

HON'BLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION NO.28198 OF 2017

Date: 29.04.2019

Between:

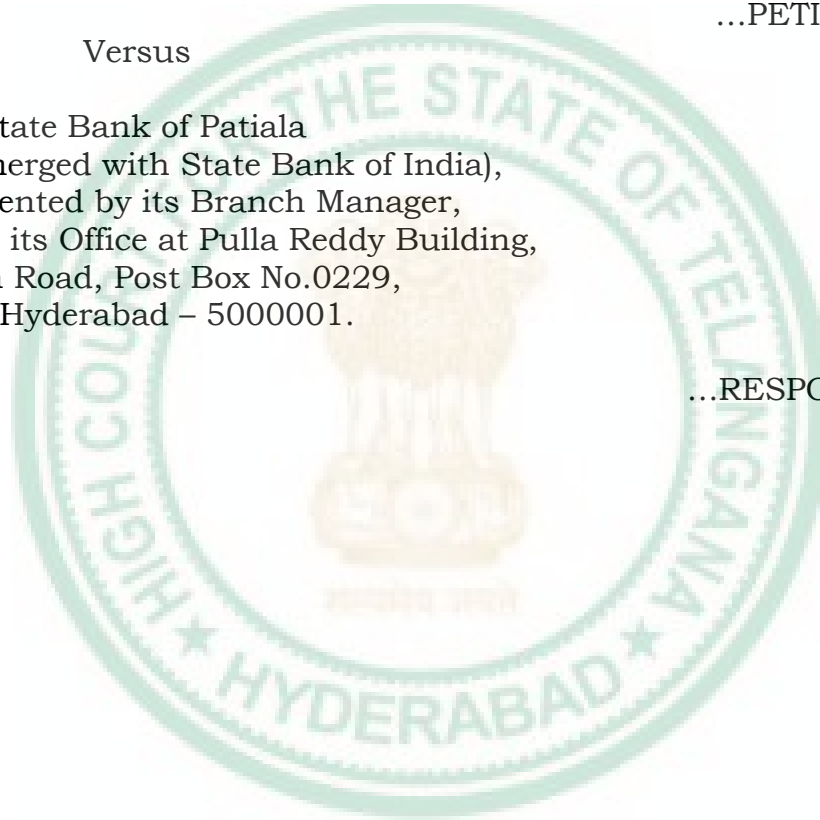
M/s. Tata Power Renewable Energy Limited,
Formerly known as Industrial Power Infrastructure
Ltd., C/o. M/s Tata Power Company Limited,
having its Office at Corporate Centre, A Block, 34,
Sant Tukaram Road, Carnac Bunder, Mumbai – 400009
duly represented by its CEO & Executive Director,
Mr. Rahul Shah who has been duly empowered under
the board resolution / Power of Attorney dated 30.08.2011.

...PETITIONER

Versus

M/s. State Bank of Patiala
(Now merged with State Bank of India),
Represented by its Branch Manager,
Having its Office at Pulla Reddy Building,
Station Road, Post Box No.0229,
Abids, Hyderabad – 5000001.

...RESPONDENT



HON'BLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION NO.28198 OF 2017

ORDER:

Heard Sri D.Prakash Reddy and Sri S.Niranjan Reddy, learned senior counsel for the petitioner; learned standing counsel for the State Bank of Patiala, and Sri Vedula Srinivas, learned counsel for M/s. Photon Energy Systems Limited (for brevity hereinafter referred to as PHOTON)

2. On 21.03.2012, an unconditional and irrevocable Performance Bank Guarantee (PBG) was issued by the State Bank of Patiala (since merged with SBI) for an amount of Rs.14,70,11,930/- in favour of the petitioner valid till 20.03.2014 with six months claim period valid up to 20.09.2014. Petitioner invoked the bank guarantee vide letter bearing No.TPREL/FY15/35 dated 03.09.2014 addressed to the Chief Manager, State Bank of Patiala, Abids Circle Branch, Hyderabad. On 19.05.2017, the SBI informed the petitioner its inability to comply with the request of the petitioner to invoke the bank guarantee. In this writ petition, the petitioner seeks declaration of the action of the respondent – bank refusing to honour the commitment under the bank guarantee.

3. The time line of events leading up to institution of this writ petition and after, that entangled the parties to the litigation which have bearing on the issue for consideration are hereunder.

3.1. On 15.03.2011, the petitioner company awarded a contract to PHOTON by executing a purchase order to set up 8 MW Solar Power Plant at Mithapur in Dwaraka Taluk, Jamnagar District,

Gujarat State. As per the purchase order, PHOTON was responsible solely for the financing, execution and setting up of the power plant. As per clause 4.3 of the purchase order, the PHOTON had to furnish PBG for an amount equivalent to 15% of the total EPC Contract Value, valid for a period of two years from the date of commissioning of the plant or till the date of execution of the Performance Ratio Bank Guarantee (PRBG), whichever is later.

3.2. On 02.03.2013, the petitioner entered into an O & M Agreement with PHOTON and under the O & M Agreement, PHOTON had to submit a PRBG of Rs.5 crores for a period of five years.

