

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

Reserved on: 17th May, 2019
Pronounced on: 23rd May, 2019

+ **O.M.P.(I) (COMM.) 152/2019**

M/S. ICOMM TELE LTD.

..... Petitioner

Through: Mr. Karan Mehra, Ms. Simran
Mehrotra and Ms. Amrita Chatterjee,
Adv.

versus

BHARAT SANCHAR NIGAM LTD. & ANR.

..... Respondents

Through: Mr. Sameer Agrawal, Adv. for R-
1/BSNL.
Mr. Suman Kukrety, Adv. for R-
2/Syndicate Bank.

CORAM: JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J

1. The present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (As Amended) ("Act") *inter alia* seeks protection of the subject matter of arbitration and appropriate directions restraining the Respondent No.1 from encashing the Bank Guarantee bearing No. 24/ICOMM/09 dated 6 October 2009 ("Bank Guarantee") for Rs. 2,64,00,000/- (Rupees Two Crores Sixty Four Lacs Only) issued in its favour.

2. Petitioner is a product designing, engineering development and turnkey solution providers company for the Telecom, Defence, Solar, Power and

Infrastructure Sectors. Respondent No.1 is an Indian State owned Telecommunication Company having its headquarters in New Delhi. Respondent No. 2 is Syndicate Bank who has issued the Bank Guarantee on behalf of Petitioner.

3. Shorn of unnecessary details, facts of the case are that on 14 March 2008, the Respondent No.1 issued a Notice Inviting Tender (NIT) for procurement of Next Generation Play Network (GE-PON) Equipment as per the schedule of requirement of section-V of the Bid Document. Clauses 20 and 25 of the General Conditions of the Contract ("GCC") provides for an arbitration agreement and jurisdiction clause, respectively.

4. The Petitioner was declared as the successful bidder and issued an Advance Purchase Order dated 20 August 2009 ("APO"). In accordance with the terms of the APO and pursuant thereto, the Petitioner Company established a Performance Bank Guarantee bearing No. 24/ICOMM/09 dated 6 October 2009 ("**PBG**") for Rs.2,64,00,000/(Rupees Two Crores Sixty Four Lacs Only). Subsequently, the Respondent No.1 also issued a Purchase Order dated 22 October 2009 ("**PO**") in favour of the Petitioner Company. On the same day, i.e. on 22 October 2009, the Respondent No.1 herein above also entered into an Annual Maintenance Contract ("AMC"). In terms of the APO/PO, the contractor was required to set up Broadband – Next Generation Play Network as GE-PON, including supply of equipment, warranty and followed by Annual Maintenance of above supplied equipment, after expiry of warranty. Petitioner supplied the required equipment to Respondent No.1 by 27th May 2010. Accordingly, the warranty

period started from 28th May 2010 for a period of 5 years.

5. Vide letter dated 12th February 2015, BSNL required Petitioner to submit a PBG for Rs. 105.4 Crores (2% of PO value) (hereinafter, the “2% PBG”) in terms of clause 8.2 (31)(c) of APO. However, the Petitioner failed to comply with the said request. During the course of the AMC period, complaints were received by BBNW Circle of BSNL regarding non-return of faulty cards sent to the Petitioner for repairs. A letter dated 17th February 2019 was issued to the Petitioner, re-iterating the non-receipt of the 2% PBG and also the faulty cards. The Petitioner replied on 23rd February 2017, stating that the submission of additional PBG for Rs. 105.4 lakhs does not arise since the original PBG of Rs. 2.64 Crores, submitted against the APO, is more than the required PBG amount. The Petitioner further submitted that the already submitted 5% PBG, of Rs. 2.64 crores, may be returned once AMC obligations are completed. Respondent alleges that Petitioner has not honoured the AMC obligations and failed to maintain the turn-around time of card repairing or maintain the EMS installed at Pune and Bangalore sites of Respondent no. 1.

6. On 3rd May 2019, Respondent No.1 invoked the Bank Guarantee (hereinafter, “the invocation letter”) for forfeiture of an amount of Rs. 1,07,37,699/- from the PBG amount, towards above defaults of ICOMM, including the cost of equipment not returned by ICOMM to BSNL units.

