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

**Judgment reserved on: 03.09.2024**

**Judgment pronounced on: 20.09.2024**

+ **O.M.P.(I) (COMM.) 261/2024 & I.A. 36978/2024**

SPRNG ENERGY PRIVATE LIMITED .....Petitioner

Through: Mr Sandeep Sethi, Sr. Adv. with Ms  
Amrita Narayan, Mr Manan Shukla,  
Mr Ashwin Rakesh, Mr Madhav  
Sharma, Mr Sumer Dev Seth and Ms  
Riya Kumar, Advs.

versus

FS INDIA SOLAR VENTURES PRIVATE LIMITED

.....Respondent

Through: Mr Rajiv Nayyar, Sr. Adv. (through  
VC) with Ms Vasundhara Bakhru, Mr  
Samarth Krishan Luthra, Ms Manjira  
Das Gupta and Mr Chirag Kakkar,  
Advs.

**CORAM:**

**HON'BLE MR. JUSTICE JASMEET SINGH**

**J U D G M E N T**

: **JASMEET SINGH, J**

1. This is a petition under section 9 of the Arbitration and Conciliation Act, 1996 seeking an order restraining/injuncting the respondents from



invoking Bank Guarantee No. PEBBOM254970 dated 15 April 2023 in the amount of INR 41,18,24,637/- furnished by the Petitioner.

2. The brief facts, as encapsulated in the present petition, are as under:-

a. The petitioner is a renewable power company and is a member of Shell Group of companies. The respondent company is a solar/panel module manufacturer.

b. The parties executed a Master Supply Agreement (MSA) whereby the petitioner agreed to purchase 335 MW of Series 7 Solar Photovoltaic Modules manufactured by the respondent. The quantities of the module denoting 335 MW were to be delivered in accordance with Appendix 1 of the MSA. The Appendix 1 of the MSA is reproduced as under:-

Appendix 1

Confirmed Volume and Indicative Delivery Schedule

| Delivery Schedule (Quarter) | Quantity (MW) | Average Bin (wp) | Price per unit in USD/Wdc ("Unit Price")* | Amount (USD Mn) |
|-----------------------------|---------------|------------------|-------------------------------------------|-----------------|
| April – June 2024           | 80            | 525              | 0.2485                                    | 19.88           |
| July – September 2024       | 165           | 530              | 0.2450                                    | 40.13           |
| October-December 2024       | 90            | 535              | 0.2425                                    | 21.83           |
| Total                       | 335           |                  |                                           | 82.13           |

\* The Unit Price is linked for the respective quarter as indicated above. The Unit Price excludes Transaction Taxes, which shall be charged separately. For each Purchase Order, the relevant Unit Price would apply based on the Delivery Schedule indicated in the Purchase Order.



c. According to clause 3.6 of the MSA, the petitioner was required to effect payment of 10% towards the confirmed volume under the MSA in the form of bank transfer or bank guarantee. At the time of



execution of the MSA, the petitioner transferred INR 67,52,00,585.60/- to the respondent by way of bank transfer for a Confirmed Volume of 335 MW.

d. The MSA was amended twice by the parties, i.e. 16.02.2023 and 20.09.2023. By way of the first amendment dated 16.02.2023, the confirmed volume of 335 MW in the MSA was increased by 200 MW, i.e. totaling to 535 MW, and associated changes were carried out in the Appendix 1 of the MSA. The amended Appendix 1 is reproduced as under:-

**Appendix 1**

**Confirmed Volume and Indicative Delivery Schedule**

| Delivery Schedule (Quarter) | Quantity (MW) | Average Bln (wp) | Price per unit in USD/Wdc ("Unit Price")* | Amount (USD Mn) |
|-----------------------------|---------------|------------------|-------------------------------------------|-----------------|
| <b>PART A</b>               |               |                  |                                           |                 |
| November-December 2023      | 100           | 515              | 0.2485                                    | 24.85           |
| January -March 2024         | 100           | 520              | 0.2485                                    | 24.85           |
| <b>PART B</b>               |               |                  |                                           |                 |
| April – June 2024           | 80            | 525              | 0.2485                                    | 19.88           |
| July – September 2024       | 165           | 530              | 0.2450                                    | 40.43           |
| October-December 2024       | 90            | 535              | 0.2425                                    | 21.83           |
| <b>Total</b>                | <b>535</b>    |                  |                                           | <b>131.84</b>   |

\* The Unit Price is linked for the respective quarter as indicated above. The Unit Price excludes Transaction Taxes, which shall be charged separately. For each Purchase Order, the relevant Unit Price would apply based on the Delivery Schedule indicated in the Purchase Order.



e. Due to the increase of the Confirmed Volume under the MSA by 200 MW, additional 10% of downpayment was provided by the petitioner in the form of bank guarantee dated 15.04.2023 for an amount of Rs. 41,18,24,637/-.

