

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

BEFORE

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

+ **W.P.(C) 11946/2018 & CM APPLs. 46305/2018, 47720/2022**

Between: -

IDBI BANK LTD
51/3, DESH BANDHU GUPTA,
KAROL BAGH (OPPOSITE KHALSA
COLLEGE), NEW DELHI
THROUGH ITS AUTHORISED SIGNATORY PETITIONER

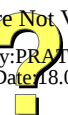
*(Through: Ms. Maninder Acharya, Senior Advocate
 alongwith Mr. Siddarth Barwa, Mr. Praful Jindal &
 Mr. Akash Mohan Srivastav, Advocates.)*

AND

POWER FINANCE CORPORATION
LTD. URJANIDHI', 1,
BARAKHAMBHA LANE,
CONNAUGHT PLACE NEW DELHI -
110001 RESPONDENT NO.1

M/S ISOLUX CORSAN INDIA
ENGINEERING & CONSTRUCTION
PRIVATE LIMITED 2ND FLOOR,
BLOCK -2, VATIKA BUSINESS
PARK, SECTOR - 49, SOHNA
ROAD, GURGAON- 122001 RESPONDENT NO.2

M/S. SOUTH EAST U. P. POWER
TRANSMISSION COMPANY LTD.,
SHALIMAR TITANIUM, 601-602,
6TH FLOOR, PLOT NO. TC/G-1/1,
VIBHUTI KHAND, GOMTI NAGAR
- LUCKNOW, UTTAR PRADESH -
226010 RESPONDENT NO.3



(Through: Mr.Sanjay Jain, ASG with Ms. Pallavi Kumar
& Mr.Pranav Tanwar, Advocates for R-1.
Mr. Abhinav Mishra, Mr. Nivebita Chauhan, Ms. Jagriti
Dosi & Ms. Komal Singh, Advocates for R-2.
Mr.Venkatesh, Mr. Siddharth Joshi, Mr. Abhishek Nangia
& Ms.Soumya Sharma, Advocates for R-3.

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Pronounced on: 12.05.2023

J U D G M E N T

1. The present petition is filed under Article 226 of the Constitution of India by IDBI Bank Ltd., praying *inter alia*—(1) quashing of the invocation notice dated 15.10.2018 issued by the respondent no.1, wherein certain bank guarantees furnished by the petitioner have been invoked; and (2) a direction to the respondents to return the bank guarantees furnished by the petitioner.

2. The facts material to the present dispute are that in the year 2011, Uttar Pradesh Power Transmission Corporation Limited declared one Isolux Corsan Concesiones S.A. (hereinafter 'Isolux') as the successful bidder for a project that, *inter alia*, was for providing transmission services to various long-term transmission customers in the State of Uttar Pradesh (hereinafter 'said project'). Isolux, along with another company, formed respondent no.3 (a joint venture company) for the purposes of executing the said Project. The respondent no.3 in turn engaged the respondent no.2 for executing the said project.

3. On 10.02.2012, in order to define the terms of the work, three agreements were entered into between the respondent nos.2 and 3, viz., Civil Works Agreement, Supply Agreement and Services Agreement (hereinafter 'Definitive Agreements'). The Definitive Agreements

provided that the respondent no.3 was entitled to withhold as "retentions" part of the payments from the periodic payments after 30 days from the issuance of Taking Over Certificate/Service Completion Certificate/Supply Completion Certificate and the balance after expiry of the Defect Liability Period.

4. On 25.02.2014, all the Definitive Agreements were amended so as to provide that the retention amount would be released by the respondent no.3, if the respondent no.2, furnishes bank guarantee (hereinafter 'BGs') for an amount equivalent to the retention amount in favour of the respondent no.3. On the other side of things, the respondent no.3 and the respondent no.1, along with some other parties, had entered into a Common Term Loan Agreement (hereinafter 'term loan agreement') on 28.02.2014 for a total amount of Rs.3,713.25 crore.

5. Subsequently, the petitioner from 30.12.2014 to 30.10.2015 issued seven BGs at the instance of the respondent no.2 for a total amount of Rs.58.5 crore, in which the respondent no.3 was the beneficiary who thereafter assigned the BGs in favour of the respondent no.1, with the consent of the petitioner.

6. On 10.10.2018, the respondent no.1 issued a notice to respondent no.3 recalling the loan facility availed by the respondent no.3 under the term loan agreement and demanded that the respondent no.3 forthwith pays the outstanding amount. Thereafter, on 15.10.2018, the respondent no.1 sent an invocation notice to the petitioner invoking the BGs and calling upon the petitioner to pay forthwith the amounts so mentioned in the BGs. The petitioner being aggrieved by the invocation notice, filed the instant petition challenging the same.

7. Ms. Maninder Acharya, the learned senior counsel for the petitioner made the following broad submissions – firstly, that the BGs were in lieu of the retention monies as provided for in the Definitive Agreements, which in turn provided that the retention monies were to be released after the completion of the work. As the work has been completed, the petitioner is therefore discharged from its obligations under the BGs. She specifically places reliance on Clauses 2 and 3 of the BGs.

