interest thereon can be considered by the Tribunal for providing relief to the appellant regarding grant of the open access for sale of power to PTC Ltd.?

(iv) Whether the appellant is entitled to open access on account of default in payment of dues and interest

thereon by the respondent no. 2 subsequent to the passing of the impugned order?

10. Let us take up the first issue regarding the validity of the PPA.

10.1. According to the learned counsel for the appellant, the PPA is not enforceable by law as the respondents no. 2 had already exceeded the permissible limit of power purchase from the renewable sources of energy as per the State Commission's Regulations and for this reason the PPA was returned by the State Commission on 6.6.2007. The approval of the State Commission was mandatory under Section 25 (3) of the Karnataka Electricity Reform Act, 1999. The PPA became void on account of the approval not having been given by the State Commission.

10.2. According to learned counsel for the respondents, merely returning the PPA would not amount to rejection as the State Commission had clearly indicated that it was considering revision in the upper limit of power purchase from the renewable sources by the second respondent.

10.3. Let us first examine the Section 25(3)(4) of the Karnataka Reform Act referred to by the appellant. The relevant extracts are reproduced below:

“25 (3) A holder of a supply or transmission licence may, unless expressly prohibited by the terms of its licence, enter into arrangements for the purchase of electricity from,-

(a) the holder of a supply licence which permits the holder of such licence to supply energy to other licensees for distribution by them; and

(b) any person or generating company with the consent of the Commission”.

“25. (4) Any agreement relating to any transaction of the nature described in sub-sections (1), (2), or (3) unless made with, or subject to, such consent as aforesaid, shall be void”.

Section 185(3) of the 2003 Act specifically stipulates that the provisions of the enactments specified in the schedule, which includes the Karnataka Reform Act, not inconsistent with the provisions of the 2003 Act, shall apply to the States in which such enactments are applicable.

10.4. According to Section 86 (b) of the 2003 Act, the State Commission is empowered to regulate electricity purchase and procurement process of the distribution licensees including the price at which electricity is procured from the generating companies through agreement for purchase of power.

10.5. In view of above, the distribution licensee has to obtain the consent of the State Commission for procurement of power against the PPA. Unless the State Commission gives its consent to the PPA, the distribution licensee can not procure power under the PPA. Thus, the PPA will come into effect only after obtaining the consent of the State Commission. If the consent is denied by the State Commission, the PPA shall become void as per Section 25(3) of the Karnataka Reform Act and Section 86(b) of the 2003 Act. Accordingly, the second respondent had submitted the PPA dated 3.5.2007 signed with the appellant before the State Commission on 25.5.2007 for its consent.

10.6. The State Commission returned the PPA by its letter dated 6.6.2007 to the second respondent.

The letter dated 6.6.2007 is reproduced below:

“S/03/o/2814

06-06-2007

*The Managing Director
BESCOM Corporate Office
K.R. Circle,
Bangalore-560 001*

Sir,

Sub: Power Purchase Agreement in respect of 24 MW Mini Hydel Power Projects of M/s. Rithwik Energy Generation Pvt. Ltd.

Ref: Bescom's lr. No. 3343-46 dated 25.05.2007

I am directed by the Commission to return the PPA entered into between BESCOM and M/s. Rithwik Energy Generation Pvt. Ltd., at Shamburi Village, across Nethravathi river, Bantwal Taluk, Dakshina Kannada Distt., as the quantum of power purchase from NCE projects in BESCOM has crossed the upper limit of 10% of the input energy fixed as per KERC (Power Procurement from Renewable Sources by Distribution Licensee) Regulations, 2004.

Further, I am also directed to inform that following issue of Government Order dated 2.03.2007 increasing the upper limit of quantum to 20%, the Commission has already floated a discussion paper on the implication of such increase in the upper limit on the retain tariff for detailed discussions with all the stakeholders before amending the Regulations.

*Yours faithfully,
For Karnataka Electricity Regulatory Commission
Sd/-
Secretary*

Copy to M/s. Rithwik Energy Generation Private Limited, D. No. 8-2-269/K/3, Plot No. 37 & 39, Navodaya Colony, Hyderabad-500 034 alongwith the D.D. No. 521771 dated 10.05.2007”.

Thus the State Commission returned the PPA as the quantum of power purchase from Non-Conventional Energy Projects for the second respondent had crossed the upper limit of 10% as per the Regulations. Further, the State Commission also informed that it had already floated a discussion paper on the proposal for increasing the upper limit following the order of the State Government dated 2.3.2007 increasing the upper limit to 20%.

10.7. Thus the State Commission had not rejected the PPA and had also informed the second respondent with copy to the appellant regarding action taken by it with regard to enhancing the upper limit for power purchase from the renewable sources for the second respondent. The State Commission had to follow the process of law and invite objections from all the stakeholders before amending the Regulations.