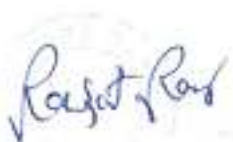
f. By way of second amendment dated 20.09.2023, Appendix 1 of the MSA was amended once again. The same is reproduced as under:-

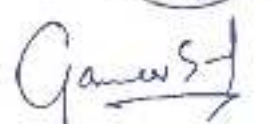
**Appendix 1**

**Confirmed Volume and Indicative Delivery Schedule**

| Delivery Schedule (Quarter) | Quantity (MW) | Average Bln (wp) | Price per unit in USD/Wdc ("Unit Price")* | Amount (USD Mn) |
|-----------------------------|---------------|------------------|-------------------------------------------|-----------------|
| <b>PART A</b>               |               |                  |                                           |                 |
| December 2023               | 100           | 528              | 0.2425                                    | 24.25           |
| <b>PART B</b>               |               |                  |                                           |                 |
| July – August 2024          | 190           | 530              | 0.2425                                    | 46.08           |
| October-December 2024       | 150           | 535              | 0.2425                                    | 36.38           |
| January-Mar 2025            | 95            | 535              | 0.2425                                    | 23.04           |
| <b>Total</b>                | <b>535</b>    |                  |                                           | <b>129.74</b>   |

\* The Unit Price excludes Transaction Taxes, which shall be charged separately.

g. In terms of the agreement, the purchase order bearing No. DPO/SGPP/2324/0017 dated 21.09.2023 was issued by the petitioner upon the respondent for 100.16064 MW of Solar Modules for an amount of Rs. 226,36,19,487.38/-. Thereafter, the purchase order was



amended on 14.11.2023, 22.12.2023 and 23.01.2024 and the purchased quantity was increased from 100.16064 MW to 111.3557 MW.

h. Subsequently, the petitioner wrote letter dated 30.10.2023 to the respondent for reducing the contracted capacity from 535MW to 290MW. The operative portion reads as under:-

“ .....

*Further, we would like to amend the contract with following changes.*

*1. The amended additional capacity we signed with FS for 200 MW dtd 15th February need to be cancelled and we request First solar to return the advance BG of 10% released by Sprng. This cancellation will be on mutual agreement basis and no penalty should be applied on Sprng Energy.*

*2. The 335 MWp MSA signed on 7th November 2022 need to be updated with reduced capacity of 290 MWp and extra advance amount available with FS should be adjusted in the 290 MWp supply on pro rata basis. Again, such amendment shall be on mutual agreement basis.*

*3. We shall lift 108 MWp of the module as already committed and balance 182 MWp capacity will be Tracker Module type and timeline and associated commercials of the same shall be discussed 3 months prior to the release of PO from Sprng Energy.”*

i. In response, the respondent issued letter dated 06.11.2023. The operative portion reads as under:-

*“While we are evaluating the below points and will also be undertaking another field trial later this month to address some of the concerns, I wanted to kick- off the amendment of the PO for 100 MW.*



*As the supplies are scheduled in another 3-4 weeks, let's get this done quickly. Please see attached the draft Change Order for PO 1, please let me know if this is acceptable so we can initiate internal approvals for execution, we will have to amend the LC value as well."*

j. The respondent also replied to the email dated 21.11.2023 of the petitioner seeking an update on the request for reduction of contracted capacity *vide* email of the same date, stating that the change order for the first purchase order was completed. The operative portion reads as under:-

*"We completed the Change order for the first PO today. We are working on the fitness assessment of the tracker module with Scopious for the next 180 MW, will update you by early next week."*

k. The petitioner submits that the deliveries under the purchase order (as amended) were commenced on 09.12.2023 and completed by 31.03.2024.

l. On 09.07.2024, the respondent issued a termination notice demanding payment of INR 171,56,48,239.25/- (equivalent to USD 20,546,685.50) by 09.08.2024. The notice reads as under:-



## Document-11

FS India Solar Ventures Private Limited  
 CIN: U29300DL2012PTC371690  
 808, 8<sup>th</sup> Floor, Narain Manzil  
 23, Barakhamba Road  
 New Delhi – 110 001  
 Tel.: +91 11-6654-3730  
 Fax: +91 11-6654-3752  
[www.firstsolar.com](http://www.firstsolar.com)

### NOTICE

9<sup>th</sup> July, 2024

To,

**Sprng Energy Private Limited,**  
 Unit No. FF-48 A, First Floor  
 Omaxe Square, Plot No. 14,  
 Jasola District Centre, New Delhi – 110025

**Attention:** Gaurav Sood  
 CEO, Sprng Energy

Re: Master Supply Agreement dated November 8, 2022 executed between FS India Solar Ventures Private Limited ("**First Solar**") and Sprng Energy Private Limited ("**Buyer**") as amended on November 8, 2022, February 16, 2023 and September 20, 2023 ("**MSA**")

Dear Gaurav,

We write to you in relation to the MSA executed between First Solar and the Buyer for supply of Series 7 solar photovoltaic modules ("**Modules**") for a total volume of 535 MW in the aggregate as agreed under the terms of the MSA.

