

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ OMP(I)(COMM) 148/2017

Reserved on: 14th December, 2017
Date of decision: 22nd December, 2017

PASITHEA INFRASTRUCTURE LIMITED Petitioner

Through: Mr.Rajat Navet, Adv.

versus

SOLAR ENERGY CORPORATION OF INDIA & ANR.

..... Respondents

Through: Mr.Bharat Sangal, Ms.Anindita
Deka, Ms.Isha Gupta &
Ms.S.Sapandana Reddy, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as the "Act") has been filed by the petitioner *inter alia* seeking the following reliefs:

"(a) pass an order of injunction in favour of the Petitioner and against the Respondent No.1 restraining the Respondent No.1 from invoking and/or encashing and/or receiving money in any manner and to any extent whatsoever under the Bank Guarantees being Bank Guarantee Nos. OGT0005160001863 & OGT0005160001871, both dated 29.01.2016 for a total sum of Rs. 1,20,00,000/- (Rupee One crores Twenty lakhs only) till final adjudication of the arbitration proceedings;

(b) pass an order of injunction in favour of the Petitioner and against the Respondent No.2 restraining the Respondent No.2 from encashing and/or making payment to Respondent No.1 under the Bank Guarantees bearing Bank Guarantee Nos.

OGT0005160001863 & OGT0005160001871, both dated 29.01.2016 for a total sum of Rs.1,20,00,000/- (Rupees One crores Twenty lakhs only) till final adjudication of the arbitration proceedings;”

2. The Respondent No. 1, on 9th September, 2015, invited bids from eligible bidders to participate in the Request For Selection (RFS) for design, engineering, manufacture, supply, erection, testing and commissioning including warranty, operation and maintenance for a period of twenty five years of roof top, solar PV Power system in different States in India for a total grid of 50 MWs roof top grid connected scheme of CPWD-Phase V.

3. The bidder in terms of Clause 3.15 of the RFS was to furnish the Performance Security/Performance Bank Guarantee (PBG). Clause 3.15 is reproduced herein below:

“3.15 PERFORMANCE SECURITY/PERFORMANCE BANK GUARANTEE (PBG)

3.15.1 Within 30 days from the date of issue of Allocation letter, Successful Bidder shall furnish the Performance Security calculated in the same manner as Bid Bond amount for the allocated capacity only. *PBG shall be submitted for different states of India (i.e. PART-II).*

The formula applicable to calculate the PBG amount will be:

PBG amount for W.B = (Rs. 30.00 Lakh) X Allocated Capacity in MWp in a State.

3.15.2 The Performance Security shall be denominated in Indian Rupees and shall be in one of the following forms:

- a. a demand draft, or a bank guarantee from the List of banks as given in Annexure-B
- b. be confirmed for payment by the branch of the bank giving the bank guarantee at New Delhi

3.15.3 The PBG shall be forfeited as follows without prejudice to the Bidder being liable for any further consequential loss or damage incurred to SECI.

a. If the Successful Bidder is not able to identify the projects and submit Project Sanction Documents to the satisfaction of SECI, PBG amount, pro-rata to the capacity for which the Successful Bidder is not able to identify the Projects and submit Project Sanction Documents.

b. If the Successful Bidder is not able to commission the projects to the satisfaction of SECI, PBG amount, pro-rata to the capacity not commissioned by the Successful Bidder. However, Hundred percent (100%) PBG amount furnished for the Sanctioned Capacity, if the Successful Bidder fails to Commission the Projects(s) to the satisfaction of SECI, for the already identified locations, which are notified by SECI in the RFS or otherwise and for which allocation letter/sanction letter has been issued.

c. In all the above cases corresponding unidentified/non-commissioned capacity shall stand cancelled.

3.15.4 The Performance Security shall be valid for a minimum period of 18 months from the date of issue of Allocation letter(s) and shall be released after 5 years from the date of commissioning with the compliance of entire obligations in the contract.”

