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

+ O.M.P.(I) (COMM.) 285/2021 & I.A. 10622/2021

SES ENERGY SERVICES INDIA LTD. Petitioner
Through Mr. Sandeep Sethi, Senior
Advocate with Mr. Abhinav Vasisht, Sr.
Adv., Mr. Amar Gupta, Adv, Mr. Abhishek
Munot, Adv, Mr. Divyam Agarwal,
Agarwal, Mr. Tushar Nagar, Adv, Mr. Anuj
Aggarwal, Adv, Ms. Akshita Sachdeva,
Advocates

versus

VENDANTA LIMITED & ORS. Respondents
Through Mr. Gopal Jain and Mr Akhil
Sibal, Senior Advocates with Mr Ajay
Bhargava, Mr Aseem Chaturvedi, Ms
Wamika Trehan and Mr Shivank Diddi,
Advocates for Respondent No. 1

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

% **26.08.2021**
(Video-Conferencing)

1. The petitioner seeks pre-arbitral interim reliefs.
2. Three agreements, executed between the petitioner and the respondents, essentially, constitute the basis of the claim in this petition. All the three agreements were executed on the same date, i.e. 20th August, 2018. The petitioner has titled these agreements as the “Principal Agreement, “Domestic Sale Agreement” and “Offshore Sale Agreement”. The Principal Agreement was for providing

localized separation facility at the Mangala Well Pads of the respondents (used for offshore oil drilling), on Rental and Operation and Maintenance (O&M) Basis, the Domestic Sale Agreement was for supply of two packages for the localized separation facility and the Offshore Sale Agreement was supply of a third package. For the purposes of the present dispute, it is not necessary to delve, in detail, into the specifics of the equipment to be provided under these agreements; suffice it to state that, under the agreements, the petitioner was to supply equipments to the respondent, to be used by the respondents in its offshore drilling facility.

3. The grievance of the petitioner arises from the attempted invocation, by the respondents, of a Performance Bank Guarantee (“PBG”, in short), dated 28th August, 2018, furnished by the petitioner to the respondents, in terms of the Principal Agreement. Paras 1 to 3 of the bank guarantee may be reproduced, for ready reference, thus:

“1. In consideration of Vedanta Limited, a body corporate established under the laws of India, and having its registered office at 1st Floor, ‘C’ Wing, Unit 103, Corporate Avenue, Atul Projects, Chakala, Andheri (East), Mumbai 400093, Maharashtra, India and office at DLF Atria, Jacaranda Marg, DLF City-Phase 2, Gurugram 122002, Haryana, India (hereinafter referred to as “Company”, which expression shall, unless repugnant to the context or meaning thereof, including all its successors, administrators, executors and permitted assigns) having entered into a contract no. 42000-11112 dated 9th August, 2018 (hereinafter called the “Contract” which expression shall include all the amendments thereto) with SES Energy Services India Private Limited, a company incorporated and validly existing under the laws of India, having its registered office at Unit No. 101, A-Wing, First Floor, Reliable Tech Park, Thane Belapur Road, Airoli, Navi Mumbai 400708 (hereinafter referred to as the “Contractor”, which expression shall unless repugnant to the

context or meaning thereof, include all its successors, administrators, executors and permitted assigns). The contract has been executed between the contractor and the company with one of the terms of the contract requiring that the contractor furnishes to the company a bank guarantee to **₹ 22,01,62,360/- (Rupees Twenty Two Crores One Lakh Sixty Two Thousand Three Hundred Sixty Only)** guarantee the satisfactory performance by the contractor in accordance with the terms and conditions of the contract.

2. We, Kotak Mahindra Bank Ltd., registered under the laws of India, having registered office at 27BKC, C 27, G Block, Bandra Kurla Complex, Bandra (E), Mumbai-400051 and acting through its branch office at Center Point, J.B. Nagar, Andheri Kurla Road, Andheri (East) Mumbai-400059 (hereinafter referred to as the “Bank”, which expression shall, unless repugnant to the context or meaning thereof, include all its successors, administrators, executors and permitted assigns), do hereby guarantee *and irrevocably undertake to pay to the company* (or if the bank has accepted the assignment of the benefit of the Bank Guarantee by the company to any third party pursuant to clause 4 of this Bank Guarantee then to that third party) forthwith, after receipt by the bank of a demand complying with the requirements of this Bank Guarantee on first demand in writing any/all moneys to the extent of **₹ 22,01,62,360/- (Rupees Twenty Two Crores One Lakh Sixty Two Thousand Three Hundred Sixty Only)** *without any demur, reservation, recourse, contest or protest, and/or notwithstanding any dispute /litigation between the contractor and the company, and without any reference to the contractor. Any such demand made by company on the bank by serving a written notice, shall be conclusive and binding, without any proof whatsoever, as regards to the amount due and payable,* notwithstanding any dispute (s) pending before any court, tribunal, arbitrator, or any other authority and/or any other matter or thing whatsoever, *as the bank's liability under these presents being absolute and unequivocal.* For the purposes of this Clause 2 “Business Day” means a day on which commercial/scheduled banks are open for business in (mention city of the bank, branch). The bank hereby agree and acknowledge that this bank guarantee is irrevocable and continues to be enforceable until it is fully and finally discharged by company in writing or **31-Dec-2020** whichever is earlier. This Bank Guarantee

shall not be determined, discharged or affected by the liquidation, winding up, dissolution or insolvency of the contractor and shall remain valid, binding and operative against the bank.

