Before the Appellate Tribunal for Electricity
Appellate Jurisdiction
New Delhi

Appeal No. 80 of 2006
With I.A. No. 80; 92 & 122 of 2006

Dated this 29th day of August 2006

Present :**Hon'ble Mr. Justice E Padmanabhan, Judicial Member**

Hon'ble Mr. H. L. Bajaj, Technical Member

Karnataka Power Transmission Corporation Limited
Kaveri Bhawan,
Bangalore- 560 009 ... Appellant

Vesus

1. R.K. Power Gen Private Limited,
No. 3423 10th Main,
3rd Cross (Near Water Tank),
Indiranagar Second Stage
Bangalore 560 038

2. Karnataka Electricity Regulatory Commission
6th & 7th Mahalaxmi Chambers,
No. 9/2, M.G. Road,
Bangalore 560 001 ... Respondents

Counsel for the Appellant : Mr. M.G. Ramachandran & Ms. Taruna Singh Baghel, Advocates

Counsel for the Respondent No.1 : Mr. R. Muthukumaraswamy, Sr. Advocate, alongwith Mr. L.N. Ganapathy, Advocate

JUDGEMENT

1. This appeal has been preferred by the Karnataka Power Transmission Corporation Ltd. challenging the order passed by the Karnataka Electricity Regulatory Commission, hereinafter referred as the "Commission" in case O.P. No. 9 of 2006 and OP No. 26 of 2005 on 23.3.2006.

2. Heard Mr. M.G. Ramachandran Advocate appearing for the appellant and Mr. R. Muthukumaraswamy Senior Advocate along with Mr. L.N. Ganapathy Advocate for the contesting first Respondent. The Second Respondent filed its counter, while the appellant also filed its reply. The first Respondent moved IA.No. 80; 92 & 122 of 2006 seeking for interim directions and orders. Since we have taken up the appeal itself for final hearing with the consent of counsel appearing on either side, we are not passing separate orders in those interlocutory applications.

3. Before framing the points for consideration, it is essential to summarise the case and counter case of the Parties. The appellant is a Government of Karnataka undertaking engaged in transmission of electricity throughout the state. The appellant and first Respondent M/s. R.K. Powergen Private Ltd. on 18.10.2001 entered into a Power Purchase Agreement (PPA) after the approval of PPA by second Respondent commission on 12.10.2001 in terms of of the statutory provisions of The Karnataka Electricity Reform Act 1999. In terms of the PPA the first Respondent agreed to set up a 20 MW capacity NCE generating station, generate power and supply the same to appellant on the terms and rates agreed to

between them. Alleging that the first Respondent-Generator in terms of Article 2.1; 2.2 read with Article 1.1 of the PPA failed to achieve final closure on or before 17-10-2002, the appellant by its letter dated 3.1.2003 called upon the first Respondent-Generator to inform its achievement of financial closure and receipt of all permits, clearances and approvals for the project. The first Respondent responded by its reply dated 8.1.2003 stating that loan has been sanctioned by M/s Power Finance Corporation, besides stating that all statutory clearances etc. had been secured and thus fulfilled all the conditions precedent in terms of Article 2 of PPA. The first Respondent followed its reply with an additional reply dated 4.2.2003 elaborating its financial closure etc.

4. The appellant on 5.7.2003 terminated the PPA and by the same letter offered to the first Respondent that in case it wishes to continue to develop the project and sell power, it may enter into a fresh PPA where tariff would be Rs. 2.80 per KWH with annual escalation of 2% on the said basic tariff, while indicating certain other terms as well. According to the appellant it is a valid termination of PPA and no equitable consideration has any relevancy.

5. Being aggrieved, the first respondent challenged the termination of PPA by filing W.P. No. 40577 of 2003 on the file of the Karnataka High Court and also secured order of interim stay of termination of PPA. Pending the writ petition, the first respondent on 18,12,2003 sought for synchronization of its generation plant to supply power. The appellant without prejudice agreed for synchronization by its reply dated 20.12.2003. The first respondent generated and supplied power with effect from 17.1.2004 onwards at the interim rate of Rs. 2.80/KWH which is well before the targeted date. The

first Respondent moved the second Respondent Commission in OP No. 3/2005 seeking for directions to the appellant to pay at the rate agreed to in terms of PPA. On 7.4.2005 the State Commission allowed the said O.P. as prayed for as the first Respondent has the benefit of interim stay in W.P. No. 13521 of 2005. The appellant challenged the said order of commission dated 7.4.2005. There has been other proceedings and orders, which may not be necessary. Ultimately by order dated 24.1.2006, the Division Bench directed the first Respondent to move the Commission under Section 86 (1)(f) of The Electricity Act, 2003 to adjudicate the dispute.