4. Clause 3.20.1 defines the scope of work as under:-

“3.20.1 The scope of work for the bidder include Identification of buildings/leasing rooftop of buildings for 25 years, Obtaining No Objection Certificate (NOC)” from Distribution Company (DISCOM) for grid connectivity, complete design, engineering, manufacture, supply, storage, civil work, erection, testing & commissioning of the grid connected rooftop solar PV project including operation and maintenance (O&M) of the project for a period of 25 years after commissioning.”

The reading of the above Clause would clearly show that it was the obligation of the bidder to identify the buildings/leasing roof tops of building for the project.

5. Clause 3.33 provides for the force majeure and the same is reproduced herein below:

“3.33 FORCE MAJEURE

3.33.1. Notwithstanding the provisions of clauses contained in this RFS document; the contractor shall not be liable to forfeit (a) PBG for delay and (b) termination of contract; if he is unable to fulfill his obligation under this contract due to force majeure conditions.

3.33.2. For purpose of this clause, “Force Majeure” means an event beyond the control of the contractor and not involving the contractor's fault or negligence and not foreseeable, either in its sovereign or contractual capacity. Such events may include but are not restricted to Acts of God, wars or revolutions, fires, floods, epidemics, quarantine restrictions and fright embargoes etc. Whether a "Force majeure" situation exists or not, shall be decided by SECI and its decision shall be final and binding on the contractor and all other concerned.

3.33.3 In the event that the contractor is not able to perform his obligations under this contract on account of force majeure, he will be relieved of his obligations during the force majeure period. In the event that such force majeure extends beyond six months, SECI has the right to terminate the contract in which case, the PBG shall be refunded to him.

3.33.4 If a force majeure situation arises, the contractor shall notify SECI in writing promptly, not later than 14 days from the date such situation arises. The contractor shall notify SECI not later than 3 days of cessation of force

majeure conditions. After examining the cases, SECI shall decide and grant suitable additional time for the completion of the work, if required.”

6. Clause 6.7 of the RFS provides for project allocation and sanction and is reproduced herein below:

“6.7. PROJECT ALLOCATION AND SANCTION

6.7.1. The identification of the projects (roof tops) at time of bidding is not mandatory. The Bidders, however, in their own interest are advised to make a preliminary survey of availability of roof tops for CPWD for which they intend to Bid and as prescribed in the RFS, as well as issue of Grid connectivity, as non-availability of roof tops and non-completion of other formalities after allocation of project will result in forfeiture of Bid Bond/PBG amount submitted by them.

6.7.2. The Successful Bidders selected as described in Clause 6.3 above shall be issued Letter of Allocation (LOA) indicating the allocated capacity & Project Cost etc.

6.7.3. The bidders who have been notified as Successful Bidders, shall be given 6 months from the date of issue of Letter of Allocation for identification of roof top. Preference should be given to SECI identified CPWD roofs first. In the event of offer given by SECI to the Bidder to execute the project in the SECI identified roof, the time for submission of project sanction documents by the bidder to SECI will be 3 months from the date of issue of allocation letter which can be extended depending upon the merit of the case. Failure of non-compliance of same shall lead to forfeiture of PBG for that State in proportion to the capacity allocated in the SECI identified location.

6.7.3.1. If after 6 months, the successful bidder could not identify rooftop(s) capacity up to the allocated capacity and submit Project sanction documents, in such case PBG for unidentified allocated capacity shall be forfeited and the allocated capacity gets

cancelled and bidder including its affiliates/GROUP COMPANIES/ Parent/ Ultimate parent company may be debarred to participate in SECI's future tenders for a period as decided by the competent authority of SECI.

6.7.3.2. Successful bidders shall share the time and date stamping photographs of the roofs and location details with SECI before entering into any legal agreement with the Owner. This has to ensure that the location identified by the Successful bidder is freshly identified and strictly complying the norms provided in Clause 13.2 below.

6.7.4. For identification of projects, SECI or state nodal agency (SNA) may provide help. However the entire responsibility of finding the buildings lies with the Bidder.

6.7.5. Onus of identifying the buildings/rooftops and completing the other documentation like finalizing the Project report and entering into agreements with the buildings/rooftops owners lies with the Successful Bidder within the above mentioned time frame even for the buildings/rooftops identified by SECI for preferential installation.

