

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

**A.No.112/08 & IA No. 148/08, A.No.113/08 & IA No.149/08,
A. No.114/08 & IA No.150/08 & A.No.122/08 & IA No.153/08**

Dated : 24th October, 2008

**Coram : Hon'ble Mrs. Justice Manju Goel, Judicial Member
Hon'ble Mr. A. A. Khan, Technical Member**

Appeal No. 112/08 & IA No. 148/08:

M/s. Vishwanath Sugars Ltd.
Bellad Bagewadi,
Belgaum – 591 305

... appellant

Vs.

1. Karnataka Power Transmission Corp. Ltd.
Cauvery Bhavan,
K. G. Road,
Bangalore – 560 009

2. Hubli Electricity Supply Co. Ltd.
Navanagar,
Hubli, Dt. Dharawad – 580 029

... Respondents

Appeal No. 113/08 & IA No. 149/08:

Doodhganga Krishna Sahakari
Sakkare Karkhane Niyamit
Chikkodi,
Dt. Belgaum

...appellant

Vs.

1. Karnataka Power Transmission Corp. Ltd.
Cauvery Bhavan,
K. G. Road,
Bangalore – 560 009

2. Hubli Electricity Supply Co. Ltd.
Navanagar,
Hubli, Dt. Dharawad – 580 029

... Respondents

A. No. 114/08 & IA No. 150/08:

M/s. Ugar Sugar Works Ltd.,
317, 14th Cross,
9th Main, Jayanagar,
Bangalore – 560 011

... appellant

Vs.

1. Karnataka Power Transmission Corp. Ltd.
Cauvery Bhavan,
K. G. Road,
Bangalore – 560 009

2. Hubli Electricity Supply Co. Ltd.
Navanagar,
Hubli, Dt. Dharawad – 580 029

... Respondents

A. No. 122/08 & IA No. 153/08:

Tata Power Trading Co. Ltd.
Corporate Centre, Block A,
Sant Tukaram Road,
Carnac Bunder,
Mumbai – 400 009

... appellant

Versus

1. Karnataka Power Transmission Corp. Ltd.
Cauvery Bhavan,
K. G. Road,
Bangalore – 560 009
2. Hubli Electricity Supply Co. Ltd.
Navanagar,
Hubli, Dt. Dharawad – 580 029 ... Respondents
3. Karnataka Electricity Regulatory Commission
6th & 7th Floor,
Mahalaxmi Chambers,
9/2, M. G. Road,
Bangalore – 560 001 ... Respondent

Counsel for the appellant(s) : Mr. Prabhuling Navadgi and
Mr. Sharan Thakur

Counsel for the Respondent(s) : Mr. M. G. Ramachandran,
Mr. Anand K. Ganesan and
Ms. Swapna Seshadri

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

This judgment is to decide four appeals being Appeals No. 112, 113, 114, 122 of 2008.

2) The facts of the case are identical except for certain details. For the purpose of writing the orders we take up the facts in appeal

No. 114/08 which is directed against the order dated 04.09.08 passed in Petition No. 9 & 10 of 2008. The other appeals are filed against the same order passed in Petitions No. 7, 8, 11 & 12.

3) M/s Ugar Sugar Works Ltd., the appellant in Appeal No. 114 of 2008, entered into a PPA in respect of its 28 MW co-generation plant at Ugar Khurd with Karnataka Electricity Board on 07.01.98. Subsequently, on 03.04.02 on the capacity being expanded and KPTCL having succeeded to the KEB a fresh agreement was entered into on 03.04.02 for a period of 20 years. One of the clauses in the agreement was that in the event of payment default by the Corporation (KPTCL) for a continuous period of 03 months, the appellant would be permitted to sell power to third parties. The tariff was fixed at Rs.2.25 per unit with an escalation of 5% till 24.04.06 whereafter the tariff was to be negotiated and in case of disagreement the power could be sold to third parties. On the introduction of the Electricity Act 2003 in the State of Karnataka with effect from 01st June, 2004, KPTCL was unbundled on account of which distribution network was assigned to five newly incorporated companies viz., HESCOM, BESCOM, GESCOM, MESCOM & CESVOM while transmission activities were retained by KPTCL.

4) The PPA between the appellant and KPTCL was assigned in favour of HESCOM (Hubli Electricity Supply Co. Ltd.) The assignment in favour of HESCOM was intimated to the appellant vide a letter dated 10.06.05. The supplemental tripartite agreement was entered into on 01.06.06 between the appellant, HESCOM and KPTCL in which the base tariff was fixed at Rs.3.32 per kWh which was to escalate to Rs.3.586 by 24.04.06 with a similar clause that after 25.04.06 the tariff had to be renegotiated with option to sell power to third parties in case of absence of an agreed tariff. However, on account failure on part of HESCOM to pay the dues, the appellant became entitled to sell power to third parties. The appellant entered into an agreement with Tata Power Trading Co. Ltd. (TPTCL for short) on 16.10.06, for the period ending 14.11.08. The factum of this agreement was duly intimated to HESCOM and KPTCL. With effect from the date of the agreement power was diverted to TPTCL. TPTCL filed applications for open access with State Load Despatch Center (SLDC) and open access was allowed with the consent of KPTCL as well as Powergrid Corporation of India Ltd. on 25.10.06, 11.11.06, 19.10.06 and so on for facilitating evacuation for the months of October and November, 2006. Subsequently when TPTCL made application on 07.11.07 for open access, it was informed on 31.08.07 by the Powergrid Corporation of India Ltd. that open access could not be allowed on account of absence of consent from KPTCL. The Chief Engineer of SLDC

