

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

% Date of decision: 18th August, 2020

+ W.P.(C) 4443/2020, CM APPL. 16009/2020

VECTRA ADVANCED ENGINEERING PVT LTD

& ANR.

..... Petitioners

Through: Mr. Balaji Subramanian, Adv. and
Ms. Ishani Banerjee, Adv.

versus

UNION OF INDIA THROUGH SECRETARY MINISTRY OF
DEFENCE & ANR.

..... Respondents

Through: Mr. Rakesh Kumar, CGSC with
Mr. Amit Gupta, Adv. &
Mr. Sahaj Garg, Adv. for R-1

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. The present petition has been filed by the petitioners with the following prayers:

“In view of the above facts and circumstances, the Petitioners pray that this Hon’ble Court be pleased to:

- (a) Call for the records of RFP being File No. 68071/SSUGS/WE-4/RFP Cell dated 12.11.2012;*
- (b) Quash the decision of Respondent No. 1 that the Petitioner No. 1 has violated the PCIP;*
- (c) Quash the letter of the Respondent No. 1 dated 20.07.2020 invoking the Bank Guarantee issued by the Respondent No. 2;*
- (d) And Grant any other and further relief that this Hon’ble Court may deem fit in the interest of justice”*

2. The facts as noted from the writ petition are, the petitioner no.1 has been in the business of providing Skid Steer Loaders to the Govt. of India and the Indian army since 2007. In November, 2012, respondent no.1, Ministry of Defence ('MoD' for short) floated a tender to fulfil their requirement of 1820 Skid Steer Loaders which are engineering equipment meant for the Armed Forces. The request for proposal ('RFP' for short) also included a Pre-Contract Integrity Pact ('PCIP' for short) that contained stipulation that the bidder must not have violated any laws in bidding for the project etc. This according to the petitioner is a standard document issued as per CVC guidelines. The PCIP mentioned the names of three eminent persons who are to act as Independent External Monitors ('Monitors' for short). It is averred that the respondent no.1 was to refer any complaint about any bidder to the said monitors.

3. The PCIP was further supported by an Integrity-Pact Bank Guarantee for an amount of Rs.3 Crore. The petitioner being one of the bidders, initially submitted a Bank Guarantee issued by Bank of Maharashtra. On September 4, 2014, the petitioners replaced the original Bank Guarantee with a fresh Bank Guarantee issued by the IDBI Bank, the respondent no.2 herein. According to the petitioners, four firms started participating in the technical trials conducted by the Director General of Weapons and Equipment. It is the case of the petitioners that on October 1, 2015, the respondent no.1 informed them that they had provisionally qualified the Field Evaluation Trials and the matter would proceed subject to vigilance clearance.

4. Thereafter on April 8, 2016, the respondent no.1 informed the bidders that their commercial quotes would be opened on April 12, 2016. According to the petitioners, this indicated to them that they had received the vigilance clearance. It is also the case of the petitioners that they were the L1. However, the respondent no.1 did not award the contract and rather kept the matter pending. Between 2014-2019, the respondent no.1 repeatedly asked the petitioners to extend the Bank Guarantee as well as commercial offer which was duly done by the petitioners. Suddenly, the respondent no.1 took a decision that the petitioner No.1 company has violated the PCIP and on July 20, 2020 sought to invoke the Bank Guarantee. According to the petitioners, the respondent no.1 had kept another similar tender with the petitioner as bidder on hold without any reason. The petitioners had filed W.P.(C) 6443/2014 challenging this inaction. In the counter-affidavit in that petition it was stated by the respondent no.1 that the petitioners had not received vigilance clearance because of pendency of two FIRs against Mr. Ravinder Kumar Rishi ('Ravinder Rishi' for short) who was associated with the Company. Neither of these FIRs pertain to the petitioner Company. Further, respondent no.1 itself stated in the counter-affidavit that out of two FIRs a closure has been filed in one case and in the other though a charge sheet was filed, Mr. Rishi was not charge sheeted.

