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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 01st April, 2024

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ARB. A. (COMM.) 17/2024

RAMKY INFRASTRUCTURE LTD TK ENGINEERING

CONSORTIUM PVT LTD JOINT VENTURE Petitioner

Through: Mr. Suhail Dutt, Sr. Advocate with
Mr. Gaurav Puri, Mr. Sankalp
Goswami, Mr. Sarthak Gupta, Mr.
Azhar Alam, Advocates.

versus

NATIONAL HIGHWAYS AND INFRASTRUCTURE

DEVELOPMENT CORPORATION LTD

..... Respondent

Through: Ms. Ruchira Gupta, Ms. Harshita
Sharma, Mr. Anshul, Advocates.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

I.A. 7080/2024 (for exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

ARB. A. (COMM.) 17/2024

1. This appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 [“the Act”] is directed against an order of a three-member Arbitral Tribunal dated 13.03.2024 by which the appellant’s application under Section 17 of the Act for an interim order of injunction against invocation of certain bank guarantees has been dismissed, subject to the directions contained therein.

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A. Facts.

2. The disputes between the parties arise from a Contract Agreement dated 07.05.2015 [“the CA”] between the appellant and the Ministry of Road Transport and Highways [“MoRTH”], by which the appellant was awarded civil works for four laning a part of National Highway– 52 in the State of Assam on Engineering Procurement Contract [“EPC”] basis. MoRTH, the appellant and the respondent-National Highways and Infrastructure Development Corporation Ltd. [“the respondent”] thereafter entered into a Tripartite Supplementary Agreement dated 21.07.2015, by which, essentially, the respondent replaced MoRTH as party to the CA.

3. For the purposes of the contract, the appellant furnished three types of bank guarantees to the respondent:

- a. Performance bank guarantees [“PBGs”] under clause 7.1 of the CA, amounting to Rs.62,17,50,000/-;
- b. Bank guarantees towards mobilisation advance [“MBGs”] under clause 19.2 of the CA, amounting to Rs.45,59,50,000/-; and
- c. Bank guarantees against *ad hoc* advances [“AHBGs”], amounting to Rs.39,40,00,000/-.

The total amount of the bank guarantees was thus Rs.1,47,17,00,000/-.

4. In the backdrop of rival contentions with regard to delays in completion of the project, with both parties blaming each other, they entered into a Supplementary Foreclosure Agreement dated 08.10.2021 [“the SFA”] by which the CA was sought to be foreclosed on the terms and conditions contained therein.



5. The disputes adjudicated in the impugned order of the learned Arbitral Tribunal concern invocation of the abovementioned bank guarantees. It may be mentioned at the outset that MBGs of a sum of Rs.15,59,50,000/- have already been encashed by the respondent and no interim orders of protection are sought with regard to these bank guarantees.

6. The appellant first sought an injunction against invocation of the bank guarantees in April 2023, by way of two petitions before this Court under Section 9 of the Act¹. The petitions were taken up on 10.04.2023 and 12.04.2023, when various clauses of the contracts were noticed. They were ultimately disposed of by a common order dated 26.04.2023 recording the contentions on behalf of the respondent as follows:

“1. The Court had in its order of 12 April 2023 noticed the dispute and questions which stood raised in the present proceedings.

2. **Ms. Gupta, learned counsel appearing for National Highways and Infrastructure Development Corporation Limited [NHIDCL] on instructions states that the entire exercise of adjudication and ascertainment of liabilities of the petitioner in terms of the Foreclosure Agreement shall be duly undertaken and a final decision communicated to the petitioner with expedition.**

3. In view of the aforesaid and subject to all rights and contentions being kept open, Mr. Nandrajog has prayed for these petitions being disposed of at this stage.

4. The Court only provides that the enforcement petitioner shall ensure that the bank guarantees are kept alive during this entire period. **Since the apprehension of coercive steps being taken would no longer survive till such time as the adjudication is completed by NHIDCL, these petitions shall stand disposed of subject to the statements recorded hereinabove.**

5. It is further observed that the rights of the petitioner to assail any final order that may be passed by NHIDCL shall stand reserved.

¹ O.M.P.(I)(COMM.) 108/2023 and O.M.P.(I)(COMM.) 111/2023.