Submissions on behalf of Petitioner

7. Learned counsels for the parties have been heard at length. It was

strenuously argued by the learned counsel for the Petitioner that the Respondent no. 1 has illegally invoked the Bank Guarantee. He contended that the Bank Guarantee was issued towards the performance obligations under the APO/ PO. The Bank Guarantee could not be invoked for alleged defaults arising under the AMC which is a separate and totally different contract. The invocation is in violation of the terms and conditions of the Bank Guarantee. Furthermore, the counsel strongly relied upon a Take Over Certificate/No Claim Certificate dated 2nd June 2018 issued by Respondent No.1 and argued that the said document undoubtedly proves that all the supplies under the APO/PO were completed and the PBG against the captioned PO had to be released, as has been certified therein. He also argued that the terms of the PBG should be analysed carefully and the invocation has to be strictly in accordance with the terms thereof. The invocation impugned in the present petition is contrary to the terms of the Bank Guarantee, and thus Respondents should be restrained from encashing the BG. Further, it was argued that the AMC period of five years commenced on 28.11.2011 and has expired on 27.11.2016 and therefore the invocation letter dated 3rd May 2019 for the alleged claims under the AMC is bad in law. In support of his contentions, learned counsel relied upon the judgment of the Apex Court in *Hindustan Construction Co. Ltd. v State of Bihar* (1999) 8 SCC 436.

Submissions on behalf of Respondent

8. Per contra, the learned counsel for the Respondent No.1 submitted that a beneficiary under a bank guarantee can be restrained from encashing/invoking a bank guarantee only under two special circumstances

namely, a fraud being committed by the beneficiary in connection with the bank guarantee and/or irreparable loss or injury resulting to one of the parties. None of these conditions are fulfilled in the present case. It was also argued that the bank guarantee is unconditional and the beneficiary/Respondent No.1 is legally entitled to realize the unconditional guarantee irrespective of any pending dispute and the Respondent no. 2/bank is bound to honour the same. It was also argued that equipment under the APO/PO was supplied to BSNL by 27th May 2010, the warranty period commenced on 28th May 2010 and was up to 27th November 2011 and after 27th November 2011, the AMC & CRC (Comprehensive Repair Contract) period started from 28th November 2011 for a period of five years. The Take Over Certificate/ No Claim Certificate relied upon by the Petitioner was issued in respect of fulfillment of obligations up to warranty period only and does not pertain to AMC obligations. The contractual obligations under the contract have not been fulfilled and the Respondent is thus entitled to invoke the PBG partially forfeiting the amount of PBG relating to claim under AMC and non-return of BSNL's equipment sent for repair to the Petitioner. In support of his submissions, learned counsel placed reliance on the judgment in *Dwarikesh Sugar Industries Ltd v Prem Heavy Engineering Works Pvt Ltd* AIR 1997 SC 2477.

Analysis and Findings

9. The law relating to invocation of such bank guarantees is no longer res integra. In the course of commercial dealings, if 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. It is

equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. There are, however, two exceptions to this Rule that the courts have recognized. The first is when there is a clear case of fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non- intervention is when there are special equities in favour of injunction, such as when irretrievable injury or irretrievable injustice would occur if such an injunction were not granted. There are several Judgments of the Supreme Court reiterating and reinforcing the above noted principles for dealing with cases relating to the encashment of Bank Guarantees. In ***Classic-KSM Bashir JV v Rites Limited*** MANU/DE/1731/2018, this Court has succinctly summarized the law relating to bank guarantee:

“33. The law of injunction in the case of bank guarantee 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.

34. *In Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd.* (2008) 1 SCC 544, the Supreme Court after relying upon various earlier judgments of the Court reiterated that the allegation with regard to the alleged breach of a 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.

35. In *Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited and Anr.* (2016) 10 SCC 46, the Supreme Court once again cautioned that 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.

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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."

