O.A.No.607 of 2024

RESERVED ON 04.09.2024	PRONOUNCED ON 09.09.2024

K.KUMARESH BABU.,J

O R D E R

This Application had been filed for the following prayer:-

a)to pass an order of interim injunction restraining the 1st and 2nd respondents, their officers, employees and agents, or any person acting for or on their behalf from taking any steps in furtherance of the invocation letter dated 28.08.2024, including by encashing the Bank Guarantee No.5555603954, dated 31.10.2022 for Rs.19,27,62,062/- furnished on behalf of the applicant and

b) to pass any other order which this Court may deem fit proper, just and convenient in the fact and circumstances of the present case.

2. When the said application came up for hearing on 29.08.2024, the learned Senior counsel representing the first respondent had submitted that the

Bank Guarantee had already been encashed and also provided the proof of such encashment and hence, he had contended that the application has become infructuous. However, the learned Senior counsel on behalf of the applicant on the other hand had contended that the application had been taken out to protect the subject matter of arbitral agreement, which may fructify into an award and therefore, even though the application has become infructuous, this Court is empowered under Section 9(1)(ii)(e) of the Arbitration and Conciliation Act (hereinafter referred to as "A&C" Act) to mould the relief for protection of the subject matter of application to be preserved till the disputes are resolved by way of an arbitration. Therefore, the learned Senior counsel requested this Court not to close the application as infructuous and to hear the applicant for the other alternative relief as prayed by the applicant namely, to grant any other relief which has been prayed under Section 9(1)(ii)(e) of the A&C Act.

3. This Court by recording the submissions made by the learned Senior counsels appearing on either side had directed the application to be listed for them to make submissions as to whether this Court can mould the relief invoking the provisions of Section 9(1)(ii)(e) of the A&C Act. However *prima facie*

considering that the object of Section 9 is for protection of property, which is subject matter of arbitral proceedings, this Court had passed an order of interim injunction restraining the first respondent from disbursing the amount that had been encashed by it from the second respondent and posted the matter for final disposal.

4.Heard Mr.P.V.Balasubramanian, learned Senior counsel appearing for the applicant and Mr.Sathish Parasaran, learned Senior counsel appearing for the respondents.

5.Mr.P.V.Balasubramanian, learned counsel appearing for the applicant would submit that a letter of award was issued to the applicant by the first respondent for supply, erection, testing and commissioning of a 220Kv GIS and 750Kv GIS for the North Chennai Thermal Power Project. Pursuant to the letter of award, purchase orders was issued in favour of the applicant, which had been revised 11 times and that the last of the 11th revised purchase order was placed on 25.05.2022, with a delivery schedule for supply by 31.08.2022. Pursuant to the purchase order, service orders were also issued and that seven (7) such revised service orders were issued with a delivery date lastly as 30.09.2023. He would submit that pursuant to the various revised purchase orders and service orders, the applicant had fulfilled its obligation under letter of award, dated 16.02.2017, within the prescribed time limits under the purchase orders and the service orders. Thereafter on the fulfillment of letter of award, the TANGEDCO had also conducted a high voltage testing, which would be the final testing on 26.07.2023. The first respondent was also a signatory of the said test report. Pursuant to the testing, the project was also inaugurated by the Hon'ble Chief Minister of Tamil Nadu. Thereafter, by communication dated 17.01.2024, 30.03.2024 & 31.05.2024, the applicant had requested the first respondent to discharge and release the Bank Guarantee as the project itself was commissioned, which itself would sufficiently prove that the applicant had performed its part of the contract and that the performance guarantee that was given by the applicant stood discharged. However, the respondent had neither replied to the letter nor had discharged and released the Bank Guarantee. It came to the knowledge of the applicant, that on 28.08.2024, the first respondent had addressed a communication to the second respondent invoking the Bank Guarantee by claiming that the applicant had not performed its part of obligation.