6.7.6. After the Project Sanctioned Document have been submitted by the Successful Bidder/ Project Developer and accepted by SECI", SECI will issue the Sanction Letter(s) for the Project (s) indicating the subsidy amount(s) which will be disbursed in line with the provisions of the RFS document. The Bidder shall complete the design, engineering, manufacture, supply, storage, civil work, erection, testing & commissioning of each project within 9 months from the date of issue of letter of allocation.

6.7.7. If the Bidder fails to commission the sanctioned project within specified time, penalty/LD on per day basis calculated for the Performance Security on a 6 month's period would be levied. After 6 months, the project will get cancelled and the total PBG would be forfeited.

6.7.8. If there is unutilized capacity available with the Successful Bidder in any State, the same can be utilized by the Successful Bidder in State PWD/other Governments buildings (including PSU's & All Panchayati Raj buildings) after approval of SECI."

7. A reading of the above Clause would show that it had been re-emphasized that the bidder would be responsible for identifying the roof tops and non-availability of roof tops or non-completion of other formalities after allocation of project will result in forfeiture of the PBG submitted by them

8. Clause 7 of the RFS again re-emphasized that it is the bidder who has to obtain all necessary approvals/consents/clearances required for the project. The same is reproduced herein below.

"7. OTHER CONDITIONS

7.1. Bidder or owner of the building has to obtain all the necessary approvals/Consents/Clearances required for Erection, Testing, Commissioning and O&M of the project including Grid connectivity. SECI shall not have any responsibility in this regard.

7.2. Bid bond and Processing fee submission: Bid bond shall be submitted separately for different States in India for the offered capacity in a separate envelop (along with processing fee) super scribed with name of the State & other details.

7.3. TAX EXEMPTIONS:

Price bids are invited inclusive of Taxes and duties. However, Tax exemptions including certificates of any sort, if available may be dealt with the concerned Dept. of Govt. of India by the bidder. SECI in no case will be responsible for providing any tax exemptions to the bidder.

7.4. Eligibility of standalone system:

7.4.1. Standalone system is not allowed under this scheme. The system should be grid interactive.

7.5. Requirement of approvals on makes of the Components:

7.5.1. The modules should be manufactured in India only. Rest of the components can be procured from any source. However these items should meet the Technical specification and standards mentioned in RFS.

7.6. OPERATION OF THE SYSTEM DURING WEEKENDS AND GENERAL HOLIDAYS AND CALCULATION OF CUF:

7.6.1. During grid failure, the SPV system stops generating. Any instances of grid failure need to be mentioned in the monthly report and those instances need to be authorized by local DISCOM. Then the period will be excluded in calculation of CUF.

7.7. Taxes and duties shall be paid extra by the bidder as applicable on the SECI service charges and the bid processing fee.”

9. Clause 8 provides for imposition of liquidated damages for delay in project implementation and Clause 9 gives the time schedule for the completion of sanctioned capacity. The same are reproduced herein below:

8. LIQUIDATED DAMAGES(LD) FOR DELAY IN PROJECT IMPLEMENTATION

8.1. SECI will issue the sanction letter(s) for the Project (s) indicating the subsidy amount(s) which will be disbursed in line with the provisions of the RFS document. The Bidder shall complete the CPWD roofs identification, submission of project sanction documents as per the requirement of SECI Engineer-in-Charge, design, engineering, manufacture, supply, storage, civil

work, erection, testing & commissioning of each project within 9 month from the date of issue of Allocation letter

8.2. If the bidder fails to commission the sanctioned project within specified time, Liquidated Damages on per day basis calculated for the Performance Security on a 6 months period would be levied. After 6 months the project will get cancelled and the total PBG amount would be forfeited.

