

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.12.2017

CORAM

THE HON'BLE JUSTICE DR.ANITA SUMANTH

O.P. Nos.816 to 818 and 820 of 2017

O.A. Nos.617 & 618 of 2017

and A.Nos.6305 and 6306 of 2017

and A.Nos.5657 and 5658 of 2017

Arkay Energy (Rameswaram) Limited,
Corporate Office,
No.20, Chamiers Road,
Nandanam,
Chennai 600 035 rep. By its
President, (Commercial & Admin)/
Authority Signatory
818 &

... Petitioner in O.P. Nos.816 to
820 of 2017

Applicant in O.A. Nos.617 & 618
of 2017 & A.Nos.6305 and 6306
of 2017 and A.Nos.5657 and 5658
of 2017.

Versus

1.Gail (India) Limited,
Chennai Zonal Officer
5th Floor, "Kuppu Arcade"
New No.4, (Old No.60),
Cenkatanarayan Roda,
T.Nagar, Chennai - 600 017

WEB COPY

Rep. By its Zonal General Manager.

2. Gail (India) Limited,

A Government of India undertaking

No.16, GAIL Building,

Bhikaiji Cama Place,

R.K. Puram, Ring Road,

New Delhi 110 066

Rep. By its Chairman and Managing Director.

...

Respondents 1 and 2 in O.P.
Nos.816 to 818 & 820 of 2017
and O.A. Nos.617 & 618 of
2017 & A. Nos.6305 and 6306
of 2017 and A.Nos.5657 and
5658 of 2017

3. Oil and Natural Gas Corporation Limited,

Cauvery Asset,

Nervy Office Complex, Karikkal,

Puducherry - 609 604

Represented by

General Manager - Chief Marketing.

....3rd Respondent in O.P.
Nos. 816 to 818 & 820 of
2017 and A.Nos.5657 and
5658 of 2017

Prayer in O.P. No.816 of 2017:

This Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint an arbitrator to resolve the dispute between the petitioner and respondents arising out of the APM debit note dt:29.05.2017 for Rs.10,35,67,605/- raised under the agreement dated 24.12.2010 extended upto 05.07.2021 vide agreement dated 31.12.2015 for the supply of 2,92,000 SCMD APM Gas.

Prayer in O.P. No.817 of 2017:

This Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint an arbitrator to resolve the dispute between the petitioner and respondents arising out of the Non-APM debit note dt:29.05.2017 for Rs.54,05,975/- raised under the agreement dated 07.03.2013 extended by Side Letter-B to GSA dated 18.04.2013 for the supply of 4,00,000 SCMD Non-APM Gas.

Prayer in O.P. No.818 of 2017:

This Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint an arbitrator to resolve the dispute between the petitioner and respondents arising out of the APM debit note bearing No.02114000162 date 31.03.2015 for Rs.4,11,70,563/- raised under the agreement dated 24.12.2010 for the supply of 2,92,000 SCMD APM Gas.

Prayer in O.P. No.820 of 2017:

This Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint an arbitrator to resolve the dispute between the petitioner and respondents arising out of the MDP debit note dated 29.05.2017 for Rs.51,13,586/- raised under the agreement dated 24.12.2010 extended periodically for the supply of 78,000/ SCMD MDP Gas.

Prayer in O.A. No.617 of 2017:

This Original Application is filed under Order XIV, Rule 8 of O.S. Rules r/w Section 9 (ii) d of Arbitration and Conciliation Act, 1996 pray to grant an order of temporary injunction restraining the respondents 1 & 2, their agents, officers employees, representatives or any one claiming under them from proceeding further under the Debit Note bearing No.GAIL/PDY/F & A/2016-2017/1600001707 dated 29.05.2017 for a sum of Rs.51,13,586/- under the agreement dated 24.12.2010 and extended periodically by side letters for the supply of 78,000 SCMD MDP gas and adjusting the said sum from Rs.3,25,55,903/- given as security deposit for further supply and consequently direct the said respondents to continue to supply the contracted quantum of gas under the said agreements without any interruption during the currency of the said agreements.

Prayer in O.A. No.618 of 2017:

This Original Application is filed under Order XIV, Rule 8 of O.S. Rules r/w Section 9 (ii) d of Arbitration and Conciliation Act, 1996 pray to grant an order of temporary injunction restraining the respondents 1 & 2 their agents, officers employees, representatives or any one claiming under them from proceeding further under the Debit Note bearing No.GAIL/PDY/F & A/2016-

2017/16000017076 dated 29.05.2017 for a sum of Rs.10,35,67,605/- under the agreement dated 24.12.2010 and extended upto 05.07.2021 vide agreement dated 30.12.2015 for the supply of 2,92,000 SCMD APM gas and adjusting the said sum from Rs.5,42,82,128/- given as security deposit for further supply under the said agreements and balance from Rs.3,25,55,903/- given as security deposit for further supply under the agreement dated 24.12.2010 and extended periodically by side letters for the supply of 78,000 SCMD MDP gas and consequently direct the said respondents to continue to supply the contracted quantum of gas under the said agreements without any interruption during the currency of the said agreements.

