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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 07.08.2020.

Date of Decision: 27.08.2020.

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O.M.P.(I) (COMM.) 150/2020

HINDUSTAN CONSTRUCTION CO. LTD. Petitioner

Through: Mr. Dayan Krishnan, Sr. Adv. with
Mr. Jayant Mehta, Mr. Rishi Agrawala, Ms. Shruti
Arora, Ms. Sanjeevi Seshadri and Mr. Ankit Banati,
Advs.
versus

NATIONAL HYDRO ELECTRIC POWER CORPORATION LTD.

..... Respondent

Through: Ms. Maninder Acharya, Sr. Adv. with
Mr. Piyush Sharma and Mr. Aayush Shukla, Advs.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

J U D G M E N T

REKHA PALLI, J

1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") seeking an order restraining the respondents from invoking or encashing the bank guarantees amounting to a cumulative sum of INR 214.36 crores, which were furnished by the petitioner as per the terms of the contract dated 09.03.2009 executed between the parties.

2. While the petitioner is a company engaged in the business of executing infrastructure projects, the respondent is a public sector enterprise, dealing with the setup and execution of hydroelectric power generation projects across the country.

3. Pursuant to the respondent's invitation for bids, issued on 25.10.2006, from prequalified bidders for turnkey execution of the 330

MW hydroelectric power plant on the Kishanganga River in Bandipora, Jammu & Kashmir (hereinafter referred to as 'the Project'), the petitioner submitted its bid and a letter of acceptance (LOA) was issued in its favour by the respondent on 22.01.2009. The parties subsequently executed a contract on 09.03.2009, being contract no. NHPC/CC/KG-Turnkey/02 to 07. As per the terms of this contract, the project involved construction of three generating units, viz. Units I, II and III carrying power generation capacity of 110 MW each, and 330 MW in total. The overall civil works to be executed included *inter alia* river diversion works, construction of upstream and downstream coffer dam, intake structure, cut-off wall, concrete faced rock-fill dam, spillway, head race tunnel, surge shaft, pressure shaft, powerhouse, ventilation tunnel. The contract price was INR 19,258,390,000/- and the project was envisaged to be completed in 84 months, i.e., by 21.01.2016. The contract further required the petitioner to furnish security in the nature of performance Bank Guarantees for a sum of INR 101.32 crores, Retention Bank Guarantees for a sum of INR 107.80 crores and Advance Bank Guarantees for a sum of INR 5.24 crores, which the petitioner duly complied with.

4. Upon the petitioner complaining that there were obstacles in the timely execution of the contractual work, the respondent had granted three extensions of time to the petitioner to carry out the same. However, in time, the parties were at crosshairs regarding the delay caused in executing the contractual work and each blamed the other. As a result, the parties invoked arbitration and a three-member arbitral Tribunal passed an award on 14.10.2019 granting a sum of INR 163.55 crores to the petitioner under its Extension of Time claim. The amount

under the award is yet to be received by the petitioner, for which purpose it has already initiated enforcement proceedings. It may be also noted that as on date, objections to the Award have not been filed by any of the parties.

5. In the meanwhile, on 26.06.2018, the Respondent, as per Article 26 of the GCC issued a completion certificate to the petitioner in respect of Unit-I with the date of completion of Unit-I as 30.05.2018. Similarly on 20.09.2018, completion certificates were issued in respect of Units-II&III with the dates of completion as 22.06.2018 and 27.06.2018 respectively. Even though the issuance of these certificates marked the commencement of the Defect Liability Period (hereinafter referred to as “DLP”) as per the contract, the certificates expressly stipulated that certain portion of the contractual works were still yet to be completed and the timelines to complete the same were provided in the annexures to these certificates.

Tracing the journey of encashment

6. Since the petitioner is aggrieved by the respondent’s decision to invoke the bank guarantees on the alleged ground that the petitioner has failed to carry out and deliver work as per contractual requirements, it may be useful to briefly note, at the outset, the events preceding the invocation.

7. After issuance of the completion certificates, the DLP commenced during which the petitioner was required to complete the balance work and carry out maintenance of the facilities on site. While the DLP was underway, the respondent, on 13.02.2020, wrote to the petitioner about its liability to complete the remaining civil works at

the project site. By way of this letter, the respondent also extended the DLP by a further period of 12 months ending on 30.06.2021 and requested the petitioner to alter work schedules and renew the bank guarantees to accommodate this extension. Subsequently, on 02.03.2020, 11.03.2020 and 10.04.2020, the respondent reiterated its request for extension of the bank guarantees as some of them were set to expire on 30.03.2020, 31.03.2020 and 15.05.2020 respectively. On 11.04.2020 the respondent sought extension of 9 more retention bank guarantees to suit the extended DLP. Similarly, on 02.05.2020, the respondent again repeated its demand for extension of three more performance bank guarantees expiring on 15.05.2020.

8. In response thereto, the petitioner submitted the originals of 22 renewed bank guarantees on 25.03.2020 but requested the respondent, on 02.06.2020, to return the remaining bank guarantees furnished by the petitioner barring those for a sum equivalent to the works which were yet to be completed, i.e., for INR 56 crores. The petitioner, on the ground of its financial troubles, requested the respondent not to retain bank guarantees for such an enormous sum of INR 214.36 crores when the work left to be done was only valued at a sum of INR 56 crores. That being said, on 10.06.2020, the petitioner extended 26 more bank guarantees, while seeking more time to submit the originals of some of them due to the operational delays ushered in by the pandemic of COVID-19.

9. On 11.06.2020, the respondent wrote to the petitioner stating that in case it failed to submit the originals of the extended performance bank guarantees for Civil, HM and E&M works, retention money bank guarantees, and advance bank guarantee of E&M contract

within seven days, i.e., by 17.06.2020, the bank guarantees would be encashed. This communication was followed by another letter from the respondent on 12.06.2020 wherein it refused to accept the petitioner's request to release any of the bank guarantees by disputing the value of the balance works and claiming that it was to recover a substantial amount from the petitioner by way of tax liabilities, reimbursement of labour wages paid, compensation for delayed submission of work and losses in power generation owing to petitioner's poor execution of work.

10. In its letter dated 18.06.2020, the petitioner, while requesting for further time to renew the bank guarantees and submit them, attributed the reason for delay in submission to the restrictions faced by the banks on account of COVID-19 and assured the respondent that the originals of all extended bank guarantees were in transit by way of courier service. The petitioner also requested the respondent to hold off on initiating the process of encashing the bank guarantees, as it had resolved to do in its letter dated 11.06.2020.

11. However, notwithstanding its entreaties, the petitioner, on 20.06.2020 received intimation from the Punjab National Bank and the ICICI Bank that the respondent had invoked the bank guarantees issued by them on behalf of the petitioner. In an attempt to control the quick spiral of events, the petitioner issued an urgent correspondence to the respondent requesting it to withdraw its request for invocation by reiterating that all the remaining originals of the extended bank guarantees were already in transit. However, the petitioner received an intimation from the Jammu and Kashmir Bank on 22.06.2020 towards request for encashment of yet another bank guarantee amounting to a

sum of INR 29,48,38,964.

12. Aggrieved by the respondent's rapid requests for encashment of bank guarantees, the petitioner instituted the present petition on 23.06.2020, seeking an injunction against the respondent from encashing any of the 48 bank guarantees. The petitioner's case, as set up in the petition, was that the respondent's sole reason for invocation was the alleged failure of the petitioner to submit originals of the renewed guarantees on time, but this was wholly arbitrary as all the extended bank guarantees had either already been received by the respondent or were in transit and the delay, if any, was only on account of the ongoing pandemic of COVID 19.

