

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 20.09.2021

+ **O.M.P.(I) (COMM.) 163/2020**

M/S ABIR INFRASTRUCTURE PRIVATE LIMITED Petitioner

versus

TEESTAVALLEY POWER TRANSMISSION
LIMITED & ORS.

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr S.S. Ray, Advocate with Ms
: Rakhi Ray and Mr Vaibhav Gulia,

For the Respondent : Mr Tarun Johri, Advocate with Mr
: Vishwajeet Tyagi and Mr Ankur Gupta.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Abir Infrastructure Private Limited (hereafter 'AIPL') has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act'), *inter alia*, praying that respondent no.1, Teestavalley Power Transmission Limited (hereafter 'TPTL'), be restrained from invoking the Bank Guarantees bearing no. 0910310BG0000163 and 0910310BG0000165 issued by respondent

no.2, State Bank of India. In the alternative, AIPL further prays that respondent nos. 2 and 3 (collectively referred to as 'SBI') be directed to not entertain any invocation of the aforementioned Bank Guarantees and to not encash the same.

2. The aforementioned Bank Guarantees are referred to as BG-163 and BG-165 and are collectively referred to as 'the BGs in question'. The present value of BG-163 is ₹7,11,04,475/- and that of BG-165 is ₹61,71,284/-.

3. Mr Ray, learned counsel appearing for AIPL, contended that TPTL is not entitled to invoke the BGs in question as the same are not unconditional Bank Guarantees and the requisite conditions for invoking the same – that AIPL has failed to perform the contract in question; has been called upon to pay the sum advanced; and has failed to pay the same – have not been met. According to him, it is not established that AIPL has failed to perform the contract in question, and therefore, the conditions in the underlying Contract have not been fulfilled. He submitted that since there is no finding of any Court or Tribunal of competent jurisdiction that AIPL has failed to fulfil its obligations under the terms of the Contract with TPTL, the BGs in question cannot be invoked.

4. It is AIPL's case that the issues involved in the present petition are no longer *res-integra* in view of the decision of a Coordinate Bench of this Court in ***Abir Infrastructure Private Ltd. v. Teestavalley Power Transmission Ltd. & Ors : 214 (2014) DLT 235***. AIPL contends that

this Court had considered the wordings of the BGs in question and had rejected TPTL's contention that the BGs in question were unconditional. The Court found that the BGs in question were conditional and could be invoked only if the conditions were met.

5. The controversy in the present case arises in the following context :-

5.1 The disputes between AIPL and TPTL arises in respect of an Agreement dated 22.02.2010 (hereafter 'the Contract') that was entered into between TTPL and a consortium of AIPL and M/s Deepak Cable India Limited for "*the construction of 400 KV D/C Transmission Line from the 1200 MW TEESTA III Hydro Electric Project in the State of Sikkim to the Kishanganj Pooling Station in the State of Bihar spanning a length of approximately 212 KM*" (hereafter 'the Project').

5.2 The Project was divided into two geographical sections. The first section stretched from TEESTA III Hydro Electric Project in the State of Sikkim to Panighata, West Bengal (termed as 'Package A-1'). The second section stretched from Panighata, West Bengal to Kishanganj, Bihar (termed as 'Package A-2'). The scope of work under the Project in respect of each section was covered under two Agreements – being the Supply Agreement and Service Agreement.

5.3 The consideration payable for the Supply and Service Agreements for the first section Package A-1 was agreed at ₹1,08,39,99,596/- (Rupees One Hundred and Eight Crores, Thirty Nine Lakhs, Ninety Nine Thousand, Five Hundred and Ninety Six only) and

₹117,41,06,487/- (Rupees One Hundred and Seventeen Crores, Forty One Lakhs, Six Thousand, Four Hundred and Eighty Seven only) respectively. The consideration for the Supply and Service Agreements for Package A-2 was agreed at ₹54,97,41,986/- (Rupees Fifty Four Crores, Ninety Seven Lakhs, Forty One Thousand, Nine Hundred and Eighty Six only) and ₹36,72,49,533/- (Rupees Thirty Six Crores, Seventy Two Lakhs, Forty Nine Thousand, Five Hundred and Thirty Three only) respectively. Thus, the aggregate consideration for the works under the Supply and Service Agreements, which were covered under the scope of the Contract, was thus ₹317,50,97,602/- (Rupees Three Hundred and Seventeen Crores, Fifty Lakhs, Ninety Seven Thousand, Six Hundred and Two only).

