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

% **Date of Decision: 28.03.2019**

\+ O.M.P.(I) (COMM.) 88/2019

M/S JAIHIND PROJECTS LTD. ..... Petitioner

Through: Mr. Y.K. Kapur with Mr. Bhushan Kapur, Advocates along with Mr. Chetan Tolani, Attorney Holder.

versus

GAIL (INDIA) LTD. ..... Respondent

Through: Ms. Madhumita Bhattacharya, Advocate.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

1. Briefly, via this petition injunction is sought *vis-a-vis* two bank guarantees which are referred to in prayer Clause (i) and (ii) of this petition. For the sake of convenience, the same are extracted hereunder:-

> "*i) Contract Performance Bank Guarantee No.BGH/2018 dated 15.06.2016 [Sic:2018] for a sum of Rs.3.00 Crores (Rupees Three Crores only) issued by Central Bank of India, Lal Darwaja Branch Post Box 100, Lal Darwaja, Ahmadabad-380001.*
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> *ii) Contract Performance Bank Guarantee No.01389BGK1800001 dated 15.06.2018 for a sum of Rs.79,23,469/- (Rupees Seventy Nine lakhs Twenty Three Thousand Four Hundred Sixty Nine only) issued by Central Bank of India, Lal Darwaja Branch Post Box 100, Lal Darwaja, Ahmadabad-380001.*"

2. It is necessary to examine the facts qua the reliefs sought for by the petitioner.

3. It appears that a Letter of Acceptance dated 11.12.2017 (in short

"LOA") was issued in favour of petitioner for construction and laying of Steel Gas pipeline along with associated facilities (12"x75.3 km) for paradeep spur line of JHBDPL, PH-II.

4. Consequent to the LOA, Contract Agreement dated 18.01.2018 was entered into between the parties. Concededly, in terms of Clause 24.1 of General Conditions of the Contract (in short 'GCC') the petitioner was to furnish a security to the tune of 10% of the accepted value of the tender. The petitioner, evidently, furnished, as required, a Performance Bank Guarantee ('PBG') as stipulated in terms of Clause 24.1 of the GCC.

4.1 It is the petitioner's case that since it was in some financial difficulty it got a third party i.e., one, Mr. Ramesh Sharma of Nirvana Metlink (P) Ltd., a financial broker, to furnish the PBG.

4.2 It is not disputed by the petitioner that the PBG furnished by Mr. Ramesh Sharma on behalf of the petitioner was fake. The petitioner avers that upon being made aware of this fact it immediately furnished another set of PBGs i.e. the subject PBGs in lieu of that which had been furnished on its behalf by Mr. Ramesh Sharma.

5 The petitioner, however, was issued a show-cause notice on 04.09.2018. The petitioner was given an opportunity to file its reply. Upon a reply dated 24.09.2018 being filed, the show-cause notice was adjudicated upon by the respondent and an order in that behalf was passed on 27.02.2019. In accordance with the leeway granted by the respondent, the petitioner has preferred an appeal before the concerned authority which is pending adjudication.

6. The immediate cause of concern for the petitioner is the two letters of invocation issued by the respondent with regard to the subject PBGs. These

are letters dated 17.03.2019 and 22.03.2019. Both these letters have been addressed by the respondent to the concerned bank i.e. Central Bank of India, Ahmedabad.

7. As is evident, the respondent seeks to encash the subject PBGs.

8. Mr. Kapur, who, appears for the petitioner, says that the invocation is flawed in view of the following: -

i) The respondent having accepted fresh PBGs in lieu of the earlier PBGs provided by Mr. Ramesh Sharma, it could not have encashed/ invoked the same.

ii) The subject PBGs can only be encashed if there is default followed by a loss or injury.

iii) That, in any case, the invocation of the second PBG is not in terms of the provision made therein.

(iii)(a) To be noted, this is the PBG which is worth Rs.79,23,470/.