10. In the present case, the above noted two exceptions are not attracted. Learned counsel has also not argued on these lines. In the grounds of

challenge, though allegations of fraud have been leveled, but same do not satisfy the test to bring the case within the ambit of the exception of “fraud”. The contention of the Petitioner that the encashment of the bank guarantee would be fraudulent, as there are no claims under the APO/PO, is misconceived. The pleadings thus lay no factual foundation of fraud and the allegations are vague and unspecific and touch upon the merits of the grounds for invoking the bank guarantee which cannot be examined at this stage. However, the main plank of the Petitioner’s contention is that the invocation of Bank Guarantee is not in accordance with the terms thereof. The Petitioner has relied upon the judgment of the Supreme Court in ***Hindustan Construction Company Ltd v. State of Bihar*** (1999) 8 SCC 436. There is no dispute to the legal proposition canvassed by the Petitioner that the terms of the Bank Guarantee are required to be noticed and invocation can only be in terms thereof. This ground has also been recognized and accepted by the courts while deciding the challenge to the invocation of the Bank Guarantee as the Bank Guarantee constitutes a separate, distinguished and independent contract. In order to decide the contention raised by the Petitioner, it is imperative to discuss the terms and conditions of the Contract between the parties whereunder the Bank Guarantee came to be established. The requirement of the security in the nature of Bank Guarantee is contained in the Notice Inviting Tenders (NIT). The said document envisages requirement of furnishing two Performance Bank Guarantees. The first PBG is in respect of the supply of material in terms of Clause 4.1 of the General Conditions of Contract (“GCC”). The Second PBG is for the AMC as provided in Special Conditions of Contract (Section IV), under Clause 47 which deals with repair of Cards. Section 47 (c) provides for the

requirement of the Performance Bank Guarantee of 2% of the purchase order value for a period of five and a half years from the date of expiry of warranty period. The said Clauses read as under:-

“4.1 All suppliers (including small scale units who are registered with the National Small Scale Industries Corporation under Single point registration scheme) shall furnish performance security to the purchaser for an amount equal to 5% of the value of purchase order within **14 days** from the date of issue of Advance Purchase Order by the Purchaser. :

4.2 The proceeds of the performance security shall be payable to the Purchaser as compensation for any loss resulting from the supplier's failure to complete its obligations under the contract.

4.3 The performance security Bond shall be in the form of Bank Guarantee issued by a scheduled Bank and in the form provided in 'Section IX' of this Bid Document.

The performance security Bond will be discharged by the Purchaser after completion of the supplier's performance obligations including any warranty obligations under the contract.

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47. a) **Repair of cards:** The exact quantity of the repairing shall be decided on the basis of actual requirement in the field at that time. The repair charges shall be valid for a period of 5 years after warranty period. **The bids without provision of comprehensive repair charges for the equipment after warranty shall be rejected.**

b) **AMC of EMS:** The bidder shall quote comprehensive AMC charges in the price schedule for maintenance of EMS as per the terms and conditions given in Annexure I of the bid document. The evaluation of the tender shall be done for the total package price including repair charges for 3 year maintenance spare units/modules/cards/sub assemblies and AMC charges for EMS for 5 years discounted at the rate of 15% per year. As the warranty is for one year from the date of taking over, the AMC shall be discounted twice in the first year and thrice in the second

year and so on for the purpose of evaluation.

c) Towards fulfillment of vendors obligation in respect of repair of cards and MC under clause 24 (a) and Clause 24 (b) the vendor is required to submit a performance bank guarantee of 2% of the purchase order value, valid for a period of five and half years from the date of expiry of warranty period, three months before the expiry of warranty period. The 5% PBG taken initially will be released only after submission of the 2% PBG stated above, subject to the fulfillment of other terms and condition of the purchase order. A separate contract for maintenance of module/card of AMC of EMS will have to be signed at the time of issue of purchase order as per the terms and conditions contained in the "Contract for repair of modules/Cards and AMC of EMS" as enclosed in Annexure- I of this bid document.

The agreement shall remain in force for five years from the expiry of the warranty while at the same time the terms and conditions of this agreement shall also apply during the warranty period, except for payment of charges to the supplier. Extension of agreement beyond five years shall be negotiable depending upon the performance of supplier during the agreement period."

