HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

WRIT PETITION No. 14692 OF 2016

ORDER:

1) The present writ petition came to be filed with the following prayer:

> "issuance of writ of mandamus to permit the petitioner to enter into an agreement and submit bank guarantee for phase III and draw the allocated quantity of RLNG gas as per letter of award dated 21.03.2016 issued by the 1st respondent and restrain the 1st respondent from invoking Bank Guarantee No.2007ILG00135 dated 23.09.2015 for Rs.55,50,186/- issued by the 3rd respondent and Bank Guarantee No.1601331BGP00128 dated 15.03.2016 for Rs.1,42,87,380/- issued by the 2nd respondent and direct the 1st respondent to return the Bank Guarantee No.1601332BGP00161 dated 07.04.2016 for Rs.13,55,50,186/- issued by the 2nd respondent for PSDF Performance Security for phase II since petitioner has not drawn any gas due to short supply in Andhra Pradesh and did not avail any subsidy from the 1st respondent."

2) The averments in the affidavit filed in support of the writ petition would show that the petitioner established a 445 MW Natural Gas based Power Project at Devarapalli, Ravulapalem, East Godavari District. He entered into a power purchase agreement with power distributing companies of Andhra Pradesh and Telangana for sale of its generation. The petitioner was allocated 2.14 MMSCMD of natural gas by the Ministry of Power

and Natural Gas and entered into an agreement with Reliance Industries Limited and GAIL (India) Limited, for purchase and transportation of gas. The petitioner was not been able to generate any power from the year 2012, due to shortage of Natural Gas and total stoppage of supply of Natural Gas to the petitioner power plant, due to lower priority to power sector. In order to regulate the supply of natural gas, the demand for which exceeded the supply, Government of India had set up an empowered group of ministers, to allocate the available natural gas among various categories of consumers. The power generation came third in the priority. From April, 2009, Reliance Industries Limited (hereinafter referred to as "RIL") started supply of natural gas from the K.G.Basin in Bay of Bengal. The empowered group of ministers allocated RIL gas among the various consumers such as fertilizer plants and power plants. The petitioner, which had a long term Power Purchase Agreement in Andhra Pradesh was allocated 70% of their requirement, which was subsequently increased to 75%. The petitioner entered into a Gas Sales and Purchase Agreement with RIL on 01.04.2009 for a total quantity of 68781 MMBTU on NHV basis and about 75% is to be supplied on firm basis and the balance of 25% has to be supplied on fall back basis subject to availability and non-utilization of gas by other allottees. The above allocation was based on production of 60 MMSCMD of Natural gas by RIL. The petitioner has been incurring expenditure to a tune of Rs.200

lakhs every month towards plant preservation, expenses, salaries and wages, watch ward for security and other statutory payments, for which the petitioner obtained loans from various banks and financial institutions. In view of stoppage of generation and the power utilities not permitting generation on alternate fuel which is Naphtha, the loans taken by the petitioner became a Non-Performing Asset.

In order to make productive use of the idle gas based power generating capacity, the 1st respondent formulated a scheme for supply of imported Re-gasified Liquid Natural Gas (RLNG) to such stranded gas based power plants and the scheme for the years 2015-2016 and 2016-2017 was notified vide memo dated 27.03.2015. Pursuant to the said memo, tenders were called for and the petitioner was found to be one of the eligible bidders in the said tender, for allotment of RLNG. The tender process is having two stages. First one is being a technical bid and the second one is the financial bid. The petitioner participated in Phase-I bidding but was successful. The petitioner participated in online bid for Phase-II and for being technically qualified, submitted the bid security in the form of Bank Guarantee, issued by the 3rd respondent on 10.09.2015 for Rs.1,98,37,566/- which was valid upto 09.12.2015. Later, the petitioner participated in the financial bid and the 1st respondent issued a letter of Award dated 17.09.2015, allotting gas for 11,64,311 SCMD which was meant to support 50%PLF for Phase II period (1st October, 2015 to

