Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 176 of 2009

Dated 18th May 2010

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. H.L. Bajaj, Technical Member

In the matter of:

Bangalore Electricity Supply Company Ltd
K.R. Circle, Bangalore-560 001 … Appellant

Versus

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

2. **Karnataka Electricity Regulatory Commission,**
   Mahalaxmi Building, C-9,
   M.G. Road, Bangalore.

… Respondents

Counsel for the Appellant(s)	**Mr. Shanti Bhushan, Sr. Adv.** **Mr. S.S. Naganand, Sr. Adv.** **Mr. S. Sriranga, Adv.** **Mr. Raghavendra Srivatsa** **Mr. Venkat Subramanian**
Counsel for the Respondent(s)	**Mr. Ravi Shankar Prasad, Sr. Adv.** **Mr. B. Prabhu S. Patil, Sr. Adv.** **Mr. P.K. Navadeya,** **Mr. Shivendra Dwiviedi** **Mr. Prabhuling Navadgi &** **Mr. Rajesh Mahale for R-1.**

JUDGMENT

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

1. Bangalore Electricity Supply Company Limited is the Appellant herein. Devangere Sugar Company Limited is the first respondent.

2. A Power Purchase Agreement (PPA) was entered into between the Appellant and the Respondent. In pursuance of the same the Respondent, the generating company, was bound to sell the power generated by it to the Appellant at the agreed rates as mentioned in the PPA. Since the agreed rates were not paid in time, the Respondent sent a Default Notice to the Appellant stating that if the dues were not paid within the stipulated time, the contract will be terminated. However, the reply was sent by the Appellant to the Respondent pointing out that there had been no default.

Since default had not been rectified, the Respondent sent a Notice of Termination and stopped supply to the Appellant.

3. Challenging the same, the Appellant filed a petition before the Karnataka Electricity Regulatory Commission (State Commission) seeking for the quashing of the notice of Termination and for restraining the Respondent from selling the power to third party. The State Commission, after hearing both the parties, dismissed the said petition. Aggrieved by the same, the Appellant has filed this Appeal before this Tribunal.

4. We shall now state the relevant and required facts for the disposal of this Appeal.

5. The Appellant is a distribution licensee within the State of Karnataka. The Respondent is a generating company. Originally both transmission and distribution functions were carried out by the Karnataka Power Transmission

Corporation Limited (KPTCL). Subsequently on unbundling of .the Corporation, the distribution functions were allotted to the Appellant.

6. Before unbundling, the KPTCL had entered into a PPA with the R-1 on 17.01.2002 for the purchase of electricity from the R-1. After KPTCL was unbundled, the PPA entered into between the KPTCL and the R-1 was assigned to the Appellant with effect from 10.06.2005. Due to some dispute that arose between them, the Agreement was terminated by the Appellant. However, on arriving at a settlement, Agreement was renewed and the same was subsequently modified to some extent by a supplemental Agreement dated 09.06.2005 between the Appellant and the R-1.

7. As per the provision of the PPA, the Respondent was bound to sell power generated by it to the Appellant alone at the agreed rates and not to the third parties. However, the

said PPA provided that the sale of power to third parties could be considered only under two circumstances: (1) In case the Appellant and the R-1 fail to arrive at a mutual agreement on tariff from the eleventh year onwards and (2) In case when there is a continued default on the part of the Appellant for a period of 3 months.

8. Despite this term relating to restriction of sale to third parties of the PPA, the Respondent, by an application dated 06.06.2009 approached the State Load Dispatch Centre (SLDC) requesting for permission to sell power to third party through open access. However, the SLDC rejected the grant of open access in view of the subsisting PPA between the Appellant and the Respondent. Aggrieved by the same, the Respondent challenged the said order by the SLDC before the Central Commission. Ultimately, the Central Commission set aside the order of the SLDC and allowed the petition. This order was challenged by the State Government before the High Court of Karnataka.

9. In the meantime, the Appellant filed a petition before the State Commission under section 86(1)(f) of the Electricity Act, 2003 seeking for injunction restraining the respondent from selling the power to third parties and seeking for a direction to the Respondent to supply power only to the Appellant as per terms of the PPA dated 17.01.2002. During the pendency of this petition, the Writ Petition came up for hearing before the Karnataka High Court. After hearing the parties, the High Court directed the State Commission for early disposal of the petition filed by the Appellant.

