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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 06th September, 2019
Pronounced on: 16th September, 2019

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**W.P.(C) 14068/2018 & CM APPL Nos.54875/2018, 5938 /2019,
34374/2019**

**CONSORTIUM OF WORLDS WINDOW
EXIM PVT LTD & ORS**

..... Petitioners

Through : Mr.Rajiv Nayyar, Senior Advocate
with Mr.K.Datta, Mr.Abhishek
Puri, Ms.Pallavi Srivastava,
Ms.Surbhi Gupta, Ms.Kanika
Singh, Advocates.

versus

AXIS BANK LTD & ORS

..... Respondents

Through : Mr.Sandeep Sethi, Mr.Tushar
Mehta, Senior Advocates with
Mr.Vaijayant Paliwal, Ms.Charu
Bansal, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This writ petition is filed with the following prayers:-

“(a) Issue an appropriate writ in the nature of a certiorari and/ or any other appropriate writ order/ direction quashing the impugned Letter dated 05.11.2018 issued by Respondent No.1 to the Petitioner No.1 purportedly cancelling the "In principle Letter of Interest" issued in favour of the Petitioners;

(b) Issue an appropriate writ/order/direction restraining Respondent No.1-13 to act in pursuance to the impugned Letter dated 05.11.2018 issued by Respondent No.1 to the Petitioner No.1;

(c) Issue an appropriate writ/ order/direction restraining Respondents from taking any steps which would jeopardize or impede or prevent the acquisition of 60% of the shares in Jhabua Power Ltd;

(d) Issue an appropriate writ/ order/direction restraining Respondent No.1 to invoke Bank Guarantee No. OGT0005180024145 dated 06.09.2018 issued by Respondent No.14 for an amount of

₹ 100,00,00,000/- (Rupees Hundred Crores Only) on behalf of Petitioner No.2 in favour of Respondent No.1 i.e. the lead Bank;

(e) Issue an appropriate writ/ order/direction calling for the entire record of Respondent nos.1-13 pertaining to the process for acquisition of controlling shareholding in Jhabua Power Ltd. including the records pertaining to consideration of the financial proposal submitted by the petitioners, cancellation of the IPLOI dated 17.08.2018, meeting held by the Evaluation Committee of the lenders on 19.11.2018 and any other subsequent meetings held by or between the Respondent nos. 1 - 12 in this regard; and

(f) Issue an appropriate writ/order/direction calling for the entire record from Respondent No.1 of CP (IB) No.1291/KB/2018 filed by Respondent No.1 before NCLT, Kolkata.

2. The learned senior counsel for the petitioner has raised three issues in the present petition - **a)** the termination letter dated 05.11.2018 could not have been issued at the instance of any single bank but could be issued only by the Evaluation Committee (of which respondents No.1, 2, 3, 9, and 11 were the members) and that too after determining *breach* of contract, hence the termination at the instance of Axis Bank is bad; **b)** the final LOI was never issued and even Definitive Agreement was never entered into, hence bank guarantee could never be invoked in the absence of a definitive contract/agreement; and **c)** the respondents have no right to invoke insolvency proceedings without informing the petitioner and rather a fraud was committed upon the petitioner as the petitioner was made to submit the performance bank guarantee of ₹ 100 Crores on 18.09.2018 and that too after the insolvency procedure was invoked on 11.09.2018.

3. Qua **(a)** and **(b)** viz illegality in issuing the termination letter, the learned senior counsel for the petitioner has referred to the following clauses of the Request for Proposal Document (RFP), viz:-

“2.1 The Bid Process shall include the following steps;

a. Step I-Selection of Qualified Bidder;

b. Step II-Submission of Bid by the Qualified Bidder;

- c. Step III- Evaluation of Bid;
- d. Step IV - Selection of Selected Bidder(s), submission of their Bid(s) to the Credit Rating Agencies (where applicable) and declaration of Selected Rating Compliant Bidder(s);
- e. Step V- Negotiation between the Evaluation Committee and the Highest Selected Rating Compliant Bidder and submission of the revised final Financial Proposal by such Highest Selected Rating Compliant Bidder;
- f. Step VI - Declaration of Recommended Bidder and issuance of In Principle Letter of Intent; and
- g. Step VII- Declaration of Successful Bidder and Issuance of Final Letter of Intent.

