IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 12TH DAY OF MARCH 2018

THE HON'BLE DR. JUSTICE ANITA SUMANTH

A. Nos.4539 to 4541, 5580 of 2017 and 56 to 58 of 2018

in

A. Nos.2638 of 2017

and

A. No.59 of 2018

in

A. No.2639 of 2017

A. Nos.2638 & 2639 of 2017:-

In the matter of Arbitration & Conciliation Act, 1996

And

In the matter of the Arbitration Agreement-by Email dated 08.04.15 & 14.04.15

M/s.Karam Chand Thapar & Bros
(Coal Sales) Ltd.,
Represented by its Authorized Signatory,
Mr.Mohammed Arief,
Thapar House,
25, Brabourne Road,
Kolkata 700001. ... Applicant

-Versus-

1. IND-BARATH PowerGencom Ltd.,
Office No.20, Chamiers Road,
Nandhanam, Chennai-600035 ... Respondent No.1

2. Tamil Nadu Generation &
Distribution Corporation Ltd.,
(TANGEDCO) 144, Anna Salai,
Chennai 600002. ... Respondent No.2/Garnishee

A. Nos.4539 to 4541 of 2017:-

M/s.IL&FS Financial Services Ltd.,
The IL&FS Centre,
Plot No.C-22, G Block,
Bandrakurla Complex, Bandra (East),
Mumbai-400 051. ... Third Party Intervener

-Versus-

1. M/s.Karam Chand Thapar & Bros
(Coal Sales) Ltd.,
Thapar House,
25, Brabourne Road,
Kolkata 700001. ... 1st Respondent/Applicant

2. M/s.IND-BARATH Power Gencom Ltd.,
Office No.20, Chamiers Road,
Nandhanam,
Chennai-600035 ... 2nd Respondent/ 1st Respondent

3. The Tamil Nadu Generation &
Distribution Corporation Ltd.,
(TANGEDCO) 144, Anna Salai,
Chennai 600002. ... 3rd Respondent/Garnishee

A. No.4539 of 2017:-

Application praying that this Hon'ble Court be pleased to reopen the hearing in A. No.2638 of 2017.

A. No.4540 of 2017:-

Application praying that this Hon'ble Court be pleased to exclude the identified Receivables earmarked and secured to the applicant, payable by the 3rd respondent/Garnishee to the 2nd respondent as set out in the schedule to the Judge's summons from the prohibitory order dated 12.07.2017, sought by the 1st respondent.

A. No.4541 of 2017:-

Application praying that this Hon'ble Court be pleased to direct the 3rd respondent/garnishee to file a statement of account on the bills raised by the 2nd respondent, including the amounts paid so far to or on behalf of the 2nd respondent, and payable to the 2nd respondent, in respect of the Bills raised by the 2nd respondent, within a date to be fixed by this Hon'ble Court.

A. No.5580 of 2017:-

The Tamil Nadu Generation &
Distribution Corporation Ltd.,
(TANGEDCO) 144, Anna Salai,
Chennai 600002. ... Applicant/3rd Respondent/Garnishee

-Versus-

1. M/s.IL&FS Financial Services Ltd.,
The IL&FS Centre,
Plot No.C-22, G Block,
Bandrakurla Complex, Bandra (East),
Mumbai-400051...Respondent/Applicant/3rd Party Intervener

2. M/s.Karam Chand Thapar & Bros
(Coal Sales) Ltd.,
rep. by its Authorised Signatory,
Mr.Mohammed Arief, Thapar House,
25, Brabourne Road,
Kolkata 700001. ... Respondent/1st Respondent/Applicant

3. M/s.IND-BARATH Power Gencom Ltd.,
Office No.20, Chamiers Road,
Nandhanam,
Chennai-35.... Respondent/2nd Respondent/ 1st Respondent

Application praying that this Hon'ble Court be pleased to modify the order dated 10.08.2017 in A. No.4541 of 2017 passed by this Hon'ble Court, to the extent that quantification of interest of M/s.Ind Barath Power-Gen-com Ltd., (3rd respondent herein) be deleted.