10. At that stage, i.e. on 10.6.2009, the Respondent issued default notice to the Respondent, as there was a default on the part of the Appellant in making the payment of dues in time as well as the interest for late payment and also in opening the Letter of Credit (LOC). Through the said default notice, the Respondent intimated to the Appellant

that there was a continuous default committed by the Appellant due to non-payment of dues in time as well as the interest for late payment and failure to open the Letter of Credit in violation of contract and warned the Appellant that if the said default is not rectified within the 30 days, the contract will be terminated. The Appellant, however, sent a reply dated 02.07.2009 stating that there was no necessity to rectify the same as there was no default.

11. Since the default had not been rectified, the Respondent issued a Notice of Termination dated 08.07.2009, terminating the PPA dated 17.01.2002 and the supplementary agreement dated 09.06.2005.

12. On receipt of this letter of Termination, the Appellant sought for amendment of the prayer in that Petition already pending before the State Commission seeking for the quashing of the Notice of Termination. Accordingly, the State Commission allowed the said amendment.

Consequently, the Appellant was allowed to argue for quashing the Notice of Termination letter 08.07.2009 and for consequent directions.

13. The State Commission heard both the parties. Ultimately, the State Commission by the order dated 08.10.2009 upheld the Notice of Termination and dismissed the petition filed by the Appellant. Aggrieved by the same, the present Appeal has been filed.

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

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

the late payment cannot be construed to be defaults which may give rise to the right of termination of contract.

(2) The Letter of Credit (LOC) was not opened by the Appellant since the respondent has not insisted for the same for the past 3 years. As such it would amount to waiver as per Clause 12 of PPA and therefore the same cannot be a ground for termination.

(3) The Default Notice dated 10.06.2009 had been served on the Appellant on 12.06.2009. The Appellant sent the reply on 02.07.2009. The provision of the contract require that the termination of PPA can be effected only if the defaults notified in the default notice are not cured within the stipulated period of 30 days from the date of the receipt of the default notice. The default notice was received on 12.06.2009. The 30 days period would expire on 12.07.2009. But, the letter

of Termination had been issued and served on the Appellant on 08.07.2009 itself. As such, this termination letter is only premature and invalid. Therefore, the impugned order is liable to be set aside.

15. The Learned Senior Counsel for the Respondent would make the following contentions by way of reply:

(1) As per the relevant clauses in the PPA, the payment shall be made within 15 days. In the present case, from the year 2004 there has been consistent delay in making payment beyond the period of 15 days. The details contained in the Chart will show that there had been a continuous delayed payment beyond 60 days. As such there is a failure to carry out material obligation under the contract. Further, as per PPA interest shall be paid for the late payment. Admittedly, the interest had never been paid. Therefore, the non-

compliance of the relevant clauses of the PPA would amount to fundamental breach giving a right to the Respondent to terminate the contract.

(2) As per the PPA, the opening of LOC is a vital part of the contract. This is a fundamental financial obligation cast upon the Appellant. Under the relevant clauses, the LOC should be opened and maintained at all times during the period of Agreement. There can be no waiver of such an essential obligation of the contract by implication. It is wrong to contend that the Respondent has not insisted for opening of the said LOC. On the other hand, Respondent sent several reminders to the Appellant instructing for opening of LOC. As such, the Respondent has never waived this requirement.

(3) The ground that the Notice of Termination had been served on the Appellant even before the expiry of 30 days period, admittedly had not been

raised before the State Commission. Similarly, this ground is not raised in the present Appeal as well. This ground has been raised before this Tribunal for the first time, that too in the additional grounds through a separate application. Therefore, it cannot be allowed to be raised before this Tribunal. Even otherwise this plea is only hyper technical in nature. The object of giving 30 days time is to give opportunity to the defaulting party to rectify the default complained. In the present case the Appellant company refused to remedy the default through its reply dated 02.07.2009 which was sent even before the expiry of this date. In view of the fact that the Appellant had clearly given its mind by stating that he would not open the LOC and he would not make payment of interest, the Respondent was constrained to send the Notice of Termination dated 08.07.2009 itself. Further, there is no

prejudice caused on the Appellant due to the issuance of termination letter even before the expiry of 30 days.

16. In the light of the rival contentions, the only question which has to be decided by this Tribunal is this "whether the Notice of Termination dated 08.07.2009 is valid or not?

