REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 5084-5085 OF 2015

RITHWIK ENERGY GENERATION PVT. LTD. …APPELLANT

VERSUS

BANGALORE ELECTRICITY SUPPLY CO. LTD.
& ORS. ETC. …RESPONDENTS

J U D G M E N T

R.F. Nariman, J.

1) The present appeals are filed by the appellant - a Generating Company, which entered into an Agreement dated 26.09.2006, with the Government of Karnataka for setting up a 24.75 MW mini hydro-electric power plant in a certain District in Karnataka. On 03.05.2007, the appellant and Respondent No.1 signed a Power Purchase Agreement (for short 'the PPA'). Pursuant to the Clauses of the PPA, Respondent No.1 sent the PPA to the State Commission for its approval. On 06.06.2007, the State Commission did not accord its approval to the PPA

and returned the same on the ground that Respondent No.1's quota of 10% under the Karnataka Regulations of 2004 had already been exhausted from other sources.

2) Meanwhile, on 26.07.2008, the appellant entered into another PPA with PTC India Limited for sale of electricity and sought the Commission's approval for supply to PTC under the Open Access provisions of the Electricity Act. On 31.08.2009, the appellant filed O.P. No. 29 of 2009 before the State Commission seeking a declaration that no valid PPA subsisted between the appellant and Respondent No.1, as a result of which it was open to the appellant to enter into another PPA and supply electricity under the Open Access system.

3) On 23.12.2010, the State Commission dismissed the appellant's O.P. holding that the return of the PPA did not tantamount to rejection, and this non-grant of approval, therefore, did not invalidate the PPA between the parties. An Appeal was preferred before the Appellate Tribunal, during the pendency of which a letter dated 05.05.2011 was sent by the appellant to Respondent No.1. As a great deal turns upon the effect of this letter, the relevant paragraphs are set out herein below:-

The letter begins with “WITHOUT PREJUDICE” and has as its Subject - “Permission to sell Power to Third Parties”. The letter then goes on to state that on the assumption that the PPA is valid, which is pending appeal before the Appellate Tribunal, the appellant wishes to bring to the attention of Respondent No.1 three specific defaults in the obligations undertaken by Respondent No.1 under the PPA. The defaults related to default in making payments for the Power Bills within 15 days of submission; default in payment of interest; and default in opening a Letter of Credit. The letter further goes on to state:

“Thus, BESCOM defaulted in its financial and material obligations, that too for over a continuous period of three months.

There, BESCOM shall permit, in terms of Article 9.2.2. of the disputed PPA, our Company to sell power from the Project to third parties and for entering into Wheeling and Banking Agreement with it.

So we request you to confirm that you will permit us to sell the power to third to pay the applicable charges.”

4) On 21.10.2011, the Appellate Tribunal dismissed the appeal filed by the appellant. On the two issues that were raised before the State Commission, the Appellate Tribunal found in favour of Respondent No.1 and was in complete agreement with the findings of the State Commission. However, the Appellate Tribunal then went on to advert to an affidavit that was filed before the Appellate Tribunal seeking to bring on record certain subsequent events as being material for decision of the appeal. And these subsequent events were sought to be brought on record by the appellant itself. After a contest on whether these events ought to be brought on record, Respondent No.1 stating that this is a new case not permissible in appeal, the Appellate Tribunal turned down the plea of Respondent No.1 and felt that it was important to examine the subsequent events on merits. It then referred to certain provisions of the PPA and, in particular, Clause 9.3.2 which deals with termination for default of Respondent No.1, and then went on to hold as follows:

> "12.12. Thus, for termination of the PPA, in the event of payment default for a continuous period of three months, the appellant has to deliver a Default Notice to the second respondent in writing

