

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 2nd June, 2016**
Judgment pronounced on: 10th June, 2016

+ **O.M.P. (I) No.552/2015**

TECPRO SYSTEMS LIMITED Petitioner
Through Mr.Anoop Bagai, Sr. Adv. with
Mr.Ankit Sibbal, Adv.

versus

INDURE PRIVATE LIMITED & ANR Respondents
Through Mr.Sandeep Sethi, Sr. Adv. with
Mr.Prashant Mehta & Mr.Alok
Tripathi, Adv. for R-1.
Mr.Rajiv Kapur, Adv. for SBI.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the present petition under Section 9 of Arbitration and Conciliation Act, 1996 for restraining the respondent No.1 from encashing the Bank Guarantees in question.
2. The predecessor Bench by order dated 24th September, 2015 after hearing both sides has passed the directions by staying the encashment of the Bank Guarantees No.0702408BG0000378 dated 3rd November, 2008 for Rs.1,02,66,310/- and No.0702408BG0000379 dated 3rd November, 2008 for Rs.27,23,690/-, subject to the petitioner keeping the said Bank Guarantees alive till the next date of hearing.
3. The said order was continued from time to time and both parties have also made their submissions on many occasions.

4. The statement was made on behalf of both the parties that Arbitral Tribunal has already been constituted.

5. The brief facts as per petition are as under:-

5.1 Rajasthan Rajya Vidyut Utpadan Nigam ("RRVUNL") entered into a contract with the respondent No.1 for the execution of their project. The said respondent in-turn floated a tender for part of the work to be performed by it as per its contract with RRVUNL on back to back basis. Hence, the respondent No.1 floated a tender for Design & Engineering, Manufacture, Procurement, Inspection, Supply and Transportation, Unloading, Handling and storage of the entire material of Belt Conveyors and associated system for RRVUN-Suratgarh on for site based.

5.2 The petitioner participated in the bidding process and was declared successful bidder. Pursuant to the said tender, two LOA's were issued in favour of the petitioner vide LOA No.I-3058/TECPRO-BC/First/01 dated 30th August, 2007 and LOA No.I-3058/TECPROBC/Second/02. The total scope of work was divided into two portions being Separate Agreements/ Contracts for supply of equipment and materials, and contract/Agreement for Erection, Testing & Commissioning. Therefore, two separate contracts were entered into between the parties to the agreement for the supply and for the erection.

As per the said contracts, the total contract value was Rs.12,96,00,000/-. The petitioner was required to provide Bank Guarantee amounting to 10% of the aggregate contract value being Rs.1,29,90,000/-. The details of the Bank Guarantees provided by the petitioner to the respondent No.1 under the present contracts are as follow:

<u>S.NO.</u>	<u>BG NO.</u>	<u>DATE</u>	<u>AMOUNT</u>	<u>VALIDITY</u>	<u>CLAIM UPTO</u>
1.	0702408BG0000378	03.11.08	1,02,66,310.00	30.09.15	31.03.16
2.	0702408BG0000379	03.11.08	27,23,690.00	30.09.15	31.03.16
	TOTAL		1,29,90,000.00		

5.3 As per the terms of contracts, the abovementioned bank guarantees were to be given for the period of the agreements with extensions from time to time and for a further period of 12 months from the date of handover as a defect liability warranty period. The total period for the completion of the agreement was a period of 12 months from the date of the LOI issued to the petitioner. The respective clause of the LOA pertaining to the Bank Guarantees is reproduced herein below:-

"9.0 BANK GUARANTEE FOR CONTRACT PERFORMANCE SECURITY

In order to secure I assure due fulfillment of the order, supplier on receipt of a preliminary acceptance letter/ detailed order as the case may be shall furnish within a period of fifteen days a Contract Performance Security deposit equivalent to 10% (ten percent) of the accepted bid value in cash/crossed Bank Draft, or by way of Bank Guarantee from any scheduled bank in India in the prescribed Performa to be obtained from the INDURE on a non judicial stamp paper of Rs.100/- (Hundred) such Bank guarantee shall be valid till the completion of the contract. If required by is the validity of the bank guarantee shall be further extended for such period as desired."

