$~ (19-22)

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

<u>Date of Decision: 16th November, 2021</u>

\+ O.M.P.(I) (COMM.) 371/2021, I.A. 14946/2021.

TRF LTD ..... Petitioner

Through: Mr. Rajiv Nayar, Senior Advocate with Mr. Sumeet Gadodia, Mr. Kaushik Poddar, Mr. Rajiv Dalal and Ms. Lavanya Gadodia, Advocates.

versus

THE INDURE PRIVATE LIMITED & ANR. ..... Respondents

Through: Mr. Akhil Sibal, Senior Advocate with Mr. Prashant Mehta, Ms. Divita Vyas, Mr. Varun Gupta, Ms. Simran Wason, Mr. Shantanu Parashar and Ms. Nitya Gupta, Advocates for R-1.

\+ O.M.P.(I) (COMM.) 372/2021, I.A. 14971/2021.

TRF LTD ..... Petitioner

Through: Mr. Sumeet Gadodia, Mr. Kaushik Poddar, Mr. Rajiv Dalal and Ms. Lavanya Gadodia, Advocates.

versus

THE INDURE PRIVATE LIMITED & ORS. ..... Respondents

Through: Mr. Akhil Sibal, Senior Advocate with Mr. Prashant Mehta, Ms. Divita Vyas, Mr. Varun Gupta, Ms. Simran Wason, Mr. Shantanu Parashar and Ms. Nitya Gupta, Advocates for R-1.

\+ O.M.P.(I) (COMM.) 373/2021, I.A. 14972/2021.

TRF LTD ..... Petitioner

Through: Mr. Sumeet Gadodia, Mr. Kaushik Poddar, Mr. Rajiv Dalal and Ms. Lavanya Gadodia, Advocates.

versus

THE INDURE PRIVATE LIMITED & ANR. ..... Respondents

Through: Mr. Akhil Sibal, Senior Advocate with Mr. Prashant Mehta, Ms. Divita Vyas, Mr. Varun Gupta, Ms. Simran Wason, Mr. Shantanu Parashar and Ms. Nitya Gupta, Advocates for R-1.

\+ O.M.P.(I) (COMM.) 374/2021, I.A. 14973/2021.

TRF LTD ..... Petitioner

Through: Mr. Jayant Mehta, Senior Advocate with Mr. Sumeet Gadodia, Mr. Kaushik Poddar, Mr. Rajiv Dalal and Ms. Lavanya Gadodia, Advocates.

versus

THE INDURE PRIVATE LIMITED & ANR. ..... Respondents

Through: Mr. Akhil Sibal, Senior Advocate with Mr. Prashant Mehta, Ms. Divita Vyas, Mr. Varun Gupta, Ms. Simran Wason, Mr. Shantanu Parashar and Ms. Nitya Gupta, Advocates for R-1.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

<u>JUDGMENT</u>

[VIA HYBRID MODE]

<u>SANJEEV NARULA, J. (Oral):</u>

1. By way of present petitions under Section 9 of the Arbitration and Conciliation Act, 1996, the Petitioner – TRF Ltd. [*hereinafter, **'TRF'***] seeks

a stay order against invocation and encashment of bank guarantees furnished in favour of Respondent No. 1 – The Indure Private Limited [*hereinafter,* ***'Indure'***]. The background facts and the relief sought being nearly identical, it is considered apposite to decide and dispose of all the petitions by way of a common order.