31st March, 2016). In terms of the said award, the petitioner was required to submit performance security in the form of Bank Guarantee for Rs.13,55,50,186/- and sign the PSDP support agreement for release of subsidy payment. The petitioner could not submit the same as the petitioner was already declared as NPA by the banks. The petitioner supplied only 1.16 MMSCMD as against the requirement of 2.14 MMSCMD. As per the award, the petitioner submitted performance Bank Guarantee for Rs.55,50,186/- issued by the 3rd respondent under PSDF format for drawal of subsidy amount towards PSDF support in partial fulfillment of the requirement for Performance Bank Guarantee on 23.09.2015. Finally, the petitioner got Performance Bank Guarantee for Rs.13,55,50,186/- from the 2nd respondent. The performance bank guarantee was required to be submitted prior to signing of PSDF support agreement for release of subsidy payment. The petitioner could not obtain the bank guarantee as he neither executed the PSDF support agreement for Phase-II nor received any gas.

The 1st respondent requested the petitioner to submit additional Bank Guarantee of at least an amount of Rs.1,42,87,380/- in order to make the petitioner eligible for participating in the RLNG allotment and also to technically qualify for Phase-III bidding. Hence, the petitioner submitted bank guarantee for the said amount on 15.03.2016. As per the scheme, the technical qualification for Phase-III bidding has to be submitted along with necessary declarations and formats and Bank Guarantee with a value of Rs.68,40,540/- on or before 10.03.2016. Accordingly, Bid Security Bank Guarantee bearing No.1601331BGB00078 dated 05.03.2016 for Rs.68,40,540/- issued by the 3rd respondent along with other documents were submitted by the petitioner. The validity of the said Bank Guarantee was upto 09.05.2016. The 1st respondent issued a notice dated 03.03.2016 stating that the petitioner had failed to provide the Performance Security and sign the PSDF support agreement. As suggested, during the discussions on 10.03.2016 with the 1st respondent, the petitioner submitted another Performance Bank Guarantee bearing No.1601331BGP00128 dated 15.03.2016 for Rs.1,42,87,380/- issued by the 3rd respondent under PSDF format for drawal of subsidy amount. Meanwhile, the petitioner addressed a letter dated 04.03.2016 explaining the reasons that supply of gas envisaged under the scheme could not be complied with by the 1st respondent.

The petitioner company could not operate the power plant which was closed for the last four years, but in order to be eligible for Phase-III, under pressure from the 1st respondent, the petitioner submitted a bank guarantee for Rs.13,55,50,186/- issued by the 2nd respondent on 07.04.2016. The petitioner had already submitted Bank Guarantee, for Rs.13,55,50,186/- on 18.04.2016.

It is said that the 1st respondent is pressurizing and threatening the petitioner to invoke the Bank Guarantee submitted to the 1st respondent by the petitioner under PSDF support mechanism for drawal of subsidy. The 2nd and 3rd respondent informed the petitioner that the 1st respondent called and informed them that they would be invoking the Performance Bank Guarantees since the petitioner has not executed the PSDF support agreement for Phase-II.

The 1st respondent proposed to invoke the partial performance security bank guarantee given under PSDF support mechanism for drawl of subsidy and also disqualify the petitioner form participating in any auction conducted by the Nodal Authority under the scheme, for a period of one year. Subsequent to the notice dated 03.03.2016, the 1st respondent granted personal hearing and issued a letter dated 18.03.2016 asking the petitioner to execute the PSDF support agreement and also to furnish the Bank Guarantee for Rs.13,55,50,186/- before the execution of PSDF agreement. Subject to the above, the petitioner was provisionally allowed to participate in the Phase-III tender process. Subsequently, the petitioner participated in Phase-III, and a letter of award dated 21.03.2016 was issued. The petitioner has to submit Performance Security for Rs.8,01,92,627/- even though there is no subsidy entitlement to be released under PSDF mechanism. It is stated that when the 1st respondent and its instrumentalities are in a position to supply only 21.2% of the awarded quantity, insisting the petitioner to fulfil its part of the obligation in an exercise in futility. Hence, the writ petition.