8. Secondly, after taking this court through Clause 3 of the BGs, the invocation notice and loan recall notice of the respondent no.1, learned senior counsel has contended that the BGs were issued for a specific purpose, that is, for the retention monies as provided for in the Definitive Agreements; and since the basis of the invocation of the BGs is failure of respondent no.3 to honour its obligations under the term loan agreement, the same is bad in law, as being contrary to the terms of the BGs itself.

9. Thirdly, the petitioner's agreement and acknowledgement of the assignment of BGs in favour of the respondent no.1, was done while honouring the terms of the BGs, and no derogation was made therefrom. The assignment, it is argued, was therefore, specifically for the purpose of retention monies provided for in the Definitive Agreements. The learned senior counsel in support of her arguments took this court through various communications that took place between the petitioner and the respondent nos.1 and 3, specifically letters dated 30.12.2014, 31.03.2015, 30.07.2015, 12.08.2015 and 30.10.2015, issued by the petitioner, in which the issuance for assignment was acknowledged and reference was made to Clauses 10 and 11 of the BGs.

10. Fourthly, an egregious fraud has taken place where all the respondents in connivance with each other have taken advantage of the petitioner, i.e., IDBI Bank Ltd., and tricked the bank into giving BGs whilst from the very beginning, having a fraudulent intention of assigning the BGs later. The petitioner-IDBI Bank Ltd. contends that the respondent no.2 and the respondent no.3 are fellow subsidiaries, having seven common Directors between them, and thereby, being under the control of a common management, were aware of the financial position of one another. Therefore, it is argued, that the respondent nos.2 and 3 had a fraudulent motive for procuring the BGs with an objective of ultimately assigning it *qua* the obligations of the term loan agreement. They placed reliance on the Grant Thornton's Forensic Audit Report dated 19.06.2020, and the Supplementary Forensic Audit Report dated 28.07.2021.

11. Fifthly, the learned senior counsel for the petitioner submits that the respondent no.2 is presently undergoing liquidation, and the petitioner would, therefore, not be in a position to exercise its right of subrogation and recover the amounts from respondent no.2. There would thus be irreparable harm and irretrievable injustice if this court does not restrain the invocation of the BGs.

12. Sixthly, the learned senior counsel for the petitioner submits that in fact there are no disputed questions of facts, as the respondents have not disputed that the BGs were invoked on account of failure of the respondent no.3 to pay the amounts due under the term loan agreement.

13. Seventhly, it is submitted that the relief(s) sought by the petitioner are primarily against the fraudulent acts so committed by the parties invoking the respective BGs in contravention to the terms of

the respective BGs, which are Government of India undertakings and therefore, a 'State' within the meaning of Article 12 of the Constitution of India. Thus, it is argued that they are amenable to the writ jurisdiction of this court, inasmuch as it is contended that even for enforcing a contractual obligation against the State, a writ petition under Article 226 of the Constitution of India is maintainable.

14. Lastly, and in furtherance of the above, it is also contended by the learned senior counsel for the petitioner that the practice of writ courts not delving into disputes arising out of contracts has been carved out when an aspect of public law is involved. They contend that since the said Project was for setting up of a transmission system in Mainpuri, UP, there is a public law character involved. It is also argued that considering the entire conspectus of facts, the respondent no.1 has acted in an arbitrary and unfair manner, therefore, Article 14 of the Constitution of India is violated. Moreover, since the present petition is being pending for quite some time, this court must decide this matter on merits instead of considering the same on the issue of maintainability.

15. In support of the arguments, the learned senior counsel relies upon the following decisions: *Century Spinning & Manufacturing Co. Pvt. Ltd. v. Ulhasnagar Municipal Council & Anr.*¹, *Gujarat State Financial Corporation v. M/s. Lotus Hotels Pvt. Ltd.*², *Union of India & Ors. v. M/s. Graphic Industries Co. & Ors.*³, *LIC of India & Anr. v. Consumer Education & Research Center & Ors.*⁴, *Ganga Retreat & Towers Ltd. & Anr. v. State of Rajasthan & Ors.*⁵, *ABL International Ltd. & Anr. v. Export Credit Guarantee Corporation*

¹ (1970) 1 SCC 582.

² (1983) 3 SCC 379.

³ (1994) 5 SCC 398.

⁴ (1995) 5 SCC 482.

⁵ (2003) 12 SCC 91.

*of India Ltd. & Ors.*⁶, *Surya Constructions v. State of Uttar Pradesh & Ors.*⁷, *Unitech Ltd. & Ors. v. Telangana State Industrial Infrastructure Corporation (TSIIC) & Ors.*⁸, *Gas Authority of India Ltd. v. Indian Petrochemicals Corpn. Ltd.*⁹, *Har Prashad & Co. Ltd. v. Sudershan Stell Mills & Ors.*¹⁰, *Chennai Metro Rail Limited v. Transtonnelstroy – Afcons (JV)*¹¹ and *M.P. Power Management Co. Ltd. v. Sky Power Southeast Solar India (P) Ltd*¹².

16. The respondent no.1 filed the counter affidavit and made various submissions. However, at this stage, the detailed submission on merit need not be considered, as a preliminary objection has been raised by respondent no.3 regarding the maintainability of this petition. However, Mr.Sanjay Jain, learned ASG, appearing for respondent no.1 unequivocally submitted that the petition is maintainable.

