

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ O.M.P. 25/2010

PTC INDIA LIMITED Petitioner
Through Mr. Vikas Singh, Senior
Advocate with Mr. Ravi Prakash,
Mr. Ashish Barnard with
Mr. Raunak Jain, Advocates

versus

JAYPEE KARCHAM HYDRO
CORPORATION LIMITED Respondent
Through Mr. Shanti Bhushan, Senior
Advocate with Mr. Vishal Gupta,
Advocate

% Date of Decision : FEBRUARY 19, 2010

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. To be referred to the Reporter or not? | Yes. |
| 3. Whether the judgment should be reported in the Digest? | Yes. |

J U D G M E N T

MANMOHAN, J (ORAL)

1. Present petition has been filed under Section 9(ii)(d) and (e) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Act, 1996”) praying for the following reliefs:-

- a. *To grant an ex-parte ad-interim stay, under section 9(e) of the Arbitration and Conciliation Act, 1996, on the termination of the PPA by the respondent vide its letter dated 17.12.2009, and*
- b. *To prevent the respondent from entering into any agreement for sale of power with any other party for the amount of power contracted by it with the petitioner, and*

c. *Pass such other directions and orders as may appear just and reasonable to this Hon'ble High Court."*

2. Briefly stated the facts of the present case are that petitioner is a trading licensee, who entered into a Power Purchase Agreement (in short "PPA") dated 21st March, 2006 with the respondent, who is proposing to set up a power generating station in the State of Himachal Pradesh. Under the PPA, Central Electricity Regulatory Commission (in short "CERC") is to determine and approve the tariff on payment of which electricity is to be supplied. However, subsequent to execution of the aforesaid PPA, the Appellate Tribunal for Electricity (in short "APTEL") vide its judgment and order dated 21st October, 2008 passed in *Appeal No. 71/2008, Lanco Amarkantak Power Pvt. Ltd. vs. Madhya Pradesh Electricity Regulatory Commission & Ors.* has held that CERC does not have the jurisdiction to determine the tariff between a trading licensee and a generating company. Consequently, the respondent vide its letter dated 17th December, 2009 took the stand that PPA executed between the parties is void. The relevant portion of the letter dated 17th December, 2009 addressed by respondent to petitioner is reproduced hereinbelow :-

"Kindly refer to your letter dated 25.11.2009, addressed to the Executive Chairman Jaiprakash Associates Limited, referring to the Order of the Central Electricity Regulatory Commission (CERC) dated 26.10.2009 holding our Petition before the CERC related to estimated capital cost and tariff as not maintainable.

In view of the facts and circumstances, we had to obtain legal advice from a senior counsel and he has, after going into all

the facts and the law on the subject, advised us that the Power Purchase Agreement (PPA) dated 21.03.2006 between this Company (JKHCL) and the PTC India Limited was void as the procedure contemplated in the PPA for determination of the tariff on the basis of which alone the price for supply of electricity by the Company to the PTC India Limited was payable could not be enforced. Since the PPA is now found to be void, no agreement, according to the legal opinion, survives between us.”

3. Mr. Vikas Singh, learned senior counsel for petitioner submits that in view of the aforesaid judgment passed by APTEL, this Court has the jurisdiction to entertain the present petition filed under Section 9 of Act, 1996. Mr. Singh states that the respondent's stand that PPA is void, is untenable in law. Mr. Singh points out that the Office Memorandum dated 31st March, 2003 permitting the respondent to set up a Hydro-Electric Project specifically stipulates that tariff would be determined by CERC. Mr. Singh contends that in case the relief as prayed for in the present petition is not granted, respondent would enter into agreements for sale with third parties and petitioner would suffer irreparable harm and injury.

4. On the other hand, Mr. Shanti Bhushan, learned senior counsel for respondent submits that even if the respondent has wrongly declared the PPA as void, still this Court cannot grant any relief to petitioner in view of the bar contained in Section 14(1)(a) to (d) read with Section 41(e) of the Specific Relief Act, 1963 (in short “Act, 1963). Sections 14(1) and 41(e) of Act, 1963 read as under :-

14. Contracts not specifically enforceable.-(1) The following contracts cannot be specifically enforced, namely:-

(a) a contract for the non-performance of which compensation is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

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41. Injunction when refused.—An injunction cannot be granted--

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(e) to prevent the breach of a contract the performance of which would not be specifically enforced;