> calling upon it to remedy the same. After expiry of 30 days from delivery of notice unless the parties have agreed otherwise or the event of default has been remedied, the appellant can deliver a Termination Notice to the second respondent under intimation to the State Commission. Upon delivery of the Termination Notice, the PPA shall stand terminated.
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> Xxx xxx xxx
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> 12.13 Admittedly, no notice to remedy the default or termination notice has been served by the appellant on the respondent distribution licensee, only a letter dated 5.5.2011 about payment default and seeking permission to third parties in terms of Article 9.2.2. was sent to the respondent distribution licensee on 19.5.2011 after the interim order of the Tribunal dated 18.5.2011"

5) On 11.05.2012, since according to the appellant, Respondent No.1 did not remedy the default in payment of interest despite the expiry of 30 days period from the date of the notice dated 05.05.2011 and also from the expiry of a further period of 30 days granted by the Appellate Tribunal, the appellant purported to terminate the PPA. The letter of 11.05.2012 specifically referred to and relied upon the notice

dated 05.05.2011 and referred to it in para 9 thereof as a default notice that was issued subsequent to which, defaults as mentioned therein, were not cured and that therefore, exercising their rights under Clause 9.3.2 of the PPA, a termination notice was then issued. It needs only to be mentioned that on 29.05.2012, in reply to the "without prejudice" part of the 11.05.2012 notice to pay interest, in any case, within 30 days from the said notice, Respondent No.1 paid a sum of Rs. 3.22 lakhs as interest. On 14.08.2012, it also substituted the earlier Letter of Credit that was opened and opened a Letter of Credit for an amount that was in accordance with the PPA, as was contended by the appellant.

6) Thereafter, on 21.02.2013, Respondent No.1 filed O.P. No. 6 of 2013 before the State Commission for a declaration that the termination of the PPA by the appellant was invalid.

7) By an order dated 09.05.2013, the Central Commission first asked the petitioner i.e. the appellant herein to approach the State Commission for adjudication of the dispute regarding subsistence or otherwise of the PPA after the termination notice dated 11.05.2012.

8) On 17.10.2013, Respondent No.1's O.P. No. 6 of 2013 was allowed by the State Commission, relying strongly on the observations of the Appellate Tribunal in its judgment dated 21.10.2011, which have been extracted above, to say that the notice dated 05.05.2011 was not a default notice or could not be said to be a default notice under Clause 9.3.2 of the PPA and that this being so, it is clear that the subsequent notice of termination based upon the 05.05.2011 notice being a default notice could not be said to be valid in law. It thus allowed the O.P. filed by Respondent No.1 and held the termination of the PPA to be invalid.

9) In appeals filed against both the 09.05.2013 order and the 17.10.2013 order, the Appellate Tribunal dismissed the appeals of the appellant, again relying upon the Appellate Tribunal's judgment dated 21.10.2011 in stating that the alleged notice dated 05.05.2011, not being in conformity with Clause 9.3.2 of the PPA, could not be said to be a default notice and that, therefore, any termination notice issued thereafter is also invalid. It also ultimately found, as a matter of fact, that so far as the Letter of Credit was concerned, since the appellant had not gone to the State Commission to remedy the same, it did

not find any fault with the State Commission's orders and ultimately after summarizing its findings, dismissed both the appeals.

10) Mr. Dhruv Mehta, learned Senior Advocate, appearing on behalf of the appellant has raised three points before us. According to him, the finding based on the letter of 05.05.2011 by the Appellate Tribunal in its judgment dated 21.10.2011 was not on a matter directly and substantially in issue, but being merely collateral, could not be said to be *res judicata*. He next argued that, in any case, the notice dated 05.05.2011 was a notice, which substantially conformed to Clause 9.3.2 of the PPA, and, therefore, ought to have been held as a default notice. This being so, the termination notice dated 11.05.2012 was valid in law and, therefore, the judgments of the State Commission as well the Appellate Tribunal are incorrect on this score. He cited certain judgments, which will be dealt with by us. He also argued that despite the relevant period under the PPA having long elapsed, defaults continued and were remedied long after the period so stated.

