**THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO**

**AND**

**THE HON'BLE MRS. JUSTICE ANIS**

**CIVIL MISCELLANEOUS APPEAL No.433 of 2015**

**JUDGMENT:** *(Per Hon'ble Sri Justice Nooty Ramamohana Rao)*

This appeal is preferred by the 1st respondent in arbitration O.P.No.2347/2014, aggrieved by the order passed therein by the XXV Additional Chief Judge, City Civil Court, Hyderabad on 31.03.2015.

The 1st respondent herein instituted arbitration O.P.No.2347/2014 seeking a restraint order against the appellant herein from invoking the bank guarantee marked as Ex.P4 dated 21.03.2012 in a sum of Rs.14.77 crores, drawn on respondent No.4-Bank and a consequential direction to the respondent No.4 not to make any payment under the above referred Bank Guarantee, to the respondent No.1/appellant herein.

The appellant entered into an agreement with the 1st respondent herein by placing a purchase order, Ex.P1 dated 15.03.2011, for designing, erecting, commissioning and including operation and maintenance for a period of five years, an 8 MW (Eight Mega Watt) Solar PV power plant along with but not restricted to required components like Solar Modules, Inverters, transformers, all associated equipments, materials and supervisory services.

This contract is to be executed on EPC mode Para 2 thereof dealt with the terms of payment which read as under:

"**2.1 Terms of payment**

1. Advance of 10% - against receipt of Advance Bank Guarantee (ABG). ABG shall be valid until commissioning of the plant.
2. 5% against submission of complete Engineering documents.
3. 55% against material delivery except solar modules. For solar modules, payment shall be made for batches of 3 MW subject to readiness of structures for fitment of the modules.
4. 15% on installation paid on pro-rata basis (every 3 MW block).

5. 15% on commissioning – payment shall be made against Performance Bank Guarantee (PBG) valid for a period of two years once entire capacity awarded to Photon is commissioned.

(Underlining is mine)

6. Payments shall be made within 30 days of receipt of invoices by IPIL. 5% of invoice amount shall be retained until receipt of a Performance Bank Guarantee (hereinafter referred to as the "PBG", format for which is provided in the SSQ) for the same value.
7. The aforesaid payments shall be subject to receipt of invoices along with enclosures by IPIL as evidence of completion of milestones and the IPIL's confirmation of the same.

**2.2 Price**

Total price including O&M for first 5 years for 8 MW Solar PV Plant is Rs.101,44,61,719."

The entire project with an installed capacity of 8 MW shall be commissioned before 31.12.2011. Para 4 dealt with Performance Bank Guarantee (hereinafter referred to as 'PBG'). In Para 4.1 the 1st respondent herein/petitioner in arbitration O.P. was required to conduct performance tests to the satisfaction of the appellant and the performance ratio as guaranteed by the 1st respondent herein for a period of 25 years on a decreasing range annually from 70.56% to 61.60% has been detailed therein.

Para 4.3 is relevant for our enquiry and hence, the said clause is extracted:

> "4.3 Peformance Bank Guarantee (PBG): A Bank Guarantee for an amount equal to 15% of the total EPC Contract value to be valid for a period of two years from the date of commissioning of the plant or from the date of execution of performance ratio Bank Guarantee (PRBG), whichever is later."

Clause (12) provided for the disputes resolution mechanism by taking recourse to arbitration proceedings in accordance with provisions of the Arbitration and Conciliation Act, 1996. It is not in dispute that the 1st respondent herein by securing the assistance of respondent Nos.2 and 3, arranged for the PBG issued by the 4th respondent on 21.03.2012 in a sum of Rs.14.77 crores. It is the case of the 1st respondent herein that the appellant has acknowledged the successful completion of the project vide its letter dated 12.04.2012, Ex.P7. Ex.P8 is a letter addressed by the appellant on 03.07.2012 requiring the 1st respondent herein to provide the Performance Ratio Bank Guarantee (henceforth referred to as PRBG). The appellant herein has also entered into an 'Operation and Maintenance' agreement on 02.03.2012 with the 1st respondent herein, marked as Ex.P.9. It is also the specific case of the 1st respondent herein that PRBG in a sum of Rs.5.00 crores, in due modification of Ex.P4-PBG, was furnished. It appears on 04.09.2014 through Ex.R2, the appellant has invoked the PBG furnished in a sum of Rs.14.77 crores.