5.4 AIPL claims that immediately on notification of the Award of the Contract on 18.11.2009, it mobilised its manpower, equipment and other resources to execute the Contract.

5.5 Admittedly, the Contract could not be executed within the stipulated period and there were substantial delays. AIPL claims that the Contract was delayed for various reasons attributable to TPTL. It claims that after mobilization of its resources, it found that TPTL had not even obtained the necessary clearances such as forest clearance or the Right of Way (RoW) under the India Telegraph Act, 1885. The other statutory approvals were also not obtained. In view of the delays caused for reasons beyond the control of AIPL, the time for executing the Contract was extended from time to time. AIPL further states that TPTL

had also not done the preliminary necessary work of planning the Project and was not equipped to execute the Contract.

5.6 In 2010, a Core Committee was constituted at the instance of TPTL and the said committee was of the opinion that certain new equipment and machinery ought to be used to execute the works instead of using conventional methods. AIPL states that it had complied with the said requirement and purchased the equipment and machinery as desired by the Core Committee, for speeding up the execution of the Contract and meeting the various timelines. However, the cost of the said machinery was not reimbursed to AIPL.

5.7 AIPL further states that in addition to the reasons attributable to TPTL, the Project was also delayed on account of other reasons not attributable to either parties such as the Gorkhaland agitation in the years 2009 to 2011 and occurrence of an earthquake in the State of Sikkim in September, 2011 that resulted in a major damage. AIPL states that despite the abovementioned delays on the part of TPTL and/or for reasons beyond the control of AIPL, it completed 74% of the work till 14.05.2014.

5.8 AIPL had furnished eight Bank Guarantees to TPTL aggregating ₹56,95,85,144/- including the BGs in question. The BGs in question were to secure TPTL in respect of repayment/recovery of funds advanced by TPTL. BG-163, as initially submitted, was for a value of ₹15,85,05,417/- and BG-165, as initially submitted, was for a value of ₹2,80,69,966/-.

5.9 On 14.05.2014, TPTL sought to invoke all the eight Bank Guarantees for an aggregate amount of ₹47,90,73,153/-. BG-163 and BG-165 were invoked for a sum of ₹8,83,85,339/- and ₹76,78,053/- respectively.

5.10 The BGs in question were furnished by AIPL against advance payments, which were to be adjusted in tranches from payments against Running Account Bills (RA Bills). The values of the BGs in question were thus, required to be reduced corresponding to the adjustment of advance payments.

5.11 Aggrieved by the action of TPTL in invoking the Bank Guarantees, AIPL filed a petition under Section 9 of the A&C Act, before this Court, being OMP No. 557/2014, seeking stay of invocation of the eight Bank Guarantees aggregating ₹47,90,73,153/- furnished by AIPL in terms of the Contract.

5.12 This Court passed an *ad-interim* order dated 16.05.2014 in the said petition staying the encashment of the Bank Guarantees subject to the same being kept alive. TPTL appealed against the said order under Section 37 of the A&C Act before the Division Bench of this Court [being FAO (OS) 250/2014]. The said appeal was disposed of by the Division Bench by an order dated 21.05.2014 directing the banks to remit the entire amount covered by the Demand Drafts issued by SBI to the Registrar General of this Court. The Registrar General was directed to keep the amount in a Fixed Deposit in UCO Bank, in its name. And,

the matter was remanded to the learned Single Judge to pass a fresh order.

5.13 In terms of the order dated 21.05.2014 passed in FAO (OS) 250/2014, a sum of ₹47,90,73,153/- was deposited in this Court in a Fixed Deposit for a period of one year in the name of the Registrar General of this Court.

5.14 On 30.05.2014, TPTL terminated the Contract.

5.15 On 03.09.2014, this Court passed a judgment disposing of AIPL's petition under Section 9 of the A&C Act [*Abir Infrastructure Private Ltd. v. Teestavalley Power Transmission Ltd. & Ors : 214 (2014) DLT 235*]. This Court held that six of the eight Bank Guarantees (all except the BGs in question) were unconditional Bank Guarantees and thus, their invocation could not be interdicted except in a case of egregious fraud or special equities. The Court held that since no such special circumstances existed, no interference was warranted to injunct invocation of the Bank Guarantees.