5. According to Mr. Bhushan, the PPA executed between the parties is an agreement which runs into such minute and numerous details and which otherwise from its nature is such that the Court cannot not enforce its material terms within the meaning of Section 14(1) of Act, 1963. He also points out that the parties provided in the PPA that in the event of default of respondent, petitioner is to receive compensation equal to Rs. 250 Crores. He refers to and relies upon Clause 14.6.1 of PPA, which reads as under:-

“14.6.1 Consequence of Termination for Company Event of Default:

Where this Agreement is terminated by PTC pursuant to Article 14.4 for a Company Event of Default, the Company shall pay compensation to PTC, an amount equal to Rupees Two hundred thirty seven point five crore only (Rs.237.5 crore only) to be passed on by PTC to the Purchaser as the Purchaser’s compensaton and an amount equal to Rupees Twelve point five crore only (Rs.12.5 crore

only) as PTC's compensation. However, in case any compensation pursuant to CERC Interstate Transmission Regulations of relinquishment of transmission access is payable by PTC or the Purchaser, then such compensation amount and the above amount of Rupees Two hundred fifty crore only (Rs.250 crore only) shall be payable by the Company. Such amount shall be paid within thirty (30) days of the day of termination of this Agreement."

6. Mr. Bhushan also submits that as PPA is in its nature determinable, this Court cannot grant any relief.

7. In rejoinder, Mr. Vikas Singh submits that the bar contained in Sections 14(1)(a) to (d) and 41(e) of Act, 1963 is not attracted in the present case as there is an implied negative covenant in the PPA itself. In this connection, Mr. Singh drew my attention to Clause 13.3 of PPA. The relevant portion of the said Clause reads as under :-

"13.3 Arbitration

Where any Dispute arising out of or in connection with this Agreement,

- a) is not resolved as provided for in Article 13.2;*
- b) not used*
- c) falls within the scope and purview of statutory arbitration under the provision of the Law;*

then such Disputes shall be submitted to arbitration in accordance with the Arbitration and Conciliation Act, 1996 ("Arbitration Act") at the request of either Party in writing to the other Party. The following provisions shall then apply:

- i) The rights and obligations of the Parties shall remain effective during the arbitration proceedings."*

8. Therefore, according to Mr. Singh, Section 42 of Act, 1963 is attracted to the facts of the present case. Section 42 of the Act, 1963 reads as under:-

42. Injunction to perform negative agreement.—
Notwithstanding anything contained in clause (e) of section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement:

Provided that the plaintiff has not failed to perform the contract so far as it is binding on him.”

9. He refers to and relies upon a Division Bench’s judgment in ***Rajasthan Breweries Limited Vs. Stroh Brewery Company*** reported in ***AIR 2000 Delhi 450*** wherein it has been held as under:-

“14. The effect of breach of a contract by a party seeking to specifically enforce the contract under the Indian law is enshrined in Section 16(c) read with Section 41(e) of the Specific Relief Act, 1963. Clause (e) of Section 41 of the Specific Relief Act provides that injunction cannot be granted to prevent the breach of contract, the performance of which would not be specifically enforced. Clause (c) of Section 41 enumerates the nature of contracts, which could not be specifically enforced. Clause (c) to sub-Section (1) of Section 14 says that a contract which is in its nature determinable cannot be specifically enforced. Learned Single Judge thus was justified in saying that if it is found that a contract which by its very nature is determinable, the same not only cannot be enforced but in respect of such a contract no injunction could also be granted and this is mandate of law. This, however, is subject to an exception, as provided in Section 42 that where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.”

10. In the alternative, Mr. Singh submits that even if the relief cannot be granted under Section 9(ii)(d) of Act, 1996, petitioner is entitled to

relief under Section 9(ii)(e) of Act, 1996 read with Sections 3, 23 and 34 of Act, 1963. The said provisions read as under :-

i) **Section 9(ii)(e) of Act, 1996 :**

9. Interim measures, etc. by court. -A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court: -

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(ii) For an interim measure of protection in respect of any of the following matters, namely: -

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(d) Interim injunction or the appointment of a receiver;

(e) Such other interim measure of protection as may appear to the court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

ii) **Sections 3, 23 and 34 of Act, 1963:**

3. Savings.- Except as otherwise provided herein, nothing in this Act shall be deemed-

(a) to deprive any person of any right to relief, other than specific performance, which he may have under any contract; or

(b) to affect the operation of the Indian Registration Act, 1908, on documents.