6. In terms of the said direction, the first Respondent filed O.P. No. 9 of 2006 under Section 86 (1)(b) of Electricity Act 2003 to adjudicate the dispute while seeking to set aside the termination letter dated 5.7.2003 and other consequential reliefs. The appellant filed written submission and contested the said OP. In the mean time this Appellate Tribunal by order dated 15.2.2006 directed the commission to dispose off the appeal.

7. By order dated 23.2.2006 the second Respondent allowed the OP holding that the termination of PPA by the appellant on 5.7.2003 is illegal, arbitrary, malafide and unsustainable and quashed the termination. Being aggrieved the present appeal has been preferred by the appellant Transmission Corporation for various grounds set out in the appeal memorandum.

8. Mr. M.G. Ramachandran learned counsel appearing for the appellant contended that the commission misdirected itself in holding that the termination of PPA for non-fulfillment of a condition precedent will attract Article 9.2 and therefore procedure

prescribed under Article 9.3.1 of the PPA is required to be followed by giving 30 days notice. The commission ought to have noted that for non-fulfillment of conditions precedent the appellant has the absolute right to terminate the PPA without notice and without assigning a reason and such contractual right exercised cannot be tested on grounds such as arbitrariness or malafide or inequitable. The right of the appellant to terminate the PPA being absolute the conclusions of the commission and the findings recorded by it are unsustainable both in law and facts. The commission erred in law in applying equitable doctrine to release the first Respondent from the consequences flowing from non-fulfillment of conditions precedent. It is erroneous for the commission to hold that the termination of PPA is without justification, and acting casually in an arbitrary manner and in violation of natural justice. It is a misconception to assume that first Respondent has accomplished financial closure and when the first Respondent had committed breach, it cannot seek for enforcement of the PPA.

9. Per contra Mr. R. Muithukumarswamy learned Senior Counsel appearing for the contesting first Respondent contended that all of the findings recorded and conclusions arrived at by the Regulatory Commission are well founded and no interference is called. It is pointed out that the contents of very termination letter speaks in volume, that failure to achieve financial closure is not the basis of termination, that the termination of PPA is without reason, without justification and without notice as stipulated in the PPA and that it is an arbitrary and malafide action on the part of the appellant. The reliance placed on various pronouncements by the learned counsel for appellant have no application as the present case is clearly distinguishable. It is further pointed out that the validity of termination of PPA has to be considered and tested on

the very contents of termination letter and not on the basis of pleas of appellant who seeks to sustain its action. The first Respondent's completion of project is fatal to appellants contentions.

10. The counsel appearing on either side took this Appellate Tribunal through the typed set of papers as well as the order appealed against and made submissions in support of their respective contentions. The following points arise for consideration in this appeal.

(A) Whether the order of the Karnataka Regulatory Commission setting aside the termination of PPA by the appellant is illegal in-excess of jurisdiction and liable to be set aside on one more grounds advanced by the appellant?

(B) Whether the approach, findings and conclusions of the Regulatory Commission as reflected in its order under appeal are unsustainable and liable to be inferred in this appeal?

(C) To what relief, if any?

11. The first two points could be considered together conveniently as they revolve around the same set of facts, However before discussing the points, it is but essential to record the undisputed facts, as the same will go a long way to appreciate the contentions and decided the controversy.

9.4.2001: The first respondent approached the appellant to set up 20 MW Biomas Power Plant in a backward area and the first respondent was informed that it has to approach the State Government, who has already issued guidelines and constituted the Karnataka State

Non-Conventional Energy Development Corporation, as the Nodal Agency.

31.5.2001: The State Government granted NOC to first Respondent to set up the Generating Plant and directed it to approach KPTCL for evacuation of power and enter into Power Purchase Agreement.

18.7.2001: KPTCL accorded approval for evacuation of power to be generated by first Respondent.

23.7.2001: Karanataka Pollution Control Board accorded consent to locate NCE generation plant to first Respondent.

12.10.2001: Draft PPA was given by the appellant to the first Respondent. Both parties initialed and submitted it before the Regulatory Commission for approval in terms of Section 11 of the Karnataka Electricity Regulatory Reform Act 1999.

18.10.2001: Power Purchase Agreement as approved by Commission was signed by the appellant and first Respondent to set up 20 MW Biomas Power Generating Plant at Hiriyur Taluk to be commissioned within 30 months from 18.10.2001. PPA stipulated that all permissions are to be secured within 18 months i.e. before 17.3.2004.

27.10.2001: Karnataka Udyog Mitra accorded approval.

--.1.2002: KPTCL sanctioned power for the construction of the plant.

19-3-2002: Factories & Boiler Department of Government of Karnataka approved the plans submitted on 14-3-2002.

4-4-2002: Airport Authority granted NOC for construction of chimney to a height of 60 meters.