5.16 Insofar as the BGs in question are concerned, this Court held that the said Bank Guarantees were conditional and the conditions had not been met. Accordingly, this Court interdicted the invocation of the two BGs in question.

5.17 Thereafter, on 01.11.2014, disputes between AIPL and TPTL were referred to an Arbitral Tribunal presided by Justice (Retired) A.S.

Anand, former Chief Justice of India, Justice (Retired) Deepak Verma and Justice (Retired) S N Krishna.

5.18 It is averred in the petition that subsequently Teesta Urja Limited (hereafter 'TUL'), Holding Company of TPTL intervened and, offered to amicably resolve the disputes. AIPL states that it was also keen for a negotiated settlement and readily accepted TUL's overture.

5.19 Thereafter, TUL constituted a three member Committee to examine the disputes between the parties. It is averred that TUL considered the relevant issues and found that TPTL's decision to terminate the Contract and to have the same executed at the risk and costs of AIPL was not justified. The Committee recommended that the amount of ₹38,30,09,761/- collected by encashment of the six Bank Guarantees be refunded along with interest. AIPL claims that despite the above it has not received any payments in terms of the recommendations made by the Committee.

5.20 On 30.01.2019 Corporate Insolvency Resolution Process was initiated against AIPL.

5.21 On 18.06.2020, TPTL once again sent a letter to AIPL demanding a sum of ₹7,72,75,759/- being the unadjusted outstanding amounts against the initial advances made to AIPL. TPTL further stated that if the payment as demanded was not made, it would invoke the BGs in question. The Resolution Professional in control of AIPL responded by a letter dated 23.06.2021 disputing the invocation of the BGs in question as the same were held to be conditional by this Court. The said

letter was followed by another letter dated 25.06.2020 requesting that the BGs in question be permitted to be kept alive for a further period of six months in terms of the decision of this Court dated 03.09.2014 in OMP 557/2014. TPTL had not consented to the same. Consequently, AIPL has filed the present petition.

Submissions

6. Mr. Ray, learned counsel appearing for AIPL, submitted that in view of the decision of this Court in OMP No.557/2014, TPTL is interdicted from invoking the BGs in question. The Court had held that the BGs in question were conditional and the said decision has attained finality. Thus, TPTL could not invoke the BGs in question without any Court or Tribunal finding that AIPL had failed to fulfil its obligations under the terms of 'the Contract'.

7. He pointed out that in terms of the BGs in question, the obligation of SBI was limited to "an amount equal to the outstanding balance of the advance payment, taking into account such amounts, which have been repaid by the Contractor from time to time in accordance with the terms of payment of the said Contract as evidenced by appropriate payment certificates". He submitted that in view of the above, the original value of the BGs in question were reduced. The value of BG-163 was reduced to ₹7,11,04,075/- on 29.06.2021 and, the value of BG-165 was reduced to ₹61,71,284/- on 28.06.2021. He submitted that currently payment against the RA Bills aggregating ₹12.44 crores were pending and therefore, no amount was payable by AIPL against the BGs in question.

8. Mr. Ray, learned counsel appearing for AIPL, also emphasized that there was no ground for TPTL to invoke the BGs in question since the three-member Committee constituted by TUL also found that the termination of the Contract was not justified. It was recommended that the amount of ₹38.30 crores recovered by TPTL by invoking the six Bank Guarantees be refunded to AIPL along with interest.

9. Mr. Johri, learned counsel appearing for TPTL submitted that this Court had, in *Abir Infrastructure Private Ltd. v. Teestavalley Power Transmission Ltd. & Ors (supra)* [order dated 03.09.2014 passed in OMP No.557/2014], interdicted the invocation of the BGs in question on the ground that the necessary conditions as stipulated in the BGs in question were not complied with. However, the same did not mean that TPTL was restrained from invoking the BGs in question after complying with the conditions stipulated therein. He submitted that the letters invoking the BGs in question did not expressly state that AIPL had failed to fulfil its obligations under the Contract; it had been called upon to pay the outstanding advance payments; and it had failed to do so. He submitted that the letters now sent to SBI fulfil the aforesaid conditions and therefore, the earlier decision in *Abir Infrastructure Private Ltd. v. Teestavalley Power Transmission Ltd. & Ors (supra)* does not come in the way of the TPTL to invoke the BGs in question.