2.6 Step V - Negotiation between the Evaluation Committee and the Highest Selected Rating Compliant Bidder and submission of the revised final Financial Proposal by such Highest Selected Rating Compliant Bidder

2.6.3 Based on the negotiations as per Clause 2.6.2, the Highest Selected Rating Compliant Bidder shall submit a revised final Financial Proposal within 3 (three) business days from the date of being shortlisted as the Highest Selected Rating Compliant Bidder or as per the schedule specified by the Evaluation Committee or the Process Advisor in this regard. If required by the Evaluation Committee, such revised final Financial Proposal shall be rated by the Credit Rating Agencies and reconfirmed for RPF compliance in terms of the Revised Framework Circular.

2.7 Step VI - Declaration of Recommended Bidder and issuance of In Principle Letter of Intent

2.7.3 The Recommended Bidder shall provide acceptance to the In Principle Letter of Intent along with the bid performance bank guarantee of INR 100,00,00,000/- (Indian Rupees One Hundred Crore only), in the format substantially set out in Appendix X (UBPG'), which shall be valid up to 9 (Nine) months after the Transfer Date and shall be subject to reissuance/extension by the Recommended Bidder (as the case maybe), as may be required by the Process Advisor or the Lenders. The BPG shall have a claim period of 3 (three) months after the date of validity of the BPG.

2.7.4 Obtaining requisite Statutory and Regulatory Approvals The Recommended Bidder shall obtain all the relevant approvals and consents required, including under contractual arrangements and under Applicable Law for acquisition of the Controlling Shareholding, within a period of 30 (thirty) days from the date of issuance of the In Principle Letter of Intent.

2.7.5 Where the Recommended Bidder/ Highest Selected Rating Compliant Bidder opts out of the Bid Process or **is found ineligible for any reason whatsoever** to participate further in the Bid Process or is in breach of the requirements of this RFP Document or the In Principle Letter' of Intent, the Evaluation Committee shall have the right to reject such Recommended Bidder's/Highest Selected Rating Compliant Bidder's Bid and the Bid Bond / BPG of such Highest Selected Rating Compliant Bidder/ Recommended Bidder shall be liable to be invoked by the Lead Bank. In such an event, the Evaluation Committee shall have the right to negotiate terms with the Selected Rating Compliant Bidder with the immediately next highest Financial Score."

4. The learned senior counsel for the petitioner then referred to In Principal Letter of Intent (IPLOI) dated 17.08.2018, it read:-

“Based on the process-set out in Clauses 2.4 and 2.5 of the RFP Document, your Bid was considered and evaluated, and you were identified, as the Highest Selected Rating Compliant Bidder in terms of Clause 2.6. of the RFP Document pursuant to email dated August 10, 2018 issued to you by the Process Advisor. In terms of Clause 2.6.2 of the RFP Document the Evaluation Committee has the right to negotiate the terms set out in your Financial Proposal and in the business plan for the purpose of implementing the Proposed Transaction. Based on the negotiations with the Evaluation Committee, you had submitted your revised Financial proposal in terms of Clause 2.6.3 of the RFP Document on August 16, 2018.

The Evaluation Committee has considered the revised Financial Proposal. The undersigned is issuing this letter to you in terms of Clause 2.7.1 of the RFP Document under the instruction of and authorization from the Evaluation Committee, declaring you as the Recommended Bidder, subject to the following conditions;

(i) to (iii) xxxxx.

