

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 03.01.2017

+ **ARB. A. (COMM.) 22/2016 and IA Nos. 9108/2016 & 14516/2016**

**M/S RATNA INFRASTRUCTURE PROJECTS
PVT LTD**

..... Appellant

Versus

**M/S MEJA URJA NIGAM PRIVATE LIMITED
(MUNPL)**

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr P.V. Kapur, Ms Kiran Suri, Senior
Advocates with Mr Purvesh Buttan, Mr Abhay N.
Das and Mr Sidhant Kapur.

For the Respondent: Mr Maninder Singh, ASG with Mr L.B. Rai, Mr
Prabhas Bajaj and Mr Kartik Rai.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. Ratna Infrastructure Projects Pvt. Ltd. (hereafter 'RIPPL') has filed the present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an order dated 08.04.2016 (hereafter 'the impugned order') passed by the Arbitrator under Section 17 of the Act. By the impugned order, the Arbitrator modified the order passed by this Court on 21.04.2015 in OMP 95/2014 and OMP 292/2014, and exempted Meja Urja Nigam Private Limited (hereafter 'MUNPL') from keeping the amount recovered from encashment of the bank

guarantees amounting to ₹13,03,57,106/-, in a separate fixed deposit in MUNPL's name with the Punjab National Bank (hereafter 'PNB').

2. RIPPL has challenged the impugned order mainly on the grounds that: (i) the application under Section 17 of the Act was not maintainable as the bank guarantees in question were not a subject matter of the dispute before the Arbitrator; (ii) the Arbitrator acted beyond his jurisdiction by modifying the order dated 21.04.2015 passed by this Court in OMP nos. 95/2014 and 292/2014; (iii) the Arbitrator before modifying the order dated 21.04.2015 passed in OMP nos. 95/2014 and 292/2014 should have satisfied himself that the said order has been duly complied with; (iv) the finding that the bank guarantees in question were unconditional and irrevocable is erroneous; and (v) the conclusion that MUNPL had suffered a loss to the tune of ₹120 crores and will further suffer loss of ₹8 crores per day due to delay in the project on RIPPL's part was untenable. It was further urged that the Arbitrator had failed to consider that the invocation of bank guarantees in question was fraudulent.

3. Before addressing the controversy, it is relevant to briefly narrate the background in which MUNPL's application under Section 17 of the Act came to be considered by the Arbitrator.

3.1 On 04.09.2009, MUNPL issued an item rate tender in respect of Site Levelling and Infrastructure Works Package for Meja Thermal Power Project of 2 x 660 MW (hereafter 'the project'). RIPPL participated in the said tender. Its bid was accepted and MUNPL issued a Letter of Award (LOA) dated 18.05.2010. Thereafter, the parties entered into an agreement dated 21.09.2010 (hereafter 'the Agreement'). The Agreement included an arbitration clause. The project was to be completed within thirty-six

months of the issuance of the LOA. However, the project completion date was later extended to 30.06.2014.

3.2 RIPPL had submitted three bank guarantees - all issued by PNB - to MUNPL amounting to ₹13,03,57,106/- (hereafter 'the BGs'); the details of which are as follows :-

Purpose	Bank Guarantee no.	Date of Issue	BG Amount	Invoked Amount	Validity of BG
Mobilization Advance	44371LG011210	01.10.2010	Rs.2, 74,43,507	Rs.2,74,43,507	18.08.2014
Performance Security Guarantee	44371LG009510	28.07.2010	Rs.6,86,08,767	Rs.6,86,08,767	18.08.2014
Performance Security Guarantee	44371LG000811	20.01.2011	Rs.3,43,04,832	Rs.3,43,04,832	18.08.2014

3.3 During the course of execution of the project, RIPPL submitted certain revised bills seeking payment for controlled blasts work, which were rejected by MUNPL. This led RIPPL to invoke the arbitration clause by a letter dated 01.03.2013. Accordingly, the Arbitrator was appointed to adjudicate the disputes between the parties.