6. He would submit that without the applicant performing its part of obligation, the project could not have been commissioned and therefore, he would submit that the first respondent could not at all have invoked the Bank Guarantee. He would also urge that since the first respondent was caveator and when the application had been moved, they had pressurized the second respondent to encash the Bank Guarantee, and by the time, the application was moved as 'lunch motion', the encashment of Bank Guarantee had taken place, that too when the matter was being heard. Therefore, he would submit firstly, the first respondent did not have a right to invoke the Bank Guarantee. Secondly, even if they had invoked the Bank Guarantee, till the disputes are resolved by an Arbitrator, the money that had been encashed under the Bank Guarantee, would be the monies of the applicant in the hands of the first respondent. In that context, he would contend that during the arbitral proceeding, if the applicant would prove that the first respondent is not entitled to encash the Bank Guarantee and an award is passed to that effect, then the first respondent cannot retain the money and would have to pay back the money to the applicant. Therefore, he would submit that the encashment of money in the hands of the first respondent, either would have to be directed to be

deposited in the credit of this application or there should be an injunction restraining the respondents from utilizing the said money for any purposes whatsoever. He would submit that interim protection granted under the A&C Act is to protect the subject matter of arbitration. He would contend that when he had made a *prima facie* case, that the invocation of Bank Guarantee itself was invalid, the amount cannot be held by the first respondent and the first respondent is not permitted to utilize the money and therefore, necessary orders of protection of the encashment of Bank Guarantee would have to be made by this Court by invoking the wider power given under Section 9(1)(ii)(e) of the A&C Act.

7.He had also relied upon the judgment of the Delhi High Court to contend that this Court also could exercise a similar power exercised by the Delhi High Court. He had further relied upon the judgment of the Hon'ble Apex Court in the case of ***Essar House Pvt Ltd., vs. Arcellor Mittal Nippon Steel India Ltd.,*** reported in ***2022 SCC Online SC 1219*** and contended that the power of the Court to grant relief is not curtailed by the rigours procedural provisions in CPC and that while granting the interim relief, this Court is not necessarily bound by the rigours of the CPC. He would also draw my attention to the similar provision under

Section 94(e) of the CPC, where this Court while granting interim relief can for the just and convenient reason mould the relief to protect the subject matter of the property.

8.The learned Senior counsel appearing for the respondents at the outset would submit that the application as framed by the applicant had now become infructuous, since by the time the matter was taken up on 29.08.2024, the Bank Guarantee had been encashed and the same had also been recorded by this Court. Therefore, in an application which has become infructuous, no relief could be moulded for the applicant. He would further submit that the letter of award was issued to the applicant in the year 2017 and only for the delay that had been caused by the applicant, revised purchase order and revised service order were issued. Further, he would submit that as per the general conditions of contract, the first respondent would also be entitled to a liquidated damages upto 10% for the delay that had occasioned on the part of the applicant, since admittedly there has been a delay in completion of the letter of award on the part of the applicant, the first respondent is entitled to 10% as Liquidated Damages and value of the Bank Guarantee is also 10% and therefore, even if a dispute is raised by the applicant, the first respondent would be entitled for the Liquidated Damages and therefore, by the encashment of the Bank Guarantee, the applicant cannot be said to be prejudiced. By relying upon the various letters annexed in the typed set of papers filed by the first respondent, he would submit that not only there was a delay on the part of the applicant on the issue of supply, but also there were quality issues and design issues which was not in consonance with the requirement of the department. He would heavily rely upon the letter dated 29.03.2023, which also refers to various other letters on the same line i.e., where the quality issues and design issues have been raised by the respondents. He would further submit that the performance guarantee is not only for the performance of the letter of award and that such performance guarantee can only be discharged and released after the performance guarantee testing and thereafter, till the defect liability period. Therefore, the applicant cannot seek for discharge and release of the performance guarantee.