BRIEF FACTS

2. TRF is a company engaged in the business of manufacturing, erection and commissioning of bulk material handling equipment. Indure is engaged in the business of procuring such equipment for installation in thermal power plants for its clients/Principle Employers, which, in the instant cases, are Rajasthan Rajya Vidyut Utpadan Nigam Limited [*hereinafter,* ***'RRVUNL'***],[1] and National Thermal Power Corporation [*hereinafter,* '***NTPC***'].[2] The Banks that have issued the bank guarantees are arrayed as Co-Respondents.[3]

3. Indure issued certain Work Orders and Purchase Orders on TRF for supply of equipment for several projects at different sites. The details of the equipment, Work Orders and Purchase and bank guarantees are different in each petition, however, the background, circumstances and grounds urged for seeking restrain orders is common. Thus, for the sake of convenience, the factual details in respect of O.M.P. (I) (COMM.) 371/2021 are being noted in

[1] In O.M.P.(I) (COMM.) 371/2021.
[2] In O.M.P.(I) (COMM.) 372/2021, O.M.P.(I) (COMM.) 373/2021 and O.M.P.(I) (COMM.) 374/2021.
[3] Bank of Baroda in O.M.P.(I) (COMM.) 371/2021, Central Bank in O.M.P.(I) (COMM.) 372/2021 and O.M.P.(I) (COMM.) 373/2021, and Indian Bank in O.M.P.(I) (COMM.) 372/2021 and O.M.P.(I) (COMM.) 374/2021.

detail, and the differentiating details of other cases, to the extent found relevant, are noted separately.

<u>FACTS IN O.M.P.(I) (COMM.) 371/2021 & 372/2021</u>

4. In respect of a project at the Chabra site in Kota, Rajasthan, belonging to RRVUNL, TRF was issued two Purchase Orders dated 31st October, 2009, for supply of *'Boom Hydraulic Drive Stacker Reclaimer with all its Accessories'* and *'Wagon Tippler/SAC/Apron Feeder/Ring Granulator/ Grizzy Feeder with all its Accessories'*; and two Work Orders both dated 31st October, 2009, for '*Erection, Testing, Commissioning and Installation*'. Under the terms of the afore-noted agreements, TRF issued Advance Bank Guarantees [*hereinafter,* ***'ABG'***] and Performance Bank Guarantees [*hereinafter,* ***'PBG'***], details whereof are set out in the prayer clause.

5. TRF claims that the equipment under the Purchase Orders has been supplied entirely. Moreover, the advance amounts for which the ABGs were issued also stand adjusted by Indure. After the supply of equipment, their erection, commissioning, and testing has also been done; even the Performance Guarantee Test stands conducted.

6. TRF thus claims that it has fulfilled all its contractual obligations to the satisfaction of Indure, and despite that, it was constrained to renew the bank guarantees, under threat of invocation relating to other ongoing contracts between the parties.

FACTS IN O.M.P.(I) (COMM.) 373/2021

7. In respect of Purchase Orders and Work Orders pertaining to a project at Kanti in Muzaffarpur, Bihar, material for the value of Rs. 70,99,36,922/- stands supplied against total value of Rs. 28.10 crores. However, corresponding payments were not released. Advance of Rs. 1,79,93,692/- towards supply of materials has been adjusted from the bills; only an amount of Rs. 1,05,16,308/- remains unadjusted. Since payments were not made, TRF was compelled to stop the supplies. Reliance is placed upon a letter dated 16th August, 2018 issued by TRF, requesting Indure to reduce the value of Advance Bank Guarantee to the extent of the amount adjusted against advance.

8. Despite substantial supply against the advance paid by Indure, ABG has not been reduced, and Indure has compelled TRF to renew the bank guarantees under threat of invocation relating to other ongoing contracts between the parties.

FACTS IN O.M.P.(I) (COMM.) 374/2021

9. In respect of project at Solapur site in Maharashtra, TRF contends that it has supplied the entire equipment; entire advance amount, except Rs. 9 lakhs, has already been adjusted, and therefore TRF is entitled to release of the ABG.

10. TRF has supplied the entire equipment to Indure, with only part of

mandatory spares pending, which is dependent upon the approval of Billing Break Up to be given by Indure which has not yet been approved despite lapse of eight years from the date of Work/Purchase Order. TRF repeatedly corresponded with Indure for reduction of the amount of ABGs, yet the same has not been done, despite the fact that only an amount of Rs. 9 Lakhs approximately is remaining to be adjusted towards ABG. With respect to PBG, it is contended that the same was valid only for a period of twelve months, commencing from taking over of equipment after satisfactory completion of trial operation and Performance Guarantee Test. The equipment has been supplied entirely, operation certificate in respect of equipment has been issued, except for some part for which front has not been made available by Indure as yet.