All rights and contentions of parties in that respect are kept open.”²

7. The respondent, by a letter dated 03.10.2023, informed the appellant that the final statement of foreclosure had been assessed and an amount of Rs.1,19,62,18,581/- was found due from the appellant to the respondent. The appellant disputed the computation by a “without prejudice” letter dated 12.10.2023 and also sought details of the break-up of the amount calculated by the respondent. According to the appellant, in fact, an amount of Rs.39,38,63,427/- was due to it in terms of the SFA. The respondent explained the computation by its letter dated 13.10.2023, giving details as to the manner in which it had arrived at the figure of Rs.1,19,62,18,581/-. The appellant reiterated its contentions by a further letter dated 26.10.2023.

8. The respondent ultimately addressed letters dated 14.12.2023 to the issuing banks, invoking the bank guarantees. The Arbitral Tribunal was constituted in the meanwhile to adjudicate the disputes, pursuant to an order of this Court dated 11.10.2023 in a petition filed under Section 11 of the Act³, by the appellant herein. The appellant filed the application under Section 17 of the Act before the Arbitral Tribunal seeking stay of invocation of the bank guarantees. During the pendency of the application, the respondent also addressed clarificatory letters dated 23.01.2024 to the banks, in addition to the original letters of invocation.

9. The Tribunal initially granted stay by order dated 17.12.2023, when the application was first taken up, but has vacated the stay by the impugned order dated 13.03.2024. While doing so, the Arbitral Tribunal

² Emphasis supplied.

³ ARB.P. 914/2023.



has noted that the bank guarantees which, as stated above, are to the tune of Rs.1,47,17,00,000/-, may be encashed only to the extent of Rs.1,19,62,18,581/-, being the amount computed by the respondent as being due to it.

B. Submissions of learned counsel.

10. Mr. Suhail Dutt, learned Senior Counsel for the appellant, has raised two arguments in support of the appeal. The first is based on irretrievable injury and special equities, whereas the second is based on invalidity of the letters by which the respondent has sought to invoke the bank guarantees.

11. In support of his contention of special equities which prevail in favour of the appellant, Mr. Dutt submits that the SFA itself contemplated an understanding that the parties would not have any claims against each other based on default of their contractual obligations. He drew my attention to clauses 5 and 7 thereof, which *inter alia* provide that there would be no punitive action upon the EPC Contractor [the appellant herein] while foreclosing the project, and that the performance security would be returned to it upon foreclosure. It was further provided that there was no further “liquidity damage”⁴ or any kind of penalty upon the appellant and that all pending bills and payments for works executed at the site, security deposit or any other deductions, withheld amounts etc., including retention money would be paid to it upon foreclosure. He specifically relies upon clause 7(b) and 7(d) of the SFA which read as follows:

⁴ *Sic.*



“7. Now, both parties taking note of the provisions of foreclosing of Contract hereby mutually agree to the following:

xxxx

xxxx

xxxx

b. **The Performance, Additional Performance security and Retention Money etc. shall be returned by the 1st Party to the 2nd Party after adjusting the amount if any due on the Contractor as per the provisions of the Original Contract. The BGs shall be released after requisite adjustment** on the condition that the fresh BG for the said amount shall be amended in the name of M/s TK Engineering Consortium Pvt. Ltd and submitted in the Jamuguri to Biswanath Package against which the Contractor may seek Adhoc Advance in the project as per the directions of HQ letter no. 649 dated 22.12.2020.

xxxx

xxxx

xxxx

d. **There will be no damages imposed on 2nd Party whatsoever as per Contract Agreement including any punitive action on account of foreclosing of the Contract.**⁵

12. Mr. Dutt further submits that by order dated 26.04.2023, this Court had noticed the submission of the respondent that the bank guarantees would not be invoked, pending the exercise of adjudication and ascertainment of liabilities in terms of the SFA. He contends that the appellant had submitted a final bill to the respondent (under clause 19.5 of the CA) on 01.11.2021, but the respondent's decision has been taken overlooking it, and without following the consultative process mandated in clause 18.5 of the CA, which reads as follows:

“18.5 Determination by the Authority's Engineer

18.5.1 The Authority's Engineer shall consult with each Party in an endeavour to reach agreement wherever this Agreement provides for the determination of any matter by the Authority's Engineer. If such agreement is not achieved, the Authority's Engineer shall make a fair determination in accordance with this Agreement having due regard to all relevant circumstances. The Authority's Engineer shall give notice to both the Parties of each agreement or determination, with supporting particulars.

⁵ Emphasis supplied.



18.5.2 Each Party shall give effect to each agreement or determination made by the Authority's Engineer in accordance with the provisions of this Agreement. Provided, however, that if any Party disputes any instruction, decision, direction or determination of the Authority's Engineer, the Dispute shall be resolved in accordance with the Dispute Resolution Procedure.”