23. Liquidation of damages not a bar to specific performance.- (1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving, to the party in default an

option of paying money in lieu of specific performance.

(2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract.

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34. Discretion of court as to declaration of status or right.-

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.”

11. Having heard the parties at some length, I am of the view that Sections 14(1)(a) to (d) and 41(1)(e) of Act, 1963 specifically stipulate that injunction will be refused if certain conditions like money being adequate compensation or if the contract is in its nature determinable are satisfied. In fact, the Supreme Court and various High Courts have repeatedly held so. Some of the relevant decisions on this issue are as under :-

A) ***Indian Oil Corpn. Ltd. v. Amritsar Gas Service*** reported in ***(1991) 1 SCC 533*** wherein Supreme Court has held as under :-

“12. The arbitrator recorded finding on Issue No. 1 that termination of distributorship by the appellant-Corporation was not validly made under clause 27. Thereafter, he proceeded to record the finding on Issue No. 2 relating to grant of relief and held that the plaintiff-respondent 1 was entitled to compensation flowing from the breach of contract till the breach was remedied by restoration of distributorship. Restoration of distributorship was granted in view of the peculiar facts of the case on the basis of which it was treated to be an exceptional case for the reasons given. The reasons given state that the Distributorship Agreement was for an

indefinite period till terminated in accordance with the terms of the agreement and, therefore, the plaintiff-respondent 1 was entitled to continuance of the distributorship till it was terminated in accordance with the agreed terms. The award further says as under:

“This award will, however, not fetter the right of the defendant Corporation to terminate the distributorship of the plaintiff in accordance with the terms of the agreement dated April 1, 1976, if and when an occasion arises.”

This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the agreement dated April 1, 1976, which contains the aforesaid clauses 27 and 28. Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revokable in accordance with clauses 27 and 28 of the agreement. It is in this sense that the award describes the Distributorship Agreement as one for an indefinite period, that is, till terminated in accordance with clauses 27 and 28. The finding in the award being that the Distributorship Agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is ‘a contract which is in its nature determinable’. In the present case, it is not necessary to refer to the other clauses of sub-section (1) of Section 14, which also may be attracted in the present case since clause (c) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to ‘the law governing such cases’. The grant of this relief in the award cannot, therefore, be sustained.”

(emphasis supplied)

B) *State Bank of Saurashtra Vs. P.N.B.* reported in (2001) 5 SCC

751 wherein Supreme Court has held as under :-

“8. Considering the fact that there was an alternative plea for damages, on the facts of the present case it would have been appropriate for the Special Court to have computed and awarded the damages in addition to ordering refund rather than requiring the appellant to purchase the units and give

the same to the respondent. In other words, a decree for specific performance in the manner in which it was passed was probably not appropriate especially when the respondent could be compensated with the return of money and award of reasonable damages.”

(emphasis supplied)

C) ***Dave Ramshankar Jivatram vs. BaiKailasgauri*** reported in ***AIR***

1974 Gujarat 69 wherein Gujarat High Court has held as under:-

“9. Accordingly, although I have dismissed the other contentions of Mr. Shah, I must accept the last one. I hold that having regard to the special facts of the case stated earlier this is not a case in which specific performance of the contract to transfer the immovable property should be granted although there is a breach of such contract. In my opinion, the breach would be adequately relieved by compensation in money. I, accordingly set aside the decree of specific performance passed by the learned 4th Joint Civil Judge, Junior Division, Baroda, in Regular Civil Suit No. 415 of 1963 and confirmed by the learned Assistant Judge, Baroda, in Regular Civil Appeal No. 162 of 1965 and instead decree that the defendant-appellant do pay to the plaintiff No .1 (respondent herein) a sum of Rs. 5,249 as compensation in money for the breach of the agreement.....”