Pursuant to the purchase order, Ex.P1 dated 15.03.2011 the 1st respondent herein has entered into a sub contract with respondent Nos.2 and 3, through Exs.P2 and P3. It is the specific case of the appellant that no such sub-contracting is provided for under Ex.P.1 contract. However, it is respondent Nos.2 and 3 who arranged Ex.P4-PBG furnished by the 4th respondent/Bank. When the appellant through Ex.R2 letter dated 04.09.2014 invoked the said PBG, respondent Nos.2 and 3, instituted Arbitration O.P.No.2060/2014 and secured an ad-interim injunction against such payment. It appears when the appellant has contested the said Arbitration O.P. respondent Nos.2 and 3 have withdrawn the Arbitration O.P.No.2060/2014. It is thereafter, the present Arbitration O.P.No.2347/2014 is instituted by the 1st respondent herein.

By order and decree dated 31.03.2015, the said arbitration O.P. is allowed restraining the appellant from invoking the PBG, Ex.P4 dated 21.03.2012 in a sum of Rs.14.77 crores.

Heard Sri S.Ravi, learned senior counsel on behalf of learned counsel for the appellant and Sri B.Vijaysen Reddy, on behalf of learned counsel for respondent Nos.2 and 3 and M/s. Indus Law Firm on behalf of the 1st respondent and Sri Sundar Kanaparti on behalf of the 4th respondent/Bank.

Learned Senior Counsel on behalf of the appellant would submit that under law, a bank guarantee furnished by a party would amount to an independent contract itself and the said contract shall be operated in terms and in accordance with the conditions contained therein. The settled legal principle is that invocation of a bank guarantee is never dependent upon the due performance of another contract by virtue of which the bank guarantee was required to be furnished. The order passed by the Court in arbitration O.P.No.2347/2014, therefore, runs contra to the settled legal principles on the subject and hence, the order dated 31.03.2015 passed in Arbitration O.P. deserves to be set aside.

On the contrary, the learned counsel for the respective respondents would urge that the obligations arising under Ex.P.4 (the PBG-Ex.P4 dated 21.03.2012), stood discharged by virtue of the satisfactory execution as admitted by the appellant by Ex.P.7, of the EPC contract, which has been cancelled/modified pursuant to Ex.P7 dated 12.04.2012. Once the obligations stand discharged there is no further necessity for Ex.P4 to be retained. Hence, it was cancelled on 22.08.2014 and it was replaced with PRBG issued afresh for a sum of Rs.5.00 crores on 02.09.2014, Ex.P11.

There is hardly any dispute with regard to the legal principles urged by the learned senior counsel on behalf of the appellant. Any Bank guarantee is an independent contract and the beneficiary is entitled to invoke the same in terms and in accordance with the stipulations contained therein and the Bank which has furnished it has to honour its commitment by duly transmitting the amount covered by such guarantee.

However in the instant case, the whole question centres around the fact whether Ex.P4-PBG dated 21.03.2012 stood cancelled/modified/altered or not?

For purpose of answering this question a look at the terms contained in the contract Ex.P1 dated 15.03.2011 is required. The scope of the contract is elaborated at the very outset therein by specifying that the purchase order was placed on the 1st respondent herein for designing, erecting, commissioning and including operation and maintenance for a period of 5 years, 8 MW Solar PV Power Plant along with required components, Solar Modules, inverters, transformers and associated equipment materials and supervisory services. In a tabulated form what are all the materials which are required to be supplied and the civil works to be executed, the designing, engineering, installation and commissioning services to be provided are all furnished. The total price agreed by and between the appellant herein and the 1st respondent was to the order of Rs.101,44,61,719/-. Out of this amount, the component for 'Operation and Maintenance' for 5 years is valued at a mere Rs.20,00,000/- and together with the service tax at 10.3% thereon it worked out to Rs.22,06,000/- only. Keeping these factors in mind, when the terms of payment contained in Para 2.1 are examined it becomes clear that the last 15% of the agreed price, is agreed to be paid on commissioning the plant and also upon providing a PBG valid for a period of 2 years. Until then 5% of every bill amount is to be withheld. The plant is required to be commissioned before 31.12.2011 as per clause (3) of Ex.P1, but however, it appears it was commissioned on 25.01.2012. Hence, the 1st respondent herein has furnished Ex.P4-PBG on 21.03.2012 valid up to 20.03.2014 with a claim period of 6 months which would expire on 20.09.2014. By virtue of Ex.P4 the 1st respondent has complied with the terms contained in Ex.P1 dated 15.03.2011 and the PBG furnished by it is in accordance with clause 4.3 of Ex.P1.