*(iv) You shall, by August- 24, 2018, **submit evidence of requisite tie up of funds** for undertaking the Proposed Transaction, to the satisfaction of Lenders, Document evidencing source of funds may include:*

*(a) **Firm letter of commitment** from asset reconstruction company proposed to be nominated for taking over of debt;*

*(b) **Final sanction** letter from banks/financial institutions;*

(c) Your and your associate's bank account statement;

(d) Your and your associate's annual audited financials; and/or

(e) Any other document evidencing the source of funds to the satisfaction of Lenders.

*(vii) Save and except as provided below, you shall obtain all the relevant approvals and consents required, including under contractual arrangements and under Applicable Law for acquisition of the Controlling Shareholding, within a period of **30 (thirty)** days from the date of issuance of this in Principle Letter of Intent.*

*(x) In the event you or **unable to comply** with the CPs within the stipulated timelines, the **Lenders may**, (a) extend the timelines with mutual consent or (b) **terminate** the transaction at their sole discretion, upon which the **BPG** and the additional bank guarantees **shall be refused.**”*

5. The learned senior counsel for the petitioner even referred to a letter dated 18.09.2018 of the respondent which interalia notes:-

“1.2 (iii) You shall, submit a PBG as defined, and in the manner provided, in clause 2.7.3 of the RFP Document on or before September 18, 2018.

1.3 (iv) You shall, by October 15, 2018 submit evidence of requisite tie up funds for undertaking the source of funds may include:-

(a) Firm letter of commitment from asset reconstruction company proposed to be nominated for taking over of debt;

(b) Final sanction letter from banks / financial institutions;

- (c) Your and your associate's bank account statement;
 (d) Your and your associate's annual audited financials; and / or
 (e) Any other document evidencing the source of funds to the satisfaction of lenders;

1.6.(viii) You shall undertake the following activities as per the following timelines:-

Time line	Milestone
On or before October 15, 2018	Additional bank guarantee of INR 10 Crs to be provided in favour of the Lead Bank
On or prior October 15, 2018	Execution of Definitive Agreements
Within 30 days of execution of Definitive Agreements or such other extended date as may be approved by the Lenders acting reasonably	Additional bank guarantee of INR 115 Crs to be provided in favour of the Lead Bank
Upon the earlier of: (a) expiry of 90 days from date of execution of Definitive Agreements and (b) compliance of the CPs	Payment of entire, consideration of INR 2350 crore and provision of counter guarantees or 100% Cash Margin for takeover of NFB limits.

Hence, it was argued the petitioner was only to disclose the *source of funds* which it disclosed from time to time, but the respondents were never satisfied. Various documents viz, sanction/ approval letters of various banks namely ABG bank, GFG Alliance, and Sale Point Capital as well as details of its own assets, worth more than ₹ 550 Crores, were shown to the respondents depicting arrangements of funds more than what was required to purchase 60% equity in Jhabua Power Plant and that there was no other way to show its *willingness* or *source of funds* as, admittedly, the petitioner did not have *final LOI* or *Definitive Agreement* in its favour, hence could not have asked for more than the sanction letters/approvals from different financial institutions as none of the financial institution could have given any money merely on MOUs/ promises etc.

6. It was argued when the petitioner gave binding *assurances* of 2.50 Million Dollars, the respondents asked for binding *commitment* and when they showed the binding *commitment*, they asked for the terms and conditions and when the *terms and conditions* were provided, the respondent said they were not satisfied, hence it is argued such satisfaction ought to have been *objective* and not *arbitrary*. It was also argued the letter of termination itself says contract could be terminated *per* clause No.2.7.5 of the RFP document, but it ought to have been terminated by the Evaluation Committee and that such minutes of Evaluation Committee were never placed on record, hence the termination is bad.

7. The learned senior counsel further argued the financial proposals were filed on 16.08.2018 with the lenders and were *to be placed for approval* before the *Competent Authority* and an approval ought to have been taken by respondent no.1 from such competent authority, pursuant to which the final LOI was to be issued to declare the petitioner as a successful bidder, however, admittedly the proposals did not reach such stage, hence no *final LOI* was ever issued.