10. He submitted that there has been a material change after the said decision was rendered on 03.09.2014. The Contract was terminated and TPTL had got the project completed from another Contractor at the risk and cost of AIPL and its JV partner. The project was completed in the

year 2019, TPTL has incurred additional costs and TPTL quantified the claim against AIPL at ₹470.33 crores. He submitted that the petitions under the Insolvency & Bankruptcy Code, 2016 (IBC) against AIPL and its JV partner Deepak Cables (India) Ltd. were admitted and there is a serious doubt as to whether the AIPL or its erstwhile JV partner can meet its obligations.

Reasons and Conclusion

11. The controversy in the present petition is within a narrow compass. According to AIPL, TPTL cannot invoke the BGs in question in view of the decision of this court in *Abir Infrastructure Private Ltd. v. Teestavalley Power Transmission Ltd. & Ors (supra)*. AIPL claims that in terms of the said decision, the BGs in question were held to be conditional and could not be invoked till the stipulated conditions were satisfied. One of the primary conditions to be satisfied is the failure of AIPL to fulfil its obligations under the Contract and, according to AIPL, the said condition would be satisfied only when the Court or the Arbitral Tribunal determines the same. According to AIPL, TPTL's assertion that AIPL had failed to fulfil its obligations under the Contract would not satisfy the condition as stipulated under the BGs in question.

12. Thus, the principal question to be adjudicated is whether the decision of this Court in *Abir Infrastructure Private Ltd. v. Teestavalley Power Transmission Ltd. & Ors (supra)* precludes TPTL from invoking the BGs in question and the Arbitral Tribunal finally determines that AIPL has failed in performance of its obligations under the Contract

and rejects its challenge to the termination of the Contract?

13. Before proceeding further, it would be pertinent to refer to the relevant terms of the BGs in question. The relevant extract from BG No.165 is set out below:

“We refer to the Contract (“the contract”) signed on 22.2.2010 between you and Joint Venture of M/s. Abir Infrastructure Private Limited having its Registered Office at Ground Floor, C-Block, Plot No.14, Factory Road, Adj. to Safdarjung Hospital, Ring Road, New Delhi-1100 29 and M/s. Deepak Cables (India) Limited having its Registered Office at No.7, N.S.Iyenger Street, Sheshadripuram, Bangalore – 560020 (“the contract”) concerning Ex-works Supply of all equipment and materials including mandatory spares for the complete execution of Tower Package – A1 for 400 KV D/C (Quad) Teesta III HEP – Panighata section of Teesta III – Kishanganj Transmission Line associated with 1200 MW Teesta III HEP at North Sikkim and concerning Services Contract for providing all services in respect of equipment supplied under Supply Contract for providing all services in respect of equipment supplied under Supply Contract for the complete execution of the Tower Package – A1 for 400 KV D/C (Quad) Teesta III HEP – Panighata section of Teesta III – Kishanganj Transmission Line associated with 1200 MW Teesta III HEP at North Sikkim.

Whereas, in accordance with the terms of the said Contract, the Employer has agreed to pay or cause to be paid to the Contractor an Advance Payment in the amount of Rs.26,17,42,403/- (Rupees Twenty Six Crores Seventeen Lakhs Forty Two Thousand Four Hundred and Three only).

By this letter we, the undersigned, State Bank of India, Industrial Finance Branch, Raj Bhavan Road,

Somajiguda, Hyderabad – 500082, a Bank (which expression shall include its successors, administrators, executors and assigns) having its Registered/Head Office at State Bank Bhavan, Central Office, 8th Floor, Madame Cama Marg, Mumbai-400021, Maharashtra, do hereby irrevocably guarantee repayment of the said amounts upon the first demand of the Employer without cavil or argument in the even that the Contractor fails to commence or fulfil its obligations under the terms of the said Contract, and in the event of such failure, refuses to repay all or part (as the case may be) of the said advance payment to the Employer.

Provided always that the Bank's obligation shall be limited to an amount equal to the outstanding balance of the advance payment, taking into account such amounts, which have been repaid by the Contractor from time to time in accordance with the terms of payment of the said contract as evidenced by appropriate payment certificates..."

14. The language of BG No.163 is also similar in material aspects.

15. As noted above, the controversy in the present case is centered around the condition regarding failure on the part of the Contractor [AIPL] to fulfil its obligations under the terms of the said Contract.