10.8. Admittedly, the power plant of the appellant had not been commissioned at the time of returning of the PPA on 6.6.2007 and was commissioned only in September, 2009. As evident from the statement of objections dated 22.10.2009 filed by the respondents before the State Commission in O.P. No. 29 of 2009, the Regulation restricting the power procurement from the renewable sources by the second respondent had been amended.

10.9. In the above statement of objections filed by the respondent before the State Commission, the respondents also enclosed a copy of letter dated 19.3.2008 from the State Commission to the second respondent requesting to inform the appellant to pay the necessary processing fees to enable the State Commission to process the PPA and a copy of letter

dated 1.4.2009 from the respondent distribution licensee asking the appellant to deposit the necessary processing fee. The relevant letters are reproduced below:

“ Karnataka Electricity Regulatory Commission

6th & 7th Floor,
Maha Laxmi Chambers,
No.9/2, M.G. Road,
Bangalore-560 001
19-03-2008

“S/03/0/4029

The Managing Director
BESCOM Corporate Office
K.R. Circle,
Bangalore-560 001

Sir,

Sub: Power Purchase Agreement in respect of 24 MW Mini Hydel Power Projects of M/s. Rithwik Energy Generation Pvt. Ltd.

Ref: Bescom's lr. No. BESCOM/GMT/BC-39/F-2665/15721-22 dated 25.05.2007

Inviting reference to the above letter, I am directed by the Commission to request you to inform the Developer to pay the necessary processing fees by way of D.D. and submit a copy of the receipt issued by the Commission to enable this office to process the PPA.

Yours faithfully,
For Karnataka Electricity Regulatory Commission

Sd/-

Secretary”

“Bangalore Electricity Supply Company Limited

General Manager, Elec.,
(RLPP)/BPPC, BEWCOM
32/1-2, Crescent Tower,
Madhavanagara,
Bangalore-560 001

Date: 01 APR 2008

No. GM(Ele.)RLPP/BPPC/DGM(Ele.)/AGM
1/BESCOM/BC-39/F-1878/143

Rithwik Energy Generation Private Limited,
D.No. 8-2-269/K/39, Plot No. 37 & 39,
Navodaya Colony,
Andhra Pradesh

Sir,

Sub: Power Purchase Agreement in respect of 24 MW Mini Hydel
Power Projects of M/s. Rithwik Energy Generation Pvt. Ltd.

Ref: The Secretary, KERC vide letter no. S/03/0/4029
dt. 19-03-2008

Referring to the above, it is to inform that, you have entered into an agreement with BESCOM on 03 May 2007 regarding Power Purchase of your Mini Hydel Project across Nethravathi at Shamburi Village, Bantwal Taluk, Dakshina Kannada Distt.

You are requested to pay Rs. 12000/- towards KERC processing fee at KERC processing fee at KERC and furnish the receipt to this office for further needful.

Yours faithfully,

Sd/-

General Manager (Ele.)
RLPP/BPPC/EBC, BESCOM,
Bangalore”

However, the appellant did not approach the State Commission with the processing fee. Instead of approaching the State Commission for obtaining its consent to the PPA and paying the processing fee for the same, the appellant signed a PPA with PTC Ltd. for sale of power from its hydro plant on 27.6.2008.

10.10. The appellant in all its submissions has referred to the PPA as 'draft PPA'. This is not correct. The PPA dated 3.5.2007 has been duly signed by the appellant and the second respondent subject to the approval of the State Commission. The PPA had to be approved by the State Commission before the second respondent actually started procuring power against the agreement. Admittedly, the State Commission had returned the PPA due to the respondent distribution licensee crossing the upper limit of power procurement

from renewable sources as per the Regulations. At the same time, the State Commission had indicated the action initiated to amend the Regulations, as required under the law, to enhance the upper limit of power purchase from renewable sources following the directions from the State Government. Subsequently, the Regulations were also amended to enable the second respondent to procure additional power from the renewable sources.

10.11. On 19.3.2008, the State Commission asked the respondent no. 2 to inform the appellant to pay the necessary processing fee to enable processing of the PPA. In pursuance to the letter of the State Commission, the respondent no. 2 vide its letter dated 1.4.2008 sent a communication to the appellant to deposit the processing fee with the State Commission. However, instead of approaching the State

Commission, the appellant signed a PPA for sale of power with PTC Ltd. without even serving a notice on the second respondent. The power project was scheduled to be commissioned only in September 2008 (but was actually commissioned in September, 2009). The second respondent on 1.4.2008 requested the appellant for payment of process fee with the State Commission for approval of the PPA and, therefore, there was no reason for the appellant to sign the PPA with PTC Ltd. after receiving the intimation from the second respondent.

