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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: April 29, 2009

Date of Order: May 04, 2009

+ OMP No.679/2008

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04.05.2009

PREM POWER CONSTRUCTION (PVT.) LTD &
BHOLASINGH JAIPRAKASH CONSTRUCTION LTD. (JV)

..... Petitioner

Through: Mr.A.S. Chandhiok, Sr.Adv. with
Mr. S.K. Malhotra, Mr. Alok Tripathi &
Mr. Jeemon, Advs.

Versus

NATIONAL HYDROELECTRIC POWER CORPORATION LTD.
& ANR.

..... Respondents

Through: Mr. S.K. Taneja, Sr. Adv. with
Mr. Tarkeshwar Nath &
Mr. P.K.Mishra, Advs.

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

JUDGMENT

1. By this Petition under section 9 of the Arbitration and Conciliation act, 1996, the petitioner has prayed this Court to restrain the respondent by issuing an injunction from encashing the following bank guarantees:-

Sl. No.	Bank Guarantee no.	Description of BG	Amount (Rs.)	Valid upto
1.	1057GTE00001607	Against mobilization	28,33,290/-	31.12.2008
2.	1057GTE00001707	- do -	50,00,000/-	31.12.2008
3.	1057GTE00001807	- do -	25,00,000/-	31.12.2008
4.	1057GTE00001907	- do -	55,00,000/-	31.12.2008
5.	1057GTE00002007	- do -	25,00,000/-	31.12.2008

6.	1057GTE00002907	- do -	20,00,000/-	31.12.2008
7.	1057GTE00003107	- do -	55,00,000/-	31.12.2008
8.	1057GTE00001407	- do -	31,33,316/-	31.12.2008
		Total	2,89,66,606/-	

2. The bank guarantees at serial nos. 1, 3 and 5 are similar in nature while bank guarantees at serial nos. 2, 4, 6, 7 and 8 are having a slightly different language and similar in nature. All these bank guarantees were given by the petitioner to the respondent against mobilization advance paid by respondent to the petitioner.

3. The petitioner had entered into a contract with the respondent no. 1 for carrying out remaining work for the small hydro project at Sippi River near Sippi village in Arunachal Pradesh. There is no dispute that the mobilization advance was received by the petitioner from the respondent and bank guarantees were executed for securing the repayment of the money received against the mobilization advance. There is no dispute that this mobilization advance has not been fully recovered from the petitioner. The correspondence between the petitioner and the respondent shows that the recovery of mobilization advance was deferred at the instance of the petitioner or his agent and this advance which should have been normally recovered from the running bills was not recovered from the running bills. The correspondence shows that the petitioner admitted that though full mobilization amount was not recovered from it, but it raised a plea that since the petitioner had also raised claims amounting to Rs. 36 crore against the respondent, therefore the amount recoverable by the respondent be

adjusted against the claims of the petitioner and the bank guarantees be not encashed. However, the main argument of the petitioner is that the invocation of the bank guarantee was not in terms of the conditions of the bank guarantee and therefore this Court should stay the invocation.

4. The relevant terms and conditions of the bank guarantees at serial Nos. 1, 3 and 5 are as under:-

“We, the Centurion Bank of Punjab (hereinafter referred to as the “the said Bank”) having our registered office at Shanta Durga Niwas, M.G.Road, Panaji – 403 001, Goa, India do hereby guarantee the due recovery by the Corporation of the said advance with interest thereon as provided, according to the terms and conditions of the Contract. If the said contractor fails to utilize the said advance for the purpose of the said contract and or the said advance together with interest thereon is not fully recovered by the corporation, we Centurion Bank of Punjab hereby unconditionally and irrevocably undertake to pay to the corporation on demand and without demur to the extent of the said sum of Rupees 28,33,290-00 (Twenty eight lacs thirty three thousands two hundred ninety only) and claim made by the corporation on us for the loss or damage caused or suffered by the corporation by reason of the corporation not being able to recover in full the said sum of Rupees 28,33,290-00 (Twenty eight lacs thirty three thousands two hundred ninety only) with interest as aforesaid.

2. We Centurion bank of Punjab, further agree that the Corporation shall be sole judge of and as to whether the said Contractor has not utilized the said advance or any part thereof for the purpose of the said Contract and the extent of loss, or damage caused to or suffered by or that may be caused to or suffered to or suffered by the Corporation on account of the said advance together with interest not being recovered in full and the decision of the Corporation that the said Contractor has not utilized the said advance or any part thereof for the purpose of the said Contract and as to the amount or amounts of

loss or damage caused to or suffered the Corporation shall be final and binding on us.