11) Ms. Pratiksha Mishra, learned counsel appearing for the respondent(s), on the other hand, first argued that Mr. Mehta's

client ought to be estopped from taking the plea that there was no *res judicata* in the instant case, and it is the appellant itself that filed an affidavit before the Appellate Tribunal and called for a finding on subsequent events which, according to the appellant, was important for determination of the issue at hand. She also adverted to the relevant portions of the judgment of the Appellate Tribunal dated 21.10.2011, and stated that, in any case, it was correct in law. So far as the opening of the Letter of Credit was concerned, it was her case that a Letter of Credit was opened and there was, therefore, no default. Only the amount for which it was opened being lower than what the PPA required, when such default was pointed out, rectification followed and the Letter of Credit as it stands after 14.08.2012 is opened in accordance with the PPA.

12) Having heard the learned counsel appearing for the parties, we are of the view that there is no doubt whatsoever that the appellant itself invited the Appellate Tribunal to go into a subsequent event, which, according to it, was of extreme importance in deciding the appeal. This being the case, it is clear that, after contest, and after the Appellate Tribunal held in favour of the appellant that such subsequent event is indeed

important and will be decided by the Tribunal, and then suffering a finding which was found, on merits, to be against it, we are of the view that the appellant is clearly estopped from attempting to argue now that the very important issue raised by way of subsequent events according to the appellant itself should be held, as a matter of law, to be only a collateral issue and therefore, not *res judicata.*

13) In ***Pasupuleti Venkateswarlu*** vs. ***The Motor & General Traders***, [1975] 3 S.C.R. 958, this Court adverted to the cautious taking into account of events that arise subsequent to the filing of a petition. Krishna Iyer, J., in the aforesaid decision, stated:

> "We feel the submissions devoid of substance. First about the jurisdiction and propriety vis a vis circumstances which come into being subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the *lis* has come to court and has a fundamental impact on the right to relief

> or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice-subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myraid. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceedings provided the rules of fairness to both sides are scrupulously obeyed."

It is clear therefore, that once a Court or Tribunal decides to

look into a subsequent event at the behest of any of the parties, the Court itself thinks that it is important to do so, otherwise it would not look into such subsequent event.

14) In ***Sajjadanashin Sayed Md. B.E. EDR. (D) by LRs***. vs. ***Musa Dadabhai Ummer and Others***, (2000) 3 SCC 350, one of the issues that arose for consideration was what exactly is an issue which is directly and substantially in issue, as opposed to being collaterally and incidentally in issue. After referring to various authorities, both English and American, this Court ultimately referred to and relied upon Mulla's Civil Procedure Code (15th Edition) in which two tests were set out. One test is that if the issue was "necessary" to be decided for adjudicating on the principal issue, and was decided, it would be treated as directly and substantially in issue as the judgment was, in fact, based upon such a decision. The other principle is that the issue must be decided on the facts of each case, the material test to be applied being whether the Court considers the adjudication of the said issue material and essential for its decision.

15) As seen from the Appellate Tribunal's judgment dated 21.10.2011, not only did the appellant considered the

subsequent event as directly and substantially in issue for deciding the appeal, which incidentally was not opposed by Respondent No.1 on this ground but on the ground that it would be bringing in a new issue at the stage of appeal, but the Appellate Tribunal having turned down the Respondent No.1's plea, and having examined subsequent events, it cannot but be said that the Appellate Tribunal itself considered the issue No.3 raised by it, based on subsequent events brought to its notice, as being directly and immediately in issue. On this ground also, therefore, we are of the view that, apart from the appellant being estopped in law from raising such a plea, the plea itself has no legs to stand down.

16) We now come to the other main plank of Mr. Mehta's submission. Mr. Mehta read to us Clause 9.3.2 of the PPA and contended that the letter dated 05.05.2011 substantially complied with the requirements of the said clause and should be treated to be a notice of default under the said clause. To appreciate this plea, Clause 9.3.2 of the PPA needs to be set out:

> "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, Company may deliver a Default Notice to the Corporation in writing which shall specify in reasonable detail the Event of Default giving rise to the default notice, and calling upon the BESCOM to remedy the same.
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> At the expiry of 30 (thirty) days from the delivery of this default notice and unless the Parties have agreed otherwise or the Event of Default giving rise to the Default Notice has been remedied, Company may deliver a Termination Notice to Corporation. Company may terminate this Agreement by delivering such a Termination Notice to Corporation and intimate the same to the Commission. Upon delivery of the Termination Notice this Agreement shall stand terminated.
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> Where a Default Notice has been issued with respect to an Event of Default which requires the co-operative of both BESCOM and the Company to remedy, BESCOM shall render all reasonable cooperation to enable the Event of Default to be remedied."