Pursuant to the terms of the MSA, First Solar completed supply and delivery of the Modules for 111 MW in accordance with the terms of the purchase order dated September 21, 2023, as amended on November 14, 2023, December 22, 2023 and January 23, 2024 ("**Purchase Order 1**").

As per e-mail dated October 30, 2023 issued by the Buyer ("**E-mail**") and subsequent discussions in that regard in early 2024, First Solar understands that the Buyer intends to (i) partly terminate the MSA by cancelling purchase of 245 MW of Modules, out of the total Confirmed Volume of 535 MW; and (ii) issue purchase orders (over and above the Purchase Order 1 issued as above) for the balance volume of 179 MW for a delivery schedule (in deviation of the agreed Delivery Schedule under the MSA) latest by June 2024. However, till date, the Buyer has not issued any purchase order over and above the Purchase Order 1.

Please note that the MSA does not provide any right to the Buyer to cancel or terminate the MSA, either partly or fully, for convenience, without any default or breach of any obligations by First Solar under the MSA. Considering the above and the contents of the E-mail and subsequent discussions as above, and in the absence of any firm Purchase Order issued in accordance with the terms of the MSA over and above the Purchase Order 1, First Solar hereby issues this termination notice in terms of Section 7.2(b) of the MSA for Buyer Event of Default and calls upon you to pay the Termination Payment for an amount equivalent to 20% (twenty per cent) of the Purchase Price for 423.643 MWdc ("**Terminated Volume**") i.e., INR 1,715,648,239.25 (USD 20,546,685.50 at current exchange rate of INR 83.5/USD) ("**Termination Payment**"), within 30 calendar days from the date of this notice ("**Termination Effective Date**"). Please note that this is without prejudice to our right to draw upon the MSA Down Payment received in terms of the MSA, in partial settlement of the aforesaid Termination Payment, which we will exercise if we do not receive the Termination Payment as above within the 30 day period as afore-stated.



FS India Solar Ventures Private Limited  
CIN: U29300DL2012PTC3716  
808, 8<sup>th</sup> Floor, Narain Mar  
23, Barakhamba Ro  
New Delhi - 110 0  
Tel.: +91 11-6654-37  
Fax: +91 11-6654-37  
[www.firstsolar.co](http://www.firstsolar.co)

Please note that First Solar reserves all its rights, claim of action or remedy under the MSA in the event the Buyer fails to comply with the above.

For any questions and communication in relation to the aforesaid, please reach out to the undersigned.

Regards,

Name: Rajat Roy

Title: Authorised signatory

FS India Solar Ventures Private Limited

3. It is stated by the petitioner that the respondent as of today holds an amount of Rs. 45,05,01,822/- in cash over and above the bank guarantee amount of Rs. 41,18,24,637/-.
4. Since the petitioner apprehended that the respondent would encash bank guarantee, the petitioner has filed the present petition.
5. When the matter came up for hearing on 14.08.2024, this court stayed the encashment of bank guarantee on the ground that *prima facie* the invocation seems to be in contravention of the Clause 7.3(b) of the MSA.
6. After service, the respondent has filed an application, i.e. I.A. 36978/2024 under Order 39 Rule 4, CPC seeking vacation of the stay. The primary submission raised by the respondent is that the terms of the bank guarantee is unconditional and irrevocable and not dependent on the terms of the MSA. It is submitted that the rights and obligations under the bank



guarantee are distinct and separate from the rights and obligations under the MSA. It is settled law that a bank guarantee is an independent agreement which is unfettered by disputes in other contracts/ arrangements between the parties *inter se*.

7. The respondent submits that the correctness of the Termination Notice or the demand for Termination Payment does not impact the Respondent/ Applicant's rights under the unconditional and irrevocable Bank Guarantee. The bank guarantee remains unaffected of any dispute between the petitioner and the respondent under the MSA.

8. Further, the respondent submits and clarifies that the confirmed values (as defined in MSA) have not been reduced since the quantity of modules agreed and confirmed by the petitioner continues to be 535 MW. Therefore, the MSA Downpayment amount to be paid by the petitioner remains the same.

9. Mr. Sandeep Sethi, learned senior counsel for the petitioner states that the respondent cannot seek to unjustly and illegally encash the bank guarantee which was furnished by the petitioner under the contract as MSA downpayment (advance payment), without adjudication of disputes by arbitral tribunal.

