IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.06.2015

Delivered on: 17.06.2015

CORAM:

THE HON'BLE MR. JUSTICE M.SATHYANARAYANAN

W.P.No.11901 of 2015
and M.P.Nos.1 and 2 of 2015

Hindustan Petroleum Corporation Ltd.,
Rep by Chief Regional Manager,
Chennai Direct Sales Regional Office,
"Petro Bhavan", 2nd floor,
82, TTK Road, Alwarpet,
Chennai-600 018. .. Petitioner

Vs.

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

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

Prayer: 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 Petitioner : Mr.G.Masilamani, Senior Counsel
assisted by Mr.M.Vijayan
for M/s.King and Patridge

For Respondents: Mr.P.Gunaraj,
Standing Counsel for R1
Mr.T.V.Ramanujan, Senior Counsel
assisted by Mr.Satish Parasaran for R2

ORDER

By consent this writ petition is taken up for final disposal.

2. The petitioner Company is a Public Sector Undertaking and would state in the affidavit filed in support of this writ petition

that based on the guidelines issued by the Government of India, initial batch of power projects were awarded on the basis of negotiations between the State Electricity Board and the power producer which is otherwise called as "Memorandum of Understanding" (MOU) and it was permitted till 18.02.1995 by the Ministry of Power, Government of India. A Power Purchase Agreement (PPA) as per the above said guidelines was executed on 12.09.1996 between the Tamil Nadu Electricity Board (TNEB), now Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO)/first respondent and the second respondent, namely M/s.GMR Vasavi Power Corporation Ltd., Chennai-600012, for a period of 15 years and the norms for the operation of the power project are as per the notification dated 30.03.1992. The power project consists of four units of 49 MW Diesel Engine each, totalling to 196 MW.

3. The petitioner would further state that the site of the project is located at Basin Bridge, Chennai-600012, admeasuring to an extent of 29.03 acres of land and the site is leased by the first respondent to the second respondent for a period of 20 years from 26.03.1997 and the said period was to be construed, considering a construction period of 3 years, operation period of 15 years and demolition period of 2 years and the lease agreement between the respondents 1 and 2 is valid till 25.03.2017. The fuel for the power plant is Low Sulphur Heavy Stock (LSHS). The unit run by the second respondent commenced its operations on 15.02.1999 and PPA came into being between the respondents 1 and 2 for a period of 15 years, which was due to expire on 14.02.2014 and the first respondent expressed its inclination to extend it by one more year till 14.02.2015, subject to the approval of the Tamil Nadu Electricity Regulatory Commission (TNERC) and a petition was also filed before the said authority, which ordered its approval for the renewal of the PPA from 15.02.2014 to 14.02.2015, vide its order dated 13.02.2015.

4. It is further stated by the petitioner that for supply of fuel, namely Low Sulphur Heavy Stock and to operate the power plant run by the second respondent, a Fuel Supply Agreement dated 04.12.1996 was executed between the petitioner and the second respondent, which shall have a initial term of 15 years commencing on the date of the agreement, unless extended or earlier terminated in accordance with the terms of the agreement and it also provides among other things that the first respondent has right to seek extension of PPA and would make such a request in writing not less than 18 months before the expiry of the current term of the PPA. The Fuel Supply Agreement entered into between the petitioner and the second respondent provides among other things that the price to be paid by the second respondent shall be based on the quality of fuel supplied in accordance with the agreement and that on the first day of each month, the petitioner shall deliver to the second respondent invoice for the fuel delivered and invoicing and payment method has been provided in Article 7 of the said agreement. The agreement also provides for furnishing Letter of Credit [LOC] by the second respondent to the petitioner and failure to pay the bills as and when due, shall attract interest as agreed in the

agreement. The terms of the PPA also provide that the bills raised by the petitioner will be forwarded to the first respondent by the second respondent along with other operational costs and the first respondent shall pay the fuel bills and other payments to the second respondent and the second respondent shall pay the fuel bills to the petitioner herein. The outstanding of the second respondent are normally covered by Standby Letter of Credits and Usance Letter of Credits and Standby LOCs are not discounted and are kept only as security and Usance LOCs are discounted at the end of the supply period for which they are provided and both LOCs, as per the terms, cover only dues against fuel supplies and it was regularly monitored by the petitioner and communicated to the second respondent in case of any deviations noted/observed.