A. Nos.56 to 59 of 2018:-

M/s.Karam Chand Thapar & Bros
(Coal Sales) Ltd.,
rep. by its Authorised Signatory,
Mr.Mohammed Arief, Thapar House,
25, Brabourne Road,
Kolkata 700001. ... Applicant/Applicant

-Versus-

1. M/s.IND-BARATH Power Gencom Ltd.,
Office No.20, Chamiers Road,
Nandhanam, Chennai-35. ... 1st Respondent/1st Respondent

2. The Tamil Nadu Generation &
   Distribution Corporation Ltd.,
   (TANGEDCO) 144, Anna Salai,
   Chennai-2 ... 2nd Respondent/2nd Respondent/Garnishee

A. No.56 of 2018:-

Application praying that this Hon'ble Court be pleased to direct that the deposited amount of Rs.13,54,05,505.44 be kept deposited to the credit of arbitration applications Nos.2638/2017 and 2639/2017 in an appropriate manner (including in an interest bearing F.D.R.) as may be directed by this Hon'ble Court till the conclusion of the arbitration proceedings before the Ld. Sole Arbitrator Hon'ble Mr.Justice (Retd.) K.P.Sivasubramaniam.

A. No.57 of 2018:-

Application praying that this Hon'ble Court be pleased to re-open A. No.2638 of 2017.

A. No.58 of 2018:-

Application praying that this Hon'ble Court be pleased to pass an order modifying the prohibitory order dated 27.04.2017 to the extent of directing the garnishee respondent No.2 to deposit in a time-bound manner an amount of Rs.13,54,05,505.44 (payable to the applicant as on 31.03.2017) to the credit of application Nos.2638/2017 and 2639/2017.

A. No.59 of 2018:-

Application praying that this Hon'ble Court be pleased to re-open A. No.2639 of 2017.

These applications coming on this day before this court for hearing the court made the following order:-

Application No.2638 of 2017 was filed by Karamchand Thapar & Sons, ('applicant') in terms of section 9 of the Arbitration and Conciliation Act 1996 ('Act') seeking an order prohibiting Tangedco ('R2/garnishee') from paying an amount of

Rs.13,54,05,505.44 to Ind Barath Powergencom Ltd., ('R1') pending arbitration proceedings.

2.Application No.2639 of 2017 was similarly filed seeking a direction to Tangedco (R2) to deposit to the credit of the application the aforesaid sum, pending arbitration.

3.An order of interim injunction as prayed for in A.No.2638 of 17 was granted on 27.04.17. The applications were closed by order dated 12.07.2017, appointing an Arbitrator. The interim injunction granted on 27.04.17 was extended for a period of four (4) weeks) after which the applicant was granted liberty to approach the Learned Arbitrator for extension thereof. The relevant portion of order dated 12.07.17 stated thus:

> *13. The 2nd respondent Tamilnadu Generation and Distribution Corporation Ltd (TANGEDCO) is subject to a prohibitory order by this Court dated 27.4.2017 restraining it from disbursing the amount in question to the first respondent. In view of my order above referring the disputes between the parties to arbitration, the pro order already granted is limited to a period of eight weeks from today, within which time, the parties may approach the Arbitrator for its continuance or otherwise as well as any other interim reliefs in accordance with law.*
>
> *14. The applications are ordered in the aforesaid terms. No costs. Consequently, all connected applications are closed.'*

Tangedco/R2 did not challenge the aforesaid order.

4. An application was filed under section 17 of the Act before the learned Arbitrator appointed seeking the deposit of the sum of Rs.13,54,05,505.44 in an interest bearing Fixed Deposit, pending arbitration. The learned Arbitrator, vide order dated 02.09.2017 passed after hearing learned counsel for the applicant, R1 and R2, directs R2 to deposit an amount of Rs.15 Crores in an interest bearing Fixed Deposit in its own name in a Nationalised Bank. This order was not also challenged by R2/Tangedco.

5. An Original Side Appeal in O.S.A.No.224 of 2017 was filed by R1 challenging the aforesaid order and R2 was arrayed as a party in the appeal. The orders passed by the Division Bench after hearing the learned counsel for all parties including R2 and the sequence of events that have transpired thereafter are set out hereunder:

(i)Order dated 21.09.2017 passed by the First Bench states as follows:

> *'Read this in conjunction with the earlier proceedings of this Court dated 06.09.2017.*
>
> *2. The interim order of stay granted vide paragraph 9 of our earlier order/proceedings dated 06.09.2017 is extended for a period of four weeks or until further orders whichever is earlier.*
>
> *3. In addition thereto, when Section 9 of the Arbitration and Conciliation Act, 1996 was first moved before the learned Single Judge on the file of the Original Side of this Court, an interim order qua garnishee was passed on 27.04.2017 in A.Nos.2638 & 2639*

of 2017. Today besides the learned counsel for the appellant and the first respondent, Mr.V.Viswanathan, learned Standing Counsel appearing for the garnishee i.e., the erstwhile Tamil Nadu Electricity Board, now the Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) is also before us.