3) By an order, dated 26.04.2016, this Court while admitting the writ petition, passed the following interim order:

> "Since admittedly the petitioner had furnished bank guarantee towards PSDF support agreement for Rs.13,55,50,186/- as directed by 1st respondent in its proceedings dated 18.03.2016 and 07.04.2016, it is not open to 1st respondent to invoke the bank guarantees given on 23.09.2016 and 15.03.2016 by the petitioner through the respondent Nos.2 and 3. Therefore, there shall be interim direction as prayed for."

4) The first respondent filed counter stating that the Government of India, through the Ministry of Power, after approval from the Cabinet, through Office Memorandum dated 27.03.2015 sanctioned the scheme for utilization of gas based power generation capacity for the year 2015-2016 and 2016-2017. The scheme contemplated conversion of imported liquefied natural gas (LNG) into Regassified LNG also known in the trade circle as RLNG and this RLNG was to be bid through reverse e-bidding to the eligible gas based plants in the country for grant of PSDF support from the Government of India from the Power System Development Fund. The scheme further contemplated various concessions by various stake holders in order to facilitate generation of electricity from the eligible gas based plants. The

purpose of the scheme was two fold, namely to utilize the stranded gas power generation capacity in the country to generate greater electricity and secondly to enable the stranded gas based plants to run so as to service their debts without any return on equity, through PSDF support. The scheme is as under:-

> To implement and execute the scheme, an Empowered Pool Management Committee (EPMC) was contemplated and constituted under the chairmanship of Special Secretary/ Additional Secretary, Ministry of Power.
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> To effectuate the mandate of the scheme, the EPMC approved the tender documents which clearly captured the reverse e-bidding process. The EPMC was authorized and fully empowered under the Scheme to resolve operational issues as may arise from time to time to ensure smooth functioning of the Scheme. In this regard all the decisions pertaining to the implementation of the Scheme and the documents issued thereto have been approved by EPMC.
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> The entire scheme was conceived after detailed deliberations and was an evolution over previous concepts which could not be fructified due to various reasons. As there were various legal, operational and regulatory issues which were involved under the Scheme, it was not essential to ensure a level playing field amongst all the bidders because it was operationally not feasible, but to allow the

bidders to bid based on the price intimated to them in advance by GAIL. Further, since all the waivers which were initially contemplated were not forthcoming, the bidding was done on an 'as is, where is basis'. Therefore, each bidder was informed the per unit landed cost of the e-bid RLNG by GAIL and the bidder was to bid accordingly after taking into consideration all the possible risks involved. The fact that the petitioner was a non-performing asset was inconsequential for the purpose of its bid and most bidders under the Scheme were stressed assets and were on the verge of being NPAs or were already NPAs. The provision for levy of penalty and invocation of bank guarantee was meant to discourage gaming of the system and to have a fair bidding process.

5) Pursuant to the scheme, the EPMC has completed three rounds of tendering with RLNG. The first phase was done for a period of 01.06.2015 to 30.09.2015 under Tender Document No.4/2/2015-Th-I(SGP) dated April 24, 2015 (1st phase). The second phase was from October 1, 2015 to March 31, 2016 under tender document No.4/33/2015-Th-I(SGP) dated August 31, 2015. The third phase of the scheme was under Tender Document No.4/2/2016-Th-I dated March 1, 2016 for the period 01.04.2016 to 30.09.2016 which was in progress on the date of filing of writ petition. The present dispute raised by the petitioner pertains to second phase.

6) The main ground urged by the learned counsel for the petitioner is that the scheme did not operate in the way it was structured to operate, thereby the petitioner was put to irreparable loss. It is further urged that the GAIL supplied only 25% of the gas promised as such default if any committed by the petitioner cannot be found fault with. Since the performance security is only a breach of agreement, the authorities should have extended time for fulfilling the same. Though there was no point in entering into an agreement after the second phase is over, the petitioner contended that the same was done under threat of execution of bank guarantee. Since no gas was used, the petitioner is entitled for the relief claimed. Though the third phase is also over, learned counsel for the petitioner submits that the orders passed by the authorities will preclude him from participating in future bids and as such seeks an observation, permitting the petitioner to participate in future schemes.

7) The same is opposed by the learned Additional Solicitor General. Though initially he pleaded that the writ petition is not maintainable but however submits that as the third phase of the scheme has also come to an end, the question of repayment of the bank guarantee or any other relief as sought for in the writ petition would not survive for adjudication.