3. The bank also agrees that company at its option shall be entitled to enforce this Bank Guarantee against the Bank as a principal debtor, in the first instance, without proceeding against the contractor and notwithstanding any security of other guarantee that company may have in relation to the contractor's liabilities."

(Italics and underscoring supplied)

4. It is clear, at a bare reading, that the PBG was unconditional in nature. Honoring of the bank guarantee by the Bank, at the request of the respondent as the beneficiary thereunder, was not conditional upon establishment, by the respondent, of any specific default having been committed by the petitioner. *Vide* para 2 of the PBG, the bank has irrevocably undertaken to pay, to the respondents, "*forthwith, after receipt by the bank of a demand complying with the requirements of this Bank Guarantee on first demand in writing any/all moneys to the extent of ₹ 22,01,62,360/- without any demur, reservation, recourse, contest or protest and/or notwithstanding any dispute/litigation between the contractor and the company and without any reference to the contractor*". The clause further clarifies that "any such demand made by the company on the bank by serving a written notice shall be conclusive and binding, without any proof whatsoever, as regards the amount due and payable", notwithstanding any dispute pending between the parties. The PBG, therefore, requires the Bank to honour the guarantee thereunder (i) forthwith, (ii) on receipt, by the Bank, of a demand, (iii) on first demand, in writing, (iv) without any demur or reservation, (v) notwithstanding any dispute between the respondent

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and the petitioner and (vi) without any reference to the petitioner. This last stipulation, even by itself, I may observe, substantially eviscerates the petitioner's right to seek interdiction of invocation or encashment of the PBG.

5. Mr. Sethi, learned Senior Counsel for the petitioner, fairly did not dispute the fact that the aforesaid Bank Guarantee was unconditional in nature.

6. *Vide* letter dated 20th August, 2021, addressed to the Kotak Mahindra Bank ("the Bank", in short), the respondents sought to invoke the aforesaid Bank Guarantee.

7. The law, regarding interference, by Courts, with invocation of unconditional bank guarantees may well be regarded as jurisprudentially fossilized. A Division Bench of this Court has, in its recent decision in ***CRSC Research and Design Institute Group Co. Ltd. v. Dedicated Freight Corridor Corporation of India Ltd.***¹, authoritatively pronounced on the principles applicable while considering prayer for interlocutory interdictions against invocation of unconditional bank guarantees. Paras 7, 15, 16 and 17 of the report may, in this regard, be reproduced thus:

"7. The settled law with respect to grant of an injunction which has the effect of restraining encashment of a bank guarantee, is (a) 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

¹ 2020 SCC Online Del. 1526

terms thereof irrespective of any pending disputes; (b) the Bank giving such a guarantee is bound to honour it as per its terms, irrespective of any dispute raised by its customer; (c) the very purpose of giving such a bank guarantee would otherwise be defeated; (d) the Courts should therefore be slow in granting an injunction to restrain the realization of such a bank guarantee; (e) the Courts have carved out only two exceptions i.e. (i) a fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee - if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so; fraud has to be an established fraud which the bank knows of and the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge; and, (ii) 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 effect[sic] the bank and its customers 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; it must be proved to the satisfaction of the Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.

15. *We are unable to agree with the contention of the senior counsel for the appellant that this Court, when approached for the interim measure of interference with unequivocal, absolute and unconditional BGs, is required to interpret the contract and/or form a prima facie opinion whether the beneficiary of the BGs has wrongfully invoked the BGs. Such exercise, in our view, is to be done in a substantive proceeding to be initiated by the appellant for recovery of the monies of the BGs, if averred to have been wrongly taken by the respondent No. 1 by encashment of BGs. If any interim relief is also claimed in the said substantive proceedings, the need for taking a prima facie view, will arise therein; however not while dealing with an application for the interim measure of restraining invocation/encashment of BGs. In the said proceedings, no question of taking a prima facie*

view arises and the enquiry is confined to, whether on the basis of the documents, a case of fraud of egregious nature in the matter of obtaining/furnishing BGs, is made out. As far as the argument of the senior counsel for the appellant, of special equities is concerned, the same is but a facet of the second exception aforesaid of irretrievable harm or injustice. Needless to state that from the entire arguments of the senior counsel for the appellant, no case of fraud of egregious nature in the matter of making/obtaining of the BGs is made out. All that emerges is that there are disputes between the appellant and the respondent No. 1 and it is not even whispered that the respondent No. 1 built the entire charade of entering into the contract, only to obtain BGs and to profiteer from the appellant. With respect to the ground urged by the senior counsel for the appellant, of special equities, the Solicitor General has stated that the appellant is a Chinese entity and if ultimately in arbitration, which has already commenced between the parties, the monies are found due to the respondent No. 1 from the appellant, the respondent No. 1 would have no means or ways available to it for recovering the same from the appellant and/or to enforce the arbitral award in China. On the contrary, it is contended that the respondent No. 1 is a Public Sector Undertaking and the monies, if ultimately found due to the appellant from the respondent No. 1, can always be recovered by the appellant from the respondent No. 1.