23-4-2002: Tehsildar issued a notice as to why the construction of the generation Plant should not be stopped.

7-5-2002: Stop work ordered by local Tehsildar despite reply.

6-6-2002: Tehsildar vacated the order on the intervention of the Deputy Commissioner.

5-6-2002: On the directions of the Appellate Authority, Gram Panchayat granted licence.

7-6-2002: Zilla Panchayat cancelled the licence.

4-7-2002: Forest & Ecology Department, Government of Karnataka, granted NOC on the application submitted on 25-9-2001.

7-7-2002: The Government of Karnataka set aside the orders of Zilla Panchayat, staying the licence granted by Gram Panchayat.

19-8-2002: Karnataka Industrial Development Board which has already allotted land handed over possession of 76 acres 36 guntas of land to the first Respondent.

25-7-2002: Local residents started agitation. Police had to resort to lathi-charge and firing. Two person died. Hence the construction had to be stopped.

27-8-2002: Tehsildar ordered stoppage of work. The Deputy Commissioner also passed orders.

2-9-2002: The generator secured approval of Government of India, Ministry of Water Resources for putting up the Bio-mas plant by its order dt. 29-8-2002.

26-12-2002: A joint Legislative Committee appointed by State Government consisting of 20 Legislative Assembly members inspected, held public hearings, examined witnesses, submitted a report to the effect that power plant is a necessity and violence was caused on extraneous considerations.

3-1-2003: Appellant caused a notice to the first Respondent alleging failure to notify fulfillment of conditions.

8-1-2003: Detailed reply sent by first Respondent

14-1-2003: Government of Karnataka issued directions to Deputy Commissioner, but Deputy Commissioner refused to implement.

4-2-2003: Additional reply sent by first Respondent detailing financial arrangements made, investments made and licenses of land and stop construction etc.

26-2-2003: The Chief Minister of Karnataka had to intervene and issued orders. Order of stoppage of work was vacated, the first respondent restarted the work.

23-4-03& 6-5-3: The appellant called upon the second respondent to deposit Rs. 8.75 lakhs towards supervision charges for construction of 66 kV D.C. evacuation line and terminal bays.

16-6-2003: KPTCL acknowledged 12 number of drawings submitted by generator.

18-6-2003: Remittances were made by first respondent as demanded by appellant's officers in the area Plant was being put up at a high cost and second Respondent placed orders for equipment worth Rs. forty crores.

By June, 2003: The first respondent has invested Rs. Twenty two crores of its own funds and borrowed funds aggregating to Rs. 50 crores.

5-7-2003: Appellant terminated the PPA with immediate effect and called upon the first respondent to enter into a fresh PPA to sell power at a reduced rate of 2.80 per KWH.

14-7-2003: First respondent generator submitted representation to withdraw the letter dated 5-7-2003 setting out full facts of investments made and licenses secured.

23-7-2003: Appellant called upon first respondent to attend a meeting on 29-7-2003 to hold discussions.

29-7-2003: Meeting attended by first respondent and it was represented that there will be a reconsideration as the

project reached advance stage but no communication of revocation communicated.

16-10-2003: First Respondent filed Writ Petition challenging the termination of PPA dated 5-7-2003, Pending WP, interim stay of the order of termination was granted by High Court.

17-1-2004: Generating plant was commissioned and synchronized with KPTCL grid, which is three months ahead of schedule as certified by KPTCL.

7-4-2005: In OP No. 3/2005 the generator moved the Regulatory Commission, who passed orders and directed the appellant to release payments at the rates agreed and in terms of PPA, which was challenged by the appellant in a writ petition.

24-1-2006: Division Bench of the High Court directed the first Respondent to go before the Regulatory Commission for adjudication of the dispute in terms of Section 86 (1)(b) of the Electricity Act 2003.

23-3-2006: Regulatory Commission allowed the petition in case No. OP No. 99/2006 and OP No. 26/2006 and issued directions. Hence the present appeal by appellant.

12. Now let us consider the merits of the contentions advanced by appellant. Admittedly 17-1-2004 the appellant generator commenced supply of power and synchronized its generating plant with Grid, but being paid at a lower rate, which is being paid and received without prejudice. The appellant was paying charges at

the rate of Rs. 2.80 ps. Per unit of power supplied as interim arrangement as against the higher rate agreed to in the PPA.

13. The learned Counsel appearing on either side took this Appellate Tribunal through the typed set containing PPA, letters, orders, communications, apart from impugned termination and made their respective submissions. After conclusion of arguments on 1-8-2006 the generator filed a memo dated 4-8-2006 with following three enclosures as additional documents to show that financial closure has been achieved by generator well in time.