6. It is the case of petitioner that in terms of the abovementioned contracts, the petitioner initiated the supplies and the work of erection as per the scope of the work mentioned in the contract and the petitioner was successful in making the supplies and performing in its work. Further, as per the contracts, the terms of the payment provided that 5% of the amount would be paid as mobilization advance

against the respective Bank Guarantees. Further, 90% of amount after the adjustment of the advance would be required to be paid against progressive fabrication and erection on pro- rata basis and the balance 10% would have to be paid after ascertaining satisfactory performance during the contract and the defect liability period.

7. It is alleged by the petitioner that it has received a total sum of Rs.11,57,42,974/- and still a balance of Rs.3,15,77,200/- is due and pending after due adjustment of the advance received. As per the terms of the contracts of the petitioner, respondent No.1 has handed over the project to the RRVUNL and in turn the RRVUNL issued a handover and take over certificate to the respondent No.1 which was effective from 26th May, 2012. The warranty period which was one year from the date of the said handover was also to commence from the same date and was to end on 26th May, 2013. As per the contract, the entire role of the petitioner was to end pursuant to the end of the warranty period as per the contract and hence any liability of the petitioner could have only accrued upto the end of the warranty period or the defect liability period.

8. It is stated by the petitioner that apart from the balance amount, it is also pertinent that the respondent No.1 also did not pay the retention money to the petitioner which was amounting to Rs.1,36,07,677/-.

9. Despite of the same, the petitioner received a letter dated 1st September, 2015 from the respondent No.1 wherein the respondent No.1 has sought for an extension of the Bank Guarantees which were given by the petitioner to the respondent No.1 as per the terms of the present contract amounting to Rs.1,29,90,000/-. In the said letter, the respondent No.1 has mentioned that Bank Guarantees as provided by

the petitioner are expiring on 30th September, 2015 and the same shall be extended by the petitioner. The said letter is being written for seeking an extension of the Bank Guarantees for a further period of 12 months from the date of their respective expiry. In the said letter of the respondent No.1 dated 1st September, 2015, the respondent No.1 has mentioned that in case the Bank Guarantees are not extended, a demand of the amount of Bank Guarantees shall be raised by the respondent No.1 which shall become payable by the petitioner and hence the Bank Guarantees shall be invoked.

10. It is submitted by the petitioner that the demand as raised by the respondent No.1 by virtue of the said letter dated 1st September, 2015 was unlawful demand and thus, the threat by way of the said letter for the invocation of the Bank Guarantees was a fraud which is being played upon the petitioner by the respondent No.1 which would cause an irretrievable loss to the petitioner. In view of the threat, the present petition was filed.

11. In reply, it is the case of the respondent No.1 that the said Bank Guarantees are unequivocally unconditional Bank Guarantees as it is trite law that when in the course of the commercial dealings an unconditional Bank Guarantees is given or accepted, the beneficiary is entitled to enforce such a Bank Guarantee in terms thereof irrespective of any pending disputes or going into the underlying contract between the parties. 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 Bank Guarantees furnished by the respondent No.2 on behalf of the respondent No.1 recites in unequivocal and unconditional terms

that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the respondent No.1 or the petitioner. It is submitted that since the Bank Guarantees represent an independent contract between the respondent No.1 and the respondent No.2, both the parties would be bound by the terms thereof. The relevant portion of the Bank Guarantees has been reproduced herein below:

*"We State Bank of India, Leather & International Branch, MVJ Towers, 177/1, Poonamelle High Road, Kilpauk, Chennai-600010 having its head office at Nariman Point, Mumbai (hereinafter referred to as the "Bank", which expression shall, unless repugnant to the context or meaning thereof, include its successors, administrators, executors and assigns) do **hereby guarantee and undertake** to pay the purchaser, on demand any and all monies payable by the Contractor to the extent of Rs.1,02,66,310 (Rupees One Crore Two Lakhs Sixty Six thousand Three hundred and ten Only) as aforesaid **at any time** up to 31.12.2009 (date-till completion of warranty period) **without any demur, reservation, contest, recourse or protest and/or without any** reference **to the contractor**. Any such demand made by the purchaser on the bank **shall be conclusive and binding** notwithstanding any difference between the purchaser and the contractor or any dispute pending before any Court, tribunal, Arbitrator or any other Authority."*