9. Ms. Madhumita Bhattacharya, who appears on advance notice on behalf of the respondent, in the first instance, took a preliminary objection that these proceedings cannot continue in view of the fact that corporate insolvency proceedings have been triggered before the NCLT, Ahmedabad Bench.

9.1 Ms. Madhumita Bhattacharya also submits that this Court ought not to injunct invocation of the subject PBGs as there has been default on the part of the petitioner.

9.2 Further, learned counsel submits that the petitioner has unnecessarily linked the aspect concerning the submission of the fake PBG, which was subject matter of show-cause notice dated 04.09.2018, with the request of invocation triggered qua the subject PBGs.

10. I have heard learned counsel for the parties and perused the record.

11. According to me, what is vital in so far as the concerned bank is concerned are the terms of the bank guarantees. It is not disputed that the terms of the subject PBGs are identical save and except the amounts for which they are worth and their number.

11.1 There are two parts of the subject PBGs which, to my mind, are relevant at this juncture. The first part concerns the first recital in the subject PBGs while the other part relates to the relevant clauses contained in it i.e. Clauses 1 to 3. For the sake of convenience, the same are extracted hereafter: -

> " *M/s. JAIHIND PROJECTS LIMITED having registered office at 3rd Floor, Venus Atlantis Corporate Park, Nr. Prahladnagar AUDA Garden, Anandnagar Raod, Satellite, Ahmedabad-380015, Gujarat, INDIA (herein after called the "contractor/supplier" which expression shall wherever the context so require include its successors and assignees) have been placed/awarded the job/work of LAYING & CONSTRUCTION OF STEEL GAS PIPELINE ALONG WITH ASSOCIATED FACILITIES FOR BHUBANESHWAR, CUTTACK & PARADEEP SPURLINES OF JAGDISHPUR-HALDIA-BOKARO DHAMRA PIPELINE PROJECT (JHBDPL) PH-II (SECTION-I) vide PO/LOA/FOA No. GAIL/NOIDA/C&P/PROJ/JHBDPL/LAYING/SPURLINES/16-077/60 dated 26.10.2017 for GAIL (India) Limited having registered office at 16, Bhikaji Cama Place, R.K. Puram, New Delhi (herein after called the "GAIL" which expression shall wherever the context so require include its successors and assignees).*
>
> *The Contract conditions provide that the SUPPLIER/CONTRACTOR shall pay a sum of Rs.79,23,470/- (Rupees Seventy Nine Lakhs Twenty Three Thousand Four Hundred Seventy Only) as full Contract Performance Guarantee in the form therein mentioned. The form of payment*

of Contract Performance Guarantee includes guarantee executed by Nationalized Bank/Scheduled Commercial Bank, undertaking full responsibility to indemnify GAIL (INDIA) LIMITED, in case of default.
The said M/s JAI HIND PROJECTS LIMITED has approached us and at their request and in consideration of the premises we Central Bank of India at H.L. Commerce College Area Branch, Ahmedabad-380009, Gujarat, India having our Head Office at ChanderMukhi Building, Nariman Point, Mumbai-400021 India have agreed to give such guarantee as hereinafter mentioned.

1. <u>We Central Bank of India hereby undertake to give the irrevocable & unconditional guarantee to you that if default shall be made by M/s. JAIHIND PROJECTS LIMITED in performing any of the terms and conditions of the tender/ order contract or in payment of any money payable to GAIL (INDIA) LIMITED we shall on first demand pay without demur, contest, protest and/ or without any recourse to the contractor to GAIL in such manner as GAIL may direct the said amount of Rs.79,23,470/-</u> (Rupees Seventy Nine Lakhs Twenty Three Thousand Four Hundred Seventy Only) only or such portion thereof not exceeding the said sum as you may require from time to time.

2. You will have the full liberty without reference to us and without affecting this guarantee, postpone for any time or from time to time the exercise of any of the powers and rights conferred on you under the order/ contract with the said M/s. JAIHIND PROJECT LIMITED and to enforce or to forbear from endorsing any powers or rights or by reason of time being given to the said M/s. JAIHIND PROJECTS LIMITED and such postponement forbearance would not have the effect of releasing the bank from its obligation under this debt.