9.He would further submit that an injunction not to invoke the Bank Guarantee can only be granted by this Court, when the fraud is alleged. That apart, the first respondent is vested with the right to invoke the Bank Guarantee, when the performance of the contract which includes the defect liability period cannot said to have been discharged on the completion of the obligation under the letter of award. He would further submit that the Bank Guarantee is an independent contract by the second respondent Bank in favour of the first respondent, the second respondent cannot be injuncted to perform their part of the contract.

10.He would further submit that the first respondent was a main contractor with the TANGEDCO, where he had been empowered to have sub-contract and the applicant is one of the sub-contractor. In view of the delay caused by the applicant, there was a delay on the part of the first respondent to complete the project for which the TANGEDCO had taken action against the first respondent and had invoked Bank Guarantee to the tune of Rs.90,00,00,000/-. Since because, it was a the delay on the part of the applicant, the first respondent had invoked the Bank Guarantee or otherwise the first respondent would be left high and dry for the acts of omission and delay that had been committed by the applicant. He would further submit that the first respondent is going concern and whereas the applicant themselves had admitted that it will be put into financial stress if, the Bank Guarantee is being invoked. He would submit that itself is a reason for which the invocation of Bank Guarantee cannot be faulted with and there was no error on the part of the first respondent in invoking the Bank Guarantee. The invocation of Bank Guarantee can be made, when there is a failure on the part of the applicant to perform of its part of contract. Since it had failed to perform its part of the contract, the Bank Guarantee has been rightly invoked by the first respondent. In support of his contentions, the would heavily rely upon the judgment of this Court in the case of ***D.Rajalingam Vs. R.Saraswathi***, reported in ***2012 SCC Online Mad 537***, where this Court after referring to the judgment of the Hon'ble Apex Court, had enumerated the right of an individual as to when the Bank Guarantee could be invoked. For a similar contention, he had also relied upon the judgments of the Hon'ble Apex Court in the cases of ***Standard Chartered Bank Vs Heavy Engineering Corporation Limited and another, Himadri Chemicals Industries Ltd. Vs Coal Tar Refining Co, Dwarikesh Sugar Industries Ltd. Vs Prem Heavy Engineering Works (P) Ltd. And Another, U.P.State Sugar Corporation Vs Sumac International Ltd.*** reported in ***2020 13 SCC 574; 2007 8 SCC 110; 1997 6 SCC 450 and 1997 1 SCC 568.*** According to him, even in the aforesaid judgments, the Hon'ble Apex Court had held that just making a statement that in the event of success before the Arbitrator, it will not be able to realize the claim from the first respondent alone will not be suffice. He would further submit that an irretrievable harm or injustice to one party on the ground that it will be impossible to recover the amount cannot be a ground to grant an invocation of Bank Guarantee. Therefore, he would submit that the applications deserve to be dismissed.

11.In reply, Mr.P.V.Subramanian, learned Senior counsel appearing for the applicant would submit that the claim of the applicant, it is impossible of recovery of money is not based on surmises and conjectures, but based on sufficient materials. He would submit that there are more than 10 number of applications before the NCLT under the IBC Code and that apart nearly Rs.1000 crores of Bank Guarantee that had been furnished by the first respondent have been invoked by various authorities. He would request this Court to take judicial notice of the fact and would seek this Court to grant sufficient protection with regard to the money that had been encashed by the first respondent. He would also relied upon a judgment of the Division Bench of the Chhattisgarh High Court in which the first respondent themselves was a appellant, and submit that the appellant on the very same contention raised by the applicant herein had got an order restraining the invocation of Bank Guarantee extended by them. He would also heavily rely upon the judgment and contend that the first respondent cannot argue against its very own submission, when it came to the invocation of Bank Guarantee against them.

12.I have considered the rival submissions made by the learned Senior counsels appearing for the parties and perused the materials placed on record.

13.It is an admitted case that the Bank Guarantee had been encashed by the first respondent and therefore, the prayer (a) as sought for by the applicant cannot be granted.

