O.A.No.111 of 2023

Reserved on	02.03.2023
Pronounced on	09.03.2023

KRISHNAN RAMASAMY, J.

The present application was filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter called as “the act”) seeking an order of an injunction directing the respondents to supply lignite to the applicant in accordance with the Fuel Supply Agreement dated 29.04.1998 and to maintain such supply pending the conclusion of the arbitration proceedings. This relief was sought by the applicant for a period from April, 2022 to March, 2023 for the supply of Annual Average Quantity (AAQ) as agreed by both the parties.

2. The applicant-company was incorporated during the year 1993 as per the provision of the Companies Act, 1956, with an object to undertake the construction and operation of 250 MW power generating facility, using lignite as fuel, at Neyveli, India. In order to achieve this object, the applicant

entered into a Power Purchase Agreement dated 20.11.1996 with the Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) for long-term supply of power for 30 years, wherein the applicant has to supply the power, generated from the project exclusively to TANGEDCO. The said agreement *inter alia* contemplated that the applicant would enter into a long-term Fuel Supply Agreement with the respondent for the supply of lignite as fuel for generation of power and this Fuel Supply Agreement was to be approved by the TANGEDCO, since the fuel costs are a pass-through to TANGEDCO. Under the Power Purchase Agreement, the applicant was required to purchase fuel only from the respondent for generation of power in the project. In order to fulfill the terms and conditions of the Power Purchase Agreement, the respondent and applicant had entered into Fuel Supply Agreement (FSA) dated 29.04.1998 for the supply of lignite by the respondent for the use of generation of power in the project for a term of 30 years from the date of commencement of the commercial operations of the project.

3. In terms of the FSA, the applicant had sent a letter dated 28.09.2020, whereby nominated 1,234,463 MT of lignite for the financial year 2022-2023. On 02.11.2020, the respondent had accepted for the said nomination of the applicant. As on 26th October 2022, the respondent had supplied 9,42,063.22 MT of lignite out of the total Annual Aggregate Quantity (AAQ) of 1,234,463 MT of lignite for the financial year 2022-2023. The respondent had also sent the letters dated 21.11.2022 and 22.12.2022, whereby it has stated that the respondent was facing the land acquisition issues, due to which they were not in a position to supply the balance quantity of AAQ. However, they had also stated that they were supplied more than the FSA quantity as agreed. Further, it has stated that due to the problems that are faced by the respondent in acquiring the land, it would review its decision to supply the balance quantity of AAQ of lignite in the first week of January 2023.

4. By virtue of the letters dated 23.12.2022, 04.01.2023 and 23.01.2023, the applicant had stated that the claim for inability to supply lignite, which was due to the issues in land acquisition, is not acceptable,

when the respondent continues to supply lignite to its own power plants without any interruption. At any cost, the non-supply of AAQ of lignite for the financial year 2022-2023 would be a breach of FSA. On 25.01.2023, the respondent sent a reply and agreed to supply a further quantity of 77,000 MT out of outstanding of AAQ, 292,399.78 MT of lignite.

5. On 06.02.2023, the applicant received a letter from the respondent *inter alia* stating that they were unable to supply the balance AAQ of 2,15,399.78 MT of lignite for the financial year 2022-2023 due to the criticality in lignite production in other mines. In the said letter, without any basis, the respondent had invoked Force Majeure provision under Article 11.1(k) of the FSA on the ground that it was purportedly facing difficulty in obtaining vacant possession of the land for mining, especially for Mine No.II.