10.12. Time required for ratification of the PPA by the Statutory Authority due to following process of law can not be a reason for the appellant unilaterally considering the PPA as void and signing another PPA with PTC Ltd. at the back of the second respondent, when the Regulatory process for the revision of the

Regulations was completed much before the commissioning of the project and before signing of PPA with PTC Ltd. Thereafter, the appellant willingly did not deposit the processing fee with the State Commission for processing the PPA despite being approached by the second respondent.

10.13. According to learned counsel for the appellant, the State Commission completed the hearings on 27.5.2010 and reserved orders. Thereafter, the State Commission after a lapse of over seven months, rejected the petition by its order dated 23.12.2010. Thus when there was long delay in delivering judgment, the judgment was bad in law. In this regard, the learned counsel for the appellant relied on the decision in 2007(7) SCC 318 in the matter of Anil Rai vs. State of Bihar, etc. This case relates to delay in delivering of judgment in case of convicted persons who filed the appeals before the High Court

while remaining in jail. In our opinion this judgment is not relevant to the present case. Though there was inordinate delay in delivering the order by the State Commission, in the present case the State Commission had given an interim order on the request of the appellant to supply power from the newly commissioned hydro plant of the appellant to the second respondent at the rates agreed in the PPA so that there is no loss of generation at the generating station of the appellant. Even though the order of the State Commission cannot be set aside on account of delay, we feel that the State Commission should have issued the order earlier considering that the delay would affect the commercial interests of the parties.

10.14. The learned counsel for the appellant has also relied on AIR 1966 SC 1644 to state that the State Commission cannot make a new PPA when there was

no valid PPA. This judgment is also not relevant in the present case as the PPA was entered into by the parties, but was only required to be ratified by the State Commission.

10.15. The learned counsel for the appellant has relied on 2003(4) SCC 86 in the matter of N.V. Shankar Bhat vs. Claude Pinto, etc. wherein the Hon'ble Supreme Court has held as under:

“When an agreement is entered into subject to ratification by others, a concluded contract is not arrived at. Whenever ratification by some persons, who are not parties to the agreement is required, such a clause must be held to be a condition precedent for coming into force of a concluded contract”.

This judgment relates to the matter of sale of property subject to ratification by the co-heirs. This judgment is also not relevant to the present case. In the present

case though the agreement had to be ratified by the State Commission as per the 2003 Act, the said ratification was not rejected by the State Commission. The State Commission could not give its consent immediately due to the respondent no. 3 exceeding the upper limit of power purchase from renewable sources set in the Regulation. However, the State Commission took action to amend the Regulations to facilitate procurement of additional power from the renewable sources by the respondent no. 2.

10.16. We also notice that the Schedule 3 of the PPA between the appellant and the respondent no. 2 refers to Government of Karnataka's order dated 2.3.2007 according approval for the upper limit of the share of renewable energy in the total quantum of energy purchased by each distribution licensee during a year to be enhanced to 20%. The Regulations stipulating

the upper limit of 10% for power procurement from renewable sources by the respondent no. 2 were also prevalent at the time of signing of the PPA. Thus, the appellant while signing the PPA with the respondent no. 2 was conscious of the issue. The State Commission also took action to amend its regulations to facilitate the respondent no. 2 to procure power from the appellant well before the actual or the scheduled date of commissioning of the power project of the appellant. In our opinion, the appellant somehow wanted to wriggle out of the PPA for no fault of the respondent no. 2.

10.17. In view of above, the first issue is decided against the appellant. The appellant and the respondent no. 2 are directed to approach the State Commission for getting the formal consent of the State Commission to the PPA.

11. The second issue is regarding non-fulfilling of the condition precedent by the appellant.

11.1. According to learned counsel for the appellant the PPA was void on account of non-fulfillment of financial closure which was a condition precedent as per Articles 2.2 and 3.4 of the PPA.

11.2. According to learned counsel for the respondents the appellant had itself contended that it had achieved the financial closure. Moreover, the appellant could not take advantage of its own wrong.

11.3. Let us first examine the clauses of the PPA. The relevant Articles 2 and 3.4 are reproduced below:

“ARTICLE 2

CONDITIONS PRECEDENT

2.1. Conditions Precedent: The obligations of the BESCO and the Company under this Agreement

are conditional upon the occurrence of following in full:

a) The Company shall have been granted and received all permits, clearances and approvals (whether statutory or otherwise) as are required to execute and operate the Project (as specifically listed out in Schedule 4) (hereinafter referred to as “Approvals”),

b. The Financial Closure shall have occurred. The date on which the Company fulfills any of the Conditions Precedent pursuant to Clause 2.1, it shall promptly notify the BESCO of the same. The company shall achieve the financial closure within six months (6) from the date of signing of this Agreement.