3.4 Thereafter, on 03.08.2013, MUNPL sent a letter to RIPPL wherein it was stated that the project had come to a standstill since four months and RIPPL was advised to complete the remaining work to avoid invocation of Clause 41 of the General Conditions of Contract (GCC). A similar letter was sent by MUNPL again on 27.08.2013. On 06.08.2013, RIPPL replied to the letter dated 03.08.2013 wherein it stated that in the absence of timely decisions taken by MUNPL, RIPPL could not proceed further with the project.

3.5 RIPPL states that this was followed by a meeting between the parties on 18.09.2013, wherein it was decided that RIPPL will commence the Site Levelling Work and after the commencement of such work, a meeting would be held to resolve the issues that had arisen between the parties. It is alleged that contrary to the aforesaid understanding, by a letter dated 27.09.2013, MUNPL called upon RIPPL to explain within seven days as to why the project had been abandoned, failing which appropriate action would be taken under the Agreement.

3.6 Subsequent to the letter dated 27.09.2013, MUNPL terminated the Agreement by a letter dated 17.01.2014 and thereafter, went onto invoke the BGs. This led RIPPL to approach this Court under Section 9 of the Act (OMP 95/2014), *inter alia*, praying for an order restraining the invocation of the BGs.

3.7 By an *ex parte ad interim* order dated 22.01.2014, this Court stayed invocation of the BGs as well as restrained PNB from making any payment against the same. RIPPL was also directed to deposit an amount of ₹19,00,000/- (which was approximately the amount not recovered by MUNPL against mobilisation advance of ₹2,74,43,507/-) with MUNPL within one week from that order. The relevant extracts of the said order are set out below:-

“The bank guarantee dated 01.10.2010 in a sum of Rs.2,74,43,507/- pertains to mobilization advance given by the respondent to the petitioner. Learned senior counsel for the petitioner has drawn my attention to the terms and conditions of the contract that stipulate that mobilization advance shall be provided to the petitioner. The mobilization advance is to be adjusted from the running account bills

raised by the petitioner from time to time in accordance with the work done.

The case of the petitioner is that up to 30th RA Bill out of Rs.2,74,43,507/-, a sum of Rs.2,55,57,001/- has already been recovered by the respondent. The balance, thus, left was Rs.18,86,506/-. Learned senior counsel for the petitioner contends that in a meeting that was jointly held between the representatives of the petitioner and the respondent on 18.09.2013, this issue was raised and accordingly it was decided that either the said amount would be recovered from 31st RA Bill or the petitioner shall pay the same. Learned senior counsel for the petitioner, on instructions, states that this amount has till date neither been recovered nor been paid. However, 31st RA bill has been raised indicating that the petitioner has a claim approximately of Rs.35,00,000/-. Learned senior counsel further contends that as the substantial amount of mobilization advance has already been recovered, the invocation of the bank guarantee for the entire amount is fraudulent.

Learned senior counsel for the petitioner, on instructions, submits that without prejudice to the rights and contentions on the merits of the matter, the petitioner is ready to deposit with the corporation a sum of Rs.19,00,000/- as the balance payable, as recorded in the minutes of the meeting dated 18.09.2013.

As regards the other two performance security guarantees, learned senior counsel for the petitioner has drawn my attention to a condition of the bank guarantee that stipulates that the bank has undertaken to pay the said amount against any loss or damage, costs, charges and expenses caused to or suffered by or that may be caused to or suffered by corporation by reason of any breach or breaches to said contractor (petitioner).

Learned senior counsel for the petitioner contends that the extension for completion of work was granted up to 30.06.2014 and the modalities for carrying out the work was recorded in the meeting of 18.09.2013. Learned senior

counsel for the petitioner contends that despite recording the modalities for completion of work, the respondent had unilaterally sought to terminate the contract and have issued a termination letter dated 17.01.2014. The case of the petitioner is that the petitioner is not at fault and delay occurred on account of the respondent. Further, the petitioner has contended that no amount has ever been quantified as to the loss suffered or likely to be suffered by the respondent.