13. When this petition was taken up for the first time on 23.06.2020, this Court restrained the respondent, on an ad interim basis, from encashing 16 of the 48 bank guarantees furnished by the petitioner. This direction was passed on the basis of the petitioner's plea that the bank guarantees were being sought to be invoked solely on the ground that the original extended bank guarantees had not been submitted on time. On the next date of 26.06.2020, by which time the respondent was already in receipt of the originals of 44 of the 48 extended bank guarantees, this Court extended the ad interim injunction to prevent encashment of the remaining 32 bank guarantees as well. On 01.07.2020, a similar protection was extended to another bank guarantee issued on behalf of the petitioner by ICICI Bank. Subsequently, although the parties attempted to resolve their differences amicably, the same did not bear fruition and this Court proceeded to hear the petition on merits.

14. In support of the petition, Mr. Dayan Krishnan learned senior counsel for the petitioner contends that the encashment of the bank guarantees is wholly malafide and fraudulent, which is evident from the fact that the respondent has constantly switched between its reasons for invocation. Although the respondent had consistently represented that it was only invoking the performance bank guarantees and retention bank guarantees, even this proved to be untrue when it invoked the advance bank guarantees issued by ICICI Bank during the pendency of this petition. By drawing my attention to the letter dated 11.06.2020, he submits that initially, when the respondent had given notice of its intent to invoke the bank guarantees, it had been on the ground of non-submission of the originals of the extended bank guarantees. He submits that however subsequently, once all the extended bank guarantees were duly submitted, the respondent shifted its stance and claimed that the petitioner's failure to complete the work on time led to encashment of these bank guarantees. This is completely contrary to the admitted position that 99% of the work at the project site is already complete, in fact the respondent's statement in its letter dated 12.06.2020 as also its act of issuing completion certificates in favour of the petitioner leaves no manner of doubt that the petitioner had adhered to the schedule. Today, the respondent has proceeded to claim that the tax liabilities it allegedly incurred through the petitioner, which are yet to be finally determined by the tax appellate authority, is also a reason for encashment of the bank guarantees. He submits that evidently, the respondent has failed to stick to a single reason for seeking encashment and resorts to taking shelter under new, constantly varying reasons to encash these bank guarantees. Infact, the

petitioner's financial difficulties, which were mainly a result of the respondent's failure to make timely and contractually stipulated payments to the petitioner, were further compounded by the restrictions triggered by the global pandemic of COVID-19, which fact was already in the knowledge of the respondent. He further submits that the petitioner had even requested the respondent to retain bank guarantees for an amount equivalent to the value of work yet to be completed, i.e., INR 56 crores, and return the remaining bank guarantees, but this was rejected by the respondent on the specious ground that it had to recover higher amounts from the petitioner on account of tax liabilities. He submits that in any event, although these financial difficulties were responsible for slowing the pace of work at the project site, 99% of the work already stands completed, the completion certificates have been issued and the DLP is currently in effect, and was extended by one year, i.e., 36 months, on 13.02.2020. This extension of the DLP stemmed from the respondent's understanding and appreciation of the petitioner's financial situation and other logistical difficulties at the project site. He submits that thus, the petitioner has time till 30.06.2021 to finish the remaining works within the DLP and prevent incurring any further liabilities under the contract dated 09.03.2009. At present, the work left to be completed at the project site is non critical, amounts to INR 56 crores and is in the process of being discharged by the petitioner. Without prejudice to his opposition to the invocation itself and by relying on the decision of this Court in ***Bhushan Power & Steel Ltd. & Anr. Vs. Union of India W.P.(C) 7740/2015*** whereunder this Court allowed the Borrower's prayer to proportionally restrict the amount of bank guarantees to be kept alive, he submits that the

respondent cannot invoke bank guarantees, amounting to INR 208 crores, for securing balance work which only amounts to INR 56 crores. He submits that such an act is completely arbitrary, mala fide and only serves to further cripple the petitioner's financial position and make it even more difficult for the petitioner to fully complete the balance works at the project site within the DLP.

15. Mr. Krishnan further submits that the mode and manner of encashment of the bank guarantees is illegal and completely contrary to contractual stipulations. He submits that the respondent initially claimed that encashment was being carried out as per clause 30.1 of the contract, but this ground does not survive anymore since this clause would operate only in case the petitioner fails to provide copies of the extended original bank guarantees. Since the originals have been submitted, the respondent now claims that the encashment is being carried out in accordance with Clause 35.1(b) and (h) of the contract which pertain to Default of Contractor, but these clauses contain contractually mandated procedural requirements including a certification from the Engineer-in-charge of the alleged default, an 8-day notice from the respondent leading to expulsion of the petitioner from the project site, or releasing it from its obligations or liabilities under the contract – none of which have been complied with. He submits that there is no question of any default on the petitioner's part considering the fact that the respondent had granted three extensions of time to the petitioner to complete the project as also extended the DLP by 12 months, i.e., till 30.06.2021, without agitating any default by the petitioner or imposing any liquidated damages on this ground. He further submits that as per Clause 29.3 of the contract, once the

completion certificates had been issued in favour of the petitioner, the petitioner's liability in the project was restricted to the work carried out during the DLP. Thus, the respondent's attempt to now take shelter under new, entirely unsubstantiated allegations of Default for work completed prior to the issuance of the Completion Certificate, cannot hold ground at all. He relies on the decision of this Court in ***Satluj Jal Vidyut Nigam Ltd. Vs. Jai Prakash Hyundai Consortium ILR (2006) I Delhi 415*** to contend that in actual fact, the respondent had no concrete grievance against the petitioner regarding the performance of the contract in question and thus was not justified in invocation of these bank guarantees.

16. Mr. Krishnan finally submits that that the respondent could not be allowed to invoke the bank guarantees merely on the plea that they, being unconditional, are independent contracts. By relying on the decisions of this Court in ***Continental Construction Ltd. & Anr. Vs. Satluj Jal Vidyut Nigam Ltd. 2006 SCC Online Del 56*** and ***Hindustan Construction Company & Anr. Vs. Satluj Jal Vidyut Nigam Ltd. 2005 SCC Online Del 1249***, he submits that facts of the present case squarely fall within the exceptional circumstances whereunder the invocation of an unconditional bank guarantee can be enjoined by a Court. He submits that the invocation is not only fraudulent considering the respondent's conflicting and ever changing reasons for the same, but a clear case of special equities exists in favour of the petitioner. He submits that admittedly, pursuant to a round of arbitration conducted previously between the parties, the respondent was found liable for the delay caused in executing the project and has been directed to pay the petitioner a sum of INR 164 crores along with

interest. He submits that although the respondent has neither challenged this award under Section 34 of the Act, nor paid the awarded amount, the petitioner has already instituted proceedings for execution thereof before this Court. He thus submits that any claim of the respondent based on which it is seeking to encash the petitioner's bank guarantees, has to be set off against its liability towards the petitioner under the award dated 14.10.2019 passed by the three-member arbitral Tribunal. By relying on the decision of a Coordinate Bench of this Court in ***Technimont Private Limited Vs. ONGC Petro Additions Limited O.M.P.(I)(Comm) 87/2020***, he submits that this ground itself creates special equities in favour of the petitioner to restrain the respondent from encashing the bank guarantees. He submits that a further reason for special equities arises out of the Office Memorandum(OM) issued on 13.05.2020 by the Ministry of Finance, Government of India, with the intent to infuse liquidity into the construction sector during the pandemic by envisaging part release of performance guarantees furnished by contractors, to the extent of the amount of work completed by them. As per this OM, the respondent ought to release the bank guarantees of INR 208 crores, reduced by the amount of work left incomplete, i.e., INR 56 crores, in favour of the petitioner. Merely because the respondent apprehends prospective liability, it cannot act contrary to the OM dated 13.05.2020 and seek to further aggravate the petitioner's financial difficulties caused by the respondent's failure to pay the awarded amount. He submits that the petitioner's case for special equities is further strengthened by the fact that it had never shied away from completing the works under the contract, as is evident from its progress at the project site till now and

the respondent's decision to extend the DLP, but was only prevented from doing so on account of financial difficulties which were now further compounded by the respondent's illegal and malafide encashment of the bank guarantees in its possession. He submits that once the respondent was satisfied with the work schedule submitted by the petitioner and had extended the DLP, its decision to turn around and invoke the bank guarantees shows that this is a case wherein special equities exist in the petitioner's favour. For all the aforesaid reasons, he submits that there is a clear case of special equities in favour of the petitioner which could not be ignored by this Court while considering the legality of the respondent's decision to invoke these bank guarantees.