5. The petitioner would further state that as on 01.04.2015, outstanding as per books is Rs.181.90 crores, out of which fuel supply outstanding is Rs.135 crores. The valid LOCs on hand is for Rs.74 crores, out of which, there are claimable invoices for Rs.34.80 crores, the others being outside supply coverage periods of the LOCs. The petitioner, found that inspite of their regular follow up, they did not receive the renewed LOCs and hence, their senior officers had a meeting with the Director (Finance) of the first respondent on 26.02.2015 and handed over the letter addressing him of the situation and requested the first respondent to repay the amount due and payable to the second respondent directly to them on first priority, so as to make good the amount on account of lapse of the LOCs. The petitioner simultaneously lodged a claim on 26.02.2015 for the two LOCs, which expiry dates are 21.02.2015 and 23.02.2015 respectively with Canara Bank and Industrial Development Bank of India (IDBI) and also written a letter to the second respondent on 27.02.2015 for getting the live LOCs worth Rs.75 crores, amended for the supply coverage dates so as to cover supplies from July to October 2014.

6. The petitioner also written a letter to the second respondent on 02.03.2015, advising them to give their concurrence to the first respondent for making direct payment to them with copy marked to the Director (Finance) of the first respondent. LOC was also invoked and Canara Bank has also paid Rs.9.44 crores to them and on 09.03.2015, IDBI renewed the LOC worth of Rs.25 Crores. The first respondent, in response to the request made by the petitioner for making direct payment, gave a response in its letter dated 17.03.2015 stating that they are agreeable to such a course, provided concurrence is made available to them from the second respondent and the petitioner in-turn has written a letter to the second respondent on 23.03.2015 seeking their concurrence to enable the first respondent to make direct payment to them and it was also followed by number of reminders, however the second respondent, by communication dated 25.03.2015, expressed their inability to issue such a letter and later on informed the petitioner that they are working out several options and their inability to pay the dues to the petitioner due to the fact that the first respondent has to pay huge sums of money and they would be in a position to pay the petitioner only if they receive money from the second respondent.

7. It is the specific claim of the petitioner that TANGEDCO/first respondent has to pay in excess of Rs.225 crores to the second respondent and out of which Rs.71.28 crores was released by the first respondent during second week of April 2015 to the second respondent, however no amount has been paid by the second respondent to the petitioner inspite of receipt of such sums. The grievance expressed by the petitioner is that inspite of some payment received by the second respondent from the first respondent, they did not make any payment in respect of fuel supplied to them and the total amount due and payable as on 31.03.2015 is Rs.181.90 crores. It is also pointed out by the petitioner that though the first respondent is inclined to the proposal for direct payment, they expressed difficulty in making such a payment unless the second respondent gives its consent and the second respondent, citing irrelevant reasons, has refused to adopt such a course and hence, came forward to file this writ petition directing the first respondent to make payment of Rs.181.90 crores together with interest @ 12% p.a. out of money due and payable to the second respondent.

8. The writ petition was listed on 23.04.2015 and this Court has directed both parties to maintain Status Quo as exists on 23.04.2015 till 11.06.2015 and ordered notice to the second respondent and directed listing of the matter on 11.06.2015 by filing counter and the learned Standing Counsel for the first respondent took notice on that date.

9. The first respondent has filed the counter and raised preliminary objection stating that the writ petition is not at all maintainable as there is no privity of contract between the petitioner and first respondent and the petitioner has to work out his remedy in terms of Fuel Supply Agreement dated 04.12.1996 entered into between the petitioner and the second respondent. It is further stated in the counter that payments are made to the second respondent by them and it is the duty of the second respondent to make payment to the petitioner and also took a stand that it cannot make direct payment to the petitioner without the consent of the second respondent and in the absence of the same, such a course cannot be adopted and prays for dismissal of this writ petition.

10. The second respondent has filed their objections in M.P.No.2 of 2015 to vacate the interim order of Status Quo granted on 23.04.2015 and in the affidavit filed in support of the said petition, it is averred among other things that the writ petition is not at all maintainable for the reason that jurisdiction under Article 226 of the Constitution of India cannot be invoked for enforcement of action as against private parties and the issue pertains to amounts allegedly due and payable by the second respondent to the petitioner under a contractual agreement and in effect, the payer in the writ petition is for a money decree and hence, the relief sought for by the petitioner cannot be granted at all. The second respondent also took a stand that in view of

Article 13 of the Fuel Supply Agreement , arbitration clause is provided and appropriate remedy for the petitioner is to invoke arbitration clause and not to approach this Court by filing this writ petition and prays for dismissal of this writ petition.

11.Mr.G.Masilamani, learned Senior Counsel assisted by Mr.M.Vijayan, learned counsel appearing for the petitioner, made the following submissions:

(i) The Fuel Supply Agreement entered into between the petitioner and the second respondent is not in dispute and so also the fuel supply made to the second respondent and the amount due and payable by them to the petitioner.