2.2. Non-Fulfillment of Conditions Precedent: Non-fulfillment of the Conditions Precedent within the period mentioned in Schedule 4 of this Agreement shall render this Agreement null and void

automatically and the BESCO shall stand discharged of all obligations”.

“3.4. Notwithstanding anything contained anywhere else in this Agreement or any other agreement between the parties, if the company does not achieve financial closure within six (6) months from the date of signing of this Agreement or commence construction of the Project before the Scheduled Date of Commencement other than due to occurrence of Force Majeure Events. This Agreement shall automatically become null and void and BESCO shall stand discharged of all obligations and liabilities, BESCO shall not also in any way, be liable for any damages for any loss, whatsoever, arising from termination of the Agreement”.

Thus, it was the obligation of the appellant to achieve financial closure within 6 months from the date of signing of the PPA.

11.4. The State Commission in the impugned order has held that the argument of the appellant is contrary to the documents placed before the State Commission. In this connection, the State Commission has referred to letter dated 13.12.2007 from the appellant addressed to the second respondent stating that the appellant had achieved financial closure with Canara Bank consortium.

11.5. Learned counsel for the appellant has argued that the financial closure could not be achieved by 2.11.2007 due to delay in approvals by State Agencies and accordingly, the project could not be commenced by 2.2.2008.

11.6. We have examined the contents of the letter dated 13.12.2007 by the appellant to the second

respondent. We reproduce below the letter dated
13.12.2007:

“RITHWIK ENERGY GENERATION PRIVATE LIMITED

December 13, 2007

To

General Manager Ele., (RLPP)
No. 32/1-2, 3rd Floor
Crescent Road, BESCO
Bangalore – 560001

Sir,

Sub: Submission of Permits, Clearances and Approvals in respect
of Mini Hydel Power Project of 24 MWs capacity.

Ref: No GM Ele. (RLEP)/BESCO/BC-39/F-2665/3338-9.

I submit herewith to your good self that we have achieved the above referred Financial Closure for the Mini Hydel Power Scheme with Canara Bank in consortium with the Indian Overseas Bank. The relevant documents are affixed as Annexure I and Annexure II. We have also obtained the necessary approvals from the Forest Ecology and Environment Department, Government of Karnataka for the above Hydel Power Scheme. The relevant Government Order is affixed as Annexure III. May I submit that Point No. 3 in your letter referred above is not applicable to our Mini-Hydel scheme as the scheme is a Run-of-the-river project situated across River Nethravathi in the interiors of Dakshin Kannada district. Conceived and developed as a green power project, it does not have any smoke emitting chimney and is also away from flying zone.

Assuring you that all relevant approvals/permissions have already been obtained and furnished, I hereby request your good self to proceed expeditiously.

Thanking You,
Yours faithfully,

Sd/-

B. Jayaprakash Reddy
Vice-President & Authorized Signatory”

The Annexure-I of the letter is Credit Sanction Advice dated 29.5.2007 from Indian Overseas Bank to the appellant. Annexure-II is Term Loan Sanction dated 20.7.2007 from Canara Bank in favour of the appellant. These documents clearly establish that the financial closure for the hydro project was achieved by the appellant within the permissible time schedule.

11.7. Even otherwise, the appellant cannot take advantage of its own default. In this connection, the learned counsel for the respondents has referred to the

following rulings:

Sl.No.	Citation	Name of Parties
1.	--	Pollock & Mulla, Indian Contract and Specific Reliefs Acts – Butterwords 12 th Edition, Volume 1
2.	(1919) 1 AC (HOL)	New Zealand Shipping Company Limited vs. Societe Des Ateliers Et Chaltiers De France
3.	(1922) 24 BOMLR 295	Chunnilal Dayabhai & Company Vs. Ahmedabad Fine Shipping & Weaving Company
4.	AIR 1961 J&K 1 (Vol. 48, C.1)	Ahmad Rathar & others vs. Tehsildar Khas & others
5.	(2009) 16 SCC 208	MD Haryana State Industrial Development Corporation & others vs. Hari Operation and Maintenance Enterprises & others
6.	(1948) 2 MLJ 356	V.K. Kandasami Chettiar & others Vs. Shanmugha Thevar & Anr.
7.	AIR 1977 SC 734	Timblo Irmaos Ltd. Margo Vs. Jorge Anihal Matos Seaueria & Anr.
8.	(2007) 11 SCC 447	Kusheshwar Prasad Singh vs. State of Bihar & others
9.	AIR 1942 Calcutta 382	W.J. Younie & others Vs. Tulsiram Jankiram & others

In view of the above rulings the appellant cannot take advantage of its own wrong.