3. We, the said Bank, further agree that the guarantee herein contained shall remain in full force and effect during the period that would be taken for the performance of the said contract and till the said advance with interest has been fully recovered and its claim satisfied or discharged and till Corporation certifies that the said advance with interest has been fully recovered from the said contractor and accordingly shall have no claim under this Guarantee after six months from the date of satisfactory completion of the said contract (as per certificate issued by the Corporation) whichever is earlier unless a notice of the claim under this Guarantee has been served on the said Bank before the expiry of the said period of six months in which case the same shall be enforceable against the said Bank notwithstanding the fact, that the same is enforced after the expiry of the said period of six months.

4. The Corporation shall have the fullest liberty without effecting in any way the liability of the said Bank under this Guarantee or indemnity, from time to time, to vary any of the terms and conditions of the said Contract or the advance or to extend time of performance by the said contractor or to postpone for any time and from time to time any of the powers exercisable by it against the said contractor and either to enforce or forbear from enforcing any of the terms and conditions governing the said contract or the securities exercised by the Corporation of the liberty with reference to the matters aforesaid or by reason of time being given to the said Contractor or any other forbearance, act or omission on the part of the corporation or any indulgence by the Corporation to the said Contractor or of any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing the said Bank from its such liability.

5. It shall not be necessary for the Corporation to proceed against the Contractor before proceeding against the Bank and the Guarantee herein contained shall be enforceable against the Bank notwithstanding any security which the Corporation may have obtained or obtain from the contractor shall, at the time when proceedings are taken against the Bank hereunder, be outstanding or unrealized.

6. We, the said Bank, lastly undertake not to revoke this guarantee during its currency except with the previous consent of the Corporation in writing and agree that any change in the Constitution of the said Contractor or the said Bank shall not discharge our liability hereunder.

If any further extension of this Guarantee is required the same may be extended to such required periods on receiving instruction from M/s. Prem Power Construction Private Ltd. on whose behalf this guarantee is issued."

5. The contention of counsel for the petitioner is that in view of the terms of the bank guarantee in clause 3, the respondent could have no claim under the above guarantee after 6 months from the date of satisfactory completion of contract and a notice for invoking the bank guarantee was required to be served upon the bank before the expiry of 6 months period from the date of completion of work. He submitted that, in this case, the completion of work had taken place on 31st March, 2007. He relied upon the internal letter of the respondent dated 16th June, 2008 wherein the General Manager (CC-II) Contract (Civil) NHPC Office complex written as under:-

"Para 1 – status of completion of project- As per the records available, the work under the scope of M/s. Prem Power Construction (Pvt.) Ltd. and M/s. Bhola Singh Jaiprakash (JV) has been completed on 31st March, 2007."

6. He also relied on a letter dated 12th December, 2008 written by Assistant Manager (Civil) to Director of the petitioner that

the work pertaining to the contract was completed on 31st March, 2007. The petitioner's counsel submitted that the invocation of bank guarantee in this case was done on 25th October, 2008, i.e., much after the period of 6 months of completion of the project. Period of 6 months expired on 30th September, 2007. The guarantee could be invoked only before 30th September, 2007 and therefore this invocation was bad and the court should issue an injunction.

7. The other proforma of guarantees at serial Nos. 2, 4, 6 & 7 given by the bank reads as under:-

"In consideration of the National Hydroelectric Power Corporation Ltd., represented by chief Engineer CCII, NHPC, Faridabad (Hereinafter called the "Corporation" which expression shall unless repugnant to the subject or context include its successors and assigns) having agreed under the terms and conditions of Contract No.NH/Contracts/CC-II/SH/SP-01 dated 19.10.2001 made between the Joint Venture comprising of M/s. Prem Power Construction Private Ltd. and Bhola Singh Jaiprakash Const. Ltd. with the Former as leader and the Corporation in connection with Construction of balance civil works of Sippi (2x2MW) Small Hydro Project, Arunachal Pradesh (hereinafter called the "said contract") to make at the request of M/s. Prem Power Construction Private Ltd. a company registered under the Companies Act' 1956 and having its registered office at Khasra No.261/1, Village Ghitorni, New Delhi-110030 in the state of Delhi (hereinafter called the contractor) a lump sum aggregate advance of Rupees 1,56,66,580/-(One Crore fifty six lacs, sixty six thousands five hundred and eighty only) for utilizing it for the purpose of the contract on his furnishing a guarantee as herein provide from a Nationalised Bank/Scheduled Bank. We, the Centurion Bank of Punjab (hereinafter referred to as the "the said Bank") having our registered office at Shanta Durga Niwas, M.G. Road,