(Emphasis supplied)

11. This requirement for issuance of Performance Bank Guarantee of 2% of the Purchase order towards fulfillment of Petitioner's obligation in respect of repair of Cards under AMC in terms of Clause 47 (a) and Clause 47 (b) noted above is also provided in the APO/PO. The relevant terms of the APO are reproduced as under:

"The A.P.O. shall be converted into detailed Purchase Order after the receipt of your unequivocal unconditional acceptance of this APO along with Performance Bank Guarantee (PBG) for an amount of Rs. 2.64 Crore/ -. The

Bank Guarantee to be furnished should be strictly in BSNL format issued by an Indian Nationalized/ Scheduled Bank.

The Bank Guarantee should be valid for minimum period of Three (03) years and is to be submitted in duplicate (One original copy + one photocopy). The proceed of PBG to the Purchaser as a compensations for any loss resulting from the suppliers failure to complete obligation under this order. The subject APO is being placed under the following terms and conditions.

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5.0 Delivery Schedule:

- (i) The delivery of the goods and documents shall be completed within 6 months from the date of issue of Advance Purchase Order. First two months are for lead period and evenly distributed supplies are expected in remaining four months. The actual delivery schedule will be given in purchase order.
- (ii) All technical assistance for installation, commissioning and monitoring of the equipment shall be provided by the Supplier at no extra cost during laboratory evaluation, validation/type approval and field trial, if any.
- (iii) The extension of delivery period against the purchase order, if any, should be granted subject to the condition the BSNL, shall have the absolute right to revise the price(s) and also to levy penalty for the delayed supplies.
- (iv) If the supplier fails to complete the supply during the original delivery period or fails to deliver the goods even, the Purchaser reserve the right to cancel the PO and (encash the PBG) impose penalty equivalent to the PBG amount.
- (v) The supplier shall ensure that the complete package of the equipment required for routes identified in the Purchase Order shall be supplied in one lot.
- (vi) BSNL reserve the right to cancel the Purchase order if agreed delivery period is not adhered to by the supplier. Any loss arising out of such delays in the supply of the equipment shall be on the supplier account.

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(31) **A) Repair of Cards:** The exact quantity of the reparting shall be decided on the baissi of actual requirement in the field at that time. The repair charges shall be valid for a period of 5 year after warranty period.

B) AMC of EMS: As the warranty is for one year from the date of taking over, the AMC shall be discounted twice in the first year and thrice in the second year and so on for the purpose of evaluation.

C) Towards fulfillment of vendors obligation in respect of repair of cards and AMC under clause 47 (a) and Clause 47 (b) the vendor is required to submit a performance bank guarantee of 2% of the purchase order value, valid for a period of five and half years from the date of expiry of warranty period, three months before the expiry of warranty”

12. Concededly, the Petitioner has furnished the 5% PBG, but not the 2% PBG. The APO was superseded by PO, but the terms and conditions of APO are equally applicable to PO. The Petitioner contends that the bank Guarantee is issued towards APO/PO and not for the AMC obligations. Relying upon the Takeover certificate/No Claim Certificate dated 2nd June 2018, it is further argued that the PBG is liable to be released in terms thereof and cannot be encashed. At the threshold, the argument of the Petitioner seemed convincing. However, when the Court probed further, Respondent No.1's counsel brought to the notice of the Court most essential document that has been concealed by the Petitioner. The concealment of material document, discussed later in the Judgment is contrary to the solemn undertaking given by the Petitioner in the Statement of Truth filed along with the Petition which *inter alia* in paras 2, 3,4 and 5 contains the following averments:-

“2. I am sufficiently conversant with the facts of the case and have also examined all relevant documents and records in relation thereto.

3. I say that the statements made in Para 1 to 34 are correct as per my knowledge and are based on information received that I believe to be correct.

4. I say that there is no false statement or concealment of any material fact, document or record and I have included information that is according to me, relevant for the present petition.

5. I say that the relevant documents in the Petitioner's power, possession, control or custody pertaining to the facts and circumstances of the proceedings initiated on my behalf has been disclosed and the copies thereof annexed with the petition and that the Petitioner does not have any other documents in its power, possession, control or custody.”

