

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.12.2017

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THE HONOURABLE DR.JUSTICE ANITA SUMANTH

O.P.No.819 of 2017 and O.A.No.693 of 2017
and A.No.5636 of 2017

Ind Barath Thermal Power Limited,
Having its Registered Office
at Plot No.30-A,
Road No.1, Film Nagar,
Jubilee Hills, Hyderabad-500 033.

.. Petitioner

Vs

1.PTC India Limited,
(Formerly Power Trading Corporation of India Ltd.)
2nd Floor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi 110 066

rep. By its Executive Director (Marketing)

2.Railway Energy Management Company Limited,
rep. by its Chief Executive Officer, SCOPE Minar,
Lakshmi Nagar,
New Delhi-110 092.

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3.Southern Railway,
rep. by its Chief Electrical Distribution Engineer,
Southern Railway Head Quarters,
7th Floor, NGO Annex,
Park Town, Chennai-600 003.

.. Respondents

Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint an Arbitrator to resolve the dispute between the respondents arising under the agreement dated 04.08.2016 between the petitioner and the 1st respondent incorporating the terms of agreement dated 04.08.2016 between the 1st respondent and 3rd respondent invoked by letter dated 17.07.2017 by the petitioner.

For petitioner : Mr.B.Benjamin George
For respondents : Mr.P.S.Raman, S.C.
for Mr.Prahalad Bhat - R1
Mr.Niranjan Rajagopalan - R2
Mr.P.T.Ramkumar - R3

सततमेव जयते
ORDER

This order disposes of O.P.No.819 of 2017 filed under Section 11 of the Arbitration and Conciliation Act, 1996 (in short 'Act') seeking the appointment of an Arbitrator and O.A.No.693 of 2017 and A.No.5636 of 2017 seeking ad interim reliefs under section 9 of the Act, pending Arbitration. O.A.693 of 2017 prays for the grant of an injunction restraining the 1st respondent from invoking the bank guarantee pursuant to letter dated 13.7.2017 and consequently restrain the 4th

respondent from making payment of the sum of Rs.28,80,00,000/- to the 1st respondent pending arbitration. A.No.5636 of 2017 is filed by IL and FS Financial Services Ltd, a third party, praying to be permitted to intervene in A No.693 of 2017 to place on record certain facts in relation to the guarantee issued by the 4th respondent to the 1st respondent.

2.The petitioner/applicant, Ind Barath, carries on the business of generation and sale of electrical energy from its coal based Thermal Power Plant situated at Tuticorin. PTC India Limited (PTC) the 1st respondent herein is a trader in electricity. Railway Energy Management Company Limited (REMCL), the 2nd respondent herein is a JV of the Southern Railway (SR), the 3rd respondent herein and floated a tender on 09.03.2016 for and on behalf of SR for the purchase of power on short term basis from various entities such as generators/trading licencees/state utilities/Distribution licencees. PTC participated in the tender at the request of Ind Barath and was successful. A letter of Award dated 13.06.2016 was issued by REMCL to PTC for the supply of power. By letter dated 14.6.2017, PTC conveyed to Ind Barath the order placed by REMCL on Ind Barath through PTC for the purchase of power. Consequent thereupon, back to back agreements dated 04.08.2016 were entered into between PTC and Ind Barath, and PTC and SR for the purchase of power.

3. The Power Purchase Agreement (PPA) between PTC and SR through REMCL could not be acted upon and were frustrated since no approval could be obtained from the Tamil Nadu Transmission Corporation Limited (TANTRANSCO) for intra-state open access. Mr. Benjamin George for Ind Barath submits that consequent to the frustration of the agreements, Ind Barath had incurred substantial loss since its plant had been kept idle in the absence of consumption by the respondents.

4. Disputes thus arose between the parties and Ind Barath has filed this original petition seeking the appointment of an Arbitrator to resolve the disputes inter se. O.A. No.693 of 2017 seeks a temporary injunction restraining PTC from invoking Bank Guarantee dated 4.8.2016 and restraining the 4th respondent, Indian Bank, New Delhi, Main Branch from making payment of a sum of Rs.28,80,00,000/- to PTC pending disposal of proceedings for arbitration.

5. A preliminary objection is raised on the maintainability of this petition by Mr. Raman appearing for Mr. Prahlad Bhat for PTC on two grounds - firstly, that there is no arbitration agreement as between the parties and secondly, that no leave has been obtained to pursue the prayer in the present application.

