HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SMT. JUSTICE T. RAJANI

WRIT APPEAL NO.646 OF 2017

ORDER: (per Hon'ble the Acting Chief Justice Justice Ramesh Ranganathan)

This appeal, under clause 15 of the Letters Patent, is filed by the petitioner in W.P. No.14692 of 2016 aggrieved by the order passed by the Learned Single Judge dated 25.04.2017. In the said Writ Petition, the petitioner had sought a mandamus to permit them to enter into an agreement, submit a bank guarantee for Phase – III, draw the allocated quantity of RLNG gas as per the letter of award dated 21.03.2016 issued by the Government of India, restrain the Government of India from invoking the Bank Guarantee dated 23.09.2015 for Rs.55,50,186/- issued by Punjab National Bank and the Bank Guarantee dated 15.03.2016 issued by the IDBI Bank for Rs.1,42,87,380/-, and to direct the Union of India to return the Bank Guarantee dated 07.04.2016 issued by IDBI Bank for Rs.13,55,50,186/- towards PSDF Performance Security for phase II as they did not draw any gas due to short supply in Andhra Pradesh and did not avail any subsidy from the Government of India.

Facts, to the limited extent necessary, are that the petitioner established a 445 MW Natural Gas based Power Project at Devarapalli, Ravulapalem of East Godavari District. They entered into a power purchase agreement with the power distributing companies of Andhra Pradesh and Telangana for sale of the power generated by them. They were allocated 2.14 MMSCMD of natural gas, for purchase and transportation of which they entered into an agreement with Reliance Industries Limited (RIL) and Gas Authority of India Limited (GAIL).

It is the petitioner's case that they were not able to generate any power from the year 2012, due to shortage of Natural Gas; there was total stoppage of supply of Natural Gas to the petitioner power plant, due to lower priority of gas to the power sector; the Government of India set up an empowered group of ministers to allocate the available natural gas among various categories of consumers; power generation was third in the order of priority; RIL started supply of natural gas from the K.G. Basin from April, 2009 onwards; the empowered group of ministers allocated RIL gas among 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%; they entered into a Gas Sales and Purchase Agreement with RIL from 01.04.2009 for a total quantity of 68781 MMBTU on NHV basis; about 75% was to be supplied on firm basis, and the balance 25% was to be supplied on a fall back basis subject to availability and non-utilization of gas by other allottees; and this allocation was based on production of 60 MMSCMD of Natural gas by RIL.

The petitioner claims to have incurred an expenditure of Rs.2 crores every month towards plant preservation, expenses, salaries and wages etc. for which they claimed to have obtained loans from various banks and financial institutions; in view of stoppage of supply of gas, the power utilities did not permit generation on alternate fuel such as Naphtha; and the loans taken by the petitioner became Non-Performing Assets.

It is stated, on behalf of the petitioner, that the Government of India had formulated a scheme for supply of imported re-gasified liquid natural gas, (RNLJ) to stranded gas based power plants, for the years 2015-2016 and 2016-2017 vide memo dated 27.03.2015; tenders were called for; the petitioner was found to be one of the eligible bidders, in the said tender, for allotment of RLNG; the tender process was in two stages, the first was the technical bid and the second the financial bid; the petitioner was successful in Phase-I bidding, and in the online bidding for Phase-II; they submitted bid security, in the form of Bank Guarantee issued by Punjab National Bank, on 10.09.2015 for Rs.1,98,37,566/- which was valid upto 09.12.2015; they participated in the financial bid; the first respondent issued letter of Award dated 17.09.2015 allotting 11,64,311 SCMD gas which was meant to support 50% PLF for the Phase II period i.e.,1st October, 2015 to 31st March, 2016; in terms of the 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; they were not able to furnish the bank guarantee as they were already declared as NPA by the banks; they were supplied only 1.16 MMSCMD of gas as against the requirement of 2.14 MMSCMD; they submitted a performance Bank Guarantee for Rs.55,50,186/-, issued by Punjab National Bank, under PSDF format for drawal of the subsidy amount towards PSDF support, in partial fulfilment of the requirement for Performance Bank Guarantee, on 23.09.2015; they also got a

Performance Bank Guarantee for Rs.13,55,50,186/- from the IDBI bank; the performance bank guarantee was required to be submitted prior to signing the PSDF support agreement for release of subsidy payment; and they could not obtain the bank guarantee, as they neither executed the PSDF support agreement for Phase-II, nor did they receive any gas.