13. Petitioner's counsel when confronted with the said document, brushed it aside and argued that the document is not relevant and has no bearing on the case of the Petitioner. The relevance of the document is discredited in a casual manner and Court is not satisfied with the explanation for not filing the document. The entire purpose of “Statement of Truth” is defeated if a party elects to keep a document away from judicial scrutiny, claiming that it is inconsequential. If a document is indeed irrelevant, it would be for the Court to decide and not for the parties. The approach adopted by the Petitioner is strongly deprecated. The material document referred to above is the letter dated 23rd February 2017 written by the Petitioner to the Respondent in response to the Respondent's several letters including the last

one dated 17th October 2017 whereby the Petitioner was called upon to furnish a PBG towards the obligations under the AMC. The said letter reads as under:-

“Dear Sir,

Sub: -Fulfillment of AMC/CRC obligations for Next Generation Play Network (GEPON) Equipment -Reg.

Ref: - 1) BSNL (HQ) PO NO. CT/PO/36/2009-2010 dated 22.10.2009.

2)AGM (CT), NEW DELHI Letter No. 80-16/2009-MMC/ICOMM/58 Dated 12-04-2015

3)AGM (CT), NEW DELHI Letter No. 80-16/2009-MMC/ICOMM Dated 31-12-2015

4)AGM (CE), NEW DELHI Letter No. 80-16/2009-MMC/ICOMM/504 Dated 17-02-2017

Kindly refer to the subject matter and references cited above; we would like to clarify point wise for the objections raised by your office for your information and doing the needful.

1. Submission of PSG of Rs.105.40 Lakhs:-

You are aware that ICOMM has submitted the PBG No. 24/ICOMM/2009 amounting to Rs.2.64 Cr issued on 06-10-2009 by Syndicate bank having original validity upto 05-10-2012 and the same was extended till 05th 2017 which is for a period of 5 Years.(Copy enclosed)

In this regard we draw your kind attention to your letter no 80-16/2009-MMC/ICOMM Dated 31-12-2015, communicated the commencement of AMC for EMS as 28-11-2011 and asked us to submit PBG for 2% of total value of PO towards AMC of EMS equipment for an amount of Rs. 105.40 Lakhs valid for five and half years from date of start of AMC (28-11-2011) as per clause no 21.ii) of the PO ie) up to 27-05-2017 and accordingly the 5% PBG taken initially will be released after submission of 2% PBG.

Sir, In the present case the PBG requirement of Rs.105.40 Lakhs

was conveyed by BSNL after completion of 4 years 1 Month of AMC Period. During that time our original PBG submitted against the PO was valid till 05th October 2017 for Rs.2.64 Cr though the BSNL requirement is for RS.105.40 Lakhs up to 27th May 2017 which is more than BSNL requirement.

In view of the above, submission of additional PBG for Rs.105.40 Lakhs does not arise since original PBG of Rs.2.64 Cr was valid till Oct 2017 and hence request you to return our Original PSG submitted against the PO once AMC obligations are completed. ”

2. Extension of AMC/CRC Period:-

As per clause no 1.3 of Annexure-F of the PO (Page no 100), ICOMM needs to provide AMC support for a period of 5 Years after the expiry of Warranty and the same was completed by 27-11-2016 by which ICOMM has fulfilled all contractual obligations including Warranty and AMC. We had a discussion with CGM (BBNW), New Delhi on 10th January 2017 and conveyed our consent to deal directly with OEM ie) UTStarcom for extension of AMC as they are having better expertise and infrastructure. Please find attached here with the copy of letter no ICOMM/BSNL/GEPON/AMC/Payment dated 12th January 2017 submitted to CGM (BBNW), New Delhi for your ready reference. Hence request to deal directly with our OEM with regard to extension of AMC/CRC Period.

3. Repair and Return of Cards during CRC Period &AMC of EMS Eguipment:-

It is to inform you that the AMC/CRC was commenced with effect from 28-11-2011 for a period of 5 Years which got expired by 27-11-2016.

We have repaired and returned GEPON modules during AMC Period .Also we have provided AMC support for the EMS Equipments installed at NOC-Pune and Bangalore.

