IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.10122 of 2015

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1. Essar Power (Jharkhand) Limited, a company incorporated under the Companies Act, 1956 having its registered office address at, Prakash Deep Building, 10th Floor, 7 Tolstoy Marg, New Delhi - 110001, through its Senior Vice President Sri Ashok Kumar Singh, son of Late Sri Ram Pravesh Singh, residing at 101, Dheeraj Gaurav Heights Andheri West, Mumbai - 400053.

.... Petitioner

Versus

1. Bihar State Power Holding Company Limited, through its General Manager (Commerce) having its registered address at 1st Floor, Vidyut Bhawan, Bailey Road, Patna - 800001, Bihar.
2. The Union of India, through the Secretary, Ministry of Coal, having its address at, Shastri Bhawan, P.O. & P.S. Parliament Street, Town & District New Delhi (N.C.T. of Delhi).
3. ICICI Bank Limited through its Manager, having its office at, ICICI Centre, 163, H.T. Parekh Marg Backbay Reclamation, Churchgate, Mumbai - 400020.

.... Respondents

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Appearance :

For the Petitioner	:	Mr Y.V.Giri, Mr., Sanjay Sen Sr. Advocates. Mr. Ashish Giri Advocate.
For the Union of India	:	Mr. S.D Sanjay, Addl. Solicitor General
For the BSPHCL	:	Mr. Anand Kumar Ojha, Advocate.

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

ORAL ORDER

4 23-07-2015 The petitioner is a power generating Company as defined under the Electricity Act 2003 (for short 'the Electricity Act'), whereas the principal respondent is the Power Company called 'Bihar State Power Holding Company Ltd. (for short' the Power Company') which constitutes integral part of the erstwhile Bihar State Electricity Board(for short 'the Board').

The Power Company and the petitioner-Company entered into a Power Purchase Agreement (PPA) on 09.07.2010 on being selected as the successful bidder for a long term procurement of electricity. The writ application has been filed inter alia for issuance of an appropriate writ/order/direction to declare that PPA dated 09.07.2010 has become null and void and also to treat the PPA as validly terminated by the petitioner-Company in view of the termination notice dated 9th July, 2015 (Annexure-8) issued under Article 11.5.1 read with Articles 4.7.1,4.7.3 and 9.3 of the PPA. Further relief prayed for is to restrain the respondent Power Company from invoking the Bank Guarantee provided by the petitioner- Company in the sum of Rs. 135,00,00,000/- (also called Contract Performance Guarantee) which was required to be furnished by the petitioner company in terms of the requests for proposal (RFP). Other consequential relief has also been prayed.

The background facts out of which the writ application germinates may briefly be noticed. The petitioner company claims to be a pioneer in developing/producing power. Currently it is developing a thermal power project in the State of Jharkhand.In the year 2005 in response to an advertisement issued by the concerned ministry of the Union of India, the petitioner-Company applied and was allocated the Chakla Coal Block lying in the State of Jharkhand for Pit-head Power Plant. On the basis of the MOU and the recommendation of the Union of India it was allocated the Chakla Coal Block on 20.02.2007. The respondent Power Company published on 20.10.2009 a notice inviting tender (NIT) for long term procurement of electricity through tariff based competitive bidding. The Petitioner-Company submitted the papers including the documents relating to allocation of Chakla Coal Block to it. The petitioner-Company was selected as the lowest bidder and the letter of intent (LOI) was issued on 08.06.2010. The petitioner-Company accepted the terms and conditions of the LOI on 11.06.2010 and an agreement was signed on 09.07.2010. As required under the agreement the petitioner company submitted the Contract Performance Guarantee from the respondent ICICI Bank for an amount of Rs. 135 crores. As per the PPA entered between them the petitioner company was required to supply power for a period of 25 years at the agreed tariff. The scheduled delivery date (SDD) was 09.07.2014. A grace period of one year was also provided under the agreement. Due to diverse reasons spelt out in the writ petition as also in the notice dated 09.07.2015 (Annexure-8) the petitioner-Company claim to have terminated the agreement invoking Clause/Articles 9.3 of the PPA which provides Force Majeure

Clause which gives option to both the parties to terminate the agreement if a natural and unavoidable catastrophe has occurred which materially interrupts the expected course of events. The present writ petition has been filed in the aforesaid background for the relief(s) as noticed hereinabove.