5. It is stated by the petitioners that they have not challenged the decision of the respondent no.1 to invoke the bank guarantee in the said writ petition. It is also stated that the said writ petition was dismissed by this Court. In substance, it is stated by the petitioners that if at all it can be said that there was anything against them, it pertains to the FIRs,

wherein nothing has been found against the petitioner no.1 Company. It is averred that the sudden decision of the respondent no.1 to hold without any notice or enquiry that the petitioners had violated the PCIP is patently arbitrary and illegal.

6. A counter affidavit has been filed by the respondent no.1 wherein it is stated that the Defence Procurement Procedure ('Procurement Procedure' for short) contemplates an acquisition process which has to pass through various stages before finalisation of the contract. This procedure includes solicitation of offers. In response to solicitation of offers, bids are received from the vendors. The PCIP between the Govt. Department and the bidder for procurement is an important requirement under the procurement procedure. The PCIP is a binding agreement between the Govt. Department and bidders for specific contracts in which the Govt. of India promises that it will not accept bribes during the procurement process and bidder promises that they will not offer bribes. Further, every bidder while submitting commercial bid is required to submit Integrity Pact Bank Guarantee.

7. The petitioner no.1 participated in various Defence Procurement Schemes viz. 1-2 Ton Rough Terrain Fork Lift Truck ('RTFLT' for short), 2.5-4 Ton RTFLT, Skid Steer Loader and Material Handling Crane. Some of these cases were held up at various stages of procurement due to adverse vigilance status of the petitioner no.1 on account of the following CBI cases:

- a. **CBI FIR RC-AC-1-2012-A0004(Truck Deal) case dated March 30, 2012**

- i. As per CBI FIR, there were irregularities in the dealing of M/s. BEML with Tatra Sipox (UK) for supply of Tatra vehicles, its components and spares as an original equipment manufacturer. However, M/s. Tatra Sipox (UK) whose affairs in India were managed by Ravinder Rishi (also shown as one of the Directors of the Company) is not involved in manufacturing of Tatra vehicles and cannot be termed as OEM.
- ii. It is alleged that unknown officers of BEML entered into criminal conspiracy with Ravinder Rishi and fraudulently assigned contracts to M/s. Tatra Sipox (UK) by showing it as OEM against the provisions of the procurement procedure. Vehicles worth approx. Rs. 5000 Crore have been supplied to Indian Army in this manner.
- iii. In continuation of the conspiracy unknown officers of BEML also allowed change of currency from US\$ to Euro and further by not levying liquidated damages caused a loss of approx. Rs.13.27 Crores.
- iv. On August 27, 2014, CBI informed that investigation in the case could not substantiate the levelled allegations. Accordingly, a closure report was filed in the Court of Special Judge, Patiala House, New Delhi on August 25, 2014 and the same is under consideration with the Court.

b. CBI FIR RC-AC-1-2012-A0014 dated October 19, 2012 (case of alleged bribery filed by General V.K. Singh Ex. Chief of Army Staff)

- i. CBI in its FIR registered a case under Section 12 of the PC Act, 1988 for suspected offence of abetting public

servant to accept illegal gratification brought out that General V.K. Singh the then Chief of Army Staff made a complaint that Lt. Gen. Retd. Tejinder Singh had offered him bribe of Rs.14 Crore on behalf of Ravinder Rishi to clear the file for procurement of 1676 high mobility vehicles including Tatra vehicles.

- ii. The charge sheet has been filed in the case naming only Lt. Genl. Retd. Tejinder Singh. As per the information received from CBI, the case is still under trial at the stage of prosecution evidence in the Court of Special Judge, PC Act, CBI.