For Petitioner in all petitions
and applications

: Mr.F.B. Benjamin George

For Respondents in all petitions
and applications

: Mr.P.V.S.Giridhar

COMMON ORDER

By this Common order, Original Petition Nos.816 to 818 and 820 of 2017, seeking the appointment of an arbitrator under section 11 of the Arbitration and Conciliation Act 1996 ('Act'), Original Applications in O.A. Nos.617 and 618 of 2017, seeking interim relief under section 9 of the Act and Application Nos.6305, 6306, 5657 and 5658 of 2017 stand disposed of. The interim relief sought for in the section 9 applications is the grant of an injunction restraining the respondents from adjusting debit notes issued by them amounting in all to a sum of Rs.11,40,87,166/- against the deposits made by the applicant and directing the respondents to continue with the supply of

gas during the currency of the agreements entered into by and between the parties.

2. Since the background in relation to the Original Applications as well as the Original Petitions are common, I set out the brief facts as hereunder. To be noted is the admitted position that the relevant terms and conditions of the three agreements that are the subject matter of this order are similar/identical and reference to a specific Article in one agreement will include similar/identical clauses in other agreements as well:

(i) The applicant, Arkay Energy (Rameshwaram) Limited, (in short, 'Arkay'), is a company incorporated under the Companies Act, 1956 engaged in the business of generation and sale of electrical energy from its gas power plant at Ramnad District with a capacity of 149.18 MW. Arkay purchases gas from GAIL (India) Limited (in short 'GAIL') under various Agreements. GAIL in turn sources the resource from ONGC under back-to-back agreements.

(ii) For the sake of the present dispute, we are concerned with three agreements between Arkay and GAIL. The first agreement is dated 24.12.2010 for the purchase of 2,92,000 SCMD (standard cubic metre per day) of gas, extended by agreement dated 30.12.2015 to be operative till 05.07.2021. The pricing is on APM (Administrative Price Mechanism) basis. The second agreement is dated 24.12.2010 for the purchase of gas of 78,000 SCMD-MDP

(Market Driven Price) and is on-going. Fall back allotment made vide Term sheet dated 07.03.2013 and agreement in side letter 'B' dated 18.4.2013 is for the delivery of 4,00,000 SCMD non-APM gas.

(iii) All agreements contain a Minimum Guarantee Offtake (MGO) clause obligating Arkay to absorb 90% of the contracted quantum on a Take or Pay (ToP) basis. Article 5.2 in Agreement dated 24.12.2010 dealing with ToP reads thus:

5.2 Take or Pay Quantity Obligation (ToPQ Obligation)

(a) Notwithstanding Article 12.5, Article 16 for each year for quantities mentioned under Article 5.1(a) for firm allocated quantity and/or Article 5.1(b) for fall back allocated quantity (as the case may be) there shall be an annual 'Take or Pay Quantity' to be taken or paid for if not taken by the Buyer to be calculated as follows:

Take or Pay Quantity = The Buyer shall pay to the Seller for actual quantity of the gas supplied by the Seller to the Buyer subject to minimum payment for 90% of the annual quantities mentioned in Article 5.1(c) hereinafter referred as Take or Pay Quantity. The Buyer guarantees to buy during every financial year such Take or Pay Quantity of gas equivalent to the quantity obtained by multiplying 90% of the daily nominated quantity mentioned in Article 5.1(c) by the number of days in the financial year. Upon the buyer failing to lift the aforesaid minimum guaranteed quantities of Gas during any Financial Year, the Buyer undertakes to pay for the said Take or Pay quantity for such Financial Year.

(b) Wherever APM gas from ONGC available in a network/field and GAIL is not under obligation to pay MGO (ToP) to ONGC, GAIL

shall not raise invoice for MGO(ToP) quantity. However in cases where GAIL is obliged to pay MG(ToP) the same shall be recovered on prorata basis subject to maximum of MGO(ToP) liability under respective contracts. No MGO(ToP) on gas price would be applicable individually to consumer (s) in the event the gas has been utilised in the network/field by other consumers and GAIL is not required to pay MGO(ToP) to ONGC.

The MGO/ToPQ obligations thus operate on a back-to-back basis, with the levy and enforcement of ToP obligations by GAIL as against Arkay being conditional upon the levy and enforcement thereof by ONGC as against GAIL.