(i) Letter dated 8-3-2006 IOB, Chennai to generator.
(ii) Letter dated 18-3-2003 written by generator to IOB to open irrevocable and confirmed letter of credit for US$ 1,111,500 Bank of China for paying supplier.
(iii) Telex Message dated 19-3-2003 from IOB to Bank of China confirming issuance of irrevocable letter of credit.

14. To the said memo Mr. M.G. Ramachandran, learned Counsel appearing for the appellant filed a reply on 8-8-2006 contending that the enclosures are mere approval on principle and do not establish financial closing as stipulated in clause 2.1 of PPA dated 18-3-2003 even as on 5-7-2003, when PPA was terminated.

15. Mr. M.G. Ramachandran, learned Counsel for appellant elaborated the above contentions and contended in his usual inimitable style that the contract has to be implemented as per terms contained in the contract and there would be no deviation on grounds of equitable consideration pleaded by first respondent/generator. Mr. Ramachandran also relied upon the pronouncement of the Supreme Court in H.H. Mahatrani Shanti

Devi P. Gaikwad Vs. Savyibbhai H Patel reported in 2001 (5) SCC 101. In this pronouncement their Lordships of the Supreme Court considered a case where specific performance in respect of land agreed to be sold was sought for. While reversing the judgment of the Gujrat High Court and dismissing the suit. In the course of discussions, their Lordship's held thus:

> *" Mr Dhanuka also contended that if clause (17) is construed to mean that power had been conferred on the parties to cancel the contract unilaterally at their wish, then such a power of termination has to be exercised for good and reasonable cause otherwise unilateral power of cancellation would have to be treated as void and ineffective in law. Reliance has been placed by the learned counsel on National Fertilizers v. Puran Chand Nangia [7] (SCC at p. 351, para 23) which reads thus:*
>
> *"23. We may also state that under the general law of contracts, once the contract is entered into, any clause giving absolute power to one party to override or modify the terms of the contract at his sweet will or to cancel the contract - even if the opposite party is not in breach, will amount to interfering with the integrity of the contract (per Rajamannar, C.I. in Maddala Tlzathiah v. Union of bzdia[8] • On appeal to this Court, in that case, in Union of India v. Maddala Thathaiah[9] the conclusion was upheld on other grounds. The said judgment of the Madras High Court was considered again in Central Bank of India Ltd. v. Hartford Fire Insurance Co. Ltd.[IO] but the principle enunciated by Rajamannar, C.J. was not differed from. [See the discussion on this aspect in 7v!Trt:lrr? Contract Act (lOth Edn.), pp. 371-72, under Section 31 of the Indian Contract Act.]"*
>
> *We have perused the decision of the Madras High Court referred to in the aforequoted passage as also the two decisions of this Court and Mulla's Contract Act. With utmost respect, we are unable to agree wi th the broad proposition that the absolute power of termination would be void: Referring to Madras case[8] and two cases of this Court, I\1ulla says that correctness of Madras case[8] was doubted. We reproduce as to what has been stated in the Contract Act by Mulla at pp. 371-72. It reads:*
>
> *"If two parties stipulate that the contract shall be void upon the happening of an event over which neither party shall have any control then the contract is void on the happening of that event. But where the contract is that the contract shall be void on the happening of an event which one or either of them can bring about then the blameworthy party cannot take advantage of that stipulation because to do so would be to permit him to take advantage of his own wrong. This principle was accepted in Australia but with this modification that in both cases the contract is voidable and not void in one case and voidable in the other, because the construction cannot differ according to events .... Some a Indian courts have held that a clause in a contract giving one of the parties the option to cancel the contract for any reason whether adequate and valid or not confers an absolute and arbitrary power on one of the parties to a contract and is, therefore, void and unenforceable. Therefore, a clause in a contract of supply of goods to the Railway Administration conferring on the Railway Administration the right to cancel the contract b 'at any stage during the tenure of the contract without calling upon the outstandings on the unexpired portion of the contract' was held to be a clause under which it was open to one of the parties, without assigning any reason valid or otherwise, to say that it was not enforceable. It conferred an absolute and*

arbitrary power on one of the parties to cancel the contract. On appeal against the Madras High Court decision, the Supreme Court upheld the order passed but held that the clause authorising cancellation applied only where a formal order had not been placed for supply of the goods contracted for at which stage no legal contract can be said to have been made and so the cancellation made in the Railway cases could not be said to have been covered by the clause. The Madras d & Bombay cases were reviewed by the Supreme Court in a subsequent judgment and distinguished and the correctness of the Madras case also doubted. And the Supreme Court held that where the language of a clause in a contract is clear it must be interpreted according to its language. In that case, a clause in an insurance policy authorising both parties to cancel the policy at will was upheld. It is submitted that the e two Supreme Court judgments show that such clauses are valid and enforceable except where, as in the Madras Railway cases, the contract is an executed contract in that a formal order of supply had already been made. "