Learned senior counsel for the petitioner contends that the bank guarantee could have been invoked only in case a loss is suffered or is likely to be suffered by the corporation. Learned senior counsel for the petitioner fairly contends that the decision of the respondent corporation as to the loss suffered or likely to be suffered is final. However, prior to the invocation of the bank guarantee, the respondent has to at least ascertain whether there is any loss and if so, the amount of the loss and it is only an ascertainment of the loss or likelihood of a loss occurring that the bank guarantee may be invoked. Learned senior counsel for the petitioner further contends that in the absence of any ascertainment of loss and the quantum thereof, the invocation would be fraudulent, more so, in view of the understanding arrived at between the parties and so recorded in the meeting dated 18.09.2013.

The petitioner has requested the respondent to permit them to carry out the execution of the work and protested the termination. Learned senior counsel further contends that it was when the petitioner demanded their balance payment, the respondent terminated the contract and invoked this bank guarantee and that the invocation is fraudulent.

I am satisfied that the petitioner has made out a prima facie strong case for grant of an ex-parte ad interim injunction for stay of the invocation of the bank guarantee. The balance of convenience is in favour of the petitioner and, in case, the ad interim injunction is not granted, the petitioner shall suffer an irreparable loss and injury.

The invocation of the bank guarantee is stayed till the next date of hearing. The respondent bank is restrained from remitting the amount till the next date of hearing.

The petitioner shall deposit with the respondent corporation an amount of Rs.19,00,000/- within one week.

The petitioner shall keep the bank guarantees alive."

3.8 Apparently, before the aforesaid order could be communicated to PNB, it paid the amounts secured by the BGs to MUNPL on 23.01.2014. This development led RIPPL to move this Court by filing another petition (being OMP 292/2014) under Section 9 of the Act. By a common order dated 21.04.2015 passed in OMP nos. 95/2014 and 292/2014, this Court directed MUNPL to keep the amounts obtained from the encashment of the BGs in a separate fixed deposit with PNB till the final adjudication of the arbitral proceedings subject to RIPPL depositing ₹19,00,000/- with MUNPL within one week from that order. The said order was expressly made subject to any variation/modification that may be made by the Arbitrator on an application filed by either party. The relevant extracts of the said order is set out below :-

"4. The Court is not at this stage called upon to express any final opinion either of the contentions particularly since the arbitration proceedings are in progress. However, in the facts and circumstances under which despite the aforesaid order dated 22nd January 2014 passed in OMP No. 95 of 2014, the amount covered by the BGs was released by the Bank to Respondent No. 1, the Court considers it appropriate to direct that during the pendency of the arbitration proceedings, and subject to the Petitioner depositing with Respondent No. 1 Rs. 19 lakhs within one week from today, Respondent No. 1 should keep the amount released to it by Respondent No. 2/Bank pursuant to the encashment of the BGs in a separate fixed ("FD") in its own name with Respondent No. 2/Bank initially

for a period of six months and keep it renewed during the pendency of the arbitration proceedings. A copy of the FD Receipt will be furnished to the Petitioner within one week from today.

5. This order is subject to variation/modification by the learned Arbitrator in an application that may be filed by the either party in accordance with law.”

3.9 MUNPL filed an appeal (being FAO(OS) 268/2015), against the order dated 21.04.2015 passed in OMP nos. 95/2014 and 292/2014. The said appeal was dismissed on 18.05.2015 as the court observed that the order appealed against was subject to any variations/modifications that may be made by the Arbitrator and the parties were at liberty to approach the Arbitrator.

3.10 Subsequently, MUNPL moved an application under Section 17 of the Act before the Arbitrator for modification of the order dated 21.04.2015.

3.11 In the meantime, being aggrieved by the fact that MUNPL had not complied with the order dated 21.04.2015 by not depositing the amounts recovered by it in a fixed deposit, RIPPL filed a contempt petition against MUNPL. On the other hand, MUNPL filed an application (CM 30882/2015 in FAO(OS) 268/2015) for clarification of the order dated 21.04.2015.

