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

Reserved on: February 9, 2017
Date of Decision: February 17, 2017

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O.M.P.(I) (COMM.) 66/2017

TRF LTD.

..... Petitioner

Through: Mr. Amit Sibal, Senior Advocate with Mr. Kaushik Poddar, Mr. Sumeet Gadodia, Mr. Gautam Singh, Mr. Rohan Alva, Mr. Vivek Raja, Advocates.

versus

ENERGO ENGINEERING PROJECTS LTD. & ANR. Respondents

Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Dhruv Dewan, Ms. Reena Choudhary, and Ms. Aakashi Lodha, Advocates.

WITH

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O.M.P.(I) (COMM.) 67/2017

TRF LTD.

..... Petitioner

Through: Mr. Amit Sibal, Senior Advocate with Mr. Kaushik Poddar, Mr. Sumeet Gadodia, Mr. Gautam Singh, Mr. Rohan Alva, Mr. Vivek Raja, Advocates.

versus

ENERGO ENGINEERING PROJECTS LTD. & ANR. Respondents

Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Dhruv Dewan, Ms. Reena Choudhary, and Ms. Aakashi Lodha, Advocates.

WITH

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O.M.P.(I) (COMM.) 68/2017

TRF LTD.

..... Petitioner

Through: Mr. Amit Sibal, Senior Advocate with Mr. Kaushik Poddar, Mr. Sumeet Gadodia, Mr. Gautam Singh, Mr. Rohan Alva, Mr. Vivek Raja, Advocates.

versus

ENERGO ENGINEERING PROJECTS LTD. & ANR. Respondents

Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Dhruv Dewan, Ms. Reena Choudhary, and Ms. Aakash Lodha, Advocates.

WITH

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O.M.P.(I) (COMM.) 69/2017

TRF LTD.

..... Petitioner

Through: Mr. Amit Sibal, Senior Advocate with Mr. Kaushik Poddar, Mr. Sumeet Gadodia, Mr. Gautam Singh, Mr. Rohan Alva, Mr. Vivek Raja, Advocates.

versus

ENERGO ENGINEERING PROJECTS LTD. & ANR. Respondents

Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Dhruv Dewan, Ms. Reena Choudhary, and Ms. Aakash Lodha, Advocates.

AND

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O.M.P.(I) (COMM.) 70/2017

TRF LTD.

..... Petitioner

Through: Mr. Amit Sibal, Senior Advocate with Mr. Kaushik Poddar, Mr. Sumeet Gadodia, Mr. Gautam Singh, Mr. Rohan Alva, Mr. Vivek Raja, Advocates.

versus

ENERGO ENGINEERING PROJECTS LTD. & ANR. Respondents

Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Dhruv Dewan, Ms. Reena Choudhary, and Ms. Aakashi Lodha, Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

17.02.2017

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1. These are five petitions under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act') filed by TRF Limited ('TRF') seeking interim reliefs against Energo Engineering Projects Limited ('Energo') (Respondent No. 1) in the circumstances outlined hereunder.

Background facts

2. TRF is stated to be primarily engaged in the business of manufacturing of Bulk Material Handling Equipments having its unit at Jamshedpur in the State of Jharkhand. TRF states that is also in the business of installing the said equipments for its various customers and companies.

3. The facts relevant for OMP (I) (Comm.) No. 66/2017 are that TRF was awarded two separate contracts by Energo – the first was in relation to the supply of Wagon Tippler ('WT') and Side Arm Charger ('SAC') by

Purchase Order ('PO') dated 10th May, 2014; the other Work Order ('WO') was issued by Energo on the same date for erection and commissioning of WT and SAC. The value of both contracts was Rs. 12,17,67,000.

4. It is stated that in terms of the said contracts, TRF was required to furnish an Advance Bank Guarantee ('ABG') in the sum equal to 10% of the total value of the supply contract and a separate Performance Bank Guarantee ('PBG') for 10% of the order value. Thus, TRF got issued by the Respondent No.2 IDBI Bank Ltd., in favour of Energo an ABG as well as PBG for Rs. 1,12,26,700 and Rs.1,21,76,700 respectively.

5. According to TRF, pursuant to the above PO and WO, it started dispatching the goods in question to Energo from 2nd December, 2014 and continued doing so till 28th September, 2015. It is important to note that both the PO and WO pertained to a Project at Korba where the principal contractor was National Thermal Power Corporation ('NTPC'), which entered into a contract with Energo. Energo in turn sub-contracted a portion of the said contract to TRF as a result of which the above PO and WO were issued.

6. The case of TRF is that it has not been paid any amount towards supplies made thus far. According to TRF, the total dues against the Korba contract were approximately Rs. 28 crores. This sum includes Rs. 66,12,000, which is the retention money available with Energo. The case of TRF is that as far as the Korba Contract is concerned, it has supplied 87% of the equipment in terms of the PO. Reference is made in this context to the Special Terms & Conditions of the Purchase Order ('STCPO'). Clause 21 of the STCPO

pertaining to Korba contract envisages that 80% of the supplied value along with taxes would be paid by Energo to TRF within 75 days of supply of material at site along with the submission of the documents stated in Clause 21(b) of the STCPO, which includes the tax invoice in original, delivery challan, lorry receipt etc. The balance 10% of the supply value was payable on the successful conduction of the Performance Guarantee Test and submission of the PBG of the equivalent amount for a period of 90 days beyond the completion.

7. The subject matter of OMP (I) (Comm.) No. 67/2017 are the PO and WO issued by Energo in favour of TRF for supply, installation and commissioning of similar equipments for Sipat Project and the subject matter of OMP (I) (Comm.) No. 68/2017 is the supply, installation and commissioning of equipment pertaining to Kudgi Project where again the principal contractor is NTPC.