3.3. PBG No.5027312BG0000024 dated 21.03.2012 for Rs.14,70,11,930/- was issued by the State Bank of Patiala (now SBI)/ R1 bank in favour of the petitioner and the said guarantee is unconditional and irrevocable.

3.4. As per clauses 9, 10 and Non-Obstante Clause it was agreed that the PBG could remain in force up to and including 20.03.2014, and claim period end date was 20.09.2014.

3.5. It is stated that on 30.08.2014 and 31.08.2014, site visit was held to assess the condition of equipments, structures, general condition of site etc., wherein it was found by the petitioner that the works conducted by PHOTON was highly defective, including corrosion of rafter, purlins, fasteners, damages to structures, damage to sheds of the inverters etc., and also found strong indication of usage of poor quality of material at EPC stage.

3.6. On 01.09.2014, the petitioner sent an E-mail to PHOTON with a copy of the same to the respondent bank and in the said e-mail the petitioner shared a detailed report of the said site visit along with details of damages and photographs for proof.

3.7. On being sounded by e-mail dated 01.09.2014, on 03.09.2014, the PBG was replaced/modified by a PRBG for a sum of Rs.5 crores. Such modified bank guarantee was sent to the petitioner on 03.09.2014.

3.8. On 03.09.2014, the petitioner invoked the PBG by issuing letter bearing No.TPREL/FY15/35 to the respondent – bank calling upon them to pay an amount of Rs.14,70,11,930/- under the PBG No.5027312BG0000024 and petitioner also informed the representative of the respondent bank about intention to invoke the personal guarantee.

3.9. Vide protest letter bearing reference No.TPREF/FY15/36 dated 04.09.2014, the petitioner questioned the unilateral action of the respondent bank in substituting the PBG of Rs.14,70,11,930/- with that of PRBG of Rs.5 crores without express written consent of the petitioner.

3.10. On 05.09.2014, the petitioner sent a reminder and sought encashment of PBG.

3.11. The respondent – bank sent a response on 05.09.2014. Instead of remitting the amount, the respondent – bank informed that they are discussing the matter with their client and would revert back.

3.12. The sub-contractor of PHOTON (M/s. Indu Projects Limited and M/s. Cirus Solar Systems Private Limited) filed O.P.No.2080 of 2014 before the Court of the Additional Chief Judge, City Civil Court under Section 9 of the Arbitration and Conciliation Act, 1996 and the said Court on 05.09.2014 granted injunction against invocation of PBG 5027312BG0000024.

3.13. By way of letter dated 06.09.2014, the respondent – bank rejected the petitioner's demand for encashment of the PBG on the basis of the said order of the Court.

3.14. On 15.10.2014, O.P.No.2080 of 2014 was withdrawn by the sub-contractors.

3.15. Thereafter, on 31.10.2014, PHOTON filed a separate and fresh application under Section 9 of the Arbitration and Conciliation Act, 1996 vide O.P.No.2347 of 2014. On 31.03.2015, the XXV Additional Chief Judge, City Civil Court, Hyderabad passed order restraining the petitioner herein from invoking the PBG dated 21.03.2013 for Rs.14,77,11,930/- and bank from any payment.

3.16. Against the said order dated 31.03.2015, the petitioner filed CMA.No.433 of 2015 before this Court. Vide order dated 11.04.2015, this Court dismissed CMA.No.433 of 2015. Petitioner filed SLP(C) No.20231 of 2016 (converted into Civil Appeal No.5638 of 2017) before the Supreme Court.

3.17. Vide order dated 26.04.2107, the Supreme Court allowed the appeal.

3.18. Thereafter, vide letter dated 29.04.2017, the petitioner conveyed the said order to the respondent – bank and requested to forthwith remit Rs.14,70,11,930/- to the bank account of the petitioner. On 04.05.2017 and 12.05.2017, the petitioner sent reminders.

3.19. On 24.05.2017, the petitioner received a letter dated 19.05.2017 from the respondent – bank. It reads as follows:

“No.MCB/HYB/80
Dated: 19.05.2017

Ms. Vasudha Sain
RRG & Associates
Law Offices
C-14, Lower Ground Floor
Chirag Enclave
Greater Kailash Part I
New Delhi – 110048

Dear Madam,

**Demand for encashment of Performance Bank
Guarantee No.5027312BG0000024 Dated 21.03.2012
favouring Tata Power Renewable Energy Limited**

Please refer to your letter dated 29.04.2017 addressed on behalf of your client Tata Renewable Energy Private Limited, regarding demand for encashment of Performance Bank Guarantee (PBG) No.5027312BG0000024 Dated 21.03.2012 for an amount of Rs.14,70,11,930.00 invoked on 03.09.2014.

After careful examination of the matter, without prejudicial to the Bank rights, we reply to the notice as under:

Your client, Tata Power Renewable Energy Ltd had entered into a contract with M/s Photon Energy Systems Ltd for supply and delivery of a Solar Photo Voltaic Project. M/s. Photon Energy Systems Ltd had in turn sub-contracted the said project to Indu Projects Ltd. (IPL). M/s. Indu Projects Limited had requested erstwhile State Bank of Patiala (e-SBP) to issue a Performance Bank guarantee of Rs.14.70 crores in favour of your client on behalf of M/s Photon Energy Systems Ltd. Accordingly e-SBP had issued a PBG in favour of M/s Tata Power Renewable Energy Limited on behalf of M/s Indu Projects Ltd valid up to 20.03.2014 with a claim period up to 20.09.2014.