11.8. Learned counsel for the appellant has also argued that due to flooding of the hydro project of the appellant due to flash floods in the river in the year 2008 and 2009 there was time and cost overrun. In view of escalation in the capital cost of the project, the tariff of Rs. 2.80 agreed in the PPA is not viable and this would render the PPA void. When the contract is impossible to be performed and practically not possible to discharge the obligations by the parties thereto, the parties would stand discharged from performing the obligations under the PPA. In this regard, he relied on AIR 1961 SC 1285 and AIR 1954 SC 44.

11.9. In this connection it will be necessary to examine the prayer of the appellant before the State Commission in O.P. no. 29 of 2009. The prayer is

reproduced below:

- i) Declare that there is no valid or subsisting PPA between the Petitioner and the 2nd Respondent and that the draft PPA executed between the Petitioner and the 2nd Respondent dated 3.5.2007 is nonest/void;
- ii) Pass an order directing the Respondents to grant non discriminatory open access through their respective transmission/distribution systems, on the payment of such wheeling charges as the Hon'ble Commission deems fit;
- iii) Pass an order or direction, directing the respondents to allow wheeling and banking of power and to enter in to a wheeling and banking arrangement with the Petitioner, on

such terms as the Hon'ble Commission deems fit; and

- iv) To pass such other order/s as this Hon'ble Commission deems fit”.

Even though the appellant in the facts of the case had indicated the increase in cost of the project due to flooding, the prayer before the State Commission was for declaring the PPA nonest/void and passing directions for granting open access and not for enhancing the tariff due to increase in the cost of the project.

11.10. The Force Majeure has been dealt with in Article 8 of the PPA. Article 8.1 (a) describes the Force Majeure Events which include floods, under which neither party shall be responsible or liable for because of any delay or failure in the performance of its

obligations or failure to meet milestone dates. Article 8.1(b) describes the limitations and restrictions to the Force Majeure Event. According to article 8.1(b)(i) the non-performing party has to give written notice to the other party describing the particulars of the Force Majeure Event. There is no provision for making the PPA void/nonest automatically due to force majeure. In our opinion, the appellant cannot take the help from Force Majeure clause for declaring the PPA void. The rulings referred to by the learned counsel for the appellant will also not be of any help as these are not relevant to the present case.

11.11. Learned counsel for the appellant also referred to letters dated 9.11.2010 from SLDC and dated 19.2.2011 from the second respondent filed before the Tribunal by an affidavit. These documents had not been filed before the State Commission as

these letters were issued subsequent to the completion of the hearing before the State Commission. The learned counsel has argued that in light of these letters from the respondents the impugned order is likely to be set aside.

11.12. The contents of the letter dated 9.11.2010 from SLDC addressed to the appellant are as under:

“You are pumping Energy to the State Grid since October 2010, Government is yet to decide upon the purchase of power form the Co-generation units without PPA. Under the circumstances, you are requested either to avail Open Access and sell power outside or to stop pumping energy to the State Grid with immediate effect.”

According to the respondents, this letter was wrongly sent to the appellant. We find that this letter is relating to pumping of energy from co-generation units

which is not applicable to the appellant. Moreover, the SLDC is not the buyer of power. The buyer of power and signatory of the PPA is the distribution company, the second respondent.

11.13. The second letter dated 19.2.2011 from the second respondent is only a request to the appellant to get the approval of the PPA by the State Commission since the interim order of the State Commission dated 25.2.2010 was valid only upto 23.12.2010.

11.14. In view of above, we decide this issue against the appellant.

12. The third and fourth issues are interconnected and are being dealt with together.

12.1. Learned counsel for the appellant has given an alternate contention regarding default in payment

which is a subsequent event. According to him, there were defaults in meeting its financial obligations by the appellant for three consecutive months and according to the terms of PPA the appellant is entitled to sell power to third parties. He argued that the Tribunal should take the subsequent event into consideration.

12.2. According to learned counsel for the respondents, the appellant has put up a completely new case before the Tribunal which is not permissible in an appeal. The case of the appellant before the State Commission was that there was no valid and subsisting PPA between the parties. However, the appellant pleads subsequent events by filing a new affidavit to state that subsequent to the passing of the order impugned, the respondents have breached the terms of the agreement.

12.3. Learned counsel for the appellant has relied on the following cases to seek relief based on subsequent event:

- i) AIR 1985 SC 207;
- ii) AIR 1981 SC 1113;
- iii) 1979 (2) Kar LJ 8;
- iv) 2004(8) SCC 76;
- v) 2007(5) SCC 660;
- vi) 2005 (5) SCC 75;
- vii) 2006(4) SCC 385;
- viii) 2004(11) SCC 168;
- ix) 1976(1) SCC 194.

12.4. Learned counsel for the appellant has also referred to rulings in the following cases to press the point that alternative pleas, even though contrary, can be entertained:

- i) 2004(8) SCC 76;

- ii) 2007(5) SCC 660;
- iii) 2005 (5) SCC 75;
- iv) AIR 1951 SC 177;
- v) 2003(1) BLR 676.