8. The subject matter of OMP (I) (Comm.) No. 69/2017 & 70/2017 are the POs and the WOs issued to TRF by Energo for supply, installation and commissioning of equipment pertaining to the Coal Handling Plant at Annupur where the principal contractor is LANCO Infra Limited ('Lanco'). The terms and conditions governing the ABG and PBG are more or less similar in all these contracts. As far as STCPO is concerned, there is a slight variation in the Kudgi Project where Clause 21(b) envisages payment of 65% of the value by Energo to TRF 75 days after the supply.

9. The further common feature in all these cases is that the STCPO itself mandates that if there is any ambiguity between the General Terms and

Conditions of the Purchase Order ('GTCPO') and STCPO, then the STCPO would have precedence over the GTCPO.

10. The genesis of the dispute between the parties is traceable to a letter written by TRF to Energo on 14th May, 2015 for payment of the outstanding dues in respect of the supply of equipments for installation of CHP at the above projects.

11. At this stage, it is necessary to point out that according to TRF the current status of implementation of the fulfilment of its obligations in respect of the above contracts both as regards supply as well as installation and commissioning of the equipments in respect of the three NTPC Projects is as under:

“Calculations Across The Three NTPC Projects namely Kudgi, Korba And Sipat

I. Percentage of supplies made towards the Projects

- a. Kudgi Project- 90%
 - b. Korba Project- 87%
 - c. Sipat Project- 48%
- Aggregate work done toward supplies = 75 %

II. Total PBG submitted across three Projects

a. Kudgi Project-	Rs.5,01,09,200.00.
b. Korba Project-	Rs.1,21,76,700.00
c. Sipat Project-	Rs.1,21,76,700.00
<u>Grand Total-</u>	<u>Rs. 7 ,44,52,600.00</u>

III. Invoices Outstanding as per Respondent

a. Kudgi Project-	Rs.6,51,03,100.00
b. Korba Project-	Rs.5,76,42,849.00

c. Sipat Project-	Nil
Grand Total-	Rs.12,27,45,949.00

Thus, even as per the Respondent the total invoices not paid is of a value of Rs. 12,27,45,949.00 as against the total PBG amount submitted by the Petitioner of Rs. 7,44,52,600.00.

IV. Admitted retention amount

a. Kudgi Project-	Rs.3,82,94,500.00
b. Korba Project-	Rs.66,12,000.00
c. Sipat Project-	Rs.36,20,000.00
Total Retention Amount-	Rs. 4,85,26,500.00

Note: If the retention amount is also added to the total value of the invoices not paid by the Respondent, the same would be as under:

a. Invoices not paid-	Rs.12,27,45,949.00
b. Retention amount -	Rs.4,85,26,500.00
Grand Total	Rs.17,12,72,449.00

V. Advance bank guarantee amount

a. Kudgi Project-	Rs.4,62,92,400.00
b. Korba Project-	Rs.1,12,26,700.00
c. Sipat Project-	Rs.1,12,26,700.00
Total Retention Amount-	Rs. 6,87,45,800.00

12. It is further stated that in reply to the above letter on 22nd May, 2015, Energo gave assurances of making payment but never, in fact, made such payments. On 21st September, 2015, Energo wrote to TRF where *inter alia* it was stated as under:

“This has reference to the emails received by us on 5th Sept. 2015. In this regard we are compelled to mention that the way above projects are being executed by TRF, they defy any logic. Your present ways of execution tantamount to dumping, which we cannot accept any further.

Till date our experience with TRF w.r.t supply of Stacker / Reclaimer, Wagon Tippler, Paddle Feeders, has been fifty percent component of the machines are supplied quickly in first couple of months but balance supplies are stretched by years. Further, team spirit for completing site activities is either missing or totally inadequate. As a result, entire completion of CHP is delayed and customers levy penalty on the entire project.

You would appreciate that breakup of prices for machine components is accepted only to facilitate smooth cash flows. However, BBU's become totally counterproductive if first to last supply is not completed in a given time frame. Even one percent balance supply is good enough to hold its commercial use.

For your ready reference, please find enclosed herewith status of Kudgi, Korba and Sipat supplies from which you would observe that lot of bought items are yet to be supplied by you.”

13. It was further stated as under:

“Under the circumstances, we are compelled to insist that we can only release machine wise payments, as and when you complete cent percent supply of machines. You may complete the supplies one by one and claim entire balance amount payable against a particular machine.

We wish to assure you that your payments will be released but we need a firm programme from TRF for completion of end to end supplies.”

14. The details of the balance supplies in respect of each of the contracts were enclosed with the letter.

First round of litigation

15. The case of Energo is that after the above letter dated 21st September, 2015, TRF stopped all supplies. When Energo sought to invoke the BGs

thereafter, the first round of litigation was commenced by TRF by filing OMP (I) (Comm.) Nos. 65/2015, 66/2015, 68/2015, 69/2015, 70/2015 in this Court. In the said petitions, the prayers were for an order restraining Energo from invoking the ABGs and PBGs in question.

16. On 23rd December, 2015, a statement was made before the Court in the said petitions by the counsel for the Respondents that till the next date of hearing they would not invoke the BGs in question. The said statement continued for several hearings thereafter. Meanwhile, the attempts by the parties to resolve their disputes through negotiations were unsuccessful.

