



O.A.Nos.176 and 177 of 2022

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M.SUNDAR, J

This common order will now dispose of the captioned two applications.

2. Mr.Arun Karthik Mohan, learned counsel for applicant in both the applications, Mr.P.T.Ramkumar, learned Standing Counsel for Southern Railways on behalf of Respondents 1, 2 in both the applications and Mr.K.Balamurali of M/s.Shivakumar & Suresh (Law Firm) on behalf of third respondent (ICICI Bank Limited which issued the Bank Guarantees and which is a formal party) in both the captioned applications are before me.

3. Proceedings/orders made by me in the captioned applications in the previous listings on 31.03.2022 and 07.04.2022 are as follows:

'Proceedings made on 31.03.2022

Captioned applications are under Section 9 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' which shall hereinafter be referred to as 'A and C Act' for the sake of brevity. Mr.Arun Karthik Mohan, learned counsel for applicant in both the captioned applications is before this Court. This Court is informed that the captioned matters pertain to two 'Power Purchase Agreements' [hereinafter 'PPAs' in plural and 'PPA' in singular for the sake of convenience and clarity], one dated 24.12.2019 and



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another dated 03.01.2020.

2. Suffice to say that the 'applicant' is the 'contractor' and the 'respondents' ['Southern Railways' collectively] is the 'employer'.

3. Article 33 in the aforementioned two PPAs captioned 'Dispute resolution' serve as arbitration agreements between the parties i.e., arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act is learned counsel's say.

4. Arbitrable disputes have erupted resulting in Southern Railway sending a communication dated 16.03.2022 bearing reference No.E.28/III/Solar/93 MWp/REMCL 5. Learned counsel for contractor submits that a very detailed reply dated 28.03.2022 has been sent. To be noted, aforementioned 16.03.2022 communications from Southern Railways is common to both PPAs. A further perusal would reveal that part of one of the Performance Bank Guarantees qua one of the PPAs has already been encashed and the captioned Section 9 interim order pertains to the balance and the entire Performance Bank Guarantee with regard to other PPA. To be noted, regarding PPA dated 24.12.2019 Bank Guarantee is to the tune of Rs.33.80 lakhs [Bank Guarantee No.6026NDDG00002321 dated 13.08.2020 issued by third respondent] and a little over Rs.20.95 lakhs has already been encashed. As regards 03.01.2020 PPA, Bank Guarantee is to the tune of Rs.20.00 lakhs [Bank Guarantee No.6026BGFD006720 DATED 21.02.2020 issued by third respondent] and it is intact.



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5. *Mr.P.T.Ram Kumar, learned standing counsel for Southern Railways accepts notice on behalf of the respondents 1 and 2 in both the captioned applications, requests for time to get instructions and very fairly submits that the remaining part of the aforementioned one Bank Guarantee bearing No.6026NDDG00002321 dated 13.08.2020 issued by third respondent and the entirety of other Bank Guarantee bearing NO.6026BGFD006720 dated 21.02.2020 issued by third respondent will not be invoked without leave of this Court. This submission/undertaking is recorded.*

6. *Issue notice to third respondent returnable in a week i.e., returnable by 07.04.2021. Learned counsel for applicant is permitted to serve on standing counsel (if any) for the third respondent-Bank.*

7. *It is made clear that in the light of the fair stand taken by Southern Railways, it is appropriate to direct the applicant to keep the aforementioned two Bank Guarantees alive until further orders from this Court even if it means multiple renewals from time to time.*

List on 07.04.2022.'

'Proceedings made on 07.04.2022

Read this in conjunction with and in continuation of earlier proceedings made in previous listing on 31.03.2022.

2. *Mr.Arun Karthik Mohan, learned counsel for lone applicant and Ms.R.Renukadevi, learned counsel representing Mr.P.T.Ramkumar, learned standing counsel for*



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Southern Railways (respondents 1 & 2) are before this Court.

3. Mr.Balamurali, learned counsel of M/s.Shivakumar and Suresh (Law Firm) who is before Court submits that the Law Firm would be entering appearance on behalf of third respondent (ICICI Bank Ltd.,) and Vakalatnama would be filed by tomorrow i.e., by 08.04.2022.

4. Be that as it may, learned counsel for applicant submits that there have been subsequent developments and the details of the same may have to be brought on Board by way of typed set of papers and requests for a short accommodation. Request acceded to.

5. List on 12.04.2022.'

4. Short forms, abbreviations and other references used in the aforementioned earlier proceedings will continue to be used in the instant order also for the sake of convenience and clarity.