6. Mr.P.S.Raman, learned Senior counsel appearing for the applicant would contend that the issues relating to the acquisition of land for the Mine No.II is not a subject matter of FSA. The FSA was entered based on the

availability of lignite on the existing Mines at the time when the contract was entered. The present reason for invoking the Force Majeure clause by the respondent was due to the inability to acquire lands for Mine No.II and the same has nothing to do with the FSA, which was entered in the year 1992 with the applicant by the respondents and no way, this supply would affect in any eventuality that would occur due to the inability of acquiring of additional lands for Mine No.II. The FSC was not based upon the acquisition of additional lands for Mine No.II, but the same was based on the coal production in the existing Mine No.I and Mine No.IA. Since there is enough quantity of lignite available in Mine No.IA, any supply of lignite from Mine No.IA to the respondent is only over and above the supply made to the applicant. After fulfilling the AAQ and FSA with the applicant by the respondent, only the balance quantity is meant for the others, including the respondent. Without taking these aspects into consideration, the respondent had blindfoldedly stated that they are facing problems in acquiring the land for Mine No.II. Hence invoking the Force Majeure clause and expressing their inability to supply any lignite as agreed in the FSA is not sustainable and the same is not in accordance with the FSA.

7. Further, he would contend that in terms of the amended Specific Relief Act, the present contract is enforceable and in this regard, he had referred a judgment rendered by the Hon'ble Apex Court in ***Katta Sujatha Reddy vs. Siddamsetty Infra Projects Private Limited*** reported in ***(2023) 1 SCC 355*** and submitted that the amendment to the Specific Relief Act is prospective and apply to those transactions that took place in post amendment. Hence, he prayed to grant the interim injunction directing the respondent for the relief as prayed for in the application.

8. Per Contra, Mr.AR.L.Sundaresan, learned Additional Solicitor General appearing for the respondent would submit that the AAQ nominated by the applicant for the financial year 2022-23 is 12,34,463 MT of lignite. As on 02.03.2023, the respondent had supplied 10,82,007.40 MT of lignite i.e., 87.65% of the nominated AAQ. The learned Senior counsel would also submit that the respondent has not been able to take vacant possession of the critical lands acquired for Mine No.II due to the reasons not attributable to and beyond the control of the respondent. By virtue of the such inability

to take possession of Mine No.II lands and consequently, Mine lignite, there has been an acute shortage in the production of lignite, which had resultantly impacted the operations of respondent's own thermal power stations. Further, he would contend that the two units (each unit is 250 MW) of the respondent's own Thermal Power Plant-II have been shut down for a prolonged period. Therefore, the respondent vide letter dated 06.02.2023 was constrained to invoke the Force Majeure under Clause 11.1(k) of the FSA and intimated the applicant about the inability to supply the lignite as per FSA.

9. The learned Senior counsel for the respondent further submitted that quantity of lignite being mined from the existing Mines depletes over time, which necessitate the acquisition of new lands for further mining. Keeping the same in mind, the parties had specifically incorporated Clause 11.1(k) of FSA, to cover the land issues faced by the respondent in Mine No.I and Mine No.IA expansion and Mine No.II, that may arise during the 30 year term of FSA. The learned Senior counsel would further submit that it cannot be expected to shut down its operation in the interest of applicant.

Therefore, the contentions of the applicant, that invoking Force Majeure Clause regarding the possession of acquired lands concerning Mine No.II, Mine No.I and Mine No.IA has to be considered as of the contract date, is not only illogical but also contrary to the express understanding of the parties.

10. Under Clause 11.3(i) of FSA, the quantities undelivered due to the Force Majeure event shall reduce the AAQ by the same amount. The learned Senior counsel further submitted that the availability of 7 LT of lignite in the stockyard of the respondent as per the CERC guidelines for preparing daily coal report dated 08.11.2017, pertaining “Coal Stocking Norms”, the respondent is obligated to maintain 15 days of stock, which is more than 14 LT of lignite. Therefore, further depletion of stock would lead to a critical situation and in violation of the norms as prescribed by the CERC.

11. The learned Senior counsel would submit that as per the Article 5.1(d) of FSA, Mine No.IA was allocated to the applicant, but the same does

not restrict the respondent from using the lignite for its own consumption or from selling the same to other buyers. Further, he would submit that when there is a shortage of lignite, the respondent would gain priority, however when there is no impediments from such supply, it shall be the obligation of the applicant to lift the entire stock of lignite stipulated in the AAQ. Further he contended that the Article 5.1(i) of FSA is not a negative covenant, as it does not restrict the supply of lignite to the respondent's own thermal power stations or to the third parties to the extent it does not jeopardies the supply to the applicant.