17. *Per contra*, Mr. Venkatesh, the learned counsel for the respondent no.3, made the following submissions - firstly, that the petitioner has no locus in the contractual matter and cannot be permitted to resile from its commitment. Secondly, it is contended, that even if it is assumed that the obligation of the petitioner under the BGs came to an end, and the petitioner was thereby discharged when the project achieved completion, the determination as to whether the project has actually been completed or not, is to be determined not by the petitioner but by the parties to the Definitive Agreements.

⁶ (2004) 3 SCC 553.

⁷ 2019 SCC Online SC 447.

⁸ 2021 SCC Online SC 99.

⁹ 2023 SCC OnLine SC 116.

¹⁰ AIR 1980 Delhi 174.

¹¹ 2021 SCC OnLine Mad 5637.

¹² (2023) 2 SCC 703

18. Thirdly, after relying upon the landmark case of *Whirlpool Corporation v. Registrar of Trademarks*¹³, the learned counsel contends that the case of the petitioner does not fit in any of the exceptions to the doctrine of alternate remedy. It is further argued that the purported irretrievable injustice is not an injustice but a consequence specifically agreed upon by the petitioner in terms of the BGs. Specific reliance is placed on Clause 6 of the BGs, which provides that termination, amendment, dissolution, or reorganisation of respondent no.2 would not release or discharge the petitioner. Even assuming there is irretrievable injustice that is caused by the petitioner, the learned counsel argued that this in itself cannot be a ground to invoke the writ jurisdiction of this court.

19. Fourthly, to specifically rebut the contention of the petitioner that writ jurisdiction may be invoked even when the dispute lies in the realm of private law in cases where a public law aspect is involved, it is argued by the learned counsel for the respondent no. 3, that there is no involvement of public law in this matter. The learned counsel states that while engaging in the act so impugned by the petitioner, the respondent no.1 was not discharging a public duty or public function. It is their case that invoking a bank guarantee, assigning it, or entering into any such agreement, is not a part of discharging a public duty or function. To that end, if the entirety of the matter is governed by a contract and falls under contract law, the matter cannot be decided by a writ court. Specific reliance is placed on a decision of the Hon'ble Supreme Court in the matter of *Joshi Technologies International INC v. Union of India and Ors.*¹⁴

¹³(1998) 8 SCC 1.

¹⁴ (2015) 7 SCC 728, Paras. 65-69.

20. Fifthly, while placing reliance on the terms of the BGs, specifically Clause 3, on which the petitioner also relied, it is contended that the invocation of guarantee has taken place within the four corners of the law. It is submitted by the learned counsel, that the only pre-requisite that needed to be complied with for the invocation of the guarantee was the raising of a demand, which has been done by respondent no.1. Sixthly, on the contention of fraud, it is argued by the respondent no.3 that the BGs, specifically Clause 11, itself envisages the assignment of the debt in favour of the long-term lender, i.e., the respondent no.1. Therefore, in hindsight, the petitioner cannot claim that it could not have contemplated the assignment in favour of the respondent no.1.

21. The other decisions relied upon by the learned counsel in support of the abovementioned submissions are *NN Global Mercantile Pvt. Ltd. v. M/S. Indo Unique Flame Ltd. & Others*¹⁵, *Gujarat Maritime Board v. L&T Infrastructure Development Projects Ltd. & Anr.*¹⁶, *Life Insurance Corporation of India v. Escort Limited & Ors.*¹⁷, *State of Bihar & Ors. v. Jain Plastics and Chemicals Ltd.*¹⁸, *Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd.*¹⁹, *UP Cooperative Federation Ltd. v. Singh Consultants & Engineering*²⁰, *Adani Agri Fresh Ltd. v. Mahaboob Sharif and Others*²¹, *Standard Chartered Bank v. Heavy Engineering Corporation Limited and Anr.*²², *Pasitheia Infrastructure Ltd. v. Solar Energy Corporation of India & Anr.*²³,

¹⁵(2021) 4 SCC 379.

¹⁶(2016) 10 SCC 46.

¹⁷(1986) 1 SCC 264.

¹⁸(2002) 1 SCC 216.

¹⁹(1996) 5 SCC 450.

²⁰(1998) 1 SCC 174.

²¹(2016) 14 SCC 517.

²²(2020) 13 SCC 574.

²³ 2017 SCC OnLine Del 12562.

*M/s Garg Builders through Shri Mohinder Pal Garg v. Hindustan Prefab Ltd and Anr.*²⁴, *Coronation Construction Pvt. Ltd. v. Indian Oil Corporation Ltd. & Ors.*²⁵ and *SKS Power Generation v. Indian Bank*²⁶.

22. I have heard the learned counsel for the parties and perused the record.

23. The first and foremost issue which lies at the core of the present dispute is whether this court should delve into the issues so raised to be adjudicated under its writ jurisdiction.

24. The submissions of the parties would reveal that at its core, the present issue is of private law. For instance:

- a. The petitioner, after taking this court through the BGs specifically Clause 3, the invocation demand letter and loan recall notice of respondent no.1, contended that the BGs were issued for a specific purpose, that is, for the retention monies as provided for in the Definitive Agreements, and since the basis of the invocation of the BGs is the failure of the respondent no.3 to honour its obligations under the term loan agreement, the same is bad in law, as being contrary to the very terms of the BGs itself.
- b. *Per contra*, the respondent no.3 while placing reliance on the terms of the BGs, specifically Clause 3 on which the petitioner also relied, contends that the invocation of guarantee has taken place within the four corners of the law. It is submitted by the learned counsel, that the only pre-requisite that needed to be complied with for the invocation of the guarantee was the raising of a demand, which has been done by respondent no. 1.