Panaji -403 001, Goa, India do hereby guarantee the due recovery by the Corporation of the said advance with interest thereon as provided, according to the terms and conditions of the contract. If the said contractor fails to utilize the said advance for the purpose of the said contract and/or the said advance together with interest thereon is not fully recovered by the corporation, we Centurion Bank of Punjab hereby unconditionally and irrevocably undertake to pay to the corporation on demand and without demur to the extent of the said sum of Rupees 50,00,000-00 (Fifty lacs only) and claim made by the corporation on us for the loss or damage caused or suffered by the corporation by reason of the corporation not being able to recover in full the said sum of Rupees 50,00,000-00 (Fifty lacs only) with interest as aforesaid.

2. We Centurion Bank of Punjab, further agree that the Corporation shall be sole judge of and as to whether the said Contractor has not utilized the said advance or any part thereof for the purpose of the said Contract and the extent of loss, or damage caused to or suffered by or that may be caused to or suffered by the Corporation on account of the said advance together with interest not being recovered in full and the decision of the Corporation that the said Contractor has not utilized the said advance or any part thereof for the purpose of the said Contract and as to the amount or amounts of loss or damage caused to or suffered by the Corporation shall be final and binding on us.

3. We, the said Bank. Further agree that the guarantee herein contained shall remain in full force and effect during the period that would be taken for the performance of the said contract and till all the dues of the Corporation under the said contract or by virtue of any of the terms and conditions governing the said Contract have been fully paid and satisfied or discharged and till Corporation certifies that the terms and conditions of the said contract have been fully paid and claim satisfied or discharges and till corporation certifies that the terms and condition or the said contract have been fully and properly carried out by the said Contractor and accordingly discharges this Guarantee subject, however, that the Corporation shall have no claim under this Guarantee after six months from the date of expiry of the Defects Liability Period as provided in the said

contract of from the date of cancellation of the said Contract, as the case may be, unless a notice of the claim under this Guarantee has been served on the said Bank before the expiry of the said period of six month in which case the same shall be enforceable against the said Bank notwithstanding the fact, that the same is enforced after the expiry of the said period of six months.

4. The Corporation shall have the fullest liberty without effecting in any way the liability of the said Bank under this Guarantee or indemnity, from time to time, to vary any of the terms and conditions of the said Contract or to extend time of performance by the said Contractor or to postpone for any time and from time to time any of the powers exercisable by it against the said contractor and either to enforce or forbear from enforcing any of the terms and conditions governing the said contract of securities available to corporation and the said Bank shall not be released from its liability under these presents by any exercised by the Corporation of the liberty with reference to the matters aforesaid of by reason of time being given to the said Contractor or any other forbearance, act or omission on the part of the corporation or any indulgence by the Corporation to the said Contractor or of any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing the said Bank from its such liability.

5. It shall not be necessary for the Corporation to proceed against the said Contractor before proceeding against the Bank and the Guarantee herein contained shall be enforceable against the said Bank, notwithstanding any security which the Corporation may have obtained or obtain from the contractor shall, at the time when proceedings are taken against the said Bank hereunder, be outstanding or unrealized.

6. We, the said Bank, lastly undertake not to revoke this guarantee during its currency except with the previous consent of the Corporation in writing and agree that any change in the Constitution of the said Contractor or the said Bank shall not discharge our liability hereunder, if any further extension of this Guarantee is required the same may be extended to such required periods on receiving instruction from M/s. Prem Power construction Private Ltd. on whose behalf this guarantee is issued."