8. It is also stated in the counter-affidavit that in the case of procurement of 1-2 ton RTFLT, the petitioners signed a PCIP with the Government on October 15, 2009 when Bank Guarantee for Rs.3 Crore was submitted by petitioner no.1 which was encashed due to violation of PCIP as the owner (virtual owner) of the petitioner no.1 was under investigation by the CBI in the above two cases. That post encashment of the Bank Guarantee, the petitioner no.1 filed a W.P.(C) 6443 of 2014 in this Court seeking directions to the respondent no.1 to act in accordance with the Procurement Procedure of 2008 and finalize the contract with the petitioner. It is stated that this Court vide a detailed order dated March 08, 2018 dismissed the writ petition and observed that PCIP was violated and the respondent no.1 has some basis to support its actions.

9. Subsequently, after the Bank Guarantee encashment in 1-2 ton RTFLT matter, the issue was considered by the respondent no.1, MoD

for action against the petitioner, in the other procurement cases involving the company / Ravinder Rishi including the Bank Guarantee encashment. Meanwhile, the respondent no.1 promulgated guidelines for penalties in business dealing with entities by the MoD. In accordance with the guidelines, action for dealing with the petitioner no.1 was processed. With the approval of the Raksha Mantri, a Committee was constituted for examining application of Ministry's guidelines for penalties to the business dealings with entities in procurement cases involving the petitioner no.1. The committee recommended suspension of business dealings with petitioner no.1 for a period of one year. The respondent also in their counter-affidavit relied upon the information received from the Ministry of Corporate Affairs in the year 2015-2016 to show the share-holding pattern of petitioner No.1 to include Ravinder Rishi and his family members. According to the respondent no.1, the large shareholding by Ravinder Rishi and his family members clearly indicate undeniable relationship between the petitioner no.1 and Ravinder Rishi and his family.

10. It is stated that Ravinder Rishi or the petitioner no.1 has never intimated MoD regarding their involvement in the two CBI cases at any point during the pendency of procurement cases. It is also averred that closure report has been filed in the case of Tatra Truck, but the same is still pending for consideration and therefore, the involvement of Ravinder Rishi in the case still needs to be taken into cognizance. It is also stated that though Ravinder Rishi has expired, his involvement in the case and linkages with the petitioner no.1 still remain for applicability of breach of the guidelines of MoD for penalties in business dealings with entities.

11. With regard to the bribery case, it is stated, though the charge sheet does not mention the name of Ravinder Rishi, the fact that FIR indicates his name shows a degree of alleged collusion of Ravinder Rishi in this case. A reference is also made to clauses 6.1 to 6.9 of the PCIP which indicates the various acts and omission or commission on the part of the bidder that have a bearing on the successful implementation of the agreement. Clause 10 of the PCIP also stipulates that any breach of provisions of the PCIP entitles the buyer to take action against the seller which includes forfeiture of the Earnest Money Performance Bond i.e., Bank Guarantee, cancellation of the agreement without giving any compensation, to recover all the sums already paid with interest, to cancel any other contracts with the bidder and debar the bidder from entering into any bid from the Government for a minimum period of 5 years.

12. On the aspect of PCIP reference is made to clause 10.2 of the PCIP which contemplates that decision of the buyer to the effect that breach of the provisions of the Integrity Pact has been committed by the bidder shall be final and binding on the bidder. However, the bidder can approach the monitors appointed under the PCIP. Clause 12.4 of the PCIP also contemplates if any complaint with regard to violation of PCIP is received by the buyer in the Procurement Case the buyer shall refer the complaint to the Independent Monitors for their comments / enquiry.

13. It is stated that as per the MoD guidelines of 2015 there are two types of complaints (a) complaints by public and (b) competing vendors. In the instant case the procurement of Skid Steer Loaders, the

matter pertains to CBI FIRs are not covered under the complaints as per the MoD guidelines. Therefore, there was no need for the respondent no. 1, that is the buyer MoD, to refer the matter to the monitors. It is also stated in the counter-affidavit that Bank Guarantee is a separate and independent contract. A perusal of the terms of the Bank Guarantee shows that the same are unconditional and on invocation of the same the bank has to honour the same without demur. The petitioners have failed to make out any case of breach of any condition of the bank guarantee by the respondent and there is not even allegation of fraud against the respondent no.1. Therefore, the petition under Article 226 of the Constitution of India is not maintainable and is liable to be dismissed.