(iv) The terms of the agreement also required Arkay to open and maintain an irrevocable, revolving letter of credit in favour of GAIL. Article 5.4 reiterates that Arkay would pay GAIL for the actual quantity of gas taken or equal to the ToP quantity. If there was a shortfall in the quantity of gas lifted, Arkay was bound to remit the differential, termed as the 'ToP Deficiency Quantity' as per debit notes to be raised by GAIL in this regard. The dispute in the present applications revolves around the shortfall in lifting of gas supplied by GAIL and the consequent demands raised by GAIL.

(v) Arkay participated in and was awarded tenders by TANGEDCO for the supply of power under various agreements and was initially supplying power to both TANGEDCO (Tamil Nadu Generation and Distribution Company Limited) as well as other captive consumers. However, Arkay had restricted its supply

only to TANGEDCO in keeping with the terms of the Power Purchase Agreements (PPA) entered into between itself and TANGEDCO, GO Ms.77 of 2014 dated 10.10.2014, the order of priority set out under agreement dated 24.12.2010 (Article 10.6(a)) as well as the side letter between itself and GAIL as provided in Article 13 thereof. In 2016-17 Tamil Nadu was declared to be a power surplus state and the PPA with Arkay was not renewed. Consequently, the agreements stood briefly suspended between 1.6.2016 and 21.7.2016 when the order of priority was changed by Amendment Agreement dated 21.7.2016 to that fixed by Arkay.

(vi) According to Arkay it was the failure of TANGEDCO to lift the power that in turn resulted in Arkay's inability to lift the contracted quantity of gas. As a consequence, GAIL issued debit notes for its failure in adhering to the ToPQ obligation. Arkay then approached this court earlier this year challenging the debit notes issued by GAIL in very similar facts and circumstances as in the present case for the years 2015 and 2016. GAIL had agreed, as a one time measure, to drop the MGO claims and Arkay withdrew the applications on the strength of GAIL's waiver on 28.04.2017. Arkay and GAIL continued operations thereafter. Arkay was contracted to open irrevocable letters of credits but was facing difficulties in negotiating the same from the Bank. Vide letter dated 6.5.17 Arkay requested that it be permitted to deposit Rs.8,68,38,031/-,

interest free, in lieu of the LoC's due for the APM and MDP-I supplies. GAIL, vide letter dated 11.5.17, accepted the request, upon condition that:

1. *Rs.8,68,38,031/- shall be transferred to GAIL's account through E-banking/RTGS and the same shall be kept as Security Deposit (SD) and no interest shall be paid on the deposited amount.*
2. *Gas supply to your plant shall be restricted to the amount of deposits transferred against each contract (APM: Rs.5,42,82,128/- and Rs.3,25,55,903/-)*
3. *If for any reason payment is delayed or any disallowance is made from the Invoice/debit note etc, GAIL shall have unrestricted right to adjust the SD amounts full or for the amount not paid, as the case may be, against the invoices/debit notes etc and to stop/regulate gas supply to M/s.Arkey Energy as per the Gas Sale Agreements.*
4. *In case of upward revision in gas price, tpt charges, tax, the SD amount should be increased to that extent as and when requested by GAIL and within 7 days of receipt of GAIL's notice.*
5. *After receipt of the proper LC's as per the contracts from M/s Arkey Energy, the security deposit shall be adjusted against the subsequent fortnightly invoices/debit notes as the case may be.*

3. On 15.5.17, Arkay confirms its acceptance of the conditions imposed by GAIL and extracted above. Since Arkay continued to default on the MGO obligations, GAIL issued debit notes dated 29.5.2017 raising a total demand of Rs.11,40,87,166/-. In response to Arkay's persistent efforts to persuade GAIL to waive the MGO claims, GAIL, vide letter dated 1.6.17 rejects the request pointing out that reference to the earlier instance when GAIL had dropped the claim was misplaced and could not be invoked by Arkay. GAIL

would state that the earlier instance was solely on account of the gesture of ONGC not to enforce its claim as against GAIL, such concession being passed on to Arkay by GAIL as provided for under the terms of contract. The waiver was one time and could not be quoted as a precedent. GAIL thus called upon Arkay to remit the sum of Rs.11.41 crore within 24 hours. The demand for the period 2016-17 is reiterated on 5.6.17 by GAIL under threat of stoppage of future supplies till such time all arrears are cleared. The requests from Arkay continue and finally, by letter dated 16.6.17, GAIL agrees not to interrupt the supply of gas upon condition that the balance of Rs.2,70,87,166/-, after adjustment of a sum of Rs.8,70,00,000/- be remitted in settlement of debit notes dated 29.5.2017 and an LC or SD for a sum of Rs.8,70,00,000/- be furnished in terms of the Agreements.

4. This was the cue for the present applications to be filed. An order of Status Quo was passed on 19.06.2017 and an order of interim injunction on 20.6.2017 after hearing both parties that has been subsequently extended from time to time. Though Mr. Benjamin George, learned counsel for Arkay would emphasize that GAIL had withdrawn debit notes earlier under identical circumstances, GAIL is not inclined to repeat it this time around and contests the present applications vehemently.