A counter affidavit has been filed on behalf of the respondent Power Company. It has been stated inter alia that the right of the parties arising out of bilateral agreement entered between them should not be entertained by this Court. The conduct of the petitioner- Company would show that it had failed to supply power even from the alternative source and within the scheduled date of delivery (SDD) at the tariff rate agreed under the PPA. The scheduled date of delivery expired without any extension being allowed to the petitioner Company. Until the rights of the parties arising out of PPA are decided no consequential relief which appears to be the main relief of the petitioner-Company can be granted. The omission and failure on the part of the petitioner Company caused a huge loss to the respondent Power Company insomuch so it has upset the plans of the power purchase in the interest of the public. The petitioner-Company had earlier requested for extension of SDD from 09.07.2014 and 17.10.2015 respectively to further three years.

Such request was made invoking Clause/Articles 9.5 of the PPA. In the said communication the petitioner company spelt out the uncertainty prevailing in reallocation of Chakla Coal Block and referred to the pending proceeding(s) in the Hon'ble Supreme Court and the Jharkhand High Court. Curiously enough, apart from extension of time due to the alleged intervention of unavoidable uncertainties it was also stated that it would now be unprofitable for the petitioner-Company to supply power at the bid out tariff as per the PPA. Diverse reasons were stated to justify escalation in O&M expenses and other financial burdens. The agreement was reached between the parties for supply of 450 MW and 300 MW power for a long term of 25 years at a levellised tariff of Rs. 3.057/KWh and Rs. 3.69/KWh respectively. The petitioner-Company had also offered to supply part of the power to the procurer (the respondent company) from the alternate source. The representatives of the parties had met with each other on few occasions. The petitioner Company ultimately did not provide power within the SDD. The grounds made in the writ petition were concisely the grounds for extension of SDD by three years as also the revision in the bid out tariff. The respondent power company having considered the same and in the light of the discussions which had taken place between them by a communication dated 16.07.2014 (Annexure-72) issued notice for termination of PPA in accord with Article 11.5 read with Article 4.2.3 of the PPA. The relevant part of the said communication is extracted herienbelow:-

> "In the circumstances hereinabove, it is requested to explain that under sub Article 4.7.1 (C) of the PPA read with Sub Article 4.7.3 & 11.5.1 why BSP(H)CL should not terminate the Power Purchase Agreement (PPA) executed on 09.07.2010 & 17.10.2011 with M/S EPJL for supply of 450 MW & 300 MW power respectively and encash the CPG for Rs. 135 crores (Rupees one hundred thirty five crores) for 450 MW & 90 Crores (Rupees Ninety Crores only) submitted by M/S EPJL towards supply of 450 MW & 300 MW power respectively. In addition to the above why BSP (H) CL should not also claim from M/S EPJL to deposit balance amount of liquidated damage i.e. Rs. 45 crores (for 450 MW) & Rs. 30 Crores (for 300 MW) in accordance with Sub Article 3.4.2 of the PPAs within 10 days of termination of PPA.
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> You are requested to submit your explanation/response in the above background within 15 days failing which the power company/seller will be free to proceed in accordance with the provisions of the PPA.
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> Yours faithfully
> S. K. Singh
> Chief Engineer (Commercial)."

In response thereto the petitioner-Company under the communication dated 24.07.2014 (Annexure-73) requested the respondent Power Company to submit the proposal for supply of power to the State which was facing acute power shortage causing public injury in diverse manners. In order to overreach the notice which was already issued to the petitioner, the present writ application has been filed for the aforesaid relief(s). The writ application is in fact premature as the respondent power company has not till date terminated the agreement the consequence whereof would be invocation of the bank guarantee (CPG).

Heard the senior counsel for the petitioner-Company, Mr. A.K. Ojha for the respondent BSPHCL (Power Company) and Mr. S.D. Sanjay for the respondent Union of India.

The learned Senior counsel for the petitioner company has submitted that Force Majeure clause/articles of the PPA read with Article 4.7.1(c) and 4.7.3 clothe the petitioner Company with power or discretion to terminate the PPA if there has been onset of circumstances contemplated under Article 4.7.1(c) of the PPA. Even the respondent power Company in the show cause notice dated 16.7.2014 acknowledged the intervention of the circumstances which rendered the performance of the contract having time essence almost impossible. The counsel has submitted that coal is the fuel/raw material for a thermal power generation Company like the petitioner Company which is indispensable. Several litigations were pending in relation thereto in Courts which made performance of the contract almost impossible. The Hon'ble Supreme Court in the month of September, 2014 declared all allocation(s) of coal blocks illegal/null and void. The other circumstances, as pleaded in the writ petition and the communication of the petitioner Company would show that there exists a situation conceived under the PPA entitling the petitioner Company to terminate the agreement and get the CPG refunded/returned. Acting bonafidely, the petitioner Company in such circumstances in the communication made in April, 2014 had requested the respondent power Company to give a re-look to the diverse stipulations of the PPA and extend the SDD and also to consider marginal escalation in the rate(s) of power, in view of the fact that captive coal block of the petitioner Company could not be utilized and transportation of coal from the alternate source would necessarily result in rise in the cost price. The stand of the respondent Power Company is arbitrary in not treating the PPA terminated in view of the notice/communication of the petitioner Company contained in Annexure-8.