10. It is stated that in the present case, the “Confirmed Volume” and the “Purchase Orders” are different terms defined in the MSA. Clauses 1.1 and 1.2 reads as under:-

*“1.1 Confirmed Volume. Buyer confirms and agrees that following the Effective Date, it shall purchase 335 MW of Modules from first Solar ("Confirmed Volume") in accordance with the indicative breakup of volume and delivery schedule of Modules as set out in **Appendix 1**. The Parties agree that no later than 9 months prior*



*to the Delivery Start Date in accordance with the Delivery Schedule (as defined hereinafter) ("Confirmed PO Date"), the Parties will mutually agree, in writing, definitive volume, break-up and Delivery Schedule (as defined hereinafter) for the Confirmed Volume and execute Purchase Order(s) as set out in Section 1.2. The Buyer confirms that the purchase of the Confirmed Volume at the price and other terms set out herein is a binding commitment of the Buyer and the individual Purchase Orders(s) shall merely firm up the break-up of the Confirmed Volume, changes to any individual bin class, the Delivery Schedule and the price adjustment as per the terms of this Agreement for each of the Modules comprised in the Confirmed Volume.*

*1.2 Purchase Orders. Following the Effective date and in any case no later than Confirmed PO Date, the Parties shall execute one or more purchase order(s) in the form set out in **Appendix 2**, for the delivery of Modules covered by each such Purchase Order in accordance with the terms thereof which shall be a binding contract of sale between First Solar and Buyer, that incorporates and is subject to the terms and conditions of this Agreement and any terms and conditions set out in the applicable purchase order (each a "Purchase Order", and collectively, "Purchase Orders"). For the purposes of this Agreement, and specifically the execution of the Purchase Order(s), the Parties agree that the term "Buyer" shall mean and include the Buyer or affiliates and subsidiaries of the Buyer who issued such Purchase Order."*

11. He further states that correspondingly, Clause 3.6 deals with Downpayment of the Confirmed Volume and Clause 3.7 deals with the Downpayment of the Purchase Order. They read as under

*"3.6 MSA Down Payment: Within 30 calendar days of the Effective Date, Buyer shall pay to First Solar a down payment in*



*the amount equal to 10% of the Purchase Price for the Confirmed Volume ("MSA Down Payment"), in the form of bank transfer or a bank guarantee (in a form and contents acceptable to First Solar) to First Solar.*

*3.7 PO Down Payment: Within 30 calendar days of the execution of the Purchase Order(s), the Buyer under the relevant Purchase Order shall pay to First Solar a down payment in the amount equal to 20% of the Purchase Price for the relevant Purchase Order(s) ("PO Down Payment"), in the form of bank transfer or a bank guarantee (substantially in the form set out in Appendix 8) to First Solar, upon which the value of the bank guarantee, provided by the Buyer under this Agreement towards MSA Down Payment, representing 10% of the Purchase Price of the relevant Purchase Order shall be proportionately reduced."*

12. The learned senior counsel for the petitioner states that in the present case that the Confirmed Volume is 535 MW whereas the Purchase Order was only for 111.3557 MW, for which the entire payment has been made by the petitioner.

13. It is the submission of the counsel for the petitioner that there are no further purchase orders by the petitioner, therefore there is no unpaid purchase price due and payable by the petitioner to the respondent. It is submitted that no condition under Clause 7.2 of the MSA has been violated by the petitioner. Despite that if the respondent terminates the agreement, which it has so done *vide* letter dated 09.07.2024, then the petitioner is only required to pay 20% of the remaining unpaid purchase price in terms of clause 7.3(b). Clauses 7.2. and 7.3 read as under:-

*"7.2 First Solar Suspension Rights and Termination Rights.  
Without prejudice to Section 7.1, First Solar may in its sole*



*discretion (a) suspend the performance of its obligations under this Agreement and/ or the Purchase Order immediately in each case for Buyer's failure to (each a "Buyer Event of Default"): (i) pay the MSA Down Payment and/ or PO Down Payment, in accordance with this Agreement and/or any Purchase Order, (ii) pay any portion of any amounts not disputed in good faith owed to First Solar and not paid on the applicable due date, (iii) provide, maintain in full force and effect, or replace any Payment Security specified in this Agreement and/ or any Purchase Order until all of Buyer's payment obligations under this Agreement and/ or any Purchase Order have been satisfied in full or (iv) comply with any of its other obligations under this Agreement and/ or any Purchase Order; (b) terminate this Agreement and/ or any Purchase Order in the event that any Buyer Event of Default remains uncured for more than 30 calendar days after written notice by First Solar of Buyer Event of Default.*

*7.3 Suspension and Termination Remedies.*

*(a) Suspension Expenses In the event First Solar suspends performance in accordance with Section 7.2, then (i) Buyer shall reimburse First Solar for its additional, reasonable and demonstrable costs and expenses along with applicable taxes (GST) resulting from such suspension within 30 calendar days after receipt of an invoice provided to Buyer by First Solar (the "Suspension Expenses") and (ii) the applicable Delivery Deadlines and/or time for performance, as applicable, shall be extended (as a minimum on a day-for-day basis) by the period of time of delay that is due to the impact of such suspension.*