observed in an endorsement “*since area distribution company HESCOM is having PPA with the generating company, it wanted to avail power and requested not to grant the open access, the consent for above transmission not being given.*” HESCOM claims to have paid the dues to the extent of Rs.1,25,22,901/- although the appellant claims that full payment has still not been made. The appellant and TPTCL filed an application under section 79 before the Central Electricity Regulatory Commission (CERC for short) being Petition No. 114 of 2007 alleging that refusal to grant open access was contrary to rules under the provisions of the Electricity Act 2003. The CERC vide an order dated 03.12.07 disposed of the application holding that the refusal to grant open access was illegal and contrary to law. Similar applications filed by Vishwanath Sugar Mills & Shree Doodhganga Krishna Sahakari Sakkare Karhane Niyamit, Chikkodi, appellant in appeal Nos. 112/08 & 113/08 respectively also disposed of by the same order. HESCOM preferred an appeal, being appeal No.6 of 2008, against the order dated 03.12.07 by which the three similar petitions were disposed of. This Tribunal passed a consent order to the effect that the HESCOM could approach KERC for matters relating to rights and obligations of the parties under the PPA and could seek interim order to the supply of power to the HESCOM and that the order of CERC dated 03.12.07 could not be interfered with. The open access

arrangements between the parties were allowed to be continued meanwhile.

5) On 30.06.08, a petition was filed by HESCOM praying that Karnataka Electricity Regulatory Commission (KERC for short) declare that the appellant was bound to fulfill its obligations of selling power to them and restrict the appellant to sell the power to third parties and also claiming a sum of Rs.10723.08 as damages. HESCOM also asked for an ex-parte interim order. The appellant alleges that the Secretary of the Commission issued notice on 21.08.08 directing the parties to appear before the Commission on 04.09.08 for a preliminary hearing. Appeal papers had been received by the appellant on 24.08.08. On 04.09.07 the appellant requested the Commission for time to file their objections to the petition. The Commission passed an impugned order which is brief and is required to be reproduced in extenso for further discussion in the matter:

“Heard the petitioner. Counsel for the respondent is present but wants to file objections. Pending final disposal of this petition, it is ordered that the respondent shall sell all the power generated by it to the petitioner in terms of the existing PPA and respondent shall make the prompt payments as provided in PPA. In other words, the

respondent is not eligible to make third party sales during the pendency of this petition.

Posted further for objections, arguments to 23.10.2008.”

Similar orders were framed on the same day on the applications preferred against the other generating companies' viz. M/s. Vishwanath Sugars Ltd. & M/s. Doodhganga Krishna Sahakari Sakkare Karkhane Niyamit.

6) The order is challenged, inter alia, on the grounds that the order is violative of principles of natural justice that the TPTCL should have been a party before the Commission before the order affecting their rights could be passed and that the order was illegal in as much as ex-parte mandatory injunction could not have been passed without recording reasons.

7) A counter affidavit is filed by respondent No.2, HESCOM. In the counter it is contended that a PPA between the appellant and the HESCOM were never terminated, that HESCOM had in fact cured the default by making all outstanding dues which was noted while entering into supplementary agreement dated 07.08.07 that the appellant on account of payment default could sell power to third parties for temporary periods i.e. the period for which

wheeling agreement had been entered into or for the period short term open access had been applied for during the continuance of the default, that TPTCL has no locus standi to be a party in the matter initiated by HESCOM, that the impugned order was not an ex-parte order in as much as it was passed in the presence of the appellant and after a notice had been issued by Secretary of the Commission, that the Commission had jurisdiction to pass an interim order, that the appellant had been committing a breach of the PPA and making unlawful gains by selling power to third party at higher price while HESCOM was facing difficulties in view of scarcity of energy available in the country and was being forced to buy power at higher price, that the action of the appellant in not supplying power to HESCOM was in breach of terms of PPA and that in these circumstances the Commission was justified in passing a mandatory injunction.

8) We have heard the two sides. On behalf of the respondent effort has been made to justify the order of an interim mandatory injunction on the merit of the entire case. However, the impugned order before us is only an interim order and therefore the scope of the present appeal is limited to the extent of examining whether by way of an interim order the impugned order could have been passed.