8. The learned senior counsel for the petitioner then referred to the *termination* clause in RFP documents viz. clause 6.2.1 and 6.2 (i) and (iv) as under:-

"6.1 The RFP Document and the Bid Process shall be governed by and construed in accordance with the laws of India and the courts at New Delhi shall have the exclusive jurisdiction over all disputes arising under, pursuant to or in connection with this RFP Document or the Bid Process.

6.2 The Process Advisor and the Evaluation Committee, in their sole discretion and without incurring any obligation or liability, reserve the right, to;

- i. suspend or cancel the Bid Process, amend or supplement the Bid Process or modify any time period or terms and conditions set out in this RFP Document;
- ii.-iii xxxx
- iv. cancel or disqualify the Bid submitted by the Qualified Bidder at any stage of the Bid Process; or
- v. xxxx”

and *In Principal Letter of Intent*(as amended) dated 18.09.2018
also read:-

“The Lenders reserve the right to suspend/cancel/amend/modify/supplement the Bid Process any time, without any liability or any obligation for such acceptance, rejection or annulment and without assigning any reasons for such actions. Save and except on account of a breach or default by you of the conditions of the RFP Document the IPLOI the Final Letter of Intent or the Definitive Agreements, in the event of a cancellation/annulment/suspension of the Bid Process by the Lenders, the Bid Bond, BPG and other bank guarantees submitted by you shall be returned to you forthwith.”

9. It was thus argued the bank guarantee in the event of the *cancellation* of the agreement could never be encashed but was to be returned. The petitioner referred to the counter affidavit of the respondents to show the respondents conveyed meeting dated 05.12.2018 where majority of the lenders agreed to start a new process, though no decision could be taken by the promoter group. It was alleged respondent no.1 had no authority to terminate the *IPLOI* as it could only be terminated by the Evaluation Committee as the delegate has only such authority what the delegator has authorised it to perform and per clause 4.3.11 viz. *the decision of the evaluation committee and the lenders shall be final and binding on the qualified bidder.*

10. The learned counsel for the petitioner also referred to clause No.4.1.15.2 and 4.1.21 of the RFP document which runs:-

4.1.15.2 *The Lead Bank (acting on behalf of the Lenders) shall have the right to invoke the BPG by issuing a written demand. The BPG can be invoked at any time;*

(a) If any of the conditions under the EoI, In Principle Letter of Intent, Final Letter of Intent, Definitive Agreements or the RFP Document are breached;

(b) ...

4.1.21 In the event of non-compliance with Clause 2.7.2, Clause 2.7.3 and Clause 2.8.2, the Evaluation Committee/Lead bank reserve the right to pursue any of the following actions:

i. ...

ii. cancel the Bid submitted by the Successful Bidder;

iii. encash the Bid Bond/BPG (as applicable) provided by the Bidder; and/ or

iv. ...

It is thus argued first the Evaluation Committee ought to have taken a decision on any alleged *breach* of the agreement by the petitioner herein per clause 2.7.5 and then only the lead bank could have invoked the bank guarantee. It was argued till 05.11.2018 i.e. the date of the termination, no decision was ever taken by Evaluation Committee to terminate the contract and neither such minutes were placed on record nor ever communicated to the petitioner herein.

11. It is submitted the bid process was rather suspended/cancelled by the respondents itself when the insolvency petition was filed by the respondents as it brought an end to the contract, hence the bank guarantee needed to be returned per letter dated 18.09.2018.

12. On the aspect of the encashment of the bank guarantee viz (c) the learned counsel for the petitioner alleged special equities exists in its favour and relied upon *Hindustan Steelworks Construction Limited vs Tarapore & Company & Another* (1996) 5 SCC 34 wherein the Supreme Court has observed:-

"16. On the basis of these observations the learned counsel submitted that the law laid down by this Court is that except in case of fraud and that too when it creates special equities in the form of irretrievable injustice, the courts should not interfere by restraining the beneficiary from encashing the bank guarantee. We have carefully gone through

the judgments delivered by Mukherji and Shetty, JJ. and in our opinion that is not the ratio of the judgment. In that case the court was not called upon to decide whether apart from fraud there can be any other valid ground for interference. Moreover, the said observations cannot be read like a text of a statute or out of context.