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

18. We have carefully considered this point. On perusal of PPA and other records, we are unable to accept this plea. It cannot be debated that even from the year 2004, there has

been a consistent and continuous delay in making the payment beyond the period of 15 days. The chart available on record would show that there had been delayed payment even beyond 60 days and that no payment had been made towards interest. Therefore, the Appellant had admittedly not complied with the payment schedule as prescribed under contract.

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

> ***"Clause 5.1: Monthly Energy Charges; Corporation shall for the Delivered Energy pay, for the first 10 years from the date of signing of Agreement to the Company every month during the period commencing from the Commercial Operation Date on the basis of***

the base price applicable for the year 1994-95 at the rate of Rs. 2.25 (Rupees Two and twenty five paise) per kilowatt-hour (the tariff) for energy delivered to the Corporation at the Metering Point with an escalation at a rate of 5% per annum over the tariff applicable for the previous year as per guidelines issued by the Ministry of Non-Conventional Energy Sources of the GOI."

20. With reference to Billing and Payment, relevant Clauses mentioned under Article 6 are 6.1, 6.2, 6.3. We can refer to the said clauses 6.1, 6.2 and 6.3 of the contract.

"Clause 6.1 - Tariff Invoices: The Company shall submit to the Chief Engineer Elecy, Corporation's Load Despatch Centre, Bangalore or any other designated officer of Corporation, a Tariff Invoice for each Billing Period in the format prescribed by Corporation from time to time setting forth those amounts payable by

Corporation for the Delivered Energy in accordance with Article 5.1.

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

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

21. Thus these clauses provide for the mechanism as to how the payment is to be made. As per Clause 6.1 the Respondent has to submit the bill (Tariff Invoices) to the Appellant for each billing period. According to clause 6.2, the Corporation (Appellant) shall make payment of the amount due within 15 days from the date of delivery of the

tariff invoice issued by the Respondent to the designated officer of the Corporation (Appellant). As per clause 6.3, if any payment from Corporation is not paid when due, there shall be penal interest at the rate of SBI Prime Lending Rate + 2% per annum for such payment from the date such payment was due until such payment is made in full to the company (Respondent).

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

the late payment. If penal interest is not paid, that is also a breach of the obligation under the contract. So when there is a failure to carry out the obligation under the contract in making the payment in time or not making the payment of interest would amount to breach of the integral obligation as contemplated in the contract.

23. Besides this, there is one more breach. Under Clause 6.6, the Corporation (Appellant) shall establish and maintain transferable, sustainable and irrevocable revolving Letter of Credit (LOC) in favour of the company (Respondent).

> ***"Clause 6.6: - Letter of Credit: Corporation, shall establish and maintain transferable, assignable, irrevocable and unconditional revolving Letter of Credit in favour of, and for the sole benefit of, the favour of, and issued to, the Company on the date here of and made operational thirty (30) days prior to the Commercial Operation Date of the Project and shall be***

maintained consistent herewith by Corporation 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:

i) In the event a Tariff Invoice or any other amount due and payable by Corporation pursuant to the terms of this Agreement is not paid in full by Corporation as and when due, the Letter of Credit may be called by the Company for payment in full of the unpaid Tariff Invoice or any such other unpaid amount.

ii) The foregoing as determined pursuant hereto, upon presentation of such Tariff Invoice or other invoice or claim for such other amount by the Company on the due date therefore or at any time thereafter, without any notification, certification or further action being required.

iii) The amount of the Letter of Credit shall be equal to one month's projected payments.

iv) The Corporation shall replenish the LC to bring it to the original amount within 30 days in case of any valid drawdown.

v) The Company shall allow a rebate of 1.8% of the Tariff Invoice amount or actual expenditure/charges for the LC account incurred, which ever is lower and the same shall be deducted from the monthly Tariff Invoice payable to the Company.

vi) The Letter of Credit shall be renewed and/or replaced by the Corporation not less than 60 days prior to its expiration."

24. As per this Clause, the LOC shall be established and issued to the company (Respondent) on the date within 30 days prior to the commercial operation of the project. In the event of any amount due and payable by the corporation

(Appellant) is not paid in full as and when due, the LOC may be called by the company (Respondent) for payment of any unpaid tariff invoice or any other unpaid amount. It also provided in this clause that the Corporation (Appellant) shall replenish the LOC to bring it to the original amount within 30 days in case of any valid drawdown.

25. In the instant case, admittedly, neither the amount due were paid in time, nor the penal interest was paid as per clause 6.3 of the contract, nor the LOC was established within the stipulated time as per Clause 6.6 of the Contract.