12. Further the learned Senior counsel referred to the judgment of the Hon'ble Supreme Court rendered in ***Adhunik Steels Limited vs. Orissa Manganese & Minerals Limited*** reported in ***(2007) 7 SCC 125*** and submitted that the Hon'ble Supreme Court refused to grant an injunction to continue the supply of manganese to Adhunik Steel Limited but restricted Orissa Manganese from selling to third parties, during the pendency of arbitration. Therefore, he would contend that under Section 42 of the Specific Relief Act [hereinafter called as “SRA”], an interim injunction may

be granted to perform as held in the above case. However in the present case, the respondent is not selling lignite to the third parties, but is admittedly only supplying the lignite to its own thermal power stations.

13. Further, the learned Senior counsel would contend that Section 14(1)(a) of the SRA (pre-2018 amendment) applies to the facts of the present case, since the contract was executed on 29.04.1998. The 2018 amendment of SRA with effect from 01.10.2018, being substantive law, cannot apply retrospectively to a transaction/contract that took place prior to its coming into force. In support of his contention, he referred the judgment rendered by the Hon'ble supreme court in the aforesaid ***Katta Sujatha*** case and the submitted that the present agreement was entered prior to the 2018 amendment. Therefore, he contended that no injunction can be passed against the respondent to continue the supply of lignite in terms of the FSA and he prayed for the dismissal of this application.

14. Heard Mr.P.S.Raman, learned Senior counsel appearing for the applicant as well as Mr.AR.L.Sundaresan, learned Additional Solicitor

General appearing for the respondent and perused the materials available on record

15. Both the parties admitted the fact that as per terms of the AAQ, the respondent has agreed to supply 1,234,463 MT of lignite to the applicants for the financial year 2022-2023. The AAQ would be determined as mutually agreed by both the parties for the financial year, starting from 1st April to 31st March. The present case is relating to the financial year 2022 to 2023. The respondents expressed its inability to supply the AAQ as agreed, due to the reason of shortage of lignite and due to the reason of inability of the respondent to acquire the lands for Mine No.II project. Therefore, the respondent invoked Force Majeure clause as per the Article 11.1(k) of the FSA and expressed their inability to supply the agreed quantity. For the purpose of reference it would be appropriate to extract the article 11.1(k) of FSA, which states as follows:

> *"(k) the seller's inability to gain vacant possession of lands acquired by GOTN for mining operations by the seller, and which lands are intended to form part of Mine II, the Mine I Expansion, and Mine 1A".*

16. A plain reading of the above Article makes it clear that when the FSA was executed on 29.04.1998, if the respondent was unable to gain vacant possession of land which had been obtained by Government of Tamil Nadu, at that point of time, the respondent could claim Force Majeure, provided the other requirements to claim Force Majeure was also met. However, in the present case, in fact the respondent had acquired the vacant possession of lands as acquired by the Government of Tamil Nadu to form part of the Mine No.II, Mine No.I and Mine No.IA. This is evident from the operation of the Mine No.II, Mine No.I and Mine No.IA for more than decades.

17. Further, Mine No.IA, which is allocated to the applicant, was in fact commissioned in the year 2003. The said Mine No.IA is also in operation and sufficient quantity of lignite is available in Mine 1A, which was also supplied by the respondent for its own requirements. Since, the respondent entered into the FSA, it is its obligation to fulfill the terms and conditions of the FSA and suppling the lignite to the applicant as

agreed. Thereafter, there could be any prohibitions to supply, over and above the supply made to the applicant, as agreed in terms and conditions of the FSA to the respondent or to the outsiders. In the present case, admittedly there is no scarcity of lignite from Mine No.IA. When such being the case, citing the reasons by the respondent that they have been facing issues in acquiring the land for Mine No.II is nothing to do with the terms agreed in the FSA by the parties, since this was not the situation referred in FSA.

