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

% *Date of Judgment: 10th January, 2018*

+ **FAO(OS) (COMM) 229/2017**

PASITHEA INFRASTRUCTURE LIMITED Appellant

Through **Mr. Rajat Navet, Advocate**

versus

SOLER ENERGY CORPORATION OF INDIA LTD. AND ANR.

..... Respondents

Through **Mr. Bharat Sangal and Ms. Vidushi
Garg, Advocates for respondent no.1.**

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

1. This is an appeal filed under Section 37(1)(a) of the Arbitration and Conciliation Act, 1996 read with Section 13(a) of the Commercial Courts Act, 2015. The appellant has assailed an order dated 22.12.2017 passed by the learned Single Judge of this Court by which a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 seeking stay of invocation of bank guarantees no. OGT0005160001863 and OGT0005160001871 both dated 29.01.2016 for a total sum of Rs.1,20,00,000/- till the final adjudication of the proceedings was dismissed.
2. The respondent no.1 had invited bids on 09.09.2015 to participate in the Request For Selection (RFS) for design, engineer, manufacture, supply, erection, testing and commissioning, including warranty,

operation and maintenance for a period of 25 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. The appellant was declared a successful bidder based on the Letters of Allocation (LOA) dated 31.12.2015. In terms of LOA, the aforesaid two bank guarantees were furnished. The appellant was unable to complete the work awarded within the stipulated period as agreed upto September, 2016 and the bids were extended uniformly for a period upto 31.03.2017. Resultantly, the respondent informed the appellant by a communication dated 22.03.2017 that the agreement between the parties has to be commissioned by 31.03.2017, failing which the agreement would stand cancelled and thereafter no subsidy would be released.

3. The case of the appellant before the respondent no.1, before the learned Single Judge and also before this Court has been consistent that the appellant had done its best to comply with the time lines, but for unforeseen circumstances beyond its control, such as non-execution of Power Purchase Agreements (PPAs) by various Government Departments, who were the roof top owners, the project could not be completed.
4. Mr. Rajat Navet, the learned counsel for the appellant, while relying on Clauses 3.33.1 and 3.33.2 of the RFS, submits that the respondent no.1 cannot invoke the bank guarantees as the grounds for non-completion would fall under the 'Force Majeure Clause', as it was beyond the control of the contractor to complete the works. Clause 3.33 relating to 'Force Majeure', reads as under:

“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 OMP (I)(COMM) 148/2017 Page 5 majeure conditions. After examining the cases, SECI shall decide and grant suitable additional time for the completion of the work, if required.”

5. Mr. Bharat Sangal, learned counsel for respondent no.1, who enters appearance on an advance copy, submits that the petition under Section 9 of the Arbitration and Conciliation Act was premature and resultantly, so is the appeal as till date the bank guarantees have not been invoked. He further submits that there is no infirmity in the order passed by the learned Single Judge, which would require interference. Mr. Sangal submits that the law with regard to an invocation of an unconditional bank guarantee is no longer *res integra*. It is settled law that the Courts would be slow in granting stay for invocation of an unconditional bank guarantee, except in cases where, a fraud of egregious nature is alleged, but in the petition under Section 9 of the Arbitration and Conciliation Act or in the present appeal, the appellant/petitioner has not pleaded any fraud much less a fraud of egregious nature.
6. We have heard the learned counsel for the parties and considered their rival submissions. The learned Single Judge has examined in detail the submissions made by the learned counsel for the appellant and rejected the same while relying upon the settled law regarding the grant of stay of an unconditional bank guarantee.
7. The first question, which arises for consideration, is as to whether the appellant had provided an unconditional bank guarantee or not? The subject matter of Section 9 petition relates to two bank guarantees no. OGT0005160001863 and OGT0005160001871 for Rs.60,00,000/- each both dated 29.01.2016 for a total sum of Rs.1,20,00,000/-. The terms of the bank guarantees, as stated, are identical. The relevant clauses of the bank guarantee, read as under:

“In consideration of the Pasithea Infrastructure Limited (hereinafter referred to as selected Solar Power Developer) submitting the response to RfS inter alia for selection of the Project under PART-II of the capacity of 5 MWp, at Delhi under Roof Top scheme in response to the RfS dated 09-09-2015 issued by Solar Energy Corporation of India (hereinafter referred to as SECI) and SECI considering such response to the RfS of Pasithea Infrastructure Limited (which expression shall unless repugnant to the context or meaning thereof include its executors, administrators, successors and assignees) and selecting the Solar Power Project of the Solar Power Developer and issuing Letter of allocation No.SECI/Cont./77/2015/ to Pasithea Infrastructure Limited as per terms of RfS and the same having been accepted by the selected SPD. As per the terms of the RfS, the INDUSIND BANK LIMITED, a banking company incorporated and registered under Companies Act, 1956 and having license to carry on banking business under the Banking Regulation Act, 1949 having its registered office at 2401, General Thimmayya Road, Cantonment, Pune – 411001 and its Corporate Office at 8th Floor, tower-1, One India bulls Centre, 841, S.B.Marg, Elphinstone Road, Mumbai – 400 013 and its one of branch office at Dr.Gopal Das Bhawan28, Barakhamba Road, New Delhi – 11 0001, hereby agrees unequivocally, irrevocably and unconditionally to pay to SECI at New Delhi forthwith on demand in writing from SECI or any Officer authorised by it in this behalf, any amount upto and not exceeding Rs.60,00,000/- (Rupees Sixty Lakh only), on behalf of M/s Pasithea Infrastructure Limited.

.....

The Guarantor Bank hereby agrees and acknowledges that SECI shall have a right to invoke this BANK GUARANTEE in part or in full, as it may deem fit.