3.12 In the aforesaid application – CM 30882/2015 filed in FAO(OS) 268/2015 - a Division Bench of this Court passed an order on 16.12.2015 and by the same, the operation of the order dated 21.04.2015 passed by the Single Judge in OMP 95/2014 and OMP 292/2014 to the extent that it required MUNPL to place the amount of the encashed BGs in a separate

fixed deposit was stayed and the order dated 18.05.2015 - dismissing the appeal being FAO (OS) 268/2015 - was recalled. In view of the aforesaid order dated 16.12.2015, the contempt petition filed by RIPPL was dismissed on 21.12.2015.

3.13 However, subsequently on 11.02.2016, this Court passed an order dismissing the application (CM 30882/2015 in FAO (OS) 268/2015) filed by MUNPL, thereby, resulting in once again reviving the order dismissing FAO (OS) 268/2015. The relevant extract of the said order reads as under:-

“3. Labelled as an application for clarification/ modification the prayer made is to either modify or make variation in the order dated April 21, 2015 that the appellant could file the application before the Arbitral Tribunal without complying with the direction contained in paragraph 4 of the order passed by the learned Single Judge.

4. Now, a clarification or a modification is sought of an order if there is an ambiguity in the order or its operation causes an inconvenience to a party or a subsequent event has taken place warranting an interim measure to be modified.

5. Masquerading as an application for modification/ clarification the appellant virtually wants the appeal to be allowed because the prayer made if allowed would result in the impugned order passed by the learned Single Judge being set aside.

6. The application is dismissed.”

4. In the application filed under Section 17 of the Act, MUNPL claimed that RIPPL was a defaulter and had caused huge losses to it. MUNPL claimed that 63% of the billed amount had been released to RIPPL and therefore, it would not be appropriate to release any further amount to RIPPL or even directing MUNPL to block MUNPL's funds in fixed deposit

in compliance of the order dated 21.04.2015. MUNPL also submitted that it would suffer severe liquidity problems if it blocked the amount received from encashment of BGs in a fixed deposit.

5. RIPPL contested the above application by contending that the Arbitrator had no jurisdiction to modify the order passed by this Court; this Court being a higher judicial body. It was RIPPL's asseveration that the BGs were not the subject matter of disputes referred to the Arbitrator and therefore, relief under Section 17 of the Act could not be granted. RIPPL further claimed that the observation of this Court as to any party being allowed to move an application "*in accordance with the law*", did not vest any jurisdiction with the Arbitrator to modify/vary the orders of this Court, in absence of the disputes with respect to BGs being referred to the Arbitrator. RIPPL also claimed that it had deposited ₹19,00,000/- with MUNPL as ordered by this Court however, MUNPL did not deposit the amounts covered by the BGs as ordered.

6. The Arbitrator observed in the impugned order that since RIPPL did not act as per the order dated 21.04.2015 within time as specified therein, therefore, MUNPL was not needed to take any further action towards compliance of the said order. On the issue of jurisdiction, the Arbitrator held that he was vested with the requisite jurisdiction to adjudicate the application for modification of the order dated 21.04.2015 passed in OMP nos. 95/2014 and 292/2014 by virtue of the express language of the said order which was also confirmed by the order dated 18.05.2015 passed by the Division Bench of this Court in FAO (OS) 268/2015 wherein it was observed that it is open to the parties to seek modification/variation of the order dated 21.04.2015 before the Arbitrator.

7. The Arbitrator referred to the language of the said BGs and concluded that the BGs were unconditional and irrevocable. He further held that encashment of the BGs fell within the legitimate rights of MUNPL.

8. The Arbitrator further observed that keeping the encashed BG amounts in the form of a fixed deposit would serve no purpose and, therefore, exempted MUNPL from keeping the amounts received by it - pursuant to the encashment of the BGs - in a separate fixed deposit in MUNPL's name with PNB during the pendency of the arbitration proceedings.