17. TRF issued a notice to Energo on 28th December, 2015 invoking the arbitration Clause. This was replied to by Energo on 27th January, 2016. Energo nominated an Arbitrator in terms of GTCPO governing the POs and the WPOs. On 19th April, 2016, TRF filed an application being Arb.P. No. 85/2016 under Section 11 of the Act. The said petition was dismissed by this Court on 19th April, 2016. Aggrieved by the said order, TRF filed Special Leave Petitions, being SLP(C) Nos. 14226/2016 & 14331/2016. An interim order was passed by the Supreme Court in the said SLPs staying further proceedings before the Arbitral Tribunal ('AT').

18. As far as OMP (I) (Comm.) Nos.65/2015, 66/2015, 68/2015, 69/2015, 70/2015 were concerned, a judgment was pronounced by the learned Single Judge on 16th September, 2016. It was *inter alia* observed therein that:

“as soon as the Special Leave Petition filed by the petitioner is disposed of, the prayer made in the nine petitions can be considered by the Arbitral Tribunal. There is no impediment or a situation where the remedy provided under Section 17 of the Act is not efficacious.

Thus, let these petitions be treated as applications under Section 17 of the Act which may be decided by the Arbitral Tribunal at an early date once the Arbitral Tribunal shall commence the first hearing. Till the said petitions are decided, the interim directions which are issued by way of statement not to take any steps for invocation shall continue subject to the condition that the petitioner shall keep the bank guarantee alive till the decision of application under Section 17 of the Act. The Arbitral Tribunal at the time of deciding the said application would pass the appropriate orders in this regard. All pleadings of these petitions shall be filed by the petitioner once the Arbitral Tribunal will commence the proceedings.”

19. Aggrieved by the above order, Energo filed FAO(OS)(Comm.) Nos. 112/2016 to 116/2016 before the Division Bench (‘DB’) of this Court. By its judgment dated 23rd December, 2016, the DB set aside the order dated 16th September, 2016 of the learned Single Judge. The DB noted that by the order dated 30th September, 2016 in the aforementioned SLPs, the Supreme Court had stayed further proceedings before the AT. In the circumstances, it was observed that TRF did not have an efficacious remedy under Section 17 of the Act and therefore, the Court had to consider the prayer for interim reliefs on merits and pass an order.

The present petitions

20. On remand, the aforementioned OMP (I) (Comm.) Nos. 65/2015, 66/2015, 68/2015, 69/2015, 70/2015 were dismissed by the Single Judge on 6th February, 2017 since, in fact, no letter had been issued by Energo as on that date to the Bank in question invoking the BGs. However, the right of TRF to urge all the points it sought to raise in the said petitions after such invocation by Energo was reserved.

21. On 6th February, 2017 itself, Energo wrote separate letters to IDBI Limited, Respondent No. 2, in OMP (I) (Comm.) Nos. 66/2017, 67/2017, 68/2017 & 70/2017 and Bank of Baroda, Respondent No. 2 in OMP (I) (Comm.) No. 69/2017 invoking the BGs issued by them in favour of TRF by stating that TRF had failed to fulfil its obligations under the above-referred Purchase/Work Order/Contracts.

22. As a result thereof, the present petitions were filed by TRF, thus, commencing the second round of litigation.

23. The petitions were first listed in the Court on 8th February, 2017. By the time they were numbered and brought up for hearing it was already 4:30 p.m. Since there was no time left, the Court while directing the notice to issue on that date kept the petitions for hearing on the very next date i.e., 9th February, 2017. Till then, Energo was restrained from encashing the BGs that had already been invoked.

24. With the consent of the learned counsel for the parties, the petitions have been finally heard.

Submissions on behalf of TRF

25. Mr. Amit Sibal, learned Senior Advocate appearing for TRF submitted that this was a case where the invocation of the BGs by Energo was not *bona fide*. It constituted a fraud not only on the Banks in question but also on the Court since Energo was dishonestly claiming that TRF was in breach of the contract when it was not. He submitted that this was a case where special equities existed in favour of TRF.

26. Mr. Sibal further submitted that each of the contracts was a separate one and the alleged breach of one contract could not be a justification for Energo not to fulfil its obligations under the other contracts. He pointed out that under the Korba Contract, no payment at all had been made for the supplies made although there was obligation to pay 80% of the amount in terms of Clause 21(b) of the STCPO, which would prevail over the GTCPO. He sought to read the ABG and the PBG as a whole. He submitted that although, facially, it might appear that the ABGs and the PBGs were unconditional, they, in fact, referred specifically to the STCPO. Therefore, unless the conditions of the STCPO were fulfilled, it would not be open to Energo to unilaterally invoke and seek to encash the BGs in question and that would be an exercise in dishonesty. He alleged that not having been paid any money by Energo to TRF, Energo was seeking to encash the BGs on false pretexts only to find the money to pay TRF. It is submitted that if indeed TRF was in breach of the contract, it was inexplicable that Energo should have chosen not to terminate the contract as yet.

27. Mr. Sibal also made extensive reference to the replies filed by Energo in the earlier petitions where, according to Mr. Sibal, there was a clear admission by way of charts presented by Energo of the amounts admittedly owed by it to TRF. Having admitted its liability to pay those amounts, there was no justification for Energo to proceed to invoke and then encash the BGs in question. According to Mr. Sibal, the lack of *bona fide* was also evident from the fact that Energo rejected all the proposals put forth by TRF during the hearings of the earlier petitions offering to complete the supplies

and thereafter install and commission the equipments under the POs and WOs. He pointed out that the *bona fides* of TRF were evident from the fact that in those offers TRF undertook to complete all supplies without insisting on compliance by Energo with Clause 21(b) of the STCPO. TRF was prepared to wait for the payment till 100% supplies were complete and yet Energo did not come forward to positively respond to the said offer. TRF even now stood by the said offers and if Energo was prepared to accept them, then there would be no need for encashment of the BGs at this stage.