16. *Fraud, as an exception to the rule of non-interference with encashment of BGs, is not any fraud but a fraud of an egregious nature, going to the root i.e. to the foundation of the bank guarantee and an established fraud. The entire case of the appellant, we are afraid, fails to qualify so. The Single Judge has written at length on the subject and save for as aforesaid, we need not say more.*

17. *Irretrievable injustice, as an exception to the rule of non-interference with encashment of BGs, is again not a mere loss, which any person at whose instance bank guarantee is furnished, suffers on encashment thereof. It is always open to such person to sue for recovery of the amount wrongfully recovered. What has to be proved and made out to obtain an injunction against encashment, is that it will be impossible to recover the monies so wrongfully received by encashment. There is not even a whisper to this effect, neither in the*

pleadings nor in the arguments.”

(Emphasis supplied)

8. Injunctions, against enforcement of bank guarantees, can be granted by Courts only in certain well recognized circumstances. One circumstance would be where the bank guarantee is conditional in nature, *in that non-performance or breach of the contract between the parties finds specific incorporation in the covenants of the bank guarantee as a condition, the satisfaction of which has to be established before the guarantee is honoured.* This rarely happens, for the simple reason that a bank guarantee is essentially intended to be in the nature of security, to secure non-performance of contractual obligations. It would, therefore, be counter-productive, if the honouring of a bank guarantee, in favour of the beneficiary thereof, were to be made conditional on establishment, by proof, of default, by the opposite party, of its obligations under the contract. It is for this reason that in nearly every case, bank guarantees whether in the form of guarantees provided as security or performance bank guarantees, are unconditional in nature – as in the present case. The guarantee obligates the bank to credit to the account of the beneficiary, the amount covered by the guarantee, on a notice being issued by the beneficiary to the bank. It is sufficient, if the beneficiary alleges default on the part of the opposite party. No proof of default is required to be furnished by the beneficiary. Nor can the bank go behind the letter and examine, whether, in fact, there was or was not any breach of the contract between the parties. The issuance of the letter by the beneficiary to the bank, entitles the beneficiary, *ipso facto*, to be credited the amount covered by the bank guarantee.

9. In cases where the bank guarantee is unconditional, the law recognizes only three circumstances in which Courts could injunct invocation or encashment of the bank guarantee. These three circumstances, essentially, dovetail into two, with the pronouncement of Courts in that regard. The three circumstances, in which the Courts may interfere, and may injunct the invocation of unconditional bank guarantees, is where there is egregious fraud, special equity exists, or where irretrievable injustice or prejudice is likely to result, if the bank guarantee is invoked or encashed. The latter two circumstances have been treated, by the Supreme Court, as well as by the Division Bench of this Court in **CRSC Design**¹ to be interconnected, in that special equities would be set to exist if the invocation of the bank guarantee would result in irretrievable injustice to the opposite party. The following passage, from **BSES Ltd v. Fenner India Ltd**², neatly encapsulates this position:

“10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. *The fraud must be of an egregious nature as to vitiate the entire underlying transaction.* The second exception to the general rule of non-intervention is *when there are ‘special equities’ in favour of injunction, such as when ‘irretrievable injury’ or ‘irretrievable injustice’ would occur if such an injunction were not granted.* The general rule and its exceptions has been reiterated in so many judgments of this Court, that in **U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568** that this Court, correctly declared that the law was ‘settled’.”

(Italics and underscoring supplied)

10. Mr. Sethi, in the present case, has not sought to pigeonhole the

case of his client within either of the latter two circumstances, i.e. special equities or irretrievable injustice. He, instead, submits that the invocation of the Bank Guarantee, by the respondents, amounts to egregious fraud.

11. On this aspect, too, the law is now well settled. Fraud, *per se*, is not sufficient to injunct the invocation of a bank guarantee. The fraud must, additionally, be “egregious” in nature. It must, as held in **BSES**², “vitiates the entire underlying transaction”.

12. “Fraud”, even by itself and untethered by any qualifying adjective, is legal misdemeanour of the highest degree. It is well said that fraud vitiates everything, ecclesiastical and temporal. Even so, the law does not regard mere “fraud”, *per se*, as sufficient to justify interdiction of invocation of a bank guarantee. The fraud must be “egregious”.

13. The Division Bench in **CRSC Design**¹ holds, in this regard, that fraud would be treated as “egregious” where it goes to the root, i.e. erodes the very foundation of the bank guarantee and is definitively established. The reason is, in my view, obvious. The obligation of the bank, under the guarantee – which constitutes an independent contract between the bank and the beneficiary – may be avoided only where the guarantee *itself is vitiated by fraud*. The fraud, therefore, must be such as vitiates *the guarantee itself, and not merely its invocation*. As such, a submission that the *invocation* of the bank guarantee is contrary to the terms of the contract between the parties, howsoever

² (2006) 2 SCC 728

compelling or meritorious, cannot make out a case of egregious fraud, so as to justify injuncting invocation thereof. Even if the invocation is fraudulent, no case for interdiction may be said to exist, unless the *bank guarantee itself is vitiated by fraud*.

14. Courts, seized with prayers for injuncting invocation of bank guarantees, are proscribed from entering into the aspect of the terms of the contract between the parties, whether any breach thereof has taken place or even whether the invocation of the bank guarantee is in accordance with the contractual provisions in that regard.

15. The philosophy behind the law, as established in this regard, is that the bank guarantee constitutes an independent contract between the bank and the beneficiary. The bank is not a party to the contract between the beneficiary and the opposite party, who is in alleged default or breach. As such the bank is not concerned with the aspect of breach of contract between the parties. This aspect, therefore, cannot be treated as a relevant circumstance, while assessing the obligation of the bank to honour the guarantee.