11. The equipment has been erected and installed by TRF which is evident from the initial operation certificates issued by the Principal Employer – NTPC. Despite that, Indure has not yet released 10% of the retention amount amounting to Rs. 5,38,37,201/-. Further, an amount of Rs. 75,90,348/- has been withheld from the bills of TRF and thus, total amount of Rs. 6,14,27,549/- is due and payable to TRF from Indure.

ARGUMENTS OF TRF

12. On behalf of TRF, Mr. Rajiv Nayyar and Mr. Jayant Mehta, Senior Counsel alongwith Mr. Sumeet Gadodia, collectively submit as follows:

12.1. The invocation of bank guarantee by Indure amounts to egregious fraud.

12.2. Despite completion of works under Purchase Orders and Work

Orders, Indure compelled TRF to renew bank guarantees under the threat of invocation under other ongoing projects between the parties. TRF has repeatedly communicated with Indure for the release of outstanding payments due to them, however, the same has not been done, despite Indure receiving the said payments from RRVUNL and NTPC (as the case may be). It is settled position in law that bank guarantee furnished in respect of one contract cannot be encashed against the non-performance of work pertaining to another contract. The alleged ground for non-completion of work in respect of other projects, is therefore, impermissible.

12.3 Indure is fully aware that the amount under bank guarantees is not payable, yet, it is invoking the same by misrepresentation and suppression of facts.

12.4. Indure is in a dire financial crisis. Several applications are pending against it before the National Company Law Tribunal ('***NCLT***'). Thus, in case an injunction is not granted, TRF would suffer irretrievable damage, as it would not be able to recover the amount of the bank guarantees.

12.5. The accounts of Indure have been declared as non-performing assets ['***NPA***'], and in this background, resorting to encashment of the bank guarantees amounts to fraudulent misappropriation of money.

12.6. The purpose for which the bank guarantee was furnished stands fulfilled. Reliance is placed upon para 21 of the decision in ***Gangotri Enterprises v. Union of India***.[4]

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[4] 2016 11 SCC 720.

<u>ARGUMENTS OF INDURE</u>

13. Mr. Akhil Sibal, Senior Counsel appearing on behalf of Indure, makes the following submissions:

13.1. The law on bank guarantee is no longer *res integra*. Bank guarantees are separate, distinct and independent from the main contract, and the scope of grant of injunction is very limited. Reliance was placed on paragraphs 11 and para 15 of ***CSRC Research and Design v. DFCCIL***,[5] in this regard.

13.2. TRF is obliged, under law, to have placed on record the entire correspondences exchanged between the parties. Yet, it has deliberately and wilfully concealed material facts in order to mislead this court. The statement of truth filed alongwith with the petition is false and inaccurate. In this regard, reliance has been placed upon observations of this court in ***ICOMM Tele Ltd. v. Bharat Sanchar Nigam Ltd.***[6]

13.3. Indure has, in a short time after receiving notice of the petition, to the extent possible, gathered a few relevant documents which would suggest that there is a serious dispute regarding fulfilment of contractual obligations by TRF. These facts are germane for this Court to understand the dispute between the parties and breach of the terms of the agreement, thereby entitling Indure to invoke the bank guarantees.

13.4. The bank guarantees in question are unconditional, and liable to be

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[5] 2020 SCC OnLine 1526. (*See* paragraphs 40-41)

[6] 2019 261 DLT 1661.

encashed, which oblige the bank to pay the amount thereunder without having any regard to the dispute pertaining to the main contract(s).

13.5. TRF has been unable to show any egregious fraud that would have the effect of vitiating the entire underlying transaction. In absence thereof, the Court should not entertain the present petition.