Per contra, counsel for the respondent Company would argue that the writ application lacks in bonafide. The circumstances are replete to demonstrate that with a view to cover up the breach of the agreement which undoubtedly has caused huge loss of public money, the present writ application has been filed in the shape of a declaratory suit. It is a camouflaged proceeding. In fact, the petitioner Company had earlier requested for extension of SDD and enhancement of rates/tariff for supply of power/energy . The same was not acceded to by the respondent power Company. Admittedly, the date of SDD has already expired and the petitioner Company has prima facie defaulted in complying with the terms and conditions of the contract (PPA). The respondent Power Company has yet to decide on the fate of the PPA in view of the attending circumstances. The writ application is, therefore, wholly premature. It has been emphatically argued that protection of Force Majeure Clause in the attending facts and circumstances of the case would not be available to the petitioner-Company. While arguing on the maintainability of the application, the counsel has submitted that the State Government enacted Bihar Public Works Contract Disputes Arbitration Tribunal for redressal of grievance relating to contracts between the Government or its instrumentality and other party. Any such dispute ought to have been raised before the Tribunal but that too after a decision is finally taken.

Rights and liabilities of the parties arising out of contract would depend on appreciation of diverse facts in the light of different contemplations/conditions of the contract. Normally the writ Court is not expected to examine such grievance which necessarily involves appreciation of disputed facts unless it is demonstrably shown that the party to the contract has acted completely arbitrarily and de- horse the conditions of contract. The contention of the petitioner Company is that the circumstances indicated in the notice (Annexure-8) would constitute a case where the plea of Force Majeure can be raised and bonafidely invoked. On the other hand, it has been contended by the respondent that the SDD had already expired well before the final order passed by the Hon'ble Supreme Court in August or September, 2014 when the coal block allotted to the petitioner Company was declared null and void and set aside. By the said time the petitioner Company had already defaulted in supplying the energy/power to the respondent power Company. Dispute and difference of such kind would essentially involve appreciation of diverse facts and circumstances pleaded in support of the rival claims. It has been brought to the notice of the Court that the State Government has already constituted a Tribunal for adjudication of such disputes arising out of contract in which one party is the

State or its instrumentality. Learned counsel for the petitioner, on the other hand, has submitted that under the Electricity Act, 2003 the Bihar Electricity Regulatory Commission shall have the power to adjudicate upon matters between generating Companies and the licensee, if a dispute has arisen between them. Thus, it appears both the parties are in agreement that there is statutory mechanism/forum provided for resolution of the disputes arising between them. Such rival claims of the parties, in my view, cannot be looked into in writ jurisdiction in order to come to a firm and final conclusion in the matter. They can be appropriately gone into in the arbitral proceedings or by the Civil Court where these shells of disputed facts can be percolated to appreciate the rival claims of the parties. The contention of the petitioner Company that in not accepting the notice given to the respondent - Company by the petitioner Company and treating the agreement terminated entitling the petitioner Company to get the Contract Performance Guarantee returned , in my view, is not well founded. It has not been argued by the either party that any Clause/Article of PPA specifically prohibits such resolution of dispute by Arbitral Tribunal.

The senior counsel for the petitioner-Company has submitted that the Contract Performance Guarantee provided by the petitioner Company has validity at least for a period of more than two years from now. The dispute raised herein is a matter which can alternatively be relooked by both the parties in the interest of the petitioner Company as well as the citizens of the State of Bihar who are to be benefited. There may be valid grounds on either side some of which are not in much dispute.

Having given anxious considerations to the contentions of the parties, this Court is of the view that the issues/disputes which have been raised herein cannot be entertained in the writ jurisdiction of the Court. The parties have forum(s) to raise such disputes effectively for adjudication. The prayer(s) made in the application is/are, therefore, declined. Both parties are granted liberty to approach the appropriate forum/Tribunal for redressal of the grievance in case the respondent Company declines the request of the petitioner Company for extension of time and reasonable enhancement of the agreed tariff of power and treat the attending circumstances as material breach of the conditions of the agreement and thereby decide to terminate/rescind the PPA. In that event the respondent Company shall not invoke/ encash the bank guarantee furnished by the petitioner Company for a period of 15 days therefrom. This Court, however, would further clarify that such restraint order against encashment of CPG in no manner inure to the advantage of the petitioner Company or the disadvantage to the respondent power Company in any dispute/proceeding to be raised in this regard.

The writ application is disposed of.

(Kishore Kumar Mandal, J)

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