14. The present issue is with regard to the claim for a protection of the money that had been encashed, by relying upon the provisions of Section 9(1)(ii)(e) of the A&C Act. Even though the learned Senior counsel appearing for the first respondent had objected to by stating that it is an infructuous application, a relief could not be moulded, he had not raised any serious objection whatsoever with the authority of this Court to mould the relief. He had also made a statement that the prayer (b) of the application is a generic prayer i.e., always raised by the

person who seeks for an interim order and that cannot be construed as an application under Section 9(1)(ii)(e) of the A&C Act.

15.At the out set, I am not able to accept the contention of the learned Senior counsel appearing on behalf of the first respondent. The object of granting interim measure under the A&C Act is to protect the subject matter of the property. Clause (ii) of sub-Section (1) of Section 9 has been provided for interim measure of protection in any of the following matters:-

> *a) sub-clause (a) of clause (ii) provides for preservation, interim custody or sale of any goods which is subject matter of arbitration agreement;*
>
> *b)sub-clause (b) provides for securing the amount in dispute in arbitration;*
>
> *c)clause (e) empowers the Court to grant such other interim measures of protection as may appear to the Court to be just and convenient.*

16.A conjoint reading of the aforesaid sub-clauses, would draw an irresistible conclusion that the authority granted to this Court under Section 9 is for preservation, securing the subject matter of the arbitration and the amount involved in the dispute. The present Application had been taken out by the applicant to preserve the Bank Guarantee and prohibit the first respondent from encashing the Bank Guarantee.

17. In this context, it would also be useful to analyse the judgment of the Hon'ble Apex Court in the case of ***Samir Narain Bhojwani vs. Aurora Properties and Investments & Anr.,*** reported ***(2018) 17 SCC 203***, the Hon'ble Apex Court had held as follows:-

> ***24.*** *That apart, the learned Single Judge as well as the Division Bench have committed fundamental error in applying the principle of moulding of relief which could at best be resorted to at the time of consideration of final relief in the main suit and not at an interlocutory stage. The nature of order passed against the appellant is undeniably a mandatory order at an interlocutory stage. There is marked distinction between moulding of relief and granting mandatory relief at an interlocutory stage. As regards the latter, that can be granted only to restore the status quo and not to establish a new set of things differing from the state which existed at the date when the suit was instituted. This Court in Dorab Cawasji*

Warden v. Coomi Sorab Warden [Dorab Cawasji Warden v. Coomi Sorab Warden, (1990) 2 SCC 117] , has had occasion to consider the circumstances warranting grant of interlocutory mandatory injunction. In paras 16 & 17, after analysing the legal precedents on the point as noticed in paras 11-15, the Court went on to observe as follows : (SCC pp. 126-27)

> *"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:*
>
> *(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.*
>
> *(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.*
>
> *(3) The balance of convenience is in favour of the one seeking such relief.*
>
> *17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."*

25. *The Court, amongst others, rested its exposition on the dictum in Halsbury's*

Laws of England, 4th Edn., Vol. 24, Para 948, which reads thus:

> *"948. Mandatory injunctions on interlocutory applications.—A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application."*

26. *The principle expounded in this decision has been consistently followed by this Court. It is well established that an interim mandatory injunction is not a remedy that is easily granted. It is an order that is passed only in circumstances which are clear and the prima facie material clearly justify a finding that the status quo has been altered by one of the parties to the litigation and the interests of justice demanded that the status quo ante be restored by way of an interim mandatory injunction. [See Metro Marins v. Bonus Watch Co. (P) Ltd. [Metro Marins v. Bonus Watch Co. (P) Ltd., (2004) 7 SCC 478] , Kishore Kumar Khaitan v. Praveen Kumar Singh [Kishore Kumar Khaitan v. Praveen Kumar Singh, (2006) 3 SCC 312] and Purshottam Vishandas Raheja v. Shrichand Vishandas Raheja [Purshottam Vishandas Raheja v. Shrichand Vishandas Raheja, (2011) 6 SCC 73 : (2011) 3 SCC (Civ) 204] .]*

Dicta that is culled out from the aforesaid judgment is that if there is a *prima facie* material justifying a finding that the status quo had been altered by one of the parties to the litigation and that the interests of justice demand that the status-quo ante be restored by way of an interim mandatory injunction, then this Court is justified in passing an interim mandatory injunction. By applying the dicta to the present facts of the case it should be analysed whether a status quo ante has to be restored and in which manner the same should be done.

