IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 01.07.2015

DELIVERED ON: 03.07.2015

CORAM:

THE HON'BLE MR.JUSTICE SATISH K. AGNIHOTRI
AND
THE HON'BLE MR.JUSTICE M.VENUGOPAL

W.A. No.889 of 2015
and
M.P. No.1 of 2015

Hindustan Petroleum Corporation Ltd.
Represented by Chief Regional Manager – Direct Sales
Chennai Direct Sales Regional Office
"Petro Bhavan", II Floor
82, TTK Road
Alwarpet, Chennai 600 018 ...Appellant

Vs.

1 Tamil Nadu Generation and Distribution Corporation Ltd.
represented by its Chairman-cum-Managing Director
144, Anna Salai
Chennai 600 002

2 GMR Power Corporation Ltd.
represented by its Managing Director
No.1, Pullianthope High Road
Basin Bridge
Chennai 600 012 ...Respondents

Writ Appeal filed under Clause 15 of the Letters Patent challenging the order dated 17.06.2015 passed in W.P. No.11901 of 2015.

Prayer in W.P.No.11901 of 2015:

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Mandamus directing the first respondent to make payment of Rs.181.90 crores together with interest at the rate of 12% per annum out of the money due and payable to the second respondent.

For appellant	:	Mr. G. Masilamani, Sr. Counsel for M/s. King and Partridge
For R2	:	Mr. T.V. Ramanujan, Sr. Counsel for Mr. Satish Parasaran
For R1	:	No appearance

JUDGMENT

(Judgment of the Court was delivered by SATISH K. AGNIHOTRI, J.)

The instant intra-Court appeal impugns the order dated 17.06.2015 passed in W.P. No.11901 of 2015.

2 For the sake of brevity and convenience, the parties are referred to as per their rank in the instant appeal.

2.1 The brief facts, in a nutshell, are that the appellant-Corporation entered into a fuel supply agreement with the second respondent on December 4, 1996, for an initial term of 15 years commencing from the date of execution of the agreement. There was yet another agreement between the respondents 1 and 2, viz., Power Purchase Agreement (for short "the PPA") executed on 12.09.1996 for purchase of power from the second respondent.

2.2 According to the appellant, there was a condition under the PPA stipulating that the bills raised by the appellant will be forwarded to the first respondent by the second respondent along with the other operational costs and the first respondent shall pay the fuel bills and make other payments to the second respondent and the second respondent, in turn, will pay fuel bills to the appellant. It is further stated that the outstanding dues as per the books against the second respondent as on 01.04.2015 was Rs.135 crores. The appellant made several attempts to secure payment from the second respondent. However, the appellant could not receive any payment from the second respondent on the solitary ground that the second respondent has to recover the outstanding dues of Rs.181.90 crores from the first respondent. Thus, the instant writ petition for a direction to the first respondent to make the payment of outstanding dues to the second respondent so that the second respondent can release payment in favour of the appellant for fuel supply.

3 Mr. G. Masilamani, learned Senior Counsel appearing for the appellant, submits that the appellant is supplying fuel to the second respondent for the purpose of generating and supplying power to the first respondent under PPA. The second respondent had failed to make payment towards fuel supply, as aforestated and as such, a direction be issued to the first respondent to make payment of outstanding dues to the second respondent. It is further contended that the first respondent is a public sector undertaking and as such, a writ may be issued directing the first respondent to make payment for power supplied by the second respondent. Even if there is no contract between the appellant and the first respondent, the first respondent may be directed in exercise of extra ordinary jurisdiction under Article 226 of the Constitution of India to clear the outstanding dues of the second respondent. It is further contended that since the first respondent had not paid its outstanding dues to the second respondent, the second respondent had expressed its inability to make payment to the appellant for supply of fuel and as such, a direction be issued to the first respondent to make the payment of outstanding dues to the second respondent.

4 The learned Senior Counsel, relying on the order dated 16.04.2010 passed by the Tamil Nadu Electricity Regulatory Commission in DPR No.10 of 2008 filed by the second respondent, would submit that a refund of Rs.10.04 crores towards entry tax was directed to be paid directly to the appellant. On the same lines, the first respondent may be directed to make the payment directly. The first respondent also agreed to make the payment, subject to no objection from the second respondent, which was never granted for no obvious reasons and as such, the appellant is before this Court for a direction to the first respondent to make the payment of outstanding dues to the second respondent, so that, the second respondent can, in turn, make the payment to the appellant.

5 The learned Single Judge, relying on the Arbitration Clause as per Article 13.2 of the Fuel Supply Agreement between the appellant and the second respondent, came to the conclusion that the writ petition is not maintainable as the appellant has to take recourse to the arbitration mechanism for recovery of its dues.

6 We have heard the learned Senior Counsel appearing for the appellant and also perused the pleadings and documents appended thereto.

7 It is undeniable and indisputable that there is no privity of contract between the first respondent and the appellant and also, there is no tri-partite agreement among the parties obligating the first respondent to discharge the liability of the second respondent for payment towards fuel charges to the appellant. Seemingly, under PPA, there is a clause which provides for submission of invoices/bills of fuel supply and other expenses to the first respondent by the second respondent. But, the said clause, by itself, does not bind the first respondent to make payment to the appellant on behalf of the second respondent for supply of fuel. The purported agreement between the first respondent and the appellant for payment of fuel bills on condition of express consent of the second respondent cannot be relied on for the purpose of securing payment from the first respondent. The said agreement which is based on understanding cannot be enforced by a judicial order. The second respondent is, admittedly, a private party and cannot be held as an instrumentality of State by any stretch of imagination, as contemplated under Article 12 of the Constitution of India. Further, the relief sought in the petition is not against the respondents under any statutory contract executed between the appellant and the second respondent and as such, the appellant is not entitled to any writ or direction in this petition.

8 The contention of the learned Senior Counsel appearing for the appellant that in order to avoid multiplicity of litigations between the parties and also instead of driving them to take recourse to arbitration which may take time, it is just and proper for the Court to exercise its extra-ordinary jurisdiction under Article 226 of the Constitution of India in the interest of justice, is noted to be rejected on the simple ground that the probability of multiplicity of litigations cannot be avoided in such petition, like the case on hand, when there is no cause of action available to the appellant against the first respondent. The appellant has sought a rather unusual relief, viz., a direction to the first respondent to make payment to the second respondent, which cannot be maintained, at the instance of the appellant.

9 Further, it is pertinent to observe at this juncture that the appellant has not sought a direction against the second respondent for payment of outstanding dues on the basis of execution of the contract between them and as such, the other disputes with regard to encashment of Letter of Credit (for short "LOC") or maintaining of LOC or keeping the LOC alive, cannot be examined and adjudicated in the writ petition.

10 Resultantly, without expressing any opinion on the merits of the case, we hold that the writ appeal is devoid of any merit and is accordingly dismissed. Costs made easy. Connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

cad

To

1 The Chief Regional Manager - Direct Sales
Hindustan Petroleum Corporation Ltd.
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"Petro Bhavan", II Floor
82, TTK Road
Alwarpet, Chennai 600 018

2 The Chairman-cum-Managing Director
Tamil Nadu Generation and Distribution Corporation Ltd.
144, Anna Salai, Chennai 600 002

1 CC to M/s. King and Partridge, Advocate SR.No. 33091

2 CCs to Mr. Satish Parasaran, Advocate SR.No.33090

W.A. No.889 of 2015

KGK (CO)
PSI (16.07.2015)