

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 8657 OF 2019

Wallams (India) Agro Products & Power Ltd.,
Islampur. Registered office at 3119/A,
Opp. Court, Islampur – 415 409,
Taluka Walwa, District Sangli

...Petitioner

V/s.

1. Hindustan Petroleum Corporation Ltd.,
(A Government of India Enterprise)
Registered office at 70, Jamshedji
Tata Road, Mumbai – 400 020
2. Senior Regional Manager,
HPCL, Post Box-48, F.L. Gomes Road,
Vasco-d-Gama, Goa-403802
3. Senior Manager,
Operations West Zone, R & C Building,
Sir J.J. Road, HPCL, Byculla,
Mumbai – 400 008

... Respondents

Mr. Aseem Naphade i/b. Ms. Divya Tyagi for the Petitioner
Mr. Pralhad Paranjape with Rahul Punjabi, Yash Tembe, Tirtha Pawar i/b.
Rahul Punjabi for the Respondents

**CORAM : ALOK ARADHE, CJ. AND
BHARATI DANGRE, J.**

DATE : 31st JANUARY 2025

Order (Per Chief Justice) :-

1. With consent of the learned Counsel for the parties, the Petition is heard finally.

2. In this Writ Petition, the Petitioner, *inter-alia*, has assailed the validity of action of the Respondents in encashing/forfeiting performance Bank Guarantee furnished by the Appellant to the tune of Rs. 43,28,625/- in favour of the Respondents. The Petitioner, *inter-alia*, seeks a direction to the Respondents to reimburse the amount of Bank Guarantee of Rs.43,28,625/- along with the interest at the rate of 18% per annum from the date of forfeiture/encashment. In order to appreciate the grievance of the Petitioner, relevant facts mentioned, are stated hereinafter.

3. The Petitioner is a Company incorporated under the provisions of the Companies Act, 1956 and engaged in the business of supply of denatured and anhydrous ethanol and other like products. The Respondent No.1 is the Corporation, viz. Hindustan Petroleum Corporation Ltd. (hereinafter referred to as a Corporation) which is a Government of India enterprise dealing with petroleum and petroleum products.

4. The tender notes floated by the Corporation inviting expression of interest for supply of around 97 crores liters of anhydrous ethanol in the product category of oil, gas and lubricants. The Petitioner participated in the aforesaid notice inviting tender. The Corporation, on 27th January 2015 issued a letter of acceptance for procurement of denatured and anhydrous ethanol from January, 2015 to November, 2015. Clause 14 of the notice inviting tender requires the successful bidder to furnish a Bank Guarantee

equivalent to 10% of basic amount. However, aforesaid requirement was reduced by a letter of acceptance to 5%. The Petitioner, thereafter, by an email dated 6th February 2015 informed the Corporation that it is taking steps to furnish the Bank Guarantee.

5. The Petitioner, on 16th February 2015 furnished the performance Bank Guarantee for a sum of Rs.43,28,625/- which was valid till 30th November 2015 and the claim period was upto 31st May 2016.

6. The Petitioner, by an emails dated 14th April 2015 and 9th May 2015, requested the Corporation to issue the purchase order. However, the Petitioner was unable to secure the license-DS-V from the Maharashtra State Excise Department and hence on 21st December 2015 sent a communication to the Senior Manager, Operations West Zone of the Corporation and requested him to release/refund the Bank Guarantee. However, the Bank Guarantee was not released in favour of the Petitioner.

7. Thereafter, on 28th July 2016 the Petitioner requested the Corporation for appointment of an Arbitrator. However, the Corporation had invoked the Bank Guarantee on 5th July 2016 and the Corporation vide the communication dated 8th September 2016 informed the Petitioner that it can invoke the Arbitration clause to take recourse to the remedy, if so advised.

8. In the aforesaid factual background, this Petition has been filed. The Petitioner submitted representation dated 12th April 2019 seeking refund of the Bank Guarantee. However, the Corporation did not refund the amount of Bank Guarantee. In the aforesaid factual background, the Writ Petition filed on 16th April 2019 seeking the reliefs as stated Supra.

9. The learned Counsel for the Petitioner submitted that the Corporation which is an instrumentality of the State is required to act in a fair, rational and reasonable manner even in a contractual field. It is submitted that the Bank Guarantee furnished by the Petitioner is a conditional Bank Guarantee and the same could have been invoked only in accordance with the terms and conditions mentioned therein. In support of aforesaid submissions, reliance has been placed on the decisions in the cases of : (1) *Hindustan Construction Co. Ltd. v/s. State of Bihar and Ors.*¹ and (2) *Gridco Limited and Anr. v/s. Sadananda Doloi and Ors.*².