16. In *Abir Infrastructure Private Ltd. v. Teestavalley Power Transmission Ltd. & Ors (supra)*, it was contended on behalf of AIPL that the BGs in question were conditional and the conditions as stipulated therein were not met. It was further contended that even if the same were met, the due process, as provided under the BGs in question, had not been followed. The relevant contentions as noted by the Court in its decision are reproduced below:

“14. The submissions advanced by Mr. Rajiv Nayar, learned Senior counsel for the petitioner can be summarised in the following manner:

- a) Firstly, learned Senior counsel for the petitioner has argued that all the bank guarantees which are subject matter of the encashment are conditional in nature and the encashment/disbursement of the bank guarantee amount is contrary to the terms of the bank guarantee and cannot be allowed. He has argued that there are different terms which are provided in the respective bank guarantees which make them conditional in nature. It has been argued that the wordings of the bank guarantee which are different from the ones contained in the unconditional bank guarantee make them obvious that there are certain conditions laid down in the bank guarantees and upon fulfilment of the said conditions only, the bank guarantees can be put to encashment.
- b) Secondly, learned Senior counsel drawing the aid from the previous submissions has read over the terms and conditions provided in the bank guarantee No.0910310BG0000163 and 0910310BG0000165 which are for the sums of Rs.8,83,85,339 and Rs.76,78,053 respectively. The said terms read as under :

“2.9.2 It is submitted that the Bank Guarantee no. 0910310BG0000163 & 0910310BG0000165 for Advance Payment amounting to Rs. 8,83,85,339/- and 76,78,053/- respectively (aggregating to Rs. 9,60,63, 692/-) are completely conditional bank guarantees. The condition precedent for invocation of the aforesaid Bank Guarantees is reproduced hereunder:

“....do hereby irrevocably guarantee repayment of the said amounts upon the first demand of the Employer without cavil or argument in the event that the Contractor fails to commence or fulfill its obligations under the terms of the said Contract, and in the event of such failure, refuses to repay all or part (as the case may be) of the said advance payment to the Employer.....”

As per the learned Senior counsel for the petitioner, the aforementioned bank guarantees are conditional in nature and are dependent upon the fulfilment of the following conditions:

- a) The failure of the petitioner to commence operations under the terms of the contract or
- b) The failure of the petitioner to fulfil its obligations under the terms of the contract and consequently.
- c) After such a failure (which implies a notice of the same to be sent to the contractor) there is a demand by the respondent of such advance money.
- d) Thereafter the petitioner refuses to repay such advance payment.

It has been argued that firstly none of the aforementioned conditions in the instant case gets attracted and even they are, still the due process provided in the bank guarantee prior to invocation of the said bank guarantee is not followed and as such the said invocation of the bank guarantees is vitiated.

- c) It has been argued by the learned senior counsel for the petitioner that it is not the respondents' case that the petitioner has failed to commence its obligations and the same is also not factually correct as the respondent's own case is that the petitioner has completed more than 50 % of the works. It has been argued that even if it assumed that there exists any such case of the respondents that the petitioner has failed to fulfil the obligations contained in the contract, the said failure ought to have been pointed out to the petitioner and in the instant case the respondent issued the cure notice dated 15th May, 2014 post the invocation of the bank guarantees. The said invocation of the bank guarantees is vitiated by the prior notice which ought to have been given by the respondent No.1 to the petitioner and this also reflects the conduct of the respondent No.1 that the actions of the respondent No.1 are actuated by *mala fide* and fraud without putting the petitioner to notice on the alleged breaches committed by the petitioner prior to the invocation of the bank guarantees.
- d) Learned Senior counsel for the petitioner has argued that the respondent No.1 has not made any demand of the money advanced to the petitioner nor there exists any refusal on the record to show that there was ever any money advanced to the petitioner. As such, it has been argued by the learned Senior counsel for the petitioner that none of the afore noted conditions provided in the bank guarantees are satisfied as there was neither a notice prior to invocation nor any demand coupled with the refusal and as such the invocation of the bank guarantees is required to be prevented by the Court as the invocation is clearly contrary to the conditions of the bank guarantees. It has been further argued by the

learned Senior counsel for the petitioner that even the invocation letter does not state any fact of demand made by the respondent and/ or refusal there of or the non fulfilment of the obligations on the part of the petitioner or anything connected with the same, thus, the invocation letter is also bad.