26. In every Power Purchase Agreement (PPA), the opening of a LOC is a vital part of the contract. It is fundamental financial obligation cast upon the Appellant by the contract to honour the same. In other words, to open an LOC forms an integral part of the contract. It is, therefore, clear that there is a failure on the part of the Appellant to honour its obligation under the contract. When there is a

failure to fulfill the material and financial obligation, then clause 9.2.2 is attracted. This clause relates to the default committed by the Corporation (Appellant). Under this clause, the failure by the corporation (Appellant) to perform its material and financial obligation under this contract would constitute "an event of default" by the corporation (Appellant) as referred to in Clause 9.2.2.

Let us quote this clause:

> **"9.2.2** ***Corporation's 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:***
>
> ***Failure or refusal by Corporation to perform its financial and other material obligations under this Agreement*"**

27. Clause 9.3.2 provides that when there is an event of default on the part of the Corporation (Appellant) as provided in clause 9.2.2, the company, namely the

Respondent may deliver a Default Notice to the Corporation (Appellant) in writing, which shall specify the full details, indicating the event of default giving rise to the Default Notice. Through this Notice, the Respondent may call upon the Corporation (Appellant) to rectify the same within 30 days. On the expiry of 30 days from the delivery of this Default Notice, the Company (Respondent) may deliver a Notice of Termination to the Corporation (Appellant) unless in the meantime, the default has been rectified or remedied. Upon delivery of Termination Notice, the contract shall stand terminated. Clause 9.3.2 reads as under:

> **"9.3.2 Termination for Corporation's Default:** ***Upon the occurrence of an event of default as set out in sub-clause 9.2.2 above, the Company may deliver a Default Notice to Corporation in writing which shall specify in reasonable detail the Event of Default giving rise to the Default Notice, and calling upon Corporation to rectify the same.***

At the expiry of 30 (thirty) days from the delivery of the default notice and unless the parties have agreed otherwise, or the event of default giving rise to the Default Notice has been remedied, Company may deliver a Termination Notice to Corporation. Company may terminate the Agreement by delivering such a notice to Corporation and intimate the same to the Commission. Upon delivery of the Termination Notice this agreement shall stand terminated.

***Where a default notice has been issued with respect to an event of default which requires the cooperation of both Company and Corporation, to remedy, Company shall render all reasonable cooperation to enable the Event of Default to be remedied.*"**

28. As per this clause, the Respondent, has delivered a Default Notice dated 10.06.2009 to the Corporation, in

writing asking for rectifying the defaults. However, the Appellant has not set right the default but on the other hand, the Appellant sent a reply to the Respondent stating that there was no default and they would not be establishing LOC and, therefore, it is open to the Respondent to approach the High Court of Karnataka seeking for the required relief. Thus, it is clear that they have expressed their categorical stand in their reply dated 02.07.2009 that they would not rectify the same.

29. At this juncture, it would be worthwhile to refer to relevant portion of the details of the defaults given by the Respondent in its Default Notice dated 10.06.2009 for termination of the contract, as under:

> **" *The amount due for the excess power exported to KPTCL beyond 20 MWs by respondent company for the period March 2004 to July 2007 – Rs. 16,79,459/-.***
>
> ***The amount due for excess power exported from June 2005 to July 2007 to BESCOM – Rs. 1,24,61,526/-***

towards the excess energy beyond 20 MWs. And the amount of interest on the said amount of Rs. 1,24,61,526/- is Rs. 43,20,000/-.

The dues from KPTCL towards the interest on delayed payments for the period March, 2004 to June 2005 – Rs. 72,73,084/-.

The dues from BESCOM towards the interest on delayed payment for the period July 2005 to March 2008 – Rs. 9,86,064/- and

The dues from BESCOM towards the interest on delayed payment for the period January 2009 to March 2009 sum of Rs. 17,49,684/-.

Neither KPTCL nor BESCOM opened the Letter of Credit favouring the Respondent company as per the obligation under clause 6.6 of the PPA. In spite of several reminders, no steps have been taken to open the LOC. If these defaults are not cured within 30 days, the PPA dated 17.01.2002 and supplemental power purchase agreement dated 01.06.2005 shall stand terminated.

30. So, the above particulars would clearly indicate the details of the defaults committed by the Corporation (Appellant) with reference to non-payment of the dues in time and interest on delayed payment and also with reference to the failure to open the LOC have been mentioned. This letter clearly shows that the Corporation (Appellant) was required to rectify these defaults within 30 days or the Agreement will be terminated.