18.It is an admitted case that the Bank Guarantee had been encashed. It is the case of the applicant that there existed no reasons for encashing the Bank Guarantee, that too when the applicant had performed its part of the duty. However, it had been contended by the first respondent that there is a failure of performance of the letter of award only for which the Bank Guarantee had been invoked. In the circumstances of the case, if this Court comes to the conclusion that the invocation of Bank Guarantee itself was an error, then this Court in exercising its power not only under Section 9(1)(ii)(b), but also under Section 9(1)(ii)(e) of the A&C Act, can pass appropriate orders to protect the interest of the parties concerned by securing the amount involved in the Bank Guarantee in an appropriate manner. For this Court to have a *prima facie* opinion that there was a erroneous encashment of the Bank Guarantee, it is necessary to look into the clauses in the contract and also the facts as pleaded by the respective parties. The relevant clauses as culled out from the letter of award would be clause 9 which relates to contract performance guarantee and the same is extracted hereunder:-

9.0 Contract Performance Guarantee:-

9.1 An amount equal to 10% of the contract price shall be furnished by the successful supplier for proper fulfillment of the contractual terms and conditions set forth against this contract in the form of Bank Guarantee for Contract Performance as per format enclosed. The Bank Guarantee for Contract Performance Guarantee has to be furnished within 7 days from the Effective Date and should be valid up to the defect liability period (i.e., Guarantee period). Performance Bank Guarantee will not carry any interest. Bank Guarantee for Performance Guarantee shall be released only on completion of all contractual obligations. If any loss or damage is incurred by the PURCHASER on account of breach of any of the clauses mentioned in this contract or any other amount arising out of the contract becomes payable by the Supplier to the PURCHASER, and the PURCHASER will in addition to such other rights that it may have under the law, may appropriate the whole or part of the Contract Performance Guarantee and such an amount that is appropriated will not be refunded to the Supplier.

9.2 The Performance Guarantee can be in form of an irrevocable Bank Guarantee on Non-Judicial stamp paper as per format enclosed obtained from any Nationalized Bank/Scheduled

Bank of India in India.

9.3.The above Performance Bank Guarantee shall be furnished within 7 days from the Effective Date failing which shall constitute sufficient grounds for termination of Contract at Supplier's default and among other remedies, the Purchaser will get Supplies from other vendors at risk and cost of the Supplier. In the event of acceptance of Contract Performance Guarantee on Supplier's delay, the interest at the rate of 22% for the delayed period shall be paid by the Supplier. The interest will be levied from the date of expiry of 7 days' time period till the date of actual receipt of Contract Performance Bank Guarantee. The interest will be adjusted in the first bill payment to the Supplier.

9.4 The Contract performance guarantee shall cover additionally the following guarantees to the Purchaser.

i. The Supplier guarantees the successful and satisfactory operation of the equipment supplied as per the Specification and documents.

ii. The Supplier further guarantees that, the equipment provided and installed shall be free from all defects in design, material and workmanship and shall upon written notice from the Purchaser fully rectify free of expenses to the Purchaser such defects as developed under the normal use of the said Supplies within the period of guarantee specified in the Specification.

iii. Supplies shall give desired output when working in *tandem in the plant.*

9.5 If the project execution period is going to be extended, then the BG shall be extended for the period as desired by Purchaser till the closure of P.O., and finalization of LD. The banker's charges for the extended period will be borne by the Suppler well in advance. On any delay/failure to so extend the BG in advance before a month of the validity of BG, Purchaser shall invoke the BG & realize the proceeds.