17. xxx

*18. What Mukherji, J. has stated in paragraph 34 of his judgment, namely, that "It is only in exceptional cases that is to say in case of fraud or in case, irretrievable injustice be done the courts should interfere" is really the ratio of the decision of this Court in U.P. Cooperative Federation Ltd. (supra) Therefore, fraud cannot be said to be the only exception. In a case, where the party approaching the court is able to establish that in view of **special equities** in his favour if injunction as requested is not granted then he would suffer irretrievable injustice, the court can and would interfere. It may be pointed out that fraud which is recognised as an exception is the fraud by one of the parties to the underlying contract and which has the effect of vitiating the entire underlying transaction. A demand by the beneficiary under the bank guarantee may become fraudulent not because of any fraud committed by the beneficiary while executing the underlying contract but it may become so because of subsequent events or circumstances. We see no good reason why the courts should not restrain a person making such a fraudulent demand from enforcing a bank guarantee."*

13. Heard.

14. It is to be noted respondents are *pledgee* of the shareholdings of Jhabua Power Limited – a company indebted to the respondents. The shareholding is held by the respondents as a security for debt and hence the respondents are well within its right to sell such shares and for this it invited the subject bids. Admittedly, an offer of ₹2350 Crores and ₹100 Crores guarantee was given by the petitioner to secure performance of sale transaction.

15. Now much is said about compliance of clause 2.7.5 of the RFP but such clause is to be read along with the In Principal Letter of Intent (IPLOI) dated 17.08.2018 and its addendum dated 18.09.2018. As per the terms of the IPLOI and its addendum, *the terms of which were*

unconditionally accepted by the petitioner, the petitioner inter alia was required to undertake the following by 15.10.2018:-

- a) provide firm commitment letters from ARC to the satisfaction of the lenders;*
- b) provide an additional bank guarantee of ₹10 crores;*
- c) execute definitive agreements*

16. It is an admitted case *neither* the additional bank guarantee of ₹10.00 Crores *nor* the definitive agreements were ever executed till 05.11.2018 i.e. the date of termination. The IPLOI dated 17.08.2018 rather contained clause (x) wherein the Lenders had reserved its right to *terminate* the transaction at its sole discretion in case the petitioner did not comply with CPs within the stipulated timelines and could invoke the bank guarantee and additional bank guarantee in such an event. The IPLOI dated 17.08.2018 further clarified *in the event of any discrepancy, between the RFP document and this IPLOI dated 17.08.2018, the terms of this IPLOI shall prevail to the extent of such discrepancy.*

17. It is pertinent to mention clause (x) of IPLOI was never amended in IPLOI dated 18.09.2018 and thus it existed.

18. Clause 4.1.15.2 of RFP document also specifically empowers the lead bank to terminate the process and invoke the bank guarantee in the event the petitioner failed to adhere to any of the conditions stipulated in the IPLOI. Thus clause (x) of IPLOI dated (with its addendum dated 18.09.2018) gave a right to respondent to terminate the contract in case of non-compliance of timelines.

19. Though some conditions of IPLOI dated 17.08.2018 were amended by the IPLOI dated 18.09.2018, but clause No.(x) above which gave right to lender to terminate agreement at its sole discretion was never amended. Admittedly, the requisite *tie ups* as noted in clause No.(iv) of the amended IPLOI dated 18.09.2018 was never shown as the petitioner failed to bring the assets reconstruction company into fore, hence per amended IPLOI, the lenders had every right to terminate the agreement and invoked the bank guarantee.