12.5. Learned counsel for the respondents while accepting that it may be permissible for a party to take alternative pleas, argued that taking mutually destructive pleas was not permissible in law. He referred to AIR 2006 SC 3229 in the matter of Steel Authority of India Ltd. vs. Union of India in this regard.

12.6. After examining the above rulings referred to by the learned counsel for the parties, we feel that we could examine the subsequent events pleaded by the appellant regarding default in payment on merits, in the interest of doing complete justice between the parties. However, we have to see that the subsequent

events were brought to the notice of the Tribunal promptly and in accordance with rules and procedural law so that the opposite party is not taken by surprise.

12.7. We have to therefore go into the sequence of subsequent events, which are described as under:

- i) Subsequent to the impugned order dated 23.12.2010 passed by the State Commission upholding the validity of the PPA, the respondent no. 2 vide its letter dated 14.1.2011 approached the appellant to pay the required processing fee to the State Commission to facilitate approval of the PPA.
- ii) On 19.2.2011 the respondent no. 2 again sent a letter dated 19.2.2011 which is reproduced below:

“KERC had issued final orders on 23.12 2010 in respect of petition No OP 29/2009 filed by M/s

Rithwik Energy Generation (Pvt.) Ltd. According to this order, the Commission has rejected the petition and ordered that the PPA has not become null and void and it continues to be valid and subsisting. As such, M/s. Rithwik Energy has to obtain the approval of KERC for the duly signed PPA on 3.5.2007. BESCO has already intimated the same and requested to obtain the approval of KERC duly making payment of requisite processing fees vide letter cited under ref(2). But the PPA is yet to be submitted by M/s Rithwik Energy Ltd. for approval of KERC.

BESCO will arrange the payment for January 2011 and onwards only after approval of PPA by KERC since the interim order issued on 25.2.2010 will be valid upto 23.12.2010 being the date on which final order had been passed by KERC.

Hence, it is requested to arrange for obtaining the approval of PPA by KERC and forward the

same to BESCO for processing the invoice for payment”.

Vide the above letter the respondent no. 2 again reminded the appellant to submit the PPA with the processing fee before the State Commission for its approval. Further the respondent no. 2 would arrange the payment for January 2011 and onwards only after approval of PPA by the State Commission since its interim order dated 25.2.2010 for payment by the second respondent till disposal of the petition was valid upto 23.12.2010, the date on which the final order was passed.

iii) However, the appellant did not take action for getting the consent of the State Commission to the PPA but instead decided

to challenge the order of the State Commission.

- iv) During the proceeding of the appeal, on 6.5.2011, the appellant filed an IA being no. 113 of 2011 seeking interim directions to the respondents to facilitate generation and usage of power from its hydro power plant.
- v) The Tribunal by its order dated 18.5.2011 directed the respondent no. 2 to pay for the energy supplied by the appellant at the PPA rates and on terms and conditions of payment as per the PPA as an interim measure from January 2011 onwards subject to the final result of the appeal.
- vi) Subsequently on 4.7.2011 the appellant filed an affidavit indicating the following:

- a) The respondent no. 2 has failed and neglected to pay the tariff for the electricity supplied for the months of January, February and March, 2011.

- b) The delay in payment in the months of January, February and March, 2011 was for 94 days, 39 days and 36 days respectively.

- c) Respondent no. 2 is liable to pay interest for delayed payments.

- d) LC has been opened for Rs. 87.65 lakhs against the requirement of Rs. 151.77 lakhs.

e) As there has been default on the part of respondent no. 2 for a continuous period of over 3 months, the appellant is entitled to sell electricity to third parties, by entering into Wheeling and Banking Agreement with the second respondent.

12.8. We notice from the affidavit filed on 4.7.2011 filed by the appellant, that the payment from January, February and March 2011 have been made on 26.5.2011 i.e. within 8 days of the order of this Tribunal and within 7 days of the letter dated 5.5.2011 sent by the appellant to the respondent no. 2 on 19.5.2011 seeking permission to sell power to third parties.

12.9. We notice that the respondent no. 2 had made requests to the appellant for getting the approval of the State Commission for the PPA processed to enable it to make payment against the invoice raised by the appellant. Apparently, the appellant did not want to get the approval of the State Commission for the PPA and instead challenged the order of the State Commission. The appellant sought interim orders from the Tribunal and the Tribunal was pleased to issue interim directions to the respondent no. 2 to make payment for the energy supplied by the appellant from January 2011 onwards at PPA rate. We find that the respondent no. 2 promptly made the payment following the order of this Tribunal.

12.10. In view of the circumstances of the case, we do not find any substance in the argument of the

appellant seeking termination of the PPA for default in payment.