5. The agreements contain a clause for arbitration that has been

invoked by Arkay on 22.3.2017. In the light of the concurrence expressed by Mr. P.V.S.Giridhar, learned counsel appearing for GAIL, the prayer of Arkay for appointment of arbitrators in O.P. No. 816 to 818 and 820 of 2017 is accepted.

6. By consent of both learned counsel, I appoint Mr. Justice AR. Lakshmanan, Judge (Retd) Supreme Court to adjudicate upon the disputes inter se the parties arising from Agreements dated 24.12.2010, 30.12.2015 and Term Sheet dated 07.03.2013 and side letter 'B' 18.04.2013. He is requested to enter reference in the matter, issue notice and adjudicate upon the issues in dispute after hearing the parties. He is at liberty to fix his schedule of fees and expenses that shall be borne by both parties equally. The agreements provide for the venue of the arbitration to be Delhi. Both learned counsel agree that the venue of arbitration would be decided by the Learned Arbitrator in conjunction with the parties. O.P. Nos. 816 to 818 and 820 of 2017 are allowed.

7. The Section 9 applications pray for an injunction restraining GAIL from proceeding further with the adjustment of the debit notes and directing it to continue with the supply of gas, pending arbitration. The arguments of Mr. George in this regard are as follows:

(i) The failure of Arkay to achieve the MGO(ToPQ) was on account of the mandate placed on it for exclusive supply to TANGEDCO. Since TANGEDCO had scaled back the quantities required by it, it had a cascading effect on the

quantities lifted by Arkay from GAIL. The mandate on exclusive supplies had been revisited and the order of priority modified by GAIL only on 21.7.16. Despite numerous requests there had been considerable delay in GAIL responding to the request for modification of the order of priority which further compounded the difficulty faced by Arkay in complying with the MOG clause.

(ii) The inaction of TANGEDCO in clearing the required quantities of gas and the delay on the part of GAIL triggers Article 9.2 of Agreement dated 24.12.2019 providing for Force Majeure events.

(iii) Clause 5.4 of Agreement dated 24.12.2010 prescribing the mechanism for Annual Payment Obligation does not provide for adjustment against security deposit but merely for stoppage of supply till payments are resumed and all outstandings met in full.

(iv) GAIL is guilty of fraud as evident from its actions narrated above and this provides an exception to the rule that there can normally be no injunction against enforcement of a bank guarantee/letter of credit/security deposit.

8. Mr. Giridhar would counter the arguments stating that the non-lifting of power by TANGEDCO is not an act of God but an act of Arkay for which it has to assume full responsibility. GAIL would allege that it was the poor marketing strategy of Arkay that was responsible for the poor business with

TANGEDCO also pointing out that TANGEDCO, in fact, pays a minimum compensation if the shortfall in offtake dips below a stipulated level. GAIL would also state that there had been continuous defaults in lifting of gas by Arkay despite GAIL's readiness to supply. Reliance is placed on various letters exchanged between the parties to establish the aforesaid position. As regards the allegation of Arkay that it was estopped from complying with the obligations on account of the order of priority thrust upon it, GAIL would point out that even prior to amendment the contractual obligations could have been met by Arkay by proper and judicious selection of one or two among the three types of gases, APM, MDP-1 and MDP-2 to supply. The specific case of GAIL is that the embargo harped upon by Arkay is on account of a commercial decision made by it and not on account of any default or delay by GAIL. GAIL would also highlight the position that the MGO claim on Arkay emanated solely from the corresponding claim made upon GAIL by ONGC. As a matter of fact, such claim had been waived by ONGC earlier paving the way for GAIL to extend the same benefit to Arkay as a consequence. In the present case, ONGC has not, till date, waived its claim.

9. Mr. Benjamin relies on the following cases:

- (i) Gangotri Enterprises Limited vs Union of India and others ((2016) 11 SCC 720)

- (ii) OPG Energy Pvt Ltd vs Gail (India) Ltd (2014 Online Mad 852)
- (iii) Radhakrishna Raghavan Nair vs Consul Consolidated Private Limited and others (2015 3 LW 882)

Mr.Giridhar relies on the following cases:

- (i) Adani Agri Fresh Limited vs Mahaboob Sharif and others ((2016) SCC 517)
- (ii) Gujarat Maritime Board vs L and T Development Projects Ltd and others ((2016 10 SCC 46)
- (iii) U.P.State Sugar Corporation V. Scumach International Limited ((1997) 1 SCC 568)
- (iv) Soundarajan Mills vs GAIL (Madras HC) ((2016 (1) CTC 351)