Ex: If a project of 500 kW is delayed by 36 days then the Liquidated Damages will be levied as given below.

$$\begin{aligned}\text{Liquidated Damages} &= ((\text{Performance Security})/180 \text{ days}) * \text{delayed days} \\ &= (15,00,000 / 180) * 36 \\ &= \text{Rs. } 3,00,000.\end{aligned}$$

“9. TIME OF COMPLETION OF SANCTIONED CAPACITY

9.1 The Bidder shall complete the CPWD roofs identification, submission of project sanction documents as per the requirement of SECI Engineer In-Charge design, engineering, manufacture, supply, storage, civil work, erection, testing & commissioning of sanctioned project(s) within 9 months from the date of issue of allocation letter(s). In case of delay beyond scheduled commissioning period, the bidder shall be liable for Liquidated Damages as per Clause 8.

9.1.1. The period of construction given in Time Schedule includes the time required for mobilization as well as testing, rectifications if any, retesting and completion in all respects to the entire satisfaction of the Engineer-in Charge.

9.1.2. A joint programme of execution of the Work will be prepared by the Engineer-in-Charge or its representative nominated for the purpose and Successful bidders based on priority requirement of this project. This programme will take into account the time of completion mentioned in clause 9.1 above and the time allowed for the priority Works by the Engineer-in-Charge.

9.1.3. Monthly/Weekly implementation programme will; be drawn up by the Engineer-in-Charge jointly with the Successful bidder, based on availability of Work fronts as per Clause 9.1.2 above. Successful bidder shall scrupulously adhere to these targets /programmes by deploying adequate personnel, tools and tackles and he shall also supply himself all materials of his scope of supply in good time to achieve the targets/programmes. In all matters concerning the extent of targets set out in the weekly and monthly programmes and the degree of achievements, the decision of the Engineer-in-Charge will be final and binding.”

10. The petitioner was awarded the contract for implementation of grid connected roof top solar PV system on the roofs of CPWD in the State of Delhi for an allocated capacity of 5000 kWp equivalent to 5MW vide Letter of Allocation dated 31st December, 2015.

11. Clause 4 of the Letter of Allocation reiterated the responsibility of the bidder/petitioner to identify the roof tops for execution of the project. The same is reproduced herein below:

“4.0 PROJECT ALLOCATION AND SANCTION

4.1 The bidders who have been notified as Successful Bidders, shall be given 6 months from the date of issue of Letter of Allocation for identification of roof top. Preference should be given to SECI identified CPWD roofs first. In the event of offer given by SECI to the Bidder to execute the project in the SECI identified roof, the time for submission of project sanction documents by the bidder to SECI will be 3 months from the date of issue of allocation letter which can be extended depending upon the merit of the case. Failure of non- compliance of same shall lead to forfeiture of PBG for that State in proportion to the capacity allocated in the SECI identified location.

4.1.1 If after 6 months, the successful bidder could not identify rooftop(s) capacity up to the allocated capacity and submit Project sanction documents, in such case PBG for unidentified allocated capacity shall be forfeited and the allocated capacity gets cancelled and bidder including its affiliates/GROUP COMPANIES/ Parent/Ultimate parent company may be debarred to participate in SECI's future tenders for a period as decided by the competent authority of SECI.

4.1.2 Successful bidder shall share the time and date stamping photographs of the roofs and location details with SECI before entering into any legal agreement with the Owner. This has to ensure that the location identified by the Successful bidder is freshly identified and strictly complying the norms provided in RFS Clause 13.2 of Section-II.

4.2 For identification of projects, SECI or State Nodal Agency (SNA) may provide help. However the entire responsibility of finding the buildings lies with the Successful Bidder.

4.3 Onus of identifying the buildings/rooftops and completing the other documentation like finalizing the Project report and entering into agreements with the buildings/rooftops owners lies with the Successful Bidder within the above mentioned time frame even for the buildings/rooftops identified by SECI for preferential installation.

4.4 ISSUE OF SANCTION LETTER

After the Project Sanctioned Document have been submitted by the Successful Bidder/ Project Developer and accepted by SECI”, SECI will issue the Sanction Letter(s) for the Project (s) indicating the subsidy amount(s) which will be disbursed in line with the provisions of the RFS document.”