12.11. Let us also examine the clauses of the PPA relating to payment default and termination. The relevant clauses are reproduced below:

“4.2. Obligations of BESCO:

- i) To allow company to the extent possible to operate the Project as a base load generating station subject to system constraints;*
- ii) Subject to system constraints to off-take and purchase all the electricity generated by the company at the Delivery Point;*
- iii) To make tariff payments to the Company as set out in Article 5”.*

“5.1. Monthly Energy Charges:

- a. BESCO shall for the Delivered Energy pay, for the first 10 years from the Commercial*

Operation date, to the Company every month during the period commencing from the Commercial Operation Date at the rate of Rs. 2.80 (Rupees Two and Eighty paise only) per kilowatt-hour without any escalation for energy delivered to the BESCO at the Metering Point”.

“6.2. Payment: BESCO 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 office of BESCO”.

“6.3. Late Payment: If any payment from BESCO is not paid when due, there shall be due and payable to the Company penal interest at the rate of SBI medium term Lending rate per annum for such payment from the date such payment was due until such payment is made in full”.

“6.5. Letter of Credit: The BESCO shall establish and maintain transferable, assignable, irrevocable and unconditional non-revolving Letter of Credit in favour of, and for the sole benefit of, the

Company. The Letter of Credit shall be established in favour of, and issued to, the Company on the date hereof and made operational thirty (30) days prior to the Commercial Operation, Date of the Project and shall be maintained consistent herewith by the BESCOM at any and all times during the Term of the Agreement. Such Letter of Credit shall be in form and substance acceptable to both Parties and shall be issued by any Scheduled Bank and be provided on the basis that:”

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

- 1. Failure or refusal by BESCOM to perform its financial and other material obligations under this Agreement.*
- 2. In the event of any payment default by the BESCOM for a continuous period of three months, the Company shall be permitted to sell electricity to third parties by entering into a wheeling & banking Agreement with the*

BESCOM for which it shall pay transmission and other charges to the BESCOM at the rates applicable from time to time as approved by the Commission”.

“9.3.2. Termination for BESCOM’s Default: Upon the occurrence of an event of default as set out in sub-clause 9.2.2 above, Company may deliver a Default Notice to BESCOM in writing which shall specify in reasonable detail the Event of Default giving rise to the default notice, and calling upon the BESCOM to remedy the same.

At the expiry of 30 (thirty) days from the delivery of this default notice and unless the Parties have agreed otherwise, or the Event of Default giving rise to the Default Notice has been remedied. Company may terminate this Agreement by delivering such a Termination Notice to BESCOM and intimate the same to the Commission. Upon delivery of the Termination Notice this Agreement shall stand terminated and Company shall stand discharged of its obligations.”

12.12. Thus, for termination of the PPA, in the event of payment default for a continuous period of three months, the appellant has to deliver a Default Notice to the second respondent in writing calling upon it to remedy the same. After expiry of 30 days from delivery of notice unless the parties have agreed otherwise or the event of default has been remedied, the appellant can deliver a Termination Notice to the second respondent under intimation to the State Commission. Upon delivery of the Termination Notice, the PPA shall stand terminated.

12.13. Thus for termination of PPA for payment default the following conditions are to be met:

- i) Payment default by the distribution licensee for a continuous period of three months;

- ii) Upon the occurrence of an event of default the appellant has to serve a notice to the respondent distribution licensee in writing calling upon it to remedy the same.
- iii) If the default is not remedied at the expiry of 30 days or the parties have not reached an agreement otherwise, the appellant can serve the termination notice. On serving the termination notice the agreement shall stand terminated.

Admittedly, no notice to remedy the default or termination notice has been served by the appellant on the respondent distribution licensee, only a letter dated 5.5.2011 about payment default and seeking permission to third parties in terms of Article 9.2.2 was sent to the respondent distribution licensee on 19.5.2011 after the interim order of the Tribunal dated

18.5.2011. The payments for the months of January, February and March 2011 had already been made by the distribution licensee when the appellant filed the affidavit before this Tribunal.

12.14. Learned counsel for the appellant has also relied on the judgment of this Tribunal dated 11.4.2011 in appeal no. 180 of 2009, etc. in the matter of Sandur Power Co. Ltd. vs. Karnataka Power Transmission Corporation Ltd. & Ors. In our opinion, this judgment is not applicable in the present case as the circumstances in the present case are different. Further, the PPA in question in the present case has a clause 9.3.2 providing for the notice and remedy for curing the default by payment within 30 days from the date of delivery of the default notice which was not there in the PPA dated 3.2.2004 entered into by the appellant with Sandur Power Co. Ltd.