The petitioner would submit that the Government of India had requested them to submit an additional bank guarantee for Rs.1,42,87,380/- to make them eligible for participation in the RLNG allotment, and to technically qualify for Phase-III bidding; they submitted a bank guarantee for the said amount on 15.03.2016; as per the scheme, technical qualification for Phase-III bidding had to be submitted along with a Bank Guarantee for Rs.68,40,540/- on or before 10.03.2016; they submitted the Bank Guarantee dated 05.03.2016 for Rs.68,40,540/- issued by Punjab National Bank valid upto 09.05.2016; on the ground that they had failed to provide performance security, and sign the PSDF support agreement, a notice was issued to them; during discussions on 10.03.2016, they submitted another Performance Bank Guarantee dated 15.03.2016 for Rs.1,42,87,380/- issued by Punjab National Bank under PSDF format for drawal of subsidy; they addressed letter dated 04.03.2016 informing the first respondent that they had failed to comply with the requirements of the scheme regarding supply of gas, which resulted in the petitioner not being able to operate the power plant which was closed for the last four years; in order to be eligible for Phase-III, they had submitted a bank guarantee for Rs.13,55,50,186/- on 07.04.2016; the Government of India was threatening to invoke the Bank

Guarantee, since the petitioner had not executed the PSDF support agreement for Phase-II; the Government of India proposed to invoke the partial performance security bank guarantee, and disqualify the petitioner from participating in any auction conducted by the Nodal Authority, under the Scheme, for one year; a personal hearing was afforded and a letter dated 18.03.2016 was issued to the petitioner calling upon them to execute the PSDF support agreement, and to furnish the Bank Guarantee for Rs.13,55,50,186/- before executing the PSDF agreement; the petitioner was provisionally allowed to participate in the Phase-III tender process; a letter of award dated 21.03.2016 was issued in their favour and the petitioner was required to submit Performance Security for Rs.8,01,92,627/-, even though there was no subsidy entitlement to be released under PSDF mechanism; and when the Government of India was in a position to supply only 21.2% of the awarded quantity, insisting on the petitioner fulfilling their part of the obligation was an exercise in futility.

In the counter-affidavit filed on behalf of the Government of India, it stated that, by OM dated 27.03.2015, a scheme for utilization of gas based power generation capacity was sanctioned for the year 2015-2016 and 2016-2017; the scheme contemplated conversion of imported liquefied natural gas (LNG) into Regassified LNG also known as RLNG which was to be bid through reverse e-bidding by 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 contemplated various concessions by various stake holders in order to facilitate generation of electricity by eligible gas based plants; the purpose of the scheme was two fold, (1) to utilize the stranded gas power generation capacity in the country to generate greater electricity, and (2) to enable the stranded gas based plants to run so as to service their debt without any return on equity, through PSDF support; to implement and execute the scheme, an Empowered Pool Management Committee (EPMC) was constituted; the EPMC approved the tender documents, and was authorized to resolve operational issues as may arise from time to time; the bidding was done on an 'as is where is basis'; each bidder was informed of the per unit landed cost of e-bid RLNG by GAIL; the bidders were required to bid after taking into consideration all possible risks; most of the 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; the EPMC completed three rounds of tendering with RLNG; the first phase was done for the period from 01.0.2015 to 30.09.2015 by way of Tender Document dated 24.04.2015; the second phase was from 1st October, 2015 to March 31, 2016 under tender document dated 31.08.2015; and the third phase of the Scheme was under Tender Document dated 01.03.2016 for the period 01.04.2016 to 30.09.2016 which was in progress on the date of filing of the writ petition.