In this connection we advise that there is a comprehensive operation and maintenance agreement between M/s Tata Power Renewable Energy Ltd and M/s Photon Energy Systems Ltd dated 02.03.2012 provided for submission of a

Bank Guarantee equal to 15% of total contract value (PBG) and another Bank Guarantee for an amount of Rs.5.00 crores (PRBG) to be submitted at least 30 days before expiry of the PBG. The said PRBG of Rs.5.00 crore shall be valid from the expiry of the first PBG until the expiry of the tenure of the agreement. With reference to this clause, your client M/s Tata Power Renewable Energy Ltd had sent several communications to M/s Photon Energy Systems Ltd for submission of PRBG of Rs.5.00 crores. Accordingly, the Bank had modified the guarantee relying on the communications sent by your client M/s Tata Power Renewable Energy Ltd. However, your client had invoked the PBG of Rs.14.70 crore. Due to subsequent multiple litigations at various courts and the injunction granted therein, Bank had not made any payment upon invocation. After the order dated 26.04.2017 of Hon'ble Supreme Court in SLP, your client had again submitted a request to make payment of Rs.14.70 crores against the invocation of PBG vide your letter dated 29.04.2017. In this connection we advise that your client had requested M/s Photon Energy Systems Ltd for issuance of a PRBG of Rs.5.00 crore. It may stated from the agreement between your client and M/s Photon Systems Ltd that PRBG of Rs.5.00 crore was intended to replaced the PBG of Rs.14.70 crore.

Aw per the whole context of the issue, it does not appear that the two Bank Guarantees were intended coexist i.e. by requesting for PRBG of Rs.5.00 crore, your client had acknowledged indirectly that the requirement of PBG of Rs.14.70 crore has come to an end. Accordingly, we are of the considered view that the invocation dated 03.09.2014 was made subsequent to amendment of PBG to PRBG as such the Bank is not in contractual obligation to comply your request for payment of Rs.14.70 crore. In this context we advise that new invocation after the expiry of the claim period of the PBG will be of no relevance.

In view of the above we express our inability to comply with your request made on behalf of your client for payment of Rs.14.70 crores by the Bank. We request you to please arrange to advise your client accordingly.

Yours faithfully
Sd/-
Assistant General Manager”

4. Hence, the Writ Petition.
5. PHOTON filed application to implead as respondent and to oppose prayer of petitioner. Sri Vedula Srinivas, learned counsel for PHOTON, was heard on the implead application and on merits. Extensive submissions are made on the maintainability of the writ petition and on merits.

6. Based on the submissions made, two issues arise for consideration:

1. Whether the writ petition is maintainable on the claim to invoke bank guarantee?
2. Whether the respondent bank can refuse to honour the request of the petitioner to invoke the unconditional and irrevocable bank guarantee made within six months grace period?

7. Before considering these two issues, it is necessary to consider the impleadment application of the proposed respondent.

8. Though the issue of invocation of bank guarantee is between the petitioner and the SBI, PHOTON, to whom the petitioner awarded contract to set up 8 MW solar power plant filed IA.No.2 of 2017 (WPMP.No.37449 of 2017) seeking to implead itself as third respondent and to oppose the prayer of the petitioner. Petitioner raised strong objection to its impleadment, contending that the dispute is between two parties to bank guarantee and the proposed respondent is no way concerned with the said bank guarantee.

9. The bank guarantee executed on 21.03.2012 was consequent to a contract entered into by the petitioner with PHOTON where under the vendor agreed to furnish irrevocable and unconditional bank guarantee. The respondent bank refused to pay the amount of the bank guarantee on the ground that the bank guarantee dated 21.03.2012 stood superceded by the PRBG as agreed by parties to the contract and therefore, the Bank cannot honour the claim of the petitioner.

10. The claim of the petitioner to enforce the bank guarantee dated 21.03.2012 depends on consideration of the issue whether the bank guarantee dated 21.03.2012 stood superceded by the subsequent PRBG for Rs.5 crores.

11. Sri Vedula Srinivas, learned counsel, has raised two preliminary objections, firstly, on the maintainability of the writ petition and secondly, on the prayer sought in the writ petition. According to the learned counsel, the petitioner and the SBI entered into agreement on the bank guarantee. The petitioner sought invocation of the bank guarantee by relying on a clause in the contract entered into on 21.03.2012. In other words, the petitioner is seeking enforcement of the terms of the contract. He would further submit that there is no public law element in the issue involved in this case and not honouring the bank guarantee by the respondent – bank is not amenable to judicial review. The scope of the writ jurisdiction is very limited in contractual matters and the Court can entertain the writ petition only if there is public law element in the contract in issue and greater public interest would be at stake if the offending party is allowed to violate the terms of the contract.