31. In response to the said notice dated 10.06.2009 sent by the Respondent company, the Corporation sent a reply dated 02.07.2009. The contents of the reply are as follows:

"a) As per Article 6.2 and 6.3, BESCOM has made in time payment of tariff invoice based on terms and condition of original PPA dated 17.01.2002 and supplemental agreement dated 09.06.2005, the statement showing the payment details up to 30.06.2009 is herewith enclosed for reference

Annexure-1. Due to cash crisis from March 09 to May 09, there is delay of very few days which comes within 60 days as defined in 6.5 of PPA. As such the payment of interest at SBI Prime Lending rate plus 2% per annum does not arise.

b) ***The tariff to be paid for excess generation over exportable capacity of 20 MW has not been defined in original PPA dated 17.01.2002 and Supplemental Agreement 09.06.2005. Your company has already filed a petition vide OP No. 40/06 before Hon'ble KERC. This matter will be considered only after final order from KERC since the matter is pending before separate judicial forum under article 10.***

c) ***Article 6 is towards billing and payment, which comprises sub-clauses. Article 6.1 to 6.7, Sub-clause 6.6 deals with establishing letter of credit.***

As per sub-clause 6.6(i) in the event of tariff invoice or any other amount due is not paid in full by corporation as and when due, the letter of credit may

be called for payment in full of unpaid tariff invoice or any such other unpaid amount. But after assigning the PPA to BESCOM, BESCOM is being making prompt and in time payment as per clause. As such establishing LOC, BESCOM has to bear bank charge like LOC negotiation charges, recoupment charges, Commitment charges etc., your company has to allow a rebate of 1.8% of tariff invoice amount or actual expenditure for the LOC account incurred whichever is lower and same will have to be deducted from the monthly tariff invoice.

Hence, non-establishment of LOC cannot be construed as a default and not liable for termination of PPA under clause 9.2.1(b)

If it is further disputed, you have approach the High Court of Karnataka for justification".

32. From the perusal of the Default Notice dated 10.06.2009 and the reply of the Appellant dated 02.07.2009, the following factors have emerged:

(1) The claim of the Respondent company, in so far as the delayed payment as well as the non-payment of interest, is admitted.

(2) Even though the cheques on the dates with the respective due dates were drawn, the said cheques were handed over to the Respondent company after much delay. This fact also is admitted.

(3) The dues from the Appellant towards interest on delayed payment for the period March 2004 to June 2005 is Rs. 1,00,34,612/-. Admittedly, this is not paid.

(4) The dues from the Appellant towards interest on delayed payment for the period from July 2005 to March 200 is Rs. 10,664,596/-. This is also not paid.

(5) The dues towards interest on delayed payment for the period Januar2009 to March 2009 is Rs. 17,49,684/-. This is also admittedly not paid.

(6) It has been categorically stated in the Default notice dated 10.6.2009 that the Letter of Credit has not been opened by the Appellant despite several reminders sent by the Respondent. The fact that several reminders have been sent to the Appellant insisting for opening of LOC as per the PPA has not been denied by the Appellant in its reply dated 02.07.2009.

(7) The failure to open LOC completely dislocates the obligation of the Corporation (Appellant). For these reasons, the Respondent company went on making representation to the Appellant insisting them to open the LOC, but there was no response.

33. In view of the stand taken by the Appellant through its reply dated 2.7.2009, the Respondent was constrained to

issue the Notice of Termination. Since the default continued, the Respondent company sent a Default Notice giving them the opportunity to cure the defaults. However, the Appellant refused to open the LOC resulting in a situation where the default is not cured. When the default is not cured, then the inevitable result would be the dissolution of the Agreement.

34. In view of the above discussion, the contention urged by the Learned Senior Counsel for the Appellant that the acts of omission committed by the Appellant cannot be construed to be defaults, giving rise to the cause action for the Respondent company to terminate the contract is misconceived and, therefore, the same is rejected.

35. Let us now come to the next issue relating to the waiver. According to the Learned Senior Counsel for the Appellant clause 12 of the PPA provides that if a party does not insist on a particular aspect of the contract for 3 years, he is deemed to have waived his right and in the present case

the PPA was entered into on 17.01.2002 and for 3 years opening of LOC was not insisted upon by the Respondent and this shows the Respondent had waived the same. It is also pointed out by the Learned Senior Counsel for the Appellant that earlier the Respondent filed an application in OP No. 14/07 before the State Commission for giving a direction to the Appellant to open the LOC but the same was subsequently withdrawn without pursuing the matter further and this also would show that Respondent has waived its right.