28. Reliance was placed by Mr. Sibal on the decision in ***Gangotri Enterprises Limited v. Union of India* 2016 (6) SCALE 664; *Satluj Jal Vidyut Nigam Limited v. Jai Prakash Hyundai Consortium* ILR (2006) 1 Delhi 415; *Hindustan Construction Company Limited v. State of Bihar & Ors.* (1999) 8 SCC 436; *P.D. Alkarma Pvt. Ltd. v. Canara Bank* 1998 (45) DRJ 423; *BSES Limited v. Fenner India Limited* (2006) 2 SCC 728; *AMKV-Tecpro v. Gail (India) Limited* 2015 SCC OnLine Del 6989. He also placed reliance on *Adani Agri Fresh Limited v. Mahaboob Sharif* 2015 SCC OnLine SC 1302.**

29. Mr Sibal pointed out that the dishonesty of Energo was apparent in that despite recovering the entire amount of the advance against the bills already submitted for the supplies made by TRF, the ABG was still sought to be invoked and encashed by Energo. Further, Energo itself asked TRF to not proceed with the installation and commissioning of the equipment supplied for the Annupur Project. In other Projects, Energo refused to come forward to facilitate the installation, erection and commissioning. It was seeking to

encash the PBGs even when the stage of conducting the performance tests had not been reached. In the circumstances, the invocation of the PBGs by Energo was dishonest.

30. Mr Sibal submitted that although the Bank in question may not be in a position to decide whether the invocation of the BGs was honest, the Court can certainly do so in order to determine whether special equities existed in favour of TRF. It is pointed out that TRF is before the Board of Industrial and Financial Reconstruction ('BIFR') and if the BGs in question were allowed to be invoked and encashed, irretrievable injustice would be caused to TRF as it would be in no position to make any payments to its employees and other creditors.

Submissions on behalf of Energo

31. Countering the above submissions, Mr. Dayan Krishnan, learned Senior Advocate appearing for Energo, first pointed out that the wording of the ABGs and the PBGs left no room for doubt that they were unconditional. He denied the assertion of TRF that the amounts due to TRF were admitted by Energo and that there was no dispute as such as regards Energo's liabilities. He submitted that the chart set out in the counter affidavits filed by Energo in the previous round of litigation cannot be read selectively. He asserted that there were disputes even as of date between TRF and Energo as to who was actually in breach of contracts. With TRF having decided unilaterally to stop supplies after 21st September, 2015, its proposal subsequently made after the filing of OMP (I) (Comm.) Nos. 65/2015, 66/2015, 68/2015, 69/2015, 70/2015 could not be said to be *bona fide*. Even

now, the offer was only conditional.

32. Mr. Krishnan pointed out that the circumstances had changed over the last one year, which make it impossible to put the clock back. He submitted that Lanco terminated its contracts with Energo and the question of therefore accepting any supplies offered hereafter by TRF could not possibly be accepted *qua* the projects involving Lanco as the principal contractor. Further, he pointed out that even as regards the Korba supplies, NTPC had chosen to directly deal with TRF at the risk and cost of Energo. This change in circumstances made it difficult to accept any of the offers of TRF which, in any event, had come too late. He submitted that the law was well settled as regards the Courts interfering with the invocation and encashment of the BGs. According to him, no special equities existed in favour of TRF for grant of any interim order as prayed for.

33. Mr. Krishnan relied on the decisions in *U.P. State Sugar Corporation v. Sumac International Limited* (1997) 1 SCC 568; *Consortium of Deepak Cable India Limited & Abir Infrastructure Private Limited (DCIL-AIPL) v. Teestavalley Power Transmission Limited* (2014) 215 DLT 246 (DB); *Airworth Travel & Tour Private Limited v. International Air Transport Association* [decision dated 29th September, 2015 of the DB in FAO(OS) No. 305/2015]; *State Trading Corporation of India Limited v. Jainsons Clothing Corporation* (1994) 6 SCC 597; *Vinitec Electronics Private Limited v. HCL Infosystems Limited* (2008) 1 SCC 544 and the decision of this Court dated 6th December, 2016 in Arb. P. No. 499/2015 in *Geo Miller & Co. Pvt. Ltd. v. Bihar Urban Infrastructure Development Corporation*

Limited.

34. As regards the charts referred to by Mr. Sibal, Mr. Krishnan pointed out that the context in which the charts were set out was in the background of the repeated breaches of the POs and the WOs by TRF which was adverted to in the paragraphs preceding and succeeding in charts. Therefore, it could not be read in isolation. He submitted that if the Court were to judge the correctness of the decision of Energo in invoking the unconditional BGs in question, then it would make the entire system of furnishing of unconditional BGs non-workable as in every case the onus would shift to the beneficiary to demonstrate before the Court the *bona fide* of its belief regarding the breach of the contract by the other party. It may also make difficult the working of the banks and they would be in no position to decide whether the invocation in terms of the BGs would cause irretrievable injustice to the other party.

35. Referring to the judgment in the ***Consortium of Deepak Cable India Limited & Abir Infrastructure Private Limited (DCIL-AIPL) v. Teestavalley Power Transmission Limited*** (*supra*), Mr Krishnan submitted that the plea of ‘lack of good faith’ and/or ‘enforcing with an oblique purpose’ or that the bank guarantee was being invoked as a ‘bargaining chip’ or as a ‘deterrent’ or in an ‘abusive manner’ are all irrelevant and hence have to be ignored. He also disputed the percentage of supplies completed by TRF by pointing out that in more than one instance, TRF failed to supply the most critical high value equipment. He submitted that no case whatsoever was made out for restraining Energo from encashing the

BGs. As far as the Korba unit offer of TRF was concerned, Mr. Krishnan submitted that Energo would be willing to consider it after the BGs were encashed.