13.6. Reliance is placed upon communications between the parties to demonstrate that disputes exist regarding the execution of the Purchase and Work Orders. TRF has deliberately and wrongly portrayed that there is no complaint regarding the equipment supplied by them, whereas, the Principal Employers have made several communications pointing out that the equipment is faulty. Thus, the bank guarantees have been rightly invoked.

13.7. TRF is also not entitled to rely upon the second exception to stay of bank guarantees as recognized by courts, i.e., irretrievable injury or special equities. No petition has been admitted against Indure by NCLT till date. Mere pendency of applications before the NCLT does not mean that invocation of bank guarantee will result in irretrievable injury. This is merely an apprehension, and not a certainty. In this respect, reliance is placed upon the judgment of this Court in ***CSRC Research*** (*supra*).

13.8. Reliance upon the judgment in ***Gangotri Enterprises*** *(supra)* is misplaced. The said judgment has been held to be *per incuriam* in ***State of Gujarat v. Amber Builders***.[7]

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[7] 2020 (2) SCC 540. (*See* para 21)

ANALYSIS

14. During the course of arguments, the counsel for Indure, assisting Mr. Sibal, has filed certain documents supporting its submissions, which include certain correspondences exchanged between the parties. The same have been taken on record and shall be adverted to later.

15. The law on stay of invocation of bank guarantees is well settled, in light of a consistent view taken by the Supreme Court, as well as this Court. Bank guarantee constitutes a separate and distinct contract, independent from the main contract. In case a bank guarantee is unconditional, then the payment thereunder has to be paid without any demur or objection, irrespective of any dispute which may have cropped up between the beneficiary and the party on whose behalf such bank guarantee has been established. Bank is thus obligated to make the payment, without protest and contest, the moment a demand is made. Unless there is an egregious fraud established before the Court, or there exist special equities, courts ordinarily do not grant a stay for restraining the encashment of the bank guarantees. The contentions of fraud or the need for special equities are to be specifically pleaded and proved. [*See:* ***C. Himadri Chemicals Industries Ltd. v. Coal Refinery Company***,[8] and ***Gujarat Maritime Board v. Larsen and Toubro***.[9]]

16. The terms of the bank guarantee(s) in question are thus absolutely essential for the Court to consider a request for stay of invocation thereof. The relevant terms of the ABG read as follows:

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[8] 2007 (8) SCC 110.
[9] 2016 (10) SCC 46.

"BANK GUARANTEE FOR CONTRACT PERFORMANCE

B.G. No.: 0019IGPER001120
Date : 11/2/2020

To
The Indure Private Limited
Indure House
Greater Kailash-II
NEW DELHI-110048

Dear Sirs,
In consideration of the Indure Private Limited, (hereinafter referred to as the "Purchaser", which expression shall, repugnant to the context or meaning thereof include its successors, administrators and assigns) having awarded to M/s TRF Limited with its registered/ head office at 11 Station Road, Burmamines, Jamshedpur-831007 (hereinafter referred to as 'The Contractor', which expression shall unless repugnant to the context or meaning thereof, include its successors, administrators, executors and assigns) a contract by issue of Purchaser's Letter of Intent/ Purchase Order No. CHHABRA/TRF/SECOND/102 dated 31-10-2009 and the same having been unequivocally accepted by the contractor, resulting in a "contract" bearing No. CHHABRA/TRF/SECOND/102 dated 31.10.2009 valued at Rs. 1,20,00,000/- (Rupees One crore twenty Lakh only) for Design, Engineering, Manufacturing and supply of Wagon Tippler/SAC/ FEEDER for Chhabra Thermal Power Project, of RRVUNL, Chhabra and the contractor having agreed to provide a Contract Performance guarantee ***for the faithful performance of the entire contract****, equivalent to 10% (ten percent) of the said value of the contract, to the Purchaser.*