18. In fact, the applicant entered into Power Purchase Agreement with the TANGEDCO. Hence, if there is any stoppage of supply by the respondent to the applicant, it will directly stop the power supply of the public and the public would affect largely due to any failure of the respondent to supply the lignite as agreed. It is not that all the Mines have been came to stand still and not in operation. In fact, 7 LT of lignite are available in the stockyard and everyday around 15,000 MT of lignite was excavated from Mine No.IA. The requirement for the supply for the applicant by the respondent is only around 5,000 MT of lignite. When the lignite excavated from Mine No.IA is 15,000 MT, there is no impediment

for the respondent to supply AAQ of lignite to the applicant as agreed. If there is any issues that are to be faced from Mine No.IA and thereby they were unable to supply the lignite to the applicant as agreed in terms of the FSA, that may be the sufficient reason to invoke the Force Majeure clause and not otherwise. Therefore, this Court is not in the position to accept the contentions of learned Senior counsel appearing for the respondent.

19. It is also brought into the knowledge of this Court that from Mine No.II and Mine No.I, the lignite is produced around 15,00,00,000 MT per annum and 80,00,000 MT per annum respectively. If such being the case, I could not see any impediment for the respondent to supply of AAQ of lignite as agreed, upto 31.03.2023 i.e., for a period of another 23 days.

20. With regard to the submission made in this application, as far as Section 14(1)(a) of SRA (pre-2018 Amendment) is concerned, the Hon'ble Supreme Court at paragraph 59 in ***Katta Sujatha*** case, has held that 2018 amendment to the SRA is prospective and cannot apply to those transaction

that took place prior to coming into force. This would mean that, based on the agreement entered, if there is any transaction i.e., cause of action, that took place prior to the amendment of the SRA, the post amendment provision would not apply, whereas in the present case, the transaction took place in the year 2022. Therefore, the cause of action arose in the year 2022 i.e., post amendment. Here the transaction does not means the date of the contract entered between the parties, since the same is not the main cause of action for filing the present application. The main cause of action that arose in the year 2022, when the respondent expressed their inability to supply the lignite due to Force Majeure clause. Hence, the contentions by virtue of Section 14(1)(a) of SRA that the applicant is not entitled for the specific performance of the contract is not in accordance with the settled law. On the other hand, this Court of the view that subsequent to the post amendment of 2018 of SRA, this Court is empowered to order specific performance of the contract in addition to the awarding of the liquidation damages.

21. In the present case, the respondent has agreed to the terms of FSA

to supply the AAQ of lignite every year for a period of 30 years. Over and above the supply made to the applicant, the respondent can supply to its own plant and to the third parties as well. Further, everyday sufficient quantity of lignite have been excavated by the respondent from Mine No.IA, i.e., around the 15000 MT of lignite. However, as per the terms of FSA and AAQ only reduced quantity of around 6000 MT of lignite alone has to be supplied to the applicant everyday. Hence, I do not see any reason to invoke Force Majeure Clause as contended by the respondent as this Court find no such event occurred as alleged by the respondent and thereby unable to supply the lignite as agreed in the terms of FSA. Further, if this Court failed to grant interim injunction directing the respondent to supply the lignite in terms of the FSC and AAQ, definitely not only the interest of the applicant would be jeopardise but also the interest of the TANGEDCO and its customers, who are all none other than the general public in the State of Tamil Nadu would be jeopardise.

22. As, the applicant made out a *prima facie* case and the balance of convenience is also in favour of the applicant and also irreparable injury

would be caused, if this Court refused to grant the interim injunction as prayed for in this application, there shall be an order of interim injunction as prayed for in the application from the date of this order until a period of one month from the initiation of arbitration proceedings, whereby the parties shall agree upon the AAQ in terms of the FSA.

23. In the result, this application is disposed of. No costs.

09.03.2023

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KRISHNAN RAMASAMY, J.

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