36. Before dealing with this contention, let us quote the decisions of the Hon'ble Supreme Court and various High Courts on the point of waiver:

1) ***P. Dasa Muni Reddy Vs. P. Appa Rao*** **(AIR 1974 SC 2089)**
2) ***Waman Shrinivas Kini s. Ratilal Bhagwandas & Co.*** **(AIR 1989 SC 689)**

3) ***Krishna Bahadur Vs. Puna Theatre and* Ohers (2004(8) SCC 229)**

4) ***Jagan Bandhu Chatterjee Vs. Smt. Nilima Rani & Ors.* (1970 (2) SC 925)**

5) ***Punjab & Sind Bank and Ors. Vs. Mohinder P:al Singh and Ors.*)AI 2006 SC 533)**

6) ***Sikkim Subba Association Vs. State of Sikkim* (2001 (5) SCC 629).**

37. In the above decisions, various principles have been laid down with regard to waiver which are as follows:

(1) Waiver is a matter of intention and can be either express or implied. Whether it is one or the other, it must be deliberate in the sense that the party waiving the right should after applying its mind to the matter decide to abandon the right. In order to hand over a waiver some positive act on the part of

the party which is supposed to have waived his right.

(2) Waiver is an intentional relinquishment of known right or advantage, abandoning claim or privilege, which except for such waiver, the party would have enjoyed. The waiver is a voluntary surrender of right. It implies the meeting of the minds. It is a matter of mutual intention. The essential element of waiver is that there must be a voluntary and intentional relinquishment of right.

(3) Whenever waiver is pleaded, it is for the parties claiming the same to show that an agreement waiving the right in consideration of some compromise came into being.

(4) Waiver actually requires two parties; one party waiving and the other party receiving the benefit of waiver. There can be waiver so intended by one

party and was sought by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. The waiver is a voluntary, conscious act which must be an affirmative act on its part. A mere omission to assert its right or insist upon its right cannot amount to a waiver or dispensation within the meaning of section 63 of the Indian Contract Act.

(5) A person cannot be said to have waived its right unless it is established that his conduct was such so as to enable the court to arrive at a conclusion that he did so with knowledge that he had a right but despite the same acted in such a manner which would imply that he has waived his right.

38. In the light of the above principles, we would analyse the point of waiver, taking into consideration the facts and circumstances of this case.

(1) The Respondent in the Default Notice dated 10.06.2009 as mentioned above, specifically stated that in spite of several reminders to the Appellant insisting for opening the revolving LOC, there was no response and since the material and financial obligation had not been complied with and the same would amount to default, the Respondent is authorized to terminate the PPA. It is very clear that the stand of the Respondent, as referred to in para 1 of the Default Notice dated 10.06.2009, is that several letters and reminders were sent to the Appellant insisting for opening of LOC but there was no response. Admittedly, this statement, namely sending of several reminders insisting for the opening of the LOC as mentioned in Default Notice dated 10.6.2009 sent by the

Respondent had not been denied by the Appellant in the reply dated 2.7.2009.

(2) The present stand taken by the Appellant with reference to waiver is a belated one as there is no whisper about the fact that the Respondent has waived its right in its reply dated 02.07.2009 to the Default Notice dated 10.06.2009. In fact, it is stated in the reply that in the absence of the LOC, the Appellant has made payments within the due dates in which case the Respondent should allow a rebate of Rs. 2,41,32,390/- and non-establishment of LOC cannot be construed as a default. Thus it is clear the Appellant not only did not dispute the statement of the Respondent in its Default Notice of 10.06.2009 stating that despite several reminders insisting for opening of LOC, there was no response, but also did not whisper anything about the waiver in its reply dated 02.07.2009. Only in the subsequent letter dated 22.07.2009,

for the first time, that too after receipt of Notice of Termination dated 8.7.2009 they raised the issue of waiver. Therefore, this belated stand cannot be accepted.