4. By consent of all parties, the interim order granted by the learned Single Judge in A.Nos.2638 & 2639 of 2017 dated 27.04.2017 qua garnishee alone will continue to operate for a period of four weeks or until further orders whichever is earlier.

5. List the matter on 12.10.2017.'

(ii) The applicant and R1 thereafter entered into a memorandum of compromise dated 13.10.2017 to the following effect:

'1.In the present appeal the appellant and the 1st respondent by consent appoint Mr.Justice K.P.Sivasubramaniam (Retd.) as the Sole Arbitrator to adjudicate the disputes between the parties. The seat of Arbitration shall be Chennai.

2.The appellant and the 1st respondent, without prejudice to their respective contentions on the merits of the case, agree and submit that the Prohibitory Order passed in Application Numbers 2638 and 2639 of 2017 dated 27.04.2017, shall continue to operate to an extent of Rs.13,54,05,505.44/- that is the amount claimed as outstanding by the 1st respondent, as on 31st March 2017, against the appellant and the same shall continue till the conclusion of the Arbitration proceedings. The parties crave leave of this Hon'ble Court to grant them liberty to approach the Learned

Single Judge of this Hon'ble Court if any modification of the Prohibitory Order is deemed just and necessary.

It is humbly prayed by the parties that the above Compromise Memo may be recorded and appropriate orders may be passed in the present appeal recording the above compromise and thus render justice.'

(iii)The O.S.A came to be disposed of on 13.10.2017 in the presence of learned counsel for all parties in terms of the aforesaid Memorandum of Compromise. Leave as sought for, for approaching the Single Judge for any modification of the interim order was thus, inter alia granted by the Bench.

(iv)It is relevant to note that Tangedco had been represented throughout in all proceedings both before the single Judge as well as the Division Bench.

(v)The order of the Division Bench dated 13.10.17 was communicated to Tangedco by the applicant on 31.10.2017 in line with which a sum of Rs.13,54,05,505.44 was to be set aside as security to protect the interests of the applicant till the conclusion of proceedings for arbitration. The receipt of the aforesaid communication by Tangedco is confirmed by Mr.Manishankar.

(vi) In the meantime, IL & FS Financial Services Ltd., (in short, IL&FS) filed applications in A.Nos.4539 to 4541 of 2017 seeking to re-open the hearing of A.No.2638 of 2017 and exclude certain receivables that, according to it, had been earmarked as payable by Tangedco to it on the ground that such receivables constituted secured debts, IL&FS being a preferential/secured creditor and for a direction to the garnishee to file a statement of account on the bills raised.

(vii) An order was passed in these applications on 10.08.2017 after hearing Mr.A.L.Somayaji, learned senior counsel for Mr.Menon Karthik, learned counsel for IL&FS, Mr.ARL.Sundaresan, learned senior counsel for Mr.K.Harishankar for Karamchand and Mr.Anirudh Krishnan, learned counsel for Ind-Bharath. There was no representation on behalf of Tangedco. The order states thus:

....

7. There is no objection raised to the intervention of IL &FS Financial Services Ltd. by any of the parties.

8. IL&FS would state that Ind Barath Power Gencom Limited is due and liable to pay to it a sum of Rs.20,49,32,514/- under invoices dated 1.1.2015 and 21.11.2015 in respect of which it is a preferential creditor. Pursuant thereto, IL&FS sought payment of the aforestated amount from TANGEDCO, vide letter dated 20.6.2017, to which there has been no response.