²⁴(2022) 281 DLT 135.

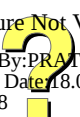
²⁵(1999) 49 DRJ.

²⁶2021 SCC OnLine Bom 12678.

25. Similar submissions have also been made on other issues. Since this court is not inclined to go into the merits of this case, therefore, they are not being dealt with at this stage.

26. Each of the issues so mentioned above, fall exclusively in the domain of private law and are fundamentally contractual in nature. There is no element of public law that this court finds involved in the present petition. The mere fact that the parties engaging in the contract are State or its instrumentalities, does not in itself make the issue relevant to public law. There is no determination of the rights relating to public law, nor is there a consideration relating to the public at large that needs to be factored in while deciding the dispute so argued by the parties. Issuance of the BGs by the petitioner at the instance of respondent no.2 in the favour of respondent no.3 and its encashment is purely governed by the terms of the BGs. The same is the commercial wisdom of the parties. It concerns the legal relationship between the parties involved, namely, the bank and the beneficiary of the guarantee. The enforcement is not the result of any administrative order or State act involving the exercise of State power.

27. The bank, before issuing BGs, is supposed to conduct a thorough credit analysis of the customer. It has to evaluate the credit worthiness and financial stability of the customer to ensure that the customer has the capacity to fulfil its obligation under the BGs. The likelihood of dispute or default are also some of the factors which need to be evaluated before a decision is taken to issue the BGs. The bank is also supposed to obtain adequate security to protect its interest in the event of default. If the bank has failed in its assessment or proper risk evaluation, the same cannot be the reason to entertain a writ petition. Moreover, all those aspects will have to be gone into, once



the parties are allowed to adduce sufficient evidence before the competent court.

28. In ***Joshi Technologies International INC v. Union of India and Ors*** (*supra*), the Hon'ble Supreme Court considered its earlier pronouncements, and at length discussed ***ABL International Ltd.*** (*supra*), upon which strong reliance was placed by the petitioner. In paragraph 67, the legal position as put forth in ***ABL International Ltd.*** (*supra*) was reproduced by the Hon'ble Supreme Court and thereafter in paragraph 68, the Hon'ble Supreme Court gave its own opinion on what the *ratio* of ***ABL Industries*** (*supra*) is, and in paragraph 69, the Apex Court summarised the legal position emerging from the various decisions delivered by the Hon'ble Supreme Court relating to the maintainability of petitions based on contracts entered into by the State. Paragraph nos. 68 and 69 are reproduced as under:

“68. The position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, can refuse to exercise. It also follows that under the following circumstances, 'normally', the Court would not exercise such a discretion:

(a) the Court may not examine the issue unless the action has some public law character attached to it.

(b) Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion Under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

(c) If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

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69. Further legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to the contracts entered into by the State/public Authority with private parties, can be summarized as under:

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(iii) Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings Under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit etc.

(iv) Writ jurisdiction of High Court Under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.

(v) Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so; and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

(vi) Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

(vii) Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

(viii) If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court Under Article 226 of the Constitutional of India and invoking its extraordinary jurisdiction.

(ix) The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in

private field of contract. This Court has maintained the position that writ petition is not maintainable...

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(xi) The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.”

[Emphasis supplied]

29. In *State of Bihar & Ors. v. Jain Plastics and Chemicals Ltd.* (*supra*), the Hon’ble Supreme Court was to adjudicate upon the issue—whether the High Court ought not to have exercised its jurisdiction under Article 226 of the Constitution of India for granting relief in case of alleged breach of contract. The Apex Court held that a writ petition under Article 226 of the Constitution of India is not the proper proceeding for adjudicating such disputes. Under the law, it was open to the respondent therein, to approach the court of competent jurisdiction for appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is available to a litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of an alternative remedy does not affect the jurisdiction of the court to issue a writ, but ordinarily, that would be a good ground in refusing to exercise the discretion under Article 226 of the Constitution of India.

30. Further in *Kerala State Electricity Board and Anr. v. Kurien E. Kalathil and Ors.*²⁷, the Hon’ble Supreme Court laid down the dicta relating to the maintainability of a writ petition, which, in effect, seeks the interpretation of a contract. In paragraph nos.10 and 11, the Apex Court held as under:

“10. We find that there is a merit in the first contention of Mr. Rawal. Learned Counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition.

Whether the contract envisages actual payment or not is a question of construction of contract? If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge Its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not of itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil Court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have been relegated to other remedies.

[Emphasis supplied]

31. Similarly, in *Union of India v. Puna Hinda*²⁸, the Hon’ble Supreme Court while relying upon *Kerala State Electricity Board*

(*supra*) and **Joshi Technologies** (*supra*) allowed the appeal while dismissing the writ petition filed by the petitioner before the High Court. The Apex Court while accepting the jurisdiction of a High Court to be wide, held in paragraph no.24, that in respect of pure contractual matters in the field of private law, where the dispute has no statutory flavour, the issues are better left to be adjudicated outside the scope of Article 226 of the Constitution of India.