17. On the other hand, Ms Maninder Acharya, learned senior counsel for the respondent while opposing the petition, submits that the petitioner had, without any basis, challenged the respondent's request for encashment. These bank guarantees were independent contracts between the respondent and the Bank and were unconditional and irrevocable in nature, which implied that they were payable on first demand. For this purpose, she relies on the decision of the Hon'ble Supreme Court in *Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited and Anr.* (2016) 10 SCC 46 and contends that these bank guarantees could be encashed at the respondent's behest without any demur or protest by the petitioner or the issuing Bank, and all the claims of the petitioner under the Concession Agreement were not material in considering the legality the incovation itself. Thus, by relying on the decision of this Court in *National Highways Authority of India Vs Elsamex –TWS-SNC Joint*

Venture *FAO No. 400/2007*, she reiterates that this Court could not embark on an examination of the parties' claims on the mere invocation of these bank guarantees, rather it was requisite for the Bank to honour its obligations under these bank guarantees. The settled exceptions to this rule of unbridled invocation of an unconditional bank guarantee were if the party objecting to the invocation could show that (1) there was an element of fraud of an egregious nature in connection with the bank guarantee and/or its encashment, (2) encashment of the bank guarantee would result in irretrievable harm or injustice of an irreversible kind to one of the parties, and/or special equities existed in favour of the petitioner. While the petitioner had not raised any plea on fraud, it had failed to establish any irreparable loss or injury which it could possibly incur on account of the encashment of these bank guarantees. By relying on the decision of a Coordinate Bench of this Court in *Umaxe Projects Private Limited Vs Air Force Naval Housing Board* 2019 SCC OnLine Del 9126, she submits that the mere possibility that encashment of these bank guarantees might aggravate any purported financial distress being faced by the petitioner, was not sufficient to conclude that the petitioner was incurring irretrievable harm. She further submits that when the respondent issued completion certificates to the petitioner on 26.06.2018 and 20.09.2018, these certificates were duly accompanied by a list of balance works bearing details of the work left to be completed. It was imperative for the petitioner to ensure that these works were completed within the DLP, in fact the petitioner had even made an admission to that effect in its letter dated 25.05.2020 stating that it was contractually bound to rectify and faithfully complete the civil work and balance works. In any event,

the extension of the DLP and the extension of bank guarantees provided for this period were composite and went hand in hand. However, with passage of time, the petitioner did not only fail to provide the extended bank guarantees to the respondent despite numerous requests spanning over five months, it also failed to take any commencement steps on the balance works, or provide any schedule to complete the balance works. In fact, the respondent, on 13.02.2020 had warned the petitioner of its failure to adhere to the schedule for completion of balance civil works as also its failure to provide the schedule for E&M and HM works, both of which were admitted by the petitioner in its letter dated 25.05.2020. Thus, the petitioner's habitually tardy execution of the works throughout the duration of the project, its failure to provide the extended bank guarantees on time compounded by its failure to duly carry out the assigned works during the Defect Liability Period triggered a justifiable apprehension in the respondent, who had already spent INR 2119 crore in a project which was initially awarded for a sum of INR 1925.84 crore, that the petitioner may not complete the balance works in time. She submits that the petitioner has already caused significant losses to the respondent by failing to deliver quality work as stipulated under the contract, and by refusing to carry out any repair work and rectifications thereto, which reduced the power generation capacity of the project. She urges that absolutely no question of special equities arises in favour of the petitioner in the present case when the request for encashment of these bank guarantees stemmed out of the petitioner's failure to adhere to the work schedule, which was agreed upon by the parties for completing the balance works, as also for violating Articles

27.2, 28.1, 30.1 and 30.2 (failure to deliver to the Owner BGs for the extended period of contract), 35.1.b (failure to commence the works or suspensions of the progress of the works...) and 35.1.h (failure to take effective steps for making good the defects, deficiencies or damages....) of the General Conditions of Contracts (GCC). She submits that another instance of the petitioner violating the provisions of the GCC was its failure to make requisite payments for outstanding dues to the PRW's/Sub-Contractors and Sub-Contractors which created disputes with them, rendering the petitioner liable for non-compliance of labour laws, triggering strikes at the project site and delaying the project considerably. As a result, while the petitioner had been open and willing to discuss the schedule for civil works, it had been entirely unable to formulate or propose any schedule pertaining to completion of balance HM and E&M works entrusted to the sub-contractors. To make matters worse, the petitioner was unable to adhere to the schedule agreed upon for completion of balance civil works. The petitioner, in further violation of the contract, had also failed to furnish fresh additional performance bank guarantee for a sum of Rs.33,23,75,341/- which was being claimed by the respondent since September 2018, a demand which was reiterated in its letter dated 10.04.2020. She submits that the petitioner, in fact, seemed to be holding all further work at the project site hostage, subject to release of payments which it alleged was due from the respondent. She submits that rather than effecting cost-cutting measures to ensure progress of work, the petitioner is under the assumption that it can raise unsubstantiated and premature demands against the respondent. For all these reasons, she submits that it is clear that it is the respondent who

would incur irretrievable damage if it were prevented from encashing these bank guarantees, and a perusal of the reasons for encashment would reveal that the special equities, infact, existed in favour of the respondent. She submits that in any event, in the light of the decision of this Court in *Suzlon Energy Ltd. Vs. Zemira Renewable Energy Ltd OMP (I)(Comm) 340/2019*, these were all serious disputes on the merits of the parties' claims and could neither be delved into to restrain the invocation of an unconditional bank guarantee, nor could be adjudicated by this Court in a petition of this nature.

18. Ms. Acharya's second submission is that contrary to the arguments advanced by the petitioner, the request for encashment of these bank guarantees were placed only after providing due notice to the petitioner of its various defaults in executing the works. She submits that notably, this was not even the first instance of the respondent invoking a bank guarantee furnished by the petitioner; repeated and regular defaults in the past by the petitioner had led to encashment of its bank guarantees by the respondent, most recently on 10.04.2020 when the petitioner had beseeched the respondent to withdraw its request for encashment of a performance bank guarantee in April 2020 in order to recover third party payments effected to discharge the petitioner's statutory liabilities for workers' wages. She submits that even this request for encashment in April 2020 was not sudden or arbitrary, but followed several correspondences exchanged between the parties on the topic of petitioner's deficient execution of works and failure to provide the originals of the extended Bank guarantees in a timely manner. The respondents had been issuing letters to the petitioner since 2018 setting out the various pending

repair works it needed to carry out at the project site and lamenting the petitioner's lack of response to these calls of action. For this purpose, she draws my attention to the letter dated 10.12.2019 sent by the respondent to the petitioner requesting submission of a workable median plan, an undertaking to effect immediate action for rectification and repair, and to expedite completion of balance works in different fronts. She submits that these correspondences are important since they proved that it was not as though the respondent was inactive or unresponsive to the dynamic ground level work at the project site, rather, it kept a close monitor on the progress of work and placed regular requests for repair and rectification with the petitioner. Even the respondent's decision to extend the Defect Liability Period was proof of the numerous opportunities granted to the petitioner to correct the course it adopted while executing these works over the last 11 years. She submits that the first correspondence relevant to the invocations challenged in this petition can be traced back to 13.02.2020 when the respondent extended the DLP by another year till 30.06.2021, pointed out the petitioner's failure to adhere to the schedule for completing balance civil works or to provide the schedule for completing the balance HM and E&M works. In the very same letter, the respondent had also directed the petitioner to extend the bank guarantees provided for the balance works, to suit the extended Defect Liability Period. When no response was received from the petitioner, the respondent, on 02.03.2020 and 11.03.2020, sent two more letters reiterating its request for extension of bank guarantees for sums of INR 107.81 crores (Retention Bank Guarantees for civil works component) and INR 2,22,94,516/- (for the PDE Contract). Admittedly, on

25.03.2020, against these demands, the petitioner submitted extended bank guarantees for a sum of INR 52.92 crores. Correspondingly, the respondent kept sending various letters to the petitioner requesting extension of bank guarantees expiring on 30.03.2020 and 15.05.2020. Even on 19.03.2020, the respondent expressed its dissatisfaction with the petitioner's manner of executing the work at the project site. She submitted that thus, the invocation was not arbitrary or malafide or sudden in any manner, it came after the respondent had extended the petitioner many opportunities over several years to begin rendering work in accordance with the schedule prescribed.