16. In the present case, as has already been noticed, the Bank Guarantee was unconditional in nature. Even so, this Court was inclined to examine the matter in some depth, because of a submission advanced on behalf of the petitioner by learned Senior Counsel, that, between July, 2020 when all obligations under the agreements, i.e. the “Principal Agreement, the “Domestic Sale Agreement” and the “Offshore Sale Agreement”, stood discharged by the petitioner, and the invocation of the Bank Guarantee by the respondents on 20th

August, 2021, *there was no communication between the petitioner and the respondents.*

17. Learned Senior Counsel for the respondents emphatically disputed this position. As such, the Court granted an opportunity to the respondents to place the requisite documents on record, between July, 2020 and the invocation of the Bank Guarantee. In accordance with the permission thus granted, the respondents have filed a list of documents under cover of an index dated 24th August, 2021. This contains several e-mails, which according to the respondents, are sufficient to justify invocation of the Bank Guarantee and which, in any case, clearly operate to disentitle the petitioner to any interlocutory injunction against such invocation.

18. Before advertng to the said e-mails, I may note, in brief, the submissions of Mr. Sethi, in support of the prayers in the petition.

19. Mr. Sethi initially invited my attention to Clauses 8 and 10 of the Principal Agreement, which read thus:

“8. The Services shall be provided over a fixed period of 570 days from date of issuance of Ready to Use Certificate for each of the Localized Separation Facility (the “Primary Term”).

If the Contractor fails to complete Mobilisation within the Commencement Date, then the Company may, at is [sic] option, have the right to reduce the duration of the Primary Term for the DR-3 period by a duration equal to total delay from the Commencement Date for each Localized Separation Facility. In such a scenario, the Company shall pay the due sums to the Contractor per hitherto agreed Compensation schedule rates only up to the date of such reduced Primary Term.

10. The Contractor shall be required to provide the Company with an irrevocable and unconditional performance bank guarantee in the sum of INR 220,162,360.00 {Indian Rupees Twenty Two Crores One Lac Sixty Two Thousand Three Hundred and Sixty Only) valid 2 months beyond of last Warranty Period as defined in Clause no. 6.3 of Supply Contract nos. 4200011110 & 4200011111 in the form attached to Schedule I (Conditions of Contract) from a bank or financial institution acceptable to the Company (acting reasonably) (the “Performance Bank Guarantee”). The Performance Bank Guarantee shall be provided by the Contractor within 3 weeks from the Effective Date. If requested by the Company, the Contractor agrees to extend the validity period of the Performance Bank Guarantee or to issue a further Performance Bank Guarantee in the event that the duration of this Contract is for any reason extended beyond the aforementioned validity date.”

20. He submitted that, in accordance with the requirement of Clause 10 of the Principal Agreement, a PBG had been provided by the petitioner, which was originally valid till 31st December, 2020 and was later extended till 30th September, 2021. It, therefore, continued to remain valid till it was invoked by the respondents.

21. Mr. Sethi then drew my attention to a “Provisional Ready to Use Certificate”, dated 13th July, 2019, issued by the respondents, which reads thus:

“ Provisional “Ready to Use” Certificate”

Date: 13-Jul-2019

Pursuant to the Contract No 4600009010 and Performance Guarantee Test Run carried out by Contractor from 10-Jul-2019 1300 hrs to 13-Jul-2019 12:59 hrs for 1st unit of

Localized Separation Facility (LSF#01) installed at Mangla Well Pad 1 (MWP-01); Company is pleased to issue this Provisional Ready to Use Certificate to M/s SES India Private Limited (Contractor) for acknowledging and accepting completion of Mobilization and commencement of Day Rate 1 (DR-1) from 14th July, 2019 Hrs as per Contract.

CONTRACTOR shall note that this certificate is being issued only for start of rental against DR-1 and shall not absolve Contractor of their obligations towards liquidation of all pending punch points as raised by the Company during mobilization and PGTR. As communicated to Contractor vide e-mail dated 13th June 2019, these Punchlists (As attached in Annexure-1) are to be liquidated within max Six (06) weeks of the completion of the PGTR, failing which, Company will retain 10% of Monthly rental or pro-rata part thereof and this will continue till liquidation of all Punchlists. Till such liquidation of 100% Punchlists, "Ready to Use" Certificate remains Provisional (i.e. with the conditions). Retentions, as applicable, will be reconciled and paid up at the end of immediate next month post closure of Punchlists. However, if Contractor fails to close the Punchlists within 6 months of PGTR, i.e. on or before 13th Jan, 2020, Company shall carry out the same thro' *[sic]* other Contractor(s) at the risk and cost of CONTRACTOR.

Contractor to also note that a separate PGTR including SAT of individual equipment for LSF#01 shall be carried out by Contractor as mentioned in approved PGTR procedure, before buy-out of Packages 1, 2A and 2B.

For & on Behalf of Vedanta Limited, Cairn Oil & Gas

Sd/-
Sudhakar Choubey
(Project Manager)

Sd/-
(Prabal Sanya)
(Contracts Manager)"

22. It would be seen, from a reading of the aforesaid Certificate, that the Certificate was provisional owing to the fact that certain items in "punch lists" remained to be rectified. It was, therefore, stated that payments would be reconciled at post closure of the punch lists, but

that if the punch lists were not closed by the petitioner within six months thereof, the respondents would carry out the said work through other contractors at the risk and the cost of the petitioner.