12. According to the learned counsel, the stand of the respondent bank is that on account of the subsequent PRBG the earlier bank guarantee stood annulled and value of PRBG is only Rs.5 crores with new terms and conditions for its enforcement and therefore, the question of invocation of the bank guarantee dated 21.03.2012 and paying the entire amount of the said bank guarantee to petitioner does not arise. If the petitioner is aggrieved

by the decision of the respondent bank and takes the stand that it is not in compliance with the terms of the bank guarantee, the petitioner has to avail civil law remedy to enforce such terms. Further, since the arbitration proceedings are set in motion, the petitioner can raise this plea also before the Arbitrator. By referring to the prayer sought in the arbitration proceedings, he would submit that the petitioner has also claimed payment of amount of Rs.14,70,11,930/- and therefore, he cannot claim the said amount in a writ petition. According to the learned counsel, PBG was executed on 21.03.2012. It was valid for a period of two years from COD or till the date of execution of the PRBG, whichever is later. The COD was dated 14.04.2014 and thereafter, the PRBG was executed on 22.07.2014. Thus, after 22.07.2014, the PBG dated 21.03.2102 is not in force and therefore, the question of invoking the said bank guarantee does not arise.

13. According to the learned counsel, the petitioner has certified that the Solar BD Plant commenced on 25.01.2012 and declared the performance as satisfactory. In view thereof, the question of invoking the bank guarantee does not arise.

14. By placing reliance on the letter addressed by the petitioner to PHOTON on 01.09.2014, the learned counsel would submit that by mutual consent the respondent bank extended the validity of the bank guarantee for a period of one year and amended the bank guarantee reducing the amount to Rs.5 crores and by referring to Article 2.2 of the agreement and the PBG dated 21.03.2012, the petitioner requested for executing the PRBG and later, the PRBG

was executed and therefore, it is no more open to the petitioner to refer to the terms of the original PBG.

15. By supplementing the submissions made by the learned counsel, Sri Vedula Srinivas, the learned counsel for the respondent – bank, submitted that the PBG dated 21.03.2012 was not in force after execution of the PRBG on 22.07.2014 whereas invocation was made on 03.09.2014. Therefore, as the earlier bank guarantee stood modified reducing the amount of bank guarantee to Rs.5 crores, with new term, the invocation of PBG was validly rejected and no illegality was committed by the respondent – bank warranting interference by this Court.

16. Learned senior counsel for the petitioner would submit that in exercise of powers vested under Section 35-A of the Banking Regulation Act, 1949, Reserve Bank of India issued circular on 01.07.2015, a copy of which is placed on record during the course of arguments. Paragraph- 2.5 of the circular deals with payment of invoked guarantees. According to paragraph 2.5.1, where guarantees are invoked, payment should be made to the beneficiaries without delay and demur. This being a statutory mandate, is binding on all the banks and it is permissible for an aggrieved person to seek its enforcement in the writ petition under Article 226 of the Constitution of India and prayer sought by petitioner is nothing but enforcement of said statutory mandate. In support of the contention that the above said circular is issued in exercise of regulatory powers and same is binding on respondent-Bank, he placed reliance on the decisions of the Supreme Court in

**CENTRAL BANK OF INDIA v. RAVINDRA¹ and PEERLESS
GENERAL FINANCE AND INVESTMENT CO. LIMITED v.
RESERVE BANK OF INDIA².**

17. Learned senior counsel would further submit that even assuming that the PBG dated 21.03.2012 was valid only up to 20.03.2014, as per clause 3 of paragraph 10 of the PBG, within six months from the last date, a written claim or demand can be made and if such a claim/demand is made, the bank has to accept and allow invocation of the bank guarantee. He would, therefore, submit that the invocation made prior to 20.09.2014 has to be honoured by the bank and cannot be refused for any reason.

18. According to the learned senior counsel, the invocation of the bank guarantee can be for various reasons such as non-performance of the terms of the contract, delay in performance of the terms of the contract and the performance was not to the satisfaction of the employer. Whether such invocation was validly made can be subject matter of dispute between the two contracting parties where under the PBG was executed, the bank has no role in that aspect and cannot refuse to honour the invocation.

19. Learned senior counsel would submit that invocation of arbitration clause pending resolution of the arbitration proceedings by the Arbitrator does not bar invoking the bank guarantee. He refers to the earlier round of litigation, ultimately, resulting in the orders of the Supreme Court in Civil Appeal No.5638 of 2017 to contend that the earlier attempts made by the proposed

¹ (2002) 1 SCC 367

² (1992) 2 SCC 343

respondent to thwart invocation of the bank guarantee was rejected and the Supreme Court upheld the competency of the petitioner to invoke the bank guarantee. He would further submit that when the petitioner invoked the bank guarantee, the bank did not refuse to accept the invocation but informed the petitioner that invocation of the bank guarantee could not be honoured because of pending OP.No.2347 of 2014 in the Court of the XXV Additional Chief Judge, City Civil Court at Hyderabad. After the disposal of the Civil Appeal by the Supreme Court arising out of the said OP, a totally different stand is taken by the bank and the same is not permissible. Once the bank guarantee is invoked, the bank cannot refuse to honour the invocation and the same amounts to illegal and arbitrary exercise of power by a nationalized bank. Such action can be assailed in a writ petition filed under Article 226 of the Constitution of India. In support of the said contention, he placed reliance on a decision of the Supreme Court in **VINTECH ELECTRONICS LIMITED v. HCL INFOSYSTEMS LTD³**.