It is submitted, on behalf of the 1st respondent, that the dispute in the Writ Petition relates to the second phase; before participation, GAIL had informed each bidder of the landed cost of e-bid RLNG by their letter dated 10.09.2015; it is after taking into account all these associated risks, which were on account of the petitioner under the 2nd phase, did the petitioner submit their financial bid, and were declared the successful bidder in the month of September, 2015; they had bid for a total of 947903401 units of electricity, and had sought support of Rs.1.43 paisa per unit from the Government of India; the gas required by the petitioner, to generate these number of units, was 1.16 mmcmd; a letter of award dated 27.09.2015 was issued to the petitioner; thereunder the petitioner was liable to furnish PSDF performance security for Rs.13,55,50,186/- by 22.09.2015, to submit a copy of the Trust and Retention Account Agreement before 21.09.2015, to sign and execute the PSDF support agreement and e-bid RLNG sale agreement by 24.09.2015, and to submit a duly executed Discom's letter of confirmation before 28.09.2015.

It is the case of the 1st respondent-Government of India that, under the 2nd phase tender document, the petitioner was contractually bound to sign the PSDF support agreement, the e-bid RLNG agreement, and submit the PSDF performance security in accordance with the specified timelines; the petitioner did not sign these agreements, and did not submit the PSDF performance security within the specified time; submission of these documents was required, under the 2nd phase tender document, in order to receive supply of e-bid RLNG from GAIL; the petitioner was contractually bound to perform its obligations; instead of complying with the terms of the LOA, the petitioner, by their letter dated 21.09.2015, sought extension of time for submission of the PSDF performance security till 29.09.2015; by its letter dated 22.09.2015, the petitioner sought extension till 06.10.2015 to provide a bank guarantee towards PSDF performance security; again, by their letter dated 23.09.2015, the petitioner informed the 1st respondent that they were submitting a partial PSDF performance security for Rs.55,50,186/-, and the remaining bank guarantee would be provided on or before 06.10.2015; the EPMC, in their meeting held on 30.09.2015, agreed to grant fifteen days extension i.e., upto 07.10.2015; by its letter dated 18.11.2015, the petitioner again sought extension till 30.11.2015 to submit the remaining PSDF performance security, and to execute the PSDF Support Agreement; no further extension was given by the EPMC to the petitioner; in terms of the LOA, the petitioner was required to submit a bank guarantee for Rs.13,55,50,186/-, against which the petitioner submitted a bank guarantee only for Rs.55,50,186/- valid till 24.05.2016; they had committed to pay the balance amount of Rs.13 crores immediately; despite their assurance, the PSDF performance security was not submitted within the requisite time under the 2nd phase tender document; despite extension of time granted by the EPMC, the petitioner did not take any steps to execute the agreements, and violated the tender conditions; a notice dated 03.05.2016 was issued calling upon them to show cause why action should not be taken against them in terms of clause 5.5 of the 2nd phase tender document; the petitioner, in their reply letter, claimed force majeure events; they sought exemption from the consequences under the 2nd phase tender document; by their letter dated 10.03.2016, the petitioner sought permission to participate in the 3rd phase tender document; in its meeting held on 11.03.2016, the EPMC noted that the bid security for Rs.1,98,37,566/-, submitted by the petitioner, had lapsed; the