23. Thereafter, Mr. Sethi referred to an inspection report, dated 20th November, 2020, following an inspection of the facilities provided by the petitioner to the respondents under the aforesaid agreements, which states that the facilities had “been verified in reference to the requirements for fit for use as stated in the annexure to this document and found in compliance with the basic documents and requirements for current operative conditions”. He also took me through the actual certificate issued by the inspecting agency, which concluded that “the limited review and verification of” the facilities provided by the petitioner “carried out to check the conformance with design basis and applicable national/international standards has been satisfactory and generally meeting the design basis and sound engineering practices”.

24. Similar certificate, points out Mr. Sethi, was issued in respect of the second well pad of the respondents and the facility provided by the petitioner in that regard.

25. Mr. Sethi, thereafter, referred me to two e-mails dated 14th July, 2020, the first being from the petitioner to the respondents at 11:23 AM and the second from the respondents to the petitioner at 5:34 PM. *Vide* the first email, the petitioner informed the respondents that it had “closed 7 CCC³ punch points” and requested for conformation in that

³ Construction Completion Certificate

regard from the respondents. The respondents replied, at 5:34 PM on the same day, confirmed thus:

“All the CCC punch list closed in CAMS.”

26. According to Mr. Sethi, following these communications, there was no correspondence from the respondents to the petitioner, in any manner expressing any misgiving regarding the performance, by the petitioner, of its obligations, under the agreements. Mr. Sethi submits that it was only after the petitioner entered into correspondence with the respondents, requiring the respondents to liquidate its outstanding payments that the respondents, in retaliation, chose to proceed for invocation of the petitioner’s Bank Guarantee at the nth hour. This, therefore, he submits, amounts to “egregious fraud” and constitutes a legitimate basis for interdicting, at the interlocutory stage, invocation of the PBG.

27. The submission of Mr. Sethi that the invocation of the Bank Guarantee came as a bolt from the blue, as there was no correspondence from the respondent to the petitioner, *apropos* the facilities provided by the petitioner under the Principal Agreement, does not appear to be correct. As noted above, consequent on the directions issued by this Court, the respondents placed on record a series of emails, addressed by the respondents to the petitioner. For ready reference, some such emails may be reproduced thus:

At 8.43 a.m. on 25th April, 2021

“From: Production Manager WP - MPT

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Sent: Sunday, April 25, 2021 8:43 AM

To: 'Shah, Prerak' <Prerak.Shah@superiorenergy.com>;
'Rawat, Maitab S' <Maitab.Rawat@SuperiorEnergy.com>

Subject: LSF sampling deviation

Dear Rawat Ji,

Please find lab BS&W and oil content in water sample results which are beyond the prescribed result. It has been observed that Demulsifier and Corrosion inhibitor dosing was under shut-in condition at LSF-1/12 since 21st April 2021 and still we didn't receive any firm plan for chemical start-up. To get required PPM please start chemical dosing immediately with desired PPM.

Point Description	Point Prefix	Schedule Date	Time	BS&W	OIL Content in Water
				% (v/v)	ppm
				ASTM D4007-02	API RP-45
LSF Surge Tank Oil Outlet WP01	M/PWR//01STO/OOL	24-Apr-21	1:00	80.6	
LSF Treated Water Outlet WP01	M/PWR//01TWO/WOL	24-Apr-21	1:00		451.9
LSF Treated Water Outlet WP12	M/PWR//12TWO/WOL	24-Apr-21	1:00		1103.2
LSF Surge Tank Oil Outlet WP12	M/PWR//12STO/OOL	24-Apr-21	3:00	52	
LSF Treated Water Outlet WP01	M/PWR//01TWO/WOL	24-Apr-21	5:00		578
LSF Treated Water Outlet WP12	M/PWR//12TWO/WOL	24-Apr-21	5:00		881.3
LSF Treated Water Outlet WP01	M/PWR//01TWO/WOL	24-Apr-21	9:00		350.4
LSF Treated Water Outlet WP12	M/PWR//12TWO/WOL	24-Apr-21	9:00		409.9
LSF Surge Tank Oil Outlet WP01	M/PWR//01STO/OOL	24-Apr-21	9:00	69.96	--
LSF Surge Tank Oil Outlet WP12	M/PWR//12STO/OOL	24-Apr-21	9:00	42.5	--
LSF Surge Tank Water Outlet (Trd Wtr Inlet) WP01	M/PWR//11TWO/WOL	24-Apr-21	9:00		--
LSF Treated Water Outlet WP01	M/PWR//01TWO/WOL	24-Apr-21	13:00		209.6
LSF Treated Water Outlet WP12	M/PWR//12TWO/WOL	24-Apr-21	13:00		1296.8

Regards
Samir"

At 8.56 a.m. on 20th April, 2021

“From: Production Manager WP - MPT

Sent: Tuesday, April 20, 2021 8:56 AM

To: 'Shah, Prerak' <Prerak.Shah@superiorenergy.com>;
'Rawat, Maitab S' <Maitab.Rawat@SuperiorEnergy.com>

Subject: FW: LSF sampling deviation

Dear Rawat Ji,

Signature Not Verified

Digitally Signed By: SUNIL
SINGH NEGI

Signing Date: 28.08.2021
14:11:57

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Please find lab BS&W and oil content in water sample results which are beyond the prescribed result. Share further plan for improvement.