A recapitulation of the legal position

36. At the outset, the Court would like to recapitulate the law pertaining to interdiction by the Court in the invocation and encashment of the BGs. For the purposes of the present petitions, reference may be made, to begin with, to the decision of the Supreme Court in ***State Trading Corporation of India Limited v. Jainsons Clothing Corporation*** (*supra*). Fraud was pleaded but on the facts of that case, it was found that no fraud had been committed by the Appellant in entering into contract with the Respondent. Nor was there any fraud “in formation or execution of bank guarantee.” Under those circumstances, it was held that “it is not a case of any fraud but at best it is a case of cancellation of the contract by the appellant-principal supplier to the foreign buyer. But that does not have the effect of frustrating or cancelling the contract which the Respondent had entered into with the Appellant.” In paras 8 & 9, the Court explained the law in relation to the interference with the encashment of BGs as under:

“8. The grant of injunction is a discretionary power in equity jurisdiction. The contract of guarantee is a trilateral contract which the bank has undertaken to unconditionally and unequivocally abide by the terms of the contract. It is an act of trust with full faith to facilitate free flow of trade and commerce in internal or international trade or business. It creates an irrevocable obligation to perform the contract in terms thereof. On the occurrence of the events mentioned therein the bank guarantee becomes enforceable. The subsequent disputes in the performance of the contract does not give rise to a cause nor is the court justified on that basis, to issue an injunction from enforcing the

contract, i.e., bank guarantee. The parties are not left with no remedy. In the event of the dispute in the main contract ends in the party's favour, he/it is entitled to damages or other consequential reliefs.

9. It is settled law that the court, before issuing the injunction under Order 39, Rules 1 and 2, CPC should prima facie be satisfied that there is triable issue strong prima facie case of fraud or irretrievable injury and balance of convenience is in favour of issuing injunction to prevent irremediable injury. The court should normally insist upon enforcement of the bank guarantee and the court should not interfere with the enforcement of the contract of guarantee unless there is a specific plea of fraud or special equities in favour of the plaintiff. He must necessarily plead and produce all the necessary evidence in proof of the fraud in execution-of the contract of the guarantee, but not the contract either of the original contract or any of the subsequent events that may happen as a ground for fraud.”

37.1 The next significant decision was ***U.P. State Sugar Corporation v. Sumac International Limited*** (*supra*). There the facts were that in terms of the contract between the parties, the Respondent/Sumac agreed to design an engineering layout and to manufacture or procure and supply to the U.P. State Sugar Corporation ('UPSSC') the machinery and equipment for a complete sugar plant for extension and modernisation of its existing plant at Rohana Kalan, District Muzaffarnagar, U.P. In terms of the said contract, five BGs were furnished by Sumac to UPSSC – one for timely delivery of the plant and machinery, a PBG for an amount representing 5% of the contract price and three BGs in respect of advance payments representing 5%, 10% and 5% of the contract price respectively. All the BGs were payable on demand and expressly provided that it would not be open to the guarantor to know the reasons or to investigate or to go into the merits of the demand. It was further provided that the invocation of the BG was binding

on UPSSC.

37.2 Aggrieved by the failure of Sumac to adhere to the obligations under the contract in question, UPSSC at one stage cancelled the contract and claimed refund of the advance payment. UPSSC then proceeded to invoke the BGs in question after giving credit for the material that had been supplied till then. This led to Sumac filing a petition in the Civil Court seeking stay of encashment of the BGs.

37.3 The trial Court dismissed the applications but the High Court reversed it in revision and granted an injunction restraining UPSSC from enforcing the BGs. In allowing the appeal of UPSSC, the Supreme Court observed as under:

“12. 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.”

37.4 The Supreme Court in ***U.P. State Sugar Corporation v. Sumac International Limited*** (*supra*) further explained the two exceptions to the rule that a bank must pay according to the tenor of the guarantee as under:

“The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank NA* (1984 [1] AER 351 at 352):

“The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged”.”

37.5 The Court also referred to an earlier decision in ***Svenska Handelsbanken v. Indian Charge Chrome*** (1994) 1 SCC 502, where it was noticed that the confirmed BG/irrevocable Letter of Credit (LC) cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. It was observed that irretrievable injury had to be of the nature noticed in the case of ***Itek Corporation v. First National Bank of Boston*** 566 Fed Supp. 1210. Confirming the observations in ***U.P. Coop.***

Federation Limited v. Singh Consultants & Engineers (P) Ltd. (1988) 1 SCC 174, the Supreme Court in ***Svenska Handelsbanken v. Indian Charge Chrome (supra)*** explained that “the fraud must be that of the beneficiary, and not the fraud of anyone else.”

37.6 In ***U.P. State Sugar Corporation v. Sumac International Limited (supra)***, the Supreme Court further explained the second exception to the rule viz., irretrievable injustice. It had to be of the kind which was the subject matter of the decision in ***Itek Corporation v. First National Bank of Boston (supra)***. In that case, an exporter in USA entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on standby letters of credit issued by an American bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American government cancelled the export licences in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The US had blocked all Iranian assets under the jurisdiction of the US and had cancelled the export contract. It was in those exceptional circumstances that the Court had to interfere. It was explained, “to avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established.”