In support of the proposition that the conditions contained in the bank guarantee are to be strictly construed, learned Senior counsel for the petitioner has relied upon the judgment passed in the case of ***Hindustan Construction vs. State of Bihar***, (1999) 8 SCC 436.”

17. It is apparent from the above that the thrust of AIPL’s contentions was that there was no failure on its part to fulfil the obligations and even if it was so, TPTL had not taken the necessary steps to point out the same. AIPL had also emphasized that after the BGs in question were invoked, TPTL had issued a Cure Notice dated 15.05.2014. The invocation of the BGs in question was vitiated as prior notice was not given by TPTL. The Court considered the aforesaid contentions; examined the letters sent by TPTL for invoking the BGs in question, and *inter alia*, held as under:

“23. From the reading of the terms of the Bank guarantees Nos. 0910310BG0000163 and 0910310BG0000165, it can be seen that the bank has guaranteed to repayment to said amount to the employer without cavil in the event the contractor fails to commence or fulfil the obligations under the terms of the contract and in the event of such failure refuses to repay all or part of the said advance payment to the

employer. **It is thus apparent that the liability of the bank would commence when the bank is informed about the demand on the ground of the failure to commence or fulfilment of the obligations under the terms of the contract and the refusal to pay the said sum or part of the advanced sum.** The liability of the bank as per the terms of the guarantee is also limited to the amount equal to the outstanding balance of the advance payment and taking into account such amount which has been repaid by the contractor from time to time. Thus, the repayment of the advance sum and/ or adjustment by way of the repayment and/or information as to refusal to repay by the contractor the said advance sum or part thereof are crucial facts which affect the liability of the bank as per the terms of the bank guarantee Nos.0910310BG0000163 and 0910310BG0000165. Accordingly, the said facts of the refusal to repay by the contractor or repayment of the advanced sum either in part or in full and adjustment of the advanced sum by way of the payment are prerequisite conditions on the basis of which, the bank can honour the guaranteed sum after getting itself satisfied in terms of the bank guarantee.

25. I have considered the submissions advanced by the learned counsel for the parties on the terms of the bank guarantees Nos. 0910310BG0000163 and 0910310BG0000165 being conditional or unconditional in nature and I would say the terms of the two bank guarantees are distinctly worded and the plain reading of the same do not indicate at least on prima facie basis that the said two bank guarantees are unconditional in nature, though in the contract, they are mentioned as unconditional and similar was the position when the exparte order was passed on 16th

May, 2014. The reasons for my prima facie view on the two bank guarantee Nos. 0910310BG0000163 and 0910310BG0000165 are as under:

- a) It is well settled principle of law that only the terms of the bank guarantee are required to be read in order to discern whether the bank guarantees are conditional or unconditional in nature. In *Mahatma Gandhi Sakkare Karkhane v. National Heavy Engineering Coop Ltd.* (supra) the Supreme Court has laid down this proposition in para 28 by approving the earlier judgment of *Hindustan Construction Co. Ltd. v. State of Bihar* (supra) and observed that the terms of the bank guarantee are extremely material in order to understand the nature of the bank guarantee. Upon applying the said principle of law to the case in hand, it can be seen that the clauses in the said bank guarantee though provide that the bank is irrevocably guaranteeing to repay the amount without of any cavil or argument but the said guarantee of the bank is further conditioned by the eventuality of the failure of the contractor to fulfil its obligation and in the event of such failure, his refusal to pay all or part of the advance payment. **Under these circumstances, the guarantee of the bank to pay by way of plain reading is not completely unconditional in nature which may enable the bank to repay the sum on mere demand but the demand has to be made to the bank and should contain the necessary ingredients including the petitioners failure to fulfil the obligations contained in the contract and its refusal to repay.** The said position is

possible once the petitioner is alarmed about the repayment of the advanced sum or the part thereof and has been given chance to repay the same and the guarantee of the bank shall commence once the petitioner/contractor refuses to repay. **The invocation letters dated 14th May, 2014 do not contain the said ingredients nor the respondent's counsel in their arguments oral as well in the writing suggest the said position.** On the contrary, the respondent continued to argue that the said bank guarantees are unconditional in nature and the wordings are to be understood in context. The said submissions are rejected as meritless in view of my reasons stated in the present paragraph.