20. The petitioner, admittedly, was given multiple opportunities to comply with the conditions of RFP and IPLOI's before termination of the contract; viz

- a. the amended IPLOI was issued on 18.09.2018 containing same conditions as in the original IPLOI dated 17.8.2018
- b. 1st opportunity was granted on 08.10. 2018 when the petitioner was requested to comply with IPLOI dated 17.08.2018.
- c. 2nd opportunity was on 15.10.2018 when again the petitioner was requested to comply with IPLOI dated 18.09.2018.
- d. then again on 17.10.2018; 01.11.2018 and till 05.11.2018 the petitioner was given opportunities to comply with IPLOIs and though there was no need to give oral hearing but in compliance with principles of natural justice and as requested by petitioner dated 14.11.2018, an opportunity of hearing was also given to the petitioner on 19.11. 2018.

Thus, the termination was effected after giving sufficient opportunities to the petitioner to comply with the terms of the IPLOIs.

21. I may further add clause No.(iv) of the initial IPLOI dated 17.08.2018 says the evidence of *tie up of funds* or the *source of funds* must be to the *satisfaction* of the lenders. The IPLOI's further say the *firm commitment letters* need to be obtained from *Assets Reconstruction*

Companies or the petitioner must file *final sanction letters* from banks. These conditions were repeated even in the amended IPLOI dated 18.09.2018 as is noted herein below:-

“1.3 Clause (iv) of the IPLOI shall be amended and restated as under:-

(iv) You shall by October 15, 2018 submit evidence of requisite tie up of funds for undertaking the Proposed Transaction to the satisfaction of Lenders. Document evidencing source of funds may include:

(a) Firm letter of commitment from asset reconstruction company proposed to be nominated for taking over the debt;

(b) Final sanction letter from banks / financial institutions;

(c) Your and your associate's bank account statement;

(d) Your and your associate's annual audited financials; and/or

(e) Any other document evidencing the source of funds to the satisfaction of Lenders.”

22. Though proposals were given by the petitioner herein on dated 19.07.2018; then on 30.07.2018; and on dated 16.08.2018 and *per* its proposals a total of ₹ 1640 Crores of the debt was to be acquired by the Assets Reconstruction Company, but no such firm letter of commitment ever provided, hence there was a *breach*.

23. Clause No.2.7.5 though says breach needs to be determined by the Evaluation Committee, but what if lenders had decided to terminate the agreement per clause (x) of IPLOI dated 17.08.2018 and the Evaluation Committee ratified its decision, would then there be any illegality? Answer is no. Though the petitioner had filed various correspondences viz email dated 06.11.2018 of Power Finance Corporation Limited; email dated 13.12.2018 of the Oriental Bank of Commerce; email dated 06.12.2018 of a Whistle Blower; and email dated 15.12.2018 of Bank of India, to show the lenders were inclined to give another chance to the petitioner to continue with the agreement and there was a lack of consensus amongst all banks/ respondents and hence the termination was

a unilateral decision of the Axis Bank and that such correspondences were in complete contradiction to the stand taken by the respondent No.1 in its counter affidavit dated 01.02.2019 wherein in para Nos.47 and 48 it has asserted all the lenders had approved of the termination of the agreement in its meeting dated 15.11.2018; but whereas the minutes of the meeting dated 15.11.2018 show the lenders, except of the Axis Bank / respondent No.1, all were of the view to give one more chance to the petitioner to continue with the agreement. Hence, it is said the cancellation was an unilateral decision of Axis Bank.