13. Mr. Dutt thus argues that the special equities in favour of the appellant arise from the contents of the SFA, which expressly bar any penalty, damages or coercive steps being taken by either party on an allegation of default against the other, whereas an allegation of default is the *sine qua non* of the respondent's attempt to invoke, at least, the PBGs.

14. Mr. Dutt also points out that the respondent has prevaricated in its assessment of the amount due from the appellant. Having first invoked the bank guarantees for a sum of approximately Rs.58 crores in April 2023, the respondent thereafter made a submission before the Court (also in April 2023) that the dues were in the region of Rs.87 crores, went on to assess the amount due as Rs. 119 crores in October 2023, and ultimately invoked the bank guarantees for the entire sum of Rs.147 crores on 14.12.2023.

15. With regard to the second ground, i.e., that the invocation letters were not in terms of the bank guarantees, Mr. Dutt points out that the terms of the three sets of bank guarantees are at some variance, although all are admittedly irrevocable and unconditional bank guarantees. In each of the bank guarantees, the relevant clauses are as follows:

Performance Bank Guarantees:

“2. A letter from the Authority, under the hand of an officer not below the rank of Superintendent Engineer in the Ministry of Road Transport & Highways, that the Contractor has committed default in the due and faithful performance of all or any of its obligations under and in accordance with the Agreement shall be conclusive,



final and binding on the Bank. The Bank further agrees that the Authority shall be the sole judge as to whether the Contractor is in default in due and faithful performance of its obligations during and under the Agreement and its decision that the Contractor is in default shall be final and binding on the Bank, notwithstanding any differences between the Authority and the Contractor, or any dispute between them pending before any court, tribunal, arbitrators or any other authority or body, or by the discharge of the Contractor for any reason whatsoever.”⁶

Ad hoc Advance Bank Guarantees:

“1. The Bank hereby unconditionally and irrevocably guarantees the due and faithful repayment on time of the aforesaid instalment of the Advance Payment under and in accordance with the Agreement, and agrees and undertakes to pay to the Authority, upon its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the Contractor, such sum or sums up to an aggregate sum of the Guarantee Amount as the Authority shall claim, without the Authority being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.

A letter from the Authority, under the hand of an officer not below the rank of [General Manager in the National Highways & Infrastructure Development Corporation Limited (NHIDCL)], that the Contractor has committed default in the due and faithful performance of all or any of its obligations for the repayment of the Adhoc Advance Payment shall be conclusive, final, and binding on the Bank. The Bank further agrees that the Authority shall be the sole judge as to whether the Contractor is in default in due and faithful performance of its obligations during and under the Agreement and its decision that the Contractor is in default shall be final and binding on the Bank, notwithstanding any differences between the Authority and the Contractor, or any dispute between them pending before any court, tribunal, arbitrators or any other authority or body, or by the discharge of the Contractor for any reason whatsoever.”⁷

Guarantees against Mobilisation Advances:

“2. **A letter from the Authority, under the hand of an officer not below the rank of Executive Director, that the Contractor has committed default in the due and faithful performance of all or any of its obligations for the repayment of the instalment of the Advance**

⁶ Emphasis supplied.

⁷ Emphasis supplied.



Payment under and in accordance with the Agreement shall be conclusive, final and binding on the Bank. The Bank further agrees that the Authority shall be the sole judge as to whether the Contractor is in default in due and faithful performance of its obligations during and under the Agreement and its decision that the Contractor is in default shall be final and binding on the Bank, notwithstanding any differences between the Authority and the Contractor, or any dispute between them pending before any court, tribunal, arbitrators or any other authority or body, or by the discharge of the Contractor for any reason whatsoever”⁸

16. As against these clauses, Mr. Dutt submits that the respondent sought to invoke all the bank guarantees by letters dated 14.12.2023 addressed to the issuing banks which only contain a statement to the following effect:

“2. Competent Authority has decided to encash the above BG on the ground of recovery of the amount due to Authority on finalization of the Foreclosure Payment of the Contractor M/s Ramky-M/s TK (JV).