12. Clause 7 of the Letter of Allocation provides for liquidated damages. Clause 8 provides for time of completion of sanctioned capacity and the same are reproduced herein below:

“7.0 LIQUIDATED DAMAGES(Lds) FOR DELAY IN PROJECT IMPLEMENTATION

7.1 SECI will issue the sanction letter(s) for the Project (s) indicating the subsidy amount(s) which will be disbursed in line with the provisions of the RFS document. The Bidder shall complete the CPWD roofs identification, submission of project sanction documents as per the requirement of SECI Engineer-in-Charge, design, engineering, manufacture, supply, storage, civil work, erection, testing & commissioning of each project within 9 months from the date of issue of Allocation letter.

7.2 If the bidder fails to commission the sanctioned project within specified time, Liquidated Damages on per day basis calculated for the Performance Security on a 6 months period would be levied. After 6 months the project will get cancelled and the total PBG amount would be forfeited.

Ex: If a project of 500 kW is delayed by 36 days then the Liquidated Damages will be levied as given below.

*Liquidated Damages=((Performance Security)/180 days)*delayed days= (15,00,000 /180)*36”*

“8.0 TIME OF COMPLETION OF SANCTIONED CAPACITY:

8.1 The Bidder shall complete the CPWD roofs identification, submission of project sanction documents as per the requirement of SECI Engineer-in-Charge design, engineering, manufacture, supply, storage, civil work, erection, testing & commissioning of sanctioned project(s) within 9 months from the date of issue of allocation letter(s). In case of delay beyond scheduled

commissioning period, the bidder shall be liable for Liquidated Damages as per Clause 7.

8.2 The period of construction given in Time Schedule includes the time required for mobilization as well as testing, rectifications if any, retesting and completion in all respects to the entire satisfaction of the Engineer-in-Charge.

8.3 A joint programme of execution of the Work will be prepared by the Engineer-in-charge or its representative nominated for the purpose and Successful bidders based on priority requirement of this project. This programme will take into account the time of completion mentioned in clause 8.1 above and the time allowed for the priority Works by the Engineer-in-Charge.

8.4 Monthly/Weekly implementation programme will; be drawn up by the Engineer-in- Charge jointly with the Successful bidder, based on availability of Work fronts as per Clause 8.3 above. Successful bidder shall scrupulously adhere to these targets /programmes by deploying adequate personnel, tools and tackles and he shall also supply himself all materials of his scope of supply in good time to achieve the targets/programmes. In all matters concerning the extent of targets set out in the weekly and monthly programmes and the degree of achievements, the decision of the Engineer-in-Charge will be final and binding.”

13. Clause 11.3 of the Letter of Allocation provided for the forfeiture of the PBG in the following terms:

“11.3 The PBG shall be forfeited as follows without prejudice to the Bidder being liable for any further consequential loss or damage incurred to SECI.

a. If the Successful Bidder is not able to identify the projects and submit Project Sanction Documents to the satisfaction of SECI, PBG amount, pro-rata to the capacity for which the Successful Bidder is not able to identify the Projects and submit Project Sanction Documents.

b. If the Successful Bidder is not able to commission the projects to the satisfaction of SECI, PBG amount, pro-rata to the capacity not commissioned by the Successful Bidder. However, Hundred percent (100%) PBG amount furnished for the Sanctioned Capacity, if the Successful Bidder fails to Commission the Projects(s) to the satisfaction of SECI, for the already identified locations, which are notified by SECI in the RFS or otherwise and for which allocation letter/sanction letter has been issued.

c. In all the above cases corresponding unidentified/non-commissioned capacity shall stand cancelled.”

14. An identical Letter of Allotment dated 31st December, 2015 was issued by Respondent No. 1 in favour of the petitioner for the State of West Bengal with the allocated capacity of 5000 kWp.

15. The petitioner submitted the subject Bank Guarantees in terms of the above Letter(s) of Allocation. The bank guarantees are unequivocal and unconditional in nature.

16. It is the case of the petitioner that the petitioner immediately went about the process of identifying the buildings for the project, however, due to non-signing of Power Purchase Agreement (PPA) by the Government Departments, there was some delay in meeting the timelines as mentioned in the RFS and the Letter (s) of Allocation.