*(b) Termination Payment. In the event First Solar terminates this Agreement and/ or the Purchase Order due to Buyer's breach pursuant to Section 7.1 or pursuant to Section 7.2, within 10 calendar days following such termination, Buyer shall pay to First Solar: (i) any unpaid amount of the Purchase Price for Modules delivered to the Point of Destination as of such termination date*



*(including, any applicable late fees and Transaction Taxes) and (ii) with respect to any Modules that have not been delivered to the Point of Destination as of such termination date an amount equal to 20% of the remaining unpaid Purchase Price along with applicable taxes (GST) under this Agreement (the "Termination Payment"). First Solar shall have the right to satisfy, in whole or in part, Buyer's obligation to pay any payment under this Agreement and/ or Purchase Order (including, the Termination Payment) by drawing on any MSA Down Payment and/ or PO Down Payment or any Payment Security that has been provided by Buyer under this Agreement and/ or any Purchase Order. The Parties acknowledge and agree that the Termination Payment is a reasonable estimate of the damages that First Solar shall suffer because of Buyer's breach as set forth in Section 7.1 and/ or Section 7.2, and shall as such be deemed to be liquidated damages hereunder and not a penalty.*

14. Further, he states that under clause 7.2(b) to allege entitlement to claim under 'Termination Payment' in terms of notice dated 09.07.2024, the respondent will have to establish 'Buyer Event of Default.' The respondent has failed to demonstrate a single event in support of the same. Reliance is placed upon the judgment dated 15.03.2011 of the High Court of Justice, Queen Bench Division, Technology and Construction Court in *Simon Carves Limited and Enus UK Limited*, [2011] EWHC 657 (TCC). The relevant portion of the judgment is reproduced as under:-

*“(a) Unless material fraud is established at a final trial or there is clear evidence of fraud at the without notice or interim injunction stage, the Court will not act to prevent a bank from paying out on an on demand bond provided that the conditions of the bond itself have been complied with (such as formal notice in writing). However, fraud is not the only ground upon which a call on the bond can be restrained by injunction.*



*(b) The same applies in relation to a beneficiary seeking payment under the bond.*

*(c) There is no legal authority which permits the beneficiary to make a call on the bond when it is expressly disentitled from doing so.*

*(d) In principle, if the underlying contract, in relation to which the bond has been provided by way of security, clearly and expressly prevents the beneficiary party to the contract from making a demand under the bond, it can be restrained by the Court from making a demand under the bond.*

*(e) The Court when considering the case at a final trial will be able to determine finally what the underlying contract provides by way of restriction on the beneficiary party in calling on the bond. The position is necessarily different at the without notice or interim injunction stage because the Court can only very rarely form a final view as to what the contract means. However, given the importance of bonds and letters of credit in the commercial world, it would be necessary at this early stage for the Court to be satisfied on the arguments and evidence put before it that the party seeking an injunction against the beneficiary had a strong case. It can not be expected that the court at that stage will make in effect what is a final ruling.”*

15. He states the respondent is already in possession of sum of Rs. 45 crores over and above the bank guarantee amount. Hence, the invocation of bank guarantee would result in the respondent receiving an additional amount of Rs. 41 crores, which shall cause irretrievable harm to the petitioner.

16. *Per contra*, Mr. Nayyar learned senior counsel for the respondent states that this amount of Rs. 45 crore was not paid as a substitute for the Bank Guarantee by the petitioner, rather this amount of Rs. 45 crore is separate and therefore ought not to be construed to have any overlap with



the respondent's rights and entitlements under the Bank Guarantee. It is stated that the unconditional and irrevocable Bank Guarantee is a separate and independent instrument and is not restricted by any other securities or amounts held by the respondent. He relies on the judgment of this court in *Sintex Oil and Gas Limited v. Union of India*, 2018 SCC OnLine Del 6781 to state that the court would not grant injunctions against invocation of an unconditional bank guarantee, except where fraud of egregious nature is alleged.

17. I have heard learned counsel for the parties.

18. In the present case, the question on whether modules under clause 7.3(b)(ii), i.e. *modules that have not been delivered to the point of destination*, includes the Confirmed Volume orders or only the orders for which Purchase Orders have been placed, is an issue which will be decided based upon the interpretation of the terms of the MSA by the Arbitrator, if/as and when appointed.

19. The determination/adjudication of the dispute between the parties would require detailed pleadings, affidavits and evidence led by the parties before arriving at the conclusion, including interpretation of Clauses 3.5, 3.6 and 7.3(b) of the MSA. The same is not required to be interpreted by this Court in a petition under Section 9 of the Arbitration and Conciliation Act, 1996, wherein the scope of inquiry is limited to granting of interim relief for preservation and securing interim custody of subject matter/amount in question of the arbitration agreement.