6. The provisions of section 7 of the Act define an Arbitration Agreement as follows:

'7. Arbitration agreement.—(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. (3) An arbitration agreement shall be in writing. (4) An arbitration agreement is in writing if it is contained in-- (a) a document signed by the parties; (b) an exchange of letters, telex, telegrams or other means of telecommunication 1 [including communication through electronic means] which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.'

7. The provisions of section 11(6A) call for an examination of the existence of an arbitration agreement as between the parties. The sequence of events that have transpired as between the parties and the documentation executed inter se are examined in seriatim and in the light of Section 7 to decide the question of whether the parties have agreed to the resolution of disputes by arbitration:

(i) Tender notification dated 9.3.2016 contains a clause for arbitration, being clause 12. This document is however not signed by either party to the dispute.

(ii) Communication dated 29.4.2016 addressed by Ind Barath to PTC authorises PTC to participate in the REMCL tender dated 9.3.2016 on behalf of Ind Barath for the sale of power as follows:

‘.....

We hereby authorize PTC India Limited (PTC) to participate in REMCL Tender No.REMCL/PP/STOA/SR/2016-17 dated 9th March 2016 (Revised Document) on behalf of M/s.Ind-Barath Thermal Power Limited for sale of time block wise power as per the details as given below:

.....

We have carefully gone through the tender document and satisfied ourselves with terms and conditions of REMCL Tender No.REMCL/PP/STOA/SR/2016-17 DATED 9th March 2016 (Revised Document) issued by REMCL and hereby unconditionally accepts to all the terms and conditions of the said tender document.’

Thus according to Mr.George, PTC has, for all practical purposes stepped into the shoes of Ind Barath and the transaction should thus be viewed as one cohesive whole.

(iii) Letter of award dated 13.06.2016 issued by REMCL to PTC which at clause 2.0, states 'The source of power should be from Ind Barath Thermal Power Limited, Tuticorin (IBTPL) District, Tamil Nadu as per the offer submitted by you'. It also confirms at Clause 6 that all other terms and conditions of the letter of acceptance will be as per the Bid document and PPA under the tender.

(iv) Communication dated 14.6.2016 inter se PTC and Ind Barath that reiterates '*all other terms and conditions*' for this transaction between PTC and IBTPL (Ind Barath) will be on back to back basis in line with REMCL tender specification'. It however, goes on to state as follows:

'In case of any doubt/clarification regarding the terms and conditions for this transaction the terms and conditions of the above mentioned REMCL tender and subsequent LOA of REMCL vide No.REMCL/PP/STOA/ST/2016-17 dated 13th June 2016 shall only prevail. The applicable jurisdiction for any dispute between PTC and IBTPL will be the Courts of New Delhi.'

(Emphasis by underlining supplied)

Attention is drawn to the last line of the paragraph above by Mr.Raman who would emphasize that the agreement as between the parties was that the proper courts to be approached would be those at Delhi.

(v)Mr.George on the other hand, would continue his efforts taking me to the terms of the PPA between PTC and Ind Barath dated 4.8.2016 as well the PPA between PTC and SR also dated 4.8.2016. The recitals in the PPA between PTC and Ind Barath encapsulate the entire sequence of events commencing from the invitation of PTC to Ind Barath on 22.3.2016 to participate in the tender till letter dated 14.6.2016 between PTC and Ind Barath settling the terms of the transaction between themselves. According to Mr.George, the PPA between the parties dated 4.8.2016 supercedes letter of award dated 14.7.2016 being later in point of time and as such no importance need be given to the stipulation therein vesting

jurisdiction in courts in Delhi for the resolution of disputes between PTC and Ind Barath.

(vi)Clauses 3 and 4 in the PPA between PTC and Ind Barath read as follows:

'3. To establish the commitment of PTC to SR, vide the Agreement referred at Sr.No.2 above, PTC hereby enters into this PPA with IBTPL. It is expressly agreed here that all the risks, title and obligations as per provision of the Agreement, signed between PTC and SR shall be applicable mutatis mutandis to IBTPL.

4. The Agreement referred in Sr.No.2 above enclosed herewith at Annexure hereby, becomes an integral part of this PPA.'

(vii)Article 12 of the PPA between PTC and SR provides for alternate dispute resolution and Article 14 vests jurisdiction in the courts at Chennai to entertain and try all matters arising out of the PPA.

(viii) Thus Mr.George would urge that on a combined reading of both PPA's, particularly by virtue of clause 4 of the PPA inter se PTC and Ind Barath extracted above, the Arbitration Agreement between PTC and SR would stand bodily lifted and incorporated into the agreement between Ind Barath and PTC.