SUBMISSIONS:-

14. Mr. Balaji Subramanian, Id. Counsel appearing for the petitioners would submit that the present petition under Article 226 of the Constitution of India is maintainable. According to him this is not a commercial dispute that can be resolved by arbitration or Civil Court. According to him, declaring the petitioner no.1 to not have integrity is a state act having severe consequences for the person concerned. In other words, the impugned action of the respondent no.1 has a public law element and as such the reliefs as sought by the petitioners in the petition are maintainable. In support of his submission he has relied upon the Judgment of the Supreme Court in the case of ***Joshi Technologies International v. Union of India, (2015) 7 SCC 728***. He also relied upon the Judgment of the Supreme Court in the case of ***Kumari Srilekha Vidyarthi v. State of UP (1991) 1 SCC 212*** in

support of his submission that every state action in the contractual realm has to satisfy the requirement of fairness.

15. That apart he stated that the impugned action is in violation of Principles of Natural Justice. According to him, for the respondent no.1 to hold that the petitioners have violated the PCIP tantamounts to blacklisting them or even worse. Surely such a declaration should ordinarily be preceded by a show cause notice and a hearing. In support of his submission, he relied upon the Judgements of the Supreme Court in the case of *Urussian Equipment and Chemicals Ltd. v. State of West Bengal*, (1975) 1 SCC 70; *Southern Painters v. Fertilizers and Chemicals Travancore Ltd.*, (1994) Suppl. 2 SCC 699; *Gorkha Security Services v. Govt. of Delhi*, (2014) 9 SCC 105; *Kulja Industries v. Western Telecom Project BSNL*, (2014) 14 SCC 731.

16. He concedes to the fact that show cause notice can be dispensed with in an emergency situation which is not the case here inasmuch as petitioner no.1 is not named in either of the FIRs or even remotely concerned with them. That apart no action has been taken on the RFP since 2016. Even the Bank Guarantee is valid till November 15, 2020 and could be extended thereafter if required. He stated the justification of the respondent no.1 that PCIP does not contemplate issuance of show cause notice is untenable. He also stated that the respondent no. 1 has violated the provisions of the PCIP more specifically clause 12.4 which contemplates respondent no.1 to refer the matter to the independent external monitors for the enquiry.

17. It was also the submission of Mr. Subramanian that any administrative action effecting the rights of persons needs to satisfy the

constitutional standards which have gradually moved from the Wednesbury principles to proportionality. According to him in the case in hand even the Wednesbury principles are not met. He stated that the allegations in Tatra Truck case have not been substantiated. Even in the bribery case, Ravinder Rishi has not been charge sheeted. The fact, that closure report is yet to be accepted by the Special Judge is irrelevant. This he says that CBI has filed a closure report and the MoD has not protested it. Further the acceptance of the closure report is between the Special Judge and the CBI over which no party has any control. Further, the mere registration of FIRs is no ground to hold that a person lacks integrity. Further the action is disproportionate and fails the principle of proportionality.

18. On the Judgment of this court in the earlier writ petition being W.P.(C) 6443/2014, Mr. Subramanian has stated that impugned action in the earlier writ petition was of August 8, 2014. MoD came to know on August 27, 2014 that CBI has filed a closure report in Tatra FIR because the investigation could not substantiate the levelled allegations and on August 14, 2014, it transpired CBI was not charge sheeting Ravinder Rishi in bribery case. That apart, Ravinder Rishi has expired in the year 2016. That apart, respondent no.1 has not justified as to why it did not hold the petitioner no 1 in violation of the PCIP in 2014 as it has done so in 2020. He prays for the reliefs as claimed in the petition.

