IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.10857 of 2018

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1. India Power Corporation (Bodhgaya) Ltd., a company duly incorporated by the India Power Corporation Limited, under the Companies Act, 1956, having its registered address at Plot No. X-1-2 & 3, Block EP, Sector-Vs-P.S. Salt Lake City, District- North 24, Pargana, Kolkata-700091 (West Bengal), through its authorized representative, Sh. Rakesh Kumar Sharma, Dept. Manager (Legal), S/o Sh. Om Prakash Sharma R/o Zeon Complex, Opp. Fire Brigade Office, Sawrajpuri Road, Gaya, Bihar, Bihar P.S. Civil Line, District-Gaya.
2. India Power Corporation Limited, a company duly incorporated under the Companies Act, 1956, having its registered address at Plot No. X-1-2 & 3, Block EP, Sector-Vs-P.S. Salt Lake City, District- North 24, Pargana, Kolkata-700091 (West Bengal), through its authorized representative, Sh. Samrat Chatterjee, Assistant Manager (Legal), S/o Sh. Kamal Chatterjee R/o A E 31, Street No. 78, P.S. NEW Town, District North 24, Pargana, Kolkata-700091 (West Bengal).
3. Mr. Ashok Kumar Goswami being one of the Directors of the Petitioner No. 1, working for gain at India Power Corporation Limited, a company duly incorporated under the Companies Act, 1956, having its registered address at Plot No. X-1-2 & 3, Block EP, Sector-Vs-P.S. Salt Lake City, District- North 24, Pargana, Kolkata-700091 (West Bengal).

.... Petitioners

Versus

1. South Bihar Power Distribution Co. Ltd., a company duly incorporated under the Companies Act, 1956, having its registered address at Second Floor, Vidyut Bhawan, Jawaharlal Nehru Marg, Bailey Road, Patna, Bihar-800022.
2. That State of Bihar, through its Principal Secretary, Department of Energy, having his office at 8, Daroga Rai Path, Patna-800001.
3. The Chief Engineer (Commercial), South Bihar Power Distribution Company Limited, Vidhyut Bhawan, Bailey Road, Patna-800001.

.... Respondents

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Appearance :

For the Petitioners : Mr. Ajit Sinha, Sr. Advocate.
Mr. Sanjay Singh
Mr. Shakib Ayaz
Mr. Zulfiquar Ali Al Quadri
Mr. Srijan Sinha, Advocates.

For the Respondents : Mr. Lalit Kishore, Sr. Advocate.
Mr. Anand Ojha, Advocate.

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN
ORAL JUDGMENT
Date: 22-06-2018

Heard learned counsel for the petitioners and learned counsel for the respondents.

2. The present writ petition has been filed for the following reliefs –

"(a) A declaration that the (i) purported preliminary termination notice dated 24.05.2018 purporting to terminate the DFA; (ii) the purported letter dated 24.05.2018 invoking the performance Bank Guarantee No. 0728BG0000052013; and the (iii) the purported letter dated 25.05.2018 threatening criminal action against the petitioners and its officials, in respect of Bodhgaya Circle and (iv) the purported letter dated 29.05.2018 asking the petitioners to reinstate the Performance Bank Guarantee are unfair, arbitrary, malafide, illegal and bad;

(b) A further writ of mandamus and/or any other appropriate writ/order/ directions to the Respondents and their men, agents and subordinates, to forthwith forbear from acting on the basis of and/or in furtherance of the (a) purported preliminary termination notice dated 24.05.2018; (b) the purported letter dated 24.05.2018 invoking the performance Bank Guarantee No. 0728BG0000052013; and (c) the purported letter dated 25.05.2018 threatening criminal action against the petitioners and its officials, in respect of Bodhgaya Circle and (d) the purported letter dated 29.05.2018 asking the petitioners to reinstate the Performance Bank Guarantee;

(c) A further writ of mandamus and/or any other

writ/order/direction to the respondent authorities to produce the records pertaining to (a) the purported preliminary notice dated 24.05.2018; (b) purported letter dated 24.05.2018 of the Respondents invoking the performance Bank Guarantee and (c) purported letter dated 25.05.2018 threatening criminal action against the petitioners and its officials, and (d) the purported letter dated 29.05.2018 asking the petitioners to reinstate the Performance Bank Guarantee so that conscionable justice may be done by quashing the same;

(d) Appropriate Writs and/or orders and/or directions to issue as would afford complete relief to the petitioners;

(e) Rule Nisi in terms of prayers above;

(f) Stay of operation of the purported preliminary termination notice dated 24.05.2018; purported letter dated 25.05.2018 threatening criminal action against the Petitioners and its officials; purported letter dated 24.05.2018 invoking the performance Bank Guarantee; and the purported letter dated 29.05.2018 asking the petitioners to reinstate the Performance Bank Guarantee.