EPMC decided to give them time upto 14.03.2016 to submit the fresh bid security for the balance amount (i.e., Rs.1.98 crores minus Rs.0.56 crores), and provisionally permitted them to participate in the 3rd phase tender documents; the permission accorded to the petitioner, to participate in the 3rd phase, was to be based on an undertaking that the petitioner would be liable for all consequences under the 2nd phase tender document; the petitioner submitted an affidavit dated 10.03.2016 undertaking to submit the PSDF performance security in a timely manner; despite so stating in their letter, the petitioner did not fulfil the conditions sworn on affidavit; in terms of the affidavit dated 10.03.2016, the petitioner had undertaken to submit the PSDF performance security for Rs.2.25 crores by 15.03.2016; they had also undertaken to submit the balance PSDF performance security in order to participate under the 3rd phase tender document; the petitioner has been playing hide and seek with the answering respondent, and had put the entire scheme in jeopardy; if the petitioner was not in a position to fulfil their contractual obligations, they should not have submitted their bid; non-fulfilment of their contractual obligations was unfair to the other successful bidders who, though similarly placed, had submitted the required PSDF performance security; in the previous phase Sravanthi Energy Private Limited were also debarred from participation under the 2nd phase Tender document to maintain seriousness among the bidders; since the bid security of the petitioner had expired, the petitioner was granted further opportunity by the EPMC to replenish an amount equal to the bid security it had submitted earlier; instead of submitting the entire PSDF security, the petitioner replenished an amount equivalent of its bid security, and further undertook to submit the entire PSDF performance security; on 15.03.2016, the petitioner submitted a bank guarantee for Rs.1,42,87,380/-; the petitioner did not take steps to submit the requisite bank guarantee; a show cause notice was issued on 15.03.2016, and a personal hearing was granted on 17.03.2016; the petitioner submitted another undertaking on 17.03.2016; this undertaking was suppressed from this Court; in terms of the undertaking, the petitioner had agreed to take necessary steps to execute the PSDF agreement and e-bid RLNG Sale agreement, and had agreed to furnish a bank guarantee towards PSDF security for Rs.13,55,50,186/-; if they did not furnish the said security, they were not entitled to be supplied any quantum of the e-bid RLNG, and they also ran the risk of being debarred from participating in phase III; they understood that the delay, in execution of PSDF support agreement and e-bid RLNG sale agreement, may entail certain consequences under the tender; they understood that their participation in phase III was provisional, and may depend on the outcome of execution of PSDF support agreement and e-bid RLNG sale agreement under phase II; if they were unable to furnish the PSDF security of Rs.13,55,50,186/-, the Nodal Authority was entitled to invoke their bank guarantees dated 23.09.2015 and 15.03.2016 issued by Punjab National Bank and IDBI bank; and they undertook to abide by the directions and decisions of the Nodal Authority.

It is the case of the 1st respondent that this undertaking was suppressed by the petitioner, and also the conditional approval granted to them on 18.03.2016 whereby the petitioner was required to take steps to execute the PSDF support agreement and the e-bid RLNG sale agreement, and to furnish a bank guarantee towards PSDF security for Rs.13,55,50,186/- before execution of the agreement; if they did not furnish the bank guarantee, they would not be entitled to any supply of RLNG, and would be deprived from participating and receiving the e-bid RLNG in phase III; their participation in Phase - III was provisional, and would depend on the outcome of execution of the PSDF support agreement and e-bid RLNG sale agreement under Phase - II of the tender; if they did not furnish the PSDF security for Rs.13,55,50,186/-, the bank guarantees dated 23.09.2015 and 15.03.2016 were to be invoked; subject to the above, the petitioner was provisionally allowed to participate in the e-auction to be held on 20.03.2015 under Phase - III; the petitioner did not submit the PSDF performance security for Rs.13,55,50,186/- within time, but did so only on 18.04.2016 after the contract period under Phase - II had already expired; though they were declared a successful bidder, they did not comply with the conditions specified under Phase - III tender documents; and they have suppressed material information from this Court.