In our view, the aforesaid passage has been misread in National Fertilizers case[7]. Further in Central Bank of India Ltd. v. Hartford Fire f Insurance Co. Ltd. 10, decisions of the Madras High Court and of this Court (Union of India v. Maddala ThatIzaialz[9]) were considered. The question in that case was whether the insurance policy had been terminated. This Court was concerned with a clause in an insurance policy which, interalia, provided that the policy can be terminated at the option of the Insurance Company. The contention of the respondent Insurance Company was that it 9 had power under the said clause to terminate the contract at will and it had duly exercised that power. The appellant's contention was that it was implied in the clause that termination could only be for a reasonable cause which did not exist in that case. It was further contended that if this interpretation of implied term is not accepted, the clause giving such right to terminate at will without reasonable cause must be treated as void and ignored. This Court h said: (AIR p. 1290, para 5) of clause 10. Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however it may dislike the result. We have earlier set out clause 10 and we find no difficulty or doubt as to the meaning of the language there used. Indeed the language is the plainest. The clause says 'this insurance may be terminated at any time at the request of the insured', and 'the insurance may also at any time be terminated at the instance of the company'. These are all the words of the clause that matter for the present purpose. The words 'at any time' can only mean 'at any time the party concerned likes'. Shortly put clause 10 says 'either party may at its will terminate the policy'. No other meaning of the words used is conceivable."

In view of the above discussion, we find force in the contention that the agreement in question was terminable before delivery of possession; it was so determined and to the ,agreement clause (c) of Section 14(1) of the Specific Relief Act, 1963 applies. Therefore, agreement' cannot be specifically enforced."

In our considered view the above pronouncement relied upon by the counsel for appellant will not advance the case of appellant and on facts of the present case, the said pronouncement has no

application.

16. Mr. M.G. Ramachandran learned counsel for appellant nextly relied upon the pronouncement in India Thermal Power Vs. State of M.P. & othrs. reported in 2000 (3) SCC 379. In this case one of the proposition laid down being as to when a contract could be held to be a statutory contract. This pronouncement also in no way assist the appellant. Yet another pronouncement relied upon by Mr. M.G. Ramachandran is State of Orissa vs. Narainprasad reported in 1996 (5) SCC.740, wherein their Lordships of the Supreme Court with respect to vending of particular quantity of liquor, it was held that the licensees shall not be permitted to turn round and question the validity. In this case it has been held thus:

> *" However, as regards Pench Thermal Power Project we find that it is not a pithead project and it did not have any appropriate coal linkage. The coal linkage which was suggested by the State Government was neither approved by the coal companies nor by the Railways. Its project cost was also not properly evaluated and the cost of supplying water from the dam was not taken into consideration on the ground that the whole cost of the dam is to be borne by MPEB. We need not go into further details regarding the merits and demerits of the Pench project, as in view of the remaining available escrowable capacity we are directing MPEB to reconsider its decision as to which remaining coal-based project should be given priority in recommending it for escrow coverage."*

17. The learned counsel for the Respondent No. 1 has no quarrel with the propositions of law laid down in those pronouncements, but it

was rightly pointed out that the same in no way advance the case of appellant with respect to the case on hand. The respondent No. 1 rightly contended that the appellant's contentions are fallacious and devoid of merits.

18. In the light of above admitted facts, let us now consider the findings recorded by the Commission and examine whether the said findings and conclusions arrived at by the Commission are liable to be interfered in this appeal. The Commission exercised the powers in terms of the directions issued by the Hon'ble High Court, though the parties for reasons best known to them have given a go-bye to the arbitration clause agreed to between them. It is the very same Commission which approved the PPA, which has examined the grievances of the generator, who complained that it is illegal to cancel PPA despite the generator having complied with the stipulations commenced generation before the stipulated date though it has been prevented by public authority and local public from putting up plant.

19. However, the appellant mainly contended that the respondent had failed to achieve financial closure and the stipulation as to notice has no application at all. Per contra it is contended by Mr. R. Muthukumarswamy, the learned Senior Counsel for the first respondent rightly pointed out that it is not for failure to secure financial closure, the PPA has been terminated but it is for other afortoir consideration . The material portion of the termination letter dated 5.6.2003/5.7.2003 signed on 5.7.2003 reads thus:

> *" This is to inform that the Power Purchase Agreement entered into with your company on 18.10.2001 in respect of purchase of power from your proposed 20 MW capacity Biomas based power project near Chinnaiah hatti village, Hiriyur Taluk,*

Chitradurga district has been terminated with immediate effect. In case you intend to continue to develop the project and sell power to KPTCL, you are requested to enter into a fresh agreement as per following tariff, terms and conditions approved by KPTCL by submitting necessary relevant documents.
Tariff: Rs. 2.80 per Kwhr, with an annual escalation of 2% on the base tariff of Rs. 2.80 Kwhr."