32. This court in **National Building Construction Corp. v. Punjab National Bank**²⁹, was to decide upon a writ petition that prayed, *inter alia*, for a direction as against the respondent no.1 therein, to remit certain amount under the bank guarantee. After relying upon **Kerala State Electricity Board** (*supra*), this court held in paragraph nos. 17 and 18 to the following effect:

“17. The law enunciated in the above two judgments is fully applicable on the facts of the present case also. The bank guarantee furnished by the respondent no. 1 in favour of the petitioner at the instance of the respondent no. 2 is a private contract and not a statutory contract. It is governed by the provision of the Contract Act. The dispute relating to the interpretation of the terms and conditions of such contract and the validity of the invocation of the bank guarantee and whether the amount was payable by the respondent no. 1 on such invocation of the bank guarantee are the questions which were agitated in a writ petition. It is a matter either of arbitration as provided by the contract or for the civil court or any other appropriate forum to decide these questions.

18. It cannot be denied that the normal remedy for enforcing a right for payment under the private contract like the bank guarantees in question from the State or from the instrumentality of the State was by filing a civil suit in the civil court...”

[Emphasis supplied]

33. It is, therefore, clear from the discussion stated above that the present petition is, firstly, in the exclusive domain of private law; and secondly, that the law as declared by the Hon’ble Supreme Court and

this court relating to the same is that, ordinarily it ought not to be adjudicated upon in the writ jurisdiction.

34. Considering the contention of the petitioner that respondent no.1 has acted in an arbitrary and unfair manner and their right under Article 14 of the Constitution of India has been violated, it must be considered, that arbitrariness needs to be adjudged from the lens of the Constitution and with elements of public law. Every act of breach of contract by a subsidiary, undertaking, instrumentality or functionary of the State, cannot be assailed before a writ court. What the criteria of arbitrariness require in order to bring a case within the parameters of Article 226 of the Constitution of India is, either a conduct that is especially reckless, attributable to the special powers/privileges accorded to the State and its functionaries, the abuse of which is alleged, but for it to be a 'State', such arbitrariness and high-handedness should not have been exercised; or that, it is a case of discriminatory practices being conducted on the part of the State.

35. This court cannot countenance the argument that, whereas, otherwise, a dispute owing to its private law origins ought to have been agitated before a civil court, merely because the entity so breaching the contract is a State or its functionary, the case is to be considered under Article 226 of the Constitution of India. Arbitrariness, under Article 14 of the Constitution of India needs to be pleaded in exclusion to claims of pure breach of contract. In the present petition, the petitioner has not been able to persuade this court that the breach so alleged on the part of respondents is of such a nature that it may be considered arbitrary and deserves to be entertained under the writ jurisdiction of this court alone.

36. For this reason, the case of ***Gas Authority of India Ltd. v. Indian Petrochemicals Corpn. Ltd.*** (*supra*) cited by the petitioner, is inapplicable. In paragraph 19 of the said decision, the Hon'ble Supreme Court provided the reasons for finding the dispute therein maintainable, which reads as under:

“19.... At the time of entering into contract, GAIL was enjoying a monopolistic position with respect to the supply of natural gas in the country. IPCL, having incurred a significant expense in setting up the appropriate infrastructure, had no choice but to enter into agreement with GAIL... [Emphasis supplied]

37. It is thus seen that the requirements, as mentioned in paragraph no.33 of this decision, had been fulfilled in the case of ***Gail Authority of India Ltd.*** (*supra*). Whereas in the present case, there is no such action that is done by respondent no. 1, which could have exclusively been done by a ‘State’, nor can it be said that the factum of it being a ‘State’ has, in the present case, allowed it to do acts that it could not have done otherwise.

38. Further, this court shall consider the contention of the petitioner regarding fraud. In brief, the contention of fraud is that the respondent nos.2 and 3 are subsidiaries and are under common management, therefore, it can be stated that from the beginning, they had the intention of procuring the BGs from the petitioner and assigning it for a purpose different from that which was contemplated in the terms of the BGs.

39. At the outset, it must be stated that the writ jurisdiction of this court is not the forum where a determination of fraud can be made out. It would be of help to refer to the authoritative textbook of Chitty on Contracts, 32nd Ed., Vol II, the paragraph 45-009 of which deals with performance guarantees as stated below:

“A number of cases have involved discussion of the nature of “performance guarantees” which are, in essence, exceptionally

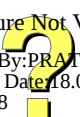
*stringent contracts of indemnity. They are contractual undertakings, normally granted by banks, to pay or repay, a specified sum in the event of any default in performance by the principal debtor of some other contract with a third party, the creditor. Sometimes the bank's liability arises on mere demand by the creditor, notwithstanding that it may appear on the evidence that the principal debtor is not in any way in default, or even that the creditor himself is in default under the principal contract. Such guarantees are sometimes called "first demand guarantees" or "demand bonds". It has been held that performance guarantees of this nature are analogous to a bank's letter of credit, and that the bank's liability is of a primary nature which is unaffected by allegations that the creditor is in breach of the main contract between him and the principal debtor. The question **whether a particular instrument (such as a "refund guarantee") takes the form of an independent performance bond (or stand-by letter of credit) or a true "see to it" guarantee is one of construction of the instrument in its factual and contractual context having regard to its commercial purpose.** While there may be a number of indications in an instrument which argue in favour of it being a "true guarantee" or, conversely, an "on-demand bond",*

"[w]here an instrument (i) relates to an underlying transaction between the parties in different jurisdictions, (ii) is issued by a bank, (iii) contains an undertaking to pay 'on demand' (with or without the words 'first' and/or 'written') and (iv) does not contain clauses excluding or limiting the defences available to a guarantor, it will almost always be construed as a demand guarantee."