19. On the other hand, Mr. Rakesh Kumar, Id. Counsel appearing for respondent no.1 at the outset stated that the present petition filed by the petitioner under Article 226 of the Constitution of India is not

maintainable. According to him, the challenge of the petitioner in this petition is to the invocation of the Bank Guarantee given by the petitioner no.1 pursuant to an Integrity Pact Agreement executed between the petitioner no.1 and the respondent no 1. The terms of the Bank Guarantee are very clear. The same being unconditional and can be invoked any time without citing any reason. He states, if the invocation of the Bank Guarantee assuming without admitting to be an illegal invocation, the remedy for the petitioner is to approach a Civil Court for damages. Further, Mr. Kumar has referred to a letter dated September 9, 2016 of the Ministry of Corporate Affairs to show the shareholding pattern of the petitioner no.1 Company to include Ravinder Rishi, his wife, his two daughters and his two sons. That apart, he stated that the closure report in Tatra Truck case filed by the CBI has still not been accepted by the learned Special Judge. So, it is still a case where the involvement of Ravinder Rishi cannot be ruled out. According to him, the position as was existing when the earlier writ petition was dismissed, continues to exist as of today. He stated that the petitioner having not challenged the invocation of the Bank Guarantee earlier cannot challenge the same today. He also stated that Mr. Subramanian cannot treat the impugned action as that of a blacklisting as no such action has been taken. He relies upon following Judgments in support of his submissions on the bank guarantee:

1. Mahatma Gandhi Sahakara Karkhana, (2007) SCC 470

2. U.P. State Sugar Corporation v. Sumac International Ltd., (1997) 1 SCC 568

3. *V.D. Swamy and Company Pvt. Ltd. v. M/s. Lodge Contrell India Pvt. Ltd., 2013 of Madras High Court decided on December 3, 2013.*

20. That apart he stated the plea of Mr. Subramanian that the matter was required to be referred to the Monitors is also without any merit as the impugned action is not on the basis of a complaint made, but on the FIRs registered by the CBI. In substance, it is his submission that stipulation shall not be applicable. He seeks the dismissal of the petition.

21. Having heard the learned counsel for the parties and perused the record, the first issue that needs to be decided is whether the petitioners who have challenged the invocation of Bank Guarantee, which is unconditional, the remedy for them would be to seek damages, that too in a Civil Court. I am not in agreement with this plea of Mr. Kumar for the reason, the petition has been filed laying challenge to the decision of the respondent no.1 that the petitioner no.1 has breached the PCIP, which also contemplates, upon such a breach, the Bank Guarantee can be invoked. So the invocation is consequential to the breach of PCIP. The substantive relief sought, being against the decision of respondent no.1, holding that petitioner no.1 has breached the PCIP, surely the petitioners are within their right to seek a consequential prayer with regard to Bank Guarantee that too against respondent no.1, which comes within the definition of State as per Article 12 of the Constitution of India, action of which surely have a public law element. Mr. Subramanian is justified on placing reliance on the Judgment of the Supreme Court in *Joshi*

Technologies Ltd. (Supra), wherein in Para 69.1, the Supreme Court has said

“The Court may not examine the issue unless the action have some public law character attached to it”

22. In so far as the other pleas advanced by Mr. Subramanian are concerned, there is no dispute that Clause 10 of PCIP under the headings “Sanctions for violation” contemplates the following action in the eventuality of breach of PCIP, i.e., Clause 6 and 7. Clauses 6, 7 and 10 are reproduced as under:

“6. The Bidder commits, himself to take all measures necessary to prevent corrupt practices, unfair means and illegal activities during any stage of his bid or during any pre-contract or post-contract stage in order to secure the contract or in furtherance to secure it and in particular commits himself to the following:-

6.1 The Bidder will not offer, directly or through intermediaries, any bribe, gift, consideration, reward, favour, any material or immaterial benefit or other advantage, commission, fees, brokerage or inducement to any official of the Buyer, connected directly or indirectly with the bidding process, or to any person, organization or third party related to the contract in exchange for any advantage in the bidding, evaluation contracting and implementation of the Contract.