20. The impugned termination letter speaks volumes against the appellant as it is without prior notice and it is not based on failure to achieve precondition. It is clear from the above letter that it not for failure of financial closure, the appellant has terminated the PPA. Without notice and in contravention of very stipulation in the PPA and in violation of natural justice, PPA has been terminated. It is contended that it is a simpliciter and arbitrary termination when admittedly substantial portion of the work of placing orders, execution of work was under progress and substantial amount has been invested by the appellant in the project, which would show that the first Respondent would have complied with pre conditions stipulated. Being termination simpliciter as rightly pointed out by the respondent, the appellant in terms of stipulation in the PPA ought to have issued a show cause notice in terms of Article 9, which is fatal to the appellant's action.

21. That apart on 3.1.2003, Superintending Engineer (SC) Project & Monitoring of the appellant corporation, addressed the first respondent , wherein it has been set out thus:

" Please refer to the PPA executed with KPTCL on 18.10.2001 in respect of your proposed 20 MW capacity Biomass based power project neatr Chinnaianhatti village, Hiryut Taluk, Chitradurga district. In accordance with Article 2 of the signed PPA, non fulfillment of the conditions precedent or refusal to waive the

conditions precedent which are not fulfilled within twelve (12) months from the date of signing of the Power Purchase Agreement, unless extended by mutual agreement, it is a ground for termination of the Power Purchase Agreement by either party. It is seen that you have neither notified the fulfillment of conditions precedent, that is the achievement of Financial Closure and receipt of all permits, clearances and approvals required for the project nor obtained extensions of time for the same by mutual consent. Hence the PPA is liable for termination. You are requested to intimate this office immediately within 15.01.2003 achievement of Financial Closure and also receipt of all permits clearances and approvals of your project. If no reply is received from you, it will be presumed that you have not achieved the financial closure so far and also not received all permits, clearances and approvals required for your project and the PPA signed with you will be terminated."

22. It is alleged in the notice dated 3.1.2003 that the first Respondent has failed to notify the appellant about the achievements and financial closure. To this letter, a reply was submitted on 8-1-2003 and followed with detailed representation on 4-2-2003, wherein the first Respondent has set out the details , which will show its securing of all licenses and investment of substantial funds, besides the stoppage of work due to agitation, law and order situation caused and the stoppage of work ordered by Tehsildar and Deputy Commissioner, who even refused to carry out the State Government's directions. The detailed reply reads thus:

"Sub. : Fulfillment of conditions precedent as per Article 2 of PPA
Ref. : Your letter reference No. B35/AEE-4/02-03 dated 03.01.2003.

We refer to you letter mentioned above and would like to inform you that we have already fulfilled all the conditions precedent as per Article 2 of PPA, as can be seen from the following :

1. We have obtained all statutory clearances necessary for the completion project. The copies of the same are enclosed in annexure A.

2. We have already got the loan sanctioned by M/s Power finance Corporation Ltd., New Delhi

3. We have placed orders for all the equipments and all are ready for dispatch.

4. We have already started construction in May 2002 but the D.C Chitradurga has issued stop work notice citing local problems and probe by sadhana samithi (enclosed in annexure B).

5. Now that the sadhana samithi has submitted the report, we have applied for permission to the government to restart the work and we are awaiting governmental clearance.

We are fully prepared to start the work and provide the much needed power to the Karnataka grid by May 2003.

From the above it can be clearly seen that the progress of the project is soley delayed for reasons beyond our control and for no fault of us."

Yet it has been pointed out there has neither been an attempt to verify and examine the contents of the said replies nor was there an inspection by the appellant. From 8-1-2003 onwards up till 5-7-2003 for nearly seven months there was total silence on the part of appellant which means, the appellant was obviously satisfied with replies and accepted the first respondent's stand that it has fulfilled the conditions precedent pointed out by the appellant.

23. In this back ground it is clear that the termination dated 5-7-2003 is not based on failure to achieve financial closure as contended at the hearing and non-fulfillment of the conditions

precedent stipulated in Article 2, cannot be relied upon or suggested by the appellant as a cause for the termination. Further before the impugned termination no notice as stipulated has been issued nor an opportunity has been afforded to first respondent resulting in violation of natural justice. Such a stand of the applicant is a clear afterthought and not borne out by records as pointed out by the Regulatory Commission. We find there is merit and force in this contention advanced on behalf of the respondent.