Submissions

9. Mr P. V. Kapur, learned Senior counsel appearing for RIPPL earnestly contended that the Arbitrator had grossly erred in concluding that the BGs were unconditional. He submitted that the said issue was examined by this Court and by an order dated 22.01.2014 (in OMP No.95/2014), this Court had noted that PNB had undertaken to pay the amounts as stated in the BGs against any loss or damage, costs, charges and expenses caused to or so suffered by MUNPL. He submitted that in this view, the BGs could not be considered as unconditional. He further submitted that the Arbitrator had not considered that the bank guarantee for a sum of ₹2,74,43,507/- was issued against mobilization advance and that the entire mobilization advance (except to the extent of ₹18,86,506/-) had been recovered.

10. Mr Kapur further contended that the finding of the Arbitrator that RIPPL had not complied with the orders passed by this Court by not depositing a sum of ₹19,00,000/- was erroneous. He submitted that

immediately after the order dated 22.01.2014 was passed, RIPPL sent a letter dated 24.01.2014 requesting the details of the payee in whose name the demand draft was required to be made. An email to the said effect was also sent but RIPPL received no response to the same. Therefore, RIPPL obtained a demand draft in the name of CEO, MUNPL, Allahabad. Thereafter, the matter (OMP Nos. 95/2014 and 292/2014) was finally heard on 21.04.2015 and the Court passed an order for payment of the sum of ₹19,00,000/-. He submitted that RIPPL obtained another draft on 27.04.2015 and sent a scanned copy of the same by mail with a request to indicate the person to whom the demand draft could be handed over. Subsequently, on 28.04.2015, RIPPL handed over the same at the Delhi office of MUNPL but MUNPL refused to accept the same. He submitted that the demand draft was returned back by MUNPL under the cover of its letter dated 09.05.2015 which was received by RIPPL on 17.05.2015. Immediately, thereafter, RIPPL obtained another draft dated 20.05.2015 in favour of MUNPL and sent the same under the cover of its letter dated 23.05.2015. Thus, RIPPL had complied with the direction to deposit ₹19,00,000/-.

11. Mr Kapur further contended that despite orders passed by this Court, MUNPL had failed to deposit the amount recovered by encashment of BGs in a fixed deposit and thus disobeyed the orders of this Court.

12. Mr Maninder Singh, the learned senior counsel appearing for MUNPL submitted that MUNPL had filed an application under Section 17 of the Act for the limited relief that it may be exempted from keeping the amounts received by encashment of the BGs in a fixed deposit. He submitted that MUNPL was a Government undertaking and required the

money for execution of the project. He submitted that there could be no apprehension that MUNPL would be unable to repay the amount in the event, the Arbitrator made an Award in favour of RIPPL. He submitted that in the circumstances there was no reason for the money to be kept in a fixed deposit as the same would not serve the interest of either party. He referred to paragraph 10 of the impugned order which indicated that the Arbitrator had considered the same and had accepted the aforesaid contention that no purpose would be served in keeping the funds blocked in a fixed deposit.

Reasoning and Conclusion

13. As indicated above, the essential grievance of RIPPL relates to the encashment of the BGs. Two of the aforesaid BGs were performance bank guarantees (BG No.44371LG009510 for a sum of ₹6,86,08,767/- and BG No. 44371LG000811 for a sum of ₹3,43,04,832/-) and the third (BG No. 44371LG011210 for a sum of ₹2,74,43,507/-) was for securing MUNPL for the amount advanced to RIPPL. The said BGs were invoked by MUNPL on 21.01.2014 and the amounts were duly remitted on 23.01.2014. In the meanwhile, on 22.01.2014, this Court had restrained the encashment of the BGs but despite the order passed by this Court on 22.01.2014, the BGs were encashed. It is in these circumstances that this Court by an order dated 21.04.2015 directed that the amounts received by MUNPL be kept in a fixed deposit. This Court also indicated that the said order would be subject to any variation or modification that may be made by the Arbitrator in any application that may be filed by either party.