It is glad to inform you that 300 no's of ONT/ONUs, 2 nos of Fan Control Board, 6 Nos of Fans, 3 nos of CSM 2 Cards and 1 No of Fan 48 V cumulative to 312 nos of Modules were repaired and dispatched by our repair center on 22nd Feb 2017 by Spoton courier and is likely to reach ICOMM, Hyderabad on 27th February 2017. We will dispatch the same to respective circles on 28th February 2017.

The Balance 576 no's of cards are under testing and are likely to be repaired by 31st March 2017 and accordingly same will be dispatched to circles in 1st week of April 2017 by which all our AMC obligations will be completed.

It is to mention that though GM (Opn & Pig), BBNW, NEW DELHI instructed us on 31st Jan 2017 to return the faulty cards sent by Circles (repaired/non repaired), instead we are putting all our efforts to repair and return to BSNL to satisfy and meet the requirement of the Customer.

Given the above stated facts and circumstances we here by request you to continue holding the existing PSG of Rs.2.64 Cr at your office in lieu of asking for the fresh PBG of Rs.105.4 Lakhs and further restrain from forfeiting the existing PBG of Rs.2.64 Cr for the genuine reason stated above and grant time upto 31st March 2017 to repair and dispatch of all GEPON Modules and accordingly return our original PSG of Rs.2.64 Cr.

It is also requested your good office to take on record of our explanation as provided above regarding fulfillment of AMC/CRC obligations of GEPON Equipment and withdraw the letter No 80-16/2009-MMC/ICOMM/S04 Dated 17-02-2017 issued by your office under intimation to our office please.

Thanking you and looking forward to seek your kind cooperation and favorable response on the above.

**Yours Truly.
For ICOMM Tele Limited.”**

14. A plain reading of the afore-noted letter brings forward the most crucial fact of the present case. The Petitioner who was required to furnish a PBG for the AMC for a value of 105.40 lacs [2%PBG], when called upon to do so, represented to the Respondent that the PBG for an amount of 2.64 crores [5%PBG] valid till 5th October 2017 was sufficient to protect the interest of the Respondent No.1 in respect of the obligation under the AMC. Respondent No. 1 was requested to hold the existing 5% PBG for Rs. 2.64 crores in lieu of the fresh 2% PBG of Rs. 105.4 lacs. Petitioner also sought time up to 31st March 2017 to repair and dispatch all GEPON Modules. In view of the aforesaid letter, it becomes evident that the Petitioner voluntarily extended the 5% PBG towards its obligations as security in terms of Clause 47 (a) and (b) of the General Conditions of Contract Act for providing the PBG/AMC. The Takeover Certificate dated 2 /11 June 2018, records that the Petitioner has fulfilled its obligations as per the terms and conditions of the PO and permitted the release of the PBG issued towards the same. **However, this release of the PBG was permissible only after the submission of 2% PBG in terms of Clause 47 (c) referred above.** Indisputably, Petitioner did not submit the 2% PBG and therefore the 5% PBG continued to be retained by the Respondent No. 1 as desired by the Petitioner. Notwithstanding the expiry of the obligations under the PO, the Petitioner continuously renewed the same from time to time even beyond the period of obligation i.e. after expiry of the warranty period. Even after issuance of the Takeover Certificate, the Petitioner renewed the 5% BG and

did not seek its release. Petitioner has extended the BG from 13th April 2018 to 15th October 2018. Further renewal was done on 16th October 2018 up to 15th October 2019 and then on 12th April 2019 for the period up to 5th October 2019. These extensions coupled with the undertaking given by the Petitioner in its letter dated 23rd February 2017, leave no room for doubt that the 5% PBG was treated as security for the obligations in respect of the AMC in question. This is also evident from the terms of the agreement dated 22nd October 2009 executed between the parties for repair of Cards and AMC, which categorically record the following terms relating to the Performance Guarantee:-

“2.1 The Performance Bank Guarantee of the value of 5% of the PO cost deposited at the time of issue of P.O., which is valid during warranty period, shall also cover the performance obligation regarding this AMC during the initial period of AMC.