20. On the objection of prayer sought in the writ petition, learned senior counsel would submit that if a case is made out by the petitioner against illegal decision of the respondent – bank in not honouring the invocation of the bank guarantee, even assuming there is defect in the prayer sought in the writ petition, the writ Court can mould the prayer and grant a relief and cannot dismiss the writ petition on that ground. In support of the said contention, he placed reliance on the decision of the Supreme Court in **M. SUDHAKR v. V. MANOHARAN⁴**.

³ (2008) 1 SCC 544

⁴ (2011) 1 SCC 484

21. Responding to said contention, Sri Vedula Srinivas, learned counsel, emphasised that as held by the Supreme Court in **K.K. SAKSENA v. INTERNATIONAL COMMISSION ON IRRIGATION AND DRAINAGE**⁵ that a writ would not lie to enforce private law rights and RBI guidelines do not come to the aid of the petitioner to maintain a writ petition when what is sought to be enforced is a term of contract and there is no public law element involved.

22. *Prima facie*, it is permissible for PHOTON to contend that the bank guarantee dated 21.03.2012 was not in force by the time claim was made by the petitioner. It is also appropriate to note that ultimately PHOTON is the person who has to shell out the money and therefore, entitled to contest on the claim of the petitioner and also point out the subsequent events leading to institution of this writ petition and thereafter. Further, PHOTON was earlier prosecuting against invoking bank guarantee by filing O.P.No.2347 of 2014 and matter went up to the Supreme Court.

23. In **VIDUR IMPEX AND TRADERS PRIVATE LIMITED v. TOSH APARTMENTS PRIVATE LIMITED**⁶, the Supreme Court, delineated the principles on consideration of implead petitions. To the extent relevant, they read as under:

“41. Though there is apparent conflict in the observations made in some of the aforementioned judgments, the broad principles which should govern disposal of an application for impleadment are:

41.1. The Court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose

⁵ (2015) 4 SCC 670

⁶ (2012) 8 SCC 384

presence before the Court is necessary for effective and complete adjudication of the issues involved in the suit.

41.2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the Court.

41.3. A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.”

24. Having regard to the controversy in this writ petition, it cannot be said that PHOTON is a total stranger to the litigation to shut it out at the threshold. Thus, the objection to impleadment of PHOTON is rejected and implead application is allowed.

25. Before appreciating the respective contentions on merits, it is necessary to look into the previous litigation on invoking bank guarantee leading to the decision of the Supreme Court in Civil Appeal No.5638 of 2017. After the letter of the petitioner to invoke the bank guarantee, PHOTON filed O.P.No.2347 of 2014 in the Court of the XXV Additional Chief Judge, City Civil Court at Hyderabad praying to restrain the petitioner from invoking the bank guarantee dated 21.03.2012. The said OP was allowed. Challenging the said decision, the petitioner filed CMA.No.433 of 2015 before this Court. Extensive submissions were made before the Division Bench touching upon various aspects including the contention of the respondent – bank herein and PHOTON that on account of the subsequent PRBG dated 22.07.2014, the original PBG stood modified and therefore, invocation is not valid. It was asserted that all the obligations stood discharged and there was no

further necessity to retain the bank guarantee dated 21.03.2012, which was executed on 22.08.2014 and was replaced with the PRBG dated 02.09.2014 for Rs.5 crores. Therefore, the stand of the petitioner that he has a right to invoke the bank guarantee was stoutly opposed. By judgment rendered on 11.04.2016, Division Bench of this Court dismissed the CMA.

26. The question considered by the Division Bench was whether the petitioner was justified to invoke PBG dated 21.03.2012 after it was modified/alterd. On consideration of the rival submissions and material placed on record, the Division Bench observed that the PBG stood modified by the PRBG and therefore, the appellant (petitioner herein) could not invoke the bank guarantee dated 21.03.2012 on 04.09.2014.

27. It is apt to note the issue considered and findings recorded by the Division Bench. They read as under:

“However in the instant case, the whole question centres around the fact whether Ex.P4-PBG dated 21.03.2012 stood cancelled/ modified/alterd or not ?

Once Ex.P7 is issued on 12.04.2012 by the appellant vouching for the fact that 8 MW Solar PV Power Plant was commissioned at Mithapur on 25.01.2012 and its performance is found to be satisfactory, the 1st respondent acting along with respondent Nos.2 and 3 has altered the PBG, no doubt entirely on their own. It should also be noted that PRBG in a sum of 5.00 crores, Ex.P11 dated 02.09.2014 was furnished to the appellant. PRBG Ex.P11 dated 02.09.2014 has been received by the appellant company and thereafter by their communication dated 03.09.2014, Ex.P12 requested the 4th respondent to treat

the said letter as a notice for invocation/encashment of PBG for 14.77 crores.