24. The findings recorded by the Regulatory Commission are well considered and not being challenged as not based on record or evidence. The attempt to explain the termination as if it is for failure to achieve, is a clear after-thought not found on the file and it is in-permissible in law. It is settled law that the validity of the action taken by the appellant, a state undertaking has to be considered and tested on the very contents or reasons contained in the termination letter and not on the basis of a plea of the appellant, who seek to sustain the said plea We agree with the following well considered findings recorded by the Regulatory Commission as they are based on appellants very files. Instead setting out the very same findings in our language we extract the portion of the commission's findings for immediate reference:

> *"16. This letter No. KPTCL/B35/SEE(P&M)/AEEE4/4395-06 dated 05.07.2003 is issued by the General Manager(Tech), KPTCL, Bangalore. In this connection, the office records maintained by KPTCL leading to the issue of termination order were called for and file No.F-149 Vol-1 and file No.B28/5003/01-02 were perused. It is seen that the said file No.F.149 starts with the order sheet recordings on 19.07.2004, wherein AGM (NC2) puts up a brief note to the General Manager)Tech) on 19.07.2004.*
>
> *"Discussed with GM(T) on 19.07.2004. Copy of the letter dated 05.07.2003 is placed in the file at flag X for kind*

perusal. No reason for termination is detailed in the letter. The information will be available at the office of the SEE(P&M). Paras for kind perusal".

"The reason for termination of PPA is not detailed in the letter of termination. However, detailed review of case to case by the SEE(P&M) is required to be done to take a considered decision."

In the detailed note at page 3 of the note sheet (para 9), the following is stated:

"Since this project was not yet commissioned as on date, the PPA signed on 18.10.2001 has been terminated on 05.07.2003, requesting the firm to enter into fresh PPA with the revised tariff, terms and conditions as approved for bio-mass projects (on that date) in case the firm intends to develop the project and sell power to KPTCL. Reasons for termination is not indicated in the termination letter."

17. The second file No.B.28/5003/01-02 starts with entries in the order sheet from 02.05.2001 onwards. After 06.11.2001, there is no entry up to 17.12.2003, wherein reference has been made to filing of Writ Petition by the Petitioner against the termination of the PPA on 05.07.2003. In both the files referred to above, there is absolutely no discussion or notings leading to issue of termination order by any authority. The records show that the issue of termination of PPA was abruptly taken up and termination order was issued.

It is evident that the decision to terminate a validly concluded PPA which had been approved by the Commission has been taken by the Respondent in a casual and arbitrary manner without sufficient and convincing reasons for the said termination. In fact, no reason has been stated in the order and the Respondent, as an afterthought, is now trying to argue that the reason had been stated in the show cause notice issued on 03.01.2003."

xx xx xx
xx xx xx

"The Respondent has to deliver a default notice to the Company in writing which shall specify in reasonable detail the event of default giving rise to the default and calling upon the Company to remedy the same. A clear 30 days' time has

to be given to the developer from the date of delivery of this default notice for remedying the default, if any, and only thereafter a termination notice could be delivered to the developer. Hence, issuing of termination order straightaway under Article 2 of the PPA is in contravention of the terms of the PPA. It is, further, noticed that the Respondent is contradicting himself. While making reference to the letter dated 3.1.2003, the Respondent relies on failure to achieve Financial Closure and obtaining permits etc. as the reason, whereas in the note recorded in the file as referred to above in para 9 at page 653 of the file No.F.149, non-commissioning of the project as on date is said to be the reason for termination of the PPA."

xx xx xx
xx xx xx

"It is also not the case that the Petitioner Company did not respond to the letter of 03.01.2003. The Petitioner sent reply vide letter dated 8.1.2003 wherein it has been stated that they have complied with all the conditions precedent and they are fully prepared to start the work. It has been clearly stated that all statutory clearances necessary for completion of the project have been obtained and copies of the same were enclosed to that letter in Annexure A. They have further stated that they have got the loan sanctioned by M/s.PFC Limited, New Delhi. Although they started construction in May 2002, the work was stopped by the Deputy Commissioner, Chitradurga citing local problems. Subsequently, another letter was sent on 4.2.2003 addressed to the Respondent wherein it was reiterated that all statutory clearances have been obtained and regarding Financial Closure, it is stated that they have to bring in an upfront equity of 30% i.e. Rs.15.00 crores as per the conditions of the loan sanctioned and they have already spent Rs.10.00 crores so far of this equity. The above Rs.10.00 crores has been utilized to pay advances to the suppliers and the material procured for site fabrication and construction. It has been further stated that they need to spend balance Rs.5.00 crores before they are able to get further amounts from financial institutions. However, in view of the order of the DC to stop the work, they are unable to proceed further. By their letter dated 16.1.2003, the Petitioner had sent copy of the loan sanctioned by PFC vide letter dated 2.12.2002. The above correspondence would clearly indicate that in response to the letter dated 03.01.2003, the Petitioner had informed the Respondent that it has fulfilled the conditions precedent and also indicated the

extent of money spent on construction activity and also the reason for stoppage of work in the project site for reasons beyond its control."