Point Description	Point Name	Schedule Date	Time	BS&W Spec	Oil Content in Water Spec
				0.1	400 mg/l
LSF Treated Water Outlet WP12	INTWTR/W12TAC/WOL	10-Apr-21	1:00		4235.4
LSF Sump Tank CII Outlet WP11	INTWTR/W11STC/OOL	10-Apr-21	1:00	88.82	
LSF Sump Tank CII Outlet WP12	INTWTR/W12STC/OOL	10-Apr-21	1:00	41	
LSF Treated Water Outlet WP01	INTWTR/W01TAC/WOL	10-Apr-21	5:00		448.5
LSF Treated Water Outlet WP02	INTWTR/W02TAC/WOL	10-Apr-21	5:00		2443.4
LSF Treated Water Outlet WP03	INTWTR/W03TAC/WOL	10-Apr-21	5:00		330.1
LSF Treated Water Outlet WP04	INTWTR/W04TAC/WOL	10-Apr-21	5:00		551.5
LSF Sump Tank Water Outlet (Treated Water Tank) WP07	INTWTR/W07STC/WOL	10-Apr-21	5:00		---
LSF Sump Tank CII Outlet WP01	INTWTR/W01STC/OOL	10-Apr-21	5:00	71	
LSF Sump Tank CII Outlet WP12	INTWTR/W12STC/OOL	10-Apr-21	5:00	72.6	
LSF Treated Water Outlet WP01	INTWTR/W01TAC/WOL	10-Apr-21	14:30		461.9
LSF Treated Water Outlet WP02	INTWTR/W02TAC/WOL	10-Apr-21	15:30		2872.0
LSF Treated Water Outlet WP03	INTWTR/W03TAC/WOL	10-Apr-21	17:30		271.5
LSF Treated Water Outlet WP04	INTWTR/W04TAC/WOL	10-Apr-21	17:30		107.9

Regards
Samir”

At 8.55 a.m. on 11th April, 2021

“**From:** Production Manager WP - MPT
<RJON.ProductionManager@cairnindia.com>
Sent: Sunday, April 11, 2021 8:55 AM
To: Rawat, Maitab S <Maitab.Rawat@SuperiorEnergy.com>;
Shah, Prerak <Prerak.Shah@superiorenergy.com>

Subject: LSF-MWP-1 Production report & Man power details on 10-Apr-2021

Dear Rawat,

BS&W and OIW has been observed on higher side (above the required Spec) .Kindly do the needful to achieve the spec.

Regards,
Saji”

At 1.13 a.m. on 11th April, 2021

From: LSFControlRoomMWP1
<LSFControlRoomMWP1@SuperiorEnergy.com>
Sent: Sunday, April 11, 2021 1:13 AM

To: Production Manager WP - MPT
<RJON.ProductionManager@cairnindia.com>; Production Superintendent WP - MPT <RJON.ProdSupt-MPT-zP@cairnindia.com>; Control Room Engineer – MPT <Rjon.ControlRoomMPT@cairnindia.com>

Subject: LSF-MWP-1 Production report & Man power details on 10-Apr-2021

External Sender: Use caution with links/attachments

Dear All,

Kindly find the production details of LSF-MWP-1,

Oil Processed	3725.456	Bbl.
Water Processed	16380.679	Bbl.
Total liquid Processed	20106.135	Bbl.
Total Gas Processed (based on Pad GOR)	5965.513	m3
Internal gas Consumption (from FG scrubber to GEG)	0.000	m3
Total Gas Flared	5965.513	m3
GOR(Based on Well pad GOR)	231	
Online Hours	24	Hrs.
PF Pump Hours	24	Hrs.

- Gas production calculated based on average BS&W of oil processed and well pad GOR.

Date	Time	Crude Oil Flow Meter Reading Cumulative (FI0102A)	Water Flow Meter Reading Cumulative (FI0103A)	Crude Oil Flow Meter Reading Cumulative (FI0102B)	Water Flow Meter Reading Cumulative (FI0102B)	Oil Production (M3)	Water Production	Total Liquid (M3)	Oil Production (BBLs)	Water Production (BBLs)	Total Liquid (BBLs)
10-Apr-21	6.00	62	319	94	332	156	651	807	981.708	4096.743	5078.451
	12.00	122	638	197	665	319	1303	1622	2007.467	8199.779	10207.246
	18.00	172	955	268	997	440	1952	2392	2768.92	12283.936	15052.856
	0.00	236	1273	336	1330	592	2603	3195	3725.46	16380.679	20106.14

Diesel consumptions For DG(Litres)				
Opening stock LITERS	Consumptions (LITER)	Received (LITER)	Closing Stock (LITERS)	Remarks
600	0	0	600	

28. Apropos the emails filed by the respondents, Mr. Sethi, learned Senior Counsel for the petitioner submitted that these emails did not pertain to any default or breach, on the part of the petitioner, *vis-à-vis* its obligations under the three agreements constituting subject matter of these proceedings. He submits that, satisfied by the equipment provided by the petitioner, certain *ad hoc* contracts were executed, each with the life of one month, starting January, 2021. He submits that the grievances expressed in the aforesaid emails filed by the respondents pertain to the services provided by the petitioner under the *ad hoc* contract for the month of April, 2021. This contract, according to him, is entirely distinct and different from the original three agreements executed between the petitioner and the respondents and the respondents are confusing matters by seeking to conflate the performance under the *ad hoc* contract for the month of April, 2021, with the three agreements originally executed between the petitioner and the respondents.

29. Having heard learned Senior Counsel and considered the available material, I am of the view that the attempt, of Mr Sethi, to extricate the facts of the present case from the narrow confines of the law relating to interlocutory interdictions against invocation of unconditional bank guarantees, cannot succeed.