(emphasis supplied)

D) ***Union Construction Co. (Private Ltd.), vs. Chief Engineer,***

Eastern Command, Lucknow and Anr. reported in ***AIR 1960***

Allahabad 72 wherein Allahabad High Court has held as under :-

“21. Even if it be assumed, though I have held to the contrary, that reference to arbitration in the circumstances of the present case is not possible, I see no reason as to why the petitioner cannot file a suit. The reply of Mr. Kunzru is that he cannot get the same relief by means of a suit which he has asked for in this petition and the relief which he may obtain by means of a suit will be wholly inadequate. It is true that under the provisions of Section 21 (a) of the Specific Relief Act "a contract for the non-performance of which compensation in money is an adequate relief" cannot be specifically enforced. Under the provisions of section 12(c) of the same Act "when the act agreed to be done is such that pecuniary compensation for its non-performance would not

afford adequate relief” specific performance of the contract may, in the discretion of the Court be enforced. This clearly shows that the Court can exercise the discretion only in a case where pecuniary compensation would not afford adequate relief.....

22. It cannot be denied that the petitioner can be compensated in money for the non-performance of the contract in the present case. The petitioner had taken the contracts with a view to make profit. It was interested in the contracts only with a view to earn money and it should not matter to the petitioner if it obtains that money by way of damages by filing a suit for the same instead of earning it as profit after completing the contract. To me therefore it appears that in the circumstances of the present case compensation in money can be an adequate relief to the petitioner. The Privy Council in the case of Ramji Patel v. Rao Kishore Singh AIR 1929 PC 190 observed as follows:

"In view of the finding that compensation in money is an adequate relief to the Plaintiff and in view of the express provisions contained in sections 12(c) and 21(a), their Lordships are of opinion that a decree for specific performance of the contract should not be made."

(emphasis supplied)

12. Undoubtedly, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative covenant, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative covenant. Section 42 is thus an exception to Section 41 of Act, 1963. This is because if there is a negative covenant, the Court has no discretion to exercise. In restraining by injunction the breach of a negative covenant, the interference of the Court is in effect an order for specific performance. The rationale for this is that if parties for valuable consideration, with their eyes open, have contracted that a

particular thing shall not be done, all that a Court has to do is to order by way of injunction that the said thing shall not be done. In such a case, the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties.

13. Express negative covenant is normally found in employment contracts where it is stipulated that in the event an employee leaves or abandons or resigns from his job before a particular period, then for the remainder term of the agreement the said employee would not be employed with a rival company. For a covenant to qualify as an implied negative covenant there should be a restriction, which can readily be implied to operate either during the period of the contract or after its termination.

14. Keeping in view the aforesaid, I am of the opinion that Clause 13.3 of PPA does not constitute a restriction either express or implied and is, therefore, not a negative covenant. In fact, the said Clause only stipulates that legal rights of both the parties during the arbitral proceedings would remain unaltered.

15. Moreover, as petitioner is a mere trader of electricity and not an actual consumer of electricity, I am of the view that petitioner can be compensated in term of money. In fact, Clause 14.6.1 of PPA makes it abundantly clear that both the parties at the time of execution of contract contemplated that in the event of termination of the contract, money

would be an adequate compensation. In my opinion, stipulation of an amount under Clause 14.6.1. of PPA is not for the purpose of securing performance of the contract but is for payment of compensation in lieu of specific performance. Consequently, petitioner is not entitled to any injunction and/or stay.

16. The reliefs prayed for in the present petition are nothing but a stay and/or injunction order. Consequently, in my opinion, petitioner would be entitled to interim relief only if the same is not barred by any statute, in particular, the Act, 1963 which specifically deals with injunctions. Petitioner's argument that even if relief of injunction could not be granted under Section 9(ii)(d) of Act, 1996, the same could be granted under Section 9(ii)(e) of Act, 1996, in my view, is untenable in law because if some essential ingredients or tests have to be satisfied for an order under Section 9(ii)(a) to (d) of Act, 1996, the same cannot be circumvented by saying that the said relief should be deemed to have been prayed under Section 9(ii)(e) and not 9(ii)(a) to (d) of Act, 1996. In fact, I am of the view that *such other interim measure or interim protection* as provided in Sub-section (e) of Section 9 of Act, 1996 has to be read in accordance with other laws/statutes. Not to do so, would be not only contrary to law but also opposed to public policy.

17. Consequently, I am of the opinion that in view of the bar contained in Section 14(1)(a) to (d) read with Section 41 of Act, 1963 no relief can be granted in the present petition. Accordingly, present petition is dismissed but with no order as to costs. However, the

statement made by Mr. Shanti Bhushan before the Division Bench shall continue till 26th February, 2010. Order dasti under the signature of Court Master.

MANMOHAN, J.

FEBRUARY 19, 2010
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