xx xx xx
xx xx xx

"The very fact that there is no reference at all to the letter dated 03.01.2003 in the termination order dated 5.7.2003, it is crystal clear that even the Respondent did not consider the letter dated 03.01.2003 as a show cause notice issued under Section 9.3.1. of the PPA."

xx xx xx
xx xx xx

"The Respondent is deliberately ignoring the fact that after stop-work notice was lifted following the GOK's intervention in February 2003, the Petitioner has completed the project and written to the Respondent by letter dated 17.12.2003 requesting for synchronization."

xx xx xx
xx xx xx

"As rightly contended by the Petitioner, it is preposterous to argue that a project of this size costing over Rs.50.00 crores was completed without adequate funds four months ahead of schedule. This is despite a series of actions by the local authorities and the Deputy Commissioner putting up roadblocks to thwart the commencement and completion of the project. The Respondent is found to be shifting its stand as it suits it. At one stage it is stated that it was not within its knowledge that the Petitioner had borrowed a sum of Rs.25.00 crores from PFC and another sum of Rs.20.00 crores from SBI and, in the same breath, it is also argued that merely because some amounts have been borrowed from financial institutions, it does not insulate the Petitioner from termination. Alas! One has to digest this contradiction when the Respondent is bent upon terminating the PPA, even if such action has no legs to stand on."

xx xx xx
xx xx xx

"The Respondent is making vain attempts to justify the termination of the PPA, whereas, in fact, there was no case at all for such termination. By issuing an order of termination without any reason and without following due procedure, the Respondent has thrown to the winds all cannons of law, especially the principles of natural justice and equity. The line of reasoning now being adopted by the Respondent to support

termination, to say the least, is not only absurd but also dangerous."

xx xx xx
xx xx xx

"We are constrained to warn that if they adopt the same attitude in respect of the PPAs approved by the Commission, then the developers will lose confidence in the PPAs. An order of termination or for that matter any order ought to be self-supportive and not leaning on crutches. The Respondent has exposed itself to the charge of uttering nothing but a thinly veiled falsehood and contradicting itself by stating non-existent reasons for supporting the termination. No reason has been stated in the termination order as, in fact, there was no reason to state and the decision was taken abruptly and arbitrarily to terminate the PPA. The records show that the Petitioner has achieved Financial Closure and commissioned the power project despite the Force Majeure conditions well within the time stipulated in the PPA and has duly intimated such compliance to the Respondent by issue of letters referred to above. It is astonishing to see that a project approved at the level of Chairman & Managing Director of KPTCL and a PPA approved by the Commission is terminated without any justifiable reason by an Officer of the rank of General Manager."

xx xx xx
xx xx xx

In our considered view every one of the above findings and conclusions are well considered, based on evidence and no exception could be taken nor an illegality could be pointed out by the appellant herein.

25. We agree with the above findings of the Commission and no exception could be taken to the said findings that apart the three documents placed before us also very much substantiate the first respondent's case and on facts even the alleged failure to achieve final closure is not sustainable. At any rate before the date stipulated, the entire project has been accomplished, generator achieved commercial operation and commenced supply to the very appellant. That apart the respondent's demands to remit

supervision charges for setting up line, being based upon the PPA, it cannot be brushed aside as formal or insignificant.

26. The Commission had chosen to adjudicate upon the dispute between licensee and generator in terms of Sec. 86 (1) (f). The power of adjudication of dispute conferred on the commission is of widest amplitude not being circumscribed by restrictions. Hence it follows that the commission's power to adjudicate is wide and to render justice between the parties before, it has exercised the jurisdiction rightly. Such exercise of power of by commission shall not normally be interfered except under extraordinary circumstances such as apparent illegality, ere of jurisdiction or such exercise being malafide. As such, in any view of the matter, we hold that the commission has rendered justice and therefore we decline to interfere.

27. Being an appellate authority exercising power of appeal under Section 111, we hold that no case has been made out warranting interference. Further in terms of Section 111 (3) of The Electricity Act 2003, we decline to interfere with the order under appeal. On facts, we hold that justice has been rendered by the Commission. Prima-facie, also on facts we hold equity that treats the importance of such time limits as being subordinate to the main purpose of the PPA. , viz. generation of power before the stipulated date has been admittedly accomplished and power supply commenced even prior to the stipulated date. In our considered view in this appeal no interference is called for nor it is justified as we do not find errors of logic and law nor there is miscarriage of justice.

28. In the foregoing circumstances, all the points are answered against the appellant and in favour of the first respondent. In the result the appeal fails. The three interlocutory applications are dismissed as in-fructuous. The parties shall bear their costs in this appeal.

Pronounced in the open court on this 29th day of August, 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr.Justice E Padmanabhan)
Judicial Member