6.2 The Bidder further undertakes that he has not given, offered or, promised to give, directly or indirectly any bribe, gift, consideration, reward, favour, any material or immaterial benefit or other advantage, commission, fees, brokerage or inducement to any official of the Buyer or otherwise in procuring the Contract or forbearing to do or having done any act in relation to the obtaining or execution

of the Contract of any other Contract with the Government for showing or forbearing to show favour or disfavour to any

person in relation to the Contract or any other Contract with the Government.

6.3 The Bidder will not collude with other parties interested in the contract to impair the transparency, firmness and progress of the bidding process, bid evaluation, contracting and implementation of the contract.

6.4 The Bidder will not accept any advantage in exchange for any corrupt practice, unfair means and illegal activities.

6.5 The Bidder further confirms and declares to the Buyer that the Bidder is the original manufacturer/integrator/authorized government sponsored export entity of the defence stores and has not engaged any individual or firm or company whether Indian or foreign to intercede, facilitate or in any way to recommend to the Buyer or any of its functionaries, whether officially or unofficially to the award of the contract to the Bidder, nor has any amount been paid, promised or intended to be paid to any such individual, firm or company in respect of any such intercession, facilitation or recommendation.

6.6 The Bidder, either while presenting the bid or during pre-contract negotiations or before signing the contract shall disclose any payments he has made, is committed to or intends to make to officials of the Buyer or, their family members, agents, brokers or any intermediaries in connection with the contract and the details of services agreed upon for such payments.

6.7 The Bidder shall not use improperly, for purposes of competition or personal gain, or pass on to others, any information provided by the Buyer as part of the business relationship, regarding plans, technical proposals and business details, including information contained in any electronic data carrier. The Bidder also undertakes to exercise due and adequate care lest any such information is divulged.

6.8 The Bidder commits to refrain from giving any complaint directly or through any other manner without supporting it with full and verifiable facts.

6.9 The Bidder shall not instigate or cause to instigate any third person to commit any of the actions mentioned above.

7. Previous Transgression.

7.1 The Bidder declares that no previous transgression occurred in the last three years immediately before signing of this Integrity Pact, with any other company in any country in respect of any corrupt practices envisaged hereunder or with any Public Sector Enterprises in India or any Government Department in India that could justify bidder's exclusion from the tender process.

7.2 If the Bidder makes incorrect statement on this subject, Bidder can be disqualified from the tender process or the contract, if already awarded, can be terminated for such reason.

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10. Sanctions for Violation

10.1 Any breach of the aforesaid provisions by the Bidder or any one employed by him or acting on his behalf (whether with or without the knowledge of the Bidder) or the commission of any offence by the Bidder or any one employed by him or acting on his behalf, as defined in Chapter IX of the Indian Penal Code, 1860 or the Prevention of Corruption Act 1988 or any other act enacted for the prevention of corruption shall entitle the Buyer to take all or any one of the following actions, wherever required.

(i) To immediately call off the pre-contract negotiations without assigning any reason or giving any compensation to the Bidder. However, the proceedings with the other Bidder(s) would continue.

(ii) The Earnest Money/Security Deposit/Performance Bond shall stand forfeited either fully or partially, as decided by the Buyer and the Buyer shall not be required to assign any reason therefore.

(iii) To immediately cancel the contract, if already signed. without giving any compensation to the Bidder.

(iv) To recover all sums already paid by the Buyer, in case of an Indian Bidder with interest thereon at 2% higher than the prevailing Base Rate of SBI. If any outstanding payment is due to the Bidder from the Buyer in connection with any other contract for any other defence stores, such outstanding payment could also be utilized to recover the aforesaid sum and interest.