9. Mr.A.L.Somayaji, learned Senior Counsel would submit that suits have been filed, wherein Ind Barath Power Gencom Ltd. has admitted its liability as well as IL&FS's exclusive entitlement to receive the amounts due and payable in respect of the invoices dated 01.11.2015 and 21.11.2015 amounting to Rs.20.49 Crores. Further, TANGEDCO has made substantial payments to two other creditors, Gimpex Private Limited and M/s.Adani Enterprises Ltd. IL&FS, thus, apprehends that its interests may be compromised. A copy of the letter dated 29.07.2017 issued by Ind

Barath Power Gencom Ltd, the second respondent, authorising TANGEDCO to release payment of an amount of Rs.47.25 crores directly to M/s.Adani Enterprises Limited towards the total settlement of their arrears was circulated.

10. Having heard the submissions, TANGEDCO is directed to file a statement of account on the Bills raised by the second respondent including the amounts paid so far to or on behalf of the second respondent and payable to the second respondent, demarcating the components of principal and interest separately on or before 18.08.2017.

11. List the matter on 18.08.2017.'

To be noted that reference to all parties in this order continues to be as per the main application filed by Karamchand Thapar and sons and IL & FS is referred to hereinafter as 'intervener'.

(viii) Tangedco circulated a statement dated 04.09.2017, as per which, only a sum of Rs.23,799/- was payable by it to R1. An application has also been filed in A.No.5580 of 2017 on 14.09.2017 seeking modification of the direction to quantify the interest due to be paid by Tangedco to R1.

(ix) The applicant, in the meantime, pursued the prayer in A.No.2639 of 2017 before this Court in view of the liberty granted by the Division Bench to approach this Court for modification of interim orders.

(x) Tangedco chooses thereafter to file a counter to A.No. 2639 of 2017 on 29.11.17 confirming at paragraph 9 thereof that the interests of the applicant would be protected by virtue of the pro-order granted by the Court. In the same breath, Tangedco states that the amount to be paid to R1 by it was only a sum of Rs.23,799/-.

(xi) Since the counter filed by Tangedco raises serious objection to the maintainability of the prayer for interim relief sought for by the applicant, Application Nos.56 to 59 of 2018 have been filed by the applicant seeking the following prayers: A.No.56 of 2018 seeking a direction that the amount of Rs.13,54,05,505.44 be kept deposited to the credit of A.Nos.2638 and 2639 of 2017 in an appropriate manner till the completion of proceedings for arbitration, A.No.57 of 2018 seeking the reopening of A.No.2638 of 2017, A.No.58 of 2018 seeking a modification of pro-order dated 27.04.2017 to the extent of directing Tangedco to deposit the aforestated amount in a time bound manner to the credit of A.Nos.2638 and 2639 of 2017 and A.No.59 of 2018 seeking the reopening of A.No.2639 of 2017.

(xii) A counter has been filed by Tangedco to the above applications reiterating its objection to the re-opening of the prayer in A.No.2369 of 2017.

6. I am called upon, in the above facts and circumstances, to decide upon the maintainability of the prayers for interim relief as well as the grant of relief as sought, on merits.

7. Heard Mr.Harishankar, learned counsel for the applicant, Mr.Anirudh Krishnan, learned counsel for R1 and Mr.Manishankar, learned AAG for Mr.V.Vishwanathan for Tangedco.

8. The main argument of Mr.Manishankar is that A.2639 of 2017 has been closed and as such the prayer for deposit of the amount of Rs.13,54,05,505.44 cannot be pursued by the applicant any longer. He also refers to the provisions of section 9(3) of the Act that require all interim relief to be sought before and considered by the Arbitrator except if it is inefficacious to do so.

9. I see no merit in the first argument as the Division Bench has, on 31.10.17 has granted liberty to the applicant to seek a modification of interim orders, if deemed necessary, from this Court. In any event, the applicant has now filed A.Nos.56 to 58 of 2017 seeking interim reliefs afresh. This Court, in the light of the liberty granted to the applicant on 31.10.17, holds the prayer for interim relief maintainable and proceeds to consider the relief sought, on merits.

10. The orders/directions of this Court have consistently been to ensure that the interests of the applicant are protected. Prohibitory orders have thus been granted since 27.04.2017 directing Tangedco, as garnishee, to withhold payments of an amount of Rs.13,54,05,505.44 to R1 pending proceedings for arbitration. The interim orders have been reiterated time and again, in the presence of learned counsel for Tangedco, including as recently as on 21.09.2017 before the Division Bench. It is seen that Tangedco has also undertaken both in the course of hearings before this Court as well as in the counter filed that it is bound by the pro-order passed by

this Court and the interests of the applicant would be adequately protected by virtue of the same. Such orders are thus final and admitted by Tangedco.