The Guarantor Bank hereby expressly agrees that it shall not require any proof in addition to the written demand by SECI, made in any format, raised at the above mentioned address of

the Guarantor Bank, in order to make the said payment to SECI.

The Guarantor Bank shall make payment hereunder on first demand without restriction or conditions and notwithstanding any objection by Pasithea Infrastructure Limited. The Guarantor Bank shall not require SECI to justify the invocation of this BANK GUARANTEE, nor shall the Guarantor Bank have any recourse against SECI in respect of any payment made hereunder.

....

This BANK GUARANTEE shall not be affected in any manner by reason of merger, amalgamation, restructuring or any other change in the constitution of the Guarantor Bank.

This BANK GUARANTEE shall be a primary obligation of the Guarantor Bank and accordingly SECI shall not be obliged before enforcing this BANK GUARANTEE to take any action in any court or arbitral proceedings against the selected Solar Power Developer, to make any claim against or any demand on the Successful bidder or to give any notice to the selected Solar Power Developer or to enforce any security held by SECI or to exercise, levy or enforce any distress, diligence or other process against the selected Solar Power Developer.”

8. A careful reading of the terms of the bank guarantee leaves no room for doubt that the appellant had furnished unconditional bank guarantees to the respondent no.1. The terms of the bank guarantee makes it clear that the beneficiary was not required to provide any proof, in addition to the written demand, neither any express format was provided. The guarantor Bank was required to make the payment on first demand without any restriction or conditions and

notwithstanding any objection by the appellant herein. In fact, the bank guarantee further makes it abundantly clear that the bank guarantee shall be a primary obligation of the Guarantor Bank and accordingly, respondent no.1 shall not be obliged before enforcing this bank guarantee to take any action in any court or arbitral proceedings against the selected Solar Power Developer, to make any claim against or any demand on the successful bidder or to give any notice to the selected Solar Power Developer or to enforce any security held by respondent no.1 or to exercise, levy or enforce any distress, diligence or other process against the selected Solar Power Developer.

9. As far as the submission with regard to Force Majeure Clause is concerned, this argument of the learned counsel for the appellant has been dealt with in detail by the learned Single Judge in paragraphs 22 and 23 of the judgment, which is extracted as under:

“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.”

10. In the case of *State of Orissa & Ors. v. Harapriya Bisoi*, reported in AIR 2009 SC 2991, fraud was defined as under:

“33. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include and any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. (See *Dr. Vimla v. Delhi Administration* (1963 Supp. 2 SCR 585) and *Indian Bank v. Satyam Febres (India) Pvt. Ltd.* (1996 (5) SCC 550).

34. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See *S.P. Chagalvaraya Naidu v. Jagannath* (1994 (1) SCC 1).”

11. In a recent decision rendered by this Court in the case of *SINTEX OIL AND GAS LIMITED v. UNION OF INDIA & ORS* decided on 01.01.2018, this Court has considered various decisions of the Supreme Court of India and held that in the absence of fraud of an

egregious nature having been pleaded, stay of bank guarantee cannot be granted. This Court has held as under:

“10. The general principle which has been laid down have been summarized in the case of ***U.P. State Sugar Corporation v. Sumac International Limited***, reported in (1997) 1 SCC 568, wherein it has been observed ‘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’.

11. The learned Single Judge has referred to three judgments of the Supreme Court to revisit the law as laid down by the Apex Court with regard to grant of injunctions against invocation of bank guarantees. The law is well-settled that the Court would not grant any injunction against invocation of an unconditional bank guarantee, except where fraud of egregious nature is alleged. The learned Single Judge has referred to the judgments in the case of ***Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works(P) Ltd.***, reported in (1997) 6 SCC 450; ***Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd.***, reported in (2008) 1 SCC 544; and ***Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited and Anr.***, reported in (2016) 10 SCC 46.

12. Mr. Malhotra, learned Senior Counsel has labored hard to canvass that the appellants were prevented from carrying the work and, thus the case of the appellant would be covered by the ‘force majeure’ clause being article 31 of

the contract as the ingress to the land was to be provided by the respondent as per the agreement. We, however, are unable to accept his submission for the reasons that the power of the Court to entertain such a submission has been frowned upon by the Apex Court. In the case of *Gujarat Maritime Board*(supra), it was held as under:

“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.”

12. At this stage, the learned counsel for the appellant submits that the appellant has appointed an Arbitrator in terms of the agreement. According to the terms of the agreement, a panel of Arbitrators is to be appointed. However, taking into consideration the nature of dispute, it would be appropriate that a sole Arbitrator may be appointed to cut the costs of both the parties. Mr. Sangal, learned counsel for respondent no.1 submits that he has sought instructions and would have no objections if a former Judge of this Court is appointed as a sole Arbitrator.
13. Accordingly, Justice Kailash Gambhir, a former Judge of this Court (Mobile No.9871300033) is appointed as the sole Arbitrator. His fee would be fixed as per 4th Schedule of the Arbitration and Conciliation Act. Learned counsel for the appellant also submits that in case there is any fear of invocation of bank guarantee, he would approach the Sole Arbitrator by filing an application before the Arbitrator under Section 17 of the Arbitration and Conciliation Act. We would request the said Arbitrator that in case such an application is filed, the same would be heard expeditiously.
14. In view of the stand taken by the parties and as prayed, the appeal is disposed of.
15. We make it clear that we have not interfered in the order passed by the learned Single Judge and the appeal is being disposed of, as agreed by the learned counsel for the appellant, making it clear that any observations made by this Court and the Single Judge would not come in the way of the appellant before the Sole Arbitrator.

CM.APPLs 47551 & 47552/2017

16. The applications stand disposed of in view of the order passed in the appeal.

G.S.SISTANI, J.

JANUARY 10, 2018

pst/

SANGITA DHINGRA SEHGAL, J.