10. On the other hand, the learned Counsel for the Corporation submitted that the Petitioner has an alternative remedy of resorting to Arbitration and therefore, this Writ Petition need not be entertained. It is further submitted that since the Petitioner had failed to perform the contract, the Corporation has rightly invoked the Bank Guarantee.

1 (1999) 8 SCC 436

2 (2011) 15 SCC 16

11. We have considered the rival submissions made on both sides and have perused the record.

12. It is trite law that an instrumentality of the State is required to act fairly and reasonably even in a contractual field and its action deserve to be adjudged on the touchstone of Article 14 of the Constitution of India. It is equally well settled legal proposition that availability of alternative remedy is not an absolute bar in entertaining the Writ Petition and in the appropriate case this Court can entertain the Writ Petition. It is noteworthy that the Writ Petition is entertained by a bench of this Court in the year 2019 and is pending for past about five years.

13. It is equally well settled proposition in law that if a Bank Guarantee is unconditional and unequivocal and wherein it is agreed to pay the amount without any demur or objection and irrespective of any dispute, the Court would refrain from interfering such matter. However, where a Bank Guarantee is conditional, the beneficiary do not have an unfettered right to invoke the Bank Guarantee and the same has to be invoked only in accordance with the terms and conditions contained therein. **(See *Hindustan Construction Company Ltd. Vs. State of Bihar and Ors. (1999) 8 SCC 436*).**

14. In the backdrop of the aforesaid well settled legal principles, we may advert to the facts of the case in hand. In clause 14 inviting tender requires

the successful bidder to furnish the Bank Guarantee in accordance with the requirement contained in clause 14 of the aforesaid notice inviting tender. Admittedly, the Petitioner has furnished the Bank Guarantee on 16th February 2015. Clause (vi) of the aforesaid Bank Guarantee is extracted below for the facility of the Advocates, which reads as under :-

“vi. The amount stated in any notice of demand addressed by the Company to the Guarantor as liable to be paid to the Company by the vendor or as suffered or incurred by the Company on account of any losses or damages of costs, charges and or expenses shall as between the Bank and the Company be conclusive of the amount so liable to be paid to the Company or suffered or incurred by the Company, as the case may be and payable by the Guarantor to Company in terms hereof.”

15. Thus, from the perusal of the aforesaid clause, it is evident that the aforesaid Bank Guarantee is a conditional Bank Guarantee and the beneficiary is entitled to invoke the same in case it makes any notice of demand to the Petitioner or in case of any loss suffered or incurred by the Company on account of any losses or damages of costs, charges or expenses. Thus, the aforesaid Bank Guarantee could be invoked only in terms of clause (vi) of the terms and conditions of the Bank Guarantee. In the instant case, neither any notice of demand was addressed by the Corporation nor it is the case of the Corporation that it has suffered any loss or damage and no letter of invocation has been placed on record wherein it has been stated that the Bank Guarantee is encashed on account of loss and damages sustained by the Corporation. The invocation of the conditional Bank Guarantee is clearly in

contravention of the law laid down by the Supreme Court in *Hindustan Construction Company Ltd.* (Supra) and therefore, the action of the invocation of the Bank Guarantee cannot be sustained and it is, therefore, set aside.

16. Now, we may advert to the relief which the Petitioner is entitled. Undoubtedly, the Petitioner is entitled to the refund of the principal amount of the Bank Guarantee i.e. a sum of Rs. 43,28,625/-. In so far as the claim for interest of the Petitioner is concerned, it may be noted that the Bank Guarantee was encashed on 5th July 2016 whereas an instant Writ Petition has been filed on 15th April 2019 and the same was entertained only on 22nd December 2023. The Writ Petition has been pending before this Court for a period of six years and the record does not indicate that the Petitioner has taken any steps to effectively prosecute the Writ Petition. The aforesaid conduct of the Petitioner shows that it was not been serious in prosecuting the Writ Petition. Therefore, we are not inclined to entertain the claim of the Petitioner with regard to interest. The Corporation is directed to refund the principal amount of Rs.43,28,625/- within a period of three weeks from today.

17. Accordingly, the Writ Petition is disposed of.

(BHARATI DANGRE, J.)

(CHIEF JUSTICE)