10. Heard learned counsel. I proceed to examine the prayer for interim relief on the anvil of whether there is a prima facie case and irreparable injury established and the balance of convenience as between the parties. Before doing so, I refer to the principles governing the grant of an injunction against invocation of bank guarantee that are well settled by a catena of judgements of the Supreme Court. To cite a few:

- (i) *Gujarat Maritime Board V. L & T Projects Ltd. and others* ((2016)10 SCC 46)

A Division Bench of the Supreme Court reiterated the settled position that an

injunction against the invocation of an absolute and unconditional bank guarantee cannot be granted except where the party seeking such relief establishes egregious fraud or irretrievable injury. The Bench quotes from its earlier judgement in *Himadri Chemicals Industries Ltd vs Coal Tar Refining Co* ((2007) 8 SCC 110) that summarizes the principles to be taken into consideration in granting/refusing injunction against enforcement of a bank guarantee or a letter of credit as follows:

'12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more res integra. In Himadri Chemicals Industries Limited v. Coal Tar Refining Company, at paragraph -14:

“14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank

guarantee or a letter of credit.

(iv) *Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.*

(v) *Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.*

(vi) *Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned.*

13. *Guarantee given by the bank to the appellant contains only the condition that in case of breach by the lead promoter, viz., the first respondent of the conditions of Lol, the appellant is free to invoke the bank guarantee and the bank should honour it ... “without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...”. It has also been undertaken by the bank that such written demand from the appellant on the bank shall be ... “conclusive, absolute and unequivocal as regards the amount due and payable by the bank under this guarantee”. Between the appellant and the first respondent, in the event of failure to perform the obligations under the Lol dated 06.02.2008, the appellant was entitled to cancel the Lol and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the Lol and resultantly invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the Lol etc., are not within the purview of an inquiry under [Article 226](#) of the Constitution of India. Between the bank and the*

appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the bank is bound to honour the payment under the guarantee.

(ii) *Adani Agri Fresh Limited vs Mahaboob Sharif and others* ((2016) 14 SCC 517)

The Bench reiterates the same principles as noted in the above judgements and, citing *U.P.Coop Federation Ltd vs Singh Consultants and Engineers (P) Ltd* ((1988) 1 SCC 174), *Vinitic Electronics (P) Ltd vs HCL Infosystems Ltd* ((2008) 1 SCC 544), *BSESs' case* (supra), *Himadri's case* (supra) and *Mahatma Gandhi Sahakra Karkhane vs National Heavy Engineering Coop Ltd* ((2007) 6 SCC 470), rejects the prayer for injunction.

(iii) In [General Electric Technical Services Company Inc. v. Punj Sons \(P\) Ltd.](#), ((1994) 4 SCC 230) the Supreme Court held:

'the Bank must honour the bank guarantee free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice, the court should interfere. The nature of the fraud that the courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else.'

(iv) In *Bses Ltd. (Now Reliance Energy Ltd) vs Fenner India Ltd. & Another* ((2006) 2 SCC 728), the Court, while reiterating the position that a bank guarantee constitutes an independent contract as between the bank and

the beneficiary also observes that the general rule is against the grant of injunction for enforcing an unconditional and irrevocable bank guarantee. The exceptions in this regard are noted in paragraph 10 extracted below:

10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in U.P. State Sugar Corpn. V. Sumac International Ltd.(1997) 1 SCC 568 (hereinafter 'U.P. State Sugar Corpn') this Court, correctly declare that the law was 'settled'.

In Bses' case (supra) the Court considered the grant of injunction pending proceedings for Arbitration, holding thus:

'29. There is no dispute that arbitral proceedings are pending. In fact, we were shown that one of the disputes referred to arbitration is whether the bank guarantees are null and void. Further, one of the substantive prayers in the arbitration made on behalf of the First Respondent, is to make an award declaring the four bank guarantees unenforceable, illegal, void and liable to be discharged. Further, there is also a prayer for permanent injunction to restrain the Appellant from encashing the bank guarantees. Therefore, since this prayer is already pending before the Arbitral Tribunal, we see no situation of "irretrievable injustice" if, at the present moment, the Appellant is allowed to encash the bank guarantees. For justice can always be rendered to the First Respondent, if he succeeds before the Arbitrators. Nor do we see any special equity in favour of the First Respondent, when there is in fact a dispute

that performance was prima facie not satisfactory, which enabled the Appellant to encash all or any of the four bank guarantees.'

(v) In *U.P.State Sugar Corporation (supra)* a specific plea was made by the respondent that since the appellant, the U.P.State Sugar Corporation was before the Board for Industrial and Financial Reconstruction, it would not be in a position to realise the award even assuming that an award was passed in its favour. Even such a circumstance was held not to constitute 'irretrievable injustice' which would be an exception to the general rule that no injunction would lie against the grant of a bank guarantee. In the present case the respondent is a PSU, a Navaratna company and to be fair to Arkay, no apprehension has been expressed with regard to the capacity of the respondents to repay, should the need arise.