30. The submission of Mr. Sethi that the act of the respondents in seeking to invoke the Bank Guarantee suffered from “egregious fraud”, in my opinion, is not acceptable, even if all the submissions advanced by Mr. Sethi, as noted hereinabove, are to be treated as correct. “Egregious fraud”, as a ground to invoke and to justify the interdicting of the invocation of the Bank Guarantee, at the cost of the repetition, has to be fraud which erodes the very foundation of the bank guarantee, and cannot be related to the manner or method of its invocation, *vis-à-vis* the contract between the parties. The fraud must vitiate the bank guarantee itself, and not merely the act of invoking the bank guarantee, *vis-à-vis* the contract between the parties. The petitioner has not made out a case that there was any fraud in the execution of the Bank Guarantee, or that the Bank Guarantee, *per se*, was vitiated on account of fraud. The submissions of Mr. Sethi, taken at the highest, can only make out a case of unjustified invocation of the Bank Guarantee, which stops way short of egregious fraud.

31. Mr. Gopal Jain and Mr. Akhil Sibal, learned Senior Counsel for the respondents, submit that the defaults, to which the aforesaid emails allude, are directly relatable to the equipment and facilities provided by the petitioner under the three agreements forming subject matter of these proceedings. Mr. Sibal has, in fact, taken serious exception to the averments, in paras 7 and 28 of the petition, to the effect that no defect, in the functioning of the LSFs/equipment supplied under the agreements was communicated by the respondents to the petitioner. In fact, in para 28, the petition specifically avers that “there was no communication or correspondence from Respondent No. 1 regarding

any deficiency or shortcomings in the service of the Petitioner whatsoever”. Para 7, in a similar vein, asserts that “no defect *in the functioning of the LSFs/equipment supplied under the agreements* have been communicated to the Petitioner”. Mr. Sibal submits that these assertions are, on their face, incorrect. He points out that the original agreements between the parties were for installation and working of the equipment provided by the petitioner. Mr. Sibal has specifically invited my attention to the schematic representation of the technical specifications of the equipment provided by the petitioner under the Principal Agreement as provided below Clause 6.3 of Schedule II of the Principal Agreement thereof. He has, in this context, drawn my attention to the following specifications contained therein.

“Stream B: Oil Stream to the Existing Manifold

Design Parameter	Design value
<i>Maximum BS & W in the Oil Stream</i>	25%
Stream pressure suitable for Oil to be pumped back to the existing manifold operating at ~14~17 bar (g).	

Stream C: Produced Gas Stream to the Existing Manifold

Design Parameter	Design value
GOR	200-265 scf/bbl
Gas Stream shall be compressed & recombined with the outgoing production fluid. CONTRACTOR shall provide suitable arrangement for proper gas recombination in the production fluid manifold. Compressor details shall be decided by the CONTRACTOR accordingly.	

Stream D: Water Stream to Power Fluid System

Design Parameter	Design value
Water Volumetric Rate	As per mass balance
Pressure of the Water Stream	~ 200 bar (g)
OIW ⁴	<i>Less than 60 ppm (Refer Compensation Schedule)</i>
TSS	20 ppm (max)”

32. Mr. Sibal points out that the disconnect, being sought to be drawn, by Mr. Sethi, between the three original agreements between the petitioner and the respondents and the monthly *ad hoc* agreements executed between them, starting January, 2021, is misguided. He submits that, in fact, the *ad hoc* agreements involved the use and performance of the facilities and equipment provided under the three original agreements between the petitioner and the respondents. In order to demonstrate the link between the Principal Agreement and the *ad hoc* agreements, *vis-a-vis* the emails addressed by the respondents to the petitioner, Mr. Sibal points out that, as per the technical specifications under the Principal Agreement (extracted *supra*), the OIW (Oil In Water) content was required to be less than 60 ppm. As against this, he submits that the OIW content, as per the Day Report on 24th April, 2021, which was also reflective of the position throughout the month of April, 2021, showed that, at various times during the said day, the OIW content was far in excess of 60 ppm. He has, in this context, invited my attention to the Day Report for 24th April, 2021, particularly to the following table contained therein:

⁴ Oil In Water

LAB ANALYSIS		
Rajasthan Operation - MPT		
Local Pad Separation (MWP # 01)		
Oil surge Vessel O/L		
Date	Density @ 15°C (gm/ml)	Avg. BS&W %
24-Apr-21	0.8840	65.28
Produced water Storage Tank O/L		
Date	Time	Oil in Water (ppm)
24-Apr-21	1:00	451.9
24-Apr-21	5:00	578
24-Apr-21	9:00	350.4
24-Apr-21	13:00	209.6
24-Apr-21	17:00	396
Day Average		397.18

33. Mr. Sibal also compared this position with the table contained in the e-mail sent by the respondent to the petitioner at 8.43 a.m. on 25th April, 2021 which, to facilitate understanding the submission, may be reproduced, once again, thus:

Point Description	Point Prefix	Schedule Date	Time	BS&W % (v/v)	Oil Content in Water ppm
				ASTM D4007-02	API RP-45
LSF Surge Tank Oil Outlet WP01	M/PWR//01STO/OOL	24-Apr-21	1:00	80.6	
LSF Treated Water Outlet WP01	M/PWR//01TWO/WOL	24-Apr-21	1:00		451.9
LSF Treated Water Outlet WP12	M/PWR//12TWO/WOL	24-Apr-21	1:00		1109.2
LSF Surge Tank Oil Outlet WP12	M/PWR//12STO/OOL	24-Apr-21	5:00	52	
LSF Treated Water Outlet WP01	M/PWR//01TWO/WOL	24-Apr-21	5:00		578
LSF Treated Water Outlet WP12	M/PWR//12TWO/WOL	24-Apr-21	5:00		881.3
LSF Treated Water Outlet WP01	M/PWR//01TWO/WOL	24-Apr-21	9:00		350.4
LSF Treated Water Outlet WP12	M/PWR//12TWO/WOL	24-Apr-21	9:00		409.9
LSF Surge Tank Oil Outlet WP01	M/PWR//01STO/OOL	24-Apr-21	9:00	69.96	--
LSF Surge Tank Oil Outlet WP12	M/PWR//12STO/OOL	24-Apr-21	9:00	42.5	--
LSF Surge Tank Water Outlet/Treated Water Inlet WP01	M/PWR//01STWO/WOL	24-Apr-21	9:00		--
LSF Treated Water Outlet WP01	M/PWR//01TWO/WOL	24-Apr-21	13:00		209.6
LSF Treated Water Outlet WP12	M/PWR//12TWO/WOL	24-Apr-21	13:00		1296.8

Mr Sibal points out that the figures in the right hand column of the table in the e-mail, showing the OIW content in ppm outside the permissible limit of 60 ppm stipulated in the Principal Agreement, correspond exactly with the figures in the tabular statement in day report on 24th April, 2021, extracted hereinabove, when one compares with reference to the time of recording the OIW content. This, when

seen in juxtaposition with the technical specifications contained in the Principal Agreement, contends Mr. Sibal, clearly shows that all was not well with the functioning of the equipment and facilities installed and provided by the petitioner under the Principal Agreement and that, therefore, it could not be said that, in invoking the Bank Guarantee furnished by the petitioner, the respondents had acted irregularly or illegally.

34. Mr. Sibal took me through certain other documents in the email between the parties and correlated them to the agreements; however, I do not deem it necessary to enter into these correspondences in detail.

35. I am in entire agreement with Mr. Sibal that the peripheries of the jurisdiction of the Court, seized with a prayer for interlocutory injunction against the invocation of a bank guarantee, do not extend so far as to justify a penetrative exercise aimed at ascertaining as to whether the invocation was in accordance with the agreement between the parties, or not. This, in fact, is precisely, what the Supreme Court has, in a catena of authorities, foreborne Courts from doing.

36. The underlying element of public interest, in desisting from interdicting the invocation of unconditional bank guarantees, is fostering of the faith of the public in the banking system, which is the lifeblood of commerce, at a national as well as international level. The following statement of the law from ***R. D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.***⁵ was approved by the

⁵ (1977) 2 All ER 862

Supreme Court in *United Commercial Bank v. Bank of India*⁶ and *Hindustan Steelworks Construction Ltd v. Tarapore & Co.*⁷, as enunciating the correct legal position:

*“It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the lifeblood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. *The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged.*”*

(Underscoring supplied; Italics in the original report)

37. The communications placed on record by the respondents indicate that they have not been able to obtain optimum results from the equipments provided by the petitioner. The initial submission of Mr. Sethi that, between July, 2020 and the invocation of the bank guarantee on 20th August, 2021, there was no correspondence between the petitioner and the respondents, as would justify invocation of the PBG, cannot, in face of the aforesaid correspondence, *prima facie* be accepted.

38. In any event, it can hardly be said that the invocation of the PBG by the respondents, in such circumstances, makes out a case of

⁶ (1981) 2 SCC 766

egregious fraud, as would justify injunction such invocation, in exercise of the jurisdiction conferred on this Court by Section 9 of the Arbitration and Conciliation Act, 1996 (“1996 Act”, in short). The merits of the submissions of learned Senior Counsel for the petitioner that the aforesaid emails addressed by the respondents to the petitioner do not make out the case of any breach of the obligations of the petitioner under the agreements with the respondents does not appear to be free from doubt.

39. No other ground for injunction of invocation of the bank guarantee was urged by Mr. Sethi. Even otherwise, the only other grounds available are of special equities and irretrievable injustice. Neither of these grounds can be said to exist. The following passage from *Hindustan Steelworks Construction Ltd*⁷ merits reproduction, in this context:

“23. We are, therefore, of the opinion that the correct position of law is that *commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done* if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/Respondent 1 on the ground that special equities or the special circumstances of the case required it. *The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter-claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an*

⁷ (1996) 5 SCC 34

exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was, therefore, not right in restraining the appellant from enforcing the bank guarantees.”

(Emphasis supplied)

To reiterate, however, Mr Sethi specifically urged that he was not pleading the existence of “special equities”, and was seeking interdiction, by this Court, on the ground that “egregious fraud” existed.

40. I, for the reasons already set out in detail hereinabove, am unable to agree.

41. Needless to say, this order only examines the issue of whether a case for interdicting invocation of the bank guarantee, under Section 9 of the 1996 Act exists, or not. The opinion expressed in this order had to be treated as *prima facie* in nature, limited to the said purpose, and no more.

42. In view of the above discussion, I am of the opinion that no case, for grant of the reliefs sought in this petition, can be said to exist.

43. Resultantly, the petition is dismissed.

C. HARI SHANKAR, J.

AUGUST 26, 2021/r. bararia