However we have noticed in clause 4.1 of Ex.P1 that performance ratio for a period of 25 years which was guaranteed by the 1st respondent ranging in a descending order between 70.56% to 61.60% was also specified. Hence, for purpose of Operation and Maintenance for a period of 5 years, a separate agreement Ex.P9 dated 02.03.2012 was entered into. It is Ex.P.9 dated 02.03.2012, which required PRBG in a sum of Rs.5.00 crores to be furnished. Therefore, it is absolutely clear that PBG in a sum of Rs.14.77 crores and PRBG in a sum of Rs.5.00 crores are totally independent components from each other. In this context Ex.P7 dated 12.04.2012 acquires significance and it reads as under:

**<u>"To whomsoever it may concern</u>**

We, Tata Power Renewable Energy Limited, Mumbai hereby confirm that M/s. Photon Energy Systems Ltd. Hyderabad have supplied and commissioned 8 MW Grid Connected Solar PV Power Plant at Mithapur, C/o Tata Chemicals Limited, Township polot B, Mithapur, Dist Jamnagar, Gujarat against our purchase order (PO) No.IPIL/FY11/01 dated 15th March 2011.

The solar PV plant has been completed and commissioned on 25th January, 2012 and performance of the plaint is found to be satisfactory to date.

Signature:

Name: Rahul Singh

Designation: Director

Company: Tata Power Renewable Energy Limited

Date: 12th April, 2012"

Once Ex.P7 is issued on 12.04.2012 by the appellant vouching for the fact that 8 MW Solar PV Power plant was commissioned at Mithapur on 25.01.2012 and its performance is found to be satisfactory, the 1st respondent acting along with respondent Nos.2 and 3 has altered the PBG, no doubt entirely on their own. It should also be noted that PRBG in a sum of Rs.5.00 crores, Ex.P11 dated 02.09.2014 was furnished to the appellant. PRBG Ex.P11 dated 02.09.2014 has been received by the appellant company and thereafter by their communication dated 03.09.2014, Ex.P12 requested the 4th respondent to treat the said letter as a notice for invocation/encashment of PBG for Rs.14.77 crores.

The appellant realising the significance of the contents of Ex.P7 dated 12.04.2012 tried to wriggle out of the situation by taking a plea that Ex.P7 has been issued in favour of the 1st respondent to enable it to participate in another tender enquiry. Ex.P7 never contained any such caveat. When once a responsible officer occupying the rank of Director of the appellant company issues Ex.P7, the contents thereof cannot be disputed or contra thereof can be attempted to be proved. Such a course of action is wholly impressible in law in view of Section 91 of the Indian Evidence Act.

If Ex.P4 stood modified by Ex.P11-PRBG, there is no way that the appellant herein can invoke Ex.P4-PBG dated 21.03.2012, on 04.09.2014. Whether Ex.P4 has been validly altered/modified/rescinded or cancelled are all questions which remain to be resolved between the appellants and respondent No.4. Respondent Nos.1 to 3 herein cannot answer them. Perhaps, such proceedings are independent of the disputes between the appellant and the 1st respondent.

When disputes arose between the appellant and the 1st respondent herein, such disputes have been agreed to be resolved through the process of arbitration mechanism as per clause 12 of Ex.P1. Pending those proceedings, the present O.P.No.2347 of 2014 is filed under Section 9 of the Arbitration and Conciliation Act, 1996. Therefore, at this stage the area of consideration or the area of exercise of jurisdiction by the Court is only to find out whether the balance of convenience between the parties has been properly and carefully assessed or not. Beyond that the merit behind the respective claims of the parties is not to be examined. Such a scrutiny will be undertaken by the arbitral Tribunal. Therefore, as at present in the arbitration O.P. the only question which is required to be addressed was as to whether irreparable injury and irretrievable hardship would be caused to the petitioner in the O.P. before the Arbitral Tribunal pronounces its award or not.

In U.P. State Sugar Corporation Vs. M/s. Sumac International Limited[1], the following principle has set out:

> "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."
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> (Emphasis is brought out)

We are in agreement that the assessment of balance of convenience has been properly carried out by the Court below. If Ex.P4-PBG is allowed to be invoked, notwithstanding, Ex.P7 and Ex.P11-PRBG dated 02.09.2014 and notwithstanding the fact that the said PBG stood modified/altered, irreparable injury and acute hardship would visit the 1st respondent herein who is the petitioner in arbitration O.P.No.2347/2014. The interests of the appellant herein are well preserved, as in case the arbitral tribunal arrives at a conclusion that the 1st respondent herein is still liable to discharge any of its obligations towards the appellant, appropriate measures would be adopted by the arbitral tribunal by providing for suitable relief. The order passed in the arbitration O.P.No.2347/2014 is only an interlocutory measure. Therefore, in our opinion, the order in the said O.P. on 31.03.2015 does not warrant any interference.

Accordingly, this appeal stands dismissed.

Consequently, miscellaneous petitions, if any, shall stand dismissed. No costs.

**JUSTICE NOOTY RAMAMOHANA RAO**

**JUSTICE ANIS**

11.04.2016
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[1] AIR 1977 SC 1644