17. The Respondent No. 1 vide its letter dated 23rd June, 2016 informed the petitioner that the timelines given in the RFS and the Letter of Allocation would remain unaltered and in fact, Respondent No. 1 was receiving regular complaints from CPWD regarding inaction of the Petitioner in execution process. Eventually, Respondent No. 1 vide its

letter dated 7th November, 2016 extended the timelines for the identification and commissioning of the project and also relaxed the levy of liquidated damages subject to certain conditions. The relevant portion of the letter is reproduced herein below:

“With regard to the above-mentioned clauses competent authority has approved the following:

1. Project proposals received up to 31.12.2016 under this scheme be accepted by SECI and considered for sanction.

2. LD charges be waived off if the bidder submits letter from the concerned government officer, mentioning the delay period and justifying that this delay was not on the bidder's part. LD charges shall be waived off only for the delay period mentioned in such letter or 3 months, whichever is less.

Irrespective of any of these relaxations. the maximum time allowed for project commissioning as regards to clause 6.7.7. shall remain unaltered i.e. 31.03.2017.”

18. The Respondent No. 1, vide its letter dated 8th March, 2017 called upon the Petitioner to submit the Project Completion Report by 15th March, 2017 and have the Plants inspected by 31st March, 2017, failing which the projects would be cancelled. The Petitioner, however, taking a plea that the PPA(s) were not being signed by Government Officers, requested the Respondent No. 1 to decrease the allocated capacity by 25 per cent for Delhi and West Bengal. The Petitioner also requested for extension of timelines for execution of the project till 30th June, 2017.

19. The respondent No.1, however, issued a final notice dated 22nd March, 2017 to the petitioner reiterating that the project has to be

commissioned by 31st March, 2017, failing which the project would be cancelled and no subsidy shall be released.

20. The petitioner apprehending that the respondent No.1 may invoke the bank guarantees, filed the present petition seeking the above quoted relief.

21. This Court vide its interim order dated 30th March, 2017, restrained the respondents from invoking or encashing the said bank guarantees.

22. Learned counsel for the petitioner submits that as the PPA(s) were not signed by the Government Departments and, therefore, the roof top could not be made available to the petitioner for the execution of the project, the petitioner was prevented, for reason beyond its control, from execution of the work and therefore, this was a force majeure condition.

23. I am afraid that the above submission of learned counsel for the petitioner cannot be accepted. As noted above, the RFS and the Letter(s) of Allocation clearly cast an obligation on the bidder, the petitioner herein, to identify the roof tops and also obtain the necessary clearances/permissions etc. for the execution of the work. The force majeure event is one which is beyond the control of the contractor and is “not foreseeable”. Before invoking the doctrine of Frustration/Force Majeure, it must be shown that the event, which has produced the frustration was one which the party to the contract did not foresee and could not, with the reasonable diligence, have foreseen. In the present case, the respondent had taken upon itself the obligation for not only identifying the roof tops but also to obtain permissions. It could have certainly foreseen that some permission may get delayed or even rejected

by the Government Departments. It cannot, therefore, plead force majeure to justifying its failure.

24. In any events, the law of injunction restraining the invocation of the bank guarantees is no longer *res integra*. In ***Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd.*** (1997) 6 SCC 450, Supreme Court reiterated this law as under:

“21. Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are Svenska Handelsbanken v. Indian Charge Chrome [(1994) 1 SCC 502] , Larsen & Toubro Ltd. v. Maharashtra SEB [(1995) 6 SCC 68] , Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd. [(1995) 6 SCC 76] and U.P. State Sugar Corpn. v. Sumac International Ltd. [(1997) 1 SCC 568] The general principle which has been laid down by this Court has been summarised in the case of U.P. State Sugar Corpn. [(1997) 1 SCC 568] as follows: (SCC p. 574, para 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 the 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.”

*Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank* [(1984) 1 All ER 351, CA] are apposite:*

“... 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 discharged."