“Ex.P4 stood modified by Ex.P11-PRBG, there is no way that the appellant herein can invoke Ex.P4-PRBG dated 21.03.2012 on 04.09.2014. Whether Ex.P4 has been validly altered / modified / rescinded or cancelled are all questions which remain to be resolved between the appellants and Respondent No.4. Respondent Nos.1 to 3 herein cannot answer them. Perhaps, such proceedings are independent of the disputes between the appellant and the 1st Respondent.”

28. Respondent No.4 therein is the SBI; Respondent No.1 therein is PHOTON and Respondent Nos.2 and 3 therein are subsidiary contractors to respondent No.1. Further, the Division Bench also observed that insofar as the invocation of the bank guarantee is concerned, it is between the petitioner and the respondent – bank and PHOTON has no say.

29. Be that as it may, the Division Bench agreed with the stand of the PHOTON that the balance of convenience is in their favour and if the PBG is allowed to be encashed notwithstanding the subsequent correspondence and execution of the PRBG, the impleaded respondent would suffer irreparable injury and acute hardship.

30. On appeal preferred by the petitioner, the Supreme Court held that in the facts and circumstances of the case and having regard to the terms of contract between the parties, there was no justification to grant injunction against encashment of bank guarantee.

31. The Supreme Court order reads as under:

“Leave granted.

Heard learned counsel for the parties.

We are satisfied that in the facts and circumstances of the present case and having regard to the terms of the contract between the parties there was no justification to grant injunction against encashment of the bank guarantee.

Accordingly, we set aside the impugned order of injunction and allow the appeal.

Pending application(s), if any, shall also stand disposed of.”

32. To recapitulate, in the earlier round of litigation, as noted above, PHOTON opposed the invocation of the bank guarantee on the ground that the petitioner requested for issuance of PRBG, it was issued accordingly, and the subsequent PRBG would amount to modification/ alteration of the earlier PBG. Therefore, the question of invocation of earlier PRBG does not arise. The invocation of the bank guarantee has to be strictly in accordance with terms of the PRBG dated 22.07.2014.

33. In view of the order of the Supreme Court, this stand is no more valid. The Supreme Court overruled the view taken by Division Bench of this Court.

34. According to clause 3 of the PBG dated 21.03.2012, the bank undertakes to guarantee the petitioner to pay on demand, without demur and without reference to the vendor such amount or amounts not exceeding the sum of Rs.14,70,11,930/- on receipt of intimation from the petitioner that the vendor has not fulfilled his contractual obligations. This clause further emphasises that the petitioner is the sole judge for such non-fulfilment and the vendor

shall have no right to question such judgment. As per clause 4, after the term of two years or on execution of the PRBG, for further period of six months, it is permissible for the petitioner to file/make claim under the bank guarantee. Clause 5 clearly mandates against cancelling the bank guarantee by the bank without express consent of the petitioner. It is settled principle of law that the bank guarantee is an independent contract and binds the parties to the said contract. Only requirement for the respondent – bank is to verify whether invocation was during the subsistence of the bank guarantee or within six months of the completion of the period mentioned in the bank guarantee. Invocation was within six months grace period. Once this condition is satisfied, there is no other option to the bank but to honour the bank guarantee and the bank cannot enter into *inter se* disputes between the petitioner and the vendor.

35. The only reason assigned by the respondent – bank for not honouring the bank guarantee was that on account of subsequent PRBG dated 22.07.2014, the earlier bank guarantee is not subsisting and therefore, not valid to invoke the bank guarantee. In view of outcome of earlier round of litigation on very same issue, *prima facie*, this stand of respondent-Bank has no substance.

36. From a closer look at the communication given by the respondent- bank dated 03.09.2014, filed at page Nos.236 and 237 along with the counter affidavit, it is apparent that there are two components. First component deals with extension of Bank Guarantee. It records that on a request made by PHOTON, the bank extended the validity of the bank guarantee dated

21.03.2012 for a further period of one year i.e. till 20.03.2015. In the second component it amends the bank guarantee by specifying the value at Rs.5 crores instead of Rs.14,70,11,930/-. In other words, unilaterally, the term of the bank guarantee was amended by the respondent-bank in the guise of extending bank guarantee.

37. Bank guarantee is a special contract and a party to contract cannot unilaterally amend/modify the terms of the agreement. Further, as per clause 2 of the comprehensive operation and Maintenance (O&M) Agreement dated 02.03.2012, the bank guarantee is valid for two years from COD or till the date of execution of PRBG. Further, it mandates PHOTON to submit another bank guarantee for an amount of 5.00 crores as PRBG 30 days before expiry of PBG. In terms thereof, PBG was executed on 21.03.2012. PBG does not contain a clause similar to clause 2 in the O&M agreement dated 02.03.2012 on PRBG. This was also noted by the Division Bench in the earlier round of litigation. Bank has no power to convert PBG to PRBG. It's role is limited. At this stage, it is necessary to revert back to clause 5 of the PBG dated 21.03.2012. The bank undertakes not to revoke the bank guarantee without express consent of the petitioner and would not affect guaranteed time or other indulgence. Whereas what was done by the respondent-bank is in clear violation of this term of contract.