3. The original BGs is enclosed herewith a lodging of our claim for invocation of the aforementioned bank guarantees in pursuant to Cl. 1, 9 & 10 of the aforesaid BGs. You are requested to encash the above bank guarantees immediately with an intimation to email: bmnhidcl@gmail.com.”⁹

17. Although the communications were clarified by letters dated 23.01.2024 from the respondent to the banks, Mr. Dutt submits that even these communications do not comply with the requirements of the bank guarantees. The letters dated 23.01.2024, are each in the following terms:

“In Continuation of the letter under reference dated 14.12.2023 and in addition to what has been stated therein, **the Bank may note that additionally the EPC Contractor M/s Ramky – TK (JV) has committed defaults in the due and faithful performance of its obligations for the repayment of the instalment of the Advance Payment under and other obligations in accordance with the Contract Agreement.** The EPC contractor has not paid the due amount

⁸ Emphasis supplied.

⁹ Sic.



to NHIDCL despite several reminders to EPC contractor.”¹⁰

18. Ms. Ruchira Gupta, learned counsel for the respondent, disputes both the submissions raised on behalf of the appellant. As far as the claim of special equities/irretrievable injury is concerned, Ms. Gupta points out that the said contentions are based entirely upon the SFA, whereas the appellant’s principal case in the statement of claims is that the SFA is not binding upon the parties as it was a product of coercion by the respondent. She submits that the appellant’s reliance upon the SFA to seek an injunction at the interim stage, while repudiating it in the final claim, ought not to be permitted.

19. Without prejudice to the aforesaid, Ms. Gupta argues that the appellant’s contentions are all based upon contractual disputes under the CA and SFA between the parties, which cannot be adjudicated in an application for injunction against a bank guarantee, being an independent contract. She submits that the appellant’s contentions in this regard remain to be adjudicated by the Arbitral Tribunal, but it has failed to make out a case for special equities, as far as the invocation of the bank guarantees is concerned. She states that the respondent has ascertained the amount due in terms of the directions of this Court dated 26.04.2023, and the disputes with regard to the correctness of that decision cannot be adjudicated at this stage. In the meanwhile, the appellant has failed to make payment of the amount due and the respondent is entitled to invoke the bank guarantees for satisfaction of its dues, subject to final adjudication by the learned Arbitral Tribunal.

20. With regard to the validity of the invocation letters, Ms. Gupta

¹⁰ Emphasis supplied.



submits that under clause 7(b) of the SFA, the securities were to be returned to the appellant after adjusting the amount, if any, due from the appellant as per the provisions of the CA. She contends that the invocation letters dated 14.12. 2023, read with the clarifications dated 23.01.2024, bring the invocations directly in line with the terms of the bank guarantees. As far as the MBGs and AHBGs are concerned, she points out that the letters dated 23.01.2024 clarify that the appellant had committed default in the due and faithful performance of its obligations for repayment thereof. As far as the PBGs are concerned, Ms. Gupta's submission is that the plea with regard to default in repayment of the advance payments constitutes a case of default in the performance of the CA, which is again in terms of the PBGs.

C. Analysis.

(a) Guiding legal principles.

21. In adjudicating these contentions, the Court is guided by two legal principles.

22. The first is that injunctions against invocation of unconditional and irrevocable bank guarantees should be granted only where the party seeking an injunction is able to demonstrate a clear and egregious case of fraud, irretrievable injury or special equities¹¹. It is the settled legal position that a bank guarantee is an independent tripartite agreement between the parties to the principal contract and the bank, which must be honoured on its own terms¹². Disputes with regard to the contractual

¹¹ In the present case, the ground of fraud was not urged before the Arbitral Tribunal, as recorded in paragraph 19 of the impugned order.

¹² *Standard Chartered Bank vs. Heavy Engineering Corporation Ltd. & Anr.*, 2019 SCC OnLine SC 1638.



obligations of the parties, including as to whether the bank guarantee has been invoked in terms of the contract, do not fall within the scope of adjudication at this stage. The only other exception to this general principle, however, is if the invocation is not in terms of the bank guarantee itself.

23. The second legal principle concerns the scope of appellate adjudication under Section 37(2)(b) of the Act. As far as this aspect is concerned, this Court has emphasised time and again that jurisdiction would be exercised only in limited circumstances, where the exercise of discretion by the arbitral tribunal under Section 17 of the Act is found to be vitiated by arbitrariness or perversity. This principle has been laid down in several judgments of coordinate benches of this Court,¹³ which trace the principle from Section 5 of the Act, as also from the general deference by appellate courts and tribunals to exercise of discretionary jurisdiction by the original court or tribunal¹⁴. The recent judgment in *Tahal Consulting Engineers India (P) Ltd. vs. Promax Power Ltd.*¹⁵ summarises the legal position thus:

“38. It would thus appear to be well settled that the powers under Section 37(2)(b) is to be exercised and wielded with due circumspection and restraint. An appellate court would clearly be transgressing its jurisdiction if it were to interfere with a discretionary order made by the Arbitral Tribunal merely on the ground of another

¹³ *Green Infra Wind Energy Ltd. vs. Regen Powertech Pvt. Ltd.*, 2018 SCC OnLine Del 8273, *Sona Corporation India Pvt. Ltd. vs. Ingram Micro India Pvt. Ltd. & Anr.*, 2020 SCC OnLine Del 300, *Dinesh Gupta vs. Anand Gupta*, 2020 SCC OnLine Del 2099, *Augmont Gold (P) Ltd. vs. One97 Communication Ltd.*, (2021) 4 HCC (Del) 642, *Sanjay Arora vs. Rajan Chadha*, (2021) 3 HCC (Del) 654, *Manish Aggarwal vs. RCI Industries & Technologies Ltd.*, (2022) 3 HCC (Del) 289, *Supreme Panvel Indapur Tollways (P) Ltd. vs. National Highways Authority of India*, 2022 SCC OnLine Del 4491, *Medipol Pharamceutical India (P) Ltd. vs. Union of India*, 2023 SCC OnLine Del 2419, *Handicraft & Handlooms Exports Co. of India v. SMC Comtrade Ltd.*, 2023 SCC OnLine Del 3981, and *Tahal Consulting Engineers India (P) Ltd. v. Promax Power Ltd.*, 2023 SCC OnLine Del 2069.

¹⁴ *Wander Ltd. and Anr. vs. Antox India (P) Ltd.*, 1990 Supp SCC 727.

¹⁵ *Supra* (note 13).



*possible view being tenable or upon a wholesome review of the facts the appellate court substituting its own independent opinion in place of the one expressed by the Arbitral Tribunal. **The order of the Arbitral Tribunal would thus be liable to be tested on the limited grounds of perversity, arbitrariness and a manifest illegality only.***¹⁶

(b) Irretrievable injury/ special equities.

24. Having regard to these principles, I turn first to the argument of Mr. Dutt on irretrievable injury and special equities. As far as this aspect is concerned, it may be noted at the outset that the argument is based upon clauses 5 and 7 of the SFA which, according to the appellant itself, was obtained by coercion and is not binding. Ms. Gupta has pointed out that in the Statement of Claims [which has not been placed on record with the appeal], the appellant has made a claim of approximately Rs.1,300 crores and one of its principal contentions is that the SFA is not valid. Mr. Dutt submits that despite this contention in the Statement of Claims, the appellant can rely upon the SFA in the alternative, to contend that the respondent is not entitled to claim any amount based upon an allegation of default against the appellant. Although I entertain some reservation as to whether the appellant can seek an injunction based upon special equities arising from an agreement which it vehemently disowns, it is not necessary to enter into that dispute in detail as I am of the view that, even based upon the arguments advanced by Mr. Dutt, the appellant has not made out a case of special equities or irretrievable injury.

25. As noted above, the bank guarantees in question are all irrevocable and unconditional. The contentions of Mr. Dutt, based upon clauses 5 and 7 of the SFA, read with clauses 18.5 and 19.19 of the CA, are contractual disputes which are yet to be adjudicated by the learned Arbitral Tribunal.

¹⁶ Emphasis supplied.



The existence of such disputes with regard to the validity of invocation of bank guarantees, however strong, do not make out a case of irretrievable injury or special equities. The very purpose of unconditional bank guarantees is to give the beneficiary direct recourse to the bank, which is obliged to honour the guarantee without demur, provided its terms – i.e., the terms of the guarantee itself – have been fulfilled.

26. Mr. Dutt's submission is that the respondent failed to entertain the appellant's arguments with regard to computation of the amount due. The learned Arbitral Tribunal, however, has recorded a finding in the impugned order to the effect that the exchange of communications between the parties dated 03.10.2023, 12.10.2023, 13.10.2023, and 26.10.2023, provided a consultative opportunity for the appellant to present its contentions. The relevant extracts of the impugned order are as follows:

"25. Having considered the submission advanced by the parties and after a comprehensive perusal of the documents relied upon, we do not find force in the submission made by Mr. Nandranjog that the Claimant has been deprived of the opportunity to make a representation, for the reason that the Respondent duly considered the request of the Claimant for providing the breakup after the Respondent had issued a letter of demand dated 03.10.2023. Notably, the Claimant sought breakup and the breakup was provided by a communication of 13.10.2023. The Claimant again expressed its dissatisfaction by a letter of 26.10.2023 and the Bank Guarantees were invoked almost after a gap of three months, only in the last week of December, 2023, during which period, in case the Claimant wished to make a representation, it was free to do so.