14. RIPPL was therefore, at liberty to file an application for further modification of the order dated 21.04.2015 and to agitate its grievance regarding invocation of the BGs. However, RIPPL did not file any application under Section 17 of the Act and rested content with the order dated 21.04.2015.

15. Thus, although, Mr Kapur earnestly contended that the invocations of the BGs were fraudulent, no relief in this regard was sought by RIPPL before the Arbitrator.

16. In view of the above, the only limited question before the Arbitrator was whether the direction to MUNPL to keep the amounts received pursuant to invocation of BGs, in a fixed deposit in its own name was required to be modified. RIPPL had opposed the grant of the said relief on several grounds. However, it appears that the principal defence urged by RIPPL was: (i) that the Arbitrator did not have the jurisdiction to modify the order dated 21.04.2015 passed by this Court; (ii) that the application was not maintainable in the arbitration proceedings in question (ARB. P. 1/2013) since the same pertained to the alleged claims made by MUNPL, which were subject matter of another arbitration proceedings (that is, ARB.P 1/2014); and (iii) that the invocation of the BGs was fraudulent.

17. MUNPL had countered the aforesaid submissions and also submitted that it was not required to deposit the amounts recovered by encashment of the BGs since RIPPL had not deposited a sum of ₹19,00,000/- as directed by the order dated 21.04.2015.

18. The Arbitrator considered the rival contentions and rejected the contention that he did not have the jurisdiction to modify the order dated

21.04.2015. This Court finds no infirmity with the aforesaid view since it was clearly recorded in the order dated 21.04.2015 (in OMP Nos. 95/2014 & 292/2014) that “*this order is subject to variation/modification by the learned Arbitrator in an application that may be filed by either party in accordance with law*”. Thus, the contention that the Arbitrator had overreached the orders of this Court is plainly unmerited. The contention that there were no new facts, which would warrant a modification of the order dated 21.04.2015 and, therefore, the Arbitrator had grossly erred in passing the impugned order is also unpersuasive. This Court, in its order of 21.04.2015, had merely noted the *ex parte* order passed on 22.01.2014 and further noted that the amounts covered under the BGs had been released despite the *ex parte* order and it is in those circumstances that the Court directed that the amount be kept in a fixed deposit. This Court did not express any view – either final or *prima facie* – on the question whether the encashment of the BGs was fraudulent as alleged. The order of 21.04.2015 was in the nature of an ad interim order. Thus, it was open for both the parties to file an application under Section 17 of the Act for seeking any interim relief in relation to the encashment of the BGs and for modification of the order dated 21.04.2015. Clearly, the Arbitrator had the jurisdiction to examine the merits of any such claim and pass appropriate orders.

19. The Arbitrator also considered the direction given to MUNPL to deposit the amounts recovered in a fixed deposit subject to RIPPL depositing a sum of ₹19,00,000/- with MUNPL and concluded that RIPPL failed to comply with the said condition. In my view, the said conclusion is unwarranted as it is not disputed that RIPPL had handed over a demand draft – albeit in the name of CEO, MUNPL – for a sum of ₹19,00,000/- to MUNPL on 28.04.2015. The said demand draft was returned by MUNPL

under cover of its letter dated 09.05.2015, which was received on 17.05.2015. RIPPL had immediately taken steps to replace the said draft and had prepared a new demand draft on 20.05.2015, a copy of which has been placed on record. The said draft was sent to MUNPL under cover of a letter dated 23.05.2015. In these circumstances, the conclusion that MUNPL was not required to deposit the money in a fixed deposit is erroneous. It is also not disputed that after the appeal filed by MUNPL against the order dated 21.04.2015 was dismissed by an order dated 11.02.2016, RIPPL had again sent a letter expressing its willingness to deposit the said amount.

20. Insofar as the allegation that the invocation of BGs was wrongful and fraudulent is concerned, the Arbitrator had examined the language of the BGs and had come to the conclusion that the BGs were unconditional and irrevocable. The Arbitrator further noted that MUNPL had issued a Show Cause Notice dated 27.09.2013 alleging that it had suffered a loss to the tune of ₹120 crores. Subsequently, MUNPL also initiated arbitration proceedings, *inter alia*, for recovery of the alleged loss suffered by it. In view of the aforesaid, the Arbitrator did not find any infirmity with MUNPL invoking the BGs.