8. Counsel for the petitioner submitted that the language of second set of guarantees shows that the guarantees could be invoked within 6 months from the date of expiry of the defect liability period as provided under the contract or from the date of cancellation of the contract as the case may be. He submitted that in this case the date of completion of the work of contract was on 31st March, 2007. The defect liability period was one year which expired on 31st March, 2008 and the 6 months period after the defect liability period also expired on 30th September, 2008. The guarantee was invoked on 25th October, 2008 i.e. beyond the period as prescribed under the guarantee and therefore the invocation of guarantee by the respondent was not in accordance with the terms of the contract. The petitioner relied on (1999) 8 SCC 436, ***Hindustan Construction Company Ltd. vs. State of Bihar & Ors.*** wherein the Supreme Court observed that where a qualified bank guarantee was given by the bank and the guarantee was not unconditional and unequivocal, the bank guarantee can be invoked only subject to such qualifications and not otherwise. The bank guarantee represents an independent contract between the bank and the beneficiary and the parties are bound by the terms of the contract. The invocation therefore will have to be in accordance with the bank guarantee or else the invocation itself would be bad.

9. Counsel for the respondent, on the other hand, argued that the bank guarantee had an expiry date of 30th June, 2008. This bank guarantee was extended by the bank at the instance of the

petitioner by letters dated 28th May, 2008. The extension letters issued by the bank formed part of the contract between the bank and the respondent and the extension letters specifically and unequivocally provided as under:-

“(ii) The Guarantee shall be valid upto 31.12.2008.

(iii) We are liable to pay the guaranteed amount or any part thereof under these guarantees only if you serve upon us a written claim or demand on or before 31.12.2008”.

10. He submitted that the invocation of the bank guarantee was therefore in accordance with the terms of the bank guarantees as extended by letter dated 28th May, 2008 which provided that the respondent can invoke the bank guarantee upto 31st December, 2008. He submitted that in case the argument of the petitioner is accepted the extension of bank guarantee would not have been made by the bank at the instance of the petitioner. The extension of the bank guarantee upto 31st December, 2008 itself shows that the conditions written in the initial bank guarantee were modified to the extent given in the extension letter and therefore the invocation of the bank guarantee by the respondent upto 31st December, 2008 was a valid invocation of bank guarantee.

11. It is also submitted by counsel for the respondent that the terms and conditions written in the bank guarantees make it specifically clear that the bank guarantees were given by the petitioner in favour of the respondent to secure the mobilization amount which was paid by the respondent to the petitioner at the

inception of the contract. Under normal circumstances, the mobilization amount should have been deducted from the running bills but since the petitioner represented that he was undergoing financial hardships, the deduction of this mobilization amount should be deferred and considering this request of the petitioner, the deduction of mobilization amount was deferred in view of the fact that this mobilization amount was secured by the bank guarantees. It is for these reasons that the petitioner extended the term of the bank guarantee after June, 2008 upto December, 2008. There is no dispute that the mobilization amount has not been recovered by the respondent and the respondent had written letters to the petitioner that it was to recover a sum of Rs.590 lakhs from the petitioner.

12. There is no doubt that the first set of bank guarantees contained a clause that the respondent will have to issue a notice of the claim under the guarantee within 6 months from the date of satisfactory completion of the contract. However, it provides that this completion must be as per certificate issued by the Corporation. Clause 42 of the contract between the parties talks about the completion certificate. This reads as under:-

“Claue-42: COMPLETION CERTIFICATE.

42.1 The work shall be completed to the entire satisfaction of the Engineer-in-Charge and in accordance with the time mentioned in Schedule ‘D’ and terms and conditions mentioned in clause-39. As soon as the work under the contract is completed as a whole, the contractor shall give notice of such completion to the Engineer-in-Charge. The Engineer-in-Charge, within

thirty days of receipt of such notice, shall inspect the work and shall satisfy himself that the work(s) has been completed in accordance with the provisions of the Contract and then issue to the Contractor a certificate of completion indicating the date of completion. Should the Engineer-in-Charge notice that there are defects in the works or the works are not considered to be complete, he shall issue a notice in writing to the Contractor to rectify/replace the defective work or any part thereof or complete the work, as the case may be, within such time as may be notified and after the contractor has complied with as aforesaid and gives notice of completion, the Engineer-in-Charge shall inspect the work and issue the completion certificate in the same manner as aforesaid."

