

(2021) 12 DEL CK 0215

In the Delhi High Court

Case No : Original Miscellaneous Petition (I) (COMM.) No. 408 Of 2021,
Miscellaneous Application No. 16720-16722 Of 2021

Meenakshi Energy Limited

APPELLANT

Vs

PTC India Ltd & Anr

RESPONDENT

Date of Decision : 22-12-2021

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9
Insolvency And Bankruptcy Code, 2016 — Section 60(5)(c)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : (2021) 12 DEL CK 0215

Hon'ble Judges : Sanjeev Narula, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sanjeev Narula, J

1. Meenakshi Energy Limited (through its Resolution Professional, Mr. Ravi Sankar Devarakonda) - the Petitioner herein [hereinafter referred to as

â??MELâ??], has approached this Court under Section 9 of the Arbitration and Conciliation Act, 1996, [hereinafter referred to as â??the Actâ??],

seeking, inter alia: (i) the stay of operation of a termination notice dated 25th November, 2021, issued by PTC India Limited - being the Respondent

No. 1 [hereinafter referred to as â??PTCâ??] in terms of Clause 4.4(c) of the Power Purchase Agreement dated 9th October, 2018 executed

between PTC and Bangladesh Power Development Board [hereinafter referred to as â??BPDBâ??], and (ii) also stay of invoking of certain

performance of bank guarantees.

2. FACTS

2.1. MEL is presently admitted to Corporate Insolvency Resolution Process (CIRP) in terms of the Insolvency and Bankruptcy Code, 2016, pursuant

to an admission Order dated 07th November 2019 passed by National Company Law Tribunal, Hyderabad Bench (NCLT).

2.2. MEL and PTC entered into an Exclusive Power Purchase Agreement on 09th January 2018 to enable PTC to participate in a bid floated by

BPDB for procurement of power. PTC was successful in the aforesaid bid and pursuant thereto, it executed the following agreements: (a) Power

Purchase Agreement dated 9th October 2018 with BPDB [hereinafter referred to as 'BPDB-PPA'], and (b) Long Term Power Purchase

Agreement dated 29th October 2018 between Petitioner and PTC [hereinafter referred to as 'PTC-PPA'], for supply of 200 MW of electricity

from MEL to PTC for onward supply to BPDB.

2.3. The BPDB-PPA and the MEL-PPA have been executed on a back-to-back basis. The said agreements identify MEL as the power generation

source, and Clause 2.1.2.1 of PTC-PPA notes that it is co-terminus with the BPDB-PPA.

2.4. With the assistance of the Committee of Creditors of MEL and PTC, the Resolution Professional was able to operationalise the PPAs by

ensuring power supply to BPDB from 07th February 2020. Initially the supply was through an alternate generator, however, from 01st January 2021

the generation and supply of electricity was from MEL's Project.

2.5. On account of certain irregularities in power supply to BPDB, predominantly due to unprecedented and unforeseen rise in price of imported coal

and freight charges, MEL's capital was wiped out. On 08th April 2020, BPDB issued a Notice of Default which was shared by PTC on a back-

to-back basis along with its own Notice of Default, which relied upon BPDB's Notice of Default. The allegation made therein was that MEL had

misrepresented facts. The same was refuted by MEL in its communications dated 6th April 2021, 27th April 2021 and 4th May 2021.

2.6. On 18th August, 2021, PTC issued a Notice of Intent to Terminate on a back-to-back basis also sharing a copy of the BPDB Notice of Intent to

Terminate dated 04th August 2021. This was followed by Notice of Termination dated 25th November 2021, making no reference to any Termination

Notice issued by BPDB.

2.7. In the aforementioned circumstances, MEL has approached this Court.

3. CONTENTIONS OF THE PETITIONER

3.1. Mr. Rajshekhar Rao, senior counsel on behalf of MEL, acknowledges that Courts are ordinarily reluctant to interfere in matters of termination of contracts, however, he argues the instant case is such that Court's intervention is warranted and necessary. He submits that the PPAs were executed on a back-to-back basis and therefore PTC cannot issue a standalone termination notice, as, pertinently, BPDB has not issued a termination notice.

3.2. All throughout, PTC's notices were issued on the basis of similar notices being issued by BPDB. Therefore, till such time the agreement between PTC and BPDB is not terminated by BTDB, PTC does not have any independent right to terminate the PTC-PPA.

3.3. Mr. Rao further submits that the CIRP proceedings are at its final stages. Two entities have shown interest for the revival of the Company. The PTC-PPA is the sole revenue generator, and thus economically valuable to MEL. Till such time the same is under consideration, PTC should maintain a status quo in respect of the impugned termination notice. The two potential resolution applicants, who have shown interest in acquiring MEL would be dissuaded if the PTC-PPA were terminated.

3.4. He also submits that since the instant transactions involve inter-country commerce, it would serve national interest as well, in the event the Respondents are permitted to enforce their termination notice, it would result in the corporate death of MEL.