(g) Injunction restraining the respondents from proceeding with the purported notice dated 24.05.2018; purported letter dated 24.05.2018 invoking the performance Bank Guarantee and purported letter dated 25.05.2018 threatening criminal action against the Petitioners and its officials, in respect of Bodhgaya Circle and (d) the purported letter dated 29.05.2018 asking the petitioners to reinstate the performance Bank Guarantee.

(h) Injunction restraining the Respondents No. 1 from terminating the Distribution Franchisee Agreement dated 31.12.2013.

(i) Injunction restraining the Respondents from taking any coercive action against the Petitioners leading to disruption of power supply in the Distribution Franchisee Area that would adversely impact around two lakh households comprising ten lakh individuals.

(j) Injunction restraining the Respondents from initiating any criminal proceedings against the Petitioners and its officials or give effect to or further effect to the purported letter dated 25.05.2018 threatening criminal action against the petitioners and its officials;

Ad interim orders in terms of prayers (f), (g), (h), (i) and (j) above;

(k) such further or other order or orders be made and/or directions be given as this Hon'ble Court may deem fit and proper."

3. The short facts of the case according to the petitioners are that the petitioner no. 1 is a Company incorporated by the petitioner no. 2, which is engaged, *inter alia,* in the business of generation, transmission and distribution of electricity. Petitioner No. 3 is a citizen of India and a Director of the petitioner no. 2. The respondent no. 1 has license to supply electricity in four Electric Supply Areas and for the said purpose entered into a Distribution Franchisee Agreement on 31.12.2013 (Annexure-1) with the petitioner Nos. 1 and 2 for sale and distribution of electricity in the South Bihar region namely Gaya Town and adjoining areas. In due course, disputes arose between the parties and it was alleged that the respondents had

violated the agreed terms recorded in the minutes of a meeting dated 14.12.2016 by making an excess withdrawal of 92% in August, 2017. It had been agreed in the meeting that the entire collected amount would be deposited in a Default Escrow Account and the respondents were entitled to withdraw 75% and the petitioners would withdraw 25%. The respondents encashed the petitioners' Letter of Credit of Rs. 9.34 crores leading the petitioners to invoke arbitration. An Arbitrator was appointed under Section 11(6) of the Arbitration Act (for short, 'the Act') by order dated 04.04.2018 and hearing before the learned Arbitrator commenced. An order of *status quo* was passed by the learned Arbitrator and it is alleged by the petitioners that the respondents encashed the petitioner's Performance Bank Guarantee of Rs. 13.29 Crores in violation of the *status quo* order. The impugned preliminary notice of termination was also filed by the respondents on 24.05.2018. Accordingly a contempt application was filed by the petitioners before the learned Arbitrator on 27.05.2018 for referring the matter to this Court.

4. Learned Senior counsel, Mr. Ajit Kumar Sinha, appearing on behalf of the petitioners vehemently submits that the respondents have acted contumaciously and their action is fraught with arbitrariness. It is submitted that the *status quo* granted by the learned Arbitrator in terms of his order dated 12.04.2018 was

continued thereafter, first on condition of deposit of the amount collected as well as future collections in the Escrow Account, which subsequently stood modified by order dated 12.05.2018 to the effect that upon failure of the petitioners to bring on record the details of the amount deposited in the Default Escrow Account on the date fixed for hearing i.e. 16.05.2018 the *status quo* would automatically stand vacated. It is submitted that the requisite details were brought on record on the date fixed on 16.05.2018 and hence the *status quo* order continued. It is further pointed out that thereafter the matter was taken up on 17.05.2018, 19.05.2018, 27.05.2018 and finally on 31.05.2018. Neither claim nor counter claim was brought on record by the parties as permitted earlier by order dated 27.05.2018, and in view of non-availability of counsels as well as the Tribunals owing to the intervening Summer Vacation, the matter was adjourned for two months and fixed on 12.08.2018 as jointly prayed and agreed between the parties.

5. Learned counsel for the petitioners therefore submits that violation of the *status quo* order by the respondents is writ large on the face of it and the preliminary notice of termination issued on 24.05.2018 granting time of 30 days to rectify and remedy the entire default is a looming threat to the petitioners which is likely to crystalise in the next few days. It is submitted that once the matter

is under consideration before the learned Arbitrator, there was no need or necessity to take coercive steps by issuance of the impugned preliminary notice of termination and the other impugned actions taken or proposed against the petitioners. It ought to have been borne in mind that the issue merely related to a financial aspect of alleged non-deposit of the collected amount in the Escrow Account by the petitioners, and not to any operational deficiency or default on their part. The petitioners have approached this Court in view of the urgency involved and non-availability of the learned Arbitrator until the next date of hearing fixed on 12.08.2018. Any adverse and coercive action taken by the respondents would leave the petitioners remediless. It is submitted that the present petition has been filed in public interest as the matter falls in the public domain having regard to the public utility services being dispensed. The consequences of the impugned action of the respondents would affect about 10 lac citizens residing in the area of supply of electricity under the petitioners' operations.