20. As regards the bank guarantee is concerned, the same is an independent contract and not dependent on the MSA. The operative portion of the bank guarantee reads as under:-



*“UNDER THE TERMS OF THE MASTER SUPPLY AGREEMENT EXECUTED ON 8TH NOVEMBER 2022 ("AGREEMENT") BETWEEN AND MSA CHANGE ORDER 1 EXECUTED ON 16TH FEBRUARY 2023 BETWEEN SPRNG ENERGY PRIVATE LIMITED, A COMPANY INCORPORATED UNDER THE COMPANIES ACT, 1956, HAVING ITS REGISTERED AT UNIT NO FF-48 A, FIRST FLOOR, OMAXE SQUARE, PLOT NO 14, JASOLA DISTRICT CENTRE, NEW DELHI-110025 (HEREINAFTER REFERRED TO AS "BUYER" WHICH EXPRESSION SHALL, UNLESS REPUGNANT TO THE CONTEXT OF MEANING THEREOF, INCLUDE ITS SUCCESSORS AND PERMITTED ASSIGNS) AND FS INDIA SOLAR VENTURES PRIVATE LIMITED, A COMPANY HAVING ITS REGISTERED OFFICE IN 808-811, NARAIN MANZIL, 23, BARAKHAMBA ROAD, NEW DELHI - 110001 (HEREINAFTER REFERRED TO AS "BENEFICIARY" WHICH EXPRESSION SHALL, UNLESS REPUGNANT TO THE CONTEXT OF MEANING THEREOF, INCLUDE ITS SUCCESSORS AND PERMITTED ASSIGNS), **BUYER HAD AGREED TO FURNISH AN IRREVOCABLE, UNCONDITIONAL, CONTINUING AND SECURITY DEPOSIT ON-DEMAND BANK GUARANTEE** FOR AN AMOUNT OF RS. 41,18,24,637.00/- {RUPEES FORTY ONE CRORE EIGHTEEN LAKHSTWENTY FOUR THOUSAND SIX HUNDRED AND THIRTY SEVEN ONLY) ("BANK GUARANTEE") VALID UP TO 31ST MARCH 2025 (CLAIM EXPIRY DATE).*

*IN TERMS OF THE ABOVE, WE, THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED, A COMPANY INCORPORATED UNDER THE COMPANIES ORDINANCE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION (HKSAR), HAVING ITS REGISTERED OFFICE AT 1, QUEEN'S ROAD CENTRAL, HONG KONG AND ACTING THROUGH ITS BRANCH AT 25, BARAKHAMBA ROAD NEW DELHI-110 001, INDIA. (HEREINAFTER REFERRED TO AS "THE BANK" WHICH EXPRESSION SHALL, UNLESS REPUGNANT TO THE CONTEXT OR MEANING THEREOF, INCLUDE ALL ITS SUCCESSORS, ADMINISTRATORS, EXECUTORS AND PERMITTED ASSIGNEES) **DO HEREBY IRREVOCABLY***



**GUARANTEE AND UNDERTAKE TO PAY TO THE BENEFICIARY, ON WRITTEN DEMAND MONEY TO THE EXTENT OF RS.41,18,24,637.00/- (RUPEES FORTY ONE CRORE EIGHTEEN LAKHS TWENTY FOUR THOUSAND SIX HUNDRED AND THIRTY SEVEN ONLY) (GUARANTEED AMOUNT) FROM THE DATE OF ISSUE OF THE BANK GUARANTEE WITHOUT ANY DEMUR, RESERVATION, RECOURSE, CONTEST OR PROTEST AND/ OR WITHOUT ANY REFERENCE TO THE BUYER. ANY PAYMENT UNDER THE BANK GUARANTEE WILL BE MADE FREE AND CLEAR OF ANY DEDUCTIONS ON ACCOUNT OF ANY PRESENT OR FUTURE TAXES OR WITHHOLDINGS OF ANY NATURE WHATSOEVER.**

**ANY SUCH DEMAND MADE BY THE BENEFICIARY ON THE BANK SHALL BE CONCLUSIVE AND BINDING, NOTWITHSTANDING ANY DIFFERENCE BETWEEN THE BENEFICIARY AND BUYER OR ANY DISPUTE PENDING BEFORE THE COURT, TRIBUNAL, ARBITRATOR OR ANY OTHER AUTHORITY. THE DEMAND ISSUED UNDER THE SIGNATURE OF THE BENEFICIARY'S AUTHORIZED SIGNATORY THAT THE GUARANTEED SUM OR ANY PORTION THEREOF IS PAYABLE TO THE BENEFICIARY SHALL BE ACCEPTED BY THE BANK AS CONCLUSIVE EVIDENCE OF SUCH AMOUNT HAVING BECOME PAYABLE AND IMMEDIATELY ON SUCH DEMAND BY THE BENEFICIARY, PAYMENT SHALL, FORTHWITH AND WITHOUT DEMUR, BE MADE BY THE BANK.**

**THE BANK UNDERTAKES NOT TO REVOKE THIS BANK GUARANTEE DURING ITS CURRENCY WITHOUT PREVIOUS WRITTEN CONSENT OF THE BENEFICIARY AND FURTHER AGREES THAT THE BANK GUARANTEE HEREIN CONTAINED SHALL CONTINUE TO BE ENFORCEABLE TILL THE BENEFICIARY ENCASHES / INVOKES THIS BANK GUARANTEE OR TILL THE EXPIRY OF CLAIM PERIOD OF THE BANK GUARANTEE, WHICHEVER IS EARLIER.**

....