3.5. Reliance is also placed on the Judgment of the Supreme Court in Gujarat Urja Vikas Nigam Limited vs Amit Gupta, 2021 7 SCC 209, relevant portion whereof is extracted below:

¶176. Given that the terms used in Section 60(5)(c) are of wide import, as recognised in a consistent line of authority, we hold that NCLT

was empowered to restrain the appellant from terminating PPA. However, our decision is premised upon a recognition of the centrality of

PPA in the present case to the success of CIRP, in the factual matrix of this case, since it is the sole contract for the sale of electricity which

was entered into by the corporate debtor. In doing so, we reiterate that NCLT would have been empowered to set aside the termination of

PPA in this case because the termination took place solely on the ground of insolvency. The jurisdiction of NCLT under Section 60(5)(c) of

IBC cannot be invoked in matters where a termination may take place on grounds unrelated to the insolvency of the corporate debtor. Even

more crucially, it cannot even be invoked in the event of a legitimate termination of a contract based on an ipso facto clause like Article

9.2.1(e) herein, if such termination will not have the effect of making certain the death of the corporate debtor. As such, in all future cases,

NCLT would have to be wary of setting aside valid contractual terminations which would merely dilute the value of the corporate debtor,

and not push it to its corporate death by virtue of it being the corporate debtor's sole contract (as was the case in this matter's unique

factual matrix).

177. The terms of our intervention in the present case are limited. Judicial intervention should not create a fertile ground for the revival of

the regime under Section 22 of SICA which provided for suspension of wide-ranging contracts. Section 22 of the SICA cannot be brought in

through the back door. The basis of our intervention in this case arises from the fact that if we allow the termination of PPA which is the

sole contract of the corporate debtor, governing the supply of electricity which it generates, it will pull the rug out from under CIRP, making

the corporate death of the corporate debtor a foregone conclusion.â??

4. CONTENTIONS OF THE RESPONDENT

4.1. Per contra, Mr. Sandeep Sethi, Senior Counsel for the Respondent, submits that the present petition is not maintainable in view of several

judgments of the Apex Court and of this Court, settling the law in relation to the scope of judicial interference in matters of determinable contracts.

4.2. Additionally, Mr. Sethi submits that prior to executing the PTC-PPA, the parties had entered into the Exclusive Power Purchase Agreement

dated 9th January, 2018 wherein MEL had made a commitment to supply power, and on that basis, PTC had proceeded to make a bid to supply power

to BPDB.

4.3. It is further contended that irrespective of whether the BPDB-PPA has been terminated, PTC has an independent right to terminate PTC-PPA.

4.4. This right is specifically incorporated under the terms of the aforementioned

agreements. Further, it is submitted that MEL was afforded several opportunities by issuing Notice(s) of Default, yet it has not been able to cure the same. Now, admittedly, there has been no supply of power since 29th July, 2021 and therefore, PTC is well within its right to terminate PTC-PPA.

4.5. In so far as public/national interest is concerned, Mr. Sethi submits that under the BPDB-PPA, it is PTC's obligation to make supply to

BPDB. In the event of default, PTC runs the risk of levy of damages. In the current scenario, when MEL has completely stopped generating power,

PTC, has to find an alternate source of power. It is thus imperative that the contract with MEL is brought to an end.

4.6. In this regard, Mr. Sethi states that indeed another party has been identified and the proposal to supply power is now pending approval with the office of the Prime Minister of Bangladesh.

4.7. In any event, Mr. Sethi submits that since there is a default on the part of MEL, and the right of PTC is clearly borne out of the terms of the contract, the Court should not grant any injunction.

5. ANALYSIS

5.1. The Court has considered the submissions advanced by the senior counsel. MEL inter alia seeks a stay of the operation of the Termination Notice

dated 25th November 2021 and further seeks to restrain them from entering into party generators for the purpose of meeting the obligations under the

BPDB-PPA dated 09th October 2018. Such reliefs are ex-facie misconceived and contrary to settled legal position.

5.2. There can be no manner of doubt that the present contract(s) are inherently determinable. Owing to failure on the part of MEL to fulfil its

obligations, as noted above, PTC had no choice, but to terminate the contract. The undisputed fact before the Court is that since 29th July, 2021, MEL

has completely stopped supplying power. This itself constitutes as a material breach of the terms of the contract which enables PTC to take recourse

to the terms, including the right of termination. Merely because the CIRP proceedings are pending where some potential resolution applicants have

shown interest, does not mean that PTC should be obligated to continue with the contract.

5.3. MEL, being the party in default, is certainly unable to fulfil its obligations and cure the default despite opportunities given. It thus cannot be

permitted to seek an injunction against termination or restrain against PTC to fulfil its contractual commitments. The three important elements i.e.

prima facie case, balance of convenience and irreparable hardship, are clearly absent. Rather, the balance of convenience is clearly in favour of PTC

and it is likely to suffer irreparable harm and loss in case it is restrained from fulfilling their obligations with the Bangladesh Party.

5.4. Much stress has been laid by Mr. Rao on the aspect of public interest, but without any cogent foundation. The effort to resolve the corporate

debtor cannot be at the cost of PTC suffering damages at the hands of Bangladesh party for contractual breaches and harm to its reputation.

Moreover, the Court finds merit in the contentions of Mr. Sethi that larger public interest, would lie in the contractual commitments being honoured by

PTC to the Bangladesh party.

5.5. The reasons cited by Mr. Rao, that BPDB-PPA has not been terminated, does not impress this Court to treat the instant case as an exceptional

one. The two contracts may be on a back-to-back basis and also co-terminus, but certainly the obligations of PTC under the BPDB-PPA are

independent. Pertinently, since concededly MEL has stopped generating power, it has discharged the contract by persistent breaches, PTC, being the

aggrieved party, has the right and option to sever its contractual ties and terminate the contract. The questions as to whether the termination is

wrongful, or whether the Respondent was justified in terminating the agreement, cannot be decided in the present proceedings.

5.6. In view of the above, the Court does not find any merit in the present petition. Accordingly, it is dismissed along with other pending applications.