38. The above decision in ***U.P. State Sugar Corporation v. Sumac International Limited (supra)*** rendered two decades ago has stood the test of time and has been consistently followed in several subsequent decisions

of the Supreme Court as well as the High Courts.

39.1. In ***BSES Limited v. Fenner India Limited*** (*supra*), the above legal position was reiterated. There is a detailed discussion in the judgment on the aspect of the exceptions to the rule that the BG must be honoured in accordance with its terms since “the bank, which gives the guarantee, is not concerned with the relations between the supplier and the customer. Neither is the bank concerned with the question whether any of them have failed in their contractual obligations or not. In other words, the bank must pay according to the tenor of its guarantee, on demand, without proof or condition.”

39.2. The two exceptions were again explained as under:

“10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are “special equities” in favour of injunction, such as when “irretrievable injury” or “irretrievable injustice” would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in *U.P. State Sugar Corporation v. Sumac International Ltd.*, (hereinafter “*U.P. State Sugar Corporation*”) this Court, correctly declared that the law was “settled”.”

39.3. An attempt was made in that case to explain the scope of the exception by reference to the decision of the Court of Appeal in Singapore in ***Samwoh Asphalt Premix Pte. Ltd. v. Sum Cheong Piling Pte. Ltd. (2002) 1 SLR 1***. It was sought to be urged that the invocation of a PBG “for an oblique purpose was not permissible” and that “the unconscionable calling of a bank

guarantee was an exception independent of fraud.” However, in **BSES Limited v. Fenner India Limited** (*supra*), the Supreme Court categorically rejected the above submission and held as under:

“14. We are afraid that in the face of the law succinctly laid down in *U.P. Cooperative Federation* [*supra*] and reiterated in numerous judgments of this Court referred to earlier, we are unable to accept the wide proposition of law laid down in the foreign judgments cited by Mr. Sorabjee. Whatever may be the law, as to the encashment of bank guarantees in other jurisdictions, when the law in India is clear, settled and without any deviation whatsoever, there is no occasion to rely upon foreign case law.”

39.4 What is also significant as far as the decision in **BSES Limited v. Fenner India Limited** (*supra*) is concerned is the clarification that it is the beneficiary in whose favour the BG is issued who is the best judge to decide as to when and for what reason the BGs should be encashed. It was held as under:

“26. ... Further, it is no function of the Second Respondent-Bank, nor of this Court, to enquire as to whether due performance had actually happened when, under the terms of the guarantee, the Second Respondent-Bank was obliged to make payment when the guarantee was called in, irrespective of any contractual dispute between the Appellant and the First Respondent. Indeed, in similar circumstances, this Court in *General Electric Technical Services Company Inc. v. Punj Sons (P) Ltd.*, held:

“[T]he Bank must honour the bank guarantee free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice, the court should interfere. The nature of the fraud that the courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else.”

27. This was also a case where, after having recovered certain amount from the running bills, a call was made on the bank guarantee in respect of the full guaranteed amount. In an observation with direct relevance for the present case, this Court pointed out that the bank was not concerned with the outstanding amount payable under the running bills: (SCC p. 238, para 10)

"The right to recover the amount under the running bills has no relevance to the liability of the Bank under the guarantee. The liability of the Bank remained intact irrespective of the recovery of mobilisation advance or the non-payment under the running bills. The failure on the part of (the Beneficiary) to specify the remaining mobilisation advance in the letter for encashment of bank guarantee is of little consequence to the liability of the bank under the guarantee.""

39.5 The aspect of irretrievable injury was again examined in ***BSES Limited v. Fenner India Limited*** (*supra*) and it was held that on the facts of that case that there was no irretrievable injury that can be said to be caused to the Respondent which was resisting the encashment of the BGs in question.

40. In ***Himadri Chemicals Industries Limited v. Coal Tar Refining Company*** (2007) 8 SCC 110, the principles for grant of refusal to grant of injunction to restrain the enforcement of the BG or LC were summarised as under:

"14. ... (i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.”

41. The legal position was further explained In ***Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engineering Coop. Ltd. (2007) 6 SCC 470*** in the following passage:

“If the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.

What is relevant are the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee in the present case, it is found that the guarantee is an unconditional one. The respondent, therefore, cannot be allowed to

raise any dispute and prevent the appellant from encashing the bank guarantee. The mere fact that the bank guarantee refers to the principle agreement without referring to any specific Clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one.”

42. In ***Vinitec Electronics Private Limited v. HCL Infosystems Limited*** (*supra*), the Supreme Court also dealt with the issue whether the preamble to the BG would control its operative part. This was because in that case the operative portion of the BG did not refer to any of the conditions for payment under the BG. It was clarified as under:

“22. ... It is true that the bank guarantee furnished makes a reference to the principal agreement between the parties in its preamble. Mere fact that the bank guarantee refers to the principal agreement in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one unless any particular clause of the agreement has been made part of the deed of guarantee.

23. The recitals in the preamble in the deed of guarantee do not control the operative part of the deed. After careful analysis of the terms of the guarantee we find the guarantee to be an unconditional one. The appellant, therefore, cannot be allowed to raise any dispute and prevent the respondent from encashing the bank guarantee.”

43. More recently, in ***Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited*** (2016) 10 SCC 46 and ***Adani Agri Fresh Limited v. Mahaboob Sharif*** (*supra*), the entire case law was revisited and reiterated by the Supreme Court.

