IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 322/2013

ENFIELD INFRASTRUCTURE LIMITED ..... Petitioner
Through: Ms. Kavita Jha and Ms. Shraddha, Advocates.

versus

NTPC VIDYUT VYAPAR LTD. & ORS. ..... Respondents
Through: Mr. Bharat Sangal with Ms. Anasuya Choudhury and Ms. Saggar Malhotra, Advocates for Respondent No.1.
Mr. Anuj Aggarwal, Advocate for Respondent No.4.

CORAM: JUSTICE S. MURALIDHAR

O R D E R
15.01.2015

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act') by Enfield Infrastructure Limited ('EIL') seeks interim relief in respect of a bank guarantee for Rs.5,07,54,000 and two bank guarantees for Rs.10,15,08,000 each against Respondent No.1 NTPC Vidyut Vyapar Ltd. ('NVVL') furnished by EIL to NVVL.

2. EIL and NVVL entered into a power purchase agreement ('PPA') on 25th January 2012. Pursuant thereto the aforementioned three bank guarantees were furnished by EIL to NVVL. In terms of the PPA, EIL was required to commission the Solar PV Project of 10MW capacity at village Mandali in Jodhpur district, Rajasthan. The Rajasthan Renewable Energy Corporation Limited ('RRECL') was appointed as

the State nodal agency and was obligated to facilitate EIL in constructing and commissioning the power plant. As per the PPA, EIL was required to commission the project and inject power from the power project to the delivery point within 13 months of signing the PPA. The effective commissioning date was, therefore, 26th February 2013.

3. According to EIL, the land site assigned to it for the project was not found suitable due to problems caused by the local villagers. The alternative site identified by the Petitioner was not made available as NVVL did not grant the requisite No Objection to the change of site. The said No Objection was granted by NVVL on 24th July 2012.On 8th October 2012 the necessary amendment to the PPA was carried out. EIL states that it is only after the said amendment that it could initiate the civil and other construction work at the site. According to EIL, RRECL was to grant permission for constructing a project road to the project site. This was granted by RRECL only on 29th January 2013. It is then stated that in the same month, the local villagers encroached on the site land and hindered the construction work.

4. As a result of delay in commissioning the project by the scheduled commissioning date, EIL sent letters to NVVL on 28th January 2013 and 5th February 2013 seeking extension of time under clause 4.5 of the PPA. According to EIL, the request for extension of time was due to

Force Majeure events. On 5th February 2013, NVVL wrote to EIL rejecting its request for extension of time. It is stated that despite a further letter sent by EIL to NVVL on 21st February 2013, NVVL threatened to invoke the bank guarantees in question. It was in the above circumstances that the Petitioner approached the Court to restrain NVVL from invoking the bank guarantees.

5. On 3rd April 2013, the Court passed an order, the operative portion of which reads as under:

> "Learned Senior counsel for the petitioner has referred to earlier order dated 1st March, 2013 passed in O.M.P. No.205/2013. His submission is that since the respondent No.1 in its letter dated 5th February, 2013 did not agree to accept the justification given by the petitioner with regard to Force Majeure, it is an apprehension that the respondents may invoke the bank guarantees in question. After having considered the pleadings and material placed on record, till the next date of hearing, subject to keeping the bank guarantees in question alive, the status quo be maintained by the respondents in respect of the following Bank Guarantees:-

Issuing Bank	Bank Guarantee details
State Bank of Bikaner and Jaipur	1037612BG0000440 dated 21st January, 2012, valid till 26th May, 2013
Dena Bank	124712IGPER0002 dated 24th January, 2012, valid till 26th

	May, 2013
Dena Bank	124712IGPER0001 dated 24th January, 2012, valid till 26th May, 2013

6. The said interim orders have continued till date. At one stage the parties explored the possibility of a settlement but that did not materialize.

7. The Court is informed today that the Arbitral Tribunal ('AT') has since been constituted and its first sitting took place on 8th August 2014.

8. It is submitted at the outset by Mrs. Kavita Jha, learned counsel for the Petitioner, that the interim order passed by the Court on 3rd April 2013 should be continued till such time the AT decides an application that may be filed by either party under Section 17 of the Act. She submits that a question whether the stay on the invocation of the bank guarantees in question should be continued can be decided by the AT.