3. Your right to recover the said sum of Rs.79,23,470/- (Rupees Seventy Nine Lakhs Twenty Three Thousand Four Hundred Seventy Only) from us in manner aforesaid is absolute & unequivocal and will not be affected or suspended by reason *of the fact that any dispute or disputes have been raised by the said M/s. JAIHIND PROJECTS LIMITED and/ or that any dispute or disputes are pending before any officer, tribunal or court or arbitrator or any other authority/ forum and any demand made by you in the bank shall be conclusive and binding. The bank shall not be released of its obligations under these presents by any exercise by you of its liberty with reference to matter aforesaid or any of their or by reason or any other act of omission or commission on your part or any other indulgence shown by you or by any other matter or changed what so ever which under law would, but for this provision, have the effect of releasing the bank.*"

(emphasis is mine)

10.2. As indicated above, except for the value and the number, the other aspects of the two subject PBGs are identical. A perusal of the recital would show that the concerned bank has undertaken to indemnify the respondent for the amount indicated in the subject PBG in case of default. Clause 1 of the bank guarantee indicates as much. Therefore, once the respondent were to state in its letter of invocation that there was a default by the petitioner and, therefore, a demand is made to pay up the monies under the subject PBG, the concerned bank would have to without demur, contest, protest, etcetera pay up the amount as reflected therein.

11 This being the scope of the subject PBGs, one only needs to look at the invocation letters.

11.1 Insofar as the PBG worth Rs.3 crores is concerned, the letter of invocation and/or encashment dated 17.03.2019 reads as follow: -

"*Dear Sir,*
This is with reference to the aforesaid Bank Guarantee issued by your bank on behalf of M/s. Jaihind Projects Ltd. towards PBG against our PO/LOA/FOA No.GAIL/ NOIDA/ C&P/

PROJ/ JHBDPL/ LAYING/ SPURLINES/ 16-077/60 dated 26.10.2017 for INR 30,000,000/- which is expiring on 31.03.2020.

Since the vendor has failed to full fill the purchase/ work order obligations as per the provisions of the order and bank guarantee we invoke the above mentioned bank guarantee and request you to send the proceeds of the bank guarantee by Electronic Transfer/ Demand Draft/ Swift (TT Transfer) in favour of GAIL (India) Limited payable at SBI A/c No.0032849362991. MICR – 110002562, IFSC-SBIN0017313, Branch – CAG-II, New Delhi immediately, as guaranteed by you in terms of the said bank guarantee."

(emphasis is mine)

11.2 As regards the other PBG, which is, worth Rs.79,23,470/-, the invocation and/or encashment letter dated 22.03.2019 which is placed on record reads as follows: -

"*Dear Sir*

Please refer our earlier letter Ref: GAIL/F&A/ 1050001515/ 106024 dated 17.03.2019 and our telephonic discussion on 20.03.2019 regarding invocation of BG No.01389BGK18000001 dated 15.06.2018 amounting to INR 7,923,470/- (Copy attached for your reference).

Please find enclosed here with the original Bank Guarantee No.01389BGK18000001 dated 15.06.2018 amounting to INR 7,923,470/- issued by your bank on request of M/s. Jaihind Projects Ltd. and send the proceeds of the bank guarantee by Electronic Transfer/ Demand Draft/ Swift (TT Transfer) in favour of GAIL (India) Limited payable at SBI A/c No.0032849362991, MICR – 110002562, IFSC-SBIN0017313, Branch – CAG-II, New Delhi immediately, as guaranteed by you in terms of the said bank guarantee.
Kindly acknowledge the receipt of above Bank Guarantee in

original."

("emphasis is mine")

11.3 As is evident, in the letter of invocation dated 17.03.2019, the respondent has stated that the vendor i.e. petitioner, "*has failed to full fill the purchase/ work order obligations as per the provisions of the order and the bank guarantee*".