19. Ms. Acharya's finally submits that the petitioner's claims for monies recoverable from the respondent were either premature or completely baseless, and were anyway irrelevant to ward off any encashment by the respondent of unconditional bank guarantees issued in its favour. All payments for the work done stood paid by the respondent and those which were yet to be carried out, were in the processing stage; the delay in payment against the petitioner's VAT and Toll Tax Claims arose out of the petitioner's own default in failing to provide the requisitioned documents to the respondent, which was in violation of Article 50.3 of the GCC, as recorded in the respondent's letter to the petitioner on 29.02.2020. In fact, subsequently in its letter dated 22.04.2020, the respondent, informed the petitioner that pending dues payable to it as claims against VAT and toll tax, CAR Insurance Premium against the extended stay were being processed. The respondent, in its letter dated 22.04.2020, had even informed the petitioner that none of its payment request were pending for certification. She submitted that the petitioner's conduct betrayed its

intent to raise unsubstantiated claims against the respondent for monies under various pretexts, in fact even in its letter 25.05.2020, the petitioner had unilaterally announced its decision to make any further progress of balance works at the project site contingent upon payment of monies by the respondent. She further submits that the sums recoverable by the respondent from the petitioner by way of *inter alia* compensation for losses caused by incomplete and delayed works, reimbursement for the wages paid to the petitioner's labourers by the respondent in the month of April, 2020 at the petitioner's behest, could not be ignored. The respondent was also yet to recover the tax liability raised by the J&K Department against the respondent for concealment of materials/goods imported by the petitioner or its suppliers/contractors using TIN of the project. She submits that the petitioner had failed to declare the invoices for interstate purchases in its sales tax return filed before the CTO, Baramulla which was also in violation of the contract between the parties. In this regard, in its letter dated 11.05.2020, the respondent had explicitly informed the petitioner that this tax liability shall also be deducted from the dues/or be recovered by encashment of Bank Guarantees under the applicable provision of contract. She submits that even the petitioner's claims for a sum of INR 163.55 crores under the arbitral award date 14.10.2019, amended in March 2020, was completely premature since the period of limitation to challenge the same under Section 34 of the Act, had not extinguished. She urges that since no verified payment of the petitioner was pending with the respondent, the petitioner's opposition to the encashment on these grounds ought to be rejected. She, thus, prays for the petition to be dismissed with costs.

20. I have heard learned counsel for the parties and with their assistance perused the record.

21. From the factual matrix as noted hereinabove, the foremost fact which emerges is that all the bank guarantees sought to be invoked are unconditional; the legal position governing such guarantees is that they are independent and distinct contracts between the issuing Bank and the Beneficiary, completely unrelated to the primary contract governing the relationship between the Borrower and the Beneficiary, and the inter se dispute of the parties cannot be a ground to withhold payment under the bank guarantees. It is also equally well settled that while dealing with a petition under Section 9 of the Act, seeking injunction on invocation of a bank guarantee, the Court is not expected to examine or determine the inter se disputes between the Borrower and the Beneficiary. However, while protection of national commercial interest requires the Court to be slow and circumspect while granting injunctions on the encashment of an unconditional and irrevocable bank guarantee, it is equally true that there are certain fetters to the beneficiary's right of encashment which have been carved out by various decisions of the Apex Court and this Court. However, identifying whether the facts of a case fall within these exceptions cannot be condensed into any straight jacket formula and, therefore, whenever encashment of an unconditional bank guarantee is challenged, the Court is required to examine the peculiar facts of each case to ascertain whether it qualifies under any of these exceptions. Therefore the short question arising in the present case is whether the unconditional guarantees furnished by the petitioner qualify under the exceptions carved out by Courts for restraining encashment of

unconditional bank guarantees.

22. At this stage, before dealing with the rival submissions of the parties, it may be appropriate to note the legal position in this regard as summarized in previous decisions of this Court. Reference may be made to the decision in ***State Trading Corporation of India Ltd. Vs. State Bank of India & Ors.*** 2013 SCC Online Del 935 wherein a Coordinate Bench of this Court, while discussing the scope of intervention in unconditional bank guarantees, held as under:

“19. The law in relation to bank guarantees has also now attained a wider dimension with the passage of time. Originally the only exception carved out to prevent the encashment of a bank guarantee was fraud. However, subsequent judicial pronouncements have extended this scope by adding other class of cases which would fall in this exception. Cases of irretrievable injury, fraud, extraordinary special equities and invocation of bank guarantee being not in terms of the bank guarantee itself. It is very difficult to draw any straitjacket formula which would universally apply to all the cases. Suppression of facts made by the party against the beneficiary and prima facie there being evidence to show that there is truth in these allegations, would not entitle the party to straightway invoke the bank guarantee. (See Synthetic Foams Ltd. v. Simplex Concrete Piles (India) Pvt. Ltd. AIR 1988, Delhi 2007 and Hindustan Construction Co. Ltd. v. Satluj Jal Nigam Ltd. AIR 2006 Delhi 169. The judgment of Dwarikesh Sugar Industries Ltd. (supra) would have no application; facts of the said case being distinct as admittedly in that case there was no breach of contractual obligation. The ultimate decision of the Swiss Court and the GAFTA having been upheld, it was patently clear that the petitioner had abused his power by invoking the bank guarantee.”(emphasis supplied)

23. Reference may also be made to a recent decision in ***Technimont Pvt. Ltd. & Anr. Vs. ONGC Petro Additions Ltd.*** 2020 SCC OnLine Del 653, wherein the Court, after examining other landmark decisions

on the question of unconditional bank guarantees and their encashment, held as under:

“12. We are in complete agreement with the law relating to invocation of bank guarantee as it emerges from the judgments cited by the learned counsel for the SJVN and other judgments of this High Court. In U.P. State Sugar Corporation v. Sumac International Ltd., (1997) 1 SCC 568, Supreme Court held:

“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 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.”