We Bank of Baroda a company incorporated under the Companies Act, 1956 and carrying on business banking under the banking regulation act 1949 and having its registered office at Mandvi, Baroda - 396006 and branch office at Main Road, Bistupur. Jamshedpur - 831001, Jharkhand (hereinafter referred to as the "Bank", which expression shall, unless repugnant to the context or meaning thereof, include its successors, administrators, executors and assigns) ***do hereby guarantee and undertake to pay the Purchaser, on demand any and all monies payable by the Contractor to the extent of Rs.12,00,000/- (Rupees Twelve Lakh only) as aforesaid at any time upto 30.06.2020 (date till completion of warranty period) without any demur, reservation, contest, recourse or protest and/or without any reference to the Contractor. Any such demand made by the Purchaser on the Bank shall be conclusive and binding notwithstanding any difference between the Purchaser and the Contractor or any dispute pending before any court, Tribunal, Arbitrator or any other Authority. The Bank undertakes not to revoke this guarantee during its currency without previous consent of the Purchaser and further agrees that the guarantee herein contained shall continue to be enforceable till the Purchaser discharges this guarantee.****"* [Emphasis supplied]

17. The Performance Guarantee is also similarly worded. Relevant portion thereof is extracted hereinbelow:

"BANK GUARANTEE FOR CONTRACT PERFORMANCE

B.G. No.: 0019IGPER001020
Date : 11/02/2020

To
The Indure Private Limited
Indure House
Greater Kailash-II

<u>NEW DELHI-110048</u>

Dear Sirs,

In consideration of the Indure Private Limited, (hereinafter referred to as the "Purchaser", which expression shall, repugnant to the context or meaning thereof include its successors. administrators and assigns) having awarded to M/s TRF Limited with its registered/ head office at 11 Station Road, Burma Mines, Jamshedpur-831007(hereinafter referred to as 'The Contractor', which expression shall unless repugnant to the context or meaning thereof, include its successors, administrators, executors and assigns) a contract by issue of Purchaser's Letter of Intent Purchase Order No. CHHABRA/TRE/FIRST/101 dated 31-10-2009 and the same having been unequivocally accepted by the contractor, resulting in a "contract" bearing No. CHHABRA/TRF/FIRST/101 dated 31-10-2009 valued at Rs. 15,85,00,000/- (Rupees Fifteen Crores Eighty five lakhs only) for Design, Engineering, Manufacturing and supply of Wagon Trippler/SAC/ FEEDER for Chhabra Thermal Power Project, of RRVUNL, Chhabra and the contractor having agreed to provide a Contract Performance guarantee ***<u>for the faithful performance of the entire contract</u>****, equivalent to 10% (ten percent) of the said value of the contract, to the Purchaser.*

We, Bank of Baroda a company incorporated under the Companies Act, 1956 and carrying on business banking under the banking regulation act 1949 and having its registered office at Mandvi, Baroda - 396006 and branch office at Main Road, Bistupur, Jamshedpur - 831001, Jharkhand (hereinafter referred to as the "Bank", which expression shall, unless repugnant to the context or meaning thereof, include its successors, administrators, executors and assigns) do hereby guarantee and undertake to pay the Purchaser, on demand any and all monies payable by the Contractor to the extent of Rs.1,58,50,000/- (Rupees One Crore fifty eight lakhs fifty thousand only) as aforesaid at any time upto 30.06.2020 (date till completion of warranty period) ***<u>without any demur, reservation, contest, recourse or protest and / or without any reference to the Contractor. Any such demand made by the Purchaser on the Bank shall be conclusive and binding notwithstanding any difference between the Purchaser and the Contractor or any dispute pending before any court, Tribunal, Arbitrator or any other Authority. The Bank undertakes not to revoke this guarantee during its currency without previous consent of the Purchaser and further agrees that the guarantee herein contained shall continue to be enforceable till the Purchaser discharges this guarantee</u>****."* [Emphasis supplied]

18. Except for the details of the contract and amounts mentioned therein, the above-extracted terms are same for all the ABGs and PBGs that are subject matter of the instant petitions [apart from in O.M.P.(I)(COMM.) 373/2021].