11. Mr.George relies on *Gangothri's case (supra)*. The bank guarantee in that case had been furnished in respect of another contract and not that in which the demand for money had been made. Further, the guarantee had been of the nature of a performance guarantee and admittedly, the respondent had recorded satisfaction that the work entrusted had been completed to its satisfaction. Though the Bench also notes that the the guarantee ought not to have been invoked during the pendency of proceedings for arbitration, the other

circumstances noted above weighed substantially with the Court. I am thus of the view that the facts are distinguishable and reliance on this case by Arkay is misplaced.

12. Mr.George also relies on OPG's case (supra). This was a matter involving supplies by GAIL where the Division Bench of this Court granted an injunction upon ensuring that sufficient security was furnished by the private party. As noted elsewhere, learned counsel for Arkay was specifically asked if alternate security could be furnished but the response was in the negative. This case also, thus, does not advance the case of Arkay.

13. A compelling case has been made out by Mr.Benjamin alleging fraud on the part of GAIL. According to him, GAIL had, in identical situations for the earlier period, come forward to settle the dispute and there were no change in circumstances for the current period. The only reason, according to him, for the difference in stand adopted by GAIL now was that for the subsequent periods, Arkay had entered into direct arrangements with ONGC which had not found favour with GAIL. Naturally, this has been denied by GAIL. Be that as it may, this cannot evidently amount to egregious fraud necessary to warrant interference at this stage. The Supreme Court in *A.Ayyasamy V. A.Paramasivam & Ors.*(Judgement in Civil Appeal Nos. 8245 and 8246 of 2016 dated 04.10.2016) considered an allegation of fraud in the context of an

application under Section 8 of the Act filed by a party to the Suit for reference of the dispute to an Arbitrator. The Trial Court as well as the High Court dismissed the application under Section 8 holding that there were serious allegations of fraud and malpractice committed by the other party and as such the competent Court to consider such a factual matrix would be the Trial Court rather than an Arbitral Tribunal. In appeal before the Supreme Court the Bench observes that the Arbitration and Conciliation Act does not exclude any specific category of disputes as non-arbitrable per se. This observation was made in the context of demarcating the limits of judicial intervention in matters where parties have agreed to arbitration which the Court states should be very limited and minimal. Section 5 of the Act makes it more than clear that there should be no judicial intervention except in matters where such intervention is specifically provided. This mandate is echoed in the context of Section 16 of the Act which provides for the competence of the Arbitral Tribunal to rule on its own jurisdiction.

14. The Bench, in *Ayyasamy* (supra) observed as follows:

'Fraud' is a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his detriment. Fraud can be of different forms and hues. Its ingredients are an intention to deceive, use of unfair means, deliberate concealment of material facts, or abuse of position of

confidence. The Black's Law Dictionary defines 'fraud' as a concealment or false representation through a statement or conduct that injures another who relies on it. However, the moot question here which has to be addressed would be as to whether mere allegation of fraud by one party against the other would be sufficient to exclude the subject matter of dispute from arbitration and decision thereof necessary by the civil court.

.....

51. A distinction has also been made by certain High Courts between a serious issue of fraud and a mere allegation of fraud and the former has been held to be not arbitrable ([Seelvory Properties and Hotels Private Ltd v. Nusli Neville Wadia](#), 2011 (2) Arb LR 479 (Bom); [CS Ravishankar v. CK Ravishankar](#), 2011 (6) Kar LJ 417). The Supreme Court in [Meguin GMBH v. Nandan Petrochem Ltd.](#), 2007 (5) R.A.J 239 (SC), in the context of an application filed under [section 11](#) has gone ahead and appointed an arbitrator even though issues of fraud were involved. Recently, the Supreme Court in its judgment in [Swiss Timing Ltd v. Organising Committee, Arb. Pet. No. 34/2013](#) dated 28.05.2014, in a similar case of exercising jurisdiction under [section 11](#), held that the judgment in [Radhakrishnan](#) is per incuriam and, therefore, not good law." A perusal of the aforesaid two paragraphs brings into fore that the Law Commission has recognized that in cases of serious fraud, courts have entertained civil suits. Secondly, it has tried to make a distinction in cases where there are allegations of serious fraud

and fraud simplicitor. It, thus, follows that those cases where there are serious allegations of fraud, they are to be treated as non-arbitrable and it is only the civil court which should decide such matters. However, where there are allegations of fraud simplicitor and such allegations are merely alleged, we are of the opinion it may not be necessary to nullify the effect of the arbitration agreement between the parties as such issues can be determined by the Arbitral Tribunal.'