13. In Dwarikesh Sugar Industries's case (supra), Supreme Court held as under:—

“Coming to the allegation of fraud, it is an admitted fact that in the plaint itself, there was no such allegation. It was initially only in the first application for the grant of injunction that in a paragraph it has been mentioned that the appellant herein had invoked the bank guarantee arbitrarily. This application contains

no facts or particulars in support of the allegation of fraud. A similar bald averment alleging fraud is also contained in the second application for injunction relating to Bank Guarantee No. 40/47. This is not a case where Defendant 1 had at any time alleged fraud prior to the filing of injunction application. The main contract, pursuant to which the bank guarantees were issued, was not sought to be avoided by alleging fraud, nor was it at any point of time alleged that the bank guarantee was issued because any fraud had been played by the appellant. We have no manner of doubt that the bald assertion of fraud had been made solely with a view to obtain an order of injunction. In the absence of established fraud and not a mere allegation of fraud and that also having been made only in the injunction application, the court could not, in the present case, have granted an injunction relating to the encashment of the bank guarantees.” (emphasis supplied)

24. Thus, what emerges is that there are primarily two exceptions to the rule of invoking an unconditional bank guarantees at the mere demand of the Beneficiary. The first being that the demand for payment is fraudulent, particularly fraud of such egregious nature which vitiates the very foundation of the entire transaction. In order to succeed on this ground, a mere bald allegation of fraud is not sufficient and the petitioner is required to furnish complete particulars in the petition itself. The second exception to the rule of immediate encashment of unconditional bank guarantees is that of special equities existing in favour of the borrower, which includes irretrievable harm or injury that may befall the borrower in case the payment for the unconditional bank guarantee is realised and, in select cases, harm which would shock judicial conscience. While the terms ‘irretrievable harm/injury’ and ‘special equity’ do not have predetermined definitions, the Courts have attempted to define their parameters in a catena of decisions. On the aspect of irretrievable injury or harm, this

Court had, in *Continental Construction Ltd. & Anr. Vs. Satluj Jal Vidyut Nigam Ltd.* 2006 SCC OnLine Del 56, referred to the decision in *Itek Corpn. Vs. First National Bank of Boston* 566 Fed Supp 1210 to observe as under:

“14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in the ITEK Corpn. case. In that case an exporter in USA entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American Bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licenses in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances and realisation of the bank guarantee/letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In ITEK Corpn. case there was a certainty on this issue. Secondly, there was good reason, in that case for the court to be prima facie satisfied that the guarantors, i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee.” (emphasis supplied)

25. In order to determine as to whether the petitioner has indeed made out a case falling within one of these two exceptions, it would be necessary to refer to the rival stands of the parties regarding the factual matrix. It may be apposite to note that both sides are ad idem that work on the project is still ongoing. Even though the completion certificates in respect of all the three units were duly issued by the respondent in favour of the petitioner in June, 2018 and September, 2018, the respondent had clearly set out the balance work which needed to be completed within the allocated time by way of annexures to these completion certificates. Consequently, the defect liability period was also extended, which meant that the petitioner was required to accordingly extend all the bank guarantees provided to secure the defect liability period. While the petitioner claims that a majority of the work stands completed, barring work amounting to a sum of INR 56 crores which is of non-essential nature and largely comprises of landscaping work, the respondent alleges otherwise. As per the respondent, the petitioner is lagging considerably behind the agreed schedule and despite the respondent's repeated requests since 2018, which are documented between the parties, the work is still proceeding at a slow pace. Considering the fact that the project was set up to provide hydro-electric power to rural and disconnected parts of the state of Jammu and Kashmir, this inordinate delay attributable to the petitioner has caused recurring losses to the respondent. The respondent, while vehemently denying the petitioner's claim that the balance work required to be carry out is only of about INR 156 crores, has further claimed that it is entitled to recover huge sums from the petitioner towards tax liabilities and labour charges alongwith

compensation for the recurring losses suffered on account of reduced production of power. I do find merit in Ms.Acharya's plea that the inter se disputes between the parties on the amounts recoverable as also whether balance work was being carried out as per the schedule are beyond the scope of the present petition and can only be determined in arbitration. In these circumstances, once the respondent has denied the petitioner's averment that the value of balance works is INR 56 crores, then the decision in ***Bhushan Power & Steel Ltd.(supra)*** will not be applicable to the facts of the present case.

26. However, since the petitioner's entire case hinges on special equities by challenging the respondent's ever changing reasons for invocation, in that its reason for invocation was initially pegged as non-submission of the originals of the extended bank guarantees and now it is default in completion of balance work in terms of the contract, it may be necessary to refer to the correspondence exchanged between the parties in some detail.

(i) The completion certificates dated 26.06.2018 and 20.09.2018 issued by the respondent: have been relied upon by the respondent to claim that an outer deadline of 01.09.2018 and 17.09.2018 respectively had been provided to the petitioner to finish the balance works. For the sake of convenience, only the relevant extract of the completion certificate issued in June, 2018 has been reproduced below:-

"Pursuant to Article 26 of GCC (Completion of Works), of the aforementioned contract agreement relating to the 'Turnkey Execution of Kishanganga H E Project (J & K), Owner hereby notify the contractor that the following part of the works was completed on the date specified below, and that, in accordance with the terms of contracts and as requested by the contractor vide letter no.HCC/EPC/KG/SA/NHPC/6841 dt. 06.06.2018, the Owner hereby

issues the Completion Certificate of the said part (s) on the date mentioned below:

1. *Description of the Section or part of the works: Generating Unit No.1 comprises of turbine-generator and all such auxiliary and associated civil, electrical, mechanical and hydro-mechanical works as are necessary for the commercial operation thereof. The above include the works of dam complex, the water conductor system, all common plant and machinery in the power house, switchyard, access and cable tunnels and all gates, valves and other electrical and mechanical plant & machinery, except such works as are necessary only for the operation of 2nd or 3rd turbine-generators.*

2. *Date of completion Unit # 1 30.05.2018*

However, the contractor is required to complete the balance works listed thereto 05 Annexure-1, 2 & 3 as per the schedule submitted vide no.HCC/SITE/KG/PM/NHPC/6838 & 6849 dt. 05/08.06.2018 i.e. by 01.09.2018.

Further this Certificate does not receive the contractor of its obligations to complete the Project in all respects in accordance with the contract nor of its obligations during the defect liability period. ”

(ii) The respondent's letter dated 13.02.2020: Although the respondent had relied on several letters dating as far back as 2018 to caution that the petitioner had been receiving warnings for a very long time to speed up its work, the decision to extend the defect liability period was finally expressed by way of its letter dated 13.02.2020. Per contra, the petitioner has also relied on this very letter to contend that extension of the defect liability period implied that the respondent found the petitioner's work to be in order. This letter reads as under:

“Sir,

This is to draw your Attention towards the last schedule for completion of balance works of the subject Turnkey Contract within the Defect liability period submitted by you (Ref.3). Vide our letters at Ref.485, you were requested to submit the schedule for completion of balance portion of Supplies and commissioning of HM & E & M

works and the pending documentations and submissions under the scope of PDE works as per the provisions of the said Contract.

But, it is seen that since Oct 2019 there has been no significant progress in execution of balance civil works as per the Schedule submitted by you. Further, M/s HCC has also not provided the Schedule/ action plan for completion of the balance E & M and HM activities. As a result, substantial portion of the balance works as identified in the Completion Certificates have remained un-executed, which is set to spill over beyond the Defect Liability period i.e. 27th June, 2020) w.r.t. the Completion certificates issued against the Units.

Apart from the above, there has been no action to firm up a workable remedial action plan for inspection, repair /rectification of damages of Runner of Unit#1, Deflector and Turbine housing etc. encountered during the Defect Liability Period and notified by you from time to time, necessitating taking up different restoration works at the risk and cost of Contractor. Despite the persuasion by NHPC vide letters mentioned at Sr. No.5 to 7, to expedite the completion of above mentioned works, no tangible action has been materialized till date.

Under the above circumstances, it is a fit case for extension of Defect liability period of the Contract for a further period beyond the 27th June, 2020 (end date of the Defect liability period) till the balance works are completed.

Keeping in view the ground situation of balance works at different fronts and schedule for completion of balance civil works submitted by M/s HCC and the time required for completion of balance HM, E & M supplies and commissioning activities under the Scope of the Turnkey Contract, in exercise of the powers conferred to the Engineer in-charge under the Article 27.6 of GCC read with Article 28.1 of GCC and the general obligation of contract under Article 27.2 of GCC, you are hereby notified of the decision to extend the Defect liability period of the Contract for a further period of one year, i.e. up to 30th June, 2021.