21. The law relating to interdicting bank guarantees is well settled and a court will not interfere with invocation of the bank guarantees unless the party claiming such relief is able to, *prima facie*, establish a case of fraud of an egregious nature (see: **U.P. Cooperative Federation Ltd v. Singh Consultants and Engineers (P) Ltd.**: (1988) 1 SCC 174). It is also well settled that a party alleging fraud must provide the full particulars to establish such allegations. A plain reading of the reply filed by RIPPL

indicates that RIPPL had pleaded that MUNPL had granted extension of time to complete the project till 30.06.2014 and the modalities to carry out the work were finalised on 18.09.2013; however, MUNPL had encashed the BGs contrary to the understanding arrived at by the parties. RIPPL had further pleaded that when the BGs were invoked, MUNPL had not asserted that any loss was caused to it. RIPPL contended that in the aforementioned circumstances, the invocation of BGs was fraudulent and wrongful.

22. A plain reading of the order passed by this court on 22.01.2014 indicates that this Court was persuaded to pass an ex parte ad interim relief injunction on the submission that MUNPL had not asserted whether it had incurred any loss or whether there was any likelihood of loss, which was the pre-requisite condition for invocation of the performance bank guarantees. However, it is apparent that the Arbitrator did not accept that the invocation of the performance bank guarantees was fraudulent as the Arbitrator noted that MUNPL had already issued a Show Cause Notice on 27.09.2013 alleging that loss to the tune of ₹120 crores had been caused to MUNPL due to non completion of works by RIPPL. Further, MUNPL had also alleged that it will incur a loss of ₹8 crores per day due to delay in completion of the works. This Court finds no infirmity with the aforesaid view. The performance bank guarantees were furnished for indemnifying MUNPL *against any loss or damage, costs, charges and expenses caused or suffered by or that may be caused to or suffered by the Corporation by reason of any breach or breaches by the said contractor of any of the terms and conditions contained in the said contract.* The BGs also expressly provided that MUNPL would be the sole Judge to determine whether the contractor had committed any breach or breaches of any terms and conditions of the Agreement. At the interim stage, the Arbitrator was not

called upon to examine the correctness of the allegations made by MUNPL; he was only required merely to examine whether the invocation of BGs was fraudulent. Clearly, RIPPL had failed to establish a case of fraud, let alone a case of egregious fraud.

23. Insofar as the third BG (BG No. 44371LG011210) is concerned, the same was furnished to secure MUNPL against amount advanced by MUNPL to RIPPL. The relevant extract of the said bank guarantee is quoted below:-

“We **PUNJAB NATIONAL BANK** hereby unconditionally and irrevocably undertake to pay to the Owner on demand and without demur to the extent of the said sum of Rs.2,74,43,507/- (Rupees Two Crores Seventy Four Lakhs Fourty Three Thousand Five Hundred and Seven Only), any claim made by the Owner on us for the loss or damage caused to or suffered by the Owner by reason of the Owner not being able to recover in full the said sum of Rs.2,74,43,507/- (Rupees Two Crores Seventy Four Lakhs Fourty Three Thousand Five Hundred and Seven Only) with interest as aforesaid.

We, **PUNJAB NATIONAL BANK**, further agree that the Owner shall be the sole judge of and as to whether the said Contractor has not utilized the said advance or any part thereof for the purpose of the Contract and the extent of loss or damage caused to or suffered by the Owner on account of the said advance together with interest not being recovered in full and the decision of the Owner that the said Contractor has not utilized the said advance or any part thereof for the purpose of the Contract and as to the amount or amounts of loss or damage caused to or suffered by the Owner shall be final and binding on us.”