(ii) Admittedly the second respondent did not make payment, though it received a part of sum from the first respondent and taking into consideration the said act of the second respondent only, the petitioner was constrained to approach the first respondent for making direct payment to them and it was also agreed to by the first respondent subject to the condition that the second respondent shall give no objection, however the second respondent, by citing untenable reasons, refused to give consent and therefore, the petitioner is constrained to approach this Court.

The learned Senior Counsel appearing for the petitioner has drawn the attention of this Court to the order of the Appellate Tribunal for Electricity dated 28.02.2012 made in Appeal No.177 of 2010 and I.A.No.205 of 2011 and would submit that the said appeal was filed by the Tamil Nadu Electricity Board (TNEB), now TANGEDCO/first respondent herein, challenging the order dated 16.04.2010 passed by the Tamil Nadu Electricity Regulatory Commission (TNERC) in DPR.No.10 of 2008, filed by the second respondent and the Appellate Tribunal has recorded a finding as to the refund of Rs.10.04 crores towards Entry Tax directly to the petitioner as it legitimately belong to them and would further submit that the order passed by the TNERC in allowing the claim of the second respondent herein and directing the first respondent herein to make payments has not been set aside and therefore, in all fairness, the second respondent is to be directed to make payment which is admittedly due and payable to the petitioner, without driving the petitioner to resort to other litigations, which is also time consuming and is not in the interest of the parties in this writ petition and prays for allowing this writ petition.

12. The learned Standing Counsel appearing for the first respondent, based on the averments made in the counter affidavit, would submit that admittedly it is not a party to the Fuel Supply Agreement and unless and until the second respondent give its consent for making direct payment to the petitioner, it cannot do so.

13. Mr.T.V.Ramanujan, learned Senior Counsel, assisted by Mr.Sathish Parasaran, learned counsel appearing for the second

respondent would vehemently contend that this writ petition is purely an abuse of process of law for the reason that the petitioner seeks the aid of this Court to enforce a non-statutory contract, which is impermissible in law and on account of availing LOCs, dispute is also brewing between them and the banks and proper remedy, if any, available to the petitioner is to invoke arbitration clause and seek for appropriate relief and prays for dismissal of the writ petition with exemplary costs. The learned Senior Counsel appearing for the second respondent, in support of his submissions, placed reliance upon the decision rendered by the Hon'ble Supreme Court of India in Pimpri Chinchwad Municipal Corporation and Others v. Gayatri Construction Company and Another [(2008) 8 SCC 172].

14. This Court paid its best attention to the submissions made by the learned Senior Counsel appearing for the petitioner, learned Standing Counsel appearing for the first respondent and the learned Senior Counsel appearing for the second respondent and also perused the materials placed before it and the judgment cited by the learned Senior Counsel appearing for the second respondent.

15. The primordial question arises for consideration is in the light of arbitration clause as per Article 13(2) of Fuel Supply Agreement dated 04.12.1996, entered into between the petitioner and the second respondent, whether this writ petition is maintainable?

16. It is not in dispute that Fuel Supply Agreement came into being between the petitioner and the second respondent on 04.12.1996 and it is comprehensive in nature and the terms of the said agreement deals with all eventualities. It is the specific case of the petitioner that in respect of power energy by the second respondent by running a plant, the first respondent has to make payments to them and on account of the fact that the petitioner supplied fuel for running the plant, the second respondent, in terms of the agreement has to make payment and also keep live the LOCs. It is also the stand of the petitioner that invoicing and payment method has been provided in Article 7 of the agreement and also provides for furnishing LOC by the second respondent to them and failure to pay the bills as and when due will attract interest. The petitioner has also expressed its grievance that inspite of the fact that the first respondent has made payment of Rs.71.28 crores to the second respondent during second week of April 2015, but did not make any payment to them and in all fairness, they should have settled at least some portion of the outstanding and also opposed the first respondent to make direct payment and the first respondent in-turn indicated its position stating that unless the consent is given by the second respondent, it cannot do so.

17. The second respondent, vide letter dated 26.02.2015 addressed to the petitioner, has stated that their current outstanding with the first respondent is Rs.246 crores which they are expecting from them in the next two months and would further state that they are persuading with the bankers to renew the expired LOCs which should happen shortly and in view of the long

standing relationship with the petitioner, requested them to consider and avoid encashing the LOCs as it will make it difficult for further borrowings and continuity of fuel purchase post extension. The petitioner, even prior to that, lodged a claim on 26.02.2015 with Canara Bank and IDBI respectively for the two LOCs which would expire on 21.02.2015 and 23.02.2015 respectively and got a sum of Rs.9.44 crores from the Canara Bank and got renewal of LOC with IDBI on 09.03.2015. It is the stand of the second respondent in their counter that there is no allegation against the first respondent with regard to any arbitrary or illegal act and allegations are levelled only against them and hence the dispute between them require complete adjudication of facts as well as interpretation and adjudication of the terms of Fuel Supply Agreement and therefore, invocation of arbitration clause is the appropriate remedy.