15. The conclusion of the Bench was that except if the allegations of fraud were so grave and apparant so as to confirm straight away such allegation, it must be left to the Tribunal to consider and decide the question under Section 16 of the Act. In the present matter, the allegations of fraud do not impinge upon the arbitrability of the dispute itself since both parties have consented to go before the Arbitrator. The allegation is made only in the context of grant of interim relief and does not, prima facie, appear convincing. No instance of fraud, let alone egregious fraud has been made out. GAIL is, after all, a public sector undertaking, and the fact that it did waive an earlier identical demand when the primary liability initially cast upon it by ONGC was lifted, reveals to me that its conduct is, prima facie, non-partisan. The arguments advanced now centre upon the interpretation of the terms of the agreements and are best left to the learned Arbitrator for decision.

16. I am of the considered view that both parties have established a

reasonably meritorious case, prima facie, and the rival contentions will have to be examined in the process of arbitration to decide one way or the other. As far as the other exception, that is, the causing of irreparable injury or 'special equities' that favour the grant of injunction, is concerned, the adjustment of the debit notes against the Security Deposit and the further condition imposed by GAIL upon Arkay for furnishing a LC or SD for an amount of Rs.8,70,00,000/- may, no doubt cause monetary hardship to Arkay. However both the adjustment as well as the imposition of the condition is, prima facie, in accordance with the terms of the Agreement and assuming that Arkay succeeds in Arbitration it can well recover the amount from Gail. On the other hand, no materials have been produced before me to establish the financial health of Arkay. However, I had specifically sought a clarification from Mr.George as to whether Arkay would be in a position to secure the interests of GAIL by alternate means or assets. He confirms that no alternate security can be furnished. This query was put to counsel since I believe that commercial considerations cannot and should not be completely lost sight of even in a matter of this nature involving State interests that are, no doubt, paramount. After all, while the use and distribution of energy reserves deserves, as the Supreme Court has held in *RNRL vs RIL* ((2010) 7 SCC 1) special protection, the other stakeholders in the industry have to be protected as well if possible,

ensuring that there is no compromise to the interests of the State. The balance of convenience has to be maintained. However, in the absence of any offer of alternate security by Arkay, I have no choice but to reject the prayer for injunction as regards the enforcement of the debit notes. However, Mr.Giridhar confirms that GAIL undertakes to continue the supply of gas to Arkay during pendency of arbitration. The undertaking is recorded. The supply will continue in accordance with the terms of the prevailing agreements.

17. To me what finally tips the balance in favour of GAIL is the fact that the commodity dealt with is natural gas that vests in the Government and consequently in the people of the Country in terms of Article 297 of the Constitution of India. The question is thus decided keeping in mind that even the sovereign rights of States over environmental resources is not proprietary but fiduciary. O.A.Nos.617 and 618 of 2017 are dismissed. The observations made herein are solely to decide the present applications and will not stand in the way of the parties in the proceedings for arbitration.

18. Applications Nos.5636 and 5637 of 2017 seek the impleadment of ONGC to the present proceedings as necessary parties. The Supreme Court, in the case of *Chloro Controls(I) Ltd vs Savern Trent Water Purification Services* ((2013) 1 SCC 641) considered the joinder of parties to proceedings for arbitration that are not parties to the arbitration agreement. In this context,

the Bench holds thus:

In the facts of a given case, the Court is always vested with the power to delete the name of the parties who are neither necessary nor proper to the proceedings before the Court. In the cases of group companies or where various agreements constitute a composite transaction like mother agreement and all other agreements being ancillary to and for effective and complete implementation of the Mother Agreement, the court may have to make reference to arbitration even of the disputes existing between signatory or even non-signatory parties. However, the discretion of the Court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously.

In the light of the above, the learned Arbitrator is requested to consider and decide the applications to implead ONGC as a preliminary issue.

19.A.Nos.6305 and 6306 of 2017 pray for the refund of court fee remitted in O.A. Nos. 617 and 618 of 2017. Reliance is placed on an order of this Court dated 06.07.17 passed in A. Diary No.11506/2017. Since the present O.As have been filed prior to the order dated 06.07.2017, the said order will have no application in the present case. As such no case is made out for the refund sought and the applications are dismissed.

20.This order is suspended till 26.12.2017.