(emphasis supplied)

The aforesaid passage was approved and followed by this Court in U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. [(1988) 1 SCC 174]

22. The second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.

25. In *Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd.* (2008)1 SCC 544, Supreme Court after relying upon various earlier judgments of the Court reiterated that the allegation with regard to alleged breach of contract by the Respondent is not a plea of fraud of a

egregious nature so as to vitiate the entire transaction. Paragraphs 24 to 28 of the Judgment are quoted herein below:

“24. The next question that falls for our consideration is as to whether the present case falls under any of or both the exceptions, namely, whether there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit and another exception whether there are any “special equities” in favour of granting injunction.

25. This Court in more than one decision took the view that fraud, if any, must be of an egregious nature as to vitiate the underlying transaction. We have meticulously examined the pleadings in the present case in which no factual foundation is laid in support of the allegation of fraud. There is not even a proper allegation of any fraud as such and in fact the whole case of the appellant centres around the allegation with regard to the alleged breach of contract by the respondent. The plea of fraud in the appellant's own words is to the following effect:

“That despite the respondent HCL being in default of not making payment as stipulated in the bank guarantee, in perpetration of abject dishonesty and fraud, the respondent HCL fraudulently invoked the bank guarantee furnished by the applicant and sought remittance of the sums under the conditional bank guarantee from Oriental Bank of Commerce vide letter of invocation dated 16-12-2003.”

26. In our considered opinion such vague and indefinite allegations made do not satisfy the requirement in law constituting any fraud much less the fraud of an egregious nature as to vitiate the entire transaction. The case, therefore does not fall within the first exception.

27. Whether encashment of the bank guarantee would cause any “irretrievable injury” or “irretrievable injustice”. There is no plea of any “special equities” by the appellant in its favour. So far as the plea of “irretrievable injustice” is concerned the appellant in its petition merely stated:

“That should the respondent be successful in implementing its evil design, the same would not only amount to fraud, cause irretrievable injustice to the applicant, and render the arbitration nugatory and infructuous but would permit the respondent to take an unfair advantage of their own wrong at the cost and extreme prejudice of the applicant.”

28. The plea taken as regards “irretrievable injustice” is again vague and not supported by any evidence.

26. In ***Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited and Anr.*** (2016) 10 SCC 46, Supreme Court once again cautioned that the bank guarantee is a separate contract and is not qualified by the contract under which it is given. Whether the cancellation was just and proper is a question to be decided by the

arbitrator and not by this Court under Section 9 of the Act. I would only quote the relevant paragraphs of the said Judgment:

“9. Unfortunately, the High Court went wrong both in its analysis of facts and approach on law. A cursory reading of LoI would clearly show that it is not a case of forfeiture of security deposit “... if the contract had frustrated on account of impossibility...” but invocation of the performance bank guarantee. On law, the High Court ought to have noticed that the bank guarantee is an independent contract between the guarantor Bank and the guarantee appellant. The guarantee is unconditional. No doubt, the performance guarantee is against the breach by the lead promoter viz. the first respondent. But between the bank and the appellant, the specific condition incorporated in the bank guarantee is that the decision of the appellant as to the breach is binding on the Bank. The justifiability of the decision is a different matter between the appellant and the first respondent and it is not for the High Court in a proceeding under Article 226 of the Constitution of India to go into that question since several disputed questions of fact are involved.

11. It is contended on behalf of the first respondent that the invocation of bank guarantee depends on the cancellation of the contract and once the cancellation of the contract is not justified, the invocation of bank guarantee also is not justified. We are afraid that the contention cannot be appreciated. The bank guarantee is a separate contract and is not qualified by the contract on performance of the obligations. No doubt, in terms of the bank guarantee also, the invocation is only against a breach of the conditions in the LoI. But between the appellant and the Bank, it has

been stipulated that the decision of the appellant as to the breach shall be absolute and binding on the Bank.

12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more res integra. In Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. [Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110] , at para 14: (SCC pp. 117-18)

“14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(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 realise 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 realisation 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.”