*On the other hand, there is a "strong presumption" that a "guarantee" concluded other than by a bank is not a demand or independent performance bond, although this presumption may be rebutted. In the event of fraud the court may be able to intervene to protect the surety; but the court has refused to imply a term to the effect that the beneficiary of such a guarantee will give notice of a claim only if there is reasonable cause. **Clear evidence is needed that the beneficiary's demand is fraudulent to the knowledge of the bank if the bank is to be restrained from paying under such a guarantee or bond, but this does not mean that all possible explanations other than fraud must be totally ruled out. It means that fraud must be the "only realistic inference".***

[Emphasis supplied]

40. The petitioner's argument on fraud, at this stage, seems to necessarily require that, *prima facie*, if it is proven that the respondents have intentionally deceived the petitioner to alter its position to its detriment, which the petitioner without such deceit, would not have done. From a perusal of the record, *prima facie*, this court is unable to discern any palpable fraud. *Prima facie*, nothing has



been brought to the notice of this court to suggest that the respondents have caused the petitioner to do an act that it would not have otherwise done. Moreover, all those aspects can still be gone into by the appropriate court. However, whether fraud is perpetuated or not is an issue that can be raised in appropriate civil proceedings. The appropriate civil forum, after the recording of evidence, would be best suited to render the finding on fraud.

41. Thus, *prima facie*, this court is unable to find any fraud as alleged by the petitioner. Clause 11 of the BGs reads as under:

*“11. The Guarantor hereby acknowledges that the Beneficiary may assign or transfer its benefits arising under this **Guarantee in favour of its Long Term Lenders/Bankers**. In case of such an assignment such third party shall be the beneficiary to the benefits arising under this Guarantee.”*

42. Further, the letters dated 30.12.2014, 31.03.2015, 30.07.2015, 12.08.2015 and 30.10.2015 issued by the petitioner acknowledging and agreeing to the assignments read as under:

“ ...

As stipulated in the clause 11 of the aforesaid Bank Guarantee the beneficiary therein wishes to assign the benefits under the Bank Guarantee in favor of its Long Term Lenders i.e. Power Finance Corporation Limited, Urjanidhi, 1, Barakhamba Lane, Connaught Place, New Delhi ‘the Assignee’

We hereby acknowledge the said assignment from South East U.P. Power Transmission Company Limited in your favour.

... ”

43. *Prima facie*, it can be seen that the petitioner was aware about the possibility of the BGs being assigned to the long term lender i.e., respondent no. 1.

44. It is further argued that since the said project has been completed, as per the terms of the Definitive Agreements and the BGs, they must be discharged and, in the alternative, since the competition date has passed, the liabilities must be reduced by fifty per cent. The

first part of the argument requires a factual determination on the part of this court, it being whether the said project has actually been completed. This averment has been vehemently denied by the respondents herein. This court is of the view that the determination of this issue is a question of fact and requires leading of evidence and interpretation of the contract. This exercise cannot be done in the writ jurisdiction. The second part of the argument is contingent upon a previous claim - that despite the assignment, the invocation of the BGs can only take place when a breach is made under the Definitive Agreements. In other words, even after the assignment, the terms of the Definitive Agreements control the invocation of the BGs. This is again an issue belonging to the domain of leading of evidence and interpretation of the contract, which this court, in its writ jurisdiction, is not inclined to embark upon.

45. Learned senior counsel for the petitioner has relied upon the case of ***Ganga Retreat & Towers Ltd. & Anr. v. State of Rajasthan & Ors*** (*supra*) to argue that given the belated stage of the present petition, the matter ought to be decided on merits. Firstly, in the present case, it must be considered that the parties herein are financially sound having adequate resources. There was nothing, therefore, that prevented the parties from approaching appropriate forums and agitating their disputes. Secondly, the case concerned does not act as an authoritative binding precedent which rules that the High Court must, in cases where a delay has been caused, entertain a petition under Article 226 of the Constitution of India.

46. This court is of the considered opinion, that the present petition, involves disputed questions of facts; has a purely contractual origin without any aspect of public law; and that the petitioner has an alternative remedy to pursue. The mere fact that the petition is pending

since long, it cannot be made a ground to entertain a petition which is incapable of being decided in writ jurisdiction. The maintainability of the writ petition must be entertained or not, is a matter that can be determined by this court either at the threshold or at the stage of final disposal. The mere passage of time is not a ground to entertain a writ petition, which is either not found to be maintainable or the court, while considering the overall facts and circumstances, comes to the conclusion that the same ought not to be entertained and the parties may be relegated to more appropriate civil remedies.

47. This is not to say that if a subsequent act has led to the alternate remedy being foreclosed, the court must not give due weightage to the same, but rather that the dominant lens of analysis must be from the perspective of the original filing.