12.15. Conjoint reading of the clauses 4.2, 5.1, 6.2, 6.3, 6.5, 9.2.2 and 9.3.2 of the PPA entered into by the appellant with the respondent distribution licensee would indicate the following:

- * Event of payment default will occur when the respondent no. 2 fails or refuses to make tariff payments as set out in Article 5 or is in payment default for a continuous period of three months.

- * On occurrence of payment default for a continuous period of three months the appellant is at liberty to sell electricity to third parties for which open access shall be granted.

- * On occurrence of an event of default, the appellant may serve a Default Notice on the respondent no.2 calling upon to remedy the same.

- * If the Default Notice is not remedied by the respondent no. 2 within 30 days of serving of Default Notice the PPA can be terminated.

In case the default is remedied within 30 days the appellant will have to resume the supplies to the respondent no.2. In this case even if it is assumed that there was a payment default, the same was remedied by the respondent no. 2 by making tariff payment.

12.16. Learned counsel for the appellant has argued that interest for delayed payment has also not been paid by the respondent distribution licensee. We,

therefore, direct the respondent no. 2 to pay the up-to-date interest for delay in payment of monthly invoices at the interest rate specified in the PPA within 30 days of date of this judgment to the appellant.

12.17. According to the learned counsel for the appellant, the respondent distribution licensee has not opened LC for the full amount as per the PPA.

12.18. According to the learned counsel for the respondent LC of Rs. 87.65 lakhs has been opened in favour of the appellant on 8.6.2011 as per the terms stipulated in clause 6.5 (iii) of the PPA which requires the same to be equal to one month's projected payment payable based on average annual generation. The respondent distribution licensee has also submitted the calculation for the same. However, the learned counsel for the appellant claims that the LC

should be for Rs. 151.77 lakhs but has not furnished any calculation for the same. We, therefore, remand this matter to the State Commission to determine the correct amount of LC according to the terms and conditions of the PPA and if it is found that the LC is inadequate, direct the respondent distribution company to enhance the same.

13. Summary of findings

13.1. On the first issue regarding the validity of the PPA, we find that the State Commission had returned the PPA on 6.6.2007 as the quantum of power purchase by the respondent no. 2 from the renewable sources exceeded the limit of 10% of input energy as stipulated in the Regulations but with the intimation that the State Commission had floated a discussion paper for amending the Regulations following the order from the State Government. These Regulations were subsequently amended. In March

2008 the State Commission asked the respondent no. 2 to inform the appellant to pay the necessary processing fee to process the PPA. Accordingly, the respondent no. 2 informed the appellant to pay the processing fee. The appellant instead of approaching the State Commission signed a PPA with PTC Ltd. for sale of power from its hydro project on 27.6.2008, at the back of the respondent no. 2. The power plant of the appellant was originally scheduled for commissioning in August 2008 but was actually commissioned only in September 2009. The appellant was aware of the provisions of the Regulations regarding upper limit of renewable purchase obligation of the respondent no. 2 and order of the State Government regarding increase in the upper limit to 20% at the time of signing of the PPA. Time taken in the regulatory process to revise the

Regulations should not be a reason for the appellant unilaterally considering the PPA as void and signing another PPA with PTC Ltd. at the back of the second respondent, when the Regulatory process was completed much before the commissioning of the project and before signing of the PPA with PTC Ltd. Accordingly, this issue is decided against the appellant. The appellant and the respondent no. 2 are directed to approach the State Commission with the necessary processing fee for obtaining the formal consent of the State Commission to the PPA.

13.2. The second issue is regarding non-fulfilling of the condition precedent by the appellant. We notice that the appellant vide its letter dated 13.12.2007 had informed the respondent no. 2 about achieving the financial closure. The

appellant had also enclosed a copy of Credit Sanction Advice dated 29.5.2007 for Indian Overseas Bank and Term Loan Sanction dated 20.7.2007 from Canara Bank in favour of the appellant. These documents establish that the financial closure for the Hydro Project was achieved by the appellant within the permissible time schedule. Even otherwise, the appellant cannot take advantage of its own default. Accordingly, this issue is also decided against the appellant.

13.3. Regarding the third and fourth issues which were raised by the appellant based on the subsequent event relating to payment default we do not find any substance in the contentions of the appellant and reject the same.

13.4. We have given direction to the respondent no. 2 to pay the up-to-date interest for delay in payment of monthly invoices at the interest rate specified in the PPA within 30 days of date of this Judgment of the appellant. We have also remanded the matter regarding determination of the correct amount of LC according to the terms and conditions of the PPA and issue necessary directions to the respondent no. 2, if any.

14. In view of above the appeal is dismissed without any cost.

15. Pronounced in the open court on this **21st day of October, 2011.**

**(Justice P.S. Datta)
Judicial Member**

**(Rakesh Nath)
Technical Member**

REPORTABLE / NON-REPORTABLE

VS