11.4 To my mind, having stated so, the respondent has correctly triggered the provisions of the said PBG in the terms stated thereunder. What is unequivocally stated in the letter dated 17.03.2019 is that there is a default on the part of the petitioner and, therefore, a demand has been made.

11.5 Mr. Kapur's argument that the respondent was required to show that there was a loss is not what is provided in Clause 1 of the subject PBG. The fact that in the recital there is a word to indemnify does not, in my view, require the respondent, to indicate that in the invocation letter it has suffered the loss. The PBG is governed by the terms contained therein and not the recital. Recital cannot override the terms of the PBG.

11.6 The bank which is required to honour the subject PBGs is not required to examine the underlying disputes between the parties including as to whether or not any loss has been suffered on account of alleged default by the petitioner.

11.7 The other argument of Mr. Kapur that the respondent having accepted fresh PBGs in lieu of the fake PBG submitted by Mr. Ramesh Sharma cannot for the very same reason invoke and/or encash the subject PBGs, in my view, is an argument which is completely untenable. Mr. Kapur is trying to, figuratively speaking, raise a ghost and then attempt to slay it. The position taken by the petitioner in its letters of invocation does not suggest that the reason for taking such a step is submission of fake PBGs.

11.8 Thus, no injunction can be granted to the petitioner *vis-a-vis* subject PBG worth Rs. 3 crores. The prayer made in that behalf is rejected.

12. Insofar as the second PBG is concerned, which is worth Rs.79,23,470/-, the same result will follow not because of the contents of letter dated 22.03.2019 but because of an earlier letter dated 17.03.2019 issued by the respondent, which is referred to in the letter dated 22.03.2019 but was, it appears, kept back by the petitioner by design or otherwise. This got revealed to me while I was dictating the order.

12.1 As noticed above, the invocation letter dated 22.03.2019 adverts to an earlier letter dated 17.03.2019. I was shown a copy of the letter dated 17.03.2019 in respect of PBG worth Rs.79,23,470/-. This letter is identical to the earlier letter of even date to which I have made a reference above and is found enclosed at page 43 of the documents file.

12.2 For the sake of good order and record, I have accepted the letter which has been placed across the bar by Ms. Bhattcharya. I have put to Mr. Kapur as to why this letter was not placed on record. Mr. Chetan Tolani, who is the attorney of the petitioner in the matter and is present in Court, says that this letter was not furnished by the concerned bank to the petitioner.

12.3 *Prima facie*, I find it difficult to accept the stand taken by Mr. Tolani. Therefore, for the moment, it would be suffice if I were to extract the contents of the letter dated 17.03.2019 which has been placed by Ms. Madhumita Bhattacharya on behalf of the respondent.

"*Dear Sir,*

This is with reference to the aforesaid Bank Guarantee issued by your bank on behalf of M/s Jaihind Projects Ltd. towards PBG against our PO/LOA/FOA No.: GAIL/NOIDA/C&P/PROJ /LAYING/ SPURLINES/16-077/60 dated 26.10.2017 for INR 7,923,470/- which is expiring on 31.03.2020.
Since the vendor has failed to full fill the purchase/work order obligations as per the provisions of the order and bank guarantee, we invoke the above mentioned bank guarantee and request you to send the proceeds of the bank guarantee by Electronic Transfer/Demand Draft/Swift (TT Transfer) in favour of GAIL (India) Limited payable at SBI A/c No.0032849362991. MICR-110002562, IFSC-SBIN0017313, Branch-CAG-II, New Delhi immediately, as guaranteed by you in terms of the said bank guarantee."

12.4 As would be evident the extract of both letters which are dated 17.03.2019 that invocation is made by the respondent based on the alleged default of the petitioner. Therefore, the same result will have to follow in respect of the second PBG as well. It is so held.

13. Thus, I find no merit in the petition. The same is, accordingly, dismissed.

RAJIV SHAKDHER, J

MARCH 28, 2019/hs