9.6 NOT USED

9.7 This BG is intended to secure the faithful execution of the project and it is not to be construed as limiting the damages stipulated in the other clauses of the contract.

19.Clause 9 deals with "Contract Performance Guarantee". Clause (1) indicates that the contract performance guarantee should be valid upto the defect liability period which is the guarantee period.

20.Clause 45 of the letter of award is "Guarantee", which is extracted hereunder:-

45.1 The Supplier shall guarantee that the equipment being supplied under this Contract shall be new and of first quality workmanship, 90% availability and shall have no defect in *manufacture, for the purpose intended. The guarantee shall be for a period of 24 calendar months commencing immediately upon completion of the successful Performance Guarantee Testing of the Supplies and Take Over or 31st October 2022 by Purchaser whichever is later shall be furnished as said above in clause 9.0GCC (Contract Performance Guarantee).*

45.2 If during the said guarantee period, the Purchaser finds any materials to be containing manufacturing defects or defect in workmanship, the Supplier would be required to replace such defective equipment free of charge. The above guarantee shall also apply to defects noticed upto stage of erection, commissioning and P.G. Testing. The Supplier shall bear all the expenses incurred in connection with replacement against such defective equipment inclusive of all freight both inland and overseas, insurance, customs levies, forwarding and clearing all demurrage and other incidental charges involved in delivering the said equipment to the Purchaser's specified destination. The charges for erection of such replacement shall not be paid by the Purchaser. The decision whether correction of the defects would be by repair or by replacement shall be mutually discussed and decided to the satisfaction of the Purchaser.

45.3 The Supplier shall take all necessary steps for expediting clearance and delivery of the replacement which may be required to be made by him under this clause.

45.4 The Purchaser and the Supplier shall mutually agree to *programme of replacement, renewal or repair which will minimize any interruption in the commercial use of the equipmnent.*

45.5 In the event, the Supplier fails to undertake necessary steps to repair or replace defective materials as stipulated above after receiving notice from the Purchaser of any defect in the materials or failure of any material to conform to the specifications, the Purchaser may procaed to undertake the repair or replacement of such defective equipment at Suppliers risk and expense but without prejudice to any other rights which the Purchaser may have against the Supplier in respect of such defects.

45.6Provision of this clause shall also apply to all materials repaired or replaced under the provision of this until the expiration of period of twenty four (24) months from the date of such replacement.

45.7 The cost of any special or general overhaul rendered necessary during the guarantee period due to defects in the plant or defective work carried out by the Supplier shall be borne by Supplier.

45.8 If the replacements or renewals are of such a character as may affect the efficiency or output of the equipment supplied or any portion thereof, then the Purchaser may, within one month of such

replacement or renewal, give to the Supplier a notice in writing requiring that tests on complete in which case such tests shall be carried out in accordance with the provisions made in this *contract.*

All costs for testing shall be borne by the Supplier.

45.9The acceptance or taking over of the equipment by the Purchaser shall in no way relieve the Supplier of his obligation under this cause.

45.10 At the end of the guarantee period, the Supplier's liability ceases except for latent defects and Supplier's obligation to prove 90% availability of the plant. In respect of goods supplied by sub-Suppliers to the Supplier, where sub-Supplier provides a longer guarantee than the one indicated in this contract, the Purchaser should be entitled to the benefit of such longer guarantees.

21. Clause 45 indicates that the supplier namely the applicant herein should guarantee that the equipments will be new and free from defects in material and workmanship for a period of 24 calender months commencing immediately upon satisfactory completion of the Performance Guarantee Testing of equipment and taking over of the equipment or 31st October 2022.

22.From the facts of the case, it could be seen that the period under letter of award had been extended periodically and the deadline for the supply order was to effect on or before 30.09.2023. When that being so, the date 31.10.2022 cannot be said to be the later date as 24 months period would only start from the date of the Performance Guarantee Testing of the equipment and taking over of the equipment. It has been disputed by the learned Senior counsel appearing for the first respondent that the Performance Guarantee Testing had not taken place, which had been contested by the learned Senior counsel appearing for the applicant by contending that High Voltage Testing is the actual testing of Performance Guarantee with regard to the equipment supplied by the applicant.