In pursuance to the decision to extend the Defect liability period of the Contract and in line with the Article 5.5 of SCC read with Articles 26, 27 and 30.2 of GCC, you are advised to take necessary action for extension of BG in respect of Retention money of INR 107.81 Crs. For civil works (M/s HCC) and INR 2,22,94,516 & Euro 5,31,517 in respect of PDE works (M/s Halcrow) for a further period upto 30th June, 2021.

M/s HCC is also requested to submitted an updated Schedule for completion of all balance Civil, Hydro-mechanical and E & M works

(including balance punch points in the schedule attached with the Certificate of Completion & supply of balance spares) and outstanding submissions & documentations required under the PDE scope of the Turnkey contract.

Necessary action for extension of validity of BG for Retention money up to the periods mentioned above and submission of updated schedule or completion of balance works may be completed at the earliest and feedback on the actions taken be communicated to this Office latest by 02nd March, 2020., ”

(iii) The petitioner’s letter dated 10.04.2020: The respondent has relied on this letter to show that the invocation under challenge is not the first instance of invocation of a bank guarantee provided by the petitioner, even in April, 2020 the petitioner had attempted to do so. However, the invocation had been deferred at the petitioner’s behest with the sanguine hope that the petitioner would adhere to the schedule and discharge its obligations in a timely manner. The relevant extracts of the letter dated 10.04.2020 reads as under:-

“Dear Sir,

At the outset HCC wishes to withdraw its letter referred at serial number 10 under reference, submitted by mail dated 09-04-2020.

Further, HCC draws kind attention of NHPC to various exchanges of communications on the matter relating to release of third-party payments in favour of various beneficiaries connected with the execution of KGHEP. HCC has already submitted the proposal in compliance to NHPC letters referred to under serial 2 and 3. In the meantime, the directions of the district administration have also been issued to ensure immediate payment in view of the prevailing COVID-19 pandemic.

In this regard HCC has received advice from the Bank (IDBI Bank Limited) to deposit an amount of Rs. 8.54 Crs immediately as part of Bank Guarantee bearing No. 2009004IBGP0050 is being encashed by beneficiary. Thus it is apparently understood that NHPC is invoking part of the PBG to clear the part liabilities of HCC. In this regard, NHPC is again requested to kindly consider HCC’s submissions made in letters at serial 7 and 8, wherein the severe adverse impact on

HCC's overall business as well as its functioning in various project under execution have been explained. Further, NHPC's attention is also invited to HCC's letter sent to Minister of power dated 08.04.2020 referred at Sl No.9). Therefore, NHPC was requested to consider release of third-party payments from various receivables of HCC and / or Retention money of the consortium.

In view of foregoing and in order to protect interest of both the parties, HCC humbly requests and proposes the following, for kind consideration of NHPC:

- 1. NHPC shall withdraw encashment request of part PBG/BG bearing no. 2009004IBGP0050 raised on IDBI Bank Limited immediately.*
- 2. NHPC to release the payment to the tune of 15.1 Crores on ad-hoc basis, in favour of the beneficiaries as per the list already provided to NHPC by HCC.*
- 3. HCC requests NHPC to conclude the pending determination of all issues as enlisted in Annexure-A attached herewith, in earliest manner so that fund thereof can be further infused/utilized in the project including adjustments ad-hoc payments. HCC confirms its readiness for providing further support and assistance for early conclusions of pending issues.*
- 4. NHPC may charge interest on above said ad-hoc release of payment till its recovery at the rates applicable as per Contract and the same shall be recovered from any of the receivables of HCC. NHPC may recover such payment by way of encashment of available BG with NHPC, only as a last resort, if receivables are found less/insufficient. NHPC may recover the same by way of encashment of available BG with NHPC, as a last resort. In addition to above, HCC also request NHPC to kindly look into the cash flow requirement of the project and extend further financial support for completing the balance works by releasing the part payment against the arbitration award.*

In view of the above, HCC requests NHPC to kindly withdraw request for part encashment of BG bearing No.2009004IBGP0050 immediately and release payments to workers and others as per the proposal already submitted to NHPC.

*In advance anticipation of affirmative support and action of NHPC, thanking and assuring you of our best cooperation at all times to come.
Thanking you”*

(iv) The respondent's letter dated 11.06.2020: The petitioner has heavily relied on this letter to urge that the respondent, being satisfied with the work schedule proposed by the petitioner, had directed it to submit originals of the extended bank guarantees within seven days, failing which the respondent would be constrained to invoke the bank guarantees. Relevant extract of the letter dated 11.06.2020 reads as under:-

“Sir,

This is with reference to our various letters mentioned under reference vide which M/s HCC was requested to submit the extended Retention Money Bank Guarantees of M/s HCC and M/s Harcrow and Performance Bank Guarantee (PBG) of Civil, HM & E & M contracts and BG towards advance of E & M contract.

In response to this M/s HCC and M/s Harcrow have submitted some of the BGs in original/ scan and some of BGs are yet to be submitted. The status of BGs submitted by M/s Kishanganga Consortium (M/s HCC and M/s Harcrow) and issued by different banks is enclosed at Annexure-1 and Annexure-II.

In view of the above also in view of the renewed situation of relaxed lockdown due to Covid-19 pandemic, it is once again requested to submit the pending extended ORIGINAL Bank Guarantees within 07 (seven) days from the issue of this letter failing which the owner will be constrained to initiate BG encashment action as per provisions of the contract and as per term and conditions of BGs.

The validity of the performance BG as mentioned at S. Nos.E1 (Annexure-1) in respect of PDF contract is also going to expire on 10.08.2020 and balance works of PDE contract still not completed, hence it is also requested the extended the validity of the said BG suitably and submit the extended BG as early as possible.

Thanking you”

(v) The respondent's letter dated 12.06.2020: This is the letter whereunder the bank guarantees, sought to be protected under this petition, were invoked and has been relied upon by the respondent to

substantiate its position that, even until the last minute, due notice and exhaustive reasons for invocation had been given to the petitioner. Relevant extract of the letter dated 12.06.20220 reads as under:

“Sir,

In response to the request of M/s HCC vide Letter No.7222 dated 10.04.20 read with Letter No.7233 dated 25.05.2020 as proposed by M/s HCC, payments for the workers engaged by M/s HCC through third party agencies were released through Assistant labour commissioner, Bandipora in compliance to Article 17 of GCC, by way of an interest bearing advance, to tide over the immediate crisis on account of COVID-19 situation. As requested by you, it is to notify that an amount of Rs.7.60 Crs including administrative charges and applicable taxes. Applicable interest charges shall be calculated on settlement of amount recoverable.

As on date, a major proportion of the balance works as committed in the completion schedules of Civil, HM and E&M works submitted by M/s HCC at the time of issue of Commissioning Certificates for the different Turbine-generator Units have remained incomplete. The schedules of completion of the balance works submitted by M/s HCC vide letter No.7233 dated 25.05.20 & the e-mail dated 26.5.20 are incomplete as they do cover the schedule in respect of the balance E & M and HM works M/s HCC has stated to be pursuing the status of the balance works and the schedule of its completion with the concerned Sub-contractors. M/s HCC to ensure submission, schedule of the HM & E & M balance works at the earliest, to give a fair picture of the schedule for completion of the balance works.

On perusal of the schedule furnished by HCC, it is noted that the schedule in respect of the balance civil works, is broadly in order. But, the balance quantities seems to require a review in respect of the items such as, Left side wall of auxiliary spillway, value house/Power pack finishing works, Downstream energy dissipation structure & some of the balance items of Power house area, to correctly account for the balance works. M/s HCC may please do the needful to review these points to ensure completion of all the balance works under the scope of turnkey contract as per Article 28 of GCC.