In the order under appeal, the Learned Single Judge observed that, as against the required bank guarantee of Rs.13,55,50,186/- to be furnished in accordance with the letter of the award, the petitioner had submitted a bank guarantee only for Rs.55,50,186/- with its validity till 25.05.2016; inspite of being given numerous opportunities, the petitioner failed to fulfil its obligations thereby violating the tender conditions; a show cause notice was issued on 03.05.2016 and, when the petitioner sought extension, a lenient view was taken by the EPMC which decided to give them time till 14.03.2016 to submit fresh security for the balance amount; though the petitioner, by way of an affidavit, had agreed to fulfil the conditions, they failed to do so; the writ affidavit was silent regarding the undertaking furnished by the petitioner expressing their willingness to fulfil their obligations, which was never fulfilled; in such circumstances, the petitioner's request for refund of the bank guarantee executed by them, and for a direction restraining the 1st respondent from encashing the bank guarantee, could not be accepted; the petitioner's request for extension of time was accepted by the respondent from time to time, and several opportunities were given to them to fulfil their contractual obligations; and since the petitioner failed to fulfil their part of the obligations, inspite of being given number of opportunities, the authorities were constrained to encash the bank guarantees.

The Learned Single Judge, further observed, that the petitioner was declared an N.P.A, and it went into losses as it could not comply with the conditions stipulated within the time prescribed; they had parted with substantial amounts by way of bank guarantees, but did not receive even a single mm of gas; while the 1st respondent could not comply with the same due to non-fulfilment of certain obligations by the petitioner, the petitioner had also lost huge amounts; and, having regard to these factors, the petitioner could make a request to the authority to consider them in future schemes, in which event the same may be dealt with in accordance with law, and by taking into consideration the fact situation.

Before us Sri M.P. Chandramouli, Learned Counsel for the petitioner, would submit that, as the petitioner had not received even a single mm of gas, invoking their bank guarantees was not justified; the requirement of executing an agreement, and furnishing a bank guarantee, was only for supply of RLNG gas; as the petitioner did not receive any gas whatsoever, they cannot be called upon to furnish security; and the action of the 1st respondent, in insisting on their furnishing security and entering into an agreement as a pre-condition for their participation in phase – III, is wholly arbitrary and illegal.

On the other hand, Sri B. Narayan Reddy, Learned Assistant Solicitor General, would submit that the petitioner, having violated the tender conditions and having failed to execute the agreement or furnish the security amount by way of bank guarantees, cannot be permitted to invoke the extra-ordinary jurisdiction of this Court; they have also suppressed relevant and material facts from this Court such as the undertaking furnished by them to the respondents; the Learned Single Judge has taken a lenient view, and has permitted the petitioner to submit a representation to the 1st respondent though their claim was wholly untenable; and the Writ Petition was liable to be dismissed solely on the ground of suppression of material and relevant facts.

The Scheme, for utilization of gas based power generation capacity for the years 2015-2016 and 2016-2017 as formulated in OM dated 27.03.2015, provided for conversion of imported liquefied natural gas (LNG) into Re-gassified Liquified Natural Gas (RLNG) which was to be bid through reverse e-bidding by eligible gas based plants in the country for grant of Power System

Development Fund support from the Government of India. While the Scheme contemplated several concessions, to facilitate generation of electricity by eligible gas based plants, it also placed certain obligations on the power generating units. Each of the gas based power plants were required to bid for RLNG on an 'as is where is basis'; and were informed of the per unit landed cost, of e-bid RLNG, by GAIL. The duration of the 2nd phase of the Scheme was from 1st October, 2015 to March 31, 2016 for which tender documents were issued on 31.08.2015. The duration of the 3rd phase of the Scheme was from 01.04.2016 to 30.09.2016 for which a tender document was issued on 01.03.2016.

The petitioner submitted their bid for the 2nd phase of the Scheme, and were declared the successful bidder in the month of September, 2015. They had bid for 947903401 units of electricity, and had sought support of Rs.1.43 paisa per unit from the Government of India. The gas required by the petitioner, to generate these number of units, was 1.16 mmcmd. The petitioner was informed, by the letter of award dated 27.09.2015, that they should furnish PSDF performance security for Rs.13,55,50,186/- apart from other agreements. Instead of furnishing such security, the petitioner, by their letter dated 23.09.2015, submitted a performance security bank guarantee only for Rs.55,50,186/-, and sought time till 06.10.2015 to provide a bank guarantee for the balance Rs.13 crores. The petitioner again sought extension of time till 30.09.2015, despite which they did not furnish security of Rs.13 crores by way of a bank guarantee. A show cause notice was issued on 03.05.2016, in reply to which the petitioner claimed force majeure events and sought exemption from the consequences under the 2nd phase tender document.