38. It was asserted that the petitioner consented for modification of the bank guarantee. A closer look at the aforesaid letter dated 01.09.2014 would show that it does not appear that petitioner consented for amending the earlier bank guarantee. Petitioner was

only reminding PHOTON its obligations in terms of O&M agreement dated 02.03.2012. Further, there is no reference to such express consent given by the petitioner in the letter extending the bank guarantee dated 03.09.2014. Further, there is no provision for amendment of PBG, even assuming that with mutual consent steps were taken. PHOTON has to take independent steps to provide PRBG and if PRBG is issued, PBG may not be valid. Admittedly, no PRBG was issued. Bank cannot convert PBG into PRBG. The entire exercise is illegal. Thus, the petitioner cannot be denied invocation of the bank guarantee by referring to illegal alteration of terms of bank guarantee.

39. Further, in a given circumstance, the petitioner can invoke the bank guarantee on non-fulfilment of terms of contract by the vendor and such non-fulfilment would, obviously, relate back to the period earlier to the invocation of the bank guarantee. As the dates noted above would make it clear that even according to the respondent – bank the performance bank guarantee dated 21.03.2012 was valid till 20.03.2014 and it is permissible to invoke the bank guarantee within six months thereof. Even assuming that the bank guarantee stood amended, such a decision was made only on 03.09.2014 and for earlier deficiency in service by the vendor, the petitioner can invoke the bank guarantee.

40. It is vehemently contended that bank's refusal to honour invocation of bank guarantee is not amenable to judicial review and party has to work out common law remedy and/or in arbitral proceedings.

40.1. In **Asia Foundation & Construction Ltd. Vs. Trafalgar House Construction (I) Ltd.**⁷, while referring to guidelines laid down in **Tata Cellular v. Union of India** [(1994) 6 SCC 651], Supreme Court held as under:

“9. The High Court in construing certain clauses of the bid documents has come to the conclusion that such a correction was permissible and, therefore, the Bank could not have insisted upon granting the contract in favour of the appellant. We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any mala fides or favouritism in the grant of contract in favour of the appellant. In *Tata Cellular v. Union of India* [(1994) 6 SCC 651] this Court has held that:

“The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers,
2. committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. ***Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:***

(i) ***Illegality***: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it;

(ii) ***Irrationality***, namely, Wednesbury unreasonableness.

(iii) Procedural ***impropriety***.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time.”

(emphasis supplied)

⁷ (1997) 1 SCC 738

40.2. In **Reliance Airport Developers (P) Ltd. v. Airports Authority of India**⁸, Supreme Court elaborated on these three parameters. Supreme Court observed:

“65. In other words, to characterise a decision of the administrator as “irrational” the court has to hold, on material, that it is a decision “so outrageous” as to be in total defiance of logic or moral standards. Adoption of “proportionality” into administrative law was left for the future.

66. In essence, the test is to see whether there is any infirmity in the decision-making process and not in the decision itself. (See *Indian Rly. Construction Co. Ltd. v. Ajay Kumar* [(2003) 4 SCC 579: 2003 SCC (L&S) 528].
(emphasis supplied)

40.3. In **Hyderabad Urban Development Authority, reconstituted as Hyderabad Metropolitan Development Authority, Secunderabad Vs. M/s IBC Knowledge Part Private Limited rep by its Managing Director, Yunus Zia and others**⁹ a Division bench of this Court reviewed the case law on the subject of maintainability of writ petition in contractual matters. In paragraph-48, the Division Bench summarised the principles deducible from precedents. Para 48 reads as under:

“48. On an analysis of the above decisions of the Supreme Court, it is clear that contractual obligations may fall under judicial review if there is some public law element involved therein. Where the dispute lies within the contractual field pure and simple in the realm of private law a writ petition is not maintainable. In such cases, the relations between the parties are governed by the contract which determines the rights and obligations of the parties *inter se*. However, where there is an element of arbitrariness or unreasonableness, illegality, irrationality or procedural impropriety in the action of state authorities offending Article 14 of the Constitution of India, even in respect of a dispute arising out of a private contract, the Court, in exercise of its power of judicial review under Article 226, can entertain the matter and grant relief as per law.

Thus, though judicial review in matters of contractual obligations is permissible, but such review must be within

⁸ (2006) 10 SCC 1

⁹ 2013(2)ALT 463(DB)

the permissible limits and in public interest and in accordance with the principles laid down by the Supreme Court. It must be intended to prevent arbitrariness or favoritism and it must be exercised in the larger public interest. It depends upon the facts and circumstances of each case. In cases where there is an element of arbitrariness, illegality or irrationality in the action of the State or its instrumentality the Court can interfere and grant relief.....”