M/s HCC, referring to their cash flow conditions, have made assumption of extension of financial support by NHPC as extended in April'20, as a condition for implementation of the submitted schedule. In this regard, it is apt to record that the third party payment for the wages

& statutory payment of manpower in April, 20, was made in the light of failure of M/s HCC comply with its statutory obligation as per Article 17 of GCC and the exceptional circumstances due to COVID-19. However, the extension of similar financial assistances on a regular basis does not appear feasible due to the following reasons:

- NHPC has released to M/s HCC the entire contractually admissible due payments as per BOQ including the contingencies in respect of the civil works and mostly so in respect of the HM works and only BOQ payments in respect of the incomplete portions of E & M Works is balance. The admissible BOQ payments will become due in respect of balance HM and Electromechanical works as and when they are executed. The request for release of the further interest bearing advances, beyond the contractual provisions, does not muster support as maximum admissible BOQ based contractual payment against the balance works is around half of the Rs.56 Cr. Only.
- The claims related to enhanced rates of Toll, VAT & GST which are contractually admissible, are in advanced stage of scrutiny and efforts are on to expedite the conclusion of decision of the Engineer. But M/s HCC is required to submit, the requested supporting documents for an early settlement of the Claim.
- Non tenability of Claims was communicated to M/s HCC time to time, after detailed examination and considered conclusion arrived at by the Engineer. It is to point out that there have been no fresh inputs from M/s HCC to justify the review of these rejected claims.
- As NHPC has reservations on the grounds/basis relied upon by the Arbitral Panel in concluding their award on the claim for additional cost during the original contract period, the Owner is exercising his contractual rights to seek remedies as admissible under Arbitration and Reconciliation Act against arbitral awards and the outcome of that process.
- Engineer had notified M/s HCC, the leader of the Consortium, of the defects/problems encountered in the operation of Turbine –generator units from time to time during the DLP, with a request to take up necessary rectification works. But, non-attendance of these problems both by M/s HCC and M/s BHEL as per provisions of Article 27 of GCC resulted in prolonged downtimes of generator Units (during 2018-19 & 2019-20), with resultant huge generation & revenue losses to NHPC. The assessed FI due to loss of generation is around INCR 564 Cr. for which, the Owner notifies his right to claim damages for the loss on account of the default of the Contractor.

- Additionally due to lack of response from M/s HCC lead Consortium, NHPC, had to incur an approx. expenditure of Rs.25 Cr. which is due for recovery from the consortium. This includes the amount released to M/s HCC recently on account of the wages to labour and Pf.
- J & K Tax department has raised a claim of around Rs.663775212/- on account of tax liability on the grounds of misuse by M/s HCC of the TIN of NHPC including interest, in bringing in their material into the territory of J & Kt during the years 2012-13 to 2015-16. Considering due interest upto 31.5.2020, this amount shall be Rs.778847382/-. The matter, which is before the Appellate authority, if not settled by the J&K Tax department, the tax claim amount is liable to be recovered from M/s HCC in terms of contractual obligations as per GCC article 33.
- The compensation cost for the extended period of working, is to be evaluated as per the contract provisions based on verification of the relevant contemporary documents. But, there were delays/non-submission of the records sought from M/s HCC resulting in delays in finalization of compensation. Meanwhile, M/s HCC referred the claim for arbitration.
- Third and final time extension was granted for the turnkey contract up to 27.06.18, based on actual commissioning of the last Unit, without levy of LD; but without any cost to Owner as well, in view of the concurrent delays on the part of the Contractor, which also contributed in equal measures to the delays in commissioning of the Units.
- Thus, the claims can only be processed within the parameters of the contractual terms and conditions. Over-reliance of M/s HCC on settlement of claim has resulted in balance works of around Rs.56 Cr. remaining incomplete nearly two years after commissioning.
- In view of M/s HCC's stated inability to furnish any fresh bank guarantee, for the release payments against the Arbitral awards request of the contractor for release of ad-hoc advance against the Arbitral award, cannot be considered.

M/s HCC will appreciate that the most critical part of the Balance works is installation, commissioning of some of the auxiliary and sub-systems of E&M and attending to recurring problems in the Units, encountered during the DLP of the Contract, due to lack of association by E&M Sub-contractor, M/s BHEL reportedly due of some pending contractual issues with M/s HCC. Despite requests, M/s HCC has not sorted out the same and NHPC was requested not to interfere in the contractual issue between M/s HCC and BHEL (Ref. M/s HCC letter No.7143 dated 26.9.2019) M/s HCC may please take action to resolve the pending issue

with M/s BHEL to streamline the balance erection/supply works by M/s BHEL.

On the issue of request vide letter No.7234 dated 29.5.20, for release of Performance Bank Guarantee, your reference is invited to Article 30.2 of GCC, as per which, the Bank guarantees shall remain valid till 15 days after the date of issue of the Final Acceptance certificate and Sl. No.5 of the OM dated 13.05.20 of Ministry of Finance appended by HCC, which clearly mentions that payment is to be regulated as per the contract provision. In view of the balance works of Rs.56 Cr. as assessed by M/s HCC and the recoverable of Rs.25 Cr. against the works done by NHPC at the risk and cost of HCC, and the issue of Tax claim of around Rs.77 Cr. raised by J & K Tax department and Revenue loss of the Rs.564 Cr. suffered by NHPC, due to failure of the contractor to discharge their obligation during DLP, it would not be feasible at this stage to accede to the request for release of PBG.

At the end, HCC may kindly note that

xxx

- 6) M/s HCC is therefore requested to start mobilization of required resources for the implementation of the proposed schedule and expedite*
- (a) A comprehensive proposal showing the planned monthly schedule of physical progress/milestones covering all the items of balance works of Turnkey Contract (Civil, HM, Electro-mechanical items, Architectural and finishing items, balance PDE works and completion of unattended rectification works and likely financial progress planned at the contractual rates, based on the above physical progress.*
 - b) Monthly cash flow requirement to supplement the existing resources to achieve the above proposed progress.*
 - c) Ways and means envisaged by HCC to ensure the repayment of the Advances with interest.”*

27. From a perusal of the correspondences reproduced hereinabove, there can be no doubt about the fact that the issues of delayed work and the invocation of bank guarantees were certainly not raked up by the respondent for the first time on 12.06.2020. Evidently, the petitioner was being granted repeated opportunities to carry out the work on time and submit fresh schedules but it failed to do so. Whether this failure can be blamed on the petitioner or the respondent or whether it was

owing to circumstances beyond the control of both parties, is a question which will have to be determined in appropriate proceedings. However, the fact remains that the petitioner was duly cautioned for lagging behind schedule, and merely because the respondent's letter dated 11.06.2020 may not be happily worded and appears to suggest that invocation of bank guarantees would take place in case the originals of the extended bank guarantees were not submitted on time, the fact remains that there were also several other, concurrent reasons for the respondent to invoke them. Furthermore even though the letters sent on 13.02.2020 and 12.06.2020 do suggest that the petitioner was required to provide the work schedule and, in accordance therewith, mobilise its resources for execution of work, these letters cannot be read in isolation and have to be read in conjunction with the other correspondences exchanged between the parties. Even though the petitioner has urged that more than 99% of the work stands completed, which assertion has been denied by the respondent, the fact remains that the work of such a prestigious and cost intensive project is still lagging behind the schedule agreed upon between the parties and stipulated in the completion certificates. Thus, the respondent's invocation of the bank guarantees cannot be deemed to be fraudulent in any manner.

28. Even otherwise, to fall within the exception of fraud, it was incumbent upon the petitioner to show fraud of egregious nature. In the present case, it is not the case of the petitioner that while entering into the contract, it was in any manner deceptively induced to furnish the bank guarantees. Even otherwise, to invoke this exception, the petitioner was required to specifically set out the particulars of fraud in

its petition, but I find that though this ground was urged at the time of making submissions, neither has the petitioner made out any case for fraud in its pleadings before this Court, nor has it been able to establish or plead any fraud underlying the contract or in the act of furnishing bank guarantees, nor do the correspondences exchanged between the parties in any manner point towards any fraud on the part of the respondent. The exception of fraud, therefore, does not arise in the present case.