**THE BENEFICIARY SHALL HAVE THE FULLEST LIBERTY WITHOUT AFFECTING THIS BANK GUARANTEE, TO**



*POSTPONE FROM TIME TO TIME THE EXERCISE OF ANY POWERS VESTED IN THEM OR OF ANY RIGHT WHICH THEY MIGHT HAVE AGAINST BUYER AND TO EXERCISE THE SAME AT ANY TIME IN ANY MANNER, AND EITHER TO ENFORCE OR FORBEAR TO ENFORCE ANY COVENANTS CONTAINED OR IMPLIED IN THE AGREEMENT OR ANY OTHER COURSE OR REMEDY OR SECURITY AVAILABLE TO THE BENEFICIARY. THE BANK SHALL NOT BE RELEASED OF ITS OBLIGATIONS UNDER THESE PRESENTS BY ANY EXERCISE BY THE BENEFICIARY OF ITS LIBERTY WITH REFERENCE TO MATTERS AFORESAID OR ANY OF THEM OR BY REASON OF ANY OTHER ACT OR OMISSION OR COMMISSION ON THE PART OF THE BENEFICIARY OR ANY OTHER INDULGENCE SHOWN BY THE BENEFICIARY OR BY ANY OTHER MATTER OR THING WHATSOEVER WHICH UNDER LAW WOULD BUT FOR THIS PROVISION, HAVE THE EFFECT OF RELIEVING THE BANK.*

**THIS BANK GUARANTEE SHALL BE IN ADDITION TO AND NOT IN SUBSTITUTION OR IN DEROGATION OF ANY OTHER RIGHT OR SECURITY INTEREST HELD BY THE BENEFICIARY TO SECURE THE OBLIGATIONS OF BUYER UNDER THE SAID AGREEMENT.** THE BENEFICIARY MAY, AT ITS DISCRETION AND WITHOUT ANY FURTHER CONSENT FROM THE BANK AND WITHOUT AFFECTING THE LIABILITY OF THE BANK, VARY OR GIVE UP SUCH SECURITY OR MAKE ANY OTHER ARRANGEMENTS WITH BUYER OR ANY OTHER PERSON AND NOTHING DONE OR OMITTED TO BE DONE BY THE BENEFICIARY IN PURSUANCE OF ANY AUTHORITY CONTAINED IN THIS BANK GUARANTEE SHALL AFFECT OR DISCHARGE THE LIABILITY OF THE BENEFICIARY UNDER THIS BANK GUARANTEE, THIS BANK GUARANTEE SHALL REMAIN IN FORCE NOTWITHSTANDING ANY INTERMEDIATE SETTLEMENT OF ACCOUNT OR PAYMENT.

**THE BANK ALSO AGREES THAT THE BENEFICIARY, AT ITS OPTION, SHALL BE ENTITLED TO ENFORCE THIS BANK GUARANTEE AGAINST THE BANK AS A PRINCIPAL DEBTOR, IN FIRST INSTANCE WITHOUT PROCEEDING AGAINST BUYER AND NOTWITHSTANDING ANY**



**SECURITY OR OTHER GUARANTEE THAT THE BENEFICIARY MAY HAVE IN RELATION TO BUYER'S LIABILITIES UNDER THE AGREEMENT. THIS BANK GUARANTEE SHALL REMAIN IN FULL FORCE AND EFFECT UPTO THE VALIDITY PERIOD I.E., TILL 31ST DECEMBER 2024 WITH A CLAIM PERIOD UNTIL 31ST MARCH 2025 AND THE BENEFICIARY SHALL HAVE THE RIGHT TO DEMAND OR CLAIM OR ENCASH / NEGOTIATE THIS BANK GUARANTEE WITHIN THE AFORESAID CLAIM PERIOD.**

.....  
**THE OBLIGATIONS OF THE BANK HEREIN ARE ABSOLUTE AND UNCONDITIONAL, IRRESPECTIVE OF THE VALUE, GENUINENESS, VALIDITY, REGULARITY OR ENFORCEABILITY OF THE SAID AGREEMENT. IT SHALL NOT BE NECESSARY FOR THE BENEFICIARY TO PROCEED AGAINST BUYER BEFORE PROCEEDING AGAINST THE BANK FOR ANY LEGAL ACTION. ....**”

*(Emphasis Supplied)*

21. A perusal of the bank guarantee shows that the same is unconditional and irrevocable. The bank has undertaken to make payment under the bank guarantee without any demur, contest or protest, without any reference to buyer, merely on a letter of demand from the respondent. In terms of the bank guarantee, the demand raised by the beneficiary/respondent shall be accepted by the bank, notwithstanding any difference/pending disputes between the buyer/petitioner and the beneficiary/respondent.