(v) To encash the advance bank guarantee and performance bond/warranty bond, if furnished by the Bidder, in order to recover the payments, already made by the Buyer, along with interest.

(vi) To cancel all or any other Contracts with the Bidder.

(vii) To debar the Bidder from entering into any bid from the Government of India for minimum period of five years, which may be further extended at the discretion of the Buyer.

(viii) To recover all sums paid in violation of this Pact by Bidder(s) to any middleman or agent or broker with a view to securing the contract.

(ix) If the Bidder or any employee of the Bidder or any person acting on behalf of the Bidder, either directly or indirectly, is closely related to any of the officers of the Buyer, or alternatively, if any close relative of an officer of the Buyer has financial interest/stake in the Bidder's firm, the same shall be disclosed by the Bidder at the time of filing of tender. Any failure to disclose the interest involved shall entitle the Buyer to rescind the contract without payment of any compensation to the Bidder.

The term 'close relative' for this purpose would mean spouse whether residing with the Government servant or not, but not include a spouse separated from the Government servant by a decree or order of a competent court; son or daughter or step son or step daughter and wholly dependent upon Government servant, but does not include a child of step child who is no longer in any way dependent upon the Government Servant or of whose custody the Government servant has been deprived of any or under any law, any other person related,

whether by blood or marriage to the Government servant or to the Government servant's wife or husband and wholly dependent upon Government servant.

(x) The Bidder shall not lend to or borrow any money from or enter into any monetary dealings or transactions, directly or indirectly, with any employee of the Buyer, and if he does so, the Buyer shall be entitled forthwith to rescind the contract and all other contracts with the Bidder. The Bidder shall be liable to pay compensation for any loss or damage to the Buyer resulting from such rescission and the Buyer shall be entitled to deduct the amount so payable from the money(s) due to the Bidder.

(xi) In cases where irrevocable letters or Credit have been received in respect of any contract signed by the Buyer with the Bidder, the same shall not be opened.

10.2 The decision of the Buyer to the effect that a breach of the provisions of this Integrity Pact has been committed by the Bidder shall be final and binding on the Bidder, however, the Bidder can approach the monitor(s) appointed for the purpose of this Pact.”

23. Respondent no.1 has referred to two cases being investigated by CBI of which reference has already been made above. In one case, i.e. Tatra Truck case, though closure report has been filed by the CBI, the same is still pending consideration of the Special Judge. It is not a case where closure report has been accepted. Further, it is not disputed by Mr. Subramanian that Ravinder Rishi was part of petitioner no.1 Company. What is important in this case, is that the petitioner no.1 had earlier filed a writ petition being W.P.(C) 6443/2014 challenging the non-consideration of its bid for procurement of RTFLT. It is a conceded case of the petitioners that even in the year 2014, respondent no.1 had invoked a similar Bank Guarantee furnished by the petitioner no.1 on the same ground, an

action which was not challenged by the petitioner no.1 in that petition. In other words, petitioner no.1 had accepted the invocation of the Bank Guarantee on the ground of breach of PCIP on same grounds. Having accepted the said decision which has been upheld by the Court vide Judgment dated March 8, 2018 by stating as under, the decision now taken cannot be faulted. The relevant part of the said judgment is reproduced hereunder:-

“7. In the present case, it is not disputed by the petitioner that the respondent invoked the bank guarantee on 08.08.2014. Interestingly, the petitioner has not challenged the invocation nor has asked for any relief pertaining to the invocation based upon the respondent’s assessment that the Pre-Contract Integrity Pact (“PCIP”) had been violated. This assumes importance because the subsequent arguments and proceedings before this Court in this petition are entirely hinged upon the action of the respondent in proceeding to hold that Integrity Pact was violated. The closure report which the respondent eludes to in its counter affidavit pertinently states that the Special Judge in the New Delhi Courts refused to proceed upon the report on 25.08.2014 and evidently therefore, as on date, when the decision to encash the bank guarantee on the determination that the PCIP was violated, the respondent had some basis to do so. In the subsequent event, i.e. omission to invite petitioner for the contract negotiations then cannot be termed as arbitrary.”