8) The record discloses that the petitioner participated in second phase tender document in the month of September, 2015

and was declared as a successful bidder. The letter of award dated 17.09.2015 was issued to the petitioner. Under the letter of award, the petitioner has to take certain steps. One amongst which being that he should sign and execute the PSDF support agreement and RLNG sale agreement but the petitioner did not comply with the same. However, through letter dated 21.09.2015 he sought extension of time till 29.09.2015. Further, vide his letter dated 22.09.2015, the petitioner sought extension till 06.10.2015 for providing the bank guarantee towards PSDF performance security.

9) The record discloses that pursuant to the letter dated 23.09.2015, the petitioner stated that he submitted partial PSDF performance security to a tune of Rs.55,50,186/- and the remaining bank guarantee will be provided on or before 06.10.2015. The EPMC in its meeting held on 30.09.2015 agreed to give 15 days time for executing a bank guarantee, as requested. Without complying the same, the petitioner again sought extension of time till 30.11.2015. However, the authorities rejected to give any further extensions.

10) It is to be noted that as against the required bank guarantee of Rs.13,55,50,186/- to be furnished in accordance with Letter of Award, the petitioner submitted bank guarantee for Rs.55,50,186/- with its validity till 24.05.2016. It is to be noticed that in spite of giving number of opportunities the petitioner failed to fulfil its obligation thereby violating the tender

conditions provided in the second phase tender document and Letter of Award. Thereafter a show-cause notice came to be issued on 03.03.2016 stating as to why appropriate action should not be initiated. The extension came to be made, seeking exemption from the consequences of second phase tender document and as such sought permission for participating in third phase tender document. The EPMC took a lenient view having regard to the purpose of the scheme and decided to give time till 14.03.2016 to submit fresh security for the balance amount ie. Rs.1.98 crores minus 0.56 crores. Though the petitioner, by way of an affidavit, agreed to fulfil the conditions of the third phase tender agreement, failed to do so. The record shows that though the petitioner has been seeking time from the authorities for fulfilling the documentation and the bank guarantees, failed to fulfil the contractual obligations.

11) The averments in the affidavit are silent with regard to undertakings given by the petitioner expressing his willingness and also the undertaking given by him for fulfilling the obligations which were never fulfilled. In view of the factual position referred to above, the request of the petitioner for refund of the bank guarantee executed and also a direction restraining the 1st respondent from encashing the bank guarantee, cannot be accepted.

12) At this stage, learned counsel for the respondents would submit that in respect of the very same scheme, the request of

one Kashipur Sravanti was rejected and was debarred from participating in the second phase tender document.

13) Though the learned counsel for the petitioner tried to plead that since it is only a breach of contract, the action of authorities in trying to forfeit the money is contrary to Section 74 of the Contract Act. The judgment of the Apex Court in *Kailash Nath Associates v. Delhi Development Authority and another*[1] which is made the basis for the said argument cannot be accepted. The instance is not a case of any breach of contract. On the other hand the request of the petitioner was being accepted from time to time and number of opportunities were given to fulfil the contractual obligations. Since the petitioner failed to fulfil his part of obligation in spite of giving number of opportunities the authorities are constrained to encash the bank guarantee.

14) Appreciation of the entire factual gamut of the case goes to show that the petitioner was declared as N.P.A. and the company went into losses as it could not comply with the conditions stipulated within the time prescribed. At the same time, it is also to be noted that substantial amount was parted by way of bank guarantees but not even a single mm of gas was received by the petitioner. It may be true that the 1st respondent could not comply with the same due to non-fulfilment of certain obligations but at the same time the petitioner has also lost huge money.

[1] (2015) 4 SCC 136

15) Having regard to the above, the petitioner herein shall make a request before the authorities to consider him in future schemes, in which event the same may be dealt with in accordance with law and by taking into consideration the facts situation as well.

16) With the above direction, the writ petition is disposed of. No order as to costs.

17) Consequently, miscellaneous petitions, if any, pending in this Writ Petition shall stand closed.

JUSTICE C. PRAVEEN KUMAR

25.04.2017
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