A reading of this clause would show that upon occurrence of an event of default, a default notice may be served to the Corporation in writing. The requirements of the aforesaid notice are two fold – (1) to specify in reasonable detail the event of

default giving rise to the notice, and (2) calling upon Respondent No.1 to remedy the same within a period of 30 days from the delivery of the default notice unless the parties have agreed otherwise. It is only then that the Company may deliver a termination notice to the Corporation.

17) On a perusal of the letter dated 05.05.2011, what is clear is that the letter speaks only of events of default, but does not call upon Respondent No.1 to remedy the same within the period specified. This, according to Mr. Mehta, is in any event substantial compliance with the aforesaid clause. We cannot agree. Both parts of Clause 9.3.2 are important - one specifying in reasonable detail the event of default and the second, calling upon Respondent No.1 to remedy the same within a period of 30 days. It is also important to note that the parties may otherwise agree, in which case the Respondent No.1 may remedy the defaults mentioned in the notice either before or after the expiry of 30 days period laid down, showing that the parties considered that this part of Clause 9.3.2 is as important as the first part, for otherwise, a termination notice could, *de hors* the second part of Clause 9.3.2 have issued straight away without more. This being the case, we are unable

to agree with Mr. Mehta's submission that there has been substantial compliance of Clause 9.3.2 of the PPA.

18) Mr. Mehta cited three judgments before us to persuade us that the letter dated 05.05.2011 substantially complied with Clause 9.3.2 of the PPA.

19) In ***Nani Gopal Biswas*** vs. ***The Municipality of Howrah***, [1958 S.C.R. 774, this Court was concerned with a notice issued under Section 299 of the Calcutta Municipal Act, 1923. Since Section 300 of the Municipal Act was attracted to the facts of the case and not Section 299, this Court held that even though the notice may be headed as being under Section 299 of the Act, it would make no difference as, in substance, the effective part of the notice leaves no doubt in the minds of the parties concerned that the requisition is to remove an encroachment caused by a compound wall which is a structure which falls within Section 300. This case is wholly distinguishable inasmuch as all that was required by Section 300 of the Calcutta Municipal Act was the fact that a compound wall was an encroachment. This was clearly stated in the notice, and the fact that it was stated to be under a wrong provision of law would, therefore, make no difference to the

substance of the notice.

20) Similarly, in ***Thakur Pratap Singh*** vs. ***Shri Krishna Gupta and Others***, [1955] 2 S.C.R. 1029, this Court dealt with the filling up of a nomination paper in order to stand for the office of President of a Municipal Committee. Here again, this Court held that the fact that the word “occupation” in the form was either struck out or left blank would make no difference since a man’s occupation is not one of the qualifications for the office of President. It was, therefore, held that this part of the form was only directory, and is part of the description of the candidate, but does not go to the root of the matter, so long as there is enough material in the paper to enable him to be identified beyond doubt. This judgment again is wholly distinguishable on facts in that, as has been found by us above, the part of Clause 9.3.2 relating to calling upon Respondent No.1 to remedy defaults within a period of 30 days unless otherwise agreed is as important as the events of default that have been stated to have taken place. Substantial compliance, therefore, can be no answer to such a mandatory requirement.

21) It is unnecessary for us to pronounce on any further aspect, including the aspect of late payment and late opening of Letter of Credit. We are of the view that the Appellate Tribunal in the impugned judgment cannot be faulted on any score.

22) The appeals are, accordingly, dismissed.

……J.
(R.F. Nariman)

……..…..J.
(Navin Sinha)

New Delhi;
February 06, 2018