24. Having said that, the plea advanced by Mr. Subramanian that the action is in violation of principles of natural justice as no show cause notice was issued before invoking the Bank Guarantee is without any merit for the reasons (i) the ground for invocation of Bank Guarantee is the same as was in the year 2014 (ii) when the invocation of Bank Guarantee of 2014 has not been challenged, but accepted, the show-cause notice is not required to be given as the grounds for invocation are already known (iii) even otherwise, no such notice is

required to be given as such a notice is not contemplated in the terms of the Bank Guarantee which in fact is unconditional. Even the plea of proportionality pleaded by Mr. Subramanian is unsustainable as action of 2014, upheld in the year 2018 was identical inasmuch as the invocation of the Bank Guarantee was on the same grounds with same consequence, i.e., invocation of Bank Guarantee for Rs. 3 Crores. In so far as the plea of Mr. Subramanian that the action has been taken without referring to the Monitors is concerned, the same is also not appealing. I agree with the submission of Mr. Kumar, who had relied upon the Clause 12.4 of PCIP which contemplates, if any, complaint is received by the buyer in a procurement case, the buyer shall refer the complaint to the Monitors for comments / enquiry. He also relied upon the guidelines of 2015 which contemplates two types of complaints (a) from public (b) competing vendors. Admittedly, the action taken is not on the basis of the complaints from the public / competing vendors but on the basis of cases investigated by CBI. The clause for reference to mediators has no applicability in the case in hand.

25. Further, I may state in so far as the invocation of Bank Guarantee is concerned, it is not the case of the petitioner that the Bank Guarantee invoked is contrary to the conditions stipulated therein. In fact, I find from the format of the Bank Guarantee it is unconditional. If that be so, the invocation cannot be faulted in view of the settled law as laid down by the Supreme Court, on which reliance has been placed by Mr. Kumar by referring to the judgement in the case of ***U.P. State Sugar Corporation v. Sumac International***

Ltd. (supra) wherein, in Para 12&16 the Supreme Court has held as under:

*“12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases. In the case of *U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.* [(1988) 1 SCC 174] which was the case of a works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first*

exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank [(1984) 1 All ER 351] (All ER at p. 352): (at SCC p. 197)

“The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged.”

This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.

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16. Clearly, therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees. There must be a fraud in connection with the bank guarantee. In the present case we fail to see any such fraud. The High Court seems to have come to the conclusion that the termination of the contract by the appellant and his claim that time was of the essence of the contract, are not based on the terms of the contract and, therefore, there is a fraud in the invocation of the bank guarantee. This is an erroneous view. The disputes between the parties relating to the termination of the contract cannot make invocation of the bank guarantees fraudulent. The High Court has also referred to the conduct of the appellant in invoking the bank guarantees on an earlier occasion on 12-4-1992 and subsequently withdrawing such invocation. The court has used this circumstance in aid of its view that the time was not of the essence of the contract. We fail to see how an earlier invocation of the bank guarantees and subsequent

withdrawal of this invocation make the bank guarantees or their invocation tainted with fraud in any manner. Under the terms of the contract it is stipulated that the respondent is required to give unconditional bank guarantees against advance payments as also a similar bank guarantee for due delivery of the contracted plant within the stipulated period. In the absence of any fraud the appellant is entitled to realise the bank guarantees.”

(Emphasis supplied)

In view of the above discussion, I do not see any merit in the petition. The same is dismissed.

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Dismissed as infructuous.

V. KAMESWAR RAO, J

AUGUST 18, 2020jg