22. The law with regard to the bank guarantee has been crystallized in numerous judgments and the essential principal being laid down in the judgment of the Hon'ble Supreme Court in *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.*, (2007) 8 SCC 110. The operative portion reads as under:-



*“14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:*

*(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.*

*(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.*

*(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.*

*(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.*

*(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.*

*(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned.”*

23. What can be seen from the above is that enforcement of bank guarantees cannot be enjoined unless (i) there is a fraud of egregious nature, which would vitiate the very foundation of the bank guarantee and/or (ii) irretrievable harm or injustice will be caused to the party.



24. The petitioner in the present case has raised the following grounds for injunction the bank guarantee and relief in its favor:-

*“28. The Petitioner states that any invocation of the BG by the Respondent is ex facie fraudulent and mala fide. It is submitted that the Respondent cannot seek to unjustly and illegally enrich itself by seeking to invoke and thereby encash the BG, which were furnished by the Petitioner under the Contract as MSA Down Payment (advance payment), without the adjudication of the disputes between the parties before an Arbitral Tribunal.*

*29. The Respondent choosing to not respond to the Petitioner's email of 30 October 2023 and not providing any next steps on 31 fitness assessment of tracker for Scopious for series 7 Module and on the other hand threatening to draw upon the MSA Down Payment is nothing but fraudulent and vitiates the special equities which are in favour of the Petitioner, i.e. levy of unadjudicated LD in the absence of any loss suffered by the Respondent.*

*...*

*32. The Petitioner will suffer irreparable loss and injury if the Respondent is able to brow-beat and harass the Petitioner by invoking the BG. The Petitioner should be relieved of the apprehension of the BG being illegally encashed.”*

25. It is settled that mere allegation of fraud will not suffice for restraining the petitioner from encashment of a bank guarantee. The party alleging fraud shall have to *prima-facie* establish fraud as a triable issue adducing strong evidence. The Hon'ble Supreme Court in *Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corpn. Ltd.*, (1996) 5 SCC 450 has held as under:-

*“4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the*



*primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.”*

26. Further, it is also settled that mere financial difficulty will not amount to irretrievable injury and injustice to stay encashment a bank guarantee. The Hon’ble Supreme Court in *U.P. State Sugar Corpn. v. Sumac International Ltd.*, (1997) 1 SCC 568 observed as under: -

*“12.....The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country.....”*

27. Additionally, the judgment of the English Court in *Simon Carves* (*supra*) relied on by the petitioner is distinguishable. The English Court held that if the underlying contract, pursuant to which the bank guarantee has



been provided, clearly/expressly imposed restrictions on the beneficiary from making a demand under the guarantee, then in those circumstances an injunction can be passed by the court. However, the true purport of the restrictions imposed in the underlying contract will be decided at the time of final hearing. In the present case, no such restrictions have been imposed on the invocation of the bank guarantee. Additionally, it is an independent contract. The guarantee is unconditional and irrevocable and the bank is obligated to make payments without any demur, contest or protest, without any reference to buyer, merely on a letter of demand from the respondent. Therefore, the judgment of *Simon Carves (supra)* is not applicable to the facts of the present case.

28. In view of the above, the petitioner has failed to show any reasonable ground to restrain the respondent against encashment of bank guarantee. At best, the argument raised by the petitioner is that the respondent is wrongly interpreting the terms of the MSA and the bank guarantee to their advantage and to the detriment of the petitioner. The same in my view does not fall within the exceptions carved out with respect to stay on encashment of bank guarantee in favor of the petitioner. The petitioner has failed to show any fraud of egregious nature hitting the very foundation of bank guarantee by the respondent or irretrievable harm or injustice, other than mere monetary loss, being caused to the petitioner.

29. Additionally, with regards to the contention of the petitioner that the respondent holds Rs. 45 crore over and above the bank guarantee, it is clear from a perusal of the bank guarantee that the bank guarantee is not in substitution or derogation of any amount or security interest held by the respondent, rather it is in addition to the same.



30. For the said reasons, the petition is dismissed and stay order dated 14.08.2024 is hereby vacated. Pending application is disposed of.

31. The parties are at liberty to avail their legal remedies in accordance with law.

32. It is made clear that anything stated hereinabove is not an expression on the merits of the case and the Arbitrator, as and when appointed, will be entitled to adjudicate uninfluenced by the order passed today.

**JASMEET SINGH, J**

**SEPTEMBER 20, 2024**

*DJ*

*Click here to check corrigendum, if any*