11. While this is so, a new dimension has been brought in by Tangedco in its statement dated 04.09.17 when it states that only an amount of Rs.23,799 was due to be paid by it to R1. Then again, in the financial statements circulated on 27.10.2017, Tangedco projects huge demands by it as against various third party entities said to be connected to R1. I refrain from referring any further to the aforesaid statement as I am concerned in these applications only to the transactions as between the parties before me.

12. This stand of Tangedco is reiterated in counter dated 29.11.2017, wherein Tangedco states that an amount of Rs.24,31,41,876/- is in fact, recoverable by Tangedco from R1. Curiously, Tangedco also states that inspite of the aforesaid demand, a sum of Rs.23,799 as per statement dated 04.09.17 is due and payable to R1. The aforesaid positions have to be seen in the context of the pro-order granted by this Court that admittedly, binds Tangedco.

13. An attempt is made by both sides to bring to the notice of this Court the remittances made to various third parties (said to be concerns related to R1) in civil suits, as well as to R1 itself. I am however not inclined to take into consideration the aforesaid circumstances since, as I have

stated earlier, I am concerned solely with the interim relief sought in the present matter inter se the parties before me.

14. The conflicting and contradictory stands adopted by Tangedco certainly justify the alarm expressed by the applicant in the protection of its interests. In the light of the vigorous assertion of Tangedco regarding the absence of dues to R1, the request of the applicant to direct Tangedco to deposit the amount covered by the pro-order seems acceptable as in the alternate the prohibitory order might itself be rendered nugatory.

15. In the light of the discussion above, I am inclined to order deposit of the amount as prayed for. My reasons for doing so, in a nut-shell, are as follows:

i. Tangedco has consistently acquiesced to the pro-orders granted by this Court and confirmed by the Division Bench and stated that it was bound by the same.

ii. The crux of the pro-orders are to the effect that Tangedco is restrained, by virtue of an order of this Court, from disbursing a sum of Rs.13,54,05,505.44 to R1 pending proceedings for arbitration between the applicant and R1. No challenge has been raised to the aforesaid orders.

iii. Orders of this Court dated 27.04.17 and 12.07.17 to the aforesaid effect have been accepted by Tangedco.

iv. Tangedco has fully participated in the O.S.A. and the Division Bench specifically records the presence of the learned counsel for Tangedco on 21.09.2017 and at all other hearings, where by consent, the prohibitory order granted was directed to continue for a period of four weeks or until further orders, whichever was earlier.

v. The position adopted by Tangedco as on 21.09.2017 before the First Bench of this Court is thus to the effect that the amount of Rs.13,54,05,505.44 was to be set aside pending arbitration.

vi. The statement of Tangedco in its counter dated 04.09.2017 to the effect that only a sum of Rs.23,799/- was payable to R1 has to be seen in the context of the above factual position.

vii. While this Court is not concerned in these proceedings with the tussle between R1 and R2, the prohibitory orders passed cannot be allowed to be frustrated by Tangedco particularly when such orders have been accepted in full by it.

viii. The position adopted by Tangedco to the effect that A.No.2639 of 2017 cannot be pursued as well as the defence put up to A.Nos 56 to 59 of 2018 wherein the applicant prays for direction to Tangedco to deposit the amount does leave the Court with the impression that the attempt of Tangedco is to frustrate the pro-orders despite accepting the orders of this court as well as the Division Bench, unconditionally and unequivocally.

16. In fine, A.No.58 of 2018 is allowed directing Tangedco to deposit the amount of Rs.13,54,05,505.44 within a period of four (4) weeks from the date of receipt of a copy of this order in an

interest bearing account in its own name to the credit of the applications. The custody of the Fixed Deposit receipt shall be retained by the Registrar General of this Court till the conclusion of the proceedings for arbitration. A.Nos.56,57 and 59 of 2018 are dismissed, A.No.5580 of 2017 is closed and A.Nos.4539 to 4541 of 2017 are dismissed.

Sd/-DR.A.S.M.J

12.03.2018

//Certified to be a true copy//

Dated this the day of 2018

JJ 11/06/2018 COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.