24. I disagree with the contention raised as there may be requests by one or the other bank to reconsider the decision but the termination cannot said to be an unilateral decision of Axis Bank as, admittedly, all the lenders, being respondents in this petition, have supported respondent No.1 qua termination. None has challenged such decision. On record there is a resolution dated 18.01.2019 of a meeting attended by the entire body of the lenders wherein they had *ratified* the decision taken by the respondent No.1 and now it is not open for the petitioner to allege there was no consensus qua termination of the contract. The minutes dated 18.01.2019 of the committee read as under:-

"Accordingly, members of the EC, summarized that, the entire EC is currently agreeable to the decision of cancellation of the In principle LOI by Axis Bank (in its capacity as lead bank) and decided to invoke the BPG in accordance with court's direction. Further the EC is agreeable for appealing against the stay granted by Hon'able HC of Delhi on invocation of the BPG in the Division Bench of the Hon'able HC of Delhi as well as continue with challenging the Writ Petition in the Hon'able HC of Delhi. "

25. I may here note even after the termination of the agreement, yet again the petitioner was called upon by the respondents to purchase

shares at the agreed rate to complete the transaction, yet the petitioner refused, hence cannot plead the termination is illegal.

26. Thus, admittedly, neither the *firm commitment* letters from Assets Reconstruction Company nor *final sanction letters* were ever furnished. Various proposals of different companies were though given, but never to the *satisfaction* of the respondents, hence the contract was terminated, per clause (x) of IPLOI dated 17.08.2018.

27. Coming to contention (c), the law of bank guarantees is quite settled, the bank guarantee is a separate contract and the terms of the contract cannot be gone into to determine whether a bank guarantee can be invoked or not. The Supreme Court in *Mahatma Gandhi Sahakra Sakkare Karkhane v. National Highway Engineering Cooperation Ltd. & Another* (2007) 6 SCC 470 has held as follows:

“22. In our considered opinion if the bank guarantee furnished is an unconditional and irrevocable one, is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.”

28. Further in *Gujarat Maritime Board vs Larsen and Toubro Infrastructure Development Projects Limited & Another* (2016) 10 SCC 46 following was held:-

“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 Limited v. Coal Tar Refining Company(2007) 8 SCC 110, at paragraph 14 (pp 117-118)

“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.”

Thus, it is amply clear while determining the question of invocation of a bank guarantee the terms of the underlying contract will be of no relevance and only the terms of the bank guarantee will need to be looked into. In the present case the bank guarantee is *unconditional* and *irrevocable*. Admittedly, clause 2.7.5 of RFP document or clause (x) of IPLOI dated 17.08.2018 were never a part of bank guarantee, hence petitioner cannot take its aid to stall the encashment.

29. The learned senior counsel for petitioner then argued the respondents have committed a fraud upon the petitioner as on 11.09.2018 the respondent No.1, while it was considering the bid of petitioner no.1, had without informing the petitioners, initiated proceedings under Section 7 of the Insolvency and Bankruptcy Code 2016 against Jhabua

Power Plant. It came to the knowledge of the petitioners only on 16.11.2018 when they searched the website of NCLT. It is alleged on 18.09.2018 the respondent no.1 even issued a letter as an addendum to the initial IPLOI and changed the timelines and these facts do establish the malafide of respondent no.1 and the illegalities committed by it during the tender process and that the respondents rather colluded with the promoters to initiate a fresh process for change of ownership and control of Jhabua Power plant and even published an advertisement dated 26.02.2019 in the Economic Times inviting expression of interest by 05.03.2019 and even went to the extent of allowing the promoters of Jhabua Power plant viz, the defaulters of ₹4329 crores, to even control and manage the company; but yet are threatening the petitioner to encash ₹100 crores (PBG). It is alleged there is a nexus between the promoters and the lenders group viz. the respondents.

30. Hence it was argued the bid process was rather *cancelled* by the respondent themselves by initiative fresh tender process & also by initiating proceedings u/s 7 of the Insolvency and Bankruptcy Code and per letter dated 18.09.2018 the bank guarantee needs to be returned.