6. Learned Senior counsel Mr. Lalit Kishore appearing on behalf of the respondent-Power Distribution Company equally vehemently opposes the writ petition, submitting at the outset that the same is not maintainable. It is pointed out that the petitioners had committed several defaults, for which a notice of critical event of default was given to them and thereafter the impugned preliminary

notice of termination dated 24.05.2018 has been issued and other actions necessitated against the petitioners. It is a matter of record that the petitioners have already made a prayer before the learned Arbitrator in their contempt petition filed by the petitioners under Section 27(5) of the Arbitration Act, for issuance of directions for *status quo ante* enforcing the interim orders, as well as for issuance of directions to the respondents to withdraw the notice dated 24.05.2018 regarding termination of the agreement and in respect of the Performance Bank Guarantee which had been encashed by the respondents. It is evident from the subsequent orders passed by the learned Arbitrator on 27.05.2018 as well as 31.05.2018 that the petitioners have sought similar relief before the learned Arbitrator as in the present writ petition, which was however not granted. The petitioners therefore cannot be allowed to take advantage of the absence of the learned Arbitrator, that that too when the matter has been fixed on 12.08.2018 as agreed by the petitioners themselves, to approach this Court in the meantime for relief on the self same grounds. If at all, their remedy might lie by way of approaching the Civil Court under Section 9 of the Act and not before this Court.

7. I have heard the parties at length and considered the materials on record. It is not in dispute that the petitioners have preferred a contempt petition under Section 27(5) of the Act wherein

they have also sought directions to the respondents to withdraw the impugned notice dated 24.05.2018 regarding termination as well as with regard to the Performance Bank Guarantee. It is also a matter of record that the petitioners have filed an application under Section 17 of the Act (Annexure-P/28) pursuant to which an order of *status quo* was first passed on 19.04.2018 by the learned Arbitrator which was continued from time to time as state above. It is also not in dispute that the impugned letter dated 24.05.2018 invoking the Performance Bank Guarantee as well as issuance of the preliminary notice of termination have been alleged by the petitioners to be in violation of the *status quo* orders, for which a contempt petition has been filed. As such I do not propose to enter into the question whether the impugned actions of the respondents have in fact been taken in violation of the *status quo* orders as that is a matter for consideration by the learned Arbitrator. I am also of the view that the petitioners may face difficulty in approaching the Civil Court under Section 9 of the Act. In the present case, the petitioners have approached the learned Arbitrator with a petition under Section 17 of the Act which has been entertained. Thus, the bar in Section 9(3) which prohibits the Court from entertaining an application for interim measure of protection unless the remedy under Section 17 of the Act would not be efficacious, may come in the way of the petitioners. The respondents have further contended that the petitioners have already taken an objection in their contempt petition with regard to the preliminary notice of termination and encashment of Performance Bank Guarantee and these aspects duly agitated before the learned Arbitrator on 27.05.2018 and 31.05.2018. I am of the view that even assuming so, there is nothing to suggest that any adverse order against the petitioners has been passed in that regard or that the issue has been decided and rejected. The matter thus remains pending for decision before the learned Arbitrator. The fact that the next date has been fixed on 12.08.2018 with consent of the petitioners cannot operate in a manner to preempt the issue and allow the respondents to crystalise the proposed coercive action in terms of the impugned preliminary notice of termination. I do not also perceive any immediate urgency on the part of the respondents to take action under the impugned preliminary notice of termination which merely involves a financial aspect of the dispute, but the consequences whereof would have far reaching ramifications including the likely inconvenience to the public at large in the area of the petitioners' operations.

8. In the larger interest and in the extraordinary circumstances that coercive action is being resorted to in between dates of hearing in the arbitration proceedings, I am inclined to interfere in the matter in exercise of writ jurisdiction. I therefore deem it proper to direct the respondents not to resort to coercive action

against the petitioners for the time being. The preliminary notice of termination and the proposed actions in terms of the impugned notices shall remain in abeyance until proceedings before the learned Arbitrator are resumed and a decision is taken by him on the pending contempt petition.

9. The writ petition stands disposed of with the aforesaid observations and directions.

(Vikash Jain, J)

Md. Ibrarul/-

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	24.06.2018
Transmission Date	N.A.