13. A perusal of above clause shows that the completion certificate of the contract can be issued only by Engineer-in-Charge. In fact the contractor has to give a notice to the Engineer-in-Charge and the Engineer-in-Charge within 30 days of the notice has to inspect the work and issue a completion certificate indicating the date of completion. A notice issued by any other functionary of the Corporation cannot be considered as a notice of completion of the project. In ***Hindustan Construction Ltd.*** (Supra), the judgment relied upon by the petitioner, the Hon'ble Supreme Court had occasion to consider a similar situation. The bank guarantee in that case was invoked by the Executive Engineer instead of Chief Engineer who was the person in whose favour the bank guarantee was given. The Supreme Court observed that where the bank guarantee was furnished to Chief Engineer and there was no definition of Chief Engineer in the bank guarantee, the Executive Engineer could not invoke the bank guarantee and only Chief Engineer can invoke the bank guarantee. The arguments advanced

by the respondent in that case that Engineer-in-Charge or Engineer or Supdt. Engineer employed by the employer should be considered as the person capable of invocation was turned down by the Supreme Court. I therefore consider that a certificate of completion of work issued by the General Manager or Assistant General Manager cannot be considered as a certificate of completion and only a certificate issued by Engineer-in-Charge as provided in the contract will have to be considered as a certificate of completion and unless the certificate of completion issued by Engineer-in-Charge is there, the 6 months of period will not start counting. If the bank guarantee can be invoked strictly as per its terms and conditions, every term and condition has to be interpreted with same strictness. If Chief Engineer cannot be substituted by Executive Engineer or Supdt. Engineer, by the same logic Engineer-in-Charge cannot be substituted by General Manager or Assistant General Manager.

14. Even otherwise, I consider that the above conditions of the bank guarantee stood modified when these bank guarantees were extended by the bank in favour of the respondent by extension letters dated 28th May, 2008 and the bank told the respondent that the bank would be liable to pay the guaranteed amount or any part thereof under the guarantee if the respondent served upon it a written claim or application on or before 31st December, 2008. Had the intention of the bank been that the earlier condition of invocation of bank guarantee was still valid, these bank guarantees

would not have been renewed and extended at all. The completion as per the petitioner had taken place on 31st March, 2007. 6 months period from completion had already expired on the date of renewal of this bank guarantee. There was no reason for renewal of the bank guarantee if this period had already expired and the bank guarantee had become infructuous. Because of the fact that these bank guarantees were renewed and the bank gave unconditional liberty to the respondent to raise a claim under the guarantees upto 31st December, 2008. I consider that the respondent rightly invoked the bank guarantees within the period upto 31st December, 2008.

15. The case of second set of set of bank guarantees is not better than the first set of bank guarantees. According to the petitioner, the second set of bank guarantees expired on 30th September, 2008 when 6 months period after the expiry of the defect liability period was over. The petitioner was very well aware of the alleged date of the completion of work as 31st March, 2007. The petitioner was keeping the bank guarantee renewed in view of the clause 13(b) of the contract which read as under:-

“b) The Bank Guarantee so furnished shall be valid till the period that would be taken for the performance of said contract or till the said advance along with interest has been fully recovered. Should there arise any occasion under the contract due to which the period of validity of such Bank Guarantees, as may have been furnished by the Contractor from time to time, are required to be extended or the same be renewed, the contractor at his own cost shall get the validity period of such guarantees extended or the same be renewed, as the case may be, and furnish the same to the Engineer-in-Charge

one month before the due expiry date of the aforesaid guarantees. In case of the failure of the contractor to strictly comply with the aforesaid provision on any account for whatsoever reason, the Engineer-in-Charge shall be at liberty, notwithstanding anything contained contrary in the contract, to take such measures and actions including but not restricted to the following, as may be considered necessary by him under the circumstances to satisfy the provisions of the contract for having the required amount of guarantee at the relevant time:

- 1) To invoke the existing Bank Guarantee and/or
- 2) To withhold the payments of the bills and other dues of the contractor till such time the aggregate of the amount of such bills reaches the level of the amount of the expired Bank Guarantees.”

16. The petitioner had renewed the bank guarantees in terms of the contract. The bank after receiving request from the petitioner had renewed the bank guarantee vide letters dated 28th May, 2008 and made it clear to the respondent that respondent could invoke the bank guarantee upto 31st December, 2008. Since the invocation was done by 31st December, 2008, I consider that the invocation was not bad but was in accordance with the contract of bank guarantee between the bank and the respondent as modified by letter dated 28th May, 2008 issued by the bank to the respondent. I therefore consider that the present application filed by the petitioner under Section 9 is not maintainable. The Petition is hereby dismissed.

May 04, 2009
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SHIV NARAYAN DHINGRA J.