9) The impugned order is not an ex-parte order in the sense it is generally understood. Nonetheless it remains a fact that the respondent was not given an opportunity of being heard before the impugned order was passed. HESCOM alone was heard, which could be seen from the order reproduced above, in paragraph 5. The appellant wanted time to file a reply. There is no mention in the order that the respondent (appellant herein) was even heard in respect of the contemplated reply. The order that has been passed is in the nature of a mandatory injunction and by the order the entire relief claimed by HESCOM in their petition has been granted. An injunction is an equitable relief. The ad interim injunction which is provided for in order 39 of the Civil Procedure Code is a discretionary relief and has to be exercised with caution. The add interim mandatory injunction is quite an extra ordinary relief and cannot be allowed unless the circumstances are extra ordinary and unless the suit may become infructuous if such relief is refused. Granting of such an interim injunction even without according an opportunity to the respondent of being heard is an order which is harsh and can be approved of only in very extra ordinary unusual and pressing circumstances.

10) The age old principles governing grant of injunction has been stated afresh by the Supreme Court in the case of *Morgan Stanley*

Mutual Fund Vs Kartick Das (1994) 4 SCC 225 in which in paragraph 36 the Supreme Court restated the principles as under:

“36. As a principle, ex parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the court in the grant of ex parte injunction are-

- (a) whether irreparable or serious mischief will ensue to the plaintiff;*
- (b) whether the refusal of ex parte injunction would involved greater injustice than the grant of it would involve;*
- (c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;*
- (d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;*

- (e) *the court would expect a party applying for ex parte injunction to show utmost good faith in making the application.*
- (f) *Even if granted, the ex parte injunction would be for a limited period of time.*
- (g) *General principles like prima facie case, balance of convenience and irreparable loss would also be considered by the court.”*

The Supreme Court further proceeded to say that whenever an ex-parte injunction was passed the court was required to record reasons for passing such an injunction.

11) In (2006) 3 SCC 312 the Supreme Court again reiterated the age old caution to be exercised by a court before passing an interim mandatory injunction.

“6. *An interim mandatory injunction is not a remedy that is easily granted. It is an order that is passed only in circumstances which are clear and the prima facie materials clearly justify a finding that the status quo has been altered by one of the parties to the litigation*

and the interests of justice demanded that the status quo ante be restored by way of an interim mandatory injunction. Keeping this principle in mind, it is necessary to see whether in the case on hand, the Additional District Judge was justified in passing the interim order of injunction.”

12) The Supreme Court quoted some of the English judgments with approval in the case of *Dorab Cawasji Warden v. Coomi Sorab Warden & Others* (1990) 2 SCC 117 and it will be sufficient to refer only to one such case namely *Shepherd Homes Ltd. V. Sandham* (1970) 3 All England Reporter in which it was said as under:

“(iii) On motion, as contrasted with the trial, the court was far more reluctant to grant a mandatory injunction; in a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this was a higher standard than was required for a prohibitory injunction.”

13) In the matter before us the salient features of the impugned order are as under:

- “(i) the respondent (the appellant herein) who was present on a short notice for preliminary hearing was not heard,*
- (ii) the respondent (the appellant herein) wanted time to file a reply and the impugned order was passed without giving the respondent such an opportunity,*
- (iii) even assuming that the petitioner before the Commission could make out the prima facie case there was no material before the Commission, in the absence of the response of the appellant herein, to weigh the balance of convenience.*
- (iv) The loss shown was only monetary loss and such a loss could have been quantified and could not have been said to be irreparable.*
- (v) No reason for granting the extra ordinary equitable relief of ad interim mandatory injunction even without hearing the respondent (the appellant herein) has been given.”*

Each of these salient features runs contrary to the principles enunciated above.

14) It may be quite possible that on full hearing of the two parties on the basis of their respective pleadings, affidavit, documents, oral

and supplemental evidence and the circumstance of the case a mandatory order of this kind may be fully justified. However, we are unable to persuade ourselves to approve of the impugned order which has been passed in the aforesaid circumstances.

15) We further say that HESCOM and other distribution companies which are parties in other appeals, themselves had defaulted in making payment forcing the appellant to enter into a PPA with TPTCL. The agreement had been entered into for a period of two years and due intimation has been given to KPTCL and HESCOM. At that point of time neither KPTCL nor the HESCOM challenged the new agreement entered into. Although it is true that the appellant did not terminate the PPAs with KPTCL and the HESCOM before entering into the PPA with TPTCL, it is equally true that KPTCL and the HESCOM did not ask for specific performance of the PPA by offering to pay the price which was due. It was long after TPTCL had started purchasing power from the appellant and had obtained open access for the purpose of evacuating power from the generating station of the appellant that HESCOM paid its dues (ignoring alleged short fall in the payment). The moot question to consider in this situation would be whether the respondents had become entitled to the extra ordinary equitable relief of interim mandatory injunction. There is nothing to show that the

Commission has either examined this aspect at all while passing the impugned order.

16) In view of the above discussion, we allow the appeal and set aside the impugned orders.

17) The IA Nos. 148/08, 149/08, 150/08 & 153/08, which pray for interim stay stand disposed of hereby.

Pronounced in open court on this **24th day of October, 2008.**

(A. A. Khan)
Technical Member

(Justice Manju Goel)
Judicial Member