18. The decision relied on by the learned Senior Counsel appearing for the petitioner viz., Pimpri Chinchwad Municipal Corporation and Others v. Gayatri Construction Company and Another [(2008) 8 SCC 172], lays down the proposition after placing reliance upon its earlier decisions that the High Court, in exercise of jurisdiction under Article 226 of the Constitution of India, cannot interfere in contractual matters as the dispute relating to interpretation of terms and conditions of such contract and whether any amount is due and refusal to pay is justified or not, are matters which could be agitated and decided in a writ petition.

19. In the case on hand, the petitioner, by invoking the jurisdiction of this Court under Article 226 of the Constitution of India, seeks the aid of this Court to enforce a non-statutory contract, namely Fuel Supply Agreement dated 04.12.1996. In the considered opinion of the Court, it cannot do so in the light of the above cited judgment.

20. In Gail (India) Limited v. Gujarat State Petroleum Corporation Limited [(2014) 1 SCC 329], the Hon'ble Supreme Court has considered the scope of Article 226 of the Constitution of India in the matter of fixation of price of gas supplied by the appellant therein and also formulated a question whether a mandamus could be issued requiring the appellant to engage itself with the respondent to arrive at the price of gas effective from 01.01.2014. The Hon'ble Supreme Court while deciding the said issue has also noted the existence of arbitration clause and the Gas Sale Agreement dated 07.02.2004 and in para 28 held as follows:

> "28. We also agree with Shri Nariman that the remedy of arbitration available to the respondent under Para 15.5 of the GSA was an effective alternative remedy and the High Court should not have entertained the petition filed under Article 226 of the Constitution of India. The contents of the GSA, the price side letters and the correspondence exchanged between the appellant and the respondent give a clue of the complex nature of the

price fixation mechanism. Therefore, the High Court should have relegated the respondent to the remedy of arbitration and the Arbitral Tribunal could have decided complicated dispute between the parties by availing the services .of experts. Unfortunately, the High Court presumed that the negotiations held between the appellant and the respondent were not fair and that the respondent was entitled to the benefit of the policy decision taken by the Government of India despite the fact that it had not only challenged that decision but had also shown disinclination to accept the offer made by the appellant to supply gas at the pooled price and had insisted on mutually agreed price."

21. The Appellate Tribunal for Electricity, vide order dated 28.02.2012 in Appeal No.177 of 2010 and I.A.No.205 of 2011, has dismissed the appeal filed by the first respondent challenging the order of the TNERC dated 16.04.2010 made in DPR.No.10 of 2008 filed by the second respondent and thereby allowing the claim of the second respondent herein and directed the first respondent to make payment. The first respondent made a challenge to the said order by filing Civil Appeal Nos.3201-3020 of 2012 and the Hon'ble Supreme Court, vide order dated 24.04.2014, has disposed of the appeals by observing that the order passed by the said Appellate Tribunal is not required to be disturbed and having noted that the dispute has arisen between the contesting parties with regard to the computation of the amount that would be payable or adjustable against their contesting claim in the event the principle applied by the Appellate Tribunal is followed and has referred the matter to the TNERC for computing and deciding the claims in the light of the order passed by the Appellate Tribunal for Electricity dated 28.02.2012 and in accordance with law within a period of 90 days from the date of submission of the memo of calculation by the contesting parties before the said commission. In compliance of the said order, the first respondent has to take appropriate steps within the time prescribed therein. It is to be pointed out at this juncture that the first respondent is not seriously disputing the amount payable to the second respondent and hence, it may take further steps in this regard.

22. This Court, on a careful consideration and analysis of the entire materials placed before it coupled with the legal position, is of the considered view that this Writ Petition is not maintainable and therefore, this Writ Petition is dismissed. No costs. Interim order of Status Quo ordered by this Court dated 23.04.2015 is vacated and M.P.No.1 of 2015 is dismissed and consequently, M.P.No.2 of 2015 is ordered.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

To

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

2.The Managing Director,
GMR Power Corporation Limited,
No.1, Pullianthope High Road,
Basin Bridge,
Chennai-600 012.

+1 cc to Mr.P.Gunaraj, Advocate,SR.29505.

+1 cc to Mr.Sathish Parasaran, Advocate,SR.29491

+1 cc to M/s.King & Partridge, Advocate,SR.29469.

Tm(co)
krd 25/6

Order
in W.P.No11901 of 2015