24. During the course of the proceedings, MUNPL was specifically asked to disclose as to the details of the amount recovered against the mobilization advance. In compliance of the said direction, MUNPL filed a

letter indicating that MUNPL had already recovered a sum of ₹2,48,57,000/- along with interest from running bills and only a sum of ₹25,86,506/- remained to be recovered. Thus, whereas according to RIPPL MUNPL had recovered a sum of ₹2,55,57,001/- and only a sum of ₹18,86,506/- remained to be recovered (as recorded in the order dated 22.01.2014); according to MUNPL, it had recovered a sum of ₹2,48,57,000/- and a sum of ₹25,86,506/- remained to be recovered. Thus, it is difficult to understand as to how MUNPL could invoke the mobilization bank guarantee for the entire sum of ₹2,74,43,507/- after having admittedly recovered ₹2,48,57,000/- along with interest. In terms of the said BG, MUNPL could only make a claim against the mobilization bank guarantee for loss or damage caused to or suffered for the reason of MUNPL not being able to recover the full amount of ₹2,74,43,407/- along with interest. Mr Maninder Singh referred to paragraph 2 of the mobilization bank guarantee and contended that MUNPL could also recover any claim for loss or damage on account of non utilization of the said advance and thus notwithstanding that MUNPL had recovered the advance, it could still invoke the said BG. In my view, this is not merited; paragraph 2 of the BG has to be read in conjunction to paragraph 1 of the BG. There is no allegation that RIPPL had not utilized the mobilization advance and therefore MUNPL has been unable to recover the same. The Arbitrator has ignored this aspect.

25. The Arbitrator has exempted MUNPL from the condition of depositing the amounts recovered against the BGs in a fixed deposit, principally, for the reason that he was of the view that blocking of the amounts in a fixed deposit would serve no purpose. RIPPL had been

unable to show as to how it is prejudiced if the amount which was directed to be deposited in fixed deposit is utilized by MUNPL for the purposes of the project. Although, Mr Kapur contended that since the sums recovered by MUNPL were directed to be kept in a fixed deposit, albeit in the name of MUNPL, RIPPL would be able to persuade PNB not to initiate any coercive action against RIPPL; but, if MUNPL was permitted to utilise the same, PNB would initiate coercive measures and RIPPL would be unable to resist the same. However, neither any pleading to the aforesaid effect has been made nor any material on record substantiates the aforesaid contention. Consequently, the said contention cannot be accepted. The Arbitrator's conclusion to exempt MUNPL from depositing the amounts in a fixed deposit cannot be faulted.

26. Although, RIPPL had not filed any application under Section 17 of the Act for modification of this Court's order dated 21.04.2015, it is clear that RIPPL is essentially aggrieved by encashment of the BGs as stated above. Insofar as the encashment of the performance bank guarantees are concerned, the same cannot be interdicted as discussed above. However, as far as the BG against mobilization advance is concerned, it is difficult to accept that MUNPL could invoke the same for the entire amount specified therein. MUNPL could only invoke the same to the extent of unrecovered advance.

27. The question whether the invocation of BGs was wrongful or fraudulent, *stricto sensu*, does not arise for consideration in these proceedings; the only question being, whether MUNPL should be exempt from keeping the money recovered by MUNPL from PNB by encashment of BGs in a fixed deposit. However, both the senior counsels had advanced extensive arguments on the controversy and therefore the same has been

considered. In the circumstances, rather than granting leave to RIPPL to file further proceedings in this regard, this Court considers it appropriate to direct that the amount recovered by invocation of the mobilisation bank guarantee in excess of the unrecovered advance (as claimed by MUNPL - ₹25,86,506/-) be deposited by MUNPL with PNB in the name of RIPPL. Thus, MUNPL shall deposit a sum of ₹2,48,57,000/- with PNB; the said amount shall be kept in an interest bearing fixed deposit till the conclusion of the arbitral proceedings and shall be subject to the final award.

28. The present appeal is disposed of with the aforesaid observations. All pending applications also stand disposed of.

29. No order as to costs.

JANUARY 03, 2017
MK

VIBHU BAKHRU, J