44. The above line of judgments have been followed by several decisions of the High Courts. However, a reference needs to be made in this regard only to ***Consortium of Deepak Cable India Limited v. Teestavalley Power***

Transmission Limited (*supra*) where it was succinctly explained as under:

“145. ... That certain amounts have been recovered under running bills and have to be adjusted for is of no concern in matters relating to invocation of bank guarantee. That there are serious disputes on questions as to who committed the breach of the contract are no circumstances justifying granting an injunction pertaining to a bank guarantee. Plea of lack of good faith and/or enforcing the guarantee with an oblique purpose or that the bank guarantee is being invoked as a bargaining chip, a deterrent or in an abusive manner are all irrelevant and hence have to be ignored. There are only two well recognized exceptions to the rule against permitting payment under a bank guarantee. The same are:

A. A fraud of egregious nature;

B. Encashment of the bank guarantee would result in irretrievable harm or injustice of an irreversible kind to one of the parties.

146. The irretrievable harm or injustice of an irreversible kind must relate to a situation akin to the one found in *Itek Corporation's* case (*supra*) or of the kind or in *Eliau's* case (*supra*).

147. There is no separate third exception of a special equity justifying grant of an injunction to restrain the beneficiary from receiving under an unconditional bank guarantee and if there exists any third exception of a special equity the same has to be of a kind akin to irretrievable injustice or putting a party in an irretrievable situation.”

45. It might appear on first blush that in some of the decisions of the High Courts as well as the Supreme Court a different line of reasoning has been adopted but, in fact, it does not appear to be so. In ***Hindustan Construction Company Limited v. State of Bihar*** (*supra*), the Court interfered with the enforcement of the BG only because of the particular wording of the BGs involved in that case which required certain conditions to be fulfilled. Even in ***Gangotri Enterprises Limited v. Union of India*** (*supra*) which has

extensively been referred to by Mr. Sibal, the underlying contract and the precise wording of the BGs weighed with the Supreme Court in holding that the Courts below were in error in declining to grant the injunction against the encashment of the BGs in question. It was held that every case has to be decided with reference to the facts. In ***Gangotri Enterprises Limited v. Union of India*** (*supra*), the facts were held to be more or less similar to the facts in ***Union of India v. Raman Iron Foundry (1974) 2 SCC 231***. In particular, in ***Gangotri Enterprises Limited v. Union of India*** (*supra*), certain circumstances were noticed which persuaded the Court to proceed to grant the injunction. These were noted in para 42 as under:

“42. On perusal of the record of the case, we find that firstly, arbitration proceedings in relation to the contract dated 22.08.2005 are still pending. Secondly, the sum claimed by the respondents from the appellant does not relate to the contract for which the Bank Guarantee had been furnished but it relates to another contract dated 22.08.2005 for which no bank guarantee had been furnished. Thirdly, the sum claimed by the respondents from the appellant is in the nature of damages, which is not yet adjudicated upon in arbitration proceedings. Fourthly, the sum claimed is neither a sum due in *praesenti* nor a sum payable. In other words, the sum claimed by the respondents is neither an admitted sum and nor a sum which stood adjudicated by any Court of law in any judicial proceedings but it is a disputed sum and lastly, the Bank Guarantee in question being in the nature of a performance guarantee furnished for execution work of contract dated 14.07.2006 (Anand Vihar works) and the work having been completed to the satisfaction of the respondents, they had no right to encash the Bank Guarantee.”

46. None of the above factors can be said to exist in the present case. The decisions of the High Courts in ***Satluj Jal Vidyut Nigam Limited v. Jai Prakash Hyundai Consortium*** (*supra*); ***P.D. Alkarma Pvt. Ltd. v. Canara Bank*** (*supra*) and ***AMKV-Tecpro v. Gail (India) Limited*** (*supra*) when

carefully examined bring out the distinguishing features as far as the facts are concerned. They also have to be reconciled with the law repeatedly stressed by the Supreme Court in several of its judgments which have been referred to hereinbefore.

Analysis and reasons

47. Turning to the facts of the present case, the Court would like to, at the outset, set out in *extenso* one of the BGs which would be sufficient since the BGs in the other cases are more or less similarly worded. The conditions attached to one of the ABGs dated 2nd June, 2014 by IDBI Bank Limited in favour of Energo read as under:

“Whereas

1. Energo Engineering Projects Ltd has entered into an Agreement vide Purchase Order No. EEPL/PO1351001 dated 10.05.2014 for supply of WT & SAC for NTPC Ltd. KORBA with M/s TRF Limited, 11 Station Road, Burmamines, Jamshedpur-831007, Jharkhand, (hereinafter called “The Supplier”) which expression unless repugnant to the context thereof shall include its successors, for purchase of machinery and equipment/execution of the work for Energo Engineering Projects Ltd, as per details given in the aforesaid agreement.
2. The Supplier has agreed to sell and supply the said machinery and equipment/execute the work to/for said Energo Engineering Projects Ltd.
3. Pursuant to Clause No.21(a) of the aforesaid agreement the Supplier has agreed to furnish to Energo Engineering Projects Ltd, security by way of a Bank Guarantee of Rs.1,12,26,700.00 (Rupees one crore twelve lacs twenty six thousand seven hundred only) being 10% of the value of the Order, against advance payment.

4. In consideration of the aforesaid and at the request of the Supplier we IDBI BANK LTD, 1st Floor, Kalyan Kutir, N. Road, Bistupur, Jamshedpur-831001 hereinafter referred to as “The Bank” has agreed to furnish such Bank Guarantee to Energo Engineering Projects Ltd. pursuant to Clause No.21(a) of the aforesaid agreement.