(3) It is submitted by the Appellant that the Respondent company earlier filed an application in OP No. 14/07 for giving a direction to the Appellant for opening of LOC and the same was withdrawn without pursuing and that this must be construed as a waiver. This submission also is misplaced since this is factually incorrect. The main prayer in OP No. 14/07 filed by the Respondent before the State Commission is seeking permission for open access. Incidentally it is mentioned in the OP No. 14/07 that the Corporation (Appellant) has not been establishing LOC and as such there is a failure to fulfill the material obligation, and on that ground the Respondent sought permission for sale of power

to the third parties. As such the main prayer by the Respondent in 14/07 was to direct the Appellant corporation to pay to the Respondent company tariff at the rate of Rs. 3.32 per unit and permit the company to resort to third party sale through open access. This Petition was withdrawn by the Respondent, since the main prayer became infructuous, in view of the fact that the Central Commission in OP No. 18/08 filed by the Respondent granted permission by the order dated 10.4.2008 to sell power through open access outside the PPA. Hence, this act of withdrawl of the Petition by the Respondent cannot be termed to be waiver.

(4) The Appellant's contention is that LOC was not insisted for 3 years from the date of the PPA as provided under clause 12.4 of PPA, it must be construed as a waiver. To consider this aspect, it is relevant again refer to clause 6.6 which refers to

the LOC. The relevant portion of the said clause is as follows:

"The Corporation shall establish and maintain transferable, assignable, irrevocable and unconditional revolving Letter of Credit in favour, and for sole benefit of the Company. This Letter of Credit shall be established in favour and issued to the Company on the date and made operational 30 days prior to the commercial date of the project and shall be maintained consistent herewith by the Corporation at any and all times during the term of the Agreement."

"Letter of Credit shall be renewed and replaced by the Corporation not less than 60 days prior to its expiration".

39. A reading of this clause of PPA would make it clear that it is a duty and obligation on the part of the

Corporation to open a LOC which may be invoked by the Company (Respondent) later. The LOC is a continuous obligation that must be renewed before it expires as per the PPA. Thus, it is not a one time obligation. Let us now look into the clause 12.4 of the PPA, which is quoted below:

> ***"Any failure on the part of the party to exercise and any delay in exercising exceeding 3 years, any right hereunder shall operate as a waiver thereto. No waiver by a party of any right hereunder with respect to any matter of default arising in connection with this Agreement shall be construed as a waiver with respect to any subsequent matter or default."***

40. The first para of this clause would show that it is a duty cast upon Appellant to open LOC and only then right to invoke the same would accrue to the Respondent. As per the latter portion, where there is a continuous obligation cast upon one party by the Agreement, the waiver of right would not absolve the other party to discharge its obligation

subsequently. From this clause it is clear that opening of a LOC is a continuous obligation to be discharged by the Appellant after the expiry of 30 days during all times of period of Agreement. Even otherwise, on the facts of this case, there cannot be any waiver of the said right for a continuous period of 3 years.

41. The PPA was entered into between the parties on 17.01.2002. Since there was a dispute between the parties, a termination letter was issued by the Appellant on the Respondent on 05.07.2003. Thereafter, in pursuance of the settlement arrived at between the parties, on 09.06.2005 a supplemental agreement was entered into between the parties. Admittedly, the commercial operation date was only after the supplemental PPA dated 09.06.2005. Therefore, the question of waiving the right after 3 years would not arise in this case.

42. As held by the Hon'ble Supreme Court to plead waiver, a distinct act, intention and knowledge are necessary. But in this case there is no material to show that the Respondent by its conduct, consciously, voluntarily and deliberately relinquished or waived the right. On the other hand, the Respondent time and again urged and insisted for opening of the LOC, as mentioned in its Default Notice dated 10.6.2009. Therefore this contention would fail.

43. Let us now come to the last issue. According to the Leaned Senior Counsel for the Appellant, the Default Notice was served on 12.06.2009 giving 30 days time to rectify the default, but, the Notice of Termination was issued on and served upon the Appellant on 08.07.2009 itself i.e. even before the expiry of 30 days and therefore the Notice of Termination is invalid.

44. Admittedly, this point has never been raised either before the Commission or in the Appeal grounds. Only

when the arguments were advanced by the Learned Senior Counsel for the Appellant, this was raised. He also sought permission to file a petition raising this as additional ground. Accordingly he filed the petition raising this ground. The Learned Senior Counsel for the Respondent objected to the raising of this point on the ground that this had never been raised before the Commission and as such it cannot be allowed to be raised before this Tribunal. In reply to this, the Learned Senior Counsel for the Appellant submitted that this being a pure question of law arising from admitted facts, this could be raised at any stage. He also cited some judgments of the Hon'ble Supreme Court in support of his plea and requested this Tribunal to consider the same.

