*   **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.553/2015**

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 Guarantee 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 Guarantee No.0702411BG0000246 dated 20th May, 2011 for Rs.69,56,000/-, subject to the petitioner keeping the said Bank Guarantee 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 Bhavnagar Energy Corporation Limited ("BECL") entered into a contract with 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 BECL. The tender was floated for design, manufacture, supply, transportation, supervision of erection, testing and commissioning and PG test of 2 Nos. Hammer Mill Crusher and 22 Nos. of Flip Flow Screens with all its accessories, mandatory spares, electrical instrumentation for 2x250 MW Lignite base TPP at Bhavnagar-Gujarat.

5.2 The petitioner participated in the bidding process and was declared successful bidder. Pursuant to the said tender, the LOA was issued in favour of the petitioner vide LOA No.I-3066/BHAVNAGAR/TECHPRO/01 dated 23rd September, 2011. The total scope of work was only limited to supply of the Hammer Mill Crusher and the Flip Flow Screens along with its accessories etc. and the contract dated 23rd September, 2011 was executed in this regard.

As per the said contract, the total contract value was Rs.6,75,60,000/-. The petitioner was required to provide Bank Guarantee amounting to 10% of the aggregate contract value being Rs.69,56,000/-. The details of the Bank Guarantee provided by the petitioner to the respondent No.1 under the present contract are as follow:

S.NO.	**BG NO.**	**DATE**	**AMOUNT**	**VALIDITY**	**CLAIM UPTO**
1.	0702411BG0000246	20.05.11	69,56,000/-	30.09.15	31.12.15

5.3 As per the terms of contract, the abovementioned Bank Guarantee was to be given for the period of the agreement with extensions from time to time and for a further period of 15 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 Guarantee is reproduced herein below:-

> "7.0 SECURITY DEPOSIT/PERFORMANCE BANK GUARANTEE
>
> *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 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 Up to Warranty period and three months thereafter."*

6. It is the case of petitioner that in terms of the abovementioned contract, 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 contract, the terms of the payment provided that 5% of the amount would be paid as mobilization advance against the Bank Guarantee and another 5% payment against the approval of drawings by BECL/TCE against Advanced Bank Guarantee of equivalent amount valid till completion period. Further, 90% progressive on account payment after adjustment of the advance along with 100% taxes and duties would be paid within 45 days of receipt of material at site along with submission of all relevant documents.

7. It is alleged by the petitioner that since it was performing its part of the contract after having received the mobilization advance, the

contract was being carried on, however, the petitioner was not being paid as per the terms of the contract and the payment was highly delayed.

8. It is stated that the entire supplies which falls within the scope of the work of the petitioner as per the contract were duly completed by the petitioner way back on 15th February, 2013 and each and every supply of the equipment was made in the site of BECL. The petitioner raised respective invoices for the same accompanied by the delivery challans etc. Hence, the warranty period as per the terms of the contract being 15 months ended on 15th May, 2015 and the scope of the entire work of the petitioner ended on the said date. However, the petitioner was not paid by respondent No.1 the balance amount due and payable.

9. A total of Rs.6,44,97,516/- is due and payable by the respondent No.1 to the petitioner apart from an amount of Rs.66,06,000/- on account of the retention money held by the said respondent thereby totalling an amount of Rs.7,11,03,516/- which is due and payable to the petitioner as on the date of filing of the petition. The petitioner constantly followed up with the respondent No.1 for the said due and pending payments. The petitioner also wrote a written complaint by way of a letter dated 25th August, 2015 to BECL.

10. 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 Guarantee which was given by the petitioner to the said respondent as per the terms of the present contract amounting to Rs.69,56,000/-. In the said letter, the respondent No.1 has mentioned that Bank Guarantee as provided by the petitioner is 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 Guarantee for a further period of 6 months from the date of its 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 Guarantee is not extended, a demand of the amount of Bank Guarantee shall be raised by respondent No.1 which shall become payable by the petitioner and hence, the Bank Guarantee shall be invoked.

11. 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 Guarantee 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 said threat, the present petition was filed.

12. In reply, it is the case of the respondent No.1 that the said Bank Guarantee is unequivocally unconditional Bank Guarantee as it is trite law that when in the course of the commercial dealings an unconditional Bank Guarantee 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 Guarantee furnished by 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 Guarantee represents 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 guarantee 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.69,56,000/- (Rupees Sixty Nine Lakhs Fifty Six Thousand only) as aforesaid* ***at any time*** *up to 31/05/2013 (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."*

13. It is submitted on merit that the Bank Guarantee was 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 warrantees contained in the Contract which was awarded pursuant to the LOA No.I-3066/BHAVNAGAR/TECHPRO/01 dated 23rd September, 2011. The petitioner has miserably failed to execute the whole of the work that has been awarded to it vide the said Contract and further failed to supply several equipments materials

and perform the erection, testing & commissioning work entrusted *vide* the Contract. The petitioner neither commissioned the equipments nor conducted the Performance Guarantee tests as required under the Contract and even abandoned the project site without any intimation. The respondent No.1 was forced to complete the remaining works/supplies etc. at the risks & costs of the petitioner.

14. 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 is submitted that the warranty period did not commence so as to put an end to the validity of the said Bank Guarantee. 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."*

15. It is also submitted that the guaranteed performance figures of the equipments supplied by the petitioner could be proved by the guarantee tests and continuous running thereafter till the warranty period 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.

16. 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 guarantee 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 BGs stood extended.

The clause 13.0 (c) 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."*

17. It is stated that the Bank Guarantee furnished in favour of the respondent No.1 survives till the validity period of such Bank Guarantee which shall be extended till the recoverable amount from the petitioner is adjusted from the Bank Guarantee. The fact that the validity of Bank Guarantee 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 Guarantee shall be kept alive and the recovery amount shall be adjusted from the same.

18. 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 Guarantee is 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 Guarantee has been renewed before expiry date and the same is 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.

19. 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/9478 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: BECL-BHAVNAGAR - Extension of Performance Bank Guarantee no.0702411BG0000246 dtd. 20.05.11 for Rs.69,56,000/- issued by you in our favour on behalf of M/s Tecpro Systems Ltd.
>
> Dear Sir,
>
> Kindly refer Performance Bank Guarantee no.0702411BG0000246 dtd. 20.05.11 for Rs.69,56,000/- issued by you in our favour on behalf of M/s Tecpro Systems Ltd. The bank guarantee shall expire on 30.09.15 with a claim period upto 31.12.15.
>
> The purpose for which the above bank guarantee was given has 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 guarantee i.e. Rs.69,56,000/- 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"

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

21. 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 Guarantee 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.

22. 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 Guarantee in question is 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.

23. 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.

24. The present petition is accordingly disposed of.

(MANMOHAN SINGH)
JUDGE

JUNE 10, 2016