26. Without entering into any controversy at this stage as to whether Clause 19.19 would apply or not, we are of the opinion that reasonable opportunity has been given by the Respondent by providing the summary of the final foreclosure statement. Although the said summary did not satisfy the Claimant, it cannot be expected that such replies representations and clarifications be an endless process, till the party seeking clarification is subjectively satisfied.



More so, in the communication dated 12.10.2023 issued by the Claimant to the Respondent, while raising various contentions, the Claimant has taken a stand in Para 11, that since the arbitrators have been appointed, parties should raise their respective claims before the Arbitrators.”¹⁷

27. The said conclusion, is in my view, not an unreasonable or perverse reading of the said communications, so as to attract the jurisdiction of the Court under Section 37 of the Act.

28. I am also of the view that this position is consistent with the order of this Court dated 26.04.2023 which recorded the submission of the respondent that it would undertake the exercise of adjudication and ascertainment of liabilities of the appellant in terms of the SFA, expeditiously. The final adjudication is a matter which remains pending before the learned Arbitral Tribunal, and it is undisputed that recovery of the amounts under the bank guarantees by the respondent would be subject to the final adjudication by the Tribunal.

(c) Validity of the letters of invocation.

29. On the appellant’s second argument with regard to validity of the invocation letters also, the learned Arbitral Tribunal has found in favour of the respondent. Although it appears from the impugned order that, before the Tribunal, a controversy was raised as to whether the signatory of the invocation letters was the person contemplated by the bank guarantees, this contention is not pressed in appeal, and the contention of Mr. Dutt is that the invocation letters are substantively deficient, in that they do not make out the grounds for invocation which are provided in the bank guarantees.

¹⁷ Emphasis supplied.



30. As far as the MBGs and AHBGs are concerned, I do not find any merit in this contention. The invocation letters dated 14.12.2023, read with the clarificatory letters dated 23.01.2024, make an express case of default in the appellant's performance of its obligation "*for the repayment of the instalment of the Advance Payment*". This phraseology is directly in terms of the MBGs and is also consistent with the terms of the AHBGs. The only distinction in the AHBGs is that the requirement was for the respondent to certify default in "*repayment of the Adhoc Advance Payment*". The substitution of the words "*repayment of the instalment of the advance payment*" do not, in my view, convey a substantially different meaning, particularly when the guarantees in question were clearly referenced.

31. As far as the PBGs are concerned, also, I am of the view that the appellant has not made out a ground for interference with the finding of the learned Arbitral Tribunal. While the subject heading of the letter dated 23.01.2024 in regard to the PBGs refers to "*Bank Guarantees against Advance Payment*", Ms. Gupta submits that this is a typographical error and did not cause any confusion. I am inclined to accept this submission, as the letter dated 23.01.2024 also bears reference to the earlier invocation letter addressed to State Bank of India dated 14.12.2023.

32. In the letter itself also, the respondent has made the requisite averment regarding default in performance of the agreement by the appellant. The bank guarantee requires the respondent to state that the appellant "*has committed default in the due and faithful performance of all or any of its obligations under and in accordance with the*



Agreement". The communication dated 23.01.2024 refers to the invocation letter dated 14.12.2023, and specifically states that the appellant "*has committed defaults in the due and faithful performance of its obligations for the repayment of the instalment of the Advance Payment under and other obligations in accordance with the Contract Agreement*"¹⁸. In view of these specific contents in the letters of invocation, I do not find any reason to interfere with the conclusion of the learned Arbitral Tribunal that the letters of invocation were in terms of the bank guarantees. The appellant's contention, to the contrary, does not commend to me at this stage.

D. Conclusion.

33. For the reasons aforesaid, I do not find any ground to interfere with the impugned order of the learned Arbitral Tribunal, in exercise of jurisdiction under Section 37 of the Act. The appeal is, therefore, dismissed. However, there will be no order as to costs.

34. It is made clear that the invocation of the bank guarantees will only be to the extent of Rs.1,19,62,18,581/-, as directed in paragraph 40 of the impugned order. Ms. Gupta, learned counsel for the respondent, also accepts that the amount already recovered by encashment of bank guarantees, would be adjusted against this amount.

PRATEEK JALAN, J

APRIL 1, 2024
"Bhupi/Adhiraj"/

¹⁸ Emphasis supplied.