- b) The clauses of these two bank guarantees Nos. 0910310BG0000163 and 0910310BG0000165 are distinctly worded from the other ones in as much as in the cases of unconditional bank guarantees where the bank has no role to play in the transactions, the stipulations like “beneficiary is the sole judge to determine the breach” or “bank has no role to further enquire about the payment to be made” or “without going into the enquiry” or related terms are normally mentioned in the guarantee documents. In the two bank guarantees, such stipulations like that the beneficiary is the sole judge or “without going into further enquiry as to payment or correctness of the payment” or related one are clearly not present. Thus, the judgments rendered in the cases of *UP Coop Federation Limited v. Singh Consultants and Engineers (P) Ltd.* (supra) and *Mahatma Gandhi* (supra) and

Himadri Chemicals Ltd v. Coal Tar Refining Company (supra) and line of the authorities passed on the basis that in unconditional guarantee documents where beneficiary is the sole judge and the party cannot raise the dispute are not applicable to the factual position in hand in view of the differences in the wordings of the Bank guarantees. Therefore, the submission of the Dr. Singhvi, learned Senior counsel for the respondent that it is understanding and belief of the respondent which is to be taken in to consideration while seeking the repayment of the advanced sum from the bank at the time of encashing the bank guarantee is required to be rejected. This is due to the reason that the wordings of the guarantee documents do not permit the beneficiary to be the sole judge of the recovery of the advanced sum. On the other hand, the wordings of the clauses of the guarantee documents provide **the objective criteria for enabling the bank to honour the guarantee and repay the advance which is that by first looking into the contractors failure to perform the obligation and refusal to repay the advanced sum and thereafter further taking into consideration the payments already made by the contractor by looking into the payment certificates.** In such circumstances, it cannot be readily inferred that the two bank guarantees are totally unconditional in nature which can be honoured on mere demand which does not fulfil the criteria for invocation as per the terms of the bank guarantee.

- c) The submission of Dr. Singhvi, learned Senior counsel that the clause 9.2.2 of the contract has to be read along with the bank guarantees while examining the petitioner's plea that the bank guarantees are conditional or unconditional as the said clause 9.2.2 mandates that the petitioner shall furnish the unconditional bank guarantees towards the advanced sum. I have examined the said submission of Dr. Singhvi and would say that the same runs contrary to the submission of learned counsel for the respondent that the bank guarantee is a contract independent to that of the underlying contract. If the terms of the bank guarantees plainly condition the liability of the bank by fulfilment of certain pre-requisites like the failure of the petitioner to perform the obligation and in that event his refusal to repay. The said mechanism is required to be followed by the respondent at the time of the invocation and non following of the same cannot be justified by substituting the terms of underlying agreement in the guarantee document. If the submission of the respondent is that the petitioner was mandated to furnish an unconditional bank guarantee and now is arguing that the bank guarantee is conditional, that by itself does not absolve the Court from examining the terms of the bank guarantees in order see through the true import of the terms of the bank guarantees. Therefore, whatever is the effect of the clause 9.2.2, if the terms of the bank guarantee are clear and plain, the court cannot go contrary to the terms of the bank guarantee document to hold otherwise. The aspect of the breach of the said terms if any

has to be looked into at the time of preferring claim or cross claim in the arbitral proceedings. Therefore, this court is unable to accede to the submission advanced by Dr. Singhvi, learned Senior counsel for the respondent.

- d) The submission of Dr. Singhvi, learned Senior counsel for the respondent that the order dated 16th May, 2014 records that the bank guarantees are unconditional in nature and thus this court should be persuaded to take the said position is also not correct in as much as the said view was taken by the court at *ex-parte* ad interim stage. The Court after hearing the parties and examining the documents filed by them and the import of them can also form an opinion different from the one taken at *ex-parte* ad interim stage. Therefore, the said submission of the respondent counsel is also rejected.

In view of my aforementioned reasons, prima facie, I find that the bank guarantees Nos.0910310BG0000163 and 0910310BG0000165 are conditional in nature and the invocation of the said bank guarantees by way of the letter dated 14th May, 2014 without fulfilment the mechanism provided in the guarantee documents by informing the petitioner about the repayment of the advanced sum and seeking the refusal or acceptance to repay is clearly contrary to the express terms of the guarantee documents. The said invocation is therefore prima facie contrary to the terms of the bank guarantee Nos.0910310BG0000163 and

0910310BG0000165 and as such liable to be interfered with by this Court.”