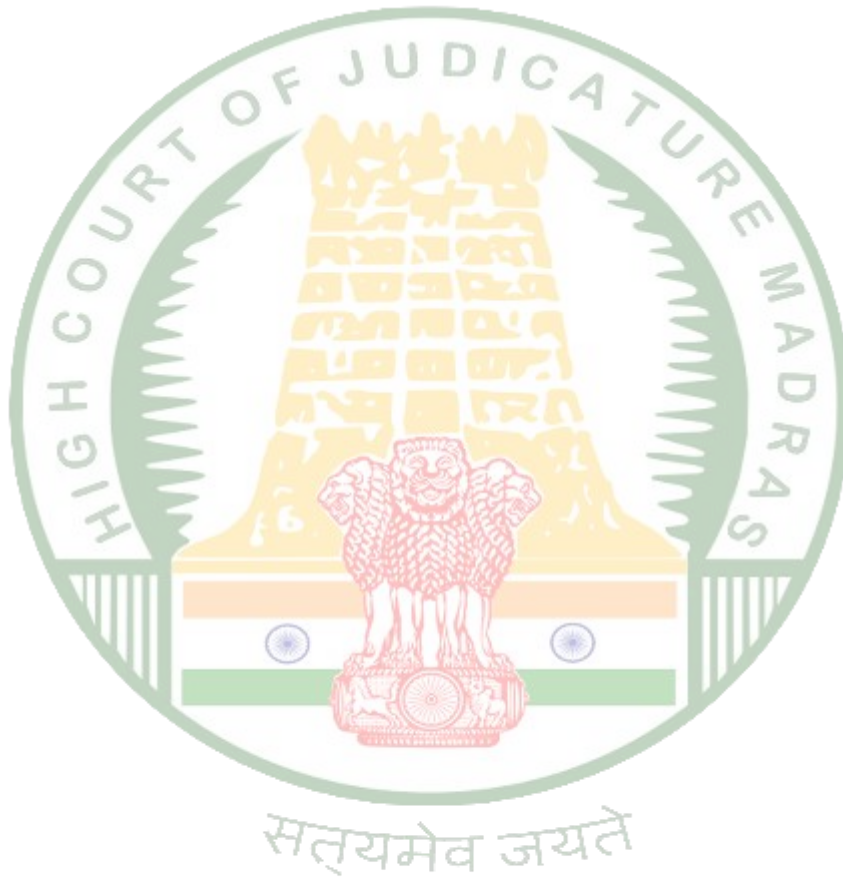
18.12.2017

Note: Issue order copy on 26.12.2017

Index:Yes/No

Speaking Order/Non-speaking order

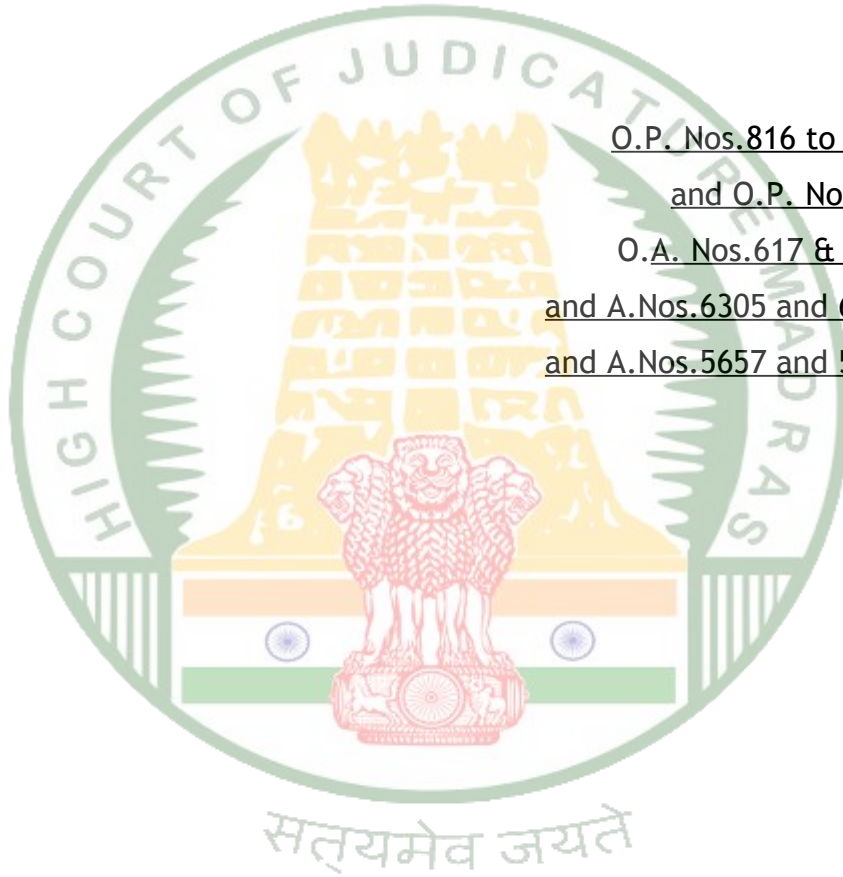
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DR.ANITASUMANTH, J.,

rkp/sl/vga



O.P. Nos.816 to 818 of 2017

and O.P. No.820 of 2017

O.A. Nos.617 & 618 of 2017

and A.Nos.6305 and 6306 of 2017

and A.Nos.5657 and 5658 of 2017

18.12.2017

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