(ix) Reference is made to the performance security given by PTC to Ind Barath dated 04.08.2016 which refers to the Letter of Award dated 13.6.2016 from REMCL to PTC, to emphasise the integrated nature of the transaction and the fact that PTC has indeed, stepped into the shoes of Ind Barath.

8. The disputes resulted in an exchange of correspondence between the parties, where Ind Barath raised a demand for a sum of Rs.138,09,60,000/- on PTC as damages for the forced idling of its plants for the entire period of contract and invoked the Arbitration clause, being clause 12 of the PPA between PTC and SR on 17.7.2017. The request for arbitration was ignored and hence the present petition.

9. SR has filed a counter to the effect that the Bank Guarantee furnished by PTC has expired and confirming that since the PPA has not been acted upon, no claim has been made upon PTC. Having heard the parties in detail, the preliminary questions that pose themselves for resolution are (i) whether the Arbitration Agreement in the PPA between PTC and SR stands incorporated by reference into the PPA between Ind Barath and PTC (ii) Whether this Original Petition is maintainable (iii) Should Ind Barath have obtained leave to sue in respect of this petition?

10. I have already set out in detail the sequence of events and the links sought to be drawn by Mr. George to illustrate the back-to-back nature of the transaction and consequently the application of Article 12 of the PPA between PTC and SR to disputes between Ind Barath and PTC as well. In deciding the first issue above, the provisions of section 7(5) would apply to the effect that *'the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to*

make that arbitration clause part of the contract.' The examination in the present case is thus whether the reference to PPA between PPA and SR in the PPA between PTC and Ind Barath is in general terms or specifically to the Arbitration clause. It is only if the Arbitration clause is separately identified and specifically included either expressly or by implication that one can arrive at the conclusion that the Arbitration Agreement has been incorporated by reference.

11. The Supreme Court has considered various scenarios under which, an arbitration agreement could be said to have been incorporated into another document. In *M.R. Engineers and Contractors Pvt Ltd vs. Som Datt Builders* (2009 7 SCC 696) the Bench summarises the position relating to reference by incorporation thus:

'13. The scope and intent of [section 7\(5\)](#) of the Act may therefore be summarized thus:

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled:

(i) The contract should contain a clear reference to the documents containing arbitration clause,

(ii) The reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,

(iii) The arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(iv) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be

incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(v) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also. '

Clause (iv) above is relevant and covers a situation identical to the one that arises in this petition.

12. An arbitration agreement is an agreement within an agreement and has an existence independent of and distinct from the clause relating to the substantive terms inter se the parties. In this regard, communication dated 14.06.2016 assumes importance as it specifically vests jurisdiction in the Courts in Delhi for the resolution of disputes between the parties. In my view, the paragraph in letter dated 14.6.15 that contains reference to the jurisdiction of courts in Delhi, contains two separate and distinct limbs. The first relates to terms and conditions of the tender and letter of award and the second confers jurisdiction upon the Courts at Delhi for the resolution of disputes between PTC and Ind Barath. The letter of Award is thus clear to the effect that while the substantive terms of the transaction would be governed by the terms of tender and the letter of award by REMCL dated 13.6.2016, as far as dispute resolution is

concerned, it is only the Courts at New Delhi that may be approached. Any other interpretation will make the last line relating to applicable jurisdiction redundant.

13. Mr. George will also argue that the reference to jurisdiction of courts at Delhi in letter dated 14.7.15 will stand superseded by the PPA dated 4.8.2015 where there is reference to the incorporation of the PPA between PTC and SR and consequently the Arbitration Agreement contained therein as well as the exclusive clause vesting jurisdiction in the courts in Chennai. My reading is different. The recitals in PPA dated 4.8.16 set out the entire sequence of events between the parties as extracted below:

WHEREAS

PTC invited IBTPL vide its e-mail dated 22nd March 2016, 27th April 2016 and 26th April 2016 for participating in Railway Energy Management Company Limited (hereinafter referred to as "REMCL" Tender Notice No:REMCL/PP/STGA/SR/2016-17 dated 9.3.2016 (REVISED) for purchase of power on behalf of Southern Railway (SR) during the period starting from 1st June 2016 to 28th February 2017 as per the terms and condition of REMCL's Tender Notice. In reply to our invite e-mail, IBTPL vide its letter No.IBTPL/REMEL/D-2/April-2016 dated 29th April 2016 authorised PTC to offer IBTPL power in REMCL Tender for Southern Railway in the State of Tamil Nadu. On the basis of IBTPL's authorisation, PTC participated in the said tender of REMCL for Southern Railway in the State of Tamil Nadu. Thereafter, REMCL issued its LoA to PTC for purchasing 100-120 MW power from IBTPL through PTC vide their LoA No.REMCL/PP/STOA/ST/2016-17 dated 13th June 2016. Subsequently