19. The extracted terms clearly demonstrate that the bank guarantees in question are unconditional, and unequivocally provide that on a demand being made, the bank has to honour the same, without any demur, contest or protest, in deference to the terms of the bank guarantee. The ABG and PBG are valid

for the the faithful performance of the entire contract to the extent provided.

20. Keeping in mind the afore-noted principles, the Court now proceeds to analyse the contentions urged by the Senior Counsel for TRF. At the outset, the Court finds the portrayal of events by TRF to be one-sided. There is absolutely no mention of any of the correspondence(s) from Indure, copies whereof have been produced by Indure during the course of arguments. No explanation is tendered for not enclosing the same. This amounts to deliberate concealment. Therefore, there is merit in the objection raised by Mr. Sibal regarding the violation of the Statement of Truth filed by TRF in the present proceedings. In ***ICOMM Tele Ltd.*** *(supra),* the court had observed that the sanctity of the Statement of Truth is breached if a party withholds relevant documents. It is the solemn duty and obligation of parties to present all documents necessary for adjudication of a petition. This concern is germane in cases like the instant one where ex-parte injunction is sought. Had the counsel for Indure not appeared before the court, the entire story would not have come out. The communication(s) shown by Indure in respect of each of the afore-noted cases indicates that there are serious disputes regarding the equipment(s) and the performance of work under the Work Orders and Purchase Orders. Mr. Nayar and Mr. Mehta have projected as if the bank guarantees stand fulfilled and are liable to be returned. However, the record reveals the truth to be quite to the contrary. Much prior to the filing of the present petitions, Indure had alleged breach of contract *viz.* Purchase and Work Orders, on the part of TRF. The documents filed by Indure in respect of each petition make out the existence of contractual disputes between the parties. To show the same, a reproduction of one of the communications –

being a letter dated 16th January, 2021 from Indure to TRF – would suffice. This letter deals with all the projects with which the present petitions are concerned, and gives us a glimpse of the disputes. The same reads as under:

> ***"From:*** *MOHAN TIWARI*
> ***Sent:*** *16 January 2021 22:55*
> ***To:*** *Abhijeet Singh*
> ***Cc:*** *Dipankar Kumar (3398); M SARMA; VARUN GUPTA; I.k.odiya@trf.co.in; INDURE SOLAPUR*
> ***Subject:*** *FW:* ***Solapur CHP Pkg- Wagon Tippler 1&2 Dust Suppression Readiness reg***
>
> *Dear sir*
>
> *Kindly refer the trailing mail on the subject. During visits of your representatives at our office from Jamshedpur as well as your Delhi office on 12th March 2019 and in June 2019 and or before and thereafter numerous times clarified that no amount is due and payable* ***to you and you were informed to complete the supply of equipment's including mandatory spares****. You were even informed to complete the job and conduct the PG test forthwith otherwise we will be constrained to take contractual actions against you.*
>
> *As you are aware that your account has been reconciled during the visit of your representative and all details were already provided.*
>
> ***In spite of our repeated requests and reminder M/s TRF has not completed the job at Solapur and not even supplied single spare****. Similarly,* ***a lot of spares are still pending and yet to be supplied at Vindhychal site even after ten years of award of the contract****. You have miserably failed to abide by the terms of the contracts and because of you, we have suffered huge losses and damages. We have to cut a very sorry figure in front of the client because of TRF. By this laidback and negligent attitude of M/S TRF we understand that M/TRF is not interested in completing the project and supplying the equipment. We are constrained to take contractual actions against you if the supplies/works are not completed. Since M/s TRF is not doing any works, we are constrain to get the works done at sole your risk and cost which we have already intimated to you.*
>
> ***M/s TRF has miserably failed to even execute fifty five percent of the contract at Kanti.*** *We have been constantly running pillar to post to get works done. We have been constantly requesting you to look into the matter but nothing is happening. We are left with no other option but to get the work done at your risk and cost. The same shall be recovered from by taking contractual actions including but not limited to encashment of the bank guarantees*
>
> ***Similarly you have left the lot of works art Chhabra which either we have directly pitched/ procured the material at your risk, cost and consequence or customer has done the works and recovered the amount from us.*** *All the details were provided to your representative during their visits in 2019 at our office. We are again bound to take remedial measures in this too in order recover amounts due and payable by you to us.*
>
> *All the end costumers are several times given us as well as M/s TRF the risk and cost notices to complete the job and in turned we have requested to M/s TRF to complete it seriously. TRF has never paid heed to our requests.*
>
> *Due to M/s TRF negligence, we have suffered a lot and incurred heavy financial losses and*