Now This Indenture Witnesseth As Follows:

We, the Bank hereby undertake to pay without any demur to Energo Engineering Projects Ltd. on first receipt of demand a sum not exceeding Rs.1,12,26,700.00 (Rupees one crore twelve lacs twenty six thousand seven hundred only) against non fulfilment of obligation under the aforesaid agreement.

We, the Bank further agree that Energo Engineering Projects Ltd. shall be the sole judge whether the Supplier have committed any breach or breaches of any of the terms and conditions of the said agreement and the extent of loss, damage, cost, charges and expenses suffered/incurred or would be suffered or incurred by Energo Engineering Projects Ltd. on account thereof.

Any demand so made on the Bank shall be conclusive as regards the amount due and payable by the Bank under the Guarantee. The Bank waives in favour of Energo Engineering Projects Ltd. all the rights, defense and pleas to which, we the Bank as guarantors and/or the Supplier may be entitled to. To give effect to this guarantee Energo Engineering Projects Ltd. may act as though we the Bank, were the principal debtors.

We, the Bank further agree that the Guarantee herein contained shall remain in force and continue to have full effect during the period that would be taken for the completion of delivery fulfilment of the performance guarantee tests under the provisions of the said agreement, but not beyond 31.05.2016.”

48. There are four preamble clauses preceding the operative portion. There can be no doubt on the reading of the above BG as a whole that it is

unconditional. However, it does not stop there. There is a specific clause under which the Bank has agreed that Energo would be the sole judge as to whether TRF has committed any breach of the terms and conditions of the BG and the extent of loss, damage etc. There are further clauses which make it abundantly clear that the demand made on the Bank would be conclusive as regards the amount due and payable by the Bank under the BG. There is express waiver in favour of Energo of all the rights, defence and pleas to which, both the Bank and the guarantor and/or the supplier may be entitled to. It is further stated that Energo could act as though the Bank were the principal debtor.

49. A draft of a BG is usually approved by the parties and then submitted to the Bank which is called upon to issue it in that very format. In this case, TRF was conscious of the wording of the BG in question and expressly agreed to it. If TRF was concerned about receiving payments for the supplies made by it and was unsure whether Energo would be honouring its commitment, then as a prudent business entity, TRF might have wanted to secure its interests by requiring Energo to open an LC with another Bank whereby payment would be made upon delivery of the goods without any further recourse to Energo. These are ultimately business decisions made consciously by the parties. The Court must bind the parties to their obligations in terms of the contract. It is for this reason that only two exceptions have been carved out by the Supreme Court in many of its decisions. These exceptions have been narrowly tailored. The reason is that it is not possible to place a burden on the bank concerned to determine as to which party is in breach. It is also not possible for the Court to undertake

that exercise at this stage.

50. As explained in *General Electric Technical Services Company Inc. v. Punj Sons (P) Ltd. (1991) 4 SCC 230* and reiterated in *BSES Limited v. Fenner India Limited (supra)*, "the liability of the Bank remained intact irrespective of the recovery of mobilisation advance or the non-payment under the running bills. The failure on the part of [the Beneficiary] to specify the remaining mobilisation advance in the letter for encashment of bank guarantee is of little consequence to the liability of the bank under the guarantee." Thus, the fact that the beneficiary may have already recovered much of the amounts secured by the BG are not relevant in deciding whether an injunction should be granted against invocation of such BG, particularly when it is unconditional. In other words, an unconditional BG has always been considered on a different footing by the Court. Even where a BG is wrongly invoked and encashed by a party, the remedy for the other party where the BG is unconditional is only to seek to make a claim against such allegedly unlawful invocation and encashment of the BG. It may not be a good ground to require the Court to injunct the encashment of the BG.

51. The Court also cannot compel one party to accept the proposal of other however *bona fide* it might seem. In this regard, the Court would like to note that the charts referred to by Mr. Sibal from the affidavits filed by Energo in the previous round of litigation do mention the amounts that are due to TRF. However, that cannot be read in isolation. If the entire narration in the affidavit is read as a whole, then the context in which such tables have been set out becomes clear. From the point of view of Energo, there appears to be

a dispute even in regard to the supplies made for the Korba Project. Energo does not admit that amounts are due to TRF independent of the claims that Energo has against TRF. It might ultimately involve reconciliation of the amounts due by one party to the other. That, however, does not mean that there does not exist a dispute between the parties as is sought to be made by TRF. The Court is, therefore, not in a position to accept the plea of TRF that there are 'admitted amounts' which are undisputed by Energo. These can at best be resolved in the arbitration proceedings.

52. The Court is, therefore, not satisfied that in the facts and circumstances of the case TRF has made out a case for applicability of either of the exceptions to the normal rule that an unconditional BG must be honoured on its terms and should not be interdicted by a Court. In other words, the Court is not satisfied that TRF has made out even a *prima facie* case that "there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit" or that there is fraud "of an egregious nature as to vitiate the entire underlying transaction". The Court is also not satisfied that the encashment of the BGs in question "would result in irretrievable harm or injustice of an irreversible kind" to TRF or that special equities akin thereto exist in favour of TRF warranting the encashment of the BGs being injuncted.

Conclusion

53. Consequently, the Court finds no reason to continue the interim order passed by it on 8th February, 2017 and further continued at the time of reserving the petitions on 9th February, 2017. The said interim orders staying

the encashment of the BGs in question are hereby vacated.

54. It is clarified that this order is only a *prima facie* view of the Court at this stage and is not intended to influence the decision on merits at any of the subsequent stages of the dispute between the parties.

55. The petitions are dismissed with costs of Rs. 20,000 in each of the petitions, which shall be paid by TRF to Energo within four weeks.

FEBRUARY 17, 2017
b'nesh

S. MURALIDHAR, J