9. On merits Ms. Jha submits that under clause 4.5 of the PPA, NVVL was obliged to grant extension of time since the Force Majeure events continued. She refers to the averments in para 22 of the petition which lists out the Force Majeure events. She points out that in para 31 of the petition it has been averred that "fraud of an egregious nature has been played by Respondent No.1 on the Petitioner" and, therefore, there was

a *prima facie* case in favour of the Petitioner for continuing the interim orders in its favour during the pendency of the arbitral proceedings.

10. Mr. Bharat Sangal, learned counsel for NVVL has opposed the above submissions. He submits that there is no justification for staying the invocation of the bank guarantees. He submitted that the law in this regard has been consistently explained by the Supreme Court in several decisions. He relied on the decisions in ***U.P. State Sugar Corporation v. Sumac International Ltd. (1997) 1 SCC 568*** and ***Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd. (2008) 1 SCC 544***. Mr. Sangal submitted that apart from a bald plea of fraud, there is nothing in the petition to show that the Petitioner would be subjected to any irretrievable injury or irretrievable injustice warranting continuance of the interim order against the invocation of the bank guarantees. He pointed out that none of the Force Majeure events cited by the Petitioner were attributable to any act of NVVL and, therefore, there was no justification in preventing NVVL from enforcing the bank guarantees.

11. The above submissions have been considered. The law concerning interference by the Court with the enforcement of bank guarantees is fairly well settled. In ***U.P. State Sugar Corporation*** (supra), the Supreme Court explained in para 12 as under:

> "12. The law relating to invocation of such bank guarantees is by now well settled. When in the course

of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The Courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The Courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may co-exist in some cases. In the case of ***U.P. Co-operative Federation Ltd. v. Singh Consultants and Engineers (P.) Ltd.*** **(1998) 1 SCC 174** which was the

> case of a works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction."

12. The Court further explained with reference to the decisions in United State District Court in ***Itek Corporation v. First National Bank of Boston 566 Fed Supp 1210*** that an irretrievable injury has to be of such a kind that realisation of the bank guarantee would "make it impossible for the guarantor to reimburse himself if he ultimately succeeds." Recently in ***Vinitec Electronics Private Ltd.*** (supra) the above legal position was reiterated. It was explained that with the bank guarantees being unconditional and irrevocable, the bank was bound to honour it and pay the amounts "at once upon receipt of written demand

of the Respondent." The Court rejected the plea of fraud in that case as being vague and indefinite and not satisfying the requirement of law. Even the plea of irretrievable injustice was "again vague and not supported by any evidence."

13. Turning to the present case the Court finds that the plea of fraud raised in para 31, is indeed vague and unsubstantiated and does not satisfy the requirement of law as explained by the Supreme Court in the above decisions. In ***Svenska Handelsbanken v. Indian Charge Chrome AIR 1994 SC 626*** it was stressed by the Supreme Court as under:

> "We have already held that the contracts between the lenders and the borrower are not vitiated by any fraud much less established fraud and there is no question of irretrievable injury, therefore, there was no reason for the High Court to set aside the order of the trial court.
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> Against there is no case of any irretrievable injury either of the type as held in the case of ***Itek Corporation*** (supra) as there is no difficulty in the judgment of this country being executable in the courts in Sweden.
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> The High Court was not right in working on mere suspicion of fraud or merely going by the allegations in the plaint without prima facie case of fraud being spelt out from the material on record."

14. The second exception spelt out in the above decisions to the general rule that Courts will normally not grant stay of an enforcement of bank

guarantee, requires the Petitioner to establish that the encashment of the bank guarantee will cause irretrievable injustice or irretrievable injury. Apart from setting out the Force Majeure events in terms of clause 4.5 of the PPA, which according to the NVVL has nothing to do with, there is no averment in the petition that the Petitioner would be subject to irretrievable injustice. The usual grounds of irreparable loss and injury which cannot be compensated in terms of the money is pleaded. That does not, however, satisfy the requirement of the Petitioner having to establish the exceptional conditions repeatedly stressed by the Supreme Court in the aforementioned decisions.

15. Consequently, the Court is not satisfied that the present case falls within either of the exceptions pointed out by the Supreme Court in the aforementioned decisions warranting the continuation of the stay on the encashment of the bank guarantees.

16. Consequently, this Court is not satisfied that the Petitioner has made out a *prima facie* case for continuing the stay on the encashment of any of the bank guarantees. Accordingly, the interim order dated 3rd April 2013 is vacated. It is, however, clarified that the encashment of the bank guarantees by Respondent No.1 will be subject to the outcome of the arbitral proceedings.

17. The petition is dismissed with no order as to costs.

S. MURALIDHAR, J.

JANUARY 15, 2015
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