damages. WE are even losing our credentials and reputation in the market because of TRF.

We therefore finally intimate you to complete the balance works at the earliest otherwise we are constrained to take contractual actions against you." [Emphasis supplied]

21. In view of the above, the contention of Mr. Nayar and Mr. Mehta that the invocation of the bank guarantee is without any basis, cannot be accepted. In light of existence of contractual disputes, right has accrued in favour of Indure to claim recovery of the whole or part of the guarantee amount. Besides, even assuming that the invocation of the bank guarantees is not contractually justified, yet, that cannot be the sole ground to restrain Indure or the Banks from encashing the same. The bank guarantees are independent of the main contract. Invocation thereof is at the absolute discretion of the beneficiary. The bank must pay without demur or protest, regardless of disputes pertaining to the main contract. The court is precluded from embarking upon an enquiry regrading *inter se* claims of parties, pertaining to performance of the underlying contract. The same would have to be examined by the arbitral tribunal. [See: ***Consortium of Deepak Cable India Limited v. Teestavalley Power Transmission Ltd***.[10]].

22. As regards the plea of fraud, TRF has failed to discharge the burden of proof. There is no pleading or *prima facie* material shown to the court to that effect. The contention of TRF - that since there is no contractual obligation, the encashment is fraudulent - is highly misconceived. The exception of fraud recognised by the courts is one of egregious nature which vitiates the very foundation of the bank guarantee. The same as pressed does not even have

[10] 2014 SCC Online Del 4741.

semblance of fraud and therefore cannot be accepted by this Court as ground for granting stay of invocation.

23. In respect of O.M.P. (I)(COMM.) 373/2021, the bank guarantees in question are unconditional, inasmuch as the clause therein is almost identically worded. The only difference is that the term provides that monies payable by the contractor shall be to the extent of an unadjusted advance of an amount of Rs. 1,42,55,000/-. The relevant terms of the ABG read as follows:

"PERFORMANCE BANK GUARANTEE

B.G. No.: 80/10
Dated : 5/7/2016

The Indure Private Limited
Indure House
Greater Kailash-II
New Delhi-110048

Dear Sirs,
In consideration of the Indure Private Limited, (hereinafter referred to as the "Purchaser", which expression shall, unless repugnant to the context or meaning thereof include its successors, administrators and assigns) having awarded to M/s TRF Limited with its Registered/Head office at 11 Station Road, Burmamines, Jamshedpur-831007, Jharkhand (hereinafter referred to as the 'Contractor', which expression shall unless repugnant to the context or meaning thereof, include its successors, administrators, executors and assigns) a contract by issue of Purchaser's Purchase Order No. Muzaffarpur-KBUNL/TRF/First/01 dt. 15.04.2016 and the same having been unequivocally accepted by the contractor, resulting into a "contract" for the complete scope of supply of WT, SAC, AF, RG, VGF, IDLER, PULLEY and the contractor having agreed to provide a Contract Performance Guarantee for the faithful performance of the entire contract, equivalent to 10% (ten percent) of the said value of the contract, to the Purchaser in terms of clause No.8 of aforementioned Purchase Order.