41. Guided by above enunciation of law, coming to the facts of this case, respondent bank being leading public sector bank required to comply its obligations flowing out of the special contract of bank guarantee. It miserably failed to fulfil its obligations. The very issue was subject matter of litigation before the civil Court in O.P.No.2347 of 2014 (XXV Additional Chief Judge, City Civil Court), before the High Court in CMA No.433 of 2015, and before the Supreme Court in Civil Appeal No.5638 of 2017 filed against Division Bench order. The stand of PHOTON as accepted by the Division Bench was overruled by the Supreme Court. The parameters of judicial review against revocation of bank guarantee, i.e., irretrievable injury to one contracting party and fraud are not attracted in this case. The decision of Supreme Court binds the respondent-bank. In terms thereof, petitioner is entitled to invoke bank guarantee. Refusal to honour the invocation is in violation of decision of Supreme Court.

42. Further, in exercise of powers vested under Section 35-A of Banking Regulations Act, 1949, RBI issued circular on 01.07.2015 mandating the banks to honour the invocation of bank guarantees and to make payments to the beneficiaries without any delay or demur. Said directions of the RBI are binding on the respondent bank, and there is a statutory obligation now visited upon the respondent-bank. As the issue in this case has statutory flavour,

it is no more open to contend that rejection to honour bank guarantee is not amenable to judicial review in a writ petition under Article 226 of the Constitution of India, and aggrieved person must avail common law remedy.

43. Further in the earlier round of litigation, respondent bank was not opposing invocation of bank guarantee, but was relying on the litigation pending between the parties to deny the payment. It has changed its stand after the litigation ended before the Supreme Court. This conduct of the respondent bank clearly amounts to whimsical exercise of power and in arbitrary manner.

44. In the facts of this case, the decision of the respondent bank to refuse to honour the invocation of bank guarantee is irrational and the entire action is illegal; is outrageous; is in total defiance of logic or moral standards by a leading commercial bank in the country; and therefore, it is irrational. The decision of the respondent bank is contrary to the settled principles of law which implores that whenever an unconditional and irrevocable bank guarantee is sought to be enforced, bank has to honour and make payment to the claimants and has no competence to refuse to make payment. Respondent-bank actions are neither reasonable nor fair. It defeats the very objective of furnishing unconditional and irrevocable bank guarantee.

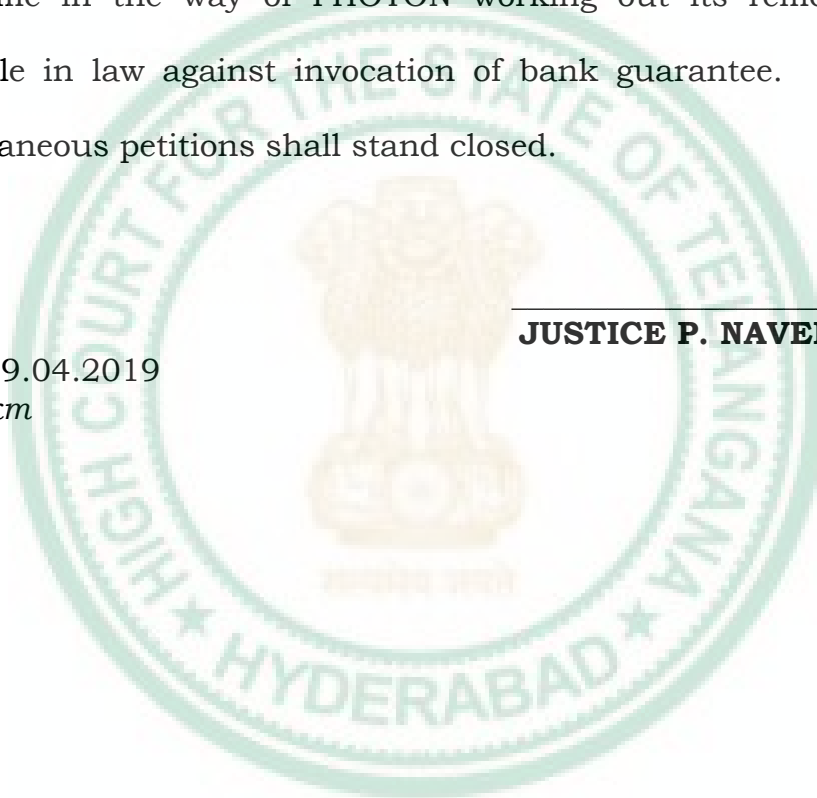
45. In the facts of this case, I am of the considered opinion that action of respondent-bank, impugned in the writ petition, is amenable to judicial review and falls within the parameters of judicial review in contractual matters as laid down by Supreme

Court in **Tata Cellular** (supra) reiterated in all subsequent decisions.

46. The Writ Petition is accordingly allowed. The petitioner is entitled to invoke the bank guarantee and the respondent-bank has to honour such invocation. The respondent-bank is directed to comply with the request of petitioner to pay the amounts as claimed by petitioner within four weeks from the date of receipt of copy of this order. However, it is made clear that this order does not come in the way of PHOTON working out its remedies as available in law against invocation of bank guarantee. Pending miscellaneous petitions shall stand closed.

Date: 29.04.2019
dsk/kkm

JUSTICE P. NAVEEN RAO



HON'BLE SRI JUSTICE P.NAVEEN RAO



WRIT PETITION NO.28198 OF 2017

Date: 29.04.2019

Dsk/kkm