31. The plea of alleged fraud appears to be non-convincing. Firstly, when the Section 7 Bankruptcy Code application was filed, the RBI circular for Resolution of Stressed Assets dated 12.02.2018 was in force and the lenders were bound by the terms of the said circular. The petitioner was also undertaking a high net worth transaction involving a bid of ₹2350 Crores and cannot be said to be unaware of the laws in existence which would affect the transactions and its consequent

takeover. In fact Section 7 application was filed on 11.09.2018 i.e. on the last permissible date for its filing. Section 7 application did not prohibit in any manner the conclusion of the above transaction if the petitioner was willing and able. Rule 8 of IBC permits any applicant to withdraw an application filed under Section 7 before it is admitted. Axis Bank filed Section 7 application in its capacity as a creditor of the borrower and the same has not been admitted till date. If the petitioner had completed the transaction within the stipulated timelines it would have easily stepped into the shoes of Axis Bank and could have simply withdrawn the application or could have dealt with the proceedings in a manner they deemed fit in their capacity as the largest financial creditor of the Borrower. In addition even if the application would have been admitted, the IBC may have allowed the application to be withdrawn under the provisions of Section 12A. Thus the plea of fraud is nothing but an afterthought as is made amply clear by the fact that even as per the petitioner's own case, while they came to know of section 7 application on 16.11.2018, they did not raise it as an *issue* to the Lenders. In fact in its letter dated 05.12.2018 and during the hearing held on 19.11.2018, the entire thrust of the petitioner was on seeking the successful culmination of the transaction. If the petitioner was genuinely aggrieved of *fraud*, as alleged, at least it would have brought it to the attention of lenders and in no event would have rather made efforts to conclude the transaction. Strongly enough the prayer of the petitioner in the present Writ Petition is rather to declare the termination as illegal and to permit the petitioners to conclude the transaction, but in fact the petitioner hardly has any

intention to complete such transaction. Thus no fraud of egregious nature or causing any irretrievable injury is found, *per* facts of the case.

32. Lastly it was urged by the learned senior counsel for the petitioner the circular dated 12.02.2018 of the Reserve Bank of India is now quashed by the Supreme Court on 02.04.2019 in Transfer Case (Civil) No.66/2018 in *Dharani Sugars and Chemicals Limited vs UOI* thereby declaring it *ultra vires*, having no effect in law, hence consequently all actions taken under said circular including the actions by which the insolvency proceedings have been triggered, must fail. As a result, all cases in which debtors have been proceeded against by the financial creditors under Section 7 of the Insolvency Code only because of the operation of the impugned circular, and the actions initiated in lieu of such circular be declared to be *non-est*.

33. The Supreme Court in *Dharani Sugars* (supra) clarified any action initiated by a creditor in exercise of its statutory rights as maybe available to it under various other statutes outside the ambit of February 12th circular would not be affected in any manner. The said decision would not impact the present process since the present process has been initiated by the Lenders in exercise of its statutory and contractual rights which are in addition to the rights as may have been available to the Lenders under the February circular. In the present case the Lenders have invoked the pledge they had over the shares of the Borrower and attempted to sell the pledged shares (constituting 60% of the share capital of Borrower). This process was exclusive of the February 12th circular and the Lenders shall always have right to sell the pledged shares and the debt to any

willing bidder. This is a contractual and statutory right independent of any directive which may be issued by the RBI from time to time. Therefore, the setting aside of the RBI Circular has no material consequence on the present transaction. The lenders in the present case are all banks and financial institutions which are regulated by the RBI and thus it is always mandatory for them to adhere to all guidelines issued by RBI from time to time. Mere references to the February 12th circular in clauses 2.5.3; 2.6.3; 2.8.1 of the RFP cannot be interpreted to mean the entire process was being run exclusively pursuant to the rights available to the Lenders under the February 12th circular. The right to undertake the present process does not in any manner emanate from the February 12th circular and is thus not affected by the *Dharani Sugars (supra)*.

34. In view of above, the writ petition is dismissed. Pending application(s), if any, also stands disposed of. Considering the value of transaction, it is deemed appropriate the *status quo* regarding encashment of the bank guarantee shall enure to the petitioner for three more days from today so as to enable the aggrieved party to seek appropriate remedy, if any. No order as to costs.

YOGESH KHANNA, J.

SEPTEMBER 16, 2019

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