5. After the first of the aforementioned proceedings/orders were made on 31.03.2022, Southern Railways has issued a communication captioned 'Termination Notice' dated 06.04.2022 bearing reference No.E.28/III/Solar/93 MWp/REMCL 5 and a scanned reproduction of the same is as follows:



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Office use / SOUTHERN RAILWAY

Headquarters Office
Electrical Branch
48-3 Chennai - 600 003
Dt. 06.04.2022

No. E.28/III/Solar/93 MWp-REMCL-5

To
M/s Sherisha Rooftop Solar SPV. Three Private Limited,
New No. 1/171, Old No. 1/122,
Old Mahabalipuram Road,
Thundalam Village, Thiruppur,
Kandheerparam, Tamilnadu-603110

Dear Sir,

TERMINATION NOTICE
(Without Prejudice)

Power Purchase Agreement(s) dated 24.12.2019 & 03.01.2020 based on NIT issued by REMCL vide REMCL NIT No. REMCL/R/y/Rooftop/2019/101 dt.01.03.2019.

In connection with execution of 2.60 MWp Solar Rooftop project in Southern Railway under REMCL-5, Power Purchase Agreement(s) dated 24.12.2019 & 03.01.2020 was signed between Southern Railway and you, based on REMCL NIT No. REMCL/R/y/Rooftop/2019/101 dt.01.03.2019 and Letter of Award issued by REMCL vide LOA No. REMCL/R/y/Rooftop/2019/01/93 MW-Refex LOA/04 dated 25.09.2019.

Since the Solar Power Project construction is being delayed much beyond the time schedule and you have failed to replenish Performance Security within 30 days of encashment despite repeated reminders, a Fifteen days' notice was given to you under this office letter E.28/III/Solar/93 MWp-REMCL-5 dated 10.03.2022, but you have taken no action to commence the work.

Since the period of fifteen days' notice had already expired, the above two Power Purchase Agreements stand terminated in terms of clause 28.1.2 under Article 28 of the Power Purchase Agreements.

Your participation as well as participation of every member/partner in any manner as an individual or a partnership firm/ JV is hereby debarred from participation in the tender for executing the work and your Performance Security in the form of Performance Bank Guarantees which was en-cashed, submitted by you will be forfeited, subjected to outcome of OA Nos. 176/2022 & 177/2022 filed before Honourable High Court of Madras, as per clause 9.2 under Article 9 of the Power Purchase Agreements.

Kindly acknowledge receipt.

Yours faithfully,
(சாதி வரம்: Sankar Nandini)
சுபா நிர்வாகி: சாதி வரம்
Chief Electrical Traction Engineer
பொது இயக்குநர் PCTE/S.R.Y./MAS
For and on behalf of the President of India



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6. Before proceeding further, it is necessary to extract and reproduce entire Article 33 of PPAs and the same reads as follows:

'ARTICLE 33

DISPUTE RESOLUTION

33.1. Dispute resolution

33.1.1. Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 33.2.

33.1.2. The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

33.2. Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Railway Electrical Engineer or nominated official by CWM/PR to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Railway Electrical Engineer or nominated official by CWM/PR or without the intervention of the Railway Electrical Engineer or nominated official by CWM/PR, either Party may require such Dispute to be



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referred to [Insert the designation of the Person authorized in this behalf] and the Chairman of the Board of Directors of the SPD for amicable settlement, and upon such reference, the said persons shall meet no later than [7 (seven)] days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the [7 (seven)] day period or the Dispute is not amicably settled within [15 (fifteen)] days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within [30 (thirty)] days of the notice in writing referred to in Clause 33.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 31.3.

33.3. Arbitration

33.3.1. If the efforts, to resolve all or any of the Disputes through conciliation fail, then such disputes shall be referred to a sole arbitrator if the total value of the claim is up to Rs.[5 million]; and to a panel of three arbitrators if total value of claims is [Railways] than Rs.[5 million]. For this purpose, Railways will make out a panel of engineers with the requisite qualification and professional experience relevant to the field to which the Agreement relates. This panel will be from among serving or retired government employees or of public sector. Railways shall provide a panel of three arbitrators for claims up to Rs.[5 million] and a panel of five arbitrators for claims of Railways than Rs.[5 million]. SPD shall choose the sole arbitrator from the panel



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of three and/or one arbitrator from the panel of five in case three arbitrators are to be appointed. The Railways shall also choose one arbitrator from this panel of five and the two so chosen will choose the third arbitrator from the panel only. The arbitrator(s) shall be appointed within a period of [30] days from the date of receipt of written notice/ demand of appointment of arbitrator from either Party.

33.3.2. The venue of such arbitration shall be Chennai. The arbitral award shall be binding on both Parties. The cost of arbitration shall be equally shared by both Parties.