48. Insofar as the argument of the petitioner that irretrievable harm and injustice would be caused since respondent no.2 is undergoing liquidation and the petitioner would not be able to recover any amount, is concerned, this court finds it to have no basis. It is true that it causes inconvenience and may even be considered unjust in the moral sense, but in law, financial inconvenience cannot be considered as irretrievable harm or injustice.

49. In ***Century Spinning & Manufacturing Co. Pvt. Ltd. v. Ulhasnagar Municipal Council & Anr.*** (*supra*), a three-judge Bench of the Hon'ble Supreme Court ruled upon the nature of discretion exercisable under Article 226 of the Constitution of India. Through paragraph nos.8 and 9, the Apex Court ruled as under:

"8. The High Court may, in exercise of its discretion, decline to, exercise its extra-ordinary jurisdiction under Art. 226 of the Constitution. But the discretion is judicial if the petition makes a claim which is frivolous, vexatious, or prima facie unjust, or may not appropriately be tried in a petition invoking extra-ordinary

jurisdiction, the Court may decline to entertain the petition. But a party claiming to be aggrieved by the action of a public body or authority on the plea that the action is unlawful, high-handed, arbitrary or unjust, is entitled to a hearing of its petition on the merits. Apparently the petition filed by the Company did not raise any complicated questions of fact for determination, -and the claim could not be characterised as frivolous, vexatious or unjust. The High Court has given no reasons for dismissing the petition in limine, and on a consideration of the averments in the petition and the materials placed before the Court we are satisfied that the Company was, entitled to have its grievance against the action of the Municipality, which was prima facie unjust, tried.

9. The Company pleaded that the Ulhasnagar Municipality had "entered into a solemn arrangement" not to levy octroi duty for a period of seven years from the date of its imposition. The evidence relating to the undertaking was contained in public records. The Government of Maharashtra advised the Municipality that it was acting in violation of the terms of that undertaking. By its resolution the Municipality declined to abide by the undertaking of its predecessor."

50. Paragraph no.9 of the said decision would reveal that the solemn agreement so referred above relates to the promise of not levying *octroi*. The said promise is inherently an act that solely a State functionary could discharge. To that end, there is a dominant public law element in the contracts itself, as action so promised is in discharge of public duty. The said decision is not found to be applicable in the facts of the instant petition.

51. In ***Gujarat State Financial Corporation v. M/s. Lotus Hotels Pvt. Ltd.*** (*supra*), the Hon'ble Supreme Court heard the Special Leave Petition challenging the dismissal of the appellant's LPA which in turn assailed the order of the single judge, wherein a writ of *mandamus* was issued, for a case, which was, in the opinion of the appellant, belonged to the sphere of private law. Paragraph nos. 12 and 13 of the decision are reproduced as under:

"12. Viewing the matter from a slightly different angle altogether it would appear that the appellant is acting in a very un-reasonable manner. It is not in dispute that the appellant is an instrumentality of the Government and would be other authority' under Article

12 of the Constitution. If it be so, as held by this Court in R.D. Shetty v. The International Airports Authority of India &Ors. the rule inhibiting arbitrary action by the Government would equally apply where such corporation dealing with the public whether by way of giving jobs or entering into contracts or otherwise and it cannot act arbitrarily and its action must be in conformity with some principle which meets the test of reason and relevance.

*13. Now if appellant entered into a solemn contract in discharge and performance of its statutory duty and the respondent acted upon it, the statutory corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct, to the respondent. In such a situation, **the Court is not powerless from holding the appellant to its promise and it can be enforced by a writ of mandamus directing it to perform its statutory duty.** A petition under Article 226 of the Constitution would certainly lie to direct performance of statutory duty by 'other authority' as envisaged by Article 12."*

[Emphasis supplied]

52. Similarly, in ***Unitech Ltd. &Ors. v. Telangana State Industrial Infrastructure Corporation (TSIIC) & Ors.***, the Hon'ble Supreme Court held that the jurisdiction under Article 226 of the Constitution of India was rightly invoked by the single judge and the Division Bench of the Andhra Pradesh in this case when the foundational representation of the contract had failed. Paragraph no.33 of the said decision notes to the following effect:-

*"33. ... TSIIC, a state instrumentality, **has not just reneged on its contractual obligation, but hoarded the refund of the principal and interest on the consideration that was paid by Unitech over a decade ago. It does not dispute the entitlement of Unitech to the refund of its principal.***

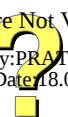
[Emphasis supplied]

53. On facts, it must also be mentioned that in ***Gujarat State Financial Corporation (supra)***, the appellant/original respondent was acting in furtherance of a statutory mandate, as noted in paragraph no.9 of the said judgement, there was a statutory obligation that was needed to be discharged. In the present case, however, there is no such statutory compulsion upon the respondents. Also, in ***Unitech Ltd. & Ors. (supra)***, the claim was more than that of a mere contract being

reneged and the action of the respondent therein was found by the Apex Court to be of such high-handedness and recklessness that Article 14 of the Constitution of India was found to be in violation. In the present petition, the petitioner has not been able to persuade this court that their fundamental right has been violated.