12. It is submitted on merit that the Bank Guarantees were furnished in favour of the respondent No.1 in order to secure/assure due fulfilment of the order, supplies and further to assure the successful performance of the plant/project in conformity with the various guarantees and warranties contained in the Contract which was awarded pursuant to the LOA No.I-3058/TECPRO-BC/First/01 dated 30th August, 2007 and LOA No.I-3058/TECPRO-BC/Second/02. The petitioner has miserably failed to execute the whole of the work that

has been awarded to it vide the said Contracts and further failed to supply several equipments materials and perform the erection, testing & commissioning work entrusted vide the Contracts. The petitioner neither commissioned the equipments nor conducted the supervision Performance Guarantee tests as required under the Contract. The respondent No.1 was forced to complete the remaining works/supplies etc. at the risks and costs of the petitioner. Further, the petitioner was issued various free materials in the form of Steel for erection purposes at site, however, the petitioner neither reconciled the unused material nor returned back such material to the respondent as required under the contract, which caused further losses to the respondent. The respondent reserves its rights to claim such further losses/damages from the petitioner before the appropriate forum as provided under the contracts.

13. It is submitted that till date the plant is not taken over as stipulated under the contract as admittedly the performance guarantee testing has not been conducted by the petitioner. The taking over as per the terms of the contract is only a subsequent act to the performance guarantee test, which is never conducted by the petitioner, despite this being their contractual obligation.

It is also submitted that the warranty period could have commenced only after the taking over of the system/plant and the plant could have been taken over by the respondent No.1 only after satisfactory completion of performance guarantee test. Now, since the petitioner had failed to conduct the performance guarantee test as agreed within the terms of the contract, therefore the plant could not be taken over by the respondent No.1. Therefore, in the absence of the taking over of the plant/system/unit, it can be safely concluded that

the warranty period did not commence so as to put an end to the validity of the said Bank Guarantees. The relevant clause of the contract is reproduced herein:

"The contractor shall warrant that the equipment to be new and in accordance with the contract document and free from defects in design, material and workmanship for a period of twelve months (12) calendar months commencing immediately upon taking over of the units and balance of plant equipment system."

14. It is also submitted that the guaranteed performance figures of the equipments supplied by the petitioner could be proved by the guarantee tests only. It was agreed within the terms of the contract that the equipments could be considered as accepted by the respondent No.1 from the quality point of view after the guaranteed values are achieved/proved by tests and the documents recording the performance of the guarantee tests are signed by both the parties. The petitioner has not annexed any document recording the performance of the guaranteed tests signed by both the parties. Further, the petitioner neither annexed any document to show that the petitioner has conducted the commissioning nor any document to show that the performance guarantee tests have been conducted in any manner.

As far as issuance of handover certificate to the respondent No.1 is concerned, the same is not denied. Similarly, 12 months period of defective liabilities has also expired; the same is not denied by the respondent No.1.

15. In a nutshell, it is submitted that the petitioner did not successfully complete the work as per the terms of the contract. The petitioner did not conduct the commissioning and performance guarantee tests of the equipments, as desired in the

agreement/contract itself reveals that the petitioner could not successfully complete the work.

The taking over as per the terms of the contract is only a subsequent act to the performance guarantee test and therefore, it is wrong and denied that the warranty period as per the contract has expired. The validity period of the said Bank Guarantees has been extended by the bank from time to time which itself reveals that the entrusted work was not performed by the petitioner within the stipulated time period and as such the extension of time was granted in order to secure/assure due fulfilment of the supply order and the erection work, once the Bank Guarantees stood extended.

The clause 16.0 of the Contract/agreement is reproduced as under:-

*"The adjustment in regard to the amount recoverable if any, in terms of relevant para **shall be made from the cash deposits/dues of the firm, bank guarantee(s)** as may be available with the INDURE and/ or in any other manner as may be deem appropriate by the INDURE."*

16. It is stated that the Bank Guarantees furnished in favour of the respondent No.1 survive till the validity period of such Bank Guarantees which shall be extended till the recoverable amount from the petitioner is adjusted from the Bank Guarantees. The fact that the validity of Bank Guarantees has been extended from time to time upto 30th September, 2015 which is beyond the period of the defect liability period/warranty period clearly shows that it was agreed between the parties that the Bank Guarantees shall be kept alive and the recovery amount shall be adjusted from the same.