13. The guarantee given by the Bank to the appellant contains only the condition that in case of breach by the lead promoter viz. the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the Bank should honour it “... without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...”. It has also been undertaken by the Bank that such written demand from the appellant on the Bank shall be “... conclusive, absolute and unequivocal as regards the amount due and payable by the Bank under this guarantee”. Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 6-2-2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal and

proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc. are not within the purview of an inquiry under Article 226 of the Constitution of India. Between the Bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the Bank is bound to honour the payment under the guarantee.”

27. In the present case, the only pleading with respect to the egregious fraud and irreparable injury, if any, are to be found in paragraphs 7 to 9 of the petition and the same are reproduced herein below:

“7. It is respectfully submitted that the proposed invocation of the Bank Guarantee is wholly illegal, wrong and fraudulent for the, following reasons:-

(i) In view of the specific reference of the terms of the RFS in the covenants of the bank guarantee, the terms of the RFS are part and parcel of the bank guarantee

(ii) The bank guarantee is conditional in view of the terms of the RFS being part and parcel of the Bank guarantee .

(iii) Clause 3.33.1 of the RFS categorically and unequivocally contemplates and stipulates that notwithstanding any other terms and conditions of the RFS, the Contractor (Petitioner herein) cannot be penalized by encashment of bank guarantee for delay or termination of contract, if it is unable to fulfill its obligations due to Force Majeure conditions.

(iv) In view of the negative covenant in Clause 3.33.1, Respondent No.1 cannot act contrary to the terms of the RFS document

(v) The Force Majeure events clearly exist in the facts of the present case.

(vi) *The threat to invoke and encash the Bank Guarantees is wholly illegal and contrary to the terms of the bank guarantees as well as contract between the parties.*

8. *Fraud of egregious nature is being played by Respondent No.1 on the Petitioner, which is writ large as submitted above. The Respondent No.1 is bent upon acting illegally and fraudulently by invoking the bank guarantees, as submitted above and is acting illegally, wrongly and fraudulently.*

9. *The Petitioner respectfully submits that Respondent No.1 does not have any right to invoke any Bank Guarantee submitted by the Petitioner. Respondent No.1 is acting fraudulently and in an attempt to unjustly enrich itself is trying to illegally encash the bank guarantees. There are special equities in favour of the Petitioner in view of the facts stated above. Respondent No.1 is trying to take advantage of its own fraud, which is impermissible in Law. Since, the threatened invocation itself is illegal, wrong and fraudulent, Respondent No.1 cannot seek encashment or any payment under the same”.*

28. As held by Supreme Court, a bank guarantee is a separate agreement and merely because there is a dispute in relation to the agreement under which said bank guarantee has been given, it would not make the bank guarantee conditional upon the dispute resolution under the given agreement.

29. The petitioner further submits that in terms of the RFS and the Letter(s) of Allocation, the respondent No.1 would at best be entitled to invoke the bank guarantee pro rata towards the sanctioned capacity which could not be commissioned. In my view, as the subject bank guarantees have not yet been invoked by respondent No.1 so far, it would not be

appropriate for this Court to presume that respondent No.1 while invoking the said bank guarantees would not keep in mind the terms of the RFS and the Letter(s) of Allocation. Respondent No.1 is a Government of India Company and it cannot be presumed today that it will act contrary to terms of the Agreement. In similar situation, this Court in *SPML Infra Limited v. NTPC Limited*, AIR 2017 Delhi 78 held that in case the bank guarantee is wrongly invoked, the remedy of the petitioner would lie in raising a claim in that behalf in the Arbitration Proceedings and not to invite a judgment in advance on the correctness of the decision of respondent No.1 to invoke the subject bank guarantee.

30. In view of the above, I find no merit in the present petition and same is accordingly dismissed. The interim order dated 30th March, 2017 would stand vacated.

31. I may only hasten to add that my above observations are prima facie in nature and would not in any manner be binding or influence the arbitration proceedings that may be initiated by either party for resolution of the disputes between them.

32. There shall be no order as to cost.

NAVIN CHAWLA, J

DECEMBER 22, 2017/NK/vp