54. This court finds that further observations deserve to be made in relation to the two above-mentioned cases. Firstly, neither of the cases set out an authoritative dictum of the nature such that in the present facts and circumstances, the writ petition must necessarily be maintained. The general rule, appreciated even in the two above-mentioned judgements, remains that the relief is essentially discretionary, and must not be granted where disputed questions of facts, contractual origins of dispute, and alternate efficacious remedies exist. Secondly, it must also be considered that both the above mentioned cases were appeals from decisions of a single judge where the concerned writ petitions were entertained. The decisions of the Hon'ble Supreme Court are then ratifying the discretion exercised by the respective single judges on the grounds so considered by the Apex Court. Broadly speaking, the said decisions give reasons as to why the exercise of discretion is correct. They, however, are not concerned with the issue—whether the non-exercise of discretion would have been incorrect. It is to be remembered, that the relief under Article 226 of the Constitution of India, is primarily discretionary, and in the absence of the two decisions ruling upon the non-exercise of discretion being against the law, the said decisions do not persuade this court to entertain the present petition.

55. The case relied upon by the petitioner in ***Union of India & Ors. v. M/s. Graphic Industries Co. & Ors.*** (*supra*) is partly found to be inapplicable, and partly against the petitioner itself. At the core of the



dispute, in the said case, the issue involved was unfairness caused by the railways as a result of withholding the payment of the appellants. In the present case, the parties concerned are well-equipped, financially and otherwise, and no aspect of unfairness in the sense used in the said decision has been contended. Paragraph no.11 of the said decision, which goes against the petitioner, is reproduced hereunder:

“11. Having come to the conclusion that the materials which the Division Bench noted do not make out a case of unfairness, it is not necessary to examine the question as to whether in the field covered by contractual rights and obligations it would always be permissible to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution. It would be enough to say that this remedy being discretionary, it would be open to the High Court to take a view on the fact situation before it that invocation of power under Article 226 would not be proper exercise of discretion, leaving the aggrieved person to seek remedy in some other forum, or to take recourse to arbitration if that be visualised by the agreement between the parties.”

56. In ***Gujarat Maritime Board v. L&T Infrastructure Development Projects Ltd. & Anr.*** (supra), the Hon'ble Supreme Court set aside the order of the High Court, where the appellant therein was restrained from invoking an unconditional bank guarantee. The said decision reiterated the position of law relating to the relief under Article 226 of the Constitution of India being discretionary. In the case relied upon by respondent No.2 in ***Federal Bank of India v. Sagar Thomas*** (supra), it was held that since the activities carried on by the bank are vital to the public interest and have the potential to affect the socio-economic development and growth of the nation, and are further governed by statutes of the State, it was held that they discharge public functions. This court is in agreement with the said decisions; however, it would have found relevance if it was disputed that the respective respondents are not 'State' as defined under Article

12 of the Constitution of India. However, the present decision is concerned with the issue of entertaining the petition, the said decision therefore, does not aid the petitioner.

57. The case of *Life Insurance Corporation of India v. Escort Limited & Ors.*³⁰, is primarily considered with the Foreign Exchange Regulation Act, 1973, the factual matrix being completely different, the same is not applicable in the present petition. Similarly, *NN Global Mercantile Pvt. Ltd. v. M/S. Indo Unique Flame Ltd. & Others*³¹, is a ruling concerned with the issue—whether a writ petition under Articles 226 and 227 of the Constitution of India would be maintainable to challenge an order rejecting an application for reference to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996. The same is, therefore, distinguishable as the issue under consideration is different. The cases of *BMW Industries Limited v. UCO Bank & Ors.* (*supra*), *Uttam Chand Rawat v. State of U.P. & Ors.* (*supra*), *Chennai Metro Rail Limited v. Transtonnelstroy – Afcons (JV)* (*supra*) are decisions by the High Courts of Calcutta, Allahabad, and Madras respectively, this court not being bound by the same, the cases are not discussed. The decision by the Hon'ble Supreme Court in the case of *Consumer Education & Research Center* (*supra*), is found to be inapplicable, as therein, the unique nature of life insurance policies formed the basis of the dispute. It was held by the Apex Court that policies of such a nature inherently have a public law aspect to them. The present matter again being different, the said case is distinguished on facts.

58. Lastly, in the case of *Surya Constructions* (*supra*) relied upon by the petitioner, it has been found that this case is completely

³⁰(1986) 1 SCC 264.

³¹(2021) 4 SCC 379.

inapplicable and utterly irrelevant to the present dispute. It was a case where payment for extra work by the Uttar Pradesh Jal Nigam had not been made though such work was expressly sanctioned and done to their satisfaction.

59. In light of the aforesaid analysis, this court, on the ground that the present petition has contractual roots and basis, requires to make factual findings on disputed questions, has no element of public law and does not involve arbitrariness in the context of Article 14 of the Constitution of India, finds that the present petition should not be entertained.

60. In view of the aforesaid, this court is not inclined to entertain the present petition.

61. The instant writ petition is dismissed along with pending applications. Needless to state, nothing in this judgement shall be construed as having expressed any opinion on the merits of the dispute. The petitioner is at liberty to take recourse to appropriate remedy, in accordance with the law.

62. This court on 30.11.2018 directed maintenance of *status quo* with respect to retention of the BGs in favour of the petitioner. Considering the peculiar facts and circumstances, let the same order remain in force for four weeks from today to enable the petitioner to take appropriate remedy, in accordance with the law.

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

MAY 12, 2023