Having failed to discharge their obligations under the 2nd phase, the petitioner sought permission to participate in the 3rd phase. They were permitted by the respondents to do so on condition that they furnished an undertaking that they would be liable for all consequences under the 2nd phase tender document. The petitioner submitted such an affidavit on 10.03.2016 undertaking, among others, to submit the PSDF performance security for Rs.2.25 crores by 15.03.2016. The petitioner submitted another affidavit on 17.03.2016, among others, undertaking to take necessary steps to execute the PSDF agreement, and to furnish a bank guarantee towards PSDF security for Rs.13.55 crores. They also accepted that, if they did not furnish the security, they would not be entitled to be supplied any quantum of e-bid RLNG, they ran the risk of being debarred from participating in phase III, and the Nodal Authority was entitled to invoke their earlier bank guarantees dated 23.09.2015 and 15.03.2016.

It is based on these affidavits of undertaking that the petitioner was granted conditional approval on 18.03.2016 to participate in Phase - III. It is only after the 2nd phase of the Scheme ended on 31.03.2016, did the petitioner furnish the PSDF performance security on 18.04.2016. As the pre-conditions, for supply of gas under Phase – II, was not complied with by the petitioner, they were not supplied gas. It also appears that the petitioner has not placed all material and relevant facts before this

Court, and have thereby secured an interim order not to encash the bank guarantees dated 23.09.2015 and 15.03.2016 by order in WPMP Nos.18278 and 18279 of 2016 dated 26.04.2016. This interim order continued to remain in force till the Writ Petition was disposed of by the order under appeal. Further, by an interim order in this appeal dated 18.05.2017, the 1st respondent was directed not to invoke the Bank guarantees dated 23.09.2015 and 15.03.2016. A contract of bank guarantee is independent of the underlying contract and, save an established case of fraud or irretrievable injury or special equities in favour of the appellant-writ petitioner being made out, no interference is called for. The appellant-writ petitioner has not been able to establish fulfilment any of these conditions, justifying any order being passed restraining the 1st respondent from invoking the bank guarantees.

Though there was no stay of invocation of the bank guarantee for Rs.13,55,50,186/-, it is now represented that this bank guarantee, along with the other bank guarantees, has also lapsed. During the course of hearing of this appeal, we asked Sri M.P. Chandramouli, Learned Counsel for the appellant-writ petitioner, whether the appellant-writ petitioner was willing to renew the bank guarantees, as they had claimed that the bank guarantees had lapsed during the pendency of the writ petition. Learned Counsel, on instructions, stated that the petitioner was not willing to renew the bank guarantees. Having failed to fulfil the conditions prescribed in the tender documents for supply of gas under phase II, the petitioner cannot now be heard to contend that no action should be taken against them by the Government of India for their failure to do so, and instead they should be permitted to participate in Phase – III of the scheme. In any event, even phase III of the scheme expired, during the pendency of the Writ Petition, on 30.09.2016. The Learned Single Judge has, in fact, shown indulgence in permitting the appellant-writ petitioner to make a request to the authority to consider them in future schemes. We find no error in the order under appeal, much less a patent illegality warranting our interference in proceedings under clause 15 of the Letters Patent. Suffice it to make it clear that neither the order under appeal, nor the order now passed by us, shall preclude the 1st respondent-Government of India from seeking restitution in accordance with law, for damages if any suffered by them as a result of the interim orders passed by the Learned Single Judge and by the Division bench of this Court.

Subject to the above observations, the Writ Appeal fails and is, accordingly, dismissed. The miscellaneous petitions pending, if any, shall stand closed. No costs.

(RAMESH RANGANATHAN, ACJ)

(T.RAJANI, J)

Date: 03-07-2017.

MRKR