AIR 1977 SC 5 Gurucharan Singh Vs Kamala Singh (para 11).
AIR 1992 SC 932 State of UP V/s Anupam Gupta (para 10).
AIR 1999 SC 647 State of Punjab V/s R.N. Bhatnagar (para 16) (1994) Supp.(3) SCC 738 Swamy Rathan Babu V/s Vaman Rao Shankar Rao Deshmukh (para 6).

45. Accordingly, we have considered this aspect also. There is no dispute in the fact that in the Default Notice dated 10.06.2009 it has been clearly stated that if default as indicated through the details of the Default Notice has not been rectified within 30 days, his contract will be terminated. According to the Appellant the Default Notice was served on 12.06.2009 and as such the 30 days period would expire only on 12.07.2009 but the issuance of Notice of Termination on 08.07.2009 itself even before expiry of 30 days would make the Notice of Termination invalid in law.

46. While considering this question, it would be necessary to take notice of relevant other facts. The Default Notice was served on the Appellant on 10.06.2009. Through the Default Notice the Appellant was asked to rectify the default within 30 days or else the contract will be terminated. The object of giving 30 days time is to give opportunity to the defaulting party to remedy the default complained within the said period. But in the present case the Appellant corporation on

receipt of default notice sent a reply dated 02.07.2009 itself to the Termination Notice, stating that they would not rectify the default as there was no default and as such it is open to the Respondents to approach the High Court of Karnataka for adjudication, thereby meaning that they would not entertain any further claims in this regard and the matter would have to be resolved only through process of court.

47. It is not the case of the Appellant corporation that if they were given exact 30 days time, they would have remedied the default within the said period of time. Even after the expiry of 30 days time, that too after receipt of the Notice of Termination dated 08.07.2009, the Appellant corporation sent another reply letter dated 22.07.2009 reiterating that they would not rectify the default. From this it is clear that the Appellant was never ready to rectify the defaults pointed out by the Respondent in their Default

Notice either before expiry of 30 days or even after the expiry of 30 days.

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

49. Our conclusions are as follows:-

i) In the instant case, there is a consistent and continuous failure to make the payment within 15 days. This would

certainly amount to breach of contractual obligation. Merely because the payment is made belatedly could not be considered to be the compliance of Clause 6 (1) & (2) of the PPA. The penal interest is also payable for late payment under Clause 6.3. Admittedly, the penal interest has never been paid. This is again a breach of obligation. There is one more breach under Clause 6.6. Under this clause the Corporation shall establish and maintain the revolving Letter of Credit in favour of the Respondent. Admittedly, this also not has been established. When there is a failure to fulfill the material and financial obligations this would amount to the "Event of default" as per Clause 9.2.2. In view of this the Respondent Company is entitled to send a Default Notice asking the Appellant to cure the said defect within time permitted. In the absence of the compliance to cure the defaults pointed out in the Default Notice, the Respondent is entitled to issue the Notice of Termination of Contract.

ii) The plea of the waiver which has been belatedly raised by the Appellant, has not been established in this case. As held by the Hon'ble Supreme Court when the party pleads the waiver, it is the said party who has to establish that the other party has waived his claim. In this case, it is not established by the Appellant by producing any material to show that the Respondent by its conduct, consciously or belatedly relinquished its right. On the other hand, the Respondent time and again urged and insisted for opening of LOC. As such, there is no waiver.

iii) It is true that though the Default Notice dated 10.6.2009 gives 30 days time to rectify the default, the notice of termination was issued and served on 8.7.2009 even before the expiry of 30.6.2009. This would not make the Notice of Termination invalid because the Appellant on receipt of Default Notice dated 10.6.2009 sent the reply dated 2.7.2009 itself stating that they would not rectify the defect and the Respondent may approach the High Court for adjudication and for necessary relief. Thus, it is clear

that even before the expiry of 30 days the stipulated time for rectification of defect, the Appellant has expressed its unwillingness to rectify those defects in the reply dated 2.7.2009. It is not the case of the Appellant that if they were given 30 days time they would have removed those faults within the said period. Further, the Appellant has never complained that due to the issuance of Notice of Termination even before the expiry of 30 days any prejudice has been caused to them. Therefore, the issuance of Notice of Termination of 8.7.2009 itself would not make the Notice of Termination invalid.

50. In view of the conclusions, referred to above, we find that there is no merit in the Appeal. Appeal is dismissed. There is no order as to cost.

(H.L. Bajaj)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: May, 2010
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