17. In view of rival submissions of the parties, I am clear in my mind that as far as underline dispute is concerned, the same cannot be

considered if the Bank Guarantees are unconditional. It is also not proper for this Court to go into the merit of the case at this stage when the rival disputes between the parties are sub-judice before the Arbitral Tribunal. The Bank Guarantees have been renewed before expiry dates and those are valid. Counsel for the petitioner, upon instructions, has given undertaking to extend the same during the pendency of arbitration proceedings. No final opinion can be formed at present, otherwise the case of one of the parties would be prejudiced.

18. The important aspect in the matter at present is the letter of invocation issued by the respondent No.1 to respondent No.2-Bank after the letter issued to the petitioner. The said letter dated 1st September, 2015 issued to respondent No.2 reads as under:-

"Ref. IND/SS/BG/9477

1st Sept. 2015

The Manager
StateBank Of India
Leather & International Branch
"M.V.J. Towers", 177/1
Poonamallee High Road, Kilpauk
Chennai 600 010

Subject: RRVUNL SURATGARH - Extension of Performance Bank Guarantees issued by you in our favour on behalf of M/s Tecpro Systems Ltd.

Dear Sir,

Kindly refer the following Performance Bank Guarantees issued by you in our favour on behalf of M/s Tecpro Systems Ltd. The bank guarantees shall expire on 30.09.15 with a claim period upto 31.03.16.

S.No	BG No.	DATE	AMOUNT	VALIDITY UPTO	CLAIM UPTO
1	0702408BG0000378	03.11.08	1,02,66,310.00	30.09.15	31.03.16
2	0702408BG0000379	03.11.08	27,23,690.00	30.09.15	31.03.16
	TOTAL		1,29,90,000.00		

The purpose for which the above bank guarantees were given have not yet been fulfilled. We therefore request you to kindly extend the validity of the bank guarantees for a further period of twelve (12) months immediately and deliver to the undersigned who is authorized representative for the purpose.

To avoid our claims being time barred you are requested to treat this letter as due NOTICE and register this as our claim for the full guaranteed sum against the above bank guarantee. In case the above bank guarantee is extended for a further period of six (6) months from the date of its expiry, and the original bank guarantee extension advice is received at the undersigned, this claim may be treated as withdrawn otherwise our claim stands as it is and you are requested to remit the equivalent amount of the above bank guarantees i.e. Rs.1,29,90,000/- immediately by demand draft in favour of M/s The Indure Private Limited payable at New Delhi.

Kindly acknowledge receipt of this letter.

Thanking you,

Very truly yours,
THE INDURE PRIVATE LIMITED"

19. It is evident from the said letter issued by respondent No.1 informing the bank that in case the petitioner would extend the Bank Guarantees for a further period of six months, the letter be treated as withdrawn. The petitioner has informed that the Bank Guarantees were extended, therefore, the effect of invocation letter has ended.

20. When this fact was pointed out to the learned counsel for the respondent No.1, who simply mentioned that the respondent No.1 has again invoked the same Bank Guarantees during the end of the month of May, 2016. It is a matter of fact that the respondents are under injunction of this Court. I am not inclined to express any opinion in this regard on this aspect.

21. In view of said situation and admission of the respondent No.1 itself in the invocation letter, the same has lost its validity as the respondent No.1 itself has mentioned in the said letter that if the Bank Guarantees in question are extended, the invocation letter be treated as withdrawn. Further, the undertaking is given that the same would be extended till the date of publishing the award by Arbitral Tribunal.

22. Thus, without expressing any opinion on merit, the interim order passed by this Court on 24th September, 2015 shall continue during

the pendency of arbitration proceedings unless the same is vacated or modified in the Arbitral Tribunal due to change of circumstances.

23. The present petition is accordingly disposed of.

(MANMOHAN SINGH)
JUDGE

JUNE 10, 2016