2.2 Two months before the expiry of the above mentioned PBG (5% of P.O. value), the SUPPLIER shall deposit another performance guarantee of 2% of the PO. value in the form of a bank guarantee for AMC obligation (valid for the remaining AMC duration plus six months), as per format given in Section VIII on prescribed judicial paper with stamps of proper value and should contain full address of the issuing branch of the bank with its telephone FAX number, in favour of BSNL issued by a nationalised bank payable at New Delhi, in favour of Accounts Officer (Cash), BSNL Head Quarter. If for any reason AMC period is extended, the SUPPLIER shall extend the PBG accordingly.

2.3 The purchaser shall have the absolute right to forfeit the Performance Guarantee valid at the time, for unsatisfactory performance of the SUPPLIER or for any non-compliance of any of the conditions of this Agreement.

2.4 The Bank Guarantee shall be discharged after successful completion of SUPPLIER's performance obligations under the

Agreement and subsequent extension if any or in the event of any default in the execution of the Agreement by the SUPPLIER as per terms and conditions of the Agreement, the Bank Guarantee shall be invoked either in part or in full.”

15. The terms and conditions of the aforesaid agreement clinches the issue. As noted above, the 5% PBG covers the initial period of AMC. Two months before the expiry, the Petitioner was to deposit another PBG being 2% of the PO that was to remain valid for the remaining duration plus 6 months. No such PBG was furnished despite requests. Petitioner had the option to replace the same with the lesser value PBG, but it chose to extend the existing PBG for the remainder period. Thus, the invocation of the PBG towards the contractual obligations under the AMC cannot be said to be contrary to the terms of the Bank guarantee. Moreover, the letter of invocation also states that the Petitioner has partially fulfilled its contractual obligations under the APO. There is yet another reason to reject the contention of the Petitioner. Claims are also made by the Respondent No.1 towards the equipment which was given to the Petitioner for carrying out repairs and have not been returned and dispatched by the Petitioner. In the letter dated 23rd February 2017, Petitioner admits that 567 numbers of cards would be returned after repairs. Respondent has placed on record the letter dated 9th February 2017 written by its BBNW Circle informing the Head Office that the cards sent for repair to the Petitioner have not been returned. Another letter dated 8th April 2019 also records that the Petitioner has not fulfilled its obligations and there are pending/faulty items, cost whereof has to be recovered from the Petitioner. The Bank Guarantee is unconditional and stipulates that the amount due and payable under the Guarantee would

be paid without demur, merely on a demand by the Respondent by a reason of breach of any of the terms and conditions contained in the Agreement or by reason of the Petitioner's failure to perform the said Agreement. Clause 1 of the PBG also stipulates that the Bank Guarantee is issued for the fulfillment of the Petitioner's obligations of the terms and conditions contained in the Agreement/APO. The terms of the APO/PO, contain a condition for the obligations of the Petitioner for carrying out repairs and providing AMC services. Thus, on meaningful reading of the PBG and the agreement, the invocation is found to be in accordance with the terms thereof. Petitioner's contention that the invocation of the PBG for the liabilities under the AMC, is unlawful, cannot be sustained.

16. Petitioner has also contended that the AMC term expired on 27th November 2016 and therefore the invocation is bad in law. This submission also is without merit. Petitioner has continuously extended the validity of the PBG and it is also understood that the same PBG was to be kept alive for the obligations under the AMC. The said PBG was accepted by Respondent towards the obligations contained in Clause 2.2 of Annexure 1 [AMC Agreement dated 22nd October 2009]. The fact that the Petitioner extended the BG as late as 12th April 2019 is indicative of the fact that the obligations under the AMC and CRC, continued and there were open claims under the contract. The equipments sent for repair to the Petitioner is yet to be returned. The cause as per Respondent No. 1 occurred during the AMC period and obligations in respect thereof *prima facie* continue. Whether the claims survive or not, would have to be examined in the arbitration proceedings that are likely to ensue.

17. For the foregoing reasons, the Court is unable to conclude that the invocation of the PBG is bad in law. There is no ground to restrain the Respondents from invoking the bank guarantee. There is thus no merit in the present petition and accordingly, the same is dismissed with no order as to cost.

18. Needless to say that the opinion expressed by this Court in this petition would not affect the merits of the claims in arbitration.

MAY 23, 2019

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SANJEEV NARULA, J.