33.3.3. The sole arbitrator or the Arbitral Tribunal shall give his award within [12] months from the date of his entering on the reference or within extended time, as the parties may consent for the same, as the case may be on all the matters referred to him and shall indicated his/their finding, along with sum awarded, separately on each individual item of dispute. In case the matter is referred to arbitral tribunal for adjudication and the views of two arbitrators differs on the issue then view of presiding arbitrator shall prevail. The demand of arbitration shall specify the matters which are in question or subject of the dispute or differences as also the amount of claim item wise, together with counter claims or set off shall be referred to arbitration and other matters shall not be included in the reference. The arbitration proceedings shall be governed by the Indian Arbitration and Conciliation Act, 1996, as



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amended from time to time including provisions in force at the time the reference is made.

33.3.4. During the dispute resolution period, both the Parties shall continue to perform their respective obligations as per provisions of the Agreement.

33.3.5. This Section is severable from the rest of this Agreement and shall remain in effect even if this Agreement is terminated for any reason.

33.4. Arbitration

33.4.1. Any Dispute which is not resolved amicably by conciliation, as provided in Clause 33.2, shall be finally decided by reference to arbitration by a board of arbitrators appointed in accordance with Clause 33.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “Rules”), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be [Delhi], and the language of arbitration proceedings shall be English.

33.4.2. There shall be a board of [3 (three)] arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the [2 (two)] arbitrators so selected, and in the event of disagreement between the [2 (two)] arbitrators, the appointment shall be made in accordance with the Rules.

33.4.3. The arbitrators shall make a reasoned award (the “Award”). Any Award made in any arbitration held



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pursuant to this Article 33 shall be final and binding on the Parties as from the date it is made, and the SPD and Railways agree and undertake to carry out such Award without delay.

33.4.4. The SPD and Railways agree that an Award may be enforced against the SPD and/or Railways, as the case may be, and their respective assets wherever situated.

33.4.5. This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

33.5. Adjudication by Regulatory Authority or Commission In the event of constitution of a statutory Regulatory Authority or Commission with powers to adjudicate upon disputes between the SPD and Railways, all Disputes arising after such constitution shall, instead of reference to arbitration under Clause 33.3, be adjudicated upon by such Regulatory Authority or Commission in accordance with the Applicable Law and all references to Dispute Resolution Procedure shall be construed accordingly. For the avoidance of doubt, the Parties hereto agree that the adjudication hereunder shall not be final and binding until an 105 appeal against such adjudication has been decided by an appellate tribunal or High Court, as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law.'

7. The aforementioned Article 33 of PPAs serves as arbitration agreement between the parties being arbitration agreement within the

meaning of Section 2(1)(b) read with Section 7 of A and C Act. To be



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noted, this has already been captured in Paragraphs 2 and 3 of my previous proceedings dated 31.03.2022. Before proceeding further, both sides submit that reference to Clause 31.3 (Clause 33.2 captioned 'Conciliation') in the aforementioned extract is a typo/printer's devil and Clause '**31.3**' should read as '**33.3**'. This submission is recorded.

8. Learned counsel for Contractor draws the attention of this Court to a communication dated 28.03.2022 which has been described as a 'detailed reply' in my 31.03.2022 proceedings. To be noted, there are two such letters as there are two PPAs. Vide these communications, Contractor has invoked Clause 33.1. This Court is informed that a meeting within the meaning of Clause 33.1.2 has not happened. Let this communication be carried to its logical end by both parties in accordance with Article 33.

9. In the interregnum, the interim order already granted on 31.03.2022 will continue for a period of 90 days from 31.03.2022 i.e., upto 29.06.2022. As regards the aforementioned termination notice dated 06.04.2022 (which has been scanned and reproduced supra) vide the concluding paragraph, the Contractor has been debarred from participation in tender which is in the nature of black listing. Law is well settled that such black listing cannot be done without putting the



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Contractor on notice and without giving opportunity to the Contractor.

Be that as it may, in the case on hand, this has been done pending captioned applications and while aforementioned interim orders are operating. Therefore, in exercise of powers of this Court, I deem it appropriate to grant relief to the Contractor under third limb (Serial No.3) of the prayer in the Judge's summons. To be noted, this order will not serve as a precedent as this is being done in the light of the unique trajectory which this matter has taken. In other words, the Contractor/Member and partner of Contractor being debarred from participation in tenders alone shall be kept in abeyance till 29.06.2022 which is the present life span of this order.

10. If the aforementioned Article 32 route is taken/carried to its logical end, in the event of the matter not getting concluded and in the event of the matter culminating in arbitration, it is made clear that it is open to both parties to raise all questions including the questions arising in the captioned applications before the 'Arbitral Tribunal' ['AT'] and also move applications under Section 17 if deemed appropriate and if permissible. AT shall consider the same on its own merits and in accordance with law notwithstanding this being a judicial order.

11. Captioned two applications are disposed of in the aforesaid



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manner. There shall be no order as to costs.
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12.04.2022