23.The dispute as regards to the Performance Guarantee Testing and High Voltage Testing are one and the same or different, which can be resolved during the arbitration proceedings.

24.In the present case, it is admitted that the 7th revised supply order had been fulfilled by the applicant. A High Voltage Testing has also been conducted in which representatives of both the applicant and the first respondent have also participated and it is not disputed by the first respondent that High Voltage Testing had been successful. This Court also takes judicial notice of the said fact, since if the same had not been successful, the plant would not have been commissioned and the first respondent had not disputed the fact that the plant had been commissioned. When that being so, *prima facie,* I am of the view that the applicant performed its part of contract, but cannot seek discharge and release of the Bank Guarantee, as the Bank Guarantee would have to be held valid till the period of 24 months from the date of Performance Guarantee Testing and take over. In the present case, even according to the applicant, the Performance Guarantee Testing was the High Voltage Testing was done on 26.07.2023 and only thereafter, taking over of the equipment by the TANGEDCO would have taken place. Even according to the applicant, the plant was commissioned somewhere in the month of March, 2024. Therefore, they are liable to continue the Bank Guarantee given for the performance at least till 2026. This view is subject to the resolution of dispute between the parties.

25.The next question that is to be dealt with is regard to the right of the first respondent for invoking the Bank Guarantee. It is not the case of the first respondent that the applicant failed to honour the purchase and supply order. Its claim is that there was a delay in supply, in view of the quality and design issues of the items to be supplied by the applicant, for which the first respondent cannot be held liable. Such supply of materials had been made as early as in July, 2023 and thereafter, the supplied material had also undergone High Voltage Testing successfully. What remain is the guaranteed working of the goods, supplied without any defect. No materials have been placed on the side of the first respondent that the goods supplied after the High Voltage Testing had become faulty and the applicant was called for to rectify the defects and that they had failed to do so. The last communication that was placed by the first respondent to the applicant is dated 17.05.2023 i.e., before the last supply order and the High Voltage Testing that took place in July, 2023. When that being so, I am *prima facie* of the view that the first respondent had failed to produce any documents or evidence whatsoever which evidences that the applicant had failed to perform its part of the obligation under the letter of award upon which the Bank Guarantee had been issued. In such circumstances, I find that there was no reason available for the first respondent to invoke the Bank Guarantee.

26.Having invoked the Bank Guarantee, the first respondent cannot now plead that such invocation was due to the fact that the Bank Guarantee issued by the first respondent had been invoked by the TANGEDCO. The agreement between the TANGEDCO and the first respondent is an independent agreement.

There may be even other violation of the said agreement for which, the TANGEDCO invoked the Bank Guarantee. As I found that there was no evidence produced by the first respondent with regard to the failure on the part of the applicant in performing its part of contract, the first respondent is not entitled to invoke the Bank Guarantee, pursuant to the letter of award dated 16.02.2017.

27.Since I have found in clear terms that there was no reason to invoke the Bank Guarantee, I am inclined to protect the amount that had been encashed by the first respondent by invoking the Bank Guarantee given by the applicant, by invoking the powers vested with this Court under Section 9(1)(ii)(b) of the A&C Act read with Section 9(1)(ii)(e) of the A&C Act. Having come to such a conclusion that I am of the view that it would only be proper to direct the first respondent to deposit the entire Bank Guarantee encashed by them pursuant to the letter of invocation dated 28.08.2024 to the credit of this application before this Court. Such deposit shall be made within a period of four weeks from the date of receipt of a copy of this order.

28.With the aforesaid directions, this Original Application stands disposed of.

09.09.2024

Index :Yes/No
Internet:Yes/No
Pbn

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Pbn

Pre-Delivery Order in

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