PTC issued its letter to IBTPL vide letter no.PTC/MTFG/IBTPL/4033 dated 14th June 2016 in duplicate. The same was thereby accepted by IBTPL by returning duly signed and stamped copy of PTC's letter dated 14th June 2016.

14.The last sentence of the sequence above states that letter dated 14.6.2016 which refers to jurisdiction vesting in the courts at Delhi was issued by PTC to Ind Barath in duplicate, accepted by Ind Barath and returned to PTC after due execution by signing and stamping the same. There is thus clear and categorical consensus *id idem* between both parties that any and all disputes between them should be resolved only by the courts in Delhi.

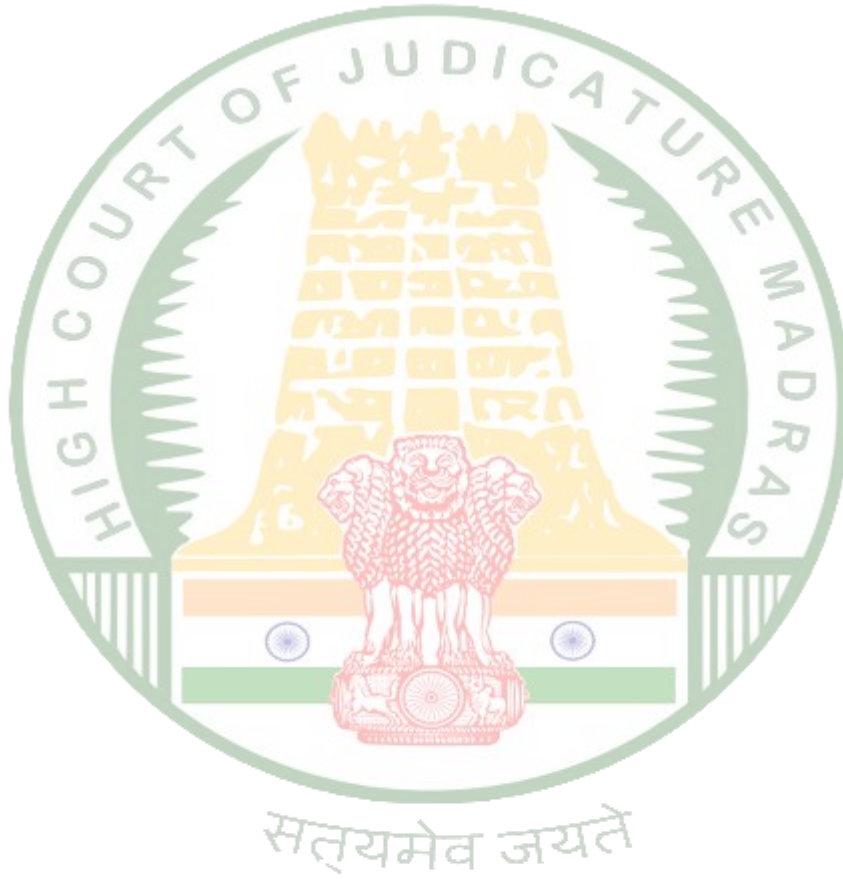
15.I am thus of the view that the arbitration clause in PPA between PTC and SR, far from being incorporated by reference, has in fact, been specifically eschewed by the parties since even the PPA between PTC and Ind Barath makes specific reference to the letter dated 14.6.2016 making disputes *inter se* subject to jurisdiction of the Courts at New Delhi. Issue (1) is answered accordingly.

16.In the absence of an Arbitration Agreement between the parties, this petition is not maintainable, thus answering issue (2). In the light of my conclusion as aforesaid, I refrain from considering or elaborating on the arguments advanced on the aspect of leave to sue or merits of the disputes between the parties. Issue

17. The original petition and consequently the applications stand dismissed without any order as to costs.

18.12.2017

msr/sl



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Dr.ANITA SUMANTH,J.

msr/sl



O.P.No.819 of 2017 and O.A.No.693 of 2017
and A.No.5636 of 2017

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Dated:18.12.2017