29. Now coming to the plea of special equities which has been vehemently urged by the petitioner. As observed hereinabove, the term ‘special equity’ cannot be compartmentalized and may include cases wherein the petitioner is able to prove that (i) encashment of the bank guarantees would cause irrecoverable loss to the petitioner or (ii) would prick the judicial conscience of this Court. Naturally, the existence of these exceptional circumstances can only be determined from the facts of each case. In the first case of irrecoverable loss under the exception of special equity, I find that there is no cause for the petitioner to apprehend an impossibility of reimbursement from the respondent in case these bank guarantees are encashed. The petitioner has certainly not made a case to that effect and while it has gone to great lengths to plead that the respondent delays payments and owes it enormous sums, it is a settled position that disputes of that nature do not find relevance in petitions under Section 9. Thus, the sole and final aspect remaining to be examined is whether, in the facts of the present case, permitting encashment of these bank guarantees would invite such harm on the petitioner which would shock the judicial conscience. This Court, while examining the parameters of this exception of

‘special equities’ in *Hindustan Construction Company Ltd. Vs. Satluj Jal Vidyut Nigam Ltd.* 2005 SCC OnLine Del 1249, had observed that any attempt to overreach the process of adjudication with an intent to cause irreparable prejudice to the other side was a circumstance which would be capable of being characterized as having shocked judicial conscience or tilt the ‘special equities’ in favour of the applicant in that regard. Thus, ‘harm which may shock judicial conscience’ is a niche demarcation within the exception of ‘special equity’, in that it travels beyond the ordinary meaning assigned to the term ‘special equity’ to include irretrievable injustice of such a nature which shocks the conscience of the Court.

30. In support of its plea that the facts of the present case squarely fell within the exception of special equity, the petitioner has primarily relied on the respondent’s letters dated 13.02.2020 and 12.06.2020 to contend that the respondent, being cognizant of the work being carried out diligently by the petitioner and the nature of the project, had not only extended the DLP on 13.02.2020 but had also directed the petitioner to extend the bank guarantees, provide a schedule for executing the remaining work and mobilise work force accordingly. It is also the petitioner’s case that once the respondent, as recently as on 12.06.2020, had acquiesced to the petitioner’s schedule for civil works and given its approval thereto, then any complaint or dissatisfaction it alleges on the respondent’s part is completely falsified. On this aspect, the several correspondences placed on record by the respondent to substantiate its contention that the petitioner was behind schedule, its work failed to meet contractually stipulated standards and that the respondent had contemplated invoking the bank guarantees earlier as

well, assumes significance.

31. In this regard, it may be appropriate to note that as per the annexures to the completion certificates issued by the respondent in June and September, 2018, the balance work was required to be completed by September-October, 2018. Today, the admitted position is that the balance works still need to be completed; though the petitioner has tried to justify the delay on various grounds, the delay itself cannot be denied and the date for completion of the work has been extended repeatedly. Therefore, the petitioner's plea that once the respondent kept extending the dates, it is now estopped from urging any default on the petitioner's part can be noted only to be rejected. I find that the mere fact that the DLP had been extended by the respondent neither implies an admission on the respondent's part of being satisfied with the petitioner's work nor proves that the respondent had acquiesced to the work schedule submitted or practiced by the respondent. Rather, the respondent, being conscious of the fact that the project was a prestigious and ambitious initiative on the part of the Government of India, was justified in extending the contract and requesting the petitioner to expedite the work, instead of terminating the contract directly. However, notwithstanding the respondent's letter dated 11.06.2020 which the petitioner has read to contend that any invocation had been made contingent on receipt of the originals of the original extended bank guarantees which is no longer possible, I find that the remaining correspondences placed on record show that there were always simultaneous reasons relating to *inter alia* deficiency in work, non-adherence to schedule, which the respondent had been agitating with the petitioner for quite some time. The letter dated

11.06.2020 and the contents thereof were not set in stone, and it was certainly not the sole correspondence sent by the respondent regarding its intent to invoke the bank guarantees.

32. In support of the petitioner's plea of special equities, Mr. Krishnan placed reliance on the decision of a Coordinate Bench in *Technimont (supra)* to urge that since the arbitral Tribunal had held the respondent liable to pay a sum of INR 164 cores to the petitioner, it was evident that special equities existed in favour of the petitioner. He also urged that in the light of this liability owed to the petitioner, the respondent could not further enrich itself by encashing the bank guarantees, that too when the balance work was of much lesser amount. Having carefully considered the decision in *Technimont (supra)*, I find that the same is not applicable to the facts of the present case at all. In the facts of that case, the Beneficiary, notwithstanding the award existing against it, was seeking to invoke bank guarantees furnished for performance of the contract. In those circumstances, the Court had held that once an arbitral award had been passed against it, the respondent/Beneficiary was estopped from invoking bank guarantees given for performance of the contract. In the present case, admittedly the arbitral award is yet to attain finality and these bank guarantees do not have any connection with the award in question. Thus, the respondent's claim of recovering a much larger amount from the petitioner on account of the wages, tax liabilities, recurring loss owing to deficient work carried out by the petitioner is yet to be adjudicated. Thus for all the aforesaid reasons, I am unable to find any special equities in favour of the petitioner which would compel me to interject to the invocation of unconditional bank guarantees.

33. Now coming to the petitioner's only other submission that the bank guarantees have been illegally invoked, without there being any default on the petitioner's part under Clauses 30.1 and 35 of the Contract, which plea was only raised during arguments. It has been urged that once no certificate of default was issued by the Engineer-in-Charge and none of the other conditions were applicable, viz. the petitioner being bankrupt or wound up or unauthorisedly assigning the contract, there was no question of any default under Clause 35 entitling the respondent to invoke the bank guarantees. Similarly, it has been contended that once the originals of all the extended bank guarantees were received by the respondent, its plea that the petitioner was in breach of Clause 30.1 was also misplaced. It has, thus, been urged that once there was no default either under Clause 30.1 or Clause 35, the invocation itself was without any justifiable cause. I find absolutely no merit in this submission. In the light of the settled legal position that an unconditional bank guarantee is an independent contract between the Bank and the Beneficiary, the question as to whether the petitioner is in default of the contract or not would not be relevant. Once these unconditional bank guarantees warrant payment to the Beneficiary without any demur or protest, the Bank is bound to honour the bank guarantees, irrespective of any disputes raised by the petitioner.

34. Before I conclude, even though I have not been persuaded by the arguments made against invocation of the bank guarantees, I am constrained to note my dismay at the gridlock prevailing between the parties in the present case and its likely impact on the completion of the project. On the one hand, the respondent/NHPC wants the petitioner to continue with the project, but it does not want to extend

any further financial assistance or leniency at the same time. On the other hand, the petitioner believes that it is owed certain amounts from the respondent and, on account of its financial constraints, has raised a demand for these amounts and has also opposed encashment of the bank guarantees as it would deepen its financial woes. Although it is not for this Court to decide these issues, which are arbitrable at the instance of either party, it cannot be ignored that a lot of the public exchequer has been utilised in this project through the Respondent. Permitting this gridlock to continue and aggravating it by encashing the bank guarantees would only delay completion of the project at a time when the nation is already reeling from the lethal outbreak of COVID-19. Irrespective of the disputes between the parties, greater regard ought to be given to the fact that ultimately it is the general public which would benefit from this project and, therefore, an endeavor should be made to provide them this benefit at the earliest.

35. Accordingly, the present petition is dismissed with no order as to costs. Keeping in view that the invocation of these bank guarantees was stayed on an ad interim basis on 23.06.2020, which direction has continued for the last two months, this interim arrangement is directed to continue for a further period of ten days.

(REKHA PALLI)
JUDGE

AUGUST 27, 2020
Sdp/gm/sr