We, Central Bank of India, Main Road, Bistupur, Jamshedpur-831001, Jharkhand (hereinafter referred to as the "Bank", which expression shall, unless repugnant to the context or meaning thereof, include its successors, administrators, executors and assigns) do hereby guarantee and undertake to pay the Purchaser, on demand any and all monies payable by the Contractor ***to the extent of proportionate value of work pending as per aforementioned purchase order*** *for an amount not exceeding Rs,2,85,10,000.00 (Rupees two crores eighty five lacs ten thousand only) as aforesaid at any time up to 31.12.2017 (date- till completion of warranty period)* ***without any demur, reservation, contest, recourse or protest and/or without any reference to the Contractor. Any such demand made by the Purchaser on the Bank shall be conclusive and binding notwithstanding any difference between the Purchaser and the Contractor or any dispute pending before any Court, Tribunal. Arbitrator or any other Authority.*** *The Bank undertakes not to revoke this guarantee during its currency without previous consent of the Purchaser and further* *agrees that the guarantee herein contained shall continue to be enforceable till the Purchaser discharges this guarantee, but not beyond the expiry date of this guarantee."*

[Emphasis supplied]

24. In respect of the afore-noted petition, Mr. Sibal has clarified that although TRF seeks stay of invocation in respect of three bank guarantees as noted below, Indure has invoked only the 1st and 3rd bank guarantees:

SL. No.	**Bank Guarantee No.**	**Date**	**Amount in Rs.**
1.	Bank Guarantee No. 80/11	05.07.2016	1,42,55,000/-
2.	Bank Guarantee No. 80/15	10.08.2016	1,42,55,000/-
3.	Bank Guarantee No. 80/10	05.07.2016	2,85,10,000/-

25. In respect of O.M.P. 374/2021, Mr. Jayant Mehta has made an additional submission. He has urged that considering the fact that there are applications pending consideration by the NCLT, there is a possibility that TRF would not be able to recover the amounts under the bank guarantees, if they were permitted to be encashed. He prays that in case the Court is not inclined to grant a stay, then the amount under the bank guarantees be directed to be kept in a no-lien account with Indure. This, he says, would protect the interest of TRF as the amount would not form part of the corpus under the IBC proceedings against Indure, if they are eventually admitted.

26. This contention, too, is meritless. The aforesaid plea is founded on the second exception to invocation of bank guarantees – *viz.* irretrievable harm or injustice or special equities. This exception, if contemplated, must be of such an exceptional and irretrievable nature that it would override the terms of the

guarantee amount, if encashed. As of now, no petition has been admitted by the NCLT. The apprehension expressed is speculative. Mere allegation that Indure is not in the pink of health does not warrant for exceptional relief as prayed for. TRF has decisively established that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution. The bank guarantees being unconditional, and no such special or extraordinary circumstances shown, the court finds no reason to indulge the submission made by Mr. Mehta.

27. The judgment in ***Gangotri*** (*supra*) has no application as the same is distinguishable on facts. Besides, it has also been held to be *per incuriam* by the Supreme Court in the ***State of Gujarat v. Amber Builders***.[11]

28. The Court does not find any merit in the present petitions, and accordingly the same are dismissed. In view of the fact that there is a breach of the statement of truth, costs of Rs. 10,000/- in respect of each of the petitions are imposed, to be deposited with the Delhi Legal Services Authority within 2 weeks from today.

29. Needless to say, the observations made hereinabove are only on a *prima facie* basis. The Tribunal, as and when constituted, shall hear the case uninfluenced by the opinions expressed herein.

SANJEEV NARULA, J

NOVEMBER 16, 2021/hd

[11] 2020 (2) SCC 540, at para 10, which reads thus:

"10. *In our opinion, the judgement rendered in Gangotri Enterprises Ltd. is per incuriam because it relies upon Raman Iron Foundry [(1974) 2 SCC 231] which has been specifically overruled by the three-Judge bench in H.M. Kamaluddin Ansari".*