18. It is clear from the aforesaid decision that this Court had found that the BGs in question were conditional. However, there is no finding that the condition regarding failure on the part of AIPL to fulfil its obligations in terms of the Contract would be met only when a Court or a Tribunal of competent jurisdiction returns a finding to the aforesaid effect. The condition stipulated in the BGs in question would be met on TPTL expressly informing SBI that the said condition had been met and calling upon SBI to pay the amount under the BGs in question. The Court also observed that the BGs in question provided for an objective criteria that could be looked into by the Bank.

19. The Court further held that “under these circumstances, the guarantee of the bank to pay by way of plain reading is not completely unconditional in nature, which may enable the bank to repay the same on mere demand but the demand has to be made to the bank and should contain the necessary ingredients including the petitioner’s failure to fulfil the obligations contained in the contract and its refusal to repay.”

20. The Court found the BGs in question to be conditional upon a demand being made in express terms thereof. The Court did not hold that conditions regarding failure of the Contractor to fulfil its obligations under the Contract would be met only on a competent court determining the same.

21. This would also run contrary to the express undertaking of SBI

to pay the amounts upon the first demand of the employer [TPTL] without cavil or argument. Thus, it follows that if TPTL had made a demand expressly in conformity with the conditions stipulated in the BGs in question, SBI would be bound to make the payments. Since the letters of invocation of the BGs in question sent to SBI were not in conformity with the conditions and did not state that the aforesaid conditions were satisfied, this Court had interdicted the invocation of the BGs in question. It is also material to note that this Court had also directed that AIPL would keep the BGs in question alive by renewing them if the need arose. It was further clarified that the same did not preclude the parties to deal with the BGs in question as per the mechanism provided under the guarantee documents.

22. Mr Ray laid much emphasis on the observation made in *Abir Infrastructure Private Ltd. v. Teestavalley Power Transmission Ltd. & Ors (supra)*:

“The submission of the Dr. Singhvi, learned Senior counsel for the respondent that it is understanding and belief of the respondent which is to be taken in to consideration while seeking the repayment of the advanced sum from the bank at the time of encashing the bank guarantee is required to be rejected. This is due to the reason that the wordings of the guarantee documents do not permit the beneficiary to be the sole judge of the recovery of the advanced sum. On the other hand, the wordings of the clauses of the guarantee documents provide the objective criteria for enabling the bank to honour the guarantee and repay the advance which is that by first looking into the contractors failure to perform the obligation and refusal to repay the

advanced sum and thereafter further taking into consideration the payments already made by the contractor by looking into the payment certificates.

23. The aforesaid decision cannot be construed to mean that the BGs cannot be invoked prior to any court/arbitral tribunal determining that AIPL had failed to perform its obligations under the Contract. The Court had not accepted the contention that the understanding or belief of TPTL was sufficient and clarified that the objective criteria as specified in the petition was required to be satisfied. Clearly, the same would be satisfied on TPTL communicating the demand in terms of the BGs in question. SBI can examine the same but such examination is limited to satisfying itself that the demand is in terms of the BGs in question; it is not required to determine the dispute between the parties or to take a view on the same.

24. In the present case, TPTL had terminated the Contract and consequently the remaining works had to be contracted to another contractor, who has since completed the same. TPTL had also made a claim of approximately ₹470.33 crores against AIPL and its JV partner.

25. It is also pertinent to note that the BGs in question were issued to secure TPTL against the advance payments made to AIPL. The said advance payments were to be adjusted against the demand to be made pursuant to the RA bills. It is not disputed that part of the advances were duly adjusted against the RA bills and the value of the BGs in question were reduced correspondingly. It is also not disputed that the BGs in question are sought to be invoked in respect of advances that

remain unrecovered or unadjusted. AIPL claims that it has presented the RA Bills to the extent of ₹12.44 crores. However, TPTL does not admit that the same is payable. The disputes between the parties are yet to be adjudicated/resolved.

26. In the given circumstances, this Court is unwilling to accept that TPTL can be interdicted from invoking the BGs in question in terms thereof.

27. Considering the above, this Court is unable to accept that TPTL is required to be injuncted from invoking the BGs in question or SBI is required to be restrained from making any payments against the same, pending adjudication of the disputes between the parties.

28. The petition is, accordingly, dismissed.

SEPTEMBER 20, 2021

pkv/gsr

VIBHU BAKHRU, J